

An examination of the benefits and risks associated with the use of tax opinions

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REMARKS

The reader is reminded of the following:

This dissertation is presented in article format, in accordance with the policies of the North-West University's Faculty of Economic and Management Sciences, and consists of one research article.

The research article and dissertation comply with the style requirements of Harvard.

KEYWORDS

Opinions, tax practitioners, risks and benefits, privilege, penalty remittance.

ABSTRACT

South Africa has a complex tax system, which often necessitates taxpayers to consult tax practitioners. Consulting with tax practitioners can result in tax opinions being issued. There is no statutory definition for an opinion available in the South African tax legislation.

The use of tax opinions provides a number of benefits to taxpayers, such as providing clarity or certainty of the application of the law and remittance of penalties in limited circumstances.

However, tax opinions may also pose a number of risks to taxpayers. Opinions may not be a legal privilege; a legal risk of litigation exists between clients and tax practitioners based on the outcome of tax opinions and consequences in terms of tax legislation, specifically the Tax Administration Act of South Africa with regard to providing wrong opinions.

This study explored the meaning of the concept “tax opinion” and examined the benefits and risk associated with the use of opinions.

ABBREVIATIONS

TAA 2011 Tax Administration Act of South Africa (28 of 2011)

SARS South African Revenue Service

IRS Internal Revenue Service

SAICA South African Institute of Chartered Accountants

SAIT South African Institute of Tax Practitioners

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

South Africa has a complex tax system, which means that taxpayers do not necessarily have the knowledge to manage their own tax affairs. Taxpayers need, therefore, opinions from tax practitioners in order to enable them to abide to all of the tax laws. However, there are certain risks and benefits associated with the use of opinions that is crucial to all taxpayers and tax practitioners.

Tax opinions are not clearly defined by the Tax Administration Act (28 of 2011), hereafter TAA 2011, in order to highlight the associated risks and benefits. The *Merriam-Webster's Dictionary* (1828) defines an opinion as “a formal expression of judgment or advice by an expert, or the formal expression (as by a judge, court, or referee) of the legal reasons and principles upon which a legal decision is based”. Clarity is, therefore, needed on what opinions – and more importantly tax opinions – are before the risks and benefits associated with opinions can be determined.

Opinions issued by practitioners can be viewed as a declaration of their knowledge pertaining to a certain field. Different fields require different practitioners – legal or tax practitioners. If clients are in need of legal advice, lawyers can be approached to provide knowledge with regard to a given scenario. The fact that clients can only consult lawyers on legal matters changed, because big accounting firms now have a sizeable footprint in the market by providing opinions on legal matters relating to tax legislation (Morello, 1997). Presently, lawyers and non-lawyers may provide opinions on legal and non-legal matters, as these matters are interlinked between different fields.

Currently, it should be noted that opinions are not defined in any tax legislation. Only one reference to opinions was found in the TAA 2011 in section 223(3). Although this section refers to opinions, no formal definition is provided – only a description of what opinions should look like and who can issue opinions. The importance of adding associated benefits and risks of opinions is, therefore, crucial in this section. Tax practitioners should always determine whether their opinions are in accordance with section 223. This section is, however, very limited with regard to what opinions are, what opinions should look like and what kind of

information is needed. This study focused on the benefits of using tax opinions and the risks with regard to the reputation of tax practitioners and their profession.

Taxpayers should be aware of this provision in the TAA 2011 to be able to receive all the benefits when making use of registered tax practitioners and they should also be aware of the risks associated when making use of tax practitioners who are not registered and who cannot provide opinions to taxpayers for the purpose intended. Something as simple as obtaining an opinion with a wrong date indicated on the document can influence the benefits associated to the opinion obtained.

Opinions can be viewed as a tool that helps taxpayers to adhere to legislation in areas where they do not have the necessary knowledge. Myer (2012) argues that the knowledge of individuals can influence their arguments – the amount of knowledge influences the opinions of individuals concerning subject matter. The knowledge of individuals concerning taxation influences their opinions. Individuals often find it difficult to give their hard earned money away. Seligson (2012) states that South Africa has a complex tax system and it can, therefore, be argued that opinions provided by practitioners are on a high demand and in turn, this demand highlights the issuance of opinions.

A complex tax system can cause more clients to consult tax practitioners. Most professional tax opinions are issued in the form of a formal letter (Flowerdew & Wan, 2006:133). Jenkins (2014) states that the purpose of tax opinion letters is to provide guidance on complex scenarios – the correct consequences of a given set of facts. In formal tax opinions, professionals are able to offer their opinion on circumstances in the form of knowledge and experience. However, this does not necessarily mean that opinions are opinions when presented in the form of a formal letter – opinions can include guidance pertaining to a set of facts. Wood (2013) adds that opinions are the answer to specific sets of facts that were analysed by using tax legislation as the foundation.

Opinions provided by practitioners can assist in building a stronger case, as these opinions are based on legislation and include the position that practitioners propose concerning the facts provided by clients (Wood, 2013). Tax practitioners and legal professional practitioners – if compared when providing the same kind of opinions – base their findings on the law, both

maintain client-practitioner relationships and these opinions can be used in a court of law. Whether clients obtain opinions to either avoid penalties or to pay the most beneficial amount possible, opinions have different goals.

Clients always want to win, they always want to pay the most beneficial tax amount (Joubert, 2013; Wood, 2013). Clients seek, therefore, professional opinions on ways that will allow them to pay the lowest amount possible. According to the case of the Inland Revenue Commissioners versus the Duke of Westminster (1936):

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow-taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

The conclusion provided in the above-mentioned case means that one can use legislation to pay a smaller amount of tax. For individuals, the only way to avoid excessive tax is to obtain a tax opinion due to their limited knowledge in the tax field. Judge Henry Friendly maintains that: "In our complex society, the accountant's certificate and the lawyer's opinion can be instruments for afflicting a pecuniary loss more potent than the chisel or the crowbar" (United States v Benjamin, 1965). In this case, the judge was unsympathetic towards white collar criminals and financial frauds. This case clearly illustrates that an interaction takes place between public values and professional relationships. Practitioners have an instrumental impact on practice when drafting opinions for clients on legal proceedings. The only way to achieve the most beneficial tax, is to acquire opinions issued by experts in the field. Individuals cannot outsmart the South African Revenue Service (SARS) on the basis of not providing some or all of the applicable information, for example when revenue for a period is downplayed (Myburg, 2016).

Opinions can be viewed as a tool to be applied in different ways. Tax opinions fulfil different functions. Practitioners should, therefore, ask themselves what the specific needs of their clients are (Rothman, 2011).

SARS can also use opinions issued by practitioners to collect tax and can request taxpayers to provide all relevant material in accordance with section 46 of the TAA 2011 while opinions of practitioners can be questioned with regard to the presentation of relevant material. Section 1 of the TAA 2011 defines relevant material as “any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3”. Even though South Africa has a complex tax system in place, SARS has more power than the Act. SARS has the necessary power to obtain the information they need (Seligson, 2012). According to section 42A of the TAA 2011, opinions provided by professionals have privilege. If certain opinions are privileged, what is the relevance of these privileged opinions and what is the difference when opinions are given to taxpayers in a professional capacity with no privilege as opposed to privileged opinions?

1.2 MOTIVATION OF TOPIC ACTUALITY

Opinions can be viewed as a tool that assists taxpayers in adhering to tax legislation in areas where they do not have the necessary knowledge. Myer (2012) argues that the knowledge of individuals influences their arguments – the amount of knowledge individuals has on a subject influences their opinions concerning subjects. The opinions of individuals regarding taxation are no different, their knowledge influences their opinions. Seligson (2012) is of the opinion that South Africa has a complex tax system. It can, therefore, be argued that the opinions issued by practitioners are high in demand and a well sought-after commodity by individuals who do not have the necessary tax knowledge – practitioners understand tax legislation better to know what the correct tax applications are.

Opinions provided by practitioners improve facts and help to build a stronger case (Wood, 2013). If compared, tax practitioners and legal professional practitioners offer the same opinions, both based on their findings concerning legislation, a client-practitioner relationship exists and these opinions can be used in a court of law. However, opinions have different goals. Clients can obtain opinions either to avoid penalties or to pay the most beneficial amount possible. The famous Morgan Stanley once said: “You must pay taxes. But there’s no law that says you gotta leave a tip.” This quote neatly sums up the opinion of individuals who pay tax – they always want to pay the minimum and in order to achieve this goal, practitioners are asked for opinions on how to use tax legislation to benefit taxpayers.

This means that the Act can be used to benefit taxpayers when they need to pay tax if the measures followed are not illegal. For individuals to avoid excessive tax, tax opinions are a realistic option due to their limited knowledge of a certain field. Tax opinions are also used for estate planning. Opinions have a huge impact on practice and legal proceedings when opinions are drafted for clients. The only way to pay tax to the benefit of taxpayers is to obtain opinions issued by experts in the field. Mere individuals cannot outsmart SARS on the basis of not providing some or all of the information required, for example when revenue for a specific period is downplayed (Myburg, 2016).

