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CHAPTER 1

INTRODUCTION, IDENTIFICATION OF AREA OF RESEARCH, OBJECTIVE AND IMPORTANCE OF RESEARCH, STRUCTURE OF THESIS, RESEARCH METHOD, AND MATTERS GENERALLY CONSIDERED TO BE BEYOND THE SCOPE OF THIS THESIS

The administration of government, like a guardianship ought to be directed to the good of those who confer, not of those who receive the trust. - Marcus

Tullius Cicero (Quoteland 2012)

1.1 INTRODUCTION: THE ROSETTA STONE AND THE SOUTH AFRICAN CONSTITUTION

Whilst studying history at school, students may have learnt (but have probably forgotten) that the Rosetta Stone, inscribed in 196 BC, was unearthed by one of Napoleon's officers in 1799 near the town of Rosetta in northern Egypt. Because one of the three languages inscribed on it was ancient Greek – a language still studied by scholars today – it enabled the other two languages, hieroglyphics (at the top) and demotic (at the bottom) to be deciphered. A great number of ancient Egyptian inscriptions that were written in hieroglyphics and demotic and which have survived to the present day, could now be deciphered, telling us the real story of life in ancient Egypt (Microsoft Encarta Online Encyclopedia: Rosetta Stone 2008).

What is not generally known and certainly was never taught at school, however, is that the Rosetta Stone is partly a tax document. Although its main purpose was to sing the praises of the boy king Ptolemy V, it provided for a general amnesty for political rebels and tax debtors as well as immunity from taxes for the priests, their temples and their crops and vineyards. Replicas of the Rosetta Stone were apparently placed by priests at the doorway to

their temples to discourage the overeager revenue collectors from entering the temple to collect taxes (Adams 1999: 2 – 3). Perhaps if one stretches one’s imagination, the Rosetta Stone can also symbolise the protection of the human dignity of the priests, their property, their privacy, their freedom of religion, belief and opinion and even perhaps be extended to encompass a right to just and fair administrative action by government officials.

The Constitution of the Republic of South Africa, 1996 (this Act was promulgated as Act No. 108 of 1996 but in terms of the Citation of Constitutional Laws (Act 5 of 2005), the Constitution of the Republic of South Africa, 1996 is the correct and legal manner in which to refer to the 1996 Constitution but for the purposes of this dissertation will be referred to as the “Constitution”) can be regarded as South Africa’s version of the Rosetta Stone – but it goes a lot further. It not only protects a person, generally, against the unlawful search and seizure of his or her property or person but it also protects many other of that person’s fundamental rights – in fact, 27 fundamental rights as listed in sections 9 to 35 of the Constitution. These 27 fundamental rights are collectively referred to in the Constitution as the “Bill of Rights” (section 7). It is the Constitution, together with the Income Tax Act (Act No. 58 of 1962) (“the Income Tax Act”), the Tax Administration Act (Act No. 28 of 2011) (“the Tax Administration Act”) – which, although promulgated on 4 July 2012, only became effective from 1 October 2012 – and South Africa’s rich Roman-Dutch common law heritage that provides the primary source on which South African taxpayers’ (when using the word taxpayer, only South African taxpayers are intended to be included in the term unless specifically indicated otherwise) rights are built. However, at the outset it is important to recognise that the full scope and ambit of a number of the protective mechanisms for taxpayers, especially those embedded in the Constitution, have yet to be interpreted. The interpretation of the Constitution, and accordingly the scope and ambit of the protection of a person’s fundamental rights, is a task specifically assigned to the judiciary by the Constitution (section 165 of the Constitution).

The approach adopted by the judiciary in interpreting the Constitution and the Income Tax Act is, it is submitted, the true commencement point for defining the scope and ambit of the protection of taxpayers’ rights within a fiscal environment. If the interpretational

approach is too strict, then there will be little protection for taxpayers and consequently the South African Revenue Service (“SARS”) will be able to reign supreme and use all the draconian and other powers at its disposal, without limit or hindrance, to harass and intimidate taxpayers.

The phrase “draconian powers” in this context is used advisedly as the judiciary often use the phrase to refer to administrative provisions of the Income Tax Act that are unusually or excessively harsh, such as the search and seizure powers given to SARS in revenue legislation (*Ferela (Pty) Ltd And Others v Commissioner for Inland Revenue and Others* (60 SATC 513); *Haynes v CIR* (64 SATC 321)) or to appoint an agent to collect taxes outstanding on its behalf or confiscate the property of a taxpayer (*Septaka v C:SARS* (72 SATC 279); *KBI v Van Rooyen en Andere* (58 SATC 117); *C:SARS and Another v East Coast Shipping (Pty) Ltd* (63 SATC 458)). The word has its origins with the Athenian statesman, Draco, who drew up a harsh code of laws in 621 BC. They were said to be written in blood rather than in ink. Criminal acts were punished with death (Britannica Online Encyclopedia: Draconian Laws 2012).

The search and seizure provisions for all revenue legislation are now consolidated in the Tax Administration Act. Since there is little difference between the search and seizure provision as contained in section 74D of the Income Tax Act and replaced in the Tax Administration Act by sections 59 to 62, the interpretation of the new search and seizure provision will be the same as was the case under section 74D.

The new Tax Administration Act, in addition to incorporating the search and seizure provisions of all revenue legislation, now also consolidates all the administrative provisions of the Income Tax Act and other revenue legislation in a single piece of legislation. Its effective date is 1 October 2012. The provisions of the new Act will be referred to and discussed where appropriate – essentially where the provisions of the new legislation differ from the equivalent provisions in the Income Tax Act.

Not all of the 27 fundamental rights listed in the Bill of Rights are relevant in a fiscal context. For example, the right to life (section 11) cannot create a meaningful right for a

taxpayer in fiscal matters. It is interesting to note, however, that until 2011, China provided for the death penalty to be imposed on tax evaders (Hands off Cain 2012). This sanction, happily, does not await an errant South African taxpayer as the Constitutional Court has ruled that the section 11 right to life provision in the Constitution does not permit the imposition of the death penalty for any crime that has been committed in South Africa, even murder (*S v Makwanyane and Another* (1995 (3) SA 391 (CC)). Thus a discussion on the right to life and other fundamental rights such as the right to education (section 29) or the right to practice one's religion freely (section 15) that do not create or even consolidate existing taxpayers' rights directly, are beyond the scope of this thesis. Nevertheless, there are realistically nine fundamental rights contained in the Bill of Rights that actually or potentially provide protection to taxpayers. They are the right to/of:

- equality (section 9);
- human dignity (section 10);
- privacy (section 14);
- freedom of trade, occupation and profession (section 22);
- property (section 25);
- access to information (section 32);
- just administrative action (section 33);
- access to courts (section 34); and
- arrested, detained and accused persons (section 35).

Prior to 1994, the taxpayer was, literally, at the mercy of SARS. Neither the Constitution in place prior to 27 April 1994 (the Republic of South Africa Constitution (Act No. 110 of 1983) and even prior to that, the Constitution of South Africa (Act No. 32 of 1961)), nor the common law, could protect the taxpayer from some of the more far-reaching discretionary powers vested in SARS in terms of the Income Tax Act, especially in regard to obtaining information and assessing and collecting taxes from taxpayers. This is the case even today as the Tax Administration Act, effective since 1 October 2012, contains virtually the same discretionary powers in this respect as existed in the Income Tax Act prior to that date. The powers were often used by SARS with immunity to violate a taxpayer's common

and administrative law rights. This was because Parliament, rather than the Constitution, was “supreme” (see generally, the discussion on the supremacy of Parliament prior to 1994 in Chapter 2, para 2.3). What Parliament decreed was the law. It did not matter that a common law right was violated provided that there was legislation in place that permitted such violation. For example, the search and seizure provisions contained in section 74(3) of the Income Tax Act were repealed and replaced in 1997 by section 74D because section 74(3) was constitutionally unsound in that the broad way in which its provisions were framed, violated, *inter alia*, the fundamental right to privacy (section 14) and even the right to human dignity (section 10). It permitted the Commissioner for the South African Revenue Service (“Commissioner”), without having to obtain a court-sanctioned warrant, to authorise SARS’ officials to search a taxpayer’s property and seize any books, documents and information that it deemed necessary for its purposes. There were no proper guidelines set as to when, where and under which circumstances the Commissioner could issue the search and seizure warrant. The search and seizure procedures, therefore, could be used for so-called “fishing expeditions”, ostensibly to gather information and evidence against a taxpayer when such information and evidence may not have existed in the first place.

The search and seizure provision, as it stood until 1997, was a good example of the violation of the right to privacy, human dignity and even the right to property. The newer section 74D of the Income Tax Act, now carried over to section 59 of the Tax Administration Act, requires that a court-sanctioned search warrant be obtained before SARS’ officials may search and seize a taxpayer’s property and seize his or her records. The section 74D search and seizure provisions of the Income Tax Act have been found to pass constitutional muster (*Investigating Director: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (2001 (1) SA 545 (CC)) as any fundamental right guaranteed in the Bill of Rights can be limited by the section 36 limitation of rights clause of the Constitution, if the limitation of the right is regarded as “reasonable and justifiable in an open and democratic society”.

It is submitted that the limits on the powers of SARS were never properly addressed by the legislature in the period prior to 1994. Neither the legal fraternity nor the taxpayers themselves campaigned vigorously enough for reform in this area. The focus was rather, as it should have been, on gross human rights violations by the Apartheid regime in power at that time and the consequential international economic and political sanctions imposed on South Africa. As a consequence, it is further submitted that the rights of taxpayers and their protection, unsurprisingly, took a back seat. However, with the general public becoming more aware of their constitutionally guaranteed fundamental rights since 1994, fiscal legislation and the decisions, actions and conduct of SARS are now being questioned, debated and argued – but still, on a relatively limited scale.

1.2 IDENTIFICATION OF AREA OF RESEARCH

South Africa has a relatively new Constitution in world terms although it is already some eighteen years old. The country also has an Income Tax Act, amended at least annually, which was enacted some fifty years ago. It is generally the interaction between the protection afforded to all the people South Africa in terms of the Constitution – especially the Bill of Rights – and the draconian powers granted to SARS in terms of the Income Tax Act, the newly effective Tax Administration Act and other fiscal legislation to assess and collect taxes that creates the conflict between the taxpayer and SARS.

Taxpayers, in effect, are in a special partnership with the state, with the partnership agreement being regulated by the provisions of the Income Tax Act, the Tax Administration Act and the Constitution. Unlike a normal partnership, however, SARS has several powers at its disposal to establish, assess and collect what is its share of the partnership income. Taxpayers can attempt to mitigate the application of the powers of SARS by invoking the provisions of the Constitution, especially their fundamental rights as guaranteed in the Bill of Rights.

From the discussion so far, it is clear that the research done for this thesis is in the area of the rights of taxpayers but restricted to certain constitutional issues as identified in paragraph 1.5 below when outlining the structure of this thesis.

1.3 OBJECTIVE OF THE RESEARCH

The general objective of the research done for this thesis was to identify, analyse and appraise the scope and ambit of certain selected rights of taxpayers from a constitutional perspective and to discuss how and when these rights are protected by the judiciary. The objective is stated in very wide terms because of the structure of this thesis. Each chapter other than the introduction and the overall conclusion to this thesis (Chapters 1 and 8), has as its core an article. Each core article of the other six chapters (Chapters 2 to 6) deals with a separate constitutional issue and each article has its own objective and limitations. Thus, it is not deemed appropriate to detail their respective objectives or limitations in this paragraph as they are already detailed in the core articles.

1.4 IMPORTANCE OF THE RESEARCH

The Constitution is already some eighteen years old. Nevertheless, unlike other areas of the law, the rights of taxpayers have not really been developed within a constitutional context. Taxpayers seem reluctant to challenge revenue legislation or the actions, decisions or conduct of SARS constitutionally. Thus, there has been a dearth of judicial decisions in this regard. Neither have there been scholarly authored textbooks or articles written on the issue of tax interpretation, tax administration and taxpayers' rights from a constitutional perspective until fairly recently. Croome (2010), Croome and Olivier (2010) and Klue, Arendse & Williams (2009) are some of the first authors to do so. However, it was not possible for any of those authors to discuss and analyse each right of a taxpayer in detail from a constitutional perspective and, therefore, there are still a number of gaps in this body of knowledge.

Research into the scope and ambit of taxpayers' rights is important, not only from a procedural point of view, for example, knowing that you are able to object and appeal against an assessment within a certain time frame, but also from a substantive law point of view, for example, interpreting the subtleties or different shades of meaning of a right to "equality" and "human dignity" or to "privacy". Having an understanding of both procedural and substantive law rights can assist taxpayers and their advisors in resisting and

protecting their own and, where applicable, their clients' rights against unconstitutional legislation and unconstitutional conduct or challenges by SARS. This opens up a whole new avenue of legal arguments to protect and enforce one's rights. Herein lies the importance of research into this area of the law.

Simultaneously, it is hoped that research in this area can be of assistance to SARS, so that it too can easily recognise the limits of its powers and not exceed them, thereby violating taxpayers' rights. Only by knowing the limits of its powers in terms of the Constitution, will SARS be in a position to execute its promise to protect taxpayers' constitutional rights, as detailed in the SARS Client Charter, which unfortunately, is no longer published on the SARS website – nor can it be found in the internet archives. Performing its duties strictly in accordance with the Income Tax Act, the Tax Administration Act and following the dictates of the Constitution (including common law principles) will, it is submitted, lead to greater respect and trust for SARS from the general taxpaying public.

The issue of taxpayers' rights is a relatively new and evolving area of our law, and many of the matters raised during the course of this research must still be further defined and refined by the judiciary. Hopefully, the matters raised, discussed or analysed in this thesis will encourage further debate in the area so that ultimately the law relating to taxpayers' rights can be properly and suitably developed.

Even rights that were available to taxpayers prior to the enactment of the Constitution, for example, rights accorded in terms of the Income Tax Act itself or through common or administrative law, are now subject to the constraints and dictates of the Constitution. The Constitution, however, does not limit the rights that taxpayers previously enjoyed. Rather, it expands the ambit of the rights, taking into account the “spirit, purport and objects of the Bill of Rights” (section 39(2) of the Constitution).

1.5 STRUCTURE OF THESIS

As already indicated in paragraph 1.3 above, this thesis has six chapters each dealing with a separate constitutional issue, in addition to the introduction and concluding chapters. The core of each chapter is based on six articles, four of which have already been published. Each article is a stand-alone or independent article but they are all connected and synthesised so that each one meets the overall or general objective of this thesis, namely to identify, analyse and appraise the general scope and ambit of certain selected constitutional rights of taxpayers and to discuss how and when these rights are protected by the judiciary.

1.5.1 Is the structure of this thesis unique?

It has been a fairly easy task to connect and synthesise both the published and unpublished articles and present them in the form of a thesis as they were originally envisaged and written as chapters for this thesis. It was only after the structure of this thesis had been finalised that a decision was taken to publish certain chapters or parts of a chapter as independent articles prior to the presentation of the thesis for examination.

The University of South Africa (hereafter “Unisa”) in its brochure that sets out the general information for master’s degrees and doctorates states that a student may “include material from any existing publications in the thesis, provided that it is clearly indicated as such” and meets the general requirements for a doctoral degree (Unisa 2010: 10). Unisa’s general requirements for a doctoral degree are based *verbatim* on the South African Higher Education Qualifications Framework (CHE The Higher Education Qualification Framework 2007) which requires a candidate

to undertake research at the most advanced academic levels culminating in the submission, assessment and acceptance of a thesis ... The defining characteristic of this qualification is that the candidate is required to demonstrate high-level research capability and make a significant and original academic contribution at the frontiers of a discipline or field. The work must be of a quality to satisfy peer review and merit publication.

The core of these requirements is high-level research, a significant and original contribution to a discipline or field, the ability to stand up to peer review and that it merits publication. It is submitted that these requirements can all be met by submitting a series of published, peer-reviewed journal articles that are connected, synthesised and presented in the form of a thesis for examination. Support for this submission is given by Draper (2008), who is of the opinion that the idea of awarding a doctoral degree by publication is “that a researcher who has published at least as much as would go in a conventional PhD should be able to apply for the award of a PhD”.

This thesis may appear to be unique to Unisa but it is not. It follows the conventional thesis route using four published, peer-reviewed journal articles as well two unpublished articles as the core to six of the chapters of the thesis. The introduction, conclusion and connecting paragraphs between chapters synthesise the articles into a coherent whole to meet the general objective of the thesis.

1.5.2 Presentation of the articles in the thesis

The six articles that make up the core of this thesis, although they vary considerably in format and style and even length, are reproduced in their original form as they were either published in the peer-reviewed accredited journals or will be submitted to an accredited journal for peer review. Each core article is presented in a separate chapter with a special introduction and concluding remarks that connect, integrate and synthesise the articles into the body of this thesis. Thus, the abstracts and full bibliographies of both the published and unpublished articles are also included in the relevant chapters. The published articles are intentionally not altered or amended in any way so as to retain their individuality within the body of the thesis. The published articles are not completely error free. There are a few language, formatting and referencing errors. These errors are noted either just before the presentation of the article in its original format or immediately after the presentation of the article. In addition, where there has been any change to legislation or a ground-breaking judicial decision subsequent to the publication of an article included in this thesis or there is

an aspect in the article that needs further clarification, amplification or analysis, they are commented upon either in the paragraph introducing the article or in the paragraph that synthesises the article to the overall framework of the thesis.

1.5.3 Details of the “core” articles used in this dissertation

Article 1 (Chapter 2)

The purposive approach to the interpretation of fiscal legislation - the winds of change.

Published in *Meditari Accountancy Research*. 16(2) 2008: 107-121.

Article 2 (Chapter 3)

Hanged by a comma, groping in the dark and holy cows – fingerprinting the judicial aids used in the interpretation of fiscal statutes.

Published in the *Southern African Business Review*. 16(3) 2012: 30-56.

Article 3 (Chapter 4)

The application and constitutionality of the so-called “reverse” onus of proof provisions and presumptions in the Income Tax Act - the revenue’s unfair advantage.

Published in *Meditari Accountancy Research*. 17(2) 2009: 61-83.

Article 4 (Chapter 5)

The taxpayer’s quest for just administrative action – clean hands, good facts, due process and the human element.

This article was unpublished at the date that this thesis was completed.

Article 5 (Chapter 6)

Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law.

Published in *Southern African Business Review*. 15(2) 2011: 1-25.

Article 6 (Chapter 7)

Judge for yourself – the application of the constitutional right to equality in a fiscal environment.

This article was unpublished at the date that this thesis was completed.

1.5.4 Structure used to connect and synthesise articles used in thesis

Adam Smith (1776) in his book, *An enquiry into the nature and causes of the wealth of nations*, postulates four maxims (also referred to as the “cannons of taxation”) that revenue laws should adhere to. These laws should be:

- equal and in accordance with the ability to pay;
- certain, clear, plain and not arbitrary;
- convenient; and
- economic.

These maxims are generally regarded as the basis of a theoretically sound taxation system. It may be argued that taxpayers have always had the expectation that government and SARS should and would adhere to these four maxims. Nevertheless, government, through the legislature, may introduce tax legislation that is not certain, clear or plain and the legislation introduced may even contain elements of arbitrariness. An example of arbitrary legislation introduced is section 23(m) of The Income Tax Act, which deals with the prohibition of certain deductions for an employee who earns remuneration not mainly in the form of commissions. This section is analysed and discussed in detail in Chapter 7 when dealing with the right to equality.

If legislation introduced is always certain, clear, plain and is not arbitrary in nature, it is submitted that there would be little need for the judiciary to be so involved in interpreting fiscal legislation. Furthermore, Smith’s other maxims relating to equality, convenience and economics are also sometimes all but forgotten by government and SARS in its quest to raise as much revenue as possible to feed the coffers of the treasury.

Unfortunately, there are regular reports in the local newspapers, radio and on television of allegations of corruption and fraud by government officials and even cronyism leading to misspending of hard earned taxpayer's taxes. Intellectual honesty demands that scarce resources rather be allocated to feed starving children and provide shelter and proper health care to the sick, elderly and homeless. Even more compelling than mere intellectual honesty, however, is section 195(1)(b) of the Constitution, which demands that the "efficient, economic and effective use of resources must be promoted" by the organs of state. Bribery, corruption and the inefficient allocation and misuse of tax revenue, at the expense of service delivery, are not acceptable. It is submitted that faced with wasteful and fruitless expenditure or expenditure relating to bribery, corruption and fraud, taxpayers may become resentful and this could be one of factors contributing to complex tax avoidance and evasion schemes being devised by or for them.

To counter possible tax avoidance and evasion schemes, the legislature introduces measures enabling SARS to obtain information and assess and collect taxes and thus to prevent tax avoidance and tax evasion schemes. Some of the measures introduced may be regarded as being out of line with the founding principles of the Constitution. However, even if such legislation is found to be constitutional, for example, the search and seizure procedures now contained in sections 59 to 62 of the Tax Administration Act, the conduct of SARS in enforcing such measures may result in the violation of a taxpayer's fundamental constitutional right. The conduct of SARS in enforcing such measures and whether such conduct measures up to the standards required by the founding principles of the Constitution, is discussed in detail in Chapter 5 of this thesis.

In its interpretations of legislation, some certainty as to the scope and ambit of the powers of SARS is also established. The approach that the judiciary uses to interpret the Constitution and fiscal legislation is, it is submitted, the foundation on which taxpayers' rights are ultimately built. Accordingly, Chapter 2 of this thesis analyses the approach used by the judiciary to interpret fiscal legislation. A published journal article on the approach used by the judiciary to interpret fiscal statutes is used as the nucleus for this chapter. With the adoption of the Interim Constitution in 1994, which was later replaced by the

Constitution of the Republic of South Africa, 1996, the judiciary was forced to reappraise the manner in which statutes, including fiscal statutes, were interpreted. The core article presented in Chapter 2 discusses the shift by the judiciary from a “strict and literal” approach to a “purposive” approach to interpreting fiscal statutes and the consequences of the change in approach for both the taxpayer and SARS.

Chapter 3 also deals with the “purposive” approach to the interpretation of statutes but is more practical in nature. It fingerprints and focuses on the aids and presumptions that are helpful to the judiciary in interpreting statutes “purposively”. Aids, both external and internal, that may have been frowned upon in the past may now be used to assist in the interpretation of fiscal statutes. The core of Chapter 3 is an article published in an accredited journal in 2012.

In 1993, a commission of inquiry was set up to investigate certain aspects of the tax structure in South Africa. The report is generally referred to as the “Katz Report” (1994). Included in the report is a brief section dealing with the expected impact of the Interim Constitution on certain provisions of the Income Tax Act. The right to privacy, the right to equality (Smith’s first maxim), recovery of tax, certain administrative practices and the reverse onus of proof provisions of the Income Tax Act were identified as, *prima facie*, violating the fundamental rights of taxpayers as guaranteed by the Interim Constitution. However, there was no real substantive law discussion on these aspects in the Katz Report. Unfortunately, eighteen years later, there still has not been much discussion or detailed academic research done on the scope and ambit of the constitutional rights of taxpayers from a substantive law perspective.

As already suggested, the approach to the interpretation of fiscal legislation is considered to be the foundation upon which taxpayers’ rights are built. However, the facts pertaining to any fiscal challenge are just as important as a challenge to fiscal legislation – perhaps even more so. Usually, the side with the best facts has the momentum. Where the taxpayer has the law on his or her side but no or few facts to support the position adopted, this will probably result in failure for the taxpayer. This is because the Income Tax Act, at

present, contains several so-called “reverse onus” provisions. These reverse onus provisions only relate to facts and not law. Thus, Chapter 4 discusses and analyses, in detail, the constitutionality of the “reverse onus” of proof provisions of the Income Tax Act (as originally identified by the “Katz Report” as being constitutionally questionable). The discussion has as its core, a published peer-reviewed journal article. Although this article was written some four years before the promulgation of the Tax Administration Act – which is effective from 1 October 2012 – it will be seen from the detailed discussion that follows on from the core article that there has been a welcome shift in the onus of proof provisions from the taxpayer to SARS where administrative understatement penalties may be imposed, in future, in terms of the new legislation.

Chapter 5 also deals with facts but from a different perspective to that of the reverse onus of proof provisions. It deals with the quest of taxpayers for just administrative action. The taxpayer is usually successful in his or her quest for just administrative action as guaranteed in terms of section 33 of the Constitution when he or she approaches the judiciary with clean hands and good facts to support his or her challenge to the decisions, actions and conduct of SARS. It appears, from the research done in Chapter 5, that the judiciary finds the combination of clean hands and good facts on the part of the taxpayer an irresistible combination and even where the legislation appears to be against the taxpayer, the judiciary attempts to find an equitable and fair constitutional remedy for the taxpayer, based usually, on the principles of natural justice. The determination of the scope and ambit of the right to just administrative action is also influenced by several other fundamental rights contained in the Constitution, for example, the right to privacy, the right to human dignity and the right to property. It furthermore overlaps with and is influenced by the right to equality, but the right to just administrative action, it is submitted, is considered to be such a vital element in the protection of the rights of taxpayers that it deserves a separate and detailed discussion. The core of Chapter 5 is in the form of an article that is at the time of submission of this thesis, unpublished.

Prior to 1994, discriminatory provisions based on gender, age, marriage and religion were scattered throughout the Income Tax Act. Several of these blatantly discriminatory provisions have now been removed to conform with the fundamental right to equality (section 9 of the Constitution). However, the substantive meaning of equality within a fiscal environment has not been properly addressed, neither by SARS nor by the judiciary and thus potentially, discriminatory provisions that infringe upon a person's human dignity, remain in the Income Tax Act. Chapters 6 and 7 of this thesis, therefore, analyse the scope and ambit of the right to equality within a fiscal environment. Chapter 6 deals with the theoretical foundation to the substantive meaning of fiscal "equality" in the form of a peer-reviewed article published in an accredited journal. Chapter 7 takes the analysis further. It looks at the practical application of the right to "equality" within a fiscal environment. The core of this latter chapter is in the form of an article that at the time of the submission of this thesis is unpublished.

In effect, therefore, Chapters 4 to 7 analyse and discuss most of the potential constitutional problem areas as identified in the Katz Report as *prima facie* violating one or other fundamental right of the taxpayer.

Chapter 8 is the final chapter of this thesis. It is the chapter that ultimately connects, synthesises, reflects and summarises the major conclusions reached in the various chapters of this thesis. It also indicates the areas of taxpayers' rights that need further research.

1.6 RESEARCH METHODOLOGY¹

The research on which this thesis is based analyses and interprets the South African Constitution, including the Bill of Rights, and tax legislation, together with relevant case law and scholarly writings on these two areas of law. The research therefore clearly falls within the domain of legal research. Identifying the paradigm into which the research can be classified is not a simple matter. As far as could be ascertained, legal researchers do not

¹ This paragraph on research methodology is based upon and aligned to the work of Professor Stack (Stack 2012) who has kindly consented to its use in this paragraph.

attempt to describe the paradigm or orientation of their research in terms of its ontology, epistemology or methodology, but merely describe the method they have used. Thus, it is considered to be beyond the scope of this paragraph to discuss a possible paradigm into which this thesis may fall. Further research into this aspect could be instructive.

The Council of Australian Law Deans, in their *Statement on the Nature of Legal Research* (2005:1), summarise the nature of legal research as follows:

Legal research is multi-faceted. It is distinctive in some respects, and part of the mainstream of the humanities and social sciences in others. It would equally be mistaken to think of legal research as wholly different from, or wholly the same as, other research in the humanities and social sciences.

The Statement refers to the *Pearce Report* (1987), which categorised legal research as either “doctrinal”, “theoretical” or “reform-oriented” research. It also refers to the Canadian *Arthurs Report* (1983), which identified “fundamental” legal research as a fourth category.

The two reports described these four categories as follows:

- doctrinal – the systematic exposition, analysis and critical evaluation of legal rules and their interrelationships;
- theoretical – the conceptual bases of legal rules and principles;
- reform-oriented – recommendations for change, based on critical examination; and
- fundamental – law as a social phenomenon, exploring social, political, economic, philosophical and cultural implications and associations.

The Council of Australian Law Deans emphasise that the categories are overlapping, rather than mutually exclusive – convenient, rather than precise ways of thinking about legal research. The present research analyses and interprets the South African Constitution and the Bill of Rights, together with relevant case law, to identify a theoretical framework of taxpayer rights and uses this framework to analyse, interpret and critique certain provisions

in South African income tax legislation to determine whether, how and to what extent they infringe upon taxpayers' rights. The research therefore clearly falls into both the doctrinal and reform-oriented research categories, in terms of their description in the *Pearce* and *Arthurs* Reports.

McKerchar (2008) states that doctrinal research “provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps predicts future developments. It is also sometimes referred to as ‘black letter’ law research as it is based purely on documentary data”. Salter and Mason (2007:44), based also on the writings of various legal scholars, strongly criticise the “black letter” approach to doctrinal research when they write that “[o]ne element of the operation of this approach is to seek to insulate your analysis of the . . . topic from the supposedly ‘non-legal’ factors regarding, for example, policy and ideological issues as if these were somehow ‘external’ to, and independent of, strictly legal research” and that “[a] central goal of black-letter analysis is to reveal the presence of a series of rules based upon a smaller number of general legal principles...”. Salter and Mason (2007:45) also submit that “[s]tudents who adopt the black letter approach are not prevented from making criticisms of legal doctrine, although such permissible criticisms are limited in nature and scope to the exposure of ambiguities and gaps within existing law...”. Salter and Mason divide legal research into doctrinal and socio-legal research. It is not clear whether doctrinal research, other than the strict “black letter” approach, falls into the socio-legal category.

The present research partly adopts the “black letter” approach, but goes much further. The *Arthurs Report* (1983), dealing with legal research, includes in the doctrinal research methodology category, expository research (conventional treatises and articles/‘black letter law’), and in the “interdisciplinary” methodology, law reform research (social-legal research/‘law in context’). By linking social science with legal research, the present research can be described as employing both expository and law reform methodologies. The methodology is clearly qualitative and the method adopted consists of the analysis and interpretation of archival data. The analysis and interpretation is based on natural language arguments using both deductive and inductive reasoning.

The literature review for this thesis consisted of a content analysis of the Constitution, the relevant provisions of the Income Tax Act, the Tax Administration Act (effective from 1 October 2012) and other relevant fiscal legislation such as the Value-Added Tax Act (Act No. 89 of 1991) and the Customs and Excise Act (Act No. 91 of 1964) as well as common law principles and case law. The reported decisions of the Tax Court (previously known as the “Special Court”), the High Court (formerly known as the “Supreme Court”), the Supreme Court of Appeal (formerly known as the “Appellate Division of the Supreme Court” or “AD”) and the Constitutional Court were frequently referred to together with the relevant reference books and journal articles pertaining to the subject matter being researched.

Foreign reported decisions, especially those from Britain, the United States of America and Canada, are referred to where appropriate. Section 38(1) of the Constitution, after all, compels the judiciary to consider international law and permits the judiciary to refer to foreign law when interpreting the Bill of Rights, provided that the judiciary “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom” (section 38(1) of the Constitution).

As far as the local court decisions are concerned, a comprehensive search has been done on the LexisNexis Electronic Library database (LexisNexis 2012) and the appropriate cases relating to the objective of this thesis were selected. An internet search was also done for various published articles on the subject under consideration, both locally and internationally.

Such an examination, by the very nature of the inquiry, is beset with considerable limitations. Nevertheless, it will be possible to conclude generally on the extent of taxpayers’ constitutional rights based on the material reviewed, analysed, discussed, appraised and critiqued during the course of this thesis.

As all the documents involved in the research are in the public domain, no ethical considerations arise. From the point of view of the possible bias of the researcher, it is clear that there is a bias in favour of the taxpayer's rights, but only to the extent that the legislation and the actions of SARS infringe these rights. The research is based on a theoretically developed framework of taxpayer's rights, which represents an objective analysis of these rights in terms of the Constitution and the Bill of Rights, but also an objective analysis of the limitations on these rights.

1.7 MATTERS GENERALLY CONSIDERED TO BE BEYOND THE SCOPE OF THIS THESIS

Of necessity, there had to be some limit to the scope of South African taxpayers' rights that are discussed and analysed in this thesis. Therefore, the discussion and analysis are limited mainly to the constitutional rights of South African taxpayers arising as a result of the fundamental rights now guaranteed in terms of the Bill of Rights, rather than the pure procedural rights arising from the Income Tax Act or the Tax Administration Act.

Also considered to be beyond the scope of this thesis is a full discussion on when the provisions of the Constitution in general and the Bill of Rights in particular, are applied 'directly' or 'indirectly' to any law or conduct that is being challenged by a taxpayer. Although, theoretically, under the 1996 Constitution, a distinction between the direct and indirect application of the Bill of Rights is no longer sustainable, it still has some practical ramifications for jurisdictional reasons. It must be clearly determined whether the legislation in question is tested directly against the Bill of Rights or whether it is merely interpreted with reference to the Bill of Rights" (Currie & De Waal 2005: para 3.5(b)). In other words, if the Constitution is applied directly and as a result a piece of legislation is declared unconstitutional by any court lower than the Constitutional Court, then such declaration of invalidity must be confirmed by the Constitutional Court (section 167(5) of the Constitution). On the other hand, if a court lower than the Constitutional Court applies the provisions of the Constitution indirectly to a piece of legislation by, for example, "reading down" when interpreting legislation (see Chapter 3), then no

confirmation of the lower court's interpretation is necessary by the Constitutional Court. When a court interprets legislation by "reading down", it is indicating that it prefers a constitutionally compatible interpretation where that is possible instead of declaring the legislation unconstitutional, which could lead to a legal vacuum being created (see Chapter 3 generally).

Distinguishing between the direct and indirect application of the Constitution is also of practical importance when it relates to remedies that the taxpayer can invoke against SARS for any decision, action or conduct that is unreasonable. This aspect is discussed briefly in Chapter 5 when dealing with the section 33 right to just administrative action.

A detailed discussion on the rule of law is also considered to be beyond the scope of this thesis. However, a definition of the rule of law as accepted internationally, is briefly given and discussed in paragraph 1.8 below in the context of a constraint on the exercise of governmental power in a fiscal environment.

Finally, as already indicated, the scope of this thesis is limited to the constitutional rights of South African taxpayers that are discussed in the core articles presented in the thesis in Chapters 2 to 7.

As the research for this thesis was completed on 30 September 2012, legislation that has become effective after that date is not analysed, with the exception of the Tax Administration Act. This latter Act became effective from 1 October 2012 and thus, where its provisions impact on any aspect discussed in this thesis that would change any of the conclusions reached, they will, of necessity, be analysed and discussed. This is particularly true in the case of the onus of proof provisions as contained in section 82 of the Income Tax Act and the corresponding equivalent replacement provisions in the Tax Administration Act. The same rule applies in respect of case law – only cases reported in law reports published up to and including 30 September 2012, are included.

Other limitations on the scope of the discussions and analysis of taxpayers' rights are mentioned as and where appropriate during the course of this thesis.

1.8 THE RULE OF LAW AND THE CONSTITUTION

Section 1(c) of the Constitution enshrines both the supremacy of the Constitution as well as the rule of law as one of its founding values. In terms of the supremacy of the Constitution, no one can be above the law, whether it be Parliament or even the State President. This is also one of the principles included in the concept of the rule of law (LexisNexis 2012).

The concept of the rule of law has different meanings for different countries. For example, Zimbabwe may claim that they are applying the rule of law when confiscating farmland from white farmers. It may be a repugnant practice but the Zimbabwean government made sure that the proper legislation was in place – passed through Parliament and properly promulgated - when the confiscation took place. In a narrow sense, their government may be technically correct in claiming that Zimbabwe is applying the rule of law. However, such a claim does not sit easily with the internationally acceptable definition of the rule of law as advocated by the World Justice Project. The rule of law, according to the World Justice Project, is founded upon a rules-based system in which the following four universal principles are upheld (Hoffman 2013):

- *"The government and its officials and agents are accountable under the law;*
- *The laws are clear, publicised, stable and fair, and protect fundamental human rights, including the security of persons and property;*
- *The process by which laws are enacted, administered, and enforced is accessible, fair and efficient;*
- *Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve."*

These four internationally acceptable principles defining the rule of law are enshrined in the South African Constitution (see the Bill of Rights generally, sections 7-39 of the Constitution and sections 165-180 of the Constitution). Thus, when mentioning the rule of law in this thesis (see especially Chapter 5 dealing with the conduct of SARS' officials), the founding values of the Constitution, which determine the ambit of the rule of law, must be taken into account. In effect, the application of the Constitution and/or the rule of law is one and the same application and act as a constraint on the exercise of governmental power, whether it be through the introduction of new legislation or the manner in which, for example, SARS carries out its mandate to assess and collect taxes on behalf of the government.

1.9 SUMMARY

The Constitution, as it stands in 2012, resembles the role played by the Rosetta Stone for early civilisation, but it goes much further. It protects the fundamental rights of all of the people of South Africa rather than a select few. Nine of the 27 fundamental rights detailed in the Bill of Rights have been identified as consolidating or possibly creating new rights for taxpayers. The judiciary is tasked with interpreting the scope and ambit of these rights.

Several powers are still available to SARS to investigate, assess and collect taxes. Many of them (discussed in greater detail in Chapter 5 of this thesis), because of their draconian nature, *prima facie*, violate one or more of a taxpayer's constitutional rights (see for example, *Ferucci and Others v C:SARS and Another* (65 SATC 470)). Prior to 1994, taxpayers hardly ever challenged these measures as any legislation passed by Parliament was regarded as "supreme" (see detailed discussion in this regard in Chapter 2 of this thesis). The advent of the Constitution and the surrounding publicity has meant that the general public have become more aware of their constitutionally guaranteed fundamental rights. Thus, fiscal legislation and the decisions, actions and conduct of SARS are now being questioned, debated and argued from a constitutional perspective.

It is submitted that the citing of constitutional rights may appear to the uninformed as a ploy of last resort – a mere clutching at straws – to delay or frustrate any action to be taken by SARS. However, the human rights culture also has a place in the tax law in South Africa – even for the blatantly fraudulent taxpayer. Taxpayers should not only examine their rights in terms of the Income Tax Act, the Tax Administration Act and other fiscal legislation but should also look to the Constitution in general (which includes common law relief) and the Bill of Rights in particular to complement their rights when involved in a dispute with SARS. The Constitution is the “supreme” law in South Africa. It is the cornerstone of our democracy and the guardian of our fundamental rights. It cannot and should never be regarded as the taxpayers’ right of last resort!

CHAPTER 2

THE WINDS OF CHANGE – FROM ADAM SMITH TO THE “PURPOSIVE” APPROACH IN INTERPRETING FISCAL LEGISLATION

“You can have a Lord, you can have a King, but the man to fear is the tax collector.”

(Adams 1999: 2-3).

2.1 INTRODUCTION

The proverb about the tax collector was inscribed on several clay tablets excavated at Lagash, in Sumer, the fertile area between the Tigris and Euphrates rivers in what is now known as Iraq. The clay tablets date back some six thousand years (Adams 1999: 2–3). Unfortunately, nothing much seems to have changed in six thousand years – the tax collector is still feared today.

Generally, taxation can be regarded as an invasion of a person’s privacy. SARS requires information on, for example, for whom you work, how you earn your income, how much you earn, what your expenses are (even private expenses if you are the victim of a lifestyle audit) and what shares or other investments you own, locally and overseas. Even the names of a taxpayer’s spouse and his or her children and the address where he or she lives, are required to be disclosed to SARS. The detailed information collected from a taxpayer and stored in SARS’ computer data bank is supplemented with and cross-checked with information obtained from third parties such as financial institutions and even the motor vehicle licensing department from which SARS can determine the make of motor vehicle that is driven and even how many kilometres are driven per annum. Every cheque and bank transaction is recorded and financial institutions are required to divulge the taxpayer’s financial transactions, on demand, to SARS. No wonder that both “innocent” and “guilty” taxpayers are equally afraid of SARS.

Tax avoidance and tax evasion have always existed alongside taxes and will continue to exist as long as there are taxes. Ironically, the only real cure for tax avoidance and tax evasion would be to end taxes. However, it is considered to be beyond the scope of this thesis to discuss the merits for the abolition of taxes. Rather, this chapter is devoted to presenting the first article that is part of the core of articles making up the body of this thesis. It is entitled “The purposive approach to the interpretation of fiscal legislation – the winds of change” and was published in *Meditari Accountancy Research* (Goldswain 2008: 107–121).

The question that may immediately be asked is: How can the approach that the judiciary uses to interpret fiscal statutes ever be regarded as part of the notion of taxpayers’ rights?

2.2 ARGUING THE NOTION THAT THE APPROACH USED BY THE JUDICIARY TO INTERPRET FISCAL LEGISLATION IS THE ROOT OR FOUNDATION OF ALL TAXPAYERS’ RIGHTS

Adam Smith’s (Smith 1776) idea that tax should be certain, clear, plain and not arbitrary, is considered to be a theoretically sound system of taxation – if there is to be a taxation system at all. Where taxes are not certain, clear and plain or are arbitrary, the taxpayer has a right to have such legislation adjudicated on by the judiciary who must then step in and interpret its scope and ambit within a constitutional framework (section 39 of the Constitution).

As indicated in the core article for this chapter reproduced in its original form below, the objective of the article, and thus of this chapter, is to answer some very important questions in regard to the interpretation of fiscal statutes, namely –

- Is the approach to the interpretation of fiscal legislation the same as the interpretation of legislation in other areas of the law?
- Should a strict and literal approach to the interpretation of fiscal legislation be followed or a more flexible approach, possibly the purposive approach, be followed?

- Has the Constitution influenced the way in which legislation (including fiscal legislation) is now being interpreted?
- If so, what is the general impact of the change in direction?

Every piece of legislation that is interpreted by the judiciary assists the process of making legislation certain, clear and plain even if the legislation is flawed in these respects *ab initio*. Arbitrary legislation usually leads, *prima facie*, to a violation of one or more of a person's constitutionally protected fundamental rights. The judiciary has confirmed that arbitrary legislation offends a person's fundamental rights and is not reasonable nor justifiable "in an open and democratic society" as required for a fundamental right to be limited in terms of section 36 of the Constitution (*First National Bank of SA Ltd t/a Wesbank v CIR and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (64 SATC 471)).

Thus, the right of recourse to the courts and the interpretation of the judiciary of any uncertain, unclear and arbitrary legislation is the most valuable right of the taxpayer. It is the starting point for the determination of the scope and ambit of all taxpayers' rights.

A discussion on the approach followed by the judiciary in interpreting fiscal statutes and taxpayers' rights that arise from it, are presented in the next paragraph. The core of the discussion is offered in the form of a peer-reviewed accredited journal article that is reproduced in its original published format. Please note that on page 109 of the reproduced article, paragraph 3 line 4, the words "in respect of" were omitted during final editing. The sentence should read, "received or accrued in respect of services rendered ...". Furthermore, the reference to "The South African Revenue Services" should read "The South African Revenue Service". Finally, as indicated in paragraph 1.1 of this thesis, the 1996 Constitution should be referred to as The Constitution of the Republic of South Africa, 1996, in terms of the Citation of Constitutional Laws (Act 5 of 2005) and not The Constitution of the Republic of South Africa (Act No. 108 of 1996) as indicated in the article.

2.3 THE WINDS OF CHANGE - THE FIRST “CORE” ARTICLE

The purposive approach to the interpretation of fiscal legislation – the winds of change

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Abstract

This study examines the way in which our judiciary approach the interpretation of fiscal legislation. It traces the roots of the historical approach (the strict and literal approach), its shortcomings and the modifications to such an approach when it leads to an absurdity. It then analyses whether the advent of the Constitution (Constitution of the Republic of South Africa Act 108 of 1996) has been a catalyst for a change from the strict and literal approach. The conclusion reached is that the Constitution has been a catalyst for a change in approach – to a purposive approach. One of the results of the change in approach means that the taxpayer now has a realistic opportunity to question and even have unjust and unfair interpretation decisions of the past reversed in the appropriate circumstances.

Key words

Constitution
Interpretation of legislation/statutes
Purposive approach
Taxpayers' rights

1 Introduction

According to legend, Abraham Lincoln was once asked: “How many legs does a dog have if you call a tail a leg?” The natural answer, of course, is “five”, to which Abe allegedly replied: “No, the answer is four, because no matter how many times you call a tail a leg it remains a tail” (Feinstein 1998: 1).

Our judiciary faces a similar quandary on a daily basis when interpreting legislation. Interpretation, in the context of fiscal legislation, is the cornerstone on which the revenue authorities can assess and collect taxes and correspondingly, the foundation on which a taxpayer’s rights are built.

Many questions arise about the approach that the judiciary used or should use to interpret fiscal legislation. Some of the important questions that arise in this context are:

- Is the approach to the interpretation of fiscal legislation the same as legislation in general?

- Is a strict and literal interpretation or a more flexible approach, possibly the purposive approach, followed?
- Has the Constitution (Constitution of the Republic of South Africa Act 108 of 1996, hereinafter referred to as the “Constitution”), which is more than a decade old, influenced the way in which legislation (including fiscal legislation), is now being interpreted?
- If so, what is the general impact of the change in direction?

2 Objective and scope of study

The objective of this study is an attempt to answer the questions posed above. This necessitates a basic analysis of case law relating to the interpretation of fiscal legislation from a historical perspective and then examining the impact that the Constitution has had on or should have on such interpretation.

It is considered to be beyond the scope of this study to discuss, in an exhaustive or detailed manner, the intricacies and difficulties in interpreting fiscal legislation. For example, there will be no discussion on the common law presumptions and aids to the interpretation of legislation, other than a brief discussion of the *contra fiscum* rule of interpretation, unless they impact on the objective of this study. Neither will the Interpretation of Statutes Act 3 of 1957 be discussed since it does not specify the general approach (the strict as opposed to the purposive approach) which should be followed when interpreting legislation.

The ambit of the rights of both the revenue authorities and the taxpayers arising from the judicial interpretation of the Bill of Rights clauses in the Constitution read together with the relevant fiscal legislation, are also not dealt with in detail. Some of the rights thus arising are recorded as an area for further research.

3 Research method

The research method adopted consists of a literature review of the relevant provisions of the Constitution, the Income Tax Act 58 of 1962 and the common law together with court decisions and published articles and textbooks relating directly to the objective.

A comprehensive search was conducted on the Butterworths Electronic Library (LexisNexis Butterworths 2008) and the appropriate cases relating to the object of this study were selected.

4 Historical basis of interpreting tax legislation - the strict and literal rule

4.1 Preview

In the English case of *Cape Brandy Syndicate v IRC*, (1921(1) KB 64), Rowlatt J indicated (at page 71) that

“ . . . in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

The Appellate Division in *CIR v Simpson* (16 SATC 268) and *CIR v Frankel*, (16 SATC 251) quoted this *dictum* with approval and for some time after, the strict and literal rule was used as the guiding principle for the interpretation of fiscal legislation by the judiciary.

The strict interpretation approach tended, in general, to favour the *fiscus* because equity and fairness played no part in such an approach. However, in isolated cases, such an interpretation could lead to a favourable result for the taxpayer. For example, in *CIR v Lunn* (1 SATC 7), admittedly an old decision, the court adopted, to the advantage of the taxpayer, what Professor Williams (1998:285) describes as a blinkered view of the nature of income. He submits that the court failed to apply the economic principle or concept that any reward for services rendered is inherently revenue in nature, irrespective of whether there is a legal obligation to pay. In that case, the taxpayer resigned his directorship of a company when the company relocated from Pretoria to Johannesburg. All fees due to him were paid and he had no further claim on the company. The shareholders sometime later resolved that the company pay the former director a gratuity in recognition of his valuable services on the Board in previous years when the directors' fees were not commensurate with the work involved and as a *solatium* for the loss of his seat on the Board on transference of the head office to Johannesburg. In the provincial division, the court held that the company was under no legal obligation to make the payment. It was a voluntary, non-recurring payment, not in the nature of a salary, stipend or wage. It was not paid in lieu of arrear salary or fees, as the director's fees due for the whole period of office had been paid. The taxpayer had no claim on the company except, perhaps, one of gratitude. The court was of the opinion that where a director of a company, after his retirement, received a monetary gift for past services, as a tribute for such services, the company not being under any legal or even moral obligation to make it, such a gift was a receipt or accrual of a capital nature and not taxable as income. On appeal to the Appellate Division, it was confirmed that the amount received was a donation and as such a benefit of a capital nature and therefore not taxable as income.

It is submitted that Williams's view is correct. The court failed to recognise the link between the payment made and the services rendered. As a result of the taxpayer's victory, para (c) of the definition of "gross income" was amended to include "any voluntary award, received or accrued in services rendered or to be rendered".

Such victories by the taxpayer, however, were more likely to arise when the matter before the court related to tax planning and the application of anti-tax avoidance legislation. The principle that the taxpayer is entitled to arrange his affairs in a manner whereby he would pay the least amount of tax, stemmed from the notion of strict interpretation (*Partington v The Attorney General*, 21 CT 370).

