The discretionary powers of the Commissioner for the South African Revenue Service – Are they constitutional?

L van Schalkwyk
Department of Accountancy
University of Stellenbosch

Abstract
The Commissioner for the South African Revenue Service has wide discretionary powers. In this article, the meaning, purpose, types, extent and exercise of these powers are examined. Do these powers promote uncertainty and/or unfairness and inconsistency, and if so, which of these powers do so? The extent of the powers given by some of the discretions not specifically subject to objection and appeal is questioned: no discretionary powers involving liability for tax should be allowed, especially not without the right to objection and appeal.

Because of the general administrative relationship between the Commissioner and the taxpayer and because exercising a discretionary power constitutes an administrative action, the constitutionality of this power was examined in terms of taxpayers’ right to just administrative action. Only discretionary powers not specifically made subject to objection and appeal are open for constitutional attack.

Key words
Administrative law relationship  Lawful administrative action
Constitutionality  Procedurally fair administrative action
Constitutional right  Objection and appeal
Discretionary powers  Reasonable administrative action
Just administrative action  Written reasons

1 Introduction
of the Commissioner” or “to the satisfaction of the Commissioner” appeared in the Act. The Commission found that 96 sections involving some 400 paragraphs and subparagraphs contained discretionary powers in one form or another.

In recent years, the move has been away from allowing discretionary powers to the Commissioner as they tend to create uncertainty (Huxham and Haupt 2004:470). With regard to taxes in general, the need for certainty is one of the four basic maxims identified by Adam Smith as far back as 1776 (Huxham and Haupt 2004:2). These maxims are still relevant in modern law. The required degree of certainty is achieved by means of the formulation of a set of rules that clearly indicates the method and manner in which tax is to be collected.

Although many discretionary powers formerly given to the Commissioner for the SARS have been removed and/or made subject to objection and appeal since the Margo Commission’s (1987) report, the Act still contains many discretionary powers affecting tax liability that are not specifically made subject to objection and appeal. This opens up the possibility of an abuse of the Commissioner’s discretionary powers. A taxpayer’s only defence against this would be his/her constitutional right to just administrative action.

The purpose of this article is to examine the meaning, purpose, types, extent and exercise of the discretionary powers of the Commissioner in order to establish whether these powers promote uncertainty and/or unfairness and inconsistency. If any of them do so, the article intends to show which of them does so. The constitutionality of those discretionary powers not specifically made subject to objection and appeal is a point of concern. In this regard the administrative relationship between a taxpayer and the Commissioner is scrutinised, followed by an investigation into the question of the constitutionality of these powers in view of a person’s constitutional right to just administrative action in terms of section 33 of the Constitution.

In a previous article, it has been argued (Van Schalkwyk 2001:286) that the prevailing low tax morality of taxpayers in South Africa, coupled with the high incidence of tax evasion in South Africa, would be exacerbated if the constitutional protection of the rights of taxpayers were not evident, or if such constitutional protection proved not to be a real aid by eliminating unconstitutional tax provisions. So far, not a single taxpayer has successfully attacked the constitutionality of a provision of the Act since the adoption of the 1996 Constitution. In view of this fact – especially given the high cost of litigation – there is clearly a need to establish what a taxpayer will have to prove if he/she wants to attack the Commissioner’s discretionary power on constitutional grounds.

2 Discretionary powers

2.1 Meaning

Davis (1972:4) defines a discretion as follows: “A public officer has discretion whenever the effective limits on his power leaves him free to make a choice
among possible causes of action or inaction.” According to Wade and Forsyth (1994:391), discretionary powers are easily recognised by the permissive statutory language that confers them: they are signalled by the use of words in empowering provisions such as “may” or “it shall be lawful”. De Koker (2004:18-69) puts it more simply – he says that discretion comprises circumstances in which the Act makes an issue depend upon the opinion of the Commissioner.

Wherever the Act uses the words “the Commissioner may”, “whenever the Commissioner is satisfied”, or “in the opinion of the Commissioner”, the effect is to give the Commissioner the power to exercise a discretion. On the Commissioner’s “satisfaction”, it is held in *ITC 1470* (52 SATC 88 at 92) that the very fact that he was “satisfied” implies the performance of an act from which legal consequences flow. The performance of that act involves the exercise of an administrative discretion. In some cases, for example, section 11(e), the Commissioner issues Practice Notes setting out how he will exercise his discretion, thereby making the discretion certain.

### 2.2 Purpose

Baxter (1989:83-84) states that there are a number of reasons why discretionary powers are necessary in a society. Firstly, not all policies are capable of being crystallised into legislation. Secondly, discretion is also necessary because Governments are “likely to go on undertaking tasks for the execution of which no one is able to prepare advance rules”. Thirdly, rules are inflexible, and every legal system retains some elements of equitable discretion in order to ensure justice as required in individual cases. Fourthly, discretion must be used to determine when the law applies, because the matching process can never be exact: the person invoking the law often has the discretion to do so.

