



# **A Critical Analysis of the Role of Administrative Action in the Customs and Excise Act 91 of 1964**

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## **LIST OF ABBREVIATIONS**

ADJR Act	Administrative Decisions (Judicial Review) Act, 1977
ADR	Alternative Dispute Resolution
Can. Tax J	Canadian Tax Journal
CCA	Customs Control Act 31 of 2014
CDA	Customs Duty Act 30 of 2014
CEA	Customs and Excise Act 91 of 1964
CEAA	Customs and Excise Amendment Act 32 of 2014
Commissioner	Commissioner of the South African Revenue Service
INPROL	International Network to Promote the Rule of Law
PAJA	Promotion of Administrative Justice Act 3 of 2000
PARA	Paragraph
PER/PELJ	Potchefstroomse Elektroniese Regsblad (PER)/ Potchefstroom Electronic Law Journal (PELJ)
SARS	South African Revenue Service
Stellenbosch L. Rev.	Stellenbosch Law Review
The Constitution	Constitution of The Republic of South Africa

**KEYWORDS**

Customs and Excise Act, right to just administrative action, international trade, South African Revenue Service, and taxpayers.

## CHAPTER 1: NATURE AND SCOPE OF THE STUDY

The *Customs and Excise Act* 91 of 1964<sup>1</sup> (hereafter referred to as the *CEA*) was introduced in South Africa before the birth of democracy and the *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*);<sup>2</sup> as such the *CEA* like most Acts that were introduced before 1994, was subject to the Supremacy of the Parliament and the authority of the executive.<sup>3</sup> However, after the enactment of the Constitution, it became very important for just administrative action to be applied in the *CEA* as the piece of legislation that is regarded to be crucial in promoting the international trade industry.<sup>4</sup>

Although the *Constitution* has been in effect since 1996, the right to just administrative action has not been well developed within the *CEA* and remains unchanged and rigid.<sup>5</sup> This lack of administrative action stems from sections 87 and 88 of the *CEA* which do not provide expressly or impliedly for the right to just administrative action when one's property and goods have been seized or forfeited by the Commissioner for South African Revenue Service (the Commissioner) in terms of the Act.<sup>6</sup> There is also a lack of specific judicial decisions and scholarly text in respect of the administrative right of taxpayers when it comes to the *CEA*. Because of the issue of lack of administrative action in the *CEA*, taxpayers are unable to defend themselves adequately in cases of an infringement of their right to just administrative action by the Commissioner.<sup>7</sup>

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<sup>1</sup> The *Customs and Excise Act* of 91 of 1964.

<sup>2</sup> The *Constitution of the Republic of South Africa*, 1996.

<sup>3</sup> Siphugu *Critical Assessment Of The Constitutionality of The South Africa Customs Legislation* i.

<sup>4</sup> Siphugu *Critical Assessment Of The Constitutionality of The South Africa Customs Legislation* i.

<sup>5</sup> Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994*- Abstract. Herbert *An Evaluation Of The Recourse Available To Taxpayers Where SARS Does Not Adhere To The Correct Tax Administrative Procedures* 6-7; Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994*- Abstract; Oosthuizen 2002 *Acta Juridica* 2.

<sup>6</sup> Oosthuizen 2002 *Acta Juridica* 448; *Deacon v Controller of Customs & Excise* 1999 2 All SA 405 (SE) page 414 (hereafter *Deacon* case); Herbert *An Evaluation Of The Recourse Available To Taxpayers Where SARS Does Not Adhere To The Correct Tax Administrative Procedures* 5-6.

<sup>7</sup> Herbert *An Evaluation Of The Recourse Available To Taxpayers Where SARS Does Not Adhere To The Correct Tax Administrative Procedures* 6.

This dissertation intends to examine the extent to which sections 87 and 88 of the *CEA* follow the requirements of just administrative action.<sup>8</sup> The answer to this question may lead to recommendations on how the Commissioner can exercise its powers, whilst still upholding just administrative action. Furthermore, the dissertation will look at how the legislature has attempted to provide remedies to parties affected by unjust administrative action by the Commissioner. This will be done by questioning and analysing the potential effectiveness of the new *Customs Control Act* 31 of 2014<sup>9</sup> (hereafter *CCA*).

### **1.1 Background**

The laws and regulations concerning imports into and exports from South Africa are regulated by the *CEA* which mandates the Commissioner to control what type of goods enter or leave South Africa.<sup>10</sup> The Commissioner has been given power by the *CEA* to promote the efficacy of the Act and help with the levying of customs and excise duties to which the Commissioner is entitled.<sup>11</sup>

To ensure that everyone complies with the Act, sections 87 and 88 of the *CEA* provide as follows:

**87. Goods irregularly dealt with liable to forfeiture.**-(1) Any goods imported, exported, manufactured, warehoused, removed, or otherwise dealt with contrary to the provisions of this Act or in respect of which any offence under this Act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this Act in the manufacture of any goods shall be liable to forfeiture wheresoever and in possession of whomsoever found: Provided that forfeiture shall not affect the liability to any other penalty or punishment which has been incurred under this Act or any other law, or entitle any person to a refund of any duty or charge paid in respect of such goods.<sup>12</sup>

**88. Seizure.**-(1) (a) An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.<sup>13</sup>

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<sup>8</sup> Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994* 2.

<sup>9</sup> 31 of 2014.

<sup>10</sup> Legwaila 2002 *Stellenbosch L. Rev* 444.

<sup>11</sup> Oosthuizen 2002 *Acta Juridica* 220.

<sup>12</sup> Section 87 of the *Customs and Excise Act* 91 of 1964.

<sup>13</sup> Section 88 (1) (a) of *Act* 91 of 1964.

**88. Seizure.**-(1) (c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner may seize that ship, vehicle, plant, material or goods.<sup>14</sup>

The Commissioner in terms of the *CEA* has the responsibility to ensure that the illicit goods are not brought into or allowed to leave the country.<sup>15</sup>

The taxpayers have to ensure that all customs duties which are payable are declared unreservedly.<sup>16</sup> This means that goods will be liable to seizure or forfeiture if they are not declared or are contrary to the Act; this includes false documents and statements made in relation to the goods.<sup>17</sup>

The aim of the *CEA* is specified in the long title of the Act as:

To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund Levy, for an air passenger tax and an environment levy; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto.<sup>18</sup>

The provisions of seizure and forfeiture must be read with the spirit and objectives of the Act demonstrated in the long title.<sup>19</sup> Sections 87 and 88 of the *CEA* help to facilitate the levying of customs and excise duties and ensure compliance with regard to importation.<sup>20</sup>

After the Commissioner has seized the goods in terms of sections 87 and 88 of the *CEA*, the goods taken are condemned and forfeited, unless the person from whom the goods were taken gives notice in writing to claim back the goods.<sup>21</sup> Once the goods have been forfeited, they become subject to public auction or such other manner that the Commissioner considers fit.<sup>22</sup>

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<sup>14</sup> Section 88 (1) (c) of *Act 91 of 1964*.

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<sup>16</sup> Legwaila 2002 *Stellenbosch L. Rev* 445.

<sup>17</sup> Legwaila 2002 *Stellenbosch L. Rev* 445.

<sup>18</sup> The Long Title of *Act 91 of 1964*.

<sup>19</sup> Legwaila 2002 *Stellenbosch L. Rev* 445

<sup>20</sup> Legwaila 2002 *Stellenbosch L. Rev* 445; *The Long Title of Act 91 of 1964*.

<sup>21</sup> Section 89 of *Act of 1964*.

<sup>22</sup> Section 90 of *Act 91 of 1964*.

## **1.2 Problem statement**

### *1.2.1 The importance of administrative action*

Section 33 of the *Constitution* affords taxpayers the right to just administrative action that is lawful, reasonable, and procedurally fair.<sup>23</sup> When the right to just administrative action of taxpayers has been adversely affected by the conduct of the Commissioner, he or she has the right to be given written reasons by the Commissioner.<sup>24</sup> Any conduct or decision by the Commissioner that is not lawful, reasonable, and procedurally fair is invalid.<sup>25</sup>

According to section 33(3) of the *Constitution*, the *Promotion of Administrative Justice Act*<sup>26</sup> (hereafter referred to as *PAJA*) was promulgated to affect the right to administrative action, which is lawful, reasonable, and procedurally fair.<sup>27</sup> *PAJA* contains all the principles and rules of administrative procedure directed at promoting an efficient administration and good governance.<sup>28</sup>

According to section 1 of *PAJA* "administrative action" can be defined as:<sup>29</sup>

- Any decision taken, or any failure to take a decision, by-
- (a) an organ of state, when-
    - i. exercising a power in terms of the Constitution or a provisional constitution; or
    - ii. exercising a public power or performing a public function in terms of any legislation; or
  - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person, which has a direct, external legal effect.<sup>30</sup>

According to section 2 of the *South African Revenue Service Act 34 of 1997* (hereafter *SARS Act*):

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<sup>23</sup> Section 33 of the *Constitution*.

<sup>24</sup> Section 33 of the *Constitution*.

<sup>25</sup> Section 2 of the *Constitution*; Section 33 of the *Constitution*; Mulder *A Critical Analysis of Administrative Action in South African Tax Environment* 1-2.

<sup>26</sup> 3 of 2000.

<sup>27</sup> Section 33(3) of the *Constitution*; the long title of *Act 3 of 2000*.

<sup>28</sup> The Preamble of *Act 3 of 2000*.

<sup>29</sup> Section 1 of *Act 3 of 2000*.

<sup>30</sup> Section 1 of *Act 3 of 2000*.

The South African Revenue Service is hereby established as an organ of state within the public administration. But as an institution outside the public service.<sup>31</sup>

Since the Commissioner is an organ of state, therefore, the decisions and actions taken by the Commissioner, or lack of decision and action by the Commissioner must meet all the aspects of the above definition of "administrative action" to be subject to the provisions of *PAJA*.<sup>32</sup>

The court in *Deacon v Controller of Customs Act* 1999 2 All SA 450 (SE),<sup>33</sup> confirmed that when a functionary is seizing and forfeiting goods in terms of the *CEA*, the exercise of the discretionary power is administrative by nature and therefore regulated by the provisions of the *Constitution* that are aimed at protecting the taxpayers.<sup>34</sup> Because the right to just administrative action is aimed at protecting the rights of the taxpayers, the requirements of just administrative action must be applied when it comes to sections 87 and 88 of the *CEA*. Therefore, the right to just administrative action applies to decisions taken by the Commissioner because of the direct and legal effect it has on taxpayers.

### *1.2.2 The legal issues*

The legal issue when it comes to the powers of the Commissioner under sections 87 and 88 of the *CEA* is that the Act does not provide either expressly or impliedly for the right to be given written reasons or make representation after the Commissioner has seized or forfeited the goods of the taxpayers.<sup>35</sup> Instead of the taxpayer being given an opportunity to request adequate reasons for such forfeiture or seizure, the taxpayer is required by the Act to write a notice to claim back their items.<sup>36</sup>

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<sup>31</sup> Mulder *The Critical Analysis of Administrative Action in South African Tax Environment* 1-2; Section 2 of Act 34 of 1997.

<sup>32</sup> Herbert *An Evaluation Of The Recourse Available To Taxpayers Where SARS Does Not Adhere To The Correct Tax Administrative Procedures* 17.

<sup>33</sup> *Deacon* Case.

<sup>34</sup> *Deacon* Case para 414; Oosthuizen 2002 *Acta Juridica* 226.

<sup>35</sup> Oosthuizen 2002 *Acta Juridica* 448.

<sup>36</sup> Section 90 of Act 91 of 1964.

Furthermore, the taxpayers must institute proceedings to claim back the goods; this may be costly and time-consuming for taxpayers.<sup>37</sup> The cost of trials in South Africa prevents many from accessing courts and those who can access courts end up being victims of delay.<sup>38</sup> The situation where trials are delayed means more costs and justice being denied, pushing the right to just administrative action beyond the reach of some taxpayers.<sup>39</sup> This is also confirmed in *Deacon Case*,<sup>40</sup> when the applicant was refused a chance to make representation to avoid seizure, the court held that “neither section 87 nor 88 of the Act expressly nor impliedly exclude or limit the right to be heard or the applicability of the rules of natural justice”.<sup>41</sup> Furthermore, the court held that when discretionary power is being exercised by a functionary in terms of the *CEA*, the objects and spirit of just administrative action must be considered.<sup>42</sup> When the taxpayer applied for an interim order to claim back his property, he claimed that the Controller did not provide adequate reasons for the seizure of the vehicle.<sup>43</sup>

Another issue is that not only do sections 87 and 88 of the Act affect the goods suspected but they also affect other property that is attached to the suspected goods such as the ship, vehicle, and other relevant property.<sup>44</sup> This may affect the financial gains of taxpayers who are in the business of trade.<sup>45</sup> Thus, Oosthuizen<sup>46</sup> is of the opinion that the powers of the Commissioner under sections 87 and 88 of the *CEA* are too wide and have

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<sup>37</sup> Section 89 of *Act 91* of 1964.

<sup>38</sup> South African Law Commission 1995  
[https://www.justice.gov.za/salrc/ipapers/ip08\\_prj94\\_1997.pdf](https://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf) 15.

<sup>39</sup> South African Law Commission 1995  
[https://www.justice.gov.za/salrc/ipapers/ip08\\_prj94\\_1997.pdf](https://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf) 15.

<sup>40</sup> 1999 2 All SA 405 (SE).

<sup>41</sup> *Deacon Case* page 414.

<sup>42</sup> *Deacon Case* 413 .

<sup>43</sup> *Deacon Case* page 406; Goldswain 2017 *Southern African Business Review* 70.

<sup>44</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* Abstract and 55.

<sup>45</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 39.

<sup>46</sup> Oosthuizen 2002 *Acta Juridica* 220.

far-reaching effects.<sup>47</sup> It is therefore important to establish when does the action taken by the Commissioner amount to administrative action and which remedies can be taken by traders when the conduct of the Commissioner has a negative effect on taxpayers. It is important because this will promote good decision-making, efficiency and administration, and good governance by the Commissioner and its functionaries.<sup>48</sup> It is important to let the reader know about the Amendment Act.<sup>49</sup> The Customs Division began to rewrite the current *CEA* in 2003 and split the Act into three Customs Bills that resulted in the following Acts:<sup>50</sup>

- a. The *Customs Control Act* 31 of 2014 (*CCA*),<sup>51</sup>
- b. The *Customs Duty Act* 30 of 2014 (*CDA*)<sup>52</sup> and
- c. The *Customs and Excise Amendment Act* 32 of 2014<sup>53</sup> (*CEAA*).

