

The Right to Just Administrative Action in the Context of Suspending the Payment of Disputed Tax

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Abstract

Section 164(3) of the *Tax Administration Act* 28 of 2011 (hereafter TAA) provides a senior South African Revenue Service official (hereafter, respectively, SARS and senior SARS official) with discretionary powers to suspend the payment of disputed tax or a portion thereof, having regard to relevant factors, if the taxpayer intends to dispute the liability to pay such tax. Making a decision in terms of section 164(3) of the TAA constitutes administrative action. Section 33(1) of the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*) grants everyone the right to just administrative action that is lawful, reasonable and procedurally fair and the *Promotion of Administrative Action Act* 3 of 2000 (hereafter PAJA) was promulgated to give effect to this right. The objective of this article is to apply the right to just administrative action to the manner in which the decision in terms of section 164(3) of the TAA is taken. This is achieved by adopting an explanatory research approach and performing a literature review of the process in terms of section 164(3) of the TAA and the constitutional obligations in terms of section 33 of the *Constitution* as given effect to in PAJA. As the decision taken by the senior SARS official is influenced directly by the right to just administrative action, it should be taken in a lawful, reasonable and procedurally fair manner to ensure compliance with the *Constitution* and PAJA. For the decision to be taken in a lawful manner, the senior SARS official must at least be authorised to exercise the discretion in terms of the TAA and comply with the procedures and conditions stated in section 164(3) of the TAA. For the decision to be considered reasonable, the decision must be, at the minimum, rational and proportional, and to ensure that the decision is taken procedurally fair, SARS should comply with at least the relevant compulsory elements in terms of section 3(2)(b) of PAJA. A decision in terms of section 164(3) of the TAA which fails to meet the requirements of lawfulness, reasonableness and/or procedural fairness will be subject to review on several grounds listed in section 6(2) of PAJA.

Keywords

Section 164(3) of the *Tax Administration Act*, suspension of payment of tax pending objection and appeal; discretion; administrative action; section 33 of the *Constitution*; *Promotion of Administrative Justice Act*.

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1 Introduction

Section 164(1) of the *Tax Administration Act* 28 of 2011 (hereafter TAA), known as the "pay now, argue later" rule,¹ in essence provides that the obligation to pay tax and the right of the South African Revenue Service (hereafter SARS) to receive and recover tax will not be suspended by an objection or appeal, unless a senior SARS official otherwise directs in terms of section 164(3) of the TAA. In terms of section 164(2) of the TAA, a taxpayer can request a senior SARS official to suspend the payment of tax, or a portion thereof, due under an assessment, if the taxpayer intends to dispute the liability to pay such tax in terms of the TAA (hereafter suspension request). Section 164(3) of the TAA then allows a senior SARS official to suspend the payment of disputed tax and contains the factors to be considered when adjudicating a suspension request. Relevant factors shall be considered, including:

- (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is *prima facie* involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.²

Section 2 of the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*) states that the *Constitution* is the supreme law in South Africa, and any law or conduct inconsistent with it is invalid. As such, all tax legislation (such as section 164 of the TAA) and all conduct by SARS (such as deciding on a suspension request) must be in compliance with the *Constitution*. The fundamental rights of people (including taxpayers) in South Africa, are enshrined and enhanced by the *Constitution*.³ Section 33 of the *Constitution* provides for the right to just administrative action, which includes the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)) and the right to be given written reasons when rights have been adversely affected by administrative action (section 33(2)). Parliament has promulgated the *Promotion of Administrative Action Act* 3 of 2000 (hereafter PAJA) to give effect to section 33 of the

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¹ Olivier 2001 *SALJ* 193.

² Section 164(3) of the *Tax Administration Act* 28 of 2011 (hereafter the TAA).

³ Erasmus *Commissioner's Discretionary Powers* 10.

Constitution.⁴ The rules and principles of administrative procedure are defined by PAJA, which aims to promote an efficient administration and good governance.⁵ PAJA furthermore creates a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function.⁶

As an organ of state, SARS is bound by the obligations and duties inferred from the right to just administrative action in section 33 of the *Constitution* and as set out in PAJA.⁷ The right to just administrative action therefore has a direct impact on any administrative actions carried out by SARS, and the importance of section 33 and PAJA in the context of tax legislation and the conduct of SARS must not be understated. It has been held by our courts that a decision by SARS on a suspension request amounts to administrative action,⁸ as contemplated in section 33 of the *Constitution* and in section 1 of PAJA. This was found as:

[I]t has long been accepted that when the Commissioner exercises discretionary powers conferred upon him (or her) by statute, the exercise of the discretion constitutes administrative action.⁹

Section 1 of PAJA defines "administrative action" as:

... any decision taken, or any failure to take a decision, by an organ of state, when... exercising a public power or performing a public function in terms of any legislation... which adversely affects the rights of any person and which has a direct, external legal effect but does not include ...

⁴ *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 42 (hereafter the *Sidumo* case).

⁵ Preamble of the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter PAJA); Kotzé 2004 *PELJ* 19.

⁶ Preamble of PAJA.

⁷ In terms of s 2 of the *South African Revenue Service Act* 34 of 1997 SARS was established as an organ of state to advance the efficient and effective collection of revenue. The Bill of Rights, which includes the right to just administrative action, applies to all organs of state in terms of s 8(1) of the *Constitution*.

⁸ *Metcash Trading Ltd v Commissioner for South African Revenue Services* 2000 63 SATC 13 para 42 (hereafter the *Metcash* case) and *Capstone 556 (Pty) Ltd v Commissioner for South African Revenue Service* 2011 6 SA 65 (WCC) para 11 (hereafter the *Capstone* case). The *Metcash* case dealt with the constitutional validity of s 36(1) of the *Value-Added Tax Act* 89 of 1991. This latter section was similar, in the context of VAT, to the current s 164 of the TAA and provided, in essence, that the obligation to pay tax is not suspended by an appeal or pending the decision of a court, "unless the Commissioner so directs". In other words, the Commissioner had a discretion to suspend the payment of disputed tax, similar to the current discretion under s 164(3) of the TAA. It was found that the relevant provisions were constitutionally valid. The *Capstone* case dealt with s 88 of the *Income Tax Act* 58 of 1962, which was similar to s 36 of the *Value-Added Tax Act* 89 of 1991.

