UNIVERSITY OF ZIMBABWE

MASTER OF LAWS

LMCO 560: APPLIED RESEARCH

AN ANALYSIS OF CHALLENGING THE CONSTITUTIONALITY OF THE COMMISSIONER'S POWER IN TERMS OF THE INCOME TAX ACT [Chapter23:06].

THIS THESIS IS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE MASTER OF LAWS

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SUBMITTED ON: 25 JULY 2022

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- Employment Law
- Insurance Law
- Stockbroking Regulation
- Microfinance Regulation
- Intellectual Property
- Deceased Estates
- Property Law
- Contract Negotiation and Review
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A well rounded individual who is able to work under pressure, at my own initiative or as part of a team and can deal with duties confidentially, competently, honestly and accurately. I am hardworking with little supervision and immensely goal driven. I possess good analytical and critical thinking skills, am able to adapt easily to a new environment and willing to learn new operation strategies. In addition, throughout the past years of my career I have cultivated an ability to create and foster mutually beneficial business relationships with key internal and external stakeholders.

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EDUCATION

Masters in Corporate Law (LLM)
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ACKNOWLEDGEMENTS

Glory and honour be given to the Lord Almighty for giving me strength, resources and provision during my entire study period. I would like to express my sincere gratitude to my loving family for all the love and the support. I am also grateful to my supervisor, Professor Lovemore Madhuku, for guidance and rich learning experience gathered during my research and his longsuffering patience with me. A big thank you to Mr Daanish Shar for his support and contribution in this dissertation, it wouldn't have been possible without him. I would like to acknowledge in a very special way Advocate Magwaliba, for allowing me to tap out of his knowledge and get to appreciate this specialised field of law. It has been a journey but with the support and willingness to share his experience and knowledge it became achievable.

May God Richly Bless You All.

ABSTRACT

The powers invoked by the Commissioner of the Zimbabwe Revenue Authority, hereinafter referred to as the Commissioner, is not only a problem for the legislature but also for the companies and shareholders doing business in Zimbabwe. The loss of income and expenses incurred in fighting legal battles, reduces the profit made by any institution. The purpose of this research is to encourage the legislature to realign its legislation and practices in accordance with the current Constitution, which prioritises and recognises the bill of rights.

Collection of taxes should be done in a harmonious manner without violating the rights of the taxpayers, taking into consideration the different social classes found in society.

Contents

1. INTRODUCTION

An appeal and objection process give taxpayers opportunities to determine and challenge the reasonableness of assessments made by the revenue authority (Atilola, Kamalahasan, Bujang, & Kamarudin, 2017). When the objection and appeals process is stringent, the taxpayer may seek means to avert the process by directly seeking legal recourse which is a lengthy, slow and an expensive process. With such processes the country becomes badly rated in delivery of justice by International organisations who are the independent watchdogs of service delivery and justice systems. A poor rating by such organisations such as the Transparency International, Organisation for Economic Cooperation and Development (OECD) and many more have a ripple effect of repelling international investors.

An appeal provides opportunities for both informal meetings with the assessor who is the Commissioner of the revenue authority in this instance and formal hearings before independent bodies to resolve disputed issues ([IAAO], 2016). Appeals and objection procedures give the property taxpayers opportunities to determine the reasonableness of their assessments and to challenge them if they so wish (Amly, 2001). The appeals and objections process has been put in most jurisdictions as a means of protecting the tax payer's right to be heard. Exclusion of such a process would mean oppression to the taxpayers thus defeating the spirit and purport of the Constitution of protecting citizens.

Some countries for example Canada and South Africa, have implemented policies that further protect the taxpayer from the taxman, in light of the recognition of the bill of rights because the appeals and objections process seemed inadequate to resolve the disputes that constantly arose between the taxpayer and the revenue authority. The legislature has deliberately put in place policies to separate the functions of the Commissioner from being the assessor of taxes and being the adjudicator of such appeals in relation to the taxation assessments. The legislator has gone a step further to set up independent tribunals that consist of independent professionals to adjudicate on objections and appeals from the Commissioner of Taxes. This has proved to bring

about the justice, efficiency and transparency needed to review the decisions by the Commissioner on any tax related dispute.

Such tribunals consist of different professionals such as chartered accountants, tax experts, economists, tax or commercial lawyers and any other professional who is in the business sector, who may have the required knowledge to assist with adjudication of taxation matters. This has proven satisfactory in that litigation of taxation matters are reduced remarkably and resolved amicably in the most efficient, informal manner before they spill over to the courts. Given the wide variety of the pool of knowledge brought in by the different experts to adjudicate on such disputes. Litigants are normally satisfied with the outcome, therefore have no need of having to take the matter up into the formal court system.

The Zimbabwe Revenue Authority hereinafter referred to as ZIMRA is mandated to collect taxes on behalf of the state.[1] The Institution is led by the Commissioner General hereinafter referred to as the Commissioner, together with a board of directors as an established creature of statute. Taxation is justified in the Constitution and must be collected as it is considered to be the cornerstone of public financing. [2]
The Constitution of Zimbabwe is the Supreme law of the land and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency (Chitove, 2021). [3] The supremacy of the Constitution binds everyone, the juristic or natural person, the state, and the executive, legislative and judicial institutions, agencies of government at every level. It is an expectation that no one is excluded nor exempted from fulfilling the expectations imposed by the Constitution together with its obligations.[4]

[1] Section 4 of the Zimbabwe Revenue Authority Act (Chapter 23:11).

[2] Section 298(2).

[3] Section 2

[4] Section 44 of the Constitution.

In the case of **The President of the Senate, Parliament of Zimbabwe & the Speaker of National Assembly v Innocent Gonese, Jessie Majome and 2 Ors** Gorowa JCC and Patel JCC in a dissenting judgment held that the Constitution was the supreme law of the land and had to be strictly adhered to. [5] The Constitution is very clear about such compliance as postulated in section 2. Therefore no one can be pardoned from the strict compliance to the Constitution.

The Constitution at the same time protects the rights of citizens and their property as postulated in section 71(3) of the Constitution.[6] However the same Constitution gives a limitation in that, it allows for an owner to be deprived of their property in terms of the law in certain circumstances which legalize and create a concept for taxation. Although the Constitution gives rights, it also limits the same through an exception found in section 86 of the same Constitution.[7] Taxation back dates to way back in the

[5] Judgment No. CCZ 1/21

[6] (3) Subject to this section and to section 72, no person may be compulsorily deprived of their property ex-cept where the following conditions are satisfied—

(*a*) the deprivation is in terms of a law of general application;

(*b*) the deprivation is necessary for any of the following reasons—

(i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or

(ii) in order to develop or use that or any other property for a purpose beneficial to the community;

(*c*) the law requires the acquiring authority—

(i) to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition;

(ii) to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and

(iii) if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition;

(*d*) the law entitles any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition……..

[7] Section 86(2) "….The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable,

times of Caesar in the bible, where the principle of tax is acknowledged.[8] The encouragement of Christians being encouraged to return to Caesar what belongs to Caesar and the presence of one of the disciples Matthew, whose profession was that of a tax collector.

The Zimbabwean law has a background of Roman Dutch law mainly because of colonization before it gained its independence. The concept of taxation was alive during the era, when the Europeans colonized African countries and developed them. Funds were needed to maintain the infrastructure that had been erected and because of colonialism the black majority was supposed to pay for tax as well although they lived in the reserves where such benefits were not available nor easily accessible to them. Slavery was a common thing then, therefore it became easy to use the black community to pay for such taxes, at no cost to the Europeans. The black community was used as free labor which in turn reduced remarkably the amount of tax to be paid by the white citizens despite them benefiting more from the government than the black people.

The current ITA was promulgated in the year 1967 which is way before Zimbabwe gained its independence in the year 1980. It goes without saying that the legislation in the ITA has a bias towards the white community to further their interests and disadvantages the majority black community back dating back into the apartheid era. This is in violation of section 56 of the Constitution.[9] Aligning the ITA with constitutionalism can go a very long way in resolving, past inequalities that were alive during colonialism. The current problems that are in the Tax courts that of being over loaded with disputes, mainly which challenge the constitutionalism of the ITA, which still has such outdated

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necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors……"

[8] Mark 12 v 17

[9] Equality and non- discrimination

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.

legislation. It is of great essence to constantly review and upgrade laws, because of the constant changes in the environment in order to keep such laws relevant and serving a purpose at any prevailing time.

The definition of tax is not given in any legislation but has been defined in the *Black's Law Dictionary* to mean "a monetary charge imposed by the government on persons, entities or property in order to yield public revenue."[10] In the case of **Nyambirai v NSSA** the court defined a tax to mean " a compulsory levy and not optional contributions imposed by the legislative or other competent public authority upon the public as a whole or a substantial sector thereof and to be utilized for the public benefit." [11] From the above definition the court held that NSSA contributions are a tax. The principle of tax being compulsory was emphasized in the case of **A.G v Wiltshire United Dairies (1921) (37) 884 TL** and the case **China Navigation Co Ltd v A.G (1932)(2) KB 1937** p197. Therefore the principle of tax is constitutionally protected as a way of influencing the right to property. Property may be compulsorily appropriated without any other justification except that it is a tax.

The mandatory nature of a tax has made it express that there should be explicit statutory authority before a tax can be imposed, as held in **Attorney General** v **Wiltshire United Dairies.** [12] The same was held to be true in **China Navigation Co Ltd v Attorney General.**[13] Despite the tax being put into place by legislation and collected for the benefit of the state, there are some sections of the Income Tax Act which do not further the spirit and the purport of the Constitution which is the supreme law of the land. The constitution (2013) seeks to protect the fundamental human rights and to protect every individual in the land without discrimination.

[10] 7th edition page 1469

[11] 1995 (2) ZLR (1) (S)

[12] 1921 (37) 884 TL

[13] 1932 (2) KB 1937 page 197.

Tax has a bearing on the economic performance of any country as it has influence over so many factors which either attract or repel foreign investors, who contribute immensely to the country's Growth Domestic Product (GDP), in the form of foreign currency. The World Bank president back then, Barber Conable stated that "A *root cause of weak economic performance in the past has been the failure of public institutions. Private sector initiative and market mechanisms are important but they must go hand in hand with good governance a public service that is efficient, a judicial system that is reliable and an administration that is accountable to the public"* (Bank, 2008).[14] This is the bearing that a tax system has on any country.

Some of the purposes and effects of tax are:

- Funding of government activities such as maintaining infrastructure, military defense and enforcing law and order.
- Redistribution of resources between taxpayers.
- Redistribution of wealth amongst citizens.
- To stimulate macro and micro economic performance.

Nationally the Income Tax Act together with other legislation such as the Value Added Tax Act (VATA), Capital Gains Act, Customs and Excise Act and other Acts govern how tax matters are handled in the country. Regionally the OECD Transfer Guidelines for Multinational Enterprises and Tax Administration is recognized as the regional standard to which countries need to adhere to in taxation matters. There are International treaties which mitigate the risk of double taxation, tax evasion and facilitate international trade (Library, 2022).

As the collection of taxes is of paramount importance to the government, which is a mandatory duty to every citizen, the government also has an obligation of protecting the taxpayers whilst collecting such revenue. It is every citizen's right to be protected

[14] World Bank Report Sub-Saharan Africa.

by the government as postulated in the Constitution.[15] Therefore there is a duty on the government not to violate taxpayer's rights as enshrined in the Constitution, whilst fulfilling their mandate of collecting such taxes from its citizens.

1.2 RESEARCH PROBLEM

1.2.1 Section 58 of the Income Tax Act thereafter referred to as ITA, gives the Commissioner the power to unilaterally and without notice to the taxpayer, garnishee the taxpayer's account, which is a violation of the taxpayer's right, to their property in terms of section 76 of the Constitution.

1.2.2 Section 69 of ITA compels the tax payer to effect payment notwithstanding nor taking into consideration any objection or appeal that the taxpayer may bring before the Commissioner, which violates the taxpayer's right to a fair hearing as postulated by section 69 of the Constitution and a violation of the right to administrative justice as enshrined in section 68 of the same Constitution.

1.2.3 Section 47 of the ITA gives the Commissioner the power to re-open audits that would have been closed, even beyond the laid down prescription period of 6 years. This violates the legal principle of *res judicata*.

1.2.4 Section 65 of the ITA gives the Commissioner power to be a judge in their own case. The Commissioner is the one that assess for taxes through their employees, who would have been delegated powers to carry out the function. If a taxpayer has an objection or appeal against such assessments, they are required to make an appeal or objection to the same functionary who is the Commissioner in this case. Therefore the taxpayer is expected to make an appeal to the same person or functionary who issued out the very assessments.