Although the *CCA*<sup>54</sup> addresses the problems highlighted in this dissertation regarding administrative legitimacy of action under sections 87 and 88 of the *CEA*,<sup>55</sup> these new Acts have yet to be implemented.<sup>56</sup> Therefore, this research will not assess the effectiveness of these Acts as there is not enough information for a comprehensive thesis in which just administrative action would be examined, to be based solely on the new legislation. However, this research will examine whether the new Acts

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<sup>47</sup> Oosthuizen 2002 *Acta Juridica* 220; Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994* 2.

<sup>48</sup> Currie *The Promotion of Administrative Justice Act: A Commentary* 2; Hoextor *Administrative Law in South Africa* 9; Herselem *Lawfulness, Reasonable and Fair Decision Making in Disciplinary Cases in Secondary Schools* 3.

<sup>49</sup> Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994* 3.

<sup>50</sup> SARS 2021  
<https://www.sars.gov.za/customs-and-excise/about-customs/new-customs-legislation-update/>.

<sup>51</sup> 31 of 2014.

<sup>52</sup> 30 of 2014.

<sup>53</sup> 32 of 2014.

<sup>54</sup> Act 31 of 2014.

<sup>55</sup> Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994* 3.

<sup>56</sup> Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994* 3.

have done enough to address the administrative shortcomings of their predecessor and whether the provisions of the new Acts, particularly the *CCA*, can be regarded as a first step towards safeguarding the said administrative rights.<sup>57</sup>

### *1.2.3 Research question*

Whether the exercise of the power vested in the Commissioner under sections 87 and 88 of the *CEA* complies with the requirements of just administrative action in terms of *PAJA*?

### *1.2.4 Motivation*

The reason for this research is that the lack of administrative action in the *CEA* needs to be addressed; the purpose is to increase awareness among taxpayers about their right to just administrative action that is lawful, reasonable, and procedurally fair when the Commissioner makes a decision that adversely affects such rights in terms of sections 87 and 88 of the *CEA*.<sup>58</sup> Such lack of administrative action that is found in sections 87 and 88 prohibits the taxpayers from defending themselves adequately when their rights have been materially and adversely affected by the actions of the Commissioner.<sup>59</sup>

The new Amendment Act has been presented as a possible solution to the multiple shortcomings of the *CEA*. Therefore, it is also necessary to question whether it has adequately addressed the challenges outlined in the problem statement.

### *1.2.5 Relevance for the Research Unit*

As international commerce grows, it is more vital than ever that the *CEA*'s trade-regulation provisions are viewed as being administratively fair

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<sup>57</sup> Fritz 2016 *Journal for Juridical Science* 20.

<sup>58</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedures* 3-6.

<sup>59</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedures* 3-6.

(lawfulness, reasonableness, and procedural fairness), since potential trade between South Africa and other nations might be lost if the rules are not perceived as encouraging administrative action.<sup>60</sup> Therefore, this research is relevant for its contribution to the Faculty's Research Unit Law, Justice and Sustainability in Finance, Trade, and Innovation.

### ***1.3 Objectives of the study***

The main aim of this research is to apply the right to just administrative action to the way the Commissioner makes decisions in terms of sections 87 and 88 of the *CEA*. This includes determining whether the procedure followed by the Commissioner in terms of sections 87 and 88 of the *CEA* amounts to the infringement of the right to just administrative action of taxpayers.

Furthermore, this research aims to answer the following questions:

- (1) What is administrative action? and
- (2) What is the role and effect of administrative action in the *CEA*?

A comparison is made in chapter 5 of this research between administrative action protection that is available for taxpayers in South Africa against administrative action protection provided in Canada and Australia. The objective of this comparison is to identify areas where administrative action protection could be improved in South Africa in case where the Commissioner is involved in administrative issues. Chapter 5 will furthermore consider recommendations for the establishment of a taxpayer administrative action protection or revisions or enhancements to the current laws.

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<sup>60</sup> Scholtz *The Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994* abstract.

### **1.4 Scope of the study**

The scope of this study is limited in that it only focuses on the South African *CEA*, in particular the powers granted to the Commissioner in terms of sections 87 and 88 of the *CEA* and the effect of these powers on the right to administrative action of traders. Other practices or procedures falls beyond the scope of this study.<sup>61</sup> This study should not be interpreted as a comprehensive discussion of all the provisions contained in *PAJA* in the context of sections 87 and 88 of the *CEA*. The only principles of administrative law that are discussed in this research are lawfulness, reasonableness, and procedural fairness of the actions taken by the Commissioner in terms of sections 87 and 88 of the *CEA*.<sup>62</sup> Also, this research questions the administrative legality of sections 87 and 88 of the *CEA*. For the purposes of this research, sections 87 and 88 of the *CEA* are deemed to be constitutionally valid and they give authority to the Commissioner to execute administrative actions. This research aims to address the issue of lack of administrative action in terms of *PAJA* in the *CEA*.<sup>63</sup>

### **1.5 Research methodology**

The method relied upon for this mini dissertation is qualitative research. Qualitative research provides:

Insights into various aspects of social life, and generates words as data for analysis. In qualitative research, emphasis is placed on peoples' feelings, perceptions, and experiences in order to explore and understand "the meaning individuals or groups ascribe to a social or human problem". Researchers interested in exploring a problem or topic in-depth can employ a qualitative methodology, especially when the perspective of a certain group of individuals cannot be understood or experienced by using statistical analysis or desk study research. In contrast, a quantitative methodology generates numbers for analysis and provides both a systematic overview of the subject being researched, and comparisons across large groups of people.<sup>64</sup>

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<sup>61</sup> De Lange and Van Wyk 2017 *PER/PELJ* 4-5.

<sup>62</sup> De Lange and Van Wyk 2017 *PER/PELJ* 4-5.

<sup>63</sup> De Lange and Van Wyk 2017 *PER/PELJ* 2017 (20) 4-5.

<sup>64</sup> Simion 2016 *INPROL- International Network to Promote the Rule of Law* 7.

This means there will be a critical analysis of both primary and secondary legal sources to analyse and interpret the role of administrative action in the *CEA*. The primary and secondary sources that will be used in this research include the *Constitution* as the supreme law of the Republic, *PAJA*, the *CEA*, case law, and published journal articles that deals with the issues raised in the problem statement.

### ***1.6 Layout of the study***

This research has five chapters, and the context of these chapters is contained below.

The introductory chapter discusses the introduction, background information, problem statement, the aims of this chapter, and research method. It defines what is just administrative action and its necessity in the *CEA*.

Chapter two will discuss the *CEA* as the empowering legislation that provides the Commissioner with the authority to make decisions.

Chapter three of this research addresses the failure of the Commissioner to adhere to the principles of just administrative action and the right to administrative action of taxpayers/traders.

Chapter four will discuss the role and application of just administrative action to the *CEA*.

The concluding chapter will analyse the potential effectiveness of the *CCA* by providing an examination and interpretation of relevant legislation from other foreign jurisdictions to determine whether the recourse available for taxpayers in South Africa under the *CCA* can be improved or whether

there are still gaps.<sup>65</sup> The purpose of a comparison analysis is to come up with recommendations and prospective changes that may be implemented in South Africa.<sup>66</sup> Thereafter, the chapter will highlight the main conclusion and make recommendations for future research.

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<sup>65</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedures* 9.

<sup>66</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedures* 9.

## Chapter 2

### 2.1 Introduction

Chapter two will discuss the *CEA* as the empowering legislation that provides the Commissioner with the authority to make administrative decisions. There are several enforcement provisions in the *CEA* aimed at improving the efficiency of the Act and making it easier for the Commissioner to collect the customs and excise duties which he is entitled to.<sup>67</sup> These enforcement provisions exist to police compliance with the provisions of the Act,<sup>68</sup> and these provisions are sections 87 and 88 of the *CEA*.

Detentions, seizures, and forfeiture are all issues that Customs and Excise Officers must deal with regularly, therefore playing a crucial role in the enforcement of the *CEA*.<sup>69</sup> When Customs and Excise Officers must detain, seize, or forfeit goods deemed illegally imported or exported, there may be some room for different interpretations of the law.<sup>70</sup> The goal of this chapter is to shed some light on the powers of the Customs Officers to detain, seize and forfeit goods in terms of sections 87 and 88 of the *CEA*.<sup>71</sup>

Section 87(1) provides that:

Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with contrary to the provisions of this act or in respect of which any offence under or in respect of which any offence under this act has been committed (including the containers of any such goods) or any plant used contrary to the provisions of this act in the manufacture of any goods shall be liable to forfeiture whosoever and in possession of whomsoever found: provided that the forfeiture shall not affect liability or any other penalty or

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<sup>67</sup> Oosthuizen 2002 *Acta Juridica* 220.

<sup>68</sup> Legwaila 2002 *Stellenbosch L. Rev* 450; Oosthuizen 2002 *Acta Juridica* 220.

<sup>69</sup> NAMRA  
<https://www.namra.org.na/documents/cms/uploaded/detention-seizure-and-forfeiture-guidelines-a908538a8d.pdf> 1.

<sup>70</sup> NAMRA  
<https://www.namra.org.na/documents/cms/uploaded/detention-seizure-and-forfeiture-guidelines-a908538a8d.pdf> 1.

<sup>71</sup> NAMRA  
<https://www.namra.org.na/documents/cms/uploaded/detention-seizure-and-forfeiture-guidelines-a908538a8d.pdf> 1.

punishment which has been incurred under this act or any law or entitle any person to a refund of any duty or charges paid in respect of such goods.<sup>72</sup>

While sections 88(1)(a) and (c) of the *CEA* provide that:

88. **Seizure.**-(1) (a) An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.<sup>73</sup>
- (c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner [for the South African Revenue Service] may seize that ship, vehicle, plant, material or goods.<sup>74</sup>

No matter who interacted with the goods or who committed the prohibited or irregular acts against the provisions of the *CEA*, the goods will be liable for forfeiture once certain legislative restrictions have been breached.<sup>75</sup>

It is apparent from sections 87 and 88 that three different stages are intended, with detention being the first step of establishing whether goods should be seized or forfeited. The three stages are namely-

- Firstly, a detention as defined in section 88(1)(a);
- Secondly, a seizure as defined in section 88(1)(c); and
- The third and final stage, a forfeiture as defined in section 87(1) of the *CEA*.

## **2.2 Detention**

The term 'detention' refers to a customs restriction on the transportation or handling of goods without customs permission while goods are being investigated or decided.<sup>76</sup> According to section 88(1)(a), such investigation or determination is conducted to establish whether (1) there has been a violation of the provisions of the *CEA*; or (2) whether the goods being or have been used in the commission of an offence; or (3) whether the

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<sup>72</sup> Section 87 of *Act 91 of 1964*.

<sup>73</sup> Section 88(1)(a) of *Act 91 of 1964*.

<sup>74</sup> Section 88(1)(c) of *Act 91 of 1964*.

<sup>75</sup> *Deacon* Case page 9.

<sup>76</sup> *Draft Customs Bills: Explanatory Memorandum [Customs Control and Customs Duty Draft Bills: Explanatory memorandum \(www.gov.za\)](#)* 43-44.

goods can be classified under the *CEA* as prohibited or restricted goods.<sup>77</sup> The court in *Supreme Court of South Africa In Commissioner, South African Revenue Service V Trend Finance and Another* 2007 (6) 117(SCA) at 130 (paragraph 29)<sup>78</sup> held that the power to detain goods lasts only for the time necessary to conduct the inquiry contemplated by the provision, and no longer.<sup>79</sup> The Commissioner's ability to retain interim payment made in accordance with a condition for the release of goods set by him under section 93(1)(c) must also be limited.<sup>80</sup> The Commissioner has no further authority after a reasonable period of investigation has passed.<sup>81</sup> The reason for such detention, according to the provisions of section 88(1)(a) of the Act, is to determine whether items are subject to forfeiture under the Act. That section must be amended to include a limitation on the right of the Commissioner to detain goods or withhold interim payments which were made to ensure the release of the goods.<sup>82</sup> Once the Commissioner has established the appropriate statutory infringement, the goods will be liable for forfeiture and declared condemned.<sup>83</sup> Then, the Commissioner must continue with further steps of seizure and forfeiture.<sup>84</sup> To determine whether the goods are liable for forfeiture, the goods may be detained at any place.<sup>85</sup>

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<sup>77</sup> *Draft Customs Bills: Explanatory Memorandum [Customs Control and Customs Duty Draft Bills: Explanatory memorandum \(www.gov.za\)](#)* 43-44.

<sup>78</sup> *Supreme Court of South Africa in Commissioner, South African Revenue Service V Trend Finance and Another* 2007 (6) 117(SCA) para 29.

<sup>79</sup> *Supreme Court of South Africa in Commissioner, South African Revenue Service V Trend Finance and Another* para 29.

<sup>80</sup> *Supreme Court of South Africa in Commissioner, South African Revenue Service V Trend Finance and Another* para 29.

<sup>81</sup> *Supreme Court of South Africa in Commissioner, South African Revenue Service V Trend Finance and Another* para 29.

<sup>82</sup> *Supreme Court of South Africa in Commissioner, South African Revenue Service V Trend Finance and Another* para 29.

<sup>83</sup> *Draft Customs Bills: Explanatory Memorandum [Customs Control and Customs Duty Draft Bills: Explanatory memorandum \(www.gov.za\)](#)* 43-44.

<sup>84</sup> *Coconut Express CC v South African Revenue Service (Custom & Excise) and others* 2016 (2) ALL SA 749 para 55.

<sup>85</sup> *Coconut Express CC v South African Revenue Service (Custom & Excise) and others* para 58.

The person who declared the goods or on whose account the goods were declared, or the person in whose possession the goods are at the time of detention must receive a detention notification from the Customs Officials.<sup>86</sup> The detention will be terminated if the grounds for detention are no longer valid, if goods are not seized by Customs, if goods were wrongfully held, or if a judge orders the termination.<sup>87</sup>

### **2.3 Seizure**

Section 88(1)(c) of the *CEA* empowers the Customs Officers to seize goods in certain circumstances, where they have been first detained.<sup>88</sup> Taking physical control of goods without relinquishing ownership of the goods is referred to as seizure.<sup>89</sup> Goods seized under section 88(1) of the *CEA* are liable for forfeiture.<sup>90</sup> Goods are liable for seizure if:

- (1) there has been a breach of the provisions of the *CEA* concerning the goods, or
- (2) the goods have been or are used in the commission of an offence, or
- (3) the goods or any mode of transportation have been built, converted, changed, or fitted in any way to hide goods, or
- (4) the goods must be destroyed or otherwise disposed of within the provisions of the *CEA*.<sup>91</sup>

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<sup>86</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 44.

