Constitutional Court Review 2021
Volume 11, 411–432
https://doi.org/10.2989/CCR.2021.0015

South African Taxpayers' Right to Privacy in Cross-Border Exchange of Tax Information

CARIKA FRITZ

ABSTRACT: Specific provisions of the Constitution of the Republic of South Africa, 1996, the Tax Administration Act 28 of 2011, the Promotion of Access to Information Act 2 of 2000 and, more generally, the Protection of Personal Information Act 4 of 2018 ('POPIA') create a framework to protect taxpayers' information privacy. Despite the protection that is given to taxpayer information in South Africa, taxpayer information is exchanged across borders to other tax jurisdictions, as such an exchange ensures tax transparency, correctly allocating taxing rights and identifying tax avoidance and impermissible tax evasion. In this article, I question whether there are sufficient safeguards in place in international tax agreements, which facilitate the cross-border exchange of taxpayer information, to ensure that the infringement of taxpayers' privacy right is reasonable and justifiable as required in terms of section 36 of the Constitution. In this respect, I conclude, firstly, that the POPIA standard of 'relevant' must prevail over the international tax agreement standard of 'foreseeably relevant' as this would lessen the impact on a taxpayer's privacy. Secondly, I conclude that when the taxpayer's information is in the possession of SARS, a taxpayer must be informed that the taxpayer information is subject to an imminent exchange. Such a notification would allow a taxpayer the opportunity to make representations and the confidentiality of a taxpayer's information is better maintained, as the taxpayer can argue whether or not the relevant information contains any trade, industrial, business, commercial or professional secret or trade process.

KEYWORDS: protection of personal information, tax administration, information privacy, international tax agreements, Model Tax Convention, South African Revenue Service

AUTHOR: Associate Professor, School of Law, University of the Witwatersrand, South Africa. Email: Carika.Fritz@wits.ac.za ORCiD: 0000-0002-3995-6646

I INTRODUCTION

When considering privacy in relation to the exchange of tax information, a specific type of privacy, that is, information privacy, applies. Westin defines information privacy as 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'.[1] In a similar vein,

> [i]t is not true, for instance, that the less that is known about us the more privacy we have. Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.[2] (Emphasis added)

Taxpayers would want some degree of control over the way in which the South African Revenue Service (SARS) handles their taxpayer information,[3] as this information could reveal details about their income, spending habits, club membership and loans.[4] Blum suggests that people may be wary to have their taxpayer information revealed, as it could lead to comparisons with others, embarrass them if it lands in the wrong hands, or could make taxpayers susceptible to identity theft or targets for scam artists or kidnappers.[5] This illustrates the importance of protecting taxpayers' information in South Africa.

Both the Tax Administration Act 28 of 2011 ('TAA') and the Promotion of Access to Information Act 2 of 2000 (PAIA) deal with the confidentiality of taxpayer information. Apart from legislation protecting taxpayers' confidentiality, the Protection of Personal Information Act 4 of 2018 ('POPIA') regulates the processing of personal information. As s 1 of POPIA defines 'personal information' to be information that relates to an identifiable person, including information about a person's finances, POPIA seeks to protect the collection, retention, dissemination and use of taxpayers' information.

Despite the protection that is given to taxpayer information in South Africa, such information is exchanged across borders. Why would such an exchange of taxpayer information be necessary? It is crucial to be able to determine a taxpayer's tax liability.[6] Nonetheless, '[a] situation which no doubt frequently arises is that information furnished by taxpayers is incomplete, inaccurate and sometimes misleading'.[7] Consequently, SARS is afforded several information-gathering powers, which are contained in Chapter 5 of the TAA. These powers include inspecting business premises;[8] requiring a person to produce relevant material in person;[9] conducting an audit;[10] conducting an enquiry before a presiding officer;[11] searching

1 AF Westin *Privacy and Freedom* (1967) 7.

2 Office of Science and Technology of the Executive Office of the President *Privacy and Behavioural Research* (1967) 8 (as quoted in US Department of Health, Education & Welfare *Records Computers and the Rights of Citizens – Report of the Secretary's Advisory Committee on Automated Personal Data Systems* (1973) 39).

3 The TAA s 67(1)(b) defines taxpayer information as information given by a taxpayer or obtained by SARS in relation to the taxpayer.

4 AJ Cockfield 'Protecting Taxpayer Privacy Rights under Enhanced Cross-border Tax Information Exchange: Towards a Multilateral Taxpayer Bill of Rights' (2010) 42:2 *University of British Columbia Law Review* 419, 437.

5 C Blum 'Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?' (2004) 6:6 *Florida Department of Revenue Tax Review* 579, 604–605.

6 The TAA Chapter 5 contains the information gathering powers of SARS.

7 *Ferucci v Commissioner for the South African Revenue Service* [2002] ZAWCHC 17 at para 5.

8 TAA s 45.

9 Ibid s 47.

10 Ibid s 48.

11 Ibid s 51.

and seizing a taxpayer's property;[12] and requesting relevant material from a taxpayer or a third party.[13] In spite of this array of powers, their sphere of application is limited, as it is difficult to enforce these powers in another jurisdiction.

As a result of globalisation and technological advancements, taxpayers are not restricted to transacting only in the jurisdiction where they are a tax resident or are present. This means that the activities that trigger tax, and the information associated with it, are not necessarily linked to one jurisdiction. To address the fact that taxpayers have become more mobile, whilst revenue authorities have not, countries have concluded agreements that provide that tax information may be exchanged across jurisdictions. Even though the exchange of information between countries ensures tax transparency and that taxing rights are correctly allocated, it also makes it difficult for taxpayers to hide their assets and income and prevents tax avoidance and impermissible tax evasion.[14]

While the benefit of agreements between countries to facilitate efficient exchange of information is apparent, it is important that these exchanges are fair vis-à-vis taxpayers, including to respect a taxpayer's right to privacy. In this article, I examine the exchange of taxpayer information in relation to the right to information privacy, as given effect to in the TAA, PAIA and POPIA.

I first consider the provisions in the aforementioned pieces of legislation in order to create a framework in respect of the protection afforded to information privacy in South Africa. Thereafter, I expand on what the exchange-of-information process entails. Lastly, I consider whether the measures that are in place to protect a taxpayer's information privacy when information is exchanged align with the South African privacy framework.

II THE RIGHT TO INFORMATION PRIVACY

A The Constitution of the Republic of South Africa, 1996

Section 14 of the Constitution of the Republic of South Africa ('Constitution') provides that '[e]veryone has the right to privacy'. In *Bernstein v Bester*,[15] it was held that a person can only rely on this right to privacy where there was a reasonable expectation of privacy. The reasonable expectation of privacy consists of a subjective and objective element.[16] Currie and De Waal indicate that the first element does not relate only to what feels private. One should also consider whether the person has consented to their privacy being invaded[17] as the principle of *volenti non fit iniuria* signifies that 'a willing person is not wronged'.[18]

[12] Ibid ss 59–63.

[13] Ibid s 45.

[14] A Oguttu 'A Critique on the Effectiveness of "Exchange of Information on Tax Matters" in Preventing Tax Avoidance and Evasion: A South African Perspective' (2014) 68 *Bulletin for International Taxation* 2, 2. In the 1998 Report of the OECD, titled 'Harmful Tax Competition – An Emerging Global Issue', the OECD identified that a lack of transparency in tax havens and jurisdictions with harmful preferential tax regimes are eroding the tax basis of other jurisdictions. Consequently, the OECD recommended that there should be rules in place to foster the exchange of information to ensure tax transparency. Perceived tax havens were required to reform, or they would otherwise be regarded as uncooperative.

