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*TAX ADMINISTRATION ACT***

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**"PAY NOW, ARGUE LATER" RULE – BEFORE AND AFTER THE TAX  
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**C Keulder\***

## **1 Introduction**

The levying of taxes is imperative for a government to ensure that it achieves its economic objectives<sup>1</sup> which, amongst others, include the economic development of the country and regulating the levels of employment.<sup>2</sup> The South African Revenue Service (SARS) is empowered to administer and collect taxes in South Africa,<sup>3</sup> and value-added tax (VAT) is one of the forms of tax collected by SARS.<sup>4</sup>

VAT is collected by registered vendors<sup>5</sup> on the supply of goods and services in South Africa and on the importation of goods and services to South Africa.<sup>6</sup> VAT is therefore concerned with the consumption of goods and services in South Africa.<sup>7</sup> In terms of the VAT system, the vendor may deduct:<sup>8</sup>

tax incurred on enterprise inputs (input tax) from the tax collected on supplies made by the enterprise (output tax).

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<sup>1</sup> Croome *Taxpayer's Rights* 1.

<sup>2</sup> Croome *Taxpayer's Rights* 3.

<sup>3</sup> Sections 3 and 4 of the *South African Revenue Service Act* 34 of 1997.

<sup>4</sup> Silver and Beneke *VAT Handbook* 3. Even though the "pay now, argue later" rule relates to all forms of tax, the focus in this article will be on VAT, because the application of the "pay now, argue later" rule is similar irrespective of the form of tax.

<sup>5</sup> Silver and Beneke *VAT Handbook* 13. S 1 of the *Value-Added Tax Act* 89 of 1991 (hereafter "the VAT Act") indicates that a "vendor" is a person registered or obliged to be registered. S 23 of the VAT Act furthermore indicates that a person must register, or is obliged to register, when the total value of the taxable supplies made by a person who is carrying on an enterprise, exceeded R1 million during the 12-month period ending that month or where there are reasonable grounds for supposing that the taxable supplies will exceed R1 million in the next 12 months. See also Silver and Beneke *VAT Handbook* 157.

<sup>6</sup> Section 7 of the VAT Act.

<sup>7</sup> SARS *Guide for Vendors* 8.

<sup>8</sup> SARS *Guide for Vendors* 9. See Silver and Beneke *VAT Handbook* 15 for a discussion on input and output tax.

This has the effect that a vendor acts as an agent by collecting tax on behalf of the government<sup>9</sup> and paying the balance, being the difference between the input and output tax, over to SARS.<sup>10</sup> This balance is calculated by means of self-assessment.<sup>11</sup> It is, however, possible that SARS may furnish the vendor with an assessment when a taxpayer does not furnish a return as required or if SARS is not satisfied with the furnished return.<sup>12</sup>

If a taxpayer is aggrieved by an assessment issued by SARS, the taxpayer may lodge an objection to the assessment.<sup>13</sup> The commissioner may then either alter the assessment or disallow the objection<sup>14</sup> and inform the taxpayer of the decision.<sup>15</sup>

Thereafter, if the taxpayer is dissatisfied with the commissioner's decision, he or she may appeal against the decision.<sup>16</sup> After an appeal is lodged, the dispute can be referred to alternative dispute resolution (ADR), the Tax Board or the Tax Court.<sup>17</sup>

Owing to SARS's duty to collect tax, it is afforded certain powers by the legislature to effect efficient and speedy collection of taxes<sup>18</sup> and restrict the ability of taxpayers to use the objection or appeal procedures to vexatiously delay the payment of their taxes.<sup>19</sup> One of these powers is the "pay now, argue later" rule. The "pay now, argue later" rule was provided for in terms of section 36 of the VAT Act<sup>20</sup> and is currently provided for in terms of section 164 of the *Tax Administration Act*.<sup>21</sup>

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<sup>9</sup> SARS *Guide for Vendors* 8.

<sup>10</sup> SARS *Guide for Vendors* 55.

<sup>11</sup> Silver and Beneke *VAT Handbook* 205.

<sup>12</sup> Sections 31(1)(a) and (b) of the VAT Act. S 31(1) stipulates other circumstances when SARS can issue an assessment. For the purposes of this article s 31(1)(a) and (b) are of relevance.

<sup>13</sup> Section 32(b) of the VAT Act.

<sup>14</sup> Section 31(4) of the VAT Act.

<sup>15</sup> Section 31(4) of the VAT Act.

<sup>16</sup> Section 33(1) of the VAT Act. S 33(1) furthermore states that time periods prescribed in s 107A relating to appeals will also apply to appeals in terms of the VAT Act.

<sup>17</sup> See s 33, 33A of the VAT Act and SARS *Dispute Resolution* 13.

<sup>18</sup> Muller *Wealth Transfer* 63.

<sup>19</sup> *Capstone 556 (Pty) Ltd v CSARS* 2011 ZAWCHC 297 para 9 – hereafter "Capstone".

<sup>20</sup> Hereafter referred to as "the section 36 rule".

<sup>21</sup> *Tax Administration Act* 28 of 2011 – hereafter "the TAA".

In accordance with the "pay now, argue later" rule, a taxpayer who disputes the assessed amount payable to SARS will still be obliged to pay this amount – even though an objection to the assessment has been lodged. This obligation is furthermore not suspended when an appeal against a disallowance is lodged.<sup>22</sup>

If section 34 of the *Constitution*,<sup>23</sup> which affords every person the right of access to court, is borne in mind, the question arises whether this rule is constitutional or not, as it seems not to allow access to the court before payment is made.<sup>24</sup> On the other hand, if the "pay now, argue later" rule were not implemented by SARS, there would be an incentive for a taxpayer to dispute an assessment, which the taxpayer would not otherwise have done.<sup>25</sup> This might lead to frivolous objections<sup>26</sup> which could cause SARS and the South African government to experience dire financial constraints.

It is therefore clear that a balance between a taxpayer's rights and SARS's duty to effectively collect tax must be achieved. In the matter of *Metcash Trading Ltd v Commissioner for the South African Revenue Service*,<sup>27</sup> the Constitutional Court held that such a balance had in fact been achieved and thus declared the "pay now, argue later" rule relating to VAT to be constitutionally sound. In view of the principle of *stare decisis*,<sup>28</sup> this Constitutional Court decision is binding on all courts, unless it can be shown that the court erred.<sup>29</sup>

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<sup>22</sup> Section 105 of the TAA, which was promulgated on 4 July 2012, provides that the "pay now, argue later" rule is applicable to an objection to an assessment and the lodging of an appeal against the disallowance of an objection. The Act will come into operation on a date to be determined by the president by proclamation in the *Government Gazette*, as indicated in s 272 of the Act. See Pato and Spira 2009 [www.saica.co.za](http://www.saica.co.za) on the amendments of s 88 of the *Income Tax Act* 58 of 1962, which section is similar to s 36 of the VAT Act.

<sup>23</sup> *Constitution of the Republic of South Africa*, 1996 – hereafter "the *Constitution*".

<sup>24</sup> See 2.4.2 herein.

<sup>25</sup> *Arnold Opinion*.

<sup>26</sup> *Arnold Opinion*.