The Margo Commission (1987:par. 28.51) also addresses the purpose of conferring a discretion upon the Commissioner. The Commission gave the following reasons:

- It is impossible to legislate for every contingency or circumstance; any attempt to do so would produce rigidity and unintended results.
- A discretion is a useful tool in ameliorating otherwise inflexible provisions of the Act.
- A discretion enables the Commissioner to give recognition to transactions which genuinely intended to order the affairs of the taxpayer and to deal appropriately with those transactions which are of an artificial nature and designed to shelter their real purpose (in the case of tax avoidance).

As O’Regan J put it in *Dawood v Minister of Home Affairs* (2000(3) 936(CC) par.53), discretion “plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner”.

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The editors of The Taxpayer (1993:2) have argued that the reasons advanced by the Margo Commission (1987) for the existence of a discretion which affects the liability for tax are unacceptable. A taxation Act should lay down parameters or conditions for liability, whether these are widely or narrowly framed, and it should be the Commissioner’s function to apply the law as he sees it to the facts as he sees them (provided that the taxpayer has the right to object and appeal, if he/she so wishes).

In the current article, the submissions by Schweitzer (1991:7), Baxter (1989) and the Margo Commission that discretionary powers are necessary in a modern society are endorsed. However, this article argues that such discretionary powers must be equitable and properly regulated. It is also imperative that these powers do not violate a taxpayer’s constitutional right to just administrative action.

2.3 Extent and types of discretionary powers

The Margo Commission (1987:par.28.55) recommended that, in view of the number of discretionary powers which are vested in the Commissioner, the protection which a taxpayer has against error by the Commissioner in the exercise of his discretion be strengthened by reducing the number of discretionary powers that are not subject to objection and appeal and making those powers that relate to tax liability subject to objection and appeal. Although the SARS has deleted a considerable number of discretionary powers in recent years, without any prejudice to the fiscus, the Act still contains numerous discretionary powers.

As indicated in Section 2.1 of this article, above, many different wordings have the effect of creating a discretionary power. Van der Walt J, in the Transvaal Provisional Division hearing of KBI v Transvaalse Suikerkorporasie (47 SATC 34), distinguished between three types of discretion: firstly, discretionary powers specifically made subject to objection and appeal; secondly, those which specifically exclude the right of objection and appeal; and thirdly, those where objection and appeal are neither expressly granted nor excluded. These three types of discretionary powers are analysed below in order to establish the type of discretionary power (if any) that might be open to constitutional attack.

2.3.1 Discretionary powers specifically made subject to objection and appeal

In these instances a taxpayer is specifically given the right to object and appeal (in terms of sections 81, 83 and 86A of the Act) against a discretion exercised by the Commissioner.

There are two places in the Act which may provide that a particular discretionary decision is subject to objection and appeal, namely Section 3(4) and the specific section itself.
Section 3(4)

This section sets out a list of 75 discretions which are made subject to objection and appeal. The sections and paragraphs listed are as follows: Delete the commas and insert semicolons The definitions of the terms “benefit fund”, “pension fund”, “provident fund”, “retirement annuity fund” and “spouse” in section 1; section 6; section 8(4)(b), (c), (d) and (e); section 9D; section 10(1) (cH), (cK), (e), (iA), (j) and (nB); section 11(e), (f), (g), (gA), (j), (l), (t), (u) and (w); section 12C; section 12E; section 12G; section 13; section 14; section 15; section 22(1), (3) and (5); section 24(2); section 24A(6); section 24C; section 24D; section 24I; section 25D; section 27; section 30; section 31; section 35(2); section 38(4); section 41(4); section 57; section 76A; paragraphs 6, 7, 9, 13, 13A, 14, 19 and 20 of the First Schedule; paragraph (b) of the definition of “formula A” in paragraph 1 and paragraph 4 of the Second Schedule; paragraphs 18, 19(1), 20, 21, 24 and 27 of the Fourth Schedule; paragraphs 2, 3, 6, 9 and 11 of the Seventh Schedule; and paragraphs 29(2A), 29(7), 31(2), 65(1)(d) and 66(1)(c) of the Eighth Schedule.

The specific section itself

The right to object and appeal is sometimes given in the section itself. In addition to the abovementioned sections and paragraphs, the following sections and paragraphs contain specific provisions regarding the right to objection and appeal: Sections 10A, 23H, 24J, 25A, 37H, 40, 63, 73C, 75A, 76, 77, 78, 79A, 79B, 81, 82, 83, 83A, 84, 86A, 88, 88F, 88H, 89 quat, 92, 94, 101, 103, 105A, 107A, paragraphs 12(3), 20(4) and 20A(3) of the Fourth Schedule and paragraphs 7(9), 12A(4) and 17(5) of the Seventh Schedule.