Such powers exhibited by the Commissioner are in conflict with the spirit and purport of the Constitution and violate the Bill of rights which seeks to protect all citizens, which includes the taxpayers.

[15] Section 46 of the Constitution.

The taxation system forms the backbone of any economy. It has to be transparently and efficiently done in order to maintain a sound economic system and at the same time not depriving, violating and straining the taxpayers. A balance needs to be reached in order to stimulate economic growth. If such is ignored there shall be unending battles between the taxpayer and the revenue authority which ultimately stifles economic growth. This is how important tax matters are as they are directly linked and influence the performance of any given economy.

Some jurisdictions observe the principle of *res judicata* in tax matters. As part of the systems and mechanisms put into place to enforce the certainty canon that is one of the foundations of taxation law. It is a requirement in most jurisdictions that, a tax must be certain and must be correctly calculated, so must be the legislation in the ITA so as not to violate taxpayer's rights. The absence of the certainty principle has been cured by the contra-fiscum rule, which gives an advantage to the taxpayer where there is uncertainty in the tax assessment issued by the revenue authority.

It is stated that there has always been a back log of taxation matters in the Fiscal Appeal Court and the Special Court for Income Tax, back dating to as far as the year 2014. As long as safe guard measures and policies are not put in place to protect the taxpayer and a deliberate effort to align the ITA with the Constitution there shall be continued litigation which will never end, which can also be easily eradicated by simply reviewing the processes and policies in place.

1.3 BACKGROUND

Some research has been done in this area of interest, but there still remains a gap in the area of study. A South African scholar under took the same study and managed to convince the legislature to amend the Income Tax of South Africa in order to protect

the taxpayer in a quest to align the same with the current Constitution. This led to the promulgation of the Tax Administration Act (Erasmus, 2013). This stance taken by the government of South Africa has improved the relations between itself and the taxpayers. The Revenue Authority has become more transparent and has improved remarkably the delivery of service to its clients.

The protection of taxpayer's rights has not been a priority nor has it been an area of interest and the powers of the Commissioner so far have not been actively challenged in Zimbabwe. It is on a daily basis that taxpayers seek the intervention of the courts for protection of their Constitutional rights which would have been violated by the Commissioner of taxes. This in a way defeats the purpose of promoting a free and democratic country where citizen's rights are continuously violated and nothing is done nor any deliberate effort is taken to permanently resolve the problem.

The heavy handedness of the Commissioner is an impediment to the development of the economic sector and such heavy handedness if not curbed scares away potential investors and encourages taxpayers to evade paying taxes. Common ground must be reached where there is a balance between the observance of taxpayer's constitutional rights and the manner in which the Commissioner carries out their duties of collecting revenue. The objections and appeals from the Commissioner must be reviewed as a matter of agency so as to comply with International standards and such would attract more investment into the country.

Taxation dispute cases take an average of at least six months to be heard before a competent court. The lack of judges who have specialized knowledge in taxation law are very few if not close to none at all. The challenge to resolve such disputes without adequate man power to interpret statute that is not in line with constitutionalism is a mammoth of a task. Much time is wasted on trying to balance constitutionalism, with the dispute before the court and coming up with a correct judgment. If the legislation is aligned with the Constitution, the waiting period of the finalization of taxation disputes can be shortened remarkably.

The release of the 2017 edition of the OECD Model Tax Convention is an example of eradicating tax related barriers to cross border trade and investment. It also seeks to achieve and provide a means for settling on uniform basis the most common problems that arise in the field of international double taxation (OECD, 2017). There is an urgent need to review the ITA so it is in line and abreast with International Standards so as to facilitate trade as the world is fast becoming a global village. Such steps encourage and attract investment and in turn grows the Gross Domestic Product (GDP).

The philosophical background by the judiciary is not very clear on how tax matters must be handled. Whether reading in, or striking down of some parts of the Income Act should be used often when the ITA does not embrace the spirit and purport of the Constitution, is still a gray area and most judges are hesitant in making new law pertaining to taxation matters, which necessary at this point.

1.3 OBJECTIVES

The research paper seeks to achieve its general objective of aligning
the current Income Tax Act [Chapter 23:06] with the current Constitution by focusing on the specific objectives;

1.3.1 To determine whether the system employed by the Commissioner as its tax administration tool, is fundamentally flawed or not in a democratic society?

1.3.2 To determine whether the appeals and objections process is transparent and affords justice to taxpayers or not in that, in the first instance ZIMRA makes an assessment and then proceeds to adjudicate upon any objection and appeal that is made by a taxpayer.

1.3.3 To determine if the Commissioner goes further to execute its own decision, without a court order, without notice to the taxpayer, without inviting submissions from the taxpayer even though there is a pending objection on the subject matter.

1.3.4 To determine whether the Commissioner has the powers to re-open audits that have prescribed which is over the 6 years prescribed in the ITA according to the spirit and purport of the Constitution, is it not violating the taxpayer's right to *res- judicata*?

1.4 RESEARCH QUESTIONS

1.4.1 To what extent does the appeals and objectives adopted and used by ZIMRA proper and transparent in a democratic society?

1.4.2 To what extent can the Commissioner be a judge in their own case?

1.4.3 To what extent is the Commissioner correct in disregarding the *res judicata* principle?

1.5 RESEARCH METHODOLOGY

The study will be a qualitative research informed by desk review. A combination of doctrinal and socio-legal approach will be used to analyse the existing laws on taxation in Zimbabwe. Secondary legal sources like case law, journal articles, reports from international organisations and books will be used.

This chapter presents the procedures implemented during data collection from the different sources, its processing and finally its analysis. The research is conducted within the qualitative research paradigm using doctrinal and comparative approaches. At the center of qualitative research is a need to gain more in-depth understanding of a subject matter in a natural setting (Arghole, 2012). In order to address the questions raised and surrounding the topic, a diagnosis of the situation, evaluating available alternatives, screening them and finally gaining insight through the process (Arghole, 2012). A combination of doctrinal and socio-legal approach will be used to analyse the existing laws on taxation in Zimbabwe. Secondary legal sources like case law, journal articles and books will be used. In the study the positivistic approach was adopted as the most suitable because there seems to be many factors influencing the taxation system. In this study the comparative approach was incorporated in addition to the doctrinal approach. The approach used comparative law as a method of research as opposed to a methodology.

In this current study the author will assume all the relevant statutory laws are observed and followed religiously but it still remains a mystery on how litigation then arises when all policies are in place.

1.6 DEFINITION OF TERMS

1.6.1 Res judicata

It is a principle founded on common law has three requirements which are namely;

(a)Same parties

(b)Same cause of action

(c)Same relief

The purpose of *res judicata* has been stated to be, to prevent the repetition of law suits between same parties, harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue as was held in the **Evervins v Shield Insurance Co. Ltd 1980 (2) SA 815 9 (A)** at 835 G.

1.6.2 *Bill of Rights*

According to the *Mirriam- Webster Dictionary* It is a summary of fundamental rights and privileges guaranteed to a people against violation by the state, used especially of the first ten amendments to a country's Constitution.

1.6.3 Governance

It has been defined by the United Nations Commission for Global Governance as follows" *it is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to force compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest."*

According to the Secretary General of the UN good governance means " *creating well-functioning and accountable institutions, political, judicial and administrative, that citizens regards a legitimate, through which they participate in decision making that affect their lives and by which they are empowered. Good governance also entails a respect for human rights and the rule of law generally."* (Pacific, 2022)[16]

1.6.4 Contra fiscum Rule

It is a rule applied by the courts where an ambiguity arises during the interpretation of fiscal legislation, the ambiguous provision must be interpreted in a manner that favors the taxpayer as was held in **Badenhorst v CIR 1955 (2) SA 207 (N) 215** (Tapera M and Majachani A, 2015).

[16] UN DocA/53/1 at par 114.

1.6.5 Constitutionalism

Can be defined according to Bazezew as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.[17]

1.7 LITERATURE REVIEW

1.7.1 *Taxpayer's Protection against Human Rights Violations*

There is an expectation by every citizen to be protected against any human rights violation, as clearly spelt out by the Bill of rights which is part of the Constitution. However the gap is still alive and is still being used by the Commissioner who is an agent of the Government to persecute and violate the rights of taxpayers which is evidenced by the number of cases that spill into the Special Court for Income Tax Appeals and the Fiscal Court of Appeal since the year 1995 in July to date (Melody, 2019)[18]. Nothing much has changed to date as tax cases continue to pile up as more and more taxpayers are disgruntled and exposed to violations of their rights by legislation which has not been aligned with the Bill of rights. Back logs of taxation cases can be averted by revising and amending the ITA so that fairness, transparency and independence are reflected in the ITA.

There have been so many amendments to the ITA which largely are concerned and caused by the Finance Act which reviews and determines gazzeted amounts bi annually, that are included in tax legislation. The aspect of constitutionalism has been neglected since the amendment of the Constitution in 2013 and nothing much has been done to align the ITA to the current Constitution, yet the tax legislation has a great bearing on the economic sector. The growth and success of the economy is directly linked to the ITA.

[17] M. Bazezew "*Constitutionalism*" (2009).

[18] Section 8 of the ITA.

A recent Zimbabwean High Court judgment by Chinamora J in the case of **Tafadzwa Musarara v Zimbabwe Revenue Authority** delivered on Tuesday the 29th of March 2022 at the High Court Harare, evidences the need to align the ITA with the Constitution (Taruvinga, 2022). The court struck down two sections of the Customs and Excise Act, which empowered ZIMRA to seize goods from importers for under declaring duty. Chinamora J declared the two sections 192(1) and 192(1a) to be *ultra vires* the Constitution, in particular to section 68 and 56 of the Constitution. The Customs and Excise Act is part of the ITA which is legislation which specifically deals with those taxes on importation of goods, which is covered by the ITA.

1.7.2 *Income Tax and the right to property*

The continued garnishing of taxpayers accounts is the order of the day in Zimbabwe. This has impacted negatively in small to medium enterprises (SME) that are not financially stable, which resultantly are forced to shut down completely as they would be crippled by such an action by ZIMRA. A revision of such an action may be re visited and alternative means to collect revenue outstanding from owing clients can be adopted. The government can collect outstanding taxes through other means that protect such victims in a bid to save such businesses which contribute to employment and eventually the economy of the country as a whole. Considering that the unemployment rate in Zimbabwe is over 80% relaxation of this method may come as a tax relief to small enterprises that need to be protected from collapsing.

It is evident that the objection and appeals process in place currently is not serving the desired intended ultimate goal which is that of an efficient tax system. Objections are directed to and adjudicated upon by the Commissioner of taxes. If a disgruntled taxpayer's objection is not allowed, it is then lodged again with the same Commissioner as an appeal. There needs to be a separation of powers in that regard, as the Commissioner is involved in the entire process. The stages of appeals and objections need to be separated and dealt with by totally independent bodies or tribunals that will always deliver accurate outcomes rather than biased ones. The more people are involved in a matter, the precise the outcome as more minds are better than one in resolving a dispute.

1.7.3 *The right to a fair hearing and the taxpayer*

The reopening of closed and completed audits by the Commissioner is one very unnecessary and unfair practice that is burdensome to the taxpayers. The ITA is clear that records shall be kept for six (6) years. There have been a number of cases before the Special Court for Income Tax and the Fiscal Appeals Court of audits being re-opened from as way back as ten (10) years ago. Such doing by the revenue authority is indeed in violation with the *res-judicata* legal principle, which unnecessarily burdens the taxpayer in terms of loss of productivity time and unnecessary stress and anxiety of litigation.

This is such an unreasonable practice as taxpayers would be expected to lead evidence on such cases as part of the litigation process. Some of the witnesses would have left the employ of such companies and having to try and track them down to witness on such occurrence, some even would have died and some would have just forgotten of the incidents and their recollection on particular happenings would have faded. This definitely affects the type and quality of evidence led by taxpayers which has a negative bearing on their cases and outcomes, hence depriving them of their access to justice.

The constant change of the economic policies in the form of statutory instruments that are passed every now and again, has caused so much instability in the country. With such a challenge in mind then the Commissioner decides to be re-opening audits which have prescribed, causes unnecessary challenges for taxpayers. Having to recollect the financial periods then marrying them with the past audits is unnecessary pressure for taxpayers and is unjust. It also has a direct negative impact on the case of the taxpayer, which then violates one of the taxation law canons that a tax must be certain (Chelliah, 1986). The Margo report points out that "…*taxes should be certain and simple in concept and in coaction. Certainty in this context requires that a taxpayer be reasonably certain of what his tax liability will be in any given set of circumstances. A complex tax system generates uncertainty, which may in turn entail costs of consultation with tax advisers. Simplicity entails that a tax should be easily assessed,*

collected and administered in order to minimise the costs of the tax to both the tax payer and the fiscus" (Tapera M and Majachani A, 2015).