<sup>87</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 43-44.

<sup>88</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 44.

<sup>89</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 44.

<sup>90</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 44.

<sup>91</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 44.

When goods are seized whether with or without the goods being detained firstly, the person who declared them or whose goods were cleared on their behalf must be given a notification including the person who had goods at the time of seizure.<sup>92</sup>

The court in *Vincent and Pullar Ltd. the Commissioner for Customs and Excise 1956 (1) SA 51 (N) at (587)* stated that:

[T]he only ground upon which the Court could declare a seizure as invalid, would be if it were made illegally. The Court has no discretion in regard to the question as to whether or not the breach of the Customs regulations was one which was so serious as to justify a seizure and forfeiture. The discretion on those questions is clearly vested in the Commissioner under sec. 143.<sup>93</sup>

If the grounds for detention are no longer valid, if Customs decide not to seize the goods, if goods were wrongfully held, or if a judge orders the termination, the detention will be terminated.<sup>94</sup> On the request of a person affected by a seizure, Customs may order the seizure to be terminated, subject to the payment of tax and any expenditures spent in connection with the seizure or earlier incarceration, as well as any other restrictions imposed by Customs.<sup>95</sup>

## **2.4 Forfeiture**

Forfeiture has the effect of relinquishing a person's ownership in respect of the relevant goods, which then become the property of the State.<sup>96</sup> According to section 87(1), the goods in question are subject to forfeiture wherever they have been dealt with in a manner that violates the provisions of the Act; or if an offence has been committed in relation to the Act, that is, if the prohibited or irregular activities have been done concerning the goods in question and the goods are subject to forfeiture

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<sup>92</sup> *Draft Customs Bills: Explanatory Memorandum [Customs Control and Customs Duty Draft Bills: Explanatory memorandum \(www.gov.za\)](#)* 44-45.

<sup>93</sup> *Vincent and Pullar Ltd. the Commissioner for Customs and Excise 1956 1 SA 51 (N) 53.*

<sup>94</sup> *Draft Customs Bills: Explanatory Memorandum [Customs Control and Customs Duty Draft Bills: Explanatory memorandum \(www.gov.za\)](#)* 44.

<sup>95</sup> *Draft Customs Bills: Explanatory Memorandum [Customs Control and Customs Duty Draft Bills: Explanatory memorandum \(www.gov.za\)](#)* 44.

<sup>96</sup> *Draft Customs Bills: Explanatory Memorandum [Customs Control and Customs Duty Draft Bills: Explanatory memorandum \(www.gov.za\)](#)* 44.

regardless of who trades with them or commits the prohibited offence.<sup>97</sup> This occurs even though the individual committing the crime no longer has possession of the goods. It is not possible to forfeit goods unless they have been seized first. The Commissioner has the power to decide whether to seize goods subject to forfeiture.<sup>98</sup> If there is a breach of the statutory provisions of the *CEA* it must be proved, and the goods will be subject to forfeiture.<sup>99</sup>

Forfeiture occurs upon written notification to the person to whom the seizure notice was given if the owner of the goods does not request for termination of the seizure within a stipulated length of time following the seizure or if the application for termination is denied.<sup>100</sup>

On application by the person who was the owner of the goods before forfeiture, the Commissioner may have a forfeiture withdrawn, provided that any taxes due on the goods and the reimbursement of the Commissioner's expenditures related to the forfeiture are paid.<sup>101</sup> Furthermore, the owner of the goods must fulfil any conditions imposed by the Commissioner.<sup>102</sup> Forfeited goods may be sold, donated, appropriated, or destroyed after confiscation.<sup>103</sup>

To avoid the immediate attachment of goods, section 93(1) provides that:

The Commissioner may, on good cause shown by the owner thereof, direct that any ship, vehicle container or other transport equipment, plant, material or other

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<sup>97</sup> *Secretary for Customs and Excise v Tiffany's Jewellers (Pty) Ltd* 1975 3 SA 578 (A) 587C-H; Section 93 of Act of 1964.

<sup>98</sup> SARS 2020 <https://www.sars.gov.za/wp-content/uploads/Ops/Policies/SC-CO-01-02-Offences-and-Penalties-External-Policy.pdf>.

<sup>99</sup> *Coconut Express CC v South African Revenue Service (Custom and Excise)* 2016 2 All SA 749 (KZD) para 57.

<sup>100</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 44-45.

<sup>101</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 45.

<sup>102</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 45.

<sup>103</sup> *Draft Customs Bills: Explanatory Memorandum Customs Control and Customs Duty Draft Bills: Explanatory memorandum (www.gov.za)* 45.

goods detained or seized or forfeited under this Act be delivered to such owner, subject to-

- (a) payment of any duty that may be payable in respect thereof;
- (b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and
- (c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such ship, vehicle container or other transport equipment, plant, material or goods plus any unpaid duty thereon.<sup>104</sup>

According to section 93, for the goods to be released by the Commissioner after detention, the owner of the goods must tender payment which the Commissioner claimed was due including duties and penalties in respect of the goods seized or detained.

### **2.5 Analysis**

It is apparent from these provisions that detention is not the same as seizure or forfeiture.<sup>105</sup> According to sections 87 and 88 of the *CEA*, detention is the first step in establishing whether seizure should be undertaken.<sup>106</sup>

Sections 87 and 88 are not subject to the rules of natural justice. Should the Commissioner refuse to accept the payment tendered by the owner for the release of the goods, the owner is left without recourse as the Commissioner is not obliged to explain the reason for the non-acceptance of the payment. This is because neither section 87 nor section 88 of the *CEA* provides nor excludes expressly or impliedly for the right to be heard or for natural justice to be applied.<sup>107</sup>

However, due to the legal consequences associated with seizure and forfeiture, when one deals with them one should always apply caution.<sup>108</sup> If the rules of natural justice were to be disregarded when one deals with

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<sup>104</sup> Section 93 of *Act 91 of 1964*.

<sup>105</sup> *CBM Hot X-Press CC & Another V Commissioner, SARS & Others* 2005 JOL 16027 (SE) page 8.

<sup>106</sup> *CBM Hot X-Press CC & Another V Commissioner, SARS & Others* page 8.

<sup>107</sup> *Deacon Case* page 17.

<sup>108</sup> *Legwaila 2002 Stellenbosch L. Rev* 450.

seizure and forfeiture, it would result in some extremely ridiculous consequences and circumstances. As a result, goods, vessels, vehicles, and other property used in relation to suspected goods may be affected, which will impact the trade and other activities of the owner and importer.<sup>109</sup> Taxpayers may suffer significant financial damages as a result of this, frequently without them being allowed to present their case before the decision to seize or forfeiture is taken.<sup>110</sup> Hence, a distinction must be made between mere detention, and seizure and forfeiture.

For the owner and/or holder of the property, seizure and forfeiture have far-reaching implications.<sup>111</sup> The rules of natural justice should apply to the seizure and forfeiture of property, but not to detention.<sup>112</sup> On the other hand, detention is the first stage in determining whether the items should be seized or forfeited.<sup>113</sup> It would be impractical for the rules of natural justice to apply to detention, as the purpose of detention is to establish whether the goods should be seized or forfeited.<sup>114</sup>

From a practical standpoint, requiring a prior hearing before detention makes little sense.<sup>115</sup> For instance, the Customs Officials would be powerless to act in many cases-

- (1) If they could not first detain certain goods without affording a prior hearing;  
or
- (2) At the stage when they might wish or have to detain the goods, the relevant parties to whom notice and the opportunity of a hearing would have to be given might not even be present or available.<sup>116</sup>

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<sup>109</sup> Scholtz *the Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994 2*.

<sup>110</sup> Scholtz *the Constitutionality of Section 88 and 90 of the Customs and Excise Act 91 of 1994 2*.

<sup>111</sup> Legwaila 2002 *Stellenbosch L. Rev* 450.

<sup>112</sup> *Henbase 3392 (Pty) Ltd V Commissioner For South African Revenue Service And Another* 2002 2 SA 180 (T) page 205.

<sup>113</sup> *Henbase 3392 (Pty) Ltd V Commissioner For South African Revenue Service And Another* 205.

<sup>114</sup> *Henbase 3392 (Pty) Ltd V Commissioner For South African Revenue Service And Another* page 205.

<sup>115</sup> *Henbase 3392 (Pty) Ltd V Commissioner For South African Revenue Service And Another* page 205.

<sup>116</sup> *Henbase 3392 (Pty) Ltd V Commissioner For South African Revenue Service And Another* page 205.

Detaining the good in such cases would be the sole method to inform the relevant persons of the risk of seizure or forfeiture.<sup>117</sup> Thus, detention is not administrative by nature.

### ***2.6 Conclusion***

The taxpayer affected by the actions of the Commissioner in terms of sections 87 and 88 of the *CEA*, must be given relevant information about the consequences of seizure and forfeiture of goods after the goods have been detained. This is because detention is not administrative; however, both seizure and forfeiture of goods must be subject to the administrative provisions of *PAJA*, to allow the taxpayer to make requisite representation to avoid seizure or forfeiture of goods.

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<sup>117</sup> *Henbase 3392 (Pty) Ltd V Commissioner For South African Revenue Service And Another* page 205.

## Chapter 3

### 3.1 Introduction

Chapter three of this research will address the failure of the Commissioner to adhere to the principle of just administrative action when the writer looks at the case law.

The reputation of *CEA* as a complex and cryptic creature is one of its enduring features.<sup>118</sup> Similar to most other pieces of legislation that were enacted before the birth of democracy in South Africa, the *CEA* had several of its provisions challenged when the Commissioner enforced them in a way that violated the spirit of the Constitution.<sup>119</sup> As a result, most of the provisions contained in the *CEA* such as sections 87 and 88 of the *CEA* disregard the right to just administrative action in the Constitution.<sup>120</sup> In this regard, the Customs division decided that it was important to consider not just revising the *CEA* in its existing form,<sup>121</sup> but also rewriting the *CEA* “to establish a sound, clear and logical legislative framework that would enhance and ‘speak to’ many other legislative instruments that rely for their implementation on Customs Control”.<sup>122</sup>

The lengthy rewrite of the *CEA* began in 2005.<sup>123</sup> The proposed Excise legislation, which is still enshrined in the *CEA*, has not yet been drafted.<sup>124</sup> The *Customs Control Bill (CCA)* and *Customs Duty Bill (CDA)* are the results of the revision of the customs dispensation, introduced at the National Assembly.<sup>125</sup> The *CCA* functions as a platform for the application

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<sup>118</sup> Keyser and Katzke 2017 <https://www.withoutprejudice.co.za/free/article/5754/view> 6.

<sup>119</sup> Siphu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 83.

<sup>120</sup> Siphu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 83 and 84.

<sup>121</sup> Siphu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 83.

<sup>122</sup> Keyser and Katze 2017 <https://www.withoutprejudice.co.za/free/article/5754/view> 6.

<sup>123</sup> Colesky and Franzsen 2015 *Comparative and International Law Journal Southern Africa* 258.

<sup>124</sup> Colesky and Franzsen *Comparative and International Law Journal Southern Africa* 258.

<sup>125</sup> Colesky and Franzsen *Comparative and International Law Journal Southern Africa* 258.

of any taxing legislation affecting goods imported into or exported from the country as well as regulating travel into and out of the country.<sup>126</sup> Furthermore, the *CCA* also establishes the requirements of procedure that must be followed when goods are imported or exported, while the *CDA* is a taxing act that is based on the Draft Customs Control Bill for its applicability.<sup>127</sup> Both these Acts are to be enforceable at a date declared by the President.<sup>128</sup>

However, the failure of the *CEA* to resolve constitutional difficulties was not the sole reason for the rewrite of the *CCA* and the *CDA*.<sup>129</sup> The intention to bring it in line with recommendations of the World Organisation as per the Revised Kyoto Convention and other international instruments was also a driving force for the change.<sup>130</sup> The Kyoto Convention intends to standardise and simplify customs operations by incorporating current customs techniques (modernisation).<sup>131</sup> As a result, the Customs Division implemented a modernisation program aimed at replacing the complicated, partially labour-intensive environment with one that is simpler, automated, and cost-effective.<sup>132</sup>

### **3.2 The right to procedural fairness**

The right to procedurally fair administrative action is expressly provided in section 3 of *PAJA*.<sup>133</sup> Section 3(1) of *PAJA* states that administrative action that adversely affects a person's rights or legitimate expectations should

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<sup>126</sup> PriceWaterHouseCoopers 2010  
<https://www.pwc.co.za/en/assets/pwc-customs-client-workshop.pdf> 14.

<sup>127</sup> PriceWaterHouseCoopers 2010  
<https://www.pwc.co.za/en/assets/pwc-customs-client-workshop.pdf> 14.

<sup>128</sup> Colesky and Franzsen 2015 *Comparative and International Law Journal Southern Africa* 258.

<sup>129</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 84.

<sup>130</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 84; PriceWaterHouseCoopers 2010  
<https://www.pwc.co.za/en/assets/pwc-customs-client-workshop.pdf> 7.

<sup>131</sup> The Preamble of the *Customs Control Act 31 of 2014*.

<sup>132</sup> The Preamble of *Act 31 of 2014*.

<sup>133</sup> De Lange and Van Wyk *the Right to Just Administrative Action in the Context of Suspending the Payment of Disputed Tax* 18.

be procedurally fair,<sup>134</sup> and section 3(2)(a) mandates that a fair administrative action procedure is determined by the facts of each case.<sup>135</sup> The following cases deal with circumstances in which the actions of the Commissioner were deemed unlawful because they conflicted with the right to just administrative action in the Constitution.<sup>136</sup>

### **3.2.1 Discussion of relevant case law**

#### *3.2.1.1 Deacon v Controller of Customs and Excise<sup>137</sup>*

The applicant, in this case, concluded a contract with the car dealer to acquire an imported motor vehicle. After the delivery of the vehicle, the applicant suspected that the documentation relating to the importation of the vehicle was not correct since it had an undeclared value.<sup>138</sup> The applicant called the Customs and Excise regional offices because of his concerns.<sup>139</sup> The applicant gave the office all the accessible and relevant information he had in his possession, including full disclosure of his role in the sale.<sup>140</sup>

The respondent (Controller) notified the applicant that he had determined that the invoices used at the time of the vehicle's clearance had been proven to be fake, the car was subject to forfeiture under Section 87 of the *CEA*, and it was seized under section 88(1)(c) of the *CEA*.<sup>141</sup> The applicant attempted to make payment under section 93 of the *CEA*, to avoid immediate seizure of the car.<sup>142</sup> The respondent refused to accept

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<sup>134</sup> Section 3(1) of *Act 3 of 2000*; De Lange and Van Wyk *the Right to Just Administrative Action in the Context of Suspending the Payment of Disputed Tax* 18; section 3(2)(a) of Act 3 of 2000.