These original decisions tended to create the impression that fiscal legislation should be interpreted differently to other legislation – strictly as opposed to attempting to establish the true intention or purpose of the legislature.

It took some 20 years after the *Simpson* and *Frankel* cases before the Appellate Division in the form of Botha JA in *Glen Anil Development Corporation Ltd v SIR* (37 SATC 319), rejected the notion that fiscal legislation should be interpreted differently to other legislation. He stated (at page 334) that the decisive and overriding principle to be used when interpreting fiscal legislation is no different from that applicable in the interpretation of all legislation. In all cases of interpretation, the true intention of the legislature is of paramount importance.

Coetzee J in *SIR v Kirsch*, (40 SATC 95) reiterated this approach when he remarked that there is no particular mystique about tax law. In order to determine the intention of the legislature, one must look fairly at the language used.

It is submitted that the strict and literal rule of interpretation was incorrectly perceived by the judiciary as a mechanism to protect a taxpayer from poorly drafted, unclear, uncertain and arbitrary provisions (*Partington (supra)*). However, to illustrate the strict and literal rule of interpretation giving rise to patently unfair results, the case of *Ochberg v CIR* (5 SATC 93), is apposite. The decision by the then highest court in the land, the Appellate Division, has perplexed and confounded tax commentators, academics and students of tax law ever since.

The decision is an interesting exercise in judicial logic, leading, it is submitted, to an illogical and unfair result. The taxpayer was considered by the court, for the purposes of the judgement, to be the sole beneficial shareholder of a certain company. He rendered services to the company in consideration for which the company allocated him additional shares. After the allocation of the additional shares, he remained the company's sole shareholder.

Looking at the transaction from a purely objective, accounting, economic and business point of view, the additional shares that he received had a value, but the total value of his shares, including the additional shares allocated to him, remained the same. That is, the value of his original shares had decreased correspondingly with the increase in the value of the additional shares issued to him. His economic wealth had not increased at all. He argued that he had received no financial benefit for the services for which he had ostensibly been paid in the form of shares.

The majority of the court, however, was unmoved by the taxpayer's argument and held that the value of the shares received must be determined objectively and be taxed accordingly. De Villiers CJ, with whom the majority of the court agreed, argued that the shares were issued for services rendered. It should not make any difference if the shares were issued to an outsider or to a person who was the sole shareholder. He concluded his argument as follows (at page 99):

"How could what is after all a purely fortuitous circumstance affect the legal position so as to convert what is received by an outsider as income into capital when received by him."

Stratford JA and Wessels JA, in their separate minority judgements, succinctly explained the illogical result arising from applying the logic used by the Chief Justice. Stratford JA was of the opinion that the shares issued to the taxpayer brought no added wealth to him. To tax him would be manifestly unjust. He concluded (at page 118):

"I can find nothing in the Income Tax Act which compels us to designate as income something which every principle of reason and commonsense tells us is nothing of the kind."

In a similar vein, but perhaps more powerfully, Wessels JA argued that the principle underlying the Income Tax Act is that a taxpayer pays his tax not out of his capital but out of his incomings. If it was assumed that Ochberg possessed nothing besides his interest in the company, then if he was liable to pay income tax on the face value of the shares issued, a transaction that did not increase his estate, he would be obliged to realise his capital in order to pay his income tax. He concluded (at page 113): "This seems to me contrary to the whole tenor of the Act."

In effect, both minority judges used a subjective test for valuing something received in a form other than cash, namely, what the value was to that individual taxpayer in those

circumstances. The aspect of the receipt being capital in nature was not properly canvassed by the majority decision but referred to by the minority judgements.

The saving grace for the majority decision (and the taxpayer) was that the objective valuation was determined as the nominal value of the shares rather than 50 percent of the company's total value. The manner in which this so-called "objective valuation" was done, namely, using the nominal value of the shares rather than 50 percent of the company's value, leads one to conclude that, far from being an objective valuation, the actual valuation was somewhat closer to a subjective valuation. This case will be referred to again in section 5.3 below, when dealing with proposed guidelines on applying the purposive approach to interpreting legislation.

4.2 *How the courts overcame the difficulty of adhering to the strict and literal rule when the application of such rule led to absurdity*

The strict rule of interpretation requires that the ordinary grammatical meaning of words must be applied (*Cape Brandy Syndicate v IRC* [1921] 1 KB 64; *R Koster & Son (Pty) Ltd & Another*, 47 SATC 24). Schreiner JA in *Savage v CIR* (18 SATC 1 at page 9), pointed out, however, that although the principle is clear, the problem is one of application. He endorsed the words of De Villiers JA in *Shaler v The Master and Another* (1936 AD 136 at page 143), where it was stated:

"Moreover, as has often been remarked by eminent judges, it is dangerous to speculate as to the intention of the legislature and what seems an absurdity to one man does not seem absurd to another."

Applying the ordinary grammatical and literal meaning to words is referred to also as the primary rule of interpretation. However, the primary rule may be departed from if the ordinary grammatical language gives rise to a glaring absurdity. In such a case, the court is justified in departing from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true "intention of the legislature" (*Venter v R*, 1907 TS 910; *M v COT*, 21 SATC 16; *Farrar's Estate v CIR*, 1926 TPD 501).

Looking beyond the ordinary, grammatical meaning of a word to establish the "intention of the legislature" in interpreting legislation (but only when the wording creates an absurdity), overlaps, to a limited degree, with the purposive approach to the interpretation of fiscal legislation. In brief, the purposive approach seeks to ascertain the intention of Parliament by reading an Act as a whole and placing in context the ends sought to be achieved (the objective) and the relationship between the individual provisions of the Act (the scheme). If the words used are clear and unambiguous and in harmony with the intention of Parliament, objective and scheme of the Act, then the ordinary and grammatical meaning of the words is used. If the words used are obscure or ambiguous, then the meaning that best accords with the intention of Parliament, the object and scheme of the Act but one that the words are reasonably capable of bearing, is to be given to them (Miers & Page 1990:177).

Putting aside the purposive approach for the moment and returning to the primary rule of interpretation, the judiciary have indicated that when using such a rule of interpretation, the ordinary, grammatical wording is decisive about the legislature's intention – there is no necessity to look any further. However, owing to the very nature of language, and more specifically, the translation of legislation from Afrikaans to English or *vice versa*, the

meanings of words in legislation are often not entirely clear and the legislature's intention is not manifest. For example, in *Geldenhuis v CIR* (14 SATC 419 at page 430), the court had to decide on the meaning of the words "received by" as used in the definition of "gross income" of section 1 of the Income Tax Act. Fortunately, the meaning attributed by the court to the words "received by" bore little relationship to its ordinary grammatical meaning. If the court had not restricted its meaning to "received by the taxpayer on his own behalf and for his own benefit", it would have led to absurd results – for example, loans would have been taxable and amounts received by an agent on a principal's behalf would have been taxable in the hands of the agent. Unlike the judges in the *Ochberg* case, the judges in the *Geldenhuis* case did not fall for the fundamentally flawed arguments put forward by the revenue authorities to tax a receipt that was not in the nature of income.

The recently decided case of *Welch's Estate v C:SARS* (66 SATC 303) is also instructive in this regard. The word "donation" was thought to be comprehensively defined in section 55 of the Income Tax Act. The revenue authorities were of the opinion that a payment made in terms of a court-sanctioned divorce order to a trust for the maintenance of an ex-wife and a minor child, fell within the ambit of the definition. However, the Appellate Division thought otherwise and narrowed the meaning of "donation" as defined, by including the essential elements of "pure liberality" or "disinterested benevolence" as demanded by the common law, in its interpretation. In so doing, the court found that payments made in terms of a divorce order could never be regarded as a donation. This is a classical purposive approach to the interpretation of statutes.

4.3 Establishing the "intention of the legislature"

When there has been uncertainty, ambiguity or absurdity in the language used in legislation, the courts have tended to seek the "intention of the legislature" and the primary rule of interpretation has been departed from. The objective of the "intention of the legislature" rule is to canvass the legislature's policy in enacting the provision and interpreting it in a manner so as not to defeat the policy (*Glen Anil Development Corporation Ltd v SIR* (37 SATC 319)). This may mean, in appropriate circumstances, giving an expansive meaning, and in other cases, a restrictive meaning to a word or phrase, depending on the policy of the legislature in enacting the legislation. In *CIR v Kuttel* (54 SATC 298), for example, a restrictive meaning was given to the words "ordinary resident" by the Appellate Division on the basis that the policy of the legislature was to extend the interest exemption concessions to those persons not ordinarily resident in the Republic so as to encourage them to invest in the country. The court held that there was no reason to extend the meaning of "ordinary resident" so as to defeat the policy which would have been the case should an expansive meaning have been applied.

However, an extended meaning was given to the phrase "in the process of manufacture" in *SIR v Safranmark (Pty) Ltd* (43 SATC 235). In that case, the court had to determine whether the preparation and cooking of "Kentucky Fried Chicken" pieces was a "process of manufacture" for the purposes of the enhanced capital allowances for plant and machinery used in such process as provided for in terms of section 12 (now section 12C) of the Income Tax Act. The majority of the court concluded that the preparation and cooking of raw chicken pieces was a "process of manufacture". They used an extensive interpretation of the phrase "process of manufacture" and second-guessed the intention of the legislature as being to provide tax incentives on capital plant and equipment purchased in any case which vaguely resembled a manufacturing process.

Corbett JA, in his minority judgement, used a “strict” or formalistic approach to his interpretation of the phrase “in the process of manufacture”. He failed to take cognisance of the legislature’s supposed intention and looked merely at the wording in the section. He apparently found it difficult to reconcile his mind to the fact that the conversion of a piece of raw chicken into a piece of cooked chicken, constituted a “process of manufacture”.

The point of this short discussion of the *Kuttel* and *Safranmark* cases is to illustrate the subtle shift over a long period by the judiciary from the strict rule of interpretation (as applied in the *Ochberg* (*supra*) and *Lunnon* (*supra*) cases) to attempting to establish the “intention of the legislature”, even in cases where the words appeared clear and unambiguous. The Appellate Division in *New Union Goldfields Limited v CIR* (17 SATC 1) in 1950 had already held that when the meaning of a word was not clear, the court was entitled, in seeking to ascertain the intention of the legislature, to consider the nature and apparent purpose of the tax. Although they did not directly refer to this approach as a purposive approach to the interpretation of legislation, such an approach is akin to the purposive approach.

5 The Constitution – a catalyst for change

5.1 *The difference between the Westminster system of government and the new constitutional dispensation - the supremacy question*

The State of the Union Act 69 of 1934, promulgated by the South African Union Parliament in 1934, confirmed the independent status of the Union. In view of South Africa’s historical connections with Britain for more than a century, it was not surprising that the Union adopted the Westminster system of parliamentary supremacy or sovereignty. The Westminster system and all its institutions remained intact until the Interim Constitution (Republic of South Africa Constitution Act 200 of 1993, hereinafter referred to as the “Interim Constitution”) was promulgated on 27 April 1994.

Parliamentary supremacy is generally taken to mean that neither the courts nor any other body have the power to review and strike down oppressive or *ultra vires* legislation enacted by Parliament. What Parliament enacted was the law and it did not matter that such legislation violated or infringed a person’s common law rights or any other rights.

Section 2 of the Constitution which replaced a similarly worded section of the Interim Constitution, provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

Section 8(1) of the Constitution further provides that the “Bill of Rights binds the legislature, the executive, the judiciary and all organs of state”, whilst section 7(2) states that the “state must respect, protect, promote and fulfil the rights in the Bill of Rights”. The courts are formally vested with the power to test the constitutional validity of any government or parliamentary action, including any legislation passed by that body (section 165). However, in terms of section 167(5), only the Constitutional Court may make a final decision on whether an Act of Parliament is constitutional. It must confirm any order of

invalidity made by any other court before that order has validity. The concept of parliamentary sovereignty has given way to constitutional supremacy.

The Bill of Rights imposes a positive obligation or duty on the state to protect, promote and fulfil the rights in the Bill of Rights – it is not merely a negative mechanism that can be used to protect its subjects against the abuse of power by the government and its organs of state (Devenish 1999:9). The Constitutional Court held in its judgement when certifying the Constitution, that in a constitutional state, “no-one exercises power or authority outside the Constitution” (*In re Certification of the Constitution of the RSA*, 1996 10 BCLR 1253 (CC) par 194). The watchdog and protector of these rights is the judiciary.

5.2 Application of constitutional principles to the interpretation of fiscal legislation

The role of taxation has changed over the centuries – from the mere collection of taxes to support a sovereign ruler and his or her courtiers in earlier times to the collection of taxes for achieving social, economic and other objectives in a modern democracy. Fiscal legislation, in modern times, has always had a purpose and this is particularly so in South Africa at present, where there is a need to uplift the previously oppressed and disadvantaged population. It therefore makes sense when interpreting legislation, to establish the purpose behind the enactment of the legislation. With the Constitution in place, strict interpretation of fiscal legislation has had to give way to a more equitable approach in line with the principles of the Constitution (Silke 1995:136).

Doubt has been cast on whether the strict and literal interpretation rule was ever part of the South African common law even before the adoption of the Constitution. Devenish (1991:375) states the following:

“The eminent and erudite Roman-Dutch scholars De Groot and Johannes Voet, who advocated a purposive methodology against the background of a natural law jurisprudential system, in effect used a teleological methodology of interpretation.”

Since the advent of the Constitution, the arguments against the continued application of the strict and literal rule have gained momentum. Many commentators, including the judiciary, have suggested that a purposive approach should be followed which will promote the democratic values enshrined in the new Constitution (Davis 1994:103; Du Plessis & De Ville 1993:199 & 356). In fact, in *Du Plessis and Others v De Klerk and Another* (1996(5) BCLR 658(CC) at page 722), it was said that constitutional interpretation is concerned with the recognition and application of constitutional issues and not with the literal meaning of legislation. Prior to that judgement, Froneman J in *Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others* (1994(3) BCLR 80 (SE) at page 87), remarked that the concept of the “intention of the legislature” does not apply in a system of judicial review based on the supremacy of the Constitution because the Constitution and not Parliament, is sovereign. As such, constitutional interpretation is not concerned with a search to find the literal meaning of legislation but with the recognition and application of constitutional values.

Section 39(1) of the Constitution gives specific instructions on how to interpret the Bill of Rights. Section 39(2) deals with the interpretation of any other legislation. Both the interpretation of the Bill of Rights specifically and other sections of the Constitution in general (including fiscal legislation by implication) must promote the values that underlie

an open and democratic society based on human dignity, equality and freedom. In addition, the courts are given the power in terms of section 39(2) of the Constitution to develop the common and customary law to promote the spirit, purport and objectives of the Bill of Rights. No legislation, common law or customary law may, however, be recognised to the extent that it is inconsistent with the provisions of the Bill of Rights (section 39(3)).

In effect, in interpreting legislation, the judiciary are obliged to promote, *inter alia*, the protection of the liberty of a person, their property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. Unfairness, inequality and unreasonableness are no longer tolerated, in theory at least, in either legislation or the conduct of public officials.

The purposive approach to the interpretation of legislation that was favoured by the Roman-Dutch writers included the principle of equity, a principle embodied in natural law. The *contra fiscum* presumption is merely an expression of that concept in the same way that the presumption against double taxation expresses the same notion. Even Corbett JA, well known for his strict and formalistic approach to the interpretation of fiscal legislation, could not resist the concept of equity when he remarked (*CIR v Nemojin (Pty) Ltd* (45 SATC 241 at page 267)):

“It has been said that ‘there is no equity about a tax’. While this may in many instances be a relevant guiding principle in the interpretation of fiscal legislation, there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and the point of view of the fiscus.”

In *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* (1990(1) SA 925(A) at page 943), a judgement delivered in 1990, Smallberger JA stated that “the notion of what is known as a ‘purposive construction’ is not entirely alien to our law”. Unfortunately, Smallberger JA preferred to follow the literal interpretation principle as being entrenched in our law and stated “I do not seek to challenge it”. He was of the opinion that it was only in cases of ambiguity that there was room for a purposive approach.

The judge in *ITC 1584* (57 SATC 63), a judgement given in 1994, abandoned Smallberger’s approach in favour of a more equitable approach in line with the constitutional principles underpinning the then Interim Constitution. In that case, an ex-spouse agreed, in terms of a divorce settlement made an order of court, to pay his ex-wife alimony and provide for the maintenance of his minor children during his lifetime as well as after his demise. A testamentary trust was established as a result of his subsequent death. It provided for a monthly amount to be paid to his ex-wife for the maintenance of his minor children in accordance with the divorce settlement order. The Commissioner included such amounts received for the maintenance of the minor children in the ex-wife’s taxable income, proclaiming that such monthly maintenance payments constituted an annuity.

Objection was made to the amounts being included in the ex-wife’s taxable income. The main basis of the objection was that the exemption in terms of section 10(1)(u) of the Income Tax Act, granting exemption for amounts paid to a former spouse or children for their maintenance in terms of an order of divorce, was applicable. The question before the court therefore was whether the section 10(1)(u) exemption was applicable when paid from a deceased estate rather than from a living person.

The provision, on the face of it, appeared clear and unambiguous – it made no specific mention of alimony and maintenance amounts paid by deceased estates as qualifying for the

exemption. In addition, the Commissioner had previously won his case some years before, based on this very same argument, in *ITC 1119* (30 SATC 159), when Kotze J applied a strict and literal interpretation to section 10(1)(u).

Seligson AJ, however, refused to follow the strict interpretation of section 10(1)(u) as was done in *ITC 1119*. In arriving at his decision, he did not refer to the Interim Constitution but rather agreed with the observation of Centlivres JA in *CIR v Simpson* (16 SATC 268), that the *Cape Brandy Syndicate* rule (*supra*) should be qualified when something needs to be “implied by necessity”. He stated the following (at page 70):

“Clearly, to interpret the relevant exemption as applicable when maintenance is paid by a former spouse, but not by such spouse’s deceased estate, would create a glaring anomaly with inequitable results . . . the effect of such a construction would be to erode the amount available for the maintenance of the minor children in need of support in a case such as the present. It could bear harshly on the custodian parent as well.”

He concluded (also at page 70) that to differentiate between the maintenance paid to an ex-spouse by the deceased estate of the ex-husband or by the ex-husband himself, appeared to be “absurd and irrational” and “could never have been intended by the legislature when it enacted the exemption in section 10(1)(u)”. He applied a so-called “judicial amendment” to section 10(1)(u) and rejected the decision in *ITC 1119* as “incorrect and ought not to be followed”. In practice, if not in words, he was following a purposive approach.

Although it is considered to be beyond the scope of this study to discuss the *contra fiscum* rule of interpretation in detail, the application thereof in the context of constitutional interpretation is instructive. In *Shell’s Annandale Farm (Pty) Ltd v CIR* (62 SATC 97), a Cape Provincial Division decision handed down in 1999, the court appeared to extend the *contra fiscum* presumption to cases not only where there is an ambiguity in the wording but also where there is an ambiguity about the intention of the legislature, even if there was no obvious ambiguity in the wording. Although not specifically stated as such, the court was giving effect to the principles underpinning the Constitution. The court had to decide whether an “expropriation” of property amounted to a “supply” as defined in section 1 of the Value-Added Tax Act. The court, applying the *contra fiscum* presumption, concluded that the interpretations of “supply” as put forward by the opposing parties, were both plausible and therefore the court had to apply the interpretation most favourable to the taxpayer. The court then went on to remark that the solution for the aggrieved revenue authorities was to amend the definition of supply to ensure that the proceeds from an expropriation were brought unambiguously within the scope of the definition. It was not long after the judgement was handed down that the revenue authorities effected the suggested legislative amendment.

It is submitted that even in cases where the language is clear and unambiguous, the Constitution and subsequent case law supports the view that the purpose of the legislation also needs to be looked at in deciding the ambit and extent of the legislation. In addition, the *contra fiscum* presumption has been and still remains a part of our common law and is not in conflict with the Constitution. In fact, it complements the principles underpinning the Constitution by ensuring an element of equity in the interpretation of fiscal legislation.

5.3 Guidelines on applying the purposive approach to interpreting legislation

It is submitted that the judiciary have accepted that the purposive approach to the interpretation of legislation is the correct one to follow, at least in principle. However, they have not really attempted to give any step-by-step guidelines on how the approach works in practice. Driedger (Miers & Page 1990:177), it is submitted, suggests the following effective three-stepped approach:

- “The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
- The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament, embodied in the Act, and if they are clear and unambiguous and in harmony with the intention, object and scheme and with the general body of the law, that is the end.
- If the words are apparently obscure or ambiguous, then the meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one which the words are reasonably capable of bearing, is to be given them.”

It is further submitted that if this three-stepped methodology is followed, the purposive approach would not be far from the requirements of the Constitution to “promote the spirit, purport and objectives of the Bill of Rights” in the interpretation of legislation.

The minority judgements in the *Ochberg (supra)* case appeared to follow this three-stepped approach. To value an “amount” received other than in cash, in their opinion, otherwise than subjectively in the circumstances of the taxpayer, would be to go against the very principle that underlies the Income Tax Act, namely, that a person “pays his tax not out of his capital but out of his incomings”.

Unfortunately, in 2007, the Supreme Court of Appeal in *C:SARS v Brummeria Renaissance (Pty) Ltd and Others* (69 SATC 205), saw fit to confirm the majority decision in *Ochberg’s* case that the valuation of an “amount” received other than in cash had to be done objectively.

It is considered to be beyond the scope of this study to analyse all the intricacies (or lack thereof) of that decision. However, it is submitted that the victory by the Commissioner was based more on what was not argued before the Supreme Court of Appeal rather than what was argued. For example, the appeal court judges, found that they were precluded from taking argument and analysing whether notional interest calculated on an interest free loan could be regarded as capital in nature as it was not raised at the time the appeal notice was lodged. In addition, the deductibility of expenses in terms of section 11(a) was not argued. Nor was any argument or justification given for how the notional interest amount on the interest free loan was to be calculated. For the purposes of the decision, the court accepted the Commissioner’s view that the right had to be determined by applying the weighted prime overdraft rate for banks to the average amount of the interest-free loans in the taxpayer’s possession in the relevant year of assessment. No account was taken of the fact that the taxpayer (and many taxpayers in the same circumstances) could probably have obtained overdraft rates at less than the prime overdraft rate. Furthermore, the judgement appears to apply only to the factual situation where life rights are granted to a person in return for an interest-free loan (a *quid pro quo*) and not where a parent, for

example, lends his son or daughter money interest free without the child giving any *quid pro quo*.

The so-called “objective valuation” postulated in the *Ochberg* case (partly objective), is a different valuation to the one postulated in the *Brummeria* case (fully objective). The fully objective valuation used by the court in the latter case was not contested or argued by the taxpayer. Thus, there still appears to be room to argue the manner in which the objective valuation is to be done.

Finally, it is submitted that the objective valuation is still subject to the overall tenor of the Income Tax Act, namely, that to be taxable, an amount must fall within the definition of “gross income” as defined. Even if an amount is received in a form other than in cash and it is valued objectively, it must still pass muster on whether the amount is capital or revenue in nature. This is demanded by the purposive approach to interpreting statutes, leads to fairness and is thus in line with the spirit and purport of the Constitution.

6 Further research on the possible effects that the constitutional approach (incorporating the purposive approach) to the interpretation of fiscal legislation has on taxpayers’ rights

No government body interferes more in the private affairs of individuals than the South African Revenue Services. Virtually every section in the Income Tax Act, *prima facie*, interferes with a person’s fundamental rights as embodied in the Bill of Rights. In fact, the very imposition of tax violates the right not to be deprived of one’s property (section 25 of the Constitution). Tax audits, investigations and search and seizure procedures clash with the right to privacy (section 14 of the Constitution) as well as possibly with the right to human dignity (section 10 of the Constitution). Answering written enquiries or attending a judicial inquiry and being compelled to answer questions, could offend against the right to remain silent and not be compelled to give self-incriminating evidence (section 35(3)(j) of the Constitution). The right to equality (section 9 of the Constitution) clashes with sections that provide, for example, that taxpayers over the age of 65 are entitled to a larger medical deduction or tax rebate than those under the age of 65.

However, these rights are not absolute. They are subject to a limitation in terms of section 36 of the Constitution that provides that the rights in the Bill of Rights may be

“limited 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 . . .”.

This limitation of rights provision is the major obstacle for taxpayers wishing to contest the violation of their constitutional rights.

Since the scope of this article precludes a detailed discussion of the ambit of the rights of both the revenue authorities and taxpayers arising from the interpretation of the Bill of Rights clauses, in particular, and of the Constitution, in general, read together with the Income Tax Act, further research in this field is considered necessary.

Nevertheless, it is submitted that it is clear from the discussions outlined above that one vital right arises because of the shift from a strict and literal interpretation to a purposive approach. The decisions in both the *Lunnon and Ochberg* cases are examples of the strict

and literal interpretation approach leading to an illogical result that is not in accordance with the tenor and purpose of the Income Tax Act. With the judiciary virtually forced by the Constitution to follow the purposive approach, a realistic opportunity exists for a taxpayer to question and even have unjust interpretation decisions of the past reversed in the appropriate circumstances. This is so even where such decisions have been decided by the highest court in the land and are regarded as binding precedent.

The right to contest and thereby correct palpably incorrect decisions does not automatically lead to uncertainty. On the contrary, it is submitted that it leads to less uncertainty. There is a *novus actus interveniens* or a new intervening factor, namely, the Constitution, which demands fairness and equity in judicial matters. Considering, for example, the economic realities when deciding a case, is a prerequisite for fairness and equality and accords with the spirit and purport of the Constitution.

7 Conclusion

Although it appeared from some of the earlier decided cases that fiscal legislation was to be interpreted differently to other legislation, over the years this notion has been completely dispelled, not only by case law (*Glen Anil Development Corporation Ltd v SIR* (37 SATC 319)) but also by section 39(2) of the Constitution.

An analysis of the decided cases also indicates that over the years, the judiciary have gradually shifted from the so-called "strict" interpretation of fiscal legislation (*Cape Brandy Syndicate v IRC* (1921(1) KB 64); *CIR v Lunnon* (1 SATC 7); *Ochberg v CIR* (5 SATC 93)), to an approach akin to the "purposive" approach (*ITC 1584* (57 SATC 63); and *Shell's Annandale Farm (Pty) Ltd v CIR* (62 SATC 97)). This shift occurred even before the advent of the Constitution (*CIR v Kuttel* (54 SATC 298); *SIR v Safranmark (Pty) Ltd* (43 SATC 235)) because such an approach was and still is in accordance with our Roman and Roman-Dutch common law heritage (Devenish 1991:375). However, the judiciary were never consistent in their approach. Even as late as 1990, the Appellate Division reverted to the strict and literal approach to interpretation (*Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* (1990(1) SA 925(A))).

The automatic application of the strict or literal approach to the interpretation of fiscal legislation is no longer, in theory, a viable option for the judiciary, especially in cases where inequitable and unjust consequences arise as a result of applying such an approach. However, in practice, the strict rule of interpretation will be used in circumstances where such interpretation is not in conflict with the overall as well as the specific intention or purpose of the legislature. Should the judiciary automatically interpret a provision strictly without even attempting to establish the intention or purpose of the legislature, it is submitted that such an omission would constitute grounds for a constitutional challenge to the decision. In addition, the strict rule of interpretation does not and cannot always take account of justice, equity, harshness or unfairness and is therefore, *prima facie*, now unconstitutional. It has been replaced by the classical purposive approach (as espoused by the Roman-Dutch writers) to the interpretation of legislation which, with little modification, is able to incorporate the essential values underpinning the Constitution.

Equity and fairness in the interpretation of fiscal legislation should never be allowed to make way for administrative or even judicial expediency.

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2.4 ERRATA IN ARTICLE

Reference to *R Koster & Son (Pty) Ltd & Another v CIR* should read 47 SATC 23 and not 47 SATC 24 on page 111 of the article and in the bibliography.

The two references in the bibliography on page 120 of the article to the author Devenish are correct but the oldest reference should have been placed first.

Reference to *Du Plessis and Others v De Klerk and Another*, 1996(5) BCLR 6758 (CC) in the bibliography on page 120 of the article is not placed in the correct position alphabetically.

The reference to *Metcash Trading Ltd v C:SARS*, 63 SATC 13 in the bibliography on page 121 of the article should be deleted.

The reference to *Shaler v The Master and Another*, 1936 AD 136 in the bibliography on page 121 of the article should read *Shenker v The Master and Another*, 1936 AD 136.

2.5 SYNTHESIS AND CONCLUDING REMARKS

This chapter commences with Adam Smith's notion that taxes should be certain, clear, plain and not arbitrary. When legislation does not meet these standards, disputes arise between the taxpayer and SARS that can only be finally settled with the intervention by the judiciary who must step in and interpret the scope and ambit of the legislation within a constitutional framework. It is this process of interpretation of statutes by the judiciary that brings certainty, clearness and plainness to possibly flawed legislation.

The approach to the interpretation of fiscal statutes, as has been seen from the article reproduced above, is vitally important in the context of taxpayers' rights. The so-called "strict and literal" approach to the interpretation of statutes often sanctioned the unfair, inequitable and unjust treatment of taxpayers. The mantra of the judiciary that "there is no equity about taxation", was the order of the day. The adoption of a new constitutional order

in South Africa in 1994, where the Constitution, rather than Parliament, was supreme, has forced the judiciary to shift from the “strict and literal” approach to the “purposive” approach to the interpretation of statutes, including fiscal statutes that take into account fairness, equity and justice, principles that underpin the Constitution.

As indicated in the article above, no attempt was made, from a practical point of view, to analyse the process followed when interpreting a statute under the “purposive” approach. Thus, the next chapter will fingerprint aids that may be considered useful for interpreting fiscal legislation under the “purposive” approach to the interpretation of statutes.

CHAPTER 3

HANGED BY A COMMA, GROPING IN THE DARK AND HOLY COWS – FINGERPRINTING THE JUDICIAL AIDS USED IN THE INTERPRETATION OF FISCAL STATUTES

“The hardest thing in the world to understand is the Income Tax” - Albert Einstein (Quotes Investigator 2012a).

3.1 INTRODUCTION

In the previous chapter, the shift from the “strict and literal” approach to the interpretation of fiscal statutes, where little attention was paid to equity and fairness, to the “purposive approach” that pays homage to fairness, justice and equity, principles that underpin the South African Constitution, was discussed and analysed. The chapter demonstrated the inequitable outcome that could result from the application of the “strict and literal” approach to the interpretation of fiscal legislation. This chapter will continue the discussion of the interpretation of fiscal statutes – through the reproduction of a published peer-reviewed accredited journal article – by fingerprinting the various aids, both internal and external, that the judiciary may use to establish the “purpose” underlying a statute, taking into account the constraints of the Constitution. The article is reproduced in its original format as published in the *Southern African Business Review* (Goldswain 2012: 30–56).

3.2 DIRECT AND INDIRECT APPLICATION OF THE CONSTITUTION WHEN INTERPRETING LEGISLATION

Although the 1996 Constitution, unlike the Interim Constitution, does not specifically differentiate between the direct and indirect application of the provisions of the Constitution

and thus also of the Bill of Rights, the judiciary, in practice, still do so. Thus, it is considered important to clarify the practical importance of differentiating between the two applications.

Currie and De Waal (2005) state the position as follows (para 3.5):

The purpose of direct application is to determine whether there is, on a proper interpretation of the law and the Bill of Rights, any inconsistency between the two. The purpose of indirect application is to determine whether it is possible to avoid, in the first place, any inconsistency between the law and the Bill of Rights by a proper interpretation of the two.

The authors also state that the direct application of the Constitution to a piece of legislation that is inconsistent with the Constitution means that such legislation can no longer form part of the law. In effect it may leave a legal vacuum. On the other hand, there is no legal vacuum when a piece of legislation is interpreted in such a way as to avoid any inconsistency between the legislation and the Bill of Rights – an indirect application of the Constitution. It is submitted that the judiciary prefer to interpret legislation by using indirect application by modifying or adapting statutes to keep them constitutional or ‘alive’ (this technique of interpretation is known as “reading down” - see the article below where “reading down” is briefly discussed) rather than declaring them unconstitutional by using the direct application approach. This could be one of the reasons why taxpayers have been inherently unsuccessful in having fiscal legislation declared unconstitutional - other than in one case (*First National Bank of SA Ltd t/a Wesbank v CIR and Another* (64 SATC 471)). Rather, the decisions and conduct of SARS have been found to be in violation of the Promotion of Administrative Act, an Act specifically introduced in terms of section 33(3) of the Constitution to embody the section 33 right to just administrative action. Attacking SARS on the basis of its decision making process or conduct in enforcing fiscal legislation has been far more successful for the taxpayer than attacking legislation itself as will be seen from the discussion on this aspect in Chapter 5 below.

3.3 HANGED BY A COMMA, GROPING IN THE DARK AND HOLY COWS - THE SECOND “CORE” ARTICLE

Hanged by a comma, groping in the dark and holy cows – fingerprinting the judicial aids used in the interpretation of fiscal statutes

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ABSTRACT

This article describes and analyses, from a practical point of view, the process followed when interpreting a statute under the ‘purposive’ approach, an approach that has been given constitutional recognition in South Africa. The research fingerprinted and identified the various aids, both internal and external, that the judiciary may use to seek the ‘purpose’ underlying the statute, taking into account the constraints of the Constitution. The discussion and conclusion indicate that several of these aids, even aids that were previously prohibited under the ‘strict and literal’ approach to the interpretation of statutes, may now be used by the judiciary to avoid any ‘groping in the dark’ when attempting to find the ‘purpose’ underlying a statute.

Many of the interpretational presumptions analysed in this article originate from centuries ago and are based on equity and fairness. They have all been given an elevated status by either being incorporated directly into the provisions of the Constitution of the Republic of South Africa, 1996 (as a fundamental right in the Bill of Rights) or indirectly as part of the constitutional recognition of the common law.

Key words: Constitution, interpretation of statutes, interpretational aids and presumptions, purposive approach, strict and literal approach, taxpayers’ rights

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Introduction

It has been said that Sir Roger Casement, the Irish patriot, was “hanged by a comma” (Webb 2004; Clark 2007: 61). In his dream to pursue an Ireland free from the yoke of British rule, he met and collaborated with the government of Germany, which was then at war with Britain. They promised the Irish guns and ammunition to support the proposed Irish Easter Rising against the British in 1916. When Sir Roger returned to Ireland, he was arrested on charges of treason, sabotage and espionage.

He was transported to England and prosecuted under the Treason Act (Act of 1351), an Act written in Norman French and unpunctuated. It had been interpreted for centuries as only applying to treasonable deeds carried out on English soil, not on foreign soil. The court, in its deliberations, called for an examination of the original parchment on which the Treason Act had been written. According to Webb (2004), a faint mark was found on the parchment, which could have been a comma or merely a dirty mark. The judges decreed that the mark found was a comma, which enabled them to determine that the Treason Act also applied to treasonable deeds carried on outside England. Sir Roger was convicted of treason and hanged in 1916.

The British government had been determined during the course of the trial to discredit the honour and reputation of Sir Roger by leaking information on Sir Roger’s alleged homosexuality (Tilzey 2011). Thus, they were ecstatic about his conviction for treason. Assuming, however, that political interference played no part in the conviction, the importance of the comma in Sir Roger’s trial illustrates only one of the problems encountered by the judiciary in interpreting statutes.

The judiciary, both in England and South Africa, until relatively recently generally used the ‘strict and literal’ approach to the interpretation of statutes, especially in fiscal matters, to overcome interpretational problems. It did not matter that such approach led to unfairness or even hardship (*New Union Goldfields Limited v CIR* (17 SATC 1)).

In England, the judiciary, with Lord Denning leading the way, moved away from the ‘strict and literal’ approach to a ‘purposive’ approach whereby the purpose underlying the statute was sought. In *Davis v Johnson* ([1978] 1 All ER 841), Lord Denning used the Hansard Parliamentary Debates Reports (the ‘Hansard Reports’), the use of which was previously denied to the judiciary, as an aid to assist the court in finding the intention of Parliament and the purpose behind a provision. He rejected the notion that judges should “grope about in the dark for the meaning of an Act without switching on the light” (851).

The House of Lords, in *Pepper (Inspector of Taxes) v Hart* ([1993] 1 All ER 42), also used the ‘purposive’ approach to the interpretation of a fiscal statute and confirmed that it is permissible to use the Hansard Reports as an aid to statutory interpretation.

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The judgement, in effect, brought down the curtain on the 'strict and literal' approach to interpreting fiscal statutes in England and ushered in the 'purposive' approach. The question that now arises is whether the 'purposive' approach to interpreting statutes is also followed in South Africa.

The South African judiciary, in interpreting statutes, have always recognised that the courts should give effect to the 'intention of Parliament'. However, unless the 'strict and literal' reading of the statute led to an absurdity, the judiciary looked no further – such literal reading, they argued, represented what Parliament intended (*Glen Anil Development Corporation Ltd v SIR* (37 SATC 319)).

Whether the 'strict and literal' approach to interpreting a fiscal statute is still valid today in South Africa was analysed in a previous article (Goldswain 2008: 107–121). The conclusion reached was that the adoption of the Constitution of the Republic of South Africa, 1996 (hereafter the 'Constitution') was a catalyst for an immediate and enforced change from the 'strict and literal' approach to a 'purposive' approach that incorporates the principles and values underpinning the Constitution. Section 39(2) of the Constitution, as interpreted by several Constitutional Court decisions – (*S v Makwanyane and Another* (1995 (3) SA 391 (CC) at 403–404); *Du Plessis and Others v De Klerk and Another* (1996 (5) BCLR 658(CC) at 722; *C:SARS v Airworld CC and Another* (70 SATC 48); *Metropolitan Life Ltd v C:SARS* (70 SATC 162)) – lends irrefutable support for this conclusion. In addition, several eminent South African jurists (Du Plessis & De Ville 1993: 63; Davis 1994: 103; Botha 2005: 9–10) endorse this conclusion. This change in approach now applies equally to fiscal legislation (*ITC 1646* (61 SATC 37)). Deviation from such an approach, without compelling reasons being advanced, could constitute grounds for an appeal to the Constitutional Court. It can also mean that precedent-creating decisions of the past can now be challenged in the appropriate circumstances (Goldswain 2008: 107–121).

These conclusions are encapsulated in *ITC 1384* (46 SATC 95 at 106), where it was stated by Steyn J that fiscal statutes:

... have to be construed subject to the presumption of a fair, just and reasonable lawgiver's intention and in consequence with the 'new approach' to interpretation of fiscal statutes, in terms whereof such measures are neither to be subjected to eviscerating formalism or strictness nor to be treated with fawning respect as 'Holy Cows'.

It is interesting to note that these words were written some ten years prior to the advent of the new constitutional order in South Africa. The new approach referred to by Steyn J is the 'purposive' approach to interpreting legislation.

Object and scope of article

The interpretation of a fiscal statute is the basis on which the revenue authorities can assess and collect taxes, and correspondingly the foundation on which a taxpayer's rights are built. A haphazard, inconsistent, discriminatory and unfair interpretation of a fiscal statute leads to chaos for both the revenue authorities and the taxpayer.

Much has been written on the general concept or theory of the 'purposive' approach to the interpretation of statutes, but little on how the concept can be translated into practice in a fiscal environment. Even one of the major recognised textbooks on taxation in South Africa, *Silke on South African Income Tax* (De Koker & Williams 2010: par 25.1D), quoted with approval in numerous tax cases (for example in *Glen Anil Development Corporation Ltd v SIR (supra)*), does not give much practical guidance in this regard. One of the other recognised textbooks on taxation in South Africa, *Income Tax in South Africa* (Urquhart 2010: par 2.1), also gives little recognition to the 'purposive' approach other than to observe that there is a trend towards the 'purposive' approach.

The object of this article, by reviewing the available relevant literature, is an attempt to fill this void by analysing the process of interpretation and fingerprinting aids that are useful in interpreting fiscal statutes using the 'purposive' approach, taking into account the constraints of the Constitution. It is hoped that the analysis and discussion of the process and the aids that may be considered in the interpretation of fiscal statutes will enable those who are involved in the tax field to interpret statutes in a similar fashion to the judiciary and thus predict the way in which a court would interpret the statute in the future, or probably more importantly, whether there is any basis for challenging the interpretation of statutes as determined previously by the judiciary.

Aspects considered to be beyond the scope of this article include aids that are discussed in sufficient detail in a well-recognised South African taxation textbook such as *Silke on South African Income Tax* (De Koker & Williams 2010) and many of the interpretational presumptions that are now embodied, either directly or indirectly, in the Constitution.

Research method

The research method adopted comprised a literature review and an analysis of the relevant provisions of the Income Tax Act, the Constitution and the reported decisions of the various courts together with published articles and textbooks that relate directly to the objective.

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As far as the local court decisions are concerned, a comprehensive search was done on the LexisNexis Electronic Library (2010), and the appropriate decisions concerning the interpretation of statutes were selected for analysis.

The interaction between language and legal skills in interpreting statutes

Language, rather than legal skills, was often resorted to in resolving the interpretation of a specific provision of a statute when the 'strict and literal' approach was used. Theoretically, it could be argued that the 'strict and literal' approach allows even the layperson who has competent language skills to interpret a provision. Thus, the presumption that 'everyone is presumed to know the law' was appropriate under that approach. Unfortunately, in practice, the interpretation of a statute is not so simple. A combination of language and legal skills is necessary to arrive at a logical, sensible and equitable interpretation irrespective of which approach is adopted, whether it is the 'strict and literal' or the 'purposive' approach.

Often the words used in a statute are inadequate to describe what was intended by the legislature. This can lead to ambiguity, confusion and consequently, uncertainty. In *Geldenhuys v CIR* (14 SATC 419), the court had to decide on the meaning of the words "received by" as used in the definition of "gross income" in section 1 of the Income Tax Act. The court did not use the everyday grammatical and dictionary meaning in deciding on its scope as the definition was obviously far too wide for what was intended by the legislature. For example, the receipt of a *bona fide* loan would have been taxable in the hands of the borrower and amounts 'received by' an agent on behalf of a principal would have been taxed in the hands of the agent if the ordinary grammatical meaning of the word 'receipt' had been applied in its interpretation.

Similarly, the meaning of the words 'accrued to', also used in the definition of 'gross income', led to uncertainty for decades. Even after the Cape Supreme Court in *WH Lategan v CIR* (2 SATC 16) had determined its meaning as being 'entitled to', the Appellate Division questioned whether the meaning should not rather be 'due and payable' (*CIR v Delfos* (6 SATC 92)). The matter was only finally settled some 64 years later by the Appellate Division in *CIR v People's Stores (Walvis Bay) (Pty) Ltd* (52 SATC 9) when the *Lategan* principle was confirmed.

In these two cases, a combination of language and legal skills was used. Language skills were necessary to establish the ordinary grammatical meanings of the words, and legal skills were required to arrive at a sensible, restrictive answer as to their meaning.

Fingerprinting the judicial aids used in the interpretation of fiscal statutes

The lack of foresight and poor draftsmanship resulting in errors or omissions in a statute require both language and legal skills for their interpretation. For example, in *Shell's Annandale Farm (Pty) Ltd v C:SARS* (62 SATC 97), the taxpayer's land had been 'expropriated' by the State, and value-added tax was claimed by the Commissioner on the compensation received by the taxpayer. 'Expropriation' was not specified as a supply or deemed supply in terms of the Value-Added Tax Act (Act No. 89 of 1991) (hereafter the 'Value-Added Tax Act'). The court, in applying the common law *contra fiscum* and *cassus omissis* presumptions, held that some act was required for there to be a 'supply', and as the 'expropriation' did not involve any act on the part of the person whose property had been expropriated, no 'supply' for VAT purposes had taken place. The omission of the word 'expropriation' was fatal for the case of the Commissioner. The Value-Added Tax Act was later amended to specifically include 'expropriation' as a deemed supply (section 8(21)). The approach in this case appeared to be more a skill of language – merely ignoring the omitted word – but it also needed a vast knowledge of legal skills relating to, *inter alia*, the *contra fiscum* and *cassus omissus* presumptions, to arrive at, it is submitted, the correct decision.

Is there a difference between the 'intention of Parliament' and the 'purpose' of a statute?

The 'strict and literal' approach to the interpretation of fiscal statutes was advocated and used by the South African judiciary prior to the change in the constitutional order in 1994. However, in a case where absurdity arose, the judiciary resorted to establishing the 'true intention of Parliament' (*Farrar's Estate v CIR* (1926 TPD 501) rather than merely looking at the strict and grammatical meaning of the words used. This was done with the assistance of judicially recognised aids, including using certain centuries-old common law presumptions. The question is whether merely seeking the 'intention of Parliament' can be equated to the 'purpose' underlying the statute, or whether something else is required. The 'supremacy' question and the dictates of the Constitution also need to be analysed in order to arrive at a conclusion in this regard.

The 'supremacy' question

When the 'strict and literal' or purely grammatical approach to the interpretation of fiscal statutes results in an absurdity, the presumption is that Parliament never intended the absurd result. The judiciary then have to resort to other means to establish what they

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term the ‘true intention of Parliament’. To assist the judiciary, they may call upon certain internal and external aids, including common law presumptions, in their quest to find the ‘intention of Parliament’ (*Venter v R* (1907 TS 910); *M v COT* (21 SATC 16); *Farrar’s Estate v CIR* (*supra*)). Seeking the ‘intention of Parliament’ originated from the concept that Parliament was ‘supreme’ or ‘sovereign’ and that whatever it decreed in a statute could not be challenged even if it led to inequitable, unfair and unjust results. In fact, it was this very principle of ‘supremacy’ that permitted the abuses and violations of human rights, including the rights of taxpayers, under the Apartheid regime prior to the adoption of the Constitution of the Republic of South Africa (Act No. 200 of 1993), generally referred to as the Interim Constitution, in 1994.

With the advent of the new constitutional order in South Africa in 1994, the ‘supremacy’ of Parliament has been replaced by the ‘supremacy’ of the Constitution. Section 2 of the Constitution provides that:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Thus, although Parliament legislates, all legislation is subject to the purport and spirit of the Constitution, which is ‘supreme’.

Dictates of the Constitution in the interpretation of statutes

Section 39(1) of the Constitution gives specific instructions on how to interpret the Bill of Rights, namely the interpretation must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) deals with the interpretation of any other legislation and, since the sub-section does not specifically exclude fiscal legislation, it implies that fiscal legislation must be interpreted in the same way as any other legislation (*ITC 1646* (*supra*)), namely the interpretation must promote the spirit, purport and objectives of the Bill of Rights. The judiciary and academia, as already discussed, have interpreted section 39(2) of the Constitution as compelling the judiciary to follow an approach similar to the so-called ‘purposive’ approach to interpreting statutes but with a South African flavour – the incorporation of the principles and values underpinning the Constitution.

Additionally, the courts are given the power in terms of section 39(2) of the Constitution to develop the common and customary law so as to promote the spirit, purport and objectives of the Bill of Rights. No statute, common law or customary law may, however, be recognised to the extent that they are inconsistent with the provisions of the Bill of Rights (section 39(3) of the Constitution).

Fingerprinting the judicial aids used in the interpretation of fiscal statutes

In effect, in interpreting legislation, the judiciary are obliged to promote, *inter alia*, the protection of the liberty of a person, his or her property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. Unfairness, unreasonableness and arbitrary actions by public officials are no longer tolerated, not even in fiscal matters (Goldswain 2008: 115).

'Intention of Parliament' v 'purpose' of statute

If the Constitution is 'supreme', does one still need to seek the 'intention of Parliament' in order to find the 'purpose' of a statute, or are the two terms synonymous?

Driegler (in Miers & Page 1990: 177) has suggested a three-stepped technique for interpreting statutes under the 'purposive' approach:

- Ascertain the intention of Parliament, the object of the Act and its scheme.
- Read the individual provisions in their grammatical and ordinary sense, and if such meaning is clear and unambiguous and is in accordance with the intention, object and scheme of the Act, that is the end.
- If the grammatical meaning of the words is obscure or ambiguous, then a reasonable meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act is to be given them.

In short, Driegler's approach is to ascertain the 'intention of Parliament' and harmonise it with the 'object' and 'scheme' of the statute. Thus, the 'purposive' approach of Driegler goes noticeably further than merely seeking the 'intention of Parliament'. Driegler's approach, however, assumes that Parliament is 'supreme'. Does this mean that the approach should be different where the Constitution is 'supreme'?

In *Minister of Land Affairs v Slamdien* (1999(4) BCLR 413 (LCCC)), seeking the 'intention of Parliament' is not specifically mentioned as a necessary technique under the 'purposive' approach. A synopsis of the approach as set out by the court follows (422):

- (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
- (ii) have regard to the context of the provision in the sense of its historical origins;
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values, which underlie it;
- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- (v) have regard to the precise wording of the provision; and

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- (vi) where a constitutional right is concerned ... adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection, which the right confers.

