

An analysis of the discretion of the SARS and the relevant factors considered following a request for the suspension of the payment of disputed tax in terms of section 164(3) of the Tax Administration Act 28 of 2011

by

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SUMMARY

Section 164(3) of the Tax Administration Act gives a senior SARS official ('the SARS') the discretion to suspend the payment of disputed tax or a portion thereof, having regard to relevant factors, including a list of specified factors.

In this study the uncertainties regarding the discretion of the SARS and the meaning and relevance of the specified factors were examined. The objectives were to determine whether the amendments to section 164(3) addressed some of the concerns and uncertainties, to establish a basic understanding of the term 'relevant factors' and the impact thereof, to analyse the impact of the constitutional right to just administrative action on the manner in which the section 164(3)-discretion is exercised by the SARS, and to determine whether the 'suspension of the payment' of disputed tax constitutes the granting of 'credit' in terms of the NCA.

It was established that the SARS has made several amendments to the specified factors, which resulted in some of the original concerns and uncertainties being addressed, many remaining unaddressed and creating new ones. For a factor to be considered 'relevant' it was determined that a close and logical sufficient connection must exist between the evidence provided by the taxpayer (factor) and the issue (request), which will make the granting of the request possible. The factor will most probably be considered with reference to all the other specific relevant factors in total. The relevance of a factor is also based upon the discretion of the SARS which adds an element of subjectivity.

However, if the decision in terms of section 164(3) is unlawful, unreasonable or procedurally unfair, a taxpayer has the right to a review in terms of the PAJA. It was established that the request will form the foundation of a review application and the taxpayer therefore needs to ensure that all relevant information is included when submitting a request in terms of section 164(3).

It was also concluded that a request for the suspension of payment can be equated with a credit transaction and, consequently with a 'credit agreement' in terms of section 8(4)(f) of the NCA. It was established that although the Tax Administration Act does contain some similarities to the relevant provisions in the NCA, the NCA can be used as guidance to simplify the process and specified factors in terms of section 164(3).

The Legislator's original intention with section 164(3) was to formalise the circumstances where the payment of tax will be required, despite objection or appeal. Based upon the existing concerns and uncertainties regarding the factors, as well as the impact of the discretion exercised by the SARS, it is however questionable whether section 164(3) in its current form endorses the Legislator's original intention. It remains to be seen whether the Legislator will take the effect of the right to just administrative action, the unresolved concerns and uncertainties and the recommendations based on the provisions of the NCA into account in future amendments to section 164(3).

OPSOMMING

Artikel 164(3) van die Wet op Belastingadministrasie verskaf aan 'n senior SAID-amptenaar ('die SAID') die diskresie om die betaling van betwiste belasting, of 'n gedeelte daarvan, op te skort. Relevante faktore, insluitend 'n lys van gespesifiseerde faktore, word oorweeg.

In hierdie studie is die onsekerheid rakende die diskresie van die SAID en die betekenis en relevansie van die gespesifiseerde faktore ondersoek. Die doelwitte was om te bepaal of die wysigings aan artikel 164(3) sommige van die bekommernisse of onsekerhede of aangespreek het, om 'n basiese begrip van die begrip 'relevante faktore' en die impak daarvan vas te stel, om die impak van die Grondwetlike reg op billike administratiewe handeling op die wyse waarop die artikel 164(3)-diskresie deur die SAID uitgeoefen word te analiseer en om te bepaal of die 'opskorting van betaling' van betwiste belasting die verlening van 'krediet' ingevolge die Nasionale Kredietwet ('NKW') uitmaak.

Daar is vasgestel dat die SAID verskeie wysigings aan die gespesifiseerde faktore gemaak het, wat veroorsaak het dat 'n paar van die oorspronklike bekommernisse en onsekerhede aangespreek is, talle onaangespreek gebly het en nuwes ontstaan het. Daar is vasgestel dat, vir 'n faktor om 'relevant' te wees, daar 'n nou en logiese voldoende verbintenis tussen die bewyse verskaf deur die belastingpligtige (faktor) en die kwessie (versoek) moet bestaan en dat die waarskynlikheid dat die versoek toegestaan sal word, daardeur beïnvloed sal word. Die faktor sal waarskynlik in totaal oorweeg word na inagneming van alle ander spesifieke relevante faktore. Die relevansie van 'n faktor is egter ook gebaseer op die diskresie van die SAID, wat 'n element van subjektiwiteit meebring.

Indien die administratiewe handeling ingevolge artikel 164(3) egter onregmatig, onredelik of prosedureel onbillik is, het 'n belastingbetaler, ingevolge die Wet op die Bevordering van Administratiewe Geregtigheid, die reg op 'n hersiening. Daar is vasgestel dat die versoek die basis vorm van die hersieningsaansoek en die belastingbetaler moet dus verseker dat alle relevante inligting ingesluit is wanneer die versoek ingevolge artikel 164(3) ingedien word.

Daar is ook vasgestel dat 'n versoek vir die opskorting van betaling gelykgestel kan word aan 'n 'krediettransaksie' en dus ook 'n 'kredietooreenkoms', ingevolge artikel 8(4)(f) van die NKW. Daar is vasgestel dat, alhoewel die bepalinge van Wet op Belastingadministrasie en

die NKW sommige ooreenkomste toon, die NKW gebruik kan word om leiding rakende die vereenvoudiging van die proses en faktore van artikel 164(3) te verskaf.

Die Wetgewer se oorspronklike bedoeling met artikel 164(3) was, om die omstandighede waar die betaling van belasting vereis sal word, ten spyte van 'n beswaar of appèl, te formaliseer. Gebaseer op die bestaande bekommernisse en onsekerhede rakende die faktore, sowel as die impak van die diskresie van die SAID, word dit egter bevraagteken of artikel 164(3) in sy huidige formaat die oorspronklike bedoeling van die Wetgewer onderskryf. Tyd sal leer of die Wetgewer die effek van die reg op billike administratiewe handeling, die onaangespreekte bekommernisse en onsekerhede en die aanbevelings gebaseer op die bepalings van die NKW by toekomstige wysigings tot artikel 164(3) in ag sal neem.

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ABBREVIATIONS AND TERMINOLOGY

‘OED’ –	Oxford English Dictionary;
‘SATC’ –	the ‘South African Tax Cases Reports’, as issued by LexisNexis;
‘the Commissioner’ –	the Commissioner for the South African Revenue Service, as defined in section 1 of the Income Tax Act;
‘the SARS’ –	the South African Revenue Service, as defined in section 1 of the Income Tax Act;
‘the senior SARS official’ –	the senior SARS official , as defined in section 1 of the Tax Administration Act;
‘the Tax Administration Act’ –	the Tax Administration Act No. 28 of 2011 (as amended);
‘the 2014 Memorandum’ –	Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2014

All references to ‘section’ are to the sections in the Tax Administration Act, unless otherwise stated.

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CHAPTER 1: INTRODUCTION

1.1 Background

Taxpayers registered with the South African Revenue Services ('SARS') are obliged to pay their tax liability according to their tax assessment. This liability to pay exists notwithstanding an objection lodged by the taxpayer. Klue, Arendse & Williams (2012:par 5.9) submit that the taxpayer's obligation to pay their tax liability when an objection is lodged, is the subject of controversy. Section 164 of the Tax Administration Act 28 of 2011 ('the Tax Administration Act'), which regulates the payment of tax pending an objection or appeal, replaced section 88 of the Income Tax Act 58 of 1962 ('Income Tax Act') and section 36 of the Value-Added Tax Act 89 of 1991 ('VAT Act'). The reason for the replacement was the enactment of the Tax Administration Act in 2012 with a view to incorporate into one piece of legislation certain generic administrative provisions of various tax acts (Memorandum on the Objects of the Tax Administration Bill, 2011:par 2.1).

Section 164(1) of the Tax Administration Act states that

“Unless a senior SARS official otherwise directs in terms of subsection (3) –
(a) the obligation to pay tax; and
(b) the right of SARS to receive and recover tax,
will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.”

This subsection is also known as the 'pay now, argue later' rule. It requires taxpayers to pay the SARS on assessment first before pursuing their various remedies against the SARS (Dachs, 2014:10). In terms of the Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2014 ('the 2014 Memorandum') (2014:par 2.50) the purpose of the 'pay now, argue later' rule is to separate the adjudication of the merits of the matter, which happens before the tax court, and the payment and recovery of the tax debt.

Section 164(2) of the Tax Administration Act allows taxpayers to make a request to a senior SARS official to suspend the payment of tax, or a portion thereof, due under an assessment if the taxpayers intend to dispute the liability to pay such tax under Chapter 9 of the Tax Administration Act. Unfortunately the Tax Administration Act provides no guidance on the

process to be followed, the form or the contents of such a request. The SARS's website has however been updated in April 2015, to include some detail in respect of the administrative aspects regarding a request in terms of section 164(2) of the Tax Administration Act.

Prior to the enactment of the Tax Administration Act, the 'pay now, argue later' rule as contained in section 36 of the VAT Act was the subject of some high-profile cases. In *Singh v Commissioner for South African Revenue Service* 65 SATC 203, the Supreme Court of Appeal held, in a unanimous judgment, that a taxpayer is entitled to receive an assessment before the SARS can demand payment of VAT. In *Metcash Trading Ltd v Commissioner for South African Revenue Services and Another* 63 SATC 13 ('the Metcash case'), the Constitutional Court held that the provisions underlying and enforcing the principle that taxes remain payable notwithstanding any pending objection or appeal to any assessment (section 36 of the VAT Act), were constitutionally valid.

As a result of the Constitutional Court judgment, the SARS issued Media Release Number 27 of 2000. This media release indicated the following examples of the circumstances where the Commissioner may exercise his or her discretion to wholly (now wholly or partially) suspend the taxpayer's obligation to pay the disputed tax: When payment of the whole amount would cause irreversible hardship if the taxpayer were to succeed in his appeal, and the circumstances of the case give rise to reasonable doubt; and when other relevant circumstances exist such as the certainty that the disputed amount will be paid were the appeal to fail.

In terms of section 88(1) of the Income Tax Act, taxpayers always had the right to request that the application of the 'pay now, argue later' rule be waived. However, the factors to be considered in adjudicating such requests have been unclear and no guidance was provided in either the Income Tax Act or the VAT Act. After the *Metcash* case, these areas of uncertainty were addressed when such factors were introduced into both the Income Tax Act and the VAT Act by means of the Taxation Laws Second Amendment Act 18 of 2009. This further clarified the 'pay now, argue later' rule with the purpose to formalise the circumstances where payment will be required despite objection (only at that stage, as section 164(1) only included 'or appeal' with the Tax Administration Act's enactment in 2012) (Memorandum on the Objects of the Taxation Laws Second Amendment Bill, 2009;par 2.13).

Following this amendment, section 88(3) of the Income Tax Act and section 36(3) of the VAT Act then listed the following factors to be considered by the Commissioner when adjudicating a request to suspend the payment of disputed tax:

“The Commissioner may suspend payment of the disputed tax having regard to-

- (a) the compliance history of the taxpayer (*Income Tax Act*) / vendor (*VAT Act*);
- (b) the amount of tax involved;
- (c) the risk of dissipation of assets by the taxpayer (*Income Tax Act*) / vendor (*VAT Act*) concerned during the period of suspension;
- (d) whether the taxpayer (*Income Tax Act*) / vendor (*VAT Act*) is able to provide adequate security for the payment of the amount involved;
- (e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer (*Income Tax Act*) / vendor (*VAT Act*);
- (f) whether sequestration or liquidation proceedings are imminent;
- (g) whether fraud is involved in the origin of the dispute; or
- (h) whether the taxpayer (*Income Tax Act*) / vendor (*VAT Act*) has failed to furnish any information requested by the Commissioner in terms of this Act for purposes of a decision under this section.”

Section 164(3) of the Tax Administration Act (‘section 164(3)’), which replaced both section 88(3) of the Income Tax Act and section 36(3) of the VAT Act, listed exactly the same factors to be considered with one critical difference regarding the person who must consider it. Section 164(3) allows for a senior SARS official, instead of the Commissioner of the SARS, to suspend the payment of tax pending an objection or an appeal. Keulder (2013:149) remarks that this merely has the effect that the Commissioner's powers are delegated. This is also evident from the definitions of ‘Commissioner’ and ‘senior SARS official’ in section 1 of the Tax Administration Act.

The Short Guide to the Tax Administration Act, 2011, (‘the SARS’ Guide’) issued by the SARS in 2013, indicates that the factors were specified in the Tax Administration Act so that taxpayers could understand which factors would be considered by a senior SARS official in exercising his or her discretion to suspend the payment of disputed tax. Taxpayers were encouraged to motivate their requests properly by referring to and arguing their case in terms of each of the factors set out in section 164(3) (Dachs, 2014:11).

The discretion exercised by the senior SARS official to accept or deny the request constitutes administrative action (Dachs, 2014:12). The term 'administrative action' is defined in section 1 of the Promotion of Administrative Action Act, Act 3 of 2000 ('PAJA'). Section 33(1) of the Constitution of the Republic of South Africa, Act 108 of 1996 ('the Constitution') further grants everyone the right to just administrative action that is lawful, reasonable and procedurally fair. This opens up further uncertainties regarding the impact of this right on the discretion exercised by the senior SARS official.

Although section 164(3) specified the eight factors to be considered, various academic writers and industry experts raised concerns and uncertainties regarding these factors *inter alia*:

- The relevance of some of the factors is unclear (Williams, 2012:6).
- The Tax Administration Act gives no guidance as to the relative weight of the factors listed, and the real issue is the way in which courts are going to interpret the provisions of section 88(3) of the Income Tax Act (now section 164(3) of the Tax Administration Act) (Williams, 2012:6).
- The Tax Administration Act does not stipulate clearly that the list of factors is not meant to be exhaustive (Johannes, 2014:65).

Owing to these and other concerns and uncertainties regarding the factors, section 164(3) has been amended several times since its enactment in 2012. One of many amendments in 2014 entails the insertion of the phrase 'relevant factors, including'. This specific amendment however created further uncertainties. The history and the effect of the amendments to section 164(3) must be investigated in order to clarify the application of this section. The provisions in the National Credit Act, Act 34 of 2005 ('NCA') regarding the granting of 'credit' (as defined), with reference to the relationship between the term 'suspend' as used in section 164(3) and the term 'defer' as used in the definition of 'credit' in the NCA, might provide guidance regarding the possible simplification of the specified factors and the process in terms of section 164(3) and are therefore also investigated.

1.2 Problem statement

The main problem statement identified is the uncertainties regarding the discretion of the SARS and the meaning and relevance of the current specific 'relevant factors' listed in section 164(3). This is further divided into the following sub-problems:

- What were the original concerns and uncertainties regarding section 164(3)?
 - o Have the various amendments to this section addressed these concerns and uncertainties?
 - o Which concerns and uncertainties remain, and did new ones arise after the 2014 amendments?
- What is the meaning of the term 'relevant factors' which was included during the 2014 amendments and how do these words impact the request for suspension?
- What is the impact of the Constitutional right to just administrative action on the manner in which the section 164(3)-discretion is exercised by the senior SARS official?
- Does the 'suspension of the payment of disputed tax' in terms of section 164(3) constitute the granting of 'credit' in terms of the NCA? If so, can the factors taken into account by the NCA when granting or denying a request for credit, provide any guidance regarding possible simplification of the specified factors and process in terms of section 164(3).

1.3 Literature review

Each of the four sub-problems mentioned above are now briefly addressed in more detail based on academic literature available on the subject. A literature study was done on section 88(3) of the Income Tax Act, as well as on section 36(3) of the VAT Act and section 164(3) to analyse the problems listed above.

1.3.1 Concerns and uncertainties regarding section 164(3)

The original concerns and uncertainties can be broken up into general concerns and uncertainties relating to the request and specific ones, which includes concerns and uncertainties relating to the specific individual 'relevant factors'. General concerns and uncertainties identified include *inter alia* the weight, exhaustiveness, subjectiveness and relevance of the factors, as well as how the courts will interpret section 164(3). To date there have been no case law on this subsection to indicate how the court interprets the provisions of this section (Williams, 2015:4). The general concerns and uncertainties are analysed in detail in Chapter 2.

Various specific concerns and uncertainties relating to the individual factors were raised after section 164(3) was enacted. The fact that the number of specific relevant factors was reduced from eight in 2012 to only five after the 2014 amendments, possibly indicates that the SARS has taken these concerns and uncertainties into account and has reviewed the relevance of the original factors. The history of section 164(3) is discussed in Chapter 2. The specific concerns and uncertainties are also analysed in detail in Chapter 2.

The 2014 Memorandum (2014:par 2.50) indicates that the 2014 amendments to section 164(3) seek to simplify the factors that the SARS may consider. It also stipulates that these factors are in addition to having regard to all relevant factors. The Tax Administration Act itself provides no guidance about the factors or the section. The SARS has also not yet issued formal guidelines, apart from the SARS's website to which some detail were added in respect of the administrative aspects regarding a request in terms of section 164(2) of the Tax Administration Act. The 2014 Memorandum (2014:par 2.50) stated that a further review of this provision will be conducted during the 2015 legislative cycle. This confirms the possibility of unaddressed concerns and uncertainties.

1.3.2 Relevant factors

The term 'relevant factors', which formed part of the 2014 amendments to section 164(3), is not a defined term in section 1 of the Tax Administration Act. Section 1(2) of the Income Tax Act, read together with section 1 of the Tax Administration Act, indicates that, should there be a definition in the Income Tax Act but not in the Tax Administration Act, then the definition in the Income Tax Act applies for purposes of the Tax Administration Act also (unless the context indicates otherwise). Since section 1 of the Income Tax Act also contains no definition of the term, one needs to consider interpretation approaches of fiscal legislation (Stiglingh, Koekemoer, Van Zyl, Wilcocks & De Swardt, 2015:10-11).

Williams (2012:2) states that, where words are not defined in an act, the golden rule is to give words wherever possible the meaning that they have in ordinary usage. He also states that the intended meaning of a word derives from the context in which it appears. Goldswain (2008:119) submits that, according to the Constitution, a purposive approach should be followed when interpreting statutes. He further explains that this means that all circumstances and resources should be taken into account to determine the objective of the Legislator.

Paragraph 2.46 of the Draft Tax Administration Laws Amendment Bill, 2014 states that the factors listed in section 164(3) were never intended to be exhaustive as a senior SARS official is administratively obliged to look at all relevant factors. It is, however, submitted that the inclusion of the term 'relevant factors' has added an element of subjectivity to this subsection, which was not the case before. Consequently, the provision is even more unclear and can cause a delay in the finalisation of requests for the suspension of payment, or a possible incorrect interpretation by the senior SARS official. The meaning of the term 'relevant factors' as used in section 164(3), as well as the impact thereof on the request for suspension, are addressed in Chapter 3.

