

# **Taxpayers' rights to just administrative action under tax audits: A South African perspective**

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## ABSTRACT

This study inspected section 42 of the TAA in order to create increased awareness among taxpayers and SARS officials of their rights and obligations to ensure just administrative actions during audits and to determine if the TAA is strong enough to protect the rights of taxpayers.

A detailed analysis of the mechanisms implemented in South Africa to the taxpayer in enforcing their rights was performed in order to establish if the TAA is applied fairly and justly. It was found that due to specific lack of tax law enforcement and independence of the various institutions, the taxpayer often has to revert to court to have their rights protected.

Relevant court cases were inspected to establish whether SARS has acted within their boundaries. It seems as if the rights of taxpayers to be informed of the progress of the audit and stage of completion thereof as contained in section 42 of the TAA was successfully challenged in court by the taxpayers.

A comparison was done between South Africa, Canada and the UK in applying the different mechanisms available to evaluate if the mechanisms are strong enough to protect the rights of taxpayer's during audit verifications. The rights of the taxpayers in Canada and the UK are specifically protected by law and independent bodies. The effectiveness of their service to taxpayers in protecting the rights of taxpayers is good compared to the poor rate in South Africa in protecting the rights of taxpayers.

A few recommendations were made in order to improve the current tax system, or mechanisms in South Africa to protect the taxpayer's rights to administrative fairness with more efficient remedies:

- Legislating a Taxpayer's Bill of Rights which would be the foundation for the taxpayer's rights to be protected;
- Implementing a SARS Service Charter which details the manner in which SARS has to deliver services in a fair and just method toward taxpayers; and
- Improving the powers afforded to the Tax Ombudsman and the independence thereof.

It was evident from the study performed that even if the taxpayer has supplied all information, SARS often neglects to respond to the taxpayer within the time frame or even at all. It seems that the duty of SARS to keep the taxpayers informed during audits are not effectively addressed by the TAA, the *Constitution* and PAJA.

## LIST OF ABBREVIATIONS

|              |                                                        |
|--------------|--------------------------------------------------------|
| ADR          | Alternative dispute resolution                         |
| Constitution | The Constitution of the Republic of South Africa, 1996 |
| CMO          | Complaints Management Office                           |
| CRA          | Canada Revenue Agency                                  |
| HMRC         | Her Majesty's Revenue Service                          |
| ITA          | The Income Tax Act 58 of 1962 as amended               |
| OECD         | Organisation for Economic Co-operation and Development |
| PAJA         | Promotion of Administrative Justice Act 3 of 2000      |
| PHSO         | Parliamentary and Health Service Ombudsman             |
| PWC          | PricewaterhouseCoopers Incorporated                    |
| SARS         | South African Revenue Service                          |
| SCA          | Supreme Court of Appeal                                |
| SSMO         | SARS Service Monitoring Office                         |
| TAA          | Tax Administration Act 28 of 2011                      |
| VAT          | Value-Added Tax                                        |
| VAT Act      | Value-Added Tax Act 28 of 2011                         |

## **KEYWORDS**

Administrative action

Taxpayers' rights

Tax Administration Act 28 of 2011

South African Revenue Service

The Income Tax Act 58 of 1962 as amended

Promotion of Administrative Justice Act 3 of 2000

Administrative justice

SARS responsibilities

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# **CHAPTER 1: INTRODUCTION AND OBJECTIVES**

## **1.1 INTRODUCTION**

In terms of section 2 of the Tax Administration Act 28 of 2011 (TAA) the objective of the TAA is to establish successful collection of tax by applying administrative actions contained in the TAA to the degree viable, by defining the rights and duties of taxpayers and the rights and duties of SARS officials and by applying the rights and duties accordingly (TAA, 2011).

If the South African Revenue Service (SARS) applies the TAA in the manner and spirit it was originally intended for, taxpayers will be more inclined to accept the application of the TAA and pay their taxes if their experience with SARS has been reasonable and fair (Jansen van Vuuren, 2016). According to Wenzel (2002) taxpayers' compliance towards taxes would increase if they receive a fair procedural and distributive justice. An example thereof is adjustments made to taxable income without following the procedures as contained in the TAA, which leads to the frustration of taxpayers.

Van Schalkwyk (2001:286) stated that in order to improve the negative tax morale among taxpayers and to reduce the high degree of tax evasion, taxpayers' rights should be protected by the *Constitution of South Africa* (1996) (Constitution). The indefensible provisions as set out in the TAA prevents taxpayers to successfully object against the morally unsound practices of SARS which are unfair and do not protect taxpayers' rights (Ofori-Boateng, 2014:2).

The intention of the TAA is to achieve a more desirable balance between the rights and obligations of SARS and taxpayers and to create a relationship that is more transparent (Mbuyiseli, 2019:6). A more transparent relationship would greatly contribute to the four canons of tax as stated by Adam Smith as equity, certainty, convenience and economy of the administration of taxes (Smith, 1776). Botha (2013) seems to be in agreement with SARS that the TAA aims to promote a greater relationship between the duties and rights of SARS and taxpayers.

## **1.2 BACKGROUND TO STUDY**

The TAA is fairly new and has only been implemented in South Africa since October 2012 (SARS, 2013:4). Hence, it has now been effective for eight years.

According to SAIT (2013b:1), the procedural framework created in the TAA creates the basis for the Tax Ombud. The TAA has detailed the administrative procedures in legislation which could be referred to the Tax Ombud in cases of dispute where the taxpayer and SARS have

not resolved the differences in terms of the normal procedures available. The rights and duties of the Tax Ombud are contained in Chapter 2 Part F of the TAA. The model adopted by South Africa for the Tax Ombud has originated from the model used by the United Kingdom (UK), where they created the Tax Adjudicator's office and is also based on the Tax Ombud's model used in Canada. Therefore, the Tax Ombud model is fairly similar to that of Canada and the UK (SAIT, 2013b:1).

The government of South Africa established national legislation to deal with the right to fair administrative action. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) applies to SARS as it requires SARS officials to interact justly with taxpayers and to protect taxpayers from SARS officials abusing their powers (SARS, 2018:11). In addition, it provides taxpayers certain rights in respect of the implementation of decisions made by SARS or lack of thereof (SARS, 2013:11).

In terms of section 1 of the PAJA "administrative action" is defined as: "any decision taken or any failure to take a decision by an organ of state when exercising a power in terms of the *Constitution*, which adversely affects the rights of any person and which has a direct external legal effect".

PAJA prescribes that the TAA must be administratively just and this will be dependent on the situation of each matter. Section 3 of the PAJA states the elements that should be taken into consideration to determine if the administrative action taken by SARS officials is fair towards taxpayers, and includes the following:

- Adequate notice of the nature and grounds of the proposed administrative action;
- Prior notice of the intended decision;
- A prior hearing before the decision is taken;
- Clear reasons for the decision;
- A reasonable opportunity to make representations;
- A clear statement of the administrative action taken;
- Adequate notice of any right of review or internal appeal, where applicable; and
- Adequate notice of the right to request reasons for the decision made (PAJA, 2000; Mahadevey, 2016:48).

In the following special cases, SARS may depart from their obligations stated in PAJA, such as prior notice and prior hearing—

- Where such deviation is reasonably fair in the situation of a specific case; and

- Where SARS is allowed by the stated regulations to follow actions that are just, but vary from the stated fairness requirements (Mahadevey, 2016:48).

Various statements were made during the commentary period on the Tax Administration Bill 11 of 2011, stating that certain sections should include administrative fairness provisions that force SARS to treat taxpayers fairly and protect taxpayers from the abuse of SARS's rights (Mahadevey, 2016:48).

It is very challenging to demonstrate the unconstitutionality of any section in the TAA that can potentially recover any amount of tax by SARS officials, due to the fact that the main intention of the government is to impose and collect taxes (Ofori-Boateng, 2014:25).

Fortunately, PAJA applies to all the statutes contained in the TAA. Thus, it is not required that the TAA itself should spell out all the relevant particulars of administrative justice. It is already implied by PAJA due to the overriding application of PAJA (SARS, 2013:10).

In the case *Minister of Environmental Affairs & Tourism v Phambili Fisheries* (2003), the court commented that there are not two systems of administrative law, one based on the *Constitution* and one based on the common law. There is only one system of administrative law, founded in the *Constitution* and expressed through PAJA (*Minister of Environmental Affairs & Tourism v Phambili Fisheries*, 2003).

Even though the TAA restricts administrative fairness provisions in respect of certain actions, it does not imply that SARS officials may depart from other administrative fairness requirements as stipulated in PAJA. SARS may only deviate from certain actions if it is just and fair in the circumstances of a specific case (Mbuyiseli, 2019:54).

The general consensus is that although not all the regulations of the TAA is applicable to all cases, it does not prevent SARS to apply the TAA in such a way which is fair and equitable towards the taxpayer. It is further substantiated in the case *VZ Nondabula v The Commissioner of SARS & Another* (2017) where the court held that SARS handled the taxpayer in an arbitrary way and in contradiction to the TAA and to the values defined in the *Constitution*. The court stated that SARS should at least adhere to its own laws and should promote the values as defined in the *Constitution* when applying its power. SARS failed to do so in this case as SARS did not comply with its obligations under section 96 of the TAA (Botha, 2017).

Where SARS made an estimated assessment in terms of section 95, SARS has a duty to give a letter, stating the grounds for the assessment according to the regulations of section 96 of

the TAA. This is also in line with the regulations as stated in section 42 of the TAA where SARS has the obligation to give adequate reasons to the taxpayer based on the grounds of the assessment.

Botha (2017:2) commented that:

this case reiterates the fact that inasmuch as taxpayers have a duty to pay tax, SARS has duties that it has to comply with in order to be entitled to collect such tax. A taxpayer that is faced with a situation where an assessment is raised by SARS, which does not meet the formal requirements of section 96 of the TAA and which does not provide the grounds for raising the assessment, should be aware that SARS is not entitled to enforce payment based on such an assessment as such an assessment is unlawful.

SARS has the contention that the taxpayer must first pay the assessment and argue later in accordance to section 164 of the TAA. However, if SARS has issued an assessment which is unlawful or incorrect as the assessment does not meet the criteria of section 164 of the TAA, the taxpayer may request for a suspension of payment until the assessment has been revised to reflect the corrected assessment (TAA, 2011).

The point is that SARS has to apply the regulations of the TAA and the administrative procedures as defined in PAJA in its dealings with taxpayers. In circumstances where the incorrect information was provided by the taxpayer or a mistake by SARS was made, SARS may deviate from the regulations of the TAA as the action of SARS could be regarded as justifiable and in national interest.

### **1.2.1 Motivation of the study**

In view of the mandatory and unjustified nature of taxation, it is crucial that the government protects the rights of taxpayers from abuse during tax collection and administration by SARS officials (Ofori-Boateng, 2014:10). The four canons of tax are based on equity, certainty, convenience and economy of tax administration as stated by Adam Smith and contributes to a good tax system (Smith, 1776). Canon of equality implies that taxation should be in line with a taxpayer's ability to pay. Not all taxpayers have the same ability to pay taxes, thus justice requires that a taxpayer having greater ability to pay must pay more taxes. Canon of certainty implies that the amount, time of payment and manner of payment of tax which a taxpayer has to pay should be certain. Canon of economy implies that a good tax system requires that the expenditure on collection of taxes should be as low as possible. Canon of convenience implies that taxes should be levied and collected in a manner that is most convenient to the taxpayer and SARS (Muley, 2021).

It is generally challenging to establish a successful tax system based on the four canons of tax and to provide the rights of taxpayers in an open and democratic nation (Ofori-Boateng, 2014:23). Taxpayer's rights need to be amplified and stated clearly and in detail to counterbalance SARS's powers (Ofori-Boateng, 2014:24).

In the case *Carlston Investment Share Block (Pty) Ltd v Commissioner for the SA Revenue Service* (2002), the taxpayer argued that "finality" had been reached and that SARS had acted unconstitutionally in terms of section 79(1) of the ITA to revisit a finalised assessment within three years. The taxpayer's argument was dismissed as the functionality of the state relies on its capacity to impose and collect taxes (van Schalkwyk, 2004:191).

In the dispute between *Estate late L.E. Strydom v Commissioner for the SA Revenue Service* (2019), the taxpayer insisted that SARS applies the TAA to achieve fairness and correctness in the assessment. For the 2011/2012 assessments, SARS had incorrectly processed pension income in two years instead of one. This was corrected by SARS in 2020. It is evident from the above that SARS must apply the TAA for the benefit of collecting taxes fairly for national interest and fairly towards the taxpayer (*Estate late L.E. Strydom v Commissioner for the SA Revenue Service*, 2019).

Butani (2007:1) commented that although a lot of changes had been made to the TAA with regard to the rights of SARS and the rights of taxpayers, a lot still has to be done in order for the tax system of South Africa to be in line with the best tax systems globally. Although the TAA was implemented in 2012, the majority of the concerns raised by Butani in 2007 still applies to the practical application of the TAA.

Croome (2013b) was of the opinion that some of the provisions as defined by the TAA does increase the protection of taxpayers' rights by means of new regulations which were not previously defined in other tax acts. Even though SARS had the TAA at their disposal for only a few years now, SARS has on a regular basis in practice, not applied all the administrative procedures correctly as contained in the TAA. Examples thereof is the time frame in which SARS responds to objections and appeals submitted by taxpayers. The taxpayer in practice has to remind SARS to respond to their objections and or appeals submitted, within the time frame allowed thereon (SAIT, 2013b:2).

The latter was more recently substantiated in the case *Brits, Tolmay, Pienaar, De Lange v Commissioner for the SA Revenue Service* (2017). The application of the applicants is founded and based on section 42 of the TAA: "Keeping taxpayer informed". SARS obtained a warrant to seize the taxpayer's documentation. SARS took about three years to prepare audit

reports and never returned the documentation to the client. The case went to court to force SARS to provide the documentation and to furnish the taxpayer enough time to respond to the allegations made by SARS in the audit reports to encourage SARS not to issue assessments. The reason why taxpayers is given the opportunity to respond to the tax audit is to empower taxpayers to convince the respondent that it was not correct in its statements of the audit findings and could in effect prevent an additional assessment. The court ruled that the respondent is interdicted from providing any additional, calculated or other assessment in accordance to the audit report relating to each of the four applicants until 30 days after the respondent has given the documentation to each taxpayer (*Brits, Tolmay, Pienaar, De Lange v Commissioner for the SA Revenue Service*, 2017).

As seen from the above, it seems that SARS and the taxpayer have the TAA at their disposal to apply all the administrative procedures contained therein when dealing with any administrative matters concerning SARS matters. There might thus be a weakness in the detail of section 42 of the TAA, that there is not enough written into the legislation in regard of taxpayer's rights to be protected if the SARS officials do not adhere to the legislation.

Guidelines to the regulations of the TAA may assist the taxpayer and SARS in case of any possible misinterpretation. If taxpayers can't depend on guidelines provided for by SARS, taxpayers will need to incur significant expenses in order to receive guidance and advice from tax specialists to make sure that they comply with tax law (Klopper, 2015:5). The fact is that the TAA exists and that taxpayers as well as SARS need to apply the TAA as envisaged.

Unfortunately, the provisions of the TAA in respect of taxpayers' rights do not assist the taxpayer as what the TAA was intended to do. There seems to be a limitation concerning the objectives of the TAA, as it doesn't contain fairness regulations in order to give assistance to taxpayers when SARS does not comply with its own duties when performing an audit:

- Regarding the duty of SARS officials to keep a taxpayer informed within a prescribed time frame, the TAA does not include any penalties on SARS in cases where SARS deviates from the prescribed time frames. Taxpayers have to approach courts to permit an interdict and direct SARS to comply with its obligations contained in section 42 of the TAA. This remedy afforded to taxpayers is expensive, time consuming and burdensome.
- According to section 49 of the TAA, taxpayers are required to assist SARS officials during audits. In terms of section 234(1) of the TAA, it will be seen as a criminal offence if a taxpayer fails to provide assistance to a SARS official during an audit. SARS is given protection against taxpayers not adhering to the regulations stipulated

in the TAA, yet the TAA does not include any regulations to protect the rights of taxpayers against the unconstitutional behaviour of SARS officials.

- From the above statements it is evident that there is an imbalance between the relationship of SARS and taxpayers (Klopper, 2015:27,28).

These statements are substantiated in the case *Mr A v The Commissioner for the South African Revenue Service* (2018) where SARS did not apply the provisions of the TAA correctly. Mr A received a severance package which he declared as a “lump sum” in his 2012 tax return. SARS taxed the amount as “other income”. SARS raised additional assessments to which the taxpayer objected and appealed against. The validity of the audit was questioned by the taxpayer (*Mr A v The Commissioner for the South African Revenue Service* (2018)). The taxpayer argued that SARS did not adhere to the requirements of section 42 of the TAA as SARS could not rely on an administratively flawed audit without informing the taxpayer of the audit. SARS’s additional assessments were dismissed by the Tax Court as SARS did not comply with section 40 and section 42 of the TAA which also contravenes the *Constitution* and the principles of legality. The court ruled in favour of the taxpayer (Croome, 2018a).

Botha (2018) commented that:

This case re-iterates the rights of taxpayers in tax dispute resolution proceedings and is confirmation that a taxpayer can insist on SARS’s compliance with the audit provisions of the TAA. Where SARS issues an assessment without complying with the provisions in sections 40 and 42 of the TAA, such an assessment can be set aside.

Croome (2017) commented that:

Taxpayers must be aware of the right that they have to be informed of the details of the assessment issued to them and failing SARS’s adherence to the TAA they can either lodge a complaint with the office of the Tax Ombud, or alternatively, approach the court for relief.

When all options have been exhausted, taxpayers last remedy available is to approach tax courts to seek relief, which can be a costly and time-consuming recourse (Klopper, 2015:27, 28).

According to section 42 of the TAA, taxpayers have a right to receive detailed reasons and explanations regarding any adjustments and decisions made by SARS within a prescribed time frame. Section 5 of the PAJA also states that taxpayers, whose rights might have been

significantly and negatively impacted by administrative treatment, can demand a statement of grounds for the actions taken by the SARS official (Areias & Kotze, 2013).

Without supplying the taxpayer with the detailed reasons and explanations regarding any adjustments and decisions made, the taxpayer is prevented from doing a comprehensive objection against SARS adjustments and/or decisions. The required feedback needs to be received from SARS in order for a taxpayer to be treated fairly and justly as contemplated in the TAA.

The meaning of “reasons” and “adequate reasons” in the context of an assessment raised by SARS is bound to create confusion and come under judicial review (Areias & Kotze, 2013).

The tax court commented on the SARS Guide on Tax Dispute Resolution and concluded that “adequate reasons” requires the decision maker to explain his decision clearly in a way which would enable an aggrieved taxpayer to say: “Even though I may not agree with it, I now understand why the decision went against me”. The aggrieved taxpayer should be placed in a position to decide whether that decision is worth objecting (Areias & Kotze, 2013).

If the TAA regulations are applied in the originally intended structure, spirit and purpose by SARS, taxpayers would not have to dispute unjust administrative treatment received from SARS.

Therefore, from the above it seems that there might be two weaknesses in the application of section 42 by SARS.

Firstly, SARS does not always inform taxpayers of the process of an audit and secondly SARS does not always inform taxpayers within the prescribed time frames. These two matters are summarised next and supported by more practical examples to substantiate this assumption.

- ***Keeping the taxpayer informed of the progress of the audit or stage of completion of the audit***

SARS does not always in practice keep the taxpayer informed of the progress of the audit or stage of completion of the audit (H&H Matthews Accounting Practise CC – Practice Nr 684). SARS has a duty and responsibility as set out in section 42 of the TAA of keeping the taxpayer informed with a report on the conclusion on audits and if not concluded provide the taxpayer with a report within 21 business days (Section 42, TAA, 2011).

SAIT (2019a) stated that:

SARS' failure to adhere to the deadlines in section 42(1) and (2) of the TAA in relation to audits as set out in the court in ITC 13726 has held that SARS' non-compliance with these provisions "clearly offends both the *Constitution* and the principle of legality" resulting in SARS' decision to conduct an audit without proper notice being subject to being set aside and furthermore that any resultant assessment may be found to be invalid (SAIT: 2019a:2).

In the case *Gold Kid Trading CC v The Commissioner for the South African Revenue Service* (2017) the issue of SARS not informing the taxpayer was addressed. SARS initially in their letter of findings made various errors in calculating the input tax and output tax of the vendor. The vendor/tax practitioner supplied SARS with the necessary documentation to prove that the majority of the letter of findings was incorrect. SARS, without informing the vendor, issued assessments based on "so-called" affidavits received from clients of the vendor. SARS did not allow input tax credits in terms of the Value-Added Tax Act 28 of 2011 (VAT Act). SARS withheld all value-added tax (VAT) credits due based on their incorrect assessments raised. The matter went to court where the vendor was successful in convincing the court that the input tax that was claimed was in accordance to specific regulations and not according to assumptions made by SARS from alleged affidavits received.