⁹ *Metcash* case para 40.

The manner in which the senior SARS official takes a decision in terms of section 164(3) of the TAA when deciding on a suspension request should therefore comply with the dictates of administrative law. In essence, the decision by the senior SARS official must be lawful, reasonable and procedurally fair.

2 Research objective, methodology and scope

The objective of this article is to apply the right to just administrative action to the manner in which the decision in terms of section 164(3) of the TAA is taken. As various academic writers and industry experts have raised valid concerns and uncertainties regarding, for example, the application of the factors listed in section 164(3),¹⁰ such an analysis is submitted to be timely and relevant. The research approach adopted to achieve the objective is explanatory research, which consists of a literature review of both primary and secondary sources.

The scope of the research is limited, in that it pertains to the South African context only. Section 164 of the TAA is considered in respect of the suspension to pay disputed income tax only, even though it may also apply to other types of taxes such as value-added tax. The right to reasons in terms of section 33(2) of the *Constitution* and section 5 of PAJA is referred to where relevant, but a detailed discussion thereof falls beyond the scope of this article. This article should in any event not be construed as an exhaustive discussion of all the administrative law principles applicable in the context of section 164(3) of the TAA. Rather, specific aspects of lawfulness, reasonableness and procedural fairness relevant in the context of suspension requests and the decision taken by a senior SARS official in this regard are selected and applied. If the provisions of PAJA, through the definition of administrative action, do not apply to an administrative action by SARS, then the constitutional principle of legality could apply.¹¹ However, a discussion of legality falls beyond the scope of this article. It should further be noted that this article does not consider the constitutionality of any legislative provisions, but considers a decision in terms of section 164(3) of the TAA only in the light of the right to just administrative action. It will be assumed that section 164 of the TAA is constitutionally valid for the

¹⁰ For a broad list of the concerns and uncertainties, see Van Wyk and Van Zyl 2016 *JEF* 564.

¹¹ Erasmus *Commissioner's Discretionary Powers* 53.

purposes of this article.¹² Erasmus¹³ points out in this regard that the provisions authorising administrators to execute an administrative action are not necessarily unconstitutional (here the provisions of section 164(3) of the TAA), but the application thereof may be (here the decision taken in terms of section 164(3) of the TAA, which is investigated in this article).

Lastly, it is acknowledged that a discussion of constitutional rights would generally not be complete without reference to section 36 of the *Constitution*, known as the limitations clause. However, as the application of section 36 of the *Constitution* has not been considered by our courts in the context of the right to just administrative action, and as its application has been questioned by academic writers,¹⁴ such a discussion will not be endeavoured in this article. Furthermore, as this article attempts to provide guidance on how the discretion of the senior SARS official should be exercised to comply with the right to just administrative action as given effect to in PAJA, i.e. to avoid the limitation of rights, section 36 of the *Constitution* is irrelevant, as it becomes relevant only when constitutional rights are limited.

3 PAJA

As stated above, PAJA defines "administrative action" in section 1.¹⁵ Section 2 of PAJA allows the Minister to grant certain exemptions of administrative actions from certain provisions of PAJA or to grant permissions to administrators to vary certain requirements of PAJA. At the time this research was undertaken, no such exemptions or permissions in respect of SARS had been granted, and PAJA therefore applies to SARS as an organ of state and to its decisions which amount to administrative actions.

As it was accepted in the *Metcash* and *Capstone* cases that a decision by SARS regarding a suspension of payment is an administrative action as defined, a detailed discussion thereof is not required. Suffice it to say the following in this regard. It is clear that SARS is making a decision (when exercising its discretion whether to suspend the payment or not) as an organ of state by exercising a public power or performing a public function in terms

¹² It was held by the Constitutional Court in the *Metcash* case that s 36(1) of the *Value-Added Tax Act*, which was similar to s 164 of the TAA, was constitutionally valid. However, this does not necessarily mean that s 164 of the TAA is also constitutionally valid as the two sections are similar but not identical. However, it is accepted that s 164 of the TAA is constitutionally valid for the purposes of this article.

¹³ Erasmus *Commissioner's Discretionary Powers* 29.

¹⁴ Quinot and Maree 2015 *CCR* 42.

¹⁵ See para 1 above. This definition is followed by a list of exclusions, none of which are relevant to this article.

of the TAA. The senior SARS official can decide to accept or deny the suspension request. A requirement of "administrative action" is that it should adversely affect rights. This seems to indicate that only a decision to deny the suspension would be "administrative action" as accepting the suspension would not, ordinarily, adversely affect the taxpayer's rights. However, all taxpayers have the right to a fair process when a suspension request is considered. It has accordingly been confirmed by the Constitutional Court that this requirement should be interpreted as administrative action that has the capacity to affect legal rights.¹⁶ In terms of a suspension request, the legal right can be seen as the taxpayer's right to have a suspension request fairly considered by a senior SARS official, as such a request is provided for in section 164(2) of the TAA.

As a decision in terms of section 164(3) of the TAA amounts to "administrative action" as defined, it must meet the requirements of section 33 of the *Constitution* and PAJA. Furthermore, a taxpayer is allowed to invoke the review remedies in section 6 of PAJA where needed.¹⁷ The process regarding a suspension request requires an analysis first (in paragraph 4 below) before the requirements of just administrative action can be considered and applied thereto (in paragraph 5 below).

