useful to conduct the audit, for SARS to then simply use that information[7](or information derived from that information handed over in self-incriminatory circumstances) as evidence to prove beyond a reasonable doubt the guilt of the taxpayer in committing a statutory or common law tax-related offence. This is contrary to the principles laid out by the Constitutional Court in *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*[8] in a similar instance where a person was compelled[9] to make available self-incriminating evidence. The Constitutional Court held that where public policy dictates that self-incriminating evidence should be made available by a person, that evidence cannot be used to incriminate that person both in its direct form, or any other evidence derived from it. This issue falls outside the scope of this thesis, but the constitutional issue that flows from it will no doubt give rise to much litigation, and opportunities for taxpayers to raise the 'just cause' defence to refuse to participate in any SARS audit by refusing to submit to SARS' demands for 'relevant material'.

Despite the above criticisms and comments, it is the writer's submission that the new proposed provisions in the Tax Administration Act do not affect the submissions and conclusions reached in this thesis.

6.2 THE NEW PROPOSED TAX ADMINISTRATION ACT

The definition in the new proposed Tax Administration Act for 'administration of a tax act' as defined in s 3(2) in so far as it is used in selecting taxpayers for inquiry and audit in ss 40 through 49 of the Tax Administration Act, states that SARS is responsible for the administration of a tax act, which in turns basically repeats the definition (with a few exceptions mentioned *infra*) of 'the administration of this act' contained in the current s 74 of the Income Tax Act and as one of the jurisdictional facts in ss 74A and 74B.

The definition is wider in that included in its ambit is the ability for SARS to: determine the future tax liability of a person (who may not even be a current taxpayer); establish the identity of a person to determine such a future tax liability; and an emphasis on the ability for SARS to investigate tax related offences and lay the appropriate statutory and

[7]Section 72 of the Tax Administration Act, unless a court directs otherwise.
[8]1996 (1) SA 984 (CC).
[9] Sections 35(3)(h)-(j) of the Constitution; See also *ITC 1818* 69 SATC 98 and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).

common law criminal charges, and do all reasonably required for the investigation and prosecution of tax offences.

It is with reference to the later administrative action that the writer believes constitutional challenges will occur, either in challenging the law as being unconstitutional in its current form, in that it does not purport to give a clear line of separation between a necessary administrative audit for SARS to revisit the tax compliance of a taxpayer, and impose various administrative penalties[10] (Chapter 15 and 16 of the Tax Administration Act) and penalty interest (Chapter 12 of the Tax Administration Act), and criminal prosecution as envisaged in the Canadian Supreme Court case of *R v Jarvis.*[11] In that case a clear line between a civil or administrative audit, and a criminal investigation was drawn, as analysed earlier in this thesis.

To take matters further, the Constitutional Court in South Africa in *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*[12] is authority for the submission that where any person has been compelled to give self-incriminating evidence in the interests of public policy, that direct, and any derivative, evidence cannot be used against the person in any subsequent criminal prosecution. This decision is in line with the constitutional guarantees given to persons in ss 35(3)(j) and (5) of the Bill of Rights[13].

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[10] The reverse onus usually applies in the case of penalties. On setting aside the 'reverse onus' by the Constitutional Court, see *William Mello and Constantina Botolo v S*1998 (3) SA 712 (CC). The Tax Administration Act places the onus of proof for understatement tax in Chapter 16 on SARS. On the difference between administrative and criminal penalties, attention should be paid to the facts. Administrative penalties are designed to assist SARS recover its costs in recovering undeclared taxes. Criminal penalties are imposed as a form of punishment. If administrative penalties are excessive under the circumstances, the issue of criminal or punitive penalties arises. Then the question of double jeopardy becomes relevant. The principles governing double jeopardy in South Africa are well summarised in *Tax Board Decision 198*, by Advocate B Spligg SC as Chairman, Lexis Nexis online at www.mylexisnexis.co.zahttp://www.mylexisnexis.co.za/nxt/gateway.dll/lc/u3b/w3b/yi1ea?f=templates$fn=default.htm $vid=mylnb:10.1048/enu (last accessed 31 March 2013), at para's [12]ff.