[15] *Bernstein & Others v Bester NO & Others* [1996] ZACC 2, 1996 (2) SA 751 (CC)('*Bernstein v Bester*') para 75.

[16] Ibid.

[17] I Currie & J de Waal *The Bill of Rights Handbook* (5th Ed, 2005) 318.

[18] J Neethling & JM Potgieter *Law of Delict* (2015) 108.

The second element is concerned with whether the subjective expectation of privacy is reasonable.[19] The Court, in *Bernstein v Bester*, provided some insight into how to determine when an expectation of privacy is reasonable when it stated that:

> [a] very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.[20]

Accordingly, the Court found that in an 'intimate personal sphere', it is more likely that there is a reasonable expectation of privacy[21] as opposed to when one 'moves into communal relations and activities'.[22]

An aspect that falls within the right to privacy as contained in s 14 of the Constitution is information privacy.[23] As indicated earlier,[24] information privacy is concerned with the control a person has over their information. In *Mistry v Interim National Medical and Dental Council* ('*Mistry*'), the Court formulated questions that must be considered to determine whether there is a reasonable expectation of privacy pertaining to information privacy, namely: Was the information acquired in an intrusive manner? Does the information pertain to intimate aspects of the person's life? Did the person provide the information for a particular purpose which is now being used for another purpose? To whom was it disseminated – the press, the general public or a person who is carrying out statutory duties?[25]

B The TAA and PAIA

Section 67(4) of the TAA stipulates that SARS must preserve the confidentiality of taxpayer information and may only in limited circumstances disclose this information. From the perspective of SARS, the benefit of keeping taxpayer information confidential encourages taxpayers to 'make full and proper disclosure of their income'.[26] A 'full and proper disclosure' may in all probability not occur if taxpayer information can be freely disclosed to third parties.[27]

One of the instances in which SARS may disclose taxpayer information to the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) is where this information is material to a tax offence.[28] A 'tax offence' is an offence in terms of a tax Act, or fraud

[19] Ibid.

[20] *Bernstein v Bester* (note 15 above) at para 77. See *Mistry v Interim National Medical and Dental Council & Others* [1998] ZACC 10, 1998 (4) SA 1127 at para 27 where the court referred to this dictum in *Bernstein v Bester* as a 'continuum of privacy interests'.

[21] Currie & De Waal (note 17 above) at 318.

[22] *Bernstein v Bester* (note 15 above) at para 67.

[23] Currie & De Waal (note 17 above) at 323.

[24] Part I above.

[25] *Mistry* (note 20 above) at para 51.

[26] *Hall v Welz & Others* [1996] ZASCA 147, 59 SATC 49 at 54.

[27] Ibid.

[28] TAA s 69(2)(a)(i).

committed against SARS in respect of the administration of a tax Act, or theft of money that is due or paid to SARS.[29]

When taxpayer information does not relate to a tax offence, the information may only be disclosed to the SAPS and the NPA when a court order authorising such a disclosure has been granted.[30] Möller argues that a balance is struck between the administration of tax legislation and taxpayers' privacy in this respect, as a judge needs to approve of the disclosure of taxpayer information that does not relate to a tax offence.[31] She correctly argues that the power of SARS is restrained by the required judicial oversight, which ensures that SARS cannot arbitrarily disclose taxpayer information.[32]

Bearing in mind that one of the questions identified in *Mistry* is whether the information is used for the purpose for which it was obtained, it follows that SARS must not be able *mero motu* to decide to disclose information that does not relate to a tax offence.

Section 35(1) of PAIA, which also relates to confidential information, provides that SARS must refuse to disclose information obtained or held by SARS 'for the purpose of enforcing legislation concerning the collection of revenue'.[33] As this phrase is not defined, there is uncertainty as to what information must be refused to be disclosed in terms of s 35 of PAIA.[34] In this respect, Croome and Olivier remark that s 35(1) acknowledges SARS' obligation to taxpayer secrecy, as contained in s 67(4) of the TAA, by prohibiting SARS from disclosing taxpayer information to any one apart from the specific taxpayer.[35]

C POPIA

As stated above, POPIA gives effect to the constitutional right to privacy and is concerned with protection against 'the unlawful collection, retention, dissemination and use of personal information',[36] including that of taxpayers.

One of the purposes of POPIA is to protect personal information when it is processed by a responsible party.[37] 'Processing' is defined as 'any operation or activity or any set of operations, whether or not by automatic means, concerning personal information'. These operations or activities include, among others, collection and dissemination by way of transmission or distribution.[38] 'Responsible party' is defined in s 1 of POPIA to mean 'a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information'. Notably, this protection of personal information

[29] Ibid s 1.

[30] Ibid s 71.

[31] L Möller *An Analysis of the Current Framework for the Exchange of Taxpayer Information, with Special Reference to the Taxpayer in South Africa's Constitutional Rights to Privacy and Just Administrative Action* (unpublished LLM dissertation, University of Cape Town, 2016) 18.

[32] Ibid.

[33] In terms of PAIA s 35(2), this mandatory prohibition does not apply when the taxpayer is requesting information about herself/himself from SARS.

[34] MM Botha & C Fritz 'Whistle-Blowing for Reward – Friend or Foe? Exploring a Possible Tax Whistle-Blowing Programme in South Africa' (2019) 40 *Obiter* 65, 89.

[35] B Croome & L Olivier *Tax Administration* (2nd Ed, 2015) 620.

[36] POPIA Preamble recital.

[37] POPIA s 2(a).

[38] Ibid s 1.

is not absolute and can be justifiably limited, for instance to protect important interests such as the 'free flow of information within the Republic and across international borders'.[39]

Another purpose of POPIA is to control the sharing of personal information by establishing the minimum requirements for the lawful processing of such information; requirements that must be in line with international standards.[40] 'Lawful processing' comprises various components,[41] including that there must be certain processing limitations.[42] For example, the processing of personal information must be adequate, relevant and not excessive in relation to the purpose for which it is processed.[43] Another component of 'lawful processing' is that the information must be collected for a specific purpose.[44] Furthermore, the responsible party must take reasonably practical steps to ensure that the data subject knows that its personal information is being collected, and from which source.[45] Also, the responsible party must inform the data subject of the responsible party's details,[46] and why the information is being collected.[47] Moreover, the responsible party must indicate whether it intends to transfer the personal information to another country or international organisation.[48]

Nevertheless, POPIA provides for instances where the responsible party does not need to inform the data subject of the particulars regarding the processing of personal information. One such instance is where the processing of personal information is required by law or to enforce legislation pertaining to the collection of revenue, as defined in s 1 of the SARS Act.[49] In this respect, 'revenue' is defined as 'taxes, duties, levies, fees and any other moneys imposed in terms of legislation, including penalties and interest in connection with such moneys'.[50]

POPIA also requires the responsible party to ensure that there are reasonable measures in place so that personal information is treated in a confidential manner to prevent unlawful access or processing of personal information.[51]

In limited circumstances, POPIA allows personal information to be transferred to another country. Such a transfer is permitted when the recipient of the information in the other country is subject to 'a law, binding corporate rules or binding agreement which provide an adequate level of protection'.[52] 'Adequate level of protection' means that the country to which the information is transferred must have requirements similar to those of POPIA for the processing

[39] Ibid s 2(a)(ii).

