

**ARE TAXPAYERS PROTECTED AGAINST ZIMRA?  
AN INVESTIGATION ON CONSTITUTIONALITY OF SELECTED  
TAX PRACTICES AND PROCEDURES IN ZIMBABWE.**

**BY**

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# DECLARATION

I, **STEWART CHATSAMA**, Student Registration Number **R978043A**, do hereby declare that this dissertation entitled:

**‘ARE TAXPAYERS PROTECTED AGAINST ZIMRA? AN INVESTIGATION ON CONSTITUTIONALITY OF SELECTED TAX PRACTICES AND PROCEDURES IN ZIMBABWE,’**

is my original work. In cases where material from other sources, have been used or quoted, such material or sources were properly referenced in line with the required academic standards outlined by the University.

\_\_\_\_\_  
**STEWART CHATSAMA**

**30/07/2022**  
**DATE**

I hereby certify that the above statement is true and correct

**Supervisor: Prof. Lovemore Madhuku**

**Signed: .....**

## DEDICATIONS

This piece of work is dedicated to my wife Olivia, and children, Mukudzei Dave, Stephany Tatenda, and Karen Prisca. I also dedicate this work to my mother Mary, and brother David who have always expected the best out of me.

## ACKNOWLEDGMENT

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## ABSTRACT

For any State to be able to effectively provide public goods and services for the benefit of citizens, it should collect as much revenue as possible for the fiscus. The enforcement of tax laws has posed a myriad of challenges to the State, the Zimbabwe Revenue Authority (ZIMRA) and taxpayers. Use of various practices and procedures to maximise revenue collection has not been without its challenges. Taxpayers are always knocking on the doors of the State seeking a balance between revenue collection and respect, promotion, and protection of taxpayers' rights. The legislature, through various pieces of tax legislation including the Income Tax Act, the Value Added Tax Act, the Excise and Customs Act, and the Revenue Authority Act, developed and promulgated various practices and procedures to assist the State in revenue collection. These include the pay now argue later rule, the agent appointment procedure, garnishing of taxpayers' accounts, as well as the practice of search and seizure. To ensure observance, respect, protection of their rights as provided for in the Constitution of Zimbabwe Amendment (No. 20), taxpayers have approached courts of law challenging ZIMRA's enforcement of the tax collection practices and procedures. Among the rights sought to be enforced includes the right to property, right to be heard, right to administrative justice, right to access to courts, and the right to privacy. The higher courts of Zimbabwe, including the High Court, the Supreme Court, and the Constitutional Court, have maintained the judicial attitude of adopting the legal principle of presumption of constitutional validity of a piece of legislation. In the circumstances, this study addressed the legal question of the constitutionality of the pay now argue later principle, the practice of the appointment of an agent and garnishing of taxpayers accounts by ZIMRA, as well as search and seizure. The study also analysed whether there is a balance between revenue collection and the need to respect, protect and promote the rights of taxpayers. The study has made findings to the effect that some of the practices and procedures are unconstitutional as they violate fundamental human rights and freedoms, among them being the right to property, the right to just administrative conduct, and the right to access to courts. Recommendations for amendments have been made.

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3. Income Tax Act [Chapter 23:06]
4. Value Added Tax Act [Chapter 23:12];
5. Revenue Authority Act [Chapter 23:11].
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1. Magistrates Court (Civil) Rules, 1980 (Statutory Instrument 290 of 1980).

## **INTERNATIONAL LEGISLATION**

### **SOUTH AFRICA**

1. Customs and Excise Act
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3. Tax Administration Act, No. 28 of 2011 ('TAA')
4. Value Added Tax Act 89 of 1991
5. Income Tax Act 58 of 1962
6. South African Revenue Services Act 34 of 1997
7. Tax Administration Laws Amendment Act (TALAA)

## **INTERNATIONAL INSTRUMENTS**

1. African Charter on Human and People's Rights (2016).
2. International Covenant of Political, Civil and Cultural Rights.



## ACRONYMS AND ABBREVIATIONS

1. SARS - South African Revenue Services
2. ZIMRA - Zimbabwe Revenue Authority

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# CHAPTER 1

In this chapter, the writer will introduce the subject under study. The chapter will outline the research background, problem statement, the study objectives and justification. Limitations of the study will be outlined as well as the synopsis of all the chapters of the research.

## 1.1 INTRODUCTION

Raising revenue is the most critical challenge for any democracy. For a state to effectively function, there is need to ensure that enough revenue is generated for the fiscus. Taxation is the main avenue to support this objective. Every State is sovereign in terms of Article 2.1 of the United Nations Charter. The sovereign right gives States the power to impose taxes on citizens. To ensure effective administration and ability to effectively provide goods and services for citizens, taxes are imposed by those in power. The main objective will be to raise as much tax as possible in any financial year. Tax is a compulsory levy imposed by any State and its agencies upon citizens.<sup>1</sup> The Income Tax Act defines “tax” as any tax or levy leviable under the Act.<sup>2</sup> The VAT Act also defines ‘tax’ as any tax imposed under the VAT Act.<sup>3</sup> Citizens have rights which ought to be respected as taxes are collected and levied.

There are various practices and procedures that are used by tax collectors to achieve their objective. These include *inter alia* the following: practice and procedures for tax assessments, collection, information gathering and enforcement of payments. Good governance is fundamental to any democratic society. Taxation principles call for fairness, efficiency, transparency, and accountability in the collection of taxes. Various stakeholders play a role in ensuring that there is a balance between tax collection and protection of rights of persons affected. The imposition and collection of taxes should not affect the

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<sup>1</sup> Nyambirai vs NSSA 1995 (2) ZLR 1 (S)

<sup>2</sup> Section 2 of the Income Tax Act (Chapter 23:06)

<sup>3</sup> Value Added Tax Act (Chapter 23:12)

rights of citizens. Respect, promotion and protection of rights of persons is key in any functional democracy. This is the bedrock of international law.

In Zimbabwe, revenue collection is the primary responsibility of the Zimbabwe Revenue Authority (ZIMRA), a state institution formed in terms of the Revenue Authority Act.<sup>4</sup> The court, in **Murowa Diamonds (Pvt) Ltd v Zimbabwe Revenue Authority and Others**,<sup>5</sup> states that:

*“..... but the first respondent (Zimra) is the Biblical Caesar. Like every other subject, the applicant is under the injunction: ‘Give to Caesar the things which are Caesar’s.....’”.*

Mafusire J, in the case of **Fairdrop Trading (Private) Limited v The Zimbabwe Revenue Authority**,<sup>6</sup> commenting on the powers of Zimbabwe Revenue Authority (ZIMRA), states as follows:

*“The respondent is a statutory corporation. It is established by s 3 of the Revenue Authority Act, [Cap 23:11]. It is the tax collector for government. Despite the Biblical exhortation “render therefore to Caesar the things which are Caesars” undoubtedly few obey willingly, Christians and non-Christians alike. It is not hard to imagine hard-pressed workers and other taxpayers with families and extended families to support wanting to exclude government from the list of dependants. The temptation sometimes is for some to craft some tax evasion schemes. Viewed from that angle the respondent’s task must be an unenviable one. But the government is a step ahead. The respondent is clothed with enormous powers to levy and collect taxes.”<sup>7</sup>*

The learned judge emphasised the enormous powers accorded to ZIMRA in the collection of taxes. Considering the courts’ glorification of ZIMRA in the above-mentioned cases of **Murowa Diamonds v Zimbabwe Revenue Authority** and the

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<sup>4</sup> Revenue Act (Chapter 23:11)

<sup>5</sup> HH125/20

<sup>6</sup> Fairdrop Trading (Private) Limited V The Zimbabwe Revenue Authority (Hh 68/2014)

<sup>7</sup> Fairdrop Trading (Private) Limited V The Zimbabwe Revenue Authority (HH 68/2014)



**Fairdrop Trading (Private) Limited V The Zimbabwe Revenue Authority**, and many others, several questions arise, ‘Is Caesar entitled to get what he wants from his subjects in whatsoever manner that he deems fit?’ How about the rights of ‘Caesar’s’ subjects, are they worthy of any respect? Should such rights be trespassed willy-nilly simply because ‘Ceaser’ is after his dues?’ Should the lion roar when there is no prey? Are all people not equal before the law? Should Ceaser not obtain what is due to him in a lawful and dignified manner? Can the judiciary maintain their impartiality and independence when they consider ZIMRA as ‘Ceaser? These and many other questions raise concerns for the writer hence this research.

Through taxation, the sovereign, acting through its law-making body, raises revenue to defray government expenses. Taxation, as argued by Adam Smith (1776), should follow the four principles of fairness, certainty, convenience, and efficiency. This thesis will interrogate the selected practices and procedures of the mighty ZIMRA in view of establishing whether there is a balance between tax collection and protection of rights of persons as taxpayers. An attempt will be made to establish the constitutionality of selected procedures like garnishee of taxpayer’s accounts, appointment of agents, and the practice of pay-pay now argue later, as well as search and seizure procedure. The judicial approach in dealing with tax matters challenging ZIMRA tax collection procedures will be analysed. Comparison will be made between the Zimbabwean approach and that of South Africa.

## 1.2 BACKGROUND TO THE STUDY

To maximise revenue, various procedures and practices are implemented in Zimbabwe as provided for in various tax statutes. In terms of the Revenue Act [23:11], the Zimbabwe Revenue Authority has the responsibility to collect revenue on behalf of the government through various tax regimes which incorporate several tax practices and procedures. As the agent of the State, the Zimbabwe Revenue Authority (ZIMRA) has the responsibility to assess, collect and enforce payment of revenues.<sup>8</sup> The Commissioner of Revenues, where he thinks it necessary, has, in terms of section 58 of the Income Tax Act, the power to appoint an agent to collect revenue from a taxpayer on his behalf.<sup>9</sup> Accounts of persons can be garnished in the tax collection process whenever ZIMRA deems it fit. In terms of section 69 of the Income Tax Act, an objection by a taxpayer against any assessment or an appeal to the Fiscal Court does not suspend the taxpayer's obligation to pay tax as assessed.<sup>10</sup> The tax-payer has an obligation to pay the tax and present his arguments later.<sup>11</sup> Persons in terms of the tax statutes have the mandate to carry out own self-assessment in determining tax liability, but where the Commissioner is not satisfied with such assessments, re-assessments are conducted with associated audits and information gathering. Search and seizure can be utilised to facilitate re-assessments.

Faced with these tax practices and procedures, the questions arising include the following: To what extent are taxpayers' rights protected from the powerful revenue collector? Do they taxpayers in Zimbabwe even have rights? If so, what are they? Do the practices amount to any abuse of power by ZIMRA? If so, does the Constitution of Zimbabwe provide any safeguards against any such abuse of power by the Zimbabwe Revenue Authority? Are there any protection mechanisms to safeguard taxpayers' rights? Are the tax practices in line with international law? Are these procedures and practices by ZIMRA in line with the constitutional guarantee that all people are equal before the law? Section 56(1)

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<sup>8</sup> Section 4(a) of the Revenue Authority Act [Chapter 23:11].

<sup>9</sup> Section 58 of the Income Tax Act [Chapter 23:06].

<sup>10</sup> Section 69 of the Income Tax Act [Chapter 23:06]

<sup>11</sup> *Murowa Diamonds (Pvt) Ltd v Zimbabwe Revenue Authority and Ors* (HH125/20)

of the Constitution of Zimbabwe provides for equality before the law for all people. Does this equality apply in cases involving the mighty ZIMRA? Some practices that Zimbabwe use in the assessment, collection and enforcement of taxes have since been declared to be unconstitutional in other jurisdictions. Is there anything to learn for Zimbabwe from these declarations made in other jurisdictions? In terms of section 68(1) of the constitution, every citizen is entitled to administrative conduct that is fair, lawful, reasonable, and impartial. Are these safeguards relevant and or adequate in facilitating protection of taxpayers' rights and providing a balance with effective tax collection? What is the international best practice of balancing the two competing interests of revenue collection and rights protection in similar circumstances?

### **1.3 PROBLEM STATEMENT**

The practices and procedures used by ZIMRA in the assessment, collection and enforcement of taxes violates fundamental rights of taxpayers in Zimbabwe. The interpreters of the law (the courts) are worsening the taxpayer's plight by glorifying the mighty ZIMRA and further protecting the revenue collector. The legislature is slow in addressing the situation in line with international best practice.

## 1.4 RESEARCH OBJECTIVES

The research seeks to achieve the following objectives:

- i. To establish and evaluate taxpayer's rights in terms of the constitution and tax statutes of Zimbabwe.
- ii. To review the constitutionality of selected tax collection practices and procedures including the garnishee of taxpayer's accounts, appointment of agents; pay-now-argue later principle; search and seizure as well as audit and information gathering.
- iii. Reviewing tax system of South Africa particularly the tax assessment, collection and enforcement procedures and comparing it with the Zimbabwe tax system on similar aspects.
- iv. Establishing international best practice and making recommendations for Zimbabwe.

## 1.5 RESEARCH QUESTIONS

- a) What tax collection practices and procedures does ZIMRA use and are such practices and procedures constitutional?
- b) Which rights exist for taxpayers in Zimbabwe in terms of the Constitution and tax statutes?
- c) Are there any rights infringement by ZIMRA through its tax collection practices and procedures and if so, is such infringement justifiable in a democratic society?
- d) How do Revenue collectors in other jurisdictions maintain the balance between exercise of their powers of collecting revenue and ensuring that taxpayers' rights are respected, protected, and promoted?
- e) What is the attitude of the judiciary towards the tax collection practices and procedures in Zimbabwe and the need to protect taxpayers' rights?
- f) Is there any need for reform on ZIMRA's tax practices and procedures?

## **1.6 SIGNIFICANCE OF THE STUDY**

The research will open an insight on taxpayers' rights and the protection of such rights in Zimbabwe. The research will help identify gaps in Zimbabwe's tax system and recommending best practice for the benefit of the legislature. Law students reading this research work will also have a deeper understanding of Zimbabwe's tax system, including taxpayers' rights and the balancing act between tax collection and rights protection. The research will identify areas that require deep exploration and further research. The research will challenge students and stimulate them to explore the field of taxation, carrying out further research into the subject. The research will raise interest of Professors and other academics and stimulate them to advance certain arguments further for the benefit of development of taxation jurisprudence in Zimbabwe. The judiciary will also benefit as they will have an opportunity to further analyse their decisions. This will help the bench develop a better understanding of the tax system in Zimbabwe. Potential investors reading this work will also get a clear picture of the tax system in Zimbabwe.

## **1.7 RESEARCH METHODOLOGY**

This is qualitative research in which the researcher utilised the qualitative research method. The researcher focused on review of secondary sources of data including statutes, case law, relevant journal articles, textbooks, and the constitution of Zimbabwe. A review was made of South Africa taxation system to draw comparisons on tax collection and the need to strike a balance with protection of taxpayer's rights. This includes review of appropriate judgements of the higher courts of South Africa, South Africa Constitution and tax statutes, journals and other useful material related to the subject. Tax legislation in Zimbabwe were reviewed with particular emphasis on the Income Tax Act (Chapter 23:11); the VAT Act; the Customs and Excise Act; the Revenue Authority Act; and other related statutes. An analysis was made of the rights of taxpayers as provided for in the Constitution of Zimbabwe Amendment (No. 20), comparing them to rights provided in the tax statutes. The powers of the Zimbabwe Revenue Authority as provided for in the

Revenue Act and other related legislation were analysed with reference to the provisions in the Constitution of Zimbabwe. It is trite to note that the qualitative research method works best for analysis of legal positions.

## **1.8 RESEARCH LIMITATIONS**

The researcher focused on the selected practices and procedures as provided for in the Income Tax Act, the Value Added Tax, the Customs and Excise Act and the Revenue Authority Act. In relation to the rights of taxpayers, only those rights that have a direct link with the collection and enforcement of taxes were analysed. Taxpayers' rights will be discussed in the context of taxation with more focus on establishing whether there are any infringements and safeguards. In comparative analysis, only South Africa tax system was analysed in depth although there was a general reference to other jurisdictions. Main area of focus in the comparative analysis will be on the selected tax practices and procedures that include the 'pay now argue later' rule, the appointment of an agent, garnishee procedure as well as search and seizure. Other tax collection and enforcement practices and procedures provided for in legislation will not be covered by this research. Only the powers and functions of ZIMRA that relate to the practices and procedures under review will be analysed.

## **1.9 CONCLUSION**

Focus of chapter one was to introduce the research subject outlining how such research will be done. The research background was useful in explaining what necessitated the research. It was highlighted that the research is a qualitative research where secondary data sources will be heavily relied on. The objectives highlighted the research focus which include establishing and evaluating taxpayers' rights in Zimbabwe; establishing how South Africa use similar practices, establishing the best practice in the collection of tax due and enforcement of payment. Importance of the research was outlined. It was stated that focus will be on the use of the 'pay now argue later rule, the

agent appointment procedure, the garnishee procedure and search and seizure. The need to establish the constitutionality of the selected tax practices was emphasised. The chapter also highlighted the research problem and identified research objectives and critical questions.

## **1.10 CHAPTER 2 SYNOPSIS**

In Chapter 2, the researcher presents the theoretical framework on taxation in general. In this chapter, the researcher outlines the importance of taxation in society, the principles of taxation, and the constitutional principles governing the interpretation of tax legislation. The chapter will review the constitutional and legislative framework for tax collection in Zimbabwe. An analysis will be made on principles governing the assessment, collection, and enforcement of taxes. The theoretical framework underpinning the selected practices and procedures will be discussed. The chapter also discusses the taxpayers' rights in Zimbabwe as provided for in the Constitution and tax legislation.

## **CHAPTER 3 SYNOPSIS**

In Chapter 3, the researcher discusses the pay now argue later rule, the agent appointment procedure, the garnishee and the search and seizure procedures. A review will be made of the key tax statutes, that is, the Income Tax Act, the VAT Act, the Customs and Excise Act, the Revenue Authority Act. Judicial attitude on taxpayers' challenge to these practices and procedures will be analysed. This will be done through review of the decisions of the superior courts of Zimbabwe, namely, the Fiscal Appeals Court, the High Court, Supreme Court, and the Constitutional Court.

## **CHAPTER 4 SYNOPSIS**

In Chapter 4, the researcher will review the tax system of South Africa. Focus will be on establishing how this jurisdiction enforces collection and payment of taxes. The procedures used in South Africa will be compared with those used in Zimbabwe. The judicial attitude of the higher courts of South Africa will towards these practices will also be analysed. Reference will also be made to other jurisdictions.

## **CHAPTER 5 SYNOPSIS**

In Chapter 5, the researcher will present conclusions of the whole research. Recommendations will be made on the findings made.



# CHAPTER 2

## FUNDAMENTAL PRINCIPLES OF TAXATION AND TAXPAYERS' RIGHTS PROTECTION IN ZIMBABWE

The chapter will introduce the fundamental principles of taxation and discuss the rights of taxpayers. In this chapter, the researcher presents the theoretical framework on taxation in general and outlines the importance of taxation in society. The chapter will discuss the constitutional and legislative framework of taxation in Zimbabwe. It will also outline the rights of taxpayers as provided for in the Constitution of Zimbabwe and tax legislation.

### 2.1 INTRODUCTION

Tax is a compulsory contribution or levy imposed by the government, local authority or other competent authority upon the public as a whole or a substantial sector thereof with the revenue from tax to be utilized for the public benefit or to provide a public service. It is levied by the state which has jurisdiction over the person or property. The power to tax is inherent in sovereignty and essential to the existence of an independent government.<sup>12</sup> Tax is a compulsory levy imposed by the legislature.<sup>13</sup> In **Nyambirai v NSSA**, in defining tax, the court stated that:

*“It is a compulsory levy and not an optional contribution, imposed by the legislative or other competent public authorities upon the public as a whole or a substantial sector thereof and to be utilised for the public benefit or to provide a service in the public interest”.*

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<sup>12</sup> David B. Wiles (1982), Taxation: Tribal Taxation, Secretarial Approval, and State Taxation: Merrion and Beyond, American Indian Law Review, Vol. 10, No. 1 (1982), pp. 167-185, University of Oklahoma College of Law

<sup>13</sup> Nyambirai vs NSSA 1995 (2) ZLR 1 (S)

People pay taxes because a higher authority says so. In terms of the Income Tax Act, “tax” is any tax or levy leviable under that Act.<sup>14</sup> Section 2 of the VAT Act also states that ‘tax’ is tax as imposed by that Act.<sup>15</sup> Section 6 of the Income Tax Act provides that collection of taxes in Zimbabwe is for the benefit of the Consolidated Revenue Fund. Thus, taxation is meant to facilitate funding of government activities. A tax can come in various forms and names as long as it satisfies the requirements of being a ‘tax’.<sup>16</sup>

Every state is sovereign in terms of article 2.1 of the United Nations Charter.<sup>17</sup> As sovereigns, states can make own laws to determine their own governance. States have broad powers to tax their citizens within their own territorial borders. As the cost of providing public services is increasing each day, states are resorting to the use of taxes as a major source of revenue. Taxation of citizens is considered as a necessary instrument of self-government and territorial administration.<sup>18</sup> The major challenge with the law of taxation is that taxpayers have since ceased to respect those parts of the law whose enforcement is left to their own voluntary action.<sup>19</sup> If no reasonable enforcement measures are developed and implemented, no one will be willing to pay taxes. This will have a serious impact on the treasury. The support and voluntary cooperation expected in a democratic society is lost. Penalties may be enforced for non-cooperation, but the penalties will be as unenforced as the law itself.<sup>20</sup> Accuracy and honesty in tax returns is questionable in most cases.

