Revenue Law Journal

Volume 7 | Issue 1 Article 2

May 1997

Taxpayers' Rights in South Africa

Bob Williams
University of Natal

Taxpayers' Rights in South Africa

Abstract
The democratisation of South Africa resulted in the enactment of a new interim Constitution in 1993, which incorporated a Bill of Rights setting out certain constitutionally entrenched rights. Provisions of the Income Tax Act which flout the Bill of Rights can now be declared invalid by the courts. Several provisions of the Bill of Rights are of great importance for taxpayers. A general charter of rights for taxpayers may well be laid down in South Africa in the reasonably near future. However, the cutting edge of legally enforceable taxpayers' rights will undoubtedly reside in the constitutional Bill of Rights.

Keywords
taxpayers rights, South Africa, law

TAXPAYERS' RIGHTS IN SOUTH AFRICA

Bob Williams
Professor of Law
University of Natal

The democratisation of South Africa resulted in the enactment of a new interim Constitution in 1993, which incorporated a Bill of Rights setting out certain constitutionally entrenched rights. Provisions of the Income Tax Act which flout the Bill of Rights can now be declared invalid by the courts. Several provisions of the Bill of Rights are of great importance for taxpayers. A general charter of rights for taxpayers may well be laid down in South Africa in the reasonably near future. However, the cutting edge of legally enforceable taxpayers' rights will undoubtedly reside in the constitutional Bill of Rights.

Introduction

This article discusses aspects of taxpayers' rights in South Africa in relation to income tax.

The first Income Tax Act in South Africa[1] was closely modelled on the income tax legislation of the state of New South Wales in Australia.[2] The income tax systems of South Africa and Australia are still broadly similar in fundamental structure and concepts and in the procedure for the assessment of taxpayers to income tax, including objections and appeals against assessments. As in the Australian model, most income tax disputes in South Africa are first adjudicated by a tribunal, known in South Africa as the Special Court for hearing income tax appeals ("the Special Court"). It is presided over by a supreme court judge assisted by an accountant and a representative from the commercial community. Appeals lie to the superior courts. However, the South African Income Tax Act has, in

1 The (Cape) Additional Taxation Act No 36 of 1904.

2 The Income Tax Assessment 1895 (NSW).

the century since its beginnings, deviated from its Australian counterpart in significant respects, of which the following are amongst the most striking. First, the current South African Income Tax Act is nothing like as lengthy or complex as the Australian statute. Second, as a general rule with only a few minor statutory exceptions, South Africa imposes income tax only on income which has its source within South Africa. Third, South Africa has not introduced a capital gains tax. The result is that gains of a capital nature in South Africa are tax-free, except where the Income Tax Act artificially deems specific gains of a capital nature to be of a revenue nature and hence taxable.

South Africa's first democratic general election in 1994 resulted in more than a change of government. The previous decades had been marked by increasing isolation from the international community - politically, economically, culturally, and in every other way. South Africa was also isolated from new ideas and values that were gaining acceptance in other parts of the world, and this isolation was evident in its income tax system. Thus, for example, the Income Tax Act implicitly assumed a male breadwinner and head of the family. A wife's income was aggregated with that of her husband, and special rules and rates of tax applied to married women. The Act was replete with provisions which gave the Commissioner for Inland Revenue (the senior government official charged with the implementation of the Income Tax Act) the power to make discretionary decisions on important matters, against which the taxpayer had no right of appeal. The previous government had been opposed in principle to a general "bill of rights" for its citizenry, and the notion of a taxpayers' charter of rights was unheard of.

As the world knows, South Africa has, since 1990, undergone a peaceful revolution. A new interim Constitution has been enacted which includes a bill of rights, certain clauses of which are relevant to taxpayers. The draft of the final Constitution, incorporating an amended bill of rights, is (at the time of writing) being scrutinised by the Constitutional Court for compliance with certain predetermined constitutional principles.