[11] 2002 (3) SCR 757; See also *US v LaSalle Bank* 437 US 298 *US* where it was held 'Congress intended Internal Revenue Service summons authority to be *used to aid determination and collection of taxes, which purposes do not include goal of filing criminal charges against citizens*; consequently, summons authority does not exist to aid criminal investigations solely' and '(p)rior to recommendation for prosecution to Department of Justice, Internal Revenue Service must use its summons authority in good faith; dispositive question in each case is whether Service is pursuing authorized purposes in good faith or whether it has abandoned, in institutional sense, pursuit of civil tax determination or collection'. Emphasis supplied; SARS in its *SARS Internal Audit Process Manual* at Chapter 5 Comparison with The United States of America, p 7 – 8 quote the *LaSalle case* in conjunction with *US v Powell* 379 US 48 where they state: '…the provisions…(are)…important for the South African situation in that the four requirements …on…the standards of good faith should substantially be complied with under South African circumstances.'*Hale v Hinkle* 201 US 43 where it was held that '(t)he privilege against self-incrimination given by the Fifth Amendment to the Constitution, U.S.C.A., is personal to the witness and cannot be invoked in favor of another person, or of a corporation of which the witness is an officer or employee'; *Murdock v Pa* 319 US 105.

[12]1996 (1) SA 984 (CC).

[13] Sections 35(3)(h)-(j) of the Constitution. See also *ITC 1818* 69 SATC 98 and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).

The encroachment of the right not to give self-incriminating evidence was justified[14]as envisaged in s 36 of the Bill of Rights by guaranteeing the exclusion of the evidence so obtained, and any derivative evidence, from any future prosecution of the accused person.

These constitutional principles are now recognised in the Tax Administration Act. In s 57 of the Tax Administration Act it is stated that incriminating evidence obtained from a person at an inquiry is not admissible in any subsequent criminal proceedings against that person. A contrary provision appears in s 72 of the Tax Administration Act, but is subject to the court making a finding that the evidence be excluded for criminal prosecution purposes. However, no mention is made of the derivative evidence, or of evidence obtained by way of written interrogatories as envisaged in ss 40 through 49 of the Tax Administration Act. No further exclusion or mention is made of this in Chapter 17 of the Tax Administration Act dealing with criminal offences.

It is the writer's submission that these *lacunae* in the Tax Administration Act will entitle a suspicious taxpayer, before participating in any SARS audit, to raise the defence of 'just cause' in refusing to participate in an administrative audit commenced by SARS in terms of ss 40 through 49 of the Tax Administration Act, until one of three things happens:

1. SARS gives written assurances that the audit will remain an administrative one, and that no evidence or communication with the SARS criminal investigation unit will take place, and all evidence obtained from the taxpayer will be excluded (including any derivative evidence) from any future prosecution;

2. The appropriate court application is brought to the Constitutional Court to declare the law or conduct of SARS invalid, and/or to seek the appropriate

[14] Careful note would have to be taken by SARS of *Nyambirai v Nssa & Another* 1995 (2) ZLR 1 (S) and *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* 1998 3 LRC 62 where this Privy Council decision was cited with approval on the issue of what is 'reasonably justifiable in a democratic society' to limit a person's fundamental constitutional rights in the Zimbabwean Supreme Court case of *Law Society of Zimbabwe and Another v Minister of Finance* 61 SATC 458: '1.Whether the legislative objective is sufficiently important to *justify limiting a fundamental right*? 2.Whether the measures designed to meet the *legislative objective are rationally connected* to it? 3.Whether the means used to impair the right or freedom are *no more than is necessary* to accomplish the objective?' (Emphasis supplied); See also *US v McCarthy* 514 F 2d 368; *Ferucci and Others v Commissioner for South African Revenue Service and Another* 65 SATC 47 at pages 54-55.