These guidelines offered by the court were derived mainly from the judgement of Chaskalson P in *S v Makwanyane and Another* (*supra*) and approved in *S v Zuma and Others* (1995 (2) SA 642 (CC) at 651). The guidelines emphasise the history of the provision, its broad objects, the constitutional values that underlie it and its interrelationship with other provisions of the statute whilst not violating the precise wording of the provision. This approach, if carefully analysed, is similar to the Driegler approach. Establishing the broad objects of a statute cannot be done, it is submitted, without also seeking 'the intention of Parliament'. It is Parliament, after all, that legislates. However, the Driegler approach is expanded to take account of the statute's historical context as well as any constitutionally affected rights. Neither the Driegler nor the *Slamdien* approach provides for violence to be done to the precise wording of a statute unless the words used do not convey the 'purpose' underlying the statute. Thus, in the *Shell's Annandale Farm* (*supra*) case, the judiciary refused to include the 'expropriation' of the property in the definition of 'supply' for the purposes of imposing value-added tax on the property so 'expropriated'. Doing so would have done violence to the words and language used in the provision. Thus, seeking the 'intention of Parliament' is only one step in the process of establishing the 'purpose' underlying a statute. It does not end there.

The purpose of this paragraph has been to analyse the process of interpretation under the 'purposive' approach. The analysis of the process sets the scene for the practical application of the process by fingerprinting and identifying the aids that are useful in interpreting fiscal statutes using the 'purposive' approach, taking into account the constraints of the Constitution.

Fingerprinting, identifying and discussing the usefulness of internal and external aids used by the South African judiciary to assist in interpreting statutes

As already discussed, in applying the 'strict and literal' approach to the interpretation of statutes, the courts departed from the 'strict and literal' meaning of the words if such meaning led to an absurdity. They then invoked the use of judicially acceptable internal and external aids, including the centuries-old common law presumptions, many of them written in Latin, to find the 'intention of Parliament' and thus interpret the provision.

Fingerprinting the judicial aids used in the interpretation of fiscal statutes

The remainder of this paragraph will endeavour to fingerprint the aids, both internal and external, used by the judiciary prior to 1994 in the process of interpretation. The usefulness or otherwise of these aids will be discussed by examining their practical application as they pertain to the 'purposive' approach to the interpretation of statutes.

Internal aids

Generally, anything contained in a statute because it has been passed by Parliament may be used as an aid to its interpretation. Unlike the Treason Act (Act of 1351), which resulted in Sir Roger Casement being "hanged by a comma", statutes today are punctuated, and account must be taken of such punctuation (*Skipper International v SA Textiles and Allied Workers' Union*, (1989(2) SA 612 (W)).

Preamble, long and short title to a statute and headings of a provision

The preamble to a statute gives an idea of its main object or 'purpose' and should always be borne in mind when interpreting a statute. In *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* (1917 AD 593 at 597), it was stated: "A preamble has been described by an old English Judge as 'a key to open the minds of the makers of the Act and the mischief which they intended to redress.'" The court also held that "where the Court is satisfied that the Legislature must have intended to limit in some way the wide language used, then it is proper to have recourse to the preamble".

It is surprising, therefore, that the majority of the judges in the very same court (Appellate Division) in *Ochberg v CIR* (5 SATC 93) did not apply this fundamental aid when coming to the conclusion that a taxpayer who owned, for all practical purposes, 100 per cent of a company and awarded himself further shares in the company at no cost, had fallen foul of the definition of 'gross income' as contained in section 1 of the Income Tax Act. By applying the 'strict and literal' approach to the interpretation of 'gross income', without reference to the preamble, which, after all, stated that the Act related to the "taxation of incomes...", they failed to recognise that neither the income nor the assets of the taxpayer had increased by the awarding of the shares. Wessels JA, however, in delivering one of the minority judgements, recognised that if the taxpayer were to be taxed on the value of the shares awarded, he would be paying the tax out of his capital. In his opinion (113): "This seems to me contrary to the whole tenor of the Act." His view was based on the preamble to the Income Tax Act read together with the definition of 'gross income' that the objective of the statute was to tax only income and not capital.

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Wessels JA's approach was, it is submitted, a classic 'purposive' approach to interpreting statutes. Perhaps his well-reasoned minority judgement lends encouragement to the view of Steyn J in *ITC 1384 (supra)* that a fair, just and reasonable lawgiver's intention should not give way to an obviously incorrect 'holy cow' precedent creating judgement that must be followed at all costs.

Even the long and short titles of a statute can assist in the interpretation of a statute. In *National Director of Public Prosecutions v Seevnarayan* (66 SATC 15), the court looked to the short title, the long title as well as the preamble to the Prevention of Organised Crime Act (Act No. 121 of 1998) in order to ascertain the 'purpose' underlying the statutory provisions contained therein. It was held that the statute was directed at the prevention of 'organised crime', and not by the wildest stretch of the imagination could the evasion of personal income tax by a single individual be categorised as 'organised crime'.

In interpreting a fiscal statute under the 'purposive' approach, it is submitted that, as a first port of call, the judiciary should always seek guidance from the preamble and the long and the short titles to a statute. These are indispensable internal aids to the interpretation of a provision.

Definitions in a statute

The definitions contained in the Income Tax Act should normally be adhered to unless the context otherwise indicates. In *Welch's Estate v C:SARS* (66 SATC 303), the definition of 'donation', although appearing to be comprehensively defined in section 55 of the Income Tax Act, was challenged. The question was whether a payment made in terms of a court-sanctioned divorce order to a trust for the maintenance of an ex-wife and a minor child fell within the ambit of the definition of 'donation'. The Appellate Division narrowed the meaning of 'donation' as defined, by including the essential elements of 'pure liberality' or 'disinterested benevolence', as demanded by the common law, in its interpretation. In so doing, the court found that payments made in terms of a divorce order could never be regarded as a donation. This is a classical 'purposive' approach to the interpretation of statutes that includes the principles underlying the Constitution – in this case, fairness and equity.

Differences in English and Afrikaans versions of a statute

A full discussion on using both the English and Afrikaans versions of a statute as an interpretational aid is considered to be beyond the scope of this article, as it is covered in both *Silke on South African Income Tax* (De Koker & Williams 2010) and *Income*

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Tax in South Africa (Urquhart 2010). Its contributory importance as an internal aid, nevertheless, needs to be recognised.

Although the signed language version usually prevails, the unsigned language version may be referred to in construing the meaning of a word (*New Union Goldfields Limited v CIR (supra)*). For example, in *ITC 1548* (55 SATC 26), the court referred to the word used in the unsigned Afrikaans version – ‘boerdery’ – in interpreting the English words ‘farming operations’ and gave it a restrictive meaning, namely, that ‘farming operations’ did not extend to farming activities like shearing sheep or harvesting, undertaken by a third party on behalf of a farmer.

External aids

An external aid is material from another source, which may assist the judiciary in interpreting a statute. The Constitution, being the supreme law of South Africa, is the most important external aid. It ensures fairness and equity in the interpretation of statutes.

An equally important external aid is the use of previously decided cases on the subject. However, a detailed discussion on the use of precedent (the *stare decisis* principle) is considered to be beyond the scope of this article.

Textbooks may and should be consulted for supporting or even alternative views. In the case of fiscal issues, a textbook such as *Silke on South African Income Tax* (De Koker & Williams 2010) is often referred to and quoted in addition to overseas textbooks such as *Halsbury's Laws of England* (Macay 1998).

The Hansard Reports and explanatory memoranda

In *More v Minister of Co-operation and Development*, (1986(2) SA 102(A)), the Appellate Division reaffirmed the rule that neither Explanatory Memoranda nor the Hansard Reports could be used as an aid to the interpretation of a particular provision. The Hansard Report is the official report of what was said in Parliament when the statute was debated. The same rule was followed by the English judiciary until Lord Denning, in *Davis v Johnson (supra)*, and the House of Lords, in *Pepper v Hart (supra)*, relaxed the rule and accepted that the Hansard Reports can be referred to in the appropriate circumstances. Lord Denning was not prepared to “grope in the dark” (851) to find the ‘intention of Parliament’ or ‘purpose’ of a provision when such relevant and important material was so readily available.

The Explanatory Memorandum, which accompanies a Bill when it is sent to the public for comment, is perhaps in a slightly different category than the Hansard

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Reports. It is primarily a National Treasury document, with inputs from the South African Revenue Service (SARS), indicating their interpretation of the legislation. However, it is not a document that is normally debated or passed by Parliament.

A search of the LexisNexis Electronic Library (2010) revealed that neither the Hansard Reports nor the Explanatory Memoranda have been used so far by the South African judiciary to assist them in interpreting a fiscal statute. Nevertheless, it is submitted that the time will come when the Hansard Reports will be found to be a useful aid to assist in the interpretation of a fiscal statute. Perhaps, even the Explanatory Memoranda may be found to be an acceptable aid as it does cast some enlightenment on why the statute is being enacted, but only from the perspective of National Treasury.

Law Commission and Law Reform Reports, Government White Papers and International Conventions

A search of the LexisNexis Electronic Library (2010) revealed that to date, the judiciary have not been inclined to use Law Commission and Reform Reports, Government White Papers or International Conventions in the interpretation of fiscal statutes except where special provision for their use is made within the statute. The Income Tax Act has no such provision. Even the Katz Report (Katz Commission Report 1994), which recommended certain amendments to the Income Tax Act (some of which have been accepted and incorporated in the Income Tax Act), has not been used as an extrinsic aid to the later interpretation of those amendments.

English law also does not accept these materials as aids to the interpretation of statutes (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591(HL)). The argument against the use of Commission Reports, Government White Papers and the like is that the final legislation as passed by Parliament is usually substantially different from that recommended by a Commission.

Nevertheless, it is submitted that the judiciary may be inclined to consult reports, papers and International Conventions, not so much to interpret, for example, the ambit of a fundamental constitutional right as it relates to a taxpayer within a South African context, but rather to elucidate the problem areas associated with such a right and to enrich the arguments for the decision eventually handed down.

The Interpretation of Statutes Act

The Interpretation Act (Act No. 33 of 1957) does not assist in finding the underlying 'purpose' of a provision. Its unambitious and limited aim is to provide, *inter alia*,

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standard definitions of common provisions that permit statutes to be drafted more briefly than otherwise would have been the case.

Dictionaries and other literary sources

Dictionaries are commonly consulted as a guide to the meaning of words or phrases in a statute where there is no help from previously decided cases on the point (*Blue Circle Cement Ltd v CIR*, (46 SATC 1)), but dictionaries are not very useful when attempting to determine the 'purpose' of a statute. In *ITC 1619* (59 SATC 309), the taxpayer argued that the word 'building', as used in section 11(bA) of the Income Tax Act, includes the land on which a building stands. The taxpayer lost his case, the court holding that the taxpayer had not referred to any dictionary meaning which supported his contention that land falls within the definition of a 'building'. Furthermore, applying the classical 'purposive' approach, the court held that the ordinary meanings of the words will only be departed from where it is found that such meanings were not intended when examined in the context of the section in which the words appear and against the background and purpose of the statute as a whole. The court found that there was no indication that the legislature used the word 'building' with the intention that it would also mean the land upon which it was erected.

Statutes or provisions borrowed from another country's legislation

Several provisions in the Income Tax Act have been borrowed from Australian and English fiscal legislation. Where this has occurred, the judiciary tended to interpret such legislation in the same way as interpreted in the country of origin. The English case of *Atherton v British Insulated and Helsby Cables Ltd* (1926 AC 205), for example, postulated the test for determining whether expenditure is of a capital or revenue nature. The test has been quoted with approval in many South African cases dealing with the same subject matter (*New State Areas Ltd v CIR* (14 SATC 155)).

Taking the historical context of a provision into account formed an integral part of the *Slamdien* (*supra*) approach to the interpretation of a provision under the 'purposive' approach. Nevertheless, the original country's interpretation will not pass muster if it is in conflict with the spirit and purport of the Constitution.

Earlier repealed statutes where the context indicated otherwise

The word 'income' is defined in section 1 of the Income Tax Act as meaning 'gross income less exempt income'. Such definition of 'income' should be used whenever it

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is found in the Income Tax Act, unless the context indicates otherwise, as happened in *CIR v Simpson* (16 SATC 268). The Appellate Division had to decide whether the word 'income', as used in section 9(2) of the 1941 Income Tax Act (Act No. 31 of 1941), the forerunner to section 7(2) of the present Income Tax Act, was to be given its defined meaning or its ordinary meaning of 'profits or gains'. The court held that the meaning of the word 'income' for the purposes of section 9(2) was not to be found in the definition section of the Act but in the original 1914 Income Tax Act (Act No. 28 of 1914), meaning 'profits or gains'. Finding otherwise would have led to absurd results.

Thus, even under the 'strict and literal' approach but only when an absurdity arose, the judiciary looked at the historical context of a provision to determine its meaning.

Statutes in pari materia

A judge may seek help from statutes that are *in pari materia* – statutes that relate to the same person or thing or to the same class of persons or things. A search of the LexisNexis Electronic Library (2010) revealed that the South African judiciary have not, so far, found a non-fiscal statute to be *in pari materia* with the Income Tax Act. However, since certain provisions of the Value-Added Tax Act are identical to those of the Income Tax Act, for example, the Pay-Now-Argue-Later provisions embodied in section 88 of the Income Tax Act and section 36 of the Value-Added Tax Act, they will probably be found to be *in pari materia*. The provisions are there to achieve the same purpose, namely to collect outstanding taxes expeditiously. Thus the constitutionality of the Pay-Now-Argue-Later provision of the Value-Added Tax Act, as determined in *Metcash Trading Ltd v C:SARS and Another* (63 SATC 13), would probably also hold true for the section 88 Pay-Now-Argue-Later provision in the Income Tax Act.

It is submitted that the fact that the judiciary are not inclined to find statutes other than fiscal statutes *in pari materia* is correct. It fits in with the approach that the judiciary should look to the preamble and long and short titles of a statute to assist in the determination of its 'purpose'. Statutes in other fields of the law do not normally have the same 'purpose' as a fiscal statute. Using non-fiscal legislation as being *in pari materia* with the Income Tax Act could light up the way in a manner that leads to the wrong path being followed.

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Interpretational presumptions

Although interpretational presumptions are considered to be external aids to the interpretation of statutes, it is considered appropriate to analyse and discuss them separately.

Presumptions have been part of the South African common law for centuries, and many of them deal with issues of fairness, equity and justice. Being part of the common law, they are indirectly part of the Constitution and have to be developed by the judiciary when interpreting legislation to align them to the Constitution (section 39(2) of the Constitution). As such, the judiciary are obliged to consider but not necessarily apply these presumptions when interpreting a statute.

The ambit of the presumptions now specifically included in the Bill of Rights and certain other common law presumptions, as specified later in this article, are considered to be beyond the scope of this article. Thus, only the presumptions relating to *cassus omissus*, 'reading down', double taxation and language will be analysed.

In the case of *cassus omissus*, words may have to be 'necessarily implied' or 'read in'

Statutory interpretation does not usually extend to 'reading in' words that have been omitted from a statute to rectify or change a statute (*Brownstein v CIR*, 10 SATC 199; *Hippo Holdings Co Ltd v CIR*, 16 SATC 112). Such actions may be regarded as a "naked usurpation of the legislative function under the thin disguise of interpretation" (*per* Lord Simonds, in *Magor and St Mellons Rural District Council v Newport Corporation* ([1951] 2 All ER 839 at 841). However, the Constitution impliedly permits the 'reading in' of words, especially when our fundamental rights are at stake (section 172). The Constitution impliedly provides for far more drastic action – the 'severance' of a provision to maintain its constitutionality (see section 172(1)(a) of the Constitution and *South African National Defence Union v Minister of Defence and Another* (1999 (6) BCLR 615 (CC)).

The judiciary uses the phrase 'necessarily implied' to 'read in' words where there is a case of *cassus omissus*. In *CIR v Peoples Stores (Walvis Bay) (Pty) Ltd (supra)*, the court held there was a 'necessary implication' that an amount, which has been taxed as an accrual or receipt, cannot again be taxed when it is received or accrued, as that would be regarded as double taxation. It may also extend to a provision when it is obviously unfair or inequitable or excludes a common law principle such as the *audi alteram partem* rule (*Metcash Trading Ltd v C :SARS and Another (supra)*).

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ITC 1584 (57 SATC 63) is a good example of the ‘necessarily implied’ or ‘reading in’ technique in practice. The case involved the interpretation of section 10(1)(u) of the Income Tax Act, which granted an exemption for amounts paid to a former spouse or children for their maintenance in terms of a divorce order. The question before the court was whether the provision could be extended to the payment of the maintenance from a deceased estate. The Judge, Seligson AJ, refused to follow a ‘strict and literal’ interpretation of section 10(1)(u), which created a “glaring anomaly with inequitable results”, and held that the legislature could never have intended such an “absurd and irrational” result and it “could never have been intended by the legislature when it enacted the exemption in section 10(1)(u)(70)”. He applied a so-called ‘judicial amendment’ to section 10(1)(u).

In the *Shell Annandale Farming* case (*supra*), the court did not permit the ‘reading in’ of the word ‘expropriation’ as a ‘deemed supply’ for the purposes of the Value-added Tax Act. The court was of the opinion that there was no *cassus omissus* in the provision and thus the *contra fiscum* presumption applied.

In both of these latter two cases, the judiciary, in following a ‘purposive’ approach, arrived at a just and equitable decision in favour of the taxpayer, something that was not easily achievable under the ‘strict and literal’ approach to the interpretation of statutes.

Statutes are ‘always speaking’: ‘reading down’ so that technical and commercial innovations and developments are taken into account

The fabric or the *mores* of society, but especially the Constitution, can influence the interpretation of statutes over time. Thus, the judiciary occasionally modify or adapt statutes to keep them constitutional or ‘alive’. This technique is known as ‘reading down’. The court in *Haynes v CIR* (64 SATC 321) used this technique in interpreting the scope and ambit of the ‘search and seizure’ provisions of section 74D of the Income Tax Act.

Applying the presumption that statutes are ‘always speaking’ sits more comfortably with the ‘purposive’ approach to the interpretation of statutes rather than with the ‘strict and literal’ approach.

Presumption against double taxation

There is an important presumption that there is no double deduction available to a taxpayer (*ITC 1766* (66 SATC 125)) unless a provision specifically provides for it or it

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is a practice generally prevailing at the date of assessment (*CIR v Hulett Aluminium (Pty) Ltd* (62 SATC 483)).

Correspondingly, the same amount cannot be taxed twice in the hands of the same person. In *Isaacs v CIR* (16 SATC 258), the court held that the imposition of income tax is fundamentally a tax upon a man's annual profits or gains and should not be taken as imposing tax upon a taxpayer twice in respect of the same profits or gains. Thus, unlike in the *Ochberg (supra)* case, the court, in effect, looked to the objective or 'purpose' of the statute as espoused in the preamble to the then Income Tax Act (Act No. 31 of 1941) in confirming this fundamental principle.

Nevertheless, the same amount may be taxed in the hands of different taxpayers. For example, one taxpayer may not get a deduction for a payment made whilst another taxpayer may have to pay tax on receipt of the same amount (*ITC 554* (13 SATC 211)).

Language presumptions

An informed analysis of words and word patterns was a necessary ingredient in the interpretation of statutes under the 'strict and literal' approach to interpreting statutes. The 'purposive' approach, as explained in the *Slamdien (supra)* case, also does not permit violence to be done to the precise wording of a statute unless the words used do not convey the 'purpose' underlying the statute. Thus, the analysis of language presumptions is just as important under the 'purposive' approach to the interpretation of statutes as it was under the 'strict and literal' approach.

***Ex abundanti cautela* or tautology**

There is a presumption against tautology (unnecessary repetition). Every word is important and none should be regarded as redundant or superfluous (*CIR v Golden Dumps (Pty) Ltd* (55 SATC 198). Where there is tautology, the repetitious words are not amended or altered; they are ignored (*Israelsohn v CIR* (18 SATC 247)).

In line with the presumption against tautology, it is not surprising that very few words in the provisions of the Income Tax Act have been found by the judiciary to be unnecessarily inserted or repetitious. One example can be found in *SBI v Lourens Erasmus (Edms) Bpk* (28 SATC 233), where the court indicated that the word 'solely' as used in the phrase 'solely or mainly' in the Income Tax Act was unnecessarily inserted since it added nothing to the meaning of the word 'mainly' as used in the phrase.

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The use of the words 'shall', 'may' and 'must', 'all' and 'mainly'

The words 'shall' or 'must' are ordinarily used in the directive sense, whilst the use of the word 'may' is an indication of permissiveness (*Big Ben Soap Industries Ltd v CIR* (16 SATC 22)). The word 'may' implies optional conduct, unless the context and 'purpose' underlying the provision indicate otherwise, as was the case in *CIR v King* (14 SATC 184), where the court held that the word 'may' imposed a duty on the Commissioner to exercise his power in terms of the forerunner to the present section 80A of the Income Tax Act, and thus its meaning in that context was directory.

The word 'all' as used in a statute does not mean 'some'. If it is to mean anything other than its ordinary meaning "that must be done in the clearest possible language" (*R Koster & Son (Pty) Ltd & Another v CIR* (47 SATC 23 at 33)).

In *SBI v Lourens Erasmus (Edms) Bpk (supra)*, the court interpreted the meaning of the word 'mainly' as used in several sections of the Income Tax Act and found it to be a quantitative measure that meant more than 50 per cent. The revenue authorities appear not to deviate from this 'more than 50 per cent' meaning. It is usually an arbitrary determination and may lead to unfair discrimination when used in provisions that could violate a fundamental right. For example, section 23(m) of the Income Tax Act uses the word 'mainly' to determine whether an employee may get a deduction for expenditure which otherwise would have been allowed in terms of section 11(a) of the Income Tax Act, but for the application of section 23(m). A 'strict and literal' interpretation of the word 'mainly' could lead to the absurd result of an employee who earns 50.1 per cent of his remuneration in the form of commission income being able to obtain a deduction for expenditure incurred in earning such income, while an employee who earns only 49.9 per cent of his income in the form of commission income would not be able to obtain the same deduction. Under the 'purposive' approach to the interpretation of statutes, the judiciary could 'read down' and amend the meaning of 'mainly' so as to obtain a constitutionally equitable result. It is considered to be beyond the scope of this article to indicate an acceptable percentage to replace the word 'mainly' as the judiciary would have to determine a constitutionally acceptable percentage, if any, depending on the circumstances.

The use of the eiusdem generis and the noscitur a sociis presumptions in interpretation

The *eiusdem generis* (of the same kind) and *noscitur a sociis* (associated with) doctrines are important presumptions. Verbal patterns in a provision suggest how that provision should be interpreted. The rules provide that the meaning of a word may be inferred from the accompanying words.

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In *Joss v SIR* (41 SATC 206), for example, the court applied the *eiusdem generis* rule in determining that an interest-free loan fell within the ambit of the words ‘donation, settlement or other disposition’. It was held that the words ‘other disposition’ took their meaning from ‘donation’ and ‘settlement’. Although ‘other disposition’ could not be regarded as a ‘donation’ for donations tax purposes, an interest-free loan is regarded as a ‘continuing donation’ and thus falls within the meaning of ‘other disposition’ for the purposes of the now equivalent section 7(3) of the Income Tax Act.

Conclusion on the use of presumptions

Generally, under the ‘strict and literal’ approach to the interpretation of statutes, presumptions, especially the language presumptions, were used to great effect in interpreting statutes. This is also the case under the ‘purposive’ approach provided that the presumptions do not undermine the ‘purpose’ of a statute, taking into account the ‘intention of the legislature’, the history of the provision, its broad objects, the constitutional values that underlie it and its interrelationship with other provisions of the statute (*Slamdien (supra)*).

The presumptions listed in the paragraph below are now incorporated directly in the Constitution or indirectly as part of the common law. Because they are constitutionally entrenched presumptions and must be applied in the interpretation of statutes, they deserve separate analysis and discussion, which, unfortunately, is beyond the scope of this article.

Interpretational presumptions now embodied in the Constitution and further research opportunities

A discussion on the centuries-old common law presumptions that are covered in the Constitution generally and the Bill of Rights in particular, as already mentioned, is considered to be beyond the scope of this article. Being constitutionally enforceable means that great care and consideration must be given to their own interpretation within a fiscal environment. Many taxpayers’ rights have been and will be recognised and developed from the fundamental rights stipulated in the Bill of Rights and are considered a fertile area for further detailed research.

Section 8(3) of the Constitution provides that in order to give effect to a right in the Bill of Rights, the judiciary “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right”. Thus, all common law presumptions listed below are either specifically covered in the Constitution or are embraced indirectly as part of the common law that must be applied and developed.

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Specifically incorporated in the Constitution are the presumptions against the:

- invasion of common law rights (section 8);
- construing of statutes that leads to a discriminatory result (section 9);
- abrogation of the protection of legal professional privilege (section 14);
- interference with vested property rights or alienating property without compensation (section 25);
- denial of procedural fairness to persons affected by the exercise of public power (section 33);
- ousting of the jurisdiction or restriction of access to the courts (section 34);
- exclusion of the right to a claim of self-incrimination (section 35); and
- exclusion of the *audi alteram partem* principle (section 35).

Presumptions that fall within the 'catch all' provisions of section 8(3) of the Constitution dealing with the common law and not dealt with already in this article include the presumption:

- in favour of the rule of law;
- favouring public policy (see *ITC 1490* (53 SATC 108) where no deduction was allowed for fines. Section 23(o) of the Income Tax Act now prohibits the deduction of fines and bribery or corruption payments);
- *contra fiscum* rule (giving preference to the interpretation that favours the taxpayer where there is ambiguity; see *Shell's Annandale Farm (Pty) Ltd v C:SARS*, (*supra*));
- *semper in dubiis benigniora preferenda sunt* rule (if two interpretations are possible, one of which leads to hardship while the other does not, the Legislature will be presumed to have intended the latter rather than the former). A serious financial hardship rule is now included in the Tax Administration Act (Act No. 28 of 2011) that was promulgated on 4 July 2012 (but which will only take effect at a future date still to be announced by the President in the *Government Gazette*) in the case where penalties are involved (section 218(2)(f));
- *generalia specialibus non derogant* (in the fiscal context, general provisions do not overrule specific or special provisions. Thus section 80A (the general anti-tax avoidance rule) cannot overrule a specific anti-tax provision such as section 7(3) (*ITC 1558* (55 SATC 231)));
- against *delegatus delegare non potest* (a delegated power by the legislature may not be further delegated). The court in *CIR v Da Costa* (47 SATC 87) considered this presumption but found it unnecessary to decide whether this presumption applies in regard of the imposition of additional tax imposed in terms of section 76 of the Income Tax Act;

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- against applying statutes extra-territorially unless there is a double taxation agreement with the country concerned;
- intending to legislate in conformity, and not in conflict, with international law;
- against administering punishment in the absence of fault or *mens rea* (intention);
- against applying statutes retrospectively (section 35 of the Constitution prohibits this where criminal sanctions are involved); and
- that a reverse onus should not be applied in penalty situations (*S v Zuma (supra)*; Goldswain 2009: 1–23).

Virtually all of these presumptions, whether they are directly or indirectly incorporated in the Constitution, require detailed further research to determine their scope and ambit within a fiscal context. The present author has already researched the theoretical ambit and scope of section 9 of the Constitution as it relates to equality and discrimination in a fiscal context (Goldswain 2011: 1–25), but there are still many other fertile areas to research. Hopefully, this article can stimulate further research in some or all of the areas listed in this paragraph.

Conclusion

Figuratively speaking, no-one wants to be hanged for or “by a comma”. This is also true of the taxpayer. He or she does not want to pay more taxes than may legally be imposed and certainly does not want any constitutional right violated. The interpretation of a fiscal statute is the basis on which the revenue authorities can assess and collect taxes and, correspondingly, the foundation on which a taxpayer’s rights are built. A haphazard, inconsistent, discriminatory and unfair interpretation of a fiscal statute leads to chaos for both the revenue authorities and the taxpayer.

One of the two objectives of this article has been to analyse the process used in the interpretation of fiscal statutes. Based on the provisions of the Constitution, which is the ‘supreme’ law of the country, judicially decided cases and the views of prominent academic authors, it is clear that South Africa has transcended from applying the ‘strict and literal’ approach to the interpretation of statutes to the ‘purposive’ approach. This is also true in respect of fiscal statutes. The interpretation must take cognisance of the ‘spirit and purport’ of the Constitution and promote, *inter alia*, the protection of the liberty of a person, his or her property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. Thus, where a previous interpretation of a statute now violates a provision of the Constitution, there are no ‘holy cows’ and the judiciary should not be afraid to overturn such a decision.

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The judiciary may 'read in' in the case of a *cassus omissus* or 'read down' and apply the presumption that a statute is 'always living' to ensure its constitutionality. In so doing, the judiciary are, in effect, making law – something, which was frowned upon under the 'strict and literal' approach, but which sits comfortably with the 'purposive' approach.

The 'strict and literal' approach appeared, on the surface, to focus primarily on the language skills of the judiciary but, in practice, this was hardly ever true. Although appearing to hide behind the language skills necessary to interpret statutes, the judiciary used their legal skills, in most cases, to arrive at a measured and sensible decision. It is for this reason that very few precedent-creating decisions, even today, can be challenged successfully.

Where an absurdity arose as a result of a 'strict and literal' interpretation, the judiciary then sought the 'intention of Parliament'. It was concluded in the current article that seeking the 'intention of Parliament' and finding the 'purpose' underlying a statute is not the same concept. Under the 'purposive' approach, something more than just finding the 'intention of Parliament' is necessary (*Minister of Land Affairs v Slamdien (supra)*). The history of the provision, its broad objects, the constitutional values that underlie it and its interrelationship with other provisions of the statute, whilst not violating the precise wording of the provision, must all be considered.

The other objective of this article has been an attempt to fingerprint the usefulness of aids, taking into account the constitutional constraints that may be used in interpreting fiscal statutes under the 'purposive' approach. The research on which this article is based indicated that all the aids, both internal and external, used under the 'strict and literal' approach to the interpretation of statutes, are still valid aids under the 'purposive' approach. In fact, the use of certain aids, for example, the use of the Hansard Reports, which were prohibited under the 'strict and literal' approach, would now seem to be valid aids in the interpretation of a statute.

Generally, anything contained in a statute because it has been passed by Parliament may be used as an aid to the interpretation of the statute. This would include the punctuation, the preamble, the long and short titles of a statute as well as the definitions – unless the context indicates otherwise. Even the unofficial Afrikaans version of a statute can be referred to in establishing the ambit of an English word, and *vice versa*.

The Constitution, together with precedent-setting judicial decisions, is the most important external aid. Textbooks and dictionaries are also often consulted. The Interpretation Act (Act No. 33 of 1957), however, belies its name and is not really a tool that can assist in finding the underlying 'purpose' of a provision.

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Several common law presumptions have been identified that can assist in the interpretation of statutes. For example, there is the presumption that there can be no double taxation. Many other presumptions deal with issues of fairness, equity and justice and have been elevated to the status of a fundamental right by their inclusion in the Bill of Rights. Even those not elevated to a fundamental right are indirectly part of the Constitution and have to be developed. These common law presumptions have been listed, but many of them are not discussed as their scope and ambit within the constitutional context require further research.

Aids, especially presumptions directly embodied in the Constitution, usually build the foundation on which a decision is based. Their use is a vital ingredient in establishing the 'purpose' of a statute. These aids add depth to the analysis of the scope and ambit of a statute.

An aid, whether it is an internal or external aid or even a presumption, is not normally used in isolation. Other aids and presumptions should also be used to reinforce and support the underlying 'purpose' of the provision and thus the interpretation decided upon. Such an approach will usually lead to a logical and fair interpretation of a statute.

The old mantra of the judiciary that there is "no equity about tax" (*CIR v Simpson (supra)* at 285; *New Union Goldfields Limited v CIR (supra)* at 15)) should give way to the refrain that there should be no more 'groping in the dark', and so-called 'holy cow' precedent-setting decisions of the past should not be endorsed if obviously incorrect.

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3.3 ASPECTS DISCUSSED IN THE CORE ARTICLE THAT NEED FURTHER CLARIFICATION

In the core article to this chapter, the remedy of “reading in” to cure an omission and using the interpretative tool of implying words in a case of “*cassus omissus*” were mentioned but not really discussed. Perhaps the impression was obtained that “reading in” and “*cassus omissus*” are the same concept. This is not the case. “Reading in” cures a constitutional omission (*South African National Defence Union v Minister of Defence and Another (supra)*) whereas the application of the interpretative tool of “*cassus omissus*” permits the judiciary in interpreting legislation to imply words omitted even if no constitutional issue is involved (*CIR v Peoples Stores (Walvis Bay) (Pty) Ltd (supra)*).

“Reading down”, on the other hand, is a form of indirect application of the Bill of Rights. It enables legislation to be interpreted as being compatible with the founding values of the Constitution wherever possible. “Reading down” is preferred by the judiciary as it is not a remedy whereby the judiciary declare a piece of legislation unconstitutional thereby leaving a legal vacuum. It keeps legislation ‘alive’ (*Haynes v CIR (supra)*).

3.4 THE *CONTRA FISCUM* PRESUMPTION

It was considered to be beyond the scope of the article reproduced above to discuss the *contra fiscum* presumption in detail. However, in order to round off the discussion on the interpretation of statutes, a short analysis on the scope and ambit of the presumption is considered appropriate. After all, the first rule of interpretation that a student of taxation hears and learns about is the *contra fiscum* rule of interpretation.

3.4.1 Origin of the *contra fiscum* rule of interpretation

The *contra fiscum* presumption in South African law originates in Roman Law, which law together with Roman Dutch Law, forms the basis of the common law of South Africa. The presumption has been formally recognised by the South African judiciary in *Elliot v Rex* (1911 EDL 514 at 517) where Kotze JP refers to the Roman Law maxim “*in dubiis*

quaestionibus contra fiscum responditur". See also *Executors Testamentary, Estate Reynolds and Others v CIR* (8 SATC 203). Furthermore, in *Glen Anil Development Corporation Ltd v SIR* (37 SATC 319), Botha JA stated (334):

... the rule that in the case of an ambiguity a fiscal provision should be construed contra fiscum...which is but a specific application of the general rule that all legislation imposing a burden upon a subject should, in the case of an ambiguity, be construed in favour of the subject...

The *contra fiscum* presumption is an equity-based rule and thus is in accordance with the objectives and provisions of the Constitution. The practical problem, however, is in the application of the rule – when does it apply?

3.4.2 When does it apply

In the *Glen Anil Development Corporation* case (*supra*), the Appellate Division saw fit to distinguish between charging sections and other sections of the Income Tax Act, which do not impose a tax, in considering the applicability of the *contra fiscum* presumption. The court held that the *contra fiscum* presumption does not apply to non-charging sections. Furthermore, the court held that, since section 103(2) of the Income Tax Act was directed at defeating tax avoidance schemes and does not impose a tax, the *contra fiscum* presumption could not be applied in that case.

The decision in the *Glen Anil* case appears to be at odds with the earlier Appellate Division decision in *CIR v King* (14 SATC 184), where the *contra fiscum* presumption was applied to the forerunner of section 103(1) and its present-day equivalent, section 80A of the Income Tax Act (anti-tax avoidance legislation provisions). No distinction was made in that judgement between charging and non-charging sections. Unfortunately, it appears as if the court in the *Glen Anil* case was unaware of the *King* decision, or if it was aware of that decision, it made no attempt to discuss and distinguish the *King* decision when handing down its judgement. Thus, there are two conflicting Appellate Division decisions on this aspect, which conflict will be discussed next.

It is submitted that, although the decision in the *Glen Anil* case was probably correctly decided in the circumstances, the wrong reasons were advanced for coming to that decision. Differentiating between charging and non-charging sections for the purposes of applying the *contra fiscum* presumption appears to have been a new principle introduced in the *Glen Anil* case without any valid basis being advanced for such differentiation. The *King* decision, unusually, was not referred to and thus it is further submitted that that decision is still precedent for the proposition that all the provisions of the Income Tax Act – not only charging sections – are subject to the *contra fiscum* presumption. Additionally, the whole basis of the argument in the *Glen Anil* case falls apart if Swart's (Swart 1996: 446–457) view is accepted that section 103(1) (and its replacement section 80A) and, by implication, section 103(2) are, in fact, charging sections. It is submitted, however, that the distinction between the charging and non-charging sections of the Income Tax Act is no longer an issue as it was under the “strict and literal” approach to the interpretation of statutes. The “purposive” approach to the interpretation of statutes, taking into account the “spirit and purport” of the Constitution, lessens the importance of the distinction for the purposes of the application of the *contra fiscum* presumption.

It has been held that the *contra fiscum* presumption is applicable only if the tax provision is ambiguous (*SIR v Raubenheimer* (31 SATC 209)). However, once again, there is no proper guidance or clarity as to the nature of the ambiguity that should exist before the *contra fiscum* presumption is applied. The court in *Union Government v Taylor* (1936 AD 100) was of the opinion that, if there are two interpretations which are reasonably possible, the interpretation which favours the taxpayer should be adopted. This approach was also followed in *CIR v Whitfield* (55 SATC 158) when the court had to interpret the meaning of the term “temporary absence” from the Republic for the purposes of the now deleted section 9(1)(d) of the Income Tax Act relating to the deemed source of income. The court approved the use of the *contra fiscum* presumption by the Special Court (now the Tax Court) and found that the term “temporary absence” was capable of two interpretations in the context of section 9(1), a section which has subsequently been repealed. The court favoured a narrow interpretation of the term, which interpretation favoured the taxpayer.

Although not expressly stated as such, it is submitted that Seligson AJ in *ITC 1584* (57 SATC 63), in applying a purposive approach to the interpretation of the exemption contained in section 10(1)(u) of the Income Tax Act, was in effect applying the *contra fiscum* presumption. This was also, it is submitted, the case in *CIR v Lunnon* (1 SATC 7). The court recognised that there could be an interpretation, which excluded a liability for taxation in the circumstances, and applied that interpretation. The *Lunnon* decision, however, has been subject to severe criticism subsequently (see article reproduced above in this regard). The decision in *Shell's Annandale Farm (Pty) Ltd v CIR* (62 SATC 97) by the Cape Provincial Division in 1999, appears to have extended the *contra fiscum* presumption to cases not only where there is an ambiguity in the wording but also where there is an ambiguity as to the intention of the legislature, even if there was no obvious ambiguity in the wording. Although not specifically stated as such, the court was giving effect to the principles underpinning the Constitution. The court had to decide whether an "expropriation" of property amounted to a "supply" as defined in section 1 of the Value-Added Tax Act. The court, applying the *contra fiscum* presumption, concluded that the interpretations of "supply" as put forward by the opposing parties, were both plausible and therefore the court had to apply the interpretation most favourable to the taxpayer. The court then went on to remark that the solution for the aggrieved SARS was to ensure that the necessary amendment to the Act was effected so that the proceeds of expropriation were brought unambiguously within the scope of the Value-Added Tax Act. SARS did not take very long after the judgement was handed down to effect the necessary unambiguous legislative amendment.

In *KBI v Boedel Wyle A de Beer* (63 SATC 467), the Supreme Court of Appeal held that where the true intention of the legislature could not be determined with reference to the usual methods of interpretation, the *contra fiscum* presumption prevails and the interpretation which favours the taxpayer must be given preference.

3.4.3 Conclusion in regard to the *contra fiscum* presumption

It is clear that the *contra fiscum* presumption has been and remains a part of our common law and is not in conflict with the Constitution. In fact, the presumption complements the principles underpinning the Constitution by ensuring an element of equity in the interpretation of fiscal statutes. Thus, it is not open for any court in South Africa to reject outright the *contra fiscum* presumption. The court in the *Glen Anil (supra)* case rejected the presumption but only in relation to non-charging sections. As already mentioned above, this decision is open to criticism and, it is submitted, is now even contrary to the values underpinning the Constitution.

3.5 SYNTHESIS AND CONCLUDING REMARKS

Chapters 2 and 3 of this thesis have discussed and analysed the valuable right of the taxpayer to approach the judiciary, through the court system (as guaranteed by section 34 of the Constitution), to interpret legislation that is neither clear nor certain and even have the judiciary declare “arbitrary” legislation unconstitutional. The vital role of the judiciary in clarifying the scope and ambit of legislation cannot be underestimated. SARS has often interpreted legislation (sometimes through “Practice Notes”, “Interpretation Notes” or even in correspondence with taxpayers) in a “narrow” manner that has led to disputes with taxpayers, and SARS’ interpretation has been found to be incorrect. SARS’ remedy has often been to change the legislation – sometimes with retrospective effect (see *Trustees of the Phillip Frame Will Trust v CIR* (53 SATC 166); *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* (52 SATC 9)).

Even so-called precedent-creating decisions of the past can be overturned to conform to the dictates of the principles underpinning the Constitution. There are no “holy cows” where these precedent-creating decisions of the past are in conflict with the principles underpinning the Constitution. If the spirit and purport of the Constitution are being upheld, then an element of justice and equity automatically follows.

The call in any legal challenge for justice and equity, however, does not only involve an interpretation of the legislation concerned but also an examination of the particular facts pertaining to the challenge and how they are presented to the judiciary. Usually, the side with the best facts has the advantage even if, it is submitted, the law is against such facts especially where equity and justice are demanded. There is some debate as to the origins of the old legal adage along the lines that if the facts are on your side, pound the facts into the table. The adage continues to advise that, if the law is on your side, pound the law into the table but where neither the facts nor the law is on your side, pound the table (Quote Investigator 2012b). This is a common-sense approach to litigation and also holds true in taxation matters. “Pounding the facts” in your favour goes a long way to satisfying the so-called “reverse onus” of proof provisions that are generally placed on a taxpayer when challenging an assessment made in terms of the Income Tax Act or even when penalties are imposed for certain tax infractions. Thus, the next chapter will be devoted to an analysis and discussion of the constitutionality of certain of the so-called “reverse onus” of proof and presumptions provisions as applied in income tax matters.

CHAPTER 4**THE REVENUE'S UNFAIR ADVANTAGE – THE PRACTICAL APPLICATION
AND CONSTITUTIONALITY OF REVERSE ONUS OF PROOF PROVISIONS
AND PRESUMPTIONS AS APPLIED IN INCOME TAX MATTERS**

“What kinda odds are those?” – Al Capone (Comisky, Feld & Harris 1995: 1(1-1))

4.1 INTRODUCTION

Al Capone, the notorious American gangster of the 1930s, whilst waiting to be charged for committing various tax offences, heard the clerk of the court call his case, “United States of America versus Alphonse Capone”. He turned to his attorneys and apparently remarked, “What kinda odds are those?” (Comisky, Feld & Harris 1995: 1(1–1)). Capone’s apprehension, it is submitted, is felt by virtually every South African taxpayer when SARS comes calling even when he or she is “innocent” of any tax offence. The apprehension can turn to fear, especially where tax evasion is involved as the penalties and sanctions that may be imposed can ruin a taxpayer financially and may even, although not usually, lead to a period of imprisonment.

A tax challenge, like any other legal challenge, involves three major elements: the law, the facts and what Cardoza (1921) refers to as the human factor in the form of the judiciary. The law and the principles involved in interpreting fiscal legislation within a constitutional framework were covered in Chapters 2 and 3. This chapter covers the second element, the facts and the onus of proof in regard to the facts. Chapter 5 will discuss both the importance of facts and the third element, the human factor, in the form of the judiciary, in the context of clean hands, good facts and due process of law as it relates to the right to just administrative action (section 33 of the Constitution) and some of the other fundamental rights guaranteed in the Bill of Rights.

It is important to distinguish between questions of law and questions of fact as the onus of proof provisions relating to revenue legislation as contained in the Tax Administration Act (previously contained in the Income Tax Act) are not concerned with

questions of law but only with questions of fact (De Koker 1995: 18.65; *ITC 1725* (64 SATC 223)). The following simple example illustrates the difference between questions of fact and questions of law:

Question of fact: Did the taxpayer receive a *bona fide* loan from his or her employer or was the loan a disguised form of remuneration?

Question of law: Is a *bona fide* loan included in the definition of “gross income” as provided for in section 1 of the Income Tax Act?

Many valid legal challenges are lost by taxpayers because they are unable to present sufficient good facts to a court to satisfy or discharge the so-called “reverse onus” of proof provisions as now contained in the Tax Administration Act. The article at the core of this chapter, entitled “The application and constitutionality of the so-called reverse onus of proof provisions and presumptions in the Income Tax Act: the revenue’s unfair advantage”, was published in 2009 in a peer-reviewed accredited journal (Goldswain 2009: 61–83), some three years prior to the promulgation of the Tax Administration Act on 4 July 2012. The article discusses the generally unfair advantage that SARS has over the taxpayer in a tax challenge because of the reverse onus of proof provisions as contained in the Income Tax Act at the time the article was written.

The structure for this chapter is to reproduce, in its original format, the peer-reviewed accredited journal article as it was published. Thereafter, the provisions of the Tax Administration Act that relate to the onus of proof will be analysed, discussed and compared to the onus of proof provisions as contained in the Income Tax Act but limited to those reverse onus provisions discussed in the article. In the article, certain recommendations were made and it will be interesting to compare the recommendations made at the time of writing the article to the new onus of proof provisions that have become effective from 1 October 2012. Please note that in the article reproduced below, the South African Revenue Service is incorrectly referred to as the South African Revenue Services. Furthermore, as indicated in paragraph 1.1 of this thesis, the 1996 Constitution should be referred to as The Constitution of the Republic of South Africa, 1996 in terms of the

Citation of Constitutional Laws (Act 5 of 2005) and not The Constitution of the Republic of South Africa (Act No. 108 of 1996) as indicated in the article.

4.2 THE REVERSE ONUS OF PROOF PROVISIONS AND PRESUMPTIONS – THE THIRD “CORE” ARTICLE

The application and constitutionality of the so-called “reverse” onus of proof provisions and presumptions in the Income Tax Act: the revenue’s unfair advantage

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Abstract

This study analyses and discusses the application and constitutionality of the general onus of proof provision (section 82 of the Income Tax Act 58 of 1962 [the “Act”]), the presumption in favour of the State when criminal sanctions are applied to an offending taxpayer (section 104(2) of the Act) and the mechanics for imposing administrative sanctions in terms of section 76(1)(b) of the Act.

The conclusion reached is that the reverse onus presumption, as provided for in terms of section 104(2) of the Act, is unconstitutional. It is penal in nature and offends against the constitutional right of an accused to a fair trial (sections 35(3) of the Constitution of the Republic of South Africa Act, 108 of 1996 [the “Constitution”]). The section 36 limitation of rights clause of the Constitution does not save it.

Section 76(1)(b) of the Act read in conjunction with the deeming provision of section 76(5) of the Act, is inextricably linked to the section 82 general reverse onus provision of the Act. Hence, when these three sections are applied together, they create a reverse onus that, *prima facie*, violates the right to just administrative action (section 33 of the Constitution).

Regarding the general reverse onus burden as provided for in terms of section 82 of the Act, the conclusion reached is that it is reasonable and justifiable in an open and democratic society and can therefore be regarded as constitutional.

Key words

Additional tax
Burden of proof
Constitution
Deeming provisions

Onus of proof
Penalties
Presumptions
Reverse onus

1 Introduction

Harold Wilson once remarked: “Everybody should have an equal chance – but they shouldn’t have a flying start” (Cohen 2000:150). His words aptly describe the unfair

advantage the Commissioner and the State have over the taxpayer when assessing a person to normal tax, additional tax and penalties because of the application of the so-called "reverse onus provisions and presumptions" contained in the Income Tax Act 58 of 1962 (the "Act").

Statutorily placing the onus of proof on a taxpayer (for example, the general onus provision of section 82 of the Act) or statutorily presuming that a taxpayer has committed a tax offence with the necessary intention to evade tax (for example, the presumption of intention contained in section 104(2) of the Act), eases the administrative burden of the revenue authorities. It facilitates the assessment to tax of a taxpayer (section 82 of the Act) and the criminal conviction of a taxpayer who has committed a tax offence (section 104(1) of the Act).

In addition to criminal sanctions which may be imposed on a taxpayer by a court of law if he or she is found guilty of a tax offence in terms of section 104(1) of the Act, the revenue authorities may also impose administrative sanctions for similar tax offences in the form of "additional tax" on a taxpayer in terms of section 76(1) of the Act. Although section 76 of the Act has no ostensible reverse onus or presumption provision, section 76(5) does contain a deeming provision couched in similar wording to that used in the section 82 onus of proof provision of the Act. The deeming provision, in effect, defines what is meant as an omission from a taxpayer's return of income for the purposes of applying section 76(1)(b) of the Act. Practically, however, it will be seen from the discussion on the application of section 76(1)(b) of the Act that the section 82 general onus of proof provision of the Act is inextricably associated with and linked to the deeming provision of section 76(5) and thus to section 76(1)(b) of the Act.