<sup>135</sup> De Lange and Van Wyk *The Right to Just Administrative Action in the Context of Suspending the Payment of Disputed Tax* 18.

<sup>136</sup> Siphu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 38.

<sup>137</sup> 1999 2 All SA 405 (SE).

<sup>138</sup> *Deacon* Case page 1.

<sup>139</sup> *Deacon* Case page 1-2.

<sup>140</sup> *Deacon* Case page 2.

<sup>141</sup> *Deacon* Case page 2-3.

<sup>142</sup> *Deacon* Case page 3.

the applicant's payment and demanded that the car be seized, without providing reasons.<sup>143</sup>

The applicant sought an order declaring that the decision of the respondent to seize the vehicle under section 88 of the *CEA*, including the decision to impose duty and penalties, was unlawful and should be reviewed and set aside.<sup>144</sup> The applicant argued that the respondent, in seizing the vehicle and holding the applicant liable for duty and penalties, failed to comply with substantively and procedurally fair procedure, and failed to comply with natural justice rules mandated by the *Constitution* and common law.<sup>145</sup> Furthermore, the applicant was denied an opportunity to make representation to prevent seizure, liability, and penalties.<sup>146</sup>

However, the respondent claimed that sections 87 and 88 of the *CEA* were not subject to natural justice principles.<sup>147</sup> The respondent maintained that once there is a breach of the provisions of the sections, the goods are subject to forfeiture regardless of who handled them or conducted acts that are considered prohibited.<sup>148</sup> According to the respondent, it would defeat the aim of seizure if he had to offer reasonable and timely notice of the seizure decision and allow the opportunity for representation, and that this would cause excessive delays.<sup>149</sup> Section 93 of the *CEA* was no longer applicable once he acted under sections 87 and 88 of the *CEA*.<sup>150</sup>

The court stated that the right to be heard or the application of natural justice rules were neither excluded nor limited by sections 87 and 88 of the *CEA*.<sup>151</sup> Moreover, the court held that when a functionary exercises discretionary powers under an Act of parliament, he or she must always

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<sup>143</sup> *Deacon* Case page 3-4.

<sup>144</sup> *Deacon* Case page 4.

<sup>145</sup> *Deacon* Case page 6.

<sup>146</sup> *Deacon* Case page 6.

<sup>147</sup> *Deacon* Case page 8.

<sup>148</sup> *Deacon* Case page 9.

<sup>149</sup> *Deacon* Case page 10.

<sup>150</sup> *Deacon* Case page 32.

<sup>151</sup> *Deacon* Case page 17.

keep in mind the spirit and goals of the Constitution's right to just administrative action.<sup>152</sup> The principles that underpin section 33's requirements must always be on the functionary's mind.<sup>153</sup> The court stated further that section 33 of the *Constitution* essentially widened the grounds for a court to intervene in the discretion of the functionary.<sup>154</sup> As a result, given the unique nature of this case, the respondent must have looked at the circumstance as requiring a thorough examination by himself and complete disclosure of all relevant facts by all parties before deciding to seize the car.<sup>155</sup>

The court stressed the need for interpreting the legislation as a whole and thus the seizure and forfeiture provisions in section 93 of the *CEA* could not be separated from the mitigation and remission provisions.<sup>156</sup> The court ordered the seizure as well as the levying of duties and penalties to be set aside.<sup>157</sup>

### 3.2.1.2 *Wong and others v Commissioner for SARS*<sup>158</sup>

The applicants, in this case, had been selling for a while and at the Montana Traders Square, Pretoria offered DVDs, movies, and other similar goods, many of which were imported.<sup>159</sup> The court papers showed no indication that the applicants were not legally permitted to engage in such activity.<sup>160</sup> Because the applicants deal in goods that may be easily replicated without a license or payment of royalties and then sold as counterfeits, an organization called the South African Federation Against Copyright Theft (SAFACT) regarded them with a jaundiced eye.<sup>161</sup>

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<sup>152</sup> *Deacon* Case page 14.

<sup>153</sup> *Deacon* Case page 14.

<sup>154</sup> *Deacon* Case page 21.

<sup>155</sup> *Deacon* Case page 21.

<sup>156</sup> *Deacon* Case page 32.

<sup>157</sup> *Deacon* Case page 32.

<sup>158</sup> 2003 JOL 11010 (T) (hereafter *Wong* Case).

<sup>159</sup> *Wong* Case para 6; Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 39.

<sup>160</sup> *Wong* Case para 7.

<sup>161</sup> *Wong* Case para 8.

The applicants' lawyer claimed that his clients had been subjected to many raids, which were carried out both with and without warrants, during the previous years.<sup>162</sup> From time to time, goods have been taken with or without a warrant, reportedly because they were counterfeit.<sup>163</sup>

The applicants' lawyer attached to his foundation affidavit some papers which demonstrated that the goods to which these documents pertain were legitimately imported.<sup>164</sup> In addition, their stock was seized while they were away from their premises. Their cubicles were smashed open, and products were taken without the presence of anybody representing the dealer.<sup>165</sup>

The representative of the Commissioner who seized the goods stated that section 4(4)(a) of the *CEA* provides that an officer has the authority to enter any place at any time and conduct any inspection and investigation he deems appropriate without prior notice.<sup>166</sup> He has the authority to demand the production of books and papers, as well to make extracts and copies from them, and he may be accompanied by assistants, provided that he acts in accordance with the provisions of the *CEA*.<sup>167</sup> He also invokes the authority granted to him by section 88(1)(a) and (b) of the *CEA*, to transport those goods to a secure location to determine whether they are subject to forfeiture under the Act.<sup>168</sup>

It is evident that exceptional steps are necessary to combat the actual threat of damage that authorities and lawful importers face because of the increasing permeability of our country's borders, which allow for the entrance of counterfeit products.<sup>169</sup> However, this does not imply that the *CEA* is not regulated by the *Constitution* and the right to just

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<sup>162</sup> *Wong Case* para 10.

<sup>163</sup> *Wong Case* para 11.

<sup>164</sup> *Wong Case* para 16.

<sup>165</sup> *Wong Case* para 19.

<sup>166</sup> *Wong Case* para 23.

<sup>167</sup> *Wong Case* para 23 and 24.

<sup>168</sup> *Wong Case* para 24.

<sup>169</sup> *Wong Case* para 40.

administrative action does not apply to the actions of the administrator.<sup>170</sup> The officers' powers, including the authority to *audi alteram partem*, remain unaffected.<sup>171</sup>

The papers contained no reasons as to why there was no attachment of the stock at Montana Traders Square for a reasonable period until the attorney of the applicant could provide the necessary documents.<sup>172</sup> Furthermore, there was no explanation for the reason why the goods, if they had to be removed, were not carefully catalogued, itemized, and transported to a nearby warehouse or other secure location.<sup>173</sup>

The court held that the extensive powers that the *CEA* affords to the respondent's officials should be applied with discretion and elasticity.<sup>174</sup> To the extent practicable, the highest level of transparency and adherence to the proper administrative procedure must be permitted.<sup>175</sup> This also applies to *audi alteram partem*. In considering the facts of the case, the court stated that the applicant should have been granted a chance to be heard and present documents that support their assertions that the goods were legitimately imported, and the required duty was paid.<sup>176</sup>

As a result, given the circumstances, and considering the authorities' failure to do so, the attachment and removal were not lawful.<sup>177</sup> Therefore, the court approved the order that the applicant requested.<sup>178</sup>

### 3.2.1.3 *Fazenda NO v Commissioner of Customs and Excise*<sup>179</sup>

The driver of the applicant in this case crossed the country at the Lebombo border station in the vehicle of the applicant, which had illicit

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<sup>170</sup> *Wong Case* para 41.

<sup>171</sup> *Wong Case* para 41.

<sup>172</sup> *Wong Case* para 46.

<sup>173</sup> *Wong Case* para 48.

<sup>174</sup> *Wong Case* para 56.

<sup>175</sup> *Wong Case* para 56.

<sup>176</sup> *Wong Case* para 56.

<sup>177</sup> *Wong Case* para 56.

<sup>178</sup> *Wong Case* para 57.

<sup>179</sup> 1998 JOL 4067 (T) (hereafter *Fazenda Case*)

cigarettes hidden in a compartment in the trailer.<sup>180</sup> When the customs authorities discovered the goods, they were detained under section 88(1)(a) of the *CEA*, and the goods were then purposefully seized under section 88(1)(d) of the *CEA* by the respondent.<sup>181</sup> The respondent gave reasons that because the cigarettes were connected and seized, the vehicle used in the driver's smuggling operation should be attached and seized as well.<sup>182</sup> As a result, the applicant sought to have the attachment lifted and the vehicles returned to their rightful owner.<sup>183</sup>

The applicant argued that because the items were not an 'other vehicle', the seizure under section 88(1)(d) of the *CEA* did not apply and that section 87(2)(a) of the *CEA* does not provide guidance on the circumstances in which other vehicles may be seized.<sup>184</sup> The vehicles would not have been returned to the owner if the owner had arranged for the loading of cigarettes in the container of the illegal goods into the nation.<sup>185</sup> The Commissioner would violate his duties if he returned vehicles to their owner while knowing that the goods had been smuggled onto their vehicle. The section safeguards the rights of innocent owners of vehicles or ships that are used in the transportation of goods subject to forfeiture.<sup>186</sup> The other person who is legally in control of the vehicle, who is not the owner and who did so outside of his criminal smuggling obligation shall be held accountable for his actions.<sup>187</sup> Judge Stafford stated that this section does not require the owner to prove to the Commissioner that he or she, as well as the driver, did not consent to or was unaware of the vehicle's usage for smuggling reasons, before it may be freed. Judge Stafford in his reading of section 87(2)(a) of the Act, said

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<sup>180</sup> *Fazenda* Case page 9.

<sup>181</sup> *Fazenda* Case page 9.

<sup>182</sup> *Fazenda* Case page 5.

<sup>183</sup> *Fazenda* Case page 5.

<sup>184</sup> *Fazenda* Case page 5.

<sup>185</sup> *Fazenda* Case page 7.

<sup>186</sup> *Fazenda* Case page 24.

<sup>187</sup> *Fazenda* Case page 24.

a gross irregularity was committed by the Commissioner.<sup>188</sup> Whatever misgivings he may have had regarding the container's adaptability are irrelevant considering this evident violation of his duties in interpreting the onus in section 87(2)(a) of the Act.<sup>189</sup> In any case, the Commissioner abused his power of discretion as he did not consider the subject in line with the statute's requirements.<sup>190</sup>

The court held that the appeal must prevail under the common-law test since the Commissioner's decision to seize and declare the vehicles and container forfeited, is under section 33(1) and (2) of the Constitution's administrative action.<sup>191</sup>

### **3.3 Analysis**

*Fazenda* Case was decided upon the principles of common law, even though a reference was made to the Constitution.<sup>192</sup> According to De Waal:<sup>193</sup>

The right to just administrative action entrenches fundamental principles of administrative law developed by courts in the exercise of their common law review powers. Whilst the entrenchment of constitutional rights to just administrative action expands the field of the judicial control of administrative power it does not replace or supersede the common law of the judicial review of administrative action. It would be unfortunate if the complex and intricate conceptual framework of judicial review which has evolved under common law was simply to be abandoned in favour of an attempt to develop an entirely new jurisprudence under section 33. This means that the courts will continue to develop the common law principles of review, especially as they relate to private bodies.<sup>194</sup>

Given De Waal's comments and the decision in *Fazenda's* case, the Commissioner has always believed that if an action is permitted under the

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<sup>188</sup> *Fazenda* Case page 24.

<sup>189</sup> *Fazenda* Case page 25.

<sup>190</sup> *Fazenda* Case page 16.

<sup>191</sup> *Fazenda* Case page 27.

<sup>192</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 48.

<sup>193</sup> De Waal, Currie and Erasmus *The Bill of Rights Handbook* 476; Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 48.

<sup>194</sup> De Waal, Currie and Erasmus *The Bill of Rights Handbook* 476.

*CEA*, it must be carried out.<sup>195</sup> As a result, acting in defiance of other people's fundamental rights is justifiable and constitutional.<sup>196</sup> When using the Commissioner's powers under the Act, the Commissioner should now examine the common law principle (*audi alteram partem*) and others in addition to the *CEA*.<sup>197</sup> In *Wong Case*,<sup>198</sup> the court admonished the Commissioner for violating one of our Constitution's most basic provisions, the right to administrative justice.<sup>199</sup>

What can be learned from these cases is that an administrator who takes administrative action in terms of sections 87 and 88 of the *CEA* has the power to adversely affect the rights or legitimate expectations of any taxpayer.<sup>200</sup>

This is because the decision taken under the said provisions affects not only the goods but also vessels, cars, and other property used in relation to the suspected goods and consequently has an impact on the trade and other activities of both the owner and the importer.<sup>201</sup> This can result in significant financial and property loss of a relevant taxpayer, often without them being allowed to present their case before the decision is taken. When goods in question have perished, losses are inevitable.<sup>202</sup> Moreover, the *CEA* makes no provisions for providing reasons for actions done.<sup>203</sup>

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<sup>195</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 49.

<sup>196</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 49.

<sup>197</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 49.

<sup>198</sup> *Wong Case* 2003 JOL 11010 (T).

<sup>199</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 49.

<sup>200</sup> Section 3(1) of *Act 3 of 2000*.

<sup>201</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 2; Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 37.

<sup>202</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 2; Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 37.

<sup>203</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 2; Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 37.

As provided in *Deacon* case, since neither section 87 nor section 88 of *CEA* directly or impliedly excludes the right to a hearing of the use of natural justice principles,<sup>204</sup> when a taxpayer has a dispute with government authority such as the Commissioner, the taxpayer should assess his or her position in terms of section 3(2)(b) of *PAJA*.<sup>205</sup>

Section 3(2)(b) of *PAJA* provides “to give effect to the right to procedurally fair administrative action”.<sup>206</sup> An administrator shall provide appropriate notice to the taxpayer of the nature and purpose of the planned administrative action, including:<sup>207</sup>

- a reasonable opportunity to make representation,
- a clear statement of administrative action,
- adequate notice of any right of review or internal appeal, where applicable, and
- adequate notice of the right to request reasons in terms of section 5 of *PAJA*.<sup>208</sup>

Section 3(3) of the *PAJA* specifies the discretion requirements and provides that the administrator may allow the taxpayer to seek help and, in critical cases,<sup>209</sup> legal representation, to submit and contest material arguments, as well as make an appearance in person.<sup>210</sup>

The judgment in *Deacon Case*<sup>211</sup> is a confirmation that a taxpayer could be able to set aside the decision of the Commissioner if the decision does not comply with the requirements of just administrative action.<sup>212</sup> If the said action taken by the Commissioner is procedurally unfair, it will have a

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<sup>204</sup> *Deacon Case* page 17.