Opinions have different facets and impacts. Opinions vary; opinions are provided by different practitioners and are weighed differently in court. When opinions are provided by legal professional practitioners, a relationship exists between clients and practitioners and opinions are based on the knowledge of these practitioners concerning legislation. According to the common law and the TAA 2011, communications (including opinions) are subject to legal professional privilege. This was already established in *S v Safatsa* (1988) where attorney-client privilege was established. According to Olivier (2009), there are three kinds of privileges: attorney-client privileges, tax practitioner-client privileges and work-product privileges. Only attorney-client privileges are applicable in South African law.

One thing to remember is that taxpayers pay for services rendered. In the case of tax opinions, tax practitioners must, therefore, always act in the best interest of their clients (taxpayers). According to Rothman (2011:3), different kinds of opinions exist: comfort opinions, contractual condition opinions, third party inducement opinions, disclosure opinions and penalty relief opinions.

Comfort opinions are obtained by taxpayers know what the outcome of their transactions would be. Contractual condition opinions are often obtained when corporate mergers occur. The purpose of opinions in such circumstances is for example when a merger depends on a tax opinion stating the affairs of the companies involved.

Third party inducement opinions are requested by clients to provide a certain course of action. This kind of opinion differs from comfort and contractual condition opinions, as this opinion is not provided directly to the clients of tax practitioners. Disclosure opinions are obtained to provide information on the accuracy of disclosures.

Penalty relief opinions offer tax relief to clients. When opinions are obtained, the position of taxpayers does not change – opinions are only a defence mechanism against penalty charges and not against additional tax payable or interest charges.

SARS may only grant penalty remittance in certain circumstances and is subject to taxpayers receiving opinions from practitioners. The question can, therefore, be asked if practitioners are still legal professionals and if penalty remittances are still applicable if taxpayers invoke their privilege.

1.3 EMPHASISING THE CONTRAST IN VIEW OF OTHER PERSPECTIVES

SARS can also use opinions from practitioners in order to collect tax. Taxpayers can be requested by SARS to deliver all the necessary information in accordance with section 46 of the TAA 2011. The question is, therefore, if the opinions of practitioners represent relevant information. Section 1 of the TAA 2011 defines relevant information as “any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3”. It is no secret that SARS has the necessary authority to obtain the information they need (Seligson, 2012). According to section 42A of the TAA 2011, opinions provided by professionals have privilege. If certain opinions are privileged, how do these privileges influence the relevance of opinions with regard to SARS, and what is the real difference in relevance between privileged opinions and opinions provided in a professional capacity with no privilege, according to the TAA 2011?

One of the functions of tax opinions is the remittance of penalties. Clients may be in need of a tax opinion to protect them from penalties that would only be applicable if clients do not obtain an opinion (Wood, 2013). SARS only grants a penalty remittance in certain circumstances and this is subject to taxpayers receiving opinions from practitioners according to a certain set of facts.

1.4 PROBLEM STATEMENT AND RESEARCH QUESTION

In the context of taxation, opinions are not clearly defined in the TAA 2011. Opinions are sought in the field of taxation when taxpayers cannot manage their own taxes. What are the risks and benefits associated with the use of tax opinions?

1.5. OBJECTIVES

The following main research objective was formulated in order to answer the research question:

- i. To interpret the concept of opinions and synonyms. Addressed in paragraph 2.3.

The following secondary research objectives were formulated in order to answer the research question:

- ii. To evaluate the risks involved when opinions are issued by tax practitioners, and the risks involved if taxpayers use the opinions of experts. Addressed in paragraph 2.3.1.
- lii To evaluate the benefits associated with the use of opinions, and the penalty remission available to taxpayers if they use the opinion of experts. Addressed in paragraph 2.3.2.

1.6 RESEARCH DESIGN AND METHODOLOGY

According to Kothari (2004), the purpose of research is to discover answers to questions by applying scientific procedures – some things may be hidden and not discovered yet, which each research study strives to unlock. There are different types of research studies available, such as a descriptive, analytical, applied or fundamental design. In an analytical study, researchers analyse information that is already available in order to conduct their study (Kothari, 2004).

1.6.1 Literature review

According to Singh (2006):

Philosophy is not a speculative discipline in the sense that it begins with gratuitous assumptions about man or the universe. Philosophy is a disciplined, orderly, logical study of the universe, thus, literally everything that constitutes reality.

According to Brynard and Hanekom (2010), researchers often start their research by determining whether the research methodology should be quantitative or qualitative.

A qualitative approach was followed to gain a deeper insight in what opinions are and what the role of opinions is, according to the TAA 2011. Previous articles focusing on opinions were analysed. The definition of an opinion is subject to the opinion of SARS with regard to relevant information, privilege and section 42A of the TAA 2011. Research was conducted to gain an in-depth understanding of section 42A by investigating the TAA 2011 and related articles. This study focused on the risks and benefits of tax opinions.

In this study, reference is made to the requirements stated by the TAA 2011. Applicable phrases were defined by making use of the law of evidence. Current law (the TAA 2011, common law, Constitutional law) was used to support this study and a comparison was made on the difference between South Africa and other countries, such as the United States of America. It was, therefore, attempted to identify the gaps as a result of not having opinions clearly defined in the TAA 2011.

1.6.2 Paradigmatic assumptions and perspectives

Epistemology focuses on the question of “what constitutes valid knowledge and how can we obtain it?” while ontology is concerned with “what constitutes reality and how can we understand existence?” (Raddon, 2016). Epistemology in the taxation field is the knowledge and an understanding of taxation. Knowledge in the field of taxation can either be from the Act itself or from precedents reached in certain court cases. Court cases were, therefore, used to gather information in order to represent valid knowledge. In the taxation field, ontology refers to the different taxation Acts that are available, from the Income Tax Act (58 of 1962) to the TAA 2011. These different Acts can be interpreted and certain interpretation notes provide guidelines in understanding the context of this study more comprehensively.

1.6.3 A critical analysis

In a previous study focusing on a comparison between tax practitioners and legal professional practitioners, a historical approach was used to compile the literature review (Moodley, 2013). To understand the benefits and risks associated with the use of tax opinions, a historical approach was also followed. Historical literature, legislation and cases were used to answer the objectives and ultimately, the research question.

A critical analysis approach was, therefore, followed. Previous articles were used and current legislation to substantiate what the risks and benefits of opinions are. After the critical analysis, a conclusion was developed with regard to the examination of the benefits and risks associated with the use of tax opinions.

It was impractical to conduct the research by using standard research instruments, such as questionnaires and surveys, due to the lack of clarity concerning tax opinions in the TAA 2011. An attempt was, however, made to interview tax practitioners to ascertain how they practically apply tax opinions.

1.7 OVERVIEW OF CHAPTERS

i. Chapter 1: Introduction and background of the research

In this chapter, the reason for and the relevance of the research with regard to taxation are set out. The background, introduction to the research, the problem statement, research objectives and the research method are discussed.

ii. Chapter 2 in article format:

An examination of the benefits and risks associated with the use of tax opinions

In this chapter, the interpretation of opinions and synonyms is examined. Clarity is provided on what an examination of the benefits and risks associated with tax opinions comprises. The objectives of the research, as identified in section 1.5, are addressed.

Risks

The associated risks with the use of tax opinions are examined. Comparisons between South Africa and other countries are drawn. The objectives, as identified in section 1.5, are addressed.

Benefits

The associated benefits with the use of tax opinions are examined. Comparisons between South Africa and other countries are drawn. The objectives, as identified in section 1.5, are addressed.

v. Chapter 3: Summary and conclusion

In this chapter, a summary is provided and the research question is answered. In the conclusion, the examination of the benefits and risks associated with the use of tax opinions are highlighted.

CHAPTER 2: RESEARCH ARTICLE

An examination of the benefits and risks associated with the use of tax opinions

ABSTRACT

South Africa has a complex tax system, which often necessitates taxpayers to consult tax practitioners. Consulting with tax practitioners can result in tax opinions being issued. Currently, there is no statutory definition for an opinion available in tax legislation.

The use of tax opinions provides a number of benefits to taxpayers, such as providing clarity or certainty of the application of the law and the remittance of penalties in special circumstances.

Tax opinions may also pose a number of risks to taxpayers. Opinions may not always contain legal privilege, a legal risk of litigation exists between clients and tax practitioners based on the outcome of a tax opinion and consequences in terms of tax legislation, specifically with regard to the Tax Administration Act when wrong opinions are provided.

This study explored the meaning of the concept “tax opinion” and examined the benefits and risk associated with the use of opinions.

KEYWORDS

Opinions, tax practitioners, risks and benefits, privilege, penalty remittance.

2.1 INTRODUCTION

South Africa has a complex tax system, which means that taxpayers do not necessarily have the knowledge to manage their own tax affairs. Taxpayers are, therefore, in need of opinions issued by tax practitioners to enable them to abide to tax legislation. However, there are certain risks and benefits associated with the use of opinions that are of paramount importance to taxpayers and tax practitioners.

