

# Evaluating the TAA's provisions on the protection of personal information

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Mini-dissertation accepted in partial fulfilment of the requirements for the degree [Master of Commerce in Taxation](#) at the North-West University

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Graduation: April 2024

## **ACKNOWLEDGEMENTS**

First and foremost, I would like to thank God for the wisdom and grace that enabled me to complete this mini-dissertation. You have provided for me at every occasion and guided me throughout this process.

Thank you to my supervisor, Ms Corrie Meiring for your guidance, insight and support. Your advice and encouragement has helped tremendously. I am grateful for the time and effort you have sacrificed in assisting me.

To all my close family members and friends who have supported me, I am thankful for all the love and support you have provided to me during my studies. Thank you for believing in me and encouraging me throughout the whole process and keeping me in your prayers.

To Cillié Swart, thank you for your input and assistance with the language editing of this mini-dissertation.

Last, but not least, I want to thank my wife Talita Coetzee for all the support, encouragement and never ending love you have provided me in completing my studies, you are my rock during difficult times and I am truly thankful for every second you are by my side assisting me.

## **ABSTRACT**

An individual's right to privacy is specifically recognised in Section 14 of *the Constitution of South Africa (1996) (the Constitution)*. South Africa is one of a few countries that explicitly recognise the right to privacy in their constitution. The need for privacy and safeguarding to protect the right to privacy is important for every individual, especially in an era where data is being processed automatically and entities hold substantial amounts of information. The South African Revenue Service (SARS), the only receiver of revenue for the South-African government, holds substantial information about all taxpayers. The Protection of Personal Information Act 4 of 2013 (POPI Act) was introduced to determine safeguards and limitations to the processing of personal information, and if an entity is permitted to process personal information, what safeguards have to be implemented to ensure the information is processed lawfully and also kept secret.

This literature review aimed to answer the research question, which analysed the provisions of the Tax Administration Act 28 of 2011 (TAA) to the requirements of the POPI Act and to determine if these provisions are satisfactory to honour the constitutional right to privacy. This study aims to consider the TAA provisions that address taxpayers' right to protect their private information in terms of the POPI Act and The Bill of Rights and identify possible amendments to the TAA to address these rights. The analysis consisted of comparing the provisions set out in the TAA to the provisions set out in the POPI Act. Based on the analysis of the provisions set out in the TAA and comparing these provisions to the POPI Act, recommendations were proposed through comparison with the Australian legislation.

This study found that the TAA aligns with most of the provisions in the POPI Act to balance the constitutional right to privacy. However, disclosing taxpayer information to other third parties could infringe on two of the taxpayer's constitutional rights depending on the information obtained.

Areas for improvement have also been identified pertaining to protecting taxpayers' right to privacy, possible amendments to the TAA, and suggestions for further studies on this topic. The value this study created was to assist the taxpayer in having peace of mind regarding their sensitive information and that the TAA does adhere to the provisions of the POPI Act, which sole purpose is to give effect to the constitutional right to privacy.

**Keywords:** POPI Act, SARS, Right to privacy, Personal Information of the taxpayer, Tax Administration Act,

## LIST OF ABBREVIATIONS

| ABBREVIATION            | DESCRIPTION   |
|-------------------------|---|
| ATO                     | Australian Tax Office   |
| DTA                     | Double Tax Agreements   |
| FIC                     | Financial Intelligence Centre   |
| Income Tax Act          | Income Tax Act 58 of 1962   |
| NPA                     | National Prosecuting Authority  |
| OECD                    | Organisation for Economic Co-operation and Development  |
| PAIA                    | Promotion of Access to Information Act 2 of 2000  |
| POPI Act                | Protection of Personal Information Act 4 of 2013  |
| SAPD                    | South African Police Department   |
| SARS                    | South African Revenue Service   |
| SARS Act                | South African Revenue Service Act 34 of 1997  |
| SARS Manual             | South African Revenue Service manual on the Promotion of Access to Information Act, 2000 and the Protection of Personal Information Act, 2014 |
| TAA                     | Tax Administration Act 28 of 2011   |
| <i>the Commissioner</i> | The Commissioner of the South African Revenue Service   |
| <i>the Constitution</i> | <i>the Constitution of South Africa (1996)</i>  |

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# CHAPTER 1: INTRODUCTION

## 1.1 Introduction

### 1.1.1 Background to the research area

An individual's right to privacy is specifically known in Section 14 of *the Constitution of South Africa* (1996) (*the Constitution*). South Africa is one of a few countries that explicitly recognise the right to privacy in their constitution (Khamroi & Shrivastava, 2019:116). According to the foreword of the Protection of Personal Information Act 4 of 2013 (POPI Act), everyone has the right to privacy, and the state must protect and promote this right in The Bill of Rights as stated in Chapter 2 of *the Constitution*. Marmor (2015:3) stated that certain people might see the right to privacy as a right that protects any document or information that must be concealed. The term information is defined in the Oxford dictionary as "acts or details about somebody or something" (Oxford university press, 2022). Every South African, whether they be a natural or juristic person, has the right to privacy under Section 14 of *the Constitution*.

The first version of the POPI Act was introduced and signed on 19 November 2013 and the resolution of the POPI Act is to protect the processing of personal information by both public and private bodies. The POPI Act is important for each South African as the act protects the distribution of personal information and aims to prevent the abuse of personal information on both domestic and international levels (Buys, 2018:954). Although the POPI Act consists of 114 sections, only certain sections that mostly deal with the appointment of the information regulator, commenced on 19 November 2013.

South Africa announced the Tax Administration Act 28 of 2011 (TAA) that came into effect on 1 October 2012 (SARS, 2012). According to SARS (2012), the TAA intends to simplify and create better unity in South African tax administration law. The TAA aims to create a single framework that eliminates redundant requirements and simplifies day-to-day administrative provisions. The TAA aims to create a balance between the taxpayers' rights and SARS' reasonable right to access information to perform its duties as the receiver of revenue for the South African government (SARS, 2012).

Chapter 6 of the TAA describes the confidentiality of the information (and all the details pertaining to the information) under the TAA. Section 67 to Section 74 of the TAA describes the general prohibition of disclosure and the guidelines to disclose information to other entities. Chapter 6, Section 70 specifically describes to whom SARS may disclose information about the taxpayer and the position the person must obtain to be authorised to disclose this information.

Not only must SARS collect taxes effectively and efficiently, but it must also adhere to Section 4(2) of the South African Revenue Service Act 34 of 1997 (SARS Act) and perform its enforcement duty in line with the requirements of Section 195 of *the Constitution*, which associates to the essential principles and functions governing public administration (Fritz, 2017:23). Britz (2014:54) concluded that a responsibility of the government is to review and amend tax laws should these laws infringe on human rights. SARS, as the only receiver of revenue for the Republic of South Africa, holds a substantial amount of information from its primary function of collecting national revenue (SARS, 2021:ii).

To address the right to privacy, the South African government introduced two acts to enforce safeguards for the personal information of every South African. These acts are the Promotion of Access to Information Act 2 of 2000 (PAIA), which came into operation on 9 March 2001, and the POPI Act. The purpose of PAIA, as per Section 2, is “to give effect to the constitutional right of access to any information held by the state, as well as information held by another person that is required for the exercise or protection of any right”.

The first issue of the SARS manual on the Promotion of Access to Information Act, 2000, was issued in April 2004. The manual above consists of the procedures for a third party to request any of SARS’ records or information regarding PAIA. SARS amended the manual in August 2014, releasing the fourth edition and renaming it to the SARS Manual (SARS Manual) on The Promotion of Access to Information Act, 2000 and the Protection of Personal Information Act, 2014 (SARS, 2021:ii). The POPI Act set out guidelines for processing personal information legally held by public and private institutions such as SARS. SARS’ main responsibility is to guarantee that the processing of personal information agrees with the procedures set out in the POPI Act. The SARS Manual is the 7th edition, and the manual will be amended as SARS and requesters explore the implications of the TAA and aim to find a balance between the right to information and the right to privacy (SARS, 2021:ii).

The President of South Africa proclaimed the commencement of Sections 2 to 38, Sections 55 to 109, Section 111, and Section 114 of the POPI Act on 1 July 2020 (Department of Justice, 2020:3). Organisations such as SARS had until 1 July 2021 to comply with the POPI Act regulations and had to ensure their policies in terms of the control and processing of private information are compliant as dictated by the POPI Act.

In response to the President’s notice in Government Gazette 43461 of 22 June 2020, SARS amended the manual. The 7th issue was released in October 2021 with guidelines on how SARS plans to secure taxpayers’ private information and who may access this information. Numerous recipients of personal information have been identified by SARS who may access taxpayers’

personal information. SARS (2021:9) defines taxpayer information as records, including tax returns, declarations, bills of entry, financial statements, assessments and financial or other information about taxpayers collected from various sources.

In terms of Chapter 3 of the POPI Act, there are 8 conditions for the lawful processing of personal information by the responsible party, namely:

- Accountability.
- Processing limitation.
- Purpose specification.
- Further processing limitation.
- Information quality.
- Openness.
- Security safeguards.
- Data subject participation.

Openness, as defined by Chapter 3 of the POPI Act, is that the “Responsible party” (in this context, SARS) must process any personal information in the manner that permits the “Data subject” (in this context, the taxpayer) to be informed what is happening to their personal information. However, SARS is exempted from obeying certain conditions as set out in Chapter 3 of the POPI Act if it is for the administration of a Tax Act as per Section 12(2)(d)(ii), Section 15(3)(c)(ii) and Section 18(3)(c)(ii) of the POPI Act. These exemptions are processing limitation, further processing limitation and openness (SARS, 2021:14-15).

Section 17 of the POPI Act defines openness as the data subject must know how their information are processed and the manner in which it is processed by the responsible party, thus SARS. Processing limitation is defined as the Responsible party which is SARS must have a valid motive to process the information and must be processed lawfully and reasonably to not infringe on the privacy of the data subject as per Section 9 of the POPI Act. Further Processing limitation is defined in Section 15 of the POPI Act as the information collected by the responsible party may only be used for the specific reason it was collected.

The right to privacy is a constitutional right, and the POPI Act must guarantee that both private and public organisations protect personal information. In certain circumstances, SARS may be able to process the taxpayer's personal information without adhering to all the conditions set out in Chapter 3 of the POPI Act. SARS is exempt from three conditions, namely “processing limitation”, “further processing limitation”, and “openness” thus, it seems that SARS may access

the information of taxpayers without considering the factor of infringing on the privacy of the taxpayer (SARS, 2021:14-15).

### 1.1.2 Literature review of the topic/research area

Previous research has been done by Brits (2014) and Fritz (2017) to identify if the TAA and SARS adhere to *the Constitution* regarding privacy and enforcement powers of SARS in a constitutional context. Erasmus (2013) raised the question of whether the TAA helps protect the taxpayer's rights. Kamdar (2021) addressed some of the questions raised by the public and clarified issues regarding the right to privacy and SARS' right to information.