It has been said that the interim Constitution is a bridge away from "a culture of authority" toward "a culture of justification - a culture in which every exercise of power is expected to be justified".[3]

---

3 Mureinik, (1994) 10 SAJHR 31 at 32.

South Africa will, therefore, provide an interesting before-and-after case study of the impact of a constitutionally entrenched bill of rights on the rights of taxpayers. To date, only a few cases relevant to taxpayers have been decided by the courts in terms of the interim Constitution and a mature appraisal will have to wait for at least a few years. However, the courts have already observed, in connection with the attitude of the revenue authorities in South Africa prior to the interim Constitution, that "the practices of the past are entirely inconsistent with modern values of openness and accountability in a democratically oriented administration".[4]

Before looking at the impact of the Bill of Rights, I would like to give a bird's-eye view of income tax in South Africa, with particular reference to the element of *certainty* from the perspective of the taxpayer.

Overview of income tax in South Africa

It is trite that taxpayers should know with reasonable certainty whether, in terms of the applicable law, they are or are not liable for income tax, or will or will not be so liable if they adopt a contemplated course of action. In South Africa, as in many other tax jurisdictions, such certainty is an ideal that is often far removed from reality. Around the world, taxing statutes are notorious for their incomprehensibility and South Africa is no exception. Indeed, in South Africa many key concepts and principles are completely absent from the Income Tax Act, and are expressed only in judicial decisions of the domestic courts and courts of other countries, particularly the United Kingdom and Australia.

The common law (in the sense of the national law) of South Africa is seventeenth century Roman-Dutch law, being the law which the first European settlers are regarded as having introduced to the country. Although it is the basis of the law in only a few other countries around the world, Roman-Dutch law is an admirable system. Its great strength is its bedrock of general principles. South African law is therefore not the "wilderness of single instances" that characterises much of English law, but has a consistency and an underlay of logical general principles which allow most legal problems to be solved by the application of those principles. The South African legal system is, for the most part, uncodified, and the Income Tax Act is far from being an encyclopaedic exposition of the

4 *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD) at 441G.

law. The South African judiciary has made a distinguished and scholarly contribution to the application and adaptation of the rules of Roman and Roman-Dutch law to a modern society. Regrettably, the judicial contribution to the development of income tax law has been less impressive. Most judges have sought solutions to the income tax cases that come before them in the ipsissima verba of the Income Tax Act, with the result that much of the case law tends to mirror the deficiencies of the Act. When this approach has led to a patently unfair result, judges have been excessively ready to take refuge in the old saw that the remedy lies in an amendment to the Act, instead of searching for a creative interpretation of the Act that would lead to an equitable result.

Particularly regrettable have been dicta in some early decisions of the Appellate Division (the highest court in the hierarchy). They became a mantra in later decisions, that the principles of accountancy and good business practice are irrelevant to the determination of disputes between taxpayers and the revenue authorities, and that the court must base its decision solely on the words of the Income Tax Act. The result has been that income tax law in South Africa cut itself off from the accumulated wisdom of other disciplines, and the courts have, on occasion, reached decisions which were completely at odds with established accountancy principles and commercial reality. This approach has also resulted in a considerable divergence between a person's "taxable income" (being the net amount of incomings minus outgoings and allowances on which income tax is calculated) and "profit" in the accounting sense. Amongst other detrimental consequences of this approach is the duplication of effort and the additional expense imposed on the business community in having both to produce a set of financial statements and to calculate "taxable income" for inclusion in the income tax return. Logically, these two determinations ought for the most part to coincide, but they do not because of the aforementioned divergence. In Australia, as early as 1938,[5] the courts observed that, "the tendency of judicial decision has been to place increasing reliance upon the conceptions of business and the principles and practice of commercial accountancy". In South Africa, it has taken more than 50 years for the obvious merits of this approach to begin gaining acceptance. One of the reasons for the reluctance of the South African courts to take cognizance of accounting principles and practice has no doubt been that most judges have no academic grounding in accountancy and have gained little practical knowledge

5 *In COT (SA) v Executor, Trustee and Agency Co of South Australia Ltd (Carden's case)* (1938) 63 CLR 108 (Full High Court of Australia).

of it whilst working their way up through the ranks of practising barristers.