It is interesting to note that no decided tax cases specifically refer to the section 82 onus of proof provision or the presumption in section 104(2) of the Act as a reverse onus provision or presumption. However, this type of onus or presumption creates what Langa J in *S v Mbatha: S v Prinsloo* (1996 (3) BCLR 293 (CC) at 299, 300 and 307) referred to as a statutory "reverse" onus presumption. See also *S v Zuma and Others* (1995 (4) BCLR 401 (CC)) where a similar conclusion was reached.

In effect, a reverse onus provision or presumption can be described as a statutory provision that places the burden of proof on someone other than the person who is normally required to bear the burden of proof under South African common law. Sections 82 and 104(2) of the Act do exactly that. They set out to place the onus of proof specifically on the taxpayer instead of the revenue authorities.

The Income Tax Act 28 of 1914 had no general reverse onus provision such as section 82 of the present Act. The common law rules therefore applied, that is, the onus of proof was placed on the revenue authorities (*CIR v Goodrick* (12 SATC 279 at 295-296)). It is submitted that placing the onus of proof on the taxpayer or creating a presumption in favour of the revenue authorities, can both be considered as falling within the ambit of a "reverse" onus provision as described in *S v Mbatha: S v Prinsloo (supra)* and *S v Zuma (supra)*.

2 Objective and scope of study

The objective of this study is to trace how the general onus provision of section 82 and the presumption of section 104(2) of the Act are applied in practice and to test their application against the provisions of the Constitution of the Republic of South Africa Act 108 of 1996

("the Constitution"). Similarly, the linking by the judiciary of the section 82 reverse onus provision to section 76(5) in imposing additional tax in terms of section 76(1)(b) of the Act, will be tested against the provisions of the Constitution. Achievement of this objective necessitates a basic analysis of case law relating to the practical application of the above-mentioned reverse onus provisions and presumptions from a historical perspective and thereafter examining the impact the Constitution has had or should have had on their constitutionality in the future.

Other reverse onus provisions or presumptions created by the Act, such as those contained in section 80G (the general anti-tax avoidance regulations) or even paragraph 28(2) of the Fourth Schedule (pay-as-you-earn provisions) to the Act, are considered to be beyond the scope of this study.

As far as can be established, the constitutionality of the general reverse onus provision (section 82 of the Act) and other reverse onus presumptions contained in the Act have not been formally challenged by adversely affected taxpayers (if challenged, such challenges have not been reported) and thus have not been tested by the judiciary. Accordingly, any submissions made in relation to the constitutionality of the sections of the Act covered in this analysis are necessarily speculative, but will be based on constitutional case law from other areas of our law, such as criminal law and the law relating to insolvency, which areas our judiciary has, to some extent, already tested constitutionally.

3 Research method

The research method adopted consists of a literature review of the relevant provisions of the Act and the Constitution, together with court decisions, published articles, reports and textbooks relating directly to the objective.

A comprehensive search was done on the LexisNexis Electronic Library (Jan./Feb. 2009) and the appropriate cases relating to the objective of this study were selected.

4 An analysis and discussion of the constitutionality of the reverse onus provisions and presumptions as applied in South African criminal law and the law of insolvency

It is considered appropriate to commence this study with an analysis and discussion of the general constitutionality of reverse onus provisions in other branches of our law. It will assist in keeping the objectives of this study in focus.

In *S v Zuma and Others (supra)*, the Constitutional Court had to decide on whether the presumption contained in section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977, requiring an accused to prove that a confession was not freely and voluntarily made, violated the right to a fair trial as provided for in terms of sections 25(2), 25(3)(c) and 25(3)(d) of the Constitution of the Republic of South Africa Act 200 of 1993 (the "Interim Constitution"). The right to a fair trial is now essentially incorporated in section 35(3)(c) of the Constitution. The court held that the common law rules in respect to the burden of proving that a confession was made freely and voluntarily were an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. A reversal of the

onus of proof in these circumstances undermined all these rights and thus violated the right to a fair trial of an accused.

The Court also found that the State had not been able to show that the use of the ordinary common law rules relating to the burden of proof would make it impossible, unduly burdensome or impair the administration of justice, for the State to discharge the onus of proof as normally required in terms of the common law by proving that a confession was freely and voluntarily made. The court, however, emphasised that the judgement did not decide that all statutory provisions that create reasonable presumptions in criminal cases are constitutionally invalid. The court was of the opinion that a reverse onus presumption would be valid, say, in cases where there is a pressing social need for the effective prosecution of a crime.

A similar line of reasoning was followed in *S v Mbatha; S v Prinsloo (supra)* where Langa J, who handed down the unanimous decision of the 11 Constitutional Court judges, held that the statutory reverse onus presumption in section 40(1) of the Arms and Ammunition Act 75 of 1969 was unconstitutional. The presumption provided that if it were proved that any arms or ammunition were on any premises, any person on the premises would be presumed to be in possession of such arms or ammunition.

The 11 judges concurred that the presumption infringed on the right of the accused to be presumed innocent in terms of section 25(3)(c) of the Interim Constitution because it could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. The State argued that the high level of crime in South Africa was linked to the proliferation of illegal arms and ammunition and that the presumption assisted in combating the rising levels of crime by ensuring effective policing. It was also submitted that the rampant crime levels had a profound, negative effect on the quality of life in communities and were a threat to social stability.

In spite of acknowledging the difficulties confronting the police in investigating crime, Langa J held that the presumption was too widely phrased and could result in innocent people being convicted. There was no inherent mechanism in the provision to exclude those who are innocent and who would otherwise be included within its reach. He ruled (at 386) that the presumption does not satisfy the requirements of reasonableness and justifiability required by the limitation of rights clause in the Interim Constitution (now embodied in section 36 of the Constitution). Furthermore, he found that the State did not demonstrate that the objective of the presumption, namely to facilitate the conviction of offenders, could not reasonably have been achieved by other means less damaging to constitutionally entrenched rights. He concluded (at 306) that the reverse onus in such circumstances is so "inconsistent with the values which underlie an open and democratic society based on freedom and equality that it cannot be said to be justifiable".

It is submitted that the conclusion that may be reached from these two cases is that a reverse onus provision or presumption where a criminal sanction may be imposed, *prima facie*, violates the right of an accused to a fair trial generally (section 35(3) of the Constitution), and in particular, the right to be presumed innocent (section 35(3)(h) of the Constitution). It is also not normally reasonable or justifiable in a democratic society and thus cannot be saved by the section 36 limitation of rights clause in the Constitution.

5 The ambit and scope of the general onus of proof provision and presumptions contained in the Act and dealt with in this study: preliminary observations

5.1 Section 82 of the Act: preliminary observations

Section 82 of the Act essentially provides that the burden of proof that any amount is exempt from or is not liable to any tax chargeable under the Act, or that a deduction, abatement or set-off is permissible or that a capital gain can be disregarded or excluded in terms of the Eighth Schedule, falls upon the taxpayer. It appears to be clear from the wording of the provision that section 82 of the Act does not apply to a penalty or even an additional tax situation but only refers to the normal assessment procedure when a taxpayer claims an exemption, a deduction, an abatement, a set-off or an exclusion for capital gains tax purposes. However, as will be seen from the discussion in paragraph 5.3 below, sections 82, 76(1)(b) and 76(5) of the Act appear to have been inextricably, and perhaps even unconstitutionally, linked by the judiciary.

It is equally clear that section 82 of the Act creates a so-called “reverse” onus burden in that it places the burden of proof squarely on the shoulders of the taxpayer should he or she, say, claim a deduction (*S v Zuma (supra)*). Statutorily, the taxpayer is thus immediately placed in an inferior position in relation to the revenue authorities. It is submitted that this reverse onus provision, *prima facie*, violates at least two rights enshrined in our Constitution, namely the right to equality before the law (section 9 of the Constitution) and to just administrative action which is lawful, reasonable and procedurally fair (section 33 of the Constitution).

Section 9(1) of the Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”. The fact that a taxpayer is placed in an inferior position in relation to the revenue authorities appears, *prima facie*, to violate this right. Of course, the answers to the questions of rationality, fairness, reasonability and justifiability as required by section 9 generally read together with the section 36 limitation of rights clause of the Constitution, are necessary to establish whether the provision does in fact violate the right to equality. The three-step approach outlined in *Harksen v Lane, NO and Others* (1997 (11) BCLR 1489 (CC)) and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, would ultimately determine whether the right to equality has actually been violated. However, it is considered to be beyond the scope of this study to discuss this right to equality any further in this study.

The potential violation of the right to just administrative action, which is lawful, reasonable and procedurally fair (section 33 of the Constitution), however, is of utmost importance in the application of section 82 of the Act. This will be discussed in greater detail in paragraph 8.3 below.

The right of an accused to a fair trial (section 35(3) of the Constitution), is only associated with criminal matters. Since section 82 does not deal with criminal matters, it cannot violate this right.

5.2 Section 104(2) of the Act: preliminary observations

Section 104(1) of the Act provides that a taxpayer shall only be guilty of an offence as listed in that sub-section if the State can prove that the taxpayer had the "intent to evade" assessment or taxation. However, the presumption contained in section 104(2) of the Act eases the burden of the State of proving an "intent to evade" taxation by the taxpayer and facilitates the conviction of the taxpayer in the case where a section 104(1)(a) or 104(1)(c) offence has taken place (makes a false statement or entry in a return or maintains false books of account or other records). This is achieved by the use of a rebuttable presumption that if one of the offences as listed in section 104(1)(a) or 104(1)(c) of the Act has been committed, the taxpayer committed the offence with the necessary "intent to evade" assessment or taxation.

It is clear from the wording of the section that a "conviction" in a court of law is necessary before any of the criminal sanctions provided for in terms of the section can be applied. The taxpayer is thus regarded as an accused if charged under this section. The constitutionality of the reverse onus presumption contained in section 104(2) of the Act is discussed in detail in section 8.1 below.

5.3 The deeming provisions of sections 76(5), 76(6) and 76(7) of the Act and the link between sections 76(1)(b), 76(5) and 82 of the Act: preliminary observations

Section 76 of the Act (the so-called "triple tax" provision), lists in sub-section (1), a number of tax offences that are administratively punishable by the revenue authorities. Committing one or more of the listed offences described therein, entitles the Commissioner to impose "additional tax" of up to 200% of the normal tax chargeable arising as a result of the offence. The section does not require any "intent to evade" taxation as is required for a conviction in terms of section 104(1) of the Act.

Section 76(5) of the Act provides that if the taxpayer, in his or her return, deducts, setoff, disregards or excludes any amount that is "not permissible" under the provisions of the Act or shows as expenditure or loss any amount that he or she has not in fact expended or lost, shall be "deemed" to have "omitted" such amount from his or her return. The effect of this deeming provision is that any omission, innocently or otherwise made in a return, is regarded as an offence under section 76(1)(b) of the Act. Although the word "presumption" is not used in section 76(5) of the Act, the word "deem" is essentially the equivalent to a presumption and is often used interchangeably (*S v Zuma (supra)* at 413 and 415).

It may be argued that section 76(5) of the Act does not create a reverse onus but merely defines what is "deemed" to be an omission for the purposes of section 76(1)(b) of the Act. However, section 76(5) read together with section 76(1)(b) of the Act appears to have been inextricably linked to the reverse onus provision of section 82 of the Act by the judiciary, owing to the fact that similar wording is used in both sections 82 and 76(5) of the Act. Thus, if a taxpayer is unable to discharge the section 82 onus of proof that an amount claimed in his or her return as a deduction is a "permissible" deduction in terms of the Act, then section 76(1)(b) of the Act theoretically becomes operative because of the deeming provision of section 76(5) of the Act. However, the additional tax imposed may be remitted by the Commissioner "as he may think fit" if there are "extenuating circumstances" present (section 76(2)(a) of the Act). For the general meaning of "extenuating circumstances" in tax

matters, see Goldswain (2001:123–135). These powers of decision making by the Commissioner in the imposition of an additional tax sanction are similar to those of a court judge and can thus be regarded as both quasi-judicial and penal in nature.

An apt example of the link between sections 82, 76(5), and 76(1)(b) of the Act can be found in *ITC 1725* (64 SATC 223). A tax consultant had advised the taxpayer to enter into an unconditional agreement for the purchase of cattle feed and claim the cost of such feed as a deduction in terms of section 11(a) of the Act even though the feed had not been delivered to the taxpayer by the end of his year of assessment. The Commissioner contended that the agreement was conditional, and therefore, that the expense claimed could not be deducted. He also contended that the taxpayer, by claiming an unjustified expense, had committed an offence in terms of section 76(1)(b) read together with section 76(5) of the Act, and accordingly, imposed additional tax of 100%.

The Special Court confirmed the Commissioner's view that the cattle feed agreement had been a conditional agreement and that the taxpayer was not entitled to the deductions claimed in the relevant years of assessment. However, the court was of the opinion that although it found against the taxpayer as regards its claim, the fact that the taxpayer had claimed the deduction on the basis of professional advice honestly given, meant that such claim could not simply be treated as a form of tax evasion. Although additional tax had to be imposed in terms of section 76(1)(b) of the Act, the court used its discretion in terms of section 76(2)(a) of the Act, to remit, *in toto*, the penalty imposed by the Commissioner.

Other similar examples of the apparent linking of the section 82 general reverse onus provision to sections 76(5) and 76(1)(b) of the Act, can be found in the following decisions: *KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms) Bpk* (58 SATC 273 and *ITC 1576* (56 SATC 1). The question whether this apparent link is appropriate or constitutional is discussed in greater detail in paragraph 8.2 below.

The section 76(6) deeming provision introduces an element of intention. It operates only when a taxpayer "wilfully" fails to disclose facts that would result in a higher taxable income should the revenue authority know the facts. However, it is submitted that this presumption does not create a reverse onus and thus can be regarded as constitutional. The onus of proof would still be on the revenue authorities to prove a "willful" failure to disclose material facts relating to the return submitted. Hence there is no necessity to discuss this provision any further.

The deeming provision of section 76(7) is also not considered important for the purposes of this study. It also does not create a reverse onus. Instead, it explains how to treat assessed losses arising from a previous year for the purposes of determining the amount omitted.

6 Prerequisites for the application of the reverse onus of proof provision and presumptions

6.1 Section 82 of the Act: prerequisites

The judiciary has indicated that before the section 82 general reverse onus becomes operative, certain prerequisites must first be present, namely:

- (a) The jurisdictional facts that bring the taxpayer within the ambit of the Act or the relevant provision must first be proved by evidence produced by the *fiscus*. Only then

will the onus fall upon the taxpayer. This prerequisite puts a brake on the arbitrary exercise of power by the revenue authorities (*Carlson Investments Share Block (Pty) Ltd v C:SARS* (63 SATC 295); *ITC 1707* (63 SATC 343); *Mpande Foodliner CC v C:SARS and Others* (63 SATC 46); and *Traco Marketing (Pty) Ltd v Minister of Finance and Others* (58 SATC 195)). For example, in the Appellate Division case of *CIR v Butcher Bros (Pty) Ltd* (13 SATC 21), the court held that the onus initially falls upon the Commissioner to prove the jurisdictional fact that an "amount" for the purposes of the general definition of "gross income" in the Act, has accrued to the taxpayer. In that case, the Commissioner first had to prove to the court that what had accrued to the taxpayer was not merely a "conjectural value" but that the accrual had an "ascertainable money value" and since he had failed to do so, the onus had not shifted to the taxpayer. The taxpayer accordingly won his appeal.

- (b) The reverse onus only applies to matters contained in the letter of assessment issued by the Commissioner and not to any other matter not contained in the letter of assessment. The judge in *ITC 1682* (62 SATC 380) confirmed this view. In other words, only issues contained in the letter of assessment are subject to the section 82 reverse onus. The judge suggested that it is unreasonable and unfair for the taxpayer to bear the onus of proving not only that he is not taxable on the basis assessed but on any other basis that the Commissioner may choose to raise, not in an assessment but, for example, in the summary of the case issued immediately before the appeal is heard or even whilst the case is being adjudicated upon. The court supported the argument of the counsel for the taxpayer that, although the absence of pleadings and defined procedures in disputes brought before the Special Court was intended to expedite proceedings, it in fact compounded the difficulty of litigation in that the Commissioner raised a number of arguments which had not been canvassed in the correspondence which sets out his decision to assess. Section 82 of the Act only refers to the appeal of the "decision" of the Commissioner and the court was of the opinion that there is merit to the interpretation of the "decision" appealed against as being the "decision" contained in the letter of assessment on which the taxpayer has to bear the burden of proof. It did not apply to other matters subsequently raised. The court found support and comfort in this interpretation from the Constitution which demands that in the interpretation of statutes, the culture of justification is promoted (section 39 of the Constitution).

Although not exactly a prerequisite, it is also worth noting that the section 82 reverse onus of proof only applies to questions of facts (De Koker, Silke 2008:18.65). Any argument on the interpretation or questions of law before or even after the facts are presented, is not subject to the section 82 reverse onus of proof provision. *ITC 1725* (*supra*) illustrates this point quite well. The taxpayer was unable to discharge the burden of proof, on the facts presented to the court, that the contract for the purchase of the cattle feed created an unconditional contract. Once the court, on the facts, found that the contract was conditional, the law was applied accordingly.

6.2 Sections 76(5) and 104(2) of the Act: prerequisites

Although, as far as can be established, there are no judicial decisions relating to the prerequisites for the application of sections 76(5) and 104(2) of the Act, it is submitted that the two aforementioned prerequisites for the application of the section 82 reverse onus of

proof provision also apply to these two sections of the Act. Section 76(5), as already discussed, is inextricably associated with and linked to section 82 of the Act by the judiciary.

The wording of section 104(2), however, appears to indicate a further prerequisite. It provides that the revenue authorities must first prove that a false statement or entry is made in a return before the presumption of intention to evade assessment or taxation becomes applicable. It is only at that stage that the burden of proof shifts to the taxpayer to prove the contrary. It is submitted that this does not create a further prerequisite but merely confirms the general prerequisite that the jurisdictional facts that bring the taxpayer within the ambit of the provision must first be proved by evidence produced by the *fiscus*.

7 How the reverse onus of proof is applied in practice

7.1 *The standard of proof required: the general rule*

Where the jurisdictional facts are present in order to discharge the onus of proof in terms of section 82 of the Act, the taxpayer must show that on a “preponderance of probabilities” (*CIR v Goodrick (supra)*) or on a “balance of probabilities” (*Reliance Land & Investment BC (Pty) Ltd v CIR* (14 SATC 47)), the Commissioner’s assessment is incorrect. In effect, “preponderance of probabilities” and “balance of probabilities” have the same meaning. It is not necessary for a taxpayer to prove any point beyond a reasonable doubt. In *Bloch v SIR* (42 SATC 7 at 14), Grosskopf J expressed the view that the taxpayer’s onus is to be “discharged on the ordinary basis applied in civil cases, that is, on a balance of probabilities”.

Where the court, however, comes to the conclusion that both the taxpayer and the revenue authorities have presented equally good arguments, the decision must go in favour of the revenue authorities, or in the words of the President of the Court in *ITC 43* (2 SATC 115 at 116), “. . . in the case of all things being equal we are bound to decide in favour of the Commissioner”.

7.2 *Application of the section 82 reverse onus of proof provision*

7.2.1 *The effect of honesty and reliability in discharging the burden of proof*

In *CIR v Gribnitz* (50 SATC 127), the taxpayer had purchased several properties which he subsequently sold. He claimed that the profits on the sale of the properties were capital in nature and therefore not subject to taxation. The lay members of the Special Court found the taxpayer to be a totally honest witness who gave satisfactory answers and explanations during his testimony as to his intention. They thus found that he had discharged the burden of proof resting on him and that the profit so arising was capital in nature. They paid little attention to the fact that the taxpayer had a prior history of purchasing and selling property at a profit and had for many years been an estate agent. Instead, they relied solely on the taxpayer’s perceived honesty in coming to the conclusion that he had discharged the burden of proof. On appeal, Eloff AJP reversed the decision of the Special Court on the basis that the taxpayer’s verbal evidence, although regarded as honest, could not be regarded as reliable because it was inconsistent with and was outweighed by the circumstances of the case.

At the hearing, the counsel for the taxpayer argued that to reverse the decision of the Special Court would have the effect of labeling the taxpayer a dishonest witness. Eloff AJP rejected this reasoning as not necessarily true. He quoted with approval, the opinion of Grosskopf J in *Malan v KBI* (43 SATC 1) that a finding adverse to the taxpayer's evidence does not necessarily involve a finding that he was dishonest. He justified his reasoning on the basis that evidence given by a taxpayer, although honest, is often unreliable after the event.

Murray J in *ITC 743* (18 SATC 294 at 297-298) approached the question of honesty slightly differently. He was of the opinion that there may be cases where probability will have to yield to the credibility of a witness. In spite of the improbabilities in the evidence of a witness, if his testimony is found to be honest, the court may find that any burden of proof resting on him has been discharged. It is submitted that his approach, albeit given many years before the advent of our Constitution, is more in line with the tenants of our present Constitution than Eloff J's decision in *Gribnitz's* case.

The right of an accused to a fair trial including the right to be presumed innocent (section 35(3) of the Constitution) is not a right which is associated with a noncriminal action. However, Murray J's reasoning, in effect, gave cognisance to this original common law presumption of innocence. His views, it is submitted, are also in line with the right to just administrative action that is lawful, reasonable and procedurally fair (section 33 of the Constitution).

It is further submitted that the taxpayer's honesty should only be questioned if he or she testifies or certifies documents and the court finds such testimony or certification implausible, dubious or far-fetched. However, where the probabilities are evenly balanced, a finding of credibility might well be the determining factor.

7.2.2 *The practical application of the section 82 reverse onus of proof provision*

Cram J in *N LTD v COT* (24 SATC 657 at 660) neatly summarised the approach adopted by the judiciary concerning the general reverse onus of proof burden. He was clear that the onus is upon the taxpayer to show by satisfactory evidence, as required in a civil suit, that the assessment be reduced or set aside. He was of the opinion that if the taxpayer kept no records, any assessment made by the Commissioner would be a mere guess. But the guesswork involved in the assessment did not mean that the taxpayer was then relieved of his duty to discharge his onus. The estimated amount assessed by the Commissioner would remain, *prima facie*, correct until the taxpayer shows that it is wrong, not only in a negative sense but also positively by showing what correction should be made to make it right. In his reasoning, he concluded that the legislature did not intend that the taxpayer be granted the valuable privilege or defence of merely stating that he lost either his memory or his books and therefore that he had discharged his onus. Something more was required.

In *ITC 980* (25 SATC 48), Fieldsend QC, in dismissing the taxpayer's appeal, followed much the same approach as Cram J. He stated that a series of unsubstantiated assumptions presented as evidence by the taxpayer, do not make the Commissioner's estimates less correct. Accordingly, the taxpayer had not discharged the onus.

In *ITC 91* (3 SATC 235 at 235-236), Maritz J suggested that the onus would shift to the Commissioner if the taxpayer produces financial statements that are correctly drawn and certified by an auditor of repute. The Commissioner would then have to produce evidence criticising the accounts or the auditor's *bona fides*.

De Koker, Silke (2008:18.65) comments that the production of correctly drawn and certified accounts may assist the taxpayer in discharging the onus falling on him or her but that it does not shift the onus on to the Commissioner. There is certainly merit in this argument since the primary purpose of audited financial statements is not to determine or assist the revenue authorities in assessing a taxpayer's tax liability. Instead, the audit opinion expresses a view as to whether the financial statements have been prepared in all material respects in accordance with an acceptable financial reporting framework (SAICA Handbook 2008/2009: ISA 200, paragraph 2) such as the International Financial Reporting Standards ("IFRS") framework promulgated by the International Accounting Standards Board (SAICA Handbook 2008/2009: ISA 200, paragraph 41). The opinion does not claim that the financial statements are error free, but provides instead reasonable assurance that the financial statements, taken as a whole, are free of material misstatement whether due to fraud or error (SAICA Handbook 2008/2009: ISA 200, paragraph 17).

The revenue authorities, and the judiciary for that matter, assuming the integrity of the auditor, should be able to rely on the signed audited financial statements to the extent that there should be no material errors in the statements. Although audited financial statements do not include a full and detailed tax calculation, the tax liability as reflected in the income statement, should have been checked for reasonableness and materiality during the audit process.

A problem may arise, however, where a detailed expense schedule submitted in support of a tax return has not been audited and there are possible misallocations between, say, expenditure regarded as revenue in nature and expenditure regarded as capital in nature. Although such misallocations, even if revealed during an audit, may not be material for the purposes of presenting the financial statements fairly in accordance with an acceptable financial reporting framework, they may become material for the purposes of determining the ultimate tax liability from the perspective of the revenue authorities.

In *ITC 580* (14 SATC 103 at 105), Ingram KC was not impressed that the taxpayer did not place any evidence before the court, other than mere unsupported statements in a letter, in his attempt to discharge his onus. The court questioned why the taxpayer did not at least appear before the court and give evidence on oath or even sign an affidavit if he elected not to appear, as to the truthfulness of the statements made in the letter. The failure to use either of these two alternatives compelled the court to conclude that the taxpayer had not discharged his onus in a case that called for an enquiry and an explanation.

In contrast to the taxpayer in *ITC 580*, the taxpayer in *ITC 1778* (66 SATC 334) successfully discharged the burden of proof resting on him in resisting the assessment issued by the Commissioner on the basis of an alleged unsatisfactorily explained increase in his capital of R733 285. He verbally testified under oath that the increase in his capital was the result of an interest-free loan of R880 097 advanced to him by a friend. The friend, who lived overseas, made a special trip to South Africa to corroborate the taxpayer's contention under oath. The court found his friend's corroborating evidence to be honest and that the increase in his capital was as a result of a loan and not of undisclosed income of a revenue nature.

The taxpayer should be able to account satisfactorily to the court for the absence of a witness who could be expected to testify on his or her behalf and corroborate his or her evidence. The same would apply for the failure to produce the relevant documentation to support his or her evidence. Without supporting evidence, the revenue authorities could

use, with impunity, the increase of capital or net worth method (method used by the Commissioner in *ITC 1778 (supra)* to determine the alleged "omission" of taxable income), analysing the taxpayer's expenditure, examining the taxpayer's bank deposits, the mark-up method and even interpolation, to estimate the taxpayer's income, all inherently unreliable methods and based more on guesswork than any scientific calculation, but satisfactory for the purposes of raising an estimated assessment.

It is submitted in conclusion that in the determination of the normal tax position, the practical position as far as the general onus of proof provision is concerned, is aptly summed up Surtees (1991:114): "In order to succeed, the taxpayer has, by means of evidence, probability based on the facts and credibility, to convince the court that the decision of the Commissioner is wrong."

7.3 Application of the deeming provision as contained in section 76(5) of the Act

The facts dealt with in *ITC 1758 (65 SATC 396)* illustrate a disturbing and unfair consequence that may arise as a result of the failure by the taxpayer to discharge the section 82 burden of proof resting upon him. As discussed in paragraph 5.3 above, section 76(5) of the Act deems that an amount is "omitted" from a return if it is disregarded or excluded from the return. Hence the taxpayer's failure to discharge the burden imposed on him in terms of section 82 of the Act may result in the Commissioner imposing additional tax in terms of section 76(1)(b) read together with the deeming provision of section 76(5) of the Act (*ITC 1725 (supra)* – the "cattle feed" case). Only once the additional tax has been imposed, will "extenuating circumstances" be considered for the remission of any additional tax imposed in terms of section 76(2) of the Act.

The taxpayer, in *ITC 1758 (supra)*, when challenged by the revenue authorities, acknowledged that he would not be able to produce sufficient evidence to discharge the onus of proving that an amount of R580 000 on which the Commissioner had levied normal tax, had been brought into South Africa as his capital when he fled Angola as a refugee at a time of the civil war in that country. He accordingly did not contest the inclusion of that amount in his income but instead came to an agreement with the revenue authorities whereby he was assessed to normal tax on the R580 000 allegedly not disclosed. Immediately after, the Commissioner imposed a 100% additional tax levy in terms of section 76(1)(b) for the amount deemed to be "omitted" in terms of section 76(5) of the Act from his return of income. The taxpayer appealed against the imposition of the penalty. Following the decision of Van Heerden JA in *Da Costa v CIR (47 SATC 87 at 95)*, the court held that the Special Court must "exercise its own, original discretion" in imposing additional tax. It found "extenuating circumstances" to be present and remitted the additional tax to a far more acceptable level of 50%.

It is submitted that there is good reason to believe that additional tax would not have been able to be imposed on the taxpayer in the circumstances as outlined in *ITC 1758 (supra)* if section 76 of the Act did not contain the section 76(5) deeming provision which, in effect, creates a reverse onus provision when applied together with section 82 of the Act. The common law rule would have applied and the onus would have rested on the revenue authorities to prove that the money had not been brought into South Africa as capital at the time he fled Mozambique. After all, the taxpayer gave a reasonable and probable reason and explanation for the increase in his capital by R580 000 and it would have been

impossible for the Commissioner to prove otherwise unless he had compelling evidence to contradict the taxpayer's explanation.

A further example of the inequity or unfairness of the section 76(5) application in an administrative penalty situation, can be found in *ITC 1489* (53 SATC 99). The taxpayer's auditor had applied a 50% cost-of-stock method of valuation, which had been used for the valuation of stock since the inception of the company. The contention by the taxpayer was that the valuation was done in accordance with accepted accounting principles applied at that time, and was therefore in accordance with section 22(1) of the Act. Although Mr Carl Schweppenhauser, a former Commissioner for Inland Revenue and a former Deputy Director in the Department gave evidence in favour of the taxpayer to the effect that prior to 1984, taxpayers had adopted various and different methods of valuing stock, which valuation had been accepted by the revenue authorities, Conradie J held that the valuation of stock in terms of section 22(1) of the Act requires proper disclosure, and to merely refer to the value of the closing stock figure as "net realisable value" is an "incorrect statement" or an omission for the purposes of section 76(1)(b) of the Act. He accordingly found that the taxpayer had culpably failed to enquire from his accountant why the year-end stock had been valued at only half its cost because that figure should have "leapt" from the financial statements at any businessperson who could read.

Although the court remitted the R90 000 additional tax initially imposed by the Commissioner to a more reasonable amount of R45 000 because there was no evidence of a tax evasion scheme, the court astonishingly and, it is submitted, incorrectly, found that the evidence given by the former Commissioner for Inland Revenue diminished the culpability of the accountant rather than the taxpayer. Goldswain (2001:141) contends that if the accountant's culpability is diminished by the testimony of the witnesses, it stands to reason that the taxpayer's culpability would also diminish, provided that the taxpayer had no intention to evade tax. After all, a taxpayer should be able to rely on his or her professional advisor.

ITC 1778 (supra) also illustrates the potential unfairness of the application of the deeming provision of section 76(5) if carried to the extreme. In that case, the taxpayer had excluded or omitted the amount sought to be taxable by the Commissioner from his return of income. He contended that since the amount excluded was a loan from a friend, it did not require disclosure. If he had not been able to bring his friend to South Africa to testify and corroborate his evidence that he had made a loan to the taxpayer, it is submitted that the taxpayer would not have been able to discharge the burden of proof imposed on him in terms of section 82 of the Act that the amount sought to be taxed was not taxable. As previously discussed, the mere fact that a taxpayer is not able to discharge the section 82 burden of proof for normal tax purposes means that sections 76(5) and 76(1)(b) of the Act theoretically become operative immediately, and the Commissioner may impose additional tax.

At a present maximum marginal rate of tax of 40%, the tax on R733 285 would have amounted to approximately R293 000 and additional tax of 200% would have amounted to R586 000, resulting in a total tax liability of R879 000 with the taxpayer still having to repay the loan to his friend. This type of scenario could lead to the complete economic ruin of the taxpayer and his family.

In conclusion, it is submitted that the case law discussed (especially *ITC 1489 (supra)*) here shows that section 76(5) of the Act is inextricably associated with and linked to the

reverse onus of proof in terms of section 82 of the Act. The application of the deeming provision can lead to unfair and even irrational decisions against the taxpayer. Unfair or irrational results, *prima facie*, may violate the right to fair administrative action (section 33 of the Constitution) as further explained and discussed in paragraph 8.2 below. Fortunately, there is a mitigating feature in this process, namely the power of the judiciary to remit unfairly imposed administrative penalties as provided for in terms of section 76(2)(a) of the Act.

7.4 Application of the section 104(2) presumption

Section 104(1) of the Act requires "intent" on the part of any person to evade assessment or taxation before he or she can be convicted criminally, on one of the tax offences listed in that subsection. If charged under section 104(1) of the Act, he or she is considered to be an accused person.

If the revenue authorities can prove that a false statement or entry is made in the return submitted by the taxpayer, in terms of section 104(2) of the Act, until the contrary is proved, he or she is presumed to have made the false statement or entry with the intent to evade assessment or taxation. With the necessary intention presumed, sections 104(1)(a) and (c) of the Act immediately become applicable. It does not matter that the false statement or entry in the return was made innocently or negligently. The onus of proof is on the accused to rebut the presumption that the statement or entry made is not false.

To be relieved of the burden of proving that the accused made a false statement or entry in a return with the necessary intention, assists the state in obtaining a conviction. The section 104(2) of the Act presumption is similar to the presumption contained in section 40(1) of the Arms and Ammunition Act 75 of 1969, which provided that if it were proved that any arms or ammunition were on any premises, any person on the premises would be presumed to be in possession of such arms or ammunition. As indicated earlier, section 40(1) was found to be unconstitutional by all 11 judges of the Constitutional Court in the *S v Mbatha: S v Prinsloo (supra)*.

It is submitted that the application of the section 104(2) of the Act presumption will be challenged by an affected accused in the appropriate circumstances in the future, based on the decision of *S v Mbatha: S v Prinsloo (supra)* as well as on the opinion of the Katz Commission Report (1994:77-78), both of which are discussed in greater detail in paragraph 8.1 below.

8 Reverse onus of proof and the Constitution

8.1 Constitutionality of the reverse onus of proof presumption imposed in terms of section 104(2) of the Act

It was recommended as far back as 1994 in the Katz Commission Report (1994:77-78) that the reverse onus presumption contained in section 104(2) should be amended to bring it into line with the Constitution. The Katz Commission Report recognised that the section 104(2) presumption relieves the State from proving an essential element of the offence committed beyond reasonable doubt, namely that it was committed with intent to evade assessment or taxation. The report concludes that the presumption *prima facie* violates the

constitutional right “of an accused to be presumed innocent . . . and not to testify during trial” by casting the onus on an accused person to prove the contrary. It acknowledges that the general “right to a fair trial” is denied.

The report also considered whether the *prima facie* violation of these rights might be justifiable and thereby be limited in terms of section 33(1) of the Interim Constitution (replaced with a similar limitation of rights clause, section 36, in the Constitution). The report finally concludes that if the Commissioner is confronted with a challenge to the section 104(2) presumption on the test enunciated by Dickson CJC in the Canadian case of *R v Oakes* ((1986) 26 DLR(4th) 200(SCC)), a court is unlikely to uphold the limitation because of the simple fact that

. . . an accused may be convicted for having failed to discharge the onus on a balance of probabilities that he did not intend to make a false statement and thereby be convicted, despite the existence of a reasonable doubt.

The Katz Commission’s conclusion in regard to the unconstitutionality of section 104(2) is also supported by the later Constitutional Court decision in *S v Mbatha: S v Prinsloo* (*supra*).

The Katz Commission Report also recommended a legislative amendment to section 104(2). Van Schalkwyk (2001:296) endorsed this recommended amendment. However, nearly 15 years later, the necessary legislative change has not been made.

The conclusion that can be reached is that it is only a matter of time before the section 104(2) reverse onus provision is challenged by an affected taxpayer on the strength of the arguments and reasoning put forward in the *S v Mbatha: S v Prinsloo* (*supra*) decision. The comment aired in *S v Zuma* (*supra*) that, in criminal cases, not all statutory provisions create a reverse onus are unconstitutional, is limited to cases where the presumption is reasonable, such as where there is a pressing social need for the effective prosecution of crime. It is debatable whether there is a direct pressing social need to prosecute tax offenders in terms of section 104(1)(a) or (c) of the Act. The fact that not many taxpayers have been prosecuted under this provision belies this social need. To punish errant taxpayers, the revenue authorities use the additional tax provisions of section 76(1) instead. In *Van der Walt v S* (52 SATC 186), the court came to the conclusion that the imposition of additional tax in terms of section 76(1) of the Act was sufficient sanction and that no further material criminal punishment or penalties should be imposed for the offence of common law fraud.

8.2 Constitutionality of the deemed provision relating to omissions in returns created in terms of section 76(5)

Senior South African Revenue Services (SARS) staff, who often have little or no judicial training, have delegated to them by the Commissioner, in terms of section 3 of the Act, the power to impose administratively, additional tax in terms of section 76(1) of the Act. This is in spite of the fact that the administratively imposed additional tax has the potential to far outweigh any monetary penalty that may be imposed by a court of law on an accused for contravening any provision stipulated in section 104(1) of the Act. The question of whether it is legally possible for the Commissioner to delegate his powers to lower ranking SARS staff or even a so-called “penalties committee” in penalty situations, is questionable in the light of the common law maxim “*delegatus non delegare potest*”, which

presumes that judicial and quasi-judicial penalties may not be delegated. See *Da Costa v CIR (supra)* at 93 where Van Heerden JA found it unnecessary for the Appellate Division to decide on the point since the taxpayer did not contend that the Commissioner had acted improperly when delegating his authority to a "penalties committee". However, this question is considered to be beyond the scope of this study and merits further detailed research to draw a proper conclusion in this regard.

In view of the questionable nature of whether powers may be delegated in penalty situations, it is surprising that the Katz Commission Report failed to consider and thus comment on the constitutionality of the deeming provision created in terms of section 76(5) of the Act.

As discussed in paragraph 7.3 above, section 76(5) read together with section 76(1)(b), is inextricably linked to the section 82 reverse onus provision of the Act. Where the deeming provision of section 76(5) is applicable, the revenue authorities are immediately empowered to impose additional tax in terms of section 76(1)(b) of the Act. If the normal tax that may be imposed on undisclosed taxable income is R40 000, then the maximum theoretical additional tax that may be imposed is R80 000. The 200% additional tax imposed may only be reduced or remitted if "extenuating circumstances" are found to be present (section 76(2)(a) of the Act).

It is interesting to note that the Adjustment of Fines Act 101 of 1991 provides that on conviction of a criminal offence, a person may be sentenced to undergo a prescribed maximum period of imprisonment or, in the alternative, to pay a fine. Where the maximum amount of the fine is not prescribed, the maximum fine which may be imposed must be determined at a ratio as set out in that Act, by taking into account the maximum period of imprisonment prescribed by such law. Currently, the maximum amount of the fine is determined at a ratio equivalent to R60 000 where the maximum period of imprisonment prescribed is three years and R300 000 where the period of imprisonment prescribed is 15 years. Hence one year of imprisonment equates to a R20 000 fine. In the example provided above, additional tax of R80 000 imposed in terms of section 76(1)(b) of the Act would equate to four years of imprisonment.

It is submitted that it is undesirable, unreasonable and unjustifiable that the deeming provision created in terms of section 76(5) of the Act can spawn a situation in which subordinate SARS staff, usually without a legal background, can impose a relatively large administrative "penalty". There is no onus on SARS staff to offer proof that a section 76(1)(b) of the Act offence has been committed.

For all intents and purposes, the additional tax imposed is a penalty. Schreiner JA supported this view in *CIR v McNeil* (22 SATC 374 at 382). He refers to additional tax as "in essence a penalty" following the judgement in *Israelshon v CIR* (18 SATC 247), which also held that additional tax is a "penalty". Most cases subsequently dealing with section 76 refer to additional tax as a "penalty" or use the words interchangeably. These cases support the conclusion that section 76(1) is quasi-judicial and penal in nature.

It is further submitted that the fact that SARS staff, other than the Commissioner himself, may impose an administrative penalty of such large magnitude without being judicially qualified, based on the deeming provision of section 76(5) of the Act, *prima facie*, violates the right to just administrative action that is lawful, reasonable and procedurally fair (section 33 of the Constitution). However, unlike the section 104(2) of the Act presumption, it does not offend against the right of an accused to a fair trial and the

presumption of innocence (section 35(3)(h) of the Constitution). The Special Court in *ITC 1825* (70 SATC 68) held that a taxpayer who is subject to administrative penalties imposed in terms of section 76(1) of the Act is not an “accused” person – hence there can be no violation of the right to a fair trial. The court reasoned on the basis that the taxpayer is not a person facing criminal prosecution, nor is he called upon to answer a criminal charge when section 76(1) of the Act is applied. Furthermore, the proceedings could not culminate in a conviction with a concomitant criminal record; nor was there any likelihood of the taxpayer being sentenced to a term of imprisonment or of being deprived of his liberty.

Should section 76(5) of the Act be challenged constitutionally on the basis that the taxpayer’s right to just administrative action has been violated (section 33 of the Constitution), assuming that section 76(5) is found to be *prima facie* unconstitutional, the onus would then fall on the revenue authorities to justify its application in terms of the limitation of rights clause in section 36 of the Constitution. However, such justification would probably have to rely on arguments similar to those raised in *S v Mbatha: S v Prinsloo* (*supra*), namely that there is proof of a high level of tax evasion in South Africa and that the deeming provision assists and is necessary for combating the rising levels of tax evasion. Furthermore, without the proper collection of taxes, the government would not be able to further its aims of socially uplifting the citizens of the country and there would be a negative effect on the quality of life of South Africans.

As indicated in *S v Mbatha: S v Prinsloo* (*supra*), these arguments were thrown out because there was no inherent mechanism in the provision to protect the innocent. Although additional tax imposed in terms of section 76(1)(b) of the Act is imposed administratively, the very fact that it is imposed presupposes a notion of guilt on the taxpayer’s part. Is it reasonable and justifiable that an administratively imposed penalty can potentially far exceed any penalty imposed by the judiciary for similar offences stipulated in section 104(1) of the Act? In addition, it is submitted that it would be virtually impossible for the revenue authorities to demonstrate that its objective of collecting taxes could not reasonably have been achieved by other means less damaging to constitutionally entrenched rights. The facts of *ITC 1778* (*supra*) brilliantly illustrate this point. What would have happened had the taxpayer not been able to secure the corroborative evidence of his witness who resided overseas?

It is time for the taxpayer to challenge the constitutionality of the deeming provision of section 76(5) when appealing against additional tax imposed by the Commissioner in terms of section 76(1)(b) of the Act. Although the Special Court is obliged in such an appeal to use its “own, original discretion” “in weighing up the factors which should be taken into account when imposing any additional tax in terms of section 76(1) of the Act (*Da Costa v CIR* (*supra*)), the judiciary is obliged to apply the section 76(5) deeming provision even if it leads to a potential miscarriage of justice. Unfortunately, to date, the judiciary has not of its own accord seen fit to question the constitutionality of section 76(5) of the Act. It is submitted that the judiciary even tends to compound the problem by linking section 76(5) of the Act to the general onus provision of section 82 thereof.

It was not specifically mentioned in *ITC 1758* (*supra*), but perhaps the court was subconsciously aware of the unfair burden a taxpayer bears in resisting additional tax imposed by the Commissioner, in coming to the conclusion that an automatic imposition of a 200% penalty was not generally imposed in practice. Relying on the authority of *Da Costa v CIR* (*supra*), the court held that even the automatic imposition of a 100% penalty

by the revenue authorities was not in accordance with the requirements of section 76(1). There were extenuating circumstances present in the case and, in addition, there was even a reasonable doubt as to whether there was a clear intention on the taxpayer's part to evade tax. The court remitted the 100% penalty initially imposed by the Commissioner to 50%.

This clearly illustrates the point of Langa J in *S v Mbatha: S v Prinsloo (supra)* that in penalty situations (and as discussed earlier, the judiciary regard the imposition of additional tax as "in essence" a penalty), a deeming provision, even if there is an appeal to a court of law, does not provide an inherent mechanism to protect the innocent or even the potentially innocent. The imposition of administrative penalties should be such that even where a taxpayer has committed an offence, that his or her constitutional rights are protected and that he or she is treated fairly. It is submitted that where an ostensible presumption of dishonesty is embodied in legislation, it heightens the conflict between the revenue authorities and the taxpayer to unacceptable limits. It also offends the basic purport and spirit of the Constitution and the violation of his or her rights cannot be justified in terms of the section 36 limitation of rights clause in the Constitution.

8.3 Constitutionality of the general reverse onus provision imposed in terms of section 82 of the Act

The Katz Commission held that there are clear grounds for justifying the general reverse onus provision of section 82 of the Act in terms of the limitation of rights clause of section 33 of the Interim Constitution (now section 36 of the Constitution). The reasons advanced for this opinion (at 77-78) were that they would necessitate a drastic departure from current procedure and would also impose a heavy burden on Inland Revenue in the preparation and litigation of tax disputes. Accordingly, the Commission regarded the section 82 reverse onus provision as constitutional and did not recommend any amendment to it.

It is submitted that the two arguments advanced by the Commission regarding the constitutionality of section 82 of the Act are somewhat thin. In *Metcash Trading Ltd v C:SARS* (63 SATC 13), in finding that the provision dealing with the pay-now-argue-later principle (section 36 of the Value-Added Tax Act 89 of 1991) was constitutional, the court mentioned the arguments put forward by the revenue authorities to justify the application of the section 36 limitation of rights clause. The court argued that the tax morality of taxpayers is low and vendors take advantage of the fact that the revenue authorities lack properly trained staff and even have difficulty employing trained accountants. Fortunately, it appears as if the court did not take these arguments into account in finding that the section 36 limitation of rights clause was reasonable and justifiable in an open and democratic society. It found that the pay-now-argue-later principle was constitutional on other grounds.

According to Swart (1996:455-456), a lack of trained revenue staff is not sufficient justification under any circumstances to curtail taxpayers' fundamental rights. In a similar vein, it can be argued that the mere fact that a "heavy burden" would be placed upon the revenue authorities in the preparation and litigation of tax disputes is no proper justification for the general burden of proof to be on the taxpayer.

A more fruitful line of reasoning is that it is generally accepted that the principle underlying the general reverse onus is based on the notion that the circumstances and facts of the issue at hand are peculiarly within the taxpayer's knowledge and not within the

revenue authorities' knowledge (*N Ltd v COT* (24 SATC 657 at 658)). This may have been true in the past, but the sophisticated computer and analytical tools now at the disposal of the revenue authorities and the type of electronic information which can be demanded from third parties by them, could potentially result in the revenue authorities having even a greater knowledge of a taxpayer's affairs than the taxpayer himself or herself has.

Perhaps the most compelling reason for the constitutionality and thus the continued application of the section 82 reverse onus provision, is that several Western countries, including Canada, whose Charter is the basic framework on which the South Africa's Constitution is based, use the reverse onus for general assessing issues arising between the taxpayer and the revenue authorities (*Johnson v MNR* (48 DTC 1182 (SCC)) without such reverse onus being regarded as unconstitutional.

It is submitted that, in the appropriate circumstances, a taxpayer may well attempt to challenge the constitutionality of the section 82 reverse onus provision sometime in the future. There are many instances in practice where the application of the general reverse onus provision could lead to a taxpayer's economic ruin merely as a result of him or her being unable to discharge the burden of proof because acceptable evidence is not available owing to the circumstances in which a taxpayer finds himself or herself. *ITC 1758 (supra)*, which is discussed in detail above, is an excellent example of a situation in which there could potentially be a miscarriage of justice. The question that can be posed is: How the economic ruin of a potentially innocent South African taxpayer can be justified in an open and democratic society?

9 Conclusion and recommendations

There is a well-known saying that the only thing easier to skin than a banana is the taxpayer (anonymous). Statutorily, a taxpayer is placed in an inferior position in relation to the revenue authorities when a reverse onus provision, presumption or even a deeming section of the Act is applied. This is especially true in penalty and additional tax situations.

It is clear that the State has a problem with the constitutionality of section 104(2) of the Act. It is submitted that when the reverse onus presumption is applied to section 104(1)(a) and (c) of the Act, it is regarded as judicial and penal in nature and thus violates the right of an accused to a fair trial generally (section 35(3) of the Constitution) and the specific right to be presumed innocent (section 35(3)(h) of the Constitution), based on the decision of the Constitutional Court in *S v Mbatha: S v Prinsloo (supra)*. There seems little prospect of the State being able to successfully argue that the section 104(2) presumption is justifiable and reasonable in an open and democratic society as demanded by the section 36 limitation of rights clause in the Constitution. In spite of the fact that the Katz Commission Report concluded some 15 years ago that the reverse onus as provided for in terms of section 104(2) is unconstitutional, taxpayers are still awaiting an appropriate amendment.