Britz (2014:54) concluded that it is a responsibility of the government to assess and amend tax laws should these laws infringe on human rights. The authority awarded to SARS is bound by *the Constitution*, which is the supreme law (Britz, 2014:54). Erasmus (2013) concluded that the TAA had received criticism from various tax professionals that it did not accomplish what was intended. Certain sections of the TAA infringe upon the constitutional rights of taxpayers. In the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service and Another* (2002), the court demonstrated the following: "no matter how indispensable fiscal statutory provisions were for the economic well-being of the country, they were not immune to the discipline of *the Constitution* and had to conform with its normative standards." It was concluded by Britz (2014:53-54) that SARS has, in some cases, ignored the right to be informed that the taxpayer has when their personal information is being exchanged, and this right that has been ignored is not a justifiable limitation. Möller (2016:56) concluded that sometimes the taxpayer is not informed when their information is being exchanged, and in certain cases, the taxpayer is not offered the opportunity to analyse the information being exchanged.

Kamdar (2021:23) stated that according to Section 15(3)(ii) of the POPI Act, The POPI Act does not apply where legislation is imposed concerning the collection of revenue as defined in Section 1 of the SARS Act. The POPI Act, however, requires safeguards to guarantee the confidentiality of the information disclosed to SARS. All Double Tax Agreements (DTA) have provisions on the exchange of information that ensure the information may only be used for the sole purpose of carrying out the provision of international tax treaties (Kamdar, 2021:24). In terms of Section 46 of the TAA, SARS may only request *relevant* information from the taxpayer. Any information requested from a third party must be limited to the records maintained by the party. The information SARS wishes to receive from the taxpayer must be within the field of the administration of a tax Act (Kamdar, 2021:25).

Fritz (2017:334) concluded that the enforcement powers of SARS were unsuccessful in considering different actions that might accomplish a more suitable balance between SARS' obligation to collect revenue and taxpayers' rights. Both SARS and the taxpayer require a give-and-take approach to achieve a better balance.

From the initial literature review performed, a common problem that has been noted is that there seems to be a discrepancy as to what extent SARS has the right to information and when SARS infringes on the right to privacy in its quest to obtain information. Section 3(1) of the TAA stipulates that the authority and responsibility of The Commissioner of South African Revenue Service (the Commissioner) may be carried out by the Commissioner personally or by an officer under the control, direction, or supervision of the Commissioner, thus by the staff of SARS.

It was concluded by van Schalkwyk (2004:176) that there is an administrative relationship between the Commissioner and the taxpayer, and implementing discretionary power establishes an administrative action. The taxpayers' rights must be investigated to ensure a just administrative action in terms of Section 33 of *the Constitution* (Van Schalkwyk, 2004:176). It was concluded by van Schalkwyk (2004:181) that some of the staff members of SARS that might have limited knowledge of tax and the constitutional rights of the public are allowed to exercise the discretionary powers of the Commissioner of SARS. This could raise a concern about the infringement of taxpayers' rights, which could go unnoticed and undetected through the system.

This study aimed to determine whether the guidelines implemented by SARS to protect taxpayers' privacy adhere to the guidelines and conditions set out in Chapter 3 of the POPI Act and to evaluate whether the TAA adheres to the conditions of the POPI Act.

Given that the right to privacy is a constitutional right under Section 14 of *the Constitution* and SARS is a public organisation that should adhere to most of the requirements of the POPI Act, it was valuable to review if the TAA set out certain limitations of SARS concerning the protection of personal information, and how SARS compares to other revenue services of countries in terms of protecting the privacy of its taxpayers.

### **1.1.3 Motivation of topic actuality**

The purpose of the POPI Act is to protect the processing of personal information by both public and private bodies (Buys, 2018:954). Kamdar (2021:23) stated that the POPI Act requires safeguards to be in place on SARS' side to ensure the confidentiality of all information revealed to SARS. From the introduction and previous research stated above, it was noted that various studies had been performed by Britz in 2014, Moller in 2016 and Fritz in 2014, to determine the impact of the POPI Act on the discretionary powers of SARS, as well as the impact of the POPI

Act on the TAA. From the previous studies by Britz in 2014, Moller in 2016 and Fritz in 2014, it indicates that the TAA adheres to certain rights of the taxpayer, but it has been found that the Commissioner and his staff have ignored some rights of the taxpayer, especially the right to privacy at that point in time (Britz, 2014:53-54). In terms of Section 4(a) of the SARS Act, the appointed commissioner may not hold office for an agreed-upon term not exceeding five years. In 2019 a new commissioner was appointed and replaced the previous commissioner in office from 2014 to 2019 (SARS 2019). The risk, therefore, remains that the same problem could happen again.

Two years after Britz's (2014:53-54) conclusion, Möller (2016:56) concluded that the taxpayer is not always informed when their information is being exchanged, and the taxpayer is not always offered the opportunity to analyse the information being exchanged. Möller (2016:56) suggested that legislation be amended to correct the infringement of the taxpayer's right to privacy.

A taxpayer's right to privacy can also be seen as being infringed on when taxpayer information is exchanged across borders. However, this can be justified if sufficient safeguards are built into tax agreements. (Fritz, 2021:432). Fritz (2021:432) suggested that some adjustments must be made to the safeguards while exchanging taxpayer information as the current safeguards are insufficient to justify the infringement of the right to privacy.

Since the POPI Act came into law on 19 November 2013, Brits (2014), Möller (2016), and Fritz (2021) concluded that the right to privacy of the taxpayer can be infringed upon by SARS, thus leaving a gap in the research to identify if any changes to the TAA and SARS Manual are sufficient enough to protect the taxpayers' right to privacy and the SARS' right to information.

Finally, the topic's relevance is supported by the recent commencement of certain sections of the POPI Act and the requirement of organisations that had to be compliant by 1 July 2021. The recent requirement to be compliant supports the argument that this research is relevant and still a field of enquiry.

## **1.2 Problem statement and research question**

The South African Government introduced the POPI Act to set out guidelines on protecting and processing personal information by both public and private bodies. The POPI Act is important for each South African as the act protects the circulation of personal information and aims to prevent the abuse of personal information. The TAA, on the other hand, aims to create a balance between the rights and obligations of both the taxpayer and SARS. However, due to the recentness of the commencement of most provisions of the POPI Act, a bigger question exists as to whether

Chapter 6, specifically Sections 67 to Section 74 of the TAA and the guidelines of the SARS Manual, adhere to the regulations of the POPI Act.

This dissertation aimed to address the following research question: How do Sections 67 to 74 of the TAA compare with the requirements of the POPI Act to protect the private information of the South African taxpayer and does the provisions set out in the SARS manual adhere to the requirements of the POPI Act?

### **1.3 Research objectives**

#### **1.3.1 Main Objective**

The purpose of the research was to analyse whether the stipulations of TAA and guidelines of the SARS manual as aimed at protecting taxpayer information compares to the requirements set out in the POPI Act and if these changes are sufficient to protect the right to privacy as stated in The Bill of Rights.

This study aimed to achieve the following secondary research objectives (SO's) to address the main objective:

#### **1.3.2 Secondary Objectives**

##### **1.3.2.1 Secondary Objective 1**

To consider the guidelines of the SARS Manual and TAA provisions that address taxpayers' right to protect their private information in terms of the POPI Act and The Bill of Rights and identify possible amendments to the TAA to address these rights. (Theoretical research objective).

##### **1.3.2.2 Secondary Objective 2**

To compare the South African TAA to Australian tax laws with regard to the protection of personal information of taxpayers and to assess how the South African TAA compares to the provisions set out by the Australian Tax Office (ATO) with regardsto the protection of personal information of taxpayers in order to determine if there are weaknesses in the South African TAA. (Theoretical research objective).

## **1.4 Research Methodology**

### **1.4.1 Research paradigms**

Guba and Lincoln (1994:105) defined the term paradigm as a cognitive orientation of an individual's point of view and knowledge or a primary set of beliefs that guides the investigation or research. The paradigm describes the philosophical intention of the researcher (Kivunja & Kuyini, 2017:26). According to Kivunja & Kuyini (2017:26), the paradigm identifies how the meaning will be established from the information that will be accumulated. McKerchar (2008:6) stated that positivism and interpretivism are two philosophical research paradigms. Both paradigms have unique characteristics and create research and knowledge.

Positivism is interpreted as the theoretical bearing of natural scientists that is operating with detectable reality, leading to the production of generalisations in society (Alharahsheh & Pius, 2020:41). Positivism, according to Alharahsheh & Pius (2020:41) strictly focuses on the pure information and facts, relating to the importance of the data as a whole, and without being affected by the evaluation or influence of humans.

Interpretivism originated through the evaluation of positivism with a subjective point of view (Alharahsheh & Pius, 2020:41). Alharahsheh and Pius (2020:41) stated that comprehensive variables are the main concern of interpretivism. Social sciences research should differ from natural sciences research. A qualitative methodology is expected to be used by the interpretive researcher (McKerchar, 2008:7). As the research aims to analyse whether the TAA fulfils the requirement of the POPI Act, the interpretivism paradigm is implemented in this study.

#### **1.4.1.1 Ontological assumptions**

This study is based on an ontological assumption that there are numerous realities. The study describes these numerous realities by considering evidence that is diverse and information that is from a variety of sources (Creswell, 2007:20).

#### **1.4.1.2 Epistemological assumptions**

Epistemological assumptions can be associated with the relationship between what is being researched and the researcher (Creswell, 2007:20). The study is formed on the principle that information and data are acquired from reliable sources and concedes that the strength of the data gathered is dependent on the soundness of the sources consulted. Reliable sources were studied to achieve the research objectives taking an objective stance to assess the information to form a conclusion.

This research aims to evaluate the TAA provisions to protect taxpayer's personal information and compare if the provisions in the TAA adhere to the requirements of the POPI Act.. Therefore, this research is done in an interpretivism paradigm (McKerchar, 2008:7).

#### **1.4.2 Research methodologies**

It is challenging to distinguish philosophical differences between the methods. Thus, research methodology is not an exact science (McKerchar, 2008:19). Before beginning this research, a literature review was executed to identify any previous research relevant to the South African POPI Act and TAA to gain knowledge of the research previously done. This research can be done in either a qualitative or quantitative manner.

According to McKerchar (2008:10), a quantitative method is a major tactic of examination consisting of utilising surveys and experiments to prove or disprove a hypothesis. Qualitative research is described as a resource for discovering and understanding the meaning that individuals or groups contribute to a social or human problem. To understand and explore the meaning that groups or individuals contribute to a social or human problem is a description of qualitative research (Creswell, 2009:4). No surveys or experiments were used in this research, thus a qualitative research methodology was performed to determine the research objectives, by gaining better knowledge of the POPI Act and how the TAA must adhere to the provisions set out in the POPI Act. Legislation like the TAA must balance the rights of different parties to adhere to these rights.

#### **1.4.3 Methods**

McKerchar (2008:8) suggests that legal research may be a research paradigm that is not associated with positivism and interpretivism. It is stated by McKercher (2008:18) that non-doctrinal studies do not focus on 'in law' but rather 'about law' and employ the methodologies usually used in other disciplines. In contrast to non-doctrinal studies, doctrinal studies are defined as the traditional approach by the systematic process of discovering, analysing, cataloguing, and uniting judicial decisions (McKerchar, 2008:18).