4 The process of a suspension request

The process of a suspension request can be divided into the following: the suspension request being submitted by the taxpayer, the consideration of the request and the discretion exercised by the senior SARS official, the decision made by the senior SARS official, and the possible reconsideration (review and revocation) of the decision by the senior SARS official. Whilst the decision made by the senior SARS official is the topic of this article, the two steps in the process preceding the decision, namely the request from the taxpayer and the exercise of the discretion by the senior SARS official, will influence the decision and must accordingly be addressed here as well.

4.1 The suspension request from the taxpayer

Section 164(2) of the TAA allows taxpayers to make a suspension request. The suspension of the payment of disputed tax is not an automatic right, and taxpayers must apply for a suspension in the form and manner

¹⁶ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 BCLR 1 (CC) para 60.

¹⁷ *Erasmus Commissioner's Discretionary Powers* 35.

prescribed by SARS.¹⁸ As stated above, taxpayers merely have a right to have a suspension request fairly considered by a senior SARS official.

The option to submit such a request is extremely helpful, but the manner was not prescribed until April 2015, when SARS updated its website to include minor detail on a suspension request.¹⁹ According to its website, a taxpayer can issue a letter to SARS requesting such a suspension. The following information must be provided in this letter: the registered details of the taxpayer, all tax reference numbers, reason(s) for the request (for example, details of the circumstances which prevent compliance), and any supporting documents (referred to as "relevant material") to support the request.

The impact of the lack of further guidance regarding the suspension request is explained below in paragraphs 5 and 6.

4.2 The discretion exercised by the senior SARS official

The use of the word "may" in section 164(3) of the TAA makes it clear that it is a discretionary power given to the senior SARS official to decide whether or not to accept a suspension request.²⁰ Discretionary powers are characterised by the element of choice that they bestow on the decision-maker.²¹ To say that someone may exercise a discretion supposes that there is no exclusive legal disposition to the problem.²² The senior SARS official accordingly has the freedom to choose to accept or deny the request, but that freedom must be exercised in line with section 164(3) of the TAA. The discretion must also be exercised in a fair manner.²³ Croome states that a taxpayer's suspension request may not instantly be dismissed.²⁴

¹⁸ SARS 2013 <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G01%20-%20Short%20Guide%20to%20the%20Tax%20Administration%20Act%202011%20-%20External%20Guide.pdf> 58 (hereafter *Short Guide to the TAA*).

¹⁹ SARS 2015 <http://www.sars.gov.za/ClientSegments/Businesses/Government/Pages/Suspension-of-Payment-and-Waiving-of-Penalties-and-Interest.aspx>.

²⁰ Hoexter and Lyster *New Constitutional and Administrative Law* 25 on permissive statutory language such as "may". S 164(3) provides that a senior SARS official *may* suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including the factors listed.

²¹ SARS 2014 http://www.iacsa.co.za/m/documents/TAA_New%20Dispute%20Resolution%20Guide_ExternalDraft_18%20Aug%202014.pdf 21 (hereafter *Draft Dispute Resolution Guide*). It may be noted that the Draft Guide has since been finalised, but the final guide has no similar reference to the meaning of discretionary powers.

²² *Draft Dispute Resolution Guide* 21.

²³ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) 53, where it was stated that "[d]iscretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner" (footnote omitted).

²⁴ Croome *Taxpayers' Rights* 220.

Based on the principles of administrative law,²⁵ the senior SARS official must properly exercise the discretion by considering all of the relevant facts,²⁶ or stated differently, must apply his or her mind to the request under consideration. It is therefore essential that all senior SARS officials are trained sufficiently to deal with suspension requests in a similar and fair manner.

Exercising the discretion in terms of section 164(3) of the TAA will require that the senior SARS official considers the relevant factors, including the factors listed. The consideration of the factors is further addressed in paragraph 5.1.2 below when analysing how the decision to accept or deny the suspension request is made, in the context of lawfulness.

4.3 *The decision made and the possible reconsideration (review and revocation) thereof by the senior SARS official*

It is compulsory for the senior SARS official to make a decision.²⁷ Such a decision must be lawful, reasonable and procedurally fair, as further addressed and applied in paragraph 5 below.

The necessary documents on hand and the reasoning behind the decision should be kept by the senior SARS official, as the *Constitution* (section 33(2)) and PAJA (section 5) allow taxpayers the right to request reasons for the decision taken, and to give written reasons proper documentation should be kept.

SARS states that there is a possible risk that taxpayers could abuse a suspension request to delay payment.²⁸ Section 164(5) of the TAA therefore provides that the senior SARS official may review and revoke the suspension (i.e. the decision) due to this inherent risk. According to this section, the senior SARS official may revoke a decision to suspend payment in terms of section 164(3) of the TAA with immediate effect, if satisfied that:

- (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
- (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;
- (c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or

²⁵ See para 6.1.3 below.

²⁶ Croome *Taxpayers' Rights* 220.

²⁷ Section 6(2)(g) of PAJA provides that a failure to take a decision is a ground for review.

²⁸ SARS 2014 <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G05%20-%20Dispute%20Resolution%20Guide%20-%20External%20Guide.pdf> 22 (hereafter *Dispute Resolution Guide*).

- (d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend the amount involved was based.