guarantees given to the applicant in *Ferreira v Levin NO and Others; Vryenhoek and Others V Powell NO and Others*[15]; and/or

3. Request detailed information from SARS in terms of s 73 of the Tax Administration Act in establishing the source of the audit, the scope of the audit, whether or not any criminal investigation is taking place or anticipated, and on what grounds. Seeking this type of information requires the taxpayer in terms of s 73 of the Tax Administration Act to do so through the mechanisms created in terms of the Promotion of Access to Information Act.[16] This requires the taxpayer to correspond with the information officer of SARS at its head office in Pretoria. A very slow, laborious and frustrating process, often resulting in the information officer refusing to make the requested information available, and expecting the taxpayer to seek redress through the internal appeal process set out in that Act,[17] which in turn causes delays running into numerous months. The purpose of the information request addressed to SARS will be to allow the taxpayer to insure SARS meets its constitutional obligations towards the taxpayer, as envisaged in 1. and 2. above.

The 'just cause' defence will prevent SARS seeking a positive conviction under s 234of the Tax Administration Act(read with ss 49(2) and 127 of the Tax Administration Act) for the taxpayer refusing to impart any 'relevant material' on the basis that SARS has made a decision that is inconsistent with the Constitution, and invalid.

6.3 RELEVANT MATERIAL

The definition of 'relevant material' in the Tax Administration Act provides for 'information, a document, or a thing (all in turn defined, but creating meanings the same as those in the current Income Tax Act, 1962) that may be useful in assessing a tax, collecting tax, or showing non-compliance with an obligation under a tax act or a tax

[15] 1996 (1) SA 984 (CC).
[16] Act 2 of 2000.
[17] The writer's experience in attempting to deal with the information officer of SARS since 2003 on numerous occasions after the promulgation of the Promotion of Access to Information Act.

offence was committed (which is specifically defined to include any other offence involving fraud on SARS)'.

In *ITC 1736*[18] Selikowitz P made the following pertinent comments:

> The term 'administration of this Act' is defined in s 74 and what is clear is that administration of the Act is a matter which falls within the domain of the Commissioner for Inland Revenue and should not be confused with this court's independent jurisdiction to decide upon matters which arise out of that administration. In other words, the rights of the Commissioner to seek to obtain information, documents and such things as he may require is not a right which is a substitute for any procedure which may be found to be applicable before this tribunal. Indeed, the purpose of discovery is far wider than the purposes required for the administration of the Act. Discovery is by its nature an extremely important aspect of our litigation procedure. It entitles a party to prepare properly by knowing what documents and other discoverable items are in existence. They may be, either items which the other party who has to discover them, is going to use in the course of presenting his or her case, or, indeed, they may be documents according to the provisions of the Magistrates' Court which tend to prove or disprove either party's case. Discovery is intended to permit the parties to litigation, to have full information as to what documentation and other discoverable items are in existence. That is a different concept to that expressed in s 74A of the Act where the Commissioner would be seeking documents which he in his own mind decides could be relevant. Clearly there may be documents in existence and in the possession of the other party which the Commissioner may not consider necessary because either he does not know that they exist or he does not know what they contain. It is therefore not an answer to suggest that s 74A of the Income Tax Act provides the Commissioner with a substitute for formal discovery.

[18] 64 SATC 464 at pages 467-8.

The principles set out in this judgment apply equally to the new 'relevant material' definition in the Tax Administration Act. However, one distinguishing factor may be the use of the words 'that may be useful in assessing tax, collecting tax, or showing non-compliance'. These words seek to broaden the scope of what SARS is entitled to now in terms of the current Income Tax Act, and may include much more than mere factual information about a taxpayer's tax affairs. This may include views or opinions (excluding those subject to attorney and client privilege)[19] that would otherwise not be only of a factual nature. In a sense, SARS is attempting to bring forward the discovery process referred to by Selikowitz P in *ITC 1736*[20] above.