This research method is to critically evaluate the legislation, namely the TAA of South Africa and the provisions set out in the POPI Act to protect the taxpayers' information vs the right to information. Based on the literature review done in paragraph 1.2, there is a discrepancy as to what extent SARS has the right to information and when is the right to privacy infringed on by

SARS in its quest to obtain information. Therefore, this study aimed to analyse if the TAA adheres to the provisions of the POPI Act.

A member country of the OECD is a country that engage with the experts of the OECD and assist with country reviews and uses the information of the OECD to assist with policy decisions where as a OECD partner are countries that are not members but they contribute to the OECD with policy debates and discussions bringing useful insights while taking part in surveys contributing to the statistical database (OECD, 2022b). Although South-Africa is not a member country they form part of the key partners of the OECD (OECD, 2022b).

After that, a comparison was performed between the TAA and the Australian tax laws to compare how the TAA compares to another country that is a member of the Organisation for Economic Co-operation and Development (OECD). The purpose of the OECD (2022a) is to work with governments, citizens and policymakers to establish international standards on social and economic challenges based on evidence. Thus it will be wise to compare the TAA to an OECD member country's tax law, as the OECD aims to stimulate economic progress and find solutions to social and economic challenges but also Australia has done their own research to assess their tax office in regards to the tax office's obligations. . Bentley (2002:5) stated that the Australian tax Charter emphasised protecting taxpayers' privacy, especially in safeguarding the taxpayers' confidential information. The Australian taxpayers' Charter was formed out of international research that identified that changing the taxpayers' behavioural responses to the revenue authority is the most functional way of improving taxpayer compliance (Bentley, 2002:4).

As seen from Table 1 below, Braithwaite and Reinhart (2019:8) found that 62% of Australians were satisfied with the ATO when respecting their privacy, and this was the 5<sup>th</sup> on the list of the Charter.

**Table 1-1: Total respondents as a percentage of taxpayers who regarded the Tax Office as meeting its obligations under the Taxpayer’s Charter.**

| Taxpayers’ Charter  | Percentage responding ‘most times’ or ‘almost always’ |
|---|---|
| Treating you as honest in your tax affairs                      | 73.9  |
| Accepting your right to get advice from a person of your choice | 72.4  |
| Keeping the information confidential                            | 70.6  |
| Treating you fairly and reasonably                              | 62.4  |
| Respecting your privacy   | 62.0  |
| Giving you access to information they hold about you            | 60.9  |
| Offering you professional service and assistance                | 56.4  |
| Explaining decisions about your tax affairs                     | 53.4  |
| Giving you advice and information                               | 53.0  |
| Giving you the right to a review from outside the Tax Office    | 51.3  |
| Being accountable for what they do                              | 45.5  |
| Helping to minimise your costs in complying with tax laws       | 36.5  |

Note: Unshaded items represent communal obligations, shaded items represent exchange obligations.

**Source: Braithwaite and Reinhart (2019:8)**

Australia, therefore, is an appropriate country to compare to, based on the premise that they have acceptable systems in place to respect the privacy of their taxpayers’ information.

Lastly, this study used the findings from the review of South African and Australian legislation to conclude if the TAA adheres to the POPI Act and make recommendations with regard to the improvement of the South African TAA. As per the literature review, this research aimed to provide additional knowledge to the field. The study strongly relied on the evaluation of legislation, namely the TAA, POPI Act and SARS Act. Furthermore, journal articles, as well as published reports from industry professionals, were used to support the researcher to identify if there are any shortcomings and assist in concluding the study.

**1.5 Limitations**

This study focused on the provisions of the TAA to ensure SARS does not infringe upon the right to privacy of the taxpayer and should SARS deem it necessary to infringe upon the right to privacy that there be necessary safeguards ..

This study was not focused on any system mistakes that may arise when dealing with taxpayer information and their right to privacy. This study did not analyse the Australian tax law for any shortcomings in their law. Lastly, this study was not focused on any review of SARS employees and their capability to ensure that they respect the taxpayer's right to privacy when assisting, handling or processing information.

## **1.6 Ethical considerations**

This study made use of the following data:

- Journals in the NWU library.
- Academic literature, such as Masters dissertations and PhD theses.
- Web site articles.
- Relevant legislation.

All the information used in this research is available in the public domain. There will be no human interaction. Limited ethical considerations are therefore applicable to this study. Ethical clearance was obtained from the North-West University Ethical Committee for this study. This study had minimal risk.

## **1.7 Chapter Overview**

The study was conducted in four chapters to achieve the main objective of the study. The detail of each chapter is as follows:

### **1.7.1 Chapter 1: Introduction**

In chapter 1, the background to the study is discussed, which provides a summary of the study and includes previous research to assist the research question. This chapter motivates the need for the study to be conducted based on prior research and current events.

This chapter provides the problem statement and underlines the primary and secondary objectives this study intends to achieve. Furthermore, this chapter addresses the research methodology that is applied and explains why this specific methodology is used.

### **1.7.2 Chapter 2: The TAA and POPI Act provisions in protecting the right to privacy of the Taxpayer**

This chapter focuses on addressing the secondary research objective as identified in par 1.3.2.1. This chapter shortly defines the purpose of the POPI Act. After that, Sections 66-74 of the TAA

are reviewed to determine if this complies with the requirements set out in the POPI Act. Lastly, the 7<sup>th</sup> edition of the SARS Manual is analysed to determine if the guidelines as proposed by SARS adhere to both the TAA and the POPI Act to protect the taxpayer's right to privacy.

### **1.7.3 Chapter 3: International comparison of the right to privacy**

Chapter 3 compares the right to privacy relating to taxpayer information in Australia with South Africa to determine how South Africa's legislation compares with regard to effectiveness and identifies if there are any gaps in the legislation. This chapter addresses the secondary research objective as identified in par 1.3.2.2.

### **1.7.4 Chapter 4: Conclusion and recommendations**

In Chapter 4, a summary of the findings of the study is provided, concluding both the primary objectives as well as secondary objective 1 and secondary objective 2. The limitations of the study are stated in this chapter. Finally, a recommendation for future studies follows based on the comparison between the TAA and POPI Act, as concluded in chapter 4.

## **CHAPTER 2: THE TAA AND POPI ACT PROVISIONS IN PROTECTING THE RIGHT TO PRIVACY OF THE TAXPAYER**

### **2.1 Introduction**

This chapter provides information that assists in understanding the laws and rules protecting the taxpayer's privacy. It also lays a foundation for analysing the safeguards implemented by SARS to protect the privacy of the taxpayer. This information is found in Chapters 5 and 6 of the TAA. This is done to address the first secondary research objective as identified in par. 1.3.2.1. that set out to consider the TAA provisions that address taxpayers' right to protect their private information in terms of the POPI Act and The Bill of Rights and identify possible amendments to the TAA to address these rights.

Four aspects are considered to achieve the research objective as identified in 1.3.2.1. The first aspect is to assess the gathering powers of SARS to obtain taxpayer information as per par. 2.3. Secondly, the definition of SARS' confidential information as defined in the TAA will be considered in par 2.4. The third aspect being considered is the definition of taxpayer information as defined in the TAA in par 2.4. Lastly, the procedures of SARS to ensure that taxpayer information is protected, are considered in par 2.4.5.

Firstly, after creating the background, the purpose of the POPI Act will be explored in par 2.1, followed by the purpose of the TAA in par 2.2. After that, an in-depth review of Chapter 5 and Chapter 6 of the TAA will follow to assess the SARS provisions regarding taxpayer information. Lastly, the SARS procedures to protect taxpayer information as stipulated in the SARS Manual will be analysed.

### **2.1 The purpose of the POPI Act**

The first version of the South African POPI Act was introduced and signed on 19 November 2013. Although the POPI Act consists of 114 sections, only the sections dealing with the appointment of the information regulator commenced on 19 November 2013. The President of South Africa proclaimed the commencement of Sections 2 to 38, Sections 55 to 109, Section 111, and Section 114 of the POPI Act to be commenced on 1 July 2020 (Department of Justice, 2020:3). Section 8 to Section 35 of the POPI Act states the conditions for lawful processing of taxpayers' personal information.

According to Section 2 of the POPI Act, the purpose of the POPI Act is to protect the processing of personal information by both public and private bodies (Buys, 2018:954). The POPI Act

safeguards the taxpayer's personal information when processed by a responsible party by giving effect to the constitutional right to privacy. The constitutional right to privacy is subject to justifiable limitations that are directed at the balancing of the right to privacy to the right against any other rights, specifically the right of access to information, and secondly by protecting vital interests, such as the free flow of information within the Republic and across international borders.

According to Section 2 of the POPI Act, the purpose of the POPI Act is to establish conditions, in accordance with international standards, that regulate the manner in which personal information may be processed and prescribe the minimum threshold requirements for the lawful processing of personal information. The POPI Act provides persons with rights and remedies to protect their personal information from processing that is not in accordance with the POPI Act.

Section 1 of the POPI Act briefly defines processing as the collecting, storing, transmitting and destroying of information.

Maleka (2020:69) held that the POPI Act regulates four aspects, namely, the constitutional right to privacy, the remedies available for a taxpayer to protect their information being processed that is not in accordance with the POPI act, voluntary and mandatory measures, including the undertaking of an information regulator and how taxpayer information may be processed.

From the above, it can be seen that the POPI Act aims to regulate organisations such as SARS to have sufficient safeguards in place. Legislation like the TAA must balance the rights of different parties to adhere to the right to privacy as per the provisions set out in the POPI Act.

The purpose of the TAA is considered next.

## **2.2 The TAA**

South Africa announced the TAA that came into effect on 1 October 2012 (SARS, 2012). The main objective of the TAA was to combine different administrative rules and regulations into one law (Matthews, 2021:17). The TAA aims to create a single framework that eliminates redundant requirements and simplifies day-to-day administrative provisions and create a balance between the taxpayers' rights and SARS' reasonable right to access information to perform its duties as the receiver of revenue for the South African government (SARS, 2012).

Maleka (2020:18) stated that the TAA allows SARS officials to collect taxpayer information using the following methods:

- Requesting the information from the taxpayer or responsible parties.
- Gathering of relevant material during an interview at a SARS office.

- A field audit or criminal investigation at the premises of a person.
- Formal enquiry before a presiding officer.
- Search and seizure.

Chapter 5 of the TAA describes the gathering powers and procedures of SARS regarding gathering information (SARS, 2018:24). The information-gathering powers of SARS were increased by the TAA and also simultaneously increased the taxpayer's rights, making them more explicit about equalising the newly increased gathering powers of SARS (SARS, 2018:24).

Chapter 6 of the TAA describes the confidentiality of the information (and all the details pertaining to the information) under the TAA. Section 67 to Section 74 of the TAA describes the general prohibition of disclosure and the guidelines to disclose information to other entities.

These chapters of the TAA are considered next in detail to determine if the regulations comply with the POPI Act.

### **2.3 Chapter 5 of the TAA: Gathering powers and procedures of SARS**

A taxpayer's personal information may be collected for a specifically defined and lawful purpose related to the administration of a tax Act. The necessary precautions must be taken to ensure the taxpayer is aware of the purpose of collecting information as per Section 13 of the POPI Act.