The application of the deeming provision of section 76(5) of the Act means that the Commissioner may theoretically impose additional tax in terms of section 76(1)(b) of the Act on a taxpayer merely because he or she was unable, in the first instance, to discharge the general onus of proof as required by section 82 of the Act (*ITC 1725 (supra)*, *ITC 1758 (supra)* and *ITC 1489 (supra)*). Section 76(1)(b) of the Act is quasi-judicial in nature and it is therefore submitted that the imposition of additional tax must be subject to the same standards of scrutiny as any other judicially imposed sanction. Only in this way will the

right to just administrative action be regarded as lawful, reasonable and procedurally fair. It is further submitted that the deeming provision of section 76(5) of the Act, linked as it is to section 82 of the Act by the judiciary, is also not justifiable or reasonable in an open and democratic society as required by the section 36 limitation of rights clause in the Constitution, especially if the following questions are posed:

- Is there any inherent mechanism in the provision, other than an appeal to the Special Court against the Commissioner's decision to impose additional tax, to protect a potentially "innocent" taxpayer? Even the Special Court is obliged to apply the deeming provision (unless it should declare it unconstitutional) that limits the protection which such court can offer to a potentially "innocent" taxpayer.
- Is it reasonable and justifiable that a subordinate SARS official lacking judicial training can impose an administrative penalty where such penalty imposed theoretically can far exceed any penalty imposed by a properly trained judicial officer for a similar offence?
- Would the revenue authorities be able to demonstrate that its objective in collecting taxes could not reasonably have been achieved by other means less Draconian than imposing an administrative penalty in circumstances where the taxpayer may have committed no offence other than not being able to satisfy the general reverse onus placed upon him or her in terms of section 82 of the Act but still being able to give a satisfactory explanation for the increase, for example, in his or her net worth?

Taking into account all the concerns raised above, it is submitted that an appropriate amendment to section 76(5) of the Act would not have much practical impact on the administration of the Act. The Commissioner would still be able to impose additional tax in cases where it is warranted with a lawful, reasonable and procedurally fair process being followed. However, it could have a major impact in those cases where the taxpayer has given a reasonable and satisfactory answer. The explanation given by the taxpayer may not be sufficient to discharge the reverse onus of proof for the purposes of section 82 of the Act, but may be sufficient to rebut the Commissioner's argument (if the onus is upon the Commissioner instead of the taxpayer) that additional tax should be imposed merely because the taxpayer was unable to discharge the onus for the purposes of section 82 read together with section 76(5) of the Act. The decision in *ITC 1758 (supra)* regarding the Angolan refugee, who fled to South Africa during the Angolan conflict, is apposite. Although the additional tax imposed was reduced to 50% (from the 100% imposed originally by the revenue authorities) by the Special Court, it is submitted that no additional tax would have been imposed but for the deeming provision of section 76(5) of the Act, read together with section 82 of the Act. It is a pity that the legal team representing the taxpayer in that case did not challenge and pursue the constitutionality of section 76(5) of the Act.

Regulations were recently issued (December 2008) under section 75B of the Act (Government Notice 1404) prescribing the administrative penalty that should be imposed for certain noncompliance taxation offences committed as described in paragraph 4 of those regulations. The specified noncompliance offences in terms of the regulations, however, exclude alleged omissions or incorrect statements in a person's return whether they were innocently or even fraudulently omitted or made. Section 76(1) of the Act (the so-called "triple tax provision") still applies to these types of offences. Although it is considered to be beyond the scope of this article, it is submitted that the South African legislators should put a brake on any possible exercise of arbitrary power by SARS staff in these

circumstances, and even limit the administrative penalty that may be imposed in terms of section 76(1) of the Act to a substantially lower amount than the 200% penalty, which may theoretically be imposed. Perhaps a good starting point would be in the region of 20%. Further research in this area is required to determine an acceptable international level for administratively imposed penalties in such circumstances. In order to punish the errant taxpayer in cases which warrant further punishment (greater than 20%), SARS should be forced to take the tax defaulters to court and charge them with common law or statutory tax fraud, with the onus being on the State instead of the taxpayer to prove beyond a reasonable doubt that the taxpayer has committed an offence with the necessary intention.

The general reverse onus provision of section 82 of the Act does not offend against the right of an accused to a fair trial (section 35(3) of the Constitution). However, it could offend, *prima facie*, against the right to just administrative action (section 33 of the Constitution). Nevertheless, it is submitted that the general reverse onus is constitutional in that it is reasonable and justifiable in an open and democratic society for the reasons outlined in paragraph 8.3 above.

This submission must be balanced against Judge Langa's comment in *S v Mabatha: S v Prinsloo (supra)* regarding the fact that the State did not demonstrate that the objective of facilitating the conviction of offenders could not reasonably be achieved by other means less damaging to constitutionally entrenched rights, applies equally to the general reverse onus as provided for in terms of section 82 of the Act. The use of sophisticated computer programs, statistical analysis, information demanded from a third party in terms of ancillary legislation and the like, has levelled the playing field. There will come a time when there is no longer any theoretical need, which may have been present in the past, for any reverse onus provisions or presumptions to be retained in the Act.

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4.3 OBJECTIVE OF THE REMAINDER OF THIS CHAPTER AND MATTERS CONSIDERED TO BE BEYOND ITS SCOPE

In the core article to this chapter, it was concluded that the three reverse onus of proof provisions of the Income Tax Act examined, *prima facie*, infringed upon one or more of the fundamental rights of taxpayers. The recommendation was that the onus of proof provisions of the Income Tax Act that provide for administrative penalties and criminal sanctions, namely sections 76 and 104, were constitutionally unsound and should be amended to bring them into line with the Constitution. In spite of the fact that the section 82 onus of proof provision is *prima facie* unconstitutional, no recommendation for its amendment was made as the ultimate conclusion was that the provision would probably pass constitutional muster as being reasonable and justifiable in an open and democratic society (section 36 of the Constitution).

Some three years after the publication of the core article to this chapter, the Tax Administration Act was promulgated and came into effect on 1 October 2012. The new legislation, *prima facie*, provides for a substantive shift in the two reverse onus of proof provisions as contained in the Income Tax Act that have been of concern since 1994 when the new constitutional dispensation was negotiated – the provisions that relate to the imposition of administrative penalties or additional tax (section 76) and criminal sanctions (section 104). The objective of the remainder of this chapter, therefore, is to examine briefly whether the new onus of proof provisions contained in the Tax Administration Act, have actually brought about any significant change to these two penal provisions.

It is considered to be beyond the scope of the remainder of this chapter and of this thesis in general, to discuss in detail how and when any administrative penalties (for failure to comply with the administrative provisions of any tax legislation) or criminal sanctions (essentially for fraudulent non-disclosure or tax evasion where wilful intent is involved) imposed by SARS on a taxpayer or by a court, if criminal in nature, may or may not be remitted as this aspect is not discussed in any detail in the core article used as the basis for

this chapter. Research was done some years ago by the present author in a series of five accredited journal articles as to the interpretation by the judiciary of the meaning of “extenuating circumstances” and the defences that may be pleaded by a taxpayer in support of the remission of penalties imposed in terms of section 76 of the Income Tax Act (see Goldswain 2001: 123–135; Goldswain 2001: 137–154; Goldswain 2002: 71–85; Goldswain 2003: 67–79; Goldswain 2003: 45–66). The defences and extenuating circumstances identified in those articles will, it is submitted, still play a part in determining the extent of any penalty that may be imposed, whether administrative or criminal, in terms of the Tax Administration Act.

In order to achieve the objective of the remainder of this chapter, it is considered necessary to present a brief overview of the differences (if any) between the onus of proof provisions as contained in the Income Tax Act – but only those onus of proof provisions discussed in the core article – and the Tax Administration Act. Thereafter, the practical implications of the changes to the onus of proof provisions will be evaluated before concluding on whether the new onus of proof provisions will ensure the fair and just treatment of a taxpayer in an administrative penalty or criminal sanctions situation. In effect, the question to be answered in this respect is whether the new onus of proof provisions will contribute towards ensuring that a taxpayer is a recipient of justice rather than a victim of justice. If this question can be answered in the affirmative, then the standards of justice and fairness as required by the Constitution will be satisfied.

4.4 DIFFERENCES BETWEEN THE ONUS OF PROOF PROVISIONS CONTAINED IN THE INCOME TAX ACT AND THE TAX ADMINISTRATION ACT

From the core article used in this chapter, it is clear that the reverse onus of proof provisions contained in the Income Tax Act and applied prior to 1 October 2012, may lead to the unfair assessment to taxes and, by its application, could even directly result in the imposition of unjust and unfair administrative penalties on the taxpayer by the Commissioner – as was the case in *ITC 1758* (65 SATC 396) and *ITC 1489* (53 SATC 99). Both these cases are

discussed in detail in the core article as well as later on in this chapter. The general reverse onus of proof provision (section 82 of the Income Tax Act) can, therefore, be considered to have a compounding effect when applied in conjunction with the reverse onus of proof provisions or presumptions for the imposition of additional tax or penalties – whether in terms of section 76 or 104 of the Income Tax Act.

The general onus of proof provision, as contained in section 82 of the Income Tax Act, remains intact in the Tax Administration Act (sections 102(1)(a), 102(1)(b) and 102(f)). The application and implications of the reverse onus of proof provisions thus remain the same as described and discussed in the core article to this chapter. As such, it can be concluded that there is still a possibility of unjust and unfair treatment for the taxpayer as far as the assessment to normal income tax is concerned.

On the other hand, in situations where administrative penalties or criminal sanctions may be imposed, the new onus of proof provisions of the Tax Administration Act appear to have levelled the playing fields. SARS appears no longer to have the unfair advantage that it had in the past. In administrative and criminal penalty situations, the onus is now on SARS to prove or justify the imposition of any penalty rather than the taxpayer having to prove that the penalty should not be imposed. Theoretically, the taxpayer is now placed in a better position than before to be “a recipient of justice rather than a victim of justice”. His or her right to just administrative action and other fundamental rights now, *prima facie*, appear to be protected.

The next three paragraphs will discuss the practical application and constitutionality of the onus of proof provisions when penalties and sanctions are imposed on taxpayers in terms of the Tax Administration Act for infractions in tax matters, namely the administrative non-compliance penalty (sections 210 and 211), the criminal non-compliance penalty (section 234), the administrative understatement penalty (sections 221 to 223) and the criminal tax evasion penalty (section 235).

4.5 ADMINISTRATIVE NON-COMPLIANCE PENALTIES

Sections 210 and 211 of the Tax Administration Act, when read together, provide for administrative penalties to be imposed by SARS on a taxpayer for certain non-compliance offences, for example, the non-submission of a return by a certain date. It is a fixed amount penalty determined according to the assessed loss or taxable income of the taxpayer for the preceding year. Sections 210 and 211 have been carried over, word for word from the present section 75B of the Income Tax Act. There is no mention, either in section 75B of the Income Tax Act or in the new sections 210 and 211 of the Tax Administration Act, of any specific onus provision. The provisions merely states that where a non-compliance offence is committed, a penalty must be imposed by SARS but may be remitted if “exceptional circumstance” are present. The “exceptional circumstances” are listed in section 218.

Thus, because of its silence, it may be presumed that the onus of proof would be on SARS to prove any non-compliance should the taxpayer contest, by the objection and appeal procedure, the imposition of any penalty. For example, SARS would allege that a taxpayer failed to submit a return of income, which he or she was obliged to do in terms of the Income Tax Act or the Tax Administration Act. With the onus of proof being on SARS, SARS would have to lead evidence to the effect that the return had neither been submitted nor received, if contested by the taxpayer. If the taxpayer alleges that the return was submitted by e-filing, a SARS computer systems expert could testify that the computer records show – the records would have to be produced as evidence – that the return had not been submitted electronically. The onus would then shift to the taxpayer to show that the return had been submitted and, if the taxpayer has an acknowledgement from SARS that the return had been received by them, then that would discharge the onus of proof and that would be the end of the dispute.

Therefore, with no reverse onus provision or presumption on the taxpayer, it can be concluded that there are no constitutional issues at stake in regard to the onus of proof in the imposition of administrative non-compliance penalties in terms of sections 210 and 211 of the Tax Administration Act.

4.6 CRIMINAL NON-COMPLIANCE AND TAX EVASION PENALTIES AND SANCTIONS

Section 75 of the Income Tax Act covered the imposition of a penalty, on conviction by a court of law, for certain non-compliance offences as well as for the understatement or non-disclosure of income or other related, but stipulated, tax fraud and evasion activities. The criminal sanction took the form of a fine or a period of imprisonment for a period not exceeding twenty-four months. There was no reverse onus of proof provision in terms of section 75 so there were no constitutional issues in that regard.

Section 104 of the Income Tax Act also covered criminal tax fraud and evasion activities but, unlike section 75, did not cover non-compliance issues or offences. Thus, there was some overlapping of sections 75 and 104 of the Income Tax Act relating to fraudulent activities but the penalty that could be imposed, on conviction by a court of law, in terms of section 104, was somewhat harsher – a fine or a period of imprisonment not exceeding five years. In an analysis of the onus provisions of section 104 in the core article to this chapter, it was concluded that the presumption of guilt of the taxpayer contained in section 104(2), which effectively creates a reverse onus of proof, was unconstitutional and should be removed.

Section 234 of the Tax Administration Act now covers the criminal non-compliance aspects that were previously covered by section 75 of the Income Tax Act. Section 235 effectively covers the criminal understatement and tax evasion offences previously covered by section 75 as well as the tax evasion and fraudulent activities stipulated in section 104 of the Income Tax Act.

Before there can be a criminal conviction for any non-disclosure offence in terms of section 234 of the Tax Administration Act, the taxpayer must be proved to have wilfully and without just cause committed the non-compliance tax-related offence. The onus of proof, since the section is silent on the matter and has no presumption to the contrary would, therefore, in terms of the common law, falls on SARS as is the case in all criminal matters. The standard of proof, as in all criminal matters, is for SARS to prove beyond a reasonable doubt that the taxpayer wilfully committed the tax offence without just cause (*S v Zuma and Others* (1995(2) SA 642 (CC)). Section 234 of the Tax Administration Act provides for a sanction, as was the case for section 75 of the Income Tax Act, of a fine or a period of imprisonment for a period not exceeding two years. Since there is no reverse onus or presumption in regard to the guilt of the taxpayer contained in section 234 of the Tax Administration Act, no constitutional issues should arise in this regard.

As indicated in the core article for this chapter, there was a constitutional issue in regard to section 104 of the Income Tax Act since a reverse onus presumption was contained in that section. Both the Katz Report (1994) and the core article to this chapter recommended that section 104 be amended to place the onus of proof on SARS. In effect, section 235 of the Tax Administration Act now places the onus on SARS to prove that the taxpayer intended to evade taxes. The standard of proof is, once again, as with all criminal matters, for SARS to prove beyond a reasonable doubt that the taxpayer intended to evade tax. Thus, at face value, there is no constitutional issue.

However, there is a sting in the tail to the onus of proof provision in the form of section 235(2), which provides that any person who makes a statement with the intention to evade or who assists another person to evade taxes, is presumed to be guilty of tax evasion unless such person “proves that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part”. In SARS’ Short Guide to the Tax Administration Act (SARS 2012a: para 17.3), SARS attempts to justify this unfair presumption by stating:

This does not result in a so-called “reverse onus”, but only places on the accused an evidentiary burden in relation to statements made by him. If discharged the onus would remain on the state to prove beyond reasonable doubt knowledge of, or negligence in relation to, the falsity of the statement. While it may limit the fundamental right to silence, it does so only in relation to facts which are peculiarly within the knowledge of the accused and in respect of which it would not be unreasonable to require the accused to discharge an evidentiary burden.

This presumption of guilt, it is submitted, is no different to the presumption of guilt as was contained in section 104(2) of the Income Tax Act. A five-year imprisonment sentence could be imposed in terms of this section 104 and therefore the concerns of the Constitutional Court as raised and expressed in *S v Mbatha: S v Prinsloo* (1996 (3) BCLR 293 (CC) at 299) – discussed in detail in the core article to this chapter – in regard to presumptions of guilt, are relevant. Even SARS, in its guide, admits that a taxpayer’s fundamental rights are violated by this presumption. Accordingly, it may be concluded that section 235 of the Tax Administration Act may not pass constitutional muster if challenged by a taxpayer in future. It is submitted that the new legislation is merely using different wrapping paper to cover the same package in an attempt to constitutionalise the process.

7 ADMINISTRATIVE UNDERSTATEMENT PENALTY

Sections 221 to 223 of the Tax Administration Act, in effect, replace section 76 of the Income Tax Act. The new sections, as was the case with section 76 of the Income Tax Act, target the more serious non-compliance offences and conduct of the taxpayer that includes elements of tax evasion and which results in an understatement of taxable income. In the core article that forms the basis for this chapter, it was argued and submitted that the deeming provision of section 76(5) of the Income Tax Act created a reverse onus of proof provision that, in combination with section 82 of the Income Tax Act, often led to injustice and unfairness for the taxpayer when the matter of administrative penalties was considered. The provisions could, therefore, be construed as unconstitutional. It was recommended that

the deeming provision contained in section 76(5) be removed or amended to bring it within the ambit of constitutional acceptability.

Sections 221 to 223 of the Tax Administration Act have now put an end to the present wide discretionary powers that were available to the Commissioner to impose “additional tax” or a penalty of up to 200% in terms of section 76 of the Income Tax Act. In particular, section 223 of the Tax Administration Act provides for an understatement penalty framework or matrix that has as its objective, “ensuring consistent treatment of taxpayers in comparable circumstances” (SARS 2012a: para 16.1). The extent of the penalty to be imposed is ascertained by placing the circumstances of each case within a table that determines the percentage penalty to be applied to the shortfall of taxes payable due to any understatement of taxable income by the taxpayer. It is done, so it is contended by SARS, according to “objective criteria” (para 16.1).

Section 223(1) of the Tax Administration Act includes the following table, which clearly sets out the percentage penalty that should be imposed in any given situation, based on the category of behaviour (not defined in the legislation) of the taxpayer:

1	2	3	4	5	6
Item	Behaviour	Standard case	If obstructive, or if it is a 'repeat case'	Voluntary disclosure after notification of audit	Voluntary disclosure before notification of audit
(i)	Substantial understatement	25%	50%	5%	0%
(ii)	Reasonable care not taken in completing return	50%	75%	25%	0%
(iii)	No reasonable grounds for tax position taken	75%	100%	35%	0%
(iv)	Gross negligence	100%	125%	50%	5%
(v)	Intentional tax evasion	150%	200%	75%	10%

In terms of section 102(2) of the Tax Administration Act, the onus of proving the basis for any understatement penalty imposed in terms of the table, is upon SARS. Thus, only in the very worst scenario of intentional tax evasion, where the taxpayer has also been obstructive or where it is a repeat case of intentional tax evasion, may SARS impose a 200% penalty. However, it still remains the prerogative of the Tax Court to exercise its “own, original discretion” should the taxpayer decide to object and appeal against the imposition of penalties by SARS (*Da Costa v CIR* (47 SATC 87 at 95)).

The shift from a reverse onus of proof to an onus that requires SARS, on a balance of probabilities, to prove that the taxpayer’s behaviour fits within one of the relevant categories in the table, is a welcome break from the past and, it is submitted, contributes towards the protection of taxpayers’ rights in general. Nevertheless, numerous questions arise in connection with the meanings or interpretation to be attributed to the various behavioural categories used in the table and whether there can be a deviation from the penalty percentage as determined in the table by the judiciary. In other words, may the judiciary use some other rate, say 40% rather than 50% if the category falls slightly short of “no reasonable grounds for tax position taken” (a 50% penalty), but substantially in excess of “reasonable care not taken in completing return” (a 25% penalty)? Only having a 25% or 50% rate for the penalty could materially affect the amount of the penalty being imposed – especially where the amount of tax understated is large. The prescribed rates are arbitrary and as will be seen from the discussions in Chapters 6 and 7 of this thesis dealing with the right to equality (section 9 of the Constitution), the judiciary tends to find that arbitrary legislation is unconstitutional (*First National Bank of SA Ltd t/a Wesbank v CIR and Another* (64 SATC 471)). Furthermore, would seeking the advice of a tax consultant and following the consultant’s advice be classified merely as a substantial underpayment of taxes or a more serious behavioural category? All these aspects will need to be decided by the judiciary in future. Further investigation and research in this area is considered necessary.

In the next paragraph, an attempt is made to compare the possible practical effect of the imposition of additional tax in terms of section 76 of the Income Tax Act to the imposition of penalties in terms of section 223 of the Tax Administration Act, bearing in mind the difference in the onus of proof provisions between the two sections. In order to make this comparison meaningful, three of the cases discussed in the core article to this chapter will be used as a basis for this comparison.

4.8 PRACTICAL EFFECT OF THE NEW ONUS OF PROOF PROVISION WHERE AN ADMINISTRATIVE UNDERSTATEMENT PENALTY IS IMPOSED

In the core article to this chapter, a few cases were discussed that indicated that the imposition of additional tax or penalties by the Commissioner in terms of section 76 of the Income Tax Act, offends the norms of justice by the level of the penalties that were imposed. In fact, it may even be questioned why these administrative penalties had been imposed in the first place. Thus, the unfair imposition of administrative penalties by the Commissioner often led to objections and appeals to the Tax Court to set aside or remit the penalties imposed.

The taxpayer, in an administrative penalty situation was, in terms of section 76(5) of the Income Tax Act, placed at a distinct disadvantage. The simple reason for this disadvantage was that, if the taxpayer was unable to discharge the onus of proof as required in terms of section 82 of the Income Tax Act, the Commissioner was inclined to impose additional tax or penalties automatically in terms of section 76 of the Income Tax Act. The onus of proof was on the taxpayer to rebut the section 76(5) presumption that he or she had committed the offence for which he or she had had the administrative penalties imposed. The lethal combination of sections 82 and 76(5) often led to situations where the taxpayer may have been completely innocent but could be destroyed financially by the penalty imposed.

The objective of this paragraph is to examine the practical effect that the new onus of proof provision (section 102(2) of the Tax Administration Act) in regard to the imposition of administrative understatement penalties (sections 221 to 223 of the Tax Administration Act) would have had on some of the more interesting and unfair cases that came to court in the past when the Commissioner, or on appeal, the Tax Court, imposed administrative penalties in terms of section 76 of the Income Tax Act. Thus, this comparison has two aspects to it, namely:

- Would the Commissioner have been able to impose such harsh penalties that he had in the past imposed if the onus of proof had been on him to prove that the penalty imposed was justified?
- Would the courts have imposed the penalty that they had in their decisions in the past if the onus of proof was on the Commissioner rather than on the taxpayer to prove that the penalty imposed was justified?

In order for a meaningful discussion on these two aspects, the facts of the cases used in the core article to this chapter will once again be described for ease of reference.

In the first case to be discussed, *ITC 1725 (supra)*, the taxpayer entered into an unconditional agreement for the purchase of cattle feed and claimed, on the advice of his tax consultant, the cost of the feed as a deduction even though the feed had not been delivered to the taxpayer by the end of his year of assessment. The Commissioner contended that the agreement was conditional, and therefore, that the expense claimed could not be deducted. As such, he determined that the taxpayer had claimed an unjustified expense and therefore imposed additional tax of 100% in terms of section 76 of the Income Tax Act.

Under the new regime, SARS would be obliged to remit the penalty *in toto* if the taxpayer had obtained the favourable opinion from a registered tax practitioner provided that the opinion had not been obtained subsequent to the due date of the relevant return (section 223(3)(b) of the Tax Administration Act). The question arises, however, in regard to a situation where the taxpayer obtained the opinion of a tax consultant who is not

registered as a tax practitioner, for example, a Senior Counsel practicing at the Bar? It is submitted that under the new regime, the case could be described as a standard case. The taxpayer is not obstructive nor is it a repeat case. Furthermore, whether there has been voluntary disclosure or not is not an issue. The next step is to consider the behaviour of the taxpayer as indicated in the table. Did the taxpayer take “reasonable care in completing the return”? It is submitted that if the taxpayer had consulted a Senior Counsel, even if not registered, then this behavioural level would not have been reached, based on the judgement actually given in the case. Thus, the next step would be to proceed to the lower level of behaviour and to establish if there had been a “substantial understatement”. “Substantial understatement” is defined in section 221 as meaning that “the prejudice to SARS must exceed the greater of 5% of the tax properly chargeable or refundable, or R1 million”. If it is not found to be a “substantial understatement”, then the offence does not fit within the table and no administrative penalty is chargeable. If it does meet the requirements of a “substantial understatement”, then, being a standard case, the penalty that may be imposed is limited to 25%. This is a far cry from the 100% originally imposed by the Commissioner on the taxpayer under section 76 of the Income Tax Act.

Would a different decision have been reached by the Special Court (now the Tax Court) if the case had been decided under the new onus of proof regime? In the original decision, the Special Court confirmed the Commissioner’s view that the cattle feed agreement had been a conditional agreement and that the taxpayer was not entitled to the deductions claimed in the relevant years of assessment. However, the court was of the opinion that, although it found against the taxpayer as regards its claim, the fact that the taxpayer had claimed the deduction on the basis of professional advice honestly given, meant that such claim could not simply be treated as a form of tax evasion. Although additional tax had to be imposed in terms of section 76(1)(b) of the Act, the court used its discretion in terms of section 76(2)(a) of the Act, to remit, *in toto*, the penalty imposed by the Commissioner. It is submitted that, if this case had come before the court under the new onus of proof provision, the court would have had to follow the same procedure as SARS would have done and the answer would probably have been the same – if the tax consultant had been a registered practitioner, then the penalty could have been remitted *in toto*. If the

tax consultant had not been registered as a tax practitioner, then the 25% penalty would be imposed if the definition of “substantial understatement” is met. It is interesting, however, to speculate whether in a case like this – where the taxpayer was honest, the tax consultant a professional but not a registered practitioner and the understatement is substantial – the judiciary may find some loophole for the remission of the penalty to a lower amount or even remit it in total, for example, that the R1 000 000 and 5% limits are too arbitrary to enforce in the specific case. This is something that the judiciary will have to wrestle with in future taking into account the founding principles of fairness, justice and equity demanded by the Constitution.

In the second case to be examined, the taxpayer in *ITC 1758 (supra)*, when challenged by SARS, acknowledged that he would not be able to produce sufficient evidence to discharge the onus of proving that an amount of R580 000 on which the Commissioner had levied normal tax, had been brought into South Africa as his capital when he fled Angola as a refugee at a time of the civil war in that country. He accordingly did not contest the inclusion of that amount in his income but instead came to an agreement with SARS whereby he was assessed to normal tax on the R580 000 allegedly not disclosed. Immediately thereafter, the Commissioner imposed a 100% additional tax levy in terms of section 76(1)(b) for the amount deemed to be omitted in terms of section 76(5) of the Act from his return of income. The taxpayer appealed against the imposition of the penalty.

It is submitted that the taxpayer gave a reasonable and perhaps even a probable reason for the increase in his capital by R580 000 and it would have been impossible for the Commissioner to prove otherwise unless he had compelling evidence to contradict the taxpayer’s explanation. Thus, with the onus now on SARS under the new regime to justify the extent of the penalty to be imposed, it is submitted that SARS would have had difficulty in finding a behaviour indicator in the table that suitably fitted the taxpayer and on which a penalty could be justified. SARS would not be able to prove “on a balance of probabilities” that the taxpayer did not bring the money into South Africa as his capital when he fled Angola. It is further submitted that a Tax Court would also have to find that no penalty could be imposed in such circumstances.

From the results of the two cases examined so far, it can be concluded that SARS no longer appears to have an unfair advantage over the taxpayer when imposing administrative understatement penalties.

The third and final case to be discussed in this context is *ITC 1489 (supra)*, which reinforces the conclusion reached in the previous paragraph. The taxpayer's auditor had applied a 50% cost-of-stock method of valuation, which had been used for the valuation of stock since the inception of the company. The contention by the taxpayer was that the valuation was done in accordance with accepted accounting principles applied at that time, and was therefore in accordance with section 22(1) of the Act. In spite of the fact Mr Carl Schweppenhauser, a former Commissioner for Inland Revenue and a former Deputy Director in the Department gave evidence in favour of the taxpayer to the effect that prior to 1984, taxpayers had adopted various and different methods of valuing stock, which valuation had been accepted by SARS, the new Commissioner disregarded this practice and imposed a penalty of R90 000 for the understatement of taxes payable resulting from the undervaluation of the closing stock.

Under the new onus of proof regime, it is submitted that, because the taxpayer gave a reasonable explanation for the stance taken – after all, evidence to this effect was given by a former Commissioner for Inland Revenue – the only possible behavioural category in the table that would fit what happened is a “substantial understatement” at the “standard case”. Accordingly, the maximum penalty that could be imposed would be at a rate of 25% if, in fact, the “substantial understatement” behaviour met the defined requirements – the greater of 5% or R1 million of the understatement of the tax payable. Failing that, it is submitted, no penalty could be imposed. It is further submitted that a court should find similarly although in the original judgement, Conradie J held that the valuation of stock in terms of section 22(1) of the Act requires proper disclosure, and to merely refer to the value of the closing stock figure as “net realisable value” is an “incorrect statement” or an omission for the purposes of section 76(1)(b) of the Act. Nevertheless, the judge still halved the penalty by remitting it to R45 000.

Once again, it can be concluded that the change in the onus of proof regime in the case of administratively imposed understatement penalties, indicates a welcome change from the old onus of proof regime. The taxpayer is protected from any unreasonable, unfair or unjust decision by SARS in regard to the imposition of penalties. The penalties imposed by SARS under the new regime should closely match any penalty imposed by the judiciary should the matter proceed to court on appeal.

4.9 SYNTHESIS AND CONCLUDING REMARKS

This chapter is a sum of two parts. The first part uses, as its basis, an accredited journal article published in 2009. The objective of the journal article was to analyse and discuss the application and constitutionality of the general onus of proof provision (section 82 of the Income Tax Act), the presumption in favour of the State when imposing criminal penalties and sanctions on an offending taxpayer (section 104(2) of the Income Tax Act) and the mechanics for imposing administrative additional tax or penalties (section 76(1)(b) of the Income Tax Act).

The conclusion reached was that the reverse onus presumption, as was provided for in terms of section 104(2) of the Income Tax Act, was unconstitutional. It was penal in nature and offended against the constitutional right of an accused to a fair trial (sections 35(3) of the Constitution). The section 36 limitation of rights clause of the Constitution could not save it as it was considered not to be a limitation that is reasonable and justifiable in an open and democratic society. Furthermore, section 76(1)(b) of the Income Tax Act, read in conjunction with the deeming provision of section 76(5) of that Act, was inextricably linked to the section 82 general reverse onus provision of the Act. Hence, when these two sections were applied together, they created a reverse onus of proof that, *prima facie*, violated the right to just administrative action (section 33 of the Constitution).

Regarding the general reverse onus of proof provision as provided for in terms of section 82 of the Income Tax Act, the conclusion reached was that it was probably reasonable and justifiable in an open and democratic society and could therefore be regarded as constitutional – although there were some constitutional concerns. The recommendation was that the reverse onus of proof provisions and presumptions of the Income Tax Act that provided for administrative penalties and criminal sanctions, namely sections 76 and 104, should be amended to bring them into line with the founding principles of the Constitution generally and with the fundamental rights as guaranteed by the Bill of Rights specifically.

In 2012, the Tax Administration Act was promulgated and became effective from 1 October 2012. The new Act incorporates and consolidates all the administrative sections as presently contained in the Income Tax Act as well as other revenue legislation. Section 102(1) of the new Act includes within its ambit, the general onus of proof provision as presently contained in section 82 of the Income Tax Act. It also stipulates the required standard of proof required when SARS imposes administrative understatement penalties (sections 221 to 223) and criminal tax evasion penalties (section 234). Thus, with the new Act in place, it is appropriate that the second part of this chapter has been devoted to an analysis of the changes made to the onus of proof provisions in the new legislation and the way they may be applied in practice. The conclusions reached are:

- The new legislation in the form of section 102, does not change the practical application of the general reverse onus of proof provision as contained in section 82 of the Income Tax Act – the general reverse onus of proof remains in place. Although there is a question mark regarding its constitutionality, this would probably be regarded as constitutional if challenged in a court of law.
- Section 234 of the new legislation corresponds to the criminal non-compliance provisions contained in section 75 of the Income Tax Act. There is no constitutional issue in regard to section 234 as there is no reverse onus of proof presumption or provision contained in this section.

- There are, however, some constitutional concerns regarding section 235 of the new legislation, which section corresponds to section 104 of the Income Tax Act. The new section provides for criminal penalties and sanctions to be imposed on a taxpayer who is involved in tax evasion. Section 235(2) of the new legislation includes a presumption that the taxpayer is guilty of tax evasion unless he or she can prove that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part. Although SARS dismisses this constitutional concern calling it merely an “evidentiary” burden, the constitutional implications will still have to be decided upon by the judiciary.
- There has been a welcome shift in the onus of proof provision in the new legislation relating to the administrative understatement penalties that may be imposed by SARS in terms of sections 221 to 223 for any understatement of taxable income. In terms of section 102(2) of the new legislation, the onus of proof is on SARS to justify any administrative understatement penalty to be imposed in terms of the behavioural table as provided for in terms of section 223(1). A comparison between the practical application of the imposition of administrative penalties in terms of section 76 of the Income Tax Act and the new regime was presented. Three cases from the original core article to this chapter pertaining to the imposition of administrative penalties were used as the basis for the comparison. In all three cases, it was established that the use of the new behavioural table contained in section 223 of the new legislation will lead to a dramatic decrease in the level of administrative penalties that may be imposed by SARS. It will also lead to a fairer and more equitable regime that is in line with the founding principles of the Constitution.

In summary, it can be said that the change in the onus of proof provision in regard to the imposition of administrative understatement penalties theoretically protects a taxpayer from unjust administrative action, decisions and conduct by the Commissioner. This is a right guaranteed by section 33 of the Constitution. It is not merely a cosmetic change wrapped in another package but a real change. However, a concern still remains in regard to the reverse presumption created by section 235(2) of the new legislation where criminal penalties and sanctions are imposed for tax evasion activities by the taxpayer. The judiciary will ultimately have to determine its constitutionality. Nevertheless, it is submitted that the new regime, especially in relation to the imposition of administrative understatement penalties, goes a long way to ensuring that a taxpayer can be a recipient of justice rather than a victim of justice.

This chapter has explored the onus of proof provisions in tax matters and concluded on their constitutionality. In order to discharge the onus of proof or rebut any adverse presumption, good facts need to be presented by the taxpayer, either to SARS in the first instance or to a court of appeal thereafter. Clean hands and honesty on the part of both SARS and the taxpayer together with strict adherence to due legal process principles and the rules of natural justice by SARS are also necessary ingredients for a fair resolution to the complex issue of when, how and to which extent penalties should be imposed, whether administratively or criminally.

The concept of clean hands, good facts, due process of law and the vital role that the judiciary plays in protecting the fundamental rights of taxpayers generally but the section 33 right to just administrative action in particular, will be developed further in the next chapter. As the old legal adage advises, “if you have good facts on your side, pound the facts” and this is exactly what is necessary when appealing to the judiciary against any unjust, unfair, unreasonable administrative action, decision or conduct on the part of SARS.

CHAPTER 5

THE TAXPAYER'S QUEST FOR ADMINISTRATIVE JUSTICE – CLEAN HANDS, GOOD FACTS, DUE LEGAL PROCESS AND THE HUMAN ELEMENT

“As a citizen, you have an obligation to the country’s tax system, but you also have an obligation to yourself to know your rights under the law.” - Donald Alexander (Taxanalysts 2012)

5.1 INTRODUCTION

There are three essential ingredients in any tax challenge – the law, the facts and the judiciary. Chapters 2 and 3 of this thesis focused entirely on legislation and the manner in which it is interpreted within a constitutional environment. Chapter 4 concentrated entirely on the facts within the context of the constitutionality of the onus of proof provisions as contained both in the Income Tax Act (as applied until 30 September 2012) and the Tax Administration Act (Act No. 28 of 2011) (as will be applied from 1 October 2012). This chapter will continue the process of analysing the facts but looking at how taxpayers’ rights are applied in practice by the judiciary by discussing the role that clean hands, good facts and due process of law play in any constitutional challenge to the decision-making process or conduct of SARS, especially where the application of draconian legislation is involved

The core of this chapter is an article that, at the time of submission of this thesis, is unpublished.

5.2 THE QUEST FOR JUST ADMINISTRATIVE ACTION – THE FOURTH “CORE” ARTICLE

The taxpayer’s quest for just administrative action – clean hands, good facts, due process and the human element

G. K. Goldswain

Abstract

Virtually no battles have been won by taxpayers who have attacked fiscal legislation that offends any of their fundamental rights contained in the Constitution of the Republic of South Africa, 1996. On the other hand, taxpayers have won significant victories in attacking the administrative decisions by the South African Revenue Service (SARS) where one or more of their fundamental rights have been violated. This has especially been the case where the taxpayer has approached the courts with clean hands and good facts.

This article traces the theme of clean hands, good facts and due legal process especially in the context of the section 33 right to just administrative justice. It also evaluates the role that the human element in the form of the judiciary play in ensuring that the taxpayer is treated lawfully, equally, reasonably and that due process is followed.

The conclusion reached is that, where the taxpayer approaches a court with clean hands supported by good facts to contest any action, conduct or decision of the South African Revenue Service, the human element in the form of the judiciary finds this an irresistible combination that makes it easy for them to grant the relief that the taxpayer seeks.

Key words

Bill of Rights, Constitution, clean hands, due legal process, Income Tax Act, right to just administrative action, taxpayers’ rights

Introduction

There is an old legal adage along the lines that if the facts are on your side, pound the facts into the table and if the law is on your side, pound the law into the table but where neither the facts nor the law are on your side, pound the table (Quote Investigator 2012b). This adage rings true in any legal challenge but it is especially relevant when a taxpayer challenges what he or she perceives to be wrongful administrative decisions made by the South African Revenue Service (“SARS”). With numerous powers at its disposal to assess, obtain information and collect taxes, it is no wonder that there is no other government body that interferes more in the private affairs of individuals and potentially limits their fundamental rights, as guaranteed by the Constitution, 1996 (“the Constitution”), than SARS.

Many provisions of the Income Tax Act (Act No. 58 of 1962) and the recently promulgated Tax Administration Act (Act No. 28 of 2011) *prima facie* interfere with a person’s fundamental rights that are protected by sections 7 to 39 of the Constitution. For example, the imposition of tax on income violates the right of a person not to be arbitrarily deprived of his or her property (section 25 of the Constitution). Legislation that permits SARS to gather information by way of tax audits, inquiries and search and seizure procedures clash with the right to privacy (section 14 of the Constitution) and the right to human dignity (section 10 of the Constitution). Legislation that discriminates or differentiates between taxpayers clashes with the right to equality (section 9 of the Constitution).

Nevertheless, even legislation that appears to violate a person’s fundamental right is not necessarily unconstitutional since fundamental rights may be limited or restricted in terms of section 36 of the Constitution. Section 36 of the Constitution provides that:

The rights in the Bill of Rights may be limited 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.

The section 36 “limitation of right clause” is a major hurdle for taxpayers to cross should they wish to successfully challenge legislation that violates one or more of their fundamental rights as contained in sections 7 to 39 of the Constitution (sections 7 to 39 are referred to as the “Bill of Rights”) as most fiscal legislation, even if draconian in nature, can pass the section 36 limitation of rights clause on the basis that it is “reasonable and justifiable in an open and democratic society”. For example, the search and seizure provisions of section 74D of the Income Tax Act (now contained in sections 59 to 62 of the Tax Administration Act) have been found to pass constitutional muster (*Investigating Directorate: SEO v Hyundai Motor Distributors* (2001(1) SA 545 (CC)). Even the so-called pay-now-argue-later principle as embodied in sections 36(1), 40(2)(a) and 40(5) of the Value-Added Tax Act (Act No. 89 of 1991) (now contained in sections 164 and 169 of the Tax Administration Act) was found to have met the founding values of the Constitution (*Metcash Trading Ltd v C:SARS* (63 SATC 130)). So too were the provisions whereby SARS can appoint an agent to collect taxes on its behalf (section 99 of the Income Tax Act and now contained in section 156 of the Tax Administration Act)) (*Hindry v Nedcor Bank Ltd and Another* (1999(2) SA 757(W)). There has been one notable exception (*First National Bank of SA Ltd t/a Wesbank v CIR and Another* (64 SATC 471) where a provision (section 114) of the Customs and Excise Act (Act No.91 of 1964) was found to have violated the right of the taxpayer not to be arbitrarily deprived of his or her property. The legislation was found to be neither reasonable nor justifiable in an open and democratic society and thus the section 36 limitation of rights clause could not save it.

Taxpayers, however, have won significant victories against SARS where they have constitutionally attacked the administrative decision-making process or conduct of SARS when applying fiscal legislation. These victories have resulted because the section 36 limitation of rights clause only applies to a “law of general application” and not to conduct or decision-making. Accordingly, where the decisions, actions or conduct of SARS in assessing, obtaining information, imposing taxes or even collecting taxes go beyond the

threshold of what is regarded as constitutional behaviour, such behaviour is not saved by the limitation of rights clause as conduct is not a “law of general application” (*Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-Aided Schools, Eastern Transvaal* (1999(2) SA 91 (CC))).

Section 33(1) of the Constitution provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”. Section 33(2) provides that “everyone whose rights have been adversely affected by administrative action has the right to be given written reasons”. Section 33(3) demands that “National legislation must be enacted to give effect to these rights ...”. The Promotion of Administrative Justice Act (Act No. 54 of 2002) was promulgated in 2000 as a direct result of the demands of section 33(3) of the Constitution. The legislation is quite technical in nature but gives guidance as to the scope and ambit of the right to just administrative action.

Section 6(2) of the Promotion of Administrative Justice Act sets out the circumstances when administrative action or conduct of SARS may be judicially challenged by a taxpayer as being unconstitutional. The circumstances include, *inter alia*, when the decision, action or conduct is biased, unfair, based on an error of law, made in bad faith, arbitrary, capricious, unreasonable, unconstitutional or unlawful. Conduct that falls within the meaning of any of these words falls foul of the Promotion of Administrative Justice Act and thus also of the constitutional right to just administrative action (section 33 of the Constitution).

In this article, the judiciary is referred to as the human element as it is made up of real live persons in the form of the judiciary. It is submitted that when the judiciary is involved in deciding whether the conduct of SARS meets the threshold of the constitutional behaviour expected of it, the judges always have at the back of their minds, the well-known legal precept that “equity must come with clean hands” (*Tinsley v Milligan* ([1992] 2 All ER 391)). When clean hands on the part of the taxpayer, indicated by integrity and honesty, are combined with good facts, the judiciary appears to find this an irresistible combination and, where possible, appropriate relief is granted to the affected or aggrieved taxpayer. Somerset

Maugham (Cohen 2000: 162) wrote in one of his works when referring to the importance of facts: “But I can do nothing unless I am in complete possession of the facts ... Obviously you can’t cook them unless you have them.” Where the taxpayer has no or few facts to support his or her challenge or goes to court with dirty hands (as was the case in *Metcash Trading Ltd v C:SARS* (63 SATC 130), which case is discussed later in this chapter), perhaps pounding the table is the only option left for the taxpayer.

Objective, research method followed and overview of article

Croome (2010) is one of the few South African authors to have written in some depth on taxpayers’ rights generally. However, there has been no attempt by him or any other South African authors to evaluate taxpayers’ rights by looking at such rights through the lens of the judiciary and establishing the role that clean hands, good facts and due process of law play in any constitutional challenge to the decision-making process or conduct of SARS, especially where the application of draconian legislation is involved

The objective of this article is to fill this gap by documenting, analysing and evaluating the importance of clean hands, good facts and due legal process in any challenge by the taxpayer against the administrative decisions, action or conduct of SARS that are inconsistent with the provisions of the Promotion of Administrative Justice Act. Of course, being inconsistent with the provisions of the Promotion of Administrative Justice Act would also mean inconsistency with the founding principles of the Constitution. This, as already mentioned, is the area in which taxpayers have the best chance of success in protecting their rights – as opposed to attacking even *prima facie* unconstitutional legislation. The analysis of clean hands, good facts and due legal process is an attempt to examine the substantive meaning and application of the right to just administrative action and other inter-related fundamental rights rather than merely examining the technical requirements of a piece of fiscal legislation.

The research method adopted to meet the objective comprised a literature review and an analysis of the relevant provisions of the Income Tax Act, the Promotion of Administrative Justice Act, the Constitution and the reported decisions of the various courts together with published articles and textbooks that relate directly to the objective.

It is important to distinguish and understand the difference between a “law of general application” and the “conduct” or administrative decision-making process of a government official. The concept of clean hands and good facts does not play any part in the interpretation of legislation but, it is submitted, plays a pivotal role in determining whether SARS, by its conduct, exceeds the threshold of what is considered to be constitutionally acceptable. Therefore, a practical illustration of the difference between a “law of general application” and the “conduct” of a government official is explained in the next paragraph. Thereafter follows a discussion of whether fundamental rights only apply to individual taxpayers or whether they also apply to juristic persons. Also, the onus of proof in a constitutional challenge of this nature is also discussed.

Overviews of the concepts of clean hands and good facts and due legal process are then given before discussing the right to just administrative action as embodied in the Promotion of Administrative Justice Act. The meaning of the word “reasonableness” and the role that it plays in determining whether the taxpayer’s section 33 right to just administrative action has been violated is also examined.

Establishing whether the actions, decision making or conduct of SARS violates any of the provisions of the Promotion of Administrative Justice Act rather than looking directly to section 33 of the Constitution for assistance, is an example of the indirect application of the provisions of the Constitution. It is settled law that the courts apply the common law or subsidiary legislation first and adapt such legislation or common law, if necessary (the so-called concept of “reading down” – see Chapter 3 in this regard), to embody the founding principles of the Constitution. Only if this is not possible, because, for example, the common law or the subsidiary legislation cannot be adapted to meet the founding values of the Constitution, does the judiciary directly apply the provisions of the Constitution (see *Du Plessis v De Klerk* (1996 (3) SA 850 (CC)); *MEC for Education: Kwazulu-Natal and Others v Pillay* (2008 (1) SA 474 (CC) para 40; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 96-97).

The search and seizure provisions, pay-now-argue-later principle and the appointment of an agent to collect taxes on behalf of SARS are then considered, analysed and evaluated against the theme of clean hands, good facts and due legal process, as the unreasonable use of these powers would lead to a violation of the right to just administrative action. The legitimate expectation doctrine is also discussed within the context of the right to just administrative action. Before finally concluding on the role that clean hands, good facts and due legal process play in protecting the rights of taxpayers, the role of the judiciary in granting relief to the taxpayer is also discussed.

The recently promulgated Tax Administration Act, which became effective from 1 October 2012, incorporates and consolidates the administrative provisions of the Income Tax Act and other fiscal legislation. Several of the administrative provisions contained in the Tax Administration Act and discussed in this article have been lifted, virtually *verbatim*, from the Income Tax Act and the Value-Added Tax Act. Thus, the new provisions will not materially affect any discussion, reasoning or conclusions reached in this article unless otherwise indicated.

As the objective of this article is to document, analyse and evaluate the importance of clean hands, good facts and due legal process in any challenge by the taxpayer against the administrative decisions, actions or conduct of SARS that are inconsistent with the provisions of the Promotion of Administrative Justice Act, any direct analysis of the technical aspects of that Act is considered to be beyond the scope of this article. For example, there is no discussion on whether the provisions of the Promotion of Administrative Justice Act give full expression to the section 33 right to just administrative action or which decisions or actions of SARS fall within or outside of the ambit of the legislation. Croome and Olivier (2010:21-71) adequately cover these technical aspects. Nevertheless, all the actions, decisions and conduct that are discussed later in this article will, in the view of Croome and Olivier, fall within the ambit of the Promotion of Administrative Justice Act. Their analysis and views on the technical aspects of the Promotion of Administrative Justice Act are endorsed.

Difference between “law of general application” and “conduct”

The decision in *City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)), is a good example of the importance of understanding and distinguishing between a “law of general application” and the “conduct” of a government official. In that case, the Pretoria Council had imposed, in the opinion of the affected residents, unfairly high levies for municipal services on them because they resided in a formerly advantaged (white) suburb of Pretoria. A further complaint was that the municipality only attempted to collect the high levies from this community but made a conscious decision not to recover the levies, albeit at a much lower rate, from the formerly disadvantaged communities. Thus, there were two constitutional issues at stake, namely:

- whether the legislation that imposed higher services levies on the formerly advantaged community constituted a violation of their right to equality; and/or
- whether the “conduct” of the council, in only collecting levies from the formerly advantaged community, also or alternatively, violated their right to equality.

Since the first issue is entirely focussed on the constitutionality of the perceived unfair discriminatory legislation and not on the conduct of the Council officials in enforcing the legislation, a discussion on the reasoning behind the decision of the court that the legislation was not unfair or unequal – and thus constitutional – is considered to be beyond the scope of this article. The issue is also analysed and discussed in some depth by Goldswain (2011) (see also Chapters 6 and 7 in this regard). From the analysis and discussion of the right to equality by Goldswain, the conclusion that may be reached is that it is in the area of inequality and discrimination specifically (by applying the provisions of the Constitution directly rather than indirectly) that the judiciary could make a finding in the future that fiscal legislation that violates the right to equality is unconstitutional.