Despite these general criticisms, the main issue with the definition of 'relevant material' relates back to the mixed civil audit and criminal investigation audit referred to above in this thesis: 'information, a document, or a thing … that may be useful in … showing non-compliance with an obligation under a tax act or a tax offence was committed'. The definition goes a long way to contribute to the potential transgression of taxpayers constitutional rights, in either not being able to be compelled[21] to give self-incriminating evidence, or where compelled to do so by public policy, receive a guarantee that any such direct or derivative evidence obtained under compulsion, will not be used against the taxpayer in any subsequent criminal prosecution.

6.4 REQUEST FOR RELEVANT MATERIAL, AUDIT SELECTION AND FIELD AUDIT

The differences between the provisions of ss 40 through 49 of the proposed Tax Administration Act, and ss 74A and 74B are summarised *infra*. SARS will be able to:

1. Request information 'that may be useful in assessing tax, collecting tax, or showing non-compliance',[22] broadening the scope of its audit investigation to include 'relevant material' that it subjectively believes 'may be useful' for its purpose;

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[19] *Heiman Maasdorp & Barker v SIR* 1968 (4) SA 160 (W).
[20] 64 SATC 464.
[21] Sections 35(3)(h)-(j) of the Constitution; See also *ITC 1818* 69 SATC 98; *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and de Wet NNO* 1997 (2) SA 636 (W).
[22] Section 1 of the Tax Administration Act, definition of 'relevant material'.

2. Request information for the 'administration of a tax act' to 'investigate whether an offence has been committed in terms of a tax act' and then, if in its subjective belief this is so 'lay criminal charges…(and)…provide the assistance that is reasonably required for the investigation and prosecution of tax offences or related common law',[23] broadening the scope of the offence investigation provisions currently contained in s 74 of the Income Tax Act under the definition of 'the administration of this Act';

3. Request information in respect of classes of taxpayers, and not just in respect of a named taxpayer, 'whether identified by name or otherwise objectively identifiable' and 'objectively identifiable class of taxpayers'.[24] For example, members of an exclusive sports club, although SARS will still have to identify the class of taxpayers using an objective means. It may be in the example cited that some of the members of the club are foreigners, who are not taxpayers, and the club may have no objective means at its disposal to objectively identify who is a taxpayer, or should be a taxpayer, and who is not. The scope of the request for information has broadened to 'for the purposes of tax policy design or estimation'.[25] If the 'relevant material' is specifically requested for this purpose, based on the conclusions reached elsewhere in this thesis, if SARS were to make this information available to assessors to issue revised assessments or criminal investigators to investigate a prosecution or imposition of a penalty[26] (that is punitive in nature, such as additional tax), the legal concept of entrapment would be available to the taxpayer as a defence. This is an untested proposition, but one that is nevertheless available to taxpayers, simply because SARS would have obtained information from the taxpayers concerned under the false pretences of actually accumulating information to attend to statistical analysis, and not to collect evidence for revised assessment or criminal investigation purposes. Taxpayers are always, in terms of constitutional guarantees analysed in this thesis,

[23] *Ibid.* s 3(1)(f).
[24] *Ibid.* s46.
[25] *Ibid.* s 70(1)(b).
[26] See the discussion in this thesis on the Canadian Supreme Court case of *R v Jarvis*2002 (3) SCR 757, at page 88.