As per Section 11(2)(a) of the POPI Act, the personal information of the data subject, may only be collected if a taxpayer is a competent person and SARS bears the burden of proof of the taxpayer's consent. A Taxpayer is the data subject when their information are being processed by SARS.

The POPI Act in Section 1 defines a competent person as any individual who can lawfully give consent to any action being taken with regard to any matter of a child as a child is any individual under 18 years of age who is not legally competent without the support of a legally competent person to decide on behalf of the child. The POPI Act distinguishes between children's information and the fact that the person or subject is aware their information is being processed and legally competent to understand the processing of information.

According to Section 12(2)(d)(iii) of the POPI Act, information may be obtained from other sources should it be necessary for the conduct of proceedings in any court or tribunal that have been commenced.

Section 12(1) of the POPI Act states that any information must be gathered directly from the taxpayer except for the following exemptions from Section 12(2) of the POPI Act:

- The information is a public record or was made public by the taxpayer.
- The taxpayer is a competent person and has given consent to collecting the information from a third party.
- The collection from a third party will not prejudice the taxpayer's interest.
- Collection from a third party is necessary for revenue collection as defined in Section 1 of the SARS Act.
- Collection from a third party is necessary for the interest of national security or for the conduct of any court proceeding that has commenced or reasonably contemplated.

According to Section 40 of the TAA, any person, both natural and juristic, can be chosen for inspection, verification, or audit by SARS based on any contemplation relevant to the bona fide administration of a tax Act, including on a random or risk assessment basis.

Maleka (2020:128) stated that the Commissioner must notify the taxpayer should he use or intend to use his information-gathering powers to request personal information from the taxpayer or a third party, such as the taxpayer's accountant, and reasonable time must be given to the taxpayer to prepare for the request from the Commissioner Section 74A of the Income Tax Act 58 of 1962 (Income Tax Act). There is an obligation placed on SARS by Section 42(1) of the TAA to keep the taxpayer informed of the stage of completion of the audit (Ouderajh, 2019:20). As per Section 74A of the Income Tax Act the Commissioner or any SARS official may request information from a taxpayer or any third party for the sole purpose of administration of any tax Act. SARS must also inform the taxpayer within 21 business days upon completion of an audit or verification and provide the taxpayer with a conclusion letter of the audit as per Section 42 of the TAA.

The selection process upon which a taxpayer may be selected for an inspection, verification or audit is determined on either a random or a risk assessment basis. The basis for criminal investigations is initiated by any sign of a serious tax offence under any of the tax Acts or common law offences, e.g. organised crime (SARS, 2018:25).

The authority to select a taxpayer for inspection, verification or audit is enhanced by Section 68(1)(k) of the TAA, which stipulates that should the selection procedures and methods used by SARS become public information, it could jeopardise the effectiveness thereof. Thus taxpayers are not legally authorised to the motive why they were selected for inspection, verification or audit, as the selection procedures and methods used by SARS are confidential information (Ouderajh, 2019:19).

A senior SARS official may allow another SARS official to consent in writing to conduct a field audit or criminal investigation. Written permission must be provided by SARS officials when they exercise their power or duty under a tax Act as per Section 41(1) & Section 41(2) of the TAA. The taxpayer is thus protected through the fact that written authorisation must be provided as per Section 41 of the TAA. A SARS official may manage a field audit at the premises of the taxpayer after giving 10 business days' notice prior to the visit, and the taxpayer must ensure all relevant information as per the SARS notice must be made available to enable the SARS official to conduct the field audit as stated in Section 48(1) of the TAA).

In accordance with the law, a taxpayer may refuse to allow the audit or investigation to proceed if a SARS official fails to exhibit their written authority to perform the audit. The taxpayer may refuse until the SARS official shows that this authority exists. Not all SARS officials may regulate audits as these powers are only awarded to certain officials and may only be implemented by duly authorised officials. A SARS official must exhibit their authority to perform these investigations (SARS, 2018). In addition to the SARS identity card, a SARS official permitted to perform investigations does not need a specified authorisation for each matter audited or investigated. However, there is a validity period that the SARS official has to conduct audits or criminal investigations (SARS, 2018:25).

According to Section 57 of the TAA, a taxpayer may not withhold any information from SARS by refusing to answer a question during an inquiry, even if the information could incriminate the taxpayer. Any incriminating evidence gathered under a Section 45 inspection at business premises without prior notice, is inadmissible in criminal proceedings against the person providing the information unless it relates to taking an oath or making a solemn declaration. Incriminating evidence is also admissible should it be found that the taxpayer provided false evidence or made a false statement; or if the taxpayer failed to answer any questions to their full potential if the question was lawfully put to the person.

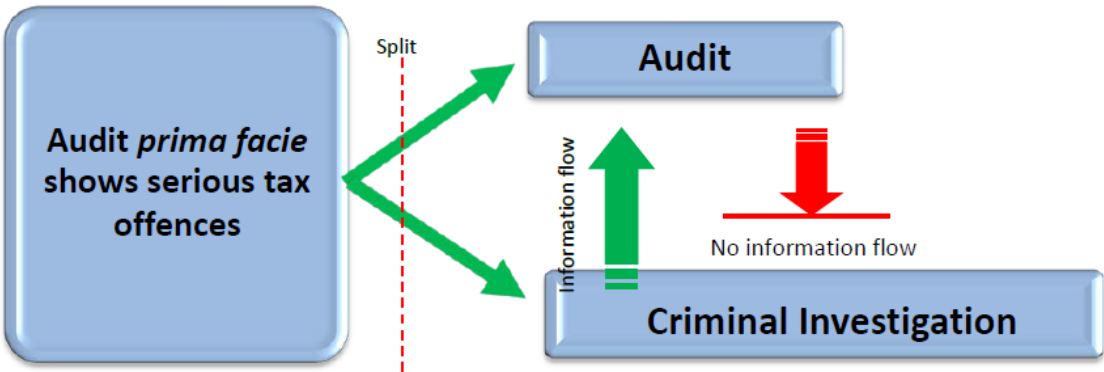
Ouderajh (2019:60) concluded that the provisions that have been enhanced regarding the gathering powers of SARS might infringe on the taxpayers' right to remain silent, the right to privacy and the right against self-incrimination as the taxpayers are compelled to disclose all relevant material, no matter if the information could be incriminating in nature. Taxpayers are forced to disclose information to SARS and satisfy their demand for information to avoid criminal repercussions for not complying with SARS' demands for information and relevant material (Ouderajh, 2019:60).

A tax offence is defined in Section 1 of the TAA as any offence regarding a tax Act involving fraudulent activities on SARS, or SARS official regarding the administration of a tax Act of any theft of monies due or paid to SARS.

Should a major tax offence appear committed by a taxpayer while being audited, a SARS auditor must disclose the matter to a senior SARS official responsible for criminal investigations, as in Section 43 of the TAA. Although an audit may continue when it appears that the major tax offence has been committed, any data gathered from the taxpayer under a Chapter 5 audit after referral to a SARS senior for criminal investigation is permissible in a criminal prosecution unless ordered by the court and SARS decides to further pursue the criminal proceeding. Only then may the relevant material be admissible for the civil and criminal proceedings that may follow (Ouderajh, 2019:21). Documents may be discovered by SARS during an investigation that could incriminate a taxpayer, and any document discovered may be used in a criminal proceeding, unless a competent court directs otherwise (Moosa, 2017:422).

This can be illustrated as follows:

**Figure 2-1: Illustration of flow of information when a serious tax offence has occurred**



Source: SARS (2018:27)

When a criminal investigation is being carried out, the SARS official must respect the taxpayer’s constitutional rights that an accused taxpayer has in a criminal investigation. The following rights of a suspect are protected as per Section 35 of *the Constitution*:

- The right to remain silent.

- The right to be informed promptly of the right to remain silent and the consequences of not remaining silent.
- The right not to be compelled to make any confession or admission that could be used in evidence against the suspect during a criminal trial.
- The right of the suspect to choose and be represented by a legal practitioner at his or her own expense, at least until arrest.

Section 45 of the TAA states that an inspection of premises may only be carried out if a SARS official has reason to believe a trading enterprise is being carried out at the establishment, e.g. signs advertising the business at the entrance, people walking in and out of the place suspected of being used for trade or third party information. However, the investigation may only be carried out for purposes of the administration of a tax Act. Although a SARS official may arrive without former notice, Section 45 of the TAA states that the inspection may only be done to establish the identification of the individual residing on the premises if he is registered for tax in accordance with the requirements of the law and whether accurate records are being kept as required in Sections 29 and 30 of the TAA. A SARS official may enter any premises of a dwelling used for trade, but they may not, without the consent of the inhabitant, enter a dwelling, house or domestic premises (Ouderajh, 2019:22).

If a senior SARS official believes, based on rational grounds, that the applicable material included in a warrant is at an undisclosed location and the relevant material is at risk of being removed or destroyed by the taxpayer, then a SARS official may enter and search the premises of the taxpayer as per Section 62(1) of the TAA. Section 63(1) of the TAA allows a SARS official to enter and search any property not listed in the warrant, if a warrant to search the property not listed cannot be attained in a timeous manner, to avoid the elimination of the suspected material, and the postponement in gaining the additional warrant would hinder the purpose of the search and seizure

Van Wyk (2019:28) concluded that any SARS official must consider the affected taxpayer's right to privacy, dignity, security and other constitutional rights while exercising their powers. A person's right not to have their home or property searched or belongings seized is embodied in Section 14 of *the Constitution*.

In the case of *Deutschmann NO and Another; Shelton v Commissioner for the South African Revenue Service* (2000), the courts held that the notion of privacy does not extend to the activities of carrying on a trade of a business. The court also held that if a warrant does comply with the requirements of Section 74D(4)(d) of the Income Tax Act and if the warrants are specific, the courts will side with SARS if the conditions are clearly met. The taxpayers in the case of

*Deutschmann NO and Another; Shelton v Commissioner for the South African Revenue Service* (2000) did not adequately research their rights in terms of the Constitution; thus, the case did not question the constitutionality of section 74D of the Income Tax Act (Van Schalkwyk, 2004:190).

The above case could give the impression that SARS has the right to obtain a warrant as they deem fit, and the taxpayer has no power to object to the warrant and be successful. However, the case *Haynes v Commissioner for Inland Revenue* (2000) demonstrates that the taxpayer succeeded in its assistance for help from the court when it was determined that SARS could not provide acceptable reasons why Section 74A and Section 74B of the Income Tax Act had not been implemented before applying for a warrant.

Matthews (2021:35) concluded that in some circumstances, SARS strays from its obligations and taxpayers sometimes have to enforce their own rights to ensure SARS officials comply with their obligations. It was further concluded by Matthews (2021:35) that Section 42 of the TAA should be changed to lawfully compel SARS to apply, without any exceptions to the regulations of Section 42, thus it should not be necessary for the taxpayer to revert to court cases to implement Section 42 on SARS.