[40] Ibid s 2(b). In this respect, J Botha, MM Grobler, J Hahn & MM Eloff 'A High-Level Comparison between the South African Protection of Personal Information Act and International Data Protection Laws' in AR Bryant, JR Lopez & RF Mills (eds) *Proceedings of the 12th International Conference on Cyber Welfare and Security* (2017) 57–66, 65 compared POPIA with several other data-protection laws in Africa and jurisdictions on other continents. They concluded that POPIA is in line with data-protection laws in these other jurisdictions.

[41] POPIA s 4. These components are accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards, and data subject participation.

[42] POPIA ss 9–12.

[43] Ibid s 10.

[44] Ibid s 13.

[45] Ibid s 18(1)(a).

[46] Ibid s 18(1)(b).

[47] Ibid s 18(1)(c).

[48] Ibid s 18(1)(g).

[49] Ibid s 18(4)(c)(ii).

[50] Definition of 'revenue' in s 1 of the SARS Act.

[51] Ibid s 19(1)–(2).

[52] Ibid s 72(1)(a). In terms of s 72(2)(a), 'binding corporate rules' refers to 'personal information processing policies, within a group of undertakings, which are adhered to by a responsible party or operator within that group of

of personal information.[53] Moreover, in the event of a further transfer to a third country, the recipient country must require an adequate level of protection from such third country before the recipient country can transfer personal information to that third country.[54]

As s 72 of POPIA only became effective on 1 July 2020,[55] there is no case law in South Africa applying the requirement of 'adequate level of protection'. Nonetheless, requiring an 'adequate level of protection' is not unique to the regulation of cross-border personal information in South Africa. Consequently, it is useful to consider how this requirement is interpreted elsewhere. Article 25(2) of the 1995 European Union Data Protection Directive[56] indicated that the context of the exchange should be considered specifically as regards the nature of the information, the purpose of the processing and the laws and security measures that apply in the recipient country. The General Data Protection Regulation (GDPR),[57] which replaced the European Union Data Protection Directive, also requires an 'adequate level of protection' when information is exchanged to a jurisdiction that is not part of the European Union. In terms of art 45(2) of the GDPR, the European Commission must consider, inter alia, whether the other country respects human rights and fundamental freedoms, whether public authorities in that country would have access to personal data, and whether there are data-protection rules and enforceable data rights. Moreover, the European Commission must consider the presence and effective functioning of independent supervisory authorities in the other country that are able to ensure and enforce compliance with data-protection rules. Another aspect the European Commission must consider is the international commitments the other country has made in relation to the protection of personal data.

Section 72 of POPIA also stipulates that a transfer of personal information to another jurisdiction can occur where: (i) the data subject consented to such a transfer taking place;[58] (ii) the transfer is required for the performance of a contract between the data subject and the responsible party;[59] (iii) the transfer is necessary for the performance of a contract between the responsible party and a third party; (iv) the transfer is in the interest of the data subject,[60] it is not reasonably practicable to obtain the consent of the data subject to such transfer, and if it were reasonably practicable to obtain such consent, the data subject would likely have consented.[61]

Arguably, if one of the instances listed in s 72 is present, the exchange of personal information with another country may take place. As a result, a cross-border exchange of personal information can occur even where the other country does not provide an adequate

undertakings when transferring personal information to a responsible party or operator within that same group of undertakings in a foreign country'.

53 Ibid s 72(1)(a)(i).

54 Ibid s 72(1)(a)(ii).

55 Government Gazette R.21 43461 (22 June 2020).

56 *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data* (1995).

57 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and repealing Directive 95/46/EC [2016] OJ L119/1* (2016).

58 Ibid s 72(1)(b). POPIA s 1 defines 'consent' as 'any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information'.

59 POPIA s 72(1)(c).

60 Ibid s 72(1)(d).

61 Ibid s 72(1)(e).

level of protection. However, failing to demand an adequate level of protection as a prerequisite for any cross-border exchange is contrary to the spirit of s 72, which is to ensure that 'information will not be transferred to another country if proper safeguards for the protection of the information have not been adopted in that country'.[62]

III CROSS-BORDER EXCHANGE OF TAX INFORMATION

Section 3(3)(i) of the TAA deals with instances where SARS is requested by a competent authority, such as a revenue authority, to exchange or spontaneously transmit taxpayer information. SARS must then, in accordance with an international tax agreement, obtain and disclose the information 'as if it were relevant material required for purposes of a tax act'.[63] According to s 76(4) of the TAA, SARS must, however, treat such information as confidential.

A An international tax agreement

For an exchange of tax information to occur, there needs to be an international tax agreement.[64] This can be a bilateral or multilateral double tax treaty that contains provisions regarding the exchange of tax information, or an agreement specifically concerned with administrative assistance,[65] either by way of a tax information exchange agreement (TIEA) or a mutual administrative assistance agreement.[66]

1 *Double tax treaties based on the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital*

Generally, double tax treaties are based on the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital ('MTC') of 2017 and the United Nations Model Double Taxation Convention between Developed and Developing Countries ('UN Model').[67] Since the UN Model has incorporated the OECD standard in relation to the exchange of information,[68] I focus on the OECD standard and as such will consider double tax treaties based on the MTC.[69]

Article 26 of the MTC deals specifically with the exchange of taxpayer information and provides:

> The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on

[62] National Treasury Explanatory Memorandum on the Objects of the Protection of Personal Information Bill, 2009 para 2.12.

[63] TAA s 3(3)(i).

[64] Ibid s 3(3)(a).

[65] OECD *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – General and Legal Aspects of Exchange of Information* (23 January 2006) para 9.

[66] SARS 'Exchange of Information Agreements' (4 May 2021) available at https://bit.ly/3x8QD52.

[67] UN Model (2011) vi.

[68] OECD *Promoting Transparency and Exchange of Information for Tax Purposes* (19 January 2010) para 4.

[69] The OECD *Commentary on Article 26 Concerning the Exchange of Information* (2014) para 4 specifies that although a treaty based on the MTC may not use the same word as the MTC, the treaty would still reflect current country practices.

> behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.

When a double tax agreement contains an exchange of information provision based on art 26(1), the parties must exchange information that is foreseeably relevant to the administration or enforcement of the domestic laws pertaining to taxes.[70] While 'foreseeably relevant' is rather wide, it is not an opportunity for a 'fishing expedition' in which information that is irrelevant to the tax affairs of a taxpayer can be requested.[71] This standard involves that when the request for information is made, there must be a reasonable possibility that the information will be relevant. It is irrelevant whether the information is relevant once it is received.[72] Parties could agree to use a standard different from 'foreseeably relevant', such as 'necessary' or 'relevant'.[73]

In the South African tax context, the standard of 'foreseeably relevant' in relation to information-gathering is recognised. In terms of s 46(1) read with s 1 of the TAA, SARS may request 'any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act'.[74] In its Memorandum dealing with the standard of 'foreseeably relevant', Treasury indicated that this standard has a low threshold and that, similar to the OECD understanding of 'foreseeably relevant', it is beside the point whether the requested material, once received, is indeed relevant.[75] Rather, the question to consider is whether, when the request for information is made, the material requested is reasonably relevant for the purpose it is requested for.[76] Treasury further indicated that the link between the requested material and the purpose for which it is requested does not need to be certain and clear – only a rational possibility of relevance is necessary.[77] As the standard of 'foreseeably relevant' is already contained in the TAA, it is unlikely that South Africa would negotiate for higher thresholds such as 'necessary' or 'relevant' in respect of the provisions pertaining to the exchange of information.