entitled to know what case they are facing if they are the subject of an adversarial investigation.[27] Facing an inquiry for statistical information that is subsequently used to pursue the taxpayer would be constitutionally questionable. However, in *S v Riaz Hassen and Another*[28] the Constitutional Court endorsed the finding of Le Roux J that 'entrapment' is not per se a violation of an accused's right to a 'fair trial' contained in s 35(3) of the Constitution. The Constitutional Court confirmed that the propriety of the admission of evidence consequent to the 'entrapment' of an accused must be examined on an *ad hoc* basis with the court carefully examining whether the prerequisites for the setting up of the trap were complied with prior to the setting up thereof.[29] The question of entrapment is potentially a difficult one. In *Dube v S*[30] the constitutional challenge of the appellant was whether the admission of the evidence of the entrapment rendered the trial of the appellant unfair. The court concluded that the admission of the evidence of the entrapment had not rendered the trial unfair and that, if anything, it was advantageous to the administration of justice. There was, in its opinion, nothing unfair about the setting up of the trap and it was held that the appellant was the victim of his own greed and dishonesty.[31] However, entrapment was specifically used in that case to entrap a suspected and allegedly dishonest accused. The approach by SARS would not normally be premised by such facts. What would more likely happen is that SARS may discover evidence, in the course of conducting the statistical analysis, of a transgression and only then submit the information to the assessor or the criminal investigator after the fact. In *Nortjé v S*[32] Foxcroft J at 459 states:

> In a work called "Entrapment in Canadian Criminal Law", Michael Stober summarizes the position in Canada as follows at 74: "Although entrapment situations have been before the Courts

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[27] *R v Jarvis* [2002] 3 SCR 757.
[28] 1997 (1) SACR 247 (T).
[29] Omar Z *The right to privacy and an accused's right to a 'fair trial' under the Constitution* De Rebus December 1998 Lexis Nexis (lasted accessed 21 March 2010).
[30] [2000] 1 All SA 41 (N).
[31] *Dube v S* [2000] 1 All SA 41 (N) at page 62b.
[32] [1996] 4 All SA 449 (C).

in Canada on several occasions, there is no clear authority, statutory or otherwise, nor a rational foundation for a defence of entrapment. In some cases, Judges have either denied the existence of the defence or skirted the issue entirely, disposing of the case before them upon other considerations. In others, there has been a common feeling among Judges that a person should not be subjected to such unconscionable practices, and consequently, courts have groped for some legal principle or device in order to exonerate the accused." The Canadian cases show a move towards recognising the defence but in *R v Mack* 44 CCC 3D at 513, the Canadian Supreme Court ruled that while entrapment is a "defence", it is based on the need to preserve the purity of the administration of justice and to prevent an abuse of its own processes. With reference to the Canadian Charter of Rights and the defence of entrapment, Stober points out (and I use the language of the Report at page 63), that "an aggrieved person must demonstrate to the court that police action infringed his rights and freedoms. The courts must, in reviewing police practices, decide first whether these practices violated the person's fundamental rights (for example right to life, liberty and security) and second whether such practices have been carried out in accordance with the principles of fundamental justice. In answering these questions the Charter prescribes that such limits be placed on these rights as can be demonstrably justified in a free and democratic society." Stober concludes at 189 that where, for example, government officials violate the personal integrity and privacy of a person through entrapment (by means of coercive tactics designed to induce an innocent person to commit an offence) it cannot be denied that his fundamental rights have been infringed. "Such conduct is far removed from any notion of fair play inherent in the principles of fundamental justice." See Commission Report, p 64. The Canadian Courts are therefore not prepared to allow the criminal justice system to be discredited by the admission of evidence

obtained in contravention of constitutional rights. Where the police act improperly, a balance should be struck between protection of the community and the protection of the individual. This balance is struck by the exclusion of evidence which brings the administration of justice into disrepute. In the words of Stober at 217: "It is offensive to common notions of decency and fair play to admit such evidence." [Commission Report, p 65].

The writer submits that the Constitutional Court should ultimately follow the line of reasoning set out in the Canadian Commission report above. However, further discussion or analysis of this point is outside the scope of this thesis.