Van Schalkwyk (2004:191) concluded that if a taxpayer wants to dispute a warrant, the taxpayer must prove a violation by SARS with other remedies to collect information and prove that the warrant does not constitute a justifiable limitation of the right to privacy.

This respects the taxpayers' right to privacy to provide the information willingly to SARS and not force SARS to acquire the documents following alternative methods.

Sections 11 and 12 of the POPI Act set out guidelines for collecting taxpayer information and when a taxpayer's information may be processed. This can assist in protecting the taxpayer's rights and set out guidelines for the TAA and SARS when gathering information from the taxpayer. Although Section 12(2)(d)(ii) states taxpayer information may be collected from third parties to comply with law enforcement regarding the gathering of revenue as defined in Section 1 of the SARS Act, there are still certain limitations to the gathering powers of SARS to protect the taxpayers' right to privacy.

From the above, it can be concluded that the gathering powers of SARS are comprehensive to obtain relevant material, although there are limitations to the powers of SARS and that SARS may only use their gathering powers to obtain information regarding the administration of a tax Act. Furthermore, the private dwelling of taxpayers is off-limits to SARS officials. The POPI Act states that personal information must be collected directly from the taxpayer, but should a taxpayer not provide the information to SARS willingly, SARS has the authority to gather the information from

other parties. SARS have, in some cases, deviated from the guidelines of the TAA and pursued more drastic measures to obtain taxpayer information rather than following the TAA before addressing the courts.

Sections 11 and 12 of the POPI Act set out guidelines for collecting taxpayer information, allowing SARS to gather information as per Chapter 5 of the TAA. The POPI Act with the TAA allows for gathering taxpayer information from the taxpayers and third parties, as long as the information is necessary to collect revenue. Thus Chapter 5 of the TAA complies with the POPI Act.

With SARS' extensive gathering powers to obtain information, SARS holds a substantial amount of information from its primary function of collecting national revenue, which poses a risk that the taxpayers' rights could be infringed upon with the disclosure of taxpayer information to other parties.

The disclosure of taxpayer information is considered next.

## **2.4 Chapter 6 of the TAA: Confidentiality of taxpayer information**

### **2.4.1 Definition of information**

SARS must ensure that reasonable steps are taken to guarantee that the taxpayer information is accurate, complete, and not misleading and that the records are up to date. SARS must ensure the information is used for the purpose it is collected for as per Section 16 of the POPI Act.

Personal information, according to the POPI Act, is information relating to an identifiable living natural person and existing juristic person and includes, but is not limited to, the following:

- Information about age, marital status, physical or mental health, disability, language, religion and birth.
- Information relating to the person's medical, financial, educational, criminal and employment history.
- Information about the e-mail address, physical address, telephone number, online identifier and identifying number.
- The name of the taxpayer.
- Information about race, gender, sex, pregnancy, ethical or social origin, colour, and sexual orientation.
- Biometric information.
- Personal opinions, views or preferences of the person.

The TAA distinguishes between taxpayer information and SARS confidential information.

According to Chapter 6, Section 68 of the TAA, SARS confidential information means any information that applies to the administration of a tax Act, e.g. any internal policy documents that consist of confidential information, legal opinions and memorandums. SARS information includes, but is not limited to, the following:

- Personal information about a former and current SARS official, both deceased and alive.
- Information subject to legal professional privilege vested in SARS.
- Information supplied in confidence by a third party to SARS.
- Information supplied in confidence by or on behalf of another state or an international organisation.
- Information related to investigations and prosecutions is described in Section 39 of PAIA.

According to Chapter 6 Section 68(2) of the TAA, any SARS official, current or former, must conceal any confidential information from anyone who is not a SARS official and may also not reveal any confidential information to an unauthorised SARS official. SARS officials must make the necessary safeguards that might be obligated by the Commissioner to avoid any person who is not authorised from gaining access to the information.

SARS (2021:9) defines taxpayer information as records, including tax returns, declarations, bills of entry, financial statements, assessments and financial or other information about taxpayers collected from numerous sources.

The definition of relevant material is any information, document or things that, in the opinion of SARS as per is foreseeably significant for the administration of a tax Act as per Tax Administration Laws Amendment Act 44 of 2014. Mayezana (2019:20) concluded that SARS can determine what constitutes “relevant material” and it is not at the taxpayers’ discretion what constitutes as information is relevant.

The reason for the distinction between taxpayer information, to which the right to privacy and sterner disclosure rules applies, and SARS confidential information, to which less strict disclosure rules apply but is still confidential information, is to separate between the two terms for all parties to clearly distinguish between the two definitions. (SARS, 2018:35).

In conclusion, the POPI Act has a broad definition of information, and similarly, the TAA allows SARS to gather different information from various sources. SARS is in the position of determining what constitutes relevant material, as long as it is for the administration of a tax Act.

### **2.4.2 Disclosure of SARS confidential information**

Any SARS official, current or former, may disclose SARS confidential information if it is public information or the Commissioner authorises it. Disclosure from a SARS official is permitted if it is authorised under any other Act which specifically provides for the disclosure of the information despite the provisions in Chapter 6 of the TAA or required by order of a High Court. Access to information has also been allowed to disclose the information regarding PAIA (Chapter 6 Section 68(3) of the TAA).

It was held in the case of *Commissioner for the South African Revenue Service v Julian Brown* (2016) that the disclosure of SARS confidential information is protected in terms of Section 86 of the PAIA and that the taxpayer does not have the right to access this information. It was further held that SARS does not have to disclose why Mr Brown was selected for audit or the internal document of SARS as this is SARS confidential information.

Mayezana (2019:61) stated that SARS does not willingly reveal the information of the third-party sources that provided the information in confidence to SARS, and this could be a difficult process for the taxpayer to obtain third-party information from SARS.

In conclusion, the TAA specifies what constitutes SARS confidential information and under which conditions SARS confidential information may be disclosed. Although SARS states that less strict disclosure rules apply to SARS confidential information, there are limited reasons for SARS to disclose this information, and only the Commissioner or order of the High Court may disclose SARS confidential information.

### **2.4.3 Disclosure of taxpayer information to third parties**

Section 20 of the POPI Act states that anyone processing personal information on behalf of SARS. thus, SARS officials and contractors of SARS may only process the information they are authorised to and treat all personal information that comes to their knowledge as confidential and may only reveal the information if it is required by law or in the course of the proper performance of their duties.

According to SARS (2018:35), the taxpayer has a right to be assured that any information provided by the taxpayer or supplied about them from another party voluntarily or to oblige with any of the tax act should be treated with strict confidence and will only be used for tax purposes and none of the information will be disclosed to third parties.

Section 6 of the POPI Act allows SARS to distribute taxpayer information to any department of state, exercising a power or performing a duty in terms of *the Constitution* which involves national security, including activities such as the financing of terrorists and public safety.

The motive behind South Africa's public policy that embraces the secrecy provisions of taxpayer information is to motivate taxpayers to register and fully disclose their income (SARS, 2018:35).

It is a statutory offence for any SARS official or individual contracted by SARS who fails to take an oath of secrecy, as all SARS officials and individuals contracted by SARS are required to take an oath of secrecy as required in Section 67 of the TAA. Any SARS official, current or former, including persons contracted by SARS, may not disclose any taxpayer information to any party who is not authorised to provide the information, as it is the general duty of the SARS official to preserve the secrecy of the taxpayer information as per Section 69 of the TAA.

The TAA requires an oath or solemn declaration to be taken by all SARS officials, current or former, including persons contracted by SARS, and this oath must be done before a magistrate, commissioner of oaths or justice of the peace as per Section 67(2) of the TAA.

Section 69 of the TAA was amended on 22 October 2015 so that taxpayer information obtained by a SARS official during their performance of duties under a tax Act may be disclosed by that official for the administration of customs legislation (National Treasury, 2015:50).

It is acceptable, both in South Africa and internationally, that exemptions to the responsibility to protect taxpayer information can be justified because information obtained by a revenue authority can be crucial to other departments of government, e.g. South African Police Department (SAPD) and Financial Intelligence Centre (FIC) in performing their purposes properly, this is specifically in the context of law enforcement (SARS, 2018:35).

Section 69(8) of the TAA allows the Commissioner to disclose a taxpayer's name and reference number. The Commissioner is also allowed to disclose a list of the following funds:

- Pension funds.
- Pension preservation funds.
- Provident funds.
- Provident preservation funds.
- Retirement annuity funds as defined in Section 1(1) of the Income Tax Act.
- Public benefit organisations approved for the purposes of Sections 18A and 30 of the Income Tax Act.

The Commissioner may further anonymously disclose a registered tax practitioner's name, registration number, and taxpayer information as per Section 69(8) of the TAA to enable a taxpayer to verify a registered tax practitioner.

Ouderajh (2019:29) stated that professionals implement confidentiality of information to ensure that their information is secure, protected and kept private and is a vital concept to anyone entrusting a third party with their confidential information. The provisions set out in Chapter 6 of the TAA are not absolute, and although these provisions' purpose is to protect taxpayers' confidential information, the taxpayer can be left vulnerable to criminal prosecution (Ouderajh, 2019:29).

From the above, it can be concluded that SARS is allowed to disclose taxpayer information to third parties. The POPI Act allows for the disclosure of information but only if it is required by law or for the benefit of public safety. The powers awarded to the Commissioner to disclose a list of pension funds, provident funds, and retirement funds do not constitute public safety but have public benefit as taxpayers are informed of allowed public benefit organisations and other funds that could assist them in tax planning. However, safeguards should be in place to ensure that the information being disclosed is allowed. This is considered in paragraph 2.4.5.

#### **2.4.3.1 Disclosure of taxpayer information by court order**

According to Section 12(2)(d)(iii) of the POPI Act, taxpayer information may be obtained from other sources should it be necessary for the proceedings of any court case that will be initiated or that have been commenced.

Section 106(2)(a)(ii) of the POPI Act allows for a responsible party to disclose taxpayer numbers if required or authorised by law or in terms of a court order, and should SARS be charged with an offence of unlawful disclosure of taxpayer information, this will be a valid defence.

The disclosure provisions as set out in the TAA can be justified where concerns about individuals' privacy are outweighed by the public benefit obtained from the publishing of relevant information that is in accordance with the law (SARS, 2018:35). A SARS official may disclose taxpayer information and abandon their duty to conceal the confidentiality of the information by order of a High Court. This authority is, however, restricted to the High Court to safeguard better protection of taxpayer information as stated in Section 69(2)(c) of the TAA.

Heydenrych (2020:42) stated that there are exceptions to the general rule to protect taxpayer information in Section 69 of the TAA when a High Court of South Africa orders the information or if another Act clearly requires the disclosure of the information.

A SARS official may also disclose taxpayer information, despite the provision of Section 69 of the TAA, if any other Act clearly requires the disclosure of the information, e.g.:

- Prevention of Organised Crime Act 121 of 1998.
- Financial Intelligence Centre Act 38 of 2001.
- Drugs and Drug Trafficking Act 140 of 1992.

Section 69(5) of the TAA has safeguards for the taxpayer that regulates the High Court may not grant the order unless pleased that the information cannot be attained elsewhere and is central to the case, the primary instruments for procuring evidence under an Act or rule of the court will produce, or has not produced, any outcomes and the information does not constitute biometric information.