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<sup>14</sup> Section 2(1) of the Income Tax Act (Chapter 23:06)

<sup>15</sup> Section 2 of Value Added Tax

<sup>16</sup> Benard Wekare vs The State & ZBC CCZ9/2016

<sup>17</sup> Article 2.1 of the United Nations Charter.

<sup>18</sup> David B. Wiles (1982), Taxation: Tribal Taxation, Secretarial Approval, and State Taxation: Merrion and Beyond, *American Indian Law Review*, Vol. 10, No. 1 (1982), pp. 167-185, University of Oklahoma College of Law

<sup>19</sup> Fred R. Fairchild (1927): Should the Tax Laws be Enforced and Enforceable? *The Scientific Monthly*, Vol. 24, No. 2 (Feb., 1927), pp. 119-125; American Association for the Advancement of Science

<sup>20</sup> Fred R. Fairchild (1927): Should the Tax Laws be Enforced and Enforceable? *The Scientific Monthly*, Vol. 24, No. 2 (Feb., 1927), pp. 119-125; American Association for the Advancement of Science

If at all there was to be a ‘*National Day of Taxation*’ where all businesses and households were to be inspected, there is a greater possibility that all such businesses and households will all be deserted and goods, records concealed from the inspectors. What then should the taxman do under such situations? The goodwill and cooperative behaviours having been lost; harsh enforcement mechanisms are then implemented to ensure adequate tax collection for the benefit of the fiscus. Taxpayers always make attempts to avoid paying taxes due and payable to the fiscus. Huston (1948), commenting on taxpayers’ behaviours, stated that:

*“When a tax law makes a certain event the signal for a contribution to the public purse, while other related events do not bear this onus, taxpayers by direct or devious methods attempt to bring their activities into tax-free fields. The ‘chiseler,’ who like the poor is always with us, is encouraged to make it appear that his receipts are the fruit of tax-free transactions. This results in under-reporting of taxable receipts, particularly in border-line cases and ‘mixed businesses,’ where both taxable and tax-free events occur.”<sup>21</sup>*

## 2.2 PRINCIPLES OF TAXATION

Collection of taxes should be guided by principles of legality, equality, fair play, ability to pay, non-retroactivity to ensure protection of taxpayers. Taxation should be aligned to the rule of law (Bentley, 1998).<sup>22</sup> There must be imposition of limitations on powers of tax collectors to safeguard against abuse. In his book, “**An enquiry into the nature and causes of the world of nations**”, published in 1776, Adam Smith came up with principles of taxation which he termed “cannons of taxation”. He outlined that such principles are key and should be considered when developing a tax system.<sup>23</sup> The principles include equity, certainty, convenience, and efficiency. As his first principle of taxation, Adam Smith, the guru of laissez faire economics, stated as follows:

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<sup>21</sup> Huston J.W (1948): The Ingredients of Tax Administration; Proceedings of the Annual Conference on Taxation under the Auspices of the National Tax Association, 1948, Vol. 41 (1948), pp. 345-350

<sup>22</sup> Bentley (1998)

<sup>23</sup> Haskell Floyd K (1982): Tax Policies—What Does The Future Hold?; The Tax Lawyer , FALL 1982, Vol. 36, No. 1 (FALL 1982), pp. 1-8;

*“the subjects of every state ought to contribute towards the support of Government, as nearly as possible, in proportion to the revenue which they respectively enjoy under the protection of the State.”<sup>24</sup>*

Adam Smith also stated as follows:

*“It is not very unreasonable that the rich should contribute to the public expense not only in proportion to their revenue, but something more than in proportion.”<sup>25</sup>*

In terms of the equity principle, payment of taxes should be based on the taxpayer’s ability to pay, that is, taxpayers with more resources should pay more to the fiscus. The other important principle stated by Adam Smith is the principle of certainty. This principle states that taxpayers ought to be clear on that which will be subjected to tax, as well as the method used to calculate the tax. As a rule of law, tax statutes are generally interpreted in favour of the taxpayer where the language of the statute is not clear.<sup>26</sup> This is the ‘*contra fiscum rule*’ and it is meant to impose a penalty on the legislature for lack of clarity on taxpayer’ obligations. In terms of the efficiency principle, the collection of taxes should be worth the effort. The costs of any tax should be proportionate to the revenue yield. The tax collection costs may include economic, social, and political costs. The convenience principle was also emphasised by Adam Smith. This principle states that levying of a tax should be done at a time and in a way that is convenient to the taxpayer.

In terms of the Ottawa Taxation Framework, tax administration should be certain and simple, neutral, efficient, flexible, fair and effective.<sup>27</sup> There is need to ensure a balance between various goals that include efficiency, equity,

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<sup>24</sup> Haskell Floyd K (1982): Tax Policies—What Does The Future Hold?; The Tax Lawyer , FALL 1982, Vol. 36, No. 1 (FALL 1982), pp. 1-8;

<sup>25</sup> Haskell Floyd K (1982): Tax Policies—What Does The Future Hold?; The Tax Lawyer , FALL 1982, Vol. 36, No. 1 (FALL 1982), pp. 1-8;

<sup>26</sup> *Pattington v Attorney-General* 1869 AC 375

<sup>27</sup> OECD: Ottawa Taxation Framework Conditions – Principles

simplicity, and raising revenue.<sup>28</sup> Social policy goals should also be considered. Neutrality requires that all taxpayers in similar situations, conducting the same transactions, be subjected to the same levels of taxation. The costs of tax administration by tax administrative authorities should be minimised. Compliance costs for taxpayers should be minimum to facilitate efficiency. To ensure certainty and simplicity, tax rules should be clear and simple. Taxpayers should anticipate in advance the consequences associated with each tax transaction. Tax systems should be fair and effective and should as far as possible minimise possibilities of tax evasion and avoidance.<sup>29</sup> Tax evasion is illegal and occurs when a taxpayer avoids paying a tax that is due and payable. Tax avoidance is considered as part of tax planning or tax mitigation. It involves use by taxpayers of legal schemes that help reduce one's tax liability. It may take the form of avoiding paying tax, reducing tax liability or postponing payment of a certain tax to a future date. Tax laws will not achieve the desired policy goals if taxpayers do not understand or comply with them or if the Revenue Collector fails to administer and enforce them.<sup>30</sup>

### **2.3 ENFORCEMENT OF TAX LAWS**

For tax laws to be enforced they should be enforceable.<sup>31</sup> Tax collection comes in various forms. These include voluntary payments and involuntary payments. Voluntary payment involves taxpayers purchasing products with a tax imposed at the source of payment, leading to voluntary remittances.<sup>32</sup> Failure to make voluntary remittances as required will impact upon the society. Failure to make the voluntary payments may discourage others from paying taxes. Tax enforcement authorities then assist the State to collect the tax revenues through

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<sup>28</sup> Janet G. McCubbin, *Optimal Tax Enforcement: A Review of the Literature and Practical Implications*, Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association, 2003, Vol. 96 (2003), pp. 16-26

<sup>29</sup> OECD: *Ottawa Taxation Framework Conditions - Principles*

<sup>30</sup> Janet G. McCubbin, *Optimal Tax Enforcement: A Review of the Literature and Practical Implications*, Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association, 2003, Vol. 96 (2003), pp. 16-26

<sup>31</sup> Fred R. Fairchild (1927): *Should the Tax Laws be Enforced and Enforceable?* *The Scientific Monthly*, Vol. 24, No. 2 (Feb., 1927), pp. 119-125; American Association for the Advancement of Science

<sup>32</sup> Keith Fogg and Sime Jozipovic (2016): *How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights*

various means. Enforcement mechanisms by the government should not drive those who fail to pay tax due to an underground economy, or force them to discontinue producing income, or to economic positions that fall through the necessary safety net.<sup>33</sup> In structuring workable tax collection systems the State must ensure that the rights of taxpayers are considered. Revenue collection should be maximised with minimum harm to the person(s) from which tax is due. The tax collection system must be workable with sufficient checks and balances to minimise harm to the taxpayer. It must recognise taxpayers' rights to preserve the social safety net. The system must have sufficient judicial and administrative oversight.<sup>34</sup>

Professor Fred R. Fairchild, a then Yale University Professor, made useful comments on the general enforcement of tax laws. In his article, '**Should the Tax Laws be Enforced and Enforceable?**', Professor Fairchild questions on whether there is any need to enforce tax law. He observes that in the old days of absolute monarchy, the laws were not made by the people but rather imposed on them by the will of the King and, as a result, hostility and opposition to the law was prevalent.<sup>35</sup> Professor Fairchild further states that in the theory of modern democracy, the laws are enacted by the people and imposed upon themselves by themselves for the common good.<sup>36</sup> Applying the principle to the law of taxation, Professor Fairchild comments on the effect. He states that taxes and tax collection methods are imposed upon the people only through the actions of their own legal qualified representatives, that is, the Parliamentarians. Goodwill and cooperation of the public is therefore expected when the taxes are being collected through the ways and means agreed upon. Thus, when the Revenue Collector and his agents collect taxes, they will be exercising the power that was given to them by the people through their legally qualified representatives.

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<sup>33</sup> Keith Fogg and Sime Jozipovic (2016): How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights.

<sup>34</sup> Keith Fogg and Sime Jozipovic (2016): How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights.

<sup>35</sup> Fred R. Fairchild (1927): Should the Tax Laws be Enforced and Enforceable? The Scientific Monthly, Vol. 24, No. 2 (Feb., 1927), pp. 119-125; American Association for the Advancement of Science.

<sup>36</sup> Fred R. Fairchild (1927): Should the Tax Laws be Enforced and Enforceable? The Scientific Monthly, Vol. 24, No. 2 (Feb., 1927), pp. 119-125; American Association for the Advancement of Science

## 2.4 IMPORTANCE OF TAX COLLECTION

Through tax, the state or local authorities can raise public revenue intended for public purpose i.e. for government expenditure.<sup>37</sup> Tax is raised for the public good and tax raised by the government in any particular year forms part of the national budget.<sup>38</sup> As Chatukuta J puts it, anything that affects the flow of revenue to the fiscus, including non-remittance of taxes, will lead to adverse impacts on good governance.<sup>39</sup> Value Added Tax (VAT) is now the most widespread consumption tax collection mechanisms in the world.<sup>40</sup> In the design of tax systems, governments face many choices. Some rely on a limited number of taxes; and others decide to adopt a wide variety of tax sources. Some chose to rely on consumption taxes; others income and capital taxes; whilst some rely on social security contributions.<sup>41</sup> In many jurisdictions, the most common types of tax are income taxes, taxes on goods and services, and social security contributions.<sup>42</sup> The main complexity on tax systems the world over is the definition of the tax base. This includes the determination of whether certain income is taxable or not.

For many States, taxes are the 'life-blood' of government and their prompt and certain availability is an imperious need.<sup>43</sup> Others consider tax as a charge for services provided by government. Tax serve as the primary means for financing public goods such as maintenance of law and order and public infrastructure.<sup>44</sup> Without taxes, the state cannot fulfil its main functions which include among others: maintaining public order, ensuring national defence and security,

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<sup>37</sup> Bindura Nickel Corporation v Zimbabwe Revenue Authority – HH 30/2008

<sup>38</sup> Bindura Nickel Corporation v Zimbabwe Revenue Authority – HH 30/2008

<sup>39</sup> Bindura Nickel Corporation v Zimbabwe Revenue Authority – HH 30/2008

<sup>40</sup> Jeffrey Owens (2006), Fundamental Tax Reform: An International Perspective National Tax Journal, March 2006, Vol. 59, No. 1 (March, 2006), pp. 131-164

<sup>41</sup> Jeffrey Owens (2006), Fundamental Tax Reform: An International Perspective National Tax Journal, March 2006, Vol. 59, No. 1 (March, 2006), pp. 131-164

<sup>42</sup> Jeffrey Owens (2006), Fundamental Tax Reform: An International Perspective National Tax Journal , March, 2006, Vol. 59, No. 1 (March, 2006), pp. 131-164

<sup>43</sup> International Enforcement of Tax Claims, Columbia Law Review, Apr., 1950, Vol. 50, No. 4 (Apr., 1950), pp. 490-504, Columbia Law Review Association, Inc

<sup>44</sup> OECD (2014): Addressing the tax challenges of the digital economy.

providing social services, subsidizing education, and culture.<sup>45</sup> Professor Fred R. Fairchild (1927), states that:

*“Taxation is the instrument by whose means we are induced to contribute the fund whose expenditure enables our government to perform those services which we, through our legislative representatives, have required of it.”<sup>46</sup>*

It is generally conceived that every taxpayer receives at least something from the State in return for his taxes.<sup>47</sup> In most cases, the taxpayer receives more in benefits than what he pays in tax money.<sup>48</sup> The US Supreme Court stated in the case of **Nicol v. Ames, 173 U.S. 509, 515 (1899)** that:

*“The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.”<sup>49</sup>*

Fuller (1960) observed that taxes are 'close cousins to the criminal law' as they, in addition to the object of raising revenue, also help to shape human conduct in ways thought desirable by the legislator.<sup>50</sup> Effective tax systems offer public law disincentives to minimise public damage. Punitive taxes can be treated as a kind of surrogate to the criminal law as they can offer a more cost-effective and ethically superior alternative to the criminal law system over a broad range of

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<sup>45</sup> Mihalache, Adrian(2009): "To Tax or Not to Tax: What Is It Worth." Masaryk University Journal of Law and Technology, vol. 3, no. 3, Fall 2009, p. 335-344. HeinOnline

<sup>46</sup> Fred R. Fairchild (1927): Should the Tax Laws be Enforced and Enforceable? The Scientific Monthly, Vol. 24, No. 2 (Feb., 1927), pp. 119-125; American Association for the Advancement of Science.

<sup>47</sup> Joseph J. Darby (1990), Confiscatory Taxation, The American Journal of Comparative Law, 1990, Vol. 38, Supplement. U. S. Law in an Era of Democratization (1990), pp. 545-555, Oxford University Press

<sup>48</sup> Joseph J. Darby (1990), Confiscatory Taxation, The American Journal of Comparative Law, 1990, Vol. 38, Supplement. U. S. Law in an Era of Democratization (1990), pp. 545-555, Oxford University Press

<sup>49</sup> Joseph J. Darby (1990), Confiscatory Taxation, The American Journal of Comparative Law, 1990, Vol. 38, Supplement. U. S. Law in an Era of Democratization (1990), pp. 545-555, Oxford University Press

<sup>50</sup> Fuller The Morality of Law (1969) 60, cited by Chester N. Mitchell (1988) in Taxation, Retribution, and Justice, The University of Toronto Law Journal, Spring, 1988, Vol. 38, No. 2 (Spring, 1988), pp. 151-183



minor, chronic, and common wrongdoings.”<sup>51</sup> Hart however argues that mere tax rules can never be taken seriously as standards of behaviour.<sup>52</sup> It is however beyond the scope of this work to take further the Hart-Fuller debate on taxation as a criminal law surrogate and disincentive for wrongdoing. Heer (1937) states that taxation can also be used an instrument of social control directed towards the attainment of consciously sought social objectives.<sup>53</sup> Such objectives include support of functions of government like education, health, social welfare, infrastructure development, maintenance of jails and courts.<sup>54</sup> In addition, taxation may help reduce wealth and income inequalities; change consumption habits of citizens; stimulate or discourage certain productive activities in a nation; facilitate changes in the way business is done; and change the volume and direction of flow of investment funds.<sup>55</sup>

In Zimbabwe, tax revenue, once collected, will be used for various purposes in the national interest. These include facilitating provision of basic services like public health, education, social amenities, roads, water, and electricity among others.<sup>56</sup> The revenue collected through taxes also help the state to fulfil its objectives as stated in chapter 2 of the Constitution. These include ensuring and promoting good governance, national unity, peace, stability, and national development.<sup>57</sup> Through such revenue, the state can also ensure food security in the country; empower citizens and provide employment; develop measures to preserve culture, address gender imbalances; and promote and protect the best interests of the children, youth and the elderly.<sup>58</sup> In addition, the State can use the revenue collected to provide adequate shelter to citizens, health facilities

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<sup>51</sup> Fuller *The Morality of Law* (1969) 60

<sup>52</sup> Chester N. Mitchell (1988): *Taxation, Retribution, and Justice*, *The University of Toronto Law Journal*, Spring, 1988, Vol. 38, No. 2 (Spring, 1988), pp. 151-183,

<sup>53</sup> Heer Clarence (1937): *Taxation as an Instrument of Social Control*; *American Journal of Sociology*, Jan., 1937, Vol. 42, No. 4 (Jan., 1937), pp. 484-492;

<sup>54</sup> Heer Clarence (1937): *Taxation as an Instrument of Social Control*; *American Journal of Sociology*, Jan., 1937, Vol. 42, No. 4 (Jan., 1937), pp. 484-492;

<sup>55</sup> Heer Clarence (1937): *Taxation as an Instrument of Social Control*; *American Journal of Sociology*, Jan., 1937, Vol. 42, No. 4 (Jan., 1937), pp. 484-492;

<sup>56</sup> Section 301 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>57</sup> Sections 9, 10, and 13 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>58</sup> Sections 15, 14, 16, 17, 19, 20 and 21 of the Constitution of Zimbabwe Amendment (No. 20)

and services, free and compulsory education for children, social security and care, sporting and recreational facilities, protection to families and marriages, and preserve traditional knowledge.<sup>59</sup>

In Zimbabwe, taxes and other revenues of government are paid into the Consolidated Revenue Fund unless if there is a specific Act of Parliament which require payment into another fund or which provide for their retention for any specified purpose.<sup>60</sup> The VAT Act,<sup>61</sup> the Income Tax Act,<sup>62</sup> and the Customs and Excise Act,<sup>63</sup> clearly provide that the taxes, levies and duties provided for in these Acts are collected for the benefit of the Consolidated Revenue Fund.