Re-opening of audits as the Commissioner has been empowered to do so in terms of section 47 of the ITA needs to be done away with as it violates the principles of tax cannons by the famous writer Adam Smith, which are widely accepted worldwide as principles governing a good tax system. It is unfair on the taxpayer to be continuously harassed for past audits they believed where closed due to the lapse of time and done away with to be revisited. Much time is spent on dealing with past events, which wastes resources for a taxpayer who is supposed to be making money and profits. The law generally does not allow prosecution of the same accused person on the same facts, therefore why should the law turn a blind eye to the *res judicata* principle when it comes to taxation matters? The law must be fairly applied to everyone in order to cure against discrimination.

1.7.4 *Consumer Protection rights and the taxpayer*

Some of the laws contained in the ITA are so oppressive that the whole ITA has to be amended to be in sync with most recent statutes as the world is dynamic. The recent introduction of the Consumer Protection Act (CPA) puts so much emphasis on protecting consumers as an international requirement, to enable e-commerce transactions and international trade with the whole world. There is need to amend the ITA for such reasons, so Zimbabwe may take part and benefit from being a member of the global village as is expected of such member states.

It is the Government's duty to make sure its citizens are protected and to up hold the Constitution, as the legal custodian of the law in the country. Any law that is in force that disturbs the nation from being effectively managed, must be corrected and tested. The watchdogs must constantly test legislation to see whether it is good or bad law and the necessary rehabilitative actions must be swiftly taken to remedy such. Bad law must not be ignored as it has a direct effect to the public and all other stakeholders. Checks and balances must be in place to constantly review such for the maintenance of an effective and efficient legal system.

1.8 CHAPTER SYNOPSIS

Chapter 2 will analyse the philosophies and theories in the taxation system in order to see whether ZIMRA is justified in handling taxation disputes in the manner that they do, in a democratic society compared to other countries?

Chapter 3 will analyse taxation and human rights. It shall be scrutinized whether the Commissioner has the right in the era of Constitutionalism to be a judge in their own case. Garnishing of taxpayers accounts without their consent and in some instances without their knowledge, notwithstanding there being a pending appeal or objection before the Commissioner of taxes.

Chapter 4 will look at the constitutionalism of the commissioner's powers and the appeals and objection process.

Chapter 5 will analyse whether the administering of the tax system by the Commissioner is fair, transparent and justified in his constitutional era.

Chapter 6 will discuss the garnishee orders as a tax collection tool.

Chapter 7 will present the findings and recommendations to be adopted in order to align the ITA with the Constitution 2013.

1.9 ABBREVIATIONS

ITA	Income Tax Act
RAA	Revenue Authority Act
OECD	Organization for Economic Cooperation and Development
GDP	Gross Domestic Product
ZIMRA	Zimbabwe Revenue Authority
SME	Small to Medium Enterprises
CPA	Consumer Protection Act
NSSA	National Social Security Authority
SARS	South African Revenue Services
ADR	Alternative Dispute Resolution
AFSA	Arbitration Foundation South Africa
UN	United Nations

CHAPTER 2

2.1 Introduction

In this chapter a review and synthesis of relevant literature will be undertaken. The chapter is organized as follows firstly the theoretical underpinnings of taxation and then the rationale behind taxation. Even before the theories of taxation could be canvassed to analyze the extent of commissioner's powers as interpreted by the courts, there is need for a fair exposition of the philosophical justification of taxation in the first place. If taxation cannot be justified under some philosophy, then it may as well be a waste of time to discuss the theories of taxation which largely focus on how tax systems should be designed.

2.2 THEORETICAL FOUNDATIONS OF TAXATION

Taxation finds expression both in economics, public finance and law. Within the public finance realm, two theories dominate which could be classified as ability to pay theory and the benefit theory. For the purposes of this study these theories were reviewed.

2.2.1 Ability to Pay

The ability to pay theory postulates that persons, natural and juristic must pay taxes to government based on their ability to pay (Chodorow, 2008). This means the wealthy should pay more taxes to government, because government services such as the police and defense help them enjoy their wealth peacefully (Chauke, 2017). Chigbu, Eze, and Ebimobowei (2012) noted that the basic tenet of this theory is that the burden of taxation should be shared by the members of society on the principles of justice and equity and that these principles necessitate that the tax burden is apportioned according to their relative ability to pay.

Kendrick (1939) argued that the usual and only serious justification of ability to pay was sacrifice. It is generally accepted that levying of tax was deprivation of taxpayers' incomes that could have been used for other more satisfying purposes. Instead taxpayers are compelled to contribute towards public treasury so that the funds get used for social ends. Surrendering one's wealth to government for social ends is

regarded as sacrifice, giving rise to the argument that sacrifice forms the basic cornerstone on which taxation should rest, as that is what it means to taxpayers.

Citing Seligam (Kendrick, 1939) argued that the sacrifice attached to the payment of taxes needed to be attached to the ease with which the taxpayer gets the funds to pay taxes. Based on the decreasing marginal utility of money, it would follow that the wealthier one becomes, then the more taxes they should pay, because they will be getting less satisfaction from the extra dollar. Easterlin (2005) observed that the proposition of decreasing marginal utility of money postulates that "*the effect on subjective wellbeing of $1000 increase in real income becomes progressively smaller the higher the initial level of income*" (p. 243). Stein (1992) argued that if the marginal utility of income holds, then tax authorities exact lesser sacrifice from high income earners with each dollar taxed compared to low income earners, because the greater a taxpayer's income, the less an additional dollar of income is worth to him or her.

It has been observed by some scholars that the welfarism and the optimal tax theory were both rooted in the decreasing marginal utility of money (Lawsky, 2011). (Lawsky, 2011) makes the argument that if that is the case then an optimal tax policy must not only tax the wealthy more but redistribute the tax revenues to the poor in order to improve their welfare. He stated that "*but if some people experience increasing marginal utility of income, a welfarist analysis that does not give explicit weight to equality will conclude that the tax system should redistribute not only from the rich to the poor, but also from certain less wealthy people to certain wealthier people*" (p. 908).

A key issue of the ability to pay theory is how the assessment of capacity should be made. Chauke et al. (2017) argued that this must be made primarily on the basis of income and property. The thinking behind use of ownership of property as a yardstick in measuring capacity to pay, is that buying properties is a sign that a person has means hence should contribute more taxes to government. This thinking however, ignores the fact that some people may earn high incomes but decide not to invest in properties.

Lately some individuals have been acquiring properties under trusts. In such cases a high income earner may have no property to their name, yet being well invested via trusts. Chauke et al. argued that the notion that property ownership means ability has been rejected on the ground that a person who earns a large income but does not invest in property will escape taxation. They further argued that property ownership must not be used as the only determinant for paying taxes.

Chauke et al. (2017) finally argued that income appears to be the more rational basis of assessing ability to pay taxes. Those who earn more should thus be subjected to more tax rates. It would appear that the pay as you earn (P.A.Y.E) is founded on this principle. Taxable employment income is put into brackets with each bracket having different tax rates, which increase as incomes increase. However, this does not apply to corporate taxes, and other taxes that are income based.

In the final analysis it would appear that the decreasing marginal utility of money forms the base upon which the theory of ability to pay rests. While the concept of decreasing marginal utility of money did not form part of the current study, it must be pointed out in line with Lawsky (2011) that should this concept not hold true, then the whole basis upon which taxes such as PAYE rest will collapse.

For expediency and for the purpose of this study the assumption that an extra dollar in the hands of a wealthy person derives little satisfaction compared to the same dollar in the hands of a poor person was maintained. This view however, is not consistent with what obtains in reality in so far as appeals and objections to assessed taxes are concerned. The rich and corporates appear to be the main litigants through the appeals and objections window. Logically if an extra dollar did not mean much to the rich, then the proportion of rich persons making objections and appeals become low compared to that of the poor. There could be other reasons why this is so, which range from greedy and means to litigate on the part of the rich, and ignorance and lack of capacity on the part of the poor. This might therefore call for need to treat appeals and objections by

the rich in a stricter way than those of the poor, same with the corporates compared to individuals.

2.2.2 The Benefit Theory

Quoted in the Economist (2011), the then United States of America President Barak Obama said "*as a country that values fairness, wealthier individuals have traditionally born a greater share of this burden than the middle class or those less fortunate. Everybody pays, but the wealthier have borne a little more. This is not because we begrudge those who have done well—we rightly celebrate their success. Rather, it is a basic reflection of our belief that those who have benefitted most from our way of life can afford to give back a little bit more. Moreover, this belief has not hindered the success of those at the top of the income scale, who continue to do better and better with each passing year".* This statement by Barak Obama probably summarizes better the benefit theory to taxation. One gives more to and to the benefit of the public good because they have benefited more from what our society offers.

The benefit theory is probably traced to the words of Adam Smith as cited by Weinziel (2014), where he said "*The subjects of every state ought to contribute toward the support of the government, as near as possible, in proportion to their respective abilities; that is in proportion to the revenue which they respectively enjoy under the protection of the state*." Put differently it could be argued that Smith was of the view that a person's ability to pay taxes must be measured or assessed based on the benefits accruing to him or her from society.

Since government spends so much on defense and security, as well as public education which are all important factors in the ability of persons and business to thrive, then those who earn more have benefitted more from these public goods services (Scherf & Weinzierl, 2019). The state also spends huge amounts of public funds on roads construction to improve on connectivity. Similarly the state invests a lot of resources in energy generation such as construction of power plants and related distribution infrastructure.

Taking an interdisciplinary approach to expand the understanding of the benefits theory, it is imperative to establish how public spending on infrastructure, defense and security, and other public utilities helps economic agents in their journey to amass wealth. Findings of a study by Miyamoto, Baum, Gueorguiev, Honda, and Walke (2020) revealed that the strength of a country's infrastructure governance played a significant role in determining the macroeconomic impacts of public investment. Nations with better governance experienced positive effects from public investment.

Similarly findings of a study by (Hosny, 2017) revealed that the perception of political instability was negatively correlated to firm performance, and could even have a negative causal impact on firms' sales and employment growth. The findings in a study by Hosny find support from findings of a study by Ouedraogo, and Lompo (2020) in Ivory Coast which established that political instability affected firm performance negatively. The researchers then recommended that the government of Ivory Coast should develop strategies to reduce political instability in order to ensure efficient and performing firms.

These study findings are congruent with the thinking behind the benefit theory, namely that incomes are positively connected to the public good. Investments by government in defense, security, utilities, and roads will see an increase in the wealth of a country's people. However, the rate of increase differs among individuals and companies. Those who benefit most must therefore give back more, not only for the state to invest further in the public good but also to those who are less endowed.

A major difference between the benefit theory and the ability to pay theory appears to be the angle from which taxation is assessed. While the ability to pay theory says because you have the means you can sacrifice more for the public good, the benefit theory says because you benefited more from the public good, then you should give back more to the community. When looked at from this perspective, one may argue that companies and individuals engaged in philanthropic and corporate social

responsibility programs, should where appropriate be exempt from certain taxes, because they are already giving back to society what they received from it. However, it is difficult to understand why the progressive taxation appears to be applied mainly on PAYE in Zimbabwe, which targets employees; when the greatest beneficiaries of the public good are companies, which pay corporate tax at a flat rate.

Powerful and more relevant as the benefit theory is, it would appear that it is getting less attention from scholars and tax practitioners. Scherf and Weinzierl (2019) observed that "*While the normative principle of benefit-based taxation has exerted substantial influence on many areas of public finance…, its influence has been more limited in the field of optimal income taxation, where welfarist objectives such as utilitarianism dominate*". Despite its waning influence on taxation, this theoretical perspective had a huge bearing on the study.

2.2 RATIONALE BEHIND TAXATION

While the referred theories of taxation appear to explain why people should pay taxes according to their means, they do not exactly explain why taxes must be paid in the first place. Kay (1986) argued that welfare economics recognize the responsibility of the state as a redistributor of wealth and incomes to households via taxation. The rationale for taxation could be classified as economic on the one hand and legal/political on the other.

2.2.1 Economic Justification

Kay (1986) pointed out that there were certain public goods that cannot be sourced from the marketplace such as defense and security. For governments to be able to offer these public goods they need to raise revenues from elsewhere, with taxation becoming such source of revenues. To this end citizens of a country, juristic or natural must submit themselves to taxation so that they will be able to enjoy certain public goods which are not offered in the marketplace.