The responsibility to preserve the secrecy of taxpayer information does not forbid a current or former SARS official from disclosing taxpayer information should the information be available to the public (Heydenrych, 2020:42). The disclosure of taxpayers' information was increased when SARS was awarded the power to respond to press reports, a right that did not exist previously (Ouderajh, 2019:31).

The TAA codified most requirements that should be represented before a court will instruct the disclosure of taxpayer information to third parties. Thus, the protection of taxpayer information is further strengthened by case law and strict requirements under the TAA (SARS, 2018:35).

In the case *Ferucci & 13 Others v Commissioner for the South African Revenue Service and Another* (2002), the court ruled in favour of the taxpayer where it appeared that SARS tried to shift the blame to the taxpayer by making unfounded allegations to support its own cause. The courts considered the requirements to be met when the prosecuting authorities sought authorisation for the electronic interception of personal communications and found that SARS did not use the less dramatic remedies available. Goldswain (2017:81) held that the decision made in *Feruci and others vs C: SARS and another* (2002) was in line with the fundamental principles of *the Constitution* and should be used as a benchmark when SARS appoints third parties to collect information on its behalf.

In the case *Public Protector v Commissioner for the South African Revenue Service and Others* (2021), the court had to decide whether the power to force a person to attend court under the Public Protector Act 23 of 1994 outweighed SARS' obligation to maintain the secrecy of taxpayer information. The Public Protector insisted that the Commissioner appear before the public protector and disclose a taxpayer's information. The Commissioner held that Section 69(1) of the TAA provides the Commissioner to withhold taxpayer information. The Public Protector was

unsuccessful in obtaining the taxpayer records from the Commissioner as the courts held that should it order the Commissioner to disclose taxpayer information to the public protector, it could have the effect that Section 69(1) of the TAA be as good as non-existent.

Palmer (2021) concluded that the cornerstone of any tax system is to keep the taxpayers' information secure and that taxpayers will be able to trust SARS and be at ease when disclosing their information so that it will not be made public. Palmer (2021) further stated that taxpayer information should only be disclosed for the narrow exceptions of the TAA.

The POPI Act does state that taxpayer information may be processed for any court proceedings, but it does have to be a justifiable limitation as per Section 36 of *the Constitution*.

As seen above, SARS and the TAA are allowed to disclose taxpayer information should a High Court decide on it. Both the taxpayer and SARS can approach the Court to assist them in keeping taxpayer information confidential should they believe that the information should be kept private and not be disclosed. Giving taxpayers peace of mind that their information will be kept safe from the public, will encourage them to voluntarily disclose their information.

From the case *Public Protector v Commissioner for the South African Revenue Service and Others* (2021), it seems that SARS is also serious in its obligation to protect taxpayer information. If the Commissioner believes taxpayer information is of such a nature that it should not be public information, the Commission will appeal against a request for information and comply with SARS' obligation to ensure taxpayer information is kept secret.

Therefore, the POPI Act allows for the disclosure of information by any court order, but the TAA amplifies this provision and allows the disclosure order only by order of the High Court to guarantee better protection of taxpayer information.

#### **2.4.3.2 Disclosure of taxpayer information to other departments**

Section 6 of the POPI Act also allows SARS to share taxpayer information to prevent and detect illegal events and combat money laundering activities or to investigate any offences. This allows SARS to share information with the FIC and other government entities to assist them in law enforcement.

Section 33 of the POPI Act allows the processing and disclosure of a taxpayers' personal information with specific regard to criminal behaviour if the processing is carried out by any government body that is charged by law with applying criminal law or by any responsible party who has attained that information in accordance with the law.

A senior SARS official may reveal certain information if it is required to conduct certain legislative functions to organs of state, institutions and employers. SARS may only unveil the information if it is deemed necessary to exercise a power or perform a supervisory function as required by law and the entity requesting the information must be entitled to the information that SARS must disclose. (SARS, 2018:37).

Section 70 of the TAA authorises the disclosure of taxpayer information to the Financial Service Board, South African Reserve Bank, FIC and National Credit Regulator, and these entities also share information with SARS to protect the public against financial manipulation through various schemes such as Ponzi, investment and pyramid schemes (SARS, 2018:37).

Mayezana (2019:64) stated that any information obtained by SARS through a lifestyle questionnaire that the taxpayer supplied might not be revealed by SARS unless disclosed to the SAPD or National Prosecuting Authority (NPA) for the evidencing of a tax offence as a witness in a civil or criminal proceeding or should it be necessary to assist an individual to provide the information as required by SARS.

Fritz (2021:432) concluded that the POPI Act's stricter standards must take preference over any international tax agreement that allows SARS to exchange taxpayer information abroad and that taxpayers must be informed when their information will be exchanged. Ouderajh (2019:36) raised the concern that the extent to which SARS is obligated to assist other departments, as indicated on their website, could cause the taxpayers' right to privacy and self-incrimination to be in jeopardy and that these rights above must outweigh the purpose for which the breach is caused. The need for revenue collection and maximisation thereof must not be at the cost of infringing a taxpayers' constitutional right as SARS is obligated to adhere to Section 195 of *the Constitution* (Ouderajh, 2019:36). The entity must be entitled to the information as required by law and only the name and taxpayer reference number may be disclosed. Any organ of the state must obey Section 195 of *the Constitution* and respect the right to privacy.

It is essential to organs of state, SARS and other entities that the basic information relating to the taxpayer is accurate. The TAA in Section 70 states that SARS may disclose information to other entities, such as an organ of the state or any institution listed in a regulation provided by the minister, that sometimes includes private institutes to enable SARS to verify the correctness and accuracy of the information. Any identifying number, contact number, physical and/or postal address, employer's name, address and contact details may also be disclosed as stated by Section 70(4) of the TAA.

Section 71(1) of the TAA states that should a judge order for disclosure of information that could reveal evidence of any offence other than a tax offence, a senior SARS official must adhere to the ruling made by a court and disclose the information even if it appears any offence has been or could possibly be committed or that it may be relevant to the investigation or prosecution of the offence or of an imminent and serious public safety or environmental risk. Specified types of significant offences and the disclosure of the information regarding the offence can be applied for using an “ex parte” court application by a senior SARS official, the SAPD or the NPA.

Möller (2016:18) argued that if a judge approves the disclosure of confidential taxpayer information to the SAPD and NPA while in the judges chamber that does not relate to a tax offence, a balance is struck between the administration of tax legislation and the taxpayers’ right to privacy as the judge only approves the disclosure of confidential taxpayer information in secret.

Ouderajh (2019:30) held that the disclosure of information to the SAPD or other bodies is a breach of the taxpayers’ constitutional right under Section 14 of *the Constitution* and although the right is limited in terms of Section 36 of *the Constitution*, the release of confidential information that is used to investigate the taxpayer could be seen as an infringement of the right to privacy and a further breach of the right to self-incrimination.

Before the changes in the TAA, if the NPA or SAPD required information to be disclosed and had cause to believe that SARS possessed the information, neither the SAPD nor NPA could initiate a court application as the powers were only awarded to SARS. The limitation that only SARS could initiate the application was not acceptable to the SAPD or the NPA. Under the new law, as the application is in the interests of one side only or of an interested outside party, no notice needs to be given to the taxpayer, but should an application be initiated by SAPD or NPA, SARS should be given at least 10 business days’ notice. However, SARS may object to the application if the disclosure of the information would extremely harm a civil or criminal tax investigation or other enforcement of a tax Act (SARS, 2018:38).

Thus, other departments are entitled to certain taxpayers’ information as held by SARS, but safeguards are in place to ensure it is absolutely necessary for the third party to access this information. Section 36 of *The Constitution* should also be considered to determine if it is a justifiable limitation to the taxpayer's right to privacy.

From the above, it can be concluded that Section 20 of the POPI Act, read with Section 6, allows the TAA and SARS to distribute and disclose taxpayer information to other departments whose main function is public safety or the defence of the public. Therefore, the TAA and SARS are allowed to share information, but only if the public benefit outweighs the right to privacy, then it is

a justifiable limitation to disclose taxpayer information to third parties. The disclosure to other departments may infringe on taxpayers' right to privacy and self-incrimination, thus simultaneously infringing on two constitutional rights. SARS must ensure that the public benefit outweighs this right to disclose the information.

#### **2.4.4 Disclosure of information to taxpayers and tax practitioners**

Section 20 of the POPI Act falls under condition 7 of security safeguards for processing personal information. As mentioned above, all SARS officials, and individuals contracted by SARS, are required to take an oath of secrecy, and Section 69 of the TAA states that any SARS official, current or former, must conceal any private information from an individual who is not a SARS official unless required by law. Thus, the TAA and POPI Act force SARS to protect taxpayers' privacy.

There are four conditions determined by Section 73 of the TAA, which regulates a taxpayer's right to access information:

- A taxpayer is entitled to a certified copy of an assessment or other decision regarding the taxpayer's income and deductions.
- SARS must provide the taxpayer with copies of information supplied to SARS from the taxpayer, for example, returns and supporting documents.
- Information obtained by SARS relating to the tax affairs of the taxpayer.
- Any information that the taxpayer's assessment is based on except SARS confidential information.

If a taxpayer requires information that SARS gathered of them, then the information request must adhere to the provisions of PAIA. A request may be refused should the disclosure of the information reveal the identity of a SARS informant or if the information is premature and prejudicial to the outcome of an investigation (SARS, 2018:38).

Section 74 of the TAA allows for a tax offender's name, any details of the offence and sentence imposed on this offence and residential area to be published by the Commissioner.

In conclusion, the disclosure of taxpayer information is allowed to be disclosed to the taxpayer at the request of the taxpayer. A SARS official may also disclose information to a taxpayer representative should the requirements to appoint a representative be fulfilled. The above disclosures are general disclosures, as the taxpayers or their representatives should generally be in possession of the information or have alternative access to it, such as medical certificates.

#### **2.4.5 SARS procedures to safeguard requests for taxpayer information as per the SARS Manual**

In terms of Chapter 3 of the POPI Act, there have to be security safeguards for the lawful processing of personal information by the SARS.

To address the requirements of Chapter 3 of the POPI Act, the SARS Manual has safeguards for protecting personal information and who may access this information. SARS (2021:11) may deny any request to access information/record if it constitutes SARS confidential information or any information denied in terms of PAIA.

SARS (2021:13) awards the power to decide on a taxpayer's request for information to the Deputy Information Officer, who has 30 days to decide on the application for information. The Deputy Information Officer will only award taxpayer information should the Deputy Information Officer be pleased that the requestor has met all procedural requirements. The requirements as set out by SARS (2021:13) are:

- The request is appropriately applied for on the given form.
- Should the request to obtain information be made on behalf of another, the requestor must provide proof of the authorisation to act on the other party's behalf.
- The records requested are adequately described to aid The Deputy Information Officer in identifying the information requested.