<sup>27</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC) – hereafter "*Metcash Trading Ltd (CC)*".

<sup>28</sup> See Hahlo and Kahn *South African Legal System* 213 for a discussion regarding the authority given to past judgments.

<sup>29</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 1 BCLR 1 (CC) para 8.

Despite the fact that the section 36 rule has been found to be constitutionally sound, the present article argues that it poses some constitutional and other problems, and, accordingly, that there might be sufficient grounds for the courts to deviate from this precedent. The article further discusses whether the section 164 rule corrects the constitutional problems experienced with the section 36 rule.

In order to fully appreciate the section 164 rule, it is essential to discuss in detail the section 36 rule and the effect thereof. Firstly, the contextual setting of the section 36 rule is explored, and, thereafter the constitutionality of the section 36 rule is investigated. This investigation is conducted with specific reference to *Metcash Trading Ltd v Commissioner for the South African Revenue Service*,<sup>30</sup> in which the courts had to deal with a constitutional attack on section 36 of the VAT Act.

After the discussion of the section 36 rule, the focus of this article will shift to the section 164 rule. Here it will be determined whether the section 164 rule addresses the problems experienced with the section 36 rule.

## 2 Section 36 rule

### 2.1 Content

Section 36 states that the payment of tax will not be suspended pending an objection or an appeal unless the commissioner directs otherwise.<sup>31</sup> A taxpayer desiring suspension of the payment of tax can, however, request a suspension.<sup>32</sup>

The commissioner can deny a taxpayer's request, or revoke the decision to suspend the payment of tax, if he or she is satisfied that the objection or appeal is frivolous,

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<sup>30</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2002 2 SA 232 (W) – hereafter "Metcash Trading Ltd (W)".

<sup>31</sup> Section 36(1) of the VAT Act.

<sup>32</sup> Section 36(2) of the VAT Act. See 2.4.4.1 herein regarding factors that the commissioner may consider in deciding whether to grant a suspension or not. These factors were inserted by way of the *Taxation Laws Second Amendment Act* 18 of 2009 – hereafter "the TLSA".

is being used as a dilatory tactic or because material changes have occurred since the suspension was granted.<sup>33</sup>

It must be noted that in the event of the objection or appeal being successful an adjustment, including interest,<sup>34</sup> will be made.<sup>35</sup> Even though the payment of interest is to be welcomed,<sup>36</sup> it must be pointed out that this may not prevent the taxpayer from experiencing financial ruin if he or she has to pay the assessed amount pending an appeal.<sup>37</sup>

## ***2.2 Contextual setting***

In order to appreciate the extent of the section 36 rule, the context in which the "pay now, argue later" rule is applied must be considered, as the "pay now, argue later" rule is not applied in isolation. The consequences if a taxpayer fails to pay the assessed amount pending an objection or an appeal are relevant, as SARS is afforded further powers to enforce the collection of taxes due.

If the taxpayer does not honour his or her obligation to pay tax pending an objection or an appeal against a disallowance, SARS may, firstly, implement the statement procedure as provided for in section 40(2)(a) of the VAT Act.<sup>38</sup>

In terms of this procedure, the commissioner may file a statement indicating the outstanding tax, interest or penalty payable, with the clerk or registrar of a

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<sup>33</sup> Section 36(4) of the VAT Act.

<sup>34</sup> See SARS 2011 [www.sars.gov.za](http://www.sars.gov.za) regarding the interest rates.

<sup>35</sup> Section 36(5) of the VAT Act. In these circumstances, SARS will issue a revised assessment.

<sup>36</sup> Temkin 2012 [www.businessday.co.za](http://www.businessday.co.za).

<sup>37</sup> Tsikwe and Schultz 2011 [www.saica.co.za](http://www.saica.co.za).

<sup>38</sup> Section 91(1)(a) of the *Income Tax Act* 58 of 1962 and s 114(1)(a)(ii) of the *Customs Act* 90 of 1964 contain a similar provision.

competent court. The filing of the statement has the effect of a civil judgment,<sup>39</sup> which enables the commissioner to obtain a writ to attach and sell property.<sup>40</sup>

Secondly, SARS may appoint a third party to act as an agent for the taxpayer. This third party would then be required to make payment of taxes from money held by the third party on behalf of the taxpayer.<sup>41</sup>

In the matter of *Hindry v Nedcor Bank Ltd*,<sup>42</sup> the constitutionality of appointing a third party as an agent of a taxpayer was tested.<sup>43</sup> Wush J<sup>44</sup> held that the appointment of a taxpayer's agent is necessary for the speedy collection of taxes, and as a weapon of great importance to the state, and consequently declared the appointment of a taxpayer's agent constitutional.

Consequently, a taxpayer's failure to pay tax pending an objection or an appeal against a disallowance may result in SARS obtaining a civil judgment or ordering a third party to act as an agent of the taxpayer. The "pay now, argue later" rule, on its own, does not guarantee the effective collection of taxes but the enforcement procedures are such that SARS is assured of effectively collecting taxes.

The need for SARS to be able to collect taxes efficiently and effectively is freely acknowledged, but it is important that a taxpayer's constitutional rights as a taxpayer should also be considered.

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<sup>39</sup> Section 40(2)(a) of the VAT Act. See Brincker and Louw Date Unknown [www.saipa.co.za](http://www.saipa.co.za) and Silke 2002 *Acta Juridica* 282-334, 293, regarding the filing of a statement by SARS.

<sup>40</sup> *Capstone* para 37. In *Metcash Trading Ltd* (CC) 1138, the court held the statement procedure to be constitutional, as the execution of the civil judgment necessitates the intervention of court officials. Accordingly a taxpayer's right of access to the courts remains intact.

<sup>41</sup> Section 47 of the VAT Act.

<sup>42</sup> *Hindry v Nedcor Bank Ltd* 1999 2 All SA 38 (W) – hereafter "*Hindry*". See Silke 2002 *Acta Juridica* 304, and Olivier and Croome *Tax Administration* 233, for a further discussion of the *Hindry* decision.

<sup>43</sup> The *Hindry* decision dealt with the appointment of a taxpayer's agent in terms of s 99 of the *Income Tax Act* 58 of 1962. The wording of s 99 of the *Income Tax Act* 58 of 1962 and s 47 of the VAT Act is similar, however.

<sup>44</sup> *Hindry* 63. See Van Schalkwyk 2004 *Meditari Accountancy Research* 185, 195.

### 2.3 A taxpayer's right of access to the courts

With the enactment of the *Interim Constitution*<sup>45</sup> and the *Constitution*, South Africa changed from a parliamentary state<sup>46</sup> to a constitutional state.<sup>47</sup> As a constitutional state, where the *Constitution* is supreme, anyone may challenge the constitutionality of any conduct or law.<sup>48</sup> This principle is enshrined in section 34 of the *Constitution*, which provides as follows:<sup>49</sup>

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

This section guarantees the right of access to a court or other tribunal, the right to a fair public hearing,<sup>50</sup> and impartiality and independence by the tribunal or forum.<sup>51</sup> Ackermann J in *Bernstein v Bester*<sup>52</sup> correctly held that an object of this right was, amongst others, "the separation of the judiciary from the other arms of the state".