## **2.5 THE POWER TO COLLECT TAXES IN ZIMBABWE**

Various taxes are collected in Zimbabwe including value Added tax (VAT), income tax, customs duty and excise tax. The income tax collection system in Zimbabwe is embodied in the Income Tax Act and involves submission of self-assessments of one's income tax, which is however subject to audit by the ZIMRA.<sup>64</sup> Collection of VAT is governed by the Value Added Tax Act (Chapter 23:12), which Act is administered by the Commissioner-General of ZIMRA. Section 28 of the VAT Act require every registered operator, within the stipulated tax period, to furnish the Commissioner with a tax return with information necessary to facilitate calculation of tax payable.<sup>65</sup> The income tax system also largely rely on self-assessments by the income earners.<sup>66</sup> The taxpayer is required to calculate amounts of tax and pay the calculable tax to the Commissioner. This self-assessment is necessitated by ZIMRA's lack of manpower and capacity to effectively monitor every transaction liable to VAT.<sup>67</sup> In terms of the VAT

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<sup>59</sup> Sections 27, 28, 29, 30, 32, and 33 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>60</sup> Section 302 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>61</sup> Section 6 of VAT Act

<sup>62</sup> Section 6 of the Income Tax Act

<sup>63</sup> Sections 86 and 95 of the Customs and Excise Act

<sup>64</sup> MGZ (Pvt) Ltd V The Commissioner General Zimbabwe Revenue Authority HH 269-21

<sup>65</sup> Section 28 of the Value Added Tax Act (Chapter 23:12)

<sup>66</sup> MGZ (Pvt) Ltd V The Commissioner General Zimbabwe Revenue Authority HH 269-21

<sup>67</sup> ZIMRA V Packers International SC28/2016.

collection system which is in place, while the burden to pay resides with the consumer of goods and services, the registered operator bears the burden of collecting VAT and remitting it to the revenue collector.<sup>68</sup> To check on compliance of the filing of returns and making of payments, ZIMRA periodically conducts audits and investigations. ZIMRA has the power to make assessments based on estimates where returns are not furnished or are improperly completed. Taxpayers have the right to object to any assessment in terms of section 32 of the Act.<sup>69</sup> The tax collection system in Zimbabwe was summarised by the court in the case of **Zimbabwe Revenue Authority v Packers International (Private) Limited 2016(2) ZLR 84(S) at 85 D-F** thus, where the court stated that:

*“The system of collection of VAT as embodied in the VAT Act, involves the imposition of tax at each step along the chain of manufacture of goods or the provision of services subject to VAT. Consequently, every registered operator is required in terms of s 28 of the VAT Act, to submit returns to the Commissioner of Taxes (‘the Commissioner’) every month, calculate the VAT due on the return and make payment of such VAT. Due to the sheer volume and complexity of the VAT collection system, ZIMRA lacks the capacity and manpower to effectively monitor each and every transaction liable to VAT and as a consequence it is heavily reliant on the self-assessment process by registered operators. However, in order to ensure that operators comply with the requirements to render returns and collect VAT, ZIMRA conducts periodic investigations as well as audits.”<sup>70</sup>*

The Commissioner has several options available to him on considering the objections to assessments. These include altering any decision; altering or reducing the assessment or disallowing the objection.<sup>71</sup> Any person affected by the Commissioner’s decision has the right to appeal to the Fiscal Court in terms of the Fiscal Court Act.<sup>72</sup> A further appeal lies with the Supreme Court in terms

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<sup>68</sup> Triangle Limited and Another v Zimbabwe Revenue Authority and 10 Others (SC 82-2021)

<sup>69</sup> Section 32 of the VAT Act

<sup>70</sup> Zimbabwe Revenue Authority v Packers International (Private) Limited 2016(2) ZLR 84(S) at 85 D-F

<sup>71</sup> Section 32(4) of the VAT Act

<sup>72</sup> Section 33 of the Value Added Tax Act (Chapter 23:12)

of section 35 of the Act.<sup>73</sup> An appeal to the Fiscal court does not suspend the obligation to pay the value added tax due unless if the Commissioner so directs.<sup>74</sup> The Commissioner has a discretion to suspend payment in terms of section 36 of the VAT Act. In **Mayor Logistics (Pvt) Ltd v ZIMRA**, his Lordship MALABA DCJ (as he then was), had this to say:

*“Failure to fulfil an obligation [to pay tax] may be due to a variety of circumstances. The legislature decided to place responsibility for deciding whether or not the particular circumstances of a taxpayer entitle him or her to a directive suspending the obligation to pay the assessed tax on the Commissioner. A court of law would be acting unlawfully if it usurped the powers of the Commissioner and ordered a suspension of the obligation on a taxpayer to pay assessed tax pending the determination of an appeal by the Fiscal Appeals Court.”*<sup>75</sup>

The taxpayer has the burden to prove that certain supplies or imports are not liable to VAT tax.<sup>76</sup>

## **2.6 POWERS OF THE REVENUE COLLECTOR IN ZIMBABWE**

The Zimbabwe Revenue Authority (ZIMRA) is an authority established in terms of the Revenue Authority Act.<sup>77</sup> The primary responsibility of ZIMRA is to collect revenue on behalf of the State. It acts as the agent of the Government in assessing, collecting, and enforcing payment of revenues.<sup>78</sup> ZIMRA is also responsible for advising the Minister of Finance on issues relating to the collection and raising of revenue for the State.<sup>79</sup> ZIMRA’s operations are managed by a Revenue Board headed by a Commissioner-General.<sup>80</sup> The Commissioner-General

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<sup>73</sup> Section 35 of the Value Added Tax Act (Chapter 23:12)

<sup>74</sup> Section 36 of the Value Added Tax Act (Chapter 23:12)

<sup>75</sup> Mayor Logistics (Pvt) Ltd v ZIMRA SC 7/14

<sup>76</sup> Section 37 of the Value Added Tax Act (Chapter 23:12)

<sup>77</sup> Section 3 of the Revenue Authority Act (Chapter 23:11)

<sup>78</sup> Section 4(1)(a) of the Revenue Authority Act (Chapter 23:11)

<sup>79</sup> Section 4(1)(b) of the Revenue Authority Act (Chapter 23:11)

<sup>80</sup> Section 5 of the Revenue Authority Act (Chapter 23:11)

manages and supervises the Authority's staff, activities, funds and property.<sup>81</sup> ZIMRA officers, with the guidance of the Commissioner-General, are responsible for tax assessments, collection and enforcement. The Minister of Finance may, through a statutory instrument, make a declaration on persons who can be allocated the responsibility to do the assessment, collection, and enforcement.<sup>82</sup> Where the Minister of Finance publishes a statutory instrument in the exercise of his functions, ZIMRA has the power to either act by itself or act through agencies.<sup>83</sup> The relationship between ZIMRA and taxpayers is a statutory one. Chatukuta J states in the case of **BINDURA NICKEL CORPORATION LTD v The ZIMBABWE REVENUE AUTHORITY**,<sup>84</sup> that:

*“it is my view that the relationship between the applicant and the respondent is a statutory one and does not fall under the contracts or transactions as perceived in the decided cases. The whole purpose of the relationship between the applicant and the respondent is to enable the respondent to raise, by way of tax, public revenue.”*

## 2.7 CONSTITUTIONAL FRAMEWORK FOR TAXATION IN ZIMBABWE

Generally, for tax to be collected there is need for a clear legislative framework.<sup>85</sup> For any tax to be collected in Zimbabwe there must be a piece of legislation that authorises its collection. Section 298(2) of the Constitution of Zimbabwe provides as follows:

*“No taxes may be levied except under the specific authority of this constitution or an act of parliament”.*<sup>86</sup>

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<sup>81</sup> Section 19(3)(a) of the Revenue Authority Act (Chapter 23:11)

<sup>82</sup> Section 21(2) of the Revenue Authority Act (Chapter 23:11)

<sup>83</sup> Section 4 of the Revenue Authority Act (Chapter 23:11)

<sup>84</sup> *Bindura Nickel Corporation Ltd v The Zimbabwe Revenue Authority* (HH 30-08)

<sup>85</sup> See *Attorney General vs Wiltshire United Dairies* (1921) 37 TLR884. See also *China Navigation Company Ltd vs Attorney General* (1932) 2 KB 197

<sup>86</sup> Section 298(2) of the Constitution of Zimbabwe

The Constitution of Zimbabwe is the supreme law of Zimbabwe and any law, practice, custom or conduct that is inconsistent with it is void to the extent of its inconsistency.<sup>87</sup> Section 298 of the Constitution provides for principles of good financial management. It emphasises the need for transparency and accountability in public financial management.<sup>88</sup> In Zimbabwe, for any tax to be tax, there must be clear legislation which states that it is tax. There is no such thing as common law tax. In terms of the Constitution, tax is considered as including ‘a duty, rate, levy or due.’<sup>89</sup>

Section 298 of the Constitution states that the burden of taxation must be shared fairly. The revenue raised must be shared equitably between central government and provincial and local tiers of government.<sup>90</sup> Revenue raised through taxes must be directed towards national development. Since tax is part of public funds, there is need for ensuring that revenue raised through taxes is used economically, prudently, effectively, and transparently.<sup>91</sup> The Constitution provides for efficiency and integrity of tax collectors. The Parliament of Zimbabwe has a responsibility to oversee the administration of State revenues and expenditure.<sup>92</sup> This includes an oversight over the performance of local authorities and the Zimbabwe Revenue Authority among others. To promote transparent, coherent, effective and democratic government in Zimbabwe, the Constitution also provides for devolution of government powers and responsibilities where appropriate.<sup>93</sup> Thus powers may be shaded to local authorities and provincial and metropolitan councils.<sup>94</sup> The devolution ensures a sound financial base for the local authorities and provincial councils.<sup>95</sup> Section 276 of the Constitution states that an Act of Parliament:

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<sup>87</sup> Section 2 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>88</sup> Section 298(1) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>89</sup> Section 332 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>90</sup> Section 298(1)(b)(ii) of the Constitution Amendment (No. 20)

<sup>91</sup> Section 298(1)(f) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>92</sup> Section 299 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>93</sup> Section 264 of the Constitution of Zimbabwe Amendment (No 20)

<sup>94</sup> Section 264(1) of the Constitution of Zimbabwe Amendment (No 20)

<sup>95</sup> Section 264(2)(f) of the Constitution of Zimbabwe Amendment (No. 20)

*“may confer on the local authorities the power to levy rates and taxes and generally raise sufficient revenue for them to carry out their objects and responsibilities.”<sup>96</sup>*

As they collect taxes, local authorities are required to ensure that fundamental human rights and freedoms are protected and respected.<sup>97</sup>

Collection of taxes is part of public administration. Section 194 of the Constitution provides for the values and principles that should govern public administration. In terms of this section, the State and its agencies and institutions must ensure that their operations are governed by democratic values and principles. These include maintaining and promoting high ethical standards, promoting efficient and economical use of resources; providing services transparently, equitably, fairly, impartially, without any bias; responding to people’s needs timeously; providing the public access to accurate and accessible information.<sup>98</sup> The State is required by law to take measures to promote the values and principles outlined in section 194. This includes developing the law which accommodate these values. Zimbabwe is a signatory to the International Covenant on the Civil and Political rights and the Universal Declaration of Human Rights. The pay now argue later rule should be checked against Article 8 of the UDHR. It should also be checked against Article 26 of the International Covenant on Civil and Political Rights. It is important to note that international treaties and conventions do not form part of the law of Zimbabwe unless and until they have been concluded and executed by the President and approved by Parliament.<sup>99</sup> Such law, to be part of Zimbabwean law, should be incorporated into law through an Act of Parliament.<sup>100</sup> Section 34 of the Constitution of Zimbabwe states places an obligation on the State to take all measures necessary

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<sup>96</sup> Section 276 (2)(b) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>97</sup> Section 266 (2)(d) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>98</sup> Sections 194(1)(a),(b),(d),(e), (f), (h) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>99</sup> Section 327 (2)(a) of the Constitution of Zimbabwe Amendment (No. 20).

<sup>100</sup> Section 327(2)(b) of the Constitution of Zimbabwe Amendment (No. 20)

to ensure that all international conventions, treaties, and agreements to which Zimbabwe is part are incorporated into domestic law.<sup>101</sup>

## 2.8 TAXATION AND GOOD GOVERNANCE IN ZIMBABWE

The Constitution of Zimbabwe, in the preamble, places emphasis on the need to entrench democracy, good, transparent, accountable and governance and the rule of law.<sup>102</sup> It also reaffirms commitment to upholding and defending fundamental human rights and freedoms. Justice, fairness, equality, honesty, and transparency are considered as key founding values of the Constitution. In terms of section 2, the Constitution imposes obligations on the State, all persons, the executive, the judiciary, the legislature and all agencies and institutions of the state.<sup>103</sup> All these are required to act in accordance with the Constitution. Section 3 of the Constitution of Zimbabwe sets out what are termed founding values and principles. These include among others respect for: the supremacy of the Constitution; fundamental human rights and freedoms; the rule of law; good governance; recognition of the equality of all human beings; and the recognition of the inherent dignity and worth of each human being.<sup>104</sup> These values ought to be reflected in Zimbabwe's tax system.

To ensure good governance, the Constitution calls for the State and all its agencies and institutions to be bound by the following principles:

- *“observance of the principle of separation of powers (Section 2(e);*
- *and respect for the people of Zimbabwe, from whom the authority to govern is derived (Section 2(f)).<sup>105</sup>*
- *transparency, justice, accountability and responsiveness (Section 2(g);”*

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<sup>101</sup> Section 34 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>102</sup> Preamble to Constitution of Zimbabwe Amendment (No. 20)

<sup>103</sup> Section 2 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>104</sup> Section 3 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>105</sup> Section 2(e) and (f) of the Constitution of Zimbabwe Amendment (No. 20)



In terms of section 9 of the Constitution, the State is required *“to adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution”*.<sup>106</sup> This includes proper appointment of public officials and development and implementation of measures to expose, combat and eradicate all forms of corruption and abuse of power by public officials.<sup>107</sup>

## **2.9 LEGISLATIVE FRAMEWORK FOR TAXATION IN ZIMBABWE**

There are various pieces of legislation governing collection of taxes in Zimbabwe including the following: the Income Tax Act, the Value Added Tax Act, Capital Gains Tax Act, Customs and Excise Act, Estate Duty Act; Stamp Duties Act, Income Tax (Transitional Period Provisions) Act, Finance Act, Fiscal Appeal Court Act, and the Constitution of Zimbabwe among others.

## **2.10 TAXATION AND THE PRINCIPLE OF PRESUMPTION OF CONSTITUTIONAL VALIDITY**

All tax laws must be consistent with the Constitution which is the supreme law of the land. The Constitutional Court of Zimbabwe is generally reluctant to grant orders for constitutional invalidity unless there is sufficient justification. The court jealously guards its power to decline an order of confirmation of constitutional invalidity, especially in cases where it is convinced that the order will have no practical effect or where the party challenging it has failed to show that he or she or is injured by the operation of the impugned law.<sup>108</sup> In terms of s 175(1) of the Constitution, any declaration of invalidity of any law or any conduct of the President or Parliament made by a competent court has no force until it has been confirmed by the Court.<sup>109</sup> The Constitutional Court makes the

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<sup>106</sup> Section 9 of the Constitution of Zimbabwe Amendment (No, 20)

<sup>107</sup> Section 9 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>108</sup> Willmore Makumire V Minister of Public Service, Labour And Social Welfare And Another CCZ 1/2020

<sup>109</sup> Willmore Makumire V Minister of Public Service, Labour And Social Welfare And Another CCZ 1/2020

final decision, in terms of section 167(3) of the Constitution, on the constitutionality of an Act of Parliament. It also has the right to confirm an order of invalidity made by other courts.<sup>110</sup>

In **S v Chokuramba** CCZ 10/19, the Court stated as follows:

*“The Court is empowered to confirm an order of constitutional invalidity only if it is satisfied that the impugned law or conduct of the President or Parliament is inconsistent with the Constitution. It must conduct a thorough investigation of the constitutional status of the law or conduct of the President or Parliament which is the subject-matter of the order of constitutional invalidity. The Court must do so, irrespective of the finding of constitutional invalidity by the lower court and the attitude of the parties. Thorough investigation is required, even where the proceedings are not opposed or even if there is an outright concession that the law or the conduct of the President or Parliament which is under attack is invalid. The reason for this strict requirement is that invalidity of the law or the conduct of the President or Parliament is a legal consequence of a finding of inconsistency between the law or the conduct in question and the Constitution. Inconsistency is a matter of fact, on the finding of which the court a quo and the Court may differ.”<sup>111</sup>*

The principle of presumption of constitutional validity of legislation pending determination of the main application is an important limitation to the exercise of judicial power.<sup>112</sup> In the case of **Willmore Makumire V Minister of Public Service, Labour and Social Welfare And Another**,<sup>113</sup> Malaba CJ made reference to the case of **Ashwander v Tennessee Valley Authority**,<sup>114</sup> where the Supreme Court of the United States of America held that:

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<sup>110</sup> Willmore Makumire V Minister of Public Service, Labour And Social Welfare And Another CCZ 1/2020

<sup>111</sup> S v Chokuramba CCZ 10/19, at p 6.

<sup>112</sup> Zimbabwe Township Developers (Pvt) Ltd v Lou’s Shoes (Pvt) Ltd 1983(2) ZLR 376(S) at 382B-D cited in Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority (CCZ 7/2014)

<sup>113</sup> Willmore Makumire V Minister of Public Service, Labour And Social Welfare And Another CCZ 1/2020

<sup>114</sup> Ashwander v Tennessee Valley Authority 297 U.S. 288 (1936) at 346-347, cited in Willmore Makumire V Minister of Public Service, Labour And Social Welfare And Another CCZ 1/2020

1. *“The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions ‘is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.’*<sup>115</sup>
2. *The Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it’.*<sup>116</sup>
3. *‘It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.’*<sup>117</sup>
4. *The Court will not ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’*<sup>118</sup>
5. *The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.’*<sup>119</sup>

The court in the **Makumire case (supra)** also referred to the case of **Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration**,<sup>120</sup> where the Supreme Court of the United States of America at p 39 held that:

*“It has no jurisdiction to pronounce any statute, either of a State or of the United States, void because [it is] irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction,*

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<sup>115</sup> Chicago & Grand Trunk Ry. v Wellman, 143 U.S. 339, 143 U.S. 345. Compare 49 U.S. Veazie, 8 How. 251; Atherton Mills v Johnston, 259 U.S. 13, 259 U.S. 15.” Cited in Willmore Makumire V Minister of Public Service, Labour and Social Welfare And Another

<sup>116</sup> Liverpool, N.Y. & P. S.S. Co. v Emigration Commissioners, 113 U.S. 33, 113 U.S. 39; [Footnote 2/5] Abrams v Van Schaick, 293 U.S. 188; Wilshire Oil Co. v United States, 295 U.S. 100, cited in Willmore Makumire V Minister of Public Service, Labour and Social Welfare and Another.

<sup>117</sup> Burton v United States, 196 U.S. 283, 196 U.S. 295, cited in Willmore Makumire V Minister of Public Service, Labour and Social Welfare And Another.

<sup>118</sup> Liverpool, N.Y. & P. S.S. Co. v Emigration Commissioners, supra; compare Hammond v Schapp Bus Line, 275 U.S. 164, 275 U.S. 169-172. ...cited in Willmore Makumire V Minister of Public Service, Labour and Social Welfare And Another.

<sup>119</sup> Ashwander v Tennessee Valley Authority 297 U.S. 288 (1936), cited in Willmore Makumire V Minister of Public Service, Labour and Social Welfare And Another.

<sup>120</sup> Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration 113 U.S. 33 (1885)

*it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”<sup>121</sup>*

It is important to note that only the Constitutional court has the final say concerning the constitutionality or otherwise of any law or conduct of the President or Parliament.<sup>122</sup>

## **2.11 PROTECTION OF HUMAN RIGHTS AND FREEDOMS IN ZIMBABWE**

**Section 11** of the Constitution places obligations on the State to develop and implement measures necessary to protect fundamental human rights and freedoms and ensure their full realisation and fulfilment.<sup>123</sup> The State is also required to take appropriate measures to create employment and empower people; provide food security;<sup>124</sup> preserve culture; protect the rights of the child; develop and train the youth; secure respect, protection and support of elderly persons; assist persons with physical and mental disabilities; respect, honour and recognise veterans of the liberation struggle; implement measures to secure full employment of all persons in Zimbabwe; protect and foster the institution of the family; promote free and compulsory basic education; develop and implement measures to ensure adequate provision of shelter and health services for the people of Zimbabwe; provide adequate social security and care to citizens in need; provide sporting and recreational facilities; and preserve traditional knowledge. To facilitate provision of the things listed above, the State should raise adequate revenue through taxes.

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<sup>121</sup> Willmore Makumire V Minister of Public Service, Labour And Social Welfare And Another CCZ 1/2020

<sup>122</sup> Marx Mupungu V Minister Of Justice, Legal And Parliamentary Affairs And Others CCZ 7/2021

<sup>123</sup> Section 11 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>124</sup> Sections 14,15,16,19,20,21,22,23,24,25,27,28,29,30,32 and 37 of the Constitution of Zimbabwe Amendment (NO. 20).