As was noted above, the South African Income Tax Act is less lengthy and complex than many of its overseas counterparts. It consists of a mere 112 sections and a few schedules, making it a single, slim volume. In only a few areas, such as fringe benefits, does the Act attempt to lay down a comprehensive body of rules. For the rest, the Act usually lays down broad general principles. This is not necessarily the mark of a naive or ineffective income tax system. It is impossible to overcome the ambiguity of language, and attempts to create a detailed jigsaw of statutory provisions often create tax-avoidance opportunities in the gaps where pieces of the jigsaw fail to mesh exactly. Nor does a detailed statutory code necessarily make for greater certainty from the viewpoint of the taxpayer, because of the difficulty and uncertainty in the interpretation of complex legislation. But where the taxing statute merely lays down general principles, a great responsibility falls on the judiciary to interpret those provisions in a way that is sensible and pragmatic. One of the great difficulties for the courts is to strike the proper balance between excessive legalism (which results in tax being avoided or imposed on the basis of technical legal distinctions) and insufficient legalism (where tax is avoided or imposed as a result of non-adherence to established legal distinctions). In my opinion, the South African courts have, on significant occasions, failed to strike the proper balance, and the pendulum has swung between excessive legalism in some early decisions to insufficient legalism in some recent decisions.

Let me give an example of each extreme. In *Commissioner of Inland Revenue v Lunnon*[6] a company passed a resolution to award the taxpayer, one of its retired directors, a substantial lump sum, ex gratia, "for services rendered" to the company during its early years when directors' fees were not commensurate with the work involved. The Appellate Division held that the amount paid to the director did not have the quality of "income" in his hands, and hence was not taxable. The court said that the company had no legal obligation to make the payment, and therefore it was "a gift pure and simple". In other words, the court adopted a blinkered view which paid regard only to the legal rights and obligations of the director and the company respectively, instead of taking a broader perspective and holding that - in terms of economic concepts - any reward for services

6 1924 AD 94, 1 SATC 7.

rendered is inherently "income", irrespective of whether there was a legal obligation to pay.

An example of insufficient judicial recognition of legal distinctions is the decision of the Appellate Division in *Elandsheuwel Farming (Pty) Ltd v SBI*.[7] This involved a familiar scenario in which property speculators acquire a controlling shareholding in a company which invests in fixed property and holds it as a capital asset. They procure the company to sell its property holdings at a profit and then argue that the company is not taxable on those profits because they are of a capital nature. (As is noted above, South Africa does not have a capital gains tax.). There are various routes which a court can follow in this kind of factual situation, that lead to the conclusion that the company is indeed taxable. But the undesirable route and the one to be avoided (but the one which the court regrettably adopted in *Elandsheuwel)*, is that which plays down the separate legal personality of the company and blurs the distinction between what the company owns (in this case, the fixed property in question) and what the shareholders own (shares in the company). Reading this decision, it is difficult to avoid the conclusion that the court failed to heed the sage warning of Lord Normand in *Lord Vestey's Executors v IRC*[8] that, "Tax avoidance is an evil, but it would be the beginning of much greater evils if the courts were to stretch the language of the statute in order to subject to taxation people of whom they disapproved". I have suggested elsewhere that there was, in fact, a straightforward way in which the court could have thwarted this particular tax avoidance scheme.[9] Even if this was not so, it would have been better for the court to let the smart alecs in question escape tax rather than to skew accepted legal principles so as to stretch the tax net in order to reach them and, in so doing, introduce uncertainty into the whole property development industry as regards the taxability of fixed property transactions.

Prior to the constitutional Bill of Rights

Prior to the enactment of South Africa's new interim Constitution in 1993, South African constitutional law was cast in the Westminster mould of parliamentary supremacy in which the courts had no power to review and strike down legislation. Under this constitutional dispensation, the full panoply of apartheid legislation was passed

---

7 1978 (1) SA 101 (A), 39 SATC 163.

8 [1949] 1 All ER 1108.

9 See comment by Williams, (1991) THRHR 826.

into law. In the context of the gross violations of human rights by the South African government during the 1950's through the 1980's, the oppressive aspects of the Income Tax Act seemed inconsequential and were naturally not the focal point of pressures for reform. Nevertheless, they included:

- provisions with a gender and racial bias;
- non-appealable discretionary decisions vested in the Commissioner;
- provisions which placed the onus of proof on the taxpayer;
- draconian search and seizure provisions;
- a general imbalance of power between the taxpayer and the revenue authorities in relation to time limits for objecting to assessment and limitations on the grounds of appeal.