Regarding the second issue raised in the *Walker* case, namely the decision not to collect the levies from the formerly disadvantaged communities, the court held that the Council's selective enforcement policy (their conduct) for the recovery of debts from only the formerly advantaged community amounted to unfair discrimination. As the conduct of the Council was attacked, the section 36 limitation of rights clause could not be invoked as justification for their discriminatory conduct. What needed to be examined was whether the taxpayer's right to equality was violated by the Council's conduct – which the court held had occurred. The decision was a bittersweet victory for the residents as the court also found that the residents had sought the wrong relief and should rather have applied for a *mandamus* (declaration of rights) to ensure that the Council first put its house in order and eliminated the unfair discrimination by collecting the arrear levies from the disadvantaged communities as well.

The *Walker* decision is an excellent example of the theme of good facts on the side of the applicant in contrast to the dirty hands on the part of the Council. Although the applicant obtained no effective relief from the judgement because the wrong order was sought, it is submitted that the decision made the Council aware of its constitutional obligations. It remedied the situation without the residents having to reinforce their rights to equality or just administrative action with a further application to court.

Two important aspects in any constitutional challenge also need to be addressed at this point before continuing with a more in-depth discussion of the theme of clean hands, good facts and due legal process, namely:

- whether fundamental rights only apply to natural persons or whether they also apply to juristic persons; and
- the importance of the onus of proof provisions in an attempt to challenge constitutionally, albeit indirectly, any decision-making process or conduct of SARS.

To whom fundamental rights apply

The Constitution protects all the people living and working in South Africa. Section 8(4) of the Constitution is helpful in regard to whether the Bill of Rights is applicable only to real or natural persons or whether the protection extends to juristic persons as well. It states, “a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person”.

Some of the fundamental rights guaranteed in the Bill of Rights, obviously do not extend to juristic persons as they are inherently personal by nature, such as the right to life; the freedom and security of a person; the freedom from slavery; servitude and forced labour; the freedom of religion, belief and opinion; and the right to citizenship. However, some of the other rights obviously can and do extend to juristic persons, especially in taxation matters, such as the right not to be arbitrarily deprived of property (*First National Bank of SA Ltd t/a Wesbank v CIR and Another (supra)*), the right to privacy (*Investigating Directorate: SEO v Hyundai Motor Distributors (supra)*), the right of access to information (Promotion of Access to Information Act (Act No. 2 of 2000) and the right to just administrative action (Promotion of Administrative Justice Act). The rights of arrested, detained and accused persons do not extend directly to juristic persons but are available to their representatives, where necessary. The right to equality, often based on the concept of the infringement of the right to human dignity, poses some interesting problems in relation to juristic persons but generally, the right also extends to them (Goldswain 2011).

Onus of proof in a constitutional challenge

In instances where a person’s constitutional right has been affected, the person affected bears the initial onus of proof that his or her right has been violated or infringed upon (section 38 of the Constitution). Each specific fundamental right has its own prerequisites for the taxpayer to prove. For example, section 9 of the Constitution dealing with equality, requires that discrimination on its own is not a violation of the right to equality. It requires

something more, namely “unfair discrimination” (*City Council of Pretoria v Walker (supra)* and *Harksen v Lane, NO and Others* (1997 (11) BCLR 1489 (CC)). In the case of the right to property (section 14 of the Constitution), it is necessary to prove that there has been an “arbitrary” deprivation of property (*First National Bank of SA Ltd t/a Wesbank v CIR and Another (supra)*). The right to just administrative action (section 33 of the Constitution) requires “lawful, “reasonable” and “procedurally fair” action by SARS in the carrying out of its duties. Thus, if the taxpayer can prove, *prima facie*, that any decision, action or conduct on the part of SARS is unlawful, unreasonable, unjustifiable, arbitrary, irrational, or capricious (see section 6(1) of the Promotion of Administrative Justice Act) by presenting good facts to the court in support of the contention, the taxpayer’s case is well on the way to being won. The onus of proof then shifts to SARS to prove otherwise. SARS may, however, attempt to adduce extraneous facts or factors to justify its conduct and thereby attempt to turn what is obviously an unreasonable decision into a reasonable or rational decision (see, for example, *Ferucci and Others v C:SARS and Another* (65 SATC 470), the facts of which are discussed below).

It is for this very reason that the taxpayer, to obtain relief, should approach the court with clean hands and good facts and an overview to this theme is offered below.

Clean hands, good facts or conversely dirty hands and bad facts – an overview

The old maxim *de bloedige hand neemt geen erfenis* is an established principle in the law of inheritance in South Africa (*Makhanya v Minister of Finance and Others* ([1997] JOL 1222 (D)). Thus, a person who murders the testator (or literally translated, has “blood” on his or her hands) cannot inherit from the deceased. Similarly, in the tax field and any other field of law, litigants who approach the court with “dirty hands” are unlikely to be treated sympathetically (*Numsa & Others v Henred Fruehauf Trailers (Pty) Ltd* ([1995] 2 BLLR 1 (AD)). The doctrine is also expressed in the United Kingdom as “equity must come with clean hands” (*Tinsley v Milligan (supra)*). Furthermore, the judiciary may take into account public policy considerations (*Tshabalala v Minister of Health* (1987 (1) SA 513 (W) 523B-C); *ITC 1490* (53 SATC 108)). An equally important concept that is linked to the “clean

hands” principle is the *in fraudem legis* doctrine – a transaction or agreement that is designedly disguised so as to escape the provisions of the law but falls within such provisions. The judiciary does not take kindly to either the taxpayer or SARS abusing the law (*Commissioner of Customs and Excise v Randles Bros and Hudson Ltd* (33 SATC 48)).

The judiciary, although it is the ultimate defender of the Constitution (section 165 of the Constitution), is also constrained by the Constitution. The judiciary is, however, made up of humans. Marshall, CJ, in *Osborn v Bank of the United States* ((1824) 9 Wheat. 738) said (866): “Judicial power is never exercised for the purpose of giving effect to the will of the judge; always with the purpose of giving effect to the will of the legislature; or in other words, to the will of the law”. In effect, Marshall was of the opinion that there is no room for judges to be subjective or biased but, it is submitted, this cannot be completely true as it is in the nature of every human being, judge or otherwise, to look at facts through the lens, *inter alia*, of their social and economic upbringing and their political education and conviction. Cardoza (1921:169) lends support for this submission. He comments on Marshall’s view of the so-called objectivity of the judiciary as follows: “It has a lofty sound; it is well and finely said; but it can never be more than partly true”. He goes on to say that Marshall’s own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. Perhaps it is for this reason that it is sometimes said, especially by teachers of law (but research into reported cases indicates that it is a phrase that has never been voiced openly by the South African judiciary) that “bad facts can make bad law” (Wisecountry 2012).

Where a taxpayer approaches a court for constitutional relief with dirty hands or bad facts or even no facts at all, he or she may still be able to obtain relief based on the concept of due legal process but the relief, it is submitted, if granted, is only temporary in nature and ultimately the taxpayer is bound to fail. An overview to the concept of due legal process, as it relates to the protection of taxpayers’ rights, is discussed in the next paragraph.

The concept of “due legal process” – an overview

Whenever SARS employs legislative provisions to assess and collect taxes, its actions must not only adhere strictly to the technical and procedural provisions of the legislation it is attempting to apply, but it must also take account of all the common law rights, including the concept of natural justice, available to a taxpayer and which it is obliged to respect. The Constitution embraces, embodies and extends the administrative and common law principles developed over the years (*Pharmaceutical Manufacturers Association of SA: In re: Ex Parte President of the Republic of South Africa* (2000 (2) SA 674 (CC)). Thus, for example, SARS must adhere to the rules of natural justice that include the *audi alteram partem* (“hear the other side”) principle as well as considering whether the legitimate expectation doctrine should be applied.

The concept of “due process of law” or “rule of law” is recognised internationally. In *State v. Green*, (232 S.W.2d 897, 903 (Mo. 1950)) it was said that the concept is founded upon the basic principle that every man (woman) shall have his (her) day in court, and the benefit of the general law which proceeds only upon notice and which the court hears and considers before judgement is rendered. In *Vaughn v. State*, (3 Tenn.Crim.App. 54, 456 S.W.2d 879 at 883), the court indicated that due process means “fundamental fairness and substantial justice”. The section 33 right to just administrative action, embodied and given effect to in the Promotion of Administrative Justice Act, follows the same notion of fairness and justice. Section 33(1) provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”. Thus, should SARS fail to adhere strictly to the technical and procedural requirements of a piece of fiscal legislation, its actions are *prima facie* unfair and therefore offend the right to just administrative action and the rule of law. Several victories have been won by the taxpayer on this basis, especially in the area related to search and seizure (*Haynes v CIR* (64 SATC 321); *Ferucci and Others v C:SARS and Another* (65 SATC 470); *Minister for Safety and Security v Van der Merwe and Others* ([2011] ZACC 19 (CC)).

Yet more interesting in this context is the principle developed by the judiciary that even where SARS may have strictly followed the technical and procedural requirements of a piece of legislation, their conduct may still be found to be offensive and thus unconstitutional. This may occur where SARS has not considered the principles of natural justice before strictly applying the letter of the law. This principle is also included in the concept of due process of law (*Deacon v Controller of Customs and Excise* (61 SATC 275)).

In *Deacon's* case, the taxpayer informed the Controller of Customs and Excise that there had been possible irregularities regarding the importation of a vehicle that it had in its possession. Since the taxpayer was not responsible for the irregularities, the Controller agreed that the taxpayer could retain possession of the vehicle until the true facts relating to the importation of the vehicle had finally been determined. Some time thereafter, without further investigation or discussion, the Controller changed his mind. He indicated in a letter sent to the taxpayer that the vehicle was liable for forfeiture in terms of section 87 of the Customs and Excise Act. The taxpayer, in order to avoid the immediate forfeiture of the vehicle, offered to pay the Controller the amount that was due in respect of the duties and penalties owing, which payment the Controller refused to accept. The taxpayer then applied for and obtained an interim court order allowing him to retain possession of the vehicle pending a final determination by the court.

The taxpayer argued, *inter alia*, that the Controller had not given adequate reasons for the decision to seize the vehicle and that he had based his decision on an incorrect assessment of the true facts. The taxpayer also argued that the Controller had followed a defective procedure and had failed to follow the rules of natural justice. The Controller, on the other hand, argued that he had complied strictly with the provisions of the legislation, which compelled him to confiscate the vehicle and thus that there was no need for him to apply the rules of natural justice.

The court held that, although not all administrative actions are subject to the rules of natural justice, any official making a decision that adversely affects individuals, must keep the rules of natural justice, the spirit and object of the Constitution and particularly the section 33 right to just administrative justice uppermost in mind, especially where the application of the rules of natural justice are not specifically excluded. The court was unimpressed with the Controller's argument that once the relevant provisions had been infringed he had no choice in the matter but was bound to seize the property concerned. The court held that if this argument succeeded, it would mean that individuals whose rights had been infringed would never be entitled to the protection of the Constitution. This was repugnant to the principles of fairness underlying the Constitution, especially where the Controller was aware of the taxpayer's innocence. The court further held that the taxpayer ought to have been properly heard (applying the *audi alteram partem* rule of natural justice) by the Controller before any seizure of the vehicle was contemplated. Reneging on the agreement was also problematic as it contravened the legitimate expectation principle of natural justice. The clean hands of the taxpayer in this case, played a big part, it is submitted, in the judiciary insisting that the rules of natural justice be applied even where the Controller was acting strictly within the ambit of the legislation.

The importance of clean hands, good facts and due legal process must not be underestimated – both on the part of the taxpayer and on the part of SARS. The core of this concept is, it is submitted, essentially embodied in the section 33 right to administrative action, which right overlaps with virtually all the other fundamental rights that are infringed when the decisions, actions and conduct of SARS are not consistent with the founding principles of the Constitution. Accordingly, the concepts of clean hands, good facts and due legal process will next be further analysed in the context of the right to just administrative action as embodied in the Promotion of Administrative Justice Act.

The right to just administrative action and reasonableness

It is clear from the Promotion of Administrative Justice Act that virtually all decisions made by SARS in terms of the Income Tax Act or other fiscal legislation, can be considered to be “administrative action”. This includes the decision to audit a taxpayer, search his premises, apply section 80A (the general anti-tax avoidance regulations) or any other provision of the Income Tax Act, including the power to disallow a deduction, raise an assessment and even impose “additional tax” or administrative “penalties” on a taxpayer. Where any decision, action or conduct on the part of SARS is unreasonable, then, it is submitted, it would also include decisions, actions and conduct that are biased, unfair, made in bad faith, arbitrary and capricious, all of which, including unreasonableness, are specifically mentioned in section 6(1) of the Promotion of Administrative Justice Act as being unconstitutional or unlawful conduct. The word “unreasonable” embodies, to a large extent, the meaning of every other word used in section 6(1) to describe unconstitutional conduct and is thus one of the core elements in determining whether the decisions, actions or conduct of SARS violates by indirect application (by applying the Promotion of Administrative Justice Act first) the section 33 right to just administrative action.

A good example of when a decision by SARS is regarded as reasonable or not, can be found in *KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms.) Bpk.* (58 SATC 273). In that case, decided before the advent of the Constitution, the taxpayer requested a review of the decision of the Commissioner not to allow it to depreciate its stock value by five per cent. Unfortunately, the taxpayer had not informed the Commissioner in its return that it had depreciated its stock value as it was obliged to do in terms of section 22(1)(a) of the Income Tax Act. Because of the “non-disclosure”, the Commissioner even decided to impose “additional tax” (a penalty) in terms of section 76 of the Income Tax Act. The additional tax was imposed in spite of the Commissioner conceding that the taxpayer’s failure to disclose the depreciation in its return was not an attempt to evade taxation.

The Commissioner argued that the Tax Court could not interfere in his decision to disallow the depreciation of the stock value because section 22(1)(a) did not specifically provide for his decision to be subject to objection and appeal. The Commissioner also argued that as he had only imposed additional tax or a penalty of 50%, it indicated that he had properly exercised his discretion in terms of section 76 and that there were accordingly no grounds upon which the Tax Court could interfere with his decision.

The Appellate Division made it clear that there were two separate discretions being exercised – one in terms of section 22(1)(a) (the depreciation of the stock value) and the other in terms of section 76 (the imposition of additional tax). The former discretion was not subject to objection and appeal but it was subject to a formal review process whilst the latter discretion was subject to objection and appeal. When the taxpayer is permitted to object and appeal against a decision of the Commissioner, the Tax Court is entitled to replace the decision by the Commissioner with its “own, original discretion” (see *CIR v Da Costa* (47 SATC 87)).

Based on the “good” evidence heard that indicated clean hands on the part of the taxpayer, the Tax Court held that the Commissioner had unreasonably exercised his discretion by disallowing the five per cent depreciation of the stock value but was unable to overturn the discretion exercised as unreasonableness, on its own, was not one of the grounds on which the Commissioner’s discretion could be overturned at that time. However, the Tax Court found in favour of the taxpayer regarding the imposition of the additional tax imposed and remitted it, *in toto*, based on the underlying unreasonableness of the Commissioner not to permit the depreciation even after he had all the facts in his possession. On appeal, the Appellate Division confirmed that the reasoning of the Tax Court was sound.

This decision lends support for the decision in *Deacon v Controller of Customs and Excise* (*supra*) that where the taxpayer approaches the court with clean hands and good facts, that the tenets of natural justice come into play. The taxpayer in *Gekonsolideerde Sentrale Ondernemingsgroep* failed to disclose, as was required by the provision, a material

fact to the Commissioner in its return. Yet when the full facts were disclosed to the Commissioner on investigation that showed that the taxpayer was innocent of attempting to evade tax and that it had a valid reason for depreciating its stock value by five per cent, the Commissioner unreasonably applied the letter of the law that included the imposition of “additional tax”. Under the section 33 right to just administrative action read together with section 6(1) of the Promotion of Administration Justice Act, the unreasonable use of the discretionary and other similar powers vesting in SARS are now unconstitutional. The judiciary was able to examine the substantive justification for an administrative action as opposed to merely ensuring that the correct procedure was adopted by SARS in arriving at a decision.

Unreasonable decisions, actions and conduct on the part of SARS not only violates a taxpayer’s right to just administrative action but could also infringe upon a taxpayer’s right to privacy (section 14 of the Constitution). Thus, the interaction and scope of these two rights need further discussion in relation to the powers of SARS to institute and conduct search and seizure procedures, always bearing in mind the theme of clean hands, good facts and due legal process.

Search and seizure procedures – violation of right to privacy and just administrative action

There is an old 17th-century saying, “an Englishman’s home is his castle”. A cynic may add that that is what he thinks when he pays taxes on it or that it is no longer his castle if it can be invaded with impunity by the State. This adage has its origins in an accepted English legal precept, which states that no-one may enter the home of another person unless by invitation. Coke (1628) expressed this precept as “For a man’s house is his castle, *et domus sua cuique et tutissimum refugium* [and each man’s home is his safest refuge]”.

South Africa has a very similar common law precept, which is now embodied in section 14 of the Constitution. It guarantees a person the right to privacy and specifically includes the right not to have his or her person or property searched, his or her possessions seized, or the privacy of his or her communications infringed. Nevertheless, the search and

seizure provisions as contained in the Income Tax Act (section 74D) have been found to be a reasonable and justifiable limitation (as provided for in terms of the section 36 limitation of rights clause of the Constitution) of a person's right to privacy (*Investigating Directorate: SEO v Hyundai Motor Distributors (supra)*). Section 74D contained safeguards to protect the taxpayer but unfortunately, in *Deutschmann No And Others v C:SARS; Shelton v C:SARS* (62 SATC 191) these safeguards were not strictly enforced by the judiciary. The taxpayers appear to have approached the court with dirty hands and little or no facts to support their application to overturn a search and seizure warrant granted by a judge in favour of SARS. This is implied in the finding of the court that the taxpayers had not shown good cause for the return of the information, documents and things seized. Perhaps because of the dirty hands and bad facts on the part of the taxpayers, the judiciary decided that not all the procedural and technical requirements of the section 74D search and seizure legislation needed to be strictly complied with for the warrant to retain its validity. Some vitally important requirements of section 74D that safeguard the taxpayer were interpreted so liberally and loosely that if this decision had created a precedent in the courts outside its provincial area of jurisdiction, a taxpayer would never be able to claim constitutional protection when faced with a search and seizure warrant or even in the case of a warrantless search and seizure procedure. It is submitted that this decision is a perfect example of the old adage coined by teachers of law that "bad facts make bad law".

To some extent, the submission rings true when three cases that followed on the *Deutschmann* decision all decided that the procedural and technical requirements of the search and seizure legislation (section 74D of the Income Tax Act) should be strictly adhered to when an application is made by SARS to a judge for a search and seizure warrant (see *Haynes v CIR (supra)*; *Minister for Safety and Security v Van der Merwe and Others (supra)* and *Ferucci and Others v C:SARS and Another (supra)*). The distinguishing features in all three cases, however, were the clean hands and good facts presented at the hearing by the various taxpayers. The Constitutional Court handed down the judgement in the *Van der Merwe* decision and has thus created a binding precedent for all lower courts that in any future application for a search and seizure warrant, the requirements of the legislation that safeguard the taxpayer's privacy must be strictly interpreted.

In *Ferucci (supra)*, the court went even further than merely interpreting the requirements strictly. It held that from a constitutional point of view, SARS had to make out a cogent case as to why it required a search to be conducted at the relevant premises and the judge issuing the warrant had to consider whether one of the less drastic mechanisms contained in the Income Tax Act could not be utilised instead. For example, SARS could have requested information, documents or things to be supplied to it in terms of section 74A of the Income Tax Act. Failing that, the Commissioner could have visited the taxpayer's premises and requested his consent for the examination of any documents or things in terms of section 74B or even called for a board of inquiry to be established in terms of section 74C and for the taxpayer to attend the inquiry and answer any questions put to him or her. Only after such avenues had first been explored should an application for a search and seizure warrant have been sought. As these alternative procedures had not even been canvassed and because the warrant was flawed in other respects as well (the offences were not stipulated and no proper parameters or guidance as to the documents to be seized were given), the court held that the warrants of search and seizure had to be set aside and all information, documents or objects seized by the Commissioner pursuant to the warrant were to be returned to the taxpayer.

A further interesting facet of the decision in *Ferucci (supra)* was the lack of facts on which SARS attempted to build its case to support its application for the search and seizure warrant. In the SARS affidavit, speculative averments, such as that because the taxpayer was in arrears with its regional services levies it was the experience of SARS that such taxpayers were often associated with income tax fraud, were given as a reason for the search and seizure application being made. Speculative averments are not facts. In effect, SARS was approaching the court with dirty hands and it was inevitable that they should suffer the consequences. Their application was no more than a "fishing expedition". In *Welz and Another v Hall and Others* (59 SATC 49), the judiciary also disapproved of so-called "fishing expeditions". It is clear, therefore, that the judiciary regards due legal process as playing an important role in protecting the right to privacy of a taxpayer.

The search and seizure provisions of section 74D of the Income Tax Act have been incorporated in sections 59 to 62 of the Tax Administration Act. Because the wording is virtually the same in both Acts, the interpretation of the new search and seizure provisions will be, in substance, the same. However, the legislature, at the behest of SARS, has seen fit to incorporate a warrantless search and seizure provision (section 63 of the Tax Administration Act). The new provision has been put in place to enable SARS to take immediate steps to prevent tax evaders from destroying records and hiding evidence during the period of delay that would normally precede the issue of a court warrant. However, there are limitations and safeguards built into the new provision. The warrantless search is only permitted if the owner or person in control of the premises consents in writing to the search or if no consent is given, a senior SARS official “on reasonable grounds” is satisfied that:

- There may be an imminent removal or destruction of relevant material likely to be found on the premises;
- SARS would have obtained a warrant had it applied for one, and
- The delay in obtaining a warrant would defeat the object of the search and seizure.

SARS may not enter a taxpayers’ residence (“dwelling-house or domestic premises”) without the consent of the taxpayer. However, where the residence is used for business, such part may be searched without a warrant provided that the three concomitant requirements detailed above have been met. Hopefully, SARS will not use this provision for so-called “fishing expeditions”. After all, the warrantless search must meet the same requirements as if a warrant had been applied for before a judge.

The so-called pay-now-argue-later provisions as contained in sections 88 and 91 of the Income Tax Act are now embodied in sections 164 and 169 of the Tax Administration Act with effect from 1 October 2012. The pay-now-argue-later provisions could amount to a violation of a right not to be arbitrarily deprived of property (section 25 of the Constitution) or even restricting the right of the taxpayer of access to court (section 34 of the Constitution). Any decision taken to enforce the provisions, without proper investigation or

application of the rules of natural justice by SARS, could also amount to a violation of the right to administrative justice. The constitutionality of the pay-now-argue-later provisions will be discussed next.

Pay-now-argue-later provisions – right not to be arbitrarily deprived of property and just administrative action

In terms of section 91 of the Income Tax Act (now embodied in section 169 of the Tax Administration Act), any amount of tax allegedly payable by a taxpayer can be collected by SARS *via* a civil judgement granted against the taxpayer. However, the civil judgement obtained is unique in that it is an order not issued by a judge or a judicial officer. All SARS has to do to obtain the judgement order against the taxpayer is merely file with the clerk or registrar of any competent court, a statement certified by SARS as correct and setting out the amount of the tax or interest allegedly due or payable by the taxpayer. The certified statement has all the effects of a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt for the amount specified in the statement. However, the taxpayer may apply for its rescission once he or she is informed of the judgement against him (*Traco Marketing (Pty) Ltd and Another v Minister of Finance and Another* (60 SATC 526)).

Section 91 of the Income Tax Act was used to great effect by SARS to enforce the provisions of section 88 that provided for the immediate payment of assessed taxes even where the taxpayer may have objected or appealed against such assessment. These two provisions embody what is generally referred to as the “pay-now-argue-later” principle. Although *prima facie* violating a taxpayer’s right of access to courts (section 34 of the Constitution) and the right not to be arbitrarily deprived of one’s property (section 25 of the Constitution), the search and seizure provisions as contained in the Value-Added Tax Act were nonetheless found to be constitutional in *Metcash Trading Ltd v C:SARS (supra)*, where the evidence indicated that the taxpayer had very dirty hands – fraud could well have been involved. However, the reasons given by the court for coming to its conclusion is considered to be beyond the scope of this article as it involved an attack on the

constitutionality of the legislation rather than an attack on the conduct or actions of SARS. The Tax Administration Act has taken over, virtually *verbatim*, the two provisions of the Income Tax Act that read together, constitute the so-called pay-now-argue-later regime and thus will be regarded as constitutionally sound and, in addition, be interpreted similarly.

When SARS issues an assessment that is different to the return submitted by the taxpayer, in effect, there has been an administrative decision by SARS. As such, SARS should provide written reasons to the taxpayer for its decision in terms of section 5 of the Promotion of Administrative Justice Act. If the reasons are not automatically forthcoming from SARS or the reasons given are inadequate, then the taxpayer, before objecting to the assessment, may ask for adequate reasons. Until adequate reasons are supplied by SARS to enable the taxpayer to make a proper objection to the assessment, SARS may not invoke the pay-now-argue-later provisions. To do so, it is submitted, would constitute unlawful conduct on the part of SARS and thus violate the provisions of the Promotion of Administrative Justice Act. The taxpayer, at the time of the objection or even at a later stage may request SARS to suspend the payment of the taxes due until the objection and appeal process has been finalised. SARS, in deciding whether to grant or not grant the suspension request, must take into account the various factors and circumstances as listed in section 164 of the Tax Administration Act (previously section 88 of the Income Tax Act). Factors to be considered include:

- 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 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 any information requested by the Commissioner in order for him to be able to make a decision.

It is interesting to observe that most of the factors to be considered by SARS appear to examine the cleanliness or otherwise of the hands of the taxpayer and whether the taxpayer can provide good evidence and facts to support his or her request for suspension of any taxes due. If these factors are not taken into account or even considered by SARS, any decision made in this respect could be regarded as unreasonable and may be set aside on application to a court of law.

In *Singh v C:SARS* (65 SATC 203), the judiciary rescued the apparently “innocent” taxpayer and fashioned a remedy to protect him from the pay-now-argue-later provisions of the Value-Added Tax Act by finding, based on natural justice principles and thus an indirect application of the founding values of the Constitution, that he was not in default for the payment of his taxes. Once again, it is clear that where the taxpayer has clean hands and good facts to support his or her application, he or she is able to approach the judiciary for protection.

Where the taxpayer is in default of the payment of his or her taxes, SARS may, instead of attempting to collect the taxes due directly from the taxpayer, appoint an agent on its own behalf to do so. Thus, a discussion on the provisions that permit SARS to appoint an agent to collect taxes on its behalf is considered appropriate, once again bearing in mind the theme of clean hands, good facts and due legal process.

Appointment of agent – right not to be arbitrarily deprived of property and right to just administrative action

In terms of section 99 of the Income Tax Act (now embodied in section 156 of the Tax Administration Act), the Commissioner could, if he deemed it necessary, declare any person to be the agent of any other person. The person declared an agent could be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which might have been held by him or due by him to the person whose agent he had been declared to be. Thus, in terms of section 99 of the Income Tax Act, SARS could, theoretically, without any proof of taxes owing, appoint an agent to collect the alleged taxes on its behalf. The judiciary did not need to be approached for permission to appoint the agent and the section was silent on whether prior notice was required before appointing a person as an agent. In view of the silence of the section in regard to prior notice being required, it is submitted that the decision of the court in *Ferucci and Others v C:SARS and Another (supra)*, although dealing with search and seizure provisions, should be extended to the appointment of an agent - the rules of natural justice must be considered and prior notice should be given to the taxpayer. After all, the appointment of an agent to collect taxes on behalf of SARS, which taxes may not even be owing in the first place and without judicial oversight, *prima facie*, is an infringement of the right of a taxpayer not to be arbitrarily deprived of his or her property.

In *Hindry v Nedcor Bank Ltd and Another (supra)*, the taxpayer had received an erroneously made refund of taxes from SARS but when requested to repay the refund, he failed to respond. SARS then appointed the taxpayer's banker in terms of section 99 of the Income Tax Act, as its agent, without informing the taxpayer, to recover the amount on its behalf. The court was asked by the taxpayer to declare section 99 unconstitutional on the basis that it violated his right not to be arbitrarily deprived his property as provided for in terms of section 25 of the Constitution. At the same time, the actions and conduct of the Commissioner in appointing an agent to collect the outstanding taxes were being questioned constitutionally in terms of the section 33 right to just administrative action.

On the question of whether section 99 violated the right of the taxpayer not to be arbitrarily deprived of his property, the court acknowledged that the provision was extra-judicial and summary in nature, but the provision did not violate the right not to be arbitrarily deprived of property. Thus, this decision is authority for the view that the appointment of an agent to collect taxes on behalf of SARS is constitutional.

With regard to the fact that no prior notification was given to the taxpayer before the bank was appointed as SARS' agent to collect the taxes owing – not following the rules of natural justice – the court held that SARS had frequently corresponded with the taxpayer regarding the erroneous refund and requesting the repayment. The taxpayer chose to ignore such correspondence. Accordingly, the court held that there was no need for a prior hearing as the taxpayer knew from the correspondence that SARS wanted the money repaid. Thus, neither the taxpayer's right to just administrative action nor the right not to be arbitrarily deprived of his property had been violated. This case once again illustrates the theme of this article that approaching the court with dirty hands and bad facts or no just cause will inevitable result in failure for the applicant.

In *Contract Support Services (Pty) Ltd And Others v C:SARS and Others* (61 SATC 338), the court held that not all administrative acts require the application of the *audi alteram partem* rule before they are effective, especially where a prior hearing would defeat the very purpose of the notice or render the proposed act nugatory. The taxpayers had failed to make out a *prima facie* case that the debt was not owed to SARS and, therefore, failed to obtain the interim relief sought. Once again, the taxpayers failed to obtain the interim relief sought because they went to court with no facts to support their claim for interim relief.

In *Mpande Foodliner CC v C:SARS and Others* (63 SATC 46), however, the taxpayer went to court with good facts and the court held generally that the denial of the *audi alteram partem rule* before issuing the agency notices, infringed the section 33 right to just administrative action (the Promotion of Administrative Justice Act was only promulgated subsequent to the decision of the Court and therefore had no bearing on the decision). The agency notice was set aside as the notice was issued based on SARS' impression – of which

there was no evidence – that money was being diverted to the taxpayer from a liquidated company to avoid tax. The denial of the *audi alteram partem* principle prior to the issue of the notice had, in this case, infringed the section 33(1) right to just administrative action. Accordingly, the action taken by the Commissioner had been unlawful and null and void.

It is submitted that the *Mpande* decision was in tune with the provisions of the Constitution. The appointment of an agent infringes upon the right of a taxpayer not to be deprived arbitrarily of one's property as well as the right to just administrative action. Therefore, in spite of the legislation appearing to permit virtually unfettered discretion to the Commissioner to issue agency notices, there are some constitutional safeguards when clean hands and good facts are presented to the judiciary. The *Mpande* decision has shown the way in this regard.

It is considered a pity, therefore, that the court in *Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another* (66 SATC 241), did not follow the *Mpande* decision but instead referred to the decision as a "lone voice". The court held that the taxpayer had not objected and appealed or used any other remedies available before attempting to obtain relief from the agency notice. Perhaps, once again, the taxpayer's facts as presented to the court did not stand up to scrutiny and this was an easy way out for the judge to find against the taxpayer.

All the decisions so far regarding agency notices are provincial division decisions and the Constitutional Court will have, sometime in the future, to determine whether the *Mpande* or the *Smartphone* decision correctly reflects our law in this regard. Nevertheless, it is clear that the right to just administrative action prevents the Commissioner from appointing a person as an agent to collect taxes due or allegedly due from a taxpayer on its behalf without just cause.

Also of vital importance in evaluating the theme of clean hands, good facts and due legal process, is the doctrine of legitimate expectation. As the application of this doctrine is a vital contributor to upholding the principle of natural justice and is also specifically catered for in the Promotion of Administrative Justice Act, a brief discussion on its application is also considered appropriate.

Legitimate expectation doctrine – right to just administrative action

Section 3 of the Promotion of Administrative Justice Act recognises the doctrine of legitimate expectation by providing that: “Any administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.” Thus, the doctrine may be used against state officials who abuse their powers, for example, by reneging on agreements (*Deacon v Controller of Customs and Excise (supra)*) or treating taxpayers differently in similar circumstances (*ITC 1682 (62 SATC 380)*).

The decision in *Plasma View Technologies (Pty) Ltd v C:SARS (72 SATC 44)* gives greater clarity to the doctrine in fiscal matters. The Commissioner for SARS had determined, of his own accord, that certain plasma screens were video monitors and qualified for a full rebate of duty when imported but later made a further contrary and retrospective determination. The Commissioner then demanded retrospective payment of duties under the new heading. The taxpayer suffered financial prejudice as a result of the Commissioner’s *volte-face*. The taxpayer asked for a review and the setting aside of the administrative action in terms of the Promotion of Administrative Justice Act. The court held that the determinations in issue constituted “administrative action” and that the Commissioner was bound by the provisions of section 3 of the Promotion of Administrative Justice Act to take administrative action that was procedurally fair. This had not been done. Accordingly, the taxpayer had made out a proper case for the decision to be reviewed and set aside. The Commissioner was not permitted to demand payment of any retrospective duties as a result of the new determination. In effect, the Commissioner went to court with dirty hands and suffered the consequences.

Sections 3(2) (exercise of powers and performance of duties by the Commissioner) and 76B-S (provisions for the issuing of advance tax rulings) of the Income Tax Act, also acknowledge the legitimate expectation doctrine but any further discussion on this point is considered to be beyond the scope of this article.

Where SARS violates the right to just administrative action as embodied in the Promotion of Administrative Justice Act, the remedies that may be sought by the taxpayer to protect his or her rights are detailed in section 8 of the Act. Thus, a taxpayer must first utilise these remedies. Where, however, any other fundamental right is violated, the taxpayer can request the court to directly apply the Constitution and thereby, in terms of section 172 of the Constitution, obtain the appropriate relief. Thus, the next paragraph will briefly discuss the remedies available in terms of the Promotion of Administrative Justice Act when a decision, action or conduct of SARS is not just, fair or reasonable.

Remedies for taxpayers when decisions, actions and conduct of SARS are found to be unconstitutional

Section 8 of the Promotion of Administrative Justice Act provides for the relief that a court may grant to a taxpayer to remedy any unjust administrative action on the part of SARS. The remedy may also be rooted in the common law, for example a delictual claim for the wrongful seizure of documents or records or even assets or contained in revenue legislation, for example, the objection and appeal processes. The remedies include –

- a declaratory order (*University of South Africa v C:SARS* (63 SATC 197));
- a temporary interdict to prevent SARS from following a certain course of action, for example:
 - preventing SARS from executing a judgement order against the taxpayer (*Mpande Foodliner CC v C:SARS and Others (supra)*) – also a common law remedy;
 - preventing the seizure of goods (*Deacon v Controller of Customs and Excise (supra)*) – also a common law remedy; or
 - halting the continuation of a search and seizure warrant (*Ferucci and Others v C:SARS and Another (supra)*) – also a common law remedy.

It is important to note that only the High Court may pronounce on the unconstitutionality of a piece of legislation but always subject to confirmation by the Constitutional Court. It is also only the prerogative of the High Court to grant an interdict or declaratory order except that such order does not have to be confirmed by the Constitutional Court. The Tax Court is an ‘inferior Court’ – equivalent to a Magistrates’ Court - and thus may not pronounce on constitutional issues or grant interdictory or declaratory relief (*ITC 1687* (62 SATC 474) in spite of the fact that a judge of the High Court also presides over a Tax Court. Perhaps it is time for an upgrade of the Tax Court to provide taxpayers with a quicker, more efficient and cheaper option of settling fiscal disputes that are based on the Constitution.

Conclusion

The objective of this article was to document, analyse and evaluate the role that clean hands, good facts and due legal process play in any constitutional challenge to the actions, decisions and conduct of SARS that are inconsistent with the provisions of the Promotion of Administrative Justice Act and thus with the founding principles of the Constitution, namely fairness, equity and justice. The role of the human element (the judges) in the form of the judiciary in this process was also examined. The scope of the objective was restricted to challenges on the decision-making process and generally the conduct of SARS, which precluded any detailed discussion on challenges related to the unconstitutionality of fiscal legislation. This limitation in scope should not be regarded as a shortcoming as research has shown that the judiciary is reluctant to declare fiscal legislation, even some of the most draconian provisions, such as the search and seizure and even the pay-now-argue-later provisions, unconstitutional. Rather, the research has shown that taxpayers who have approached the judiciary with clean hands and good facts, requesting that they be granted relief from the unreasonable decisions, actions or conduct of SARS, have won major victories. Thus, for example, SARS should not go on so-called “fishing expeditions” and they should certainly not use the warrantless search provision as provided for in terms of the

new Tax Administration Act unless they, prior to embarking on the search, are able to fully meet all the prerequisites of the provision. SARS should never employ the most draconian procedures without first exploring other less invasive procedures. Failure to do so would indicate dirty hands on the part of SARS.

The meaning of the word “reasonableness” was examined and it was concluded that its meaning has an invaluable role to play when evaluating whether a person’s right to just administrative action as embodied in the Promotion of Just Administrative Action has been violated. Clean hands supported by good facts that cry out for justice and equity, *prima facie*, indicate that SARS has been unreasonable in its decision-making process or even in its general conduct. The human element then takes over and the judiciary finds it virtually impossible to deny the taxpayer relief in such circumstances. This is even the case where SARS has strictly followed the letter of the law but has failed to apply the rules of natural justice in cases that warrant its application.

On the other hand, where the taxpayer applies to court for relief with dirty hands and bad facts, the judiciary is not really helpful to such taxpayer and sometimes the bad facts even seem to cloud their judgements. This has led to what teachers of the law refer to as “bad facts make bad law” and could result in difficulties for litigants who subsequently approach the judiciary for relief. However, the resilience of the judiciary is such that it is willing to “respectfully disagree” with a previous court’s ruling or to indicate that the rules of natural justice must be applied to the specific set of circumstances presented by the taxpayer to circumvent so-called “bad law”. Of course, so-called “bad law” can be overturned by a higher court.

Dishonest taxpayers may be able to rely on the due process of law or even a technicality to obtain relief from, for example, an investigation by SARS that calls for an audit, the supply of information or even a search and seizure warrant. However, the relief is normally only temporary in nature and the victory is pyrrhic. SARS will then be able to pursue other avenues of attack that could have devastating financial implications for the taxpayer at a later stage and tie-up the taxpayer in court proceedings for years to come.

The right to just administrative action, in effect, humanises the Constitution. Where a taxpayer fails in his or her endeavours to have legislation declared unconstitutional, the judiciary, it is submitted, can always invoke the right to just administrative action as embodied in the Promotion of Administrative Justice Act where fairness, justice and equity are demanded. This is achieved by the taxpayer applying to the judiciary for remedies such as interdicts and declaratory orders against SARS where legislation is applied unfairly or unreasonably and urgency is demanded to prevent its application. Attacking the unfair or unreasonable actions on the part of SARS by application to a High Court (a declaratory order or interdict), is far easier and more quickly resolved than a direct attack on the constitutionality of legislation, which could take years of litigation to resolve. The Tax Court – which at present has no jurisdiction to hear constitutional issues - in addition to the High Court, should be empowered to decide on the constitutionality of legislation. After all, the Tax Court is presided over by a judge of the High Court. The empowerment of the Tax Court could alleviate the present lengthy time and cost issues involved in attacking the constitutionality of legislation or obtaining interdictory or declaratory relief only through the High Court.

Emphasising the clean hands and good facts of the taxpayer or conversely pointing out the dirty hands of SARS, has been shown in this article to have resulted in victories for the taxpayer where the right to just administrative action is contested. Without good facts to pound, taxpayers should not proceed to court unless they merely want to pound the table – an expensive exercise.

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5.3 SYNTHESIS AND CONCLUDING REMARKS

Taxpayers have, as seen from the discussion in the core article to this chapter, won significant victories in attacking the administrative decisions, actions or conduct of SARS where one or more of their fundamental rights have been violated. The section 33 right to just administrative action as embodied in the Promotion of Just Administrative Action is capable of protecting the taxpayer against unreasonable decisions, actions and conduct of SARS. This has especially been the case where the taxpayer has approached the courts with clean hands and good facts. The judiciary finds this an irresistible combination and the taxpayer is likely to receive the relief that he or she seeks.

On the other hand, there have been no victories for the taxpayer in attacking the constitutionality of fiscal legislation to date except in one case that concerned the arbitrary deprivation of property (*First National Bank of SA Ltd t/a Wesbank v CIR and Another*) (*supra*). The lack of success is not unexpected since section 36 of the Constitution permits legislation that offends one or more of a taxpayer's guaranteed constitutional rights to be limited if it can be proved that the legislation is "reasonable and justifiable in an open and democratic society". Nevertheless, it is submitted that there is one vital area where fiscal legislation can be attacked constitutionally – where the fiscal legislation is discriminatory and therefore violates the right to equality (section 9 of the Constitution).

Prior to 1994 and even for some time thereafter, discriminatory provisions based on gender, age, marriage and religion were scattered throughout the Income Tax Act. Most of these blatantly discriminatory provisions have now been removed. However, it is argued in the next chapter that the substantive meaning of equality within a fiscal environment has not yet been properly addressed, neither by SARS nor by the judiciary and thus potentially, discriminatory provisions that infringe upon a person's human dignity, remain in the Income Tax Act or have even been introduced in that Act subsequent to 1994. In Chapters 6 and 7 of this thesis, therefore, an analysis of the scope and ambit of the right to equality within a fiscal environment is presented. Chapter 6 deals with the theoretical foundation to

the substantive meaning of fiscal “equality” in the form of a peer-reviewed article published in an accredited journal. Chapter 7 takes the analysis further. It looks at the practical application of the right to “equality” within a fiscal environment. The core of this latter chapter is also in the form of an article but it is unpublished.

CHAPTER 6**ARE SOME TAXPAYERS MORE EQUAL THAN OTHERS? - AN APPRAISAL OF
THE AMBIT OF THE CONSTITUTIONAL RIGHT TO EQUALITY IN SOUTH
AFRICAN TAX LAW**

“The constitution does not provide for first and second class citizens.” - Wendell Wilkie
(Cohen 2000: 150)

6.1 INTRODUCTION

In the conclusion to Chapter 5, it was submitted that the section 9 right to equality – which includes the right not to be discriminated against or as Wendell Wilkie (Cohen 2000: 150) phrases it, that there is no such precept as first- and second-class citizens under the American Constitution – may be one of the areas where a taxpayer may be successful in challenging legislation that does not live up to the founding principles of the Constitution, the section 36 limitation of rights clause notwithstanding.

This chapter, therefore, deals with the substantive meaning of fiscal “equality” in the form of a peer-reviewed article published in an accredited journal (Goldswain 2011: 1–25). It provides a theoretical analysis of how to determine the ambit of the fundamental right to equality in South African law. The analysis covers both the possibility of challenging legislation and the actions, decisions and conduct of SARS where the legislation or the actions, decisions and conduct of SARS lead to inequality or discrimination between taxpayers. However, this analysis is all but useless unless it can be applied to a real practical situation. Thus, the next chapter, Chapter, 7 takes the analysis further. It looks at the practical application of the right to equality within a fiscal environment. The core of this latter chapter is also in the form of an article that is unpublished.

Please note that the reference to “The South African Revenue Services” should read “The South African Revenue Service”. Furthermore, as indicated in paragraph 1.1 of this thesis, the 1996 Constitution should be referred to as The Constitution of the Republic of South Africa, 1996.

6.2 THE CONSTITUTIONAL RIGHT TO EQUALITY – THE FIFTH “CORE” ARTICLE

Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law

G.K. Goldswain

ABSTRACT

The general ambit of the South African constitutional right to equality in revenue matters in general and taxation matters in particular is not defined. Thus, taxpayers, their advisors and even the revenue authorities themselves experience difficulty in deciding whether revenue legislation or the practices of the revenue authorities actually violate the constitutional right to equality. The aim of this study was to analyse the ambit of the right from a theoretical point of view using Constitutional Court decisions and other literature relevant to the study. The conclusion reached is that the right must be widely and liberally interpreted. There are still many provisions in the Income Tax Act and the practices of the revenue authorities that, *prima facie*, violate the right to equality, and these provisions and practices still need to be evaluated against the theory discussed in this study.

Key words: Bill of Rights, Constitution, Income Tax Act, human dignity, discrimination, right to equality

Introduction

George Orwell (1945), in Chapter 10 of *Animal Farm*, his satirical work on communism, wrote: “All animals are equal, but some animals are more equal than others”. The Income Tax Act (Act No. 58 of 1962) (hereafter ‘the Act’) is littered

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with sections that treat certain taxpayers or groups of taxpayers “more equally” than others. The question that arises is whether the “more equal” treatment of certain taxpayers or groups of taxpayers violates a person’s or group’s constitutional right to equality, as guaranteed by the Constitution of the Republic of South Africa (Act No. 108 of 1996) (hereafter ‘the Constitution’).

The ambit of the right to equality is generally contained in Section 9 of the Constitution. Section 9(1) states: “Everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(2) provides that “equality includes the full and equal enjoyment of all rights and freedoms”. It also provides for the promotion of and “achievement of equality” by the adoption of “measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination”. In fact, Section 9(4) specifically stipulates one of the measures to be taken, namely “[n]ational legislation must be enacted to prevent or prohibit discrimination”. Any other measures may also be taken to prevent or prohibit unfair discrimination (Section 9(2)).

In addition, Section 8(1) of the Constitution provides that the “Bill of Rights binds the legislature, the executive, the judiciary and all organs of state”, while Section 7(2) states that the “state must respect, protect, promote and fulfil the rights in the Bill of Rights”. Sections 8(1) and 7(2) read together with Sections 9(2) and 9(4) of the Constitution indicate that there is a positive obligation on the state and, by extension, the revenue authorities, to promote and protect a taxpayer’s right to equality. It is therefore not merely a negative mechanism that can be used to protect its subjects against the abuse of power by the government and its organs of state (Devenish 1999: 9). Section 2 of the Constitution reinforces the aforementioned and confirms that “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

Although the general public have a vague notion of the meaning of the phrase “right to equality” as described in Section 9 of the Constitution, their understanding of it is not necessarily the interpretation attributed to it by the judiciary. It is only by analysing the South African judicial interpretation of the right to equality that its ambit, in a revenue context, can be understood.

Unlike other areas of the law, there are few judicially decided cases specific to taxpayers’ rights in terms of the Constitution in general, and there are no reported South African cases dealing with a taxpayer’s right to equality in particular. In addition, not much research has been conducted in this area. Consequently, those provisions that still remain in the Act and that, *prima facie*, violate the right to equality, have neither been analysed in any great detail nor have they been challenged judicially by affected taxpayers to establish their validity in terms of the Constitution. Recently,

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however, Croome (2010) published a textbook on taxpayer's rights in South Africa in which he devotes a full chapter to the right to equality (73–121). It was considered beyond the scope of this study to analyse his work in this regard, as his emphasis is more on the identification and application of the taxpayer's right to equality than on an analysis of the ambit of the right from a theoretical point of view. It will be an interesting exercise for a future study to compare the provisions of the Act that he identifies as potentially violating the right to equality by applying the theoretical analysis set out in this article to the scenarios posed in his book. A study comparing the results obtained in the two approaches could stimulate further academic debate on the matter.

Objective and scope of study

The objective of this study was to attempt, from a purely theoretical point of view, to delineate the ambit of the right to equality of taxpayers in the South African context.

The theoretical analysis developed in this study would not pass muster if it did not have any practical application. Thus, although it is not intended to cover the practical application of the theoretical framework in this study, the theory and practical application are so interwoven that some discussion is inevitable. However, the identification, recognition and understanding of the practical application of the right to equality in its fullest sense would require a further detailed study.

Aspects considered beyond the scope of this study will be mentioned during the course of the discussion, as and where appropriate.

Research method

The research method adopted comprised a literature review and an analysis of the relevant provisions of the Act, the Constitution and the reported decisions of the various courts together with published articles and textbooks that relate directly to the objective.

General principles used to interpret the Bill of Rights in general and the right to equality in particular

The principles to be used to interpret our fundamental rights as contained in the Constitution are a prerequisite for determining the general ambit of our fundamental rights. Thus, this paragraph sets out what the Constitution and the judiciary have to

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say in this regard. Thereafter, an attempt is made to reconcile the principles so arising in order to understand the process to be followed in interpreting fundamental rights.