1.3.3 The impact of the right to just administrative action on the discretion exercised in terms of section 164(3)

The SARS can only suspend the obligation to pay disputed tax upon request by taxpayers (SARS Dispute Resolution Guide, 2014:22). The discretion whether or not to grant such requests lies with the senior SARS official in terms of section 164(3). The senior SARS official's decision will constitute 'administrative action' and is subject to the right to just administrative action that is lawful, reasonable and procedurally fair (Croome, 2010:205). Lawful administrative action means, at its simplest, that administrators should comply with the law and must have lawful authority for their decisions (Hoexter, 2013:666). Reasonable administrative action can be divided into two components namely rationality and proportionality (Hoexter, 2013:669). On the other hand, what procedural fairness demands, may vary from case to case (Hoexter, 2013:673).

Parliament has enacted the PAJA due to a constitutional obligation to give effect to the right to just administrative action embodied in the Constitution (*Sidumo v Rustenburg Platinum Mines Ltd.* (2) SA 24 (CC)). The PAJA is therefore the law which defends the right to just administrative action (Blacksash, 2015). The manner in which the senior SARS official exercises its discretion in terms of section 164(3) should therefore comply with section 33 of the Constitution and the principles of administrative action as defined in the PAJA. The impact of the Constitutional right to administrative action on the manner in which the section 164(3)-discretion is exercised by the senior SARS official, is discussed in Chapter 4.

1.3.4 Comparison between a request for the suspension of payment in terms of section 164(3) and the granting of 'credit' in terms of the NCA

The introduction of section 164(3) states that "A senior SARS official may suspend payment of the disputed tax...". The meaning of 'credit', when used as a noun, is defined in section 1 of the NCA as "(a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or (b) a promise to advance or pay money to or at the direction of another person". It is therefore submitted that if 'defer' and 'suspend' are synonyms or have a similar meaning, the suspension of the payment of disputed tax appears to be comparable to the granting of 'credit' in terms of the NCA.

According to section 8 of the NCA, a 'credit agreement' for the purposes of the NCA constitutes, amongst others, a 'credit transaction' as described in subsection (4). Section 8(4)(f) of the NCA states that a 'credit transaction' constitutes "any other agreement other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of the agreement or the amount that has been deferred".

In Chapter 5 it is determined whether a suspension of the payment in terms of section 164(3) constitutes the granting of 'credit' in terms of a 'credit agreement' in terms of the NCA. It is further established whether the factors taken into account by the NCA when granting or denying a request for credit, can provide any guidance regarding the factors and process in terms of sections 164(3) and 164(5) of the Tax Administration Act.

1.4 Research rationale and objective

The SARS provides limited guidelines regarding the request process. However, no guidelines regarding the factors to be considered are provided and a clear definition of the term 'relevant factors' is lacking. All the aforementioned concerns and uncertainties negatively affect taxpayers who want to submit a request for the suspension of the payment of disputed tax.

The research objectives of this study are fourfold:

- To analyse the history of section 164(3) in order to provide a basic understanding of the concerns and uncertainties for further detailed discussions.

- To provide a basic understanding regarding the meaning of the term 'relevant factors' as used in section 164(3). This is done in order to determine how the element of subjectivity added by these words impact the request for suspension.
- To determine the impact of the Constitutional right to just administrative action on the manner in which the section 164(3)-discretion is exercised by the senior SARS official.
- To investigate whether the suspension of payment in terms of section 164(3) can be seen as granting 'credit' in terms of the NCA. The factors considered in terms of the NCA when granting or denying a request for credit are compared to the factors considered by the senior SARS official, as well as the process followed regarding a request for the suspension of the payment of disputed tax, in order to make possible recommendations which can possibly simplify the process and factors in terms of section 164(3).

The aim of the research objectives is to add clarity regarding section 164(3), in order to assist taxpayers with their requests for the suspension of the payment of disputed tax.

1.5 Research methodology

A non-empirical study (historical method) is conducted by reviewing existing literature that relates to the 'pay now, argue later' rule, the term 'relevant factors', the factors listed and the process followed by the senior SARS official in terms of section 164(3), as well as the right to just administrative action. The literature review includes relevant articles by academics and industry experts. South African legislation and case law are also reviewed.

The study also contains an element of comparative research by comparing the process and factors regarding a request for the suspension of the payment of disputed tax to the factors or process applicable to the granting of 'credit' in terms of the NCA. Based on the outcome of the literature review and comparative investigation, recommendations are made.

1.6 Chapter outline

Chapter 1: Introduction

The introduction of the study includes the background to section 164 of the Tax Administration Act, with specific focus on subsection (3). Chapter 1 also sets out the problem

statements and research questions, research objectives, research methodology and scope of the study.

Chapter 2: Analysis of and amendments to section 164(3)

The aim of this chapter is to answer the following three questions:

- 1) What were the original concerns and uncertainties regarding section 164(3)?
- 2) Have the various amendments to this section addressed these concerns and uncertainties?
- 3) Which concerns and uncertainties remain, and did new ones arise after the 2014 amendments?

Answers to the questions above can indicate whether the factors listed in the latest version of the Tax Administration Act are indeed the most relevant and applicable ones to consider when a request for the suspension of the payment of disputed tax is received by the SARS. The results of Chapter 5 will, however, also impact on this conclusion and are taken into account in the final conclusions.

Chapter 3: The meaning of the term 'relevant factors' as used in section 164(3) and the impact thereof on a request for the suspension of the payment of disputed tax

This chapter contains an in-depth literature review to establish the meaning of the term 'relevant factors' within the context of section 164(3). In light of the lack of a definition of this term, the purposive approach is followed by taking all circumstances and resources into account to determine the Legislator's objective in including the term 'relevant factors' as well as the meaning of the term. Dictionaries, case law, relevant articles and other spheres of the law are examined to search for a definition that will be acceptable within this context. The impact of the consideration of relevant factors on the request for suspension are also assessed in this chapter. Establishing a suitable definition and the possible impact thereof on the request for suspension, will create more certainty for taxpayers regarding what kind of information to provide along with their request.

Chapter 4: The impact of the right to just administrative action on the manner in which the section 164(3)-discretion is exercised by the senior SARS official

In this chapter a literature review is performed on section 33 of the Constitution and specific sections of the PAJA. Relevant articles are analysed to get an understanding of the process involved when deciding to accept or deny a request for the suspension of the payment of

disputed tax. The detail obtained from section 33 of the Constitution and related sections of the PAJA, is used to establish the impact of the right to just administrative action on the discretion exercised in terms of section 164(3) by the senior SARS official. This is done to critically analyse the discretionary powers applied by the senior SARS official and to indicate the constitutional obligations that the SARS must adhere to when exercising a section 164(3)-discretion.

Chapter 5: A comparison between a request for the suspension of payment in terms of section 164(3) and the granting of 'credit' in terms of the NCA

In this chapter the connection between 'defer' and 'suspend', with focus on the definition of 'credit' in terms of the NCA, is investigated. This is done in order to determine whether a request for the suspension of the payment of disputed tax in terms of section 164(3), constitutes the granting of 'credit' in terms of a 'credit agreement' in terms of the NCA. The importance of determining this relationship lies in the possible guidance which the NCA can provide regarding the simplification of the process and specified factors in terms of section 164(3). This chapter therefore also discusses the interplay between the factors considered in a request for suspension and the factors considered or process followed, when credit is provided or refused in terms of the NCA.

Chapter 6: Conclusion

In this chapter the results of the previous chapters is considered and summarised in order to draw conclusions. Finally, recommendations for addressing and resolving the research questions effectively are offered.

CHAPTER 2: ANALYSIS OF AND AMENDMENTS TO SECTION 164(3)

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CHAPTER 2: ANALYSIS OF AND AMENDMENTS TO SECTION 164(3)

2.1 Introduction

According to the 'pay now, argue later' rule, the SARS requires taxpayers to make payment on assessment before pursuing the various remedies against the SARS (Dachs, 2014:10). The obligation to pay tax arises upon the issuing of an assessment (section 164(1) of the Tax Administration Act). This might result in taxpayers needing to fund the tax payment for a long period whilst pursuing their various remedies unless a request to suspend payment is approved. Taxpayers therefore need to understand the provisions of the Tax Administration Act dealing with the possible suspension of their obligation to make payment to the SARS (Dachs, 2014:10-11).

Taxpayers are not required to object against an assessment before submitting a request for suspension. They are allowed to require reasons under rule 6 of the new rules issued under section 103 of the Tax Administration Act beforehand. The reasons will enable them to formulate their objection (SARS Dispute Resolution Guide, 2014:23). Therefore, when taxpayers receive an assessment from the SARS to which they intend to object, they are allowed to request the suspension of the payment of the disputed tax then and there, and therefore should consider submitting a request in terms of section 164(2) of the Tax Administration Act (Dachs, 2014:11; SARS Dispute Resolution Guide, 2014:23).

When considering whether or not to submit a request for the suspension of the payment, taxpayers must be aware of the factors listed in section 164(3). The senior SARS official will take these factors into account to decide whether or not to grant the request. Croome (2009:12) stated that these relevant factors would improve consistency in the treatment of taxpayers and facilitate better understanding by taxpayers. Keulder (2013:143) opines that the enactment of the factors after the decision in the *Metcash* case contributed towards some legal certainty regarding whether taxpayers would have to pay now and argue later, or whether payment should be suspended pending an appeal.

A number of academic writers and industry experts have raised some concerns and uncertainties regarding the factors to be considered since their introduction into legislation. This chapter briefly mentions the history of section 164(3) after which each of the original general and specific concerns and uncertainties raised, are examined. The effect of all the

amendments made since enactment is then discussed to determine whether each concern and uncertainty identified has been addressed by the relevant amendments, and whether the latest amendments have not perhaps created new concerns and uncertainties. This chapter therefore determines whether the factors listed in the latest version of the Tax Administration Act are indeed the most relevant and applicable ones to consider.

2.2 The history of section 164(3)

Section 164(3) has been amended in both 2013 and 2014, since the Tax Administration Act's enactment in 2012. In 2013 there was only one amendment to the section. Section 164(3) was however amended significantly by the revised draft of the Tax Administration Laws Amendment Bill, dated 16 October 2014. This Bill eventually led to the Tax Administration Laws Amendment Act 44 of 2014 ('TALA'). The amendments will be discussed in the relevant sections below.

2.3 Analysis of the concerns and uncertainties regarding section 164(3) and the amendments thereto

2.3.1 General concerns and uncertainties

2.3.1.1 Weight of the factors

Williams (2012:6) was concerned because the Tax Administration Act gives no guidance on the relative weight of the factors listed.

The SARS unfortunately has not yet issued guidelines in general about the factors in subsection (3), and the Tax Administration Act itself provides no guidance either. PWC South Africa (2015:4) also underlines the fact that no respective weight is allocated to the various factors, and adds that the factors are also not placed in order of relative importance. This concern therefore still exists.

2.3.1.2 Exhaustiveness of the factors

Williams (2012:6) also raised the concern that the Tax Administration Act was silent on whether the list of factors were meant to be exhaustive. Klue *et al.* (2012:par.5.9) submitted that "this list may not be exhaustive and a decision not to postpone the payment of tax may

result in unfair ‘administrative action’ which may be challenged by the taxpayer”. Johannes (2014:68) submitted that these factors were interpreted incorrectly in practice as being exhaustive and that the incorrect application of section 164(3) may result in taxpayers’ right to just administrative action being hampered. Johannes therefore recommended that section 164(3) be amended to state clearly that the factors listed are not comprehensive and that all surrounding factors of a specific case should be taken into account by the senior SARS official when deciding upon a request for suspension of payment (Johannes, 2014:68).

One of the several amendments to section 164(3) introduced by paragraph 50 of the TALA, was the insertion of the term ‘relevant factors’, together with the word ‘including’. The senior SARS official must now have regard to relevant factors *including* the five factors specifically listed.

The uncertainty of whether or not the list was meant to be exhaustive, has now been addressed. Although the list of factors had been shortened, the subsection now indicates that the list of factors is not comprehensive and that the range of relevant factors is unlimited (Williams, 2015:4). The use of the word ‘including’ clearly confirms this viewpoint. PWC South Africa (2015:4) also confirmed that the section no longer sets out a closed list of relevant factors, that the list is not exhaustive and that the variety of relevant factors is now unlimited. The meaning of the term ‘relevant factors’, and the impact thereof on a request for the suspension of the payment of disputed tax, will be covered in Chapter 3.

2.3.1.3 Factors to be addressed and complied with in the request

The Tax Administration Act is unclear as to whether or not all factors listed in section 164(3) should be addressed in the request and whether all factors must be complied with before a request will be granted. Dachs (2014:11) recommends that taxpayers refer to and argue their case with reference to each of the factors set out in section 164(3). Dachs (2014:11) also states that it is, however, unnecessary for taxpayers to “pass” each of these tests, as the test is a compound one. Johannes (2014:57) is also of the opinion that any one or a mixture of the factors might be adequate for a senior SARS official to grant a request for the suspension of the disputed tax. He base this opinion on the use of the conjunction “or” at the end of subparagraph (g) (before the TALA) (Johannes, 2014:57).

Johannes (2014:57) gave the example of a set of facts where the taxpayer concerned had a good compliance history, the amount of tax was significant, there was a low risk of dissipation of assets by the taxpayer during the period of suspension, the taxpayer could provide adequate security for the payment of the amount involved, there were no imminent sequestration or liquidation proceedings, no fraud was involved in the original dispute, and the taxpayer had furnished all information requested to verify these factors for the purposes of a decision to be made in respect of the request. He states that it should theoretically have been possible that the taxpayer's request for the suspension of payment in these circumstances would have been granted (before the TALA). In practice, however, a senior SARS official denied the request for the suspension of payment given this set of facts, on the basis that the payment of the amount involved would not result in irreparable financial hardship for the taxpayer. This denial therefore focused on only one of the eight factors originally listed, while the circumstances of the case clearly indicated that the other seven factors posed no risk for the SARS should the request be granted. This view of the senior SARS official was in itself challenged, but the example serves to illustrate how the provisions of section 164(3) may be interpreted incorrectly by some senior SARS officials (Johannes, 2014:57).

Based on abovementioned example, it was therefore claimed that all factors needed to be met before a request could be granted (Johannes, 2014:68). Johannes (2014:68) recommended that the provision should be amended to reflect clearly that not all factors listed have to be complied with before a request for suspension is granted. He further suggested that these recommended amendments could be supplemented by internal communication by the SARS on the correct application of section 164(3) (Johannes, 2014:68).

To date no amendment has been made to section 164(3) regarding this concern. No guidance has been issued either. This concern therefore still exists.

2.3.1.4 Subjectiveness of the factors

A concern initially raised in par.2.8.2 of the Final Response Document to the Taxation Laws Amendment Bill, 2009 when the factors were introduced in the Income Tax Act and the VAT Act, was raised again in the September 2011 Response Document on the Tax Administration Bill of 2011 ('the Response Document'). Paragraph 9.3 of the Response

Document states that some factors are subjective and that the senior SARS official's decision should be made subject to objection and appeal. The Response Document indicated that it was held in the Metcash case that the discretion exercised by the SARS in terms of section 36 of the VAT Act (now replaced by section 164 of the Tax Administration Act) constitutes administrative action as regarded in section 33 of the Constitution. The Response Document further stated that this therefore means that an unfavourable decision regarding a request for the suspension of the obligation to pay tax would be reviewable before a court according to the principles of administrative law.

The Response Document explained that the aforementioned right to review was the reason why no amendments have been made to the relevant provision in response to this concern by the time that the Tax Administration Act was enacted. This is still the case today. The Response Document further stated that the other reason why no specific provision regarding this concern has been added, is that taxpayers have other remedies available to them, for example, requesting the SARS to review and withdraw the decision under section 9 of the Tax Administration Act or carrying out an administrative complaint internally in the SARS and, if unresolved, through the Tax Ombud or by approaching the Public Protector. It is submitted that the chances of this concern ever being addressed are very low. Chapter 4 will, however, investigate the impact of the Constitutional right to just administrative action, on the manner in which the section 164(3)-discretion is exercised by the senior SARS official.

2.3.1.5 Relevance of the factors

Williams (2012:6) also identified the lack of clarity regarding the relevance of some of the factors as a general concern.

From the changes introduced by the TALA, it is clear that some of the factors previously enclosed in section 164(3) have now been removed (Treurnicht, 2015:2). It is submitted that with the SARS's review of the relevance of the factors over the years, some of the factors for consideration were identified as irrelevant for purposes of the request for the suspension of disputed tax. Refer to section 2.3.2 for the specific factors removed.

2.3.1.6 SARS: A party and judge to a dispute

Another general concern is that the senior SARS official (previously the Commissioner) remains, as before, the judge in a dispute to which he or she is a party. Rood (2009:44) explains that this means that the SARS, who is a party to the tax dispute, has the authority to determine if the taxpayer has a valid case. According to Rood (2009:44) this places the Commissioner (now the senior SARS official) in the position of both judge and jury, which is unfair to taxpayers.

There has been no amendment to date to address this concern. It is submitted that since the refusal to accede to a request in terms of section 164(2) of the Tax Administration Act would be reviewable before a court according to the principles of administrative law (Response Document, 2011:par 9.3), this concern will, although valid, probably remain unaddressed.

2.3.1.7 Interpretation of courts

According to Williams (2012:6), the real issue was the uncertainty regarding the way in which courts were going to interpret the provisions of section 88(3) of the Income Tax Act. This section has been repealed and replaced with section 164(3) of the Tax Administration Act. Williams (2012:6) states that, should an adverse decision for suspension be taken on review in terms of the PAJA, the court is likely to take the view that, unless there is a substantial reason to decide otherwise, the obligation to pay tax should not be suspended. He also states that the court is likely to take the view that the opposite interpretation, namely that the obligation ought to be suspended is the default position, is indefensible unless there is substantial reason to decide otherwise. He then, as an example of a substantial reason, refers to the case that would arise should there be a significant risk of the dissipation of assets during any period of suspension (Williams, 2012:6).

To date there has been no case law on this subsection to indicate how the court will interpret section 164(3) (Williams, 2015:4). Therefore, to date, no judgment in a court case resulted in an amendment made to this section and it remains to be seen how courts will interpret section 164(3).

2.3.2 Specific concerns and uncertainties

This section's analysis is done based on each phrase of the original wording of section 164(3) with the enactment of the Tax Administration Act in 2012. All the amendments to each phrase will be discussed under the same heading.