Article 26(2) of the MTC stipulates that the exchanged information should be treated as confidential in accordance with the domestic laws of the receiving country. The information may only be disclosed to authorities or persons involved in assessing, collecting, and enforcing taxes or in prosecutions relating to taxes. The exchanged information may not be disclosed to a third country unless the international tax agreement between the initial countries specifically allows such further exchange.[78]

When two contracting countries conclude an international tax agreement based on art 26 of the MTC, there is no obligation on the requested country to exceed the information-gathering powers it has in terms of domestic laws.[79] Moreover, the requested country does not

[70] MTC art 26(1).

[71] OECD Commentary (note 69 above) at para 5.

[72] Ibid.

[73] Ibid. Initially, art 26 of the MTC provided a standard of 'relevant'. This standard was adjusted to a standard of 'foreseeably relevant' to align the MTC standard with the standard of the Model Agreement on Exchange of Information on Tax Matters (TIEA). However, The OECD Commentary (note 69 above) at para 4.1 stipulates that it does not alter the substance of the provision.

[74] The phrase 'in the opinion of SARS is foreseeably relevant' was inserted into the definition of 'relevant material' as contained in s 1 of the TAA by way of s 37*(b)* of the Tax Administration Laws Amendment Act 44 of 2014.

[75] Treasury Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2014 (2014) 42.

[76] Ibid.

[77] Ibid.

[78] OECD Commentary (note 69 above) at para 12.2.

[79] MTC arts 26(3)(a)–(b). See, also, OECD Commentary (note 69 above) para 14.2.

need to use information-gathering powers that are not provided for in the requesting country's domestic laws.[80] However, in all probability, different countries will have different information-gathering powers. Consequently, a broad and pragmatic approach should be used to determine which powers should be resorted to in order to obtain the relevant information. This approach requires a country to evaluate whether the difference in information-gathering powers between the countries means that the requested country, when it is requested to exchange information, would, overall, have the ability to obtain and provide the requested information.[81] Article 26(3)(c) of the MTC provides that there is no obligation imposed on a requested state to exchange information that will reveal any trade, industrial, business, commercial or professional secret or trade process.

2 *Model agreement on exchange of information on tax matters*

Exchange of information can also be fostered by way of an agreement dealing only with exchange of information, ie TIEA, instead of concluding a double tax treaty with an article on exchange of information. This is crucial in relation to governments of a country that would very seldom sign a tax treaty such as those of tax havens.[82]

In 2002, the OECD developed a Model Agreement on Exchange of Information on Tax Matters (TIEA Model) that can be used as a basis for such agreements. Subsequently, in 2005, art 26 of the MTC and the commentary to art 26 were amended to accord with the changes that the TIEA Model had brought about.[83] Thus, both the TIEA Model and the MTC reflect the same OECD standard pertaining to the exchange of information.[84]

3 *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters*

The cross-border exchange of tax information can also be permitted by way of the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters (amended by the 2010 Protocol) ('Multilateral Convention'). The object of the Multilateral Convention is to foster administrative assistance between its parties.[85] In this context, administrative assistances comprise of the exchange of tax information, assisting in tax recovery or collection and serving documents.[86]

---

[80] OECD Commentary (note 69 above) at para 15.

[81] Ibid.

[82] L Olivier & M Honiball *International Tax: A South African Perspective* (5th Ed, 2011) 850 define 'tax havens' as 'countries which subject income (or some form of income) or entities (or certain entities) to low or no taxation, also referred to as 'low-tax jurisdictions' or 'offshore financial centres'. See, also, Oguttu (note 14 above) at 7–9.

[83] OECD Commentary (note 69 above) at para 4.

[84] M Pankiv 'Tax Information Exchange Agreements (TIEAs)' in O Günther & N Tüchler (eds) *Exchange of Information for Tax Purposes* (2013) 3. As the TIEA Model reflects the same standard as the OECD MTC regarding the exchange of tax information, I will not analyse the TIEA Model, as this would be a duplication of what has already been discussed in the section dealing with treaties based on the MTC. For a general comparison between art 26 of the MTC and the TIEA Model, see Oguttu (note 14 above) 7. The Global Forum on Transparency and Exchange of Information for Tax Purposes is tasked with monitoring the implementation of the OECD standards by conducting peer reviews (Global Forum on Transparency and Exchange of Information for Tax Purposes, available at http://www.oecd.org/tax/transparency/who-we-are/about/).

[85] OECD Multilateral Convention art 1.

[86] Ibid art 2.

Important for purposes of this article, art 4(1) of the Multilateral Convention, like the MTC, sets a standard of 'foreseeably relevant' for the administration of domestic tax laws. Furthermore, art 4(3) authorises a party to the agreement to inform a resident or national of the party of an imminent exchange of tax information if it is in accordance with the domestic legislation of such a party.

B Methods of exchanging taxpayer information

Generally, three methods are used to exchange information: on request, spontaneously and automatically.[87] The exchange by way of a request involves a specific request where the revenue authority requesting the information has exhausted its domestic information-gathering powers.[88] A request for the exchange of information pursuant to an instrument based on the relevant MTC provision should be as comprehensive as possible and should contain relevant information such as the details of the taxpayer who is subject to this request, the purpose for which the information is required, the reasons why it is believed that the requested information can be gathered from the requested state, and the specific information that is required.[89]

In turn, a request for the exchange of information pursuant to an instrument based on the TIEA Model would need to contain the following information:

(i) the identity of the taxpayer;
(ii) details regarding the information requested, which include the nature of the information and the desired form in which it should be received;
(iii) the tax purpose for which the information is sought;
(iv) the reasons why it is believed that the requested information is held in the requested state or is in the possession of a person who is within the requested state;
(v) a declaration that, if the information was within the requesting state, obtaining the information would have been permitted in terms of the law and administrative practices of the requesting state; and
(vi) a declaration that the requesting state has exhausted all domestic powers at its disposal.[90]

The Tax Justice Network identifies this as a catch-22, as the specific details required to make such a request are in all probability not known before the information is exchanged.[91] As a result, Sawyer questions how a country should go about obtaining the information that is required in order to initiate the request for the exchange of tax information.[92] Based on the

[87] OECD Commentary (note 69 above) at para 8.

[88] Ibid.

[89] OECD *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – Exchange of Information on Request* (23 January 2006) para 4.

[90] TIEA Model art 5(5).

[91] Tax Justice Network 'The Death of International Exchange Agreements?' (19 April 2011) available at https://bit.ly/3xrqLBA. *Collins Dictionary*, available at http://bit.ly/1dpX2zH, defines the phrase 'catch-22' as 'a situation in which any move that a person can make will lead to trouble'. According to *The Phrase Finder*, available at http://bit.ly/1GkUheg, the phrase 'catch-22' originated from a novel written by Joseph Heller. In his 1961 novel, the catch-22 was that, if a pilot applied to be exempt from threatening bombing missions based on insanity, he would be considered sane, as that is precisely what a sane person would do.