What the Constitution has to say about the interpretation of the right to equality

The Constitution of the Republic of South Africa (Act No. 200 of 1993) (hereafter the 'Interim Constitution') came into effect on 27 April 1994 and included a Bill of Rights. The Final Constitution superseded it, with minor changes to the Bill of Rights, with effect from 4 February 1997.

In order to determine the ambit of the fundamental right to equality, it is necessary to analyse the provisions of Section 39(1) of the Constitution, as it gives specific instructions on how to interpret the fundamental rights included in the Bill of Rights. It compels the judiciary to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". The section also directs that, where applicable, the interpretation must have regard to public international law applicable to the protection of the right as entrenched in the Bill of Rights and may consider foreign case law. Furthermore, the preamble to the Constitution directs that, in interpreting a fundamental right, recognition is given to "the injustices of our past".

In spite of these specific instructions, the interpretation of a fundamental right included in the Bill of Rights is a task fraught with difficulties for the judiciary.

What the judiciary has to say about the interpretation of the right to equality

In *S v Makwanyane and Another* (1995 (6) BCLR 665 (CC)), the Constitutional Court gave some guidelines on how the Bill of Rights should be interpreted. Although this case dealt with the right to life in the context of the constitutionality of the death penalty, the guidelines set out by the Court for the interpretation of the right to life are the same as for the interpretation of the other fundamental rights guaranteed in terms of the Constitution.

In the *Makwanyane* case, Chaskalson P (676) referred, with approval, to the previously decided Constitutional Court decision of *S v Zuma* (1995 (6) BCLR 665 (CC)) on the approach to be adopted in the interpretation of a fundamental right, namely an approach that is "generous" and "purposive" and gives expression to the underlying values of the Constitution while paying due regard to the language that has been used. It was considered beyond the scope of this study to discuss the "generous"

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and “purposive” approach to the interpretation of legislation. Nevertheless, it is appropriate to point out that the “generous” and “purposive” approach can have far-reaching consequences in determining the ambit of the right to equality in a revenue context, especially if the principle of recognising “the injustices of our past” can be applied in a given situation.

The fact that the right to equality is being interpreted in a revenue context does not mean that it should be interpreted any differently from other legislation. Prior to the adoption of the Interim Constitution, there was a well-documented notion that revenue laws must be interpreted “literally” and “strictly”, that is, differently from other legislation, but this notion has now been dispelled in favour of the purposive approach to interpreting legislation, including revenue legislation (see Goldswain 2008: 107–121).

The part played by public international law and foreign law in the interpretation of South African fundamental rights is also instructive. Although there is an injunction to consider applicable public international law, Currie (Currie & de Waal 2005: 160) states that “in its early jurisprudence the Constitutional Court seldom referred to public international law, with the exception of the jurisprudence of the European Court of Human Rights” and that “references to international law that are made do not appear to be as persuasive to the Constitutional Court as comparative foreign case law”.

In the *Makwanyane* case, Chaskalson P (687) indicated that foreign law is of importance “particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw”. The judge warned that the use of foreign case law will not necessarily offer a safe guide to the interpretation of the Bill of Rights. Although the courts may “have regard to” foreign law, “there is no injunction to do more than this” (687).

Furthermore, the judge was of the opinion that in dealing with foreign law, “we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country” (687). It is of importance that due regard be paid to “our legal system, our history and circumstances, and the structure and language of our own Constitution” (687–688).

He concluded that Section 35(1) of the Interim Constitution (now embodied in Section 39(1) of the Constitution) requires a court, in its interpretation of a fundamental right, to evaluate all the dimensions of the evolution of South African law that may help us in our task of promoting freedom and equality, namely “our common law” as well as “traditional African jurisprudence” (787). The “traditional African jurisprudence” that the judge referred to is the concept of “*ubuntu*”.

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The judiciary also had a chance in the *Makwanyane* case to explain and expand on how the *ubuntu* concept, a concept incorporated in the post-amble to the Interim Constitution, affects the interpretation of the Bill of Rights. The word *ubuntu* was not incorporated into the Final Constitution, but the spirit, purport and objective of the Constitution, as detailed in the preamble, are similar to the concept of *ubuntu*, and thus remain a cornerstone in the interpretation of the Constitution (see Section 39(2) and also *Dikoko v Mokhatla* [2006] JOL 18035 (CC)).

Section 39(2) read with Section 39(3) indicates that in interpreting the Constitution, “customary” law must also be considered and developed, provided that such law is consistent with the Bill of Rights. Langa J describes *ubuntu* as “the values we need to uphold” and as a concept that “recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of” (751) and states that any treatment that is “cruel, inhuman or degrading is bereft of *ubuntu*” (752). Mokgoro J (771) describes *ubuntu* as “humaneness” and integrates it into the Western fundamental rights culture.

Thus, in interpreting the ambit of a fundamental right as described in the Bill of Rights, the judiciary must instil the spirit of humaneness and include such virtues as compassion, forgiveness and human dignity. Furthermore, the judiciary must, where appropriate, carry out the stated objective of the preamble to the Constitution to “recognise the injustices of our past”. These principles of interpretation apply equally and especially to the right to equality, which is one of the cornerstones on which the fundamental constitutional rights are built. In fact, the right to equality is the first substantive right listed in the Bill of Rights. It overlaps in many instances with all the other rights, but especially the right to human dignity, as guaranteed by Section 10 of the Constitution.

Reconciliation between the use of foreign law (and decisions), the concept of *ubuntu*, Western culture fundamental rights (common law) principles and the stated objective of the preamble to the Constitution to recognise the injustices of the past as they relate to the interpretation of the right to equality

As already mentioned, the politics and history of South Africa play an important part in the interpretation of a fundamental right. In the *Makwanyane* case, the historical and political background to the right being contested was examined in order to establish the ambit of the right. As O’Regan J indicated in the *Makwanyane* case, Section 39(1) of the Constitution (formally Section 35(1) of the Interim Constitution)

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provides instruction in interpreting the Constitution “to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition” (775).

It was considered beyond the scope of this study to discuss in detail the origins and even the development of the idea of so-called Western culture fundamental rights prior to the introduction of the Interim Constitution. The values embodied in the Bill of Rights are not merely an import of the Western culture of fundamental rights, but also of the African concept of *ubuntu* and the stated objective in the preamble to the Constitution to “recognise the injustices of our past”. Nevertheless, some discussion on the origins of the fundamental rights can be instructive in determining the ambit of the South African constitutional right to equality in tax matters.

One of the foundations of the so-called Western culture of fundamental human rights and constitutional democracy is the theory of the 17th-century English philosopher John Locke. Locke’s *Two Treatises of Government* (1690) suggested that every person has the inalienable rights to life, liberty and property, which are derived from natural law. By definition, inalienable rights can never be taken away from a person. He indicated, however, that the community could agree to limit but not surrender their inalienable rights to a government for the public good. The one exception to this limitation is the right to judge and punish his fellow man, which is in the domain of the government. His work inspired the authors of the US Constitution (*Encyclopaedia Britannica* 2010).

The human liberty principles enunciated in the French *Déclaration des Droits de l’Homme et du Citoyen* (translated as ‘Declaration of the Rights of Man and of the Citizen’ and adopted by France’s National Assembly in 1789) inspired the French Revolution and served as the preamble to the French Constitution in 1791. The Declaration was based on the principle that “all men are born free and equal in rights”, and the rights were specified as liberty, private property, the inviolability of the person and resistance to oppression. The best of the theories and thoughts of philosophers such as John Locke, Montesquieu, Jean-Jacques Rousseau and Voltaire were incorporated into the Declaration. They specified the principles that are fundamental to man and therefore universally applicable (*Encyclopaedia Britannica* 2010).

The concept of *ubuntu* accords generally with the Western fundamental rights culture (common law). However, the incorporation of the principle of recognising “the injustices of the past” as a stated objective in the preamble to the Constitution to determine the ambit of fundamental rights is a potential problem area particularly where it relates to a tax provision.

Although, as already mentioned, there are no reported South African judicial decisions specifically on the right of a taxpayer to equality, there have been South

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African landmark decisions on the right to equality in other areas of law similar or comparable to revenue laws, such as the law of insolvency and the ability of local government (municipalities) to impose rates and taxes on landowners, that will assist in this process. Although the interpretation section in the Constitution stipulates that the judiciary “may” use foreign cases that have comparable constitutions to that in South Africa, it is submitted that the courts would be reluctant to rely exclusively on such judgements, as transplants from foreign precedent require careful management. This view was supported by the Constitutional Court in *Sanderson v Attorney-General, Eastern Cape* (1998 (2) SA 38 (CC)). Firstly, South Africa has a very liberal constitution compared to other countries. Secondly, the interpretation must take into account the spirit and purport of the Constitution, including the concept of *ubuntu* and the novel objective of “recognising the injustices of the past”. Finally, with numerous decisions already having been given by the Constitutional Court on the interpretation of the right to equality (some of which are discussed later), there is no necessity to turn to foreign decisions for further help in its interpretation. Based on the South African *stare decisis* principle of following precedent, there now appears to be a trend away from using foreign decisions, especially in the case of the right to equality. This trend accords with Chaskalson P’s view in the *Makwanyane* case, namely that the use of foreign law is of importance “particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw” (687). This decision was handed down some 15 years ago when the transition period was still in its infancy. It is submitted that the South African Constitution and its interpretation is no longer in its infancy. It has matured over the past 15 years to such an extent that it is time to break free of these shackles in the appropriate circumstances.

The interpretation of the constitutional right to equality: Analysis of its ambit

The concept of *ubuntu*, the principles of common law fundamental rights, the stated objective of the preamble to the Constitution to “recognise the injustices of the past” and the use of foreign law and decisions are now applied to interpret the general ambit of the right to equality.

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Placing the right to equality in its constitutional context

General

Section 9(1) of the Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(3) continues as follows:

The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

If any legislative provision discriminates on one or more of the 17 grounds listed in Section 9(3) of the Constitution, then it “is unfair unless it is established that the discrimination is fair” (Section 9(5) of the Constitution). However, some of the more important questions that arise from a reading of the Section 9 right to equality provisions are the following:

- Whether discriminatory and/or unfair legislation that does not violate one or more of the 17 grounds listed in Section 9(3) of the Constitution can also violate the right to equality
- Whether the right to equality is limited to natural persons only or whether it extends to juristic persons
- Whether specific discriminatory legislation based on one or more of the 17 grounds listed in Section 9(3) of the Constitution (for example taxing a previously disadvantaged group of persons, based on race or gender, at a lower rate of tax than a previously advantaged group of persons) may be promulgated into law in the Act as a positive measure demanded by sections 9(2) and (4) of the Constitution to right the wrongs and injustices of the past (as a remedial or restitutionary function)
- Whether the state in general and the revenue authorities in particular have taken positive measures to achieve equality in tax matters
- Whether the Section 36 limitation of rights clause of the Constitution can restrict the right to equality
- Whether it can be expected that the interpretation of the right to equality, in the light of the demands of the Constitution, can change over time.

A brief discussion of these questions should provide a solid foundation on which a fuller discussion and analysis of the ambit of the right to equality in revenue matters can be based.

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Whether discriminatory and/or unfair legislation that does not violate one or more of the 17 grounds listed in Section 9(3) of the Constitution can also contravene the right to equality

This debate is neatly set out by Devenish (1999: 49–52), who is of the opinion that the right to equality should be extrapolated to cover discrimination that is neither listed nor analogous “if a human attribute is involved that requires protection in accordance with the spirit and ethos of the constitution”. He nevertheless comments that the “human attribute” criterion is not a satisfactory test, as it would then exclude the protection of juristic persons. He concludes that “in each case the court would have to consider the intrinsic merit of the claim, rather than endeavouring to bring the claim within the ambit of a particular criterion” (Devenish 1999: 51). He also comments that the conceptions of society as to what constitutes legitimate discrimination change and develop over time. What may constitute legitimate discrimination today may not constitute discrimination in 20 years’ time and *vice versa*. Perhaps the Latin phrase “*tempora mutantur et nos mutamur in illis*” (“times change and we change with them”) is an apposite conclusion in this regard.

Section 10 of the Constitution specifically provides that “everyone has inherent dignity and the right to have their dignity respected and protected”. The Section 9 right to equality also covers the dignity characteristic. The Constitutional Court in *Harksen v Lane, NO and Others* (1997 (11) BCLR 1489 (CC)) repeatedly mentioned that where a person’s dignity is violated, his or her right to equality is also violated. The decision confirmed that discrimination based on a ground other than one of the 17 listed grounds falls within the ambit of the right to equality.

The central, but not the exclusive, role of dignity in the right to equality was reaffirmed in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (2000 (1) BCLR 39 (CC)) when it was said that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. See also *President of the Republic of South Africa and Another v Hugo* (1997 (6) BCLR 708 (CC)) and *Harksen v Lane* (*supra*) where the same sentiments were expressed.

Albertyn (2007: par 4.8.22(h)) argues for a very wide meaning to be given to the concept of human dignity. Her opinion is that vulnerability emerging from social or material disadvantage, such as distinctions made on the basis of working status, poverty or geographic location, fall within the ambit of impaired dignity. She further argues (par 4.8.22(h)) that the judiciary has begun to address the relationship between dignity and a classification that “causes or perpetuates social and/or economic systematic disadvantage” results in a “comparable effect” to the impairment of dignity. Support for her view is found in the minority judgement by O’Regan J in the

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Harksen decision. Albetyn concludes (par 4.8.22(h)) that “distinctions made on the basis of working status or poverty/socio-economic status or geographic location could be shown to be prohibited grounds”. It is submitted that her views are in accordance with the concept of *ubuntu* and the stated objective of the Constitution of “recognising the injustices of the past”.

Thus it may be concluded that the ambit of the Section 9 right to equality encompasses discrimination based on grounds wider than the 17 grounds listed as discriminatory in Section 9(3).

Whether the right to equality is limited to natural persons only or extends to juristic persons

The wording of the right to equality clause in the Constitution appears to limit the right to natural persons. However, Section 8(2) of the Constitution gives clear guidance that a provision of the Bill of Rights binds a natural or a juristic person to the extent that it is applicable, taking into account the nature of the right and any duty imposed by that right.

Nevertheless, the 17 grounds of discrimination listed in Section 9(3) of the Constitution all contain a “human attribute” and thus do not extend to juristic persons. Thus, the juristic person must rely on other grounds of discrimination to institute a claim of discrimination in terms of Section 9 of the Constitution.

Whether discriminatory legislation based on one of the 17 grounds listed in Section 9(3) can be introduced in the Income Tax Act as a positive measure demanded by sections 9(2) and (9)(4) of the Constitution to right the wrongs and injustices of the past (as a remedial or restitutionary function)

The wording of Section 9(2) calling for “legislative and other measures” to be taken “to promote and advance” categories of persons disadvantaged by unfair discrimination, read together with Section 9(4) of the Constitution mandating that “national legislation must be enacted to prevent or prohibit unfair discrimination”, lends itself to the interpretation that remedial and restitutionary legislative measures can and should be taken to address the wrongful discriminations of the past. In *Minister of Finance and Another v Van Heerden* (2004 (11) BCLR 1125 (CC)), the Constitutional Court held that the Constitution recognised that decades of systematic racial discrimination could not be eliminated without positive action being taken to achieve equality. Such positive action taken by the legislature does not necessarily constitute unfair discrimination.

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The facts in the case of *City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)) provide a good example of positive measures taken by a local city council to redress the wrongs of the past. Although it did not deal specifically with a taxation measure, it nevertheless covered a revenue issue. It involved the imposition of levies on residents for municipal services provided and the collection of such levies. Two constitutional issues relating to the right to equality were involved, but only the aspect dealing with positive measures in the form of legislation introduced to right the wrongs of the past is discussed in this paragraph. The other issue, relating to the “conduct” of the municipal officials in the manner in which the levies were collected or not collected, as the case may be, is discussed briefly in the paragraph on whether the Section 36 limitation of rights clause of the Constitution can restrict the right to equality.

A resident of a former so-called white suburb (in the “apartheid era”) of Pretoria took the Pretoria City Council to court on the basis that he and his fellow residents were being charged more for municipal services than the residents of the former black townships of Pretoria. He contended that the different basis of charging the municipal services levy amounted to discrimination on a racial basis. The Constitutional Court, although ruling that there was indirect discrimination on the basis of race, held in favour of the Pretoria City Council. The white complainant had not been adversely impacted in any material way. He was not from a disadvantaged group and in fact had benefited economically from apartheid, while the black people of the townships suffered economic disadvantage and were still being deprived, to some extent, of the provision of basic municipal services. The positive cross-subsidisation measure introduced did not violate the right to equality. The Cape Provincial Division reached a similar decision on similar facts in *Rates Action Group v City of Cape Town* (67 SATC 73, 2004 (12) BCLR 1328 (C)).

The Constitutional Court in both *Van Heerden’s* and *Walker’s* cases confirmed the acceptability of introducing positive legislation or other measures to right the wrongs and injustices of the past. The question, however, is whether the introduction of similar discriminatory legislation in the Act is appropriate. Such a question has political overtones and was considered beyond the scope of this study. Nevertheless, it is interesting to note that the state, together with the revenue authorities, have so far not introduced such far-reaching legislation in the Act since the adoption of the Constitution. Perhaps the principle of progressive rates of taxation for individuals (which have been there since before the adoption of the Constitution) can fall within this category of legislation.

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Whether the Section 36 limitation of rights clause of the Constitution can restrict the right to equality

The right to equality is already limited in terms of Section 9(3) of the Constitution. The section provides that “discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”. Where discrimination is found by the judiciary to be fair, that is then the end of the enquiry (*Harksen v Lane (supra)*). Such legislation is regarded as constitutional. If, however, the discrimination on one of the 17 grounds is found to be unfair and thus *prima facie* unconstitutional, then it may still be open for the state and the revenue authorities to argue that the Section 36 limitation of rights clause as contained in the Constitution applies. However, Currie and De Waal (2005: 165) are of the opinion that Section 9(3) contains an internal demarcation that “repeats the phrasing of section 36 or that makes use of similar criteria” and accordingly that the enquiry stops there. If the legislation is found to be unfair based on one of the 17 listed grounds of discrimination, then it should not be able to be found reasonable and justifiable for the purposes of the Section 36 limitation of rights clause (see further discussion on this point in the paragraph on the comments and conclusions on the *Harksen* decision).

Section 36(1) of the Constitution provides that any right in the Bill of Rights may be:

... limited 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.

If the wording of this clause is closely examined, it is clear that the limitation is only applicable to fundamental rights contained in the Bill of Rights (Sections 7 to 36 of the Constitution) and to a “law of general application”. Therefore, it applies neither to any constitutional provision not contained in the Bill of Rights nor to any unreasonable, irrational or unjustifiable “conduct” on the part of the revenue authorities (*Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-aided Schools, Eastern Transvaal* (1999 (2) SA 91 (CC)). Thus, the Section 36 limitation clause can restrict or limit the right to equality, even if a legislative provision discriminates unfairly, provided that the provision is “reasonable and justifiable in an open and democratic society”.

It was considered beyond the scope of this study to discuss, in detail, the constitutionality or otherwise of the “conduct” of the revenue authorities in this context, as this is more of an application of this analysis than a theoretical problem. Nevertheless, it is instructive to discuss briefly the second constitutional issue raised in the *Walker* decision, namely the Pretoria City Council’s selective enforcement policy involving a moratorium on the recovery of debts owed by defaulting residents

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of the formerly black townships while taking strong action to recover debts owed by defaulting residents of the formerly so-called white areas of Pretoria. The Court held that such conduct amounted to unfair discrimination, and stated as follows (262):

No members of a racial group should be made to feel that he or she was not deserving of equal concern, respect and consideration and that the law was likely to be used against him or her more harshly than others who belonged to other race groups.

It was a bittersweet victory for the taxpayer on this second point. Although the conduct of the Council officials was found to constitute unfair discrimination, the Court concluded that Walker had sought the wrong relief. The breach of the taxpayer's right to equality could not be a defence to the Council's claim for arrear levies withheld by him. He should rather have applied for a *mandamus* (declaration of rights). In this way, he could have ensured that the Council first put its house in order and eliminated the unfair discrimination by collecting arrear levies from the disadvantaged communities as well.

The lesson to be learned from *Walker's* case is that even if a person's right has been violated by unfair or discriminatory "conduct" of an official, the correct relief must also be sought so that the unfairness or discrimination is eliminated. The correct relief to be sought by a taxpayer when his or her constitutional right is violated is an aspect that requires further detailed study.

Whether the state in general and the revenue authorities in particular have taken positive measures to achieve equality in tax matters

Prior to 1994, the Act contained several discriminatory provisions with a gender, racial or religious bias. With the enactment of the Interim Constitution, several changes were made to the Act to conform to the Bill of Rights in general and the right to equality in particular. For example, the Act had provided for a wife's income to be included with that of her husband's for the purposes of calculating her tax liability. This discriminatory method of calculating a wife's tax liability resulted in a higher tax burden for the married woman than the single woman who was earning the same income. The Act was amended to provide for each spouse to be taxed at the same rate of tax as any other individual in order to preclude a challenge under the right to equality provision of the Bill of Rights.

Similarly, the retirement age for both men and women for certain provisions of the Act, for example Sections 10(1)(x) and 7A(4A), were synchronised at the age of 55 instead of 50 for women and 55 for men, as was previously the case. Both these sections have now been deleted with effect from 1 March 2011. In addition, a donation to the Bible Society of South Africa, a Christian organisation, which had

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previously been allowed as a special deduction against taxable income in terms of Section 18A(2)(c) of the Act, was deleted with effect from 1996 so that it could not be contended that other religious bodies of a non-Christian nature were being unfairly discriminated against. Furthermore, the definition of “married” in Section 1 of the Act was deleted and replaced with the definition of “spouse” to encompass same-sex or heterosexual unions. Croome (2010: 74–76) gives several more examples of other discriminatory provisions in the Act that have been amended or removed to prevent discrimination.

The conclusion is that the right to equality provision has resulted in positive amendments to the Act, at least in the areas of gender, marital status, sexual orientation and religion. There are still a few provisions in the Act that discriminate on the basis of age, for example Section 10(1)(i)(xv)(bb) (interest exemption) and Section 18 (medical deductions), but these provisions are probably constitutional as there is specific national legislation that has been introduced to protect the elderly, namely the Older Persons Act (Act No. 13 of 2006). Its objective is to empower older persons to continue to live meaningfully and constructively in a society that recognises them as important sources of knowledge, wisdom and expertise.

Whether it can be expected that the interpretation of the right to equality, in the light of the demands of the Constitution, can change over time

A section in the Act may appear to be neutral, yet a narrow interpretation by the judiciary may lead to unequal treatment or “more equal” treatment of a taxpayer or group of taxpayers. Albertyn (2007: par 4.8.22(h)) gives a stimulating example in this regard. She discusses the principle that could permit the deduction for tax purposes (in terms of Section 11(a) of the Act) of entertainment or health club membership as a business expense incurred in the production of income. She contrasts these possible deductions to the denial of a similar deduction to working women for child care costs while at work and earning income.

She is of the opinion (par 4.8.22(h)) that should a claim for the violation of the right to equality be made in such circumstances on the basis of gender, the judiciary “would have to examine the social and economic position of women in society and the social and economic costs of child care that women bear”. Her argument continues along the line that a women’s responsibility for child care has been a source of social and economic disadvantage and has created barriers to equal participation in the workplace and that the “gendered public/private division has also meant that the ‘private’ expenses of childcare have been ignored in defining certain deductions in tax laws” (par 4.8.22(h)). She concludes (par 4.8.22(h)) that “a clear understanding of

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the systemic roots of gender bias in the law is required to adjudicate this claim fairly”. This is a good example of how the judiciary can carry out its mandate to recognise the injustices of the past.

***Harksen v Lane*: The principles and tests used to determine whether legislation violates the constitutional right to equality**

The facts

In order to obtain a better understanding of the principles and tests arising from the *Harksen* decision in determining whether legislation violates the right to equality and to extend the principles so arising to tax legislation, a brief discussion of the facts of the case was considered helpful. Mrs Harksen’s property was attached by the Master of the Supreme Court in terms of Section 21(1) of the Insolvency Act (Act No. 24 of 1936), which provides for the estate of the solvent spouse to vest in the Master when the other spouse’s estate is sequestrated. She was the solvent spouse, married out of community of property to the insolvent, whose estate had been sequestrated. Such attached property could be released under certain circumstances, for example if she could prove that she had inherited the property from her parents and was thereby excluded from the joint estate. However, the Master in this case refused to release any property owned by the solvent spouse.

Mrs Harksen contended that her right to equality was violated under the Interim Constitution on the basis that there was discrimination between the solvent spouse of an insolvent (based on “marital status”) and other persons who might have had an even closer business relationship with the insolvent. It should be recorded that discrimination on the basis of “marital status” was not, in terms of the Interim Constitution, one of the listed grounds of discrimination. It was only when the Final Constitution was adopted that “marital status” was included as one of the 17 grounds listed as discriminatory. However, as already indicated in the paragraph on whether discriminatory and/or unfair legislation that does not violate one or more of the 17 grounds listed in Section 9(3) of the Constitution can also contravene the right to equality, not being a listed ground does not, and did not, prevent the *prima facie* claim of discrimination and thereby the protection of the Section 9 right to equality.

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The Constitutional Court's three-step approach to determine whether legislation violates the right to equality

In the *Harksen* case, Goldstone J, presenting the majority decision, set out a three-step approach to determine whether legislation violates a person's right to equality. The three-step approach can be described as follows (1511–1512):

- Does the provision differentiate between people or categories of people? If it does and it is not rationally connected to a legitimate governmental purpose, then there is a violation of the right to equality. Nevertheless, even if the differentiation is considered rational, it might still amount to discrimination.
- Does the differentiation amount to unfair discrimination? This is tested by a two-stage analysis:
 - If the discrimination is based on a specified ground, then discrimination will have been established. If it is not on a specified ground, then the discrimination is tested objectively, taking into account attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - If the differentiation amounts to “discrimination”, it must be tested to establish whether such discrimination amounts to “unfair discrimination”. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
- If, at the end of this stage of the enquiry, the differentiation is found to be fair, then there will be no violation of the right to equality and that would be the end of the enquiry. If the discrimination is found to be unfair, then a determination has to be made as to whether the provision can be “justified” under the limitation of rights clause (now Section 36 of the Constitution).

The differences in the application of the three-step approach to the facts between the majority and the minority decisions

Goldstone J (in the *Harksen* case), writing the majority judgement, found that there was patent differentiation between solvent spouses and other closely connected persons, but that such differentiation was “rational” and not “arbitrary”. It was connected to the legitimate governmental purpose of protecting the public interest by protecting the rights of creditors of insolvent estates. In any event, in his view, other legal remedies were available to Mrs Harksen to obtain relief from the automatic

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vesting of the property in the Master. Nevertheless, the Court still had to determine the fairness or otherwise of the discrimination.

The judge then looked at the factors that had to be taken into account in determining whether there was unfair discrimination, namely the position of the complainant in society (the solvent spouse was neither a person or group that suffered discrimination in the past, nor was she or the group vulnerable), the nature of the provision (duty of parliament to protect the public interest by protecting the rights of creditors of insolvent estates) and the effect of the discrimination on the solvent spouse (the Master will be presumed to act reasonably and honestly and release attached property when appropriate).

The conclusion reached by Goldstone J was that Section 21 of the Insolvency Act does not constitute “unfair discrimination” but rather a “kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary” (1515). Thus, Section 21(1) of the Insolvency Act was found not to violate Mrs Harksen’s right to equality.

O’Regan J, writing one of the minority judgements in the *Harksen* case (Sachs J wrote a similar minority judgement) supported by two other judges of the Constitutional Court, agreed with the finding of the majority of the Court that the discrimination was rational. However, in testing whether the discrimination was fair or not, she gave powerful reasons for coming to a different conclusion from the majority decision. She compared the automatic vesting of the property of a solvent spouse in the hands of the Master to the non-vesting in relation to other family members and close business associates. She concluded in this respect that the automatic vesting of the solvent spouse’s property in the hands of the Master merely because she was married to the insolvent spouse was contrary to the Constitution’s commitment to human dignity. The impairment was “substantial and sufficient to constitute unfair discrimination” (1527). The option of using other remedies to have her property released only mitigated the discriminatory effect of the legislation.

Having found “unfair discrimination”, O’Regan J, following the final step of the three-step approach as set out in Goldstone J’s majority decision, had to consider whether the infringement occasioned by Section 21 of the Insolvency Act was “reasonable and justifiable” in terms of the limitation of rights clause of the Interim Constitution. It is submitted that this part of the minority judgement is considered important for the purposes of determining the test for “justification” as required by the present Section 36 limitation of rights clause in the Constitution. This interpretation, agreed to by three other concurring judges of the Constitutional Court, is, after all, also a decision of the Constitutional Court and has a powerful persuasive influence

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on the interpretation of the meaning of “justifiable”. It is submitted that it is unlikely that a court would take a contrary position to this interpretation in the future.

O’Regan J used the test of “proportionality between the invasion caused by the infringing provision and the importance, purpose and effects of that provision” to determine whether such provision was “reasonable and justifiable” as required by the limitation of rights clause. She argued that Section 21 of the Insolvency Act catches within its net all spouses of insolvents, even those spouses innocent of collusion, but does not attempt to catch a range of people who may be in a similarly questionable relationship with the insolvent. She concluded (1528) that the section is “over broad given its purpose in relation to spouses and their property and too narrowly drawn in relation to other people”.

She also mentioned that no evidence was placed before the Court to show that the section achieved its aim of frustrating collusion between partners. She pointed out that the United Kingdom, Canada, Australia, New Zealand and Germany all do not have a similar provision to Section 21 of the Insolvency Act. Therefore, she was of the opinion that a variety of other mechanisms could be used to achieve similar objectives to those that motivate Section 21 of the Insolvency Act. Automatically vesting a solvent spouse’s estate in the hands of the Master is “not an essential component of insolvency law” (1530). She concluded (1530) that “the balance between the interests of the spouse of the insolvent and the interests of the creditors of the insolvent estate seems to favour the interests of creditors disproportionately” and that no proper balance has been achieved.

Comments and conclusions on the Harksen decision

Five judges, constituting the majority of the Court, found that Section 21 of the Insolvency Act, although discriminatory, was rational as well as fair. Four judges supported the minority decision given by O’Regan J, who found that Section 21 of the Insolvency Act, although rational, was patently discriminatory, was “unfair” and could not be “justified” as required by the limitation of rights clause in the Interim Constitution.

The judgement (including both majority and minority opinions) makes it clear that there is a difference between the “rationality” enquiry under Section 9(1), the “unfair” examination in terms of Section 9(3) and the “justification” test under Section 36 of the Constitution. Even if there is a “rational” reason for the discrimination, that is not the end of the enquiry. The discrimination provision must not be “unfair” (Section 9(3) of the Constitution). If the legislative provision is found to be “unfair”, it can only be saved by its being found “reasonable and justifiable” in terms of the

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Section 36 limitation of rights clause. The arguments based on administrative capacity, alternative methods less invasive to achieve the same results and whether other countries have similar discriminatory provisions enter the argument at the justification stage.

It is submitted that where legislation is found to be irrational or arbitrary under the Section 9(1) enquiry (*Harksen's* first step), it probably cannot be saved under the reasonable and justifiable clause of Section 36 of the Constitution. Support for this view is given in *First National Bank of SA Ltd t/a Wesbank v CIR and Another* (64 SATC 471, 2002 (7) BCLR 702 (CC)) when the Constitutional Court had a further opportunity to examine the Section 36 limitation of rights provision of the Constitution. In coming to its decision, the Court examined the meaning and scope of the word "arbitrary" as used in Section 25(1) of the Constitution relating to property rights. It held that the word "arbitrary" as used in that section was a far narrower concept than the words "reasonable and justifiable" as used in Section 36 of the Constitution. Accordingly, the Court was of the opinion that it was an unavoidable conclusion that an "arbitrary" deprivation of property was also not reasonable and justifiable in an open and democratic society. *Albertyn* (2007: par 4.8.22(h)) is also of the opinion that "it is difficult to conceive of a situation where arbitrary or irrational action by the state will be justified by section 36 and the courts have yet to find one".

It is further submitted that this principle can be extended to all provisions of the Income Tax Act – if the provisions permit arbitrary action against a taxpayer, then such provisions can never meet the requirements of reasonableness and justifiability as required by Section 36 of the Constitution and will thus be invalid to that extent. However, if the discrimination is found to be rational and fair, that is the end of the enquiry. The provision would not violate the right to equality.

Goldstone J, in setting out the three-step approach in *Harksen*, mentioned a "legitimate governmental purpose" as justification for a limitation of a person's right to equality or any other fundamental right. It was considered beyond the scope of this study to discuss this aspect, as it can only be examined in detail when dealing with an application of the theory to a set of facts. The meaning and scope of this phrase require a further detailed study.

The onus of proving the unconstitutionality of legislation on the basis that a person's right to equality has been violated

The burden of proof is a shifting burden. In the first instance, the burden of proof rests on the taxpayer to make out a *prima facie* case of discrimination, that is, that his or her right to equality has been violated or infringed in some way. If discrimination

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did take place based on one of the 17 grounds listed in the Constitution, there is a *prima facie* case for discrimination. It is regarded as unfair unless the revenue authorities prove that it is fair. If there is discrimination on an unlisted ground, then the taxpayer must prove that the discrimination is unfair.

If the provision is found to be unfair, the burden of proof is on the revenue authorities to establish that any restriction on a taxpayer's right is "reasonable and justifiable in an open and democratic society", as provided for in terms of Section 36 of the Constitution.

Constitutional remedies to the violation of a fundamental right

It was considered beyond the scope of this study to discuss the constitutional or other remedies available to a taxpayer when any of his or her fundamental rights in general and the right to equality in particular have been violated. Depending on the type of violation that has occurred, the appropriate remedy (constitutional or otherwise as per the *Walker* case) must be pursued. As already mentioned, the practical application of the theoretical analysis in this study requires a further detailed study.

Identification of a few provisions of the Act that appear, *prima facie*, to be discriminatory and that need to be tested in a future study using the theoretical analysis as discussed

The following are examples of provisions of the Act that, *prima facie*, may violate the right to equality. This list should not be considered an exhaustive list, as there are many other provisions that also, *prima facie*, may violate the right to equality:

- The denial of deductions to employees who earn their remuneration other than mainly in the form of commission – Section 23(m) of the Act
- The different tax treatment of restraint of trade receipts and deductions for an individual as opposed to a company – para (cA) of the definition of "gross income" in Section 1 and Section 11(cA) of the Act
- The taxation of farmers as opposed to any other businessman – farmers being taxed under the favourable special provisions of the First Schedule of the Act
- The taxation of Small Business Corporations as opposed to the taxation of other companies – the application of Section 12E of the Act.

Croome (2010: 84) also lists provisions of the Act and other aspects of a revenue nature that may be considered, *prima facie*, discriminatory. However, some of these provisions need to be tested in a future study using the theoretical analysis

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as discussed to determine the extent of their constitutionality. As a preliminary observation, several of the examples given in this article and by Croome may be saved by the Section 36 limitation of rights clause.

Conclusion

The ambit of the fundamental right of the taxpayer to equality in tax matters as provided for in Section 9 of the Constitution has, as yet, still to be determined by the judiciary. There is no case law, as such, pertaining directly to revenue issues relating to the right to equality. However, there have been several landmark Constitutional Court decisions in other branches of the law on the interpretation of the right to equality in general that indicate the ambit of the right. For example, in *S v Makwanyane (supra)*, the concept of Western culture fundamental rights, the African philosophy of *ubuntu*, the objective of the preamble to the Constitution to “recognise the injustices of the past” and the part played by foreign decisions in determining the ambit of the right to equality were discussed and integrated for the purpose of interpreting our fundamental rights. Other Constitutional Court decisions, especially those from similar branches of the law, such as insolvency (*Harksen v Lane (supra)*) and the ability of local government to impose rates and taxes on landowners (*City Council of Pretoria v Walker (supra)*), have been analysed from a theoretical point of view in order to give further indication of the ambit of the right to equality in revenue matters.

The following conclusions were reached:

- Everyone is equal before the law and any provision (even dealing with revenue issues) that violates this right is, *prima facie*, unconstitutional (Section 9 of the Constitution).
- Unequal treatment by the state or any other person does not only refer to discriminatory legislation but extends to discriminatory practices or conduct of a state official. Furthermore, the Section 36 limitation of rights clause can never save an action or conduct by a state official that is discriminatory if it is unfair (*City Council of Pretoria v Walker (supra)*).
- The violation of the right to equality is not limited to one or more of the 17 grounds of discrimination listed in Section 9(3) of the Constitution. This is especially the case where human dignity is involved (*Harksen v Lane (supra)*).
- The right to equality extends to juristic persons in the appropriate circumstances.
- It appears permissible that the state may introduce legislation in terms of Section 9(2) of the Constitution as a positive measure to right the wrongs and injustices of the past (*City Council of Pretoria v Walker (supra)*). The Income Tax Act is not

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excluded from this positive measure. However, to date, no such legislation has been introduced in the Act.

- The Section 36 limitation of rights provision in the Constitution can restrict the right to equality if the legislation is found to be “reasonable and justifiable in an open and democratic society”. The minority judgement of O’Regan J in *Harksen v Lane (supra)* is considered a precedent for determining how to apply the Section 36 limitation of rights clause in the Constitution relating to equality challenges for legislative provisions. Unreasonable or unfair “conduct” on the part of the revenue authorities when carrying out the provisions of the Act that violates a fundamental right is not covered by the Section 36 limitation of rights provision (*Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-aided Schools, Eastern Transvaal (supra)* and *City Council of Pretoria v Walker (supra)*). Furthermore, “arbitrary” legislation has been found not to be “reasonable or justifiable” and thus cannot be saved by the Section 36 limitation of rights provision (*First National Bank of SA Ltd t/a Wesbank v CIR and Another (supra)*).
- Unequal taxation on the basis of gender, marital status, sexual orientation and religion has been removed from the Act. A few sections relating to age remain. However, there are good reasons for some of these discriminatory sections to remain (Older Persons Act, Act No. 13 of 2006).
- The South African concept of “equality” may evolve over time, and what is now considered fair discrimination may be regarded as unfair discrimination in the future.
- Foreign decisions from countries with similar constitutions to that of South Africa have played a huge part in interpreting fundamental rights in South Africa while the Constitution was in its infancy. However, the South African Constitution and its interpretation are no longer in their infancy. It was submitted that the South African judiciary is increasingly refraining from using foreign decisions to interpret the right to equality. The South African Constitution is more liberal than most foreign constitutions, and it is difficult to match the spirit of *ubuntu* and the object of recognising the injustices of the past to foreign constitutions. However, foreign decisions still remain a starting point if there is no South African decision on the point.

The core of the right to equality for a natural person is human dignity (*Harksen v Lane (supra)*), and a wide meaning should be attributed to human dignity. Alberynt’s (2007: par 4.8.22(h)) view that distinctions made on the basis of working status, poverty or geographic location impair a person’s dignity is endorsed. It accords with the stated objective of the Constitution to recognise the injustices of the past.

The mere theoretical analysis of the ambit of the right to equality from a taxpayer's point of view would be an exercise in futility unless the analysis could be translated to a real-life application. Unfortunately, the scope of this study has precluded such an exercise. However, a few examples of provisions of the Act have been identified as, *prima facie*, violating the right to equality. Croome (2010: 84) has also identified several tax scenarios that potentially violate the taxpayer's right to equality. Some of the examples listed in this article and by Croome could be used as a starting point for a proposed future study. The differences in approach between the analysis of Croome and the analysis as described in this study may, or may not, lead to different results. Further academic debate could be stimulated by such a study.

Another area identified as requiring further study is the scope of the term "legitimate governmental purpose". For example, can the violation of a person's right to equality be justified because the revenue authorities have a staff shortage or because the revenue authorities wish to cut costs? Is this a legitimate governmental purpose that can be used by the revenue authorities to discharge the onus that such actions are reasonable and justifiable in an open and democratic society to limit a person's right to equality?

Finally, the remedies available, constitutional or otherwise, to a taxpayer whose right to equality has been violated either by discriminatory legislation or by the arbitrary, irrational or unfair "conduct" of the revenue authorities need to be examined. The Constitutional Court in *City Council of Pretoria v Walker (supra)* indicated that a constitutional remedy is not the correct route to follow in the first instance.

The right to equality is, theoretically, a very valuable right to a taxpayer. In the South African context, it must be interpreted widely and liberally. It is up to the affected taxpayer to pursue his or her right to equality by seeking the correct remedy through the judicial system.

Perhaps George Orwell's satirical comment is not only applicable to communism but also to a constitutional democracy and can be adapted to read "all people are equal but some still appear to be more equal than others". In a tax context, this is a real possibility.

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6.3 SYNTHESIS AND CONCLUDING REMARKS

This chapter has analysed, from a theoretical point of view, the ambit of the right to equality. It has concentrated, to a large extent, on the meaning of the right to equality from a substantive law point of view and the arguments that can be used to have a piece of discriminatory or unfair legislation declared unconstitutional. It was concluded that the right to equality should be widely and liberally interpreted to give substance to the right. Nevertheless, any unfair or discriminatory decisions, actions or conduct of SARS in obtaining information from a taxpayer, assessing such person to taxes and collecting taxes due, may fall foul of the section 9 right to equality as well as to the section 33 right to just administrative action. The section 33 right to just administrative action can also be advanced to prevent SARS from making decisions or applying legislation in a manner where taxpayers are treated unequally or where there is an element of discrimination involved. The ambit of the section 33 right to just administrative action was discussed and analysed in Chapter 5.

There are still many provisions in the Income Tax Act and the practices of SARS that, *prima facie*, violate the right to equality, and these provisions and practices still need to be evaluated against the theory discussed in this chapter. This is what the next chapter attempts to achieve, namely to test the theoretical framework as developed in the current chapter against certain discriminatory provisions still contained in the Income Tax Act, such as the unfairness of progressive rates of taxation on individuals and the potential violation of the right to equality as provided for in terms of section 23(m) of the Income Tax Act.

CHAPTER 7**JUDGE FOR YOURSELF – THE PRACTICAL APPLICATION OF THE RIGHT
TO EQUALITY WITHIN A FISCAL ENVIRONMENT**

“His lordship may compel us to be equal upstairs, but there will never be equality in the servant’s hall.”- James Barrie (Cohen 2000: 149).

7.1 INTRODUCTION

In the previous chapter, the meaning and ambit of the section 9 right to equality was analysed and discussed from a theoretical point of view. It was concluded that the right to equality should be widely and liberally interpreted to give substance to the right to equality. However, no real discussion on its practical application was attempted. Accordingly, the current chapter will attempt to test the theoretical framework as developed in the previous chapter against two potentially discriminatory provisions still contained in the Income Tax Act, namely, the progressive rates of taxation on individuals and section 23(m) of the Income Tax Act.

This chapter, which tests the theoretical framework of the right to equality, has as its core, an article that is unpublished.

7.2 JUDGE FOR YOURSELF - THE SIXTH “CORE” ARTICLE

Judge for yourself – the application of the constitutional right to equality in a fiscal environment

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Abstract

The South African judiciary have, so far, not been called upon to adjudicate on the substantive law meaning of the fundamental right to equality within a fiscal environment. The aim of this study and a previous study by the present author has been to develop a theoretical framework for determining the substantive meaning of fiscal equality and applying the meaning so attributed, to practical situations. A decision tree based on the logical and precise step-by-step process as laid down by the Constitutional Court in the precedent-setting *Harksen v Lane* case, has been developed to assist in understanding the process to be followed in a tax equality challenge. The *prima facie* unfairness of progressive rates of taxation applying to individuals and the potential violation of the right to equality of section 23(m) of the Income Tax Act (Act No. 58 of 1962) were then examined using the *Harksen* step-by-step process in conjunction with the decision tree that was developed. The conclusion is that progressive rates of taxes applying to individuals do not violate the right to equality. However, section 23(m) of the Income Tax Act appears to violate the substantive right to equality.

Key words

Bill of Rights, Constitution, Discrimination, Human dignity, Income Tax Act, Right to equality

Introduction

Shawcross, the 20th-century British politician and lawyer, observed, “The so-called new morality is too often the old morality condoned” (Cohen 2000: 342). Although not commenting on taxation matters, Shawcross’ observation is, nonetheless, a thought-provoking statement in the context of the fundamental right to equality as contained in section 9 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) and the practical application of that right by the judiciary in a fiscal environment.

Some would argue that inequalities and even discriminatory provisions in a fiscal statute are necessary and essential to protect and even enhance the tax base. This line of argument, in effect, advocates that political and policy decisions of the government that patently or even ostensibly violate a fundamental right of a taxpayer should be allowed to threaten the very values that underpin the Constitution. The argument condones and even perpetuates the old morality of unfairness, inequality, differentiation and discrimination in fiscal matters.

In a previous article in this journal, the present author (Goldswain 2011: 1–25) presented a theoretical framework for the scope and ambit of the right to equality. The final observations in the article were that “the mere theoretical analysis of the ambit of the right to equality from a taxpayer’s point of view is an exercise in futility unless the analysis could be translated into a real life application” (Goldswain 2011: 24).

Croome (2010) is one of the few authors to write on South African taxpayers’ rights. In his book, entitled *Taxpayer’s Rights*, he devotes a full chapter to the ‘Right to Equality’ of taxpayers (73–121). His emphasis is on the identification of a *prima facie* violation of a taxpayer’s right to equality, and he discusses the violation by referring to similarly judicially decided foreign cases to arrive at an opinion as to whether the South African right to equality in a particular fiscal scenario has fallen foul of the Constitution.

Croome’s (2010: 119) general conclusion is that:

Based on the decisions of the courts in India and the latitude afforded to the State in choosing what policies to adopt, taxpayers may face difficulties satisfying a court that a particular fiscal provision should be struck down on the basis that it unlawfully violates section 9 of the Constitution.

Object and scope of this article

The research, on which this article is based, attempted to take the theoretical analysis of the scope and ambit of the substantive right to equality as already analysed, discussed and developed by the present author (Goldswain 2011) and apply it to two practical problem areas within the fiscal context. It was not the objective of this research to compare the results of the present author's approach, based primarily on the substantive meaning of the right to equality, to that of Croome (2010), who relies predominantly on foreign decided cases in the same or similar circumstances. Different decisions, based on the approach used, could result. However, a comparison of results of the approaches used, may stimulate further academic debate on which approach the judiciary should use when faced with a case of the violation of a taxpayer's right to equality. It could also equip taxpayers and their advisors with substantive law arguments to resist a tax assessment based on a provision of the Income Tax Act (Act No. 58 of 1962) (the "Income Tax Act), such as section 23(m) of that Act, which is not obviously discriminatory, unfair or unequal but on closer analysis may not meet the standards required by the Constitution in general or the right to equality in particular.

Some of the more important conclusions reached by the present author in his previous article (Goldswain 2011) are listed below. This should be regarded as a reference or commencement point for the practical application of the right to equality in fiscal matters as further discussed below. However, for a full exposition of the theoretical ambit and scope of the right to equality, the previous article should be consulted.

Aspects considered to be beyond the scope of this article are mentioned during the course of the discussion, as and where appropriate.

Research method

The research method adopted comprised a literature review and an analysis of the relevant provisions of the Income Tax Act, the Constitution and the reported decisions of the various courts together with published articles and textbooks that relate directly to the objective.

Theoretical scope of right to equality in fiscal matters

The Katz Commission Report (1994: 77–78) recommended several changes to the income tax system with regard to procedural fairness and equality in fiscal matters. Unfortunately, however, only blatantly discriminatory provisions based on gender, marital status, sexual orientation and religion were recommended for removal. The Commission failed to explain or comment on the meaning of substantive equality in fiscal matters.

This paragraph sets out some of the conclusions reached by the present author in an earlier article in this journal on the theoretical scope and thus the meaning of substantive equality in fiscal matters (Goldswain 2011: 22–23). Understanding the meaning of substantive equality as opposed to merely looking at procedural equality is a vital ingredient in determining whether discriminatory legislation actually violates the right to equality. The practical application has, as its foundation, the theoretical meaning of substantive equality, and it is thus considered necessary to review its theoretical meaning.

The conclusions reached were:

- The full scope of the right to equality in tax matters still has to be determined by the judiciary.
- The Constitutional Court in *S v Makwanyane* (1995 (6) BCLR 665 (CC)) married the concepts of Western culture fundamental rights, the African philosophy of *ubuntu* and the objective of the preamble to the Constitution to “recognise the injustices of the past” and not perpetuate them. In so doing, the court steers us in the direction of the meaning of substantive equality.
- Decisions of the judiciary, especially those from similar branches of the law, such as insolvency (*Harksen v Lane* (1997 (11) BCLR 1489 (CC)) and the imposition of discriminatory rates and taxes on landowners by local city municipalities (*City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)), enabled some extrapolation as to the possible scope and ambit of the right to equality in fiscal matters.