Despite the difficulties with entrapment, the other defence available to the taxpayer would be a transgression by SARS of the constitutional guarantee of not using any evidence given to SARS under compulsion, as discussed in detail earlier in this chapter. This defence would assist in criminal prosecutions, but not in SARS raising a revised assessment. The final point on this proposed section, is that the taxpayer would have 'just cause' in not furnishing any information to SARS until it was advised what the precise scope and purpose of the request for 'relevant material' was, so as to enable it to enforce any rights the taxpayer may have to avoid constitutional breaches by SARS. This begs the question – if the taxpayer has been dishonest and this has been unearthed by the statistical analysis taking place, why should SARS not be entitled to hand over the information to the appropriate authorities? The answer to this question lies in the fact that organs of state such as SARS must also abide by a set of laws equally applicable to them that ensures the prevalence of the rule of law. Just because the taxpayer breaks the law, does not mean that SARS can also break the law so as to pursue the taxpayer. The wrong of SARS does not trump the wrong of the accused. The provisions of the Constitution apply specifically to SARS to ensure they comply with

respecting the fundamental rights of accused who have allegedly broken provisions of tax acts;

4. Request any 'relevant material' that 'is foreseeably relevant'.[33] This new proposed addition can be relied upon by taxpayers to ensure that SARS is specific in what they require as 'relevant material' from taxpayers. It would not suffice to request the taxpayer to make available general information such as all trial balances for specified years of assessment, but that SARS is required to be more specific – specify which information from the trial balances they require. Again 'just cause' would arise in favour of the taxpayer not to submit just any 'relevant material' until SARS can specify with 'reasonable certainty' what is specifically sought by SARS, and for what purpose;

5. Request that the person submitting the 'relevant material' must do so 'under oath or solemn declaration'[34] giving rise to the additional potential exposure to that person of a criminal charge of perjury, if the information turns out to be incorrect. Once again, 'just cause' will arise in favour of that person not to submit any information 'under oath or solemn declaration' until they are certain they will not be committing perjury at some point in the future;

6. Select a taxpayer for audit 'for the proper administration of a tax act, including on random or a risk assessment basis'.[35] Despite the specific proposed wording referring to 'random' audits, this is in line with current practice of SARS. Constitutional questions still arise, nevertheless, on

[33] Definition of 'relevant material' in the Tax Administration Act. These provisions echo the findings of the American courts as follows: *US v Powell* 379 US 48 (quoted from the headnote): where '(p)rimary purpose of clause that no taxpayer shall be subjected to unnecessary examinations or investigations in sub-section of statute going on to provide that only one inspection of taxpayer's books shall be made for each taxable year unless taxpayer otherwise requests or Secretary or delegate, after investigation, notifies taxpayer in writing that additional inspections are necessary, *was no more than to emphasize responsibility of agents to exercise prudent judgment in wielding extensive powers granted to them* by Internal Revenue Code'. (Emphasis supplied); *US v Brown* 536 F.2d 117 (quoted from the headnote): where the cout held '"Books, papers, records, or other data" to be produced under … the Internal Revenue Code relating to examination of books and witnesses … did not … authorize the IRS to require the manufacture of documents or other data for examination'; see also *Local 174 International Brotherhood of Teamsters v US* 240 F.2d 387, where 'revenue agents … had burden to show that demand was reasonable under all circumstances and to prove that books and records were relevant or material to tax liability of taxpayer…'; *May v Davis* 7 F Supp 596.
[34] *Supra* footnote 1 at s 46(7).
[35] *Ibid.* s 40.

whether or not the conduct by SARS would be arbitrary in conducting random audits without the support of at least a risk analysis performed internally at SARS to suggest that a random audit of that taxpayer would be appropriate. Taxpayers would be entitled to access any information from SARS in terms of the Promotion of Access to Information Act[36] to access any relevant information from SARS on a risk review of a group of taxpayers that the taxpayer being sought to audit falls into, so that the taxpayer can better understand what the scope and purpose of the random audit is. If SARS can provide these answers, the random audit would not simply be arbitrary, and can be justified by SARS and in line with the Bill of Rights guarantee to taxpayers that they can expect just administrative action from SARS;[37]

7. Request entry to the business premises of the taxpayer to conduct the audit as set out in s 74B of the current Income Tax Act, but in terms of s 37(5) 'a SARS official must not enter a dwelling-house or domestic premises (except any part thereof used for the purposes of trade) … without the consent of the occupant'. The use of the word 'occupant' is not specific to a representative of a taxpayer, or the owner, or lessee of the premises, but may be any occupant, as long as the occupant gives consent. This provision is in accordance with developed Constitutional Court judgments on the privacy of persons, where the invasion of privacy becomes more justified where the premises in the place of business of the taxpayer.[38]

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[36] Act 2 of 2000.