Currently, opinions are not clearly defined by the Tax Administration Act of South Africa (28 of 2011), hereafter TAA 2011. This makes it very difficult to understand the risks and benefits associated with the use of tax opinions. The *Merriam-Webster's Dictionary* (1828) defines an opinion as “a formal expression of judgment or advice by an expert, or the formal expression (as by a judge, court, or referee) of the legal reasons and principles upon which a legal decision is based”. Clarity is, therefore, first needed on what opinions entail before the risks and benefits associated with opinions can be addressed.

Opinions issued by practitioners can be viewed as practitioners applying their knowledge in a certain field of expertise. Different fields require the expertise of different practitioners, for example legal practitioners or tax practitioners. If clients are in need of legal advice, lawyers can be approached to apply their knowledge in a specific scenario. In the past, lawyers were only consulted regarding legal matters. However, large accounting firms changed that and they now have a sizeable footprint in the market by providing opinions concerning tax legislation (Morello, 1997). The market has changed with lawyers and non-lawyers now being able to issue opinions with regard to legal and non-legal matters, as these matters are interlinked amongst different fields of expertise.

Currently, it should be noted that opinions are not clearly defined in any tax legislation. Only one reference is made to opinions in section 223 of the TAA 2011. Even though this particular section refers to opinions, no formal definition of opinions exists – a description is provided on what opinions should look like and who can issue opinions. An examination of the risks and benefits of opinions is, therefore, of importance. Tax practitioners should determine whether opinions are needed in accordance with section 223 of the TAA 2011. However, this section is very limited with regard to what opinions actually are and what opinions should

look like – what kind of information should be included. In the next section, the benefits and risks of making use of tax opinions with regard to the reputation and professionalism of tax practitioners are discussed.

Taxpayers should be aware of this provision available in the TAA 2011 to obtain these benefits when requesting the services of registered tax practitioners. They should also know what risks are associated when unregistered tax practitioners are used and when opinions are issued that do not fulfil the needs of taxpayers. Something as simple as obtaining an opinion with an incorrect date indicated on the document can influence the benefits associated with the opinion obtained.

Opinions can be viewed as a tool that helps taxpayers to abide by the law in areas where they do not have the necessary knowledge. Myer (2012) argues that the knowledge of individuals influences their arguments – the amount of knowledge individuals have on a subject influences, therefore, their opinion on a subject. The knowledge individuals have on taxation influences their opinions. Taxpayers find it difficult to give their hard earned money away. Seligson (2012) states that South Africa has a complex tax system and it can, therefore, be argued that the opinions issued by practitioners are sought after.

A complex tax system can cause clients to consult practitioners for the issuing of tax opinions. Most professional tax opinions are provided in the format of a formal letter (Flowerdew & Wan, 2006:133). Jenkins (2014) states that the purpose of tax opinion letters is to provide guidance when taxpayers face complex scenarios and to highlight consequences when a given set of facts are considered. In these letters, professionals provide their opinion by applying their knowledge and experience. However, opinions provided in a letter format can also include guidance on how to deal with circumstances. Wood (2013) adds that opinions are the answer when a specific set of facts was analysed by using tax legislation as the foundation.

Opinions issued by practitioners improve the chances of a good tax position and help to build a stronger case, as opinions provided by practitioners are based on legislation and include the most favourable position proposed by practitioners when the facts provided by taxpayers are considered (Wood, 2013). If compared, both tax practitioners and legal professional

practitioners provide opinions, both base their findings on legislation, a client-practitioner relationship exists and opinions can be used in a court of law. Opinions have different goals whether clients obtain an opinion to either avoid penalties or to pay the most beneficial amount possible.

Clients always want to win and they want to pay the most beneficial tax amount (Joubert, 2013; Wood, 2013). Clients seek, therefore, professional opinions on how to pay the lowest amount possible. According to the case of the Duke of Westminster (1936):

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow-taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

The conclusion provided in the above-mentioned case means that one can use legislation to benefit oneself if it does not include any illegal measures to pay the lowest amount possible. The only way for taxpayers to avoid excessive tax may be to obtain a tax opinion due to their limited knowledge of the taxation field. Judge Henry Friendly maintains that “in our complex society, the accountant's certificate and the lawyer's opinion can be instruments for afflicting a pecuniary loss more potent than the chisel or the crowbar” (United States v Benjamin, 1965). In this case, the judge was unsympathetic towards white collar criminals and financial frauds. This case clearly illustrates that interactions occur between public values and professional relationships. Opinions have an instrumental impact on practice when these letters are drafted for clients and have an impact on legal proceedings. The only way to pay the lowest amount possible, is to obtain opinions issued by experts in the taxation field. Individuals are unable to outsmart the South African Revenue Services (hereafter SARS) by not providing the necessary information, for example when revenue for a period is downplayed (Myburg, 2016).

Opinions are, therefore, a tool that can be used in different ways. Tax opinions fulfil different functions – practitioners should ask themselves beforehand what the needs of their clients are (Rothman, 2011).

SARS can also use the opinions issued by practitioners to collect the necessary tax and can request taxpayers to present all relevant material in accordance with section 46 of the TAA 2011 if SARS thinks that an opinion issued by a practitioner does not represent all the relevant material. Section 1 of the TAA 2011 defines “relevant material” as “any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3”. It is no secret that SARS has the authority to obtain the necessary information from taxpayers (Seligson, 2012). However, according to section 42A of the TAA 2011, opinions issued by some professionals have privilege. If certain opinions are privileged, how is the relevance of these privileged opinions influenced with regard to SARS? In addition, what is the difference then between privileged opinions and opinions provided in a professional capacity but with no privilege, according to the TAA 2011?

Opinions contain different facets and have different impacts. Opinions vary and are provided by different practitioners, for example tax practitioners and law practitioners, and carry different weights in a court of law. Opinions are issued by legal professional practitioners when a relationship exists between clients and practitioners and opinions are based on the knowledge of these practitioners of the law. According to common law and the TAA 2011, any communications (including opinions) are subject to legal professional privilege. Attorney-client privilege was established in *S v Safatsa* (1988). According to Olivier (2009), three kinds of privileges exist: attorney-client privileges, tax practitioner-client privileges, and work-product privileges. Only attorney-client privileges are applicable in South Africa.

One thing to remember is that taxpayers pay for services rendered (tax opinions obtained) and this means that practitioners always keep the best interest of clients in mind. According to Rothman (2011:3), there are different kinds of opinions available, such as comfort opinions, contractual condition opinions, third party inducement opinions, disclosure opinions and penalty relief opinions.

Comfort opinions are obtained to indicate the probable outcome of transaction to taxpayers. Contractual condition opinions are often obtained when corporate mergers occur. These opinions provide relevant information about the affairs of relevant companies before a merger occurs.

Third party inducement opinions are requested when a third party must agree to a certain course of action. This kind of opinion differs from comfort and contractual condition opinions, as this opinion is not provided directly to clients. Disclosure opinions are needed when the accuracy of a disclosure must be determined.

Penalty relief opinions offer relief to clients. When an opinion is obtained, it does not mean that the position of a taxpayer has changed. Penalty relief opinions are only a defence against possible penalty charges and not against additional tax payable or interest charges.

SARS may only grant penalty remittances in certain circumstances and these remittances are subject to taxpayers receiving opinions from practitioners. If these opinions are issued by legal professional practitioners, are penalty remittances still applicable if taxpayers invoke their privilege?

2.2 PROBLEM STATEMENT, RESEARCH QUESTION AND OBJECTIVES

The TAA 2011 or any other statutory provision does not define opinions in the context of taxation. Opinions are especially sought when taxpayers cannot calculate their own taxes. This study aimed to answer the research question by determining the risks and benefits associated with the use of tax opinions.

The following main research objective was formulated in order to answer the research question:

- ii. To interpret the concept of opinions and synonyms.

The following secondary research objectives were formulated in order to answer the research question:

- ii. To evaluate the risks involved when opinions are issued by tax practitioners, and the risks involved if taxpayers use the opinions of experts.
- lii To evaluate the benefits associated with the use of opinions, and the penalty remission available to taxpayers if they use the opinion of experts.

2.3 AN EXAMINATION OF THE BENEFITS AND RISKS ASSOCIATED WITH THE USE OF TAX OPINIONS

The *Merriam-Webster's Dictionary* (1828) defines an opinion as “a formal expression of judgment or advice by an expert, or the formal expression (as by a judge, court, or referee) of the legal reasons and principles upon which a legal decision is based”. The literal meaning¹ of the word “opinion” may be used to understand, use and apply the meaning of opinions as noted in some court cases, such as the Commissioner for South African Revenue Service v Labat Africa Limited (2011), where the court used the literal meaning of the word as it stood.

Plato said: “Opinion is the medium between knowledge and ignorance”. Based on current tax legislation, there is no definition available on what opinions issued by tax practitioners entail and/or the benefits and risks associated with opinions.