Kay (1986) further argued that there were certain externalities which arise from activities of some economic agents, which have a negative impact on the lives of other

economic agents. Under such a situation, the authorities have two options, to regulate the activities of the economic agents or ask the economic agents to pay tax for the negative effects of their activities on others. Taxes such as carbon taxes, would be justified by this argument. It is common cause that most emissions from industrial activities have an impact on the environment, yet the industrialists benefit financially from such activities. It would thus be unfair to let those who do not enjoy the financial benefits from the industrial activities suffer from the emissions for nothing. A form of tax that would force the industrialists to reduce the emissions, while being used to mitigate the negative effects of such emissions will be beneficial to society.

The other reason for taxation put forward by Kay (1986) is paternalism. Human behavior does not always conform to the best interests of the very person engaging in such behavior. Notwithstanding that smoking and taking alcohol could be hazardous to health there are many people who smoke and consume alcohol resulting in a very thriving industry of alcoholic beverages and cigarettes. In order to lessen consumption of such products governments impose taxes often called "sin taxes". Ebbe and Dejgaard (2016) stated that ""*Sin taxes," or, more generally, "sumptuary taxes," are fiscal instruments meant to lessen the consumption of specific products (such as high calorie foods and drinks, tobacco, etc.) the use of which is (truly or allegedly) undesirable, for example, in terms of health effects*" (p. 55). These taxes will be justifiable under public reason to the extent that they are "*endorsable, or non-reject able by all reasonable citizens or members of the public*" (Ebbe & Dejgaard, 2016, p. 58).

Kay (1986) also argued that where ownership rights are not well defined this could result in market failure, demanding that government comes in through regulations or taxation. In such instances regulation would come in to create defined ownership structure to obviate competitive exploitation that could result in inefficient economic outcomes. On the other hand taxation would become necessary to extract the rents from the public intervention created via regulation.

An analysis of the extent to which judicial interpretation of the powers of the commissioner on objections and appeals must of necessity take into account the economic justification of taxes being appealed against. The reasonability or otherwise of certain taxes, and their quantum could be a function of the rationale behind the particular tax to begin with. As an example, the Government of Zimbabwe recently introduced what was deemed to be punitive transaction taxes on the use of the United States Dollar on local transactions. Government however justified the taxes on the basis that it wanted to induce increased use of the local currency in local transactions as that would help stabilize the exchange rate between the local currency and the United States Dollar. An assessment of an objection or appeal that misses the rationale behind a tax will no doubt result in consequences that are detrimental to the economy as a whole.

2.3.2 Legal or Political Justification

The legal or political justification for taxation appears to rest on the social contract theory. At the heart of the social contract theory as pioneered by Thomas Hobbes and Jacques Rousseau is the liberty of the individual (Mangoting, Sukoharsono, Rosid, & Nurkholis, 2015). According to Thomas Hobbes, human beings were exclusive and selfish; and will thus always pursue their best interests (Mangoting et al., 2015). To this end Friend (2004) stated that humans had extensive freedoms that include freedom to control economic assets for the purposes of earning maximum economic benefits from them. Through use of the freedoms to extract maximum benefits from economic assets humans were capable of deceit, fraud, and murder to reach their end game of wealth maximization (Mangoting et al, 2015). Similarly, Jacques Rousseau's thinking about the social contract was embedded in the freewill of humans (Hardwick, 2011).

Whilst the freedoms and available courses of action available to human beings may result in wealth maximization, when viewed in isolation; in reality the options constitute great threat to the wealth and assets of the very same humans. If one can use deceit and fraud to realize their wealth maximization objectives, the very same person can be a victim of deceit and fraud as another person seeks to maximize their

own wealth objectives. To this end Thomas Hobbes argued that human freedom was temporary; while Jacques Rousseau noted that human beings' capacity to leave alone and exclusive was very limited (Mangoting et al., 2015).

To cure the negation brought about humans' freewill and liberties there was need for an institution that could protect the assets of humans, and lay out rules by which humans could interact with one another in a mutually beneficial way. This consent to have an institution act to protect their wealth is birthed by a social contract between the humans as a sovereign collective or civil society. In return for the protection that comes from the institution, the humans forgo some of their freedoms and liberties, and surrender some of their resources to the chosen institution (Wattimena, 2007). That institution is government or more broadly the state to capture all the three arms: the executive, judiciary, and the legislature.

For Rousseau (2006), the most important function of the general will is to inform enactment of state laws. These laws, though codified by an impartial, noncitizen "lawgiver," must in their essence express the general will. Accordingly, though all laws must uphold the rights of equality among citizens and individual freedom, Rousseau states that their particulars can be made according to local circumstances. Although laws owe their existence to the general will of the sovereign, or the collective of all people, some form of government is necessary to carry out the executive function of enforcing laws and overseeing the day-to-day functioning of the state.

By willingly surrendering part of their resources to government for the latter to effectively discharge its mandate of protecting their assets and interests; human beings conferred the right to levy tax on government which must be done through a system of tax laws that conforms to the dictates of equality, fairness, and justice. This then brings us back to the taxation theories namely ability to pay and benefit theory. Either theory should be explained based on its power to articulate the sovereign will of the people to be taxed based on their abilities or based on what society endowed to them.

2.2.3 Combining the Justification for Taxation with Theories of Taxation

Combining the justification for taxation with the theories of taxation it should be possible to come up with principles of a good taxation system. Adam Smith was credited for coming up with four principles of a good tax system which are still recognized and used in the present day: fairness, certainty, convenience, and efficiency (Olalekan and Oyedokun, 2019). Whilst a plethora of other principles have been put forward by tax scholars and experts, Adam Smith's principles appear to be sufficient and capture all that a good tax system should encompass. Looking at these principles it is argued that they resonate well with the social contract theory.

There will be no way a sovereign collective would agree to a tax system that is not fair to their collective aspirations. Similarly the general will of humans would be to know their tax obligations in advance with certainty, while they would want the tax system to be convenient and efficient. It is apparent that tax appeals and objections are better justified on those four principles. Conversely, when handling appeals and objections, one would expect the commissioner to be guided by these principles.

If the sovereign collective see paying tax as a sacrifice, in line with the decreasing marginal utility of money assumption, they would expect the wealthier among them to be willing to be taxed at a higher rate than the poor. On the other hand, if the collective sees paying tax as giving back the benefits accorded to individuals by the public good, then it should be willing to have those who received more to pay more and vice-versa.

It is argued that tax authorities in design, assessment, and dealing with tax appeals must be guided by these founding principles of taxation, namely the social contract, and the theories of ability to pay, and benefit theory. Similarly interpretation of tax legislation should also be founded on these cornerstones, otherwise a country will end up with a tax system that does not speak to the sovereign will of the governed.

3. CONSTITUTIONALISM

According to (Mapuva) the constitution seeks amongst other objectives, to regulate between the governed and the governors. The spirit of constitutionalism is there to enforce the separation of power by the government. The power is separated into the judiciary, the legislature and the executive. It is the principle on which the Zimbabwean constitution is built on. It is mandatory that all laws be in compliance with the constitution which does not exclude the legislation on taxation. All forms of ta legislation and policies must be seen adhering and observing the separation of powers as set out in the constitution which is the supreme law of the land.

4. General approach of courts in interpretation of tax statutes.

It is settled that a purposive approach should be taken in the interpretation of tax statutes. Gowora JA (as she then was) in **Care International in Zimbabwe v Zimbabwe Revenue Authority and Others SC 76/17** stated that "*a construction of the body of statutes concerned with matters of revenue assessment, collection and enforcement requires a purposive approach from the courts as a whole*". Devenish (1992) stated that "*the purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to the semantic and grammatical analysis …. The interpreter must endeavor to infer the design or purpose which lies behind the legislation. In order to do this, the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources … words should only be given ordinary grammatical meaning if such meaning is compatible with their complete context*".

It is argued that this approach to interpretation of tax statutes allows the courts to factor in theories and underlying principles behind each tax statute. It is argued that to the extent that the objections and appeals procedure makes it difficult for appellants, which are largely corporates with means and rich individuals to fight tax assessments made against them, then such provisions resonate well with the benefits theory of taxation, and the human rights perspective to taxation.

CHAPTER 3

CONSTITUTIONALITY OF COMMISSIONER'S POWERS: TAXATION AND HUMAN RIGHTS

3.1 Introduction

Chapter 4 of Zimbabwe's Constitution contains the Bill of Rights, while Section 71 provides for protection of property rights. For the purposes of this study it is presumed that taxation potentially violates people's property rights. This gives rise to a fertile ground for objections and appeals against taxes and their assessment, requiring the commissioner to adjudicate on.

3.2 General Human Rights Perspective of Taxation.

Sepulveda (2014), the United Nations Special Rapporteur on extreme poverty and human rights stated in her report that "*Taxation is a key tool when tackling inequality and for generating the resources necessary for poverty reduction and the realization of human rights, and can also be used to foster stronger governance, accountability and participation in public affairs*" (p. 1). She went on to argue that nations and states had an obligation to respect and guarantee fundamental human rights of equality and non-discrimination in their revenue raising policies.

A progressive tax system as opposed to a flat tax system will more likely achieve equality and non-discrimination as Sepulveda (2014) pointed out that "*compliance with these rights may require States to set up a progressive tax system with real redistributive capacity that preserves, and progressively increases, the income of poorer households. It also implies that affirmative action measures aimed at assisting the most disadvantaged individuals and groups that have suffered from historical or persistent discrimination, such as well-designed subsidies or tax exemptions, would not be discriminatory. In contrast, a flat tax whereby all people are required to pay an equal proportion of their income would not be conducive in achieving substantive equality, as it limits the redistributive function of taxation*".

The major take away from Sepulveda's (2014) report is that progressive taxation is consistent with protection and advancement of universal human rights. This pours cold

water on the natural property rights perspective in relation to taxation. It is argued that human rights must be looked at from sovereign collective point of view as opposed to focusing on a section of the sovereign collective as the natural property rights perspective seeks to do.

Burrows (2015) opined that regressive tax systems in developing countries that relied on indirect taxes like VAT were counterproductive in addressing inequalities facing the poor within developing countries. The researcher argued that companies making huge profits operating in developing countries were not being taxed, and instead they were getting tax holidays, which was akin to governments giving away taxes collected from the poor to the already rich multinationals. In as far as these regressive tax systems were inhibiting governments' capacity to generate enough resources to meet the sustainability goals, they were a violation of human rights of poor citizens in developing countries.

Burrows (2015) like Sepulveda (2014) advocated for a progressive tax system. He argued that a "*fair tax system not only raises revenue for human rights. It can also redistribute wealth, reducing inequality and the gap between rich and poor within countries and between countries. Taxes are the most reliable and sustainable source of government revenue, compared to overseas aid, loans or private funding. A fair tax system can increase representation and accountability, of the state to citizens, encouraging better governance and more independent and responsive policy-making*".

Avi-Yonah and Mazzoni (2019), while generally agreeing that a progressive tax system provided adequate resources to governments to meet their human rights obligations, went further to argue that the capacity of the rich and multinational corporations in developing countries to avoid or evade taxes was a violation of human rights, as such actions deprived the countries the means with which they can advance and protect the basic rights of citizens. They stated that "*the ability of rich residents of developing countries and multinational corporations operating in those countries to evade or avoid taxation is directly linked to violations of human rights in those countries, especially*

from the perspective of social and economic rights like health and education. Providing such countries with the means to fight back and collect adequate revenues is essential in advancing such rights".

In recent times there has been a raging debate between conservative property rights advocates and their liberal advocates on the constitutionality of a progressive tax system (Kades, 2018). Natural property rights theories earn their badges from resisting any attempts at legislative encroachment on private property rights (Mack, 2010). This makes them a major departure from the school of thought around contemporary property scholarship, which is premised on the understanding that property rights exist only when created by the sovereign.

3.3 Right to Property

The natural property rights proponents prostituted that natural rights precede the state, therefore the sovereign cannot dictate the nature and extent of private property rights. In the extreme Epstein (1985) argued that "*the state should prohibit murder because it is wrong; murder is not wrong because the state prohibits it*". By that analogy the state should protect property rights because it is the right thing to do. It is the right thing to protect private property rights not because, the state through the constitution has protected them but because they are inalienable.

Natural property rights theorists contend that citizens and property owners confer to the state the power to force certain exchanges in relation to property, visa vie: paying taxes in exchange for public services, live with regulations of property rights in return for regulation of others, and selling property in return for just compensation (Kades, 2018). With regards to payment of taxes in return for public services, they argue that the public services received should be commensurate with the proportion of tax each pay (Kades, 2018). Put differently natural property rights theorists would want a situation where those who pay more taxes get preference in getting government services.