In *Chief Lesapo v North West Agricultural Bank*,<sup>53</sup> the court indicated that another object of section 34 is to ensure a peaceful and orderly society "without resorting to self-help". The court further elaborated by stating that "no one is entitled to take the law into her or his own hands".<sup>54</sup>

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<sup>45</sup> *Interim Constitution of the Republic of South Africa Act 200 of 1993*.

<sup>46</sup> In a parliamentary state, parliament has the power to enact any law, whilst no one, including the courts, has the authority to challenge the law. See Currie and De Waal *Bill of Rights* 3.

<sup>47</sup> See Currie and De Waal *Bill of Rights* 11.

<sup>48</sup> Currie and De Waal *Bill of Rights* 704. S 1(c) of the *Constitution* confirms that South Africa is a constitutional state, as it indicates that South Africa is founded on the supremacy of the *Constitution*.

<sup>49</sup> Section 34 of the *Constitution*.

<sup>50</sup> The right ensures that "due process" is followed. See Currie and De Waal *Bill of Rights* 704. This right can also be linked to the right to administrative justice enshrined in s 33 of the *Constitution*.

<sup>51</sup> Currie and De Waal *Bill of Rights* 704.

<sup>52</sup> *Bernstein v Bester* 1996 2 SA 751 (CC) 804.

<sup>53</sup> *Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC) 1429 – hereafter "Chief Lesapo".

<sup>54</sup> *Chief Lesapo* 1436.

The fact that the right of access to the court protects against self-help is further supported by Cheadle, Davis and Haysom, and by Jazbhay, who are of the opinion that self-help contravenes the right of access to the courts.<sup>55</sup> Jazbhay furthermore indicates that this concept of self-help could be described as becoming a judge in a matter to which one is a party.<sup>56</sup>

In *Chief Lesapo*<sup>57</sup> the court emphasised that section 34 of the *Constitution* is of great importance to prevent self-help and "[a]s a result, very powerful considerations would be required for its limitation to be reasonable".<sup>58</sup>

Would SARS's duty to effect the speedy collection of tax therefore create a powerful consideration such as was envisaged by the court in *Chief Lesapo*? This article will now deal with the constitutionality of the section 36 rule, with specific reference to *Metcash Trading Ltd*.<sup>59</sup>

## 2.4 **Constitutional attack**

### 2.4.1 *General principles*

It is necessary to focus briefly on some general principles relating to constitutional evaluation.

The right of access to the courts contained in the Bill of Rights is not absolute and may, in accordance with section 36 of the *Constitution*, be limited if the limitation is reasonable and justifiable. The application of section 36 can be divided into two stages.

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<sup>55</sup> Cheadle, Davis and Haysom *Constitutional Law* 620; Jazbhay 2000 [www.legalcity.net](http://www.legalcity.net).

<sup>56</sup> Jazbhay 2000 [www.legalcity.net](http://www.legalcity.net).

<sup>57</sup> *Chief Lesapo* 1429.

<sup>58</sup> The reasonable limitation indicated by the court refers to the fact that, in terms of s 36 of the *Constitution*, a right may be limited if the limitation is reasonable. See 2.4.1 herein.

<sup>59</sup> *Metcash Trading Ltd (W)* and *Metcash Trading Ltd (CC)*.

Firstly, it must be proved by the applicant – in this instance, a taxpayer – that a constitutional right has been limited.<sup>60</sup> This would require the person to show that the situation for which he or she seeks constitutional protection falls within the ambit of the particular constitutional right,<sup>61</sup> and that the right or practice he or she wishes to challenge impedes the exercise of the protected activity.<sup>62</sup> Only then will the court move to the second stage.

In this instance (namely that of a taxpayer), an assessed amount that has been questioned, either by way of objection or appeal, will still be due and payable and SARS's right to recover the money from the taxpayer will not be stayed. It seems that a taxpayer's right against self-help, as embodied in section 34 of the *Constitution*, will be restricted by the application of the section 36 rule, as SARS can enforce the statement procedure or declare a third party an agent of the taxpayer. The court will therefore be able to move on to the second stage.

The second stage examines whether the limitation is a reasonable and justifiable limitation based on the concepts of human dignity, equality and freedom.<sup>63</sup> In order to ascertain whether or not the limitation is reasonable and justifiable, the court must consider the nature and extent of the limitation, the importance of the purpose of the limitation, as well as the relation between the limitation and the said purpose. Furthermore, the court must consider if there are less invasive means available, and must also consider the nature of the right that is being limited.<sup>64</sup>

If it is a reasonable and justifiable limitation, the impediment will be allowed. In the event that it is not reasonable and justifiable, the practice will be unconstitutional.

Section 36 of the *Constitution* sets out factors which the court has to take into consideration when determining if a limitation is reasonable and justifiable. These

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<sup>60</sup> Woolman and Botha "Limitations" 34-4.

<sup>61</sup> Woolman and Botha "Limitations" 34-4.

<sup>62</sup> Woolman and Botha "Limitations" 34-5.

<sup>63</sup> Section 36(1) of the *Constitution*.

<sup>64</sup> Section 36(1)(a)-(e) of the *Constitution*.

factors must not be seen as comprising a check list, but rather as part of a balancing act.<sup>65</sup> When weighing up these factors, the following dictum must be kept in mind:<sup>66</sup>

[T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other.

When a court has to deal with the constitutionality of the section 36 rule, it will have to weigh the purpose, effect and importance of the "pay now, argue later" rule against the nature and effect of this rule on a person's right of access to the courts.

The purpose of the "pay now, argue later rule" is to effect the speedy collection of taxes.<sup>67</sup> These taxes are used to improve the country's economic development and to regulate levels of employment.<sup>68</sup> With the "pay now, argue later" rule, SARS can reduce the number of frivolous objections and guarantee that the treasury will not be prejudiced by a delay in payments.<sup>69</sup> On the other side of the scale will be the impact of the "pay now, argue later" rule on the right of access to the courts, as the taxpayer is *prima facie* obliged to pay the assessed amount before approaching the court.

The *Metcash Trading Ltd* judgment is now discussed with these general principles in mind.

## 2.4.2 Metcash Trading Ltd

### 2.4.2.1 Facts

SARS served an assessment in the amount of R266 million, in terms of section 31(1) of the VAT Act, on the applicant.<sup>70</sup> The applicant objected to this assessment, but

<sup>65</sup> *S v Manamela* 2000 3 SA 1 (CC) 19.

<sup>66</sup> *S v Bhulwana* 1995 ZACC 11.

<sup>67</sup> Muller *Wealth Transfer* 63.

<sup>68</sup> Croome *Taxpayer's Rights* 3.

<sup>69</sup> *Metcash Trading Ltd* (CC) 29.

<sup>70</sup> *Metcash Trading Ltd* (W) 320. This amount included penalties, additional tax and interest.

the objection was disallowed by SARS.<sup>71</sup> The applicant was also notified that, if he did not effect payment, SARS would implement its summary procedure.<sup>72</sup>

Metcash, in response, approached the High Court on an urgent basis. A consent order was granted to the effect that the applicant must lodge an application before a specific date to have sections 36, 40(2)(a) and 40(5) of the VAT Act declared contrary to sections 25(1) and 34 of the *Constitution*.<sup>73</sup> SARS undertook not to enforce the summary procedure before the specific date.