A detailed discussion of the revocation of a decision falls beyond the scope of this article. However, it is submitted that section 164(5)(c) of the TAA, which relates directly to the initial administrative action of accepting the suspension request, is subject to abuse by SARS. Once a decision in terms of section 164(3) of the TAA is taken in favour of a taxpayer (i.e. the suspension request is accepted), it is submitted that such a decision should be able to be regarded as a final decision if the suspension request was *bona fide* (i.e. the objection or appeal is not frivolous or vexatious or no dilatory tactics are employed) and if no external circumstances change materially.²⁹ In terms of section 164(5)(c) of the TAA, however, SARS is allowed to revoke its previous decision merely "on further consideration of the factors", which presumes that a proper consideration did not initially take place as "the suspension should not have been given". Thus, even though a taxpayer may secure a suspension of the payment of disputed tax, SARS still has the power to revoke that decision for no reason and even if none of the circumstances have changed. It is therefore questionable whether section 164(5)(c) of the TAA leaves the taxpayer whose suspension request was accepted with a reasonable chance to rely on the suspension, pending the finality of the dispute resolution process. Whilst it is generally accepted that legislation may provide for the variation or revocation of a decision (as, for example, provided for in section 164(5) of the TAA),³⁰ it is stated by Hoexter³¹ that:

... the demands of the Constitution must be borne in mind: the legislature would not be entitled to confer an unlimited or too extensive power of revocation, as this would undermine the rule of law.

It is submitted that SARS should not be allowed to consider the section 164(3)-factors on a continuous basis if there is no external or new reason for a reconsideration, as the taxpayer has a right to regard the decision as final. If valid changes to the circumstances occur where it will not be considered unfair for SARS to react to such changed circumstances, it is still possible for SARS to rely on section 164(5)(d) of the TAA. Considering whether section 164(5)(c) of the TAA is constitutionally valid is scope for further research to be conducted.

As the decision made in terms of section 164(3) of the TAA constitutes administrative action, the requirements that "administrative action" needs to be lawful, reasonable and procedurally fair are discussed next. The impact

²⁹ See ss 164(5)(a), (b) and (d) of the TAA.

³⁰ Hoexter *Administrative Law* 278; Quinot *Administrative Justice* 127.

³¹ Hoexter *Administrative Law* 278.

of these requirements on the decision in terms of section 164(3) of the TAA is analysed under each of the requirements.

5 The right to just administrative action and the impact thereof on the decision in terms of section 164(3) of the TAA

The rules applicable to administrative action can be divided into substantive just administrative action (i.e. lawfulness and reasonableness) and procedural fairness.³²

5.1 Lawful administrative action

Hoexter³³ notes that, at its simplest, lawfulness means that administrators must comply with the law and must have lawful authority for their decisions. In other words, lawfulness requires that an administrator must be authorised by law to make a decision and that the decision must be made in line with the authorisation. De Ville³⁴ states that public authorities are allowed to do only that which they are empowered to do and the authority which exists may not be exceeded. Erasmus³⁵ emphasises that a law must authorise the exercise of power (the administrative action). Erasmus' statement is derived from the decision by the Constitutional Court in *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council*,³⁶ where it was held that:

[i]t is central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.³⁷

Hoexter³⁸ states that it follows from this decision that SARS, as an organ of state, does not have inherent powers to do as it pleases. In *Stroud Riley and Co Ltd v SIR*³⁹ it was noted that the word "may", which is also used in section 164(3) of the TAA, is used merely to "confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise".

³² Erasmus *Commissioner's Discretionary Powers* 21.

³³ Currie and De Waal *Bill of Rights Handbook* 666.

³⁴ De Ville *Judicial Review* 90.

³⁵ Erasmus *Commissioner's Discretionary Powers* 74.

³⁶ *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC).

³⁷ *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 58.

³⁸ Hoexter *Administrative Law* 255.

³⁹ *Stroud Riley and Co Ltd v SIR* 1974 4 SA 534 (E) 540.

A senior SARS official is authorised to exercise a discretionary power in terms of section 164(3) of the TAA. The senior SARS official is authorised to exercise the discretion only after having regarded the relevant factors, including the factors listed. It is submitted that section 164(3) of the TAA therefore contains at least two requirements related to lawfulness. Firstly, only a senior SARS official is authorised to make the decision (i.e. the person making the decision must be lawfully authorised), and secondly, the decision may be made only after having regard to all the relevant factors. These requirements are respectively addressed below under the headings "who" and "how" in paragraphs 5.1.1 and 5.1.2.

5.1.1 Who made the decision to accept or deny the suspension request?

The powers and duties required by the TAA to be executed by a senior SARS official must, in terms of section 6 of the TAA, be executed by either the Commissioner, a SARS official who has specific written authority from the Commissioner to do so, or a SARS official occupying a post designated by the Commissioner in writing for this purpose. Failure by SARS to comply with section 6 of the TAA would mean that the decision-maker concerned would not have the lawful authority to make the decision in terms of section 164(3) of the TAA. Kruger⁴⁰ notes that whether or not the recipient of the request will indeed be a senior SARS official will not necessarily be clear from the person's designation and therefore this needs to be assumed by the taxpayer who is submitting the suspension request. It is argued in paragraph 5.3 below, however, that a disclosure of who the decision-maker was, as part of the procedural fairness requirement, should include that the decision-maker was a designated senior SARS official.

Section 164(3) of the TAA clearly requires that the suspension request be considered by a senior SARS official. It is necessary to establish if this power may be delegated by a senior SARS official. In terms of section 6(2) of the TAA, read together with section 10 of the TAA, it is envisaged that only the Commissioner may delegate powers and duties. Section 6(4) of the TAA allows "the execution of a task ancillary to a power or duty" to be delegated by a senior SARS official only to a SARS official under the control of the senior SARS official. It is submitted that a decision in terms of section 164(3) of the TAA is not such a "task ancillary to a power or duty", but rather an actual power or duty. It is also stated in the Short Guide to the TAA that section 164 of the TAA contains powers or functions reserved for senior SARS officials.⁴¹ Consequently, as a senior SARS official is not allowed to delegate powers and duties, the section 164(3)-decision will be unlawfully

⁴⁰ Kruger 2014 *BTCLQ* 27-29.

⁴¹ *Short Guide to the TAA* 13.

taken if performed by anyone other than a senior SARS official in terms of an attempted delegation.