2.3.2.1 A senior SARS official may suspend payment of the disputed tax having regard to -

A comment was raised in the Draft Response Document from National Treasury on 11 September 2013 that the SARS must only be given the discretion to enforce the 'pay now, argue later' rule to the extent that a taxpayer admits liability for a part of the tax liability. Paragraph 58 of the Tax Administration Laws Amendment Bill, 2013 proposed the inclusion of the words "or a portion thereof" in this opening line of section 164(3) and it then read as follows:

A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to –

A "whole or nothing" approach was followed initially in relation to any requests for suspension received (Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013:par.2.58). Therefore either the full amount of disputed tax was approved to be suspended, or nothing at all. The aforementioned amendment entails that the senior SARS official can now exercise his or her discretion and only grant suspension for a portion of the amount of disputed tax. The memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013 paragraph 2.58 notes that the undisputed part of the assessment is not covered by section 164. This memorandum also states that the reason for the amendment was to clarify that the SARS may suspend the whole or a portion of the amount of disputed tax, as opposed to all or nothing.

It is submitted that this amendment raises the following question: How will the senior SARS official determine for which portion of the amount of disputed tax, payment can or should be postponed and for which portion it cannot or should not be postponed? It is further submitted that this amendment also provides the SARS with the opportunity to portray statistics around the number of requests for suspension granted in a positive light, without specifying the number granted for only a portion of the amount of disputed tax. Taxpayers might, however, see the fact that only a portion of their amount of disputed tax might be approved for

suspension as negative and then refrain from submitting a request. It is therefore submitted that this amendment might affect the taxpayer negatively.

The amendment in 2014 which includes the phrase, "...relevant factors, including –" to this opening sentence of the provision, is discussed separately in Chapter 3.

2.3.2.2 (a) the compliance history of the taxpayer;

It is submitted that the original uncertainties relating to this factor lie within the phrase "compliance history". It is unclear, for example, what "compliance" refers to. One would suspect it to refer to the taxpayer's compliance with taxation obligations, although it is not clearly indicated as such in the legislation. If one assumes it to be the taxpayer's taxation compliance that will be considered, another question arises: what type of tax compliance will be considered – only the type being disputed, namely either income tax or VAT, or all the taxes for which the taxpayer is registered at the SARS?

Another matter that is unclear is whether "compliance" refers to only compliance provisions as stipulated in the Tax Administration Act, or any Act. With regard to the "history" element of this factor, one wonders how far back in time the SARS will examine the taxpayer's compliance. And, as a corollary question, will the SARS be lenient in the case of first-time offenders when the SARS considers a taxpayer's compliance history?

This factor was also amended by paragraph 50 of the TALA. The words "with SARS" were added to this specific factor as follows: "the compliance history of the taxpayer with SARS".

As stated before, the 2014 amendments seek to simplify the factors to be considered by the SARS. The inclusion of the words "with SARS" makes it clear that a taxpayer's taxation compliance history is being considered. This factor therefore now stipulates another reason why taxpayers should ensure that their tax filings and payments are made as and when required (Kotze, 2013:27). Kotze (2013:27) is of the opinion that the following matters regarding the compliance history of taxpayers are among those that will be considered with reference to the request for suspension: regular or serious transgressions in the past, applications for voluntary disclosure relief or amnesty in the past, or any unsuccessful disputes by the taxpayer in the past. Kotze (2013:27) also opines that this does not mean

that taxpayers with a poor record will be unsuccessful, but their application might just require more detail.

Kruger (2014:29) states that a suspension of the payment may be more effortlessly granted to a taxpayer with a good compliance history, compared to a non-compliant taxpayer. Kruger (2014:29) is of the opinion that the following factors, to name but a few, might play a role: “the timeous submission of tax returns, co-operation with the SARS in its investigation of the taxpayer’s affairs and payment of taxes due.”

Matters that are still unclear include whether the compliance only refers to compliance with provisions as stipulated in the Tax Administration Act, or any Act administered by the SARS; whether compliance with only the disputed tax type, that is to say either income tax or VAT, is considered, or compliance with all the taxes for which the taxpayer is registered with the SARS; how far back in time the SARS will consider the history of a taxpayer’s compliance; and whether first-time offenders will be treated differently from those taxpayers who has a history of a few non-compliance matters.

It is therefore submitted that there are still too many unaddressed concerns and uncertainties regarding this specific factor, and both taxpayers and tax practitioners would benefit greatly if some guidelines in this regard are issued by the SARS.

2.3.2.3 (b) the amount of tax involved;

Williams (2012:6) identified the lack of clarity regarding the relevance of some of the factors as a general concern. He also questioned whether a large amount of disputed tax would point towards granting a suspension or towards declining a suspension of the obligation to pay. Kotze (2013:27) also highlighted the fact that there was no indication whether a small or a large amount will be given more favourable attention. However, Kotze (2013:27) did indicate that the amount of taxes may be linked back to the context and situation of the taxpayer. It is submitted that one also needs to consider that taxpayers might not even consider submitting a request for the suspension of the payment if the amount of disputed tax is small, because they might see the process as an administrative burden compared to the small amount being disputed.

Paragraph 11.9 of the draft response document to the Draft Tax Administration Laws Amendment Bill, 2014, states that “the amount of tax involved” is not a relevant consideration. It explained that if, from the taxpayer’s perspective, the tax involved is relatively little, this could be considered by the SARS as a factor weighing against the suspension of payment. However, if, from the SARS’s perspective, the amount of tax involved is significant, this might also be a factor weighing against the taxpayer (Draft Response Document, 2014:par. 11.9).

This factor has therefore been removed by the TALA in 2014. PWC South Africa is of the opinion that “the amount of tax involved” has been removed from the list probably because this consideration is covered by the factor of whether taxpayers will suffer hardship if they have to pay disputed tax up-front (PWC South Africa, 2015:4). Refer to section 2.3.2.6 for the analysis of this factor.

2.3.2.4 (c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;

Williams (2012:6) raised the concern regarding the interpretation by the courts (see 2.3.1.7) and he then, as an example of a substantial reason that can cause a court to override an adverse decision for suspension, refers to the case that would arise should there be a significant risk of the dissipation of assets during any period of suspension.

The TALA (2014:par. 50) amended this factor and it now reads as follows: “whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets”. The words “concerned during the period of suspension” therefore have been removed and therefore the risk relating to the dissipation of assets has been widened because not only is the period of suspension taken into account, but in effect any period in general with reference to the payment of the disputed amount. This factor now consists of two points and even though the word ‘or’ separates the two points, it is submitted that the senior SARS official is required to consider both of the points, because if any one of them is met, it might have a negative impact on the decision of the senior SARS official.

The words “whether the recovery of the disputed tax will be in jeopardy” were introduced by the TALA. Jeopardy is not a defined term in the Tax Administration Act and section 164 does not explain circumstances when the recovery of disputed tax will be in jeopardy (Solomon,

2015:par.8). According to the Oxford English Dictionary ('OED'), "jeopardy" means, among others, "a risk of loss". It must therefore be determined whether there is a risk that the SARS will be unable to recover the disputed tax from the taxpayer. Solomon (2015:par. 8) is of the opinion that this requirement can easily be dealt with, if it can be verified that no risk with regards to collection exist. It is however submitted that, based on the SARS's powerful collection procedures and policies, the chances are really slim that the SARS will be unable to collect the tax amount, or at least a portion thereof. It is therefore questioned whether this new point is really relevant when considering a request for the suspension of disputed tax. One should, however, take note that section 164(6) of the Tax Administration Act prohibits the SARS from taking steps to recover the tax during the period between the receipt of a suspension request and ten business days after a notice of the SARS' decision regarding the suspension has been issued. This prohibition is not applicable if the SARS has a reasonable belief that there is a risk of dissipation of assets by the taxpayer concerned. It is uncertain what is meant by 'reasonable belief' and also how the SARS is going to apply this subjective judgment in a consistent manner.

'Dissipation of assets' is also not defined in the Tax Administration Act, and neither the 2014 Memorandum nor the SARS' Guide contains guidelines on actions which may be dissipation of assets. Based upon the court's decisions in respectively *Carmel Trading Company Ltd v Commissioner for South African Revenue Service and Others* 70 SATC 1 and *Knox, D'Arcy Ltd and Others v Jamieson and Others* (4) SA 348 (A), Kruger (2014:31) opines that a dissipation of assets in the context of taxation, involves the wasting or hiding of assets with the purpose of defeating or blocking the collection of tax debt by the SARS. According to her, it excludes the bona fide sale of such assets at fair value in particular (Kruger, 2014:31).

The risk of dissipation of assets is described by Kotze (2013:27) as the fact that the SARS will consider whether there is an actual risk that the assets of the taxpayer may be reduced, which may jeopardise the collection of the taxes at a later stage. It is submitted that Kotze thereby, in effect, proactively underlined the link between the two points in this factor in 2013. It is therefore submitted that if the SARS reasonably believes that there is an actual risk as aforementioned, then the SARS can take collection steps before the issuance of the notice of decision regarding the suspension.

It is submitted that the other uncertainty regarding the risk of dissipation of assets is: which assets are being considered? Is it all the taxpayer's assets, or only those with a relevant

market value that can be considered to cover the taxpayer's debt? And what type of assets? An asset is defined in section 1 of the Tax Administration Act to include property of whatever nature, whether moveable or immovable, corporeal or incorporeal, and a right or interest of whatever nature to or in the property. It is therefore submitted that the SARS will consider any type of asset, because the definition is very broad.

In general, however, it seems that this factor as a whole deals with the consideration of the SARS's credit risk which can be determined through the execution of the SARS' credit risk procedures. Therefore, if the senior SARS official is of the opinion that any type of credit risk exists, it is submitted that it might have a negative impact on the outcome of a request. To reduce concerns or uncertainties regarding this factor, it is recommended that its wording be amended to something like "the recoverability of the amount of disputed tax" which will contribute to the simplification of the specified factors as discussed in Chapter 5 with reference to the possible guidance from the NCA.

2.3.2.5 (d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;

It is submitted that the uncertainty relating to this factor in its original form is about the meaning of "adequate security". How will taxpayers know (or the senior SARS official decide) whether the security that they are able to provide will be considered adequate for the purpose of requesting the suspension of payment? Since the wording only referred to the ability to provide and not to the actual provision of adequate security, it is also uncertain whether, if adequate security is actually provided, it will increase the possibility of the approval of the request or not.

Buttrick (2013:2) noted that, in his and his colleagues' experience, the SARS was willing to allow a suspension where the quantum of taxes were significant provided that taxpayers actually provided adequate security on suitable terms. According to Buttrick (2013:2), taxpayers should consider the following when offering security:

- The appropriateness of the security. For example, a guarantee by an entity that is already over-indebted will be of no actual value to the SARS if compared to the guarantees provided in the form of listed shares, third party guarantees, or other liquid assets that may be appropriate in the circumstances;

- The security's value should at least cover the capital and interest portion of the taxes due; and
- The period for which the suspension shall remain often is critical. Taxpayers will prefer that the suspension run for as long as possible, if at all possible until the final determination by the highest courts. The SARS, on the other hand, will have the desire of the payment being suspended only until determined by the tax court, to ensure speedy the collection of taxes as soon as possible following a judgment in its favour.

Kruger (2014:31-32) states that the type of security pictured by the SARS can be guarantees from shareholders or the pledge of any assets held by the taxpayer. Although these considerations and examples can assist taxpayers to understand what is meant by adequate security, no formal guidelines relating to this have been published by the SARS to date.

Paragraph 50 of the TALA also amended this factor. Firstly the words "able to provide" were replaced with the word "tendered". Secondly the phrase "and accepting it is in the interest of SARS or the *fiscus*" were added to the original factor's wording. The factor therefore now reads as follows: "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*".

It is submitted that the first amendment to this factor shifted the focus from the mere ability to provide, to the actual provision of security. This formalises the provision of security because something now needs to be tendered or put down on paper which is a more onerous requirement (Solomon, 2015:par.6). It is therefore submitted that if a taxpayer tenders adequate security, it is doubtful that this factor can negatively influence the discretion exercised by the senior SARS official.

Treurnicht (2015:2) submits that it is no longer enough for taxpayers to only tender adequate security for the payment of tax. The SARS, according to her, will also be required to consider whether, should this security be accepted, it will be in the interest of the SARS or the *fiscus*. It is, however, submitted that the words 'and accepting it is in the interest of SARS or the *fiscus*', might simply mean that the SARS must accept that any adequate security tendered will be in the interest of the SARS or the *fiscus*. Or, alternatively, the added words mean that the security can only be considered for purposes of the request when the security is in the interest of the SARS or the *fiscus*. This would mean that, even though the taxpayer is able

to tender adequate security, it will not be considered in the request for suspension if it is not in the interest of the SARS or the *fiscus*. These different possible meanings indicate another distinct uncertainty. The question that also comes to mind is: how does one determine what is in the interest of an organisation such as the SARS or the *fiscus*? Taxpayers will see this as another uncertainty.

This factor, as currently worded, therefore created new uncertainties which needs to be addressed by the Legislator.

2.3.2.6 (e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;

No definitions for the words “irreparable” and “hardship” exists in the Tax Administration Act and this is part of the uncertainties regarding this factor. The ordinary meaning of these words requires consideration, as the meaning of the phrase ‘irreparable financial hardship’ has not yet been considered by the South African courts (Kruger, 2014:32). “Irreparable” is defined in the Oxford English Dictionary (‘OED’) as “not reparable – cannot be rectified or made good (incapable of being repaired)”. The term ‘hardship’ is defined in the same dictionary as “a condition which presses unusually hard upon one who has to endure it” and the term “financial” is defined as “of, pertaining, or relating to finance or money matters”. In other words it is submitted that irreparable financial hardship exists if taxpayers need to pay amounts of disputed tax immediately, and they find themselves in a situation that will be hard to survive financially because of this payment, to the extent that they will be unable to recover financially in the near future.

Kotze (2013:27) states that the SARS will consider whether the amount in question will lead to financial hardship for the taxpayer if instant payment is required. Kruger (2014:32) is of the opinion that if the payment of the amount results in irreparable financial hardship for the taxpayer, it may offer realistic grounds for the suspension of payment. Whether ‘irreparable financial hardship’ has been suffered, is a factual question according to Kruger (2014:32). Williams (2012:6) is concerned that the adjective “irreparable” sets the bar very high and might even be inappropriate, since any amount of financial loss is by nature reparable by an award of damages. Williams is therefore uncertain about the relevance of this factor. Kruger (2014:33) notes however that, where a taxpayer had to sell assets to pay its tax debt and the taxpayer is successful in its appeal, the refund by the SARS with interest for the taxpayer

to reacquire those assets, will not be sufficient due to an increase in the cost thereof since disposal. This will therefore result in irreparable financial hardship for the taxpayer, since he or she would have suffered costs that cannot be recovered (Kruger, 2014:33).

Dachs (2014:12) regards this factor as a key factor to consider. He is of the opinion that “irreparable financial hardship” does not mean that taxpayers might go into liquidation if they would be required to make payment of tax. Instead, it covers circumstances where, for example, taxpayers might be required to dispose of illiquid investments in a “fire sale”, which would result in irreparable financial hardship as they would lose money that they are unlikely to regain in the future (Dachs, 2014:12). His concern, however, is that, if taxpayers indicate that the payment of disputed tax will not result in irreparable financial hardship, the SARS will merely demand that the tax be paid. On the other hand, if taxpayers argue that paying the tax will result in irreparable financial hardship, the SARS might be worried that they will be unable to do the payment at a later stage, which will also result in the SARS refusing the request for the suspension of payment (Dachs, 2014:12). So where does this leave taxpayers?

Two amendments were made to this factor in terms of paragraph 50 of the TALA. Firstly, the word “financial” was removed and secondly the phrase, “not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered”, were added. The factor now reads as follows: “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”.

As mentioned above, Williams submitted that the word “irreparable” sets the bar very high and might even be inappropriate, since any amount of financial loss is naturally reparable by an award of damages. The removal of the term ‘financial’, indicates that the Legislator recognises that a taxpayer can suffer irreparable hardship that is not essentially financial, when being forced to make payment before a dispute is resolved (Solomon, 2015:par.7). Solomon (2015:par.7) considers this to be an amendment which can be seen as positive for taxpayers. It is, however submitted that, although any form of hardship will now be considered and not only financial hardship, a request for the suspension of payment remains a financial matter. It is therefore questioned whether the first amendment was appropriate.

The second amendment by the TALA in effect requires that the prejudice to the SARS or the *fiscus* if the tax is not paid or recovered, must be weighed up against the irreparable

hardship that taxpayers will suffer if the tax were paid, and not merely whether there will be “irreparable financial hardship” (Treurnicht, 2015:2). PWC South Africa (2015:5) states that this new factor is the most problematic of all the individual factor amendments introduced by the TALA in 2014. According to these authors, the language is odd, for it submits that it is only in circumstances in which there will be “irreparable” hardship (and apparently nothing less than “irreparable” hardship is relevant) that it becomes necessary to balance such hardship against the potential prejudice to the SARS.

PWC South Africa (2015:5) further states that any matching of prejudice between the SARS and taxpayers will be difficult, and even impossible. They explain that in the case of a review, for example, the High Court will ask what weight would match up to the non-financial prejudice to taxpayers of having to dispose of their main residence, rely on public transport to get to work, or move their children from private to public educational institutions so that they can make payment of the disputed tax? How will it ever be possible to balance such a lifestyle disadvantage against the purely financial loss that the SARS potentially could experience if the due tax was never paid? In short, according to them, this factor will require a reviewing court to compare apples with oranges (PWC South Africa, 2015:5).

The other uncertainty raised by PWC South Africa is how the countervailing financial prejudice to the SARS will be measured, seeing that even the largest amount involved in any single tax dispute is a mere drop in the ocean compared to the overall amount of tax collected by the SARS (PWC South Africa, 2015:5). The question asked by PWC South Africa therefore is: Will or can the damage suffered by taxpayers ever be justified by the damage suffered by the SARS? Based on the size of the SARS as an organisation, it is submitted that this most probably will never be the case. It is further submitted that the amendments introduced by the TALA to this factor will lead to many challenges in practice, especially if a decision for suspension should be reviewable in court.

2.3.2.7 (f) whether sequestration or liquidation proceedings are imminent;

No specific concern or uncertainty relating to this factor was identified based on the literature review performed. This factor was however one of the three factors which have been removed by the TALA. It is therefore submitted that the SARS considered this to be an irrelevant factor for purposes of the request for the suspension of the payment of disputed tax.