In these cases, the Special Court (now called the Tax Court) is called upon to exercise its own, original discretion, based on the facts (CIR v Da Costa (47 SATC 87)). The case is therefore heard de novo and the court’s decision is substituted for that of the Commissioner. In view of the taxpayer’s right to objection and appeal in all of the abovementioned sections and paragraphs, it is submitted that none of the discretionary powers connected to these sections and paragraphs would be open to constitutional attack, as these powers would not constitute unfair administrative action.

2.3.2 Discretionary powers specifically excluding the right of objection and appeal

Only four sections in the Act specifically exclude the right to objection and appeal. These sections are the following:

Section 37 H(17)(b)

If the approval of a project in terms of the section 37H tax holiday scheme was obtained by fraud or as a result of any misrepresentation or failure to disclose any material fact, the company shall pay an additional charge of twice the tax chargeable in respect of its taxable income for each such year of assessment. The Commissioner may in his discretion remit the additional
charge or any part thereof. However, if the Commissioner agreed with the company on the amount of the additional charge to be paid, the amount so agreed upon shall not be subject to any objection and appeal.

**Section 76(2)(c)**
A taxpayer is required to pay additional tax of 200% calculated in various ways in respect of three offences listed in section 76(1). The Commissioner may in his discretion remit the additional charge or any part thereof. However, if the Commissioner agreed with the taxpayer on the amount of the additional charge to be paid, the amount so agreed upon shall not be subject to any objection or appeal.

**Section 78(2)**
The Commissioner may issue an estimated assessment in the various circumstances listed in section 78(1), (1A) and (1B). Any such estimate shall be subject to objection and appeal. However, if the Commissioner and the taxpayer agreed on any amount of income, aggregate capital gain or aggregate capital loss, net capital gain or assessed capital loss, funds in foreign currency or value of assets owned outside the Republic, any such amount or value so agreed upon shall not be subject to any objection or appeal.

**Section 88H**
Where any dispute between the Commissioner and a taxpayer had been settled in terms of the new rules provided for in Part IIA of the Income Tax Act, and the Commissioner altered the assessment for purposes of giving effect to that settlement, the altered assessment shall not be subject to objection and appeal.

It is clear that the common factor in all four the above sections is the fact that there is or has been an agreement between the Commissioner and the taxpayer. In these cases, therefore, the need for a right to object and appeal seems to be non-existent and it is submitted in this article that the fact that such a right is specifically excluded would not be open to constitutional attack.

### 2.3.3 Discretionary powers not specifically made subject to objection and appeal

Discretions that are not expressly made subject to objection and appeal are usually called absolute or administrative discretions, as in the case of *Irvin and Johnson (SA) Ltd v CIR* (14 SATC 24). The Act is interspersed with these discretions. Every time any of the different wordings giving the Commissioner discretionary power is used, apart from those sections listed in Sections 2.3.1 and 2.3.2 of this article, above, the Commissioner is given an absolute discretion. (An accurate listing of each of these discretions would warrant a doctoral study and falls beyond the scope of this article.) Two examples of such discretions, relating to the collection of taxes, are section 89, which confers a discretion upon the Commissioner to extend the period by the end of which the taxpayer may pay his tax without liability for interest, and section 91, which empowers the Commissioner to obtain a judgement
for the tax which he claims is due, without notice to the taxpayer and notwithstanding the fact that the taxpayer has lodged an appeal against the Commissioner’s assessment (see Section 2.4.2 of this article for further discussion in this regard).

To prevent an abuse of discretion in these cases, the Tax Court has the power to review the exercise of the Commissioner’s discretion on the usual grounds for review (described in *Union Government v Union Steel Corporation* (1928 AD 220 at 237) as consisting of *mala fides*, ulterior motives and failure to apply the mind). The question is not whether the Commissioner is right or wrong. The sole question is whether he has duly considered the matter. The focus is therefore not so much on the result of the Commissioner’s discretion, but on the way he exercises his discretion.

South African courts have traditionally been reluctant to intervene in the exercise of discretionary power. In a review application, the Court rather refers the case back to the Commissioner with a request to follow the correct procedure, as in *Shidiack v Union Government* (1912 AD 642). The Court has also said that, if the administrator has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. Each of the three usual grounds for review has been subject to elaboration by the courts, and now to statutory translation in The Promotion of Administrative Justice Act (PAJA) (Hoexter and Lyster 2002:156).

In a strict sense, *mala fides* or bad faith refers to fraud or dishonesty: the conscious or knowing use of power for ends that are prohibited by law. The term is, however, also used in a looser sense to mean an abuse of power induced by an honest mistake or mere stupidity – that is, the ground of *mala fides* has been treated as a sort of “failure to apply the mind” (Hoexter and Lyster 2002:159). The PAJA lists “action taken in bad faith” as a ground for judicial review in section 6(2)(e)(v).