In the case of unauthorised and therefore unlawful administrative action, the decision would be reviewable in terms of section 6(2)(a)(i) or (ii) of PAJA in terms of which a court or tribunal has the power to judicially review an administrative action if it was taken by an administrator who was not authorised to do so by the empowering provision⁴² (when the decision is made by someone other than a senior SARS official) or who acted under a delegation of power which was unauthorised by the empowering provision⁴³ (when a delegation was attempted, as delegation is unauthorised by the TAA in this context).

5.1.2 How was the decision to accept or deny the suspension request made?

Another aspect of lawfulness relates to how the decision was made or whether all the required procedures and conditions were met.⁴⁴ According to Erasmus,⁴⁵ this includes the conditions which SARS must satisfy and comply with as stated by the authorising legislation. Appropriate compliance with the conditions of section 164(3) of the TAA would include the following: ensuring that the request relates to a suspension of the payment of "disputed" tax, ensuring that the request is from a "taxpayer" as defined in the *Income Tax Act 58 of 1962* or the TAA, and ensuring the consideration of the relevant factors, including the factors listed.

Section 164(3) of the TAA requires that the senior SARS official has regard to relevant factors, including the factors listed in paragraphs (a) to (e) of section 164(3). It is submitted that the factors do not constitute a closed list.⁴⁶ Before the 2014 amendment to section 164(3) of the TAA, the word "including" did not appear and it was required that regard should be had to the factors listed only. SARS has stated that before the 2014 amendment (when the factors arguably seemed to constitute a closed list), the phrasing of section 164(3) of the TAA did not limit a senior SARS official to considering only the factors provided for, when exercising his or her discretion.⁴⁷ The reason for this statement is SARS's administrative fairness obligation, i.e. to take a decision only once all relevant considerations have

⁴² Section 6(2)(a)(i) of PAJA.

⁴³ Section 6(2)(a)(ii) of PAJA.

⁴⁴ Quinot *Administrative Justice* 135-136.

⁴⁵ Erasmus *Commissioner's Discretionary Powers* 76.

⁴⁶ PwC South Africa 2015 <http://www.thesait.org.za/news/216884/Tax-Administration-Laws-Amendment-Bill-B14-of-2014-will-effect-amendments-to-the-TAA-.htm> 4.

⁴⁷ *Draft Dispute Resolution Guide* 21.

been taken into account.⁴⁸ This is now clarified in the present version of section 164(3) of the TAA, which clearly allows for factors other than those listed in paragraphs (a) to (e) to be considered.

A question regarding the factors and how the decision was made is whether SARS is always required to consider at least all the factors listed in paragraphs (a) to (e), irrespective of whether they are relevant or not. In other words, is it required that the factors listed in paragraphs (a) to (e) must be relevant, or does "relevant" apply only to any other factors? For example, one of the factors listed is whether fraud is *prima facie* involved in the origin of the dispute (paragraph (c)). Is this a factor to be considered in all suspension requests, or only when fraud is involved? Does it count in the taxpayer's favour when fraud is not *prima facie* involved in the origin of the dispute (i.e. is it a factor which must be considered even though fraud is not relevant)? Or is paragraph (c) not required to be considered as a factor if no fraud is involved? The use of the word "including" could be interpreted to mean that relevant factors must be considered, including at least all the factors listed in paragraphs (a) to (e), whether they are relevant or not. The use of the word "or" (instead of "and") between paragraphs (d) and (e) seems to indicate, however, that all the factors do not have to be considered, but that the factors are rather alternatives from each other, depending on their relevance. SARS has stated, however, that the factors listed in section 164(3) of the TAA "must" be considered.⁴⁹ In accordance with SARS' own view, it is submitted that the senior SARS official should consider at least all of the factors listed in paragraphs (a) to (e) to avoid the risk of the section 164(3)-decision falling foul of the lawfulness requirement by not meeting the required procedures and conditions of the empowering provision. Accordingly, it would, for example, count in the taxpayer's favour when fraud is not *prima facie* involved in the origin of the dispute because fraud is a factor which must be considered even though fraud is not relevant to the origin of the dispute.

After having considered the factors in paragraphs (a) to (e), it falls within the discretion of the senior SARS official to determine whether any other factors should be considered as relevant. As no definition exists for the term "relevant" in the TAA, the grounds for review in section 6 of PAJA as also referred to in this paragraph 5 could provide a general scheme of the broadness of the discretion to be exercised in this regard. For example, the factor to be considered should have a sufficiently close and logical (i.e. rational) connection to the suspension request and should be considered

⁴⁸ *Draft Dispute Resolution Guide* 21.

⁴⁹ *Short Guide to the TAA* 58. This comment was made on a previous version of s 164(3) but which also had the word "or" between the second last and the last factor.

with reference to the other factors as a whole.⁵⁰ Therefore, what is considered to be relevant will differ from case to case. This is supported by a statement that relevance is a matter of degree.⁵¹

It is important that each suspension request be considered on its own merits. Section 164(3) of the TAA contains no specific guidelines on the application of the relevant and specified factors to be considered.⁵² However, if a senior SARS official decides on a suspension request without giving proper consideration to the factors, such conduct could be indicative of a failure by the senior SARS official to apply his or her mind properly. A decision where the discretion was misguided in this way could fall within, for example, section 6(2)(e)(iii) of PAJA, which specifically states that where the action was taken because irrelevant considerations were considered or relevant considerations were not taken into account, this would be a ground for review. Section 6(2)(b) of PAJA, which allows for review if "a mandatory and material procedure or condition prescribed by an empowering provision was not complied with", can also be used as a ground for review should it be shown that the conditions or requirements of section 164(3) of the TAA were not complied with.

5.2 Reasonable administrative action

Goldswain⁵³ expresses the opinion that reasonableness is the cornerstone of the right to just administrative action. In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*⁵⁴ Judge O'Regan set out a number of factors which can be used to determine if a decision is reasonable. These include:

... the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected.⁵⁵

Erasmus⁵⁶ indicates that to determine whether or not a decision is reasonable, both the rationality and the proportionality of the decision need to be determined. Hoexter⁵⁷ confirms this, and suggests that these two

⁵⁰ Van Wyk *Analysis of the Discretion of the SARS* 42.