<sup>205</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 2; Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 37.

<sup>206</sup> Section 3(2)(b) of *Act 3 of 2000*.

<sup>207</sup> De Lange and Van Wyk *The Right to Just Administrative Action in the Context of Suspending the Payment of Disputed Tax* 18; section 3(2)(b) of *Act 3 of 2000*.

<sup>208</sup> Section 3(2)(b) of *Act 3 of 2000*.

<sup>209</sup> Section 3(3) of *Act 3 of 2000*.

<sup>210</sup> De Lange and Van Wyk *The Right to Just Administrative Action in the Context of Suspending the Payment of Disputed Tax* 18, Section 3(3) of *Act 3 of 2000*.

<sup>211</sup> 1999 2 All SA 405 (SE).

<sup>212</sup> De Waal, Currie, and Erasmus *The Bill of Rights Handbook* 476; Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 37.

negative impact on taxpayers complying with the law in the future, thereby defeating the purpose of the Act which is to prevent prohibited goods from entering or leaving the country.<sup>213</sup>

Therefore, it is argued in this research that the *Deacon* Case was effective because of the subsequent changes that came after the case which led to the current amendments customs Acts which have not yet been implemented and in improving the administrative action protection for taxpayers. It is submitted that because of *Deacon* Case judgement the taxpayers have now the right to be heard and be provided with written reasons when the Commissioner makes a decision that affects the fundamental rights or prejudice the taxpayer under sections 87 and 88 of the *CEA*.

### ***Conclusion***

From the facts above, it is clear that sections 87 and 88 of the *CEA* have a material effect on the administrative actions of taxpayers, and according to section 33 of the *Constitution* once administrative action has adversely affected a person's right, such person must be provided with written reasons. However, the *CEA* nowhere mentions that a person must be provided with reasons or be informed of the intended seizure or forfeiture of goods that have been determined to be administrative by nature. Actions which are administrative by nature are subject to section 33 of the *Constitution*, therefore subject to the provisions of *PAJA* as it was promulgated to give effect to the right to just administrative action. Therefore, the writer can conclude, in looking at the cases above, that the *CEA* does not comply with the requirements of just administrative action or the provisions of *PAJA*. Because of the *CEA*'s disregard of just administrative action rights, the Customs Division decided to rewrite the *CEA* to give effect to the rights of taxpayers. Although the new Acts are not yet being enforced and the *CEA* is still applicable, it is therefore

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<sup>213</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 39.

important for the administrator to apply the spirit and objects of the *Constitution* and just administrative action. When applying the provisions of the *CEA*, the administrator must interpret the legislation with its objectives.

## **Chapter 4- The role and application of just administrative action to the CEA**

### **4.1 Introduction**

The purpose of this chapter is to examine the application of the provisions of *PAJA* against the actions of the administrator acting under sections 87 and 88 of the *CEA*. If the actions of the said provisions are not covered by the definition of 'administrative action' in terms of section 1 of *PAJA*, the application of *PAJA* will be removed from consideration for this research.<sup>214</sup>

The right to just administrative action protects taxpayers from unlawful, unreasonable, and procedurally unfair administrative decisions taken by administrators;<sup>215</sup> and any taxpayer affected by the administrative decision taken can challenge the conduct of the administrator.<sup>216</sup> In the case of a dispute between a taxpayer and the administrator in terms of sections 87 and 88 of the *CEA*, the taxpayer must evaluate his or her position in terms of *PAJA*, including the provisions of any relevant statutory procedures that may or may not apply to the issue.<sup>217</sup>

The question that arises here is whether the decisions of the administrator acting under the above-said provisions amounts to administrative action in

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<sup>214</sup> Scholtz *The Constitutionality of Sections 88 And 90 Of the Customs and Excise Act 91 Of 1964* 12.

<sup>215</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 31.

<sup>216</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 31.

<sup>217</sup> Scholtz *The Constitutionality of Sections 88 And 90 Of the Customs and Excise Act 91 Of 1964* 12.

terms of *PAJA*,<sup>218</sup> and whether taxpayers can challenge the decisions of the administrator on the ground that the decision taken by the administrator infringes their constitutional right to just administrative action.<sup>219</sup>

#### **4.2 Application of the administrative action**

According to section 1 of *PAJA*, an “administrative action” is defined as:

- Administrative action means any decision taken, or any failure to take a decision, by
- a) an organ of state, when
    - i. exercising a power in terms of the Constitution or a provincial constitution; or
    - ii. exercising a public power or performing a public function in terms of any legislation; or
  - b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.<sup>220</sup>

##### *4.2.1 Organ of state*

For *PAJA* to be applicable, the Commissioner acting under sections 87 and 88 of the *CEA* must first be considered as an organ of state.<sup>221</sup> An “organ of state” is defined, among other things, as “any department of state or administration in the national, provisional, or local sphere of government”.<sup>222</sup>

Section 2 of the *SARS Act*,<sup>223</sup> as noted in Chapter 1, creates the Commissioner as an organ of state within the public administration but as an institution apart from the public service.<sup>224</sup> While section 2 of the *CEA* provides that:

The Commissioner shall, subject to the control of the Minister, be charged with the administration of this Act, including the interpretation of the Schedules thereto.<sup>225</sup>

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<sup>218</sup> Scholtz *The Constitutionality of Sections 88 And 90 Of the Customs and Excise Act 91 Of 1964* 12.

<sup>219</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 31.

<sup>220</sup> Section 1 of *Act 3 of 2000*.

<sup>221</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 32.

<sup>222</sup> Section 239 of the *Constitution*.

<sup>223</sup> 34 of 1997.

<sup>224</sup> Section 2 of *Act 34 of 197*.

<sup>225</sup> Section 2 of *Act 91 of 1964*.

Considering the above, the Commissioner is an “authoritative person” (organ of state) that exercises public power and public functions, and its decisions are governed by the provisions of *PAJA*.<sup>226</sup> The Commissioner or any other related administrator exercising power in terms of the *CEA* are not excluded from the application of *PAJA*’s provisions, as provided for in section 2 of *PAJA*.<sup>227</sup>

#### 4.2.2 Decision

Section 1 of *PAJA* defines administrative action as “a decision or the failure/refusal to make a decision”.<sup>228</sup>

Therefore, for administrative action to exist, a decision must have been taken by the Commissioner.<sup>229</sup> Where a decision is required to be made by the Commissioner but he or she refuses or fails, the taxpayer has the right to challenge the decision of the Commissioner not to decide.<sup>230</sup> The taxpayer cannot use the provisions of *PAJA* or section 33 of the *Constitution* until an administrative action has been decided upon by the Commissioner.<sup>231</sup>

The court in *Commissioner for South African Revenue Service v Trend Finance (Pty) Ltd* 2007 (6) SA 117,<sup>232</sup> stated that the seizure of goods in terms of section 88 of the *CEA* pending a possible forfeiture investigation has been found to constitute administrative action which is carried out

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<sup>226</sup> Van Schalkwyk 2004 *Meditari: Research Journal of the School of Accounting Sciences* 175; Mulder A *Critical Analysis of Administrative Action in the South African Tax Environment* 32.

<sup>227</sup> Mulder A *Critical Analysis of Administrative Action in the South African Tax Environment* 32.

<sup>228</sup> Section 1 of Act 3 of 2000; Mulder A *Critical Analysis of Administrative Action in the South African Tax Environment* 33.

<sup>229</sup> Mulder A *Critical Analysis of Administrative Action in the South African Tax Environment* 33.

<sup>230</sup> Mulder A *Critical Analysis of Administrative Action in the South African Tax Environment* 33.

<sup>231</sup> Mulder A *Critical Analysis of Administrative Action in the South African Tax Environment* 33.

<sup>232</sup> *Commissioner, SARS v Trend Finance (Pty) Ltd* 2007 (6) SA 177 (SCA) para 25.

following the requirements of the *Constitution* as spelt out in *PAJA*.<sup>233</sup> Whilst in *Deacon Case*,<sup>234</sup> the court held that the Respondent's (or his officials) exercise of discretion under sections 87 and 88 of the *CEA* is administrative by nature, therefore, section 33 of the *Constitution* and *PAJA* must be applied.<sup>235</sup>

#### *4.2.3 Empowering provision*

An "empowering provision" is defined as:

A law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.<sup>236</sup>

The empowering provisions under which the Commissioner exercises his or her discretion, in this case, are sections 87 and 88 of the *CEA*. In acting under the said provisions, the Commissioner acts from a position of authority and implements the empowering legislation that gave him or her the right to detain, seize, and forfeit goods and the transportation (ship and vehicle) that is used to carry the goods.<sup>237</sup>

#### **4.3 Procedural fairness**

Section 33 of the *Constitution* provides "everyone has the right to administrative action that is procedurally fair".<sup>238</sup> Within the scope of this research, the administrative actions of the Commissioner under sections 87 and 88 of the *CEA* affect the rights of a taxpayer rather than the public at large.<sup>239</sup> Therefore, the provisions of section 3 of *PAJA* will be applicable in this research. Section 3(1) of *PAJA* provides that:

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<sup>233</sup> *Commissioner for South African Revenue Service v Trend Finance* para 25; *Commissioner, South African Revenue Service v Saleem* 2008 (3) SA 655 (SCA) para 7; Hoexter *Administrative Law in South Africa* 196.

<sup>234</sup> 1999 2 All SA 405 (SE).

<sup>235</sup> *Deacon Case* page 16.

<sup>236</sup> Section 1 of *Act 3 of 2000*.

<sup>237</sup> *Commissioner for South African Revenue Service v Trend Finance (Pty) Ltd* 2007 (6) SA 177 (SCA) 25.

<sup>238</sup> Section 33 of the *Constitution*.

<sup>239</sup> Scholtz *The Constitutionality of Sections 88 And 90 Of the Customs and Excise Act 91 Of 1964* 21.

Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.<sup>240</sup>

Sections 87 and 88 of the *CEA* have a material effect on taxpayers because they empower the Commissioner to detain or seize a ship, vehicle, plant, material, or goods that are subject to forfeiture under the Act.<sup>241</sup> When the above-mentioned items are detained or seized, they cannot be used to complete any international trade contracts that may have been completed by parties to a contract of sale.<sup>242</sup> Therefore, the actions of the Commissioner can result in financial loss because the detainment or seizure of goods occurs at the expense of the taxpayer and in addition, the loss of property as the transportation used to carry the suspected goods can be detained, seized, or forfeited.<sup>243</sup>

#### *4.3.1 Section 3(2) of PAJA*

For the administrative decision to be procedurally fair, the Commissioner acting under sections 87 and 88 of the *CEA* must provide the taxpayer with the following:

- adequate notice of the nature and purpose of the proposed administrative action
- a reasonable opportunity to make representation
- a clear statement of the administrative action
- adequate notice of any right of review or internal appeal, where applicable; and
- adequate notice of the right to request reasons in terms of section 5.<sup>244</sup>

The taxpayer must be informed about the nature and the purpose of the planned administrative action by the Commissioner as this would allow the taxpayer to have the opportunity to make representation before an administrative decision could be taken.<sup>245</sup> Furthermore, the Commissioner must provide adequate information to the taxpayer regarding the intended

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<sup>240</sup> Section 3(1) of *Act 3 of 2000*.

<sup>241</sup> Scholtz *The Constitutionality of Sections 88 And 90 Of the Customs and Excise Act 91 Of 1964* 28.

<sup>242</sup> Scholtz *The Constitutionality of Sections 88 And 90 Of the Customs and Excise Act 91 Of 1964* 2-3.

<sup>243</sup> Scholtz *The Constitutionality of Sections 88 And 90 Of the Customs and Excise Act 91 Of 1964* 2-3 and 28.

<sup>244</sup> Section 3(2)(b) of *Act 3 of 2000*.

<sup>245</sup> Croome *Taxpayers' Rights in South Africa* 163.

administrative action, so that the taxpayer can comprehend the consequences of the action.<sup>246</sup>

This is consistent with the *audi alteram partem* principle of natural justice, which acknowledges the taxpayer's right to be heard and be furnished with reasons for any administrative decision taken.<sup>247</sup> After an administrative decision has been made by the Commissioner, the taxpayer must be notified about it.<sup>248</sup>

In *Deacon Case*,<sup>249</sup> the Controller contended that it would defeat the objective of the seizure if the affected person concerned were to be given adequate or timely notice of the decision and the opportunity to make arguments, and it would defeat the purpose of seizure.<sup>250</sup> Customs officials could hardly be expected to conduct a complete investigation.<sup>251</sup> He claimed that such a method would cause delays, place an undue burden on the respondent's resources, and, in some ways, contradict the objective of the Act.<sup>252</sup> Customs officials could hardly be expected to conduct a complete investigation and a hearing in each case where it was determined to seize goods due to unpaid duties.<sup>253</sup>

The court held that allowing the applicant to make the essential representations and hearing the applicant on those statements was a minor price to pay for the respondent to discover the truth.<sup>254</sup> If the respondent had heard the applicant in this respect, the respondent would likely have behaved differently, without necessarily implementing the obligations of sections 87 and 88 of the *CEA*.<sup>255</sup>

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<sup>246</sup> Croome *Taxpayers' Rights in South Africa* 163.

<sup>247</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Administrators' Guide*-179.

<sup>248</sup> Croome *Taxpayers' Rights in South Africa* 165.

<sup>249</sup> *Jol 4770 (SE)*.

<sup>250</sup> *Deacon Case* page 10.

<sup>251</sup> *Deacon Case* page 10.

<sup>252</sup> *Deacon Case* page 10.

<sup>253</sup> *Deacon Case* page 10.

<sup>254</sup> *Deacon Case* page 33-34.

<sup>255</sup> *Deacon Case* page 34.