The tax practitioner of H&H Matthews commented on the dispute between *A Greyvensteyn v The Commissioner for the South African Revenue Service* (2019) with regard to the taxpayer's right to receive reasons set out in section 42 of the TAA. SARS performed an audit on the taxpayer's income for several tax years. The taxpayer and the tax practitioner responded to the audit findings of SARS. SARS made several adjustments to the audit findings as a result of facts/records supplied by the taxpayer/tax practitioner. SARS however issued an assessment and levied a 100% additional tax on the assessment. The taxpayer argued that SARS neglected to state the reasons as prescribed in the TAA for levying a 100% additional tax on the assessment. SARS admitted that they neglected to inform the taxpayer of the reasons for SARS imposing 100% additional tax. SARS agreed in writing to wave the 100% additional tax raised due to their failure to comply with the regulations of the TAA (H&H Matthews Accounting Practise CC – Practice No. 684).

The above is further substantiated in the case *ABC Trust v The Commissioner for the South African Revenue Service* (2018) which brought the taxpayer to the tax court to force SARS to give proper reasons why the additional assessments for 2012 were

issued to enable the taxpayer to formulate its objection. More than five years after the original assessment was submitted, SARS raised an additional assessment. In terms of section 99(1)(a) of the TAA it is stated that an assessment may not be raised three years after the original assessment was submitted, unless the provisions of section 99(2)(a) of the TAA apply. Section 99(2)(a) of the TAA allows for an additional assessment after three years on the basis that the full amount of the tax liability was not assessed due to misrepresentation, fraud or non-disclosure of material information. The ultimate fact must be due to misconduct. The taxpayer requested reasons from SARS for their failure to issue a correct tax assessment on the non-disclosure or the correction of the assessment within the three-year period from date of the original assessment.

SARS states that the taxpayer's tax return did not disclose a capital gain, but rather disclosed the capital gain as income, which was impermissible. The judge viewed this to be insufficient because in order for a taxpayer to object against SARS, the aggrieved taxpayer should not be left with unclear reasons given by SARS for substantiating the case. SARS should have made their grounds for reasons clear and give express in the answering of statements made during these administrative actions (McFadden, 2020).

- ***Informing taxpayers within the prescribed time frame***

SARS does not always in practise inform taxpayers within the prescribed time frames of progress, conclusions and outcomes of audits. A letter of audit findings must be supplied to the taxpayer within 21 business days of the audit being completed, or alternatively SARS must inform the taxpayer that the audit was not conclusive. The reasons for the proposed adjustments by SARS must be set out in a letter to the taxpayer (Section 42, TAA, 2011).

This is in particular the case with VAT credit audits as stated in the above case of *Gold Kid Trading CC v The Commissioner for the South African Revenue Service* (2017), where the taxpayer and/or the tax practitioner had to request SARS to respond to the audit as their time frame thereof had been exceeded. This was confirmed by Registered Tax Practitioners H & H Matthews Accounting Practise CC – Practice No. 684 that has been in practice in excess of 27 years.

SAIT (2019b) had the following view on the outcome of the audit process:

In our experience, however, there seems to be a tendency by SARS to “comply” with the obligation by issuing a letter of audit findings when an audit has been conducted, but without specifying the grounds for the proposed assessment or at least all the grounds for the proposed assessments (SAIT, 2019b:2).

From the stated cases and comments relating to the obligations of SARS to keep the taxpayer informed within the prescribed time frame during the audit process, it seems that SARS neglects their duty thereof to the detriment of the taxpayer.

From the relevant court cases stated it seems that before the TAA was implemented, and since the implementation thereof, the TAA was unfortunately legislated in such terminology that it does not clearly define SARS’ consequences during audits and investigations if SARS does not adhere to section 42 of the TAA, PAJA and the *Constitution* to be fair and just in respect of the administrative procedures. The consequences thereof are that the taxpayer has to incur excessive cost to ensure that SARS complies with the TAA fairly and justly. The shortcomings of the TAA leads to unnecessary cost incurred by the taxpayer to determine the correct interpretation thereof.

### **1.3 PROBLEM STATEMENT**

The TAA has to be applied in line with the four fundamental principles as stated by Adam Smith; equity, certainty, convenience and economy of tax administration matters between SARS and the taxpayer. Specifically, with regard to the taxpayer’s rights in terms of section 42 of the TAA to keep the taxpayer informed of the progress, conclusions and outcomes of audits/verifications and also to provide reasons for the proposed adjustments made by SARS within the prescribed time frame. Therefore, the scope and application of section 42 of the TAA seems to be problematic as the provisions of section 42 are currently not strong enough to protect the taxpayer’s rights.

If the taxpayer has exhausted all its options in resolving the matter as contained in the TAA, lodged a complaint and also referred the matter to the tax ombudsman without success, the next costly step will be referring the matter to court. This unfortunately is a regular occurrence where taxpayers need to incur excessive costs to resolve such matters. Taxpayers unfortunately have to refer to the TAA and PAJA, which may place taxpayers who are uninformed and uneducated at risk.

### **1.3.1 Research Question**

Is the scope of section 42 of the TAA, which states that taxpayers should be informed of the progress, conclusions and outcomes of audit/verification and provided with adequate reasons for proposed adjustments within the prescribed time frame, strong enough to protect taxpayer's during the audit verification processes?

## **1.4 RESEARCH AIM AND OBJECTIVES**

### **1.4.1 Main objective**

The primary objective of this study is to determine if the taxpayer's right of administrative justice to be informed of the progress, conclusions and outcomes of audit/verification and to be provided with adequate reasons for proposed adjustments made in the prescribed time frame, comes to its full right as determined in terms of section 42 of the TAA.

### **1.4.2 Secondary objectives**

The main objective of this study will be addressed by the following four secondary objectives:

- The first secondary objective of the research is to evaluate the rights and duties of taxpayers and SARS officials in terms of the TAA and PAJA to determine if the fundamental issues to be fair and just as set out by the TAA is applied accordingly. This will be addressed in Chapter 2. The following three questions will be addressed specifically in this chapter:
  - What are the obligations a taxpayer needs to adhere to in terms of the TAA to receive information requested within the prescribed time frame?
  - What are the obligations of SARS to supply the taxpayer with relevant information within the prescribed time frame in terms of the TAA?
  - Should section 42 not be redefined in order to ensure that the application of section 42 is strong enough in order to protect the taxpayer's rights?
- The second secondary objective of the study is to investigate specific court case dealings in South Africa with regard to the constitutional right of a taxpayer to receive information within the prescribed time frame regarding an outcome that has been expressed in a case/audit/any other tax administrative matters. This will be addressed in Chapter 3.
- The third secondary objective of the study is to research the different administrative mechanisms of Canada and the UK, specifically in terms of the right of taxpayers to

be informed within a prescribed time frame, and to compare these mechanisms to that of the South African TAA. This will be addressed in Chapter 4.

- The fourth secondary objective of the study is to make recommendations and to establish, based on the findings of the study, possible better alternatives to implement in South Africa. The incorporation of provisions to protect the rights of taxpayer's in order to administrate fairness through more effective recourses will also be evaluated. This will be addressed in Chapter 5.

## **1.5 RESEARCH METHODOLOGY**

The research approach is based on various models; ontology, epistemology and methodology. Ontology can be defined as the nature of the knowable or study of being as it deals with the nature of reality and what is known about reality (De Klerk, 2020:9). Epistemology refers to a theory of "knowledge", the actual facts of the study is applied to distinguish mere belief from knowledge. Lastly methodology can be described as the way the researcher should go about to finding knowledge, which techniques or procedures to follow in order to gather reliable data of the study topic which will influence the research approach. Ontology and epistemology are crucial factors in selecting the research approach as it will clearly impact the research paradigm (McKerchar, 2008).

Ontology in this study can be defined as the study or research of the main topics of this study and the relationship or comparison between the main and secondary topics being researched.

Epistemology refers to the nature of the relationship between the knower, the researcher and the known (Bosman, 2020:6)

Qualitative research includes the collection and evaluation of qualitative data in order to understand concepts, judgements and experiences. Qualitative research can be used to gather extensive insights into a problem or create new ideas for research (Bhandari, 2020).

In positivism studies, the study is based on scientific verifiable duties which can substantiate logical conclusions made based on the verifiable data or information used in the study. Interpretivism relates to the interpretations by the researcher based on the facts stated in the research study (Dudovskiy, 2018).

Knowledge gained through the research of facts was applied to provide a framework for the study. In order to come to a conclusion on the research questions and problem statement as defined in the study, factual data obtained was interpreted before making logical conclusions of the study (Dudovskiy, 2016). The research study followed the interpretivism philosophy.

Section 42 of the TAA was inspected specifically with respect to SARS officials applying tax law and adhering to the regulations as stipulated in section 42 of the TAA during audit verification processes.

The epistemology used to reach conclusive findings on the study, is based purely on facts. All the facts researched in this study will form the basis of the logical interpretation thereof (Crotty, 1998).

To prove the credibility of this study, the researcher has to ensure that the methods applied, and the resulting findings are based on actual facts and the conclusions made can be validated (Cutcliffe & McKenna, 1999:374-380).

In order to better understand the TAA, specifically with respect to audit verification processes and the remedies available to taxpayers, a comparison will be conducted between South Africa, Canada and the UK.

#### **1.5.1 Literature review**

Relevant literature regarding the right to just administrative action in the context of the TAA, the rights and duties of taxpayers, the rights and duties of SARS/ SARS officers will be assessed in order to reach conclusions. The literature review will enable the researcher to better understand section 42 of the TAA.

The literature includes the following:

- The *Constitution* of the Republic of South Africa (1996);
- The Income Tax Act 58 of 2011;
- Tax Administration Act 28 of 2011;
- Laws in Canada and the UK regarding the powers and duties of tax officers and taxpayers specifically in terms of the right to be informed within a prescribed time frame;
- Various articles and reports on administrative justice, the rights of taxpayers to receive reasons for decisions made by SARS within a prescribed time frame would be retrieved from the internet in order to make conclusions and recommendations;
- Case Law applicable to the study;
- Academic research references; and
- Any other information that is applicable to this study.

### **1.5.2 Canada and the UK for comparison**

The choice of Canada and the UK for comparison is based on the premises that the model adopted by South-Africa for the Tax Ombud is based on the model adopted by the UK in creating a tax adjudicator's office and the Tax Ombud's office in Canada. The Tax Ombud model is thus fairly similar to the model adopted by Canada and the UK. This study would investigate the remedies/provisions in place in their respective jurisdictions in relation to administration action specifically in terms of taxpayer's rights to receive information in the prescribed time frame in order to establish if the remedies/provisions and the application thereof are similar to South Africa, and if it would be justified to follow the administrative action as applied by Canada and the UK.

Available literature will be inspected thoroughly to be able to establish the similarities and differences between South Africa, the UK and Canada's application and interpretation of the TAA in order to come to a conclusion with regard to the possible weaknesses of the TAA and also to identify where the application of the TAA specifically in terms of section 42 might possibly not meet its objectives.

This study deals with a specific provision in the Act, section 42 of the TAA and how SARS officials adhere to their duties as set out by tax law specifically in terms of audit verification processes.

### **1.5.3 Limitations of this study**

The literature research will include the analysis and application specifically applicable to section 42 of the TAA during audit/verification processes. The focus of this study will only be on tax audits/verifications as set out in section 42 of the TAA and not criminal investigations. Section 42 of the TAA will also be compared to the administrative actions of Canada and the UK focused on audit/verification procedures and not criminal investigations.

## **1.6 EXECUTIVE SUMMARY**

The research is presented in five chapters and is summarised as follow:

Chapter 1 includes the general background of the research, the problem statement, the aims and objectives and the research methodology.

In Chapter 2 the rights and duties of taxpayers and SARS officials in terms of the *Constitution*, TAA and PAJA will be considered. The responsibility of SARS to apply the TAA in a

fundamentally fair and just manner will be evaluated. Chapter 2 will address the first secondary research objective as identified in par 1.4.2(i).

In Chapter 3 specific court case dealings in South Africa with regards to the constitutional right of a taxpayer to receive reasons within the prescribed time frame regarding an outcome as set out in section 42 of the TAA will be investigated. Chapter 3 will address the second secondary research objective as identified in par 1.4.2(ii).

In Chapter 4 the importance of the right to just administrative action as contained in the TAA and specific problems with regards the powers and functions of SARS officers in South Africa is considered. A comparative research will be performed regarding the powers and functions of tax officers in Canada and the UK. Chapter 4 will address the third secondary research objective as identified in par 1.4.2(iii).

In Chapter 5 the findings, provisions, recommendations and conclusion of the research are presented. Chapter 5 will address the fourth secondary research objective as identified in par 1.4.2(iv).

## **CHAPTER 2: POWERS AND DUTIES OF TAXPAYERS AND SARS OFFICIALS**

### **2.1 INTRODUCTION**

This chapter will evaluate the rights and duties of taxpayers and SARS's powers and duty in protecting the rights of taxpayers in terms of the *Constitution*, PAJA and specifically with regards to section 42 of the TAA. The responsibility of SARS to apply the TAA in a fundamentally fair and just manner will also be inspected. This chapter addresses the secondary research objective as identified in par 1.4.2(i).

#### **2.1.1 Background**

The collection of tax is essential to guarantee that the objectives of the government are met (Fritz, 2017:164). It is crucial for the government to protect the rights of taxpayers from abuse during tax collection and administrative actions by SARS officials due to the mandatory character of tax. It is generally difficult to establish a successful tax system and provide rights in an open and democratic society based on Adam Smith's four canons of fairness, certainty, convenience and efficiency (Smith, 1776).

Croome (2008a:23) also commented that taxpayers are universally in an unfair position as taxpayers are forced by law to contribute to the government. Emphasis needs to be placed on taxpayer's rights that should be stated clearly and in detail to counterbalance SARS's powers.

The primary objective whilst drafting the TAA was to combine the different tax administrative regulations and align the provisions into one law. The TAA included various new administrative provisions, some of which aimed to promote the rights of taxpayers and while other provisions were included to increase the powers afforded to SARS officials. Whilst drafting the TAA, it was neglected to provide specifically for the required protection of taxpayers' rights against the potential abuse of power by SARS officials (Klopper, 2015:13).

The *Constitution* of South Africa is the supreme law of South Africa and it supersedes over all laws, including tax legislation. All organs of the state, including SARS officials and the taxpayers must adhere to the *Constitution* (Moosa, 2016:255). Thus, the tax laws of the country must comply with the regulations of the *Constitution* and specifically the Bill of Rights, which gives certain rights to taxpayers (Ofori-Boateng, 2014:13).

Specified regulations contained in the *Constitution* provides protection to taxpayers against unjust treatment. The administrative imbalance between SARS and taxpayers is starting to

become a bigger concern as taxpayers are more conscious of their rights contained in the *Constitution*. It is therefore anticipated that the combination of the different tax administrative regulations provided for in the TAA would provide a standard, to address SARS-taxpayer relationships (Ofori-Boateng, 2014:9).

In order to determine if the fundamental issues to be fair and just as set out by the TAA is applied accordingly, the following three questions will be addressed:

- What are the obligations a taxpayer needs to adhere to in terms of the TAA to receive information requested within the prescribed time frame? This question will be addressed under section 2.2: Taxpayer's rights and obligations.
- What are the obligations of SARS to supply the taxpayer with relevant information within the prescribed time frame in terms of the TAA? This question will be addressed under section 2.3: Powers and duties of SARS officials.
- Should section 42 not be redefined in order to ensure that the application of section 42 is strong enough in order to protect the taxpayer's rights? This question will be addressed under section 2.4: General provisions in respect of audits / verifications evaluated against the objectives of section 42 of the TAA.

## **2.2 TAXPAYER'S RIGHTS AND OBLIGATIONS**

The protection of taxpayer's rights is stated in chapter two of the *Constitution*, referred to as the Bill of Rights. The Bill of Rights aims to safeguard the rights of taxpayers and to regulate the relationship between state organs and taxpayers. Section 7(2) of the *Constitution* states that: "the state must respect, protect, promote and fulfil the rights in the Bill of Rights", which places the responsibility on state organs to perform their duties in terms of the Bill of Rights (*Constitution*, 1996).

The courts are empowered to assess the validity of any law or administrative action that is not consistent with the *Constitution* (Ofori-Boateng, 2014:13). The average taxpayer in South Africa, who is not educated in tax legislation, is generally not aware that their rights are safeguarded in the Bill of Rights, as set out in the *Constitution* and PAJA, particularly regarding tax matters (Klopper, 2015:96; Britz, 2014:45).

It can be concluded that it is the just and fundamental responsibility of SARS to respect, protect, and safeguard the rights of taxpayers as provided for in the Bill of Rights (Ofori-Boateng, 2014:14). Taxpayers would be able to enforce their tax rights if they insist that SARS applies their obligations toward the taxpayers as envisaged in "The Bill of Rights" in the *Constitution*. These rights will be considered.

### 2.2.1 Taxpayer's rights in terms of the Bill of Rights

Section 8 of the *Constitution* defines that the Bill of Rights applies to all legislature, the executive, the judiciary and all the state organs such as SARS to the provisions of the Bill of Rights (*Constitution*, 1996). The court may develop or apply common law rules in the application of the provisions of the Bill of Rights to taxpayer's rights to give effect to that right or limit it in certain cases, on the condition that the limitation does not infringe the provisions of section 36 of the *Constitution*. The scope of a taxpayer's rights in terms of the Bill of Rights depends on the nature of the taxpayer (Ofori-Boateng, 2014:14,15).

The conclusion from above is that SARS is required to act in a manner that is in line with the provisions contained in the Bill of Rights. Section 8 of the *Constitution* is a critical provision that combines the rights of a taxpayer and SARS as juristic person acting as a representative of the state.

Taxpayers should be aware of the fact that their rights as contained in the *Constitution* are not absolute and may be limited by section 36 of the *Constitution*. Taxpayers have the wrong impression that because the *Constitution* contains rights, that it may not be restricted.

In terms of section 36(1) of the *Constitution* the rights in the Bill of Rights may only be limited if the limitation is fair and just (*Constitution*, 1996).

"Conduct" is not regarded to be the law of general application. Meaning any "conduct" by SARS cannot be justified by the limitations of the rights proviso (Dwyer, 2004:39). Thus, if the actions of any SARS official, which may involve the exercise of discretion, violates the rights of a taxpayer as intended by the *Constitution*, it will be invalid (Ofori-Boateng, 2014:19).

As set out in section 39 of the *Constitution*, a taxpayer who has been unjustly treated may approach the tax courts for relief in cases where the taxpayer feels that his or her fundamental rights as stated in the Bill of Rights have been interfered with (Ofori-Boateng, 2014:32).

Even though taxpayers have various rights, taxpayers must be aware of the fact that their rights can be limited in certain situations. In order for a taxpayer successfully address the constitutionality of a section in the TAA, the taxpayer must illustrate their rights have been violated. SARS will have to fail in proving that the violation constitutes, a justifiable restriction of the taxpayers' rights.

It is evident from the above findings that the enforcement of the Bill of Rights by the taxpayer against SARS when the taxpayer's rights, have been violated/infringed is not always

successful as SARS can challenge the justifiable restriction of these rights. The Bill of Rights contained in the *Constitution* was not specifically compiled for the rights of taxpayer but for the general rights of all juristic entities.

### **2.2.2 Right to just administrative action**

In terms of section 33(1) of the *Constitution* taxpayers has the right to administrative action that is lawful, justifiable and procedurally fair. Section 33(2) of the *Constitution* further states that “everyone whose rights have been adversely affected by administrative action has the right to be given written reasons” (*Constitution*, 1996).

It seems that a taxpayer’s recourse for relief does not vest in seeking to combat tax law. However, it seems to lie in challenging the procedures used by SARS in exercising its powers, and the administrative rights of taxpayer’s, being the right of access to information, administrative justice and access to courts that may provide a better means of challenging the actions of SARS (Ofori-Boateng, 2014:32).

Taxpayers must be given the right to recuperate expenses incurred from SARS to get financial relief. This declaration must be embraced as it seems fitting to the current situations seen in South Africa. Section 8 of PAJA includes the recourses available in proceedings subject to judicial review where the taxpayer’s right to administrative justice has been breached. Section 8(1)(f) of PAJA affords the court with the power to make orders regarding costs (Croome, 2008b). In the recent case of *SIP Project Managers v The Commissioner for South African Revenue Service* (2020), SARS appointed Standard Bank as a third-party agent to withdraw funds from the taxpayer’s bank account to settle a tax debt. It was concluded that SARS has to repay the money to SIP, together with interest as well as the costs of litigation as the court found that SARS did not provide sufficient notice to SIP before it instructed the bank to pay over the outstanding debt (Curson, 2020).