2.3.2.8 (g) whether fraud is involved in the origin of the dispute; or

Rood (2009:44) raised the uncertainty relating to this factor during 2009, when the factors to be considered were introduced for the first time in the relevant sections of the Income Tax and VAT Acts. He submitted that it was unclear whether this section only refers to alleged fraud or to an actual conviction. He suggested that if a mere allegation of fraud is considered, this would be unfair, as taxpayers would not have had the opportunity to defend themselves against the allegation. It is also submitted that it is unclear what the Legislator means by ‘the origin of the dispute’. Does this mean that the senior SARS official is of the opinion that fraud is involved in the return submitted by the taxpayer, because this return and the assessment based thereon would also have given rise to the dispute and therefore the request?

This factor has been amended by the TALA in 2014. The words “*prima facie*” were included and the factor now reads: “whether fraud is *prima facie* involved in the origin of the dispute”. Before this amendment, this factor considered whether the assessment raised by the SARS contained elements of fraud on the part of taxpayers (Kotze, 2013:27). The words “*prima facie*” is Latin for “at first sight”, which means a fact is presumed to be true unless it is disproved or rebutted (Black’s Law Dictionary, 1999:1209). The impact of this amendment is that the SARS is provided with a chance to exercise its discretion to decline a request if, *at first sight*, it considers fraud to have been involved in the origin of the dispute (Treurnicht, 2015:2).

If this is the case and this factor is considered applicable (although all relevant factors should be considered), it is submitted that the SARS most probably will ensure that this factor plays a big role in its decision and therefore actually carry a greater weight compared to the other factors considered. The reason for this submission is that fraud is considered a tax offence in terms of section 1 of the Tax Administration Act. Therefore, if applicable, the chances are good that the suspension request will be denied.

However, it remains unclear whether it is only alleged fraud or an actual conviction that is referred to in this factor (see Rood’s uncertainty) and also what the words ‘in the origin of the dispute’ refers to. It is submitted that the amendment introduced in 2014 added to the concerns and uncertainties regarding this factor.

2.3.2.9 (h) whether the taxpayer has failed to furnish any information requested under this Act for purposes of a decision under this section.

No specific concern or uncertainty was identified relating to this factor based on the literature review performed. This factor was however the third factor which have been removed by the TALA. It is submitted that the SARS considered this as an irrelevant factor due to the fact that no guidelines exist on the specific information required for purposes of a decision on the request.

2.4 Conclusion on the effect of the amendments

After the significant amendments by the TALA in 2014, section 164(3) currently reads as follows:

“A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including (author’s emphasis) –

- (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*.”

The SARS’ Guide (2013:4) states that the Act pursues ways to make the relationship between the SARS and the taxpayers clearer and that the balance between the powers and duties of the SARS and the rights and obligations of taxpayers will contribute significantly to the equity and fairness of tax administration. Treurnicht (2015:3), however, is of the opinion that it is clear from the 2014 amendments introduced by the TALA that in the future it will be tougher for taxpayers to convince the SARS to suspend their obligation to pay a disputed amount of tax. Furthermore, apart from the specific concern raised in Chapter 2.3.2.6, PWC South Africa (2015:5) is of the opinion that the current factors as provided for in the legislation, will cause interpretation and application problems to a reviewing court. It therefore is submitted that these amendments have not contributed to the Act’s ability to

improve the relationship between these two parties or to balance the powers and duties of the SARS and the rights and obligations of taxpayers.

2.5 Conclusion

Chapter 2 has determined that quite a few general and specific concerns and uncertainties regarding a request for the suspension of the payment of disputed tax exist. Due to these concerns and uncertainties, it also was established that the SARS has made several amendments to section 164(3).

The amendments introduced had both positive and negative effects on the request for the suspension of the payment of disputed tax. Some of the original general and specific concerns and uncertainties identified were addressed by the amendments. It is submitted that the factors listed in the current version of the Tax Administration Act are not necessarily the most relevant and applicable ones to consider regarding a request for the suspension of the payment of disputed tax. This submission will be further investigated in Chapter 5. It is anticipated that the present concerns and uncertainties may, however, only be clarified by the amendments during the 2016 year of assessment since the proposed amendments in the draft 2015 Tax Administration Laws Amendment Bill and Draft 2015 Taxation Laws Amendment Bill both dated 22 July 2015, didn't include any amendments to section 164(3).

One of the most significant amendments introduced by the TALA in 2014 was the inclusion the term 'relevant factors'. In Chapter 3 the focus will shift to the meaning of relevant factors as used in section 164(3).

CHAPTER 3: THE MEANING OF THE TERM ‘RELEVANT FACTORS’ AS USED IN SECTION 164(3) AND THE IMPACT THEREOF ON A REQUEST FOR THE SUSPENSION OF THE PAYMENT OF DISPUTED TAX

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CHAPTER 3: THE MEANING OF THE TERM 'RELEVANT FACTORS' AS USED IN SECTION 164(3) AND THE IMPACT THEREOF ON A REQUEST FOR THE SUSPENSION OF THE PAYMENT OF DISPUTED TAX

3.1 Introduction

One of the key amendments to section 164(3) introduced by the TALA, is that the senior SARS official should consider 'relevant factors', including or together with the list of factors provided for in the legislation (TALA, 2014:par. 2.50). Solomon (2015:par.5) is of the opinion that this amendment is considered to be a beneficial one for the taxpayer submitting the request. Insight into the purpose of the inclusion of the term 'relevant factors', is gained from the 2014 Memorandum. The purpose of a *Memoranda of Objects* is to provide the background, reasons for and details of proposed amendments to administration legislation (SARS, 2015). Paragraph 2.50 of the 2014 Memorandum states that the list of specific factors which the SARS may consider in a request for the suspension of disputed tax, are in addition to having regard to relevant factors. As noted in Chapter 2.3.1.2, the reason for the amendment was to clarify that the factors originally listed in section 164(3) are not exhaustive: a concern which was initially raised by several academic writers. What the Legislator means by 'relevant factors' in the context of section 164(3) and what the impact thereof is on a request for the suspension of the payment of disputed tax, however, remains unanswered questions.

The meaning of 'relevant factors' and the effect thereof on the suspension request are important for both parties to the request. For the taxpayer, it will provide certainty regarding what can be expected to be considered as relevant by the senior SARS official, which in return will assist the taxpayer to determine what type of information to provide along with their request. For the senior SARS official, it will ensure the correct interpretation of the provision and consistent application of its discretion in terms of section 164(3).

In this chapter the interpretation of words used by the Legislator is briefly discussed to form the basis for the interpretation of the term 'relevant factors' as used in section 164(3). 'Relevant factors' (with focus on the word 'relevant'), as defined in dictionaries and interpreted in case law are also analysed. However, to determine the meaning of the word 'relevant', other spheres of the law are also considered. The issue of relevance is usually related to the admissibility of evidence in court cases on account of its relevance to a matter.

This chapter therefore also considers the principles of the Law of Evidence in determining the meaning of 'relevant'. The chapter concludes with a basic understanding of the term 'relevant factors' within the context of section 164(3), and the influence thereof on a request for the suspension of the payment of disputed tax.

3.2 Interpretation of words used by the Legislator

The interpretation of statutes is often a tough task and the rules of interpretation are applied inconsistently (Clegg and Stretch, 2010:par2.1). Clegg *et al.* (2010:par2.1) further states that income tax is in essence a creature of statute, and the principles of interpretation which apply to statutes, also applies to the interpretation of taxation statutes.

De Koker and Williams (2011:par 25.1B) opines that the meaning of words used by the Legislator is often not totally clear due to the nature of language. Case law is being referred to in this regard for guidance on interpretation. There are two main approaches of interpretation that are applied by the courts when interpreting the law: the literal or textual approach and the contextual or purposive approach (Stiglingh *et al.*, 2015:10-11).

According to the literal approach, the interpreter focuses on the plain language of the provision of the Act (De Koker *et al.*, 2011:par 25.1A). The literal approach to interpretation was described in the judgment of *Commissioner for Inland Revenue v Simpson* 16 SATC 268, as follows:

“In a taxing Act one has to look merely at what is clearly said. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used.” (285)

The literal approach was, however, changed to some extent in the case of *R Koster & Son (Pty) Ltd & Another v Commissioner for Inland Revenue* 47 SATC 23 (van der Zwan, 2015:22). Nicholas JA held in this specific case that when interpreting a provision in the Act:

“[T]he plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.” (32)

Therefore, when the literal approach gives rise to absurdity, inconsistency, hardship or anomaly, the courts may deviate from the ordinary meaning of the word to the extent that is required to remove the absurdity, inconsistency, hardship or anomaly and to give effect to the intention of the Legislator (*De Koker et al.*, 2011:par 25.1B).

The contextual approach on the other hand, determines the purpose of the legislation by taking all the surrounding circumstances and resources into account (*Stiglingh et al.*, 2015:10). Kellaway (1995:68) notes that, from as early as 1560, the courts have stated that the significance of 'the purpose' is regarded as being of greater importance than the actual letter of the language used when determining the meaning of an enactment.

However, van der Zwan (2015:22) indicates that when taxpayers are assessed for tax, they find themselves time and again in a position where the Commissioner applies the letter of the law. This interpretation resonates the literal approach because it refers to when the literal interpretation of the words (the 'letter') is followed, namely the strict and exact force of the language used in a statute, as oppose to the intention or plan behind it (*Black's Law Dictionary*, 1999:916). The latter is referred to as the spirit of the law, where the general purpose of the statute and the intention of the Legislator, are obeyed (*Black's Law Dictionary*, 1999:1409).

The contextual or purposive approach basically entails legislation to be interpreted holistically (van der Zwan, 2015:22). Van der Zwan (2015:22) further remarks that ambiguous wording should not be seen as a pre-condition for this interpretation approach, but rather wording with several interpretations and the purpose of the legislation may not be reflected by some of them. Ambiguity or uncertainty arises where the meaning of the words used is not completely clear and can either relate to individual words or an entire phrase (*Clegg et al.*, 2010:par2.1).

Sections 39(1) and (2) of the Constitution state the following:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Sections 39(1) and (2) of the Constitution therefore indicate that it is essential that the contextual approach be followed when interpreting legislation, including the Tax Administration Act (Stiglingh *et al.*, 2015:10). According to Mdumbe (2004:481), reading the text remains the starting point when interpreting legislation. The courts should however, not limit themselves to the wording of the text, but should also consider the broader context. The purpose of the legislation should be established in the light of section 39 of the Constitution (Mdumbe, 2004:481).

A study was done by Goldswain in 2008 to examine the way in which our judiciary approach the interpretation of fiscal legislation. The study concluded that the promulgation of the Constitution has been a catalyst for the change in interpretation approaches, from literal to purposive (Goldswain, 2008:107). According to Goldswain (2008:107), the results of the change in approach provides the taxpayer with a realistic opportunity to question unfair interpretation decisions.

Following the aforementioned, the ordinary and plain meaning of the words will be used, unless it is in conflict with the intention of the Legislator and the Bill of Rights. A purposive approach will be followed to interpret the term ‘relevant factors’ as used in section 164(3). All circumstances and resources needs to be taken into account to determine the meaning of the term in context of its overall purpose. Therefore, and bearing in mind the justification for the inclusion of the term ‘relevant factors’, section 164(3) must be read again and in context of the Tax Administration Act as a whole. Additionally, in determining the meaning of the term ‘relevant’ in the context of section 164(3), dictionaries, case law and principles of the law of evidence are also considered as resources.

3.3 The meaning of the term ‘relevant factors’ with reference to its ordinary English meaning

As discussed above, the term ‘relevant factors’ is not a defined term on its own. Therefore dictionaries are used as a resource to determine the ordinary and plain meaning of the words ‘relevant’ and ‘factor’ individually.

The Oxford English Dictionary ('OED') (2015) and Osborn's Concise Law Dictionary (Bird, 1983) defines 'relevant' as:

Relevant (adjective)

- "Bearing on or connected with the matter in hand; closely relating to the subject or point at issue; pertinent to a specified thing" (OED, 2015)
- "A fact so connected, directly or indirectly, with a fact in issue in an action or other proceeding that it tends to prove or disprove the fact in issue" (Bird, 1983:284).

'Factor' is defined in the OED (2015) as:

Factor (noun)

- "An element which enters into the composition of something; a circumstance, fact, or influence which contributes to a result" (OED, 2015)

From the above definitions it is clear that for the 'factor' to be considered 'relevant' in terms of section 164(3), there must be a close connection between the facts to be considered and the request for the suspension of disputed tax and the result thereof.

'Relevant' is also defined in the Dictionary of Legal Words and Phrases, where it was cited from the 12th edition of the Digest of the Law of Evidence. It is defined as "any two facts to which it [the word *relevant*] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders possible the past, present or future existence or non-existence of the other" (Stephen and Sturge, 1936:4).

As noted by Dachs (2014:11), taxpayers are encouraged to motivate their requests properly by referring to and arguing their case in terms of the factors. This statement was made with reference to the specific individual factors in section 164(3), before the 2014 amendments. It is submitted that the taxpayer will therefore also submit as part of the request for the suspension of the payment of disputed tax, evidence in connection with factors to be considered as relevant. Based on the ordinary meaning of the words 'relevant' and 'factor', the taxpayer will have to provide evidence about facts which are related either to the specified individual factors or to the matter of suspending the specific payment. If these facts are also able to prove why the request for suspension should be granted, it is submitted to be considered as relevant factors.

3.4 The meaning of the term ‘relevant’ with reference to case law

It is submitted that the term ‘factor’ is well-known based on its clear definition. Also due to the fact that there has been no case law on section 164(3) to date (Williams, 2015:4), emphasis in this section will therefore be placed on case law in which the meaning of ‘relevant’ were addressed, in order to establish a basic understanding of the term as used in section 164(3).

In *Berea West Estates (Pty) Ltd v Secretary for Inland Revenue* 3 All SA 93 (A) (‘the Berea West Estates case’), the relevant factors to a decision regarding the nature of activities (change in intention with an asset) was considered. In this case it was evident that, when the court considered whether a factor is relevant or not, the court advances a holistic approach to the factors taken into consideration, based on the words “the cumulative effect” and “on the facts as a whole” used in its reasoning (110). This ties back to the definition of relevant from the Digest of the Law of Evidence which states that, the facts(factor) are so related to each other that one either taken by itself or in connection with other facts, proves or renders possible the past, present or future existence or non-existence of the other (Stephen *et al.*, 1936:4).

The meaning of ‘relevant’ was also discussed in *Tomkins v Tomkins* 1 All ER 237. In this case relating to a divorce matter, the judge held that when referring to the term ‘relevant’, it means “so nearly touching the matter in issue as to be such that a judicial mind ought to regard it as a proper thing to be taken into consideration” (239). This meaning illustrates again that there should be a close connection with the matter in issue, which can be logically determined.

It should be noted that, based on research to date, there hasn’t really been specific tax cases apart from the *Berea West Estates* case, where the meaning of ‘relevant’ has been addressed. The principles of the law of evidence are therefore considered as an additional resource, to establish a basic understanding of the meaning of the term in the context of section 164(3).

3.5 The Law of Evidence

The first occurrence of a tax appeal is heard either by the Tax Board or the Tax Court (SARS, 2015). The Tax Board is an administrative tribunal created under the Tax Administration Act and therefore not a court as referred to in section 166 of the Constitution (SARS, 2015). Williams, Wilson & Viljoen (2015:6) state that even though the Tax Court is also not a court of law, but rather a specialist tribunal, fundamental principles of the Law of Evidence can still be applied. As seen in Chapter 3.3, relevancy was defined within the context of Law of Evidence. Rule 44(2) of the Rules promulgated under section 103 of the Tax Administration Act, states very briefly that – “A party must present all evidence...and must adhere to the rules of evidence”. Thus, even though the relevant cases in which the Law of Evidence has been developed may not necessarily be tax cases, the principles formulated in these cases would still be applicable to tax cases and it is therefore considered appropriate to discuss the detail thereof in determining a basic understanding of the term ‘relevant’. This is done in order to establish how the courts will possibly determine the relevancy of the factors (evidence provided by the taxpayer) to be considered, should the decision of a request for suspension be reviewed by the court.

It was stated in *S v Gokool* 3 SA 461 that the principle on which the law of evidence is based, is that evidence is acceptable if it is relevant to an issue in the case (475). This statement is derived from *S v Letsoko and Others* (4) SA 768 (A) where it is held that:

“[R]elevancy is based upon a blend of logic and experience lying outside the law. The law starts with the practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible.” (775)

In *Regina v Randall* UKHL 69 Lord Steyn said:

“A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue (par. 20G). The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience.” (Keane, 2000:20)

In *DPP v Kilbourne* AC 729 it was determined that it is appropriate to say that relevant (that is logically probative or disprobative evidence), is evidence which makes the issue which requires proof, relatively probable (756D). It would be incorrect to assume that evidence is admissible due to its logical relevance (Schwikkard *et al.*, 2009:47).

In *S v Gokool* 3 SA 461 Harcourt J further held that:

“[B]efore it can be said that evidence is legally relevant, and thus admissible and to be considered, there must be a sufficient *nexus* between the evidence sought to be led... and the issue on which it is sought to be led (or considered)”. (476)

In *S v Zuma* 2 SACR 191(W) van der Merwe J held:

“[T]he question of relevancy can never be divorced from the facts of a particular matter before court.” (199)

It was also said in *R v Guney* 2 Cr App Rep 242 that whether evidence is relevant does not depend on abstract legal theory, but on each case’s individual circumstances (265).

Based on the abovementioned cases, it is submitted that the meaning of relevant is based on the following:

- Common sense
- A sufficient *nexus* between the evidence sought to be led and the issue on which it is sought to be led
- Increasing or weakening the possibility of the existence of a fact in issue
- Process of eliminating irrelevant aspects

According to Schwikkard *et al.* (2009:47-57), the following factors and considerations place a check on the admissibility of relevant evidence:

- The issues (as the essential point of departure)
- Reasonable or proper inference: assessing the potential weight of the evidence
- Avoiding a proliferation or multiplicity of collateral issues
- The risk of manufactured evidence
- Prejudicial effect
- The doctrine of precedent
- The principle of completeness
- Constitutional imperatives and the position of the accused

It is submitted that these factors and considerations can be used by a taxpayer as a guideline in the determination of whether a factor will be considered as relevant or not. These factors and considerations will, however, not be discussed in detail further. As seen above, the key consideration remains the issue at hand. Schwikkard *et al.* (2009:47) note that to decide

whether evidence is relevant cannot be done in a vacuum. The nature and extent of the argument must be taken into consideration (Schwikkard *et al.*, 2009:47). This confirms the importance of the connection between the relevant factor for consideration and the request for the suspension of the payment of disputed tax.