#### 2.4.2.2 Court *a quo*

The question before the court *a quo* was whether sections 36, 40(2)(a) and 40(5) of the VAT Act were in conflict with sections 25(1) and 34 of the *Constitution*. The applicant did not pursue any argument regarding the possible infringement of a person's right to property as contained in section 25(1) of the *Constitution*.<sup>74</sup> Accordingly, the court had to deal only with the effect that the sections of the VAT Act had on a person's right of access to the courts.

In her judgment Snyders J<sup>75</sup> referred to *Chief Lesapo* and stipulated that the infringement of a constitutional right cannot be justified by the merits of a specific case. The test is therefore objective. Snyders J<sup>76</sup> held that the summary procedure does infringe on a taxpayer's right of access to the courts, as SARS acts as a substitute for the court by determining every aspect of the vendor's liability and enforcement thereof. Further, she held that all interlocutory relief by the court is precluded by this section.<sup>77</sup> She elaborated by stating that:<sup>78</sup>

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<sup>71</sup> *Metcash Trading Ltd* (W) 321.

<sup>72</sup> As contained in s 40(2) of the VAT Act. S 91(1) of the *Income Tax Act* 58 of 1962 contains a similar provision. The statement procedure forms part of the summary procedure. See 2.2 herein for a discussion of the statement procedure.

<sup>73</sup> *Metcash Trading Ltd* (W). For the purposes of this article, the focus is on the "pay now, argue later" rule contained in s 36 of the VAT Act.

<sup>74</sup> *Metcash Trading Ltd* (W) 322.

<sup>75</sup> *Metcash Trading Ltd* (W) 322.

<sup>76</sup> *Metcash Trading Ltd* (W) 327.

<sup>77</sup> *Metcash Trading Ltd* (W) 327.

<sup>78</sup> *Metcash Trading Ltd* (W) 327.

[t]he prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then.

Accordingly, the first stage of the constitutional evaluation was successful and the court moved on to examine whether the said infringement was reasonable and justifiable.

The commissioner argued that a reasonable and justifiable limitation was created for the following reasons, amongst others:

- frivolous objections would be made to delay the payment of taxes;
- fraudulent and dishonest tax returns would be encouraged;
- South Africa could not afford a situation where taxpayers do not pay promptly.<sup>79</sup>

The court held that a delay *in casu* would not have such a big impact, considering the greater scheme of national tax.<sup>80</sup> It was further held that the limitation of a person's right of access to the court was extensive and that, even though it might be only temporary in nature, the effect could be ominous and permanent.<sup>81</sup> The limitation was accordingly held not to be reasonable and justifiable.

The statement procedure,<sup>82</sup> the "pay now, argue later" rule<sup>83</sup> and denial of the right to challenge the correctness of the assessed amount on the statement<sup>84</sup> were consequently declared invalid in the court *a quo* and the matter was referred to the Constitutional Court for confirmation.<sup>85</sup>

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<sup>79</sup> *Metcash Trading Ltd* (W) 327.

<sup>80</sup> *Metcash Trading Ltd* (W) 328.

<sup>81</sup> *Metcash Trading Ltd* (W) 328.

<sup>82</sup> Section 40(2) of the VAT Act.

<sup>83</sup> Section 36 of the VAT Act.

<sup>84</sup> Section 40(5) of the VAT Act.

<sup>85</sup> *Metcash Trading Ltd* (W) 330. In terms of s 167(5) of the *Constitution*, the Constitutional Court has to confirm an order declaring legislation invalid before the order comes into effect. See also Editor February 2000 *Taxgram* 1-3; Silke 2002 *Acta Juridica* 310; Olivier 2001 *TSAR* 194; Vorster 2001 *De Rebus* 47-47; Moodley Date Unknown nattymoodley.com; Olivier and Croome *Tax Administration* 223.

#### 2.4.2.3 Constitutional Court

The minister of finance and the commissioner for SARS opposed confirmation of the order granted in the court *a quo*.<sup>86</sup> They argued that the limitation was reasonable and justifiable as there were adequate opportunities for a taxpayer to have a hearing on the assessment.<sup>87</sup>

Metcash supported the ruling and reasoning of Snyders J in the court *a quo*.<sup>88</sup> It contended that the opportunities for a "hearing" on the assessment referred to by the respondent were insufficient, as the taxpayer was in effect compelled to pay and hope that he or she would get the money back at a later stage.<sup>89</sup> The applicant submitted that there were less invasive means available to SARS to effect the speedy collection of taxes.<sup>90</sup> These means included the imposition of higher interest rates, time-linked penalties and the furnishing of security.<sup>91</sup>

The court indicated that section 36(1) had two objectives, namely to ensure that the obligation of an aggrieved taxpayer to pay tax not be delayed pursuant to other remedies, and secondly that the necessary refunds be made later.<sup>92</sup> Kriegler J therefore held that the "pay now, argue later" rule was not concerned with access to the court and contained no provision ousting the court's jurisdiction.<sup>93</sup> He further elaborated on the functioning of the Special Tax Court and the fact that it functions like an ordinary court. The taxpayer would therefore have access to the courts by appealing to the Special Tax Court.<sup>94</sup>

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<sup>86</sup> *Metcash Trading Ltd* (CC) 6.

<sup>87</sup> *Metcash Trading Ltd* (CC) 6. These opportunities would entail the following: an objection to the assessment; requesting an extension to pay from the commissioner; if the commissioner refuses said extension, taking the matter on review by a relevant court; as well as appealing to the Special Tax Court.

<sup>88</sup> *Metcash Trading Ltd* (CC) 7.

<sup>89</sup> *Metcash Trading Ltd* (CC) 7.

<sup>90</sup> *Metcash Trading Ltd* (CC) 7.

<sup>91</sup> *Metcash Trading Ltd* (W) 329.

<sup>92</sup> *Metcash Trading Ltd* (CC) 7.

<sup>93</sup> *Metcash Trading Ltd* (CC) 18. See 4.2.4 herein for criticism of this point of view.

<sup>94</sup> *Metcash Trading Ltd* (CC) 25. See 4.2.4 herein for criticism regarding Kriegler's decision relating to the court's jurisdiction being ousted.

The court agreed with the commissioner that, in exercising his or her discretion in terms of section 36(1) of the VAT Act, his or her conduct constitutes administrative action which would be reviewable in terms of administrative law.<sup>95</sup> It was concluded that the court *a quo* had thus erred in holding that the court's jurisdiction was ousted.<sup>96</sup> In a unanimous decision, the Constitutional Court dashed the aggrieved taxpayer's hope by refusing to declare sections 36, 40(2)(a) and 40(5) unconstitutional.<sup>97</sup>

The court therefore held the section 36 rule to be constitutional, and furthermore held that this rule constitutes administrative action. The fact that the "pay now, argue later" rule constitutes administrative action means that a taxpayer may also utilise the review procedure<sup>98</sup> provided for by the *Promotion of Administrative Justice Act*<sup>99</sup> when dissatisfied with an assessment. Since the court held the "pay now, argue later" rule to be unconstitutional, utilising the review procedure might seem to be an alternative for an aggrieved taxpayer.<sup>100</sup>

#### 2.4.3 Constitutional problems

Vorster<sup>101</sup> correctly speculates that opinions may differ on the question of whether or not the judgment in *Metcash Trading Ltd* (CC) was correct. For the purposes of this article, two conflicting opinions are highlighted.