It would therefore appear that there are grounds upon which aggrieved taxpayers could try to recover costs from SARS in the event that their rights have been contravened. The exposure of SARS to the risk of being liable to repay taxpayers due to maladministration of the TAA, would improve the administration of the tax system in South Africa (Croome, 2008b).

PAJA was introduced by the South African government to deal with the right to just administrative action (Croome, 2008b). PAJA requires SARS administrators to act justly and protect taxpayers from the abuse of power (SARS, 2013:11). PAJA also creates a framework that taxpayers may use for administrative justice.

Friedland (2003) commented that PAJA prescribes that the TAA must be procedurally just and that it will depend upon the circumstances of each case. Section 3 of PAJA stipulates the factors that need to be taken into account in establishing the justification of the administrative actions, includes the following:

- Reasonable notice of the nature and grounds of the proposed administrative action;
- Prior notice of the intended decision;
- A prior hearing before the decision is made;
- Clear reasons for the decision;
- A reasonable opportunity to make representations;
- A clear statement of grounds of the administrative action;
- Reasonable notice of any right of review or internal appeal and
- Reasonable notice of the right to request grounds for the decision (PAJA, 2000).

It is thus not essential for the TAA to state all the relevant aspects of administrative justice, as it is implicit in the overriding application of PAJA (SARS, 2013:10). Meaning the rules relating to administrative justice and the principles of PAJA have been successfully embedded in the TAA (Van der Walt, 2015).

The concept of equality is a fundamental principle of taxation that accentuates that the taxing powers of legislation must be applied in such a way that the burdens imposed by taxation are administered in a fair manner. The enactment of PAJA exemplifies a few of the practical steps taken by the government to ensure equal and fair treatment (Ofori-Boateng, 2014:16). SARS officials thus have the duty to provide unbiased recourses to taxpayers in order to ensure equal and fair treatment without considering their societal, political or economic status (Cockfield, 2010:17).

SARS officials should not act unreasonable, but instead apply their discretion in accordance to strict administrative guidelines and should be clear. Taxpayers should be able to understand the reasons for decisions made by SARS.

From the above it can be concluded that PAJA and specifically section 3 thereof together with section 33(1) of the *Constitution* emphasises the rights of taxpayers to administrative action that is useful, just and procedurally fair.

SARS should always conform to the administrative guidelines of PAJA and the *Constitution*. The Tax Ombud is also available to taxpayers before they need to approach the courts (The Office of the Tax Ombud, 2016). If a taxpayer had no success with the Tax Ombud, the

taxpayer would however have to resort to court to have his rights enforced when applying the fairness of administrative action, if the taxpayer and SARS are unable to resolve the tax dispute.

This part considered what obligations a taxpayer needs to adhere to in terms of the TAA to receive information requested within the prescribed time frame. It was found that a taxpayer has an obligation to submit all required information as required by SARS within the time frames thereof as stipulated in the TAA. The taxpayers must also complete all tax returns and other required information requested by SARS correctly and comprehensively. If the taxpayer has complied with its obligations as stated above, SARS is obliged under the provisions of the *Constitution*, PAJA and section 42 of the TAA to respond thereto within the prescribed time frame.

The powers of SARS officials and their duty to protect the rights of taxpayers as stipulated in the *Constitution*, PAJA and TAA will now be considered.

### **2.3 POWERS AND DUTIES OF SARS OFFICIALS**

SARS was constituted in terms of the South African Revenue Service Act 34 of 1997. SARS is a semi-autonomous revenue authority and thus an organ of state within the constitutional administration, but an institution outside the Public Service. SARS's objective is the successful and cost-effective collection of tax. SARS is required to act in congruence with section 195 of the *Constitution* which have to do with "Public Administration". Section 195 of the *Constitution* requires a great quality of ethical behaviour, cost-effective resources, and also the unbiased treatment of taxpayers.

In the case of *AM Moolla Group v Commisioner, SARS & other* (2005) it was stated that: "Being a creature of statute, the first respondent (SARS) must perform its task laid down in the Act and not by will."

The collection of tax is imperative to ensure the objectives of the state are met and SARS is therefore given certain powers to achieve this (Keulder, 2011:1). SARS's duty by law is to collect taxes from taxpayers for the right amount and in time. SARS's method in this regard has been to continuously ensure fairness among all taxpayers through some of its collection recourses (Ofori-Boateng, 2014:23).

Friedland (2003:1) stated that the Bill of Rights contributes directly to the powers afforded to SARS in respect of the administration and collection of taxes. There is no doubt that the rights

referred to in the Bill of Rights have a direct relation on the powers afforded to SARS by the different fiscal states (Stark & Smulders, 2018:287).

While some of the powers afforded to SARS may be able to assist SARS in the proper application of its powers as stipulated by law, many of the powers afforded may be unconstitutional. It may be challenging to prove the unconstitutionality of any section in the TAA that might lead to the recovery of tax by SARS, since the very functioning of the state is based upon its capability to collect taxes (Ofori-Boateng, 2014:25).

The aim of the TAA is to improve the relationship between SARS and taxpayers whilst SARS successfully collect taxes and to ensure that taxpayer's rights are not unfairly limited (Keulder, 2011:2). Unfortunately, SARS officials are not always considerate of taxpayer's rights.

The *Constitution* provides taxpayers the right to just administrative action. The right to just administrative action further includes legitimate expectations (De Lange & Van Wyk, 2017). A legitimate expectation is created that SARS officials will act in accordance with its rulings (Keulder, 2011:21).

While taxpayer's rights may not be unjustly restricted, the government still requires capital to finance the administrative needs and reach specified economic targets enforced on it by the *Constitution*. It is thus crucial that collection of taxes should be correctly administrated in order to make sure that taxpayers adhere to legislation and their obligations contained in it. SARS should also act in accordance with the powers afforded to them by the state. (Croome, 2010b:11)

In conclusion to the above, it can be stated that the crucial balance between SARS's rights to effectively collect tax, against the rights of the taxpayers as contained in the *Constitution*, PAJA and TAA to be treated fairly, is dependent on SARS not exceeding their powers whilst performing their duties to collect taxes.

### **2.3.1 SARS's duty to protect the rights of taxpayers**

Apart from the constitutional protection of the rights of taxpayers as set out in the Bill of Rights in the *Constitution* and embedded in PAJA, SARS has strived to implement different remedies to assist and protect taxpayer's rights.

#### **2.3.1.1 Interpretation notes**

The intention of interpretation notes is to give guidance to SARS officials and taxpayers in order to correctly interpret and apply the provisions of tax legislation. Interpretation notes will

eventually substitute the current practice notes to the magnitude that the interpretation notes relate to the interpretation of numerous acts. Although interpretation notes can give guidance to taxpayers and SARS officials, it is not equal to law (Williams, 2006:7).

It is only fair that taxpayers should be aware, and it should be made clear whether or not they are subject to pay taxes. In South Africa, such assurance is a concept that is generally far from the current situation prevailing. The worldwide taxing status are well-known for their incoherence and the same is noted in South Africa. In fact, in South Africa countless vital standards are completely omitted from the ITA and are only stated once a decision is made in the court (Williams, 2006:7).

Misra (2004:77) commented that problems of tax administrative actions mostly arise due to the insufficient interpretation and lack of knowledge of tax legislation.

From the above it can be concluded that if the legislation of the ITA and the TAA was drafted in such a manner that the contents thereof were not subject to interpretation as to determine the actual meaning of the legislation, the taxpayer would be able to apply the legislation without seeking interpretation thereof. Interpretation notes are still very useful and do provide a level of certainty.

#### **2.3.1.2 Short Guide to the Tax Administration Act**

The Short Guide to the Tax Administration Act issued in 2013, gives guidance to taxpayers in order to understand what their rights and duties are as stipulated in the TAA (SARS, 2013:2).

This guide provides the reassurance to taxpayers that the TAA will result in more efficient and cost-effective services and also highlights the fact that tax evaders will be reprimanded in accordance with the rights given to SARS to ensure successful tax collection (SARS, 2013:5). It is thus crucial for taxpayers to educate themselves to gain an in-depth understanding of the provisions contained in the TAA in order to be compliant with it (Croome, 2013b).

#### **2.3.1.3 Alternative dispute resolution**

In 2003, revised legislation was authorised that brought in a new resolution referred to as the Alternative Dispute Resolution (ADR). The ADR process grants the taxpayer an alternative solution of solving matters with SARS officials. This process has been designed as an informal, cost-efficient manner to solve tax disputes. The ADR process is applicable to all forms of taxes. The ADR route should be taken by an aggrieved taxpayer at the point where

the taxpayer submitted an objection / appeal with regard to the taxpayers' assessment that was prohibited in full or part thereof (Haupt, 2020:661).

Tax law is very difficult to understand, in so-much that if no compromise can be made between SARS and the taxpayer, the matter must be taken up with the tax courts to solve the dispute (Williams, 2013:1).

The enforcement of taxpayer's legal rights in court generally requires extensive costs. This entails that the average aggrieved taxpayers who have limited funds to take further actions against their case with SARS, can most likely not be successful in applying their procedural rights against SARS.

From the above it can be concluded that the ADR is an option available to taxpayers to resolve tax disputes, which could not be resolved through the normal channel of objections and appeals against the assessments. The "informal" method of formalizing a tax dispute presents the taxpayer the opportunity to present his case to the ADR Board. The outcome of the ADR meeting is usually conveyed to the taxpayer shortly after the ADR meeting. The taxpayer may however refer the matter to court or the tax court if the taxpayer is not satisfied with the ADR result. This is a method available to taxpayers but maybe not utilized effectively by taxpayers to obtain a result in tax disputes.

#### **2.3.1.4 Tax Ombud**

The intention of the Tax Ombud's office is to contribute value to the rights of taxpayers and achieve a counterbalance to the rights afforded to SARS (Klopper, 2015:14). The taxpayer may refer unresolved tax administrative matters to the Tax Ombud's Office if the tax administration matter is not resolved by SARS.

The Tax Ombud's office was implemented to protect the rights of taxpayers. As stipulated in section 16 of the TAA, the objective of the Tax Ombud's office is to review taxpayer's complaints relating to tax administrative matters and to provide solutions to SARS in order to resolve the matter under dispute (Klopper, 2015:53). In terms of section 17 of the TAA, the Tax Ombud's office does not administer disagreements on the interpretation of legislation or cases subject to objection or appeal. The Tax Ombud cannot force SARS to take corrective action in order to be able to defend taxpayers' rights against the abuse of powers afforded to SARS officials (Klopper, 2015:16). The Tax Ombud's office can only overlook an administrative matter relating to a disagreement of a legal proceeding (Croome, 2013a).

The purpose of the Tax Ombud evaluated against the purpose of the TAA triggers certain weaknesses. Firstly, it is doubtful whether the Tax Ombud's office could be seen as being sufficiently independent. Independence is questionable due to the fact that employees from the SARS office are allocated to the Tax Ombud's office and that the expenses of the Tax Ombud's office is funded by SARS (Klopper, 2015:19). It can be argued that the staff of SARS are used due to their insight of the internal processes of SARS as it will ease the administration of taxpayer's matters (SARS, 2013:15).

The Tax Ombud must report to the Minister of Finance, which may influence the independence of the Tax Ombud, for instance if he is pressured to keep the Minister of Finance happy and also to protect the Minister from the embarrassment of illegal actions taken by SARS. The inadequate independency of the Tax Ombud's office will have a negative impact on the rights of taxpayers and the balance of the relationship between SARS and taxpayers (Klopper, 2015:19).

The question that arises is whether SARS could possibly "bully" the Tax Ombud due to the limited financial independence of the Tax Ombud. The way the Tax Ombud places continuous reliance on SARS for financial assistance, IT and procurement services could be a risk of perceived and alleged corruption, which may adversely affect taxpayer's confidence (Carr, 2018).

Secondly, as set out in section 20(2) of the TAA, any decision taken by the Tax Ombud is not compulsory to be made by SARS. This raises doubt as to whether the Tax Ombud has any jurisdiction to direct SARS to take corrective action in order to promote the balance between taxpayer's rights and the powers afforded to SARS officials. It is questionable whether the Tax Ombud contributes to the four canons of tax; equity, certainty, convenience and economy of tax administration (Klopper, 2015:19).

The prolonged process that needs to be adhered to before a taxpayer can submit a complaint to the Tax Ombud also hinders the objective to minimise the administrative costs of taxpayers (Klopper, 2015:53).

The intention of the Tax Ombud is to make sure that the regulations of the laws are enforced fairly and justly towards taxpayers and that SARS's treats taxpayers in a manner that is just. Due to insufficient independence and powers afforded to the Tax Ombud, the effectiveness of the Tax Ombud, and the objectives of the TAA are not met.

From the above it can be concluded that although the ultimate aim of the Tax Ombud is to add value to the rights of taxpayers and to afford the Tax Ombud with sufficient power to

counterbalance the extended rights granted to SARS officials, the Tax Ombud can unfortunately only review administrative matters and not force SARS to take corrective action. The office of the Tax Ombud lacks the definition of independence as the office is funded by SARS and SARS officials are employed at the office. For the Tax Ombud to be effective, the Tax Ombud has to be totally independent and impartial with the necessary power to direct SARS into corrective action, where necessary.

#### **2.3.1.5 Public Protector and Human Rights Commission**

Section 181 of the *Constitution* endorses the implementation of different state bodies to strengthen the constitutional democracy of South Africa. These state institutions include the Public Protector and the Human Rights Commission (Ofori-Boateng, 2014:33,34). The *Constitution* requires these bodies to be independent, subject only to the *Constitution*, and the law, and to carry out their responsibilities, without prejudice.

The Public Protector's role is to support and enhance constitutional democracy by investigating the conduct of state affairs where there is suspicion of maladministration. These state bodies are available to aggrieved taxpayers when seeking relief against SARS. Due to insufficient tax knowledge, taxpayers unfortunately rarely approach the Public Protector for assistance (*Constitution*, 1996). The Public Protector is unfortunately heavily under resourced and thus can't attend to taxpayer's cases in the most effective manner (PMG, 2014:7). The Public Protector's role is to support and enhance constitutional democracy by SARS and other state sectors where maladministration is suspected. Unfortunately, the Public Protection and the officials thereof are often accused of contravening the very same principles they are supposed to uphold. Due to the maladministration of the Public Protector and the influence of politics in its duties, the taxpayer does not receive the attention to matters referred to the Public Protector (PMG, 2018).

From the above it can be concluded that the Public Protector is thus not an option for taxpayers in general to be successful in instance where SARS has not complied with the regulations of the Constitution, PAJA and the TAA. Likewise, the Tax Ombud through its administrative structure, which is funded by SARS and SARS officials, lacks the impact required from the Tax Ombudsman, especially as no recommendation made by the Tax Ombud is enforceable on SARS.

Besides other alternatives available to the taxpayer, the ADR process should be a better alternative to the taxpayer in resolving tax disputes with SARS than the Public Protector or the Tax Ombud.

### 2.3.1.6 SARS Service Monitoring Office

The SARS Service Monitoring Office (SSMO), implemented during 2002, was aimed to be a remedy of last resort for taxpayers to resolve disputes of service, legislative or administrative nature. The activities of the SSMO have been criticised due to the facts prevailing that the SSMO lacks independence and power.

Even though the SSMO does address taxpayer complaints, but it must be borne in mind that these complaints are managed from the view of helping SARS to meet their obligations. The SSMO is helpful in escalating matters that requires SARS's attention. Yet, the SSMO does not concern itself with the justification of a matter but rather whether or not a complaint is getting SARS's attention (Ofori-Boateng, 2014:34).

Even though the SSMO or Tax Ombud are not able to deal with the substance of a matter, for instance a disagreement on the facts or legislation or both, the SSMO or Tax Ombud may investigate the manner in which the matter is being handled by SARS. The SSMO or Tax Ombud thus only facilitates the resolution of complaints of a procedural nature. The SSMO or Tax Ombud may only investigate an administrative matter which subject to an objection or appeal (SARS, 2020a:21).

Another reason for the failure of the SSMO to protect the rights of taxpayers is due to the fact that the SSMO will not inspect a taxpayer's matter if the taxpayer had already lodged it's complained with the Public Protector. The SARS Complaints Management Office (CMO) has replaced the SSMO, this only affected the name of the office, while the office's purpose remained unchanged (Herbert, 2018:38).

Aside from the legal protection taxpayers are given under the *Constitution*, several non-legislative methods have been taken advantage of by SARS. The protection of the rights of taxpayers are then exploited. Yet, just as much as taxpayers have some relief available under both legislative and non-legislative remedies from the state and SARS, it can be concluded that these measures are not practically absolute, due to certain weaknesses in the manner it is applied. Taxpayers are still defenceless to the inefficient administration and abuses by SARS officials (Ofori-Boateng, 2014:32).

It can be concluded that although the SSMO escalates outstanding tax issues that require SARS's attention, it does address the justification of the case referred. The SSMO is just a mechanism to escalate tax matters which have not been addressed through the normal SARS processing systems.

Although the taxpayer has the *Constitution*, PAJA, and the TAA to protect its rights for administrative fairness in tax matters versus SARS's right to collect taxes and the administration proceedings applied by SARS in collecting taxes often ends in disputes between the tax parties. The taxpayer will have to prove that the administrative procedures followed by SARS are not in agreement with the *Constitution*, PAJA, and the TAA and are thus not enforceable. The taxpayer unfortunately has to refer the matter to court to obtain a decision on the dispute as the referral to the Tax Ombud and the Public Protector is usually not successful.

The obligations of SARS to supply the taxpayer with relevant information within the prescribed time frames in terms of the TAA will now be considered below.

### **2.3.2 Duty of SARS to keep taxpayers informed during audit verification**

SARS is empowered, under the provisions of the TAA, with certain rights and powers to assure the collection and recovery of taxes. Part A, Chapter 5 of the TAA stipulates the general administration provisions regarding inspections and field audits which aims to contribute to the rights of taxpayers (Klopper, 2015:22).

It is crucial that taxpayers adhere to their obligations provided for in the TAA and that SARS officials also comply with the procedural requirements provided for in the TAA and importantly, that SARS officials acts in accordance with the provisions of administrative justice, stipulated in section 22 of the *Constitution* and as expressed by PAJA (Ofori-Boateng, 2014:26).

Section 33(2) of the *Constitution* states that "everyone whose rights have been adversely affected by administrative action has the right to be given written reasons" (*Constitution*, 1996). The right to just administrative action as stipulated in section 33(2) of the *Constitution* thus empowers taxpayers, a right to request grounds, from SARS, for decisions made in their interactions with taxpayers (Croome: 2010a).

The TAA was implemented on 1 October 2012. The publication contributed to many changes made to the rights and obligations of taxpayer's and SARS officials. Some of the changes of provisions previously contained in the ITA have seen a propitious improvement in taxpayer's rights. One of these improvements is contained in section 42 of the TAA (Sonnenbergs, 2013).

Previously, the TAA did not contain the responsibility on SARS to keep the taxpayer informed during an audit process, nor did it require a time frame which SARS had to adhere to when finalising an audit verification. The taxpayer could thus be oblivious and uncertain with regards to the stage of completion of an audit. This position was clearly not sound to good commercial

or fair practices. The taxpayer had to request SARS to provide a status update on the audit or request that such an audit be completed within a reasonable time. SARS could simply state that it was under no legal obligation to finalise the audit within a specific time frame and that complexities in performing the audit required extensive use of resources (Sonnenbergs, 2013).

Section 42 of the TAA, however now regulates that taxpayers have the right to be kept up to date on the progress of an audit, receive detailed reasons and explanations regarding any adjustments and decisions made by SARS within a prescribed time frame. SARS officials has a legislative duty of keeping taxpayers informed during and after an audit.

Taxpayers rights of being informed is further substantiated by section 5 of the PAJA which states that: “every person, whose rights may have been materially and adversely affected, by administrative action, may request written reasons for that action from the administrator responsible” (PAJA, 2000).

When taxpayers are uninformed and not supplied with detailed reasons regarding any adjustments and decisions made, the taxpayer is prevented from doing a comprehensive objection against SARS adjustments and/or decisions. In order for taxpayers to be treated fairly and justly as contemplated in the TAA and embedded in PAJA, taxpayers require the necessary feedback from SARS.

The taxpayer’s rights as stipulated in the Constitution, PAJA and the TAA, and in particular the obligations of SARS to implement their duties as contained in section 42 will be outlined in the analysis of section 42.

### **2.3.2.1 Stage of completion of the audit**

A taxpayer should be notified by SARS of the stage of the audit in the manner and form prescribed by legislation. The report should set out the scope, stage of finalisation of the audit and if any additional information is needed to finalise the audit (SARS, 2012).