It is argued that should this conception of property rights and taxation be allowed to prevail, then nations will end up with a taxation regime that favors the rich at the detriment of the poor. In addition such a resultant taxation regime will be a negation of both the ability to pay and benefits theories. It is also important to note that those with means are more likely to appeal against tax assessments, and should this conception of property rights and taxation be accepted then the rich will get away with paying as little or enjoying preference on public services at the detriment of the poor.

Critiquing the natural property rights theories, Kades (2018) argued that these theories by prescribing a flat tax for all, put tax authorities in a straightjacket with no freedom to address a complex and changing world. A one size fits all flat tax will be inadequate to address the varying needs of the society and neither will it result in optimal taxation. In a bid to avoid imposing a prohibitive tax burden on the poor, governments will end up with very low flat tax rates, with the result that government will have very low tax revenues; against unlimited public service responsibilities. At the end of the day, there will be poor public service delivery or governments will resort to printing money to meet public expenditure, causing inflation in the process (Ishaq, 2015).

Kades (2018) further argued that the natural property rights theory bars redistributive policies imbedded in taxation notwithstanding that such policies could be beneficial to the rich. Inequality generally culminate in unrests that may harm the assets of the rich directly or result in diminution of the value of assets due to the resultant political risk profile of a country. Slater (2013) pointed out that "*a growing chorus of voices is pointing to the fact that whilst a certain level of inequality may benefit growth by rewarding risk takers and innovation, the levels of inequality now being seen are in fact economically damaging and inefficient*".

Findings of a review of literature by McAdams (2007) revealed that "*economic theory predicts, and econometric evidence finds, that inequality increases crime and political corruption and, in certain circumstances, constrains growth*". As crime increases the

rich will then need to pay more to safeguard their assets. Practical examples are the neighborhood watch committees set up in certain affluent suburbs to help combat crime at night. These private initiatives cost residents money, in addition to the CCTVs they would have set up at their premises. Political corruption raises the risk profile of a country resulting in diminution of the value of the assets of the rich. It is therefore undoubted that inequality is in the long run costly even to the rich, making the natural property rights theory a double edged sword that slay even the very group whose interests it seeks to protect.

Kades (2018) further criticized the natural property rights theory for devoting very little time on how authorities should design taxation policies, even its favorite flat tax rate system. Put differently the natural property rights perspective to taxation is largely academic with little implications on tax policy. For any scholarship to be useful to society it must aim at addressing the challenges which the society faces. Within the context of taxation, theories should aim at helping authorities attain optimal taxation from a sovereign collective perspective, not just from the perspective of one sector of the collective.

From the foregoing, it is argued that barring the natural property rights perspective, the human rights-taxation discourse is generally inclined to the theories of taxation and rationale for taxation expounded earlier. This has a profound effect on the analysis of the powers of the commissioner in relation to objections and appeals by tax subjects. An interpretation of the powers of the commissioner that negate the human rights implications of taxation can never be said to be constitutional under any stretch of imagination. With these underpinnings in mind, the following sections analyzed the powers of the commissioner in relation to tax objections and appeals.

3.4 Right to Administrative Justice

The Constitution recognizes that every citizen has a right to administrative justice[19]. The Administration of Justice Act [Chapter 10:28] was promulgated to make sure that

[19] Section 68 of the Constitution.

rights to administrative action and decisions that are lawful, reasonable and procedurally fair are enforced. Section 5(i) and (j) of the Administration of Justice Act expressly states that any decisions or procedures done in a way that constitutes abuse of power and which is unreasonable may be appealed against at the High Court. This may be the reason for the escalation of the number of cases rising in the courts for example the Administrative court, High court, Special Court for Income Tax and the Fiscal Appeals Court.

The right to administrative justice as a fundamental right enshrined in the Constitution, guarantees that everyone has the "*right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally correct"* (Feltoe, 2019). In the sections that follow an assessment is made of whether the current provisions of the ITA and their interpretation by courts is not consistent with the administrative justice tenets.

The strict adherence to administratvive justice rights should give way to basic human rights for the greater proportion of the population. This approach is consistent with the social contract theory as a rationale for taxation. It is argued that the sovereign whole will generally agree that the rich should not burden tax authorities with litigations to avoid payment of taxes, because they are benefiting the most from society. With the purposive approach to tax statute interpretation in mind, some principles of administrative justice rights are discussed in the sections that follow, in relation to the current tax appeals and objections process in Zimbabwe.

3.5 Right to a fair hearing

It is a well-accepted principle of law that one cannot be a judge in their own case. This is a principle spanning from both the Roman law and English common law *nemo judex in causa sua (* no man should be a judge in his own case), provides the rationale for a common political authority whom all subjects must obey (Page, 2015). *Nemo judex in causa sua* is also commonly known as the rule against bias. It is the minimal

requirement of the natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias (IILS], 2021).

Section 69(2) of the Zimbabwean Constitution entrenches the right to a fair hearing. It is every citizen's right that when their civil rights and obligations are involved, every citizen has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court. This principle has always been observed in order to bring about justice to the aggrieved parties in dispute.

A matter that falls for consideration is whether or not the Commissioner cannot deal with appeals from and objections against decisions of his or her subordinates impartially and without bias as required by the law. The Commissioner General of taxes is generally a person who has vast experience and training in tax administration. This is a person who has seen objections and appeals against his or her own assessments being overturned during his or her time as a junior tax officer, by the Commissioner before him or her or by courts of law. This is also a person who is fully aware of the obligations resting on him as an administrative authority. Lastly, as an accounting officer of the revenue collection authority he or she will be fully aware of the cost implications of legal costs arising from failure to deal with tax objections and appeals in accordance with the law.

Some may note that Commissioner through his or her subordinates having made the assessments and issued such, becomes the first port of call when the taxpayer wants to challenge the same. They may argue that there is no logic in going back to the same institution seeking them to review an earlier decision. This argument is premised on the assumption that when one executes a task, it will be difficult to persuade them into accepting that they made an error or misconceived or missed the point prior or on initial execution of the task. Getting a taxpayer to approach the Commissioner to lodge an objection with the same institution that audited the process will not be fair based on the premise. The chance of convincing the authority to derogate from their initial outcome may become a mammoth of a task. This view thus contends that the

Commissioner is indirectly given the position of judge in their own case by having to review an earlier decision they would have made, through subordinates, when initially issuing out the assessments.

It is argued that the jurisprudence in relation to the recusal of judicial officers can shed light on the impartiality issue in relation to the Commissioner of Taxes. Recusal of judicial officers is not new in the history of the judiciary here in Zimbabwe and in other jurisdictions. In the case of **President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1999] ZACC 9; 1999 (4) SA 147 (CC) (SARFU)**, cited with approval by Hungwe J, in **S v Obert Nhire** *and* **Florence Kanjere HH 619/15;** the court laid down two factors for consideration in the recusal of judicial officers, namely: presumption of impartiality of judicial officers and the double-requirement of reasonableness. By virtue of the oath judges take on appointment, to dispense justice without fear or favor, and judges' capability to carry out that oath by reason of their training and experience; it is presumed that a judicial officer will impartially deal with any case assigned to him or her, until the contrary is proved in the case **Bernert v ABSA Bank Ltd 2011 (4) BCLR 329 (CC); 2011 (3) SA (92).**

A person seeking to rebut the presumption of impartiality of a judicial officer must demonstrate reasonableness on his or her part and that the apprehension of bias he or she has is reasonable **South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing) [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC)) (SACCAWU).** Ngcobo CJ, in *Bernert*, stated that "*the other aspect to emphasize is the double-requirement of reasonableness that the application of the test imports. Both the person who apprehends bias and the apprehension itself must be reasonable… This double requirement of reasonableness also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased — even a strongly and honestly felt anxiety — is not enough*" (para 34).

Cameron AJ, in *SACCAWU*, pointed out that the presumption of impartiality is not easily dislodged and calls for cogent or convincing evidence for it to be rebutted. He stated that absolute neutrality in judicial context was impossible and an illusion, because judicial officers were humans, who are a 'product of their life experiences', which in turn informs their discharge of judicial duties. He stated that "*impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal view- that is the keystone of a civilized system of adjudication. Impartiality requires in short a mind open to persuasion by the evidence and the submissions of counsel*" (para 14).

Ngcobo CJ, in *Bernert*, underscored the importance of the considerations of presumption of judicial impartiality and double reasonableness thus: "*The presumption of impartiality and the double-requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favor. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, judges do not choose their cases; and litigants do not choose their judges. An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias*".

Whilst, unlike judges, the Commissioner of Taxes does not take an oath to act impartially, his or her training and experience in tax administration puts him or her in a position to have a mind open to persuasion by argument of appellants or their counsel. With the decision of the Commissioner being open for judicial review for both procedural and substantial reasonableness and fairness; the Commissioner will always be live to the fact that his or her decisions are subject to judicial scrutiny.

An internal administrative process for hearing objections and appeals is not unique to Zimbabwe. Within the Latin American context internal administrative process that review tax decisions are hailed as progressive. The World Bank Group (2019) stated that "*a well-designed internal administrative process for reviewing tax decisions can contribute to economic efficiency, competitiveness, and growth by accurately identifying errors in tax administration, lowering compliance costs for taxpayers, and enhancing the credibility and popular legitimacy of the tax regime*". Following a review of administrative review processes in the Latin American countries, The World Bank Group argued that "*a sound tax-review system delivers timely, credible decisions at a reasonable cost. The effectiveness of a tax-review process hinges on four criteria: legality, independence, transparency, and efficiency…All four are essential to the quality and integrity of the review process*" (p. 26).

The World Bank Group (2019) further argued that while a complete separation between a person who makes the initial assessment and the person who makes a review of the assessment on appeal would bring about independence in the review process; the associated costs would be heavy on the tax administration system. The World Bank Group then recommended that "*policymakers in each country or jurisdiction must attempt to strike the balance between independence and administrative efficiency that best reflects their unique circumstances*" (p. 27). Crawford (2013), however argued that the Latin American and Caribbean countries should have *"a separate and independent body to handle the first level of tax objections at the tax administration level*". He further stated that appeals officers must be able to act independently of the tax administration, both in appearance and fact.

It is argued that having the commissioner deal with appeals and objections does not violate the nemo judex principle. In addition, the system is not only unique to Zimbabwe but to other countries across the world. Reputable institutions such as the World Bank Group find the system to be effective as long it meets the criteria of legality, independence, transparency, and efficiency.

The human rights approach to taxation enjoin policy makers, law makers, and interpreters of tax laws to lean towards promotion of payment of taxes by the rich so that funds are available to execute programs that address basic human rights of the less privileged. This is in conformity to the "right to fair and equal treatment" of citizens, therefore the ITA is in agreement to the ability to pay theory which in turn supports the spirit and purport of the Constitution.

CHAPTER 4
IN THE APPEALS AND OBJECTION PROCESS

4.1 Introduction

It must be stated at the outset that for any analysis of the powers of the commissioner of taxes on appeals and objections to find traction, it must be grounded in some recognized theories of taxation, which were discussed at length in chapter 2.

In this section a comparative analysis of appeals and objection processes of different countries is undertaken. This is to measure if the current appeals and objection process currently being used by ZIMRA is effective compared to that of other countries. The standards and methods used by other countries shall be interrogated and shall be used to recommend changes in the current system, in order to improve the current process or alternatively introduce a whole new process that will incorporate constitutionalism.

However the appeals and objection notification processes seem very similar throughout the world but there is a remarkable difference in how the notifications are handled thereafter, which has necessitated this particular study. In some places the commissioner is notified about the objection and the objection process is dealt with by an independent board, whereas in some countries the commissioner is notified of the objection and the very same commissioner then adjudicates on the objection and comes up with a ruling which may vary the assessments in dispute or dismiss the same.

The current objections and appeals process in use in Zimbabwe by the taxman is a process that is being constantly challenged in the courts and the special courts. Declaratory orders are constantly being sought in tax matters where a taxpayer is

constantly disputing the laws contained in the ITA. The recent appeal by one organisation challenging constitutional matters is one that is of interest. In the recent case of **Murowa Diamonds (Pvt) Ltd v Zimbabwe Revenue Authority** [20] Mafusire J was presented with a matter where the appellant sought a declaratory order to declare section 58 of the ITA[21] to be in conflict with section 56(1) of the Constitution[22] and section 68(1) of the Constitution[23].