Croome agrees with the judgment and states that the fact that the taxpayer may approach a court on review of the matter ensures that the taxpayer has a right of access to the court.<sup>102</sup> He is further of the opinion that section 88 of the *Income Tax*

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<sup>95</sup> *Metcash Trading Ltd* (CC) 21. See Burns *Administrative Law* 19; Currie and Klaaren *Benchbook* 4; and De Ville *Judicial Review* 38 for a discussion of "administrative action".

<sup>96</sup> *Metcash Trading Ltd* (CC) 22.

<sup>97</sup> *Metcash Trading Ltd* (CC) 33. See also Editor December 2000 *Taxgram* 1-2; Editor February 2001 *Taxgram* 1-4.

<sup>98</sup> Moodley Date Unknown nattymoodley.com.

<sup>99</sup> *Promotion of Administrative Justice Act* 3 of 2000 – hereafter "PAJA".

<sup>100</sup> See 2.4.3 herein, where Olivier indicates that the fact that review proceedings are an option does not mean that a provision can be constitutional.

<sup>101</sup> Vorster 2001 *De Rebus* 47.

<sup>102</sup> Croome *Taxpayer's Rights* 40.

*Act*, which contains a similar provision, would also muster constitutional scrutiny.<sup>103</sup> Williams,<sup>104</sup> however, submits that it is not a foregone conclusion that the court would have come to the same conclusion in *Metcash Trading Ltd* (CC) had it been an income tax matter. This is because the court in *Metcash Trading Ltd* (CC) specifically drew a clear distinction between income tax and VAT and emphasised that the matter before it dealt with VAT and no other fiscal statute.<sup>105</sup> Firstly, the court indicated that VAT liability arises continuously, unlike income tax liability, which arises once an assessment has been issued.<sup>106</sup> Secondly, and more importantly, vendors act as collection agents on behalf of SARS;<sup>107</sup> hence VAT is money collected that is due to the state.<sup>108</sup> The calculation of VAT payments is therefore less complicated than that in respect of income tax.<sup>109</sup> This means that, in the case of income tax, the scope for conflict regarding the interpretation of the statute or accounting practices is far greater.<sup>110</sup> A dispute regarding a VAT assessment will often arise owing to adverse credibility findings by SARS.<sup>111</sup>

It is submitted that the *Metcash Trading Ltd* (CC) judgment was concerned only with the application of the "pay now, argue later" rule in relation to VAT and has no binding effect on other tax legislation. The considerations that influenced the court in arriving at this decision in relation to VAT would not necessarily lead to the same conclusion in relation to income tax matters.

On the other hand, unlike Croome, Olivier is of the opinion that the Constitutional Court erred on several counts in its judgment.

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<sup>103</sup> Croome *Taxpayer's Rights* 226. See also Croome 2001 *Business Day Professional* 6-6.

<sup>104</sup> Williams 2012 *Synopsis* 4-4.

<sup>105</sup> *Metcash Trading Ltd* (CC) 9, 10, 13. See also Olivier and Croome *Tax Administration* 224.

<sup>106</sup> *Metcash Trading Ltd* (CC) 9.

<sup>107</sup> See 1 herein.

<sup>108</sup> *Metcash Trading Ltd* (CC) 10.

<sup>109</sup> *Metcash Trading Ltd* (CC) 13. See 1 herein for an explanation of the VAT calculation.

<sup>110</sup> *Metcash Trading Ltd* (CC) 13. See also Williams 2012 *Synopsis* 4-5.

<sup>111</sup> *Metcash Trading Ltd* (CC) 13.

Firstly, she criticises Kriegler's view that the section 36 rule does not oust the jurisdiction of the court as a taxpayer may appeal to the Special Tax Court.<sup>112</sup> She indicates that the taxpayer never argued that the jurisdiction of the court is completely excluded, but that this rule excludes the jurisdiction of the court when the rule is invoked.<sup>113</sup>

On the basis of Olivier's criticism, it is submitted that the constitutional attack on the section 36 rule lies therein that the right of access to the courts, as contained in section 34 of the *Constitution*, aims to prevent self-help. The court should thus have examined whether this rule, at the time it is invoked, unreasonably permits SARS to "help itself" and become the judge in its own case. The question, therefore, should not be whether the taxpayer will have access to the courts at some stage, but rather whether the taxpayer will have the opportunity to access the courts before being obliged to pay the assessed amount.

Olivier further points out that, in theory, the possible judicial review of the commissioner's discretion not to suspend a taxpayer's payment pending an appeal does allow a taxpayer access to the courts, but, according to her, the grounds of review are fairly narrow.<sup>114</sup>

It must also be borne in mind that the remedies available when a court reviews the commissioner's discretion not to suspend payment are limited. In terms of section 8 of PAJA, the court can grant an order directing the commissioner to provide reasons or reconsider the decision. However, the court does not have the power to overturn the commissioner's decision.

The value of the review procedure is further diminished when the statement procedure in terms of section 40(2)(a) of the VAT Act is invoked,<sup>115</sup> as the taxpayer

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<sup>112</sup> *Metcash Trading Ltd (CC)* 18, 25. See also 4.2.3 herein.

<sup>113</sup> Olivier 2001 *TSAR* 196.

<sup>114</sup> Olivier 2001 *TSAR* 197. Unfortunately, it is not clear to the present writer what the basis of this statement by Olivier is.

<sup>115</sup> See 2.2 herein regarding the statement procedure.

may then not challenge the correctness of the statement in legal proceedings.<sup>116, 117</sup> With reference to the review procedure, Olivier also refers to *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*<sup>118</sup> where it was held that:<sup>119</sup>

the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights.

Therefore, there is still a duty on the legislature to ensure that provisions are constitutional, even though a decision can be taken on review.

Olivier also submits that, in both the High Court and the Constitutional Court, it was said on behalf of the respondents that this practice was implemented in other countries.<sup>120</sup> Snyders J, in the High Court, held that this did not persuade her that the South African provision is constitutional.<sup>121</sup> The Constitutional Court, however, came to a different conclusion.<sup>122</sup> It is unclear which countries served, or did not serve, as examples of this practice.<sup>123</sup>

Olivier furthermore indicates that, if legislation defined the grounds on which the commissioner would exercise his or her discretion to suspend payment pending an appeal, a person's right of access to the courts would be better protected.<sup>124</sup>

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<sup>116</sup> Section 40(5) of the VAT Act.

<sup>117</sup> Olivier 2001 *TSAR* 198. See also *Metcash Trading Ltd* (CC) 27 where the court discussed the limitation of the nature of the relief afforded to the taxpayer due to s 40(5) of the VAT Act.

<sup>118</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCR 837 (CC); Olivier 2001 *TSAR* 197.

<sup>119</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCR 837 (CC) para 48.

<sup>120</sup> *Metcash Trading Ltd* (W) 329 and *Metcash Trading Ltd* (CC) 30.