South Africa has a complex fiscal environment (Seligson, 2012). Tyler (1990) states that the reason why individuals obey the law is based on their perspectives. Individuals shape their behaviour based on their perspectives and respond to change and immediate incentives. Penalties associated with the law are viewed as an immediate incentive. The complex fiscal environment of South Africa can also be an incentive for clients to obtain opinions from professionals to get their tax affairs in order. Penalties – normally consisting of fines and interest – are also viewed as incentives for taxpayers to acquire opinions, especially if they do not have the necessary knowledge to sort out their tax affairs themselves. Opinions are a safe option to avoid penalties if taxpayers came to the wrong conclusion on their own. In the field of taxation, different opinions exist and can be used for different purposes (Wood, 2010). Rules and regulations are needed to govern the use of opinions and the impact opinions have on taxpayers, tax practitioners and SARS.

In South Africa, no requirements exist for obtaining tax opinions. However, when opinions are used to sustain a position, legislation provides a few requirements. No distinction is made between formal opinions given to clients and opinions used by other entities, such as banks,

¹ The literal approach is the literal meaning of the text as it stands, as was set out in *Partington v The Attorney-General* (1869) and *Cape Brandy Syndicate v Inland Revenue Commissioner* (1921).

due to the lack of a definition and procedures to govern opinions. In the United States of America, practitioners are beholden to the Treasury Department Circular No. 230 (Rev. 6-2014). This document sets out requirements that practitioners need to comply with, according to the federal rules when tax opinions are expressed (Edlavitch & Masterson, 2007). Circular No. 230 governs tax professionals who provide services and act in a professional capacity as practitioners who practice in accordance with the Internal Revenue Service, hereafter IRS.

The circular contains the rules, duties and restrictions relating to the authority of practising before the IRS, the sanctions for violating these regulations, rules applicable to disciplinary hearings and general provisions with regard to the availability of official records. In terms of Circular 230, only certain practitioners, such as attorneys, certified public accountants, enrolled agents, enrolled actuaries and enrolled retirement plan agents, may represent clients before the IRS.

The circular defines opinions as covered opinions consisting of reliance opinions and market opinions. With reliance opinions, clients can rely on opinions issued. Clients can rely on the opinions provided by tax consultants if the chance of success with regard to the position provided – according to Circular 230 – is more than 50% (more likely than not). When other individuals beside clients use the opinions expressed by practitioners, then these opinions are defined as market opinions (Treasury Department Circular No. 230, 2014).

Just as opinions vary, vary the reasons of clients for acquiring different opinions. Every tax opinion fulfils a different function – practitioners should ask themselves beforehand what the needs of their clients are (Rothman, 2011). It is therefore evident that opinions are not only used by clients or taxpayers to obtain tax benefits, but are also used by banks before loans are awarded and even SARS can use or rely on opinions.

Taking into account what the Treasury Department of the United States of America states about opinions, the core of opinions should be used to define opinions in the TAA 2011. It is therefore evident that the only place in the TAA 2011 where opinions is mentioned, is in section 223 concerning understatement penalties.

Section 223 refers to tax practitioners and in order to understand sections 223 and 240, tax practitioners should be defined. According to section 240, tax practitioners must be registered at SARS within 21 business days from the date when tax practitioners first provided advice, completed or assisted in completing a tax return. Tax practitioners must not only be registered at SARS but have to register with or fall under the jurisdiction of a “recognised controlling body” within 21 business days after tax practitioners provided advice for the first time or completed or assisted in completing a tax return. If tax practitioners do not comply with these rules, non-compliance constitutes a criminal offence that can lead to fines and/or imprisonment.

Section 223 further requires in subsection (b)(i) that taxpayers must be in the possession of opinions no later than the date on which relevant tax returns are due. This means that tax practitioners should be approached before the date on which tax returns are due and tax practitioners should, therefore, issue opinions before the date on which tax returns are due. SARS cannot remit penalties if the date provided on the opinions of taxpayers is not before the date on which tax returns are due.

Furthermore, the TAA 2011 states in subsection (b)(ii) that remittances are based on the full disclosure of specific facts and circumstances of arrangements made. Taxpayers must, therefore, disclose all the facts and circumstances of the arrangement highlighted in the opinion obtained. The Act states that as part of the anti-avoidance provision, this requirement cannot be met unless taxpayers are able to demonstrate that all the steps in or sections of an arrangement were fully disclosed to their tax practitioner even if the tax practitioner was not directly involved in the steps or sections of the arrangement. This requirement solely depends on taxpayers and the information that taxpayers disclose to tax practitioners. If SARS finds that not all the necessary steps were taken by taxpayers to inform their tax practitioner of all the facts and circumstances of the arrangement, then SARS is not legally empowered (under the TAA 2011) to remit penalty charges.

The last requirement states that opinions – confirming the position of taxpayers – are not likely to mean anything should matters go to court. This requirement applies to tax practitioners and must be included as a key element in tax opinions issued to taxpayers. This

requirement is in line with what Circular No. 230 states: The likelihood of opinions succeeding in a court of law is not higher than 50%.

Relevant information

Even though no formal definition or set of rules exist concerning opinions, opinions have important functions, as is clear from the use and users of opinions. The TAA 2011 states that SARS has access to anything that can be classified as “relevant material”. In section 1 of the TAA 2011, relevant material can be defined as “any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3”.

The TAA 2011 amended the definition of relevant material by adding “in the opinion of SARS”. Van der Walt (2015) is of the opinion that, according to the Short Guide of the TAA 2011 of South Africa, SARS has extended their powers due to the amount of debates concerning the information SARS is entitled to. Moreover, “foreseeably relevant” does not mean that taxpayers have the authority to decide what information should be given to SARS.

The Revenue Service Act (34 of 1997) provides SARS with the mandate to ensure compliance with all tax laws, to ensure optimal revenue collection and to collect revenue by providing services to taxpayers. Treasury amended the TAA 2011 to establish the rights of SARS – enabling them to achieve their mandate. Seligson (2012) in turn, states that this amendment can lead to abuse, as SARS can view *anything* as relevant or foreseeably relevant and this may lead to “fishing expeditions”. “Relevant information” is a broad term and “foreseeably relevant” is even more leniently interpreted. The mandate of SARS is also stipulated in section 2 of the TAA 2011 – the purpose of SARS is to effectively and efficiently collect tax.

The question is, therefore, whether opinions issued by tax practitioners constitute relevant information in the opinion of SARS. In other words, opinions that were initiated by clients and paid for must be handed over to SARS. By applying the definition of relevant material, SARS can state that opinions must be handed over to them, as these opinions meet the requirements of relevant information. Opinions can, therefore, be viewed as relevant material and can also include the reasons for a specific position held by taxpayers.

Because of the recent amendment to what relevant information constitutes and that the authority of SARS can lead to “fishing expeditions”, the court provided guidance in the case of Brown (2016). In the Brown case, SARS requested Brown to complete a lifestyle questionnaire. Brown has never submitted a tax return and was also not registered for tax. Brown’s attorney responded to the request of SARS and questioned them on which law gave SARS the authority to request specific information. The attorney went further to state that if this information was requested in terms of section 3(2) of the TAA 2011, additional information must be provided by SARS, such as the reasons for the investigation, copies of the identity documents of SARS officials and a letter of authority. The attorney indicated that in terms of section 46 of the TAA 2011, taxpayers are entitled to request information from SARS to ensure their power of authority. Brown was of the opinion that SARS was busy with a fishing expedition and based on the constitutional rights of human beings, Brown did not provide the information. However, the judge found that the affairs investigated by SARS were relevant and that the inspection was not a fishing expedition. Every case should, therefore, be evaluated on its own merit, because “foreseeably relevant” is a term based on judgement.

The purpose of the TAA 2011 is to create a single body of law that contains the procedures, remedies, rights or obligations of both taxpayers and SARS as stated in section 2. The TAA 2011 should be viewed as a transparent relationship between taxpayers and SARS and was implemented to target tax evaders. Unfortunately, privileged opinions do not establish transparent relationships, and that is why the risk is evident when the true income of taxpayers is obscured.

Section 46 of the TAA 2011 further stipulates in which manner, format and the timeframe taxpayers must hand over required documentation. If the information required is kept by individuals connected to taxpayers who must hand over information, the same rules apply. Only information required from individuals who are not taxpayers, and only information that is required to be kept can be requested. Moreover, this section further stipulates that if SARS feels there are sufficient grounds to extend the period in which taxpayers can submit requested information, SARS may extend the period.

Privileged tax opinions

A definition of relevant material is now included in the TAA 2011 as well as a new provision, section 42A. Section 42A sets out the procedures that must be followed for a legal professional privilege to be applicable. However, no clear definition is available in the TAA 2011 with regard to what opinions are and what privileged opinions constitute. It can, therefore, be assumed that the requirements that need to be met for legal professional privileges to exist are implemented from South African common law.

Legal professional privileges – according to common law – were defined in the case of *S v Safatsa* (1988) when the Supreme Court of Appeal acknowledged the fundamental right to speak openly and freely to legal professional practitioners without the information having to be disclosed later on and not only during a law of evidence ruling (Schwikkard & Van der Merwe, 2009).