The ground of ulterior purpose or motive is contained in section 6(2)(e)(ii) of the PAJA. If a court finds that powers have been used for unauthorised purposes or purposes “not contemplated at the time when the powers were conferred”, it will hold that the decision or action is illegal (Hoexter and Lyster 2002:157).

The ground of “failure to apply the mind” is a phrase which is capable of covering most instances of bad decision-making quite comfortably. This general ground does not feature in the PAJA, and is instead broken up into a number of component parts or more specific grounds like “irrelevant considerations” (section 6(2)(e)(iii)), “arbitrariness and capriciousness” (section 6(2)(e)(vi)), “failure to take a decision” (section 6(2)(g)) and “failure to act within a reasonable time” (section 6(3)).

The review procedure places a very difficult onus on the taxpayer as he has to show that the Revenue Service has acted in bad faith or that the official has not properly exercised his mind. Due to the provisions of section 33(1)
and (2) of the Constitution, however, the role of the Court in judicial reviews is no longer confined to the way in which an administrative decision was reached, but extends to the substance and merits of the decision as well (*Roman v Williams NO* (1998(1) SA 270 (C)).

It is submitted that this type of discretion is the only one that might be open to constitutional attack. The taxpayer is effectively prohibited from using the simpler and more effective objection and appeal process in Part III of the Act as well as the new Dispute Resolution procedures in Part IIIA of the Act and forced to take the case to court on review. This would imply an attack similar to a constitutional attack on reasonable administrative action (see section 4.3 of this article, below). In light of the zero per cent success rate of taxpayers attacking the constitutionality of provisions of the Act and the high costs of litigation, it is strongly submitted that absolute discretions affecting a tax liability should be made subject to objection and appeal.

### 2.4 Exercising the discretion

#### 2.4.1 Who can exercise the discretion?

Section 3(1) of the Act provides that the powers and duties of the Commissioner may be carried out by him personally, or by an officer under the control, direction or supervision of the Commissioner, in other words, by the staff of the South African Revenue Service (SARS).

Section 3(2) provides that if any officer of the SARS makes a decision in the exercise of a discretionary power, the decision may be withdrawn within three years from the date of the written notification of such decision or of the notice of assessment giving effect to the decision. The three-year rule does not apply if all the material facts were not known to the officer when he made his decision – in such a case the decision can be changed after any number of years.

Since the restriction of the power of the Commissioner or officer concerned only applies to decisions of which written notification has been given or to which the notice of assessment has given effect, it follows that any other decisions made by an officer under the control of the Commissioner in the exercise of the discretionary power may at any time be withdrawn or amended by the Commissioner or by the official concerned.

In terms of section 3(3), a written decision made by the Commissioner personally in the exercise of a discretionary power under the provisions of the Act cannot be withdrawn or amended by the Commissioner provided that all the material facts were known to him when he made his decision.

Since the restriction of the power to amend or withdraw only applies to written decisions, it follows that the Commissioner may withdraw or amend any decisions made in the exercise of a discretionary power which are not in writing (Meyerowitz 2002/3: 4-2).
2.4.2 How must the discretion be exercised?

In *Shidiack v Union Government* (1912 AD 642), it was held that, when a matter is left to the discretion of an official, his decision cannot be interfered with, provided that he has:

- Applied his mind.
- Exercised his discretion *bona fide*.
- Not disregarded statutory provisions or the decisions of a competent court of law.

Deliberate disregard of the provisions of a statute or ignorance of the law as laid down by a competent court of law would constitute evidence that the official had not applied his mind to the matter. These considerations apart, De Koker (2004:18-69) maintains that the Commissioner’s discretion, exercised *bona fide* and honestly, is free and unfettered.

Hoexter and Lyster (2002:26) do not agree with De Koker (2004). They argue that to act with discretion means to act wisely and after due reflection; and so, although discretion can be very wide, it is never completely “free”, “unfettered”, “absolute” or “arbitrary”, notwithstanding the frequency with which these and similar adjectives are used by judges. Baxter (1989:409) rightly describes an “unfettered” discretion as a contradiction in terms.

A discretion viewed in a serious light is the power given to the Commissioner under section 91(1)(b). It enables him, upon failure of the taxpayer to pay his tax or interest by the due date, to file with the clerk or registrar of a competent court a statement that the Commissioner certifies as correct, setting forth the amount of tax or interest due and payable. Filing the statement has all the effects of a civil judgement lawfully given in favour of the Commissioner; and any proceedings, such as execution, may be taken on the statement.

Section 92 goes on to add that no person shall be competent in any proceedings in connection with the statement to question the correctness of any assessment on which such statement is based, notwithstanding the fact that an objection and appeal has been lodged against the statement.