Furthermore, the taxpayer must be advised by the Commissioner regarding his or her right to request a review or internal appeal of the administrative decision which has been taken.<sup>256</sup> In accordance with section 6 of *PAJA*, a taxpayer may ask a court to review a decision issued by the Commissioner.<sup>257</sup> However, the taxpayer must first exhaust all internal remedies, unless there is no reason to proceed since the official in question is biased, and the right to a fair hearing is unlikely to be received by the taxpayer.<sup>258</sup>

#### 4.3.2 Section 3(3) of *PAJA*

The Commissioner has the power under Section 3(3) of *PAJA* to authorize three additional procedures in making an administrative decision.<sup>259</sup> However, failure to allow such processes does not inherently imply that the administrative action is unjust.<sup>260</sup>

- The first procedure under section 3(3)(a) of *PAJA* requires that the Commissioner consider enabling the taxpayer to seek assistance and, in more complicated circumstances, obtain legal representation.<sup>261</sup>
- The second procedure under section 3(3)(b) of *PAJA*, is that taxpayers should be given the chance to challenge the information and arguments of the Commissioner.<sup>262</sup> The Commissioner is not required by *PAJA* to provide the taxpayer with a chance to refute the information on which he relies. However, the writer submits that failing to do so implies that the administrative decision is procedurally unfair.<sup>263</sup>

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<sup>256</sup> Croome *Taxpayers' Rights in South Africa* 165.

<sup>257</sup> Croome *Taxpayers' Rights in South Africa* 165

<sup>258</sup> Croome *Taxpayers' Rights in South Africa* 165.

<sup>259</sup> Section 3(3) of *Act 3 of 2000*; Croome *Taxpayers' Rights in South Africa* 165.

<sup>260</sup> Croome *Taxpayers' Rights in South Africa* 165.

<sup>261</sup> Section 3(3) of *Act 3 of 2000*; Croome *Taxpayers' Rights in South Africa* 166.

<sup>262</sup> Section 3(3)(b) of *Act 3 of 2000*; Croome *Taxpayers' Rights in South Africa* 166.

<sup>263</sup> Croome *Taxpayers' Rights in South Africa* 166.

- The third procedure requires the Commissioner to permit the taxpayer to make a presentation in person under section 3(3)(c) of *PAJA*.<sup>264</sup>

Considering the serious nature of seizure and forfeiture which has the potential of impairing the finances and property of the taxpayer, the right of the taxpayer to seek assistance and legal representation must not be left to the discretion of the Commissioner, because this will infringe their right to procedural fairness.<sup>265</sup> The taxpayer must also be provided with information that the Commissioner has in order to dispute the information.<sup>266</sup>

#### 4.3.3 Section 3(4) and (5) of *PAJA*

According to section 3(4) of *PAJA*, if it is fair and justifiable under the circumstances, an administrator may deviate from any procedural fairness in section 3(2) of *PAJA* if it is reasonable and justifiable in the circumstances.<sup>267</sup> This provision has the effect of providing the administrator with the discretion to deviate from the requirements of fair procedure.<sup>268</sup> On the other hand, Section 3(5) of the *PAJA* authorises an official to implement a procedure that differs from the one outlined in section 3(2) of *PAJA* if it is fair.<sup>269</sup> Therefore, a distinction between a 'departure' and the application of 'fair but different' enabling provision is made by *PAJA*.<sup>270</sup>

Which of the two procedures will be applied to the actions of the Commissioner under sections 87 and 88 of the *CEA* will be dependent

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<sup>264</sup> Section 3(4) of *Act 3 of 2000*.

<sup>265</sup> Section 3(4) of *Act 3 of 2000*; Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 23.

<sup>266</sup> Croome *Taxpayers' Rights in South Africa* 166.

<sup>267</sup> Section 3(4) of *Act 3 of 2000*.

<sup>268</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 23.

<sup>269</sup> Section 3(4) of *Act 3 of 2000*; Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 23.

<sup>270</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 23.

upon the facts of each case, meaning that fair administrative action is always determined by the circumstances.<sup>271</sup>

The question of whether an administrator can act on an "act now, hear later" basis under sections 87 and 88 of the *CEA* may be challenged.<sup>272</sup> An administrator could take such action if, due to the urgency of the decision to be taken, he or she was required to act promptly to prevent unlawful goods from entering or exiting the country.<sup>273</sup> Because the right to be heard is described by *PAJA* as a discretionary factor, it appears that the power of the administrator to act on an "act now, hear later" basis may once again be subject to the facts of each case.<sup>274</sup> However, it is argued that the administrator must present valid reasons for departing from the right to be heard before a decision is made. This is because the right to be heard is regarded as the core of a fair hearing and the courts will always demand it since it has the potential of affecting the taxpayer's rights, liberties, and privileges under sections 87 and 88 of the *CEA*.<sup>275</sup>

#### **4.4 Reasonableness**

The outcome of the decision is not the only factor that should be considered. The reasonableness of the decision is also a significant factor that must be considered when an administrative decision is made.<sup>276</sup> *PAJA* provides that an administrative action may be reviewed in court when the exercise of the authority provided by the empowering provision under which the administrative action was conducted, is so irrational that no reasonable administrator could have employed the power in that

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<sup>271</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 23.

<sup>272</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 25-26.

<sup>273</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 26.

<sup>274</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 26.

<sup>275</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 26

<sup>276</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 30.

manner.<sup>277</sup> According to the court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>278</sup> what constitutes a reasonable decision would be determined by the facts of each case.<sup>279</sup>

Because of the very nature of the consequences of seizure and forfeiture under the far-reaching provisions of sections 87 and 88 of the *CEA*,<sup>280</sup> it is urged that the Commissioner consider whether there is a less extreme approach to accomplish the same objectives when acting under the relevant provisions.<sup>281</sup> To determine the legality of an administrative action it must, therefore, be determined if the administrative action taken under the said provisions is reasonable.<sup>282</sup> The reasonableness of any administrative decision taken under sections 87 and 88 of the *CEA* would therefore differ based on each case. The elements relevant in deciding whether the decision was reasonable or not will include:

- The nature of the decision taken.
- The factors that may be taken in making the decision.
- The reasons provided by the administrator in reaching the decision.
- The nature of the opposing interests.
- The eventual effects of the decision upon the individuals who are impacted by it.<sup>283</sup>

Because each case will be decided on its own merits and circumstances and what is reasonable in one case may not be reasonable in another, it is important that the administrator exercises due diligence in applying his or her mind to the facts of the case at hand to reach a reasonable

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<sup>277</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 30.

<sup>278</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

<sup>279</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 32.

<sup>280</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 33.

<sup>281</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 33.

<sup>282</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 33.

<sup>283</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* para 45; Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 32.

decision.<sup>284</sup> The criteria above must be used as a guideline in determining the reasonableness of the decision taken by the administrator.<sup>285</sup>

#### **4.5 The right to reasons**

Under *PAJA* provision 3(2)(b)(v), in order to ensure that the right of the taxpayer to procedural fairness is respected, the administrator acting under sections 87 and 88 of the *CEA* should inform the taxpayer of his/her right to request reasons for an administrative decision that was taken.<sup>286</sup>

The administrative decision taken by the administrator is justified if he or she provides reasons.<sup>287</sup> Thus, when the Commissioner, as an administrator, should provide reasons to explain how the decision was reached.<sup>288</sup>

Section 5 of the *PAJA* gives effect to the right to request reasons, which states that if a taxpayer does not receive reasons for the administrative action taken, he/she may ask for such reasons within 90 days after becoming aware of the administrative action or should have reasonably become aware of it.<sup>289</sup> The administrator must reply to the affected taxpayer's request with reasons within 90 days of receiving it.<sup>290</sup> If the administrator does not respond, section 3 of *PAJA* will declare that such a decision was reached without any good reason.<sup>291</sup>

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<sup>284</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 32.

<sup>285</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 33.

<sup>286</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 37.

<sup>287</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 37.

<sup>288</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 37.

<sup>289</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 37.

<sup>290</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 37.

<sup>291</sup> Section 5(3) of *Act 3 of 2000*; Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 37.

The reasons furnished by the administrator should be sufficient and written down.<sup>292</sup> If no such request is made by the taxpayer, the administrator is not required to offer reasons, albeit in most cases, the administrator will.<sup>293</sup> However, it is only when the actions of the administrator have considerably and adversely affected the rights of taxpayers, that reasons can be requested.<sup>294</sup> Since the provisions of sections 87 and 88 of the *CEA* have an impact on the financial situation and property of the taxpayer, consequently impacting the rights of the taxpayer; it is, therefore, crucial that the administrator furnishes reasons.

After reading sections 87 and 88 of the *CEA*, it is evident that the Act does not expressly nor impliedly provide for the taxpayer's rights to be given reasons to avoid prejudice by the administrator acting in compliance with the stated empowering provisions.<sup>295</sup> The court in *Deacon* Case stated that,<sup>296</sup> with respect to the reasons for the decision, the *Constitution* established a standard of justifiability.<sup>297</sup> The test is objective, and the reasons for justifiability require the administrative decision to be objectively substantiated.<sup>298</sup> Whilst according to Nwauche and Scholtz, the tests that are employed by South African courts in the determination of administrative basis is the reasonable suspicious test and the reasonable apprehension test.<sup>299</sup> This research, however, will not discuss the lengthy impact of these tests.

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<sup>292</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 38; section 33(2) of the *Constitution*.

<sup>293</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 38.

<sup>294</sup> Mulder *A Critical Analysis of Administrative Action in the South African Tax Environment* 38.

<sup>295</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 34; *Deacon v Controller of Customs and Excise* pageCase page 17.

<sup>296</sup> 1999 JOL 4770 (SE).

<sup>297</sup> *Deacon v Controller of Customs and Excise* page 22. *Deacon* Case para 22.

<sup>298</sup> *Deacon* Case page 22.

<sup>299</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 34; Nwauche 2005 *PER* 3.

However, these tests may be applied in circumstances where the rights of the taxpayer have been affected by the administrative action that was taken by the administrator accused of not providing reasons when acting in compliance with sections 87 and 88 of the *CEA*.<sup>300</sup> Because the *CEA* does not appear to contain provisions that give effect to the right of written reasons when a taxpayer has been adversely affected by administrative action, the taxpayer may seek relief under section 5 of *PAJA*.<sup>301</sup> By providing reasons to the taxpayer, issues such as bias, a hazy administration, and the non-accountability of the government will be avoided. This will result in justified decisions being made and illogical decision-making being eliminated.<sup>302</sup>

#### **4.6 Analysis**

The provisions of sections 87 and 88 of the *CEA* do not provide guidelines that demonstrate the factors and circumstances the administrator must use when identifying the ship, vehicle, plant, material, or goods that must be detained, seized, and forfeited.<sup>303</sup> How the administrator determines whether a ship, vehicle, plant, material, or goods is subject to forfeiture is completely subjective; this is all dependent on the reasonable suspicion of the administrator to decide whether the ship, vehicle, plant, material or goods may be subject to detention, seize or forfeiture.<sup>304</sup>

Moreover, sections 87 and 88 of the *CEA* do not mention any requirements that the taxpayer must comply with to avoid detention and seizure of goods liable for forfeiture.<sup>305</sup> This, therefore, makes it difficult for

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<sup>300</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 34.

<sup>301</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 34.

<sup>302</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 39.

<sup>303</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 28.

<sup>304</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 28-29.

<sup>305</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 29.

taxpayers or even the administrators to know whether the decision taken is lawful and justifiable.<sup>306</sup>

It can therefore be concluded that sections 87 and 88 of the *CEA* do not comply with the requirements of *PAJA*. However, in exercising its discretion, the official must always act in the public interest, not for personal gain.<sup>307</sup> In addition to this obligation, an administrator acting under sections 87 and 88 must be bound by the purposes outlined in the *CEA*.<sup>308</sup> In cases where the purpose of the Act is not evident, the court will be compelled to determine the particular purpose of the legislation.<sup>309</sup> The result of deciding for an unauthorized subjective purpose, or for reasons not intended when the administrator's powers were granted, is that the decision or action will be deemed illegal.<sup>310</sup>

### ***Conclusion***

What can be concluded from the above is that the Commissioner is an organ of state that exercises public power or public function under sections 87 and 88 of the *CEA*, whose actions amount to administrative action and have an adverse effect on the just administrative rights of the taxpayer. Therefore, the administrative decisions of the Commissioner under sections 87 and 88 of the *CEA* are regulated by section 33 of the *Constitution* and the provisions of *PAJA*. Where the rights of the taxpayer have been affected by said provisions, the taxpayer should seek reasons since the Act does not expressly or implicitly make provision for the right to such reasons. These reasons can be used in the pursuit of further relief under the Act and will be discussed in the next chapter.

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<sup>306</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 29.

<sup>307</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 29.

<sup>308</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 29.

<sup>309</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 29.

<sup>310</sup> Scholtz *The Constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 29.

## **Chapter 5- The recourse that is available for taxpayers under the CCA in comparison with other recourses that are available in foreign jurisdictions.**

Based on the above discussion, the actions of the administrator who acts in terms of sections 87 and 88 of the *CEA* do affect the rights of taxpayers, and an aggrieved taxpayer is permitted to challenge the administrative decisions/actions taken by an administrator who acts in terms of the above-mentioned sections.<sup>311</sup> The question that arises here is what remedies are available to such taxpayers and through which institution these remedies can be initiated.<sup>312</sup>

The purpose of this chapter is to study the recourse available to taxpayers in Canada and Australia who have been affected by the administrative decisions or actions taken by their customs authorities, in comparison to the administrative recourse of taxpayers in South Africa under *PAJA*.<sup>313</sup> The purpose of this comparison is to ascertain whether the existing remedies in South Africa may be supplemented by the recourse of the above foreign countries' laws.<sup>314</sup>

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<sup>311</sup> Scholtz *The Constitutionality of Sections 88 and 90 of The Customs and Excise Act 91 of 1964* 47.

<sup>312</sup> Scholtz *The Constitutionality of Sections 88 and 90 of The Customs and Excise Act 91 of 1964* 47.

<sup>313</sup> Herbert *An Evaluation of The Recourse Available to Taxpayers Where SARS Does Not Adhere to The Correct Tax Administrative Procedures* 50.

<sup>314</sup> Herbert *An Evaluation of The Recourse Available to Taxpayers Where SARS Does Not Adhere to The Correct Tax Administrative Procedures* 50.