Interpreting applicable law

One of the reasons why taxpayers need tax practitioners is that the tax law is not easy to interpret and understand. It can also be argued that the law – when interpreted by different practitioners – has different meanings. Even in a court of law, the court has to decide on what interpretation is applicable and correct. The courts make use of two methods to interpret the law, according to Swanepoel (2012:2). The literal approach is based on the text as it stands while a purposive approach is based on the text in context. The primary rule of a literal interpretation is that if a clear meaning of the word can be used without the meaning of the word being misleading or vague, then the literal meaning is equated to the intention of legislators. In *Partington v The Attorney-General* (1869):

If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Moreover, in *CSARS v Airworld CC and Another* (2008), the purposive approach was adopted. However, in the final judgement, two of the five judges disagreed to the application of the purposive approach.

The golden rule of interpretation is that the courts may deviate from the literal meaning if the application of the literal meaning leads to absurdness, according to the case of *Sigsworth Bedford v Bedford* (1935).

2.3.1 RISKS

Risks of opinions for the remittance of penalties

As stated above, opinions are only mentioned in the TAA 2011. According to section 223, opinions obtained have to meet certain requirements if opinions are used to remit penalties at a later stage. The requirement stated in this section – that taxpayers must prove that all the facts and circumstances were disclosed to their tax practitioner – is not defined in the TAA 2011 and what these steps entail is not specifically stipulated. Common law can, therefore, be applied to conclude whether taxpayers disclosed what any reasonable person should disclose. In a court of law, this conclusion depends on the circumstances of each case.

Section 223 of the TAA 2011 only refers to the remittance of penalties by SARS. Taxpayers should also keep in mind that the tax payable on transactions must be paid, not only the applicable interest and penalties.

This provision is the only provision that provides remittance by obtaining opinions and should be used not only by tax practitioners to know what should be included in opinions and what information is needed from taxpayers, but taxpayers must know what information to provide and what information they expect to find in their opinion before they submit their tax return.

The main reason why taxpayers obtain an opinion is to understand taxation. Taxpayers need to know that if a stance is taken and the dispute leads to court, an opinion obtained can be used irrespective of the date on which it was obtained. However, should taxpayers lose their case and must repay the taxation amount, interest and penalties, the remittance of the

penalty is only available if the opinion was obtained before taxpayers completed their tax return.

Tax practitioners also carry the risk that clients can litigate against them based on the success of the opinion issued to them. Tax practitioners are, therefore, exposed to the liability for negligence. Stock *et al.* (2008) state that a possible way to limit this risk is by issuing a comprehensive engagement letter. Engagement letters should, therefore, stipulate clear responsibilities and ownership.

Tax practitioners also need to take into consideration that the opinions provided by them may be defined as reportable arrangements and that practitioners can then be viewed as promoters of these arrangements. In section 35 of the TAA 2011, arrangements are reportable if individuals are participants in an arrangement, if the arrangement has certain characteristics and if the Commissioner has listed the particular arrangement in a public notice. Participants can also be viewed as promoters and promoters, according to section 34 of the TAA 2011, “means a person who is principally responsible for organising, designing, selling, financing or managing the arrangement”. If tax practitioners are involved in any of the actions mentioned above, there is an additional risk that needs to be considered by them.

If tax practitioners are associated with an arrangement, their reputation can be severely damaged but direct financial implications should also be considered. Section 212 of the TAA 2011 states that a penalty of R100 000 can be given in the case of promoters. Practitioners are liable to pay a penalty if they did not disclose arrangements in accordance with section 37 of the TAA 2011 within 45 days of qualifying as participants. Section 38 of the TAA 2011 states that the following items must be disclosed: 1) a detailed description of the arrangement; 2) a detailed description of the tax benefit for all the participants; 3) the names, registration numbers and registered addresses of all the participants; 4) a list of all the agreements; and 4) a financial model for the tax treatment.

Risk associated with section 241 of the TAA 2011 (28 of 2011)

The TAA 2011 does not only govern the implications of non-compliance with the law (penalties), but also regulates tax practitioners who issue tax opinions. When tax

practitioners issue opinions, the provisions stated in the TAA 2011 add additional risks. Beside the risk concerning the reputation of tax practitioners when incorrect or incomplete opinions are provided, there is an additional risk of a fine and/or imprisonment if SARS officials report practitioners to their regulating body. The regulating body will assess the situation based on their own disciplinary rules and procedures. Tax practitioners can, therefore, lose their membership to the body and would be unable to provide opinions in their capacity as tax practitioners again.

An additional risk occurs when tax practitioners misinterpret the law. In the case of *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* Smalberger JA (1989) the conclusion was that:

Although the intention of the legislature is the primary rule of interpretation, it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it.

Regulations have been put in place to govern the work that practitioners perform (Van der Zwan, 2013), because the Minister of Finance and SARS have both indicated their discontent with non-compliance by tax practitioners. Tax practitioners can be fined and/or imprisoned if it was found that tax practitioners were not compliant. In section 241 of the TAA 2011, SARS officials have the necessary authority to lodge a complaint with a recognised controlling body if tax practitioners have acted in the following manner:

(a) without exercising due diligence prepared or assisted in the preparation, approval or submission of any return, affidavit or other document relating to matters affecting the application of a tax Act; (c) given an opinion contrary to clear law, recklessly or through gross incompetence, with regard to any matter relating to a tax Act; (d) been grossly negligent with regard to any work performed as a registered tax practitioner; (e) knowingly given false or misleading information in connection with matters affecting the application of a tax Act or participated in such activity.

The responsibility has, therefore, shifted from SARS to the recognised controlling body. As previously mentioned, tax practitioners have to be registered at both SARS and one other regulatory body. Section 240A of the TAA 2011 states that one of the criteria to be recognised

as a regulatory body depends on the disciplinary codes and procedures of that body, for example the Independent Regulatory Board for Auditors or the General Council of the Bar of South Africa.

Privileged opinions

According to the TAA 2011, is “relevant material” subject to the administration of a tax Act, as referred to in section 3. Relevant material may be requested by SARS in order to administer the TAA 2011. Controversy exists with regard to SARS having the authority to request information that in their opinion may be relevant. According to the TAA 2011, the authority of SARS with regard to requesting relevant material should be limited to the purpose of administering the TAA 2011.

Since this provision on privilege is new and was only implemented in 2016, answers may be found in other jurisdictions that have also struggled with these issues. These jurisdictions have experienced trials and errors concerning legislation changes. The rulings of some relevant cases are discussed below.

In the case of *United States v White* (1973), a taxpayer was summoned to deliver certain documents to the Inland Revenue Service. The documents were prepared by the taxpayer’s accountant but were in the possession of the taxpayer’s lawyer. The attorney argued the Fifth Amendment on behalf of the taxpayer. The Fifth Amendment refers to the fundamental right of human beings to not provide any self-incriminating information (Nutting, 1957). The Fifth Amendment states that taxpayers have, therefore, the right not to hand over any document(s) that can self-incriminate them even if these documents were drawn up on behalf of clients (Gerity, 1973). The Fifth Amendment can also be applied to opinions. Practitioners issue opinions according to a set of facts on behalf of clients. Opinions cannot, therefore, be subjected to privilege against self-incrimination, as the primary purpose of opinions is the view of experts on legislation. Opinions issued by practitioners should, therefore, not be subjected to self-incrimination, as opinions are based on the correct conduct of tax practitioners in accordance with the law. South Africa also has a Fifth Amendment in the Constitution of South Africa (86 of 1996) under section 35(3)(j): Human beings have the fundamental right to a fair trial and have the right to not provide incriminating information.

A definition of what “incriminating information” entails was laid out in the case of *Boyd v United States* (1886). It was found that privilege includes testimonies and any incriminating documents. Incriminating documents may include anything that can lead to self-incrimination, such as opinions issued by professionals and financial statements.

Gerity (1973) states that the general rule is that taxpayers must be in possession of the documents if they want to invoke privilege. This was also found to be the case in *United States v Cohen* (1967). Documents prepared by accountants can only be acceptable to invoke privilege when accountants transfer possession to taxpayers. The *United States v Couch* (1973) case further stipulated that privilege can be invoked even when taxpayers are not in possession of the documents as long as constructive possession² can be proven. The same principle can be applied to opinions received from practitioners. Taxpayers have to be in possession of their opinion or should have constructive possession of the opinion in question.

From the above-mentioned cases, it is, therefore, evident that confidentiality privileges relating to taxpayer communications are the general binding rule in the United States of America and the same common law principles are applicable to taxpayers and to attorney communications between taxpayers and their attorneys. Opinions issued by tax practitioners are a form of communication between taxpayers and tax practitioners. Tax shelters are excluded from this rule.

Another jurisdiction that has already started implementing new privilege structures is New Zealand. New Zealand’s structure promotes compliance with tax laws (Cullen, 2002). According to this structure, a distinction is made between the facts of a transaction and an advisor’s opinion on how tax laws are applicable to transactions.

However, this structure can cause a tax burden on taxpayers who comply with the law, because if taxpayers have privilege on an opinion, their true income may be concealed (Cullen, 2002). This can be viewed as an inconsistency with the basic mandate of the Revenue Service and the voluntary compliance of taxpayers.

² The *Merriam-Webster’s Dictionary* (1828) defines constructive possession as “possession that exists by virtue of a right (as by title) rather than direct occupancy or control” (Constructive possession, para.3).