⁵¹ Keane *Modern Law of Evidence* 20.

⁵² Van Wyk and Van Zyl 2016 *JEF* 562.

⁵³ Goldswain *Winds of Change* 237.

⁵⁴ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 45.

⁵⁵ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 45.

⁵⁶ Erasmus *Commissioner's Discretionary Powers* 90.

⁵⁷ Currie and De Waal *Bill of Rights Handbook* 670.

grounds are theoretically different, because PAJA has separate grounds for review for each of them. Rationality and proportionality are subsequently considered in the context of a decision in terms of section 164(3) of the TAA.

5.2.1 Rationality

The test to determine rationality was first formulated in *Carephone (Pty) Ltd v Marcus*,⁵⁸ and it was confirmed in the decision of the *Sidumo* case as follows:

[I]s there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?⁵⁹

A rational decision therefore means that one must be able to justify the decision based on the information known to the administrator and the reasons supplied for that decision.⁶⁰ Routledge⁶¹ states that where the decision is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it", the decision can be challenged on the grounds of irrationality. Judge Kriegler stated in the *Metcash* case that the Commissioner (now the senior SARS official) should be able to "justify his decision as being rational".⁶²

A decision will be reviewable in terms of section 6(2)(f)(ii)(aa) to (dd) of PAJA if:

- (f) the action itself – [...]
- (ii) is not rationality connected to -
 - (aa) the purpose with which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator.

Section 6(2)(f)(ii)(cc) of PAJA can, for example, be applied in the context of a suspension request as follows. Rationality requires, *inter alia*, that there must be a logical connection between the decision and the information on which the decision was based. It is submitted that the required information to be submitted by taxpayers when making a suspension request is not stipulated in sufficient detail by SARS (see paragraph 4.1 above). Although

⁵⁸ *Carephone (Pty) Ltd v Marcus* 1999 3 SA 304 (LAC).

⁵⁹ *Carephone (Pty) Ltd v Marcus* 1999 3 SA 304 (LAC) para 25.

⁶⁰ Hoexter *Administrative Law* 340.

⁶¹ Routledge Cavendish *Constitutional Law* 134.

⁶² *Metcash* case para 35.

the listed factors in section 164(3) of the TAA are not exhaustive,⁶³ guidelines for at least the factors listed should be issued to ensure, for example, the rationality of the decision required by PAJA as part of the reasonableness requirement. This would enable taxpayers to know exactly what information the senior SARS official needs to base a rational decision on. Taxpayers do not know the type or extent of the information which is required for each factor, and furthermore, as the factors in section 164(3) of the TAA are considered to be not exhaustive (an interpretation based on the terms "relevant factors, *including...*"),⁶⁴ taxpayers also do not know what SARS considers as any other relevant factors in addition to the factors listed. As taxpayers may not know what could be considered to be relevant by the senior SARS official when exercising the discretion, it might be difficult for taxpayers to determine the exact scope of the request. Furthermore, requests in terms of section 164(2) or decisions in terms of section 164(3) of the TAA are not published by SARS and as such, taxpayers may not know of factors which had previously been considered relevant in other cases. SARS is not transparent in this respect, which poses the risk that the decision made may be arbitrary (in the sense of it being unpredictable or inconsistent) and irrational.

Section 6(2)(f)(ii)(bb) also provides for a ground of review if the action is not rationally connected to the purpose of the empowering provision (i.e. the purpose of section 164(3) of the TAA, which empowers the senior SARS official to make a decision on a suspension request). This implies that an understanding of the purpose of specific legislative provisions is important when a discretion is exercised by SARS officials. It is submitted that the purpose of section 164(3) of the TAA is to provide relief to taxpayers who are subject to the "pay now, argue later" rule of section 164(1) of the TAA in circumstances where such relief is warranted. For the decision on a suspension request to be rationally connected to this purpose, the grounds of section 164(5) of the TAA upon which a senior SARS official may deny a suspension request or revoke a decision to suspend payment become relevant. A decision to deny a suspension request if, for example, the objection or appeal is not frivolous or vexatious and if the taxpayer is not employing dilatory tactics in conducting the objection or appeal (section 164(5)(a) and (b) of the TAA) may arguably be irrational, based on the purpose of section 164(3) of the TAA.

⁶³ PwC South Africa 2015 <http://www.thesait.org.za/news/216884/Tax-Administration-Laws-Amendment-Bill-B14-of-2014-will-effect-amendments-to-the-TAA-.htm> 4.

⁶⁴ PwC South Africa 2015 <http://www.thesait.org.za/news/216884/Tax-Administration-Laws-Amendment-Bill-B14-of-2014-will-effect-amendments-to-the-TAA-.htm> 4; Silke *et al Silke on Tax Administration* 5.9.

In *Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission*⁶⁵ it was determined that in terms of the *Constitution* only a rational connection with minimal justification is required by the organ of state or administrator to overcome the rationality grounds for review, rather than the court's having to replace the decision because it is essentially incorrect. Erasmus⁶⁶ also believes that in practice the absence of a rational connection might be difficult for taxpayers to prove and as such, section 6(2)(f)(ii) may not be the most effective ground for the review of a section 164(3)-decision.

5.2.2 Proportionality

According to *Woof et al*,⁶⁷ proportionality refers to whether manifestly disproportionate weight has been allocated to one or other consideration, relevant to the decision. Proportionality may also be defined as "the notion that one ought not to use a sledgehammer to crack a nut".⁶⁸ Erasmus⁶⁹ states that proportionality means that the decision must be in proportion to the facts and circumstances of the case. Hoexter⁷⁰ states that proportionality's essential elements are balance and necessity, together with suitability.