The interim 1993 Constitution and the Bill of Rights

In 1993, South Africa enacted an interim Constitution which came into force on 27 April 1994 as the product of a multi-party negotiating process and which will remain in place until supplanted by a final Constitution. The post-script to the interim Constitution records that it aspires to be an "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence".

Chapter 3 of the 1993 interim Constitution entrenches 25 fundamental rights. None of these rights is absolute because all are subject to s 33(1) (usually called "the general limitation clause"). This clause is similar to that in the Canadian Charter of Rights and provides that the constitutionally-protected rights,

> may be limited by a law of general application, provided that such limitation shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right in question.

Hence, any statutory provision which infringes a constitutionally-entrenched right must be examined by the court to see whether the infringement can be justified in terms of this general limitation clause. The onus of proving that a limit on a constitutionally-guaranteed right or freedom is justified under the general limitation clause rests on the party seeking to uphold the limitation.[10]

---

10 *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) at 215A.

Therefore, South Africa's Income Tax Act,[11] like all other legislation, is now vulnerable to constitutional challenge, but all of its provisions remain in force unless and until repealed or amended by Parliament or declared unconstitutional by the Constitutional Court. The impact of the Bill of Rights in matters of income tax is likely to be greatest in relation to the following constitutionally-protected rights:

- the right to equality;
- the right to privacy;
- the right of access to information;
- the right to administrative justice;
- the right to property.

The interim Constitution provides[12] that, in interpreting the Bill of Rights, a court "shall" have regard to public international law and "may" have regard to comparable foreign case law. To date the judgments of the Constitutional Court have shown a readiness to embark on a wide-ranging search of international parallels in search of guidance, coupled with a determination to interpret the Constitution in harmony with the principles of the South African legal system, and to be circumspect in following foreign precedents.[13]

The right to equality

Section 8(1) of the interim Constitution provides that:

> Every person shall have the right to equality before the law and to equal protection of the law.

The Income Tax Act has already been amended to excise all racial and gender bias. Such inequalities and biases as remain, for example, differential tax rates and personal rebates linked to marital status and age, will presumably be defended, if challenged, in terms of the general limitation clause in the Constitution. In Canada, a compulsory retirement age, which prima facie infringed the constitutional right to equality and non-discrimination, has been held to be constitutionally justified in terms of that country's similarly-worded general limitation clause.[14]

---

11 Act 58 of 1962, as amended.

12 In s 35(1).

13 *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W) at 237H.

14 *McKinney v The University of Guelph* (1991) 76 DLR (4th) 545 (SCC).

The equality clause, quoted above, has already been invoked in South Africa by a taxpayer engaged in civil litigation with the revenue authorities, in conjunction with the access to information clause and the administrative justice clause, discussed below, in order to compel those authorities to divulge information in their possession which was relevant to the exercise or protection of his rights.[15]

The right of access to information

The period from 1950-1990 was marked by a culture of state secrecy in South Africa. In the sphere of income tax, this mindset was epitomised by the secrecy surrounding the in-house manual of practice compiled by the revenue authorities as a guide to its assessors in the processing of income tax returns. Although this manual did not have the force of law, it would have oiled the wheels of the system if income tax practitioners had known its contents and been able to ensure that their clients' returns fell within its guidelines. But the manual remained strictly embargoed. When leakage made its contents generally known, it was revealed to be, not an Aladdin's treasure trove, but an ill-written, poorly organised, hotchpotch of trite, dubious and largely out-of-date information which was gathering dust on the shelves of assessors who had long since ceased to pay any attention to it.

The task of updating and rewriting this manual has now been contracted out, and it will apparently be published. One of the items of interest to practitioners will be its references to unreported decisions of the income tax Special Court which have decided points of principle in favour of the revenue authorities. Hitherto the Commissioner has been wont to keep the existence of these decisions hidden in income tax litigation and to spring them on the taxpayer at the hearing.

South Africa has, as yet, no general legislation regarding access to information, although there is mounting public pressure for such legislation from private citizens, environmental groups, civic associations, trade unions, business groups and others. Hence the provisions of the interim Constitution in this regard are of a pioneering nature.

---

15 *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD).