Olivier (2009) highlights that information can be protected by one of three privileges in the United States of America: attorney-client privileges, tax practitioner-client privileges and work-product privileges. Only attorney-client privileges are applicable in South African law. This means that when an attorney-client relationship is present, the communications and documents are privileged, but not when there is a tax practitioner-client relationship. Croome (2007) states that clients should be able to obtain advice from lawyers and non-lawyers and from a constitutional point of view, both should be privileged.

According to Brodsky (2006), one of the differences between tax practitioners and legal professional practitioners is that legal professional practitioners practice on all aspects of the law but tax practitioners only specialise in tax legislation. The fact that legal practitioners practice the law on all aspects and tax practitioners are limited to the tax field, is one of the reasons why attorneys have legal professional privilege and not tax practitioners. Tax practitioners can either be lawyers or non-lawyers, such as accountants.

Olivier (2009) states that it cannot be assumed that the same law and judgement in the United States of America can be applicable in South African law. When accountants deliver documents to the lawyers of clients, such as financial statements or opinions, the mere fact that lawyers are in possession of these documents does not make them privileged – as found in the case of *R v Davies* (1956). The current ruling in South Africa is that privilege is not applicable to all practitioners – only to legal professional practitioners – because privilege is a common law principle. Privilege was highlighted in the case of *Safatsa* (1988) concerning attorney-client privilege. Attorney-client privilege stands in direct conflict with the privilege concerning self-incrimination (Gerity, 1973).

In section 2 of the Constitution (108 of 1996), it is stated that inconsistencies within the constitutional law are invalid. Taxpayers can, therefore, assume – based on their rights stipulated in the Constitution – that they have a right to privacy or a right not to provide any self-incrimination documents.

Controversy exists regarding the authority of the TAA 2011 and the Constitution (108 of 1996) in section 14: The right to not self-incriminate yourself or the right to privacy.

SARS was established to collect revenue in terms of the Revenue Service Act (34 of 1997) as an organ of state. SARS must, therefore, according to section 4(2) of the Income Tax Act (56 of 1962), perform their mandate within the Constitution.

It is stipulated in section 72 of the TAA 2011 that taxpayers cannot claim that the documents cannot be handed over or returns not submitted based on the fact that they have a right not to self-incriminate themselves (Zerbst, 2013). However, subsection 2 stipulates that if any competent court directs otherwise, taxpayers may still have their right to not self-incriminate themselves.

This stipulation can be linked to other principles, such as the constitutional right to administrative justice, detailed in the Promotion of Administrative Justice Act (3 of 2000). This constitutional right can serve as a protection or a remedy against SARS when the TAA 2011 is enforced on an unfair basis. Taxpayers cannot claim self-incrimination or a right to privacy on opinions obtained from practitioners, but rather that the opinions are not relevant.

The other issue concerning legal professional privilege is set out by Schwikkard and Van der Merwe (2009) with requirements that have to be met in order for legal professional privilege to be applicable: 1) legal professional practitioners must act in a professional capacity; 2) communications and sharing of documents must be confidential in order to require legal advice; and 3) clients/taxpayers must invoke legal professional privilege. When the second requirement – the sharing of communications must be confidential – is taken into account, clients have to assess that if opinions are given to SARS: Communications were shared with a third party and are, therefore, no longer confidential.

It was found that attorney-client privilege is not applicable if documents were prepared by the accountants of taxpayers, because an attorney-client relationship only exists after the accountants have prepared the documents or opinions for taxpayers (Gerity, 1973). The same principle applies in South Africa – documents and communications between attorneys and clients are only privileged from the moment that a relationship exists (Schwikkard & Van der Merwe, 2009). However, tax practitioners are not attorneys and an attorney-client privilege is, therefore, not applicable. Lawyers have, therefore, a competitive advantage over tax advisors (Cullen, 2002).

The above-mentioned development puts more pressure on the TAA 2011 and practitioners in general. If opinions issued by tax practitioners are also privileged, then this may lead to more court cases in an attempt of SARS to successfully collect revenue. There are certain consequences for tax practitioners if wrong opinions are issued and practitioners should be more careful with the opinions they issue.

In the United States of America, opinions must meet the “more likely than not” standard in order to be taken into consideration for the penalty protection (Mauldin & Abahoonie, 2008). This standard is not only applicable to tax practitioners, but to lawyers as well. Some states, such as New York and California, have separate tax penalties applicable if the tax preparers do not meet the “more likely than not” benchmark. In the United States of America, this penalty can be avoided if reasonable cause and “in the act of good faith” criteria can be proven.

The tax system does not just impose tax on individuals, but offers some relief in the form of rebates. Rebates are given to a natural person based on their age. However, the tax system also has penalties in place, such as penalties on late payments and penalties on a wrongful estimation of the amount that taxation needs to be calculated on.

In the case of Long term Capital Holdings v United States, the judge found that an opinion from a practitioner is not a free pass from facing penalties (Prescott, 2008). This would have caused a major shortcoming in the economic environment if taxpayers only need to consult practitioners to obtain a free pass from any penalties. This issue led to the implementation of section 240(2A) in the TAA 2011 – practitioners are held liable (Prescott, 2008). In the case of Long Term Capital Holdings v United States, an artificial loss was cloned and then sold to two separate groups of taxpayers, and then included as a deduction. The court then refused to let the taxpayers escape the penalties just because the taxpayers obtained favourable opinions from prominent law firms (Alvin & Warren, 2005). Accordingly, untrustworthy behaviour only changes when penalties are in place. In South Africa, SARS can report practitioners to their controlling body if gross negligence was determined, according to section 241. Complaints are considered by the controlling body, according to the rules stipulated in section 243.

Taxpayers should also take into account that if opinions are obtained from practitioners who are not registered, as described above, SARS is under no obligation to remit penalties, as part of the requirement stipulated in section 223(3) of the TAA 2011 – opinions must, therefore, be obtained from registered tax practitioners.

According to the Treasury Department Circular No. 230 (Rev. 6-2014), American opinions do not necessarily offer penalty protection. This is in accordance with the Treasury Department Circular No. 230 (Rev. 6-2014), which states that in the United States of America, reliance opinions do not necessarily offer penalty protection.

When practitioners provide professional opinions to clients with regard to specific aspects, they must take into account that these opinions given should not lead to tax avoidance. If practitioners provide arrangements in their opinions with the sole purpose to obtain tax benefits, these arrangements can be viewed as impermissible tax avoidance arrangements in terms of section 80A of the Income Tax Act (58 of 1962). In some cases, clients may consult practitioners with the mindset of obtaining opinions that offer the most beneficial tax outcome, for example the most beneficial tax consequences between buying shares in a company or buying the assets of a company. In the case of the Duke of Westminster (1936), Lord Tomlin found that individuals may order their affairs in such a way to pay the minimum amount of tax within the rules of legislation. Practitioners must, therefore, know and understand legislation in order to issue opinions that offer taxation benefits to taxpayers within the framework of the law.

2.3.2 BENEFITS

Privileged opinions issued by tax practitioners

In the taxation field, practitioners continually consult on tax issues. These issues vary from company mergers and acquisitions to individual tax assessments. South Africa has a complicated fiscal environment with tax laws and regulations changing every year.

An important question is whether the correspondence between taxpayers and their legal practitioners can be considered as “relevant information” in terms of SARS. In light of this dilemma, an inconsistency exists regarding the fundamental right of individuals to legal

professional privilege, as stipulated in the Safatsa case (1988), or the authority wielded by SARS in terms of their mandate.

A gap was identified in the TAA 2011 regarding privileged opinions before the new provision was introduced. Are the opinions issued by legal professionals protected by privilege under section 64 of the search and seizure chapter of the TAA 2011? According to Seligson (2012), clarity is needed and he is of the opinion that the TAA 2011 (1994) of New Zealand provides the necessary clarity when the Act states that if there is privilege to be claimed, the district court judge must determine whether this privilege is valid.

Based on the difficulties between the authority of the Revenue Service and the new privilege section, New Zealand is planning to implement a new system that would help resolve some of the issues concerning information that may be privileged but also relevant. Cullen (2002) states that a new system will consist of two parts; the one part focusing on the privilege of opinions concerning tax law with the second part focusing on existing legislative privilege based on their new Evidence Code.

In sections 20B to 20G of the TAA 2011 (1994), a statutory privilege is found. This statutory privilege states that documents are privileged if these documents are confidential and created for the purpose to seek tax advice (Maples & Blissenden, 2010). If documents were created for wrongful or illegal acts, these documents are not viewed as privileged. Opinions can, therefore, be viewed as privileged information. In section 42A of the TAA 2011, the “procedure where legal professional privilege is asserted” only includes legal professional privilege, also known as attorney-client privilege.

When assessing section 35(3)(j) of the Constitution of South Africa (108 of 1996) and the Fifth Amendment of the United States of America, it is clear that this section provides the right to not make self-incriminating evidence available – guilt by own recognition. By applying the constitutional law, it may be possible that section 35(3)(j) is applicable to tax records depending on the facts of each case.