A decision taken in terms of section 164(3) of the TAA must be proportional to the facts and circumstances of the case.⁷¹ For a proportional decision in terms of section 164(3) of the TAA, there should be a balance between the facts and the decision, and the need for the request should be considered together with the appropriateness thereof.⁷² This again confirms that the discretion exercised for each suspension request will be on a case-by-case basis.

It is submitted that proportionality requires that the senior SARS official takes other powers which are available to SARS into account. SARS might have other (less drastic or more proportional) powers available to secure the payment of disputed tax, which may result in the denial of the suspension request being disproportionate. If a taxpayer appears to be entitled to a suspension, there may still be some risk to accepting the request, but denying the request would be disproportionate. The question is

⁶⁵ *Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 3 SA 143 (C) 164G.

⁶⁶ Erasmus *Commissioner's Discretionary Powers* 92.

⁶⁷ *Woof et al De Smith's Judicial Review Glossary*.

⁶⁸ *S v Manamela* 2000 3 SA 1 (CC) para 34.

⁶⁹ Erasmus *Commissioner's Discretionary Powers* 93.

⁷⁰ Hoexter *Administrative Law* 344.

⁷¹ Erasmus *Commissioner's Discretionary Powers* 93.

⁷² Hoexter *Administrative Law* 344.

then whether SARS has any other powers available that are more proportionate, rather than denying a suspension request. For example, if there is information giving reason to believe that a taxpayer might flee from the country but on all other grounds a suspension request should be accepted, SARS could consider bringing an application to court for an order that the taxpayer should surrender his or her passport.

If the exercise of the discretion is not proportional, the decision will be reviewable in terms of section 6(2)(h) of PAJA, which requires that the power exercised was so unreasonable that no reasonable person could have so exercised the power. The reasonableness or otherwise of the senior SARS official's decision will be significantly influenced by the factors in section 164(3) of the TAA. If any of the factors are not considered by the senior SARS official, or if the factors are not equally considered by the senior SARS official, the decision could be reviewed in terms of section 6(2)(h) of PAJA.

5.3 Procedurally fair administrative action

Section 3 of PAJA specifically provides a detailed approach to be followed in fulfilling the right to procedurally fair administrative action. Section 3(1) of PAJA provides that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair" and section 3(2)(a) of PAJA provides that "a fair administrative procedure depends on the circumstances of each case". PAJA distinguishes between compulsory and discretionary elements of procedural fairness. It may be noted that the compulsory elements are still subject to the flexibility provided for in section 3(2)(a) of PAJA, in other words, depending on the circumstances of each case.⁷³ Other exceptions are allowed for in terms of section 3(4) of PAJA, where, if it is reasonable and justifiable to depart from the requirements in section 3(2) of PAJA, the departure will be acceptable. Section 3(5) of PAJA also allows the use of "fair but different" procedures as an alternative to the provisions in section 3(2) of PAJA.

The compulsory elements in terms of section 3(2)(b) of PAJA are that the administrator *must* give the taxpayer adequate notice of the nature and purpose of the proposed administrative action, a reasonable opportunity to make representations, a clear statement of the administrative action, adequate notice of any right of review or internal appeal, where applicable, and adequate notice of the right to request reasons in terms of section 5 of PAJA. The discretionary elements are provided for in section 3(3) of PAJA

⁷³ Quinot *Administrative Justice* 154 with reference to *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).

and include that the administrator *may* give the taxpayer an opportunity to obtain assistance and in seriously complicated cases legal representation, to present and dispute information and arguments, and to appear in person.

Some of the aforementioned elements of procedural fairness which are particularly relevant are subsequently applied in the context of section 164(3) of the TAA.

Regarding the first compulsory element of procedural fairness, it is submitted that no notice of the nature and purpose of the proposed administrative action is required by the senior SARS official, as it is the taxpayer who makes the request and who is therefore deemed to be aware of the nature and purpose of the proposed administrative action. As stated above, compulsory elements are subject to the flexibility provided for in section 3(2)(a) of PAJA or can be departed from where it is reasonable and justifiable in terms of section 3(4) of PAJA.

The second compulsory requirement is that the administrator must provide a reasonable chance to make representations. In the context of section 164(3) of the TAA, a taxpayer is given a reasonable chance to make representations by submitting all relevant information to SARS when the suspension request is made. This gives the taxpayer a way of participating in the decision to be made by the senior SARS official in the form of *audi alteram partem*. Hoexter⁷⁴ states that through the *audi alteram partem* principle the taxpayer is given both the opportunity to participate in decisions that will affect his or her rights adversely and a chance to influence the outcome of those decisions to ensure procedural fairness. The taxpayer cannot interactively participate in the decision taken, as the taxpayer only submits the request and the senior SARS official then has the authority to accept or deny the request. The only possible manner in which the taxpayer could be heard or could influence the decision of the senior SARS official is by ensuring that all relevant documentation pertaining to the suspension is included in the request. It is submitted that the senior SARS official, if unable to make a just decision on the information before him or her, should grant the taxpayer an opportunity to appear in person, for example, to clarify any uncertainties, which is one of the discretionary elements of procedural fairness.

Thirdly, a clear statement of the administrative action must be given by the senior SARS official. According to Hoexter, this would entitle the affected person (the taxpayer who made the suspension request) to know what was decided (whether the request was accepted or denied), when the decision was made, by whom the decision was made (in this regard, it is submitted

⁷⁴ Hoexter *Administrative Law* 363.

that it should be stated that the decision-maker is a designated senior SARS official, as this would also partially satisfy the lawfulness requirement as explained in paragraph 5.1.1 above) and the legal and factual basis on which the decision was made.⁷⁵ The legal basis would be section 164(3) of the TAA. It is submitted that the factual basis on which the decision was made should originate from the taxpayer's suspension request, which contains the information presented by the taxpayer to the senior SARS official. The "clear statement of the administrative action" which must be provided will accordingly assist the taxpayer to evaluate the reasonableness of the decision, which requires that there must be a rational connection between the information, the decision and the reason for the decision. Even though it is not required for the senior SARS official to provide reasons as part of the clear statement, it should provide the taxpayer with some explanation because the factual basis on which the decision was made must be provided.