The Deputy Information Officer may, according to SARS (2021:14), deny access to information should the information be any of the following:

- Compulsory protection of certain records of SARS, such as SARS confidential information.
- Compulsory protection of a third party's commercial information.
- Compulsory protection of a third party.
- Compulsory protection of a natural third party's privacy.
- Compulsory protection of the safety of individuals and protection of property.
- Compulsory protection of legal proceedings containing privileged records.
- Defence, security and international relations of the Republic; economic interests and financial welfare of the Republic and commercial activities of public bodies.
- Compulsory protection of research information of both third parties and a public body.

According to SARS (2021:20), taxpayers have the right to object to SARS processing their personal information. The right to object is subject to the exceptions controlled by the POPI Act. Thus, the taxpayer's information with regard to SARS' collection of revenue is exempt from the

POPI Act, but SARS is only limited to information about revenue collection. Thus, the taxpayer cannot dispute SARS requesting their information (Kamdar, 2021:25).

SARS (2021:18) states that an objection to the processing of personal information can be lodged under the following circumstances:

- The processing of the taxpayers' information for express advertising activities that are not electronic correspondence as stated in Section 69 of the POPI Act.
- The processing of information is based on a legitimate interest of the taxpayer.
- The processing of information to follow SARS' legitimate interest or the interest of a third party to whom the information is supplied.

Reasons containing adequate details must be given to SARS when objecting to processing taxpayer information based on the taxpayer's particular circumstances, thus allowing SARS to evaluate the legitimacy of the objection. Should a taxpayer be displeased with the proceedings of the objection to the processing of personal information and how SARS handled it or is of the opinion that SARS is illegitimately processing the taxpayers' personal information, the taxpayer may file a complaint with the Information Regulator (SARS, 2021:18).

Should SARS breach the conditions set out in the POPI Act, a damages civil action claim can be initiated by taking SARS to courts for violating the conditions for the lawful processing of the taxpayers' personal information. The Information Regulator may also, if the taxpayer requests him to initiate a damages civil claim against SARS in a court of law for the breach of the conditions for the lawful processing of the taxpayers' Personal Information (SARS, 2021:20).

## **2.5 Conclusion**

The Constitution stipulates that the taxpayer's rights supersede all other laws. This chapter addressed four aspects to assist with the first secondary research objective to determine if the provision of the TAA addresses the taxpayers' right to the protection of their private information and if these provisions adhere to the terms of the POPI Act. The findings are discussed as follows:

The first aspect addressed is the gathering powers of SARS to obtain taxpayer information and the taxpayer's right to privacy.

The findings were that the gathering powers of SARS are comprehensive to obtain relevant material, there are limitations to the powers of SARS and that SARS may only use their gathering powers to obtain information regarding the administration of a tax Act as stated in section 12(2)(d)(ii) of the POPI Act and that the private dwelling of taxpayers is off limits to SARS officials.

The second aspect addressed is the definition of SARS confidential information defined in the TAA and disclosure of SARS information.

The findings were that the TAA specifies in detail what constitutes SARS confidential information and under which conditions SARS confidential information may be disclosed. Although SARS states that less strict disclosure rules apply to SARS confidential information, there are limited reasons for SARS to disclose this information, and only the Commissioner or order of the High Court may disclose SARS confidential information.

The third aspect addressed is the definition of taxpayer information as defined in the TAA and disclosure of taxpayer information as per TAA and POPI Act provisions.

There are several reasons for a SARS official or the Commissioner to disclose taxpayer information. The first reason is to disclose information to the taxpayer at the taxpayer's request. A SARS official may also disclose information to a taxpayer representative should the requirements to appoint a representative be fulfilled. SARS officials may also disclose taxpayer information should it be public information. The TAA also allows a SARS official or the Commissioner to disclose information to other authorised organs of state or other third parties if required by law. If the public benefit outweighs the right to privacy, then it is a justifiable limitation to disclose taxpayer information to third parties. The disclosure to other departments may infringe on taxpayers' right to privacy and self-incrimination. Thus SARS must ensure that the public benefit outweighs this right to disclose the information.

The findings were that the TAA specifies what constitutes taxpayer information and under which conditions taxpayer information may be disclosed. Although there is a specific description of information, the TAA has a gap for SARS to exploit as relevant material is up to the discretion of SARS. It was found that although SARS states strict rules to apply to disclose taxpayer information, there are numerous reasons for SARS to disclose taxpayer information to other parties.

The fourth and final aspect addressed is the procedures of SARS to ensure that taxpayer information is protected when any third party requests the information.

The findings were that SARS aims that no unauthorized persons get access to taxpayer information. The Deputy Information Officer has 30 days to respond to a request for information, thus enough time to assess the application and ensure the requestor is authorised to view the taxpayer's information.

Therefore, it was found that the POPI Act set out guidelines for the protection of the personal information of the taxpayer. Both the TAA and the POPI Act align with the definition of information. The POPI Act allows for SARS to process and collect information, and taxpayers should not waste resources to dispute whether SARS is entitled to their information as SARS can determine what constitutes relevant material. Although it may seem that the taxpayer must give up all information, the courts can aid the taxpayer in protecting their right to privacy. If SARS did not adhere to the laws and should a taxpayer believe that SARS did not follow the rules, the courts usually favour the taxpayer.

In conclusion, the TAA does align with the POPI Act and, when read together, gives both the taxpayer and SARS a clear path to the protection of information and when it is allowed to disclose taxpayer information.

## **CHAPTER 3: INTERNATIONAL COMPARISON OF THE RIGHT TO PRIVACY**

### **3.1 Introduction**

This chapter provides information about the ATO and the procedures implemented to protect Australian taxpayers' information. This will assist in gaining an understanding of the laws and rules protecting the privacy of the Australian taxpayer and then used to compare to the rules protecting the privacy of the South African taxpayer. The information will assist in comparing the ATO and SARS' procedures for obtaining and disclosing taxpayer information.

This chapter has two aspects to address the second secondary research objective as identified in par. 1.3.2.2, which is to compare the South African TAA to Australian tax laws with regard to the protection of personal information of taxpayers and to assess how the South African TAA compares to the provisions set out by the ATO with regard to the protection of personal information of taxpayers in order to determine if there are weaknesses or strenghts in the South African TAA.

The first aspect is to compare the definition of taxpayer information defined by the ATO to that of the TAA. The second aspect is to identify the procedures of the ATO to ensure the taxpayer information is protected and compare it to that of the TAA.

The motivation why Australia was chosen for this comparison follows below.

### **3.2 Background**

The purpose of the OECD (2022a) is to work with governments, citizens and policymakers to establish international standards on social and economic challenges based on evidence. A member country of the OECD is a country that engage with the experts of the OECD and assist with country reviews and uses the information of the OECD to assit with policy decisions where as a OECD partner are countries that are not members but they contribute to the OECD with policy debates and discussions bringing usefull insights while taking part in surveys contributing to the statistical database (OECD, 2022b).

AS seen from table 1-1 the Australian tax charter also did their own study to determine how satisfied the Australians were regarding tax obligations and 62% were satisfied with the ATO respecting their privacy while 70.6% were satisfied regarding keeping the information confidential. Bentley (2002:5) stated that the Australian tax Charter emphasised protecting taxpayers' privacy, especially in safeguarding the taxpayers' confidential information.

Thus it will be wise to compare the TAA to an OECD member country's tax law, as the OECD aims to stimulate economic progress and find solutions to social and economic challenges. Australia has done their own research to assess their tax office in regards to the tax office's obligations and based on the premise that they have acceptable systems in place to respect the privacy of their taxpayers' information as seen from table 1-1 Australia is a suitable country to compare the TAA .

Australia joined the OECD as a member on 7 June 1971 (OECD, 2022b). The OECD (2017) revised the exchange of information practices by combining peer review reports, and Australia was found to be "Largely Compliant". South Africa is a leader in the activities of the OECD in Southern Africa, especially on taxation and in 2007, it became a key partner of the OECD (OECD, 2022c).

The *Australian Privacy Act* of 1988 protects the taxpayer's personal information and requires that the ATO complies with the Australian Privacy Principles as set out in Schedule 1 of the *Australian Privacy Act* of 1988. The ATO collects, holds, uses, and discloses personal information to administer the taxation and superannuation laws (ATOa, 2022).

The definition of taxpayer information according to this act follows:

### **3.3 Taxpayer information**

Taxpayer information, according to Section 262A of *the Income Tax Assessment Act* of 1936 includes:

- Names, addresses, email addresses, telephone and facsimile numbers.
- Dates of birth, occupations, gender, marital status, residency status, names of partners and relatives, unique identifiers such as tax file numbers and Australian business numbers and director identification numbers.
- Business and financial information, bank account and financial institution details.
- Income which includes salary and wages.
- Shareholding and investment interest details.
- Student numbers and institution codes.
- Trustee and tax agent details.
- Health fund and superannuation fund details.
- Australian Transaction Reports and Analysis Centre (AUSTRAC) reports.
- Business ownership details, business transaction reports, business tax debt, property ownership and sales data.

The ATO's main approach to obtaining information is a cooperative approach where the ATO gathers the taxpayers' information by requesting it from the taxpayer, and all income tax returns are accepted at face value and are not subject to immediate scrutiny (McLaren, 2019:29). The ATO believes that using a cooperative approach will help build good working relationships and keep any cost and disruption at a minimum (ATO,2022).

This respects the taxpayers' right to privacy to provide the information willingly to the agency and not force them to acquire the documents following alternative methods.

Therefore, the ATO clearly defines taxpayer information, and as discussed in paragraph 2.4.1, SARS also clearly defines taxpayer information. Both agencies share the same view of what taxpayer information consists of.

However, the key difference is business ownership, shareholding, and investment interest details. The TAA and SARS do not specify shareholding and investment interest details as taxpayer information. However, shareholdings form a key component in the taxation of small business corporations, and the change in shareholding could also have a capital gains impact on the taxpayer.

### **3.4 Gathering Powers**

The ATO can refer to their formal access powers if they cannot obtain the information required through a cooperative approach as per the ATO can access taxpayers' premises and documents at all rational times as per Section 353-15 of the *Taxation Administration Act* of 1953. The ATO only enforces their rights of access to the laws they administer. Like the ATO, SARS has the power to obtain records and personal information as long as it is within the tax law's administration and revenue collection. The information requested must be within the field of the administration of a tax Act (Kamdar, 2021:25).

The ATO may use its gathering powers to enter and remain on any land or premises and have full and free access to any documents. The ATO can only enforce its rights of access for the purposes of the applicable laws (ATO, 2022). For the purposes of a taxation law, the Commissioner of the Australian Tax Office (the Commissioner of the ATO), or an individual authorised by the Commissioner of the ATO, may remain on any land, premises or place and have full and free access to books and documents as per Section 353-15 of the *Taxation Administration Act* of 1953. The ATO can make copies of documents for their records but cannot seize or remove any documents without the taxpayer's consent. Maples and Woellner (2019:26) stated that the Australian courts have suggested that an investigator may use force against a property, e.g., opening doors and boxes containing the relevant material to obtain the relevant

material, and it is justified where necessary and appropriate to obtain access to relevant material. As seen in paragraph 2.3, SARS is prohibited from entering or remaining on a taxpayer's dwelling or domestic premises, except if specific areas are used for trade purposes. Thus, SARS is more restricted and forced by law to use its gathering powers only to administer a tax law.