However, the fundamental right described in section 35(3)(j) of the Constitution (108 of 1996) is only applicable during a trial to ensure that the proceedings are fair. The authority and

duties of SARS include asking taxpayers if the information contained in opinions is relevant. This fundamental right is, therefore, not applicable when there is no trial involved.

Section 42A of the TAA 2011 states the proceedings when legal professional privilege is applicable. The proceedings stipulated in section 42A are the same proceedings provided in common law.

According to Foster (2013), privilege does not apply if advice is provided for the purpose of presentations – even if this advice is provided by legal professional practitioners. Presentations refer to situations where information needs to be disclosed. Moreover, Foster states that privilege cannot be invoked, because clients consulted practitioners when other equally qualified practitioners could have been consulted. The reason behind communications with legal practitioners is, therefore, very important, because privilege can only be invoked if communications with legal practitioners took place to obtain legal advice. Ultimately, the privilege stipulated in section 42A of the TAA 2011 applies only to legal practitioners and attorneys and *not* to tax practitioners and accountants. Privileges should not be applicable to individuals providing advice, but rather the nature of the advice given – tax advice is based on tax legislation and case law (Mosupa, 2013).

Determining whether legal professional privilege applies to tax practitioners is very relevant, as clients enquire about this matter. Certain tax practitioners are trained in the legal field while others are chartered accountants and members of professional accounting bodies (Croome, 2007).

Lord Neuberger P made his judgement in the Prudential PLC case (2013):

Why, as a matter of pure logic, that privilege should be restricted to communications with legal advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field.

This verdict is, however, not binding in South African courts, but this matter should be addressed by Parliament.

If these requirements are measured against common law requirements, then all of the applicable facts and circumstances are the same, as the basic fundamental right of human beings stipulates they must disclose all the facts and circumstances to their legal professional practitioners and they have the right to invoke privilege. To conclude, the communications of legal professional practitioners can be viewed as privileged, but the same requirements apply to tax practitioners but their communications are not viewed as privileged.

Benefits in terms of penalties

One of the advantages for taxpayers is that if tax practitioners issue opinions, these practitioners can be held liable for any penalties due to South Africa's complex fiscal environment (Seligson, 2012). However, section 155 of the TAA 2011 stipulates that representative taxpayers are still personally liable to pay their tax. In sections 210 to 224, four different types of penalties are listed. Fixed amount penalties are imposed by the table provided in section 211. Percentage-based penalties normally apply to taxpayers when an amount was not paid when required. These penalties can be imposed in addition to any other penalties or interest imposed by SARS (section 213). Understatement penalties must be paid in addition to the relevant tax payable for a period (section 222). According to section 221 of the TAA 2011, understatements occur when returns are not submitted, omissions occur in return, incorrect statements in returns or the failure of paying the correct amount if no tax return was provided. Substantial understatements occur when understatements are greater than 5% of the amount payable of more than R1m. Penalties are calculated based on the table provided in subsection 1. According to section 223(3), SARS must remit understatement penalties when taxpayers made a full disclosure of arrangements before the relevant tax return date and when taxpayers were in the possession of their opinions. Opinions must, however, be issued by independent registered tax practitioners and provided before the relevant tax return date. Opinions must be based on a full disclosure of specific facts, especially with regard to reportable irregularities. This section only applies if taxpayers can demonstrate that all the steps in arrangements were disclosed to their tax practitioner, irrespective of whether taxpayers can be viewed as the direct party. The tax position of taxpayers should more likely succeed in a court of law. There is also a penalty specifically

applicable to reportable arrangements (section 212) and this penalty applies to individuals who are part of an arrangement, as stated in section 80A of the Income Tax Act (58 of 1962).

When taxpayers consult tax practitioners, a remedy is available with regard to understatement penalties. Remittance of understatement penalties in terms of section 241 of the TAA 2011 is available to taxpayers if taxpayers are in possession of opinions issued by independent registered tax practitioners. The requirements of registered tax practitioners are stipulated in section 240 of the TAA 2011. However, opinions may not be issued on a later date as the date specified on which tax returns must be submitted, opinions must be based on a full disclosure of all the specific facts and circumstances, and tax practitioners must confirm that the position of taxpayers can more likely than not be upheld in a court of law.

The TAA 2011 makes allowance for specific rules regarding the expectations of SARS concerning opinions obtained by taxpayers. These specific rules benefit taxpayers and tax practitioners and can be used to remit penalties. If taxpayers obtain opinions that meet all of the requirements set out in section 223 of the TAA 2011, then there is no reason why SARS would not remit the penalties inflicted.

With reference to Circular 230, the same requirement is applicable to South African practitioners. SARS should be satisfied that the position of taxpayers is more likely than not to stand firm in a court of law. The only difference is that “more likely than not” is not defined as specifically as in Circular 230. The TAA 2011 is law, and failure to comply with the Act can lead to criminal proceedings. According to Schwikkard and Van der Merwe (2009), in criminal proceedings, individuals have to be proven guilty beyond a reasonable doubt, which does not necessarily mean more than 50%. In the case of *S v Hendricks* (2010), the requirement of guilty beyond a reasonable doubt was described as the golden thread running through criminal law.

The taxation field becomes more specialised, as there are more at stake due to the rules set out in the TAA 2011 with regard to tax practitioners. SARS also sets out specific rules and procedures with regard to non-compliance that scare away practitioners who are not serious about providing sound tax advice.

2.4 CONCLUSION

Foster (2013) is of the opinion that Australia, Canada, New Zealand and the United States of America have addressed or are in the process of addressing this issue with regard to privilege. In order to ensure growth in South Africa's economy and in order for practitioners to still be able to offer valuable services of issuing sound tax opinions to their clients, and for clients to have access to tax benefits when they make use of legal professional practitioners, South Africa should also address this issue.

Cullen (2002) states that the current section is in direct conflict with the authority of New Zealand's revenue service, as there have been some reported cases of difficulties. This shows that the section may not be perfect, but hopefully a step in the right direction.

SARS recently dismissed pleas to enforce the privilege of legal professional practitioners to tax practitioners as well. The main reason is because lawyers are governed by the law while tax practitioners are governed by professional bodies that are self-constituted, such as the South African Institute of Chartered Accountants (SAICA) and the South African Institute of Tax Practitioners (SAIT). SARS states that in order to extend privilege, regulations must be imposed by law (Mosupa, 2013).

The fact that tax practitioners are not entitled to privilege poses a great danger to the accounting profession (Mosupa, 2013). In order for tax practitioners to issue opinions, all of the relevant information must be disclosed by clients. Most courts still follow the literal approach – only legal professional practitioners are entitled to privilege.

The rationale behind privilege, according to Lord Hoffman in the case of *Morgan Grenfell and Co Ltd v Special Commissioner of Income Tax* (2002), is that practitioners cannot perform optimally without the necessary facts and circumstances available, but clients will not disclose information if that information is later used against them.

However, privilege has been extended to tax practitioners in both the United States of America and in New Zealand. In the United Kingdom, only limited privilege is applicable (Mosupa, 2013) while in South Africa, only legal professional practitioners can provide their clients with the right to impose privilege.

SARS has the authority to collect tax in order to fulfil their mandate. The reason behind their authority is explained by the Privy Council:

The whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if the Commissioner has no power to obtain confidential information about taxpayers who may be negligent or dishonest.

A number of jurisdictions have extended privilege to non-lawyers, countries such as the United States of America, Germany, the United Kingdom, Australia and New Zealand (Croome, 2007).

As previously stated, the process is still in a trial and error period. The need for a clear definition and guidance on the risks and benefits associated with opinions may ensure that SARS is in a position to practise their mandate. Furthermore, is it safe for taxpayers to rely only on their tax practitioners? Should they not be placed in a position to also consult legal professional practitioners? Ultimately, taxpayers consult tax practitioners instead of legal professional practitioners. Although there is no formal definition available for opinions in the field of tax legislation, the TAA 2011 sets out specific rules and guidance what the risks and benefits of tax opinions entail. The TAA 2011 provides certain rules with regard to penalties – specifically concerning understatement penalties that can be remitted by SARS. The TAA 2011 governs registered tax practitioners and only registered practitioners can provide tax benefits with regard to tax opinions. Besides possible fines and/or imprisonment that tax practitioners can face, practitioners can also be subjected to disciplinary laws and regulations under the regulatory body where they are registered. This is the only place in the Act where opinions are mentioned and should, therefore, be applied and understood by all tax practitioners so that they are aware of the risks and benefits associated when issuing tax opinions.

A lifeline is provided for taxpayers in section 75 of the TAA 2011 – an advanced tax ruling. There are two kinds of rulings available: binding rulings and non-binding rulings. Binding rulings from SARS mean that even if statements are wrong, SARS cannot go back on statements provided. Non-binding rulings are informal and do not have a binding effect. The purpose of binding private rulings is to “promote clarity, consistency, and certainty regarding

the interpretation of a tax Act by creating a framework for the issuance of ‘advance rulings’, as set out in section 76 of the TAA 2011.