[92] A Sawyer 'The OECD's Tax Information Exchange Agreements: An Example of (In)Effective Global Governance?' (2011) *Journal of Applied Law and Policy* 41, 52.

specificity required, the exchange of information is somewhat ineffective, as the exchange simply helps to obtain proof of misconduct but does not identify the misconduct.[93]

The second method for exchanging information, namely spontaneously, relates to instances where one party to an agreement transfers information to the other party when the information is foreseeably relevant to the last-mentioned party.[94] Spontaneous exchange of information is considered to be more effective than exchange of information on request, since the exchanged information is detected and selected by tax officials in the country that has access to the foreseeably relevant information and is then transferred to another country.[95]

The last method that is generally used to exchange information is automatic exchange, which entails a 'systematic and periodic transmission of "bulk" taxpayer information'.[96] The source country transmits information about different types of income, for example interest, salaries and dividends, which the source country obtained by way of routine reporting by, inter alia, the payers of the income.[97] This information enables the resident country to verify if the taxpayer has reported the foreign income.[98] Moreover, automatic exchange of information can convey details regarding changes in residence, the disposal of immovable property, and value-added tax refunds.[99]

There have been substantial developments in relation to the automatic exchange of information held by financial institutions. In terms of an United States of America (USA) Foreign Account Tax Compliance Act (FATCA)[100] intergovernmental agreement, the tax administrations of the USA and South Africa automatically exchanges tax information.[101] The Standard for Automatic Exchange of Financial Account Information builds on FATCA intergovernmental agreements and extends the reach to all foreign held accounts.[102] The Standard for Automatic Exchange of Financial Account Information establishes a Common Reporting Standard (CRS) sets out a minimum standard for the exchange of financial account information pertaining to the financial institutions that must report the various types of accounts and taxpayers covered by the CRS and provides due diligence procedures that financial institutions should follow in this automatic exchange.[103]

[93] Oguttu (note 14 above) at 11. Even though the effectiveness of an exchange by way of request is questioned, the TIEA Model only provides for this way of exchanging information (TIEA Model art 5). Countries wishing to include the other methods of exchanging information in a TIEA may use the wording contained in the OECD *Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA* (2015).

[94] OECD *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – Spontaneous Exchange of Information* (23 January 2006) para 1.

[95] Ibid.

[96] OECD *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes – Automatic (Routine) Exchange of Information* (23 January 2006) para 1.

[97] Ibid.

[98] Ibid.

[99] OECD *Automatic Exchange of Information – What It Is, How It Works, Benefits, What Remains to be Done* (2012) 7.

[100] FATCA stipulates that foreign financial institutions and some non-financial foreign entities must report on foreign assets held by USA account holders, otherwise the foreign institution and entities will be subject withholding on payments that can be withheld. See Inland Revenue Service Foreign Account Tax Compliance Act, available at https://bit.ly/3iyDjD0.

[101] SARS (note 66 above).

[102] Ibid.

[103] OECD *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (2017) 14.

This CRS is typically implemented by way of an international tax agreement based on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as it allows for a multilateral approach to facilitate an international exchange framework with all interested parties.[104]

IV RIGHT TO PRIVACY IN THE EXCHANGE OF TAX INFORMATION

A An expectation of privacy

An expectation of privacy is a prerequisite for the right to (information) privacy. Consequently, it is important for purposes of this article to establish if there is an expectation of privacy relating to taxpayer information that SARS has in its possession. The questions posed in *Mistry* are useful in this respect.

Firstly, was the information acquired in an intrusive manner?[105] This depends on the circumstances, as the information-gathering powers of SARS span a spectrum from somewhat invasive to very invasive. On the one side of the spectrum, a request for relevant information may not be too invasive.[106] On the other side of the spectrum, Baker and Groenhagen consider searches to be '[t]he most extreme form of interference with a taxpayer's right to privacy'.[107]

In relation to the second question identified in *Mistry*, in terms whereof it must be determined whether the information pertains to intimate aspects of a person's life,[108] taxpayer information inevitably exposes the financial information of the taxpayer. In turn, the financial information reveals intimate details regarding income, spending habits, club membership and loans.[109]

In *Mistry*, the Court also stipulates that one needs to consider the purpose for which information was provided originally, as well as the purpose for which the information is now to be used.[110] SARS is tasked with the administration of a 'tax Act'[111] and information is gathered for this purpose. Does this purpose change when the information is transferred to another country? At first glance, it appears that the purpose has changed, as a 'tax Act'[112] relates only to South African tax legislation.[113] Even so, when the National Executive concludes an international tax agreement with another country and the formalities in relation thereto are disposed of, the agreement will 'have effect as if enacted' in the Income Tax Act.[114] Therefore,

[104] OECD *Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook* (2018) 41.

[105] *Mistry* (note 20 above) at para 51.

[106] TAA s 46.

[107] P Baker & A Groenhagen 'The Protection of Taxpayers' Rights – An International Codification' (2001) *European Financial Forum* 48. The TAA ss 59–63 provide for the power to search.

[108] *Mistry* (note 20 above) at para 51.

[109] Cockfield (note 4 above) at 437.

[110] *Mistry* (note 20 above) at para 51.

[111] TAA s 6(1).

[112] In terms of s 1 of the TAA read with s 4 of the SARS Act 34 of 1997, a 'tax act' includes, inter alia, the TAA, the Transfer Duty Act 40 of 1949, the Estate Duty Act 45 of 1955 and the Income Tax Act 58 of 1962.

[113] Möller (note 31 above) at 18.

[114] Income Tax Act s 108(2). Section 108(2) of the Income Tax Act, read with s 231(4) of the Constitution, deals with the process of a tax treaty becoming part of domestic law. The debate regarding this process falls outside the scope of this article. See I du Plessis 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) 24 *South African Mercantile Law Journal* 31, 32–41 in this regard.

the exchange of tax information with another jurisdiction still falls within the initial purpose – the administration of a tax Act.

Lastly, as stipulated in *Mistry*, one must consider to whom the information was disseminated.[115] In the case of the exchange of taxpayer information, the information is disseminated to another revenue authority so that the revenue authority can fulfil its statutory duty of gathering information, establishing tax liability, and collecting the relevant taxes. Both art 26 of the MTC and the TIEA Model limit what the exchanged information can be used for. According to art 26 of the MTC, it can only be used for assessing, collecting, and enforcing taxes or in prosecutions related to taxes, whereas art 8 of the TIEA Model adds the determination of appeals to the list of uses. The information may only be disclosed to persons or authorities that are concerned with any of the aforementioned uses.

Based on the above discussion of the *Mistry* questions, a possible expectation of privacy can be discerned. In addition, the confidentiality granted in respect of taxpayer information in terms of the TAA and PAIA shows that a taxpayer would generally have a reasonable expectation that her or his taxpayer information would be kept private. As a result, when taxpayer information is transferred to another country, the taxpayer's right to (information) privacy is infringed.

B Balancing of interests

The question arises whether the infringement of privacy when tax information is exchanged is reasonable and justifiable in terms of section 36(1) of the Constitution. Section 36(1) of the Constitution provides as follows:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

When determining if an infringement is reasonable and justifiable, section 36(1) of the Constitution calls for a balancing of interests instead of considering the factors contained in section 36(1)(a)–(e) as a checklist.[116]

The right to privacy is an important right in South Africa. Similarly, permitting the cross-border exchange of tax information is also important as it ensures tax transparency, prevents tax evasion and impermissible tax avoidance, and ultimately ensures the fairness of tax systems. What is more, the exchange of tax information is permitted in other democratic jurisdictions.