[37] Sections 33 of the Constitution. Section 195(1)(b) and (f) requires SARS to use its resources efficiently and cost effectively, and requires SARS to be accountable for its decisions. Any arbitrary decision unsupported by underlying research analysis or a reason, would be conduct that is contrary to the provisions of the Constitution, and invalid conduct as stated in s 2 of the Constitution.

[38] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079, Langa DP stated (with reference to *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 at para [68]) that the right to privacy lies along a continuum, where the more a person interrelates with the world, the more the right to privacy becomes attenuated (at para [15]). The right, however, does not relate solely to the individual within his intimate space, and when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. See M. Dendy, Protection of Privacy, de Rebus, August 2009, Lexis Nexis. http://www.mylexisnexis.co.za (last accessed 31 March 2012). S 14 of the Constitution, 1996. Silke on Tax Administration, at para. 8.19, Lexis Nexis. http://www.mylexisnexis.co.za (last accessed 31 March 2013). Stricter enforcement of the privacy provisions on the Consttution, 1996 are enforced at the dwelling of the person concerned.

The proposed information gathering provisions in the proposed Tax Administration Act do not change the conclusions reached in this thesis. As demonstrated above, the opportunity for the taxpayer to raise the 'just cause' defence is increased in some instances where taxpayers have good reason not to participate in an audit. Section 3(3)(f) of the Tax Administration Act on what is meant by for the purposes of the administration of a tax act, was severely criticised by submissions made by the Law Societies of South Africa in respect of the Tax Administration Act,[39] as follows:

> In terms of paragraph 3 of the Tax Administration Act, SARS is authorised to liaise with the prosecuting authorities and charged with the duty to do all things required for the due prosecution of tax and other offences. In my view Parliament does not have the power to pass an Act containing such a provision. An amendment to the Constitution, 1996 would be required. This is so because section 179 of the Constitution establishes an independent prosecuting authority. It must exercise its functions without fear, favour or prejudice. Neither the Constitution nor the national legislation contemplated in section 179 contemplates that another organ of state, in the executive arm of Government, should be charged with the responsibility of ensuring the due prosecution of charges in relation to which it is the complainant! It is the function of the prosecuting authority to deal fairly with any charge made by a complainant, to have due regard to the rights of the accused person and to decide independently and without fear or favour whether to proceed with a prosecution. I am aware that SARS already has a Criminal Investigations Division that has a liaison of sorts with the DPP. It has with some justification been referred to as a "clandestine collusion" between SARS and the DPP. Details of the liaison have not, as far as I am aware, been made public but we are all aware of the arrangements in terms of which the work of the traditional "investigating officer" [very definitely not employed by the complainant] is now done by a SARS employee in the

[39] Drafted by Prof. H Vorster, and first submitted to SARS in June 2009, and again on 5 March 2010 by the LSSA Kris Devan, the PA: Manager Professional Affairs.

> SARS Criminal Investigations Division, assisted, or even directed, by the special prosecutor presented by the DPP by arrangement with SARS. The prosecution is presided over by a magistrate specially arranged to hear prosecutions of tax offences and presented by courtesy of the Department of Justice by prior arrangement with SARS. Early morning arrests and search and seizure raids are conducted by SARS officials and police officers with media reporters and television cameras in tow arranged, according to the evidence of a SARS official in a recent case, by courtesy of the SARS Media Department. There are those who hold the view that these arrangements and the involvement of SARS officials in the investigation and prosecution process will not withstand scrutiny. They might well be correct. Even if they were not, I am of the opinion that the involvement of SARS officials in the prosecution process cannot be legitimised in the manner now provided for in paragraph 3(2)(e)(ii) and (iii) of the Tax Administration Act.