## 5.1 The South African Customs Law

### 5.1.1 Detention

According to section 754 of the *CCA*, any goods may be detained by a Customs Officer in order to investigate or determine if:<sup>315</sup>

- (i) a breach of this Act or a tax levying Act has been committed in relation to the goods;
- (ii) goods claimed to be excluded or exempted from a requirement of this Act or to be goods in respect of which an authorisation, permission, approval, recognition or other special dispensation applies, are in fact goods excluded or exempted from such requirement or in respect of which such special dispensation applies;
- (iii) the goods are prohibited, restricted or sectorally controlled goods; or
- (iv) the goods have been or are being used in committing an offence.<sup>316</sup>

The Customs Officer may also detain documents relating to the goods that are being detained to investigate or determine if:<sup>317</sup>

- (i) a breach of this Act or a tax levying Act has been or is being committed in relation to any goods or matter to which the document relates;
- (ii) the document affords evidence of the commission of such a breach;
- (iii) any goods to which the document relates are prohibited, restricted or sectorally controlled goods; or
- (iv) any goods to which the document relates have been or are being used in the commission of an offence.<sup>318</sup>

Furthermore, the detention of the goods or documents must be permitted,<sup>319</sup> and they may be detained whenever they are found.<sup>320</sup> A Customs Officer, when detaining goods, is required to provide a notice of detention to the taxpayer and detain the goods in the presence of the person clearing the goods or who made a clearance statement;<sup>321</sup> or the person in possession of goods or suspected to have those goods.<sup>322</sup> The detention notice should determine the goods to which it refers; specify the date for the detention of goods; provide reasons why the goods are detained, and provide any other information required by law.<sup>323</sup>

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<sup>315</sup> Section 754(1)(a) of *Act 31 of 2014*.

<sup>316</sup> Section 754(1) of *Act 31 of 2014*.

<sup>317</sup> Section 754(2)(a) of *Act 31 of 2014*.

<sup>318</sup> Section 754(2) of *Act 31 of 2014*.

<sup>319</sup> Sections 754(1)(b) and (2)(b) of *Act 31 of 2014*.

<sup>320</sup> Section 754(3) of *Act 31 of 2014*.

<sup>321</sup> Section 757(1)(a) of *Act 31 of 2014*.

<sup>322</sup> Section 757(1)(b) of *Act 31 of 2014*.

<sup>323</sup> Section 757(4) of *Act 31 of 2014*.

Furthermore, goods are required to be “detained for a reasonable time”.<sup>324</sup> The *CCA* also requires the presence of the affected taxpayer when the detained goods are inspected or when any package or container is opened; and goods are to be detained for a reasonable period.<sup>325</sup>

### **5.1.2 Seizure**

The customs authority has the power to seize any goods, including those that have been detained before.<sup>326</sup>

- If the goods are subject to seizure;
- If the goods are required as evidence in a criminal case;
- If the seizure is authorised by the Act or any tax levying Act; or any other situation that the law prescribes.<sup>327</sup>

A Customs Officer who seizes goods is required to provide a notice of seizure to:<sup>328</sup>

- a. The person who was served with the notice of detention, where goods have been detained before;<sup>329</sup>
- b. In the case of goods seized without being detained before:<sup>330</sup>
  - To the person who is clearing the goods or who submitted the clearance declaration; or
  - To the person in possession of the goods at the time of seizure.<sup>331</sup>

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<sup>324</sup> Section 760 of *Act 31 of 2014*.

<sup>325</sup> Section 758 of *Act 31 of 2014*.

<sup>326</sup> Section 762(1) of *Act 31 of 2014*.

<sup>327</sup> Section 762(1) of *Act 31 of 2014*.

<sup>328</sup> Section 763(1) of *Act 31 of 2014*.

<sup>329</sup> Section 763(1)(a) of *Act 31 of 2014*.

<sup>330</sup> Section 754(1)(b) of *Act 31 of 2014*.

<sup>331</sup> Section 763(1)(b) of *Act 31 of 2014*.

The affected taxpayer is required to be provided with notice of seizure that contains the identification of goods to be seized; the date of seizure of goods; the reason for the seizure; and any other information that the law may require.<sup>332</sup>

### **5.1.3 Confiscation**

The following goods are subject to confiscation:

- (a) Any goods in respect of which a breach of this Act or a tax levying Act has been committed;
- (b) any goods that must be destroyed or otherwise disposed of to give effect to a requirement in terms of this Act, a tax levying Act or any other legislation;
- (c) any other goods conveyed, stored, mixed, packed or found with any goods referred to in paragraph (a) or (b);
- (d) any goods that have been used in committing a breach of this Act or a tax levying Act, including—
  - (i) a vessel, aircraft, railway carriage or vehicle or other means of transport;
  - (ii) reusable transport equipment; and
  - (iii) plant, machinery, equipment and apparatus;
- (e) any goods, including a vessel, aircraft, railway carriage or vehicle or other means of transport, that have been specifically constructed, adapted, altered or fitted in any manner for the purpose of concealing goods;
- (f) any document in respect of which a breach of this Act or a tax levying Act has been committed or which relates to a matter in respect of which a breach of this Act or a tax levying Act has been committed; or
- (g) any other goods that may be confiscated in terms of any other provision of this Act or a provision of a tax levying Act.<sup>333</sup>

Any goods will be confiscated by the administrator if the goods are still seized after 30 calendar days and no request to have the seizure removed has been made to the customs authority; seizure has not been removed by judicial order; or a case where the application was made but was rejected.<sup>334</sup> Any confiscation of goods must be announced in writing by the administrator and once the goods are confiscated, the state becomes the owner of those goods.<sup>335</sup>

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<sup>332</sup> Section 763(4) of *Act 31 of 2014*.

<sup>333</sup> Section 766(1) of *Act 31 of 2014*.

<sup>334</sup> Section 766(2) of *Act 31 of 2014*.

<sup>335</sup> Section 766(3) and (4) of *Act 31 of 2014*.

## **5.2 Recourse available to taxpayers under South African law**

### ***5.2.1 Reconsideration of decision***

Chapter 37 of the *CCA* provides for the internal review of the decisions of the customs administrators in the application and enforcement of the Act; and the settlement of disputes resulting from the application, enforcement, or interpretation of the Act.<sup>336</sup> Section 826 of the *CCA* states that a decision made by an administrator may be internally reconsidered and be affirmed, amended, or revoked by the Commissioner, the Customs Officer who made the decision; the supervisor of the officer who made the decision; or by an aggravated taxpayer in the form of a written request.<sup>337</sup> Furthermore, a decision can be reviewed based on an appeal by an aggrieved person who lodges an appeal and there is the possibility of a dispute being settled.<sup>338</sup> An affected taxpayer has the right to receive written reasons for the decision taken by an administrator in order to consider any appropriate legal recourses that may be available to them.<sup>339</sup>

### ***5.2.2 Administrative appeals***

A dispute arising from the implementation, enforcement, or interpretation of the Act between an administrator and a taxpayer may be resolved through an administrative appeal.<sup>340</sup> A taxpayer who has been affected by a decision of an administrator may appeal such decision to “the Commissioner or the Official in charge of the Customs office where that customs officer or *SARS* official is stationed”.<sup>341</sup> An appeal from a decision must be filed electronically or to the *SARS* Office that informed the taxpayer of the determination, as well as:

- a. A letter of motivation stating the basis for the appeal; and

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<sup>336</sup> Section 825(a) and (b) of *Act 31 of 2014*.

<sup>337</sup> Section 826 of *Act 31 of 2014*.

<sup>338</sup> Section 826(b) and (c) of *Act 31 of 2014*.

<sup>339</sup> Section 829(1) and (2) of *Act 31 of 2014*.

<sup>340</sup> Section 827 of *Act 31 of 2014*.

<sup>341</sup> Section 839(1)(a) and (b) of *Act 31 of 2014*.

b. Any other papers and information that the rules may prescribe.<sup>342</sup>

### **5.2.3 Alternative dispute resolution**

A taxpayer who has been aggrieved by the decision of an administrator can apply to the Commissioner in writing for a dispute to be handled using Alternative Dispute Resolution (ADR).<sup>343</sup> However, the case may be referred for alternative dispute resolution subject to the taxpayer being unsuccessful in an alternative appeal (administrative appeal) and the ADR is appropriate for the decision.<sup>344</sup> Furthermore, there must be no pending or ongoing legal proceedings against the decision.<sup>345</sup> The Commissioner also has the power to commence the ADR process on their initiative; and when it is in the best interest of the state and appropriate to settle a dispute between the Commissioner and other parties under part 5 of Chapter 37.<sup>346</sup>

### **5.2.4 Voluntary Disclosure Relief**

The concept of 'voluntary disclosure relief' has been added to the South African customs law, and it has been available to other SARS-administered taxes for a long time.<sup>347</sup> In effect, this permits those who have benefited from faulty determinations to voluntarily report them in exchange for the Commissioner agreeing not to bring criminal proceedings or apply administrative fines against them according to section 864 of the CCA.<sup>348</sup>

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<sup>342</sup> Section 841(1) of *Act 31 of 2014*.

<sup>343</sup> Section 846 of *Act 31 of 2014*; Levendal *Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

<sup>344</sup> Section 848(1)(a) and (b) of *Act 31 of 2014*; Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

<sup>345</sup> Section 848(1)(c) of *Act 31 of 2014*; Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

<sup>346</sup> Section 853 of *Act 31 of 2014*; Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

<sup>347</sup> Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

<sup>348</sup> Section 864 of *Act 31 of 2014*; Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

### **5.2.5 Judicial review**

Chapter 40 is concerned with judicial matters and is significant when criminal procedures are brought in response to a serious breach of the Act.<sup>349</sup> It distinguishes between offences classified as Category 1 (section 887) and Category 2 (section 888), depending on the transgression's brevity.<sup>350</sup> If a person is convicted of a Category 1 or 2 offence, he/she is liable for possible fines ranging from R 500 000 to R 1 million and/or sentences ranging from three to five years.<sup>351</sup>

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<sup>349</sup> Chapter 40 of *Act 31 of 2014*; Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

<sup>350</sup> Chapter 40 of *Act 31 of 2014*; Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

<sup>351</sup> Section 890 and 892 of *Act 31 of 2014*; Levendal *A Comparison of the South African Regime with Selected Foreign Customs Penalty Regimes* 23.

## **5.3 The recourse of foreign jurisdiction**

### ***5.3.1 Canada***

The Canada's *Customs Act* was amended in 1986.<sup>352</sup> Under the Act, persons must declare the imported goods, make a proper entry for them and pay the required duties and taxes in order for the goods to be released.<sup>353</sup> The Customs Act in Canada provides legislative authority to the Minister of National Revenue (the Minister) to administer and enforce the collection of numerous other acts' duties and levies.<sup>354</sup> Failure by an importer/taxpayer to comply with the Act's obligations to declare goods and pay applicable customs duty may result in their seizure and forfeiture of goods and conveyances for breaching the provisions of the Act.<sup>355</sup> In addition, contravention of the Act can result in a fine and even incarceration if one is convicted of an offence under the Act.<sup>356</sup>

#### *5.3.1.1 Seizure and forfeiture*

The customs officials are empowered by Canada's Customs Act to seize goods and conveyances as a forfeit for the breach of the Act.<sup>357</sup> The seizure of goods can also take place if the customs official has reasonable reasons to believe that the Act or Regulation has been breached.<sup>358</sup> If the conveyance was used in connection with the suspected goods either during or after the breach, it may be seized.<sup>359</sup> Furthermore, the customs officials have the power to seize whatever would prove a breach of the Act or Regulation.<sup>360</sup>

The seizing officer is required under the Customs Act to provide notification to the affected party who has a legitimate interest in the

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<sup>352</sup> Heinrich 1987 *Can. Tax J* 1210.

<sup>353</sup> Heinrich 1987 *Can. Tax J* 1209.

<sup>354</sup> Heinrich 1989 *Can. Tax J* 1211.

<sup>355</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

<sup>356</sup> Heinrich 1989 *Can. Tax J* 1209 and 1209.

<sup>357</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

<sup>358</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

<sup>359</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

<sup>360</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

seized object.<sup>361</sup> This clause is intended to allow innocent third parties to file an application to demonstrate their ownership of the seized object.<sup>362</sup> The failure by the affected party to initiate proceedings for the return of seized goods in due time and within the time limits set out in the Act can affect the chances of the party to recover the goods. Unless they are reviewed and set aside, both seizure and forfeiture are final once declared.<sup>363</sup>

#### *5.3.1.2 Review of seizure and ascertainment of forfeiture*

The deputy minister is required to have been furnished with a report detailing the circumstances of the seizure by the customs officials who seize goods or conveyances or serve a notice of ascertainment forfeiture.<sup>364</sup> The customs officer must provide a form K119, entitled "seizure receipt", when the goods are physically seized; whereas a form K9, labelled "notification of seizure and/or ascertained forfeiture", is given when there is no actual seizure.<sup>365</sup> The appeal procedure is started once these forms are issued.<sup>366</sup> Before the actual seizure or issuing of the notice of ascertainment forfeiture, the affected person must make representations to the customs officer.<sup>367</sup> The jurisdiction of the officer to deal with the subject is revoked once the seizure or notification has taken place.<sup>368</sup>

The seizure or notification of ascertained forfeiture may be challenged by providing the seizing officer or a customs officer who decided to seize the goods with a request for a ministerial decision.<sup>369</sup> To determine whether the Act was breached, the Minister is required to evaluate the

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<sup>361</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

<sup>362</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

<sup>363</sup> Heinrich 1989 *Can. Tax J* 1209 and 1225.

<sup>364</sup> Heinrich 1989 *Can. Tax J* 1209 and 1229-1230.

<sup>365</sup> Heinrich 1989 *Can. Tax J J* 1209 and 1230.

<sup>366</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230

<sup>367</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>368</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>369</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230

circumstances surrounding the seizure or notice.<sup>370</sup> Within 30 days after the date of seizure or serving of the determined forfeiture notice, the notice is required to be provided.<sup>371</sup> The notice must be given timeously and sent by registered mail by the person making it.<sup>372</sup> Any claim will be lost if the proper notification is not given.

After receiving a request for a ministerial decision, the Act requires the deputy minister to give written reasons for the seizure or the issuing of a notice of loss of ascertainment to the person who requested to be given reasons.<sup>373</sup> These reasons are generally brief and merely list the provisions of the Act that were violated as justification for the seizure or notice.<sup>374</sup>

The affected party filing the notice has 30 days after receiving the reasons for the seizure or notification of the forfeiture to present whatever evidence he/she deems to support his/her view that the seizure or notification of forfeiture is unnecessary.<sup>375</sup> The complaint must be filed with the Customs and Excise Adjudication Directorate.<sup>376</sup> Each seizure or notification of forfeiture that has occurred must follow the procedure of seizing the property and obtaining a ministerial ruling.<sup>377</sup>

If the Minister determines that the Act or Regulations have not been breached, the seized items, conveyance, or substituted security must be returned immediately.<sup>378</sup> If the Minister determines that the Act or Regulations have been breached, the Act empowers the Minister to decide under what terms and circumstances the seized property or conveyances can be restored, or what amount of debt under an established forfeiture must be paid.<sup>379</sup> Similar to the provisions of seizure and forfeiture in the

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<sup>370</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>371</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>372</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>373</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>374</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>375</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>376</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230.