The South African Law Reform Commission has noted in its Discussion Paper 113, that the lack of a legal definition of relevance has not yet lead to any difficulties in practice. Nevertheless, there are no obvious disadvantages in defining relevance (Discussion Paper 113, 2008:par.3.30).

It can be submitted from the context of the Law of Evidence, that for taxpayers to determine whether a factor will be considered as relevant for the purposes of a request for the suspension of payment, they should ensure that that there is a logical sufficient connection between the evidence (factor) and the issue (request) which will make the granting of the request reasonably possible.

3.6 The impact of the meaning of the term ‘relevant factors’ on a request for suspension of the payment of disputed tax

Although a senior SARS official have always been administratively obliged to take into account all relevant factors (Draft Tax Administration Laws Amendment Bill, 2014:par. 2.46), it is submitted that the inclusion of the term ‘relevant factors’ added an element of subjectivity to section 164(3). This is supported by a statement that relevance is a matter of degree (Keane, 2000:20), which means what will be considered as ‘relevant’, will depend on the extent of the concern.

However, based on dictionaries and case law as resources, a basic understanding of the meaning of the term ‘relevant factors’ as used in section 164(3), is submitted to be as follows: The factor to be considered should have a close and logical sufficient connection with the request for suspension and will most probably be considered with reference to all the other specific relevant factors in total (based on the purpose of the term), to determine whether it will increase or decrease the probability of the request being granted.

According to Treurnicht (2015:2) the word ‘including’ after the term ‘relevant factors’, open the way for further relevant factors to be considered when the SARS is exercising its

discretion. She opines that this means that both the taxpayer and the senior SARS official will be allowed to take into account additional relevant factors. Treurnicht (2015:2) states further that the relevancy of the factors remains to be seen and will almost certainly depend on the specific circumstances and facts of each matter.

It should also be noted that another place in the Tax Administration Act where the meaning of 'relevant' also appears to be an uncertainty, is in the definition of 'relevant material'. This definition, after its amendment in 2014, reads as follows: "any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3". With regards to the amendment of this definition, the 2014 Memorandum states that: "The proposed amendment aims to clarify that the statutory duty to determine the relevance of any information, document or thing for purposes of for example a verification or audit, is that of the SARS and the term foreseeable relevance does not imply that taxpayers may unilaterally decide relevance and refuse to provide access thereto, which is what is happening in practice" (2014:par. 2.37.2).

It can be derived from the abovementioned paragraph that although the taxpayer would benefit from knowing what will be considered to be 'relevant', this is in fact a decision which will depend on the SARS based on its statutory duty in terms of the Tax Administration Act. This presents an element of subjectivity in that it can differ from case to case and between the different senior SARS officials. However, according to a SARS Regional stakeholder meeting in 2014, the decision to suspend is being executed by a committee in practice. The Tax Administration Act contains no authority for this. The element of subjectivity has the possible impact of adverse decisions for taxpayers. Senior SARS officials might also interpret the consideration of 'relevant' incorrectly due to no guidelines being available. A further impact is the possible delay in the finalisation of requests for the suspension of payment, as all factors considered to be relevant and submitted by the taxpayer, should now be considered by the senior SARS official.

Therefore, based on the basic understanding of the meaning of the term 'relevant factors' provided, it should not be a difficult exercise for a taxpayer to determine which factors will be considered relevant for purposes of the request for suspension. However, the fact that the senior SARS official ultimately has the statutory duty to determine the relevance of any factors, impacts the request in various manners as indicated above. It should, however, be remembered that the decision of the SARS senior official will constitute an administrative

action and the taxpayer will therefore be entitled to apply for judicial review in the event of an adverse decision (PWC South Africa, 2015:4). PWC South Africa (2015:4) states that a review doesn't relate to whether the decision was right or wrong, but to whether the decision was rational and arrived at through a proper process which includes whether relevant factors were taken into account and irrelevant considerations ignored.

3.7 Conclusion

Although a basic understanding regarding the meaning of the term 'relevant factors' as used in section 164(3) was established, it was also determined that this might differ for each request based on the specific circumstances of each request. It is submitted, however, that it should not be difficult for a taxpayer to determine which factors will be considered relevant for purposes of the request for suspension and what type of information to include with their request. In this chapter it was also determined that the element of subjectivity added by these words, has various impacts on the request for the suspension of the payment of disputed tax. Goldswain (2008:107), however, opines that the interpretation approach followed by the courts provides the taxpayer with a realistic opportunity to question unfair interpretation decisions. The manner in which the section 164(3)-discretion is exercised by the senior SARS official, is examined in Chapter 4.

CHAPTER 4: THE IMPACT OF THE RIGHT TO JUST ADMINISTRATIVE ACTION ON THE MANNER IN WHICH THE SECTION 164(3)-DISCRETION IS EXERCISED BY THE SENIOR SARS OFFICIAL

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CHAPTER 4: THE IMPACT OF THE RIGHT TO JUST ADMINISTRATIVE ACTION ON THE MANNER IN WHICH THE SECTION 164(3)-DISCRETION IS EXERCISED BY THE SENIOR SARS OFFICIAL

4.1 Introduction

The SARS has to take a decision in response to a request received from a taxpayer for the suspension of the payment of a disputed tax (PWC South Africa, 2015:6). It appears that most of the factors considered by the SARS, examine the cleanliness or otherwise of taxpayers' hands and whether taxpayers can provide good evidence and facts to support their requests for suspension of any taxes due (Goldswain, 2012:147). If these factors are not taken into account or considered by the SARS for purposes of deciding whether to grant the request or not, the decision could be regarded as an unreasonable decision and may be set aside on application to a court of law (Goldswain, 2012:147).

Binns-Ward J said in *Capstone 556 (Pty) Ltd and Another v Commissioner for South African Revenue Service and Another* 74 SATC 20:

“The exercise of the power to grant a suspension in terms of (what is now section 164 of the Tax Administration Act) constitutes administrative action within the meaning of section 33 of the Constitution and of PAJA.” (28)

PWC South Africa (2015:4) states that where the SARS gives a negative response to a request for suspension, a taxpayer would be eligible to apply for a judicial review and not an appeal against that decision. Consequently the factors as stipulated in section 164(3) which the senior SARS official is required to consider in making its decision, will be a fundamental concern of the reviewing court in deciding whether an adverse decision should be set aside (PWC South Africa, 2015:4).

This chapter considers the impact of a taxpayer's right to just administrative action that is lawful, reasonable and procedurally fair on the discretion exercised in terms of section 164(3) by the senior SARS official. However, before investigating the manner in which the section 164(3)-discretion is exercised with reference to a taxpayer's right to just administrative action, the right to just administrative action first needs to be discussed in general.

4.2 Constitutional right to just administrative action

Goldswain (2012:2) states that it is the Constitution, together with the Income Tax Act, the Tax Administration Act and South Africa's rich Roman-Dutch common law heritage that provides the primary basis on which South African taxpayers' rights are built. The fundamental rights of taxpayers in South Africa are protected by the Constitution (Erasmus, 2013:10). These fundamental rights are jointly referred to as the Bill of Rights. The Bill of Rights in the Constitution is a set of moral norms, values and principles aimed at protecting South African residents' rights and interests (Blacksash, 2015).

The right to just administrative action is defined in section 33 of the Constitution as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

The PAJA is the national legislation promulgated in terms of section 33(3) of the Constitution to give effect to the rights in section 33 (Hoexter, 2013:649). Blacksash (2015) states that the SeSotho term 'Batho Pele' means 'people first'. They opine that these Batho Pele principles are a vital guide for how administrators should behave when making decisions and that it also has a legal effect which is included in the PAJA. They further state that the need for a right to just administrative action did arise due to the fact that government administrators need to make decisions that are lawful and adheres to the rule of law as found in section 2 of the Constitution. This section states that the Constitution is the supreme law of South Africa and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. The supremacy of the Constitution is therefore also applicable to tax legislation, as to any other legislation (Erasmus, 2013:35). Erasmus (2013:47) further states that a fundamental principle of constitutional law is normally understood to be the rule

of law, to the degree at least that it expresses the principle of legality. If the provisions of the PAJA, through the definition of administrative action, do not apply to an administrative action by the SARS, then the constitutional principle of legality will apply.

Hoexter summarised the relationship between the PAJA, the Constitution and the common law, as included in the judgment of *Minister of Health v New Clicks South Africa (Pty) Ltd* (2) SA 311 (CC), as follows:

“The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in section 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights... Nor is it possible to sidestep the Act by resorting to the common law... The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act.” (par.97)

In this study, focus will only be placed on administrative action in terms of the PAJA and section 33 of the Constitution.

The question of the inter-relationship between section 33 of the Constitution and the PAJA has been commented on as follows:

- Treurnicht (2013:par. 8) notes that section 33 should be read together with the PAJA.
- Hoexter (2013:649-650) states that the PAJA makes the constitutional rights effective by providing an expanded and detailed expression of the rights to just administrative action and providing remedies to justify them. The Constitutional rights exist independently of the statute that gives effect to them, but fall back to a background role. She further states that based upon the principle of avoidance and the related principle of subsidiarity, the free-standing constitutional rights in section 33(1) and (2) can only be relied on directly in exceptional cases.
- Erasmus (2013:44) puts forward that in the absence of applying the Constitutional principle of legality, the PAJA regulates ‘administrative action’.

Croome (2010:205) argues that many of the Commissioner’s decisions constitute ‘administrative action’ and are thus subject to the right to just administrative action. Croome (2010:205) specifically states that decisions made on requests for the suspension of tax pending the finalisation of an objection or appeal, is an example of decisions made by the Commissioner which constitute ‘administrative action’. Hoexter (2013:653) states that

jurisprudence based on the constitutional right to just administrative action, at its broadest and simplest, is the exercise of public power by any organ of state with a few exclusions.

The Bill of Rights, which includes the right to just administrative action, applies to all organs of state in terms of section 8(1) of the Constitution. In terms of the South African Revenue Service Act, 34 of 1997 ('SARS Act'), the SARS was established as an organ of state in order to advance the efficient and effective collection of revenue. Hence it is bound by the obligations and duties compulsory in terms of section 33 of the Constitution through both section 8 of the Constitution and through the PAJA.

Klue *et al.* (2012:par 3.25) opines that the impact and scope of the PAJA on tax legislation is determined by numerous interlocking statutory descriptions. Therefore, to consider the impact of section 33 of the Constitution on the discretion exercised in terms of section 164(3), the principles of the PAJA is briefly discussed.

4.3 The PAJA

Section 2 of the PAJA allows the Minister certain exemptions or variations regarding an administrative action or group or class of administrative action, which should be approved by Parliament and published by notice in the *Gazette*. At the time of this study no such exemptions has been granted to the SARS and the PAJA therefore applies to the SARS.

The term administrative action is not defined in the Constitution. The PAJA defines 'administrative action' in section 1 as follow:

“**administrative action**’ means any decision taken, or any failure to take a decision, by—

- (a) an organ of state, when—
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect . . .”

This definition is followed by a list of exclusions. However, it is submitted that none of the exclusions are of particular significance for this study.

Hoexter (2013:654) notes that the action complained of must meet the following seven requirements in order to constitute administrative action falling within the scope of the PAJA:

- i. “it must be a decision;
- ii. by an organ of State;
- iii. exercising a public power or performing a public function;
- iv. in terms of any legislation;
- v. that adversely affects someone’s rights;
- vi. which has a direct, external, legal effect; and
- vii. which is not included in the list of exclusions in subparagraphs (aa) to (ii) of the definition of administrative action.”

Therefore, for purposes of the PAJA, any ‘decision’ made by the SARS, which affects a person’s rights or legitimate expectations in an adverse manner and which has a direct, external effect, constitutes ‘administrative action’ insofar as that decision entails the SARS exercising ‘a power in terms of the Constitution’ or a ‘public power’. Hoexter and Lyster (2002:25) explains that, as stated by Wade and Forsyth (1994), discretionary powers are easily recognised amongst others by the use of words like ‘may’ in provisions. Section 164(3) provides that: “A senior SARS official **may** (author’s own emphasis) suspend payment of the disputed tax or a portion thereof...”.

PWC South Africa (2015:4), confirmed that the decision of the senior SARS official in response to a request for suspension will constitute administrative action as envisaged in the PAJA. This was already held by the Constitutional Court in the *Metcash* case namely that:

“It 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 which is reviewable in terms of the principles of administrative law.” (34)

Erasmus (2013:35) puts forward that in order for the taxpayer to invoke the review remedies in the PAJA, a decision of the SARS must fall within the definition of 'administrative action' as defined in the PAJA. Therefore the SARS, in deciding whether a taxpayer should be granted a suspension of payment, must act in terms of the PAJA and section 33 of the Constitution and where it doesn't, a taxpayer should be successful in having the decision reviewed by the High Court (Croome, 2011:par.19). Section 6(2) of the PAJA provides the statutory grounds of review.

According to the SARS' Guide (2013:59), the period as stipulated in terms of section 164(6) during which the SARS is not allowed to take any recovery proceedings as referred to in Chapter 2.3.2.4, is to allow a taxpayer to consider its rights, for example whether to apply for a review against the decision not to suspend. A judicial review is not concerned with the merits of decisions, but pays attention to the process by which decisions were made and actions taken (Kruger, 2014:35). Buttrick (2013:2) also states that this review is of limited scope. This means that if the senior SARS official incorrectly applies his or her mind and consider the taxpayer's request for suspension in an unreasonable manner, a decision can be challenged on the grounds that it infringe the taxpayer's right to administrative action (Buttrick 2013:2).

It should however be noted that such a review application can take several months and therefore it is necessary to either agree with the SARS to not collect the disputed tax until the finalisation of the review application or submit an application for an interdict prohibiting the SARS from collecting the dispute tax (ENS, 2015).

The requirements that 'administrative action' needs to be lawful, reasonable and procedurally fair are therefore important. The requirements are discussed separately before determining the impact thereof on the discretion exercised in terms of section 164(3).

4.4 Lawful, reasonable and procedurally fair administrative action

Erasmus (2013:21) states that the right to just administrative action requires substantive just administrative action, namely lawfulness and reasonableness. It also requires procedural fairness, which includes the *audi alteram partem* principle (the taxpayer's right to be heard as part of procedural fairness), and unbiased conduct (Erasmus, 2013:21). Each of these

requirements are now separately discussed in general with reference to both the Constitution and the PAJA.

4.4.1 Lawfulness

Hoexter (2013:666) notes that, at its simplest, lawfulness means that administrators must comply with the law and must have lawful authority for their decisions. According to Erasmus (2013:71) lawfulness comprises authority, jurisdictional facts and abuse of discretion. The abuse of discretion includes: improper or ulterior purposes or motives, *mala fides* (bad faith), the failure to apply mind or failure to take into account relevant considerations and taking irrelevant considerations into account, unlawful hampering of a discretion, and arbitrary and impulsive decision-making by the SARS (Erasmus, 2013:71).

The PAJA does not add much to the concept of lawfulness, apart from the fact that it gives effect to the constitutional right to lawful administrative action through a right to judicial review of administrative action on several specific grounds, as well as a common ground of unlawfulness, listed in section 6 of the PAJA (Hoexter, 2013:667).

4.4.2 Reasonableness

Goldswain (2012:237) opines that reasonableness is the cornerstone of the right to just administrative action. Erasmus (2013:90) indicates that to determine whether a decision is reasonable, both the rationality and proportionality of the decision needs to be determined. These two components of reasonableness are therefore discussed individually.

According to Hoexter (2012:340), a rational decision 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. The rationality test was first formulated by the court in *Carephone (Pty) Ltd v Marcus NO* (3) SA 304 (LAC). It was confirmed in the recent decision of *Sidumo v Rustenburg Platinum Mines Ltd* ZACC 22 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?” (par. 25)

Erasmus (2013:93) states that proportionality on the other hand means that the decision must be in proportion to the facts and circumstances of the case. Hoexter (2012:344) states that proportionality's essential elements are balance and necessity together with suitability. In *Minister of Health v New Clicks South Africa (Pty) Ltd* (2) SA 311, Sachs J held that proportionality will always be a significant element of reasonableness (par. 637).

O'Regan J sets out a number of factors in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* (4) SA 490(CC) which can be used to determine if a decision is reasonable. These include: "[T]he 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" (par 45).

The PAJA has two grounds of review relating to reasonableness, namely rationality in terms of section 6(2)(f)(ii) and proportionality in section 6(2)(h) of the PAJA. Because there are two separate grounds of review, Hoexter (2013:670) suggests that these two grounds are theoretically different. She notes further that it is clear from the jurisprudence of the Constitutional Court that rationality is usually a less rigorous or intensive standard of review than reasonableness (Hoexter, 2013:670). Essentially, reasonableness includes the concept of proportionality, which rationality alone excludes (Hoexter, 2013:670).

4.4.3 Procedural fairness

This right ensures that administrators make decisions in a fair way (Blacksash, 2015). This right consists of two elements namely bias and *audi alteram partem* (see Chapter 4.4).

Erasmus (2013:96) notes that for a decision taken by the SARS to be set aside for reasons of financial bias, the taxpayer only has to prove the mere appearance of bias, rather than its actual existence (*South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (3) SA 705 (CC)). The courts accept that the 'smallest pecuniary interest' will be sufficient to raise the suspicion of bias (*Rose v Johannesburg Local Road Transportation Board* (4) SA 272).

Keulder (2011:12) puts it that the right to just administrative action in terms of section 33 of the Constitution constitutionalises the ancient rules of natural justice among others *audi*

alteram partem which means “to hear the other side” (Burns, 1998:169). Hoexter (2012:363) states that through the *audi alteram partem* principle, taxpayers are given both the opportunity to participate in decisions that will affect their rights adversely and a chance to influence the outcome of those decisions to ensure procedural fairness.

Hoexter (2013:673) states that although section 33(1) of the Constitution appears to say that *all* administrative action must be procedurally fair, it is clear that what fairness demands, may differ from case to case. The concept of fairness has been discussed in several cases.