Chapter 4 of the Zimbabwean Constitution contains the Declaration of rights. In terms of section 44, the State, and every institution and agency of government must promote, respect, protect, and fulfil the fundamental rights and freedoms.<sup>125</sup> Section 46(2) of the Constitution states that ‘when interpreting any statute, every court, tribunal, or body must be guided by the spirit of chapter 4 of the Constitution which contains the declaration of rights.’<sup>126</sup> Section 46 also provide as follows:

**“46 Interpretation of Chapter 4**

- (1) *When interpreting this Chapter, a court, tribunal, forum or body–*
- (a) *must give full effect to the rights and freedoms enshrined in this Chapter;*
  - (b) *must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;*
  - (c) *must take into account international law and all treaties and conventions to which Zimbabwe is a party;*
  - (d) *must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and*
  - (e) *may consider relevant foreign law; in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.”*<sup>127</sup>

## 2.12 HUMAN RIGHTS AND TAXATION

Section 56 of the Constitution provides that all persons are qual before the law and have the right to equal protection and benefit of the law.<sup>128</sup> The State is required by law to take reasonable and other measures to promote the achievement of equality of all persons.<sup>129</sup> Section 57 of the Constitution provides for the right to privacy. It states that:

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<sup>125</sup> Section 44 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>126</sup> Section 46(2) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>127</sup> Section 46 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>128</sup> Section 56 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>129</sup> Section 56 of the Constitution of Zimbabwe

### **“57 Right to privacy**

*Every person has the right to privacy, which includes the right not to have—*

- (a) their home, premises or property entered without their permission;*
- (b) their person, home, premises or property searched;*
- (c) their possessions seized;*
- (d) the privacy of their communications infringed; or*
- (e) their health condition disclosed.”<sup>130</sup>*

Another important right relating to taxpayers is the right to administrative justice provided for in section 68 of the Constitution. This section states that:

### **“68 Right to administrative justice**

*(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.*

*(3) An Act of Parliament must give effect to these rights, and must—*

*(a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;*

*(b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and*

*(c) promote an efficient administration.”<sup>131</sup>*

Section 69 of the Constitution provides for the right to a fair hearing. It states that:

### **“69 Right to a fair hearing**

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<sup>130</sup> Section 57 of the Constitution of Zimbabwe

<sup>131</sup> Section 68 of the Constitution of Zimbabwe Amendment (No. 20)

*(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.*

*(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.*

*(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.*

*(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.”<sup>132</sup>*

**Section 71(3)** of the Constitution provides for the right to property. In terms of this section, no person can be arbitrarily deprived of his property. It states that:

*“Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied - ”<sup>133</sup>*

## **2.13 ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS**

Section 85 of the Constitution provides for the enforcement of fundamental human rights and freedoms. In terms of this section, enforcement can be by persons affected, or through representatives. Any person who feels that his right has been infringed or is likely to be infringed can approach court for appropriate relief.<sup>134</sup> The constitution provides that the rights and freedoms in Chapter 4 should be reasonably exercised with regard giving respect to the

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<sup>132</sup> Section 69 of the Constitution of Zimbabwe

<sup>133</sup> Section 71(3) of the Constitution of Zimbabwe

<sup>134</sup> Section 85 of the Constitution of Zimbabwe

rights of others. The exercise of such rights and freedoms may be limited in certain circumstances including the following:

*“(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, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—*

*(a) the nature of the right or freedom concerned;*

*(b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;*

*(c) the nature and extent of the limitation;*

*(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;*

*(e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and*

*(f) whether there are any less restrictive means of achieving the purpose of the limitation.”<sup>135</sup>*

Taxpayers should have a remedy against legislation which affects their rights. This equally apply to tax legislation. Many Constitutional courts are reluctant to obstruct the legislature in tax related areas, although they are willing to control subordinate legislatures.<sup>136</sup> There are instances where taxpayers experience or are exposed to tax legislation that will be too high and digs too deep into their pockets. In some cases, taxpayers may experience tax collection and enforcement procedures that affect their enjoyment of certain rights. The primary remedy in such cases lie in lobbying with the legislature to eliminate, reduce or amend any such laws.<sup>137</sup> This is usually done by an organised tax sensitive constituency which have an understanding that legislators in a parliamentary democracy depend on the electorate for their

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<sup>135</sup> Section 86 of the Constitution of Zimbabwe

<sup>136</sup> Tiley John (1998): Human Rights and Taxpayers, The Cambridge Law Journal, Jul., 1998, Vol. 57, No. 2 (Jul., 1998), pp. 269-273,

<sup>137</sup> Joseph J. Darby (1990), Confiscatory Taxation, The American Journal of Comparative Law , 1990, Vol. 38, Supplement. U. S. Law in an Era of Democratization (1990), pp. 545-555, Oxford University Press



political power.<sup>138</sup> Taxpayers should have the right to challenge the underlying tax liability and proposed tax collection action; the right to be informed, the right to fair and just tax system. Taxpayers must be informed about the amount of tax due, the basis of tax liability, when the payment is due, and the process of collection.<sup>139</sup>

## **2.14 ROLE OF COURTS IN TAX ADMINISTRATION**

Taxpayers can also approach courts of law for a remedy in relation to taxation. Courts can be approached on review, appeal, or for orders relating to the validity or constitutionality of certain laws and decisions of administrative authorities. Courts, however, are generally reluctant to overturn a duly enacted tax statute. The major reason is that the State needs adequate revenue for it to be able to function and render services. Failure to raise adequate or enough tax revenue would mean that the salaries of government employees, including judges, will not be paid. Due to this reason, the judiciary cautiously walks the thin line unwilling to upset carefully planned public budgets.<sup>140</sup> It is always considered that striking down an anticipated source of government finance would lead to disastrous consequences.

## **CONCLUSION**

In this chapter, the principles of taxation were discussed as developed by Adam Smith. The constitutional and legal framework for taxation in Zimbabwe was outlined. The chapter also discussed the rights for taxpayers in Zimbabwe as provided for in tax legislation and the Constitution. The powers of ZIMRA were also outlined.

In Chapter 3, selected tax practices and procedures in Zimbabwe will be identified and analysed.

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<sup>138</sup> Joseph J. Darby (1990), *Confiscatory Taxation*, *The American Journal of Comparative Law*, 1990, Vol. 38, Supplement. U. S. Law in an Era of Democratization (1990), pp. 545-555, Oxford University Press

<sup>139</sup> Keith Fogg and Sime Jozipovic (2016): *How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights*.

<sup>140</sup> Joseph J. Darby (1990), *Confiscatory Taxation*, *The American Journal of Comparative Law*, 1990, Vol. 38, Supplement. U. S. Law in an Era of Democratization (1990), pp. 545-555, Oxford University Press

# CHAPTER 3

## TAX PRACTICES AND PROCEDURES IN ZIMBABWE

This chapter will specifically focus on the use of selected tax practices and procedures in Zimbabwe. Focus will be on analysing the following: the ‘pay now argue’ later principle; appointment of an agent by ZIMRA; garnishee of taxpayers’ accounts, and search and seizure procedure for information gathering purposes. Emphasis will be placed on reviewing the practices and procedures as provided for in the Income Tax Act, the Value Added Tax Act, the Customs and Excise Act as well as the Revenue Authority Act. Decisions of the higher courts of Zimbabwe will be analysed to establish the judicial attitude towards these practices and procedures. Particular attention will be placed on reviewing the extent to which a balance is struck between use of these practices and procedures in collecting taxes, and the need to protect the rights of taxpayers in Zimbabwe.

### 3.1 INTRODUCTION

The ability to collect taxes is key to any government’s capacity to finance services, key among them being electricity, health, education, infrastructure, and other public goods. Developing countries suffer from low levels of tax collections leading to high risk in economic development. Strengthening capacity to collect tax revenue is key. In Zimbabwe, there are various tax procedures that are used to facilitate effective tax collection. These include use of ‘pay no argue later rule,’ appointment of agents to collect tax on behalf of ZIMRA and other tax authorities, search and seizure procedure as well as garnish of taxpayers accounts.

The **pay-now-argue-later rule** is a principle widely used in the collection of taxes. In terms of this rule, taxpayers who owe any taxes or fines following an assessment are required by law to first pay the entire amount outstanding or part thereof in order for them to be able to challenge the tax or the fine in any

competent court.<sup>141</sup> In other legal systems, the pay now argue later rule is also referred to in Latin expression as ‘*solve et repete*’.<sup>142</sup> When expressed in English this means “pay and then retrieve.” The rule, which mostly apply in administration of taxes, helps to minimise, or eliminate frivolous tax challenges made against the treasury. Proponents of this rule find comfort in the argument that use of the rule helps ensure that public administration is not delayed or paralysed due to unfounded lawsuits. The pay now argue later rule require taxpayers to first pay tax due before mounting a challenge on any assessment in court. It has been argued that the rule tends to limit the legal protection of the persons affected.

Mafusire J, in the case of **Fairdrop Trading (Private) Limited V The Zimbabwe Revenue Authority**,<sup>143</sup> commenting on the practices and procedures by ZIMRA, stated as follows:

*“It is public policy that revenue inflows to government should not be interrupted. Government functions must not grind to a halt. Therefore, for example, through the Income Tax Act, [Cap 23: 06], (“the Act”), in addition to the power to levy and collect taxes (s 6) the government, through Parliament, has granted respondent the following sweeping powers:*

- 1. Section 45 of the Act, the power to make tax assessments and even to make estimates of taxes due from the available information,*
- 2. ....*
- 3. Part VI of the Act, the power to appoint another person to be the agent of a taxpayer where there is some taxable income due by the agent to the taxpayer, and the power to penalise the agent for any breach of this obligation.*

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<sup>141</sup> Lewis, Sebastian. "The Rule Pay First, Litigate Later or Solve et Repete in Chilean Law." *Journal of Comparative Law*, vol. 8, no. 1, 2013, pp. 105-145. HeinOnline.

<sup>142</sup> Lewis, Sebastian. "The Rule Pay First, Litigate Later or Solve et Repete in Chilean Law." *Journal of Comparative Law*, vol. 8, no. 1, 2013, pp. 105-145. HeinOnline.

<sup>143</sup> Fairdrop Trading (Private) Limited V The Zimbabwe Revenue Authority (HH 68/2014)

*4. Part VII of the Act, the power to insist on payment of any tax as levied pending the determination of any objection to, or an appeal against, a tax as charged, and the power to resort to self-help to recover such tax.”<sup>144</sup>*

### **3.2 TAX ASSESSMENTS IN ZIMBABWE**

In Zimbabwe, just like in other jurisdictions, collection of taxes begins with an assessment. Commenting on ZIMRA assessments, Musithu J in the case of **FMC FINANCE (PRIVATE) LIMITED v ZIMBABWE REVENUE AUTHORITY**,<sup>145</sup> states that:

*“The commissioner makes a decision or issues an assessment based on the information supplied by or obtained from a tax paper. Yet the same taxpayer is then allowed to object to an assessment or decision made based on information that the taxpayer itself would have supplied. It must have occurred to the drafters of the law that the taxation regime is highly complex and technical such that the parties must be permitted the highest latitude to place all information on the table to allow for an extensive ventilation of the issues before the dispute is escalated to courts of law.”*

The Commissioner of ZIMRA is required by law to comply with the law regarding tax assessments. In **Nestle Zimbabwe v Zimbabwe Revenue Authority**,<sup>146</sup> Makoni JA, stated that

*“whenever the Commissioner issues an assessment to a taxpayer, there should never be any doubt that what the Commissioner has issued is indeed an assessment in terms of the relevant law as ‘any default by the taxpayer can be met with the administrative powers bestowed on the Commissioner in the Act.’ The learned judge stated that the rationale for the Commissioner to comply with the Act regarding assessments was given*

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<sup>144</sup> Fairdrop Trading (Private) Limited V The Zimbabwe Revenue Authority

<sup>145</sup> FMC Finance (Private) Limited V Zimbabwe Revenue Authority (HH 311-2022 @ P4)

<sup>146</sup> Nestle Zimbabwe v Zimbabwe Revenue Authority SC 148/2021

in *Barclays Bank v Zimbabwe Revenue Authority*<sup>147</sup> at p 154 F-G as follows:

*“It is imperative that an assessment contains the requirements of the Act as the administrative functions bestowed by the Act on the Commissioner amount to a determination which is executable through a garnishee. He is also bestowed with the power to hear any objections, in terms of the assessment made, after which he can insist on payment of the tax pending the determination of any dispute arising from an assessment. The legislature could only have envisaged granting the commissioner power to execute pending determination in circumstances where the taxpayer has been clearly advised of the basis for the assessment. In addition, s 51 requires the taxpayer to be given due notice of the assessment and the tax payable in the manner stipulated in that section. There should be no doubt as to whether the document sent by the Commissioner to a taxpayer is an assessment in view of the taxpayer’s right to object within 30 days. Annexure A is not headed “Notice of assessment” nor “assessment” and does not give 30 days’ notice for objection as is required by the Act. Further, the document cannot be said to constitute an assessment as it falls short of the definition of assessment in terms of s 2 of the Act. In the process of serving the taxpayer with an assessment and hearing objection, the Commissioner should comply with the provisions of the Act as his administrative acts have far reaching consequences of a garnishee on the taxpayer.”*<sup>148</sup>

The court, in **Nestle Zimbabwe v Zimbabwe Revenue Authority**, declared an assessment that was issued by ZIMRA to be invalid and therefore null and void. The court argued that the assessments were issued contrary to the requirements of the Act and could not therefore create any obligation to pay tax.<sup>149</sup>

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<sup>147</sup> *Barclays Bank of Zimbabwe v Zimbabwe Revenue Authority* 2004 (2) ZLR 151 (H)

<sup>148</sup> *Barclays Bank Zimbabwe v Zimbabwe Revenue Authority* cited in *Nestle Zimbabwe v Zimbabwe Revenue Authority* SC 148/2021

<sup>149</sup> *Nestle Zimbabwe v Zimbabwe Revenue Authority* SC 148/2021

### 3.3 TAX PRACTICES AND PROCEDURES IN ZIMBABWE

Under this section, the writer will discuss the pay now argue later rule, the agent appointment and garnishee procedures, and the search and seizure procedure as provided for in statutes. An analysis of the judgments of higher courts in Zimbabwe will be made.

#### 3.31 ANALYSIS OF THE APPLICATION OF THE PAY NOW - ARGUE LATER PRINCIPLE IN ZIMBABWE

The pay now argue later principle is a fundamental principle in tax administration in Zimbabwe. The obligation to pay the amount of tax assessed to be due and payable is imposed by tax statutes which include the Value Added Tax Act, the Income Tax Act, and the Customs and Excise Act. In the Value Added Tax Act, the ‘pay now argue later’ rule is provided for in **section 36 of Act**. This section states that:

##### **“36. Payment of Tax pending appeal**

*The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the Fiscal Appeal Court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to section forty-six) and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received, and amounts short-paid recoverable with penalty and interest calculated as provided in subsection (1) of section thirty-nine.”<sup>150</sup>*

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<sup>150</sup> Section 36 of the VAT Act

In terms of this section, the obligation of the taxpayer to pay taxes due is not suspended by the noting of an appeal to the Fiscal Court. The taxpayer is required by law to effect the payment despite lodging the appeal.

In the Income Tax Act, the pay now argue later rule is also provided for. Section 69 of this Act provides as follows:

**“69. Payment of tax pending decision on objection and appeal.**

*(1) The obligation to pay and the right to receive any tax chargeable*

*under this Act shall not, unless the Commissioner otherwise directs and subject to such terms and conditions as he may impose, be suspended pending a decision on any objection or appeal which may be lodged in terms of this Act.*

*(2) If any assessment or decision is altered on appeal, a due adjustment shall be made, for which purpose amounts paid in excess shall be refunded and amounts short paid shall be recoverable.”<sup>151</sup>*

Section 119 of the Customs and Excise Act provides for the ‘pay now argue later’ rule. This section states that:

*“119 Appeals against valuation of goods*

*[1] Any person who is aggrieved by any determination of the Commissioner in terms of this Part may, subject to section one hundred and ninety-six and after payment of the amount of any duty or tax demanded by the Commissioner in respect of the goods concerned, appeal to the High Court against such determination.*

*[2] If on an appeal in terms of this section the High Court determines that a lesser amount was payable by way of duty or tax than the amount actually paid by the appellant in terms of subsection [1], the Commissioner shall refund the amount overpaid in accordance with section one hundred and twenty-five.”<sup>152</sup>*

Section 14 of the Fiscal Appeal Court Act provides for the ‘pay now argue later’ rule. This section states as follows:

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<sup>151</sup> Section 69 of the VAT Act

<sup>152</sup> Section 119 of the Customs and Excise Act

#### **“14 Payment of tax pending appeal**

*The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal in accordance with section 11 or 13 or pending the decision of the court, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the court, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received, and amounts short-paid being recoverable with penalty and interest.”<sup>153</sup>*

### **3.32 REVIEW OF COURT JUDGMENTS WHERE THE RULE WAS INTERPRETED**

In the case of **Main Road Motors V Zimbabwe Revenue Authority and Others**,<sup>154</sup> a case where the court heard three similar cases in one hearing, ZIMRA raised a technical objection, based on section 119 of the Customs and Excise Act, that the applicants had no right to be heard as they were approaching the court with dirty hands. The applicants were challenging ZIMRA’s conduct of seizure of their motor vehicles. The argument by ZIMRA was that the applicants had no right of audience as the law required them to pay first any tax, duty or levy due before challenging it in a court of law. The court however disposed of the cases based on other technical objections that were raised by ZIMRA. It would have been interesting and useful to the development of our tax law if the court had proceeded to analyse the use of the ‘pay now argue later’ rule as an objection.

The case of **Zimbabwe Revenue Authority v Packers International (Private) Limited**,<sup>155</sup> dealt with an appeal by ZIMRA to the Supreme Court following a High Court judgment that suspended a ZIMRA garnishee order. Chigumba J had made an order compelling ZIMRA to suspend the garnishee made on Packers

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<sup>153</sup> Section 14 of the Fiscal Appeal Court Act (Chapter 23:05)

<sup>154</sup> Main Road Motors V Zimbabwe Revenue Authority and Others (HMA 01/2018)

<sup>155</sup> Zimbabwe Revenue Authority v Packers International (Private) Limited (SC 28/2016)



International's bank accounts, until finalisation of the appeal that was pending before the Fiscal Appeals Court.<sup>156</sup> Chigumba J, in **Packers International Private Limited v Zimbabwe Revenue Authority** (HH 328-14), stated that:

*“the “pay-now argue later principle is a pithy phrase that is used as a different expression of the biblical injunction to “render unto Caesar what belongs to Caesar”.”*<sup>157</sup>

Dealing with a case involving a taxpayer who approached the court seeking relief after its bank accounts had been garnished by ZIMRA following tax liability, the learned judge commented thus:

*“Put differently, it means that the obligation to pay tax is inviolable, one cannot escape from that obligation, and, one is required to discharge the obligation first, and then raise objections after paying.”*<sup>158</sup> In this case, the court commented that the

### **3.33 FURTHER ANALYSIS OF JUDICIAL ATTITUDE TO THE PAYNOW ARGUE LATER PRINCIPLE AS EXPRESSED IN PACKERS INTERNATIONAL PRIVATE LIMITED v ZIMBABWE REVENUE AUTHORITY<sup>159</sup>**

An Applicant approached the court for relief following garnish of its bank account held at FBC bank by ZIMRA. The taxpayer argued that the action by ZIMRA would force it into liquidation. The Applicant sought an order for the Respondent to immediately uplift the garnishee order and letter of agency appointment placed to its bankers, FBC bank. It also sought the revocation or withdrawal by ZIMRA of the appointment of FBC bank as its agent in line with sections 58 and 59 of the Income Tax Act [Cap 23:06]. In addition, the Applicant sought an order barring the Respondent from unlawfully interfering with applicant's day to day business

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<sup>156</sup> Packers International Private Limited v Zimbabwe Revenue Authority (HH 328-14)

<sup>157</sup> Packers International Private Limited v Zimbabwe Revenue Authority (HH 328-14)

<sup>158</sup> Packers International Private Limited v Zimbabwe Revenue Authority (HH 328-14)

<sup>159</sup> HH 328-2014

operations, including the placing of its officers or agents at applicant's business premises.

In support of its application, Applicant argued that the garnishing of its account was unlawful, and its net effect would result in its imminent business closure by rendering it inoperable. Applicant further argued that the conduct by ZIMRA of garnishing its account was unconstitutional as the garnishee order was arbitrary and the order had been imposed without notice. It was further argued that the garnish would make it virtually impossible for Applicant to operate, as it could not pay its suppliers, or its workers. Applicant stated that the garnishee action would force march them into liquidation leading to great risk on the welfare of its one thousand plus employees. In response, ZIMRA argued that its actions were clearly within the ambit of the law and denied having acted unlawfully, capriciously, maliciously, or unconstitutionally. It stated that the Applicant was required by law to exhaust its domestic remedies first by approaching the Commissioner for relief in terms of Income Tax Act and the VAT Act.

The learned judge, Chigumba J, relied on section 14 of the Fiscal Appeal Act in holding the view that the noting of appeal by the Applicant suspended payment of amount being disputed. The court went on to say that *"It should be emphasized that my reading of section 14 is that the obligation to pay is not suspended, otherwise that would result in conflict with s 36 of the VAT Act. The obligation /liability to pay is not suspended by the noting of the appeal. The appeal will establish whether the taxpayer is indeed liable to pay the assessed sum. What is suspended is the actual payment of the assessed sum, in full."*

As a result, the High court in this case issued a final order in the following terms:

1. *"The respondent uplifts and suspends the garnishee order placed on applicant's accounts with FBC Bank, immediately and forthwith, until the appeal that is pending before the Fiscal Appeals Court is finalised."*

2. *The respondent shall allow a period of seven working days to elapse after the up-liftment and suspension of the original garnishee order, where-after it shall replace it with a fresh garnishee order for the sum of USD 905 801-32(Nine Hundred and Five Thousand Eight Hundred and one Dollars and thirty two cents), which shall remain in place until the appeal is finalised or payment is made in full, whichever comes first.*
3. *The respondent shall not unlawfully interfere with applicant’s business operations and its day to day activities, including the placing of its officers at applicant’s business premises.”<sup>160</sup>*

The High Court found that taxpayer’s liability in terms of section 36 of the VAT Act could not be affected by noting of an appeal unless the Commissioner directs otherwise. The court further found the appointment of FBC Bank as an agent was lawful and in line with section 48 of the VAT Act. The correctness of this position was confirmed by the Supreme court on appeal.<sup>161</sup> The court also stated that the agent’s obligation was only subject to section 48 of the VAT Act and not any other law. A finding was made that section 48 of the VAT Act overrides anything that is contrary to it which may be set out in any other law. This position was confirmed by the Supreme Court on appeal.