<sup>377</sup> Heinrich 1989 *Can. Tax J* 1209 and 1230-1231.

<sup>378</sup> Heinrich 1989 *Can. Tax J* 1209 and 1231.

<sup>379</sup> Heinrich 1989 *Can. Tax J* 1209 and 1231.

CCA, taxpayers are entitled to be given reasons for any administrative action taken by an administrator this includes the right to be provided with notice before goods can be seized or detained.

### **5.3.2 Australia**

Section 203 of Australia's Customs Act empowers a customs officer or any other authorised persons to seize forfeited goods; or goods that he or she believes are forfeited, provided that the belief is based on reasonable reasons.<sup>380</sup> This includes the seizure of ships, planes, merchandise, and parcels that are forfeited to the Crown under the Act.<sup>381</sup>

#### *5.3.2.1 Forfeiture*

Forfeiture operates automatically under Australia's Customs Act, without the need for further actions or decisions, such as seizure.<sup>382</sup> Forfeiture can also take place after the act or decision of seizure.<sup>383</sup> The Australian Customs Service (ACS) cannot dispose of seized goods until they are condemned, although the goods have already been forfeited to the Crown.<sup>384</sup>

#### *5.3.2.2 Seizure of goods*

The Customs Act establishes a procedure for the seizure of goods. Normally, this is how the procedure of seizure would be executed:

- After the goods have been seized under section 203 of the Act or after the issuing of seizure warrant, the owner of the goods or the person who is in possession or control of the goods at the time of the seizure must be served with seizure notice by the customs official who seized them.<sup>385</sup>

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<sup>380</sup> Section 203 of The *Customs Act* 1901; Livingstone-Ward 1994 *Revenue Law Journal* 199.

<sup>381</sup> Livingstone-Ward 1994 *Revenue Law Journal* 199.

<sup>382</sup> Livingstone-Ward 1994 *Revenue Law Journal* 200.

<sup>383</sup> Livingstone-Ward 1994 *Revenue Law Journal* 200.

<sup>384</sup> Livingstone-Ward 1994 *Revenue Law Journal* 200.

<sup>385</sup> Section 205(1) of The *Customs Act* 1901.

- The seizure notice that is provided to the affected party must contain identification of goods, the date on which the goods were seized, the reasons for seizure, and the effects of not claiming the recovery of the goods in time.<sup>386</sup>
- The seizure notice served should be in writing and be personally served or delivered by mail.<sup>387</sup> If the owner of the goods or the person in possession or control of the goods cannot be found after a reasonable amount of investigation, the notice must be posted in a newspaper that circulates in the area where the goods were seized.<sup>388</sup>
- The owner of the seized goods can institute a claim to a customs official to recover the goods.<sup>389</sup> If 30 days pass following the notice of seizure and the claim is not made for the goods, such goods will be condemned as forfeited to the Crown, and the case will be closed.<sup>390</sup>
- If a seizure notice is not issued within 30 days following the seizure, the goods are declared condemned as forfeited, and the case is closed.<sup>391</sup>

#### *5.3.2.3 Judicial Review*

Judicial review of administrative decisions made by administrators is regulated by the Administrative Decisions (Judicial Review) Act, 1977<sup>392</sup> (the ADJR Act) when a taxpayer is affected because of an administrative decision.<sup>393</sup> An affected taxpayer has the right to obtain reasons for the

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<sup>386</sup> Section 205A of The *Customs Act* 1901.

<sup>387</sup> Section 205(1) of The *Customs Act* 1901.

<sup>388</sup> Section 205(1) of The *Customs Act* 1901.

<sup>389</sup> Section 205B of The *Customs Act* 1901.

<sup>390</sup> Section 205B of The *Customs Act* 1901.

<sup>391</sup> Section 205C of The *Customs Act* 1901.

<sup>392</sup> The *Administrative Decisions (Judicial Review) Act*, 1977.

<sup>393</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 61.

administrator's administrative decision before initiating a Judicial Review.<sup>394</sup> The ADJR Act does not apply to administrative decisions that are challenged on their merits or decisions that are excluded under Schedule 1 of the ADJR Act.<sup>395</sup> However, section 39B of the *Judiciary Act* 1903<sup>396</sup> (Australian Law Reform Commission) allows decisions excluded by the ADJR Act to be brought under Judicial Review; this includes decisions in which merits are being challenged.<sup>397</sup>

Therefore, the Federal Court of Australia will hear a judicial review of an administrative decision made under the ADJR Act.<sup>398</sup> The ADJR Act allows for judicial review to be brought in the following cases: (1) where the decision has already been made, (2) the decision that is being made, and (3) the decision which will be made.<sup>399</sup>

Reasons for each sort of Judicial Review must be provided. The Federal Court has the authority to issue specific directives to correct the administrative decision that was challenged.<sup>400</sup> Section 16 of the ADJR Act specifies the kind of orders that the Federal Court may make, based on the nature of the review.<sup>401</sup> When an administrator makes a decision, such a decision or a portion of it might be overturned or set aside by the Federal Court.<sup>402</sup> Similar to *CCA*, an affected taxpayer is required to be

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<sup>394</sup> Section 13 of The *Administrative Decisions (Judicial Review) Act*, 1977; Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 61.

<sup>395</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 61; Schedule 1 paragraph of the *Administrative Decisions (Judicial Review) No.59 Act* 1977.

<sup>396</sup> Section 39B of the *Judiciary Act* 1903.

<sup>397</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 61.

<sup>398</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 61.

<sup>399</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 62.

<sup>400</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 62.

<sup>401</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 62.

<sup>402</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 62.

provided with notice before detention and seizure, this includes the right to be provided with reasons for any administrative decisions taken by the administrator.

#### *5.3.2.4 Independent Tribunal*

The Administrative Appeals Tribunal (AAT) created in 1976, is an Independent tribunal in Australia. The AAT is separate from the customs authority, and attempts to examine administrative decisions in a fair, cost effective, informal, timely and in a just manner. To account for cases in which the parties and their legal representatives lack the necessary qualifications to analyse and present pertinent evidence. However, the evidential rules do not bind the AAT. The tribunal will thereafter be able to present a party's case how it sees proper. The decisions of the AAT are administrative decisions, and according to the Administrative Appeals Tribunal Act (AAT Act) only a federal court of appeal or a Full Federal court of Appeal on a matter of law is possible. A tribunal, in that instance, an appeal from a single judge from the same court will be heard by a full federal court bench.

The high court of Australia can hear a final appeal as long as it has to do with a legal issue. This is also provided in section 44(1) of the AAT Act, which states that appeals to the Federal Court of Australia from AAT ruling must be limited to question of law, particularly legal mistakes made by AAT.

The AAT can also be used to resolve a dispute over duty payment, this could involve the clarification of goods, which determines the duty rate. Customs duty can be paid under protest under section 167 of the Customs Act. Subject to the filing of a review against a decision by the customs administration, the payment of the customs duty under protest at the time of the importation is provided for under section 167 of the Customs Act as a result. As a result, a classification dispute should be discovered at the same time as goods are cleared from importation.

## **5.4 Analysis**

In comparison to the Customs Act in Canada and Australia, it is evident that the *CCA* like the Customs Act in Canada and Australia provides for an internal complaints process to which parties who have been affected by the administrative actions of government officials, can resort.<sup>403</sup> Taxpayers who are affected by seizure or forfeiture in Canada and Australia are given notices, reasons, and the right to make representation to prevent the seizure or forfeiture of goods. Similar to the *CCA*, when the administrator is detaining or seizing the goods, the administrator is required to provide notice of detention or seizure that contains the provisions of reasons for action, the identification of the goods, and the date on which the goods are to be seized or detained.<sup>404</sup> Furthermore, the *CCA* requires the presence of the affected taxpayer when the detained goods are inspected or when any package or container is opened; and goods are to be detained for a reasonable period.<sup>405</sup>

However, there are still gaps in the *CCA* in that the Act does not mention the right of the taxpayer to make representation nor the right to legal assistance when goods are being detained or seized, considering the serious consequences that are associated with seizure and forfeiture. Furthermore, when the goods are being seized without being detained first, the *CCA* does not mention the duration of seizure of goods before they could be forfeited or released to the owner of the goods; and whether the goods seized can be inspected in the presence of the affected party.

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<sup>403</sup> Herbert *An Evaluation of the Recourse Available to Taxpayers Where SARS Does Not Adhere to the Correct Tax Administrative Procedure* 66-67.

<sup>404</sup> Sections 757(4) and 763(4) of *Act 31* of 2014.

<sup>405</sup> Section 758 of *Act 31* of 2014.

### **5.5 The changes introduced by the new amendments Acts**

The changes that were introduced by the new amendments Acts which were not included in the *CEA* include the Commissioner following subsequently and procedural fair procedure and applying the rules of natural justice. Under the new Acts, the taxpayer who has been affected by the decision of the Commissioner is required to be given notice of detention or seizure which determines which goods are affected, the reasons why the goods are being taken and any other relevant information in relation to the goods. The *CCA* furthermore requires the goods to be detained within reasonable time that is specified in the Acts. The new Acts also direct the Commissioner to consider the taxpayer's right to a hearing by providing them with a number of recourses which are available to them mentioned in paragraph 5.3, in cases where they are not satisfied with the decision that has been taken by the Commissioner. The changes that have been made by the new Acts promote the rules of administrative justice and consider the principle of fairness for taxpayers who have been adversely affected by the decision of the Commissioner. However, the changes that were in the new Acts are not enough to address the lack of administrative action protection for taxpayers in dealing with disputes involving the Commissioner in relation to detention, seizure and forfeiture.

### **5.6 Conclusion**

When it comes to the provisions of seizure and forfeiture under sections 87 and 88 of the *CEA*, the administrator is provided with extreme and far-reaching powers as the above-mentioned provisions do not only affect the suspected goods but also the property that is used to transport the goods.<sup>406</sup> Furthermore, the *CEA* does not provide an affected taxpayer with

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<sup>406</sup> Scholtz *The Constitutionality of Sections 88 and 90 of The Customs and Excise Act 91 of 1964* abstract.

the opportunity to present their case nor require the administrator to give reasons or notice for any administrative decision taken under the said provisions.<sup>407</sup> Therefore, affecting the taxpayers' right to just administrative action under section 33 of the Constitution.

In seizing the goods the Controller in the case of *Deacon v The Controller of Customs and Excise*<sup>408</sup> failed to comply with substantially and procedurally fair procedure, including the natural justice rules demanded by the common law and the Constitution.<sup>409</sup> The court in *Wong Case*<sup>410</sup> admonished the Commissioner for violating one of our Constitution's most essential foundations, the right to administrative justice.<sup>411</sup>

Due to the administrative failure of the *CEA* to comply with all the requirements of just administrative action, the *CEA* has been repealed and the South African legislature has attempted to rectify its failures through the creation of the new *CCA*. Under the *CCA*, a taxpayer affected by the administrative decision taken is entitled to be given notice of the intended detention and seizure of goods, this includes the right to be provided with reasons for detention, seizure, or forfeiture of goods.<sup>412</sup>

Furthermore, the *CCA* requires the presence of the affected taxpayer during inspection of the suspected goods and for the goods to be detained for a reasonable time.<sup>413</sup> It is clear from the above investigation that the legislator has taken reasonable steps to rectify the failures of the *CEA*.<sup>414</sup>

Due to the fact, the *CCA* has not yet been implemented, this research has not evaluated the effectiveness of these legislative changes in protecting

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<sup>407</sup> Scholtz *The Constitutionality of Sections 88 and 90 of The Customs and Excise Act 91 of 1964* abstract.

<sup>408</sup> *Deacon Case* page 6.

<sup>409</sup> *Deacon Case* page 6.

<sup>410</sup> 2003 JOL 11010 (T).

<sup>411</sup> Siphungu *Critical Assessment of the Constitutionality of the South African Customs Legislation* 49.

<sup>412</sup> Chapter 34 of *Act 31 of 2014*.

<sup>413</sup> Section 758 and 760 of *Act 31 of 2014*.

<sup>414</sup> Scholtz *The Constitutionality of Sections 88 and 90 of The Customs and Excise Act 91 of 1964* 58.

the right to just administrative actions. However, the *CCA* certainly leaves one optimistic about the future protection of the right to just administrative action in South Africa, particularly with regards to customs proceedings.

### **5.7 Recommendations**

Because of the consequences for the taxpayer that are associated with seizure and forfeiture, it is recommended in this research that administrators acting under the provisions of seizure and forfeiture exercise care when dealing with such actions.<sup>415</sup> This part of the writer's research thereby provides recommendations for reference to guide administrators when dealing with seizure and forfeiture. These recommendations should only be viewed as guidelines.

Firstly, since the *CCA* does not provide the taxpayer with the right to make representations after the act of seizure and forfeiture, it is thereby recommended that the right to be heard or the application of the rules of natural justice be implemented by the administrator.<sup>416</sup> This will allow the affected taxpayer to make representations to avoid the consequences which are associated with the seizure and forfeiture of goods.

Secondly, it is recommended that the affected taxpayer be permitted to make use of legal assistance, particularly in serious and complex cases that have dire consequences for the affected taxpayer.<sup>417</sup>

Thirdly, it is recommended that taxpayers be made aware of the administrative rights when interacting with the Commissioner under sections 87 and 88 of the *CEA* since the Act does not expressly or impliedly mention them. This will equip taxpayers with knowledge of their administrative action rights in order to adequately defend themselves in a case where there is infringement of their rights.

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<sup>415</sup> Legwaila 2002 *Stellenbosch L. Rev* 450.

<sup>416</sup> *Deacon* Case page 16.

<sup>417</sup> Scholtz *The Constitutionality of Sections 88 and 90 of The Customs and Excise Act 91 of 1964* 53.

Lastly, since the provisions for detention, seizure, and forfeiture are meant to facilitate the enforcement of the *CCA*'s provisions, as a result, it is advised that the courts interpret the legislative objective as well as the rationale for the legislation to be properly considered.<sup>418</sup> This is because legislating is a purposeful activity; therefore, the legislative intent must be elevated to the purpose of the legislation's functional framework.<sup>419</sup>

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<sup>418</sup> Legwaila 2002 *Stellenbosch L. Rev* 452.

<sup>419</sup> Legwaila 2002 *Stellenbosch L. Rev* 452.

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