The editors of the Taxpayer (1994:182) argue that the provisions of sections 91(1)(b) and 92 put a truly drastic power into the hands of the Commissioner which, if exercised, could be highly prejudicial, financially and otherwise, to the taxpayer concerned, who may indeed be able to succeed in his appeal against the assessment. Therefore the power should be exercised with the utmost circumspection, and only in circumstances where, if the taxpayer has appealed his liability, there is a probability that the taxpayer would deliberately or by misfortune lose the finances available to him to pay the tax due.

If a transaction, operation or scheme meets the requirements of section 103(1) of the Act, the Commissioner is empowered to determine the liability for and the amount of any tax, duty or levy imposed by the Act, as if the transaction, operation or scheme had not been entered into or carried out. The Commissioner’s determination can, alternatively, be made “in such manner as in the
circumstances of the case he deems appropriate for the prevention or diminution of (the) avoidance, postponement or reduction (of tax)\textquotedblright.

Swart (1996:468) has raised the question whether this discretionary power of the Commissioner amounts to a delegation of impermissibly wide powers. Has Parliament, in other words, provided the Commissioner with objective guidelines or decisional criteria regarding the manner in which he may exercise this power? He submits that the guideline of “normality” will not provide a satisfactory answer in all circumstances. The recent reformulation of section 103(1) requires the Commissioner to determine the amount of tax on the basis of what it would have been had the transactionit been entered into or carried out in a manner normally employed for \textit{bona fide} business purposes (other than to obtain a tax benefit). This criterion would appear to be subject to the same shortcomings in situations where a transaction can normally be entered into or carried out for \textit{bona fide} business purposes in more than one manner. He further submits that section 103(1) covers a borderline situation and might not be safe from constitutional attack. However, the fact that section 103(1) is subject to objection and appeal might safeguard this section from constitutional attack as discussed in Section 2.3.1 of this article, above.

Huxham and Haupt (2004:469) submit that the Commissioner must exercise his discretion in good faith and give reasons for any decision he makes. The court suggested in \textit{Arepee Industries Ltd v CIR} (55 SATC 139) that a taxpayer is entitled to know the grounds on which the Commissioner has based an assessment (in contrast to the Commissioner’s reasons for the assessment).

Parts III and IIIA of the Act contain drastic new and amended provisions regarding the procedures for objection, appeal and the settling of disputes. These changes came into effect on 1 April 2003 in respect of all assessments issued, objections lodged and appeals noted on or after that date. One dramatic amendment is contained in rule 3(1)(a) of the Rules promulgated under Section 107A of the Act, which allows a taxpayer to request written reasons for an assessment. The Constitutional right to written reasons whenever anyone’s rights have been adversely affected by administrative action contained in section 33(3) are discussed more fully in Section 4.5 of this article, below. Section 5(1) of the PAJA gives a person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action the right to request written reasons for the action.

Where a discretionary power of the Commissioner is not specifically made subject to objection and appeal, and the review process is the taxpayer’s only remedy, it is submitted that rule 3(1)(a) still functions as an aid to an aggrieved taxpayer. Even though the objection and appeal procedure is not available to the taxpayer as a remedy for absolute discretions, a taxpayer is entitled to request written reasons for an assessment based on an absolute discretion.

\section*{2.5 Concluding remarks}

Administrative discretion, which has been referred to as the “scourge of justice”, has sadly all too often been associated with unpredictability, arbitrariness,
uncertainty and inconsistency (Boulle, 1986:138). Unpredictability and inconsistency in the exercise of administrative power clashes with the concept of justice, since the individual is unable to regulate his or her conduct accordingly (Burns, 2003:177).

Although it is generally agreed that discretionary powers are necessary in a modern society, the extent and drastic power of some discretions as contained in section 91(1)(b) discussed above are questionable. It is submitted that uncertainty and/or unfairness and inconsistency can easily be promoted by any discretionary powers that are not specifically made subject to objection and appeal and that drastic powers such as those in section 91(1)(b) can be abused.

The argument by the editors of the Taxpayer (2001:69) that, when it comes to taxation laws, the scope of discretionary powers should be limited to administrative matters, for example, to extensions of time, the payment of taxes in instalments, etc., is hereby endorsed. Where liability for tax is involved, there should be no room for an exercise of discretion, certainly not a discretion which is not subject to objection and appeal.

3 The administrative law relationship

An administrative law relationship is a vertical relationship between two parties: a person or body exercising authority and a subordinate person or party. The authoritative person is clothed with public authority and has the power to exercise that authority. The authoritative person or entity can therefore force the subordinate person or party to act in a certain way, or prohibit the subordinate person or party from doing so.