SARS has the obligation to inform the taxpayer of the present scope of the audit in detail before commencement of the audit. The taxpayer has an administrative right to receive the scope of the audit and prepare the documentation required for the audit according to the requested information required, by SARS (Sonnenbergs, 2013).

### 2.3.2.2 Outcome of the audit

In terms of section 42(1) and section 42(2) of the TAA, SARS has a duty to keep the taxpayer informed with a report on the conclusion on audits and if not concluded provide the taxpayer with a report within 21 business days, informing the taxpayer that:

- the audit conducted, concluded insufficient audit evidence; or
- a potential material adjustment was noted along with the reasons for the stated assessment or decision. The taxpayer is allowed to give feedback in writing within 21 business days from receipt of the report (Klopper, 2015:24).

In terms of sections 42(4) and 42(5) of the TAA, SARS is not obliged by the above proceedings if the taxpayer forfeits his right to be informed or if the SARS official is of the opinion that this will hinder the outcome of the audit. In terms of section 42(6) of the TAA, it is stated that SARS may proceed to raise an assessment and is required to inform the taxpayer of the reasons of the assessment within 21 business days from the date that the assessment was raised. This time frame could also be extended, depending on the complexity of the audit (Klopper, 2015:24).

The legislative duty of SARS to inform taxpayers during the audit verification process, positively contributes to the rights of taxpayers. Although SARS is obliged to act according to the regulations of section 42 of the TAA or outcomes of an audit, SARS unfortunately does not always apply the time frame or outcomes of audits to taxpayers as regulated. Due to a lack of legislation enforcing SARS to comply with the various legislation, the taxpayer often has to revert to court for administrative fairness rights of the taxpayer to be applied.

Despite the obligation on SARS to keep the taxpayer informed during the process of an audit, it is unfortunate that when SARS fails to adhere to the legal obligations of the TAA, there is no penalty against SARS nor remedy for the taxpayer. SARS could thus simply fail to issue the findings report as it will have no adverse effect on SARS's ability to collect taxes (Sonnenbergs, 2013).

The above is substantiated in the case of *Mr. A v The Commissioner for the South African Revenue Service* (2018). The taxpayer did not receive a notice of the audit prior to the issue being disclosed in the findings letter, stating the grounds of the assessment. The audit was administratively flawed as SARS did not comply with the requirements of section 42 of the TAA (PWC, 2018b). The SARS official responsible for the audit did not provide the taxpayer with a letter indicating the stage of completion of the audit. There was also no conclusions or

findings reported to the taxpayer as would be required when an audit is finalised (Pocock, 2018).

PWC (2018a:7) stated that on the strength of evidence provided to court by the taxpayer, that SARS had neglected to disclose that they had a full record of an audit conducted on the taxpayer. The court stated that there were obvious administrative errors committed by SARS in this case.

In this part it was considered what the obligations of SARS are to supply the taxpayer with relevant information within the prescribed time frame in terms of the TAA. It was found that although the taxpayer rights have been significantly enhanced through the TAA, and specifically section 42 thereof together with the rights of taxpayers as contained in the Constitution and PAJA, the practical application of the obligations of SARS as outlined in section 42 is often not adhered to by SARS. The taxpayer has to revert to court if the taxpayer is unable to utilize the other remedies available in order to obtain fair and just administrative processes from SARS. Unfortunately, section 42 of the TAA lacks the authoritative impact to compel SARS to comply with the regulations thereof.

The objectives of section 42 of the TAA will be investigated to evaluate whether section 42 is strong enough in order to protect the rights of taxpayers.

## **2.4 GENERAL PROVISIONS IN RESPECT OF AUDITS / VERIFICATIONS EVALUATED AGAINST THE OBJECTIVES OF SECTION 42 OF THE TAA**

Section 42 of the TAA aims to provide taxpayers with greater certainty and required time frames of completion of an audit in order to add value to the objectives of the TAA to counterbalance the rights of SARS and the rights of taxpayers and to reduce the administrative burden on taxpayers.

The responsibility of SARS to inform taxpayers, positively contributes to the objectives of the TAA as it should reduce the dissatisfaction that taxpayers endure during verification processes, i.e. receiving no feedback or correspondence from SARS for extensive durations, and be presented with a demand with brief notification from SARS to submit information (Croome, 2013b).

It is unfortunate that when SARS omits to adhere to the legal obligations when performing a field audit, that there is no sanction against SARS nor fairness provisions to assist taxpayers. In effect SARS could proceed to issue the letter of findings indefinitely, alternatively could

merely fail to issue the letter of findings as it will have no adverse effect on its ability to collect taxes (Sonnenbergs, 2013).

The TAA does not state any consequences in situations where SARS does not adhere to the deadlines with regard to the legal requirement of keeping taxpayers informed. Whereas, in terms of section 49 of the TAA, a taxpayer is obligated to provide assistance to a SARS official during a field audit and failure to do so is a criminal offence as set out in section 234(l) of the TAA (Klopper, 2015:27).

The TAA does not make specific provisions to protect the rights of taxpayers against SARS who do not act justly as required by section 4(2) of the TAA, even though SARS officials is afforded protection against taxpayers who do not adhere to legislation. There is thus an imbalance between the powers afforded to SARS and the protection of taxpayer's rights (Klopper, 2015:28).

Even though the view may be that the provisions of the TAA seems to be weighted in favour of SARS officials, due to the powers that is afforded to SARS to require information and to enforce payment of taxes, it must also be noted that the TAA imposes duties on SARS to inform taxpayers of their actions or intended actions. Failure by SARS to comply with their respective duties may nullify actions taken by SARS (PWC, 2018a:7).

Taxpayers should be astute and ensure that any additional assessments issued by SARS during an audit verification, are in compliance with the provisions of the TAA (PWC, 2018a:7).

One possible remedy can be to approach civil courts for the intention of receiving a compulsory interdict against the relevant SARS official to be able to force the SARS official to perform its obligations in terms of section 42 of TAA (Sonnenbergs, 2013).

An alternative could be to address the High court to nullify the unconstitutional behaviour of SARS officials due to SARS's failure to adhere to the regulations as set out in section 33 of the *Constitution* as well as PAJA (Klopper, 2015:40). Litigation is costly and thus the process of litigation far outweighs the possible resolution the court may order. The majority of taxpayers cannot afford to seek justice from a legal court, and it is usually a case of the taxpayer having to surrender to SARS's authority (Sonnenbergs, 2013).

Due to insufficient mechanisms available to taxpayers when SARS does not comply with their duties as set out in the TAA, it leads to the costly approach aggrieved taxpayers have to incur in order to obtain relief. There are no remedies available under the TAA to assist aggrieved taxpayers to recover expenses incurred from SARS, other than to approach the courts to grant

costs incurred against SARS officials (Klopper, 2015:52, 53). Although the TAA objective of improving taxpayer's rights and improving SARS' administrative duties, there are still some weaknesses which have been highlighted since the implementation thereof.

Penalties given to taxpayers for not complying with certain provisions are often unfair, while the reciprocal penalties imposed on SARS officials are usually not even provided for. It is still important for all taxpayers to be aware of their rights in these situations and to be able to request professional advice where issues regarding the behaviour of SARS officials during audits arise (Sonnenbergs, 2013).

In this part it was considered whether section 42 is strong enough in order to protect the taxpayer's rights or if it should be redefined. It was found that there is a general view that SARS officials generally do disregards its own empowering legislation (Herbert, 2018:22). It can be concluded that section 42 is not strong enough to protect the rights of aggrieved taxpayers. The TAA does not provide for an adequate balance between the powers afforded to SARS officials and the protection of taxpayers' rights, and thus the objective of equality is not achieved.

## **2.5 CONCLUSION**

The general aim of the chapter was to explore the powers and duties of taxpayers and SARS officials. The fundamental objective of SARS is to collect sufficient tax to meet the economic and social objectives of the state. The rights of taxpayers as embodied in the *Constitution* and particularly the Bill of Rights supersedes all other laws. The taxpayers right to fair and just administrative treatment by SARS as contained in the Bill of Rights is often disregarded by SARS in its primary objective to collect taxes. Three objectives were specifically addressed in this chapter and the findings is discussed.

The first objective addressed was regarding the obligations of a taxpayer to adhere to the TAA to receive information within the prescribed time frame.

The taxpayer has an obligation to submit all relevant information to SARS within the time frame thereof as stipulated in the TAA. Once the taxpayer has submitted all the relevant information correctly and comprehensively, SARS is obliged to respond under the provisions of the *Constitution*, PAJA and section 42 of the TAA within the prescribed time frame to the taxpayer.

The findings were that even if the taxpayer has complied with all the obligations, SARS often does not meet the requirements to supply the taxpayer with the necessary information within the prescribed time frame.

The second objective addressed in this chapter were the obligations of SARS to supply the taxpayer with relevant information within the prescribed time frame as stipulated in the TAA.

SARS has a duty to adhere to the procedural requirements to apply the provisions of administrative action expressed in section 22 of the *Constitution* and also the PAJA act requirements. SARS thus has to comply with the stated requirements and is obliged to react to the taxpayer within the time frame as stated in the TAA.

SARS is further obliged to adhere to the provisions as set out in section 195 of the *Constitution*. Again, the application thereof is subject to interpretation. SARS has also published interpretation notes and also a guide to the TAA. Unfortunately, the interpretation notes have no legal standing and merely assist taxpayers on the interpretation of the various tax laws.

A less costly tax dispute route to be utilized by taxpayers is the ADR, which can resolve tax disputes without following the costly legal court route.

The functionality of The Public Protector and the Human Rights Commissioner are not specifically for taxpayers matters. The Public Protector and Human Rights Commission are both faced with maladministration in their structure and in the current environment not able to assist taxpayers with matters referred to them.

Section 42 of the TAA has been added to the provisions of the TAA, specifically to enhance the rights of taxpayers during audits and also the duties of SARS to keep the taxpayers informed.

The legal challenge procedures of section 42 of the TAA when SARS does not perform its duties according to the regulations of section 42 of the TAA might be the more successful procedure to follow in order to protect the rights of the taxpayer and enforce SARS to comply with the regulation of section 42 of the TAA.

It was found that SARS unfortunately often deviates from its obligations and the taxpayer has to enforce the taxpayer's rights in order to make sure that SARS officials complies with their obligations.

The third objective addressed in this chapter was to consider whether section 42 should not be redefined in order to ensure that the application of section 42 is enforceable in order to protect the taxpayer's rights.

The TAA was drafted to generate one legislation for the various tax acts. The rights of taxpayers are now specifically outlined in the TAA. However, the TAA also empowers SARS

to deviate from its duty of fair and just administrative procedure towards the taxpayer, if the deviation is considered fair and just in the circumstances. The interpretation of what is fair and just administrative procedure often have to be challenged by court. The *Constitution* was not specifically drafted for taxpayers but for juristic entities in general and is thus not specifically drafted for the protection of taxpayers' rights.

The taxpayer has section 3 of the PAJA and section 33(1) of the *Constitution* for its rights to administrative action that is useful, reasonable and procedurally fair. The Tax Ombudsman unfortunately lacks the necessary independence and legal standing to hold SARS accountable to their obligation of reasonable and procedurally fair administrative action.

It can be concluded that section 42 of the TAA should be redefined in such a manner to legally compel SARS to apply all the regulations of section 42 without exception. The taxpayer currently has to revert to court to enforce section 42 on SARS if all other procedures have failed.

The following chapter will specifically address court case dealings in South Africa with regards to the rights of a taxpayer to receive information within the prescribed time frame regarding an audit as set out in section 42 of the TAA.

## **2.6 A SUMMATIVE COMPARISON OF THE DIFFERENT LEVELS OF POWER AND DUTIES OF THE TAXPAYER AND SARS OFFICIAL**

| <b>POWER AND DUTIES OF THE TAXPAYER</b>                                                                                                           | <b>POWERS AND DUTIES OF SARS</b>                                                                                                               |
|---------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Primary duty to pay taxes if or when due to SARS                                                                                               | 1. Primary objective to collect tax to meet the objectives of the Government.                                                                  |
| 2. The taxpayer are forced by the various tax laws to contribute taxes to the Government.                                                         | 2. SARS should apply the canons of equality, certainty, convenience and economy when collecting taxes from the taxpayer.                       |
| 3. The TAA administrative regulations are aimed to promote the rights of taxpayers.                                                               | 3. Certain regulations of the TAA is to increase the powers offered to SARS.                                                                   |
| 4. The taxpayer's rights is protected by the Bill of Rights as set out in Chapter 2 of the <i>Constitution</i> in all administrative tax matters. | 4. SARS has to adhere to the regulations as contained in the Bill of Rights when applying the administration of tax matters with the taxpayer. |

| POWER AND DUTIES OF THE TAXPAYER                                                                                                                                                                                                                  | POWERS AND DUTIES OF SARS                                                                                                                                                                                                                                                                         |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5. The taxpayers rights as contained in the <i>Constitution</i> is not absolute, it may be limited if the limitation is fair and just.                                                                                                            | 5. SARS may apply the <i>Constitution</i> if the application thereof is fair and just to collect taxes.                                                                                                                                                                                           |
| 6. The taxpayer must illustrate that their rights have been isolated in court procedures.                                                                                                                                                         | 6. SARS will have to fail in proving that the violation constituted is a justifiable restriction of taxpayer's rights.                                                                                                                                                                            |
| 7. The taxpayer whose rights have been adversely effected, has the right to be given written reasons.                                                                                                                                             | 7. SARS will be challenged in the administrative proceedings, specifically with regards to the taxpayer's right to receive information and for the administrative procedures to be fair and just.                                                                                                 |
| 8. The taxpayer has the right to recuperate expenses incurred against SARS in terms of section 8(1)(f) of PAJA.                                                                                                                                   | 8. SARS would have to prove that their administrative actions were in line with the TAA, the <i>Constitution</i> and PAJA.                                                                                                                                                                        |
| 9. The taxpayer has a fundamental right that the taxing powers of legislation must be applied in such a way that the burdens imposed by taxation are administered in a fair manner.                                                               | 9. SARS officials thus have a duty to provide unbiased resources to taxpayers in order to ensure equal and fair treatment without considering their societal, political and economic status.                                                                                                      |
| 10. The taxpayer has the right to approach the office of the Tax Ombudsman if the taxpayer had no administrative success with SARS.                                                                                                               | 10. SARS may respond to the taxpayer's complaint lodged to the Tax Ombudsman. SARS will have to prove that the administrative action of SARS was in line with the regulations of the TAA, the <i>Constitution</i> and PAJA.                                                                       |
| 11. The taxpayer has an obligation to submit all required information as required by SARS within the prescribed time frames. The taxpayers must also submit and complete all the tax returns and other information correctly and comprehensively. | 11. If the taxpayer has submitted all the relevant information requested by SARS including all the returns within the prescribed time frames, SARS is obliged to respond thereto under the provision of PAJA, the <i>Constitution</i> and section 42 of the TAA within the prescribed time frame. |

| POWER AND DUTIES OF THE TAXPAYER                                                                                                                                                                                                     | POWERS AND DUTIES OF SARS                                                                                                                                                                                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 12. The taxpayer thus has a right to be treated on an ethical manner and totally unbiased in accordance to section 195 of the <i>Constitution</i> .                                                                                  | 12. As an organ of the state, SARS has to act in accordance to section 195 of the <i>Constitution</i> which requires ethical behaviour, cost effective use of resources and the unbiased treatment of the taxpayer. |
| 13. The taxpayer may utilize the ADR process in tax matters not resolved during the objection and appeal processes. The “informal” procedure prevents the taxpayer the opportunity to resolve tax matters without going to court.    | 13. SARS has the right and duty to access all relevant information during an ADR process and can finalize the tax matters in an “informal” way between the two parties.                                             |
| 14. The taxpayer may use the SSMO in addressing complaints against SARS in the administrative actions taken against the taxpayer.                                                                                                    | 14. SARS, upon receiving an administrative complaint through the SSMO, escalates the complaint without addressing the complaint itself.                                                                             |
| 15. Section 33 of the <i>Constitution</i> states that everyone whose rights have been adversely affected by administrative action, has the right to be given written reasons thereof.                                                | 15. SARS is obliged to provide the taxpayer with written reasons in terms of section 33 of the <i>Constitution</i> if the administrative rights of the taxpayer have been infringed.                                |
| 16. The taxpayer has the right to be kept up to date on the progress of an audit, receive detailed reasons and explanations regarding an adjustment made by SARS within the prescribed time frame in terms of section 42 of the TAA. | 16. SARS has a legislative duty of keeping taxpayers informed during and after an audit in terms of section 42 of the TAA.                                                                                          |

Source: Author’s own compilation of the information presented above

## **CHAPTER 3: COURT CASES**

### **3.1 INTRODUCTION**

In this chapter specific court case dealings in South Africa will be investigated with regards to the constitutional right of a taxpayer to receive information within the prescribed time frame regarding an outcome that has been expressed in a case/audit/any other tax administrative matters as set out in section 42 of the TAA. The court case proceedings will be analysed in order to determine if the taxpayer's right of administrative justice is protected with regards to being informed and provided with adequate reasons, within the prescribed time frame, of the progress, conclusions and outcomes of the audit/verification. In this chapter the second secondary research objective as identified in par 1.4.2(ii) will be addressed.

The greatest power at SARS's disposal are the auditing powers set out in section 40 (selecting a taxpayer for an audit), section 41 (conducting an audit) and section 42 of the TAA (keeping a taxpayer informed during an audit) (Pocock, 2018).

Taxpayers have a right to be informed and receive adequate reasons regarding any adjustments and decisions made by SARS within a prescribed time frame as set out in section 42 of the TAA. SARS has a duty and responsibility of keeping the taxpayer informed with a report on the conclusion of audits and if not concluded provide the taxpayer with a report within 21 business days. The reasons for the proposed adjustments by SARS must be set out in a letter to the taxpayer (Section 42, TAA, 2011).

Taxpayers' right to be informed and receive adequate reasons is also set out in section 5 of PAJA, which provides that all taxpayers, whose rights may have been unfairly acted on by SARS officials, may request written grounds for the unfair behaviour from the SARS official responsible (PAJA, 2000).

Aggrieved taxpayers must be aware of their right to be informed of the progress and outcomes of an assessment raised by SARS and when SARS officials fails to adhere to the provisions as set out by the TAA, they can either submit their complaint to the Tax Ombud, or approach the court for relief (Croome, 2017).

The taxpayer is prevented from doing a comprehensive objection against SARS's adjustments and/or decisions made, if the taxpayer is not supplied with adequate reasons regarding the adjustments and/or decisions made. Detailed reasons regarding adjustments/ decisions made

by SARS during an audit/verification, needs to be received from SARS in order for a taxpayer to be treated fairly and justly as contemplated in the TAA and PAJA.

If additional assessments raised by SARS is found to be invalid, the matter will be set aside. An additional assessment is defined as administrative action as set out in section 33 of the *Constitution*, which aims to protect the right to just administrative action (*Mr A v The Commissioner for the South African Revenue Service*, 2018).

In terms of section 42 of the TAA, a SARS official is compelled to keep a taxpayer informed of the stages of the audit and the findings in respect thereof (Pocock, 2018).

Two weaknesses have been identified in the application of section 42 by SARS which will now be evaluated by inspecting specific court cases dealing with the objectives of section 42. The first weakness identified is that SARS does not always keep taxpayers informed of the process of an audit. The second weakness is that SARS does not always inform taxpayers within the prescribed time frames of the progress of the audit or stage of completion of the audit.

Court cases dealing with the right of taxpayers to be informed of the progress of the audit or stage of completion of the audit as set out in section 42 of the TAA will be inspected below.

### **3.2 KEEPING THE TAXPAYER INFORMED OF THE PROGRESS OF THE AUDIT OR STAGE OF COMPLETION OF THE AUDIT**

#### **3.2.1 Mr A v The Commissioner for the South African Revenue Service (2018)**

In the case of *Mr. A v The Commissioner for the South African Revenue Service* (2018), SARS was criticized and penalised for not adhering to the correct administrative procedures when interacting with a taxpayer during an audit verification as set out in section 40 and 42 of the TAA (Herbert, 2018:28).

Section 40 of the TAA specifies the cases where SARS may select a taxpayer for inspection, verification or audit, whereas section 42 of the TAA regulates how a SARS official should act during an audit process by keeping the taxpayer informed during the audit process. Section 40 and 42 of the TAA imposes the obligations on SARS in order to give effect to the right to just administrative action as set out in section 33 of the *Constitution* (Herbert, 2018:30,31).

##### **3.2.1.1 Background**

Mr. A was the chief executive officer of XYZ (Pty) Ltd for just over sixteen years, when his employment came to an end in 2012. A severance package of R7 066 530 was paid out to Mr

A when his services came to an end, which he declared as a “lump sum” in his 2012 tax return (*Mr. A v The Commissioner for the South African Revenue Service*, 2018).

