

Exchange of Taxpayer Information and the Protection of Taxpayer's rights in South Africa: Within the Bounds set by the Constitution of South Africa?

Louise Möller

69th Congress of the International Fiscal Association

Basel 2015



UNIVERSITY OF CAPE TOWN
IYUNIVESITHI YASEKAPA • UNIVERSITEIT VAN KAAPSTAD



UCT TAX INSTITUTE
FOR FISCAL RESEARCH
Gateway for Global Engagement

Introduction

This leaflet aims to provide an overview of the research I am currently conducting on the South African constitutional questions raised by the framework for the exchange of taxpayer information, with special reference to the fundamental human rights of taxpayers in South Africa.

This leaflet briefly sets out the scope of my research. The research is carried out in the context of a mini-dissertation being drafted as a requirement for a Master's degree, specialising in the field of International Taxation, at the University of Cape Town (supervised by Prof Johann Hattingh).

Comments, suggestions and queries are warmly invited. Please refer to my contact details provided at the end of this leaflet.

A copy of this leaflet as well as my poster will be made available online at: www.tax.uct.ac.za

Scope of the research project

To a great extent, the question as to whether the current rules and regulations surrounding exchange of taxpayer information in South Africa would pass constitutional muster has, as yet, gone unasked and unanswered.

This dissertation seeks to identify and analyse the constitutional questions raised by current rules and practices in place in South Africa surrounding exchange of information, and the

protection afforded to taxpayers under South Africa's existing tax legislation.

South Africa has repeatedly expressed and demonstrated its commitment to advancing the movement for greater transparency in the international tax arena – specifically in promoting the exchange of taxpayer information. This position was recently affirmed in the first interim report on base erosion and profit shifting (“BEPS”) released by the Davis Tax Committee for public comment¹. The “[c]ompliant” rating assigned to South Africa in the combined first and second phase Global Forum Peer Reviews is indicative of South Africa's endeavors to ensure compliance with international best practice². South Africa's ever expanding network of treaties containing exchange of information mechanisms covers more than 90 jurisdictions³.

In South Africa, these treaties are domesticated and become part of domestic tax legislation. In terms of this legislation, the competent authority, as part of the South African Revenue Service (“SARS”), enjoys broad authority and is granted extensive investigative powers. This

¹ The Davis Tax Committee was called into being in 2013 by the then Minister of Finance, Pravin Gordhan, and charged with “*assess[ing] South Africa's tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability*” – which includes evaluating the South African tax regime in the light of base erosion and profit shifting.

² OECD (2013), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013: Combined: Phase 1 +Phase 2, incorporating Phase 2 ratings*, OECD Publishing, p. 8, Available at <<http://dx.doi.org/10.1787/9789264205901-en>>

³ *Ibid.*, p. 9

includes the authority to gather information for the purpose sharing it with other States' competent authorities (in accordance with South Africa's treaty obligations).

Although the SARS has been afforded these powers by the relevant enabling legislation and is allowed a certain degree of discretion in the manner in which it conducts itself, all these powers remain subservient to the Constitution, which means that "any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will ... not have the force of law"⁴. The SARS, in its actions, from whatever source it derives its authority, must stay within the bounds of the playing field as determined by the Constitution.

The cornerstone of the Constitution is the Bill of Rights, which enshrines the rights of all people in South Africa (both natural, and corporate), and applies also to persons who are not citizens. As such, the Bill of Rights is "the principal source of substantive constraints on public power"⁵.

The aim of this research project is to analyse, in light of existing South African constitutional case law, both automatic exchange of information and exchange upon request in the context of two fundamental rights (as expressed in the Bill of Rights), namely

the right to privacy⁶ and the right to just administrative action⁷.

Firstly, the paper will investigate whether these rights are infringed during the exchange of information process (as it currently stands).

The Bill of Rights affords everyone the right to privacy⁸. The comprehensive right to privacy of all taxpayers specifically includes the right not to have their person, home or property searched or seized. In this regard, the following question will be addressed:

Does divulging confidential information to foreign competent authorities amount to an infringement of a taxpayer's right to privacy?

