

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

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**SUMMARY**

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

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

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

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

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

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