The Cape Bar prepared a memorandum criticising the Tax Administration Act under the hand of Advocates Milton Seligson SC, Trevor Emslie SC and Joe van Dorsten, published in the February 2010 edition of The Taxpayer journal:[40]

> (On s 3(1), (2) and (3) of the Tax Administration Act) - In our view, it should be clarified that the role of SARS is limited…(and)…not itself prosecute taxpayers…The power to prosecute is vested by s 179 of the Constitution in the national prosecuting authority.
>
> (On s 33(1) (and what is now s 40) of the Tax Administration Act) - The broad category of 'another person' may include persons who are in possession of 'relevant material' that includes material that is subject to legal professional privilege. Provision should be made

[40] *Comment on the Draft Tax Administration Bill*, The Taxpayer Journal, February 2010, at page 24.

> for a procedure to challenge any requirement of SARS relating to privileged material, in order to safeguard documents or information that is subject to such privilege.

The scope of the LSSA, Cape Bar Council and other criticisms are beyond the subject matter of this thesis. However, the criticisms clearly illustrate the extent of other concerns expressed on the ability for SARS to investigate, lay and prosecute criminal charges as set out in the Tax Administration Act, and the potential ability for SARS to access through third parties information of a taxpayer subject to legal professional privilege.[41]

If these proposed provisions become law, taxpayers will have more reason than before to challenge SARS on the scope and purpose of a contemplated inquiry and audit.

> Any participation in the prosecution of taxpayers by SARS in the Tax Administration Act is contrary to the provisions of s 179 of the Constitution and the doctrine of the separation of powers entrenched in the Constitution. This may cause a constitutional challenge as to the validity of this aspect of the proposed s 3 of the Tax Administration Act. This may lead to an opportunity for taxpayers affected by this offending proposed provision to raise the 'just cause' defence in not participating in an inquiry and audit initiated by SARS, until the constitutional validity of the proposed provision is deliberated upon by the courts.

The uncertainty surrounding the issue of legal privileged information will give taxpayers the opportunity with 'just cause' not to participate in the SARS inquiry and audit, until either SARS or a court acknowledges that the 'relevant material' excludes legal privileged information of taxpayers.

6.5 CONCLUSION

Until the taxpayer is satisfied that its constitutional rights are not being transgressed by SARS implementing the proposed provisions of ss 3, 33 36 and 37 of the Tax

[41] *Heiman Maasdorp & Barker v SIR* 1968 (4) SA 160 (W).

Administration Act, the taxpayer will have 'just cause' not to participate in the audit, inquiry or any request for 'relevant material' by SARS.

Should SARS attempt to force the taxpayer to comply with the proposed provisions of ss 3, and 40 through 49 of the Tax Administration Act, judicial review of the decision of SARS to compel the taxpayer to comply, would be available to the taxpayer. The process of judicial review is discussed in Chapter 5. Nothing in the proposed Tax Administration Act changes the ability for taxpayers to review decisions taken by SARS in an attempt to enforce the proposed provisions of the Tax Administration Act, where SARS have failed to diligently and without delay perform its obligations in terms of s 237 of the Constitution, in complying with its duties as set out in ss 1(c), 33, 41(1) and 195(1) of the Constitution, and as analysed in this thesis.[42]

In summary ss 1 (c), 33, 41(1) and 195(1) SARS (as reiterated in s 4(2) of the SARS Act) are the constitutional duties that SARS must adhere to in order to comply with the rule of law, where SARS may only assume power and functions provided in terms of the Constitution, act with a high degree of professional ethics, use resources efficiently, be impartial, equitable, fair, unbiased, accountable, and transparent in their conduct and administrative actions. Failure by SARS to adhere to its constitutional duties will be reviewable in terms of PAJA and the principle of legality.[43]

[42]See Chapter 3 *supra*.
[43] See Chapter 4 *supra*.