The learned judge ruled that Section 56(1) did not apply to the issue of taxation as the revenue collection agent can never be equal to the tax payer. He said "*I find the applicant's argument on equality rather flawed. Caesar is not equal to his subjects. The applicant and the first respondent may be two parties to a dispute. But that is as far as the equality goes. The respondent must collect the tax due to the fiscus. Government business must not grind to a halt by reason of glitches in the recovery process. The first respondent must be clothed with powers to effectively collect the tax. It must be equipped with powers and instruments to overcome roadblocks in its collection mandate. The first respondent is an administrator. It cannot be said to be equal to the taxpayer. Section 56(1) of the Constitution does not apply. It addresses a position altogether different from the applicant's situation herein*".

The learned judge in Murowa Diamonds (supra) further stated that "*The applicant's further argument that the power given to the first respondent in s 58 is disproportionate to the need to protect any national interest or that such power is unreasonable, unfair, unnecessary and unjustifiable in a democratic society that is based on openness, justice, human dignity, equality and freedom, is equally flawed. Firstly, the applicant's approach to target for impeachment only s 58 of the Income Tax Act against a whole gamut of the tax legislation is rather curious and somewhat irrational…Secondly, and more importantly, tax legislation is complex. It is intricate.*

[20] HH125/20 and HH 156/18.

[21] The power to appoint an agent by the Commissioner

[22] Right to Property

[23] Right to administrative justice.

The provisions are interrelated. They are interdependent. The whole tax regime is designed to achieve one purpose: the efficient recovery of outstanding taxes unhindered by disruptive and interruptive objections and legal processes. This stems from public policy. Tax legislation is like a gear with several cogs, a wheel with spokes. It makes no sense to me to seek to knock down one cog or one spoke. All what that will do is to impede the flawless function of the gear or the wheel. In the present case for example, if the first respondent has assessed the tax due by the applicant who does not impeach s 69 that allows such tax to be recovered even in the face of an objection, I see little point or the justification to hamstring the first respondent and disable it from going all the way to recover the tax due…".

Turning to practices obtaining in other jurisdictions, the learned judge argued that while there are certain aspects that could be learnt from such jurisdictions, the current system as it is obtained in Zimbabwe was just about reasonable. He argued "*Much can be said of the tax regimes of other countries that have now expressly incorporated the need for notice before garnishment procedures are invoked and the inclusion of some guidelines before the collector of revenue exercises his discretion in dealing with objections. This is certainly a development that could well be recommended to our own Parliament. However, I am not convinced that there are such gross deficiencies in our tax legislation as should lead one to declare as unconstitutional the first respondent's powers in s 58 of the Income Tax Act…The garnishee procedure is recognized in all other countries which have open and democratic societies based on freedom and equality and which recognize, protect and enforce human rights*".

It would appear from *Murowa Diamonds* (supra) that the courts in Zimbabwe are inclined towards protecting the commissioner's powers on tax matters. This could be subconsciously be influenced by the thinking that tax subjects which have resources to make objections and appeals have the means or have benefitted more from society and hence should not be allowed to get away with non-payment of taxes. This view finds support from Uchena JA's arguments in **Delta Beverages (Private) Limited v Zimbabwe Revenue Authority SC 3/22,** where he said "*The determination of tax issues require*

clarity and incisiveness in decision making. This is because the law requires that those who should pay tax should do...There should be no room for those within the group which should be taxed escaping through failure by the Commissioner to net them in and if he fails the Special Court in the exercise of its full jurisdiction should net them in".

4.2 The Appeals and Objection Process in Canada

The Income Tax Act, RSC 1985, c1 (5th Supplementary) herein after known as the Act provides for a formal process for those who are aggrieved by the outcome of tax audits carried out by the taxman. The aggrieved parties are encouraged to approach the Commissioner to discuss and register their dissatisfaction of the assessments. This affords the taxpayer the opportunity to engage and negotiate with the commissioner in a bid to find each other and avoid a formal court process. This process also allows the Commissioner to review the assessments sent out any make adjustments or amendments were necessary.

If an objection involves an amount of not more than $25 000 or if a disputed loss is not more than $50 000 the appellant may use the informal process, which is known in some countries as the Alternative Dispute Resolution method (ADR) to resolve the conflict. Categorization of disputes according to amounts involved is one commendable classification as it indicates how much funds are tied up at any given moment. This informal route of resolving disputes also assists the Commissioner in decision making on how to go about resolving disputes, mainly focusing on their gravity and impact in the economic society. In some countries the informal process compares to or is alternatively known as the Alternative Dispute Resolution (ADR) method.

It is important to note that the informal structure of the appeals and objections process for amounts below a certain threshold gives access to tax justice for the poor. Formalized processes such as litigation are costly as they involve use of lawyers who are both specialized in procedure and the particular tax dispute. At the end of the day a formalized process will only leave the rich with access to tax justice, yet it is these

very same people who should be paying more to facilitate realization of the human rights objective of taxation.

If the dispute has not been resolved in the informal process it is escalated to the Federal Court where the informal process procedure is reviewed. The federal courts Act restricts the grounds for an appeal from a judgment heard under the informal procedure (Authority, 2021). The matter is allowed to be appelaed further until to the apex court.

It seems that other tax regimes have taken the step further to protect taxpayer's rights in accordance with the Billl of rights in that, objections and appeals process have been decentralised from the respective Commissioners, in that tribunals or independent tax boards have been set up. The engagement of other methods and independent parties, fulfils the aspect of timeliness as these cases normally deal with money or investment issues, which play a pivotal role in the economy.Such tribunals consist of different professionals who are non affiliated to the Revenue Authority in order to have a fair trial and provide unbiased decisions. Transparency is promoted as no one becomes a " *judge in their own case.*" Normally outcomes from such tribunals are well reasoned and thought out and provide expedient relief in such disputes.

The tax system in Canada is very similar to that of South Africa but the remarkable difference is that Canada classifies or categorizes their disputes by the value of the amounts in dispute. Classification by amounts is prudent as this gives different indicators to the different stakeholders such as the Commissioner, different economic players, stakeholders, policy formulators, policy implementers and the judiciary. Having an idea of how much is tied up in disputes helps stakeholders in managing their budgets with figures in mind and once the figures spiral out of a certain range, emergency measures can easily be set in to manage the situation, which is used as a means of managing a crisis.

4.3 Appeals and Objection process in the Republic of South Africa

In the Republic of South Africa, the appeals and objections process has been promulgated in the Tax Administration Act (No.28 of 2011) that was brought into effect in 2014. When a taxpayer is aggrieved by the outcome of an assessment issued by the Commissioner, he lodges an objection within thirty days to the Commissioner of the South African Revenue Services (SARS)[24]. The Commissiner is required to furnish a reply within sixty days. Thereafter if the taxpayer is still not satisfied with the outcome, he or she may lodge an appeal with the tax board as postulated in the Tax Act section 11, who having dealt with the matter may or may not remit it to the Tax Court.

Before the matter is set down for hearing before the tax board, the parties in dispute are given a chance to engage in a dispute resolution process, held by an independent facilitator as enshrined in the Tax Administration Act[25] . This process follows the formal rules and procedure of an arbitration process, with the hope of resultantly getting the parties to agree to a settlement outside the formal court proceedings. This willingness to engage in an alternative dispute resolution (ADR) must be expressed by the appellant in their letter of objection to the Commissioner of SARS.

Commercial arbitration is fashionably becoming one of the most common and sought after dispute resolution method under the Alternative Dispute Resolution method in the commercial world globally. This is so because it is a confidential process, that seeks to preserve relations, yet dealing with disputes outside the formal court system. It is friendly, saves on time and involves the parties in dispute in resolving their dispute amicably. This form of alternative dispute resolution method has proved to be efficient in the business world, as the long and time consuming court processes proved to pause a challenge. These unnecessary delays in decision making by the courts, resulted in losses in profits and opportunity cost that could have been avoided by taxpayers.

[24] Section 7 of the Tax Administration Act (No.28 of 2011).

[25] Section 13.

A facilitator who is independent is chosen by both parties to lead the hearing. The procedure of choosing such facilitator is laid out in the Act[26]. A formal register is kept by the Commissioner of SARS of all qualified arbitrators in tax matters and a sitting arbitrator can only be chosen from that list. This way of choosing an arbitrator is a very commendable as it incorporates third independent parties to adjudicate in the appeals and objection processes, therefore making the process fair and transparent to the parties involved.

The formal arbitration process that has been embraced by the Republic of South Africa in their legislation as a means of resolving tax disputes has proved to be efficient in that not all tax disputes go to the Tax Court. It is efficient in that it is a stop gap measure that is used to identify whether the matter warrants the attention of a higher authority or not and at the same time solving disputes. This reduces the amount of litigation amongst the revenue collecting authority and the taxpayers, which in turn preserves a professional relationship in the process. ADR being a non-court process, the parties are free to engage in a free manner, without the emphasis of formal court proceedings which eliminates the element of fear, as the parties will not be in a formal court setup.

If the ADR does not yield any binding agreement, the facilitator or the arbitrator refers the matter further to the Tax board, for further management in the hope of resolving the dispute. The tax board is led by the chairperson who is in charge of overseeing the processes brought before such board. Formal proceedings like those of a competent court are followed for example leading of evidence, filing of court papers and many more, but the matter is before a tribunal. The procedure to be followed before the tribunal is set out in section 28 of the Tax Administration Act.

The tax board is made up of independent professionals with an understanding of tax matters for example chartered accountants, tax experts, commercial lawyers and any

[26] Section 16 of the Tax Administration Act.

other professional with an expertise in tax law. This is highly plausible as all aspects of the dispute are looked into with different board members from different backgrounds who will adjudicate on the dispute with the different viewpoints in mind, thus eliminating biasness and providing a fair hearing for the appellant. After the tax board has deliberated on the matter and has failed to resolve the dispute, the matter is remitted to the Tax Court for a hearing. The formal procedures of the court and the rules are adhered to and the parties in dispute appear before a Judge to present their case.

Such administration of taxation disputes has proved to be fruitful in South Africa as it has been shown by its remarkable growth in arbitration cases. For the years 2007 to 2016 only ten disputes had been referred to Arbitration Foundation South Africa (AFSA), compared to the eighteen received in 2018 alone, with a total quantum of in excess of ZAR 640 million (Andropolous J, 2020). ADR has brought about growth in the economy of South Africa and at the same time providing efficient means of resolving disputes even in taxation matters. This has attracted investors and in turn has grown the economy remarkably.

4.4 The appeals and objection process in Zimbabwe

Amendment 20 of the Constitution of Zimbabwe brought about constitutional protection of administrative justice rights. Before that administrative justice rights were protected under common law and the Administrative Justice Act (Chapter 10: 28). Section 68 of the Constitution of Zimbabwe provides for the protection of administrative rights:

(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

The Administrative Justice Act provides in section 3 that administrative authorities have a responsibility to act lawfully, reasonably, and in a fair manner (Feltoe, 2014). Section

1 of the Act defines administrative authorities to include persons and bodies authorized by any enactment to exercise or perform an administrative power or duty (Feltoe, 2014). That the Zimbabwe Revenue Authority (ZIMRA) is an administrative authority is beyond question. In the case of **Zimbabwe Revenue Authority v Packers International (Private) Limited SC 306/14** Gowora JA (as she then was) stated that "*The appellant, (hereinafter referred to as "ZIMRA") is an administrative authority established in terms of the Revenue Authority Act, [Chapter 23:11]. It is tasked with the obligation to collect taxes and other statutory dues and fees under various legislative instruments including the Value Added Tax Act, [Chapter 23:12], and the Income Tax Act, [Chapter 23:06]".*

Section 62 of the ITA[27] expressly states that an aggrieved taxpayer must lodge an objection of the assessment with the Commissioner within thirty days, from the issuance of the assessment. The court held in **Barclays Bank of Zimbabwe Limited v Zimbabwe Revenue Authority HH 162 /04** that it is the taxpayer's right to receive an assessment from the Commissioner, and should be certain that it is indeed an assessment, so they can be able to object to an assessment in thirty days. It is the Commissioner's administrative duty to issue every taxpayer with such an assessment, so they can object and make appeals were need be.

[27] (1) Any taxpayer who is aggrieved by—

(*a*) any assessment made upon him under this Act; or

(*b*) any decision of the Commissioner mentioned in the Eleventh Schedule; or

(*c*) the determination of a reduction of tax in terms of section *ninety-two*, *ninety-three*, *ninety-four*, *ninety five*

or *ninety-six*;……..