As such, the relevant question pertaining to the right to privacy and exchange of tax information is not whether it should be permitted, but rather the scope of what should be permitted.

[115] *Mistry* (note 20 above) at para 51.

[116] *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 104; *S v Manamela & Another (Director-General of Justice Intervening)* [2000] ZACC 5, 2000 (3) SA 1, 2000 (5) BCLR 491 para 32.

Since POPIA aims to balance, on the one hand, the protection of personal information[117] against the importance of ensuring a flow of information across borders,[118] on the other, it provides the basis as to how these two interests should be balanced in the South African context. Section 72, which deals with cross-border exchanges, is of specific importance for purposes of this article.

Although I have indicated above[119] that a plain reading of s 72 of POPIA suggests that only one of the instances provided for in s 72 needs to be present, in my opinion, when we deal with the exchange of tax information with another country, in most instances the only ground on which it could be transferred to that jurisdiction would be when the other country has an adequate level of protection in place.

Firstly, it is doubtful that a taxpayer would provide informed consent for the exchange of tax information,[120] as this would require the taxpayer to agree to the exchange of tax information whilst understanding the implication of such exchange and the risks associated with it.[121] In this regard, the risks associated are that another country would have access to private information which could be used to determine the taxpayer's liability in that country. Nonetheless, in the unlikely event of a taxpayer consenting, the exchange of tax information cannot be considered an unreasonable limitation due to the principle of *volenti non fit iniuria*.

Secondly, the situation of a transfer taking place to comply with a contract between the data subject and the responsible party does not seem to fit into the scenario of SARS transferring taxpayer information to another country. It is difficult to contemplate any contract between SARS and the relevant taxpayer that would require the exchange of taxpayer information.

Lastly, the other two situations provided for in s 72 of POPIA (namely when the transfer is necessary for the performance of a contract between the responsible party and the third party that is in the interest of the data subject,[122] and when transferring the personal information is in the interest of the data subject, but it is impracticable to obtain the consent of the data subject and if it was practicable to obtain such consent, the data subject would likely have consented)[123] both require the transfer to be in the interest of the data subject. Consequently, for purposes of this article, both situations require the exchange of tax information to be in the interest of the taxpayer.

While one can argue that the exchange of tax information is in the interest of taxpayers overall, as the exchanged information is used to levy the correct tax liability against a taxpayer, it would very rarely be in the interest of the taxpayer whose information was transferred. The possibility that the exchange of tax information could lead to a refund for the taxpayer would not be sufficient to argue that it is in the interest of the taxpayer.

---

[117] POPIA s 2(a).

[118] Ibid s 2(a)(ii).

[119] See paragraph II.C above.

[120] POPIA s 1 defines consent as 'any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information'.

[121] The requirements for informed consent emanate from the common law and are: (i) giving consent voluntarily; (ii) being capable of understanding the implication of giving consent; (iii) having complete knowledge of and appreciating the possible extent of the risks; and (iv) giving actual consent. See Neethling & Potgieter (note 18 above) at 111–114 as to how these requirements are applied in delict.

[122] POPIA s 72(1)(d).

[123] Ibid s 72(1)(e).

As the exchange of tax information would likely be dependent on whether or not the receiving country has adequate levels of protection in place, it is important to consider whether the international tax agreement terms are aligned with the provisions of POPIA.

C Cross-border exchange of tax information vs POPIA

1 *Threshold for exchanging tax information*

As stated above,[124] 'lawful processing' in terms of POPIA requires the processing of personal information to be relevant in relation to the specific purpose for which it is processed.[125] However, both the MTC and the TIEA Model allow for the exchange of tax information when the information is 'foreseeably relevant',[126] which is a lower threshold than 'relevant'.[127] Despite a request for taxpayer information in terms of either the MTC or TIEA Model requiring a particular level of specificity and that the purpose of the exchange should be for assessing, collecting and enforcing taxes or for prosecutions relating to taxes, this does not detract from the fact that the threshold for exchanging tax information is lower than for lawful processing in terms of POPIA.

The question arises: Which threshold should prevail – 'relevant' or 'foreseeably relevant'? Does an international tax agreement, which in terms of s 108 of the Income Tax Act forms part of the Income Tax Act, override the provisions of POPIA? On the one hand, s 3(2)(a) of POPIA provides that POPIA will prevail over provisions in any other legislation that are contrary to the objective or specific provisions of POPIA. On the other hand, in the matter of *Commissioner for the South African Revenue Service v Tradehold Ltd* ('*Tradehold*'),[128] the Supreme Court of Appeal held that a double tax agreement 'modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.'[129] Generally, this modification is necessary to prevent double taxation and, consequently, the double tax agreement allocating taxing rights between the relevant jurisdictions.[130] As a result, the court in *Tradehold* was guided by the purpose of double tax agreements to reach its decision.[131] Seemingly contrariwise, in *Glenister v President of the Republic of South Africa and Others* ('*Glenister*'),[132] the Constitutional Court held that incorporating an international agreement, in terms of section 231(4) of the Constitution, into domestic law creates ordinary statutory rights and obligations.[133] Further in this regard, the minority in *Glenister* indicated that 'an international agreement that becomes law in our country enjoys the same status as any other legislation. This is so because it is enacted into law by national legislation and can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates its intent that the enacting legislation should have such status.'[134]

[124] Paragraph II.C.
[125] POPIA ss 10 & 13.
[126] MTC art 26(1); TIEA Model art 1.
[127] National Treasury (note 77 above) 42.
[128] *Commissioner for the South African Revenue Service v Tradehold Ltd* [2012] ZASCA 61, 2013 (4) SA 184 (SCA).
[129] Ibid at para 17.
[130] Ibid.
[131] T Gatuza 'Tax Treaties, the Income Tax Act and the Constitution – Trump or Reconcile?' (2016) 28 *South African Mercantile Law Journal* 482, 497–501.
[132] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).
[133] Ibid at para 102.
[134] Ibid at para 101.

As the court in *Tradehold* had to determine the status of a double tax agreement in relation to domestic *tax* legislation, it follows that preference must be given to the double tax agreement because it sets out to modify the domestic *tax* provisions.[135] It is submitted, however, that in line with the dictum in *Glenister*, this preference that a double tax agreement, or any other type of international tax agreement, enjoys cannot extend to domestic legislation that does not relate to tax. Accordingly, the dicta of the courts pertaining to the status of double tax agreements in relation to tax provisions do not address the question of whether the standard of 'foreseeably relevant', as contained in an international tax agreement, would take preference over the standard of 'relevant' as envisaged in POPIA.

I argue that, in addition to s 3(2)(a) of POPIA explicitly providing that POPIA must enjoy preference, the maxims of *lex posterior priori derogate* and *generalia specialibus non derogant* point toward POPIA's 'relevant' standard taking preference. Whilst *lex posterior priori derogate* provides that when dealing with two clearly inconsistent and irreconcilable provisions, the later enacted provision takes preference, the *generalia specialibus non derogant* provides that special provisions take preference over general provisions.[136] Thus, when these two maxims are applied together, the later enacted provision takes preference 'unless the later enacted provision is a general provision and the earlier provision is a special provision.'[137] When applying these two maxims to the current inconsistent standards, POPIA's standard must take preference as POPIA deals specifically with the protection of personal information irrespective of when an international tax agreement becomes part of South African law. Hence, the appropriate threshold that should apply in relation to cross-border exchange of tax information should be 'relevant' and not 'foreseeably relevant'.