The interim Constitution provides[16] that:

> Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

Though narrowly formulated, this provision will be significant in the relationship between the South African taxpayer and revenue authorities in matters of income tax. In South Africa, these authorities are clearly organs of the state. The courts have already recognised that the "exercise or protection" of rights in terms of this clause is not confined to the context of litigation and that the "right" should be broadly defined.[17]

A number of aspects of this provision were examined in *Jeeva v Receiver of Revenue, Port Elizabeth*,[18] including its inter-relationship with the general limitation clause and with professional privilege. In this case two companies had been placed in liquidation, and the joint liquidators, at the instigation of the Receiver of Revenue, applied for and were granted leave to hold a commission of inquiry into the affairs of the companies in terms of the Companies Act. Some of the erstwhile directors of and shareholders in the companies, who were to be interrogated at the inquiry, brought an urgent application to court for an order that the Receiver of Revenue give them access to all information in his possession relating to the two companies, except such as was covered by professional privilege. The Receiver admitted that he was in possession of information relevant to the interrogation of the applicants, but argued, inter alia, that the information was covered by the secrecy provisions of the Income Tax Act, and that non-disclosure was justified by the general limitation clause in the interim Constitution. In a lengthy and detailed judgment, the court held that the applicants were entitled, in terms of the equality clause and the administrative justice clause in the Constitution, to access to all relevant information in the possession of the Receiver, apart from that covered by legal professional privilege. Such privilege, said the court, was a reasonable and justifiable limit on those constitutional rights in terms of the general limitation clause.

---

16 Section 23.

17 *Qozeleni v Minister of Law and Order* 1994 (3) SA 625E at 642F-G.

18 1995 (2) SA 433 (SECLD).

The right to privacy

South Africa's interim Constitution provides that:

> Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

The draconian provisions of the Income Tax Act in relation to the right of revenue officials to search premises and seize documents have not been amended in anticipation of a constitutional challenge in terms of this provision. The Income Tax Act provides in this regard that:[19]

> any officer engaged in carrying out the provisions of this Act who has ... been authorised by the Commissioner in writing may ... without previous notice, at any time during the day, enter any premises whatever and on such premises search for any money, books, records, accounts or documents [and] in carrying out such search, open ... any article in which he suspects any money, books, accounts, records or documents to be contained [and] seize any such books records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax.

This provision is bound to come under constitutional challenge. If, as seems to be the case, it is a clear infringement of the constitutional right to privacy, the question will be whether it is legitimised by the general limitation clause which, as is noted above, permits the rights protected by the Bill of Rights to be limited by a law of general application, to the extent that it is "reasonable and justifiable in an open and democratic society based on freedom and equality".

An indication of how the courts may resolve the interplay between the constitutional right to privacy and the general limitation clause in relation to a search and seizure operation under statutory authority appears from the decision in *DA Park-Ross v The Director, Office for the Investigation of Serious Economic Offences.*[20] It involved the constitutionality of search and seizure provisions in the Investigation of Serious Economic Offences Act, which are similar to the search and seizure provisions in the Income Tax Act.

---

19 Income Tax Act no 58 of 1962, s 74(3).

20 1995 (2) SA 198 (C).

The facts of *Park-Ross* were that, in the course of an investigation into alleged irregularities involving a tender for a government contract, the police, acting in terms of powers of search and seizure in the Investigation of Serious Economic Offences Act, raided the premises of a certain company and the house of one of its directors and seized and removed certain documents. The company and the director challenged the constitutionality of the provisions of the statute in terms of which the search and seizure had taken place.

The court had no difficulty in holding[21] that the search and seizure provisions of the Act in question violated the right to privacy in the Constitution. The question then became whether the violation of that right was permissible in terms of the general limitation clause in the Constitution.

In earlier cases, the South African courts[22] had looked for guidance in the interpretation of the general limitation clause to the Canadian decision in *R v Oakes*,[23] which concerned a similarly-worded provision in the Canadian Charter of Rights and Freedoms. That decision held that, to establish that a limit on a constitutionally-guaranteed right or freedom is reasonable and demonstrably justified in a free and democratic society, two central criteria had to be satisfied. First, the objective had to be of sufficient importance to warrant overriding the protected right or freedom; second, the means chosen had to be reasonable and demonstrably justified. The latter element, said the court in *Oakes*, involves a proportionality test requiring the interests of society to be balanced against the interests of individuals and groups. The proportionality test, said the court, has three elements: first, the measures adopted must not be unfair, arbitrary or irrational; second they should impair the right or freedom as little as possible; third, there must be a proportionality between the effect of the measures which infringe the right or freedom and the objective of the measures.