An additional assessment was issued by SARS in 2013. SARS did not accept that the “lump sum” received by Mr. A was as a result of a retrenchment and taxed the amount as “other income”. SARS raised additional assessments to which the taxpayer objected and appealed against (*Mr. A v The Commissioner for the South African Revenue Service*, 2018).

The validity of the audit and additional assessment was questioned by the taxpayer. The taxpayer argued that SARS did not adhere to the requirements of section 42 of the TAA as SARS did not inform the taxpayer of the audit proceedings (*Mr. A v The Commissioner for the South African Revenue Service*, 2018).

### **3.2.1.2 Findings**

Mr. A argued that the payment received was a “lump sum” and could not be taxed as normal taxable income as SARS had taxed the payment received as “other income” in the additional assessment. Mr. A further argued that the “lump sum” of R7 066 530 should have been taxed in accordance with the specified tax table available when lump sums are received for retirement and retrenchment (*Mr. A v The Commissioner for the South African Revenue Service*, 2018).

SARS argued that the payment received was not a severance pay out as defined in the ITA, due to the fact that Mr. A was relieved of his duties as stipulated in clause 14.2 of his employment contract with his employer, XYZ. Clause 14.2 of his employment contract dealt with the provisions of severance pay outs pursuant to a dismissal. SARS argued that the payment received constituted taxable income (*Mr. A v The Commissioner for the South African Revenue Service*, 2018).

Mr. A was not informed of the status of the audit. SARS did not comply with its own legislation, based on the fact that SARS failed to comply with the provisions of section 42(1) of the TAA which stipulates that the SARS official responsible for conducting the audit, has to provide the taxpayer with a letter stating the stage of completion of the audit. In addition, no letter or written findings as required during the finalisation of an audit was found. No audit file could be discovered, and it was also required that a financial inspection had to be done before any additional assessment could be raised, none of which occurred (Pocock, 2018).

Mr. A was also not informed of the outcome of the audit, thus section 42(2)(b) of the TAA was openly disregarded by SARS. Mr. A was thus deprived from the opportunity to be able respond

to any of the issues presented (Pocock, 2018). If Mr. A was given the chance to explain his situation, he could have informed the SARS official that his services came to an end due to the retrenchment process XYZ had to implement and accordingly terminated the services of a significant amount of its employees (*Mr. A v The Commissioner for the South African Revenue Service*, 2018).

SARS argued that Mr. A was not retrenched, but that his services were rather terminated through a dismissal based on SARS's reliance of the termination letter received. The letter together with the type of severance paid to Mr. A, indicates that his services were terminated as part of a retrenchment process of XYZ, in that the package paid to Mr. A was equal to a package calculated during the process of the retrenchments. If an audit had been performed by SARS in terms of section 40, 41 and 42 of the TAA, the result of the audit may have been very different (*Mr. A v The Commissioner for the South African Revenue Service*, 2018).

### **3.2.1.3 Conclusion**

The audit of Mr. A was performed by SARS without adhering to tax laws, specifically section 42(1), 42(2)(b) and 42(3) of the TAA and thus resulting in the disregard of SARS's obligations, the audit was administratively flawed.

As a result of SARS's disregard to the legislation of the TAA, SARS's additional assessment was dismissed by the Tax court as SARS did not comply with section 40 and 42 of the TAA and clearly contravened both the *Constitution* and the principles of legality. SARS's decision to raise an additional assessment without notice, was nullified as it did not comply with the provisions contained in the TAA and it was also constitutionally unsound. The assessment was found to be invalid (Pocock, 2018).

Botha (2018) commented that:

This case re-iterates the rights of taxpayers in tax dispute resolution proceedings and is confirmation that a taxpayer can insist on SARS's compliance with the audit provisions of the TAA. Where SARS issues an assessment without complying with the provisions in sections 40 and 42 of the TAA, such an assessment can be set aside.

This case does not only demonstrate the result of an unconstitutional audit on assessments raised but emphasises the importance of a taxpayer's constitutional rights that cannot be forfeited on the altar of tax expediency (Pocock, 2018).

It can be concluded from the above that if SARS makes any decision/adjustment that affects an assessment in any way in relation to an audit, SARS must comply with section 42 of the TAA. Taxpayers have a legal right to be informed of the status of an audit and also when the audit is completed. Taxpayers are empowered to request a letter of audit findings as well as to request the grounds for those assessments raised. The assessment will be invalid, unconstitutional and as a result will have to be set aside if SARS does not comply with the regulations as set out in section 42 of the TAA and likely not award costs against SARS for not adhering to the legislation (Croome, 2018a).

This case is evidence to how important it is for taxpayers to be conscious of their rights and duties as set out in the TAA and also to be aware of the powers afforded to SARS.

### **3.2.2 A Way to Explore v The Commissioner of the South African Revenue Service (2017)**

Assessments issued and decisions taken by SARS which negatively affect a taxpayer, qualify as administrative action and an aggrieved taxpayer has the right to request grounds for the assessment raised or a decision taken by a SARS official. Taxpayers' rights to receive grounds for assessments raised is given practical effect in a tax context in terms of rule 6 of the Tax court. Rule 6 sets out that a taxpayer may request grounds for an assessment raised or decision taken by a SARS official if the taxpayer is aggrieved by such assessment raised or decision taken. SARS is obliged to provide grounds to a taxpayer, who requires the reasons in order to prepare for an objection (Fasken, 2020).

Taxpayers usually make the crucial mistake of objecting to an assessment raised before requesting grounds for the assessment raised, simply due to the fact that most taxpayers are not aware that they have the right to request grounds when they have received an assessment, which was also the result of the case of *A Way to Explore v The Commissioner of the South African Revenue Service*, 2017 (Fasken, 2020).

#### **3.2.2.1 Background**

In the case of *A Way to Explore v the Commissioner of South African Revenue Service* (2017), the entity recruited English-speaking residents on behalf of North American employers. The taxpayer thus provided services to non-resident persons, while such persons were physically outside South Africa, which is zero-rated as stipulated in section 11(2)(1) of the VAT Act No. 89 of 1991 (Herbert, 2018:32).

The taxpayer had declared VAT returns claiming a refund of input tax, due to the supply of services being zero-rated, whereas VAT was incurred regarding goods and services procured by the taxpayer for the purpose of providing such services (PWC, 2017)

The taxpayer declared his VAT return during November 2015, the taxpayer was notified by SARS that the return had been selected for a verification. SARS informed the taxpayer that such declaration had been identified for verification due to differences in the taxpayer's VAT submission (Herbert, 2018:32).

The taxpayer stated that the requested information was uploaded timeously on e-filing. The taxpayer then received an additional notice from SARS informing the taxpayer that it had not yet responded to SARS's verification request, which was followed by an additional verification request by SARS in respect of the same VAT period. This was all accompanied by a reminder and a final request (Herbert, 2018:32).

The repeated additional requests for the information were ignored by the taxpayer as the taxpayer was of the view that they had already made full disclosure of the documents requested and regarded that it was not necessary to provide a response to the additional requests (PWC, 2018b).

After quite some time, the taxpayer still did not receive feedback from SARS regarding the information submitted to SARS for the respective VAT periods and correspondently, the taxpayer's bookkeeper queried the actions of SARS. After the enquiry was made to SARS, the taxpayer was informed, for the first time, that the case was now under audit verification (*A Way to Explore v the Commissioner of South African Revenue Service*, 2017).

Two months after the discussion, SARS raised additional assessments stating that the supplies that had been previously classified as zero-rated in the original VAT returns declared, were now classified as standard rate supplies on the basis that the taxpayer had not fulfilled its burden of proving that the services are zero-rated (PWC, 2017).

The taxpayer was not informed by SARS regarding the audit findings and potential adjustments to be made to the original assessment declared. SARS also did not inform the taxpayer of the outcome of the audit, nor was the taxpayer afforded to respond to the findings. The taxpayer was of the opinion that the actions of SARS were unreasonable, and that the taxpayer was treated unfairly treated (*A Way to Explore v the Commissioner of South African Revenue Service*, 2017).

### **3.2.2.2 Findings**

The taxpayer claimed to have the additional assessments raised nullified due to SARS not complying with the procedural requirements in terms of section 42 of the TAA on the basis that the taxpayer was not informed of the progress nor the outcome of the audit (PWC, 2017).

SARS did not adhere to the provision of section 42(2)(b) of the TAA, which stipulates that SARS is obliged to inform a taxpayer when the audit findings has identified potential adjustments to be raised on the additional assessment. SARS also did not adhere to section 42(3) of the TAA, due to SARS not informing the taxpayer of the outcome of the audit findings.

The court was unfortunately not able to nullify the additional assessments raised due to the fact that the taxpayer's objection was still in progress and thus the internal remedies had not yet been exhausted. In terms of section 7(2)(a) of PAJA, only when all the internal remedies have been followed by the taxpayer, may such administrative action come under judicial review (Herbert, 2018:33).

### **3.2.2.3 Conclusion**

Even though SARS has empowering rights to collect taxes, SARS is still obliged to perform its duties while adhering to the proper administrative actions. If SARS does not comply with the specified provisions in the process of collecting taxes, SARS's actions may be seen to be unjust and invalid.

The right to receive adequate grounds is a crucial right of a taxpayer and has an important function in the successful finalisation of any dispute against SARS. The courts have explained this right widely and have occasionally requested SARS to provide sufficient grounds to a taxpayer to allow that taxpayer to object to an assessment raised or decision taken (Fasken, 2020).

It is evident that SARS has extensive rights to raise additional assessments, to conduct audits and to collect taxes from taxpayers. SARS is still expected to conduct such powers in line with the required procedures as set out in the TAA (Herbert, 2018:34).

Taxpayers should make sure that they make use of their right to receive grounds and ensure that they have clear grounds for their claim in before proceeding with any objection against SARS (Fasken, 2020).

### **3.2.3 Gold Kid Trading CC v The Commissioner of the South African Revenue Service (2020)**

The *Constitution* provides that taxpayers whose rights have been negatively affected by administrative action has the right to be given written grounds (Carrim, 2018).

The standard for what the meaning is of “adequate reasons” for an assessment raised or decision made by SARS was described in the case of *Commissioner for South African Revenue Service v Sprigg Investment 117CC t/a Global Investments* (2010), where the SCA stated with reference to the *Minister of Environmental Affairs & Tourism & others v Phambili Fisheries (Pty) Ltd & another* (2003):

SARS must explain the decision made in a manner which will allow a taxpayer to respond, in effect:

“Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.”

#### **3.2.3.1 Background**

Gold Kid Trading CC is involved in the processing of “second-hand” gold and the wholesaler of the processed gold and related products. A large portion of the processed gold is exported due to the market thereof in foreign countries. The taxpayer usually submitted a VAT credit return due to the zero-rated export sales. The returns were subject to SARS verification and after submission of the required information the verification was finalized. However, the VAT for the periods from 2014/08 until 2016/03 in total of R73 707 440.00 was not paid to the taxpayer (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

SARS reacted to the taxpayer’s insistence for the VAT credits to be made by auditing the relevant VAT periods. All relevant material was supplied to SARS as requested. SARS issued a revised assessment for the relevant VAT periods without complying with the regulations of section 42 of the TAA, PAJA or the *Constitution* (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

SARS denied the input VAT claims of two of the major suppliers of the taxpayer, on the assumption that the two suppliers “were no longer in business”. The taxpayer eventually referred the matter to the tax court of South Africa (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

The tax court found that SARS had failed to act according to the provision of section 42 of the TAA. SARS had failed to react to the information supplied by the taxpayer, but reacted on their assumptions that the two suppliers were no longer in business (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

### **3.2.3.2 Findings**

The tax court held that SARS had not conducted the audit with the necessary skill and prudence as is expected and also failed to apply section 42 of the TAA (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

The judge stated when an audit against a taxpayer is conducted in terms of the TAA, it comes with massive power. It allows the auditors to investigate and interrogate, making full use of the machinery of the TAA. However, the power to investigate comes with a huge responsibility. It must be done in a proper, reasonable and responsible manner (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

The approach adopted by SARS in this appeal was not fair towards Gold Kid Trading CC. Fairness demands that Gold Kid Trading CC must be informed, in no uncertain terms, what underlying facts are placed in dispute so that Gold Kid Trading CC knows what should be proved and which witnesses to call to discharge its onus. This was not done. Instead, general allegations were made regarding recipient generated invoices, stating that the entities did not exist or conduct enterprises and that there was no supply of goods (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

In terms of section 130 of the TAA, the court may grant an order for costs if SARS's grounds of assessment are held to be unreasonable. SARS's statement of grounds of assessment are unreasonable for the following reasons: SARS contended in the letters of assessment that the tax invoices were not valid; that the suppliers Glowing Gold and Cosmic Gold did not exist or conduct enterprises and that no supplies were made. These grounds were carried through to the Statement of Grounds of Appeal. SARS was also ordered to pay the taxpayer's costs (*Gold Kid Trading CC v The Commissioner of the South African Revenue Service* (unreported case) number 1712/2020 of 2 April 2020).

### **3.2.3.3 Conclusion**

In the case *Gold Kid Trading CC v The Commissioner for the South African Revenue Service* (2020) the issue of SARS not informing the taxpayer of additional assessments raised was addressed. SARS initially in their letter of findings made various errors in calculating the input tax and output tax of the taxpayer. The taxpayer supplied SARS with the necessary documentation to prove that the majority of the letter of findings was incorrect. SARS, without informing the taxpayer, issued assessments based on “so-called” affidavits received from clients of the taxpayer. SARS did not allow input tax credits in terms of the VAT Act. SARS withheld all VAT credits due based on their incorrect assessments raised. The matter went to court where the taxpayer was successful in convincing the court that the input tax that was claimed was in accordance to specific regulations and not according to assumptions made by SARS from alleged affidavits received.

SAIT (2019b) had the following view on the outcome of the audit process:

In our experience, however, there seems to be a tendency by SARS to “comply” with the obligation by issuing a letter of audit findings when an audit has been conducted, but without specifying the grounds for the proposed assessment or at least all the grounds for the proposed assessments.

### **3.2.4 A Greyvensteyn v The Commissioner for the South African Revenue Service (2019)**

#### **3.2.4.1 Background**

SARS did a detailed audit of the taxpayer’s tax affairs for the 2012 to 2016 tax year. The taxpayer supplied all relevant information to SARS as requested. SARS made various incorrect calculations which were referred to the taxpayer and corrected by SARS. SARS taxed the taxpayer on deposits on his bank account where he could not obtain the necessary documentation and also calculated a capital gains tax on a donation made. An assessment was issued with a 100% penalty raised on the assessment. An objection was raised against the penalty raised without success (*A Greyvensteyn v The Commissioner for the South African Revenue Service*, 2019).

#### **3.2.4.2 Findings**

The taxpayer requested the matter to be resolved in court. In a pre-trial meeting between SARS and the taxpayer, SARS admitted that they have failed to supply the taxpayer with the reasons of levying a 100% penalty on the assessed taxes. SARS agreed to waive the 100%

penalty raised as they did not comply with the TAA regulations (*A Greyvensteyn v The Commissioner for the South African Revenue Service*, 2019).

### **3.2.4.3 Conclusion**

SARS performed an audit on the taxpayer's income for several tax years. The taxpayer and H&H Matthews (2020) responded to the audit findings of SARS as a result of their audit. SARS made several adjustments to the audit findings as a result of facts/records supplied by the taxpayer. SARS however issued an assessment and levied a 100% additional tax on the assessment issued. The taxpayer argued that SARS neglected to state the reasons as prescribed in the TAA for levying a 100% additional tax on the assessment. SARS admitted that they neglected to inform the taxpayer of the reasons for SARS imposing 100% additional tax. SARS agreed in writing to wave the 100% additional tax raised due to their failure to comply with the regulations of the TAA (H&H Matthews, 2020).

### **3.2.5 ABC Trust v The Commissioner for the South African Revenue Service (2018)**

#### **3.2.5.1 Background**

SARS raised an assessment in respect of the taxpayer's 2012 year of assessment on 31 January 2013, the assessment stated that no amount was payable and the taxpayer's return was not subject to audit or verification (*ABC Trust v The Commissioner for the South African Revenue Service*, 2018).

More than five years after the original assessment was submitted, SARS issued an additional assessment. As set out in section 99(1)(a) of the TAA, an assessment may not be raised three years after the original assessment, unless the provisions of section 99(2)(a) of the TAA apply. Section 99(2)(a) of the TAA allows for an additional assessment after three years if the tax assessed was due to fraud, misrepresentation or non-disclosure of material facts. The ultimate fact must be due to misconduct (*ABC Trust v The Commissioner for the South African Revenue Service*, 2018).

The taxpayer brought the issue to court to force SARS to give proper reasons why the additional assessments for 2012 were issued to enable the taxpayer to formulate its objection (*ABC Trust v The Commissioner for the South African Revenue Service*, 2018).

#### **3.2.5.2 Findings**

The taxpayer contended that SARS must provide reasons as to why the non-disclosures caused SARS not to assess correctly the amount of tax chargeable in its original assessment,

nor in the three-year period thereafter that SARS was permitted to do so. SARS stated that the taxpayer's tax return did not disclose a capital gain, but rather disclosed the capital gain as income, which was impermissible (*ABC Trust v The Commissioner for the South African Revenue Service*, 2018).

### **3.2.5.3 Conclusion**

The judge viewed this to be insufficient because in order for a taxpayer to make an objection against SARS, it should be clear as to what SARS has given as its grounds for substantiating the case. SARS should have made the grounds for the case clear to the taxpayer and rendered express in the passages of its answering affidavit in these proceedings (Fasken, 2020)

### **3.2.6 V Z Nondabula v the Commissioner of SARS & Another (2016)**

SARS is a creature of statute and must perform its duties within the legal provisions which empowers it (Lockem, 2017). SARS is governed by and operates in terms of the TAA. SARS thus cannot do anything not specifically contained in the TAA or other laws nor can SARS conduct in a manner contrary to the regulations of the TAA (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

In the case of the *Competition Commission of South Africa v Telkom SA Limited and Another* (2009) it was held that: "the principle of legality entails that no public power may be exercised, and no function performed beyond that conferred by law".

In the case of *VZ Nondabula v the Commissioner of SARS & Another*, the court was called upon to settle a dispute regarding the way in which SARS had acted towards the taxpayer. The court stated that SARS is at the minimum expected to comply with its own laws.

#### **3.2.6.1 Background**

The taxpayer, VZ Nondabula, is a sole proprietor of a fuel station named Umzimkhulu Shell Garage (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

The issue that brought the matter to judicial review was due to the fact that SARS raised an additional assessment without informing the taxpayer with sufficient notice of the additional assessment, nor was reasons provided for the additional assessment raised (Herbert, 2018:23)

SARS issued an additional assessment for the 2014 tax year which amounted to the taxpayer owing R1 422 637 to SARS. The taxpayer was informed through a letter which stated that the

taxpayer had failed to pay the outstanding tax debt. The notification requested that the outstanding amount be paid within 10 days and failing to do so will result in further action taken against the taxpayer (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

SARS did not explain or set out how these amounts came about. SARS only issued a statement of account which reflected an additional assessment for 2014 amounting to R1 240 455 as at 1 March 2016. How the amount or any of the other amounts were calculated was not explained to the taxpayer (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

The taxpayer challenged SARS about the ignorance of how the amount was arrived at. The taxpayer stated that he did not know how SARS reached the amount or what information informed SARS to reach that amount. The taxpayer further stated that he was not consulted or confronted with any information that SARS could have used to reach that amount (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

#### **3.2.6.2 Findings**

Nowhere in the findings does SARS give a breakdown to the taxpayer. Even in the documents filed and during the dispute proceedings, no contention was made available on behalf of SARS in order for the taxpayer to understand how SARS calculated the amounts provided for in the additional assessment. The taxpayer objected to the additional assessment (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

SARS neglected to inform the taxpayer of the legal basis on which the additional assessment was made. It is apparent that SARS relied on section 92 of the TAA which provides that: “if at any time SARS is satisfied that an assessment does not reflect the correct application of a tax act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice” (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

What thus caused the additional assessment was the fact that the taxpayer had declared interest income to the value of nil in his submitted tax return which did not agree with the interest income amount of R32 734.00 held by the taxpayer at ABSA Bank (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

SARS then raised an additional assessment to the amount of R1 240 455.00 which was triggered by the taxpayer not disclosing the interest earned on his tax return. The basis and calculation of the additional assessment was not communicated to the taxpayer as required by SARS per section 42 of the TAA.