<sup>121</sup> *Metcash Trading Ltd* (W) 329.

<sup>122</sup> *Metcash Trading Ltd* (CC) 30.

<sup>123</sup> Olivier 2001 *TSAR* 199.

<sup>124</sup> Olivier 2001 *TSAR* 199. See 2.4.4.1 herein for a discussion on the guidelines used by the commissioner when exercising his or her discretion in terms of the "pay now, argue later" rule.

She concludes that the court did not deal with the argument raised by the applicant that there are less invasive ways to effect speedy collection of tax.<sup>125</sup> The possibility that there are less invasive ways to for SARS to achieve its objective is one of the factors the court would have had to consider in terms of section 36 of the *Constitution*.

#### 2.4.4 Post Metcash Trading Ltd (CC)

##### 2.4.4.1 Guidelines

After the Constitutional Court judgment, SARS issued Media Release 27. This release set out the circumstances in which the commissioner may exercise his or her discretion in suspending payment pending an appeal that might be decided in favour of the taxpayer. One such example was when payment of the whole amount would cause irreversible damage if the taxpayer's appeal were successful, and where the circumstances of the matter created reasonable doubt.<sup>126</sup>

The TLSA has further clarified the "pay now, argue later" rule by amending section 88 of the Income Tax Act and section 36 of the VAT Act.<sup>127</sup> The sections were amended to set out the factors that the commissioner may take into consideration when exercising his or her discretion to suspend a payment pending an appeal, and include the following:

- the amount involved;
- the taxpayer's compliance history;
- whether the taxpayer might alienate his or her assets during the postponement of payment;
- whether the taxpayer is able to provide adequate security for the payment of the assessed amount;

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<sup>125</sup> Olivier 2001 *TSAR* 199. This is one of the aspects the court has to take into consideration when weighing up rights in terms of s 36 of the *Constitution*. See 2.4.1 herein.

<sup>126</sup> See SARS *Media Release*.

<sup>127</sup> See Magolego 2009 [www.polity.org.za](http://www.polity.org.za).

- whether payment of the amount would cause irreparable financial hardship to the taxpayer;
- whether there are impending sequestration or liquidation proceedings;
- whether the taxpayer has failed to furnish requested information; and
- whether fraud is present.<sup>128</sup>

The guidelines provided after the decision in *Metcash Trading Ltd* (CC) assist in ensuring some legal certainty regarding whether a taxpayer would have to pay now and argue later or whether payment should be suspended pending an appeal.<sup>129</sup>

#### 2.4.4.2 Guideline problems

"[O]n-going confusion and misunderstandings" still persist, however, regarding the section 36 rule.<sup>130</sup> Rood<sup>131</sup> indicates that the commissioner is still the judge in a dispute to which he or she is a party. This means that SARS, as a party to the dispute, can decide whether the taxpayer may, for instance, possibly alienate assets and, if it is of the opinion that the taxpayer will alienate assets, can then proceed accordingly with collection proceedings.<sup>132</sup>

He furthermore indicates that it is unclear whether the fraud referred to in the amended section refers only to alleged fraud or to an actual fraud conviction. If an allegation of fraud is taken into consideration, this would be unfair, as the taxpayer will not have had the opportunity to defend himself or herself against the allegation.

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<sup>128</sup> Section 88 of the *Income Tax Act* 58 of 1962 and s 36 of the VAT Act. See also SARS Date Unknown [www.sars.gov.za](http://www.sars.gov.za); Pato and Spira 2009 [www.saica.co.za](http://www.saica.co.za); Croome 2011 [www.bericcroome.com](http://www.bericcroome.com); Edward Nathan Sonnenbergs 2009 [www.saica.co.za](http://www.saica.co.za); Goldberg De Villiers 2012 [www.goldbergdevilliers.co.za](http://www.goldbergdevilliers.co.za); Mukuwane Date Unknown [www.belldevwar.co.za](http://www.belldevwar.co.za); Daya and Gers 2011 [www.ens.co.za](http://www.ens.co.za); Sapa 2011 [mybroadband.co.za](http://www.mybroadband.co.za); and Williams 2012 *Synopsis* 6.

<sup>129</sup> See 2.4.3 herein where Olivier indicates that a taxpayer's rights would be better protected if the grounds on which the commissioner may decide to suspend payment pending an appeal or an objection were identified.

<sup>130</sup> Williams 2012 *Synopsis* 5.

<sup>131</sup> Rood 2009 *Finweek* 44.

<sup>132</sup> Rood 2009 *Finweek* 44.

The Act is furthermore silent as to the relative weight which should be attached to each of the above factors.<sup>133</sup> Moreover, the relevance of some of the factors is questionable.<sup>134</sup> For instance, is the fact that a large amount of tax is involved an indication that suspension of payment should be granted or refused?<sup>135</sup> The relevance of the possibility that the payment of the amount would cause irreparable financial hardship to the taxpayer is doubted by Williams, who thinks that the payment of any amount would be reparable by a damages award.<sup>136</sup> This might, however, not be the case when a taxpayer is rendered insolvent. The objection and appeal procedure may take a substantial amount of time, which could severely prejudice a taxpayer and even lead to the taxpayer's sequestration or liquidation.

In *Mokoena v CSARS*<sup>137</sup> and *Capstone*, the respective courts came to entirely different conclusions on a pertinent aspect of the rule.<sup>138</sup> In the former case the court held that while SARS is competent to demand payment of tax pending an objection or appeal based on the "pay now, argue later" rule it may not obtain judgment in the interim.<sup>139</sup> This decision was criticised in *Capstone*, as the filing of a statement does not amount to a judgment.<sup>140</sup> Binns-Ward J conceded that, even though it is not a judgment in the ordinary sense, it has the effect of a judgment, as SARS is able to obtain a writ of execution.<sup>141</sup>

It is apparent that, even though the "pay now, argue later" rule in terms of the section 36 rule was held to be constitutional and further guidelines were provided, the application of the "pay now, argue later" rule is still problematic.

With the enactment of the TAA, the "pay now, argue later" rule is provided for in terms of section 164 of the TAA. This article will now proceed to focus on the "pay

<sup>133</sup> Williams 2012 *Synopsis* 6.

<sup>134</sup> Williams 2012 *Synopsis* 6.

<sup>135</sup> Williams 2012 *Synopsis* 6.

<sup>136</sup> Williams 2012 *Synopsis* 6.

<sup>137</sup> *Mokoena v CSARS* 2011 2 SA 556 (GSJ) – hereafter "Mokoena".

<sup>138</sup> Williams 2012 *Synopsis* 5.

<sup>139</sup> *Mokoena* 559. The "judgment" referred to here is the filing of a statement in terms of s 40(2)(a) of the VAT Act. See 2.2 herein for a discussion of the statement procedure.

<sup>140</sup> *Capstone* 297 para 37.

<sup>141</sup> *Capstone* 297 para 37.

now, argue later" rule in terms of the TAA, and will attempt to determine if the problems experienced with the section 36 rule are addressed by the section 164 rule.