The parties to the administrative law relationship are the Commissioner and the individual taxpayer. Section 2 of the Act states that the Commissioner is responsible for carrying out the provisions of this Act – the Commissioner is therefore the “authoritative person” and the individual taxpayer the subordinate person. Schweitzer (1991:91) explains that the basis of this administrative law relationship is contained in the fact that the Commissioner is required to collect tax and the taxpayer is required to pay the tax.

Wiechers (1985:57) distinguishes between general (objective) relationships and individual (subjective) relationships. General administrative relationships are relationships in which the same legal rules apply to all persons within those relationships and which are created or varied by legislative measures. It is clear that there is a general administrative relationship between the Commissioner and a taxpayer.

In looking at the administrative law relationship from the perspective of the taxpayer, the question arises whether the taxpayer has the remedy of legitimate expectation which can be enforced against the Commissioner.

3.1 The doctrine of legitimate expectation

The common law rules of natural justice (which have been taken up by the constitutional right to procedural fairness) are expressed in two maxims, namely
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audi alteram partem (hear the other side) and nemo iudex in sua causa (no one should be a judge in his own cause). Formerly, the rules of natural justice were applied when the applicant had an “existing right”. The doctrine of legitimate expectation, which derives from English law, extended the scope of application of the principles of natural justice to situations which were not previously reviewable by courts and extended the application of the rules to situations which did not necessarily relate to a person’s rights, liberties or interests. So, for example, in England, the doctrine applied where a promise had been made by the administration, or where an established administrative practice existed (Burns 2003:199).

The doctrine of legitimate expectation forms part of the law of South Africa (Administrator, Transvaal and Others v Traub and Others, 1989(4) SA 731(A)) and has been received with enthusiasm in this jurisdiction (Taylor v Minister of Education and Another, 1996(2) ZLR 772(5)). In Traub’s case, supra, Corbett CJ described the legitimate expectation doctrine as:

. . . . sometimes expressed in terms of substantive benefits or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person is taken . . . in practice the two forms of expectation may be interrelated and even tend to merge.

Clearly therefore, the legitimate expectation principle embraces more than the expectation to be heard audi alteram partem. It includes the expectation that the decision maker must act fairly. Therefore, where the decision maker has laid down a particular procedure or policy, those affected thereby should be able to expect that the procedure or policy will be followed until they are advised to the contrary.

Corbett CJ also stated that such a legitimate expectation could stem from an express promise by the authoritative body or from an established practice that could be expected to continue. A legitimate expectation can therefore arise as a result of oral or written communications by the Commissioner or any official under his control, direction or supervision, as well as established practices of the SARS. This means, for example, that, if a Revenue Official tells a taxpayer that a certain transaction will not result in tax, and if the taxpayer, as a result of that representation, enters into the transaction, the Revenue Official cannot later say that he had made a mistake and that the transaction is taxable.

3.2 Concluding remarks

In the light of the administrative law relationship between the Commissioner and the taxpayer, and the fact that the exercise of a discretionary power constitutes an administrative action, the taxpayer’s right to just administrative action in terms of section 33 of the Constitution must be investigated. The restrictive definition of ‘administrative action’ in section 1 of the PAJA causes doubt as to the status of the doctrine of legitimate expectation. Although it has been said
that there is no reference to legitimate expectation in the 1996 Constitution, the courts have clearly indicated that a definition is unnecessary, since the doctrine has already become part of our common law (Jenkins v Government of the Republic of South Africa (1996 8 BCLR 1055 (Tk)). This means that the doctrine will continue to exist and apply to situations in which the application of procedural fairness is in issue.

4 Constitutionality

4.1 The meaning of just administrative action

Section 33 of the Constitution describes the right to just administrative action 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 four rights

☐ Lawful administrative action

☐ Reasonable administrative action

☐ Procedurally fair administrative action

☐ Written reasons

will be discussed below. Administrative action is “just”, and therefore constitutionally valid, if all four the abovementioned rights are honoured. “Just administrative action” is not the only item describing the complete validity of administrative action. Other umbrella terms have developed over time, mainly in case law. Examples of these synonyms are “intra vires”, “administrative legality” and “proper application of the mind”.

Section 7(3) of the Constitution places a limitation on all rights contained in the Bill of Rights by making these rights subject to the limitations contained or referred to in section 36 or elsewhere in the Bill. If a taxpayer wishes to prove the unconstitutionality of the exercise of a discretion by the Commissioner, he/she must therefore show that one of these four rights has been infringed and that this infringement is not justifiable in terms of the provisions that appear in section 36 or elsewhere in the Bill. It is submitted in this article that only the
discretionary powers not specifically made subject to objection and appeal might be constitutionally contestable.

4.2 **Lawful administrative action**

Lawful administrative action requires all the legal requirements for just administrative action in all the sources of law to be met. This means that all the provisions of the Constitution, the PAJA, the Act, other Acts, common law and case law must be taken into account. Section 6(2)(i) of the PAJA includes unlawful administrative action as a ground for judicial review.