SARS was authorised in terms of section 95 of the TAA to issue an additional assessment due to the taxpayer submitting a return that was incorrect and inadequate. SARS could thus estimate the amounts based on documentation available to it (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

SARS is required to also comply with section 96 of the TAA which stipulates that SARS must provide the taxpayer assessed with a notice of the assessment made and SARS must give the taxpayer assessed a letter stating the reasons for the assessment (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

A letter providing the reasons for the assessment was not given to the taxpayer. Notably no income tax assessment was issued to the taxpayer reflecting the additional assessment. SARS did adhere to the provisions of section 96 of the TAA. SARS referred to the provisions of section 179(1) of the TAA and issued the third-party notice in which SARS instructed ABSA Bank to withhold and pay over money held in the taxpayer's bank account. The actions of SARS were unlawful and a complete disregard of the principle of legality. The court nullified the third-party notice and forced SARS to pay the taxpayer's legal expenses (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

### **3.2.6.3 Conclusion**

SARS interacted with the taxpayer in an unjust manner contrary not only to the TAA but also the values contained in the *Constitution*. SARS's actions had the potential to close down the taxpayer's business with devastating results not only for the taxpayer and his family but also for all of his employees (ENSafrica, 2018).

The minimum that is required of a SARS official is to comply with its own laws and to promote the provision contained in the *Constitution* when performing its duties. SARS acted unlawfully and unconstitutionally due to SARS not adhering to section 96 of the TAA to provide the taxpayer with all the information as prescribed (*VZ Nondabula v the Commissioner of SARS & Another*, 2016).

The case of *VZ Nondabula v the Commissioner of SARS & Another*, is a key demonstration of instances where SARS does not comply with proper administrative provisions legislated. It is only fair for taxpayers to presume that a SARS official will perform its duties in accordance with the respective legislation that empowers it. This case has demonstrated how it is in a taxpayer's best interest to rather be sceptical of SARS in order to adequately protect their rights (Herbert, 2018:27).

In conclusion of the above it is emphasised that SARS is not allowed to issue additional assessments without informing the taxpayer. In the case that an additional assessment must be raised, SARS is obliged to interact with the taxpayer in a just manner according to the provisions contained in the TAA. SARS must provide sufficient reasons to state why the additional assessment must be raised in order for the taxpayer to be able to respond to such grounds appropriately (Herbert, 2018:28).

As clearly indicated by findings in the court cases in the study, SARS has grossly neglected their duties and obligations to act in terms of their obligations of the TAA and their administrative conducts found unlawful and unconstitutionally.

The court cases also found SARS not complying with section 42 of the TAA, not promoting the values of the applicable *Constitution* Acts and also not adhering to the PAJA requirements.

The court cases have highlighted the taxpayer's rights to be treated fairly and justly and protected the taxpayer's rights from receiving the necessary information as outlined in section 42 of the TAA.

Court cases dealing with the right of taxpayers to be informed within the prescribed time frame of the progress of the audit or stage of completion of the audit as stipulated in section 42 of the TAA will be analysed.

### **3.3 INFORMING TAXPAYERS WITHIN THE PRESCRIBED TIME FRAME OF THE PROGRESS OF THE AUDIT OR STAGE OF COMPLETION OF THE AUDIT**

In the case of *Commissioner for South African Revenue Service v Pretoria East Motors* (2014), it was held that in conducting an audit, SARS must "engage the taxpayer in an administratively fair manner, as it is obliged to do."

#### **3.3.1 Gold Kid Trading CC v The Commissioner for the South African Revenue Service (2017)**

Taxpayers are not always informed within the prescribed time frame of the progress of the audit or stage of completion of the audit. This is in particular the case with VAT credit audits as stated in the case *Gold Kid Trading CC v The Commissioner for the South African Revenue Service* (2017), where the taxpayer had to request SARS to respond to the audit as their time frame thereof had been exceeded (H&H Matthews, 2020).

### **3.3.2 Brits, Tolmay, Pienaar, De Lange v Commissioner for the South African Revenue Service (2017)**

#### **3.3.2.1 Background**

In the case of *Brits, Tolmay, Pienaar, De Lange v Commissioner for the South African Revenue Service* (2017), the application of the taxpayer is founded and based on section 42 of the TAA: "Keeping taxpayer informed".

As stipulated in section 42 of the TAA, a SARS official responsible for an audit must supply the taxpayer with a findings report stating the stage of completion of the audit. When the audit has been finalised and the audit was inconclusive, SARS must notify the taxpayer accordingly within 21 business days (Botha, 2020).

If the case where the audit detected potential adjustments, SARS must notify the taxpayer with a findings report within 21 business days, or the further period that may be required based on the complexities of the audit, containing the outcome of the audit and the reasons for the proposed assessment (Botha, 2020).

The taxpayers are VAT vendors who buy jewellery containing gold from the general public and sell it to entities such as micro refineries. During November 2015, SARS obtained a warrant to seize the taxpayer's documentation which related to the 2012 to 2015 tax years (Botha, 2020).

#### **3.3.2.2 Findings**

SARS took about three years to prepare audit reports and never returned the documentation to the taxpayer. During October 2017, SARS had completed the VAT audits of the taxpayers and issued letters of audit findings which concluded that all the transactions were fictitious and that all input VAT claimed by the taxpayer's over the 2012 to 2017 period, should be written back. The case went to court to force SARS to provide the documentation and to furnish the taxpayer enough time to respond to the allegations made by SARS in the audit reports to encourage SARS not to issue assessments (*Brits, Tolmay, Pienaar, De Lange v Commissioner for the SA Revenue Service*, 2017).

The reason why a taxpayer is afforded an opportunity, in terms of section 42(3), to respond to the tax audit is to enable a taxpayer to persuade SARS that it was incorrect in its audit, which could avoid an assessment. In order for the taxpayers to respond meaningfully to SARS's

letters of audit findings, the taxpayers must have sight of the documents on which the audits are based (Botha, 2020).

### **3.3.2.3 Conclusion**

The court stated that the taxpayers had a legal right to the documents, if one considers the provisions of section 42 of the TAA (Botha, 2020).

The court ruled that SARS is interdicted from issuing any additional, estimated or other assessment pursuant to the letters of audit findings relating to each of the four taxpayers until 30 days after SARS has provided the documentation to each taxpayer (*Brits, Tolmay, Pienaar, De Lange v Commissioner for the SA Revenue Service*, 2017).

The Brits judgment is evidence that a taxpayer who is faced with a SARS audit process that is not conducted in a manner consistent with the TAA, can enforce its rights under the TAA. After the Brits judgment was concluded, section 42(1) of the TAA was revised by the Tax Administration Laws Amendment Act No. 22 of 2018 to state that SARS must; “provide the taxpayer with a notice of commencement of an audit and, thereafter, a report indicating the stage of completion of the audit” (Botha, 2020).

Taxpayers should also note that where SARS issues an assessment in accordance with a flawed audit process, it would be possible to successfully dispute such assessment on the basis that the issue of the assessment was preceded by a flawed audit process, that was conducted in a manner inconsistent with section 42 of the TAA (Botha, 2020).

## **3.4 CONCLUSION**

### **3.4.1 Informing taxpayers within the prescribed time frame of the progress of the audit and stage of completion of the audit**

The objective addressed in this chapter was to consider specific court cases in South Africa that addresses the right of a taxpayer to receive information within the prescribed time frame from SARS. From the court cases considered it was evident that SARS has an obligation to act according to the requirements of section 42 and all the other relevant sections of the TAA. The taxpayer would be successful in challenging SARS if SARS has failed to comply with the requirements of section 42 of the TAA.

The right of a taxpayer to receive information within the prescribed time frame is addressed in section 42 of the TAA. From the court cases considered in the study, the rights of the taxpayer

to receive information within the prescribed time frame was successfully concluded on in the court cases.

### **3.4.2 Keeping the taxpayers informed of the progress of the audit and stage of completion of the audit**

The taxpayers' right of administrative justice is protected with regards to being informed and provided with adequate reasons of the outcome and progress of audits and verifications. From the court cases considered in the study the constitutional rights of the taxpayer were successfully upheld.

Based on the findings above the relevant court cases and comments relating to the obligations of SARS to keep the taxpayer informed during the audit process, it seems that SARS often neglect their duty thereof to the detriment of the taxpayer.

SARS has thus failed in its own duties to adhere to its own laws and to promote the values contained in the *Constitution*. From the court cases used in this study, SARS has failed to keep the taxpayers informed of the progress of the audit and stage of completion of the audit.

### **3.4.3 General**

SARS seems to fail too often to correctly deal with objections submitted against assessment raised, by rejecting the objection as invalid. Taxpayers must be conscious of their right to be provided with reasons of the assessment issued to them. In cases where SARS fails to adhere to the rules of the TAA, taxpayers can submit an issue to the Tax Ombud's office or proceed to the court for relief. Through the consideration of various South African court case dealings based on tax administrative issues, it is evident that the rights of taxpayer's can be successfully protected and defended in situations where SARS is in contravention of such rights.

Regarding the requirement to notify a taxpayer, the TAA does not contain any penalties in situations where SARS does not comply with to the prescribed timelines. If taxpayers had no success with approaching the Tax Ombud's office, taxpayers will need to approach the courts and force SARS to perform its duties as stipulated in section 42 of the TAA. The consequences thereof are that the taxpayer has to incur excessive cost to make sure that SARS complies with the TAA fairly and justly. The shortcomings of the TAA leads to unnecessary cost incurred by the taxpayer to determine the correct interpretation thereof.

After inspection of the relevant court cases, it can be concluded that the TAA was unfortunately legislated in such terminology that it does not clearly define SARS's consequences during audits and investigations if SARS does not adhere to section 42 of the TAA, PAJA and the *Constitution* to be fair and just in respect of the administrative procedures. The provisions of the TAA in respect of taxpayer's rights do not assist the taxpayer as what the TAA was intended to do. There seems to be a weakness in the TAA in regarding the objectives of the TAA, due to the TAA providing for just recourses to provide guidance taxpayers in cases when SARS officials fail to perform its duties when performing an audit verification.

In conclusion, it seems that there might thus be a weakness in the content of section 42 of the TAA, that there is not enough depth in the legislation with regard to taxpayers' rights to be protected or consequences for SARS officials if the SARS officials do not adhere to the legislation. The second secondary objective of this study was therefore successfully addressed.

The following chapter will address the importance of the right to just administrative action in the context of the TAA and specific weaknesses identified regarding the powers and functions of SARS officers in South Africa. A comparative study will be performed regarding the powers and functions of tax officers in Canada and the UK.

## **CHAPTER 4: POWERS AND FUNCTIONS OF TAX OFFICERS IN CANADA AND THE UNITED KINGDOM COMPARED TO SOUTH AFRICA**

### **4.1 INTRODUCTION**

In this chapter a comparative study will be performed regarding the different administrative actions of Canada and the UK, specifically in terms of the right of taxpayers to be informed within a prescribed time frame, compared to the administrative actions of the TAA in order to consider possible improvements to the tax administrative actions in South Africa. The importance of the right to just administrative action in the context of the TAA and specific problems regarding the powers and functions of SARS officers in South Africa is considered. This chapter will address the third secondary objective as identified in par 1.4.2(iii).

### **4.2 BACKGROUND**

The choice of Canada and the UK for comparison is based on the premises that the model adopted by South Africa for the Tax Ombud is based on the model implemented by UK in creating a tax adjudicator's office and the Tax Ombud's office in Canada (Croome, 2013b). The TAA is thus fairly similar to the TAA of Canada and the UK. Canada and the UK were used as basis in drafting the TAA, further substantiate the choice made to evaluate the procedures implemented by Canada and the UK regarding the administration of taxes.

The UK and Canada also follows a common law legal system, which is also followed in South Africa. The UK has a long-standing Taxpayer's Charter, whereas Canada has a legislated Taxpayer's Bill of Rights. South Africa, UK and Canada are all part of the Commonwealth of Nations.

The remedies in place in Canada and the UK's respective jurisdictions with regard to administration action specifically in terms of taxpayer's rights to receive information in the prescribed time frame will be investigated in order to express an opinion and conclude if the situations are similar to South Africa. The strengths and weaknesses of following UK and Canada's methods of administrative proceedings will also be evaluated.

The similarities and differences between South Africa, the UK and Canada's application and interpretation of the TAA will be analysed to express an opinion concerning possible weaknesses of the South African TAA as well as to identify where the application of the South African TAA specifically in terms of section 42 might possibly not meet its objectives.

The goal of this comparative study is to establish recommendations and possible improvements to be implemented by South Africa in order to enhance the protection of taxpayer's rights to be treated fairly and justly when interacting with SARS officials.

#### **4.3 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT**

The OECD published guidelines with the aim to accomplish cooperative compliance and to enhance the interaction between tax authorities and taxpayers. This will allow for a comparison to be made and recommendations to be identified in order to strengthen South Africa's tax administration to be in line with international best practices (Herbert, 2018:8).

Administrative assessments and particularly the duty of a Tax Ombud and other independent bodies is crucial in protecting the rights of taxpayers and contributes to the equality of tax systems and taxpayer's experience of the tax system as being just (Klopper, 2015:62).

The OECD highlights the value of an independent relationship of such a special institution. The following independent institutions are listed as examples and will be considered in the comparison between the countries (Klopper, 2015:62):

- South Africa's Tax Ombud;
- UK's Taxpayer's Adjudicator;
- Canada's Tax Ombudsman.

The remedies available to aggrieved taxpayers in South Africa will now be discussed below.

#### **4.4 SOUTH AFRICA**

Even though it is crucial to urge tax compliance among taxpayers, it is important that taxpayers are aware that they have remedies available that they can use should their rights be violated in any way (Herbert, 2018:49).

Revenue authorities have internationally started to change their view of taxpayers, by seeing taxpayers as clients and developed remedies to improve their services. SARS also introduced a Service Charter in 2005 which stipulates the service levels that taxpayers can require from SARS officials. The intention of the Service Charter is that taxpayer's expectations are attained with reasonable performance methods (Klopper, 2015:70).

SARS's Service Charter specifies the rights and duties taxpayers have to adhere to when interacting with SARS. However, the Charter is not binding due to it not being legislated. When a taxpayer feels that their administrative right to be treated fairly have been violated by a SARS

official, the South African tax administrative system has the following remedies available to taxpayers in order to be able to address their administrative issues against SARS officials (Herbert, 2018:50):

- SARS Call Centre / Branch Office;
- SARS Complaints Management Office (CMO) (Previously known as SARS Service Monitoring Office (SSMO));
- Tax Ombud;
- Public Protector and Human Rights Commission;
- Alternative dispute resolution;
- Approaching tax courts

If a taxpayer is subject to a verification/audit, SARS must conclude on the outcome within 21 business days from the date all required supporting information are received. The performance indicator for the 2020 year showed that only 56.25% of taxpayer's cases was concluded within the 21 day's time frame. Complaints made by taxpayers to the CMO was unsatisfactory, only 48% of taxpayers were satisfied with the service. Complaints made to the Office of the Tax Ombud were also unsatisfactory, as only 11% of taxpayers were satisfied with the outcome. The overall performance of the service charter was 68.3% for the 2020 year (SARS, 2020b).

The remedies available to aggrieved taxpayers in the UK will now be evaluated below.

#### **4.5 THE UNITED KINGDOM**

The tax authority in the UK is referred to as Her Majesty's Revenue and Customs, also known as Her Majesty's Revenue Service (HMRC). HMRC was established in 2005 when the Inland Revenue and the Board of Customs and Excise merged (Investopedia, 2020).

The UK's tax administration consists of a framework of rules and obligations. The tax administration framework refers to legislation, regulations, procedures and guidance that allow HMRC to administer the tax system. The framework establishes the key interactions that take place between HMRC and taxpayers and states the obligations on both (HMRC, 2020b).

UK has a self-assessment tax system. Most of the UK's taxpayers tax liability is settled through tax withheld at source and does thus not require any further declarations to be made. However, the rest of the taxpayers whose tax liability is not settled through tax withheld at source, needs to complete and file a tax return, which will be issued by HMRC yearly. Married couples and taxpayers in civil partnerships which are independently taxed, must manage their own taxes and submit their own returns (PWC, 2020).

Audits is an important tool used by tax authorities to improve compliance of taxpayers. The tax audit process of the UK entails that the HMRC has the right to inspect a taxpayer's return and anything contained in it. The Inspector must notify the taxpayer of that intention to inspect the tax return within a 12-month period of the return being submitted. If the return has been submitted late to HMRC, an enquiry must be made by the "quarter day" next following the first annual date of the delivery date. "Quarter days" are 31 January, 30 April, 31 July, and 31 October (PWC, 2020).

When the HMRC observed that tax have been lost by a taxpayer's due to fraudulent or negligent actions, the prescribed time frames for enquiries are extended and the HMRC will seek to recover that taxes. The prescribed time frames for raising an assessment is four years following the end of the tax year, which is named a "discovery" assessment. The time frame for issuing an assessment on a taxpayer in a case that involves a loss of tax revenue brought about negligently by that taxpayer is six years following the end of the tax year. In respect of an offshore matter, the HMRC will have at least 12 years to inspect the return. The time frame for issuing an assessment on a taxpayer in a case involving a loss of income caused deliberately by that taxpayer is 20 years following the end of the tax year. If the HMRC finds that a taxpayer has underpaid on tax through mistakes and/or negligence, the taxpayer will be subject to pay HMRC the full amount of tax outstanding (PWC, 2020).

The aim of the HMRC is to create a better customer experience for all taxpayers in order for compliance to increase and to raise revenue more effectively. 81.6% of taxpayers were satisfied or very satisfied with the HMRC's digital services and 70.3% of taxpayers post which requires a response was cleared within 15 days of receipt during the 2019/2020 year (HMRC, 2020a:40).

The HMRC has the following remedies available to taxpayers in order to be able to address their administrative dispute against HMRC.

#### **4.5.1 Your Charter**

Your Charter was adopted by the HMRC in 2009 as an administrative method which stipulates the provisions that the HRMC must follow in order to make sure that taxpayers are dealt with justly and fairly (Klopper, 2015:69).

The HMRC's Charter sets out the standard of behaviour and values taxpayers can expect when dealing with HMRC and also what taxpayers can expect when interacting with the HMRC (HMRC, 2020b). The HMRC revised the Your Charter in 2016, taking into consideration comments and suggestions provided by taxpayers for an improved standard stipulating the

rights and obligations of taxpayers and HMRC in a way that is understandable to all taxpayers (HMRC, 2016).

The information set out in the Charter is not legislated by UK law, yet the existence thereof is promoted through the provisions of section 16A of the Commissioners for Revenue and Customs Act 2005. The Charter must be regularly reviewed and updated when relevant to do so. HMRC is also required to issue a yearly report which states the findings on how the HMRC has complied with the regulations as set out in the Your Charter. Even though the Your Charter is not legally binding, taxpayers may have an expectancy for HMRC to obey to the regulations stipulated and be held accountable for the HMRC's own regulations (Herbert, 2018:51).

The following rights of taxpayers are stipulated in the Your Charter (HRMC, 2020b:3):

- Respect and to be treated honestly;
- professionalism and integrity;
- assistance from the HRMC;
- dealing with complaints quickly and fairly;
- Acting towards taxpayers who do not adhere to the regulation;
- confidentiality of information;
- representation by someone else.

In return, the HRMC expects the following from taxpayers (HMRC, 2020b:3):

- To be honest, respectful and take reasonable care when acting under the tax system;
- Keeping the HMRC informed;
- Responding in good time;
- Keeping accurate records and confidentiality of information;
- Cooperate with the HMRC and be aware what your representative does on your behalf.

#### **4.5.2 Complaints process**

The Your Charter provides that taxpayers can expect to be treated with respect, be provided with a helpful, efficient and effective service and have their issues resolved quickly and fairly (HMRC, 2020b). Taxpayers who belief that their rights have been violated by HMRC are entitled to make use of the complaints process.

If a taxpayer believes that they have suffered unfair treatment, they must first approach the HMRC directly either online, via phone or post. If the first attempt of the taxpayer's complaint

to the HMRC has not been resolved, the taxpayer may seek that the HMRC reviews the same issue again. The review of the matter will then be handled by a different HMRC advisor (HMRC, 2020b).

After the HMRC has given the taxpayer feedback from the second review process of the taxpayer's matter, it is the duty of HMRC to inform the taxpayer of their right to take the complaint up with the Adjudicator's Office (HMRC, 2020b).

The administrative dispute proceedings have to be administered by the HMRC before the matter is allowed to be addressed to the Adjudicator's Office.

#### **4.5.3 The Adjudicator's Office**

The Adjudicator's Office is independent from the HMRC and provides a free, impartial and independent service and investigates all complaints within the Adjudicator's remit (Adjudicator's Office, 2020:35). The main objective of the Adjudicator's office is to service taxpayer's matters against HMRC and to act objectively between the taxpayer and HMRC.