### **3 Section 164 rule**

#### ***3.1 The TAA***

The legislature began drafting the TAA in 2005<sup>142</sup> and it came into operation on 1 October 2012.<sup>143</sup> This act aims to "provide for the effective and efficient collection of tax".<sup>144</sup> It is therefore clear that the TAA was enacted to assist SARS in its duty to collect tax. This is achieved, amongst other ways, by "aligning the administration of the tax Acts".<sup>145</sup>

If a taxpayer is liable for the payment of tax in terms of a provision in a tax act, for instance the VAT Act, the tax administration will be done in terms of the TAA, except if the TAA is silent with regard to the administration in that instance.<sup>146</sup>

The TAA specifically deals with the situation of the payment of tax pending an objection or an appeal. Accordingly, since 1 October 2012 the "pay now, argue later" rule will be dealt with in terms of section 164 of the TAA.

#### ***3.2 Content***

Section 164 of the TAA stipulates that the obligation of a taxpayer to pay tax will not be suspended pending an objection or an appeal unless a senior SARS official indicates otherwise.<sup>147</sup> A taxpayer can request a senior SARS official to suspend the

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<sup>142</sup> Vanek 2012 [www.moneywebtax.co.za](http://www.moneywebtax.co.za).

<sup>143</sup> In terms of s 272 of the TAA, the president determined, by means of Proc 51 in GG 35687, that the TAA, except for certain provisions, would come into operation on 1 October 2012.

<sup>144</sup> Section 2 of the TAA.

<sup>145</sup> Section 2(a) of the TAA.

<sup>146</sup> Sections 4(1) and 4(2) of the TAA. If the TAA is silent with regard to the administration in a specific instance, the provisions of the relevant tax act will apply.

<sup>147</sup> Section 164(1) of the TAA.

payment if the taxpayer intends to lodge an objection or an appeal against an assessment.<sup>148</sup> The official will take into consideration the amount involved, the taxpayer's compliance history, whether the taxpayer might alienate his or her assets during the postponement of payment, the taxpayer's ability to furnish security, whether the payment pending an objection or an appeal would cause irreparable financial hardship, and if there are any imminent sequestration or liquidation proceedings pending. The official will also consider if the taxpayer has failed to furnish required information or if any fraud is involved.<sup>149</sup>

A taxpayer's request may be denied or a suspension may be revoked if the objection is frivolous or is used by the taxpayer simply to delay the payment of tax. Furthermore, the suspension can be revoked if a material change has occurred since the official decided to suspend payment.<sup>150</sup>

In terms of section 164(6), SARS is prohibited from invoking recovery proceedings for a period commencing on the day SARS receives a request for suspension, or a previously granted suspension is revoked, and ending ten business days after a notice of SARS's decision regarding suspension or revocation is issued. This means that, once the taxpayer has requested a suspension in terms of section 164(2), the enforcement proceedings<sup>151</sup> are prohibited until ten days after SARS has delivered its decision to reject a suspension request or revoke a suspension. SARS is, however, permitted to continue with the collection procedures if it has a reasonable belief that the taxpayer may alienate assets.<sup>152</sup>

In the event that an assessment is altered by SARS in accordance with an objection or an appeal, SARS will make a due adjustment.<sup>153</sup>

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<sup>148</sup> Section 164(2) of the TAA.

<sup>149</sup> Section 164(3) of the TAA. These factors mirror the guidelines enacted in terms of the TLSA. See 2.4.4.1 herein.

<sup>150</sup> Section 164(5) of the TAA.

<sup>151</sup> These enforcement proceedings can include, amongst others, the statement procedure and the appointment of a taxpayer's agent.

<sup>152</sup> Section 164(6) of the TAA.

<sup>153</sup> Section 164(7) of the TAA.

Accordingly, the "pay now, argue later" rule will still be applied by SARS, but now in terms of section 164 of the TAA. The section indicates factors that a SARS official may consider in suspending the payment of tax pending an objection or an appeal. Nevertheless, the enforcement of the tax due to SARS is initially suspended until ten days after SARS has decided whether or not to suspend the payment of tax.

### ***3.3 Contextual setting***

As with the section 36 rule,<sup>154</sup> the context in which the section 164 rule is applied is of importance. What, for instance, would the consequences be if the payment of tax pending an objection or an appeal were not suspended?

Like the section 36 rule, the section 164 rule affords SARS further powers to enforce the collection of taxes due. These powers include, amongst others, the appointment of a third party as an agent of the taxpayer<sup>155</sup> and the statement procedure.<sup>156</sup> Mention must also be made of the fact that section 172(2) specifically states that SARS may apply the statement procedure even though an objection or an appeal is lodged, unless a suspension has been granted.

It is, therefore, important to note that, if a taxpayer's obligation to pay tax pending an objection or an appeal is not suspended, SARS can actively take steps to enforce the collection of tax.

This leads one to ask if there are any substantive differences between the section 36 rule and the section 164 rule.

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<sup>154</sup> See 2.1 herein.

<sup>155</sup> Section 179 of the TAA. This section is similar to the s 47 procedure in terms of the VAT Act. See 2.2 herein for a brief discussion of this procedure.

<sup>156</sup> Section 172 of the TAA. This section is similar to the s 40(2)(a) procedure in terms of the VAT Act. See 2.2 herein for a brief discussion of this procedure.

### **3.4 Section 36 rule v section 164 rule**

Both rules provide for the practice of "pay now, argue later" and the wording of these two sections is similar. The section 164 rule deviates from the section 36 rule in only two respects.

Firstly, in terms of the section 164 rule, a senior SARS official has the authority to suspend the payment of tax, whilst with the section 36 rule only the commissioner had this authority.<sup>157</sup>

Secondly, section 164(6) of the TAA contains a unique section. In terms of this provision, SARS is prohibited from taking collection steps during the period of considering a suspension request and ten days after issuing a notice of denial or revocation of the suspension.<sup>158</sup>

It needs to be determined whether these changes in terms of section 164(6) of the TAA address the problems identified regarding the "pay now, argue later" rule in terms of section 36 of the VAT Act.<sup>159</sup>

### **3.5 Section 164 rule – addressing problems**

In the discussion on the constitutionality of the section 36 rule, certain problems were highlighted.<sup>160</sup> Further problems were then identified with the section 36 rule in the discussion of the problems arising after *Metcash Trading Ltd.*<sup>161</sup>

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<sup>157</sup> See 2.1 and 3.2 herein.

<sup>158</sup> Except if SARS believes that the taxpayer might alienate assets. See 3.2 herein and Vanek 2012 [www.moneywebtax.co.za](http://www.moneywebtax.co.za).

<sup>159</sup> See 2.4.3 and 2.4.4.2 herein.

<sup>160</sup> See 2.4.3 herein.

<sup>161</sup> See 2.4.4.2 herein.