The importance of fairness with regards to the exercise of discretionary power was explained by Goldstone J in *Janse van Rensburg v Minister of Trade and Industry NO (1) SA 29 (CC)* as follow:

“[I]t has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness are thus all the more important and are reflected in the Bill of Rights. Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.” (24)

In *Metro Projects CC v Klerksdorp Local Municipality (1) SA 16 (CC)*, Conradie JA stated that the circumstances of each case will determine the fairness and whatever is done, must display the qualities of fairness and transparency. In *Gardener v East London Transitional Council and Others (3) SA 99 ECD* it was stated that fairness was a relative concept:

“The meaning to be attached to ‘procedurally fair administrative action’ must therefore be determined within the particular framework of the act in question viewed in the light of the relevant circumstances. The procedure must be fair not only to the holder of the right affected by the administrative act but also the executive or administration acting in the public interest.” (116D)

The PAJA provides a ground for review in terms of section 6(2)(a)(iii) where the administrator who took the administrative action “was biased or reasonably suspected of being bias”. Section 3 of the PAJA specifically provides detail on the procedures to be followed in fulfilling the right to procedurally fair administrative action affecting any person.

Section 3(1) of the PAJA provides that: “Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.” Klue *et al.* (2012:par.3.25) opines this to be the lynchpin of the PAJA. The requirement of procedural fairness goes beyond that which affects the rights of a person and extends into the realm of a person’s legitimate expectations. This study doesn’t focus on the meaning of ‘materially’ and ‘legitimate expectations’ as referred to in section 3(1) of the PAJA. Section 3(2) of the PAJA provides that “a fair administrative procedure depends on the circumstances of each case”. This is seen to be the guiding principle under the Constitution as well (Hoexter, 2013:677).

The PAJA distinguishes between five compulsory elements of procedural fairness in terms of section 3(2)(b) of the PAJA and three discretionary elements as provided for in section 3(3) of the PAJA. The discretionary elements *may* be provided if necessary to obtain procedural fairness in a specific case, compared to the compulsory elements which appear to be minimum requirements to be provided for by an administrator in every case (Hoexter, 2013:677). The only exceptions provided for this, is in terms of section 3(4) of the PAJA where, if it is reasonable and justifiable to depart from these requirements in section 3(2) of the PAJA, it will be allowed. Section 3(5) of the PAJA also allows the use of ‘fair but different’ procedures as an alternative to the provisions of section 3(2) of the PAJA.

The impact of these requirements on the manner in which the section 164(3)-discretion is exercised, will be analysed in Chapter 4.6. However, firstly the process regarding a request for the suspension of the payment of disputed tax and how the discretion is exercised in terms of section 164(3), needs to be understood.

4.5 The process and discretion exercised in terms of section 164(3)

4.5.1 The process of a request for the suspension of the payment of disputed tax

According to paragraph 10.6.1 of the SARS’ Guide, 2011, the suspension of the payment of disputed tax is not an automatic right and taxpayers must apply for the suspension in the form and manner prescribed by the SARS. The manner was, however, nowhere prescribed, up until April 2015 when the SARS updated its website to include some detail on a request for the suspension of the payment of disputed tax.

Due to the fact that no specific guidelines or information regarding the prescribed manner was available until April 2015, various academic writers and industry experts made comments and suggestions to interested taxpayers regarding the process. Croome (2011:par.11) stated that taxpayers should submit a formal application by way of a letter and show that each of the factors as stated in the section 164(3) have been complied with. Treurnicht (2013:par.2) suggested that it will be necessary for taxpayers to properly motivate their requests and satisfy certain factors in order for the request to be granted. Further suggestions included that the request should be made in writing to a SARS branch or that the email facility (pcc@) can also be made use of (SAIT, 2014). Mzizi (2014) suggests 12 easy steps to follow in order to get the SARS to approve a request for suspension.

On the SARS' website in the section of "Owing SARS money" (where one would expect information on a suspension request for the payment of disputed tax), it only states that "under limited circumstances the debt may be suspended" and that "you can call your call centre or visit your nearest branch for assistance." No additional guidelines are provided or any information given on the process to be followed.

The SARS' website was, however, updated on 23 April 2015 under the "tax and doing business" section which forms part of the government section of the "Businesses and Employers" division. A section named "Suspension of Payment and Waiving of Penalties and Interest" were added. In this section it states that a taxpayer can write a letter to the SARS asking for the suspension of payment or part of a payment, if the taxpayer plans to dispute the liability to pay the tax. The taxpayer can email, fax, post or drop the letter in a drop box at a SARS branch. It also indicates that requests for suspension can be send for Income- , Employees' and Value-Added Tax, as well as for Customs and Excise. It also states that the following information must be provided in the request letter: Registered details of the taxpayer, all tax reference numbers, reason(s) for the request for example details of the circumstance which prevented compliance and any supporting documents (relevant material) to support the request.

It is clear from the abovementioned information on the SARS' website, that no reference is made to the specified factors as provided for in section 164(3) and whether information regarding them should be provided or not. One can, however, possibly derive from the words 'and any supporting documents (relevant material)' that information regarding relevant factors to be considered should be provided. Nel (2015) states that section 164(3) does not

require that information on those factors which the senior SARS official should consider, must be submitted together with the request. He says that taxpayers in practice, however, do provide information on the factors for consideration as they probably expect that the SARS will request the information if they want to take it into account. Although the SARS has now provided some guidelines on the manner in which a request for the suspension of the payment of disputed tax can be made, the guidelines are not completely clear and are also not very easily accessible based on its current location on the website.

According to Kotze (2013:27), the SARS will only consider a request for suspension if it is filed with the SARS in the recommended format and if the taxpayer is able to provide all the information required by the SARS at that time. According to Treurnicht (2015:2), the SARS would not usually take into account a request under section 164 without the taxpayer dealing with and providing sufficient motivation in respect of all the said factors.

Nel (2015) confirms that in practice, feedback on these requests are not given swiftly. This statement was acknowledged by Croome (2015:par.13) who states that the SARS frequently does not respond timeously or at all to the letters requesting for a suspension of payment. This is mainly due to the fact that the requests for suspension cannot be submitted to the SARS electronically and are therefore not properly tracked within SARS's systems (Croome, 2015:par.13). Croome (2015:par.14) further indicates that too often taxpayers, who have legitimately applied for a suspension of payment, receive demands for payment or in a worst case scenario, are informed of an adverse decision even though the SARS has been in possession of their request for suspension for several months. Buttrick (2013:2) on the other hand states that a taxpayer should at no time assume that their request will be successful. Kotze (2013:27) also recommends that it is not wise to merely file a request for the suspension of payment without confirmation that the SARS has agreed to it. He suggests that taxpayers should follow up regularly on the progress of the collection of the taxes until a confirmation of suspension has been issued by the SARS (Kotze, 2013:27). Nel (2015) recommends that a type of "acknowledgement of receipt" is received, as it is considered important especially for the purposes of section 164(6).

According to Nel (2015) the SARS is in the process of developing a system to handle requests through the e-filing platform. He mentions that the aim is to give the taxpayer, at the beginning or even just before the dispute process, the opportunity to submit the request

electronically. This will hopefully contribute to a more efficient process once such system is active.

4.5.2 The discretion exercised in terms of section 164(3)

To gather information on the process followed by the SARS when such a request is received, one can only revert back to the provision and observations from academic writers. Given the permissive statutory language such as 'may' used in the introduction of section 164(3), it is clear that it is a discretionary power given to the senior SARS official to decide whether or not to grant a request for the suspension of the payment of disputed tax (Draft Dispute Resolution Guide, 2014:21). It was held in *Dawood and Another v Minister of Home Affairs and Others* (3) SA 936 (CC) that the use of a discretion plays a crucial role in any legal system (par. 53). According to the Draft Dispute Resolution Guide, discretionary powers are characterised by the element of choice that they bestow on their holders. To say that someone has a discretion presumes that there is no exclusive legal answer to the problem (Draft Dispute Resolution Guide, 2014:21).

Croome (2010:220) states that the Commissioner (now senior SARS official) may not instantly dismiss a taxpayer's request for the suspension of the payment of tax pending the hearing of an appeal. Based on the principles of administrative law, the senior SARS official must properly exercise the discretion granted by considering all relevant facts (Croome, 2010:220). The Draft Dispute Resolution Guide also stated that, before the 2014 amendment which added the term 'relevant factors', the wording of section 164(3) did not limit a senior SARS official exercising its discretion to have regard only to the factors provided for. The reason for this statement is due to the SARS' administrative fairness obligation to take a decision, only once all relevant considerations have been taken into account (Draft Dispute Resolution Guide, 2014:21). The meaning of the term 'relevant factors' was discussed in Chapter 3. Although a basic understanding of the term was established, the senior SARS official still has the discretion to determine what should be regarded as relevant in respect of each specific request received. This confirms that relevancy will differ from case to case.

According to Bothe (2015), the senior SARS official exercises its discretion by taking into account factors and evidence provided and thereafter concludes whether to grant the

request or not. Nel (2015) states that the senior SARS official must be able to justify its decision and will therefore have to keep the necessary paperwork by hand.

Still, the Dispute Resolution Guide states that there is a possible risk that taxpayers misuse the request to delay payment (2014:22). The Tax Administration Act therefore provides that the SARS may review and withdraw the suspension due to this inherent risk (Dispute Resolution Guide, 2014:22). The suspension of payment is withdrawn, which means the suspension of tax collection automatically lapse, in terms of section 164(4) of the Tax Administration Act, if:

- “(a) no objection is lodged;
- (b) an objection is disallowed and no appeal is lodged; or
- (c) an appeal to the tax board or court is unsuccessful and no further appeal is noted.”

According to section 164(5) of the Tax Administration Act (‘section 164(5)’), the senior SARS official may deny a request in terms of section 164(2) or revoke a decision to suspend payment in terms of section 164(3) 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
- (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.”

As seen above, it is concluded that many of these factors in deciding whether a request should be denied or revoked, are subjective. Dachs (2014:12) also emphasises the fact that once the SARS has refused a suspension request by a taxpayer, the taxpayer is obligated to pay the tax to the SARS. With reference to section 164(5)(c), it is submitted that the factors referred to in section 164(3) can almost be considered by the SARS on a continuous basis, which may be the reason why so many uncertainties regarding these factors as discussed in Chapter 2 exist. Thus, even though a taxpayer may secure a suspension of the payment of disputed tax, the SARS still has the power to revoke that decision. So how does that leave the taxpayer with a fair and equitable chance regarding a request for the suspension of the payment of disputed tax?

Due to the fact that the decision made in terms of section 164(3) constitutes administrative action, the impact of section 33 of the Constitution on the manner in which the section 164(3)-discretion is exercised is analysed.

4.6 The application and impact of the right to just administrative action on the discretion exercised in terms of section 164(3)

Although the 'pay now, argue later' rule was upheld in the *Metcash* case by the Constitutional Court, Croome (2010:220) opines that a taxpayer may still challenge the Commissioner's (now senior SARS official's) decision to enforce payment and that an infringement of the rules of administrative action provides the ground for such challenge. Erasmus (2013:29) points out that the provisions authorising administrators to execute an administrative action are not necessarily unconstitutional, but the application thereof may be. Erasmus (2013:29) further states that if the specific section in the Act were interpreted and enforced in a manner that is in conflict with the Constitution, the action of the SARS would be unjust and unconstitutional.

This section analyses the limitations applicable to the SARS when exercising its discretion in terms of section 164(3), in making a decision to grant a request for the suspension of the payment of disputed tax. If the discretion exercised by the SARS in terms of section 164(3), transgresses the constitutional obligations placed on the SARS in terms of section 33 of the Constitution, its conduct will be unconstitutional. The impact of each of the constitutional obligations in terms of the right to just administrative action, namely lawfulness, reasonableness and procedural fairness, as well as the right to written reasons are now discussed in detail with reference to the discretion exercised in section 164(3).

4.6.1 Lawful administrative action in terms of section 164(3)

As aforementioned, (see Chapter 4.4.1), lawfulness comprises authority, jurisdictional facts and abuse of discretion. Erasmus (2013:74) emphasises that a law must authorise the exercise of power. This statement is derived from the decision by the Constitutional Court in *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* (1) SA 374 (CC) where it was held that:

“[C]entral 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.” (par.58)

Hoexter (2012:255) states that from this statement it follows that the SARS, as administrator, does not have inherent powers to do as it pleases. She also states that the source from which the public power exercised by the SARS is derived from, should be a lawful empowering one (Hoexter, 2012:255). In *Macdougall v Paterson* 11 CB 755 by Jervis CJ, it was noted that the word ‘may’, which is also used in section 164(3), is merely used to:

“[C]onfer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise.” (par.766)

A senior SARS official is authorised by the Tax Administration Act to exercise a discretionary power in terms of section 164(3). The senior SARS official is only authorised to exercise the discretion once having regard to all the relevant factors including those factors specified in section 164(3). No authorisation letter or a similar document is required from the senior SARS official to exercise the discretion in terms of section 164(3). It does not mean, however, that the senior SARS official is not required to be properly authorised. The powers and duties required by the Tax Administration Act to be executed by a senior SARS official must, in terms of section 6 of the Tax Administration Act, 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 the SARS to comply with section 6 of the Tax Administration Act would mean that the senior SARS official concerned would not have the lawful authority to exercise the discretion.

Whether the recipient of the request will indeed be a senior SARS official, will not be clear from the person’s designation and therefore need to be assumed by the taxpayer who is submitting the request (Kruger, 2014:29). Kruger (2014:29) also advise taxpayers to request to be informed should the assumption be incorrect, as this can affect the request. Where the decision regarding the request for suspension is made without the required authority (by a person who is not authorised to exercise the discretion), the decision would be reviewable in terms of section 6(2)(a)(i) or (ii) of the PAJA.

The second element of lawfulness, jurisdictional facts (see Chapter 4.4.1), include the conditions which the SARS must satisfy and comply with as stated by the authorising

legislation (Erasmus, 2013:76). Appropriate compliance with the jurisdictional facts of section 164(3) would include the following: delegation of the relevant powers by the senior SARS official to a SARS official in terms of section 6 of the Tax Administration Act where applicable; 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- or Tax Administration Act and ensuring consideration of relevant factors including those specified in section 164(3). It is submitted that section 6(2)(b) of the PAJA, which determines that if "a mandatory and material procedure or condition prescribed by an empowering provision was not complied with", can be used as a ground of review should it be shown that the jurisdictional facts were not complied with. Alternatively the phrase, "otherwise unconstitutional and unlawful" in section 6(2)(i) of the PAJA, can be used as a ground of review.

The impact of the third element of lawfulness, namely the abuse of discretion also needs to be considered with reference to the discretion exercised in terms of section 164(3). Hoexter *et al.* (2002:25-6) states that an exercise of discretion can be recognised by the use of the word 'may' in provisions such as section 164(3). It is submitted that this type of discretion can create the urge to abuse the discretion. A detailed discussion on the traditional grounds of abuse of discretion namely *mala fides*, ulterior purpose or motive and failure to apply mind, is excluded from this study.

It should however be noted that Hoexter (2012:253,316-318) refers to 'relevant considerations' as a sub-section of a failure to apply mind, one of the traditional grounds of abuse of discretion. This again emphasises the importance of the meaning of the word 'relevant' as discussed in Chapter 3. Henning J best described what is to be considered as relevant and what not in *Bangtoo Bros v National Transport Commission* (4) SA 667 (N). He says it is a case of a factor of obvious and paramount importance being relegated to a position of insignificance, while another factor is given weight far in excess of its actual value (685). This meaning is similar to one of the components of the basic understanding obtained in Chapter 3 namely that the factor will most probably be considered with reference to all the other specific relevant factors in total.

As stated before in Chapters 2 and 3, section 164(3) contains no specific guidelines on the application of the relevant and specified factors to be considered. However, if the SARS makes a decision on a request for suspension without giving proper consideration to the

relevant factors or the specified factors, such conduct would be indicative of an abuse of discretion. A decision where the discretion exercised was abused could fall within the grounds of review in terms of sections 6(2)(e) or 6(2)(f)(ii) of the PAJA. Section 6(2)(e)(iii) specifically states that, where the action was taken because irrelevant considerations were taken into account or relevant considerations were not taken into account, it would be a ground for review.

4.6.2 Reasonable administrative action in terms of section 164(3)

Regarding the first element of reasonableness, rationality (see Chapter 4.4.2), Routledge (2006:134) 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. Erasmus (2013:91) believes that in practice this is a difficult ground to prove. Kriegler J stated in the *Metcash* case that the Commissioner (now senior SARS official) should be able to “justify his decision as being rational”. (35)

It is submitted that in terms of section 164(3), a possible example of a case of irrationality would be where all the relevant and specified factors point towards a positive outcome for a suspension request, but the request for suspension is not granted. Therefore, the SARS’ decision in terms of section 164(3) must be rationally connected with the purpose for which the power was given to the senior SARS official. Otherwise, the decision is seen as irrational and inconsistent with this requirement (*Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others (2) SA 674 (CC)*).

Section 2(f)(ii)(aa) to (dd) of the PAJA as ground of review for irrationality, reads as follows:

- “(f) the action itself - ...
 - (ii) is not rationally 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”.

In *Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* (3) SA 143(c) it was determined that in terms of the Constitution, only a rational connection with minimal justification is required by the SARS to overcome this ground of review, rather than the court having to substitute the decision because it is essentially incorrect (164G). Erasmus (2013:92) also believes that in practice this might be difficult for taxpayers to prove.

Regarding the other element of reasonableness, proportionality (see Chapter 4.4.2), a decision taken in terms of section 164(3) must be proportional to the facts and circumstances of the case (Erasmus, 2013:93). For a proportional decision in terms of section 164(3), 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 (Hoexter, 2012:344). This confirms again that the discretion exercised for each and every request for suspension received, will be on a case-to-case basis and cannot be compared to other requests. However, in the absence of the basic requirement for proportional conduct, the decision will be reviewable in terms of section 6(2)(h) of the PAJA.

4.6.3 Procedurally fair administrative action in terms of section 164(3)

As stated in Chapter 4.4.3, one of the two elements of procedural fairness is bias. An example of a possible instance where a form of bias can occur regarding section 164(3), is when a senior SARS official grants a request for suspension for one taxpayer, but not for another taxpayer who has exactly the same facts or circumstances in terms of relevant factors and the specified factors to be considered.

Regarding the other element of procedural fairness, *audi alteram partem* (see Chapter 4.4.3) taxpayers can participate in any decisions that will adversely affect them and influence the outcome of those decisions to ensure procedural fairness. The court, however, stated in *Gardener v East London Transitional Council and Others* (3) SA 99 ECD that it does not believe: “that the *audi alteram partem* principle is absolutely applicable to every administrative act” (116D). It is submitted that, in terms of section 164(3), taxpayers cannot participate in the decision exercised, as the taxpayer only submits the request and the senior SARS official is the one who has the authority to grant or deny the request. The only possible manner in which the taxpayer can maybe influence the decision of the senior SARS official, is by making sure they include all relevant documentation when submitting their request.

This right of a taxpayer is therefore limited by the fact that an adverse decision regarding a request is subject to a review and not to an appeal.