2 *Informing the taxpayer of the imminent exchange of tax information*

Although 'lawful processing' usually requires that data subjects be informed of the processing of their personal information, this obligation does not apply to the exchange of tax information with another country. The reason for this is that the exchange of tax information is undertaken to fulfil an obligation (deriving from the international tax agreement that has been incorporated as part of the Income Tax Act), and to enforce the collection of revenue. Consequently, the exchange of tax information falls within the exception not to notify the data subject (taxpayer) as contained in s 18(4)(c)(ii) of POPIA.

Notwithstanding the fact that POPIA does not require SARS to inform taxpayers when their personal information will be transferred to another jurisdiction, the International Bureau for Fiscal Documentation (IBFD) advocates a minimum standard in terms whereof

> [t]he requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer, unless it has a reasoned request from the requesting state that the taxpayer should not be informed on the grounds that it would prejudice the investigation.[138]

In the South African context, some scholars have argued that, based on the right to just administrative action as contained in section 33 of the Constitution and in the Promotion

[135] *Tradehold* (note 128 above) para 17.

[136] L Du Plessis 'Statute Law and Interpretation' in *LAWSA* (Last update March 2011) 290, 305.

[137] Gatuza (note 131 above) at 482.

[138] IBFD *Observatory on the Protection of Taxpayers' Rights – General Report* (2019) 133.

of Administrative Justice Act 3 of 2000 (PAJA), which was enacted to give effect to the right contained in section 33 of the Constitution,[139] a taxpayer must be informed of an impending exchange of tax information and subsequently be allowed to challenge the exchange of information.[140] Regardless of the fact that I focus on the exchange of taxpayer information vis-à-vis the right to privacy in this article, it is important to further explore this argument pertaining to the right to just administrative action because the extent of the invasion of one's privacy could be limited if there is a sound argument in law as to why the taxpayer should be notified and be able to challenge the exchange. If the taxpayer can successfully challenge the exchange, there would not be any invasion of privacy. In spite of s 3(2)(a) of POPIA stipulating that, in general, the provisions contained in POPIA prevail over provisions in other pieces of legislation that also regulate the processing of personal information, whenever the conditions for lawful processing of personal information are more extensive, those extensive conditions will apply.[141] Therefore, it is important to scrutinise the provisions of PAJA to establish if PAJA does provide more extensive conditions that should apply when exchanging a taxpayer's information.

The delineating question when dealing with the right to just administrative action is: What is administrative action?[142] Administrative action is defined in PAJA as

> any decision taken, or any failure to take a decision, by –
> (a) an organ of state, when –
> (i) …
> (ii) exercising a public power or performing a public function in terms of any legislation; … which adversely affects the rights of any person and which has a direct, external legal effect.[143]

The following elements emerge from this definition:
(i) a decision, or failure to make a decision;
(ii) by an organ of state;
(iii) a person's right(s) must be adversely affected; and
(iv) it (the decision) should have a direct, external legal effect.

As regards the first element, 'decision' refers to 'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision'.[144] From this definition it is clear that the decision must be of an administrative nature and in terms of an empowering provision. The concept 'administrative nature' is not defined in PAJA, but the matter of *The President of the Republic of South Africa v South African Rugby Football Union* ('*SARFU*')[145] provides some insight in this respect. In this matter, the Court held that 'administrative in nature' does not refer to 'whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or

[139] Constitution s 33(3); long title of PAJA.
[140] Möller (note 31 above) 45.
[141] POPIA s 3(2)(b).
[142] H Corder 'Administrative Justice' in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (Last update November 2020) 27-1, 27-12.
[143] PAJA s 1.
[144] Ibid.
[145] *The President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059.

not.'[146] Burns and Beukes indicate that actions are administrative in nature when they relate to public law and an unequal relationship exists.[147] In turn, 'empowering provision' is defined in s 1 of PAJA to be 'a law, a rule of common law, customary law or an agreement, instrument or other document'.

Arguably, when SARS decides to transfer tax information in terms of an international tax agreement, this does comply with the element 'decision'. My view is based on the fact that, when SARS exercises its discretion as to whether or not the requested information could be foreseeably relevant in the administration or enforcement of taxes in the other country, and if the transfer of the information could expose any trade, industrial, business, commercial or professional secrets or trade processes, this is done in terms of an empowering provision, namely the Income Tax Act. Moreover, the relationship between SARS and the taxpayer is not equal in this scenario.

Since s 2 of the SARS Act provides that SARS is an organ of state, the second element of 'administrative action', namely that the decision must be made by an organ of state,[148] is fulfilled. Moreover, in order for the decision by SARS (to exchange tax information) to 'adversely affect the rights of any person', the consequence of the administrative action must be considered.[149] Whenever there is a deprivation of a person's established rights or when a determination of a person's rights is not in favour of that person, this third element of administrative action is met.[150] As illustrated throughout this article, when tax information is exchanged, the right to privacy is affected.

The concept 'legal effect' as contained in the last element overlaps with the element 'adversely affect the rights of any person',[151] as 'legal effect', similar to 'adversely affecting rights', suggests a determination, change or withdrawal.[152] At the same time, the concept 'direct effect' as contained in the same element relates to the common law principle in terms whereof a complainant should only seek recourse from the courts when a decision is final. As a result, the court would not have to consider 'half-formed' decisions.[153] Lastly, the 'external effect' part entails that the decision must affect someone other than the organ of state that made this decision.[154] An exchange of tax information would comply with this element of direct, external legal effect, since a decision to exchange tax information is final as there is no further process (currently) in terms whereof such decision of SARS can be challenged or needs to be approved by someone else. Moreover, the decision does affect someone other than SARS, namely the taxpayer.

As a result, the decision by SARS to exchange tax information constitutes administrative action, which must be lawful, reasonable, and procedurally fair as stipulated in section 33 of the Constitution. Therefore, when we deal with the exchange of taxpayer information, there

[146] Ibid at para 141.

[147] Y Burnes & M Beukes *Administrative Law Under the 1996 Constitution* (3rd Ed, 2006) 22.

[148] Subsection (b) of the definition of administrative action in PAJA s 1 stipulates that a decision can also constitute an administrative action if it is made by a juristic or natural person. Subsection (b) of the definition is, however, not applicable to this article.

[149] I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 75.

[150] C Hoexter 'Just Administrative Action' in I Currie & J de Waal (eds) *Bill of Rights Handbook* (6th Ed, 2013) 661.

[151] Currie & Klaaren (note 149 above) 75; Burns & Beukes (note 147 above) at 27, 31; C Hoexter *Administrative Law in South Africa* (2nd Ed, 2012) 229.

[152] Currie & Klaaren (note 151 above) at 82.

[153] Hoexter (note 151 above) at 585–587.

[154] Currie & Klaaren (note 149 above) at 82; Burns & Beukes (note 147 above) at 31.

is an overlap between POPIA and PAJA pertaining to how the task of exchanging information must be administered. Thus, if the provisions in PAJA pertaining to the exchange of the information are more favourable to the taxpayer than those contained in POPIA, the PAJA provisions will take preference in terms of s 3(2)(b) of POPIA. PAJA section 3(2)(b) specifies that 'procedurally fair administrative action' generally means that an administrator should give the affected person

> (i) adequate notice of the nature and purpose of the proposed administrative action;
> (ii) a reasonable opportunity to make representations;
> (iii) a clear statement of the administrative action;
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
> (v) adequate notice of the right to request reasons in terms of section 5.