Once the taxpayer has made use of all the remedies provided for in the HMRC complaints process for an administrative dispute and the taxpayer is still not satisfied, the taxpayer may approach the Adjudicator's Office. Taxpayers are not always aware of their right to take their unresolved matter up with the Adjudicator's Office. It seems that for the few taxpayers that are aware of their right to escalate their matter to the Adjudicator's office, mostly feel that they don't have adequate knowledge or that they are not financially strong enough funds to further escalate their complaints (Herbert, 2018:52).

The Adjudicator's Office will try to settle the matter either through negotiation or recommendation. The Adjudicator will act as a negotiator to assist the taxpayer and the HMRC to settle the matter in a justly manner. When negotiation is not an appropriate approach to follow, the Adjudicator will review the matter and will provide a written recommendation to both the taxpayer and HMRC, describing the reason behind the decision and providing recommendation on how to best settle the matter. Since this is a recommendation, it is not enforceable by either the taxpayer or the HMRC (Herbert, 2018:52).

Once the Adjudicator's Office have given their decision and the taxpayer is in disagreement or dissatisfied or HMRC is not adopting the Adjudicator's recommendation, the taxpayer can approach their Member of Parliament to put their matter to the Parliamentary and Health Service Ombudsman (Adjudicator's Office, 2020:17).

#### **4.5.4 Parliamentary and Health Service Ombudsman**

The Parliamentary and Health Service Ombudsman (PHSO) investigates complaints where a taxpayer believes there has been injustice due to an organisation that has not acted fairly (Parliamentary and Health Service Ombudsman, 2020:9).

The Ombudsman was established by Parliament to investigate and provide remedies to taxpayers that have been unfairly treated by the HMRC (Herbert, 2018:53). PHSO is the last step in the complaint's process for taxpayers to resolve a complaint about UK Government and public organisations (Parliamentary and Health Service Ombudsman, 2020:28). The Ombudsman only receives a minimal number of complaints against HMRC as most of the complaints are settled at the Adjudicator's Office.

When the PHSO identifies that a mistake has been made, they recommend to the organisations to put things right. On the infrequent occasion that an organisation does not comply with the recommendation made by PHSO, they can lay a report before Parliament. The Public Administration and Constitutional Affairs Select Committee can establish an inquiry to look into the case or refer it to another Committee (Parliamentary and Health Service Ombudsman, 2020:39).

If a taxpayer feels that the PHSO have acted unjustly in reaching a decision about their complaint, the taxpayer can apply to the High court for the decision to be reviewed by the courts. If the taxpayer's applications are successful, there is a full court hearing (Parliamentary and Health Service Ombudsman, 2020:44).

#### **4.5.5 Judicial Review**

When the HMRC acts unjustly, an aggrieved taxpayer may approach the courts to bring their matter under judicial review.

Judicial review is a form of legal action and is recommended to only be used as a remedy once all other available remedies have been resorted to and resulted in unsatisfactory outcomes (Herbert, 2018:53). Legal action should be a remedy of last resort (Herbert, 2018:53 & Judiciary for England and Wales, 2020:18).

The Judicial Review action is when an aggrieved taxpayer challenges the HMRC on the basis of the action, or omission thereof by the public body, to make sure that the HMRC fulfil its legal duties (Judiciary for England and Wales, 2020:5).

After a complaint has been presented to the court, the court will evaluate the way in which the HMRC applied its judgement or made a specific ruling that resulted in the matter. The court will none the less be considerate of the merits of the taxpayer's issue (Herbert, 2018:53).

The taxpayer needs to apply for approval to submit the matter to the courts. The request should be submitted to the Administrative court within three months after the grounds for making the claim first arose.

Before a request is filed with the Administrative court, the taxpayer should inform the HMRC of the intention to take the matter up with the courts. The letter, named as the pre-action letter should include the date and details of the act or omission of the HMRC that is being challenged and a detailed summary of the facts on which the case is based. The letter should also include any additional documentation in respect of HMRC's decision explaining why it is considered relevant (Judiciary for England and Wales, 2020:19).

This letter gives the HMRC the opportunity to investigate the taxpayer's matter and supply the taxpayer with the suitable remedy (Herbert, 2018:53).

Adam Craggs (2018), partner and head of the tax dispute practise at Reynolds Porter Chamberlain, commented that the HMRC is under significant political influence to reach targets and increase taxes which can push the HMRC to follow an aggressive approach which can leave the HMRC vulnerable to legal challenges by taxpayers. The increasing judicial review applications files is a sign that HMRC is progressively exceeding its powers and acting unjustly towards taxpayers (Craggs, 2018).

Adam Craggs (2018) further stated that:

We have seen a number of cases in the last 12 months where HMRC has withdrawn its decision once it became apparent that our clients intended to issue Judicial Review proceedings. It is regrettable that taxpayers are forced to take such action before HMRC acknowledges its mistakes and does the right thing.

It is thus important for taxpayers to stick to the protocol before commencing a claim as in some cases this may result in the matter being settled by HMRC without the need of litigation or at least narrow the issues of the litigation.

Submitting a complaint to the courts for Judicial Review could result in substantial financial resources of the aggrieved taxpayer and should thus be the last resort for the taxpayer to approach the courts. All other remedies should thus first be attempted to resolve the complaint of the taxpayer in order to avoid the financial burden.

In order for a matter filed to be successful, the taxpayer must prove that the HMRC has acted unlawful. When the taxpayer was successful in proving under Judicial Review that the HMRC has acted unlawful, the court will conclude on the matter based on the discretion whether or not to award a remedy.

#### **4.5.6 Conclusion**

The UK has a framework of rules and regulations that administers the tax system, the “Your Charter” which ensures that the taxpayer are dealt with fairly and justly based on respect, honesty, professionalism and integrity. Taxpayers are assisted by the HRMC and generally receive a speedy response in tax related matters.

An Adjudicator’s office independently handles all matters against the HRMC. All injustices against a taxpayer are investigated by The Parliamentary and Health Service Ombudsman.

Further disputes will be placed under judicial review where taxpayers will bring the tax matters to court. The structures in the UK are there to protect the rights of taxpayers and provide a system that is fair and just. The system ensures that the taxpayer’s rights are protected and the HRMC collects taxes efficiently.

In comparison to the UK, the Tax Ombud of South Africa does not have adequate rights to force SARS to take corrective action. The Tax Ombud can only make recommendations and not force SARS to corrective action. The recommendation to be implemented in South Africa will ensure that the rights of the Tax Ombud are increased to provide for the power to enable the Tax Ombud to force SARS to compensate taxpayers for expenses as a result of SARS acting unjustly towards taxpayers.

The remedies available to aggrieved taxpayers in the Canada will now be evaluated.

#### **4.6 CANADA**

There are two levels of government in Canada, namely Federal and Provincial. Parliament and government do not mean the same thing. The Canada Revenue Agency (CRA) is the revenue authority and has the power to levy and administer all taxes and to ensure tax compliance on behalf of all the governments within Canada (Library of Parliament, 2016:6).

There are three sectors that work together to govern Canada namely the executive, legislative and judicial sectors. The executive sector, “the Government” is the decision-making sector, made up of the Monarch, the Prime Minister, and the Cabinet. The legislative sector (Parliament) is the law-making sector. The judicial sector is a series of independent courts that

interpret the legislation passed by the other two sectors. . Canada is a constitutional monarchy, meaning that they recognize the Queen or King as the head of state, while the Prime Minister is the head of government (Library of Parliament, 2016:14).

Canada also has a self-assessment tax system. The Minister of Finance exercises the functions of the Minister of Revenue provided for in the TAA of Canada (Québec, 2020).

Audits are an important part of the CRA's scope of activities to ensure that the tax system is fair for everyone. The auditor may request supporting documentation from the taxpayer and will examine the records provided for by the taxpayer. If the auditor finds that the taxpayer's assessment is correct, nothing more has to be done and the taxpayer will receive a completion letter and the audit will be closed (Government of Canada, 2019).

If the auditor finds that the taxpayer's return has to be reassessed, the taxpayer will receive a proposal letter explaining the reason for the reassessment. The taxpayer will have 30 days to agree or disagree with the proposal. If the taxpayer is in disagreement with the proposal, the taxpayer is encouraged to contact the auditor to explain why he/she disagrees and provide any other documents to support their position. The auditor will carefully consider the taxpayer's explanations and respond to questions about the proposal (Government of Canada, 2019).

At the end of an audit, a final letter will be sent to the taxpayer with one of the following outcomes:

- no adjustments will be made to the taxpayer's previous assessment;
- a reassessment will be made, and the taxpayer will have to pay the balance owing or will be entitled to a refund (Government of Canada, 2019).

If an adjustment results in more tax being owed, the auditor can give the taxpayer an estimate of the amount before the CRA issues a notice of assessment or notice of reassessment. This will give the taxpayer the opportunity to avoid interest charges by paying all or part of what the taxpayer owes right away, rather than waiting for a notice. If a taxpayer does not agree with a reassessment, the taxpayer has the right to appeal it (Government of Canada, 2019).

In comparison to section 42 of the TAA, the tax audit process of Canada is very similar to South Africa. The taxpayers of Canada also have the right to receive reasons for grounds in respect of additional assessments raised, the CRA issues a proposal letter explaining the reason for the reassessment. At the end of the audit, the taxpayers of Canada must also be informed of the outcome of the audit, a final letter is sent by the CRA stating the outcome of

the audit. The CRA is not bound by legislation to inform the taxpayers of the outcome of the audit within a prescribed time frame.

The Tax Ombud's aim is to respond to taxpayer's complaints within five business days of receipt of the complaint 95% of the time. During the 2019-2020 year the Tax Ombud met that standard 97% of the time. 93% of recommendations made by the Ombudsman to the Minister of National Revenue in systematic reports was acted upon by the CRA during the 2019-2020 year (Government of Canada, 2020a:37).

The following remedies are available to taxpayers in order to be able to address their administrative dispute against CRA.

#### **4.6.1 Taxpayer Bill of Rights**

The Minister of National Revenue established the Declaration of Taxpayer Rights in 1985. The Taxpayer Bill of Rights was introduced in 2007 and duly replaced the Declaration (Government of Canada, 2019).

The Taxpayer Bill of Rights consists of sixteen rights that govern the relationship between taxpayers and the CRA and is intended to help taxpayers understand what they can expect when dealing with the CRA and to make the CRA more accountable. Eight of these rights are "service rights", meaning stating the standard of service and fairness taxpayers can expect when dealing with the CRA (Government of Canada, 2019).

The eight service rights of taxpayers are summarised as follow in terms of the Taxpayer Bill of Rights (Klopper, 2015:68):

- the right to be treated professionally and fairly (Taxpayer Bill of Rights, article 5);
- the right to complete, accurate, clear, and timely information (Taxpayer Bill of Rights, article 6);
- the right to submit a service complaint and to be provided with reasons for CRA's findings (Taxpayer Bill of Rights, article 9);
- the right to have the costs of compliance taken into account when tax legislation is administered (Taxpayer Bill of Rights, article 10);
- the right to expect the CRA to be accountable (Taxpayer Bill of Rights, article 11);
- the right to expect the CRA to publish service standards and report annually (Taxpayer Bill of Rights, article 13);
- the right to expect the CRA to warn taxpayers about questionable tax schemes in a timely manner (Taxpayer Bill of Rights, article 14);

- the right to be represented by a person of the taxpayer's choice (Taxpayer Bill of Rights, article 15) (Government of Canada, 2017).

Rights can't provide protection without awareness, oversight and redress and thus the Taxpayer's Ombudsman was appointed to defend the service rights for taxpayers (Government of Canada, 2016a).

The Taxpayer Bill of Rights provides guidance on the remedies available to taxpayers in cases where taxpayers have been treated unjustly or their rights have been violated by the CRA. The Taxpayer Bill of Rights is not legislated and is thus not binding, nonetheless, it is an official document that sets out the CRA's obligations towards taxpayers (Herbert, 2018:55).

During 2013, the Taxpayer's Ombudsman and the Minister of National Revenue, provided for an addition to the list of rights provided for in the Taxpayer Bill of Rights (Herbert, 2018:55). The additional right as set out in article 16 of the Taxpayers Bill of Rights specifies that taxpayers have the right to submit a complaint or request a formal review without fear of retaliation from the CRA (Klopper, 2015:69). This right was implemented with the intention to encourage taxpayers to submit complaints against the CRA if they are unhappy with the way the CRA has treated them (Herbert, 2018:55).

The intention of the additional right is to give taxpayers the comfort that the CRA will treat them fairly, give taxpayers the right to complain about the CRA without fear and to improve taxpayer's trust in the integrity of the tax system. Canada has taken the lead internationally in providing sufficient protection of taxpayer's rights (Klopper, 2015:69).

#### **4.6.2 Complaints process**

The Taxpayer Bill of Rights states that taxpayers have the right to submit a service complaint against the CRA (Herbert, 2018:55).

The eight service rights of taxpayers include the following:

- the right to complete, accurate, clear, and timely information from the CRA;
- the right to submit a service complaint and to be provided with reasons of the CRA findings;
- the right to have the costs of compliance taken into account when tax legislation is administered;
- the right to expect the CRA to be accountable;
- the right to expect the CRA to publish service standards and report annually;

- the right to expect the CRA to inform you about questionable tax schemes in a timely manner; and
- the right to be represented by a person of your choice (Herbert, 2018:55).

When taxpayers have a complaint or feel that any right as stipulated in the Taxpayer Bill of Rights, has been violated by the CRA, taxpayers are entitled to make use of the three-step service complaint process (Herbert, 2018:56):

Step 1 – It is recommended that the taxpayer resolve the complaint by communicating with the CRA employee that was dealing with the taxpayer's case or make contact with the CRA via the contact details provided. If there are any disagreements or concerns in the way the CRA employee has communicated to the taxpayer, the matter can be taken up with the employee's supervisor (Herbert, 2018:56; Government of Canada, 2020b).

Step 2 – When the taxpayer is still not happy after the above procedures has been performed, the taxpayer can file a service complaint online, by fax or via mail. A service feedback officer will respond directly to the taxpayer in a fair and timeous manner. The timeline to resolve a complaint, is dependent on the complexity of the case, but the aim of the CRA is to resolve the complaint within 30 business days (Herbert, 2018:56; Government of Canada, 2020b).

Step 3 - Where the taxpayer remains unhappy with how the CRA handled the service complaint, the taxpayer can contact the office of the Taxpayer's Ombudsman. The Office of the Taxpayer's Ombudsman will not review a service complaint submitted until the CRA has finalised the review (Government of Canada, 2020b).

#### **4.6.3 Taxpayer's Ombudsman**

The Canadian Taxpayer's Ombudsman was implemented in 2007. A Digest of Taxpayer Service Rights was introduced by the Taxpayer's Ombudsman in an attempt to create an awareness and understanding of taxpayer's service rights and set out the role of the Taxpayer's Ombudsman (Office of the Taxpayer's Ombudsman, 2012:4).

The Taxpayer's Ombudsman reports directly to the Minister and is operationally independent from the CRA. The aim of the implementation of the Ombudsman is to improve service to taxpayers by offering a service complaint process that is independent from the CRA (Government of Canada, 2016b).

A taxpayer will be required to make use of all internal remedies provided for by the CRA before approaching the Taxpayer's Ombudsman, except when a taxpayer is financially unsound, the taxpayer may directly approach the Taxpayer's Ombudsman (Government of Canada, 2016b).

The Taxpayer's Ombudsman will not get involved in tax disputes. Unfortunately, the Ombudsman is unable to overrule actions by the CRA regarding service issues (Herbert, 2018:57).

The Taxpayers' Ombudsman may however act as negotiator between the taxpayer and the CRA in an attempt to settle the matter in dispute. The Taxpayer's Ombudsman may also alternatively issue a formal recommendation to the Minister of National Revenue (Herbert, 2018:57).

#### **4.6.4 Judicial Review**

The Tax Court does not have administrative powers as the validity of a tax assessment are separate and apart from any liability of the CRA. Therefore, the Tax court is not allowed to settle disputes relating to the unjust actions of the CRA or instances where the CRA disregards its power in its interaction with taxpayers. The Tax Court may only be approached to settle matters that involve the merits of a decision made by the CRA. A taxpayer may approach tax courts in terms of the Federal Courts Act. (Herbert, 2018:57).

Taxpayers have the right to be treated with due care by CRA's staff. In the case of *Leroux v Canada Revenue Agency* (2014), the British Columbia Supreme Court ruled that when the CRA's staff interact with taxpayers, they should treat taxpayers with due care. This case gives taxpayers confidence that there are cases where the CRA staff, who did not act in accordance with the appropriate manner of care as expected, were held accountable for such misconduct. Even though this case was held in British Columbia, it is general practice for courts to refer to rulings of other provinces when concluding on a new case. British Columbia is a province of Canada and will therefore form part of the private law of British Columbia. This case was referenced to in order to emphasise the principle of "duty of care" that CRA's staff are expected to treat taxpayers with during their interactions (Herbert, 2018:58).

#### **4.6.5 Conclusion**

The CRA administers the tax system in Canada on behalf of the government. Specific time frames exist for audits.

A Taxpayer's Bill of Rights exists which provides service rights to taxpayers. The taxpayer may submit claims against the CRA without fear of retaliation. The taxpayer thus has a right to submit a complaint against the CRA.

The taxpayers Ombudsman is independent from the CRA and has the role of negotiator between the CRA and the taxpayer during disputes.

The tax court only handles matters on merit and not on administrative disputes. The tax system in Canada is regarded as one of the leading systems in the world, due to the well-balanced structure thereof, protecting the rights of taxpayers and ensures effective tax collections.

From the above analysis of Canada's tax remedies available to taxpayers it is recommended that SARS should provide for adequate fair and just regulations in the TAA or compile a Taxpayers Bill of Rights. Currently taxpayer's rights are safeguarded in terms of the Bill of Rights provided for in the Constitution and expressed in PAJA. By implementing fair and just regulations in the TAA or compiling a Taxpayers Bill of Rights, the balance between the powers of SARS and rights of taxpayers might be improved. Taxpayer's rights and service expectations are not formally documented, and it is recommended that it should be formally documented, e.g., Taxpayers Bill of Rights. Taxpayers should also be able to make complaint without the fear of retaliation.

#### 4.7 A SUMMATIVE COMPARISON OF TAXPAYER'S RIGHTS DURING AUDIT/VERIFICATIONS CONDUCTED BY REVENUE AUTHORITIES

|                                                                                                                                                                  | <b>SA</b> | <b>Canada</b> | <b>UK</b> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|---------------|-----------|
| Does the jurisdiction have a comparable TAA?                                                                                                                     | Yes       | Yes           | Yes       |
| Are the taxpayer's rights specifically endorsed by the taxpayer's Charter or Taxpayers Bill of Rights?                                                           | No        | Yes           | Yes       |
| Does the Taxpayer's Adjudicator and the Tax Ombudsman operate independently from the respective Revenue Authorities?                                             | No        | Yes           | Yes       |
| Are the time frames for Canada and the UK in responding to taxpayers during audits/investigations similar to RSA?                                                | N/A       | Yes           | No        |
| The right of taxpayers to lodge a service complaint without fear of retaliation is specifically applicable                                                       | No        | Yes           | No        |
| The leading country internationally is protecting the rights of taxpayers.                                                                                       | No        | Yes           | No        |
| The Tax Ombudsman may participate in negotiations between the taxpayers and Revenue authority to resolve the disputes.                                           | No        | Yes           | No        |
| The Taxpayers Adjudicator/Tax Ombud to direct Revenue Authority to reimburse the taxpayer for costs due to errors and delays of Revenue Authority during audits. | No        | No            | Yes       |
| The Taxpayer Adjudicator/Tax Ombud has the power to force Revenue Authority to take corrective actions?                                                          | No        | No            | No        |
| First point of reference is to exhaust all other internal complaint resolution mechanisms within the revenue body.                                               | Yes       | Yes           | Yes       |
| When a taxpayer is not satisfied with the outcome delivered from the internal mechanisms, a complaint may be lodged at the Tax Ombud.                            | Yes       | Yes           | Yes       |
| If the taxpayer is still unhappy with the outcome, the matter can be elevated to the Public Protector/Parliamentary Ombudsman.                                   | Yes       | No            | Yes       |

Source: Author's own compilation of the information presented above

## 4.8 CONCLUSION

The equivalent of the SARS's Service Charter is the Your Charter and the Taxpayer Bill of Rights in the UK and Canada, respectively. The SARS's Service Charter in South Africa is not legally binding and align with the provisions of the UK and Canada.

The biggest difference between South Africa, Canada and the UK are taxpayer's rights stipulated in a SARS Service Charter as opposed to be contained in legislation.