With the aim of decreasing the possibility of procedurally unfair administrative action, the taxpayer needs to ensure that all relevant documentation is included when the suspension request is submitted. However, if the taxpayer is affected by procedurally unfair administrative action, he or she will be entitled to launch a review application in terms of section 6(2)(c) of PAJA, based on the action being procedurally unfair.

The rule against bias is also regarded as part of procedural fairness,⁷⁶ and requires that the decision-maker must be impartial.⁷⁷ For a fair decision in terms of section 164(3), the senior SARS official must not be biased or reasonably suspected of bias. In case of bias or a reasonable suspicion of bias, the taxpayer can make use of section 6(2)(a)(iii) of PAJA for review. A more detailed discussion of bias falls beyond the scope of this article. Suffice it to say that financial bias will exist should the senior SARS official who makes the decision on the suspension request earn an incentive bonus based on the amount of tax collected.

6 Conclusion

This article analyses the impact of the right to just administrative action on the manner in which the decision is made in terms of section 164(3) of the TAA.

⁷⁵ Hoexter *Administrative Law* 376. According to Quinot *Administrative Justice* 156, the same must be set out in the clear statement of the administrative action, namely "what was decided, who the decision-makers were, and on what legal and factual basis the decision was made".

⁷⁶ Hoexter *Administrative Law* 451; Quinot *Administrative Justice* 166.

⁷⁷ Hoexter *Administrative Law* 451.

Essentially, as the decision in terms of section 164(3) of the TAA constitutes administrative action, the decision must be taken in a lawful, reasonable and procedurally fair manner to ensure compliance with the *Constitution* and PAJA. For the decision to be taken in a lawful manner, the senior SARS official must at least be authorised to exercise the discretion in terms of the TAA and comply with the procedures and conditions stated in section 164(3) of the TAA, the main requirement of which is to ensure the consideration of relevant factors, including the factors listed. For the decision to be considered reasonable, the decision must be, at the minimum, rational (i.e. one must at least be able to justify the decision based on the information known to the decision-maker and the reasons supplied for that decision) and proportional (i.e. the decision taken in terms of section 164(3) of the TAA must be proportional to the facts and circumstances of the case, and other less drastic or more proportional powers available to secure the payment of disputed tax should have been considered by the senior SARS official). To ensure that the decision is taken procedurally fair, SARS should comply with at least the relevant compulsory elements in terms of section 3(2)(b) of PAJA. A decision in terms of section 164(3) of the TAA which fails to meet the requirements of lawfulness, reasonableness and/or procedural fairness will be subject to review on several grounds listed in section 6(2) of PAJA.

The impact of the right to just administrative action on the decision taken in terms of section 164(3) of the TAA required investigation from the viewpoint of taxpayers and from the viewpoint of SARS. The contribution of this study is broadening the taxpayers' knowledge of suspension requests, the right to just administrative action in the context of suspension requests, and the specific remedies available in PAJA in the case of non-compliance by SARS. Recommendations are suggested which SARS can consider implementing to ensure compliance with its constitutional obligations in respect of the right to just administrative action and to avoid reviews in terms of PAJA. Further, in a broader context, the study can be generally useful in the numerous other instances where SARS obtains discretionary powers in tax legislation. It is submitted that this research is relevant with regard to the practical protection of taxpayer rights as well and more generally to an understanding of the impact of South African constitutional law in the area of tax administration.

It is recommended that SARS should issue guidelines to taxpayers on the process followed and the factors taken into account when considering a suspension request, and how the constitutional obligations of SARS in respect of the right to just administrative action are complied with. This could be in the form of a guide or an interpretation note, but it is essential that there be transparency around SARS' practice of considering suspension

requests, to ensure that the right of taxpayers to just administrative action is upheld. The implementation of administrative law in institutions such as SARS is vital to improving governance. The crucial pre-condition is, however, the education of administrators in the standards of law which they need to comply with. Essentially, the senior SARS official must act neutrally, ensure careful consideration of the factors in play, and not abuse this discretionary power. Also, the decision must be justifiable with reference to the information available to and reasons given by the senior SARS official, and correspond with the facts and circumstances of each request.

A guide or interpretation note should also address the problem of information asymmetry which currently exists. The fact that a taxpayer does not know what the senior SARS official may consider to be relevant when the suspension request is considered is problematic in terms of the requirements of just administrative action. The criteria according to which the senior SARS official will exercise the discretion must be known for the taxpayer to submit the suspension request containing the relevant information. At present, without such guidelines or criteria, there is a risk of the outcome being unjust, or at least appearing to be unjust.

To date, there has been no reported judgment regarding a suspension request. It has been stated that speculative inferences can be drawn from this fact.⁷⁸ One reason for this might be that SARS did not want to take the risk of a pro-taxpayer judgment, as this could increase the number of suspension requests.⁷⁹ However, this should not prevent a taxpayer from submitting a suspension request, and if necessary, from bringing an application for the review of the decision in terms of PAJA. When making a suspension request, the taxpayer needs to ensure that all relevant information is included and that the request is complete. As a taxpayer has no right of appeal when a suspension request is denied, the request will form the foundation of a review application in terms of PAJA. Hence, the taxpayer's formulation of the request could have a significant impact on the success of any subsequent review application.

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List of Abbreviations

BTCLQ	Business Tax and Company Law Quarterly
CCR	Constitutional Court Review
JEF	Journal of Economic and Financial Services
PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SARS	South African Revenue Service
TAA	Tax Administration Act 28 of 2011