### 3.5.1 *The constitutional problems*

Olivier's main points of criticism levelled at the section 36 rule are, firstly, that, at the time the rule is invoked, the court's jurisdiction is excluded. The question that arises from this criticism is if SARS is unreasonably permitted to become the judge in its own case by being able to enforce its collection procedures despite an objection or an appeal being lodged.<sup>162</sup> Secondly, Olivier indicates that there might be less invasive means available which will assist in achieving a balance between SARS's duty and the taxpayer's right of access to the courts.<sup>163</sup>

The fact that section 164(1) allows for a senior SARS official, instead of the commissioner of SARS, to suspend the payment of tax pending an objection or an appeal only has the effect that the commissioner's powers are delegated. It does not address the problem that SARS is permitted to enforce the collection of tax even though an objection or an appeal has been lodged. Furthermore, authorising a senior SARS official to consider suspending the payment does not make the procedure less invasive if the request to have the payment suspended is rejected. Therefore, the first change in terms of the "pay now, argue later" rule will not have a significant impact on a taxpayer's right of access to the courts.

The change in terms of section 164(6) of the TAA provides a taxpayer with a degree of legal certainty, because the taxpayer is guaranteed that SARS will not continue with any collection steps for a certain period, as the collection of tax is stayed for such a period. As a result, SARS will reach a decision regarding the request for suspending the payment pending an objection or an appeal as soon as possible to ensure that it can continue collecting tax rapidly.

It follows that SARS will have an incentive to reach a swift decision, namely to be able to proceed with enforcement as soon as a request for suspension is rejected. This could result in senior SARS officials not taking into account all relevant

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<sup>162</sup> See 2.4.3 herein.

<sup>163</sup> See 2.4.3 herein.

considerations<sup>164</sup> in determining whether payment pending an objection or an appeal should be suspended. If this is indeed the case, taxpayers will be forced to take these decisions on review.<sup>165</sup>

Section 164(6) furthermore does not explore the fact that there might be less invasive means available.

It appears that the change in terms of section 164(6) of the TAA does not assist in resolving any of the problems identified previously.<sup>166</sup>

### *3.5.2 The guideline problems*

The guidelines provided for in terms of the TLSA were also criticised. The opinion was expressed that SARS acts as a judge in a matter to which it is a party. Furthermore, the weight, meaning and relevance of some of these factors were criticised.<sup>167</sup> The guidelines provided for in terms of the TLSA are replicated in section 164(3) of the TAA. The criticism levelled at the section 36(3) factors will therefore still obtain in respect of the section 164 rule. Accordingly, the section 164(3) rule does not address the problems identified previously.<sup>168</sup>

The TAA does, however, address the confusion that arose in *Mokoena* regarding whether or not SARS may proceed with the collection of tax even though an objection or an appeal has been lodged. Section 172(2) of the TAA specifically states that SARS may proceed with the statement procedure even though an objection or an appeal is lodged, provided that the obligation has not been suspended in terms of section 164 of the TAA. It is therefore confirmed that SARS may proceed with the statement procedure if the payment of tax is not suspended.

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<sup>164</sup> In terms of s 6(e)(iii), this will constitute a ground for judicial review in terms of PAJA.

<sup>165</sup> See s 8 of PAJA and 2.4.2.4 herein for the remedies available when a matter is taken on review.

<sup>166</sup> See 2.4.2.4 herein.

<sup>167</sup> See 2.4.4.2 herein.

<sup>168</sup> See 2.4.4.2 herein.

#### 4 Conclusion

It was established, when examining the constitutionality of the "pay now, argue later" rule, that a balance has to be achieved between the speedy collection of taxes and the taxpayer's right to approach the court. The court held in *Metcash Trading Ltd* (CC) that this balance is in fact achieved and, accordingly, that the "pay now, argue later" rule is constitutional.

Two issues must, however, be kept in mind. Firstly, *Metcash Trading Ltd* (CC) dealt with the "pay now, argue later" rule in terms of the VAT Act. Therefore it does not create a precedent regarding income tax matters. The court still needs to determine whether the "pay now, argue later" rule in income tax matters will muster constitutional scrutiny.

Secondly, the courts will be bound by the *Metcash Trading Ltd* (CC) decision unless it can be shown that this decision was wrong. Numerous arguments made by Olivier may assist a taxpayer in proving that the court erred, in the *Metcash Trading Ltd* (CC) judgment, in declaring section 36 of the VAT Act to be constitutional.

Since 1 October 2012, the "pay now, argue later" rule has, however, been provided for in terms of section 164 of the TAA. The question that arose was whether or not the problems identified with regard to the section 36 rule would be addressed by section 164 of the TAA. Owing to the fact that the wording is fairly similar to that of section 36 of the VAT Act, the section 164 rule does not address the problems. In fact, it is possible that the new rule may lead to other problems.

It is thus submitted that the legislature has failed to make productive use of the opportunity to draft legislation that would achieve a balance between SARS's duty and a taxpayer's right of access to the courts.

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### **List of abbreviations/acronyms**

ADR	Alternative dispute resolution
ASA	Accountancy SA
CC	Constitutional Court
SARS	South African Revenue Service
TAA	Tax Administration Act 28 of 2011
TLSA	Taxation Laws Second Amendment Act 18 of 2009
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
VAT	Value-added tax
VAT Act	Value-Added Tax Act 89 of 1991

**"PAY NOW, ARGUE LATER" RULE – BEFORE AND AFTER THE TAX  
ADMINISTRATION ACT**

**C Keulder\***

**SUMMARY**

The South African Revenue Service (SARS) is entrusted with the duty of collecting tax on behalf of the South African government. In order to ensure effective and prompt collection of taxes, the payment of tax is not suspended pending an objection or an appeal, unless directed otherwise. This is also known as the "pay now, argue later" rule, and, for value-added tax purposes, is provided for in terms of section 36 of the *Value-Added Tax Act* 89 of 1991.

The "pay now, argue later" rule in terms of section 36 of the *Value-Added Tax Act* *prima facie* infringes on a taxpayer's right of access to the courts as envisaged in section 34 of the *Constitution*. This is due to the fact that a taxpayer is obliged to pay tax before being afforded the opportunity to challenge the assessment in a court.

In *Metcash Trading Ltd v Commissioner for the South African Revenue Service*, the Constitutional Court held the "pay now, argue later" rule in terms of section 36 to be constitutional. Olivier, however, does not agree with the court on several matters. Amongst the problems she indicates are that the taxpayer does not have access to the courts at the time the rule is invoked, and that the court did not consider the fact that there might be less invasive means available which would ensure that SARS's duty is balanced with the taxpayer's right of access to the courts. Guidelines were also issued which provide legal certainty regarding the factors SARS may consider in determining whether the payment of tax should be suspended or not. These guidelines also evoked some points of criticism.

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Since 1 October 2012, the "pay now, argue later" rule has been applied in terms of section 164 of the *Tax Administration Act* 28 of 2011. The question arises whether this provision addresses the problems identified in respect of section 36 of the *Value-Added Tax Act* and the guidelines. In comparing these sections, only slight differences emerged. The most significant difference is that section 164(6) of the *Tax Administration Act* stipulates that the enforcement of tax be suspended for a period when SARS is considering a request for suspension. Section 164(6) does not provide a solution to the problems identified regarding section 36 of the *Value-Added Tax Act*. It is even possible that this section could give rise to further problems.

Therefore, the legislature has failed to address the imbalance between the duties of SARS and the right of a taxpayer to access the courts.

**KEYWORDS:** Pay now, argue later; objections; appeal; Tax Administration Act; tax administration; taxpayers' rights; access to the courts; Constitution; tax collection; suspension of payment of tax.