In the case of **ZIMBABWE REVENUE AUTHORITY v PACKERS INTERNATIONAL PRIVATE) LIMITED**,<sup>162</sup> Zimra appealed against the order issued by the High Court in HH 328-2014. According to the facts of the case, Packers International failed to pay taxes due leading to ZIMRA garnishing its several bank accounts held with FBC Bank so as to collect outstanding amounts. The court stated as follows:

*“The VAT Act provides a detailed mechanism for vendors to keep certain records and to periodically calculate, account for and pay value added tax to the Commissioner. The Act as a whole and, in particular, its provisions*

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<sup>160</sup> PACKERS INTERNATIONAL PRIVATE LIMITED v ZIMBABWE REVENUE AUTHORITY (HH 328-2014),

<sup>161</sup> SC 28/2016

<sup>162</sup> ZIMBABWE REVENUE AUTHORITY v PACKERS INTERNATIONAL (PRIVATE) LIMITED (SC 28-2016)

*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.”<sup>163</sup>*

The learned judge went on to state 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.”<sup>164</sup>*

The Supreme Court considered the decision of Gowora J as an ‘**apparent volte face**’. The oxford dictionary defines a ‘volte face’ as a clear reversal of policy. The Supreme Court considered section 36 of the Income Tax Act to be the ‘*anchor*’ to the provisions on recovery of tax.

According to the Oxford Advanced Learners dictionary, an anchor is “*a heavy metal device attached to a rope or chain. Anchors are dropped over the side of ships or boats to keep them in the same position on the water.*” It is important to note that an anchor is there to give security or confidence. It gives a firm basis or foundation. Supreme Court stated that section 48 of the VAT Act is the sharp end to the VAT system. The court also stated that section 36 of the VAT Act allows the Commissioner to use his discretion in deciding whether to suspend tax

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<sup>163</sup> ZIMBABWE REVENUE AUTHORITY v PACKERS INTERNATIONAL (PRIVATE) LIMITED (SC 28-2016)

<sup>164</sup> PACKERS INTERNATIONAL PRIVATE LIMITED v ZIMBABWE REVENUE AUTHORITY (HH 328-2014),

payment pending appeal. The court considered this as a remedy for the amelioration of possible taxpayer financial hardship.

### 3.34 ANALYSIS OF THE CONSTITUTIONAL CHALLENGE TO THE PAY NOW ARGUE LATER PRINCIPLE

In the case of **Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority**,<sup>165</sup> the Constitutional Court of Zimbabwe was called upon to determine ‘whether an interim order could be made suspending payment of taxes pending appeal finalisation in the Fiscal court or pending determination of constitutional challenge to the validity of the legislation. The facts of the case show that Mayor Logistics (Pvt) Ltd (the company) had approached the Constitutional court in terms of section 85(1) of the Constitution, challenging the validity of section 69(1) of the Income Tax Act and section 36 of the VAT Act. The basis of the challenge was that the legislative provisions violated the company’s right of access to the courts provided for in section 69(3) and the right to administrative justice provided for under section 68(1) of the Constitution. The company sought an order declaring the two sections, that is, section 69(1) of the Income Tax Act and Section 36 of the VAT Act to be in contrary with and ultra vires section 68(1) and 69(3) of the Constitution.

The facts of this case reveal that following investigations into the business affairs of **Mayor Logistics (Pvt) Limited (the company)**, ZIMRA concluded that the company had under declared Value Added Tax that was due to and payable. An assessment was then issued stating the company’s liability, which assessment was objected to based on incorrectness in terms of section 32 of the VAT Act. The Commissioner disallowed the objection leading to an appeal being filed by the company to the Fiscal Appeal Court. ZIMRA had appointed the company’s bankers and Sakunda Energy as its agents to ensure payment tax due.<sup>166</sup>

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<sup>165</sup> Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority (CCZ 7/2014)

<sup>166</sup> Mayor Logistics (Pvt) Limited v Zimbabwe Revenue Authority CCZ 7/2014

The Constitutional Court dismissed the application for an interim order for suspension of the obligation imposed on the applicant, to pay the tax due and payable pending the hearing of the appeal by the Fiscal Appeal Court or the constitutional matter.<sup>167</sup> Malaba DCJ (as he then was), commented thus: “A court of law would be acting unlawful if it usurped the discretionary powers of the Commissioner and ordered a suspension of the obligation on a taxpayer to pay assessed tax pending determination of an appeal by the Fiscal Appeal Court.”<sup>168</sup> The learned Deputy Chief Justice Malaba (As he then was), pointed out that judicial power is limited by the principle of presumption of constitutional validity of legislation pending determination of the main application. Malaba DCJ (as he then was), also stated as follows:

*“The order would create uncertainty and confusion about the status of the provisions of the Acts of Parliament. In MEC Development Planning & Local Govt. v Democratic Party 1998(4) SA 1157 at para. 61 the Constitutional Court of South Africa on a similar issue said: “It is sufficient to point out here that considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision.”*

### **3.35 EFFECT OF THE PAY NOW ARGUE LATER RULE**

The pay now argue later principle appear to have little relevance in securing payment by the taxpayer. Despite the rule, the taxpayer may simply decide not to pay. The challenge with this however is that the tax due will start to accumulate interest and penalties.<sup>169</sup> In terms of section 39 of the VAT Act, the penalty chargeable for non-payment of tax due can equal to the actual amount of tax due. Interest also accrue on the outstanding amounts. The Commissioner of ZIMRA also has power to impose a fine on the taxpayer in terms of section 65

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<sup>167</sup> Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority (CCZ 7/2014)

<sup>168</sup> Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority (CCZ 7/2014)

<sup>169</sup> Section 71 of the Income Tax Act & Section 39 of VAT Act

of the VAT Act. ZIMRA can proceed to institute proceedings in a competent court for the recovery of the tax due, which amount will be considered as a debt to the State. Section 78 of the Income Tax Act indicate that the taxpayer will lose the right to challenge the amount when the court proceedings are instituted. The section states that:

*“78 Form of Proceedings*

- (1) Proceedings in any court for the recovery of any tax shall be deemed to be proceedings for the recovery of a debt validly acknowledged in writing by the debtor.*
- (2) In any such action or proceedings for the recovery of any tax it shall not be competent for the defendant to question the correctness of any assessment, notwithstanding that an objection or appeal may have been lodged thereto.”<sup>170</sup>*

In terms of section 79 of the Income Tax Act, documents submitted by the Commissioner in support of the court proceedings for the recovery of tax are considered as conclusive evidence. The section states that:

*“79 Evidence as to assessments*

*The production of any document under the hand of the Commissioner or of any officer duly authorised by him purporting to be a copy of an extract from any notice of assessment shall be conclusive evidence of the making of such assessment and except, in the case of proceedings on appeal against the assessment, shall be conclusive evidence that the amount and all the particulars of such assessments appearing in such document are correct.”<sup>171</sup>*

Section 40 of the VAT Act provides that the Commissioner may approach a competent court and file a statement certified by him which states the amount of tax, additional tax, interest or penalty due and payable by any

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<sup>170</sup> Section 78 of the Income Tax Act

<sup>171</sup> Section 79 of the Income Tax Act

person.<sup>172</sup> The certified certificate has the effect of a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in such statement.<sup>173</sup> In terms of section 40(8) of the VAT Act, the correctness of the Commissioner's statement is conclusive and cannot be questioned. The section states that:

*“Notwithstanding that an objection and an appeal may have been lodged against the assessment made in terms of this section, it shall not be competent for any person in any proceedings in connection with any statement filed in terms of subsection (2) to question the correctness of any assessment upon which such statement is based.”<sup>174</sup>*

In terms of section 42 of the VAT Act, whenever the Commissioner produces or issues any document as copy of or an extract from any notice of assessment, such document will be considered as conclusive evidence that the amount stated in it is correct.<sup>175</sup> Whenever there is need to make a refund to the taxpayer, the Commissioner has a right to set-off the amount against any unpaid taxes.<sup>176</sup> The Commissioner also has the power to appoint agents to collect VAT tax.<sup>177</sup>

A situation is being presented where the taxpayer is being dragged to court just to be a by-stander, with no opportunity to answer to the charges. He is not required to challenge the evidence that will be presented against him. He has no right to challenge the conclusive certificate. The correctness of the evidence of the Commissioner is unquestionable. This seems to be in violation of the right to a fair hearing as provided for in section 68 of the Constitution. The independence of courts of law is being taken away since the courts have no right to scrutinise the correctness of the evidence presented. The

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<sup>172</sup> Section 40(1) of the Value Added Tax Act (Chapter 23:12)

<sup>173</sup> Section 40(2) of the Value Added Tax Act (Chapter 23:12)

<sup>174</sup> Section 40(8) of the Value Added Tax Act (Chapter 23:12)

<sup>175</sup> Section 42 of the VALUE Added Tax Act (Chapter 23:12)

<sup>176</sup> Section 44 of the Value Added Tax Act (Chapter 23:12)

<sup>177</sup> Section 48 of the Value Added Tax Act (Chapter 23:12)



taxpayer's right to adduce and challenge evidence as provided for in section 70 of the Constitution is under threat.<sup>178</sup> The impartiality and independence of courts provided for in section 69(1) of the Constitution is being taken away. Section 164(2) of the Constitution clearly states as follows:

*“the independence, impartiality, and effectiveness of the courts of law are central to the rule of law and democratic governance.”*<sup>179</sup>

The writer is of the view that the pay now argue later rule has no place in a democratic society. Although the rule does not have a direct bearing on the taxpayer's rights, its effects lead to violation of fundamental human rights and freedoms. The failure to suspend taxes leads to the charging of interest and penalty. Moreso, when the taxpayer fails to effect payment as required, the Commissioner will make use of the 'conclusive certificate' procedure. When this procedure is utilised, the taxpayer has no right to challenge the evidence presented. ZIMRA will also move on to implement other measures like the garnishee procedure which will be discussed in the next section.

### **3.36 REVIEW OF THE EXPEDITED PROCEDURE**

Section 33A of the Revenue Authority Act provides for an expedited procedure by Zimra to recover outstanding taxes.<sup>180</sup> In terms of this section, Zimra has the right to attach and remove property of persons to achieve its objectives. In terms of this section, to ensure payment of outstanding assessed taxes, additional tax, duty due, interest or penalties, the Authority may make an application on notice to the Magistrates of the province where the taxpayer is resident.<sup>181</sup> In such an application, the Authority may seek the following orders:

*(a) for the payment of the assessed tax, additional tax, duty due, penalty or interest and authorising the messenger of court if the application is*

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<sup>178</sup> Section 70(1)(h) of the Constitution states that “any person accused of an offence has the right (a) to be presumed innocent until proven guilty, and.... (h) to challenge and adduce evidence.”

<sup>179</sup> Section 164(2) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>180</sup> Section 33 of the Revenue Authority Act

<sup>181</sup> Section 33A of the Revenue Authority Act (Chapter 23:11)

*granted to attach the taxpayer's movable property itemised in the application to satisfy the debt due upon the service of the order on the taxpayer, and*

*(b) authorising the Messenger of Court to attach the taxpayer's movable property to satisfy the debt due upon service of the order on the taxpayer.'*<sup>182</sup>

For the expedited procedure to be in properly before the court it is supposed to be accompanied by an affidavit by the Commissioner or the Commissioner's representative. The affidavit must confirm that a tax assessment was served on the taxpayer and that there was no objection or appeal to the assessment.<sup>183</sup> Order 22 Rule 2 of the Magistrates Court Rules provides any persons served with an application an opportunity to respond to the application.<sup>184</sup> In the statement of response, the Respondent may consent to the order sought or oppose it specifying grounds on which he opposes the order.<sup>185</sup> Thus, he may furnish the court with a written statement in response, accompanied by an affidavit, outlining his response. In addition, he may place additional facts before the court to support his defence. The application for an expedited procedure can only be made within a period of six years from the date when the debt became due.<sup>186</sup>

### **3.4 ANALYSIS OF THE PROCEDURE OF GARNISHING OF ACCOUNTS BY ZIMRA**

ZIMRA has the power to garnish the account of any taxpayer. When an agent is appointed by ZIMRA, it fulfils the obligation to pay the tax due through garnishing taxpayers' account that it holds. This procedure was analysed by the court in the case of **TREGERS INDUSTRIES (PRIVATE) LIMITED v COMMISSIONER GENERAL OF THE ZIMBABWE REVENUE AUTHORITY**.<sup>187</sup> In this case, ZIMRA Officers visited the

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<sup>182</sup> Section 33A (2) of the Revenue Authority Act (Chapter 23:11)

<sup>183</sup> Section 33A (3)(a) and (b) of the Revenue Authority Act (Chapter 23:11)

<sup>184</sup> Order 22 Rule 2 of the Magistrates Court (Civil) Rules, 1980.

<sup>185</sup> Order 22 Rule 2 of the Magistrates Court (Civil) Rules, 1980.

<sup>186</sup> Section 33A (8) of the Revenue Authority Act (Chapter 23:11)

<sup>187</sup> *Tregers Industries (Private) Limited V Commissioner General Of The Zimbabwe Revenue Authority*. (HH 83-2006)

Applicant's offices for inspection of export files. Following investigation and audit, ZIMRA discovered that the Applicant was not charging Value Added tax and they were requested to ensure that payment was made. The applicant disputed liability and refused to pay. ZIMRA consequently proceeded to garnishee the applicant's current account with Barclays bank resulting in the bank paying the amount to ZIMRA as requested. The Applicant approached the High court seeking relief of refund of the amount garnished arguing that it was not liable to pay the VAT as alleged. ZIMRA disputed having acted unlawfully by issuing the garnishee order against the Applicant. The court stated that ZIMRA was entitled to demand payment of the tax due in terms of section 48 of the Value Added Tax.

**Section 48** of the Value Added Tax (Chapter 23:12) gives the Commissioner power to recover from any source, including bank accounts, taxes due. This section states that:

*“(2) The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any amount of tax, additional tax, penalty, or interest due from any moneys in any current account, deposit account, fixed deposit account or savings account or any other moneys—(a) including pensions, salary, wages or any other remuneration, which may be held by him.....”<sup>188</sup>*

Any person declared as an agent in terms of section 48 is liable to pay tax, additional tax, penalty or interest in respect of moneys controlled by him or transactions concluded by him.<sup>189</sup> The liability is incurred in representative capacity. The agent is required to pay taxes due from the assets of the respective taxpayer in his possession or under his management or control.<sup>190</sup> The agent so

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<sup>188</sup> Section 48 of the Value Added Tax Act

<sup>189</sup> Section 49(2) of the Value Added Tax Act

<sup>190</sup> Section 49(3) of the Value Added Tax Act

appointed incurs personal liability for the payment of tax, additional tax, penalty, or interest if he

*“(a) alienates, charges or disposes of any money received or accrued in respect of which tax is chargeable; or*

*(b) If he disposes of or parts with any fund or money belonging to the person whom he represents which is in his possession or comes to him after the tax, additional tax, penalty or interest has become payable, if such tax, additional tax, penalty or interest could legally have been paid from or out of such fund or money.”<sup>191</sup>*

In terms of section 50 of the Act, the Commissioner of ZIMRA has the same remedies against all property of any kind under the management or control of an agent as he would have against the property of any person liable to pay any tax under the VAT Act.<sup>192</sup>

In the case of **Zimbabwe Revenue Authority V Packers International (Private) Limited**, the Supreme court stated that section 48 of the VAT Act is not subject or subservient to any other law. The court categorically stated that *“one a person is declared an agent in terms of this section, the person so appointed is duty bound to pay the assessed taxes notwithstanding the provisions of any other law.”<sup>193</sup>* ZIMRA’s entitlement to appoint an agent for the collection of assessed tax includes an entitlement to garnish the taxpayer’s account through the agent for the collection of tax. The Supreme Court considered the High court decision of ordering a discharge of the garnishee to be contrary to the law. Explaining the import of the provision, the court stated that section 48 provides a mechanism by which enables the Commissioner to collect and remit taxes due to the fiscus. The court also commented that the garnishee order is not the substantive tax assessment, it is merely a collecting mechanism. The court stated that the

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<sup>191</sup> Section 49(6) of the Value Added Tax Act

<sup>192</sup> Section 50 of the Value Added Tax Act

<sup>193</sup> ZIMRA V Packers International (Pvt)Ltd – SC 28/2016

interdict, issued by the High Court against ZIMRA, was an unlawful interference with ZIMRA's powers under the VAT Act.

In **Fairdrop Trading (Private) Limited V The Zimbabwe Revenue Authority**,<sup>194</sup> the applicant approached the court seeking the suspension of the garnishees placed on its accounts pending the determination of an appeal to the Fiscal Appeal Court. The Applicant, in the words of Mafusire J, condemned the 'garnishees as a hatchet job.'<sup>195</sup> The applicant accused ZIMRA of having abused its powers and also of being 'heavy-handed, vindictive, dishonest, malicious, and cold-hearted.'<sup>196</sup> It was alleged that ZIMRA had generated false and gargantuan tax liabilities to collapse the applicant.

A garnishee on an account has dire consequences. In the **Fairdrop Trading (Pvt) Ltd case (supra)**, the Applicant argued that if the garnishee were not suspended, applicant would be placed on the verge of liquidation. The Applicant argued that it had not paid its employees for months, it only had USD10 left in its Stanbic Bank Account, its pharmacy department had been shut, and that its cancer unit would inevitably shut down thereby putting at risk the life of cancer patients.<sup>197</sup> Applicant further argued that removal of the garnishee would go a long way in reviving the applicant's business. The court, in dismissing the application, stated that the applicant had made very strong moral arguments, which were however short of the law. It stated as follows:

*"The applicant is not without my sympathy. It is undoubtedly in dire straits. It has made a very strong and persuasive moral argument for the hardships it is facing. But one should not be dazzled by that. The argument is short on law. The respondent has the law on its side. It must be assumed that parliament was alive to the hardships or unfairness of the application of s 69 of the Income Tax Act. The law says in spite of any objection or any appeal,*

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<sup>194</sup> Fairdrop Trading (Private) Limited v The Zimbabwe Revenue Authority (HH 68/2014)

<sup>195</sup> Fairdrop Trading (Private) Limited v The Zimbabwe Revenue Authority (HH 68/2014)

<sup>196</sup> Fairdrop Trading (Private) Limited v The Zimbabwe Revenue Authority (HH 68/2014)

<sup>197</sup> Fairdrop Trading (Private) Limited v The Zimbabwe Revenue Authority (HH 68/2014)

*the tax as charged is payable. Any overcharge is refunded should the objection or the appeal succeed.”<sup>198</sup>*

### 3.5 POWER TO APPOINT AGENTS BY ZIMRA UNDER THE INCOME TAX ACT

In **Murowa Diamonds v ZIMRA & Anor**,<sup>199</sup> the court dismissed an application relating to a challenge of the constitutional validity of section 58 of the Income Tax Act. In this case, the applicant had approached the court challenging the constitutional validity of the statutory tax regime that empowers ZIMRA to unilaterally incept tax collection mechanisms to recover outstanding tax even if that tax be genuinely in dispute. The court was called upon to declare section 58 of the Income Tax Act to be in conflict with s 56(1) and s 68(1) of the Constitution of Zimbabwe. Section 58 states that:

*“58 Power to appoint agent (1) The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any tax due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, including pensions, salary, wages or any other remuneration, which may be held by him for, or due by him to, the person whose agent he has been declared to be. (2) For the purpose of subsection (1)— “person” includes— (a) a bank, building society or savings bank; and (b) a partnership; and (c) any officer in the Public Service.”<sup>200</sup>*

The argument by Applicant that section 58 is in conflict with the Declaration of Rights as it leads to extra-judicial self-help by the Revenue Collector did not find favour with the court.

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<sup>198</sup> Fairdrop Trading (Private) Limited v The Zimbabwe Revenue Authority (HH 68/2014)

<sup>199</sup> Murowa Diamonds v ZIMRA & Anor, HH 125-20

<sup>200</sup> Section 58 of the Income Tax Act

**Section 60 of the Income Tax Act** requires the agent to provide information to the Commissioner relating to the taxpayer concerned. In terms of section 42 of the VAT Act, the production of any documents by the Commissioner shall be considered as **conclusive evidence** of the liability of the taxpayer.