(2) No objection shall be entertained by the Commissioner which is not delivered at his office or posted to

him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the taxpayer

satisfies the Commissioner that reasonable grounds exist for delay in lodging his objection.

While objecting against an assessment made by a ZIMRA official to the Commissioner who is the head of ZIMRA may appear to be an unfair process to the taxpayer; it must be noted that exhaustion of internal remedies is fairly a standard imposed by statute across various jurisdictions. For instance in South Africa, section 7(2) (a) of the Promotion of Administrative Justice Act, places an obligation on an aggrieved party who desires judicial review of an administrative action to exhaust any internal remedies at his or her disposal before approaching a court. The section reads: '*No court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted*.' This position has since been crystalized in that country' jurisprudence through judgment in the case of ***Nichol v The Registrar of Pension Funds*** **2008 (1) SA 383 (SCA) [2006] 1 All SA 589 (C) (1) SA 383 SCA.**

The Commissioner has the discretion of allowing the objection, dismissing, reducing, increasing or altering an assessment being objected to. The Commissioner may even dismiss the objection altogether. The process is initiated by ZIMRA and the appeal process is also handled by the same organization. However, as an administrative authority the commissioner will be enjoined by section 68 of the Constitution as well as the provisions of the Administrative Justice Act to act lawfully, reasonably, and in a fair manner both substantively and procedurally and be careful not to violate a taxpayer's right.

In terms of lawfulness it is beyond argument that the commissioner can only act as provided for by the relevant laws. In terms of reasonableness and fairness, it is argued that the yardstick for measuring these two in respect of the commissioner's decision must be the rationale behind a tax whose assessment is under objection or appealed against; in light of the theories and human rights objectives of taxation. In addition, it is argued that the reasonableness and fairness of the commissioner's actions must be assessed based on the class into which an objector or appellant falls. In respect of objectors or appellants falling in the poor category reasonableness and fairness must be interpreted liberally with the bias towards leniency. However, with respect to those

falling in the rich category, who include corporates there should be strict interpretation of reasonableness and fairness, with bias towards having the objector or appellant pay the taxes as assessed.

Section 65(2) of the ITA goes a step further to make sure that its position of maintaining an upper hand is maintained[28]. After a taxpayer has objected to an assessment they need to notify ZIMRA within twenty-one days that they are aggrieved with the outcome and intend to lodge an appeal with the Special Court for Income Tax or the Fiscal Appeals Court. Unless the rules are adhered to the appeal will be considered as lapsed and to no effect[29]. Whilst the appeals process appear to be very cumbersome with a tendency to deny litigants access to courts, it must be viewed from the perspective that the rich who have the means to avoid or evade taxes are the ones who are most likely to use the process. As was argued earlier in this study, taxes form an important source of revenue for government that allows it to fulfil its mandate on basic human rights and achieve wealth redistribution functions. By making the appeals process a bit stricter and cumbersome, the law is leaning towards compelling the rich to pay taxes than spend resources fighting against paying taxes.

[28] (2) Every notice of appeal shall be in writing, shall state whether the appellant wishes to appeal to the High

Court or to the Special Court and shall be lodged with the Commissioner within twenty-one days after the date of the notice mentioned in subsection (4) of section *sixty-two* or, as the case may be, after the expiry of the period mentioned in the proviso to that subsection. Unless such notice of appeal has been lodged within the period prescribed by this subsection, it shall be of no effect whatsoever and the objection shall not be considered further:

[29] ***5. Submission of appeals***

Within fourteen days after serving his reply on the appellant, the appropriate officer shall submit to the registrar of the Court two copies of—

(*a*) the notice of appeal and any other document served on him in terms of rule 3; and

(*b*) his reply served on the appellant in terms of rule 4; and

(*c*) any material correspondence relating to the appeal.

It must be noted further that the Special Court for Income Tax or the Fiscal Court when dealing with tax appeals from the Commissioner, they exercise original discretion, meaning that they will not be confined to the record and evidence adduced before the Commissioner. This position was well stated by Gubbay CJ (as he then was) in the case of **Sommer Ranching (Pvt) Ltd v Commissioner of Taxes 1999(1) ZLR 438 (SC)** at p 443 A-B, where he said "*Presently, it is well settled that in an appeal against a decision where the Commissioner exercised a discretion the Special Court is called upon to exercise its own original discretion. Nor is it restricted to the evidence which the Commissioner had before him. The appeal to the Special Court is not only a rehearing but can involve the leading of evidence and the submission of facts and arguments of which the Commissioner was unaware*".

An analysis of the Commissioner's powers on appeals and objections cannot be complete, without reference to relevant theories of taxation, an exposition of the rationale for taxation, and the human rights perspective of taxation. For the purposes of this study the ability to pay and the benefit theories were found to be relevant for a proper understanding of the grounding and extent of the powers of the Commissioner on tax appeals and objections. While the two theories seek to explain taxation from two different angles, they both contend that those with more means should pay more taxes relative to their less privileged counterparts.

Using the above analytic lenses, the review and synthesis of literature indicated that the current appeals and objections process is consistent with the administrative justice provisions of the constitution of Zimbabwe. In addition the analysis revealed that the Commissioner's power to appoint collection agents through garnishee was consistent with the constitution. It is conceded that there is great room for improving the current administrative review of objections and appeals to entrench independence.

CHAPTER 5

GARNEESHING OF TAXPAYERS ACCOUNTS.

5.1 Introduction

Taxation authorities have the express right to garnishee taxpayer's accounts by legislation found in section 8 of ITA. Section 48 of the VAT Act also allows for the appointment of an agent through which ZIMRA can access the accounts of defaulting taxpayers. The logical construction of this provision is that, payment by the agent is by means of a garnishee against any account to the taxpayer's credit held with the agent (Tachiona, 2020). Section 58 of ITA also confers substantial authority to the revenue authority to attach any assets or belongings that have an equivalent value of the debt or the tax, which becomes due to the debtor by a garnishee, without the need for a court order or any form of judicial oversight. Garnishee orders appear arbitrary and highly heavy handed to the extent of being unreasonable in a just society.

5.2 Garnishee orders

A garnishee order concept was well defined in the case of **Paramount Furnishers v Lezars Shoe Store and Outfitters** [30] where Trengrove J stated "*the effect of a garnishee order is that the employer s garnishee is obliged to deduct the amount stipulated from the emoluments accruing to the judgment debtor and to pay them to the garnishor… but for the garnishee order, the garnishee would ordinarily be obliged to pay amounts deducted to the judgment debtor as his employee. Ordinarily the garnishee, as employer, cannot discharge his obligation towards his employee by paying emoluments due to him to any third party unless he has some express or implied authority to do so. The garnishee order, however, compels him to pay to the judgment creditor and consequently any such payment operates as a discharge pro tanto of the garnishee's obligation as employer to the judgment debtor as his employee. By operation of law the judgment creditor thus becomes entitled to receive money which would otherwise be payable to the judgment debtor and to that extent he steps into his shoes.*

[30] 1970 (3) SA 361 (T).

5.2.1 Garnishee orders at common law

Garnishee orders have been used in many different jurisdictions as common law such as Botswana where they are provided for in the Deserted wives and Children Protection Act, where it is postulated in section 6(1) "*a garnishee order may be issued against future earnings in respect of instalments not due under such maintenance order…*" In Zambia the Subordinate Courts Act [31] provides for the attachment-of-earnings order.[32] In Zimbabwe the Magistrates Court Act [Chapter 7:10],[33] as read with Order 29 of the old Magistrate Court (Civil) Rules, garnishee orders re recognised.[34] For the purposes of the present enquiry, special attention shall be paid to the mechanism, the Garnishee Order, as applied and enforced in Zimbabwe in terms of the Magistrates Court Act.

In South Africa the principle of garnishee was confirmed in case of *African Distillers Ltd v Honiball and another*.[35] The Judge held that:

"*What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid receipt and discharge for the money. It enables him in the event of the money not being paid to obtain execution. He has all those rights, but there is no transfer of the debts, and he has not created a creditor*."[36]

These attachments which are done due to a garnishee order, are made in the hands of a third party ,see **European Hotel, Pretoria v Beckett,[37]Spence v Davidson,***[38]*and

[31] 28 of 1970.

[32] Armstrong, A.1992. "Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning. Studies in Family Planning". Vol. 23, No. 4 (Jul. - Aug), 217-228 at 219. http://www.jstor.org/stable/1966884 (accessed 2/5/16).

[33] Chapter 7:10.

[34] 290 of 1980.

[35] 1972 (3)SA 135 (R) at 136 D-E.

[36] Para 136 H.

[37] 1911TPD 31.

[38] 1911 WLD 147.

Hall and De Beer and Slade v Hall.[39] It should be noted that money in the hands of the State cannot be subject to a garnishee order.[40]

5.3 Constitutional Implications of Garnishee orders in tax collection in Zimbabwe and South Africa

The issue of garnishee orders was dealt with by the Zimbabwe Supreme Court in the case of **Zimbabwe Revenue Authority v Packers International (Private) Limited SC 28/16**. Gorowa JA (as she then was) appeared to be inclined to the view that the provisions relating to garnishees were an indispensable tax collection mechanism. She stated that "*The Act as a whole and, in particular, its provisions relating to assessments and the payment recovery and refund of tax provisions found in Part VII of the VAT Act are indispensable tools for the prompt collection of tax due. From an economic point of view, the provisions of the VAT Act are meant to ensure a steady, accurate and predictable stream of revenue for the fiscus*". She pointed out that the provisions of the VAT Act were meant to protect the fiscus from delays in payments that could be caused by frivolous legal challenges. She stated that "*these provisions are an embodiment of the principle "Pay Now Argue Later", suggesting that an appeal would not have the effect of suspending payment. The principle is aimed at discouraging frivolous or spurious objections and ensures that the whole system of tax collection in the country maintains its efficacy. This serves the fundamental public purpose of ensuring that the fiscus is not prejudiced by delay in obtaining finality in any dispute*".

The South African constitutional court had occasion to deal with the constitutionality of similar provisions in the case of **Metcash Trading Limited v The Commissioner for the South African Revenue Service & The Minister of Finance 001 (1) SA 1109 (CC)**. The court held that the VAT system required vendors themselves to collect and pay tax on their transactions, which means that an assessment necessarily involves a finding of

[39] 1916 TPD 372.

[40] Ex parte Venter 1940 TPD 286.

dishonesty on the part of the vendor. Having regard to the pressing national interest in enforcing honest and prompt payment of VAT, such limitation of the right of access to the courts as the "pay now, argue later" rule could be justified under section 36 of the South African Constitution. Earlier a South African High Court had held that the appointment of a taxpayer's agent (garnishing of accounts) was necessary for the speedy collection of taxes, and as a weapon of great importance to the state, and consequently was constitutional **Hindry v Nedcor Bank Ltd 1999 2 All SA 38 (W)**.

The rationale for paying taxes give a compelling case for taxation and the need to ensure prompt payments of assessed taxes, while mechanisms should be put in place to ensure that tax avoidance and evasion is minimized. It is public in some countries like Zimbabwe and South Africa that public funds should not be interrupted with for any reason unless it is unavoidable. This is so for the efficient running of the country and ensuring that government business is never brought to a halt. In order to enforce this revenue authorities have been empowered with sweeping powers through legislation to do the following;

1. The power to levy penalties on tax debts.
2. To make estimates were actual tax cannot be determined.
3. The power to insist on payment although there being a pending case on appeal before the courts or even the revenue authority i.e pay now argue later principle.

It is argued that the Zimbabwean and South African courts' adoption of the "pay now, argue later" principle in relation to tax statutes accords well with the two theories of taxation: ability to pay and benefit theory, and the assumption that the rich possess the means to resist taxation via court processes. Since they have the ability to pay they can as well pay whilst their objections are being considered so that government programs are not unnecessarily delayed pending resolution of their objections. Viewed from the perspective of the social contract theory, it is argued that the sovereign collective believe that individual concerns about their tax liabilities should not unduly constrain the functioning of governments; therefore tax payers aggrieved by tax assessments against them should pay while their objections are being considered.

However it must be mentioned that the concept of garnishee orders comes with a violation of human rights when it is used to and enforced on taxpayers. Taxpayer's constitutional values are violated especially to that of their right to property, right to a fair hearing and some other rights that are limited when such garnishee methods are used.

CHAPTER 6

FINDINGS AND RECOMMENDATIONS

6.1 Tax Administration

There is a gap in the administration system used by ZIMRA in regard to their review process of objections and appeals. The same authority that does the audits, is the same that issues out the assessments and eventually is the same authority that receives and reviews the objections or appeals from taxpayers. There is no observation of separation of powers and thus no transparency in the review process. This tends to disadvantage taxpayers and as result depriving them of their constitutional right to a fair hearing.