4.3 **Reasonable administrative action**

Reasonable administrative action means that the administrative action taken is procedurally and substantively reasonable and fair. Two important legal commentators writing during the 1980s regarded unreasonable administrative action as an unreasonable exercise of a discretion or, more commonly, the abuse of discretionary power. Wiechers (1985:237-254) has suggested that the reasonableness of an administrative action does not relate to the subjective disposition of the official concerned – whether he acted in good faith or with an ulterior purpose – but to the consequences of that decision on the individual’s rights. He therefore adopts an objective approach rather than the subjective approach, which is directed at an examination of the subjective mind of the administrator. Baxter (1989:485), who also adopts an objective approach, distinguishes between dialectical unreasonableness (which relates to the method by which the decision was reached) and substantive unreasonableness (which relates to the correctness of the decision). He says that a proposition may be regarded as “reasonable” in the dialectical sense if, in support of it, an appeal was made to factors, values and standards which the other party would recognise as legitimate, given the context of the argument. The proposition would be regarded as “reasonable” in the substantive sense if it is itself accepted by the other party as the conclusion that should logically be drawn from the arguments used in its support.

As indicated in section 2.3.3 of this article above, a taxpayer’s only remedy in the case of a discretionary power which has not specifically been made subject to objection and appeal is the review process. In the review process, the focus is not so much on the result of the Commissioner’s discretion, but on the way he has exercised his discretion. In proving the unreasonable exercise of a discretion, the focus seems to be more objective (in other words, on the consequences of the decision on the individual’s rights) than subjective (in other words, on whether the official acted in good faith or with an ulterior motive). Although the focus therefore differs, both the objective and subjective elements should be taken into account by a Court if a wide interpretation is followed.

Section 6(2)(h) of the PAJA limits the right to institute judicial review in cases where the exercise of the power, or the performance of the function in pursuance of which the administrative action was taken, is so unreasonable that
no reasonable person could have so exercised the power or performed the function. Burns (2003:248-250) argues that a literal interpretation of section 6(2)(h) suggests that the legislature has adopted a rather limited view of unreasonableness and that it appears as if the unreasonableness of the act does not relate to the effect/result or the consequence(s) of the action. She further submits that, although the test of unreasonableness is an objective rather than a subjective one, the reasonable man test does not cover all instances of unreasonable administrative action. In other words, although the reasonable man may have arrived at a particular conclusion, that is not to say that the action is reasonable. Conversely, a reasonable man may, arrive at a conclusion which has unreasonable consequences for the individual concerned.

It may be argued that section 6(2)(h) unduly restricts the constitutional right to administrative justice contained in section 33. This section simply states that all administrative action must be reasonable. This article therefore submits that the relevant provision in the PAJA, which was promulgated to give effect to this constitutional right, must be given a wide interpretation.

4.4 Procedurally fair administrative action

The common law rules of natural justice are the origin of the right to procedurally fair administrative action. Courts and writers generally accept that the following two Latin maxims summarise the common law rules of natural justice:

- **Audi alteram partem** – this means to “hear the other side” and embraces the right to be heard, to be informed about the case against a person so that he can defend himself and to be given reasons for any decisions taken by the administrator.

- **Nemo iudex in sua propria causa** (literally: “nobody can be a judge in his or her own case”) – this proverb is known as the rule against prejudice. The basis of the rule is that justice must not only be done, but must be seen to be done and therefore administrative action may not be “ . . . vitiated, tainted or actuated by bias” (Yates v University of Bophuthatswana and others (1994 SA 815 (BG)). The reasonable person must therefore have no perception or suspicion of prejudice with regard to the administrative action.

Our courts have clearly stated that procedural fairness is not merely a codification of pre-constitutional law and is not limited to the rules of natural justice. Farlam J stated in Van Huyssteen NO v Minister of Environmental Affairs and Tourism (1995 9 BCLR 1191 (K)) that”

. . . a party entitled to procedural fairness is entitled in appropriate cases to more than just the application of the audi alteram partem and nemo iudex in sua causa rules. What he is entitled to is, in my view, . . . the principles and procedures . . . which, in the particular situation or set of circumstances, are right and just and fair.

Section 3(2) and (3) of the PAJA respectively lays down certain procedures which the administrator must and may in his discretion follow before making a decision. Section 3(4)(a) of the PAJA states that there can only be a deviation
from the requirements of procedurally fair administrative action if it is reason- 
able and justifiable. The requirements for a justifiable limitation of this right 
contained in section 3(4)(a) and (b) boil down to a rewording of the require-
ments of section 36 of the Constitution, in other words:

- The right may only be limited in terms of a law of general application.
- The limitation must be reasonable and justifiable in an open and democratic
  society based on human dignity, equality and freedom, taking into account
  all relevant factors including
  - the nature of the right;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - the relation between the limitation and its purpose; and
  - less restrictive means to achieve the purpose.