If the ATO cannot provide Proof of authority after being instructed by the tenant/owner to produce evidence of the authority to be on the land, premises the ATO must leave the premises as they are not permitted to remain (Simonovska, 2021). A SARS official must be authorised by the taxpayer when they exercise a power or duty under a tax Act in person in terms of Section 41 of the TAA.

Both the ATO and SARS need to provide authority that entitles them to perform an investigation and enter a taxpayers' premises. Taxpayers' privacy is protected so that not anyone can enter their dwelling and state they are busy administering a law. The party busy with the investigation has to provide authorisation to the taxpayer.

According to McLaren (2019:30), taxpayers are assured by the ATO that their privacy is respected and assure taxpayers that the collection of information is fairly and lawfully that is not unreasonably intrusive.

There is a limitation to the gathering powers of the ATO if the taxpayer claims their documents are protected from processing by either (Simonovska, 2021):

- Legal professional privilege or
- The administrative concessions that apply to
  - Professional accounting advisers' papers (the accountants' concession) or
  - Corporate board advice on tax compliance risk.

As seen in 2.4.5., SARS requires an objection to the processing of personal information to be lodged should a taxpayer be of the opinion that SARS does not have the right to process their personal information.

The ATO may give the taxpayer or a third-party notice to supply information to the ATO or attend and supply relevant material as requested by the ATO that is in the taxpayer's or the third party's possession (Simonovska, 2021).

Simonovska (2021) concluded that the ATO has both broad informal and formal information-gathering powers and that the Australian taxpayer must keep accurate records to provide to the ATO.

In conclusion, both the ATO and SARS have a broad scope for gathering relevant information from taxpayers. Both the ATO and SARS have full access to taxpayers' personal information as long as it is considered to be for the purposes of the administration of a tax Act. Not all taxpayer information is "fair game", as there are exceptions to allowed information, such as legal professional privilege information.

A key difference between SARS and the ATO is the gathering powers regarding search and seizure. SARS is more restricted and forced by the law to use its gathering powers only to administer a tax law, where the ATO is allowed to use force to obtain relevant material, and the investigators may remain on any premises to obtain documents.

### **3.5 Disclosure of taxpayer information**

Devos (2014:178) stated that disclosure of Australian taxpayers' information has generally been non-existent, and the public only has access to information already in the public domain or part of court recordings. Devos (2014:179) remarked that the disclosure of taxpayer information was limited up until the new legislation was introduced. The main objective of this new legislation was to discourage aggressive tax avoidance practices. The ATO will inform the taxpayer of why any of their information is being gathered and the purpose for which the information will be used, especially from third parties. The information will only be shared with another person or organisation if it is authorised by law (Devos, 2014:178).

As per paragraph 2.4.3.2, a SARS official may, despite the provision of Section 69 of the TAA, disclose taxpayer information if any other Act expressly provides for the disclosure of the information. SARS and the ATO can disclose taxpayer information to third parties if required by law. Such parties in South Africa are the FIC, NPA and SAPD.

The ATO will not be allowed to release any information regarding the taxpayers' investigation, and this should be reassuring to Australian taxpayers that the consultation paper released by the ATO named "Review of Tax and Corporate Whistleblower Protections in Australia," addressed the privacy of the taxpayer (Andonie, 2017:73). The consultation above paper is not law, but a discussion that addresses comments from the public in Australia (Andonie, 2017:73).

McNab (2021) stated that any officer of the ATO who does not adhere to the law regarding the protection of personal information is liable to imprisonment for two years. Exceptions that officers may disclose taxpayer information are only related to the administration of tax law and disclosure to the court and federal government agencies (McNab, 2021).

As stated in paragraph 2.4.3.1, taxpayer information may be disclosed if an individual's privacy is outweighed by the public benefit obtained from the lawful publishing of applicable information in South Africa. A SARS official may disclose taxpayer information and abandon their duty to preserve the information's secrecy by a High Court's order.

According to the guidelines of the OECD (2012:8), any information received must be treated with secrecy, and the information may only be disclosed to persons or authorities such as administrative bodies and courts. Disclosure of taxpayer information is, however, limited to courts and administrative bodies that are involved in the following:

- Assessment.
- Collection.
- Enforcement.
- Prosecution.
- Determination of appeals .

In conclusion, both the ATO and SARS are allowed to disclose taxpayer information to other entities if required by law. It is accepted internationally and by both the ATO and SARS that taxpayer information may be disclosed to the courts or any administrative body.

### **3.6 Conclusion**

In this chapter, two aspects were addressed to assist with the second secondary research objective, as stated in par 1.3.2.2, to compare the South African TAA to Australian tax laws with regard to the protection of personal information of taxpayers and to assess how the South African TAA compares to the provisions set out by the ATO with regard to the protection of personal information of taxpayers in order to determine if there are weaknesses in the South African TAA.

The findings were as follows:

The first aspect was to compare the definition of taxpayer information defined by the ATO and compare it to that in the TAA.

The findings were that both agencies share the same view of what taxpayer information consists of. However, the key difference is that there is certain information that SARS does not specify as taxpayer information, specifically shareholding and investment interest details.

The second aspect was to identify the procedures of the ATO to ensure they protect the taxpayer information and compare this to the provisions in the TAA.

The findings were that both the ATO and SARS are allowed to disclose taxpayer information to other entities if required by law. It is accepted internationally that taxpayer information may be disclosed to the courts or any administrative body.

Finally, the TAA regulates SARS to be more restricted to using its gathering powers only to administer a tax law and protect the taxpayers' right to privacy when it comes to a private dwelling. The ATO is allowed to use force to obtain relevant material, and the investigators may remain on any premises to obtain documents. Both the TAA and ATO allow for the same disclosure of taxpayer information as this is internationally allowed to assist other government bodies with their administration.

## CHAPTER 4: CONCLUSION

### 4.1 Findings

This mini-dissertation aimed to evaluate whether the stipulations of the TAA as aimed at the protection of taxpayer information compare to the requirements set out in the POPI Act and if these changes are sufficient to protect the right to privacy as stated in The Bill of Rights. This research focused on the right to privacy provided by *the Constitution*.

Throughout this study, the SARS Manual was addressed. The SARS Manual is the 7th edition, and the manual will be amended as SARS and requesters of taxpayer information explore the implications of the TAA and aim to find a balance between the right to information and the right to privacy. The SARS Manual provided insight into how SARS addresses the protection of taxpayers' right to privacy and the processes implemented to disclose taxpayer information.

Chapter 2 described what constitutes taxpayer information and to what extent SARS is entitled to this information. Taxpayer information or relevant material as used by SARS can be obtained through various processes by SARS. This is allowed by the POPI Act as information collected from third parties to comply with law enforcement concerning the collection of revenue is a justifiable limitation as per Section 36 of *the Constitution*. Section 36 of *the Constitution* states that the nature of the right and limitation, the vitality of the purpose of the right being infringed and if there are less extreme actions that can be taken to achieve the same goal that has to be taken under consideration to determine if it is a justifiable limitation. Both the POPI Act and Section 36 of *the Constitution* allow for gathering information, but before SARS may infringe upon the taxpayers' rights, it has to be considered if there are no easier methods to obtain and secure the information.

Chapter 2 also addressed the protection of taxpayer information that SARS has obtained. It was concluded that although SARS may disclose taxpayer information to other government bodies or third parties by court order as stipulated by the TAA and allowed by the POPI Act, where the Commissioner felt that the taxpayer information must not become public information, the Commissioner will challenge the request. The courts can come to the aid of both the Commissioner and the taxpayer to protect their information. This can be seen by the recent court ruling in the case *Public Protector v Commissioner for the South African Revenue Service and Others* (2021). The disclosure of taxpayer information does infringe on the taxpayers' right to privacy, and the disclosure of other departments, such as the SAPD, could

also infringe on the right against self-incrimination. However, revenue collection is a justifiable limitation as per Section 36 of *the Constitution* of these rights.

The goal of Chapter 3 was to determine how the TAA compares to the Australian tax legislation. It was concluded that the provisions of the TAA and SARS align with the provisions set out by the ATO and that the disclosure provisions of the TAA are similar to the ATO and those recommended by the OECD.

For any disclosure of taxpayer information that infringes on the taxpayers' right to privacy, there must be a justifiable limitation. The POPI Act set out guidelines and safeguards for organs of state, and the TAA that set out rules for SARS does adhere to these safeguards and guidelines. Where the TAA has a provision for disclosure of taxpayer information or a provision to obtain information, it is supported by a section in the POPI Act that enables SARS to perform its duties.

Finally, it is found that the TAA's provisions to protect taxpayer information adhere to the guidelines set out in the POPI Act, and the provisions of the TAA, in some circumstances, are stricter than the provisions of the POPI Act. The Bill of Rights provides the taxpayer with the right to privacy, and all laws must adhere to these rights. Although the provisions of the TAA do, in some circumstances, infringe on a taxpayer's right to privacy, these infringements are allowed as per Section 36 of *the Constitution*.

Both the POPI Act and the TAA have a broad definition of information, and SARS can determine what constitutes taxpayer information. This could give SARS a "blank cheque" to ask for any information as long as they can argue that it is for the administration of a tax Act. It could benefit taxpayers if the TAA has a specific definition of relevant material and taxpayer information. This will allow taxpayers to know what SARS is rightfully entitled to and disclose this information freely and not waste energy disputing if SARS is allowed to access this information.

## **4.2 Future study suggestions**

The aim of this study was not to perform in-depth analyses of any system mistakes that may arise when dealing with taxpayer information and their right to privacy by the Commissioner or any staff of SARS. There is a gap for future studies to expand on this research to see if the system used by the Commissioner and any staff of SARS adheres to the guidelines set out in the TAA.

Further studies could assist taxpayers in being assured that the provisions set out in the TAA are adhered to in the day-to-day operation of SARS and its employees when handling and processing taxpayers' information. Further studies will give taxpayers peace of mind that their information is not unnecessarily exchanged and that the persons responsible for gathering and processing the information are competent and strictly adhere to the TAA. This will further lead to more taxpayers giving their information freely as they are assured their information is kept confidential.

Another aspect of this research that was not addressed is an in-depth review of the POPI Act. There is a gap for future studies to expand on this research to see if the POPI Act truly assists with the recognition of privacy as stated in Section 14 of *the Constitution*.

Further studies of the POPI Act will assure parties that their right to privacy is respected as the laws and guidelines in place to protect their rights are in line with *the Constitution*. Further studies in this area will benefit all citizens of South Africa and enhance the TAA as Taxpayers will have both of these Acts to consult to ensure their right to privacy is respected and their information is kept confidential.

A third aspect is the disclosure of taxpayer information to other organs of states, such as the SAPD or NPA, as these disclosures are allowed under both the TAA and the POPI Act but could infringe on two constitutional rights, namely the right to privacy and the right against self-incrimination.

An in-depth study to determine if this is a justifiable limitation according to Section 36 of *the Constitution* will add value to the field and assure taxpayers that all aspects of the law have been considered when obtaining information.

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