In this instance the Commissioner is a *judge in their own case*. The appeal to the commissioner is normally considered predictable as the outcome is very obvious and therefore considered to be time consuming and slowing down the process of getting the matter adjudicated on by a third and independent party expediently. The process is long and unnecessarily ties down working capital in tax disputes which money could have been invested elsewhere and received interest.

Although most countries have adopted this method for reviews, they have included the aspect of independent tribunals to hear the dispute before it is formally taken to the courts for litigation. The independent tribunal gets a chance to hear the matter and adjudicate upon it, which culminates an aspect of justice and fairness before the matter is taken up to litigation.

Having other safety nets is most prudent, in that the matter is closely scrutinized before it is taken for litigation. The biggest disadvantage currently is that, the sitting judges have no background of taxation which is a specialized field. Judges are law scholars

who are well versed in legal procedures and understandings rather than the accounting and business aspect that taxation is grounded on. Therefore getting well-reasoned judgments from such unfamiliar scholars in the taxation field is always a challenge as they will just focus on the legal aspect of things and neglect or overlook the economic impact such a matter has on the overall effect of the economy as a whole. This eventually affects international ratings on the rankings that the country has on doing business with other countries.

Other alternatives of safety gate measures that include arbitration and independent tribunals may be utilized or adopted, to hear and receive objections and appeals in order to provide an independent view on any objections and appeals. The appeals and objection system currently in place does not recognize arbitration by an independent arbitrator, as a means of curtailing tax disputes. Some countries are using this method to their advantage and it has proved to be very effective, especially in the Republic of South Africa. This dispute resolution mechanism has proved to be effective in tax disputes as much as it is effective in other areas of law and has culminated in a reduction of tax disputes spilling over into litigation through the formal court system.

The recognition of arbitration by an independent arbitrator gives even the smallest of them taxpayers the opportunity to negotiate in a manner that saves their businesses from collapse and a good and healthy working relationship is preserved. Parties or taxpayers becoming willing to engage rather than avoid and evade tax. This builds confidence in taxpayers that the revenue authority is not there to bring them down, harass or trouble them but instead to work together for the betterment of the nation.

6.2. *Lack of interaction between the taxpayer and the Revenue Authority*

It has been found that there is no interaction between taxpayers and the revenue collector. Without such synergies between the revenue authority and the taxpayers with the authority, it becomes difficult to forge healthy working relations. The revenue authority has exhibited heavy handedness and no spirit of tolerance or empathy towards taxpayers, which is not good as taxpayers will always show uncalled for repulsive

behaviors. Not much is accomplished when parties engage with such hostile attitudes towards each other but instead a much antagonistic relationship is forged which may end up beyond repair. Such hostile working behaviors towards parties locked in a dispute is uncalled for and stifles progress and growth in the economy. The Revenue authority is well known to recover taxes owing by garnishing taxpayer's bank accounts. In the precedent case of **ZIMRA v Packers International (Pvt) Ltd [2016] ZWSC 28** the court held that "*The other principle of the revenue authority's heavy handedness is the principle of "pay now ague later."* ZIMRA has adopted this procedure so often that taxpayers are convinced that the revenue is always ruthless in making recoveries. It is evident that ZIMRA is heavy handed by the financial reports published in the past two years were ZIMRA has surpassed its target. This shows that heavy handedness has been employed to recover taxes owing, despite the harsh economic environment prevalent in the country in the past decade.

The ability to pay theory is the underlying philosophical view of most taxpayers. Zimbabwe has one of the highest taxes in Africa on individual and corporate taxes (Asen, 2020) and later on in the world, therefore taxpayers are convinced that taxes do eat up their income that they would have worked very hard to earn. Taxpayers then justify the avoidance and evasion of tax due to the high taxation rates. That explains the high defaults in return of taxes and the unending litigation cases before the courts. Instead of the revenue collector coming up with strategies to engage and resolve this issue, it retaliates and uses garnishees and levying penalties on the defaulting taxpayers, which then presents an unending cycle of litigations, rather than resolving the problem at hand.

6.3 *Need for a new Income Tax Act*

There is no evidence of any effort that has been officially made to deliberately attempt to align the ITA with the current constitution like other countries have done. This can go a very long way in restoring the confidence concerning governance issues pertaining to the use of public funds and updating legislation to be in line with the current economic policies and the dynamic environment. This can be coupled with the

introduction of robust policies that promote public service delivery and include the taxpayers in decision making. This also enables the country to match the internationally recognized practices and standards.

New policies that relax tax laws may be introduced as that of tax holidays. Countries such as Bahamas, Kuwait, Qatar and many other countries do not levy income tax on their residents but somehow these countries seem very rich. Tax holidays have always been an incentive to businesses and with such investors are lured to come and invest. Tax benefits attract investors and will quickly grow and resuscitate the ailing economic business and generate the most needed foreign currency. Tax incentives have the much required pull factor that this country needs to resuscitate the business environment and restore it to being one of the best countries to invest in because of the resources already available in the country.

6.4 Need for more friendly tax recovery methods

The Zimbabwean economy is largely made up of small to medium enterprises and such groups are the taxpayers. Having to use very stringent enforcement mechanisms may be forcing them to liquidate their companies. The revenue authority must have regard for the scale on which different businesses operate, so they help spare such. The larger the economies of scale the more strict the revenue authority must be.

7. RECOMMENDATIONS

7.1 Improving the Administrative aspect of taxation

It has been found that the Zimbabwe Revenue Authority has not taken the Bill of rights into cognizance and still does not interact with taxpayers in a friendly manner. Such tendencies by the authority encourages tax avoidance and evasions more rampant. Taxpayers need to be engaged with, to forge positive working relationships that encourage positive synergies between the authority and the taxpayers which will make the revenue authority's task of collecting revenue easier.

It is also believed that such positive relations may also reduce the number of litigations against the revenue authority, as taxpayers would get a better service and

understanding between themselves and the taxpayers. Below are some of the ways that the authority may use to interact and build relations with taxpayers;

7.1.1 *Enforcing healthy working relations with taxpayers*

It is recommended that the revenue authority forge positive relationships with the taxpayers. It is highly recommended that ZIMRA has more interactions with the community so as to correct the negative image that has been portrayed about the authority as a money sucking authority at whatever the cost. The taxpayers must be free to seek indulgence and assistance when it comes to tax matters at any given time, as ZIMRA is a public office. This can be achieved through the following;

7.1.2 Capacity building

The revenue authority can invest in a capacity building department, where this department just focuses on capacitating tax payers with tax matters and legislation. This assists taxpayers with the knowledge they require in order to be tax compliant and make more informed decisions that go a long way in doing business. This assists the taxpayer by empowering them with knowledge and also assists the revenue authority, by reducing the number of evasion and other related illegal crimes associated with tax.

This has worked effectively for the Procurement Regulatory Authority of Zimbabwe as one will find that companies which are not government entities will follow the procurement regulations in awarding contracts although they are not required to. This is so because the public has recognized they have more to benefit in following those procedures than to lose out. It therefore becomes publicly acceptable and eventually appreciated by the community in the long run.

7.1.3 Awareness campaigns

This is a traditional way that has been used to get recognition in society as it is eye catching and also affords time for interaction with the targeted market. The community is afforded the chance to ask questions so the myths that they have can be dispelled. This is done in a more informal environment that is relaxed such that no one is intimidated by the seriousness of the surroundings.

Such awareness campaigns reach out even to the marginalized in our communities and they get to be educated on how they fit in and their importance in remitting taxes and what benefit it avails to them. This becomes a healthy relationship forged between the tax authority and the taxpayer, which cements healthy synergies over ally.

7.1.4 Mentoring of tax officers

As a means of returning to the community that the revenue authority operates in, ZIMRA can offer refresher courses to tax officers from different institutions. It keeps the responsible officers up to date and in touch with the relevant tax legislation at any given time. This in a way refreshes the tax officers' knowledge and at the same time makes enforcement and compliance checks easier for the revenue authority as partnering with the different tax officers makes their task of collecting, assessing and managing taxation matters easier.

7.1.5 More friendly staff members working within the revenue authority

Behind any successful organisation is a good relationship with the customer. Customer relationship management has grown businesses for some significantly yet those who have ignored this aspect have lost out in business significantly. Building a healthy relationship with the customers and in this case the taxpayers is a good strategy as it appeals to the taxpayers to happily pay their taxes. Robust way of doing it normally is faced with much resistant and antagonistic behavior.

7.2 *Separation or decentralization of powers possessed by the Commissioner*

In any given transparent and fair organisation, there needs to be a form of independence and separation of powers and duties. This needs to be adhered to even in the appeals and objection process in relation to taxation matters. There needs to be a tribunal that is independent from the Revenue Authority that will sit to hear and adjudicate objections to the findings of the Commissioner. This gives transparency and fairness to the whole process which also is a constitutional right to every citizen to be treated fairly in any proceeding.

Different professionals can constitute a tribunal for example a chartered accountant, a tax expert, a tax lawyer and any other relevant professional who can be of assistance

in the dispute resolution for example engineers or architects where it is business that involves construction or engineering. Such a diversified pool of legal expertise tends to understand the disputes better and tend to solve the dispute in a better manner as all the aspects of the dispute are attended to , compared to a single person who is the Commissioner in this instance, who has limited knowledge in resolving the dispute. The Commissioner in this instance just has knowledge in tax but has no in depth knowledge of the particular dealings of the business involved in the dispute. Therefore having a pool of knowledge of different professionals hear the objection and adjudicate on it yields better outcomes to the taxpayer as the tribunal is objective in their adjudication process.

7.3 *Arbitration*

Commercial arbitration is fashionably becoming one of the most common and sought after dispute resolution method under the Alternative Dispute Resolution method in the commercial world globally. This is so because it is a confidential process, that seeks to preserve relations, yet dealing with disputes outside the formal court system. It is friendly, saves on time and involves the parties in dispute in resolving their dispute amicably. This form of alternative dispute resolution method has proved to be efficient in the business world, as the long and time consuming court processes proved to pause a challenge. These unnecessary delays in decision making by the courts, resulted in losses in profits and opportunity cost that could have been avoided.

Commercial arbitration is a means of settling disputes by referring them to a neutral person, known as an arbitrator, selected by the parties for a decision based on evidence and arguments presented to the arbitrator. Hence the need for courts to be reluctant to interfere. The parties agree in advance that the decision will be binding (Domke, 2019). The learned author (Webster, 2021) defines commercial arbitration as "*arbitration by which disputes arising out of business contracts or transactions may be settled out of court by a special tribunal.*" (Madhuku, 2012) defines arbitration as a procedure whereby a third party, not acting as a court of law, being empowered to take a decision which disposes the dispute. If the new ITA can recognize and make

provision to include this form of dispute resolution mechanism so as to speed up the process and clear taxation disputes which normally clog the court system, this would assist in clearing the backlog of taxation matters before the courts.

For example South Africa has brought its International arbitration legislation into tandem with other jurisdictions worldwide, and that has created a huge appetite and uptake of its country as an arbitration seat. The modernization of the law and the strides that have been made in publications of rules and best international best practices have brought about a complete overhaul to the discipline of arbitration in the country. The South African courts in instances where parties to arbitration proceedings are required to approach them for assistance in enforcement or for interim relief, have been forthcoming and assisting. There seems to be great appreciation of the subject arbitration within the judiciary system. Zimbabwe may also embrace this stance and this will definitely assist grow the economy rapidly.

7.4 The need for a new Income Tax Act

The call for a new Income Tax Act is way overdue. The current legislation was promulgated in 1967 and no new Act has been put into place to date. There have been amendments the Constitution after independence and this calls for an overhaul of the whole Income Tax Act in order to be in line with the most current Constitution which recognizes the bill of rights.

The nation cannot keep relying on an outdated piece of legislation which was crafted to protect the white community yet disadvantaging the black majority.

7.5 Introduction of a notice period by the revenue authority before a garnishee is put to effect to the taxpayer.

The revenue authority must give warning to the defaulting taxpayer before garnishing an account. Legislation can be crafted that requires the revenue authority to give notice to the defaulting party as a procedural safeguard to the right of a fair hearing and also enforcing the *audi partem alteram* rule. Such legislation will help safeguard the rights of the taxpayers. Such has been adopted by the South Africans in the Administrative Act in section 172. The same method has been in use in the United

States of America, where the United States Internal Revenue code in section 6331(d) and 6331(d) (2) where a notice of thirty days is given to the defaulting taxpayer before their account is garnished.

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