Applying these tests, the court in *Park Ross* held[24] that the objective of the Act which authorised the search and seizure in issue was sufficiently important to justify limiting the constitutionally-protected right of privacy. The court then turned its attention to

---

21 Ibid at 214F.

22 *In Qozeleni v The Minister of Law and Order* 1994 (1) BCLR 75 (E); *Phala v The Minister of Safety and Security* 1994 (2) BCLR 89 (W).

23 (1986) 26 DLR (4th) 200.

24 Above n 20 at 217D.

whether the search and seizure provisions of the Act impaired the right of privacy no more than was necessary to achieve the objective of the Act. On this issue, the court looked for guidance to the Canadian decision in *Hunter v Southam*[25] which held that, to be "reasonable", there must have been a prior authorisation of the search and seizure, usually in the form of a warrant, by an impartial and independent person who was bound to act judicially in so doing. The court noted[26] that the need for judicial authorisation is also recognised in the United States, and indeed also in South Africa in terms of the Criminal Procedure Act no 51 of 1977, which requires search and seizures of property to be authorised by a magistrate or justice of the peace on information given under oath.

Applying these principles to the facts before it, the court in *Park-Ross* held that the search and seizure provisions in the Serious Economic Offences Act were unconstitutional on the grounds that there had been no prior authorisation of the search by an impartial arbiter.[27] The director of the Office for Serious Economic Offences, said the court, could not fulfil that role, and it would accord with the spirit of the Constitution if the necessary prior authorisation were obtained from a magistrate or judge in chambers on the basis of an application which, at the very least, set out under oath the suspicion giving rise to the inquiry and the need for a search and seizure. The court held, further,[28] that the provision of the Serious Economic Offences Act which authorised the copying of any book or document found on the premises and the requesting of an explanation regarding entries therein was unconstitutional, because it did not exclude the use of evidence so obtained from use in any subsequent criminal proceedings.

The decision in *Park-Ross* held that:[29]

> it must ... be accepted that for the purpose of the preservation of law and order and the proper investigation and combating of crime, as well as for the protection of society and the rights of the members of that society, searches may have to occur at times and be permissible even if privacy is affected thereby. It must also be accepted that pursuant to a permissible search, property including documents and books, of the person whose premises are searched, may be seized and removed.

---

25 (1985) 14 SCC (3d) 97 SCC.

26 Above n 20 at 219B.

27 Ibid at 220D.

28 Ibid at 221A.

29 Ibid at 216E.

Accordingly, the court held[30] that, applying the criteria laid down in *R v Oakes*, the objective of the Serious Economic Offences Act was sufficiently important to justify limiting the constitutionally-protected right to privacy, but that the search and seizure provisions in their present form were in conflict with the Constitution.[31]

There are differences in the respective objectives of the Serious Economic Offences Act and the Income Tax Act. The decision in *Park-Ross* was concerned only with the former, and it should not be assumed that an inquiry into the constitutionality of the search and seizure provisions of the latter Act will run in the same tracks to precisely the same conclusion. In particular, the application of the proportionality test mandated by the decision in *R v Oakes* may lead to a different result. Liability for income tax is a form of civil liability incurred by the taxpayer toward the State, and it may be that a court would hold that prospective civil liability justifies a less radical incursion into rights and freedoms than an attempt to garner evidence for a criminal prosecution. On the other hand, tax evasion is also a crime, and the search and seizure provisions might be justified in terms of the inquiry into a prospective criminal prosecution for common law fraud or statutory tax evasion, rather than merely a tax-collection measure.

The approach of the court in *Park-Ross* is consistent with decisions on the interpretation of the Fourth Amendment of the Constitution of the USA, which refers to the right not to be subjected to "unreasonable searches and seizures". Although the Fourth Amendment does not explicitly require the prior issue of a warrant, the courts of the United States have consistently held that, to be "reasonable", searches of a home must, unless done with consent or in exigent circumstances, be done pursuant to a warrant,[32] and that a neutral person must decide whether to issue a warrant.[33]

The right to lawful and fair administrative action

Section 24 of South Africa's interim Constitution provides that:

> Every person shall have the right to -

---

30 Ibid at 217D.

31 Ibid at 222E.

32 *See Steagold v United States* 451 US 204 (1981) at 211.