In the case of **MUROWA DIAMONDS v COMMISSIONER GENERAL OF THE ZIMBABWE REVENUE AUTHORITY**,<sup>201</sup> the procedure for appointment of an agent by ZIMRA was also put to test. The case involves alleged non-payment of withholding tax for the period 2009 to 2010 was due and payable. The facts of the case are as follows: ZIMRA had threatened to institute recovery proceedings against the applicant. The Applicant argued that garnish of its accounts would cripple its business activity. The Applicant approached the court seeking an order barring the Respondent from appointing an agent for the purpose of collecting money on its behalf. Applicant argued that the Respondent's 'sword of Damocles' was hanging over them, given ZIMRA's powers that includes the power to appoint a bank as agent to collect money due on behalf of ZIMRA. As a result, the Applicant sought a temporary order prohibiting ZIMRA from appointing agents in terms of section 48 of the VAT Act. As final order, the Applicant sought the following:

*“That the respondent be and is hereby prohibited from appointing agents in terms of s 48 of [Cap 23:12] until such time as the applicant’s indebtedness, if any, to the respondent has been determined in accordance with the procedure relating to the Declaratory Order to be instituted by the applicant against the respondent.”<sup>202</sup>*

The court restated and emphasized the position that ZIMRA was empowered to appoint any person as an agent in terms of section 58 of the Income Tax Act. The power was bestowed by the legislature to ensure ZIMRA complies with its obligations in terms of the Act. Gowora J went on to state as follows:

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<sup>201</sup> Murowa Diamonds V Commissioner General Of The Zimbabwe Revenue Authority (HH 1-2011)

<sup>202</sup> Murowa Diamonds V Commissioner General Of The Zimbabwe Revenue Authority (HH 1-2011)

*“It cannot be argued by the applicant that the exercise by the respondent of his powers under the empowering legislation is improper where monies are admitted to be due and owing. It seems to me that this court can only be enjoined by a litigant to bar the respondent from exercising those powers on the basis that the respondent is acting improperly or that there exists some irregularity in the manner in which the powers are being exercised, or that the sums sought to be collected from the exercise are not in fact owed to the fiscus. In casu, there is no allegation that the respondent is improperly seeking to appoint an agent. There is also no suggestion that withholding tax is not due.”*

In **Packers International v ZIMRA**, following a challenge by the Applicant on the conduct of ZIMRA to appoint agent and garnish the applicant’s account, the High Court issued an order to the following effect:

*“1. The respondent uplifts and suspends the garnishee order placed on applicant’s accounts with FBC Bank, immediately and forthwith, until the appeal that is pending before the Fiscal Appeals Court is finalised.*

*2. The respondent shall allow a period of seven working days to elapse after the upliftment and suspension of the original garnishee order, where-after it shall replace it with a fresh garnishee order for the sum of USD 905 801-32(Nine Hundred and Five Thousand Eight Hundred and one Dollars and thirty two cents), which shall remain in place until the appeal is finalised or payment is made in full, whichever comes first.*

*3. The respondent shall not unlawfully interfere with applicant’s business operations and its day to day activities, including the placing of its officers at applicant’s business premises.”<sup>203</sup>*

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<sup>203</sup> Packers International v ZIMRA – SC28/2016



On appeal, the Supreme court placed the High Court judgment on vacation and stated that the interdict that was issued against ZIMRA was an unlawful interference with the powers issued to this administrative body by the VAT Act.<sup>204</sup>

Commenting on the provisions in the VAT Act which provide for the rule of ‘pay now argue later’, Gowora JA, *ZIMRA v Packers International (Supra)*, commented thus:

*“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.”*<sup>205</sup>

### 3.6 INFRINGEMENT OF A RIGHT

Deposits held in a bank account by any taxpayer is part of his property. The taxpayer can make a withdrawal of can give instructions to the bank authorising use of such funds to his benefit. When the deposits are taken by ZIMRA through the agents, such action can be viewed as a direct infringement on the right of the taxpayer. This is in violation to section 71(3) of the Constitution which states that no person shall be arbitrarily deprived of his property. The word ‘property’ was defined by Currie and De Waal to include, in addition to land, corporeal movables, incorporeals, commercial interest and intellectual property.<sup>206</sup>

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<sup>204</sup> Per Gowora JA in *ZIMRA v Packers International (Pvt) Ltd - SC28/2016*

<sup>205</sup> *ZIMRA V Packers International (Pvt) Ltd – CS28/2016*

<sup>206</sup> Currie I & De Waal J *The Bill of Rights Handbook* (2005) at 536

## 3.7 PRACTICE OF SEARCH AND SEIZURE

### 3.71 SEARCH AND SEIZURE IN TERMS OF CUSTOMS AND EXCISE ACT (CEA)

The Commissioner-General or his authorised officers have power to obtain a warrant for search and seizure from the courts. Section 34F of the Revenue Authority Act provides that to facilitate assessments, the Commissioner-General may require taxpayers to produce books, plans, deeds, accounts, trade lists, instruments, stock lists, records, or any documents for examination.<sup>207</sup> Where there is reason to believe that the taxpayer committed an offence that warrants investigation, the Commissioner General or the responsible officials may approach the court for a issuance of a warrant authorising search and seizure. Section 34F of the Revenue Act states as follows:

- (a) *“without previous notice, at any reasonable time during the day enter any premises whatsoever and on such premises search for any moneys, valuables, deeds, plans, instruments, books, records, accounts, trade lists, stock lists or documents;*
- (b) *in carrying out any such search, open or cause to be removed and opened any article in which he or she suspects any moneys, valuables, deeds, plans, instruments, books, records, accounts, trade lists, stock lists or documents to be contained;*
- (c) *seize any such deeds, plans, instruments, books, records, accounts, trade lists, stock lists or documents as in his or her opinion may afford evidence which may be material to assessing the liability of any person for any tax;*
- (d) *retain any such deeds, plans, instruments, books, records, accounts, trade lists, stock lists or documents for as long as they may be reasonably required for any assessment or for any criminal or other proceedings under a Scheduled Act or the Finance Act.”<sup>208</sup>*

It is important to note that to obtain the warrant specified in section 34F(8) of the Revenue Authority Act, the ZIMRA officials have an obligation to satisfy the

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<sup>207</sup> Section 34F(2) of the Revenue Authority Act (Chapter 23:11)

<sup>208</sup> Section 34F (8) (a,b,c,d) of the Revenue Authority Act (Chapter 23:11)

magistrate through a statement made on oath, that reasonable grounds exist that the taxpayer concerned committed an offence which warrant investigation.<sup>209</sup>

### **3.72 SEARCH AND SEIZURE UNDER THE VAT ACT**

The VAT Act provides for gathering of information, documents, and items from places of business during normal business hours upon giving of prior notice.<sup>210</sup> Taxpayers will be required to furnish the Commissioner with such information, document, item or record necessary for inspection, audit, or examination. Section 61 of the VAT Act authorises the Commissioner or his officers to enter any place of business or trade to search any such place for the purpose of enforcing payment of any tax.<sup>211</sup> The officers will furnish taxpayers with the necessary authorisation document. The ZIMRA officers may also take possession of documents that they deem necessary for the purpose of examination, investigation, trial or inquiry.<sup>212</sup>

### **3.73 SEARCH AND SEIZURE UNDER THE CUSTOMS AND EXCISE ACT**

The Customs and Excise Act (Chapter 23:02), provides for the imposition, collection and management of customs, excise and other duties.<sup>213</sup> ZIMRA officers have the power to enter every ship, vehicle, aircraft or vehicle to search and examine every goods and containers.<sup>214</sup> They have power to seal off goods on ship, aircraft or vehicles to ensure payment of duty.<sup>215</sup> In terms of section 7 of the Act, the officers have:

*“...power to fasten down hatchways, doors and other openings, to lock up, seal, mark or otherwise secure any goods or containers on board that ship or to remove any goods or containers to a State warehouse or to any*

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<sup>209</sup> Section 34F (8) of the Revenue Authority Act (Chapter 23:11)

<sup>210</sup> Section 60 of the Value Added Tax (Chapter 23:12)

<sup>211</sup> Section 61 of the Value Added Tax Act (23:12)

<sup>212</sup> Section 61(1)(d) of the Value Added Tax Act (Chapter 23:12)

<sup>213</sup> Customs & Excise Act (Chapter 23:02); Duty means duty levied under the Customs & Excise Act

<sup>214</sup> Section 7 of the Customs & Excise Act (Chapter 23:02)

<sup>215</sup> Section 8 of the Customs & Excise Act (Chapter 23:02)

*other place indicated by the officer, and shall have the right to lock up, seal or otherwise secure the ship's wireless apparatus.”<sup>216</sup>*

Section 8 of the Customs and excise Act show that ZIMRA officers also have power “to open in any manner they deem fit, any package within or upon any ship, aircraft or vehicle that is locked or otherwise secured where the keys thereto are not produced on demand.”<sup>217</sup> In addition, the officers have power to stop and detain within the limits of Zimbabwe any ship, aircraft or vehicle entering or being about to depart from Zimbabwe or any ship, aircraft or vehicle suspected of containing uncustomed goods.<sup>218</sup>

In terms of s 192[1] of the Customs and Excise Act [Cap 23:02 [“the Customs Act”] ZIMRA is empowered to seize or embargo goods in respect of which the correct amount of duty has not been paid. Section 192[1] of the Customs Act provides as follows:

“192 Embargo on goods which have passed out of customs control

*If at any time an officer has reason to believe that the correct duty has not been paid on any goods which have passed out of customs control, or that there has been or may be in respect of those goods a contravention of any of the provisions of this Act or any other law relating to the importation of goods, he may, within a period of six years from the date of importation, removal from bond or delivery from factory in the case of excisable goods, seize or place an embargo on those goods, wheresoever or in possession of whomsoever found, and until the embargo has been withdrawn no person shall remove such goods from the place indicated by the officer or in any deal therewith, except with the permission of the officer”*

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<sup>216</sup> Section 7 of the Customs & Excise Act (Chapter 23:02)

<sup>217</sup> Section 7 of the Customs & Excise Act (Chapter 23:02)

<sup>218</sup> Section 7(4) of the Customs & Excise Act (Chapter 23:02)

Section 193 of the Customs and Excise Act (CEA) accords officers of ZIMRA the power to seize any goods upon a reasonable belief that the goods are liable for seizure. The section provides that:

*“Subject to subsection (3), an officer may seize any goods, ship, aircraft, or vehicle (hereinafter in this section referred to as articles) which he has reasonable grounds for believing are liable to seizure”.*<sup>219</sup>

In terms of s 193(2) of ‘the CEA’, goods can be seized by officers of ZIMRA if they are:

*“(a) liable to forfeiture under this Act or any other law relating to customs or excise; or*

*b) the subject matter of an offence under or a contravention of any provision of (i) this Act or any other law relating to customs and excise; or*

*(ii) any enactment prohibiting, restricting or controlling the importation or exportation thereof;*

*Notwithstanding the fact that no person has been convicted of such an offence or contravention”.*

Any person whose goods have been seized by ZIMRA officers has a burden to prove that any such goods were not liable for seizure. This is done in terms of section 204 of the Customs and Excise Act. In terms of this section:

*“When any goods are stopped, seized, or placed under embargo under this Act...if any question arises as to whether duties have been paid on the goods...the burden of proof of the affirmative of these facts shall be on the person who owns, owned or claims such goods...”*<sup>220</sup>

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<sup>219</sup> Section 193 of the Customs and Excise Act (Chapter 23:02)

<sup>220</sup> Section 204 of Customs and Excise Act (Chapter 23:02)

The procedure for seizure and forfeiture was broadly outlined in section 193 of the Customs and Excise Act. This section states as follows:

*“(12) Subject to section one hundred and ninety-six, the person from whom the articles have been seized or the owner thereof may institute proceedings for—*

*(a) the recovery of any articles which have not been released from seizure by the Commissioner in terms or paragraph (a) of subsection (6); or*

*(b) the payment of compensation by the Commissioner in respect of any articles which have been dealt with in terms of the proviso to subsection (6); within three months of the notice being given or published in terms of subsection (11), after which period no such proceedings may be instituted.”<sup>221</sup>*

Where goods or items have been seized by ZIMRA and there is no action instituted to recover the seized goods within the time stipulated in section 193, the action based on unlawful seizure will prescribe. This position was confirmed by the court in several cases including **Machacha v ZIMRA**,<sup>222</sup> and **Chigonga v ZIMRA**.<sup>223</sup>

**In the case of Main Roads Motors v Zimbabwe Revenue Authority and Others (HMA01-2018)** a case where Mafusire J combined three similar cases for a single hearing, applicants approached the court seeking an order declaring as ultra vires the Constitution, section 192[1] of the Customs and Excise Act, Cap 23:02 [“the Customs Act”]. Applicants also sought an order declaring as unlawful, the seizure, or attempted seizure, by the ZIMRA, of certain motor vehicles that applicants had imported. In addition, the Applicants sought immediate return of the seized motor vehicles by ZIMRA. The facts of the cases show that upon audits, ZIMRA discovered anomalies in declarations made by applicants. ZIMRA alleged that the applicants had made false representations on the vehicles’ models and milage, leading to under valuation. Re assessments were made and called upon applicants to pay. The goods were seized in terms of section 192 of the Customs

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<sup>221</sup> Section 193 of the Customs and Excise Act

<sup>222</sup> Machacha v. ZIMRA, HB-186-11

<sup>223</sup> Chigonga v ZIMRA, HH-663-17

and Excise Act. The applicants argued that the seizure by ZIMRA was unlawful as such conduct violated their inalienable right to property as enshrined in section 71 of the Constitution.<sup>224</sup> Section 71(3) states that:

*“Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied - ”*<sup>225</sup>

Applicants also argued that section 192(2) of the Customs and Excise Act was ultra vires section 68 of the Constitution which provides for the right to administrative conduct that is lawful, proportionate, efficient, reasonable, impartial, and both procedurally and substantively fair.<sup>226</sup>

### 3.8 ANALYSIS OF THE SEARCH AND SEIZURE PROCEDURE

In **Qingsham Investments (Private) Limited V Zimbabwe Revenue Authority**,<sup>227</sup> the court stated that placement of an embargo on goods and subsequent seizure in terms of sections 174 and 204 of the Customs and Excise Act is lawful conduct that cannot be interdicted. The court supported its reasoning with the position stated in **Mayor Logistics v Zimbabwe Revenue Authority**,<sup>228</sup> where it was stated that:

*“It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a prima facie right. It is also axiomatic that the prima facie right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct”*

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<sup>224</sup> Main Roads Motors v Zimbabwe Revenue Authority and Others (HMA01-2018)

<sup>225</sup> Section 71(3) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>226</sup> Section 68 of the Constitution of Zimbabwe Amendment (No. 20)

<sup>227</sup> Qingsham Investments (Private) Limited V Zimbabwe Revenue Authority (HH 207-2017)

<sup>228</sup> Mayor Logistics v Zimbabwe Revenue Authority CCZ 7-14 @p8-9

### 3.9 THE PRINCIPLE OF PRESUMPTION OF CONSTITUTIONAL VALIDITY

The case of **Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority** is key in the development of our tax jurisprudence. The case emphasised the importance of the principle of constitutional validity of any legislation. Malaba DCJ (as he then was), stated that: *“Any court faced with an application challenging the constitutionality of a statutory provision, is required to proceed on the presumption that the legislation is constitutionally valid until the contrary is clearly established.”*<sup>229</sup> . The court noted that through observance of this fundamental principle, due respect is given to the legislative branch of Government in line with the fundamental doctrine of separation of powers. The Constitutional Court can only declare any legislation to be invalid following a thorough examination of the factual and legal issues. The court reasoned thus: *“A finding has to be made first that there has been, a contravention of a fundamental right or freedom. The legal consequences of a decision by the Constitutional Court that a law, a regulation or some of their provisions, are unconstitutional are that they lose their legal force on the day of the publication of the Constitutional Court decision. Until then, the law, regulation or any provision has legal force. An impression should not be created in the minds of right thinking members of the public that the outcome of the hearing by the Constitutional Court of the question of constitutionality of legislation has been pre-determined.”*<sup>230</sup>

### 3.10 ARE ZIMRA POWERS UNDER CHECK?

The Minister of Finance, in terms of section 34 of the Revenue Authority Act, constantly checks on the operations of ZIMRA and may cause an investigation to be carried out into its affairs.<sup>231</sup> Any persons appointed to carry out the investigations in terms of section 34 is accorded powers equivalent to those conferred by the Commissions of Inquiry Act [Chapter 10:07].<sup>232</sup> Section 2 of the

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<sup>229</sup> Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority (CCZ 7/2014)

<sup>230</sup> Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority (CCZ 7/2014)

<sup>231</sup> Section 34 of the Revenue Authority Act (Chapter 23:11)

<sup>232</sup> Section 34 of the Revenue Authority Act (Chapter 23:11)



Commissions of Inquiry Act provides for appointment of Commissions of inquiry to investigate matters of public nature.<sup>233</sup> The Constitution provides for the Zimbabwe Anti-Corruption Commission to constantly check on the conduct of public officials to ensure good governance. It also provides for the Human Rights Commission to ensure the protection, promotion and respect of fundamental human rights and freedoms in Zimbabwe. The Administrative Justice Act was promulgated to provide a remedy to all persons against irrational, unreasonable, and unlawful conduct by those holding public office. The Office of the Auditor General was provided for in the Constitution to ensure good and sound financial administration in public matters. The Prosecutor General plays a great role in facilitating prosecutions of any persons alleged to have committed offences in terms of the Criminal Law (Codification and Reform) Act. The Parliament of Zimbabwe also have an oversight on Zimra's operations.

### **3.11 RIGHTS OF TAXPAYERS IN ZIMBABWE**

Rights are legal entitlements enforceable at law. Chapter 4 of the Constitution of Zimbabwe provides for fundamental human rights and freedoms. Just like any other citizen, taxpayers' rights should be protected. Parliament should not place more emphasis on the need to raise revenue at the expense of violation of taxpayers' rights. They need not to do anything and everything that brings revenue just like 'lions' under the throne of Parliamentary sovereignty.<sup>234</sup>

In terms of section 44, 'the state, every person and every institution including the government agencies at every level have a duty to respect, protect, promote and fulfil the rights and freedoms as specified in the declaration of rights.'<sup>235</sup> The rights and freedoms must be given full effect by every court, tribunal or body faced with a task of interpreting them.<sup>236</sup> Emphasis must be placed on justice,

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<sup>233</sup> Section 2 of Commissions of Inquiry Act (Chapter 10:07)

<sup>234</sup> John Tiley(1998), Human Rights and Taxpayers, The Cambridge Law Journal, Vol. 57, No. 2 (Jul., 1998), pp. 269-273), Cambridge University Press

<sup>235</sup> Section 44 of the Constitution of Zimbabwe

<sup>236</sup> Section 46 of the Constitution of Zimbabwe

equality, human dignity and freedom.<sup>237</sup> The Constitution also provides for the need to consider relevant foreign law in ensuring that the rights are protected. In terms of section 56 of the Constitution, all persons are equal before the law with the right to equal protection and benefit of the law.<sup>238</sup> This category of rights placed emphasis on equal treatment, and right not to be discriminated against.<sup>239</sup> Any discrimination becomes unfair if it is not established on the basis of fairness, reasonableness and justifiable.

In terms of section 57, every person has a **right to privacy**. This includes privacy against property intrusions, property seizures, communications interruptions, and unwarranted searches.<sup>240</sup> Section 34A of the Revenue Authority Act provides for the preservation of secrecy. In terms of this section, ZIMRA officials are required to keep secret, and aid in keeping secret, all information coming to their knowledge in the exercise of their functions.<sup>241</sup> Thus information obtained during tax assessments, collection and enforcement should not be divulged to any person other than the taxpayer or his lawful representative. In terms of section 34A, and section 5(4) of the Income Tax Act, ZIMRA officials responsible for tax assessment and collections are required to take and subscribe before a magistrate, justice of the peace, or commissioner of oath the prescribed oath of secrecy.<sup>242</sup> Unnecessary disclosure of information obtained during tax assessments and collection results in a criminal sanction.<sup>243</sup> The Revenue Authority Act however allows the Commissioner-General of ZIMRA to disclose the taxpayer's information where necessary in cases involving the need to combat money laundering, crime, or terrorism financing.<sup>244</sup>

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<sup>237</sup> Section 46(1) of the Constitution of Zimbabwe.

<sup>238</sup> Section 56 of the Constitution of Zimbabwe

<sup>239</sup> Section 56(3) of the Constitution of Zimbabwe

<sup>240</sup> Section 57 of the Constitution

<sup>241</sup> Section 34A of the Revenue Authority Act (Chapter 23:11)

<sup>242</sup> Section 34A(5) of the Revenue Authority Act (Chapter 23:11); Section 5(4) of Income Tax Act (Chapter 23:06)

<sup>243</sup> Section 34A(6) of the Revenue authority Act (Chapter 23:11); Section 5 of the Income Tax Act (Chapter 23:06)

<sup>244</sup> Section 34A (3)(3a) of the Revenue Authority Act (Chapter 23:11), Section 5(3)(3a) of Income Tax Act

Section 5 of the Income Tax Act also provides for the preservation of secrecy. In terms of this section, all persons employed by ZIMRA to are required to keep secret and aid in keeping secret, all information coming to their knowledge as they perform their functions.<sup>245</sup>

Section 68 of the Constitution provides for the right to administrative justice. That is, every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both procedurally and substantially fair.<sup>246</sup> Important to note is the fact that any Act of Parliament must give effect to the right to administrative justice and promote an efficient administration. A duty is also imposed on the State to give effect to the right to administrative justice.