The Bill of Rights also affords to everyone the right to administrative action that is lawful, reasonable and procedurally fair⁹. In light of this right, the question to be addressed is as follows:

Does a decision by SARS to exchange taxpayer information amount to 'administrative action'? If 'yes', is there an infringement of a taxpayer's right to just administrative action when:

- (i) *no up-front notice is given to the taxpayer of a request received from a foreign authority (or no constructive notice is given in cases of automatic exchange);*

⁴ Curry, I., and De Waal, J., *The Bill of Rights Handbook*, 6th edn. (Cape Town: Juta & Co. Ltd, 2014), p.9
⁵ *Ibid*, p. 23

⁶ Art. 14 of the Constitution
⁷ Art. 33 of the Constitution
⁸ Art. 14 of the Constitution
⁹ Art. 33 of the Constitution

- (ii) *no opportunity is provided to the taxpayer to check the accuracy of information that will be exchanged;*
- (iii) *no opportunity is provided to the taxpayer to make representations in regard to the information that will be shared?*

Although at first glance it might be quite apparent that the sharing and disclosure of confidential taxpayer information infringes on at least one of the above mentioned rights, the analysis cannot stop at raising questions surrounding whether a right has been limited.

In South Africa, constitutional rights and freedoms are not absolute¹⁰. The Bill of Rights includes a general limitation provision by virtue of which any fundamental right may be restricted. Critically, however, this infringement may only be made in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors¹¹.

The factors to consider would include, amongst others: the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve this purpose.

The hurdle that must be cleared before limiting any of the fundamental rights is meant to be a high one.

Fundamental rights cannot simply be overridden on the basis that the general welfare of society will be served by the restriction¹². Appropriate substantive evidence must be available to justify the infringement – the decision of whether the limitation is ‘reasonable’ and ‘justifiable’ cannot be determined in the abstract, based on a hypothetical argument¹³.

The analysis will therefore also consider the questions raised by the limitation of rights clause in the context of the taxpayer’s right to privacy and just administrative action in the exchange of information. Questions in this regard that will be addressed include the following:

When the fundamental rights of a taxpayer are limited, was this done in accordance with a law of general application?

A fundamental principle of the rule of law is that rules be stated in a clear and accessible manner. The internal policies and practices of an organ of state (such as the SARS) will not qualify as ‘law’ in this sense. Furthermore, even if internal practices are codified in legislation, such a law cannot be said to be of ‘general application’ should it simply grant an administrator wide and unconstrained

¹⁰ Curry and De Waal, p. 150

¹¹ Art. 36 of the Constitution

¹² Curry and De Waal, p. 151

¹³ Ibid, p. 154

discretion in determining when it might be justified to limit someone's rights¹⁴.

Is the current legislation directing the SARS, as an administrator, in its duties surrounding the exchange of taxpayer information robust enough to clear this hurdle?

Currently, domestic tax legislation contains no provisions setting out the criteria that tax administrators must consider when deciding whether to exchange taxpayer information (e.g. how the 'foreseeably relevant' criterion, for example, should be decided). Critically, there are also no provisions regulating the process of exchange, as far as taxpayers are concerned.

The core aspect of the limitation clause deals with the question whether a limitation of a fundamental right is reasonable and justifiable, taking into account all relevant factors. This consideration raises a host of questions in the context of exchange of information. For instance, the following:

What is the purpose of exchange of taxpayer information in South Africa?

Is the purpose the same for automatic exchanges as for those on request?

Is automatic exchange rational?

How effective are these mechanisms in achieving their purpose/s - can a causal link be drawn between the limitation of the taxpayers rights and

accomplishing the objective of exchanges?

What substantive evidence can be produced to demonstrate this link? In other words, does exchange of information actually achieve the result it was set out to attain, particularly automatic exchange?

Are there less restrictive means available to achieve the purpose of exchange of information (e.g. in respect of automatic exchange)?

Internationally, as well as domestically in South Africa, projects aimed at increasing transparency in tax matters has gained momentum over the past few years, especially in the light of the OECD led BEPS project. Ensuring that the constitutionally guaranteed rights of the taxpayer remain protected amidst the hurried implementation of these reforms is of paramount importance and cannot be overlooked or deferred. This paper hopes to take an initial step in identifying and analysing the constitutional questions South Africa currently faces in the light of its existing treaty obligations to exchange taxpayer information.

¹⁴ Ibid, p. 161

Louise Möller is a Chartered Accountant (SA). She is currently a senior consultant in the Corporate and International Tax department of PwC, Cape Town.

Louise received her BAccounting (Honours) degree from Stellenbosch University and is currently pursuing a Master's degree, specialising in the field of international taxation, at the University of Cape Town.

Contact details:

Email: louise.moller@za.pwc.com

MLLLOU007@myuct.ac.za

Tel: +27 21 529 2227