Taxpayers whom are affected by procedurally unfair administrative action, will be entitled to submit a review application in terms of sections 6(2)(c) or 6(2)(i) of the PAJA in that the "...action was procedurally unfair..." or "... is otherwise unconstitutional or unlawful'.

The compulsory elements of procedural fairness in terms of section 3(2)(b) of the PAJA, are: adequate notice, an opportunity to make representations, a clear statement of the administrative action, notice of any right or review or internal appeal and notice of the right to request reasons. The discretionary elements are: an opportunity to obtain assistance or legal representation, to present and dispute information and arguments, and to appear in person. How it is determined whether the discretion exercised in terms of section 164(3) complies with the compulsory elements as stipulated in section 3(2)(b) of the PAJA or whether the SARS carries out their administrative action in terms of section 164(3) in a manner which is "fair but different" to section 3(2)(b) is, however, an open question.

4.6.4 The right to written reasons

A taxpayer has, in terms of section 33(2) of the Constitution, the right to request written reasons where the 'administrative action' adversely effects his or her rights. Adequate reasons, where a taxpayer's rights were materially and adversely affected, will also be required from the SARS as provided for in terms of section 5(2) of the PAJA. A wide interpretation of the meaning of the terms 'adversely effects' and 'rights' are adopted by several academic writers (Hoexter, 2012:470-472, Croome, 2010:207-208). It is therefore submitted that in this context, the senior SARS official must be able to substantiate to the taxpayer how he or she decided on the outcome of the request for the suspension of the payment of disputed tax, should a taxpayer make such a request.

A taxpayer is allowed to require the SARS to specify each and every factor that was taken into account in reaching the adverse decision (PWC South Africa, 2015:4). Croome (2014:par.25) corroborates on the aforementioned, stating that the SARS officials are required by law to properly evaluate the documentary evidence presented and should taxpayers conclude that it was not the case, they should contest the SARS' decision. The reasonableness or otherwise of the senior SARS official's decision will be significantly

influenced by the factors as stipulated in section 164(3), which the SARS is required to apply in responding to a request (PWC South Africa, 2015:6). Croome (2014:par.25) suggests that, alternatively, taxpayers could raise the problem directly with the office of the Tax Ombud. This office deals with abuses of power by the SARS and non-compliance with proper procedures in administering the tax laws of South Africa.

4.6.5 Conclusion on the impact of the right to just administrative action on the discretion exercised in terms of section 164(3)

Croome (2013:par.28) says it is unfortunate for taxpayers that the Tax Administration Act does not contain a specific remedy when the SARS officials disregard their obligations imposed on them under the Tax Administration Act. It is submitted from the abovementioned discussion, that if a taxpayer can show, with reference to the examples stated above where applicable and substantiated by the relevant facts, that defective administrative action by the SARS exist, the decision will be subject to review based on the grounds listed in section 6(2) of the PAJA. If not, the SARS is still bound by the Constitutional principle of legality.

Dachs (2014:12) emphasises the fact that the obligation to pay the tax to the SARS remains, regardless of the opinion of the taxpayer that the decision by the SARS constitutes unfair administrative action. It was, however, also noted by PWC South Africa (2015:5) that the amendments in 2014 as discussed in Chapter 2, have made the task of reviewing even more difficult regarding the interpretation and application of section 164(3) should a review application be submitted. The High Court before which the application is made may order the SARS to stop recovery proceedings until the finalisation of the review application (Dispute Resolution Guide, 2014:23).

4.7 Conclusion

This chapter analysed the inter-relationship between section 33 of the Constitution, the PAJA and a decision by the senior SARS official in terms of section 164(3). It was concluded that due to the fact that the decision in terms of section 164(3) constitutes administrative action, the SARS should exercise its discretion in a manner which is lawful, reasonable and procedurally fair to ensure compliance with the PAJA and the Constitution.

If the administrative action in terms of section 164(3) is, however, unlawful, unreasonable or procedurally unfair, a taxpayer has the right to submit a review application in terms of the reviewable grounds provided for in section 6 of the PAJA. To date, there has been no reported judgment regarding a request for the suspension of the payment of disputed tax. Several speculative inferences can be made from this fact (PWC South Africa, 2015:4). PWC South Africa (2015:4) opines that one reason might be that the SARS did not want to take the risk of a pro-taxpayer judgment, which might have increased the requests for the suspension of the obligation to pay disputed tax. However, this should not refrain a taxpayer from submitting a request for suspension. If the taxpayer makes a request for suspension, he or she needs to ensure that all relevant information is included with the submission thereof and that the request is complete. Due to having no right of appeal when a request for the suspension of the payment of disputed tax is denied, the request will form the foundation of a review application where applicable, and can therefore have an enormous impact on a review application.

With reference to the whole process of suspension requests, it was established that there are still some uncertainties and it is submitted to be a tedious process. Improvements including the necessity of the factors for consideration and the role thereof, should be reconsidered.

The suspension of payment might have a similar meaning to the deferral of payment which is defined as the provision of 'credit' in the NCA. A credit provider also considers certain factors in terms of the NCA, before granting credit to a customer. Therefore, if there is a similarity between 'suspend' and 'defer', the factors provided for in the NCA can be investigated as an additional source and compared to those specified in section 164(3), to establish whether the NCA can be used as guidance to simplify the process and specified factors in terms of section 164(3). This comparison is done in Chapter 5.

CHAPTER 5: A COMPARISON BETWEEN A REQUEST FOR THE SUSPENSION OF PAYMENT IN TERMS OF SECTION 164(3) AND THE GRANTING OF ‘CREDIT’ IN TERMS OF THE NCA

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CHAPTER 5: A COMPARISON BETWEEN A REQUEST FOR THE SUSPENSION OF PAYMENT IN TERMS OF SECTION 164(3) AND THE GRANTING OF ‘CREDIT’ IN TERMS OF THE NCA

5.1 Introduction

Section 164(3) provides that a senior SARS official may ‘suspend payment’ of the disputed tax. The term ‘suspend’ is defined in ten different ways in the OED depending on the context it is applied to. The most relevant definition from the OED in the context of section 164(3) is, “to put off to a later time or occasion”. In terms of section 164(3), this means that a taxpayer’s obligation to pay its tax debt is temporarily ceased. Subparagraph (a) of the definition of the term ‘credit’ in section 1 of the NCA states that ‘credit’ is, *inter alia*, ‘a deferral of payment of money owed to a person, or a promise to defer such a payment’. In this chapter the connection between ‘defer’ and ‘suspend’ is investigated, with a focus on the definition of a ‘credit agreement’ in terms of the NCA.

This is done in order to determine the relationship between a request to ‘suspend’ a payment of disputed tax in terms of section 164(3), and a ‘credit agreement’ to ‘defer a payment’ in terms of the NCA. The factors considered or the process followed when credit is provided or refused in terms of ‘credit agreements’ as defined in the NCA are compared to the factors considered when a request for the suspension of the payment of disputed tax is granted or denied in terms of sections 164(3) and 164(5). The importance of determining this relationship and the performance of the comparison thereafter, lies in the possible guidance which the NCA can provide regarding the factors and process, in terms of section 164(3).

5.2 The relationship between ‘defer’ and ‘suspend’

According to Black’s Law Dictionary (1999:1469), the verb ‘suspend’ is defined as “to interrupt; postpone; defer”. This clearly indicates that the two terms, ‘suspend’ and ‘defer’, have a similar meaning. It is, however, interesting to note that the definition of the term ‘defer’ in the same dictionary, makes no reference to the term ‘suspend’ (1999:432).

On the other hand, in Burton’s Legal Thesaurus (2007:561) an explicit connection is made between the terms ‘defer’ and ‘suspend’, where ‘defer’ is referred to as an alternative word for ‘suspend’ and ‘suspend’ is also noted as a synonym for ‘defer’ (Burton, 2007:153).

It is therefore clear that these two terms have a similar meaning and can therefore be used as substitutes for each other. According to the common law maxim '*Eiusdem generis*', courts should interpret terms of the same kind in a similar manner. Hence, it is submitted that to 'suspend a payment' in terms of section 164(3) can be equated to the provision of 'credit' in terms of the NCA. The NCA can therefore be used as an additional resource to identify further possible guidance regarding section 164(3).

5.3 The application of the definition of 'credit agreements' in terms of the NCA to a request for suspension in terms of section 164(3)

Section 4(1)(a)(iii) of the NCA states that it applies, amongst others, to every 'credit agreement' between parties dealing at arm's length and made within, or having an effect within, the Republic, except a credit agreement in terms of which the consumer is an organ of state. The two parties involved in a request for suspension in terms of section 164(3) are the taxpayer and the senior SARS official, therefore meeting the requirement of two parties dealing at arm's length in terms of the NCA. It is submitted that, in most cases, the request will be submitted in South Africa and it must therefore now be determined whether a request for the suspension of the payment of disputed tax can be seen as a 'credit agreement' in terms of the NCA and whether the aforementioned exception is applicable or not.

The word 'agreement' in the term 'credit agreement' is defined in section 1 of the NCA as "an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties." It is submitted that once a taxpayer requests a senior SARS official to suspend the payment of disputed tax, an understanding is created between the taxpayer and the senior SARS official with the intention to establish a relationship between these two parties in terms of the Tax Administration Act. It is therefore submitted that a request for suspension constitutes an 'agreement' in terms of the NCA.

A 'credit agreement' is defined in section 1 of the NCA as an agreement that meets all the criteria as set out in section 8 of the NCA. The section 8 criteria relevant to this discussion is contained in section 8(1)(b) of the NCA which states that an agreement constitutes a credit agreement for the purposes of this Act if it is, *inter alia*, a 'credit transaction', as described in section 8(4). In terms of section 8(4)(f) an agreement constitutes a credit transaction if it is "any other agreement, other than a credit facility or credit guarantee, in terms of which

payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-

- (i) the agreement; or
- (ii) the amount that has been deferred”.

Section 8(4)(f) of the NCA therefore firstly requires that there must be an agreement in terms of which the payment of an amount owed is deferred. A taxpayer requests, in terms of section 164(3), the senior SARS official to suspend the payment of the amount of disputed tax owed to the SARS. As established in Chapter 5.2, the terms ‘defer’ and ‘suspend’ has a similar meaning and a request to suspend payment in terms of section 164(3) is therefore similar to an agreement which defers the payment of an amount owed.

The second required element of a credit transaction in terms of section 8(4)(f) of the NCA entails that any charge, fee or interest must be payable to the credit provider in respect of the amount that has been deferred. One therefore needs to consider whether interest is payable on the amount of disputed tax if the payment thereof is suspended in terms of section 164(3), and whether the SARS can be seen as a ‘credit provider’ in this situation.

The notice of assessment issued by the SARS must, in terms of section 96(1)(f) of the Tax Administration Act, contain the date for paying the amount of tax assessed. The obligation to pay this tax by that date is not suspended by an objection or appeal (section 164(1) of the Tax Administration Act). However, if a taxpayer intends to dispute (meaning that the taxpayer intends to object against the assessment) or dispute the liability to pay such tax under Chapter 9 of the Tax Administration Act, a request for the suspension of payment can be made in terms of section 164(2) of the Tax Administration Act. Such a request for suspension is therefore merely a step prior to an objection against an assessment.

Section 187 of the Tax Administration Act contains the provisions regarding interest payable, but since the date of commencement of this section must still be proclaimed, interest is still imposed in terms of specific provisions of the relevant tax Acts. Section 89(2) of the Income Tax Act determines that, if the taxpayer fails to pay any tax in full by the date in the notice of assessment, interest shall be payable unless the Commissioner grants an extension and otherwise directs. Section 164(7)(a) of the Tax Administration Act also states that interest remains payable on amounts short paid even if an assessment is altered after an objection or appeal.

According to the SARS' Guide (2013:59), interest will also continue to accrue on the unpaid amount even if a taxpayer's payment obligation is suspended in terms of a review application against an adverse decision of a request in terms of section 164(3). Interest is therefore payable on the disputed amount of tax whether the payment thereof has been suspended in terms of section 164(3) or not, thereby meeting the interest requirement of section 8(4)(f) of the NCA.

In order to determine whether the SARS can be considered to be a 'credit provider', the definition of the term in section 1 of the NCA must be considered. This definition lists nine specific persons including, in subparagraph (h), "the party who advances money or credit to another under any other credit agreement".

When granting a request for the suspension of the payment of disputed tax, the SARS grants 'credit' to the taxpayer, based on both their 'agreement' (understanding) in terms of the request and the relationship between the terms 'defer' and 'suspend'. It is therefore concluded that the SARS can, in this case, be considered to be a 'credit provider' in terms of the NCA according to subparagraph (h) of the definition of the term.

Although the SARS is an organ of state, the 'consumer' in terms of the request is the taxpayer and not the SARS. The aforementioned exception referred to in section 4(1)(a)(iii) of the NCA is therefore not applicable. It is therefore concluded that a request for the suspension of the payment of disputed tax can be equated with a credit transaction in terms of section 8(4)(f) of the NCA and is therefore a 'credit agreement' as defined in section 8(4)(f) of the NCA. In light of the aforementioned, the other relevant provisions of the NCA could prove to provide guidance regarding the factors taken into account by the senior SARS official.

5.4 The factors to be considered or process to be followed when credit is provided or refused in terms of the NCA

In terms of section 60(1) of the NCA, every natural person has a right to apply to a credit provider for credit. Scholtz (2015:par. 6.2.2) emphasises that section 60(1) provides for the right to apply for credit, and not for a right for the credit to be granted. Section 60(2) of the NCA, however, provides the following:

“Subject to sections 61 and 66, a credit provider has a right to refuse to enter into a credit agreement with any prospective consumer on reasonable commercial grounds that are consistent with its customary risk management and underwriting practices.”

The provisions relating to credit-granting and credit-refusal and -termination are discussed separately below.

5.4.1 Credit-granting

One of the most important statutory duties of credit providers is that the credit provider must perform a credit assessment before entering into a credit agreement with a prospective consumer (Otto, 2012:par. 34.1). The reason for this statutory duty is based on one of the main purposes of the NCA, namely to discourage the granting of reckless credit (Scholtz, 2015:par.6.5.4).

A credit agreement is seen as ‘reckless’ in terms of section 80 of the NCA if, at the time that the agreement was made, the credit provider failed to conduct an assessment as required by section 81(2), or the credit provider entered into the credit agreement with the consumer, despite the fact the consumer did not generally understand the risks, costs or obligations under the proposed credit agreement; or the information available to the credit provider indicated that entering into a credit agreement would make the consumer over-indebted.

Section 81(2) of the NCA specifies that, before entering into a credit agreement, the credit provider must first take reasonable steps to assess -

“(a) the proposed consumer’s -

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.”

The NCA does not contain detailed provisions specifying exactly how the assessment must be executed, apart from the broad considerations in the provision above (Scholtz, 2015:par.11.4.2). As long as the assessment mechanisms used by credit providers are fair and objective, they may use their own means of evaluation (section 82(1) of the NCA). As part of the assessment, credit providers can consider making use of the information kept by the National Credit Bureau to obtain information on the consumer. 'Consumer credit information' is defined in section 70(1) of the NCA as:

- “(a) a person’s credit history, including applications for credit, credit agreements to which the person is or has been a party, pattern of payment or default under any such credit agreements, debt re-arrangement in terms of this Act, incidence of enforcement actions with respect to any such credit agreement, the circumstances of termination of any such credit agreement, and related matters;
- (b) a person’s financial history, including the person’s past and current income, assets and debts, and other matters within the scope of that person’s financial means, prospects and obligations, as defined in section 78(3), and related matters;
- (c) a person’s education, employment, career, professional or business history, including the circumstances of termination of any employment, career, professional or business relationship, and related matters; or
- (d) a person’s identity, including the person’s name, date of birth, identity number, marital status and family relationships, past and current addresses and other contact details, and related matters.”

Section 81(1) of the NCA also requires that, while an application for a credit agreement is being considered by a credit provider, the prospective consumer must answer any requests for information made by the credit provider.

The decision whether to grant credit in terms of the NCA therefore entails an in-depth process to be followed. This is done in terms of a credit assessment, where specific factors or steps need to be assessed on a reasonable basis and can also include the consideration of consumer credit information. It is, however, clear that the consumer’s credit history and debt repayment history, as well as his or her financial history, means and obligations, play an important role in this assessment. Although broad guidelines are stipulated by the NCA, credit providers are still permitted to use their own means of evaluation as long as these are fair and objective and credit is not granted recklessly. The two parties, the consumer and

the credit provider also needs to collaborate with one another during the period of consideration.

5.4.2 Credit-refusal and -termination

Section 60(2) of the NCA provides that the right for a consumer to apply for credit does not prevent the credit provider from refusing to grant credit. However, the reason for refusing to grant the credit must be based on business grounds which are in line with the credit provider's credit risk evaluation process (National Credit Regulator, 2007:10).

Section 62(1) of the NCA states that the consumer, upon request, has the right to be given reasons for credit which has been declined. The credit provider needs to provide the consumer with written reasons as to why his or her application for credit has been declined (National Credit Regulator, 2007:10). In practice, occurrences might take place where credit providers are hassled with frivolous requests for reasons (Scholtz, 2015). Section 62(3) of the NCA allows a credit provider to make an application to the National Consumer Tribunal ('Tribunal') to limit its obligation in terms of section 62 of the NCA, if the Tribunal is satisfied that the requests for information from the consumers, are frivolous or vexatious.

In accordance with the provisions of section 123 of the NCA, a credit provider can terminate a credit agreement before the time provided in the agreement (section 123(1) of the NCA). If a consumer is in default under a credit agreement, the credit provider is allowed to take debt enforcement steps to enforce and terminate the agreement (section 123(2) of the NCA). The remainder of section 123 of the NCA mainly deals with a credit facility and contains no specific provisions in respect of the termination of a 'credit transaction' as a type of credit agreement in terms of section 8(4)(f) of the NCA.

Based on the aforementioned, a credit provider therefore has the right to refuse credit, but must, on request, provide written reasons if credit is declined.

5.5 A comparison between the factors and processes to be followed in terms of sections 164(3) and 164(5) of the Tax Administration Act and the NCA

The right to apply for credit in terms of section 60 of the NCA is an automatic right. The right to apply for the suspension of the payment of disputed tax is not an automatic right and

taxpayers therefore need to apply for suspension (the SARS' Guide, 2013:par.10.6.1). Currently taxpayers can only apply for suspension when intending to dispute the tax payable (section 164(2) of the Tax Administration Act). Based upon the connection made between 'credit' and the suspension of payment (see Chapters 5.2 and 5.3), a taxpayer should, however, theoretically be allowed to apply for suspension in every instance that an amount is due to the SARS. Alternatively, it is submitted that the Legislator should consider automatically suspending the payment of disputed tax until the dispute is resolved. This, however, reverts to the arguments relating to and including the constitutionality of, the 'pay now, argue later' rule, which is excluded from the scope of this study.