Sections 6(2)(a)(iii) and 6(2)(c) include administrative action by an administra-
tor who was biased or reasonably suspected of bias, as well as administrative 
action that was procedurally unfair, as grounds for judicial review. Burns
(2003:198) has correctly stated that section 6(2)(a)(iii) therefore reflects the 
position under common law, but that the statutory prohibition of bias appears to 
have a wider ambit of application than its common law counterpart, in that the 
subsection prohibits all the actions of the administrator which are biased, 
whether they take place within the sphere of procedural fairness or not.

4.5 Written reasons

Section 33(2) of the Constitution gives everyone whose rights have been ad-
versely affected by administrative action the right to be given written reasons. 
The furnishing of reasons facilitates fairness and proper administrative behav-
iour on the part of the administrator. He must apply his mind to the matter and 
produce sound and legally acceptable reasons to avoid the possibility of internal 
review or review by the court.

Section 5 of the PAJA gives effect to section 33(2) by giving any person 
whose rights have been materially and adversely affected by administrative 
action and who has not been given reasons for the action, the right to request 
(within 90 days after the date on which that person became aware of the action 
or might reasonably have been expected to have become aware of the action) 
that the administrator concerned furnish sufficient written reasons for the action. 
The question whether section 5 is an unconstitutional limitation to the right to 
reasons laid down in section 33(2) is a matter yet to be resolved by the courts. A 
departure from the requirement to furnish adequate reasons must be reasonable 
and justifiable in the circumstances and the administrator must inform the 
person making the request of the departure forthwith.

The requirement that there has to be a right that was adversely (or materially 
and adversely in terms of the PAJA) affected before this right to written reasons
comes into existence, combined with the same possible limitation of this right as discussed in Section 4.4 of the article above (section 5(4)(a) and (b) of the PAJA) and the high cost of litigation, might discourage taxpayers from exercising their right to written reasons. However, as discussed in Section 2.4.2 of this article, above, the new rule 3(1)(a) now allows a taxpayer to request written reasons for any assessment issued on or after 1 April 2003.

4.6 Concluding remarks
A taxpayer’s right to just administrative action requires the Commissioner to meet all the legal requirements for just administrative action in all the sources of the law; to exercise his discretion procedurally and substantively reasonably and fairly; to hear the other side; not to be the judge in his own case; to be unbiased; and to give written reasons where rights have been adversely affected. The SARS has gone a long way toward proving its commitment to the improvement of service delivery and administrative action (for example, by issuing the new rules promulgated under section 107A of the Act as well as establishing a SARS Service Monitoring Office). However, none of these actions will assist a taxpayer in defending his/her constitutional right to just administrative action. If a taxpayer wishes to prove that the exercise of a discretion by the Commissioner is not constitutional, he/she will have to show that one of the four rights set out in Sections 4.2 to 4.5 of this article has been infringed and that this infringement is not justifiable in terms of the provisions that appear in section 36 of the Constitution or elsewhere in the Bill of Rights.

5 Conclusion
As discussed in Section 2 of the article, above, the extent and types of discretionary powers of the Commissioner are very wide. It is submitted that uncertainty and/or unfairness and inconsistency can easily be promoted by discretionary powers that are not specifically made subject to objection and appeal and that drastic powers such as those in section 91(1)(b) can be abused. The exercise of discretionary powers by staff of the SARS (who are sometimes tired, overworked and undertrained people in an understaffed office) combined with the limited knowledge of the general public about tax and their constitutional rights raises concern about the extent and possibility of errors and an infringement of taxpayers’ rights that can slip through the system unnoticed or undetected.

In light of the fact that the exercise of a discretion by the Commissioner is an administrative action and that the taxpayer has a constitutional right to just administrative action, any discretion exercised by the Commissioner must comply with all four rights given to such a person in section 33 of the Constitution.

Discretionary powers specifically made subject to objection and appeal afford a taxpayer the chance of querying the doubtful exercise of a discretion. If discretionary powers were made subject to objection and appeal, it is submitted
that none of these powers would be open to constitutional attack. Discretionary powers, like those in sections 91 and 92, which are not specifically made subject to objection and appeal and which place drastic powers in the hands of the staff of the SARS, are an issue of great concern and it is submitted that these powers might be constitutionally contestable. All four of the discretionary powers which are not subject to objection and appeal are based on a mutual agreement between the Commissioner and the taxpayer and it is submitted that these powers would not be open to constitutional attack.

Although the discretionary powers of the Commissioner are therefore not found to be unconstitutional per se, it is submitted that the extent and drastic powers of some of the discretions not specifically made subject to objection and appeal should be revisited by the law makers, and that no discretionary powers should be allowed where the liability for tax is involved, certainly not a discretion which is not subject to objection and appeal.

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