A list is included in section 76(5) of what must be included in a SARS ruling and can be viewed as “opinions”. By assessing this list and the information obtained from this research study on what should be included in tax opinions, a comparison was possible. Rulings must include “(a) a statement identifying it as a ‘binding private ruling’ made under this section”, tax practitioners must include a statement stating that this opinion is more likely than not to succeed in a court of law. In subsections, (b) “the name, tax reference number and postal address of the ‘applicant’” must be provided and the opinion obtained from a tax practitioner must be signed, including the name of the tax practitioner and the number of the tax practitioner. The following should be included in subsections: “(d) the relevant statutory provision or legal issues, (e) a description of the ‘proposed transactions’, (f) any assumptions made or conditions imposed by SARS in connection to the validity of the ruling; (g) the specific ruling made; (h) the period for which the ruling is valid”. Tax practitioners must include an indemnity clause (to protect themselves), an understanding of the facts provided and the opinion must state that everything was addressed.

Taking into account the minimum requirements stated above, the minimum requirement of a penalty, according to section 223 of the TAA 2011, is that taxpayers must be in the possession of their opinion before the date of submission indicated on the tax return. Opinions obtained must reflect the position of taxpayers and must more likely than not succeed in a court of law. Taxpayers must disclose all the facts and circumstances to their tax practitioner who made use of this information to issue opinions. Even if all the above-mentioned requirements were obtained, opinions can only be used to remit penalties, but not the interest and difference in tax payable.

The most important factor to determine in terms of tax compliance is whether or not taxpayers are treated fairly (Jones & Maples, 2012:528). Taxpayers who submitted all of the relevant information to their auditor or obtained an opinion in order to take all the necessary precautions to fulfil the law, would not feel as if they are treated fairly if these documents are handed over to SARS.

According to Smith (cited by Nyaga, 2016:6), there are four principles that highlight a good tax system: equality, certainty, convenience and economy. Smith stresses that the principle of certainty is of crucial importance:

Individuals should be secure against unpredictable taxes levied on their wages or other income: the law should be clear and specific; tax collectors should have little discretion about how much to assess tax payers, for this is a very great power and subject to abuse.

Opinions provided by tax practitioners enhance the certainty that taxpayers know how much taxes they must pay and opinions are, therefore, a powerful tool based on the principles of a good taxation system.

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CHAPTER 3: CONCLUSION

3.1 OBJECTIVE OF THIS CHAPTER

The objective of Chapter 3 is to present a summary of the key findings of the study and how these findings address the research question that was formulated in Chapter 1.

3.2 RESEARCH FINDINGS

3.2.1 Research objective 1

The first research objective was to examine the interpretation of opinions and synonyms. It was found that opinions are not clearly defined by the TAA 2011 but that opinions still have an important role to play due to South Africa's complex fiscal environment. The study assessed the meaning of "relevant information" and the use thereof in the tax system. There are no requirements for opinions in South Africa. However, the United States of America makes use of Circular 230 that states that opinions must be more likely than not to succeed in a court of law. Although this is also the case in South Africa, as section 223 of the TAA 2011 states, part of the requirement for penalty remittances is the "more likely than not" clause.

3.2.2 Research objective 2

The risks associated with the use of tax opinions were examined. It was found that risks can be split into risks associated with the remittance of penalties, risks associated with section 241 of the TAA 2011 and risks associated with privileged opinions.

The remittance of penalties, according to section 223, has to meet specific requirements. There is also the risk that tax practitioners can be litigated for issuing incorrect opinions. If tax practitioners are negligent, they not only face litigation, but also the risk associated with their governing body. Privilege was defined by the Safatsa case and although the case presented privilege as a constitutional right, privilege in South Africa is still only available to legal professional practitioners. Some inconsistencies are evident in the way the TAA 2011 is addressing this issue. Some countries tried and tested the principle and implemented a

new privilege that is also applicable to tax practitioners. In some countries, privilege is not *only* available to legal professional practitioners.

3.2.3 Research objective 3

The benefits associated with the use of tax opinions were examined. It was found that there are benefits associated with opinions, for instance the benefit of penalty remittance, the possibility that tax practitioners have more solutions available to approach taxation with benefits for taxpayers and estate planning. An inconsistency was found with regard to how other countries implement privilege concerning tax practitioners.

3.3 OVERALL CONCLUSION

Foster (2013) highlights that Australia, Canada, New Zealand and the United States of America have addressed or are in the process of addressing this issue of how opinions must be approached. In order to ensure growth in South Africa's economy, in order for practitioners to still be able to offer a valuable service of issuing tax opinions to their clients, and for clients to obtain the same benefits as clients who make use of legal professional practitioners, South Africa should also address this issue.

Cullen (2002) states that the section included by New Zealand is in direct conflict with the powers that their Revenue Service possess, as there have been reported cases of difficulties in New Zealand. This shows that their section may not be perfect, but maybe a step in the right direction was taken.

SARS recently dismissed pleas to provide tax practitioners with privilege and not just legal professional practitioners. The main reason for this dismissal is because lawyers are governed by the law while tax practitioners are governed by professional bodies that are self-constituted, such as SAICA and SAIT. SARS states that in order to extend privilege, there needs to be regulations stipulated by law (Mosupa, 2013).

The fact that the opinions of tax practitioners cannot impose privilege poses a great danger to the accounting profession (Mosupa, 2013). In order for tax practitioners to issue opinions, all the relevant information must be disclosed by clients. However, most courts still follow a

literal approach, which means the law does not allow tax practitioners privilege only legal professional practitioners.

The rationale behind privilege, according to Lord Hoffman in the case of *Morgan Grenfell and Co Ltd v Special Commissioner of Income Tax* (2002), is that practitioners cannot perform optically without the necessary facts and circumstances, but clients will not disclose information if that information can later be used against them.

However, privilege has been extended to tax practitioners in both the United States of America and in New Zealand. In the United Kingdom, only limited privilege is applicable (Mosupa, 2013) while in South Africa, only legal professional practitioners can provide their clients with the right to impose privilege.

SARS has the authority to collect tax in order to fulfil their mandate. The reason behind their authority is explained by the Privy Council:

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A number of jurisdictions have extended privilege to non-lawyers, countries such as the United States of America, Germany, the United Kingdom, Australia and New Zealand, (Croome, 2007).

As previously stated, this process is still in a trial and error period. The need for a clear definition of opinions and guidance on the risks and benefits associated with opinions may ensure that SARS is in a position to practise their mandate. Furthermore, is it safe for taxpayers to rely only on tax practitioners? Ultimately, taxpayers decide to consult tax practitioners instead of legal professional practitioners. Although there is no formal definition available for opinions in the field of tax legislation, the TAA 2011 sets out specific rules and guidance what the risks and benefits of tax opinions entail. The TAA 2011 provides certain rules with regard to penalties – specifically concerning understatement penalties that can be remitted by SARS. The TAA 2011 governs registered tax practitioners and only registered practitioners can provide tax benefits with regard to tax opinions. Besides possible fines

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A lifeline is provided for taxpayers in section 75 of the TAA 2011 – an advanced tax ruling. There are two kinds of rulings available: binding rulings and non-binding rulings. Binding rulings from SARS mean that even if statements are incorrect, SARS cannot go back on statements provided. Non-binding rulings are informal and does not have a binding effect. The purpose of binding private rulings is to “promote clarity, consistency, and certainty regarding the interpretation of a tax Act by creating a framework for the issuance of ‘advance rulings’”, as set out in section 76 of the TAA 2011.

A list is included in section 76(5) of what must be included in a SARS ruling and can be viewed as “opinions”. By assessing this list and the information obtained from this research study on what should be included in tax opinions, a comparison was possible. Rulings must include “(a) a statement identifying it as a ‘binding private ruling’ made under this section”, tax practitioners must include a statement stating that this opinion is more likely than not to succeed in a court of law. In subsections, (b) “the name, tax reference number and postal address of the ‘applicant’” must be provided and the opinion obtained from a tax practitioner must be signed, including the name of the tax practitioner and the tax practitioner number. The following should be included in subsections: “(d) the relevant statutory provision or legal issues, (e) a description of the ‘proposed transactions’, (f) any assumptions made or conditions imposed by SARS in connection to the validity of the ruling; (g) the specific ruling made; (h) the period for which the ruling is valid”. Tax practitioners must include an indemnity clause (to protect themselves), an understanding of the facts provided and opinions must state that everything was addressed.

Taking into account the minimum requirements stated above, the minimum requirement of a penalty, according to section 223 of the TAA 2011, is that taxpayers must be in the possession of their opinion before the date of submission indicated on the tax return. Opinions obtained must reflect the position of taxpayers and must more likely than not

succeed in a court of law. Taxpayers must disclose all the facts and circumstances to their tax practitioner who made use of this information to issue opinions. Even if all the above-mentioned requirements were obtained, opinions can only be used to remit penalties, but not the interest and difference in tax payable.

The most important factor to determine in terms of tax compliance is whether or not taxpayers are treated fairly (Jones & Maples, 2012:528). Taxpayers who gave all of the relevant information to their auditor or obtained an opinion in order to take all the necessary precautions to fulfil the law, would not feel as if they are treated fairly if these documents are handed over to SARS.

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