Nevertheless, s (4)(a) of PAJA provides that an administrator can depart from these requirements when it is reasonable and just to do so in a specific instance. In this regard, the administrator should, inter alia, consider the purpose of the empowering provision and the possible impact of the administrative action.[155] Consequently, SARS has to determine whether it is reasonable and just, when dealing with the exchange of tax information, not to notify the taxpayer thereof. While the exchange of information between countries is important, the possible impact on a taxpayer can be significant. In this respect, I do not deem the possibility that the exchange of information could reveal tax evasion or impermissible tax avoidance by the taxpayer as part of the possible impact on a taxpayer. The reason for this is that the exchange of information is merely exposing the true situation. Rather, SARS, as the administrator, must consider if the exchange of tax information could reveal any trade, industrial, business, commercial or professional secret or trade process. Such a consideration is extremely important, as both art 26(3)(c) of the MTC and art 5(7) of the TIEA Model gives a discretion to a revenue authority as regards revealing this type of information. In most instances, SARS would, however, be ill-equipped to determine if certain taxpayer information relates to any trade, industrial, business, commercial or professional secret or trade process. A taxpayer could make representations in this respect, but, of course, only if the taxpayer is aware that such an exchange of tax information is imminent.

I am not proposing that SARS must in all instances notify a taxpayer and afford the taxpayer the opportunity to make representations. Instead, SARS must follow the approach advocated in s 3(2)(a) of PAJA, in terms whereof the fairness of the process depends on the circumstances of each case. For instance, if SARS is not yet in possession of the requested information and has to use its information-gathering powers, I concede that the taxpayer should not at that stage be informed of the impending exchange of information. Notifying the taxpayer at this point could negate the purpose of exchanging information, as the taxpayer may destroy documents that contain such information. Once SARS is in possession of the required information, it would be prudent to inform the taxpayer of the imminent request so that the taxpayer can make relevant representations. Although this delay would not be ideal for the receiving revenue authority, a taxpayer must still be notified so that she or he can take appropriate steps to protect her or his right to privacy where necessary.

[155] PAJA s 4(b).

3 *Confidentiality of taxpayer information*

An important safeguard that must be in place to ensure that a taxpayer's right to privacy is not unnecessarily infringed when exchanging tax information, is confidentiality.[156] Confidentiality has two dimensions: Firstly, whether the information is confidential and must not be transferred to the other country; and, secondly, how the exchange and subsequent handling of information must be done.

In relation to the first dimension, s 69(2)(a) of the TAA provides that SARS may disclose information in 'the course of performance of duties under a tax Act'. Therefore, the TAA allows SARS to exchange tax information with another country, as the international tax agreement will be seen to form part of the Income Tax Act, which falls within the definition of a tax Act. Further confirmation that confidentiality in general would not prohibit SARS from exchanging tax information is found in s 108(5) of the Income Tax Act, which stipulates the following:

> The duty imposed by any law to preserve secrecy with regard to such tax shall not prevent the disclosure to any authorized officer of the country contemplated in subsection (1), of the facts, knowledge of which is necessary to enable it to be determined whether immunity, exemption or relief ought to be given or which it is necessary to disclose in order to render or receive assistance in accordance with the arrangements notified in terms of subsection (2).

In view of these South African provisions pertaining to taxpayer confidentiality as well as art 26(5) of the MTC, which stipulates that a country may not decline an exchange of information merely because the information is held by a financial institution or a person acting in a fiduciary capacity, I conclude that confidentiality does not constitute a hurdle regarding whether information must be exchanged. However, art 26(3)(c) of the MTC and art 7(2) of the TIEA Model do point towards some form of hurdle, as there is no obligation on a country to exchange information that will reveal any trade, industrial, business, commercial or professional secret or trade process. Nevertheless, it is debatable whether this really creates a hurdle, as the Commentaries on the TIEA Model and the MTC observe that the issue of trade, business or other secrets does not generally arise during information requests and as such only plays a role in limited instances.[157]

Moving to the second dimension, that is, the manner in which the information is treated, both the MTC and TIEA Model specify for what purpose tax information may be exchanged. There is thus a so-called minimum standard of confidentiality as to how the information must be treated.[158] Moreover, art 26(2) of the MTC provides that the exchanged information should be dealt with in a confidential manner and in accordance with the domestic laws of the country receiving the information.[159]

The fact that the way the taxpayer information will be treated after the actual exchange is dictated by the domestic laws of the receiving country highlights the importance of examining the relevant provisions in another country before concluding an international tax agreement

[156] OECD *The 2002 Model Agreement on Exchange of Information on Tax Matters and its Commentary* (2011) para 94.

[157] Ibid para 80; OECD Commentary (note 69 above) at para 19(2).

[158] OECD *Keeping It Safe – The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes* (2012) 10.

[159] Even though the TIEA Model does not make a similar reference to the domestic provisions of the receiving country, the OECD *Keeping It Safe* (note 158 above) at 10 remarks that there should be very little difference practically between an exchange based on the MTC and one based on the TIEA because of the minimum standards of confidentially that are required in terms of both.

that facilitates the exchange of tax information. This also links to the requirement in POPIA that the country to which information is transferred should have adequate protection. A proper examination is imperative because, once a taxpayer's confidentiality has been breached, there is no recourse to undo the impact this has on a taxpayer's privacy.

V CONCLUDING REMARKS

When dealing with South African taxpayers' right to privacy in relation to the exchange of tax information, there are two conflicting interests at play. On the one hand, a taxpayer has the right to privacy as enshrined in section 14 of the Constitution and, for the purposes of this article, as given effect to in the TAA, PAIA and POPIA. On the other hand, the flow of information across international borders ensures tax transparency and that taxing rights are correctly allocated, identifies tax avoidance and evasion.

While the exchange of tax information infringes on a taxpayer's right to privacy, safeguards are built into international tax agreements[160] and POPIA. The question that arises, however, is: are these safeguards sufficient to conclude that the infringement of taxpayers' privacy rights when their tax information is exchanged is reasonable and justifiable as required in terms of section 36 of the Constitution? I argue that some adjustments must be made to the current safeguards, as the exchange of tax information can be achieved by using less invasive means, which is an important consideration in terms of section 36(1)(e) of the Constitution.

Firstly, POPIA's stricter standard of 'relevant' must prevail over the international tax agreement standard of 'foreseeably relevant'. Limiting the scope of taxpayer information that can be transferred would lessen the impact on a taxpayer's privacy. Secondly, when the taxpayer information is in the possession of SARS, a taxpayer must be informed that the taxpayer information is subject to an imminent exchange. This is in line with the IBFD recommendation in this respect and with my interpretation of how this administrative action should be dealt with in terms of PAJA. In addition to complying with PAJA, when notifying a taxpayer and allowing the taxpayer to make representations, the confidentiality of a taxpayer's information is better maintained, as the taxpayer can argue whether or not the relevant information contains any trade, industrial, business, commercial or professional secret or trade process.

[160] This is assuming that the specific tax agreement is based on one of the models discussed in this article.