In terms of section 72 of the Constitution, every person has a right not to be compulsorily deprived of his property.<sup>247</sup> Limitations are however placed on this type of right considering interests of defence, public safety and security, public order, public morality, and public health.<sup>248</sup> In terms of section 85, where a fundamental human right has been breached, persons have the right to approach courts of law for redress.<sup>249</sup>Section 86 places limitations on some fundamental human rights and freedoms contained in the Declaration of Rights.

### **3.12 THE ROLE OF THE JUDICIARY**

Courts in Zimbabwe play a crucial role in interpreting legislation. They comprise of the Constitutional Court, the Supreme Court; the High Court; the Labour Court; the Administrative Court; Magistrates Courts; the customary law courts; and other courts established by Acts of Parliament.<sup>250</sup> As they carry out their functions, they are required by law to adopt reasonable interpretation of the

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<sup>245</sup> Section 5 of the Income Tax Act (Chapter 23:06)

<sup>246</sup> Section 68 of the Constitution

<sup>247</sup> Section 72 of the Constitution

<sup>248</sup> Section 72(3) of the Constitution.

<sup>249</sup> Section 85 of the Constitution of Zimbabwe

<sup>250</sup> Section 162 of the Constitution of Zimbabwe Amendment (No. 20)

legislation that is consistent with any international convention, treaty, or agreement binding on Zimbabwe.<sup>251</sup> Courts in Zimbabwe are independent and subject only to the Constitution and the law.<sup>252</sup> They are required to provide services expeditiously, without fear, prejudice or favour, and to be impartial.<sup>253</sup> Independence, impartiality and effectiveness of courts is critical for ensuring the rule of law and democratic governance.<sup>254</sup> The judiciary play a significant role in safeguarding human rights and freedoms and the rule of law.<sup>255</sup> The judiciary should exercise their role efficiently with reasonable promptness.<sup>256</sup> The judiciary must keep abreast with developments in domestic and international law.<sup>257</sup>

### **3.13 REMEDIES AVAILABLE TO THE TAXPAYER**

Sections 36 of the VAT Act and 69(1) of the Income Tax Act provides a remedy to the taxpayer. In terms of these provisions, a taxpayer has the right to seek deferment of taxes to a future date if he produces evidence that satisfy the Commissioner that such deferment is necessary.<sup>258</sup> Where taxpayers furnish the Commissioner with returns and have made payment, they are allowed to make deductions of amounts of tax paid in respect of irrecoverable debts.<sup>259</sup> When a taxpayer is dissatisfied by an assessment made by the Commissioner, he has the right to object to the assessment in terms of Section 32 of the VAT Act. The Commissioner may alter, reduce, increase, allow or disallow the objection.<sup>260</sup> If not appealed against, the decision of the Commissioner is final and conclusive.<sup>261</sup> An appeal against the decision of the Commissioner lies with the Fiscal court. Anyone not satisfied with the decision of the Fiscal Court have the right to appeal

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<sup>251</sup> Section 327(6) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>252</sup> Section 164 (1) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>253</sup> Section 164(1) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>254</sup> Section 164 (2) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>255</sup> Section 165(1)(c) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>256</sup> Section 165(1)(b) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>257</sup> Section 165(7) of the Constitution of Zimbabwe Amendment (No. 20)

<sup>258</sup> Section 12A of the Value Added Tax Act (Chapter 23:12)

<sup>259</sup> Section 22 of the Value Added Tax Act (Chapter 23:12)

<sup>260</sup> Section 32(4) of the Value Added Tax Act (Chapter 23:12)

<sup>261</sup> Section 32(5) of the Value Added TAX Act

to the Supreme Court.<sup>262</sup> The Fiscal Court may confirm, vary, cancel or set aside the Commissioner's decision.<sup>263</sup>

### 3.14 EXHAUSTION OF INTERNAL REMEDIES BEFORE APPROACHING COURTS

Before challenging the Commissioner's decision in courts of law, taxpayers are required to exhaust domestic remedies first as provided for in the respective pieces of tax legislation. This position was emphasized in the case of **Qingsham Investments (Private) Limited V Zimbabwe Revenue Authority**.<sup>264</sup> This means where a statute states that an applicant is supposed to appeal to the Commissioner or make representations to the Commissioner first when affected by any conduct of officials in the collection and enforcement of taxes, such a procedure must be followed. The need to exhaust domestic remedies were also emphasis in the case of **Girjac Services Private Limited v Mudzingwa**.<sup>265</sup>

**In the case of TASMINE ENTERPRISES P/L v ZIMBABWE REVENUE AUTHORITY**,<sup>266</sup> the need to exhaust domestic remedies was emphasised. In this case the Applicant approached the court seeking release of goods imported from Botswana that had been seized by ZIMRA. Zimra had seized the goods and given the applicant a Notice of Seizure following a realization that the Applicant was disposing of embargoed goods. The court upheld a point *in limine* that was raised by the Respondent that the Applicant was supposed to exhaust internal or domestic remedies before approaching the courts of law. This meant that Applicant was supposed to make representations to the Commissioner for him to decide on whether to release the seized goods in terms of section 193 of the Customs and Excise Act.

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<sup>262</sup> Section 33 & 34 of the Value Added Tax Act (Chapter 23:12)

<sup>263</sup> Section 34

<sup>264</sup> Qingsham Investments (Private) Limited V Zimbabwe Revenue Authority (HH 207-17).

<sup>265</sup> Girjac Services Private Limited v Mudzingwa. (1999 (1) ZLR 243 (SC) @ 249 B-E)

<sup>266</sup> TASMINE ENTERPRISES P/L v ZIMBABWE REVENUE AUTHORITY HB 115-09

In terms of section 61(2), any person whose documents have been taken or seized have the right to access documents and make extracts or copies under supervision in terms of the directives of the Commissioner.<sup>267</sup>

### **3.15 CONCLUSION**

In this chapter, the writer discussed the pay now argue later rule, the appointment of agent by ZIMRA, the garnishee procedure, as well as the search and seizure practice. Court decisions were analysed to establish the judicial attitude towards the practices.

In chapter 4, the writer will discuss the practices and procedures applied in South Africa.

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<sup>267</sup> Section 61(2) of the Value Added Tax Act (Chapter 23:12)

# CHAPTER 4

## COMPARATIVE ANALYSIS WITH THE PRACTICES AND PROCEDURES USED IN SOUTH AFRICA TO ENFORCE PAYMENT OF TAXES

### 4.1 INTRODUCTION

In Chapter 3, focus was on the Zimbabwean tax system. In this chapter, key focus will be on comparing Zimbabwe's tax system with those used in South Africa. An analysis will be made of the rights of taxpayers in South Africa, identification of tax procedures and practices used for tax assessment, collection, and enforcement. Court decisions relating to constitutional challenge to tax practices and procedures in South Africa reviewed. The attitude of the courts will be analysed.

Comparison between Zimbabwe and South Africa is beneficial for the following reasons. Both countries apply the same practices and procedures in tax collection. The countries use the same legal system and draw lessons from each other in several cases. The courts in South Africa have had several opportunities to interpret the applicability of the pay now argue later principle. There is a dearth of case law in Zimbabwe relating to instances where the constitutionality of tax legislation is challenged. The tax legislations of the two countries have many things in common. The comparative analysis will help stimulate a legal debate on how the Zimbabwean courts should deal with constitutional challenges to the tax practices and procedures. The comparative analysis helps determine whether the judicial attitude of the two countries towards tax legislation is in any way different and whether one country can learn from another. Both countries are parties to Human Rights instruments that include the African Charter on Human and People's Rights,<sup>268</sup>

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<sup>268</sup> African Commission on Charter on Human and People's Rights Ratification table: African Charter on Human and People's Rights (2016)

## 4.2 CONSTITUTIONAL FRAMEWORK FOR TAXATION IN SOUTH AFRICA

Taxation is the major source of the State in South Africa. Revenue collected through taxes form part of the National Revenue Fund.<sup>269</sup> The Constitution provides for imposition of taxes and levies by the legislature. This includes the National Assembly and the Provincial Councils.<sup>270</sup> In terms of section 228, provincial legislators may impose “taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties.”<sup>271</sup> Municipalities also have the power to levy taxes, levies, rates and duties where appropriate.<sup>272</sup> The revenue collected through taxes is equitably shared amongst national, provincial, and local spheres of government.<sup>273</sup> The distribution is done in terms of an Act of Parliament with considerations of national interests, national obligations and debt, the need for municipalities to provide basic services, economic disparities among others.<sup>274</sup> Taxes and levies collected by provincial councils are paid into Provincial Revenue Funds.<sup>275</sup> Section 229 of the Constitution require Municipalities to comply with sound principles of taxation in the collection of taxes.<sup>276</sup>

In South Africa, the primary responsibility to collect tax lies with the South Africa Revenue Authority (SARS).<sup>277</sup> The most common taxes are income tax and VAT tax. The relationship between VAT vendors and SARS is that of debtor-creditor relationship.<sup>278</sup> VAT vendors and SARS havTo facilitate collection of taxes, SARS is empowered to appoint third parties as agents,<sup>279</sup> to apply the pay now argue later rule,<sup>280</sup> and to search and seize goods where appropriate.<sup>281</sup>

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<sup>269</sup> Section 213(1) of the Constitution of South Africa, 1996.

<sup>270</sup> Section 77, 191 & 120 of the Constitution of the Republic of South Africa

<sup>271</sup> Section 228 of the Constitution of South Africa, 1996.

<sup>272</sup> Section 229 of the Constitution of South Africa, 1996.

<sup>273</sup> Section 214(1) of the Constitution of South Africa, 1996.

<sup>274</sup> Section 214(2) of the Constitution of South Africa, 1996.

<sup>275</sup> Section 226 of the Constitution of South Africa, 1996.

<sup>276</sup> Section 229 of the Constitution of South Africa, 1996.

<sup>277</sup> S 2 of the SARS Act

<sup>278</sup> Director of Public Prosecutions, Western Cape v Parker, 2015(4) SA 28 (SCA)

<sup>279</sup> S 99 of the Income Tax Act 58 of 1962

<sup>280</sup> Section 88 of the Income Tax Act 58 of 1962

<sup>281</sup> Section 74 of the Income Tax Act 58 Of 1962



### 4.3 THE PRINCIPLE OF LEGALITY AND THE RULE OF LAW IN SOUTH AFRICA

In South Africa, the principle of legality applies to all state actions and all laws. The Constitution is considered as the supreme law and is founded on the principle of rule of law. In terms of this principle, any law that is inconsistent with the Constitution is void. The Constitutional Court explains the rule of law in *Pharmaceutical Manufacturers*<sup>282</sup> where it states that:

*“it is a requirement of the rule of law that the exercise of public power by an executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”*<sup>283</sup>

### 4.4 CONSTITUTIONAL PROTECTION OF TAXPAYERS’ RIGHTS IN SOUTH AFRICA

The Constitution of the Republic of South Africa of 1996,<sup>284</sup> provides for establishment of a society based on democratic values, social justice, and protection of fundamental human rights.<sup>285</sup> It places emphasis on equality before the law and consider the Bill of Rights as South Africa’s cornerstone for democracy.<sup>286</sup> The State has an obligation based on affirmation to human dignity, democratic values of human dignity, equality and freedom, to promote, protect, respect and fulfil the rights in the Bill of Rights outlined in Chapter 2 of the Constitution.<sup>287</sup> All South African legislation and other

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<sup>282</sup> [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241.

<sup>283</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 at para 85

<sup>284</sup> The Constitution of the Republic of South Africa, 1996, adopted on 8<sup>th</sup> May 1996 and amended on 1<sup>th</sup> October 1996 by the Constitutional Assembly

<sup>285</sup> Preamble to the Constitution of the Republic of South Africa, 1996

<sup>286</sup> Section 7 of the Constitution of the Republic of South Africa, 1996.

<sup>287</sup> Section 7 of the Constitution of the Republic of South Africa, 1996.

measures must be designed in a way that ensure equality of all persons.<sup>288</sup> The right to human dignity is key.<sup>289</sup> It is important to note that many of the rights contained in the Bill of Rights apply to tax administration in South Africa. In **First National Bank of SA Ltd t/a Wesbank v C: SARS**,<sup>290</sup> the court ruled that SARS is subject to the Constitution. It stated as follows:

*“no matter how indispensable fiscal statutory provisions were for the economic well-being of the country, they were not immune to the discipline of the Constitution and had to conform with its normative standards.”*<sup>291</sup>

The Constitution of South Africa also provides for other rights including the right to privacy. Section 14 states that:

**“Privacy**

*14. Everyone has the right to privacy, which includes the right not to have—*

- (a) their person or home searched;*
- (b) their property searched;*
- (c) their possessions seized; or*
- (d) the privacy of their communications infringed.”*<sup>292</sup>

The Constitution also provides for the right to property. In terms of section 25, persons should not be arbitrarily deprived of their property except in terms of law of general application.<sup>293</sup> The general application is considered to include deprivation for :

*“(a) a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of*

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<sup>288</sup> Section 9 of the Constitution of South Africa, 1996.

<sup>289</sup> Section 10 of the Constitution of South Africa, 1996.

<sup>290</sup> First National Bank of SA Ltd t/a Wesbank v C: SARS

<sup>291</sup> First National Bank of SA Ltd t/a Wesbank v C: SARS

<sup>292</sup> Section 14 of the Constitution of the Republic of South Africa, 1996.

<sup>293</sup> Section 25(1) of the Constitution of the Republic of South Africa, 1996.

*payment of which have either been agreed to by those affected or decided or approved by a court.”<sup>294</sup>*

Section 32 of the Constitution provides for the right to access to information. The section states that:

*“everyone has a right of access to information that is held by another person and that is required for the exercise or protection of any right.”<sup>295</sup>*

Another right relating to taxation is the right to just administrative action. In terms of section 33 of the Constitution, everyone has a right to administrative action that is lawful, reasonable, and procedurally fair.<sup>296</sup> This right includes the right to be given reasons when there is an administrative action that affects any right; and the right to review of administrative actions by courts of law or independent and impartial tribunals.<sup>297</sup> In terms of section 35(3) of the Constitution, everyone has a right to a fair trial including the right to be presumed innocent.<sup>298</sup> The rights as expressed in the Bill of Rights may only be limited where its reasonable and sufficiently justified.<sup>299</sup>

#### **4.5 THE CONSTITUTIONALITY OF ACTS OF PARLIAMENT IN SOUTH AFRICA**

Section 167(4) provides that only the Constitutional Court has the powers to decide on constitutional validity of any parliamentary or provincial Bill.<sup>300</sup>

Section 167(5) states that:

*“(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the*

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<sup>294</sup> Section 25 (2) of the Constitution of the Republic of South Africa, 1996.

<sup>295</sup> Section 32(1)(2) of the Constitution of the Republic of South Africa, 1996.

<sup>296</sup> Section 33(1) of the Constitution of South Africa, 1996.

<sup>297</sup> Section 33 & 34 of the Constitution of South Africa, 1996.

<sup>298</sup> Section 35(3) of the Constitution of the Republic of South Africa, 1996.

<sup>299</sup> Section 36 of the Constitution of South Africa, 1996.

<sup>300</sup> Section 167(4) of the Constitution of South Africa, 1996.

*Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.”*<sup>301</sup>

In terms of section 167(6):

*“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—(a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court.”*<sup>302</sup>

The High Court of South Africa may also decide a constitutional matter in terms of section 169 of the Constitution.<sup>303</sup>

#### **4.6 POWERS OF COURTS OF SOUTH AFRICA IN CONSTITUTIONAL MATTERS**

The powers of the courts of South Africa when called upon to deal with constitutional matters are clearly outlined in section 172 of the Constitution. In terms of this section, a court deciding a constitutional matter has the power to declare any law to be invalid due to inconsistency with the Constitution.<sup>304</sup> The court may also make an order suspending the invalidity for any conditions or specified period to provide room for correction of the defect by the authority concerned.<sup>305</sup> The Supreme Court of Appeal, the High Court can also make orders of constitutional validity of an Act of Parliament subject to confirmation by the Constitutional Court.<sup>306</sup> Section 172(b) states that in instances where a court makes an order for constitutional invalidity, a provision may be made for a temporary interdict or relief to a party pending confirmation of its decision by the Constitutional Court.<sup>307</sup> Any national

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<sup>301</sup> Section 167(5) of the Constitution of South Africa, 1996.

<sup>302</sup> Section 167(6) of the Constitution of South Africa, 1996

<sup>303</sup> In terms of section 167(7) of the Constitution of South Africa, a “constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution,”

<sup>304</sup> Section 172(1)(a) of the Constitution of South Africa, 1996.

<sup>305</sup> Section 172(1)(b)(ii) of the Constitution of South Africa, 1996.

<sup>306</sup> Section 172(2) of the Constitution of South Africa, 1996

<sup>307</sup> Section 172(2)(b) of the Constitution of South Africa, 1996

legislation is required to provide referral to the constitutional court any order of constitutional invalidity.<sup>308</sup>

#### 4.7 PAY NOW ARGUE LATER - SOUTH AFRICA

In South Africa, taxpayers are required, in terms of the Tax Administration Act (TAA),<sup>309</sup> to first pay to SARS any tax due before mounting any challenge in courts of law.<sup>310</sup> SARS's right to receive tax or the taxpayer's obligation to pay tax due will not be suspended by any objection, appeal, or any pending court decision. If the taxpayer succeeds in his challenge, a refund of the tax paid will be made by SARS. The pay now argue later rule is provided for in several pieces of South African tax legislation. These include section 88(1) of the Income Tax Act; and section 164 (1) of the Tax Administration Act.

An important case in the challenge to the constitutionality of the pay now argue later principle is the case of **Metcash Trading Ltd v Commissioner, South African Revenue Service**.<sup>311</sup> This case involves a challenge to the constitutionality of the pay now argue later principle following a dispute on VAT Tax. The constitutional attack was on section 36 of the VAT Act which has since been repealed. The section provided that a taxpayer was required to pay taxes due despite having filed any objection or appeal unless if there was a directive to the contrary from the Commissioner of Taxes.<sup>312</sup> The facts of the case show that the taxpayer, in high court proceedings, raised the argument that the 'pay now argue later' principle is incompatible with section 34 of the Bill of Rights.<sup>313</sup>

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<sup>308</sup> Section 172(2)(c) of the Constitution of South Africa, 1996.

<sup>309</sup> Tax Administration Act, No. 28 of 2011 ('TAA')

<sup>310</sup> South Africa Tax Administration Act, No. 28 of 2011 ('TAA')

<sup>311</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC)

<sup>312</sup> Section 36(1) of the VAT Act

<sup>313</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2000 (2) SA 232 (W)

Sanders J, in **Metcash Trading Ltd v Commissioner for the South African Revenue Service**,<sup>314</sup> had made an order declaring the pay now argue later to be in conflict with the constitutional right of taxpayers to access courts. An argument by SARS that the limitation that had been placed on the right to access to courts was unreasonable and unjustified. A reference to the Constitutional court was then made by the High court for confirmation of the order. The Constitutional court declared that the ‘pay-now-argue later principle, as it relates to VAT payments, is constitutionally sound. The court stated that the pay now argue later principle helps deal potential frivolous objections that may affect the South African government and SARS’ ability to collect revenue.<sup>315</sup> The Constitutional court ruled that the pay now argue later principle did not in any way limit the right of persons to access courts.

Keulder (2013), commenting on the Constitutional court ruling in the Metcash case, argued that the rule promotes self-help by SARS and this constitutes an infringement on the right to access courts.<sup>316</sup>

Dealing with a case involving the same principle, the court, in the case of **Capstone 556 (Pty) Ltd and Commissioner, South African Revenue Service**, held that:

*"the considerations underpinning the "pay now, argue later" concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes".<sup>317</sup>*

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<sup>314</sup> Metcash Trading Ltd v Commissioner for the South African Revenue Service 2000 (2) SA 232 (W)

<sup>315</sup> Metcash Trading Ltd v Commissioner for the South African Revenue Service 2001 1 BCLR 1 (CC)

<sup>316</sup> Keulder (2013): "Pay now argue later rule – Before and after the Tax Administration Act' Potchefstroom Electronic Law Journal 144

<sup>317</sup> Capstone 556 (Pty) Ltd v Commissioner for SARS 2011 6 SA 65 (WCC).

**The court went on to say the following:**

*"There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority - regulated income tax dispensation. Thus, the considerations which persuaded the Constitutional Court to reject the attack on the aforementioned provisions of the VAT Act in Metcash might not apply altogether equally in any scrutiny of the constitutionality of the equivalent provisions in the [Income Tax] Act".<sup>318</sup>*

It appears that the South African Constitutional court's interpretation of the pay now argue later rule could have been different had there been constitutional challenge to the application of the rule under the Income Tax Act.