The individual processes of credit-granting and credit-refusal as discussed in Chapter 5.4.1 and 5.4.2 respectively, are now compared to the factors considered and process followed when granting or denying a request for the suspension of payment, in terms of sections 164(3) and 164(5) of the Tax Administration Act as discussed in Chapter 2 and 4.5.2 respectively.

5.5.1 The granting of a request for the suspension of the payment of disputed tax compared to credit-granting

The following similarities and differences are noted:

5.5.1.1 Focus points

As seen from sections 81(2) and 70(1) of the NCA, the credit assessment focusses on the credit provider's credit risk with reference to the proposed consumer's credit history and its financial history. It is submitted that one of the SARS's main concerns is whether they will be able to collect all amounts owed to them in terms of tax assessments. Therefore one would expect the SARS to focus on matters or considerations relating to this concern, when considering a request for the suspension of the payment of disputed tax. Buttrick (2013:2) notes that any decision to not grant a suspension of payment of tax pending a dispute in respect of a single taxpayer, needs to be weighed against the larger public's need for appropriate and timeous collection of funds for the *fiscus*.

It is submitted that three of the current five specified factors (being factors (a), (d) and (e) after the 2014 amendments) in section 164(3), focus on matters relating to the revenue

collection concern of the SARS. However, taking “the compliance history of the taxpayer with SARS” into account as a factor, does not really directly relate to the concern of revenue collection. It is a regulatory matter in the sense that it includes, for example, the consideration of whether the taxpayer has submitted its returns on an annual basis and within the required time period. It is submitted that the SARS should rather consider the “payment” history of the taxpayer, in order to determine if the taxpayer pays its amounts owed to the SARS on a regular basis. This will add more value to address the revenue collection concern and is in line with the NCA.

5.5.1.2 Additional matters for possible consideration by the senior SARS official

With reference to the reasonable steps provided for in section 81(2) of the NCA, the following additional factors are recommended for consideration in terms of section 164(3):

- The senior SARS official must establish how many previous requests for the suspension of the payment of disputed tax the taxpayer has submitted, including the results of such requests. These details should be easily accessible from the SARS’ database. This will provide the senior SARS official with an indication as to whether the taxpayer is familiar with the request process and has made all the payments in respect of such disputed tax which have been suspended on request.
- The senior SARS official must determine the current financial means, prospects and obligations of the taxpayer. This will include the consideration of the taxpayer’s cash position according to its banks statements, the taxpayer’s income as per its IRP5, the taxpayer’s assets and debts, etc. It is deemed to be a relevant factor for consideration, as the ultimate purpose to keep in mind with requests like these, is whether the SARS will receive the amounts owed to them should the outcome of the dispute be in favour of the SARS. It is noted in the SARS’ 2013/14–2017/18 strategic plan that the SARS is considering to collaborate with credit bureaus to gain third party information on taxpayers (South African Revenue Services: Strategic Plan, 2013:44). The SARS should consider the use of such collaboration in gaining information for this purpose.
- The senior SARS official should assess the taxpayer’s general understanding of the relevant provisions impacting the request, namely those of subsections (4) to (7) of section 164 of the Tax Administration Act. This can ensure that both parties understand their rights and obligations in terms of a request for the suspension of the payment of disputed tax.

5.5.1.3 The ambit and relevancy of the factors or reasonable steps during the process of consideration

A general difference noted is the fact that the factors and steps listed in the NCA are considerably less and to the point compared to the specified list of factors in terms of section 164(3). Due to these steps being to the point, it is considered to be the most relevant steps. It is therefore submitted that the execution of these steps most probably result in fewer uncertainties or concerns, compared to the numerous concerns and uncertainties relating to the factors in section 164(3), as discussed in Chapter 2.

Compared to the inclusion of the phrase “relevant factors, including” in section 164(3), it is also noticeable that the reasonable steps in terms of the NCA do not include any specific reference to for example, “any other relevant matters” to be assessed as part of the required credit assessment. The exclusion thereof keeps the credit assessment in terms of the NCA to the point and will perhaps contribute to quicker responses from credit providers compared to the drawn-out and extensive type of process followed by the SARS when assessing a request for the suspension of the payment of disputed tax as discussed in Chapter 4.5.1.

To reduce the uncertainties regarding the term ‘relevant factors’ as discussed in Chapter 3, it is suggested that the specified list of factors be revised and updated to include only the most relevant factors as recommended and discussed above. The SARS should then rather, after taking into account only these factors, request the taxpayer to submit identified relevant material, where applicable. This will be similar to section 81(1) of the NCA which requires the prospective consumer to answer any requests for information made by the credit provider, while an application for a credit agreement is being considered. Although this suggestion might impact the timing of a response to such a request, it will reduce the possibility of unnecessary paperwork due to the uncertainties and the taxpayer will be informed in detail of what the SARS requires. The suggestion should therefore have a positive influence overall.

5.5.1.4 Acting recklessly

The senior SARS official are required to carry out its statutory duties in terms of section 6 of the Tax Administration Act. The senior SARS official therefore cannot grant requests which might result in an increase of the SARS’s credit risk and thereby reducing the possibility of

revenue collection. This is similar to section 80 of the NCA, which discourages the granting of reckless credit.

It is concluded that the factors referred to and specified in section 164(3) should focus on the matter that is relevant in this regard, namely to minimise any risk that the SARS will not receive the disputed tax debt owed to them if the payment thereof is suspended. The recommended changes above, as derived from the process followed by the NCA, will contribute to a less complicated process and reduce the uncertainties relating to a request for the suspension of the payment of disputed tax.

5.5.2 The revoking or denial of a request for the suspension of the payment of disputed tax compared to credit-refusal or termination

If a credit provider refuses to grant credit to a consumer, the reason thereof needs to be based on business grounds which are in line with the credit provider's credit risk evaluation process (section 60(2) of the NCA). Section 164(5) of the Tax Administration Act lists the grounds that can cause a senior SARS official to deny a request or revoke a decision to suspend payment in terms of section 164(3). Applying the principle in the NCA, it can be asked whether the grounds in section 164(5) are reasonable and consistent with the SARS's customary risk management and underwriting practices. Currently the grounds in section 164(5) relate to the status or progress of the objection or appeal, and to any changes or further considerations regarding the factors stipulated in section 164(3).

According to the SARS' 2013-2014 Annual report, the SARS has a broad risk management policy (2014:55). Each division and business unit within the SARS have their own specific requirements. To best address these requirements, each of them applies its own risk management strategy and guidelines, which is in compliance with the policy. An effectiveness team within each business unit is responsible for keeping an accurate and current divisional risk register that states the unit's risk factors, rates their likely occurrence and impact, and includes measures taken to address these threats (SARS, 2014:56).

The SARS' 2013/14–2017/18 strategic plan, states that the SARS will strengthen risk management of taxpayer debt by introducing credit screening (2013:45). The plan further states that to update the risk criteria applied in the debt environment, the SARS will leverage the credit screening system developed by credit bureaus and other data sources.

In light of the limited information available on how the SARS evaluate their credit risk, it is therefore difficult to determine whether the grounds stipulated in section 164(5) of the Tax Administration Act are in line with the SARS' credit risk evaluation process. It does, however, seem that the SARS' strategic plan might address some of the principles of the NCA in this regard.

Should a taxpayer not be satisfied with the outcome of its request for the suspension of the payment of disputed tax, the taxpayer is allowed to request reasons therefor in terms of the right to just administrative action as discussed in Chapter 4. This is similar to the provisions of section 62 the NCA, where the consumer have the right to be given reasons for credit being refused.

5.5.3 Conclusion on Chapter 5.5

It is evident from Chapter 5.5 that one of the SARS' core objectives entails revenue collection. Should requests for the suspension of the payment of disputed tax be granted, it can impact the SARS' revenue collection. Croome (2009:12) opines that, although a taxpayer may have an arguable case and can satisfy the factors contained in section 164(3), the SARS will insist on the payment of the tax in dispute due to the economic conditions and shortfalls in revenue collections.

In a media release issued by the SARS on 1 April 2015 relating to the 2014/2015 fiscal year, a 9.6% growth in total revenue (R986.4 billion) from 2013/2014 was announced. In this media release it was also stated that the reason for this revenue performance, was due to an extraordinary drive by the SARS on compliance improvement, which compensated for the revenue collection shortfall caused by a slowing economy (2015:par.2). This confirms that the SARS have an extreme focus on revenue collections, which will reduce their credit risk and this can therefore, in return, affect the outcome of requests for the suspension of the payment of disputed tax.

5.6 Conclusion

Sections 164(3) and (5) of the Tax Administration Act were compared to a statute outside the sphere of tax law, namely the NCA. The comparison was done to establish whether the current factors to be considered as listed in section 164(3), are the most relevant factors

and to identify other possible enhancements as recommendations, which can simplify the process of a request for the suspension of the payment of disputed tax.

The conclusion is made that the Tax Administration Act provisions do contain some similarities to the relevant NCA provisions, although these provisions are broader, which in return creates concerns and uncertainties. There is thus scope for improving the relevant provisions of the Tax Administration Act, which will also assist in addressing such concerns and uncertainties. This will ensure that only the most relevant factors are considered which will also in return simplify the process in terms of section 164(3). It is therefore recommended that the provisions of the Tax Administration Act should contain more of the equivalent provisions as found in the NCA to ensure that only the most relevant factors are included.

CHAPTER 6: CONCLUSION

Section 164(3) provides a senior SARS official with the discretion to suspend the payment of disputed tax or a portion thereof, having regard to relevant factors, including a list of specified factors.

With the enactment of the Tax Administration Act in 2012, section 164(3) replaced section 88(3) of the Income Tax Act. The SARS does not provide any additional guidelines on the interpretation of this provision and concerns and uncertainties, especially regarding the specified factors, therefore progressed. This study firstly discussed the general and specific concerns and uncertainties that exist regarding the meaning and relevance of the factors referred to in section 164(3). The aim of this study included, amongst others, to determine whether the amendments to section 164(3) addressed some of the uncertainties or concerns and also to determine the meaning of the term 'relevant factors' as used in section 164(3). Further, due to the fact that the decision in section 164(3) constitutes administrative action, the impact of the right to just administrative action on the discretion exercised in section 164(3), was investigated. Lastly, a comparative study was performed where the factors considered or the process followed when credit is provided or refused in terms of 'credit agreements' as defined in the NCA, were compared to the factors considered in respect of a request for the suspension of payment in sections 164(3) and 164(5). This was done in order to identify if the NCA can provide any guidance regarding the factors taken into account by the senior SARS official in terms of sections 164(3) and 164(5) of the Tax Administration Act.

It was established that the general concerns and uncertainties included matters such as: the weight, exhaustiveness, compliance, subjectiveness and relevance of the factors; how the courts interpret section 164(3) and the fact that the SARS is a party and judge to a dispute. Taken into account all the amendments to section 164(3) to date, the majority of these general concerns and uncertainties still exist. However, one of the main general concerns, namely the exhaustiveness of the list of factors, was addressed with the inclusion of the phrase 'relevant factors, including' as an amendment to the provision, in 2014. The specified list of factors was also shortened in 2014, which confirmed that the SARS assessed the relevance of some of the previous specified factors.

Specific concerns and uncertainties were identified for each of the specified factors in section 164(3). It was established that the SARS has made several individual amendments to the specified factors, which resulted in some of the specific concerns and uncertainties being addressed. Some of the amendments however, especially those made in 2014, introduced new concerns and uncertainties regarding certain factors. Many of the original concerns and uncertainties still remain unaddressed. It is submitted that the factors as listed in the current version of the Tax Administration Act will make it more difficult for taxpayers to convince the SARS to suspend their obligation to pay a disputed amount of tax.

One of the core amendments made to section 164(3) in 2014 was the inclusion of the phrase 'relevant factors, including'. An in-depth literature review was performed to establish the meaning of 'relevant factors' within the context of section 164(3). In light of the lack of a definition of this term, the purposive approach was followed by taking all circumstances and resources, including other spheres of the law into account to determine the Legislator's objective in including the term 'relevant factors' and to determine the meaning thereof. It was established that the term was included to confirm that the list of specific factors which the SARS may consider in a request for suspension of disputed tax, are in addition to having regard to relevant factors.

A basic understanding regarding the meaning of the term 'relevant factors' was established as the following: The factor should be closely connected to the request for suspension and will most probably be considered with reference to all the other specific relevant factors in total (based on the purpose of the term), to determine whether it will increase or decrease the probability of the request being granted. In terms of the guidance obtained from the context of the law of evidence, taxpayers should ensure that there is a close and logical sufficient connection between the evidence (factor) and the issue (request) which will make the granting of the request reasonably possible. The taxpayer will have to provide evidence about facts which are related either to the specified individual factors or to the matter of suspending the specific payment. It was also determined that the meaning of the phrase 'relevant factors' might differ for each request based on the specific circumstances of each request. However, it should not be difficult for a taxpayer to determine which factors will be considered relevant for purposes of the request for suspension and what type of information to include with their request.

The impact of the consideration of relevant factors on the request for suspension, were also assessed. The determination of which factors will be considered relevant for the purposes of the request for suspension, is based upon the discretion to be exercised by the senior SARS official and his or her interpretation of the term 'relevant'. This results in an element of subjectivity being added to the request for the suspension of the payment of disputed tax. A relevant factor may, therefore, not necessarily influence the request positively.

The decision in terms of section 164(3) constitutes administration action. The inter-relationship between section 33 of the Constitution, the PAJA and a decision by the senior SARS official in terms of section 164(3) was therefore analysed. To ensure compliance with the PAJA and the Constitution, the SARS should exercise its discretion in a manner which is lawful, reasonable and procedurally fair.

If the administrative action in terms of section 164(3) is unlawful, unreasonable or procedurally unfair, a taxpayer has the right to submit a review application in terms of the reviewable grounds provided for in section 6 of the PAJA. It was, however, identified that a reviewing court might experience problems with the interpretation and application of the current version of the factors in section 164(3). Furthermore, it was established that the request will form the foundation of a review application should a taxpayer intend to submit a review application. The taxpayer therefore needs to ensure that all the relevant information is included with the submission of the request for the suspension of the payment of disputed tax.

It was further established that there are still some uncertainties regarding the process involved when a senior SARS official must decide whether to accept or deny a request for the suspension of the payment of disputed tax. It is also submitted to be a tedious process. Improvements to the process, including the necessity of some of the listed factors and the role thereof, should be reconsidered.

A comparative study has been performed between sections 164(3) and 164(5) and the NCA. It was confirmed that the suspension of payment in terms of section 164(3) can be equated to the deferral of payment, which is defined as the provision of 'credit' in the NCA. It was subsequently concluded that a request for the suspension of the payment of disputed tax can be equated with a 'credit transaction' in terms of section 8(4)(f) of the NCA and is therefore a 'credit agreement' as defined in section 8(4)(f) of the NCA. The factors

considered by a credit provider before granting or refusing credit to a customer, as provided for in the NCA, has therefore been compared to the factors considered when a request for the suspension of the payment of disputed tax is granted or denied in terms of sections 164(3) and 164(5) of the Tax Administration Act. The comparison was done to establish whether the current factors to be considered as listed in section 164(3), are the most relevant factors and to identify other possible enhancements as recommendations which can simplify the process of a request for the suspension of the payment of disputed tax.

It was found that the provisions of the two acts do contain some similarities, although those of the Tax Administration Act are broader and not in all aspects as defined as the credit granting and -refusal provisions of the NCA. The NCA can therefore be used for guidance to simplify the process for a request for the suspension of the payment of disputed tax. It is therefore recommended that the provisions of the Tax Administration Act should contain more of the equivalent provisions as found in the NCA to ensure that only the most relevant factors are included.

In conclusion, if the taxpayer doesn't dispute its assessment or request a suspension for the payment of disputed tax, the SARS can apply the pay now argue later rule. Taxpayers are therefore encouraged to submit a request for the suspension of the payment of tax once they receive an assessment against which they anticipate to lodge an objection. This might avoid the SARS from collecting taxes which may not be due by the taxpayer.

Section 164(3) offers taxpayers who find themselves in a potential dispute with the SARS a form of guideline to follow when applying for the suspension of payment. Although concerns and uncertainties still exist regarding the factors as listed, the SARS must apply the procedures governing the payment of tax pending objection and appeal in a lawful, reasonable and procedurally fair manner in order to heed to the principles of just administrative action.

It is questionable whether section 164(3) in its current form is in actual fact in agreement with the Legislator's original intention with section 164(3), namely to formalise the circumstances where the payment of tax will be required despite objection or appeal. The hope is expressed that the remaining concerns and uncertainties regarding the factors will be clarified by the amendments during the 2016 year of assessment and that this will *per se* contribute to the Tax Administration Act's ability to improve the relationship between the

taxpayer and the SARS. It remains to be seen whether the Legislator will take the effect of the right to just administrative action, the unresolved concerns and uncertainties and the recommendations based on the provisions of the NCA into account in future amendments to section 164 of the Tax Administration Act.

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ANNEXURE A: EXTRACTS FROM THE TAX ADMINISTRATION ACT NO 28 OF 2011

164. Payment of tax pending objection or appeal

- (1) Unless a senior SARS official otherwise directs in terms of subsection (3)—
- (a) the obligation to pay tax; and
 - (b) the right of SARS to receive and recover tax,
- will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.
- (2) A taxpayer may 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 or disputes the liability to pay that tax under Chapter 9.
- (3) A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, 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*.
- (4) If payment of tax was suspended under subsection (3) and subsequently—
- (a) no objection is lodged;
 - (b) an objection is disallowed and no appeal is lodged; or
 - (c) an appeal to the tax board or court is unsuccessful and no further appeal is noted,
- the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.
- (5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of subsection (3) 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
- (d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based.

(6) During the period commencing on the day that—

- (a) SARS receives a request for suspension under subsection (2); or
- (b) a suspension is revoked under subsection (5),

and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

(7) If an assessment or a decision referred to in section 104 (2) is altered in accordance with—

- (a) an objection or appeal;
- (b) a decision of a court of law pursuant to an appeal under section 133; or
- (c) a decision by SARS to concede the appeal to the tax board or the tax court or other court of law,

a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid are recoverable with interest calculated as provided in section 187 (1).

(8) The provisions of section 191 apply with the necessary changes in respect of an amount refundable and interest payable by SARS under this section.