33 *Johnson v United States* 333 US 10 at 13.

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;
(b) procedurally fair administrative action ...;
(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests ...

Internationally, the constitutional entrenchment of the right to administrative justice is a rarity. The likely impact of s 24 is a matter of intense debate in South Africa. It is, however, clear that, subject only to the general limitation clause in the Constitution, the section blocks any legislative ouster of judicial review of administrative action.

The common law of South Africa has always recognised the judicial reviewability of administrative decisions, but only on the narrow ground that the person in question had exercised a discretionary power mala fide or without properly applying his mind to the matter. The provisions of the Bill of Rights, quoted above, are far broader than these common law principles.[34] However, the removal from the Income Tax Act of almost all the provisions which gave the Commissioner a non-appealable discretionary power has greatly reduced the area within which review will be a significant remedy. Almost all challenges to the exercise of the Commissioner's powers can now take place in terms of the provisions of the Income Tax Act relating to appeal, as opposed to review, or by way of a constitutional review.

In litigation with a taxpayer, the revenue authorities frequently invoke the secrecy provisions of the Income Tax Act to avoid the disclosure of documents or information. The courts have always had a discretion to order the revenue authorities to disclose information, despite those secrecy provisions.[35] The administrative justice and equality clauses of the interim Constitution will now take the issue out of the realm of pure judicial discretion and make it justiciable in terms of the Constitution.

Reverse onus

In the criminal law context, there have already been constitutional challenges in South Africa to statutory provisions in which the onus

---

34 For an analysis of s 24 see de Ville, "The Right to Administrative Justice: an Examination of Section 24 of the Interim Constitution" (1995) 2 SAJHR 264.

35 *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD) at 458C.

of proof has been cast onto the accused. The challenge has been mounted under s 25(3) of the interim Constitution which entrenches the right to a fair trial, including the presumption of innocence. Prior to the Bill of Rights, statutory incursions into the presumption of innocence were legion, many of them taking the form of a reverse onus of proof. In a series of cases, the Constitutional Court has held such provisions to be in conflict with the Bill of Rights.[36] For example, the Criminal Procedure Act[37] provides that when an offence has been committed for which any corporate body is liable to prosecution, any director or servant of the corporate body is guilty of an offence, unless he or she proves that he or she did not take part in the commission of the offence and could not have prevented it. In *S v Eckert*[38] the court accepted, but did not have to decide, that this provision is probably unconstitutional.

The South African Income Tax Act contains a general provision that, in any objection to an income tax assessment, the onus of proving the assessment wrong rests on the taxpayer.[39] The standard of proof is the civil standard, namely a balance of probabilities. The Income Tax Act contains other provisions which place the onus of proof on the taxpayer in specific situations. Most notably, the general anti-avoidance provision of the Act stipulates that, if a transaction has the effect of avoiding tax, the taxpayer is presumed to have entered into it for the purpose of avoiding tax, unless he or she proves the contrary. (Proof of such a purpose is a prerequisite for the implementation of the anti-avoidance powers of the Commissioner, as laid down in the section.) The constitutionality of such reverse onus provisions in the realm of income tax has not yet come under challenge.

Such a constitutional challenge could not be brought under the provisions of the Bill of Rights which guarantee the right to a fair trial and the presumption of innocence, as these provisions are applicable only to criminal proceedings.[40] The challenge will

---

36 For a compendium of the decisions on this issue, see Mosikatsana, (1996) 12 SAJHR 125.

37 Act 51 of 1977.

38 1996 (2) BCLR 208 (SE).

39 Income Tax Act, s 82.

40 *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) at 210I.

probably be brought in terms of the constitutional right to equality before the law and to procedurally fair administrative action.[41]

Conclusion

Prior to South Africa's first democratic elections in 1994, taxpayers' rights were scarcely on the agenda. Since those elections, and as part of the move to inculcate a "culture of rights" amongst the citizenry, there has been recognition of the need to establish some kind of charter of taxpayers' rights, although the exact form that such a charter will take is not yet clear. But the major impetus for legally enforceable taxpayers' rights will come from the interim (and later, the final) Constitution.

41 *See Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD) at 444F.