Section 164(3) of the Tax Administration Act of South Africa,<sup>319</sup> ensure protection of South African taxpayers. The section provides for suspension of payment of the disputed tax or a portion thereof by a SARS official after making the following considerations:<sup>320</sup>

- *"The compliance history of the taxpayer;*
- *The amount of tax involved;*
- *The risk of dissipation of assets by the taxpayer concerned during the period of suspension;*
- *Whether the taxpayer is able to provide adequate security for the payment of the amount involved;*
- *Whether the payment of the amount involved would result in irreparable financial hardship to the taxpayer;*
- *Whether sequestration or liquidation proceedings are imminent;*
- *Whether fraud is involved in the origin of the dispute; or*
- *Whether the taxpayer has failed to furnish information requested under the Tax Administration Act for purposes of a decision under section 164."*

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<sup>318</sup> Capstone 556 (Pty) Ltd v Commissioner for SARS 2011 6 SA 65 (WCC).

<sup>319</sup> Tax Administration Act, No. 28 of 2011 ('TAA')

<sup>320</sup> Section 164(3) of the Tax Administration Act, No. 28 of 2011 ('TAA') of South Africa

Section 164(2) of TAA gives taxpayers an opportunity to make an application for suspension of tax payment.<sup>321</sup> The decision of SARS not to allow the application for suspension of payment is not appealable and no objection can be raised on it. Since it is an administrative decision, such decision will be subject to review under principles of administrative law. In terms of section 164 (6) of the Tax Administration Act, once SARS deny a taxpayer's request for a suspension of tax payment, obligation to pay tax to SARS arise on the taxpayer.<sup>322</sup> Review proceedings will not take away the taxpayer's obligation to pay the tax due. However, the taxpayer can approach the court seeking to obtain an interim interdict by way of motion proceedings.

Fritz (2018) states that use of the 'pay now, argue later' rule in South Africa unjustifiably and unreasonably limits taxpayers' right of access to the courts.<sup>323</sup>

#### **4.8 SARS POWER TO APPOINT AGENTS**

SARS' power to appoint agents to collect taxes is provided for in the VAT Act,<sup>324</sup> Tax Administration Act,<sup>325</sup> and the Income Tax Act. The main purpose of the power to appoint an agent is to maximise collection of assessed tax. The use of the procedure follows failure by the taxpayer to effect payment of tax due despite demand by SARS.

In terms of section 47 of the VAT Act<sup>326</sup> and section 179 of the Tax Administration Act,<sup>327</sup> SARS has the power to appoint an agent to facilitate collection of taxes. The agent has an obligation to pay to SARS any such money

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<sup>321</sup> Section 164(2) of TAA of South Africa

<sup>322</sup> Section 164(6) of TAA of South Africa

<sup>323</sup> C Fritz 'Payment obligations of taxpayers pending dispute resolution: Approaches of South Africa and Nigeria' (2018) 18 African Human Rights Law Journal 171-188

<sup>324</sup> Section 47 of the VAT Act of South Africa

<sup>325</sup> Section 179(1) of the Tax Administration Act as read together with section 66(1) of Tax Administration Laws Amendment Act (TALAA)

<sup>326</sup> Section 47 of the VAT Act of South Africa

<sup>327</sup> Section 179 of the Tax Administration Act of South Africa



belonging to the taxpayer concerned that it will be holding. Section 99 of the Income Tax Act of South Africa provides that:

*“The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.”<sup>328</sup>*

**Section 97 of the Act makes the appointed agent liable for failure to act as required by SARS. It states that:**

*“Every representative taxpayer shall be personally liable for any tax payable by him in his representative capacity, if, while it remains unpaid) he alienates, charges or disposes of the income in respect of which the tax is chargeable; or*

*b) he disposes of or parts with any fund or money, which is in his possession or comes to him after the tax is payable, if the tax could legally have been paid from or out of such fund or money.”<sup>329</sup>*

This procedure of appointing an agent to collect taxes was constitutionally put to test in the case of **Hindry v Nedcor Bank Ltd.**<sup>330</sup> Following appointment of his bank to be an agent for SARS for recovery of tax due and erroneously refunded, the taxpayer approached the court seeking to interdict his bank from transferring the money to SARS. The taxpayer argued that the agent (his bank) was a “removed third party” with no knowledge of the taxpayer’s affairs. The taxpayer further argued that the procedure was out of control of court; did not give him any notice or opportunity to make representations; and that compliance by the agent was due to threat of sanctions. The agent

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<sup>328</sup> Section 99 of the Income Tax Act of South Africa

<sup>329</sup> Section 97 of the Income Tax Act of South Africa

<sup>330</sup> 1999 2 All SA 38 (W).

appointment was considered by the taxpayer to be a breach of the right to privacy,<sup>331</sup> the right to access to courts,<sup>332</sup> and the right to administrative justice.<sup>333</sup> In defence to the procedure in section 99 of the Act,<sup>334</sup> SARS emphasised that the procedure gives room to speedy recovery of taxes without delay and that it enhances voluntary compliance necessary in a self-assessment tax system. The court declared the procedure of appointing an agent to collect taxes on behalf of SARS to be constitutional. The court stated that the practice of appointment of an agent to collect taxes is an important weapon to the State necessary to ensure the speedy collection of taxes.<sup>335</sup> The court also stated that giving of notice would frustrate the SARS' ability to recover due taxes.<sup>336</sup> The court stated that the procedure of agent appointment was a necessary weapon for the state. It also reiterated that section 99 of the Income Tax Act<sup>337</sup> is a reasonable limitation to the right to the taxpayer's right to property and just administrative action.<sup>338</sup> The South African Courts have taken and maintained the position that the procedure of appointment of an agent is not unconstitutional.

#### **4.9 GARNISHEE ORDERS AND AGENT APPOINTMENT**

Garnishee orders require court orders to be made by a competent court. In such cases, unlike in procedure for appointment of an agent, the taxpayer is given an opportunity to defend himself in line with the rules of court. Due notice is given to the other party unlike in cases of agent appointment. Agents appointed are required to comply with SARS instructions. The personal liability of the agents will depend on the extent to which the agent holds funds on behalf of the taxpayer.<sup>339</sup> An agent who is unable to comply as required has a right to make representations to SARS in terms of section 47

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<sup>331</sup> Section 14 of the constitution of South Africa, 1996.

<sup>332</sup> Section 34 of the Constitution of South Africa, 1996.

<sup>333</sup> Section 33 of the Constitution of South Africa, 1996.

<sup>334</sup> Section 99 of the Income Tax Act of South Africa

<sup>335</sup> *Hindry v Nedcor Bank Ltd* 1999 2 All SA 38 (W).

<sup>336</sup> *Hindry v Nedcor Bank Ltd* 1999 2 All SA 38 (W).

<sup>337</sup> Section 99 of the Income Tax Act of South Africa

<sup>338</sup> *Hindry v Nedcor Bank Ltd* 1999 2 All SA 38 (W).

<sup>339</sup> Section 97 of the Income Tax Act

of the VAT Act.<sup>340</sup> With the garnishee orders, the financial position or capacity of the debtor can be assessed by the court. The financial position of the taxpayer is not key in appointment of an agent. The garnishee procedure accommodates the *audi alteram partem* rule.

#### **4.10 SEARCH AND SEIZURE AND TAXPAYERS' RIGHT TO PRIVACY**

The practice of search and seizure is provided for in section 74D (1) (a) to (c) of the Income Tax Act, and section 59(1) of the Tax Administration Act. The South African constitution provides for the right to privacy.<sup>341</sup> This right includes the right to prevent unwarranted any search and seizure of their person/ property/ possessions/ and home.<sup>342</sup> The right also includes the right not to have the privacy of their communications infringed.<sup>343</sup>

#### **4.11 CONSTITUTIONAL CHALLENGE TO THE TAX LAWS IN SOUTH AFRICA**

Following a study of the decisions handed down by the Constitutional Court, Supreme Court and High Courts of South Africa, van Schalkwyk (2004) notes that South African taxpayers have experienced difficulties in challenging the constitutionality of tax collection procedures in South African tax legislation, particularly the Income Tax Act No. 58 of 1962 and Value Added Tax No. 89 of 1991.<sup>344</sup> It has proved to be difficult for the taxpayers to invoke the Constitution in disputes against the mighty South African Revenue Services (SARS). Elimination of alleged unconstitutional tax provisions is a major challenge and a battle lost before it even begins.<sup>345</sup>

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<sup>340</sup> Section 47 of South Africa VAT Act

<sup>341</sup> Section 32 of the Constitution of South Africa

<sup>342</sup> Van Schalkwyk L (2004): Constitutionality and the Income Tax Act – revisited, Meditari Accountancy Research Vol. 12 No. 2 2004 : 185–201.

<sup>343</sup> Van Schalkwyk L (2004): Constitutionality and the Income Tax Act – revisited, Meditari Accountancy Research Vol. 12 No. 2 2004 : 185–201.

<sup>344</sup> Van Schalkwyk L (2004): Constitutionality and the Income Tax Act – revisited, Meditari Accountancy Research Vol. 12 No. 2 2004 : 185–201

<sup>345</sup> Van Schalkwyk L (2004): Constitutionality and the Income Tax Act – revisited, Meditari Accountancy Research Vol. 12 No. 2 2004 : 185–201

#### 4.12 JUST ADMINISTRATIVE CONDUCT

SARS is an organ of the State within public administration which performs administrative acts.<sup>346</sup> The courts of South Africa confirmed this position in **Carlson Investments Shareblock (Pty) Ltd v Commissioner for the SA Revenue Service**.<sup>347</sup> It is the duty to act fairly and to abide by the *audi alterum partem* rule.<sup>348</sup> When applied to taxation, this ensures just administrative action to taxpayers. SARS is subject to the Constitution.<sup>349</sup> Commenting on SARS' exercise of power, the court in **CSARS v Hawker Aviation Services Partnership & Others**,<sup>350</sup> the court stated as follows:

*"The Commissioner is indeed endowed with tremendous powers to collect taxes in the national interests, however, that power must be exercised within the bounds of the law and constitutional imperatives...[I]t is for the courts to maintain a modicum of fairness and justice in curbing the excesses of arbitrary use of public power."*<sup>351</sup>

#### 4.13 USE OF THE PAY-NOW-ARGUE LATER RULE IN OTHER JURISDICTIONS

The pay-now argue later rule is widely used in several jurisdictions. The rule is contained in Article XIII, section 32, of the Constitution of the State of California which states as follows:

*"No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature"*<sup>352</sup>

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<sup>346</sup> Section 2 of the South African Revenue Services Act

<sup>347</sup> **Carlson Investments Shareblock (Pty) Ltd v Commissioner for the SA Revenue Service** (2002 (5) BCLR 521 (W) at 531).

<sup>348</sup> Section 33 of the Constitution of South Africa, 1996.

<sup>349</sup> **First National Bank of SA Ltd t/a Wesbank v CSARS & Another** 2002 (4) SA 768 (CC)

<sup>350</sup> **CSARS v Hawker Aviation Services Partnership & Others; CSARS v Hawker Air Services (Pty) Ltd** 4[2005] 1 All SA 715 (T), para [75].

<sup>351</sup> **CSARS v Hawker Aviation Services Partnership & Others**

<sup>352</sup> Article XIII, section 32, of the Constitution of the State of California

In Constitutional Court of Italy declared the '*solve et repete*' or the pay now argue later rule to be in violation of fundamental right to legal protection.<sup>353</sup> The rule has faced serious challenge in several jurisdictions. Lewis (2013) states that this rule has been held to be unconstitutional in Uruguay, Spain, Venezuela, Colombia, the Dominican Republics and Peru.<sup>354</sup>

#### 4.14 CONCLUSION

The practices and procedures for tax collection used in South Africa are almost similar to those utilised in Zimbabwe. Both jurisdictions make use of search and seizure for information gathering, pay now argue later rule, procedure of appointment of an agent as well as the garnishee procedure.

In Chapter 5, the writer will focus on conclusions and recommendations.

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<sup>353</sup> Decision 21 of 1961

<sup>354</sup> Lewis, Sebastian. "The Rule Pay First, Litigate Later or Solve et Repete in Chilean Law." *Journal of Comparative Law*, vol. 8, no. 1, 2013, pp. 105-145. HeinOnline.

# CHAPTER 5

## RESEARCH SUMMARY AND RECOMMENDATIONS

### 5.1 INTRODUCTION

This chapter will summarise findings of the research and provide recommendations. The summary of tax practices and procedures used by Zimbabwe and those used by South Africa will be presented. Recommendations will be made on international best practice on text issues and areas for reform will be identified and explained.

1. ZIMRA and SARS are the public authorities with the responsibility to collect and enforce payment of taxes in Zimbabwe and South Africa respectively. They derive their powers from legislation. The Constitution of Zimbabwe Amendment (No. 20) provides for rights of persons including taxpayers. These rights, provided for in sections 57, 62, 68, 69, 70 and 71, include the right to privacy, right to access to information, right to administrative justice, right to a fair hearing, right to presumption of innocence until proven guilty, right to adduce evidence, and the right to property. The South African Constitution, 1996 provides for the right to privacy, property, and administrative action in sections 14, 25, taxpayers' rights in sections 14; 25; 33, 34, and 35. Zimbabwe and South Africa are signatories to international Human Rights instruments including the Universal Declaration of Human Rights and the African Charter on Human Rights. The Constitutions of both countries provide that the need for the State to develop, adopt and implement measures that facilitate protection, promotion and respect for fundamental human rights and freedoms. There are provisions that provide for limitation of these rights and such limitations should always be justifiable and reasonable in a democratic society.
2. It appears that both Zimbabwe and South Africa have given enormous powers to the revenue collectors, ZIMRA and SARS. In both jurisdictions, the pay now argue later rule is utilised to maximise collection of revenue for the fiscus. The rule was incorporated in legislation. In Zimbabwe, the rule is codified in

the Income Tax Act, the Revenue Authority Act, and the VAT Act. In South Africa, the rule was codified in the South African Revenue Services Act, the Tax Administration Act, and Tax Administration Amendment Act. In terms of this rule, a taxpayer is required to pay any tax due and argue his case later if he is not satisfied with the tax assessment or liability. The obligation of payment of tax is not suspended by noting of an appeal against any assessment or any pending determination of challenge on constitutionality of any legislation. The case of **Metcash Trading Ltd v Commissioner for the South African Revenue Service** has proved to be decisive in determination of the challenge to the pay now argue later rule in South Africa.

3. In Zimbabwe, the constitutional court made a landmark decision in the case of **Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority**.<sup>355</sup> In these two cases, it was categorically stated that the pay now argue later rule is not unconstitutional and does not in any way affect taxpayers' right to just administrative action, access to court, or any other right. The writer is of the view that these decisions warrant review. The net effect of use of this principle by the revenue collectors affect the taxpayers' rights. This is due to the fact that as the rule is being implemented, ZIMRA makes use of enforcement measures that include approaching courts with a certified statement which is considered as conclusive and not challengeable. Taxpayers have no right to challenge the certificate. This in the writer's view, should not have a place in a democratic society. Courts of law should maintain their impartiality and independence and litigants approaching courts should be equal. Any evidence adduced in any competent court must be challenged to determine its correctness and relevance.
4. The judiciary have glued themselves to the constitutional rule of presumption of constitutional validity so much such that regard to its role in determining constitutionality of any legislation is now undermined. More emphasis is placed on the need to ensure that the revenue collectors collect as much revenue for the fiscus without determining the reasonableness of some of the

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<sup>355</sup> CCZ 7/2014

measures used to collect the revenue. The same objective of maximising revenue collection can still be achieved whilst due regard is given to the need to protect rights of taxpayers.

5. The Zimbabwean tax legislation provides for search and seizure, garnish of taxpayers' accounts, and the procedure of appointment of a third party as an agent to collect taxes. The South African tax legislation has provided for the same practices and procedures. Writer submits that through these procedures, ZIMRA was accorded draconian powers by the legislature. The appointment of an agent to collect taxes places ZIMRA in a position which is far more superior. Although the constitution provides that all persons are equal before the law, it is quite clear that there are persons who are more equal than others, and ZIMRA is one such person. It has power to appoint a third party without any notice and can give instructions to the third party which must be complied with without any question. The taxpayer has no immediate remedy when the agent is appointed. Although the appointment of an agent is a decision of a purely administrative nature, the courts have done very little in reviewing any such decisions.
6. The judiciary, both in Zimbabwe and South Africa, have confirmed that the pay now argue later principle is the anchor of the tax system in Zimbabwe and South Africa. The basis for this confirmation is that it ensures that the State is guaranteed of sufficient revenue collection to ensure adequate revenue for the fiscus.
7. When Zimra issues an assessment, the assessment is required to comply with the requirements of the law. If it fails to comply, courts of law have the power to declare any such assessment to be null and void. This was the case in the **Nestle Zimbabwe v Zimbabwe Revenue Authority, SC148/2021**. This ensures protection of the taxpayers' rights.
8. It is submitted that Ceaser' should not collect his taxes as he deems fit. He must comply with the law. His powers should always be checked and the judiciary, in its excise of independence, and impartiality, carries on the



checking function. The powers of ZIMRA are not inviolable. There are constitutional safeguards to protect the rights of taxpayers. As an administrative authority, the Commissioner of ZIMRA is expected as part of public administration, to be impartial, fair, accountable, transparent in line with section 195 of the Constitution.

9. Just like any other citizen, taxpayers have a right to administrative justice in terms of section 68 of the Constitution. This right calls for administrative conduct that is prompt, lawful, efficient, reasonable, proportionate, impartial and both procedurally and substantively fair. The fact that the State require adequate revenue for it to function and that such revenue mainly come from taxes does not exonerate the Commissioner and his officers to just administrative conduct.

## **5.2 RECOMMENDATIONS**

1. The pay now argue later rule should not be applied in the Zimbabwean legal system. All persons are equal before the law (Section 56 of the Constitution of Zimbabwe). Equality is not achieved when taxpayers are required to pay the tax first and present their arguments to retrieve it later. The rule constitutes an arbitrary discrimination against taxpayers. Taxpayers should be given an opportunity to challenge tax levied before they can pay it. Any evidence presented by ZIMRA in any court of law must be susceptible to challenge to determine its correctness and relevance.
2. The pay now argue later principle takes away the right to legal protection. Section 70(1)(a) of the Constitution clearly state that every accused person has a right to be presumed innocent until proven guilty. When taxpayers are called upon to pay the tax first before challenging the legality of the tax, they are being treated as guilty before trial. The presumption of innocence is significantly affected. Due process of the law must be allowed to take place first for taxpayers to prove their innocence where necessary.

3. It is the writer's view that the practice of search and seizure violates the fundamental right to own private property which is provided for in section 71 of the Constitution of Zimbabwe Amendment (No. 20). In terms of this section, persons should not be compulsorily deprived of their property.
4. The judiciary have a role in terms of the Constitution (Section 165(7)) to keep abreast with developments in domestic and international law. Through this, they can be able to shape our law to ensure that fundamental rights and freedoms are protected. The pay-now argue later principle was declared to be unconstitutional in several jurisdictions including Uruguay, Spain, the Dominican Republic, Venezuela, Colombia, Peru, and there is no reason why our courts should not follow the same. The right to legal protection should be protected.
5. Can 'Ceasar' be calm when the subjects' behaviour is erratic? Fairness in tax collection should be interpreted to include fairness from both the taxpayer and the tax collector. Taxpayers have a corresponding obligation to be fair, honesty in their tax returns and payments. Self-assessments should be done with utmost good faith and respect. Taxpayers should not cry foul when the tax collector wields an 'axe' upon them. Taxpayers should do the best they can under the circumstances and render honest and accurate assessments when required to do so. Through this the tax collector will make use of tax enforcement methods that would command respect of the taxpaying public and the tax system would gain confidence of all parties.
6. It is good government policy to provide extra measures of protection against abuse in the tax collection arena. Section 40(8) of the VAT Act does not allow taxpayers to challenge the correctness of a certified statement of the Commissioner General that proves indebtedness of the taxpayer. Once the statement is filed by a competent court it will be given the effect of a civil judgment for a liquid debt in favour of the Commissioner. This is bad law. The taxpayer must be given an opportunity to be heard and to make representations.

7. It is recommended that taxpayer payment obligation should be suspended pending determination of an appeal case. Through this, the taxpayer's right to access to courts and administrative justice will be realised. The approach creates a bias in favor of ZIMRA. Other measures to deal with a disputed tax payment obligation must be established.
8. Further research is recommended on how other jurisdictions are progressing with use of the pay now argue later rule. It is important to find out how other states that have held this rule as unconstitutional are progressing ensuring that tax collection is maximised and taxpayers' rights protected.

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