The CRA and the HRMC are clear and open about their duty to make sure that they deliver the best service possible to taxpayers. This provides taxpayers with the comfort that their respective revenue authorities are mindful of their duties. The quality of a revenue authority's service as well as taxpayer's belief that they are being treated fairly is a key factor to ensure voluntary tax compliance by taxpayers. There is no formal declarations or statements available in South Africa which is similar to the CRA and the HRMC, in order to make both taxpayers and SARS officials aware of taxpayer's rights (Klopper, 2015:71).

SARS should formally document a Service Charter within the TAA or provide for a Taxpayers Bill of Rights similar to that of Canada to make SARS officials more aware of their obligation to treat taxpayers fairly and justly and to elaborate the rights that are available to taxpayers (Klopper, 2015:71; Mahadevey, 2016:69). This might improve taxpayer's perception of the tax system and could contribute to voluntary and cooperative tax compliance by taxpayers (Klopper, 2015:71). This will provide clarity to taxpayers and SARS officials without having to refer to the *Constitution* and PAJA (Mahadevey, 2016:69). By formally documenting taxpayer's rights and making it available to SARS officials and taxpayers will promote that the tax system is just.

It is evident from the above analysis of the administrative complaint's resolution proceedings followed by the SA, UK and Canada that all three the jurisdictions have an internal complaints processes that is administered by the respective revenue authorities. The internal complaints mechanism is the first step for a taxpayer to attempt to settle an administrative matter.

UK, Canada and South Africa all have independent institutions that can be approached when the internal complaints remedies have not delivered the desired result and the aggrieved taxpayer is still unsatisfied with the case. The independent bodies within each jurisdiction have different authorities and regulations and it can be concluded that not all independent institutions operate the same and may conclude differently on specific matters in the various jurisdictions.

Taxpayers should be able to benefit from the functions of Tax Ombud's Office as it provided for an additional complaint mechanism made available to taxpayers in order to protect their rights during administrative matters (Klopper, 2015:65).

When comparing the function of the Tax Ombud's office of South Africa to the Tax Ombudsman of Canada, it is clear that the administrative procedures followed are very similar to the procedures followed by Canada which indicates that the Tax Ombud of South Africa is in line with international best practises. The exception identified is that no remedy is available to a Canadian taxpayer who is unsatisfied with the outcome of a matter. South African taxpayers are thus in a better position in comparison to Canadian taxpayers, since they can submit a complaint to the Public Protector if the Tax Ombud was unable to settle the matter (Klopper, 2015:62).

However, in comparison to the UK, one important difference was identified from the analysis. The Taxpayer's Adjudicator of the UK has the power to direct the HRMC to compensate a taxpayer for costs incurred due to errors and delays on behalf of the HRMC. Although the Taxpayer's Adjudicator is not given any legal power to order the HRMC to act on any recommendation, the HRMC has stated that all the recommendations of the Taxpayer's Adjudicator have been acknowledged. Similar to the Public Protector in South Africa, the UK has a Parliamentary Ombudsman (Klopper, 2015:63).

Thus, in comparison to the UK, the Tax Ombud of South Africa lacks sufficient power to direct SARS to take corrective action. The Tax Ombud can only make recommendations and not force SARS to corrective action. It is therefore recommended that the powers of the Tax Ombud of South Africa are increased to include the power to force SARS to compensate taxpayers for administrative expenses incurred due to inefficiencies of SARS to ensure that taxpayers are treated justly (Klopper, 2015:65).

The Tax Ombud is not independent from SARS. Independence of the Tax Ombud is a key factor to ensure that taxpayers' experience is positive and by implementing a Tax Ombud that is independent, the rights of taxpayers would be defended. Although it seems that the Tax Ombud is functioning well, it is only regarding administrative issues. The successful implementation of the Tax Ombud's authority would boost the confidence and faith of taxpayers in the tax system. It is thus recommended that the Tax Ombud in South Africa should become independent from SARS.

This Chapter examined the different administrative actions of South Africa, Canada and the UK. It was evident that the TAA is in line with international best practices except for the weaknesses identified for improvement.

There are some aspects of the UK and Canada's administrative complaints remedies that may improve South Africa's complaints proceedings, if the stated recommendations are implemented into South African tax legislation. The recommendation of such aspects will be discussed in Chapter 5.

## **CHAPTER 5: CONCLUSION**

The aim of this study was to determine if the scope of section 42 of the TAA, which states that taxpayers should be informed of the progress, conclusions and outcomes of audit/verification and provided with adequate reasons for proposed adjustments within the prescribed timeframe, is strong enough to protect taxpayer's during the audit verification processes..

Due to insufficient fairness regulations included in the TAA, taxpayers unfortunately have to refer to the TAA and PAJA, which may place taxpayers who are uninformed and uneducated at risk. The lack of properly completed legislation of section 42 of the TAA does not meet the primary objectives of section 42 to protect the taxpayer's rights. The current legislation of section 42 is very limited and requires amendments to rectify the limitations thereof. A more comprehensive and legally correct detail constructed wording of section 42 would give effect to the proper interpretation of section 42 by the taxpayer and SARS.

The "Bill of Rights" states that taxpayers have the right to be treated lawful, reasonable, and in a procedurally fair manner. The "Bill of Rights" was enacted by the "Promotion of Administrative Justice Act (PAJA)" (*Constitution*).

The "Bill of Rights" combined with the "Promotion of Administrative Justice Act" together with the TAA and specifically section 42 of the TAA is there to protect the taxpayer's rights towards fair and just treatment of audits conducted by SARS in line with the regulations of section 42 of the TAA. SARS has therefore an obligation to act in an administrative correct manner by informing the taxpayer of the progress, conclusion and outcome of audits/verifications and providing the taxpayers with adequate reasons for proposed adjustments made in the prescribed time frame under section 42 of the TAA.

In this chapter findings, provisions and recommendations will be made in order to establish, based on the findings of the study, possible better alternatives to be introduced by South Africa. The incorporation of revised regulations to provide protection against taxpayer's rights to administer fair and just treatment through more effective remedies will also be evaluated. The conclusion of this study will be presented. This chapter will address the fourth secondary research objective as identified in par 1.4.2(iv).

### **5.1 INTRODUCTION**

SARS exercises its power through empowering legislation. A taxpayer has the right to challenge SARS's power in order to establish whether SARS is conducted such power

properly, in line with the applicable law and in accordance with taxpayer's constitutional rights. When SARS contravenes the constitutional rights of a taxpayer, the taxpayer has the right to approach court. There is a general view that an imbalance exists between the powers afforded to SARS and taxpayer's rights. This may be due to taxpayers not afforded sufficient remedies available should their rights be contravened upon by SARS (Herbert, 2018:68).

Chapter 4 of the study examined the different regulatory procedures accessible to taxpayers in the UK and Canada compared to the administrative procedures of the TAA in South Africa. It is recommended that some aspects of the remedies accessible to taxpayers in the UK and Canada should be implemented in South Africa to advance the current tax administrative procedures in South Africa regarding audits/verifications. The objective of this chapter is thus to put forward recommendations on how some aspects of the remedies in South Africa can be enhanced to further give effect to the protection of taxpayer's right to just and fair administrative action during audit verification processes.

The most significant recommendations to be implemented in South Africa to protect taxpayer's right of administrative justice during audit verification processes as identified in Chapter 4 will now be discussed.

## **5.2 LEGISLATE A TAXPAYERS BILL OF RIGHTS**

In Canada and the UK, taxpayer's rights are formally documented in the Taxpayer's Bill of Rights in Canada and in the Your Charter in the UK. The Your Charter is not legislated, however there is legislation that supports the Charter, namely the Commissioners for Revenue and Customs Act of 2005, which is prepared and maintained by the HMRC. The Taxpayer's Bill of rights is not binding by law, it is an official commitment from the CRA to taxpayers. There is currently no formal documentation available to taxpayers in South Africa which is similar to Canada or the UK (Herbert, 2018:69). South Africa does not have a law or formal documentation that specifically defines taxpayer's rights. The rights of taxpayers are stated in the SARS Service Charter (Klopper, 2015:95).

It is recommended that SARS should provide for sufficient fairness legal provisions in the TAA or legislate a Taxpayers Bill of Rights (Klopper, 2015:96). Even though in comparison to UK and Canada, the Your Charter and Taxpayer's Bill of Rights are not legislated, it is recommended that taxpayer's rights be legislated in order to be enforceable and be able to direct SARS to take corrective action.

By implementing fairness provisions in the TAA or by legislating a Taxpayers Bill of Rights, the balance between the powers of SARS and rights of taxpayers will be improved (Klopper,

2015:93). Taxpayer's rights are currently not formally documented, and it is recommended that it should be formally documented. By legislating a Taxpayers Bill of Rights or improving the codification of taxpayer's rights in the TAA, SARS officials will be more aware of their obligation to treat taxpayers fairly and justly and taxpayers will be able to force SARS to corrective actions in cases where SARS did not adhere to the regulations of section 42 of the TAA to inform the taxpayer of the progress of the audit within the prescribed time frame.

This may remind both taxpayers to be aware of their rights and SARS officials to be considered of taxpayer's rights during audit processes and could address the criticism that the TAA does not include adequate fairness provisions and does not achieve the desired balance of the relationship between SARS and taxpayers (Klopper, 2015:96).

Taxpayer's rights are protected in terms of the Bill of Rights stated in Chapter 2 of the *Constitution*. The Bill of Rights only provides for basic human rights and does not address a taxpayer's rights in respect of tax administration (Herbert, 2018:69). Taxpayers who are uneducated are unaware of their rights. Unfortunately, SARS officials are also not always mindful of taxpayer's rights (Croome, 2014).

By introducing a Taxpayers Bill of Rights, taxpayers and SARS officials will have more clarity about their rights and powers specifically regarding audit verification processes without having to refer to the *Constitution* and PAJA. It will promote a more just administrative tax system in South Africa if taxpayer's rights are formally documented (Mahadevey, 2016:69).

Although the SARS's Service Charter provides a formal document that stipulates taxpayer's rights, it is difficult to enforce such rights if it is not legislated. It is recommended that the Taxpayers Bill of Rights is legislated separately, as it will be able to address the specific rights of taxpayers to be informed of the progress, conclusions and outcome of audits/verifications and provided with adequate reasons for proposed adjustments within the prescribed time frame to ensure that such rights can be enforced and defended. If taxpayer's rights are legislated, it will be enforceable and will encourage SARS to uphold such rights as SARS would be held accountable if they exercise disregard for such rights (Herbert, 2018:69).

The implementation of an enforceable Taxpayer Bill of Rights would promote the balance between the powers of SARS and the rights of taxpayers. One of the rights that should be included in the Taxpayers Bill of Rights, should be the right to finality, meaning the right to be informed of the time frames for reviews and audits, as well as the time frames for SARS to respond to taxpayers. The taxpayer should be given the benefit of conclusion of matters where SARS fails to adhere to specified time frames (Croome, 2018b).

If taxpayers were to experience that their rights are being effectively protected and defended, it may result in taxpayer's having a better attitude towards tax compliance and might encourage cooperation and tax compliance by taxpayers (Herbert, 2048:69).

### **5.3 ACCOUNTABILITY OF SARS'S SERVICE CHARTER BEING INCREASED**

It is further recommended that alternatively to a Taxpayers Bill of Rights being legislated, the accountability of SARS towards the SARS's Service Charter should be increased. The Your Charter in the UK is also not legislated, but it is a requirement that the HMRC should publish an annual report and give feedback on the extent that the HMRC adheres to their rights and obligations. In the annual report issued for 2019/2020 year it was concluded that 81.6% of taxpayers was satisfied or very satisfied with the HMRC's digital services and 70.3% of taxpayers post which requires a response was cleared within 15 days of receipt during the 2019/2020 year (HMRC, 2020a:40).

In order for the SARS's Service Charter to be more successful, the TAA should provide that such Charter must be prepared and maintained by SARS. SARS should be held responsible to the contents of the Charter by publishing an annual report and giving feedback on SARS's adherence to the regulations as set out by the Charter (Herbert, 2018:70). SARS will then be held accountable if a SARS official does not adhere to the scope of section 42 of the TAA.

### **5.4 ADDITIONAL RIGHT TO BE ADDED TO THE SARS'S SERVICE CHARTER**

Taxpayer's should be able to make a complaint without the fear of retaliation. Many South African taxpayers feel threatened by SARS, due to SARS's extensive powers. This fear was built up due to many taxpayers being objected to SARS's misuse of power. In order to reduce distress amongst taxpayers, evident in the Canada's Taxpayer Bill of Rights, it is proposed that the following additional right be added to the SARS's Service Charter: "the right to lodge a complaint without fear of retaliation" (Herbert, 2018:70).

### **5.5 INCREASE THE POWER AFORDED TO THE TAX OMBUD TO DIRECT SARS TO TAKE CORRECTIVE ACTION**

Independent bodies dealing with taxpayer's complaints in respect of tax administration is crucial as it aids in the taxpayer's experience of a just tax system. The remedies available in the TAA with regards to the Tax Ombud's office to align with the remedies of Canada and the UK. The Tax Ombud can only make recommendations and not force SARS to corrective action, which is also the case with Canada's Tax Ombud which can't override the actions of

the CRA (Klopper, 2015:94). It is thus noted that the Tax Ombud lacks sufficient power to direct SARS to take corrective action (Klopper, 2015:65).

The Tax Ombud recommendations are not enforceable by either the taxpayer or SARS. It will be of no value to South African taxpayers if the legislated Bill of Rights are not enforceable. For the Tax Ombud to be enabled to enforce and administer such rights it is recommended that the Tax Ombud's powers be increased (Herbert, 2018:70).

Even though the TAA has made good progress in terms of the Tax Ombud's Office to protect taxpayers rights, the TAA does not make adequate provisions for cases where SARS does not adhere to its obligations in terms of the TAA, specifically with regard to section 42 of the TAA, where SARS has the duty to inform the taxpayer of the progress, conclusion and outcome of an audit/verification within the prescribed time frame (Klopper, 2015:95). For the increased effectiveness of the Tax Ombud, , the Tax Ombud should be empowered to force SARS to make a decision or rectify a decision already made if SARS did not adhere to their duties (Herbert, 2018:71).

Should taxpayers feel that they can defend their rights adequately by making use of remedies available, they may be more inclined to comply with their tax obligations. When taxpayers feel that their rights have been violated by SARS and that any contravention thereof may be adequately defended, it may encourage tax compliance among taxpayers (Herbert, 2018:72).

## **5.6 POWER AFFORDED TO TAX OMBUD TO FORCE SARS TO REIMBURSE TAXPAYERS FOR ADMINISTRATIVE COSTS**

Disputing against SARS will generally require professional advice and might result in excessive costs being incurred by taxpayers. Unnecessary costs incurred by a taxpayer as a result of unjustified administrative actions by SARS may be regarded as deprivation of the taxpayer's property. The TAA does not provide legal grounds for taxpayers to initiate recovery actions where SARS has abused their powers. Taking the matter to court is the only option available to taxpayers to try to recover administrative costs. This action will however result in additional legal costs that the taxpayer will be responsible for. (Herbert, 2018:71).

The Taxpayer's Adjudicator of the UK has the power to direct the HRMC to compensate an aggrieved taxpayer for incurred costs due to errors and delays resulting from actions by the HRMC. Although the Taxpayer's Adjudicator has no given legal right to order the HRMC to proceed on any recommendation, the HRMC has stated that all the recommendations of the Taxpayer's Adjudicator have been acknowledged (Klopper, 2015:63).

In comparison to the UK, The Tax Ombud can only make recommendations and not force SARS to corrective action. It is therefore recommended that the powers of the Tax Ombud are increased enable the Tax Ombud to force SARS to compensate taxpayers for regulatory costs incurred due to inefficiencies and unjust administrative actions of SARS to ensure that taxpayers are treated justly during audit/verification processes (Klopper, 2015:65).

The Tax Ombud should be empowered to make recommendations to SARS, the provisions should be legislated that set out the conditions in which a taxpayer may attempt to recover administrative expenses from SARS due to inefficiencies and unjust administrative actions. Introduction this into legislation would assist the process to compensate aggrieved taxpayers for SARS's misuse of power and balance out SARS's powers by increasing the rights and remedies available to taxpayers (Herbert, 2018:71). This will align with the authority granted to the UK's Tax Adjudicator.

## **5.7 INDEPENDENCE OF THE TAX OMBUDSMAN**

Currently the Tax Ombud in South Africa is not independent from SARS, due to the Tax Ombud being financially and geographically dependent on SARS, as SARS pays the salaries of the staff and the Tax Ombud shares the same building as SARS. For taxpayers' peace of mind, the offices should be located elsewhere, and not at SARS (Ofori Boateng, 2014:62).

The Ombudsman needs to be independent in order to improve the relationship between SARS and taxpayers. Being independent and through appropriate appointment procedures, funding, location and staffing of the Tax Ombud's office would ensure the proper functioning of the Tax Ombud. Independence would ensure the proper functioning of the Tax Ombud through appropriate appointment procedures, location, funding and staffing of the Tax Ombud's office. Successfully executing the Tax Ombud's mandate would restore the confidence and trust of taxpayer in the tax system (Ofori Boateng, 2014:56,72). It is thus recommended that the Tax Ombud in South Africa become independent from SARS.

## **5.8 CONCLUSION**

The recommendations referred to are to ensure that SARS complies with their obligations as currently endorsed by the "Bill of Rights", PAJA and the TAA by keeping the taxpayers informed of the progress of the audit and stage of completion of the audit and also within the prescribed time frame thereof as referred to in section 42 of the TAA. The recommendations made are there to improve the taxpayer's rights to fair and just treatment by SARS whilst applying section 42 of the TAA.

Taxpayers will be more willing to adhere to their duties if they have a positive attitude towards SARS. The above recommendations are an attempt to improve the interactions between taxpayers and SARS and to increase taxpayer's attitude towards SARS (Herbert, 2018:72).

This study was further aimed to make taxpayers more aware of their administrative rights in their interactions with SARS, specifically in terms of section 42 of the TAA. If taxpayers are aware of their rights and understand their rights, it will enhance taxpayers' ability to challenge SARS when SARS officials have abused their power in administrative dealings with taxpayers (Herbert, 2018:72).

The intention of the research was to determine the taxpayers' right of administrative justice, to be informed of the progress, conclusion and outcome of audits/verifications and to be provided with adequate reasons for proposed adjustments made in the prescribed time frame as set out in section 42 of the TAA. The main objective of this study was successfully addressed and can be concluded that the scope of section 42 of the TAA is not strong enough to protect taxpayers' rights during audit verification processes.

The recommendation that South Africa adapts a legally enforceable "Taxpayer Bill of Rights" would enforce the taxpayers rights which are currently not specifically contained in the "Bill of Rights" in the *Constitution*.

A SARS Service Charter would also compel SARS to apply the correct administrative procedure in dealing with taxpayers. The Charter will be specifically focussed on "SARS services" and not on the general provisions as currently in the "Bill of Rights" of the *Constitution* and PAJA. The taxpayer should receive improved administrative justice treatment from SARS through the SARS Service Charter.

Empowering the Tax Ombud to instruct SARS to comply with decisions made by the Ombudsman would ensure that SARS complies with section 42 of the TAA and that the taxpayer's rights are protected. The Tax Ombud currently may only make recommendations to SARS without instructing SARS to comply with the TAA. This would definitely assist the taxpayers by ensuring that their rights are enforceable and SARS acts according to the administrative procedures as contained in the TAA and more specifically section 42 thereof.

In relation to the recommendation to empower the Tax Ombud to reimburse taxpayers for administrative costs would make SARS in general more aware of the financial costs if SARS contravenes their obligations as outlined in the TAA and also specifically section 42 thereof.

The taxpayer would also be encouraged to oppose SARS in instances where their rights as taxpayer as per section 42 of the TAA have not been respected and their administrative costs will be refunded by SARS on the instruction of the Tax Ombud.

## **5.9 RECOMMENDATIONS FOR FURTHER RESEARCH**

For later study purposes, it is suggested that consideration be provided to specific case law available in the UK and Canada with respect to taxpayers' rights during audit proceedings.

It is also suggested that the comparison of dispute resolution processes currently implemented in South Africa, UK and Canada be taken into account.

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## APPENDIX: DECLARATION OF LANGUAGE EDITING



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### DECLARATION OF POST-EXAMINATION LANGUAGE EDITING

I, Christina Maria Etrechia Terblanche, hereby declare that I edited the thesis  
titled:

**Taxpayers' rights to just administrative action under tax  
audits: A South African perspective**

for **A Matthews** for the purpose of submission as a postgraduate research  
study. Suggestions were indicated in track changes and application was left  
to the author.

Regards,

A handwritten signature in black ink, appearing to read 'CME Terblanche', with a stylized flourish at the end.

CME Terblanche

Cum Laude Language Practitioners (CC)

South African Translators Institute accr nr: 1001066

Full member of the Professional Editors Guild