- Unequal treatment by the State or any other person does not only refer to discriminatory legislation but extends to any discriminatory practices or conduct of a state official (*Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-Aided Schools, Eastern Transvaal* (1999 (2) SA 91 (CC)); *City Council of Pretoria v Walker* (*supra*)).
- The violation of the right to equality is not limited to one or more of the seventeen grounds of discrimination listed in section 9(3) of the Constitution. The violation extends to all discriminatory or unequal treatment provisions or practices of SARS, particularly where human dignity is involved (*Harksen v Lane* (*supra*)).
- The right to equality extends to juristic persons in the appropriate circumstances.
- The section 36 limitation of rights provision in the Constitution can restrict the right to equality if the legislation is found to be “reasonable and justifiable in an open and democratic society”. The minority judgement of O’Regan J in *Harksen v Lane*, (*supra*) is considered precedent for determining how to apply the section 36 limitation of rights clause in the Constitution relating to fiscal equality challenges to legislative provisions.
- Legislation that has been found to be “arbitrary” can never be “reasonable or justifiable” and thus cannot be saved by the section 36 limitation of rights provision (*First National Bank of SA Ltd t/a Wesbank v CIR and Another* (2002 (7) BCLR 702 (CC)).
- Foreign judicial decisions from countries with constitutions similar to that of South Africa have played an important role in interpreting our fundamental rights whilst our Constitution was in its infancy. However, foreign decisions relating to equality challenges are being referred to less and less. The Constitutional Court in *S v Makwanyane* (*supra*) and in *Glenister v President of the RSA & others* ([2011] JOL 26915 (CC)) have endorsed this trend away from foreign decisions as the right to equality in South Africa has its own unique flavour.

- The core of the right to equality for a natural person is human dignity (*Harksen v Lane (supra)*) and a wide meaning should be attributed to it. Albertyn's (Cheadle, Davis, Haysom 2007: para 4.8.22(h)) view that distinctions made on the basis of working status, poverty or geographic location impairs a person's dignity, is endorsed. It accords with the stated objective of the Constitution to recognise the injustices of the past.

Although these broad conclusions attempt to give some indication of the meaning of substantive equality in a fiscal context, they do not guide us on the actual application or logical process to be followed in determining whether a legislative provision actually violates the section 9 constitutional right to equality. The Constitutional Court, however, in *Harksen v Lane (supra)* developed a three-step approach to assist in the process and this approach, known as the *Harksen* three-step approach, has been subsequently followed by the judiciary. A synopsis of this approach is described in the next paragraph.

***Harksen* three-step approach – used to determine whether the right to equality has been violated**

The first step in the *Harksen* analysis is to establish whether the provision differentiates between people or categories of people, and if it does, whether the differentiation bears a rational connection to a legitimate government purpose. The test used to measure the rationality of a legislative provision in this context is discussed in detail later in this article. If it is found that there is no rational connection to a legitimate government purpose, then the legislation is in violation of the right to equality and that would be the end of the enquiry. The legislation is unconstitutional to the extent that it violates the right to equality. Nevertheless, even if the provision does pass the rationality test, it is not the end of the enquiry – the legislation still has to be tested for unfair discrimination, the *Harksen* second step in the enquiry.

The second step in the analysis, therefore, is to establish whether the differentiation amounts to unfair discrimination. If the discrimination is based on one of the 17 listed grounds as described in section 9(3) of the Constitution then the discrimination is presumed to be unfair. If it is not based on a listed ground, then the discrimination is tested objectively to determine its fairness or otherwise, taking into account attributes and characteristics that

have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. There is no presumption of unfairness and the onus is then on the complainant to prove unfair discrimination.

The test of unfairness (discussed in greater detail later in this article) focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found to be fair, then there will be no violation of the right to equality and that would be the end of the enquiry.

If the discrimination is found to be unfair, then the final step is to determine whether the legislation can be “justified” under the section 36 limitation of rights clause of the Constitution. If it cannot be justified by the state – the full ambit of this clause and its relationship with the rationality test are discussed in the next paragraph – then the legislation has to be found unconstitutional.

Relationship between the “rational connection to a legitimate government purpose” enquiry and the “justification” clause in terms of section 36 of the Constitution

In *Harksen v Lane NO (supra)*, the court was called upon to test the constitutionality of a provision in the Insolvency Act (Act No. 24 of 1936) that provided for the property of a spouse whose estate had been sequestrated, to automatically vest in the Master. Only if the solvent spouse could prove his or her ownership of the property, could it be released to the solvent spouse. The court acknowledged that the provision differentiated between married couples and third parties and that this could have harmful effects on the spouse of an insolvent. However, the court found that the provision was rational and served a legitimate government purpose to protect the creditors of the insolvent.

Marriage was not a listed discriminatory ground in the Constitution of the Republic of South Africa (Act No. 200 of 1993) (“Interim Constitution”) – the time when the *Harksen* case went to court, which meant that there was no presumption of unfairness. The majority of the court found that the provision was fair (the minority decision found the provision to be unfair) and thus that the provision did not constitute unfair discrimination. The provision was there to safeguard the interests of the creditors of the insolvent estate – it was enacted for the public good. Because the provision was found to be fair, there was no necessity to test its “justifiability” in terms of section 36 of the Constitution.

Discrimination on the basis of marriage is now a listed ground of discrimination in section 9 of the Constitution and if the discrimination is based on a listed ground, it is automatically presumed to be unfair. If marriage had been listed as one of the grounds of discrimination at the time that Mrs Harksen challenged the legislation, it would have meant that the onus of proof rested on the State to prove the fairness of the discrimination rather than on the solvent spouse to prove the unfairness of the discrimination. The automatic presumption of unfairness would have meant that, following the *Harksen* three-step approach, the next step would have been to test whether the unfair discrimination could be regarded as “reasonable and justifiable in an open and democratic society” as provided for in terms of the section 36 limitation of rights clause in the Constitution. The powerful arguments presented by O’Regan in her minority judgement led her to the conclusion that the provision was not only unreasonable but also that it was not justifiable in terms of section 36 of the Constitution.

The facts in *Larbi-Odam v Member of the Executive Council for Education (North West Province)* (1997 (12) BCLR 1655 (CC)), give a good practical illustration of the relationship between the “rationality” test and the “justifiability” test. It is also an illustration of the *Harksen* three-step approach in practice.

The legislation in question prevented non-citizens from occupying permanent positions as educators. The Constitutional Court recognised that the legislation differentiated between citizens and non-citizens. It also accepted the argument raised by the Education Council that the purpose behind the legislation that prevented non-citizens from occupying permanent positions as educators, was rationally connected to the legitimate government aim of providing jobs to South Africans “particularly when thousands of qualified educators are unemployed” (p. 1669; para 30). The legislation thus passed the *Harksen* first step but the Court held that it failed the second step as the prohibition amounted to unfair discrimination. Thus, the only way that the legislation could be found to be constitutional was for it to pass the *Harksen* third step, namely, test its reasonableness and justifiability under the section 36 limitation of rights clause in the Constitution.

The Court held that the prohibition, although rationally connected to the legitimate government purpose, was competing with other important societal goals such as the primary

aim of providing quality education for learners, and the alleviation of the harsh effects of the prohibition on the rights of non-citizen permanent residents. The societal goals were found to outweigh the rationale for the introduction of the provision and the legislation was accordingly found to be neither reasonable nor justifiable in terms of the section 36 limitation of rights clause. It was thus regarded as unconstitutional.

The court in *Prinsloo v Van der Linde* (1997 (6) BCLR 759 (CC)), also distinguished between the rationality inquiry (*Harksen's* first step) and the justifiability test under the section 36 limitation of rights clause (*Harksen's* third step). The court held that whether the legislation could have been tailored in a different and more acceptable way is relevant for the issue of justification under section 36 of the Constitution but it is irrelevant to the enquiry as to whether there is a sufficient relationship between the means chosen and the end sought (p. 774; para 35) – the rationality test.

In *Jooste v Score Supermarket Trading (Pty) Ltd* (1999 (2) BCLR 139 (CC)), Yacoob J, expressed similar sentiments. He held that a rationality review only involves an inquiry into “whether the differentiation is arbitrary or irrational, or manifests naked preference” and the inquiry was not concerned with whether “the scheme chosen by the legislature could be improved in one way or another” as this argument was part of the “justification” step (at 147: par 16). The inquiry also was not concerned with any policy choices which should properly be considered to fall within the exclusive domain of the legislature and thus only tested at the justification stage.

The United States Supreme Court follows a similar approach to determine rationality. In *United States Railroad Retirement Board v Fritz* (449 US 166 (1980) at 179), the court held that in the absence of arbitrariness or irrationality, this enquiry is at an end if plausible reasons for Congress' action are advanced.

In *Glenister v President of the RSA & Others* ([2011] JOL 26915 (CC)), Ngcobo CJ, in delivering his judgement (a minority judgement but this part of his judgement was approved by the majority of the court), indicated that Parliament cannot act capriciously or arbitrarily when legislating. He also explained that legislation need not be reasonable or appropriate to survive a rationality review and furthermore expressed the view that the court may not question political decisions in a rationality review.

It therefore appears that the rationality review as developed by our judiciary and even supported internationally, favours the executive and the legislature. They are given wide powers to initiate and pass legislation. Even purely political decisions that favour their own constituency cannot be attacked on the “rationality” aspect. In *Glenister’s* case (*supra*), a decision was made at a political party congress to disband the Scorpions, an independent crime and corruption busting fighting force and creating a new force, the Hawks, under the control of the Commissioner of Police that undermined its independence to fight crime and corruption. The court held that political decisions that motivated such change in law was rational. However, the majority decision was that the legislation was ultimately defective in that it was not reasonable and justifiable in an open and democratic society.

The third step in the *Harksen* approach is a far narrower concept than the notion of rationality, and to be found “reasonable and justifiable in an open and democratic society”, the section 36 limitation of rights clause of the Constitution provides that account must be taken of, *inter alia*, the nature of the right to equality which is based on human dignity and freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and any less restrictive means to achieve the purpose. These latter aspects will be dealt with in detail later when applying the section 36 limitation of rights clause to a practical situation.

The aspect of “fairness” in a discriminatory context is a close relation to the rationality and justifiability enquiries and will be discussed briefly in the next paragraph.

Determination of “fairness”

If the differentiation in the legislation is based on one of the 17 grounds listed in section 9(3) of the Constitution, namely, race, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, the legislation is deemed to be unfair unless SARS can rebut (the onus is on SARS) the presumed unfairness. If the presumed unfairness cannot be rebutted by SARS, the next step is to test it against the section 36 limitation of rights clause.

If the differentiation is based on a ground not listed or specified in section 9(3) of the Constitution, there is no presumption of unfair discrimination and the onus is upon the complainant to prove that the legislation in question is unfair. In *Larbi (supra)*, the court summarised the process of deciding whether the legislation is unfair, namely, examining “the nature of the group affected, the nature of the power exercised, and the nature of the interests involved” (p. 1656).

The *Larbi* decision followed the guiding principle regarding unfairness as explained in *President of the Republic of South Africa and Another v Hugo*, (1997 (6) BCLR 708 (CC)) as follows (728-729: para 41):

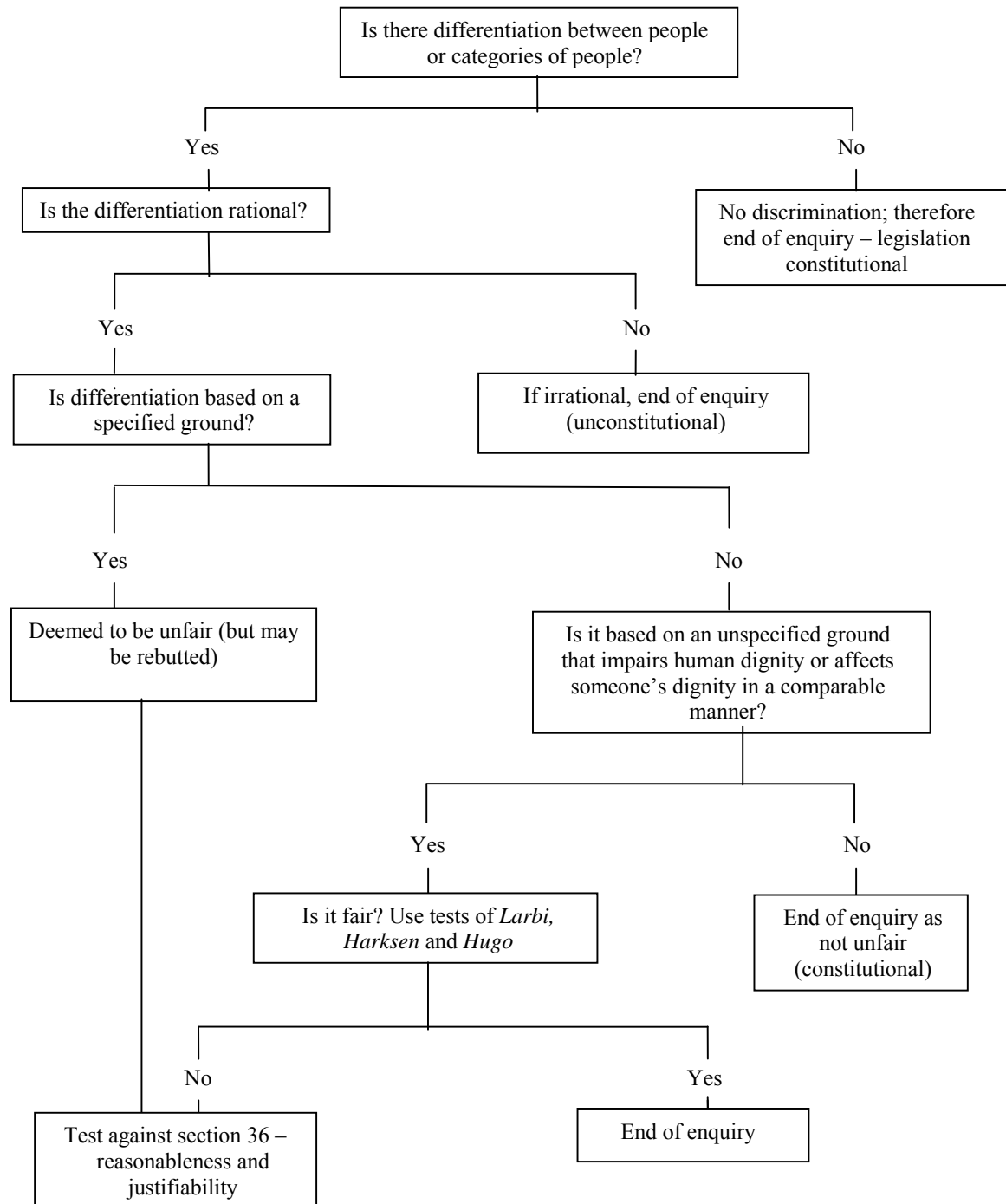
At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

In *Harksen (supra)*, the Constitutional Court, when focusing on the meaning of unfairness, explained that where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it is regarded as unfair. If in some other way it affects persons adversely in a comparably serious manner, it may also be regarded as unfair and thus constitute a breach of the right to equality. In *Prinsloo (supra)*, the court explained that the meaning of discrimination encompassed the unequal treatment of people “based on attributes and characteristics attaching to them” (p. 762).

If legislation is irrational, arbitrary, capricious or illegal, by definition, it is unfair and should never pass the first step of the *Harksen* approach. However, there are less obvious shades of unfairness in legislation, such as possibly, progressive rates of taxes for individuals, or the prohibition on the deduction of previously claimable expenses by certain employees in terms of section 23(m) of the Income Tax Act. Both these aspects will be discussed and analysed later in this article using the *Harksen* three-step decision tree which is offered below.

Decision tree for the application of the *Harksen* three-step approach as developed by the author

The *Harksen* three-step approach can be represented diagrammatically in the following decision tree.



This decision tree can be used as a quick and simple method to test whether a discriminatory provision, *prima facie*, is unconstitutional. It is not intended to be a tick-list approach to complaints of unfair discrimination. Rather, it will be used as an aid in the paragraphs following, to analyse the constitutionality of two fiscally-related issues that have been identified as possibly violating the right to equality.

Constitutionality of progressive rates of taxation for individuals

If the decision tree is used, it is clear that there is differentiation between persons and groups of persons. Progressive rates of taxation by their very nature, treat the rich differently from the poor. Should two taxpayers each earn R1 000 on the last day of the fiscal year but they are taxed at different rates, then there is differentiation between the taxpayers. The differentiation, however, is rationally connected to a legitimate government purpose of collecting taxes for the betterment of society as a whole.

The next step, according to the decision tree is to test the fairness of the principle of progressive rates of taxation. Since the differentiation is not based on one of the 17 listed grounds of discrimination, it is therefore not presumed to be unfair. The differentiation is based on an unspecified ground, which means that it is up to the complainant to prove the unfairness of progressive rates of taxes.

There is no doubt that the principle of progressive rates of tax is patently unfair and a flat rate of tax on income would be a far fairer regime. For example, a 30% flat tax rate permits all taxpayers to retain 70% of their income. The question to be answered, however, is whether the principle of progressive rates of taxes impairs the human dignity of the rich – by them having to pay more in income tax than the poor on the same amount of income? Vertical equality recognises that a taxpayer's ability to pay increases with his or her income. No discussion on the merits of vertical equality is offered as it is considered to be beyond the scope of this article. England, Germany, France and the United States of America all use the principle of progressive tax rates. On this basis, the principle of progressive taxation should be found to be fair and therefore that would be the end of the enquiry. In the unlikely event that the progressive rates of tax principle is found to be unfair, then the state would be able to argue, for the purposes of the section 36 limitation of rights clause of the Constitution, that the unequal and unfair differentiation is reasonable and justifiable in an

open and democratic society using the same line of arguments as have been used for the rational and unfair enquiries as described above.

Constitutionality of section 23(m) of the Income Tax Act

On 1 March 2002, section 23(m) of the Income Tax Act became effective. In terms of that legislation, expenses incurred that were previously available to salaried employees in terms of section 11 of the Income Tax Act became prohibited deductions except for a limited number of expenses that are specifically excluded from the prohibition. The primary reason for the legislation being introduced was to alleviate the administrative burden of SARS (National Treasury 2002: 83).

The disingenuous argument put forward by National Treasury and SARS for the introduction of the prohibition was that employees who were remunerated in the form of a salary incurred very few expenses that would qualify as a deduction in terms of section 11 of the Income Tax Act (National Treasury 2002: 83). The implication is that, because a large majority of taxpayers do not incur the particular expenses and therefore cannot claim a deduction, all the rest of those employees who could have claimed a deduction should suffer a harsher tax regime. Thus, the introduction of section 23(m) means that employees, who have substantial expenses related to the production of their income for their specific profession or calling, may no longer deduct such expenses.

In spite of the introduction of section 23(m), employers may still require that employees pay for certain expenses themselves to permit them the freedom to determine how they will carry out their employment duties as well as to alleviate their (the employer's) administrative burden. Such expenses are usually accounted for by including the possible expenses to be incurred by the employee in their total salary package or as a special allowance for such expenditure to be incurred. The costs related to, *inter alia*, telephone rental and calls, internet connections, registration with a professional body, the entertainment of clients, travelling costs, attendance at seminars and workshops, immediately spring to mind. The costs so incurred can be substantial and if not allowed as a deduction can seriously impair the economic position (in this case, the after-tax cash flow) of an employee.

In order to test the constitutionality of the prohibition of the deduction to employees of costs incurred on carrying on their trade as employees as provided for in terms of section 23(m), it is necessary to analyse the general provisions of the section and to establish whether it violates the right to equality by utilising the *Harksen* three-step approach and the decision tree developed from it.

Analysis of section 23(m)

Section 23(m) prohibits the deduction of any expenditure, loss or allowance that is permitted as a deduction in terms of section 11, “which relates to any employment of, or office held by, any person in respect of which he or she derives any remuneration, as defined in paragraph 1 of the Fourth Schedule” of the Income Tax Act. The section then provides an exclusion to this prohibition, namely “an agent or representative whose remuneration is normally derived mainly in the form of commissions based on his or her sales or the turnover attributable to him or her”. The section also lists certain expenditure that may be claimed by an employee as a deduction. However, these permissible deductions do not influence the general constitutionality of the section and thus will not be discussed.

An analysis of section 23(m) of the Income Tax Act reveals that the legislation does not extend to a non-employee such as an independent contractor, a sole proprietorship, a partnership or even to the letting out of rental property (see also SARS’ Interpretation Note No. 13). Taxpayers who “normally” earn their income “mainly” in the form of commission based on turnover attributable to them, also fall outside the ambit of this prohibition. Thus, if the commission is based on something else, such as gross profit or even net profit, technically the exclusion does not apply although there is a tenuous argument along the lines that even gross profit or net profit is ultimately based on turnover attributable to an employee and on this basis should qualify for the exclusion. Further detailed discussion on this aspect is considered to be beyond the scope of this article.

Two words used in this commission exclusion, however, need amplification, namely, “normally” and “mainly”. The word “mainly” has been interpreted by the judiciary to be a purely quantitative standard that “exceeds 50 per cent” (*SBI v Lourens Erasmus (Eiendoms) Bpk* (28 SATC 233)). This purely quantitative standard of determination is a problem in itself and, as will be illustrated later, can lead to absurd economic and tax results.

The word “normally” has not been interpreted by the judiciary in this context. Thus, what would happen if a taxpayer earns his or her remuneration mainly (exceeds 50%) in the form of commission for five years but because of a chronic illness earns commission income that is less than 50% of his total income for the next five years? Would the taxpayer still qualify for the exclusion? A discussion on the meaning of “normally” in this context is regarded as being beyond the scope of this article as it will not determine the constitutionality or otherwise of section 23(m).

Superficially, section 23(m) of the Income Tax Act may not appear to violate the right to equality of a taxpayer but only by testing this provision against the *Harksen* three-step approach, using the substantive meaning of equality, can a conclusion in this regard be reached.

Is there differentiation?

Section 23(m) of the Income Tax Act differentiates between people and categories of people. It differentiates between employees earning their remuneration mainly in the form of commission and those not earning their income mainly in this form in spite of the fact that they may be performing exactly the same employment functions. Furthermore, self-employed taxpayers and partners in a partnership fall completely outside the ambit of the section 23(m) prohibition and thus there is differentiation in this respect. Therefore, this first hurdle is cleared for the possible finding that section 23(m) violates the right of a taxpayer to equality.

Is the differentiation rationally connected to a legitimate government purpose?

The acknowledged purpose behind the introduction of section 23(m) of the Income Tax Act is to alleviate the administrative burden of SARS (National Treasury 2002: 83). Whether the administrative burden argument is rationally connected to a legitimate government purpose, is discussed in detail below. Swart (1996: 446–457) is of the opinion that the administrative burden argument is not a legitimate government purpose. His view is supported by the overseas decision in *United States Department of Agriculture v. Murry (supra)*, and to some extent in the South African decision of *S v Ntuli* (1996 (1) BCLR 141 (CC)).

Arbitrary legislation also fails this first step (*Jooste v Score Supermarket Trading (Pty) Ltd (supra)*; *Prinsloo v Van Der Linde and Another (supra)*). The word “mainly” and its meaning of “exceeds 50 per cent” (*SBI v Lourens Erasmus (Eiendoms) Bpk (supra)*), is an arbitrary numerical determination which usually results in economic differentiation and ultimately unfairness. In fact, the strict application of the arbitrary numerical determination can lead to absurd results as can be seen from the following example:

Assume that an employee

- earns a basic salary of R200 000 per annum and commission income of 10% on all the products that he sells
- sells R2 050 000 of products that results in a commission of R205 000 being earned
- is taxed at an average rate of tax of 30%
- bears the following expenses which will qualify for a deduction in terms of section 11(a) of the Income Tax Act

	<u>R</u>
Entertainment	25 000
Help of assistants to hand out pamphlets on street corners	40 000
Printing of pamphlets, telephone and fax	<u>35 000</u>
Total expenditure	<u>100 000</u>

The taxable income of the employee would then be calculated as follows taking into account the fact that section 23(m) does not apply as the remuneration of the employee is “mainly” (more than 50%) in the form of commission income:

	<u>R</u>
Gross income	
Basic salary	200 000
Commission	<u>205 000</u>
	405 000
Less: Deductions in terms of section 11(a) of the Income Tax Act	<u>100 000</u>
Taxable income	<u>305 000</u>
Taxation @ 30%	<u>91 500</u>

Now, assuming that a second employee performs the same selling function, earning the same basic salary and with the same expenditure but the sales on which his commission is based is R1 950 000, his taxable income would be calculated as follows:

	<u>R</u>
Gross income	
Basic salary	200 000
Commission	<u>195 000</u>
Taxable income	<u>395 000</u>
Taxation @ 30%	<u>118 500</u>

Since the second employee falls foul of section 23(m) in that his remuneration is not “mainly” in the form of commission income, he may not deduct the R100 000 expenses he incurred in earning the commission income. The cash flow position of each employee, if compared, gives a very interesting but disturbing result:

	First employee	Second Employee
	<u>R</u>	<u>R</u>
Cash received	405 000	395 000
Less: Cash expended	<u>100 000</u>	<u>100 000</u>
	305 000	295 000
Less: Taxation	<u>91 500</u>	<u>118 500</u>
Net cash flow	<u>213 500</u>	<u>176 500</u>

Thus for a difference of only R10 000 in commission income, the second employee’s cash flow is reduced by R37 000 in comparison to the first employee. The arbitrary determination of who qualifies for the “mainly” commission income exemption not only results in unfairness but also makes an “ass of the law” (*Steeple v Derbyshire County Council* ([1984] 3 All ER 468: 500)). Theoretically, therefore, section 23(m) of the Income Tax Act does not even pass the first step of the *Harksen* three-step approach.

Nevertheless, it is submitted that should the judiciary find that the legislation is rationally connected to a legitimate government purpose, it would be on very tenuous grounds but the court would still have to proceed to the next step and test the fairness or otherwise of the legislation in accordance with the *Harksen* three-step approach as diagrammatically represented in the decision tree above.

Is the differentiation fair?

From the practical scenario sketched in the paragraph above, it is clear that the differentiation, to the average salaried person, is unfair and unjust. The question is, however, whether this is the type of unfair discrimination that is contemplated in section 9(1) of the Constitution as explained in *Harksen*?

The differentiation is not based on one of the 17 grounds listed in section 9(3) of the Constitution as being presumed unfair and therefore the onus is upon the complainant to prove that section 23(m) is unfair. The test advocated in *Harksen* is to establish whether the discrimination impairs the fundamental dignity of a person or affects him or her in a comparably serious manner. The unfairness is established by looking at the impact of the discrimination on the complainant and others in his or her situation.

If section 23(m) of the Income Tax Act is analysed in this light, it is clear that its application can result in inequality between employees who earn remuneration in different forms for the same work (commission *versus* non-commission income). The fact that two employees can earn the same salary for doing the same work yet are taxed differently and therefore have different after-tax cash flows, can seriously impact on the type of lifestyle that the non-commission salary earner leads. It could mean having to buy or rent a house in a cheaper neighbourhood, sending their children to an inferior school that could affect their academic record and limit their opportunities in later life, not being able to afford the most nutritious food or even adequate clothing and medical care. The consequences of the discrimination and thus the impairment of human dignity are endless as a result of a provision which aims merely to relieve SARS of its administrative burden.

The discriminatory effect between employee taxpayers and self-employed taxpayers is even greater. It may be argued that workers or employees have historically been disadvantaged in relation to their bosses. Section 23(m) perpetuates the historical disadvantage in that a deduction is permitted for expenses incurred for tax purposes to a self-employed person (boss) whereas it will not permit the same deduction to the worker (employee) who earns a salary. Discrimination based merely on a person's station in life, which is "statutorily sanctioned", namely, a worker as opposed to a self-employed boss, was entrenched as a way of life in South Africa prior to 1994 and is inherently unfair - it casts them "in the role of supplicants" (*Khosa and Others v Minister of Social Development and Another* (2004 (6) BCLR 569 (CC) at 598–599)".

Applying the tests for fairness (as *per* the majority decision in the *Harksen* decision), namely examining the position of the complainant in society (employees are a group who are vulnerable and suffered discrimination in the past), the nature and extent of the provision (what public interest is parliament protecting – not protecting a public interest but merely alleviating the administrative burden of SARS) and the effect of the discrimination on the taxpayer (the worker will suffer financial indignity – as opposed to a boss or fellow employee earning mainly commission income), leads one to the conclusion that section 23(m) perpetuates and promotes unfair discrimination and is therefore unfair in terms of *Harksen's* second step.

Looked at in this light, it is submitted that section 23(m) cannot meet the fairness test since the impairment of the taxpayer's financial interests is, to use the words of O'Regan J, "substantial and sufficient to constitute unfair discrimination" (*Harksen (supra)* at 1527). Thus, the only way in which section 23(m) can be saved is for the state to argue that the right to equality should be limited as the discrimination is "reasonable and justifiable in an open and democratic society" as required by section 36 of the Constitution.

Is the limitation of the right to equality reasonable and justifiable?

Where legislation is found to be irrational or arbitrary under the section 9(1) enquiry (*Harksen's* first step), it should be treated as the end of the process and the legislation should be declared unconstitutional. However, assuming that the judiciary decide otherwise but unfair discrimination is proved by the complainant, it is then open for the state under

section 36 of the Constitution to have another bite at the cherry by advancing reasons and arguments that support the limitation of the right as being “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.”

Arbitrary legislation or even words in such legislation that lead to arbitrary results such as the word “mainly” as used in section 23(m) of the Income Tax Act, cannot be justified. Support for this view is given in *First National Bank of SA Ltd t/a Wesbank v CIR and Another (supra)* where the Constitutional Court held that the word “arbitrary” is a far narrower concept than the words “reasonable and justifiable” as used in section 36 of the Constitution. Albery (Cheadle *et al* 2007: para 4.8.22(h)) is also of the opinion that “it is difficult to conceive of a situation where arbitrary or irrational action by the state will be justified by section 36 and the courts have yet to find one”.

An analysis of the general relationship between the rational connection to a legitimate government purpose inquiry and the justification tests under section 36 of the Constitution indicates that it is easier for the taxpayer to attack the constitutionality of discriminatory legislation on the basis that the discrimination legislated for is not “reasonable and justifiable in an open and democratic society” (section 36) rather than on the “rationality” enquiry. The decisions of the Constitutional Court indicate that an attack based only on the rationality enquiry will inevitably end in failure for the taxpayer. The “rationality” test favours the government as even legislation resulting from political interference can be found to satisfy the “rationality” enquiry (see *Glenister (supra)*). However, an attack on the legitimacy basis, interestingly, has succeeded in the United States of America.

In the case of *United States Department of Agriculture v Moreno* (413 US 528 (1973)), the United States Supreme Court nullified a legislative provision because of its illegitimate purpose. A specially enacted provision that excluded certain households from participating

in a food stamp programme where a person who lived in the house was not related to any other member of the household, was found to be invalid. This was so in spite of the fact that such a household was in comparably the same economic situation as those households that did qualify. The purpose of the provision was to improve the nutritional standard of economically deprived households and to stimulate the national agricultural economy. The court examined the legislative history of the provision and concluded that the purpose for the exclusion was to disqualify hippies and hippie communes from participation in the food stamp programme. The Court held that a desire to harm a politically unpopular group does not constitute a legitimate government interest.

In spite of this foreign decision, it may seem as if the rationality inquiry is superfluous and that this examination can be dispensed with, with the justifiability test in terms of section 36 of the Constitution being the ultimate deciding factor or tie breaker as to whether the discriminatory legislation is constitutional or not. This is probably true but the arguments raised at this first stage of the process (the rationality inquiry), set the scene for the arguments used during the “unfairness” (*Harksen’s* second step) and “justifiability” (*Harksen’s* third step) stages. If, for example, the rationality inquiry only meets the minimum standards of rationality (borders on arbitrariness), then it has a good chance of failing the justifiability test.

Thus, it is in the interests of the complainant to follow the rationality route, especially where discriminatory legislation is introduced with the avowed purpose of easing the administrative burden or capacity of a state department such as SARS. If the purpose for the introduction of discriminatory legislation is to assist SARS in overcoming administrative capacity such as a staff or skills shortage or even to act as a cost-cutting exercise — such an argument was advanced by SARS at the time of the introduction of section 23(*m*) of the Income Tax Act - the question that arises is whether the legislation meets the rationality test or fails it on the basis of it being an illegal government purpose.

Swart (1996: 446–457) supports the view that discriminatory legislation introduced merely to alleviate the administrative burden rather than to pursue a legitimate government purpose such as the stimulation of the economy, generally violates a person’s constitutional rights. Thus, his view, extrapolated to the meaning of legitimate government purpose, is that

the administrative burden or capacity argument by SARS would fail the first step of the *Harksen* approach if there is any differentiation between taxpayers in like circumstances. Swart's view is supported by the judiciary in *United States Department of Agriculture v Murry* (413 U.S. 508 at 513), where it was held that ease of administration, on its own, is not sufficient to justify an otherwise irrational legislative enactment.

The ease of administration argument specifically related to staff shortages at SARS, was raised in *Metcash Trading Ltd v C:SARS and Another* (63 SATC 13). However, the Constitutional Court quite correctly, it is submitted, refrained from giving any weight to this argument in their decision. A fundamental right should never be limited simply because it is convenient to do so.

A similar administrative capacity argument was raised by the prosecutors in *S v Ntuli* (*supra*), to justify the constitutionality of the provisions of section 305 of the Criminal Procedure Act (Act No. 51 of 1977). The provision required that every appeal noted by a prisoner against his conviction or sentence imposed by a lower court necessitates the production of a judge's certificate if the accused wished to prosecute the appeal without employing a legal practitioner to act for him or her. Didcott J found the provision a breach of the right to equality as well as being unjustifiable in terms of the limitation of rights clause of the Constitution. In analysing whether the provision was justifiable as required by the limitation of rights clause, Didcott J held that the purpose of avoiding administrative difficulties that would result from allowing such appeals without a judge's certificate, is a consideration that carried weight, but not a "factor important enough to override the protection of the constitutional rights in question" (p. 151: par 23).

The Constitution and the fundamental rights associated with it, may as well be consigned to the scrap heap if the administrative capacity argument by SARS or any other state department, is sustainable for the justification of discriminatory legislation. In effect, SARS and any other state department would then never have to defend any discriminatory revenue legislation other than to advance the argument that the purpose of the legislation introduced was to ease the administrative burden.

Appointing additional staff members to ease the administrative burden is a far better solution than utilising discriminatory legislation to achieve the same purpose. It is a less “restrictive means to achieve the purpose” (section 36(1)(e) of the Constitution). The solution of SARS in introducing section 23(m) is disproportionate in relation to the administrative burden or problem, namely, staff shortages. In the words of O’Regan J (p. 1530) in *Harksen (supra)*, “balance has not been achieved”. Furthermore, the onus would be on SARS to show that the section actually achieved its aim of substantially cutting down the administrative burden.

Finally, it may be argued that the government’s stated purpose of reducing the administrative burden does not carry enough weight to override competing considerations, such as one of the primary aims in the Constitution of “righting the wrongs of the past” and the harsh effects of economic inequality. As was stated in *S v Ntuli (supra)*, an administrative burden is a consideration that carries weight, but it is not a “factor important enough to override the protection of the constitutional rights in question” (p. 151: par 23).

Croome’s view on the Constitutionality of section 23(m)

Croome (2010: 92) is of the view that section 23(m) of the Income Tax Act would survive a constitutional challenge based on a decision given in Japan (*Oshima and Others v Director of Sakyō Tax Office* (1985) 39(2) Minshū 247 Supreme Court). No attempt is made by Croome to follow the three-step analytical approach as set out by the Constitutional Court in *Harksen*. Neither is any indication given by Croome as to the similarities or otherwise of the South African and Japanese Constitutions or whether the Constitution of Japan is the supreme law of the country as it is in South Africa.

In regard to the use of foreign or international law and decisions, Ngcobo CJ indicated in the *Glenister (supra)* decision that, when interpreting the Bill of Rights and the obligation in terms of section 39(1)(b) of the Constitution to “consider international law”, a distinction must be made between using international law as an interpretive aid, on the one hand, and relying on international law as a source of rights and obligations, on the other. He concluded that foreign law (including foreign decisions) cannot “be used to create constitutional obligations that do not exist in our Constitution” (at 57: para 108). See also *Makwanyane*

(*supra*) where it was said that it is important that due regard must be paid to “our legal system, our history and circumstances, and the structure and language of our own Constitution” (at 687; para 39).

Conclusion with regard to the constitutionality of section 23(m) of the Income Tax Act

Based on the foregoing discussion, it is submitted that section 23(m) is irrational and arbitrary. In addition, it constitutes unfair discrimination and should not be saved by the section 36 limitation of rights clause. The action taken by the legislature to alleviate the administrative burden of SARS is disproportionate to the perceived problem the legislature and SARS sought to redress and the employment of alternative methods, such as hiring more staff, would be less invasive of the right to equality. Taking all of these considerations into account, including Albertyn’s (Cheadle *et al*, 2007: para 4.8.22(h)) view that distinctions made on the basis of working status, poverty or geographic location impair a person’s dignity, it can be concluded that section 23(m) of the Income Tax Act may not survive a constitutional attack provided that the taxpayer has compelling facts and arguments to support his or her challenge.

Although it is considered to be beyond the scope of this article, one more aspect needs to be covered to round-off the discussion on the practical application of the right to equality, namely, what are the procedural remedies that a taxpayer should follow when his or her right to equality is violated?

Taxpayer’s procedural remedies when the right to equality is violated

A discussion on the procedural remedies available to a taxpayer when his or her right to equality is violated is considered to be beyond the scope of this article. However, the following observations can be made in this regard.

- A taxpayer must first argue his or her case in terms of the provisions of the Income Tax Act or other fiscal legislation (indirect application of the Constitution) before seeking relief on constitutional grounds by direct application of the Constitution (*Fose v Minister of Safety and Security* (1997 (7) BCLR 851 (CC) and *S v Mhlungu* (1995 (3) SA 867 (CC)). The Constitutional Court in *City Council of Pretoria v Walker* (*supra*) indicated that a constitutional remedy is not the correct route to follow in the first instance. For

example, the objection and appeal procedures as provided for in the Income Tax Act, must first be followed by an aggrieved taxpayer before seeking constitutional relief. Other common law remedies, such as an interdict may be obtained against the Commissioner preventing him or her from instituting the so called pay-now-argue-later provision or a *mandamus* (declaratory order) may be sought forcing SARS to issue an assessment in the appropriate circumstances (*Singh v C:SARS* (65 SATC 203); *Metcash Trading Ltd v C:SARS* (63 SATC 13, 2001 (1) BCLR 1 (CC)). The courts may even have to fashion new remedies to secure the protection and enforcement of a fundamental right (see *Fose v Minister of Safety and Security (supra)* and section 8(3)(b) of the Constitution).

- The Tax Court has no jurisdiction to decide whether any provision of the Value-Added Tax Act (Act No. 89 of 1991) or the Income Tax Act, is inconsistent with the Constitution and therefore unconstitutional. Accordingly, it may make no court order in that regard (*ITC 1806* (68 SATC 117)).
- Any finding that an Act of parliament is unconstitutional by a court other than the Constitutional Court is suspended until confirmed by the Constitutional Court (section 172(2)(a)).
- Any ordinary law or conduct that is inconsistent with or violates one of the fundamental rights may be declared invalid to the extent of the inconsistency (section 172(1) of the Constitution – direct application of the Constitution) or the common law may be developed to take cognisance of the values underpinning the Constitution (sections 173 and 39(2) of the Constitution – indirect application of the Constitution). There is an obligation on the Court to grant or fashion the appropriate relief or remedy in such circumstances but the order must be “just and equitable” (section 38 of the Constitution).

Should the taxpayer wish to challenge the constitutionality of section 23(m) of the Income Tax Act, he or she would have to go through the normal objection and appeal process (*Fose (supra)*) or request a declaratory order (*mandamus*). If the former route is followed, the Tax Court, without even being able to give a decision on the matter, would have to refer the matter to the High Court or even the Constitutional Court as the Tax Court has no jurisdiction to hear constitutional matters (*ITC 1806 (supra)*). If the High Court or

Constitutional Court finds that section 23(m) of the Income Tax Act does violate the right to equality, then it must fashion the appropriate relief that is fair and equitable. It is submitted that the best outcome for the taxpayer would be an order that invalidates section 23(m), *in toto*. It is not permissible, however, whilst fashioning the appropriate constitutional relief for the court to make the position worse for another taxpayer. Thus, for example, the court may not make an order to the effect that mainly commission-earning employees (as per section 23(m) of the Income Tax Act) will also be denied the deductions available to them in order to put them on the same tax footing as salaried employees.

It is considered unfortunate that the Tax Court has no jurisdiction to hear constitutional issues or to grant remedies such as interdicts and declaratory orders. Tax Courts are presided over by a judge of the High Court and it makes sense that its jurisdiction is extended to constitutional issues and the granting of relief. The empowerment of the Tax Court in this regard could alleviate the present lengthy time and cost issues involved in attacking the constitutionality of legislation only through the High Court.

Conclusion

"There is all the difference in the world between treating people equally and attempting to make them equal." This quote by Hayek (2011) not only neatly describes the difference in meaning between procedural and substantive equality but also expresses the values underpinning the Constitution. Although section 9 of the Constitution specifically deals with both procedural and substantive equality, the theme of the Constitution, generally, is to protect and especially enhance equality between the previously disadvantaged and the advantaged. Human dignity is the cornerstone of the substantive meaning of equality. The meaning of equality transcends mere procedural equality that is patently obvious and takes account of subtle shades of discrimination or inequality that are not so obvious.

Taxpayers' rights and their application within a constitutional context are still at the early stages of development in South Africa. However, research for this article and for a previous article in this journal by the present author (Goldswain 2011) examined the meaning of substantive equality and attempted to extrapolate the theory into a practical fiscal environment. The substantive meaning of equality, as extrapolated, provides a basis for a taxpayer to challenge legislation and the decisions, actions and conduct of SARS'

officials when his or her fundamental right to equality is violated. However, this is a field in its infancy and it will still take a number of years or even decades before the extent of the right to equality of the South African taxpayer is fully developed.

The objective of the research on which this article is based has been to analyse and consolidate the theoretical framework to determine the ambit of the right to equality and apply it in practice within the fiscal environment. This entailed a detailed analysis of the *Harksen* three-step approach, endorsed by various other Constitutional Court decisions, as to when and whether the right to equality has been violated. A decision tree based on the *Harksen* three-step approach was then developed. However, without further clarification on the meaning of words and phrases used in the *Harksen* approach, the decision tree is all but useless. This holds true also for the *Harksen* approach itself. Thus, a detailed examination of the words and phrases used in the *Harksen* decision was essential for a better understanding of the *Harksen* approach.

The first examination concerned the relationship between a “rational connection to a legitimate government purpose” enquiry and the “justification” clause in terms of the section 36 limitation of rights clause of the Constitution. The conclusion reached is that policy choices, political interference, unreasonableness or even inappropriateness, probably do not detract from a legitimate government purpose. These aspects are only addressed at the justification stage. Arbitrary differentiation, on the other hand, is not a legitimate government purpose and thus immediately violates the right to equality and it is not necessary to take the process further. In any event, arbitrary legislation could never be saved under the section 36 limitation of rights clause of the Constitution.

It appears easier for the taxpayer to attack the constitutionality of discriminatory legislation on the basis that the discrimination legislated for is not reasonable and justifiable in an open and democratic society (section 36 of the Constitution), rather than to rely on the rationality enquiry. Perhaps the rationality enquiry is superfluous and can be dispensed with because the justifiability test in terms of section 36 is the ultimate deciding factor or tie breaker as to whether the discriminatory legislation is constitutional or not.

The determination of the concept of ‘fairness’ within the meaning of section 9 of the Constitution was also explored. If the discrimination is based on one of the 17 listed grounds of discrimination, then it is presumed to be unfair unless SARS can rebut the presumption. If it is based on any other ground, then it is also considered to be unfair if the discrimination impairs a person’s fundamental dignity as a human being or affects a person adversely in a comparably serious manner.

The decision tree, developed by the present author, was used as an aid in the process of determining whether the tax regime of a progressive rate of taxation for individuals is constitutional. It was concluded that progressive rates of taxation do not impair the dignity of a taxpayer and thus the differentiation is fair. The decision tree was also used as an aid to test the constitutionality of section 23(*m*) of the Income Tax Act. The acknowledged reason for section 23(*m*) being introduced is to alleviate the administrative burden of SARS and it is for this reason that it should fail the section 36 ‘justifiability’ test of the Constitution and be declared unconstitutional. It is submitted that discriminatory fiscal legislation introduced merely to alleviate an administrative burden rather than to pursue a legitimate government purpose such as the stimulation of the economy, is not considered important enough on its own, to override a taxpayer’s constitutional rights. The Constitution and the fundamental rights associated with it would not be worth the paper it is written on if the administrative capacity argument by SARS or any other state department, is sustainable. In effect, they would never have to defend any discriminatory revenue legislation other than to advance the argument that the purpose of the legislation introduced was to ease the administrative burden.

Section 23(*m*) may not even pass the “rationality” test as the legislation has been shown to be “arbitrary” when tested against two taxpayers, earning virtually the same remuneration, doing the same job and incurring the same expenses, but one taxpayer earning a straight salary whilst the other taxpayer is earning commission based remuneration.

It has already been mentioned that Croome (2010) also examined section 23(m) of the Income Tax Act for constitutionality. He found the provision to be constitutional based on a Japanese decision dealing with a similar provision as contained in section 23(m) of the Income Tax Act. However, his analysis did not follow the three-step analytical approach as set out by the Constitutional Court in *Harksen*. His analysis neither gives recognition to the similarities or otherwise of the South African and Japanese Constitutions nor takes into account the sentiments of the Constitutional Court in the use of foreign decisions for equality issues. Also, his examination did not investigate the aspect of arbitrariness. Nevertheless, his contribution is important from the point of view of comparing the two approaches. It can lead to further useful academic debate on the matter.

Other possible violations of the right to equality identified by the present author in a previous article (Goldswain 2011: 1-25), such as;

- the different tax treatment of restraint of trade receipts and deductions for an individual as opposed to a company – para (cA) of the definition of “gross income” in section 1 and section 11(cA) of the Act.
- the taxation of farmers as opposed to any other businessman – farmers being taxed under the favourable special provisions of the First Schedule to the Income Tax Act.
- the taxation of small business corporations as opposed to the taxation of other companies – the application of section 12E of the Act;

and those identified by Croome could benefit from a constitutional analysis using the *Harksen* three-step approach. In the words of Judge Dennis Davis, as he puts it in his popular e-tv programme (Judge for Yourself), it would be left to the reader after the analysis to “judge for yourself”.

The procedural remedies available to a taxpayer when his or her right to equality is violated, are considered to be beyond the scope of this article. However, a brief overview has been given regarding this aspect but it is suggested that further research needs to be done in this area. Also it is recommended that the jurisdiction of the Tax Court be extended to constitutional issues.

Albertyn's (2007: par 4.8.22(h)) view that distinctions made on the basis of working status, poverty or geographic location impairs a person's dignity is endorsed. It accords with the stated objective of the Constitution to recognise the injustices of the past. It can only be hoped that the judiciary see discrimination and equality in this light in fiscal matters otherwise one would have to conclude that in relation to the right to equality as applied by the judiciary, in the words of Shawcross (Cohen 2000: 342), "too often is the old morality condoned".

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7.3 SYNTHESIS AND CONCLUDING REMARKS

This chapter has attempted to bring together the theoretical framework and ambit for the section 9 right to equality and its practical application. It is clear that the substantive meaning of the right to equality in a fiscal context still has some way to go. The legislature in general and SARS in particular, should never attempt to subvert the founding principles and the fundamental rights as guaranteed by the Constitution by claiming, as they did when introducing section 23(m) of the Income Tax Act, that the purpose for the introduction of discriminatory legislation is to assist SARS in overcoming administrative capacity such as a staff or skills shortage or even to act as a cost-cutting exercise.

De Villiers CJ, in *In re Willem Kok and Nathaniel Balie* ((1879) 9 Buch 45), a decision delivered in 1879, released the sons of two Griqua chiefs who had been detained by the military authorities. The military authorities argued that, even if the detentions were invalid, the court should not order the release of the two men because of the instability that would result from the release of such troublemakers. De Villiers CJ ordered the release of the two, holding that the “disturbed state of the country ought not in my opinion to influence

the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country” (at 66). Although this case was decided some 130 years ago, the principle is still valid today, even in a fiscal sense – the duty of the court is to ensure that legislation and the application of legislation that discriminates against a taxpayer is not condoned even where the discrimination practiced would lead to the expedient collection of taxes. See also *Pharmaceutical Manufacturers Association of SA: In re: Ex Parte President of the Republic of South Africa* (2000 (2) SA 674 (CC)) where similar sentiments are expressed.

This is the last chapter of this thesis save for the final conclusion and recommendations chapter that follows.

CHAPTER 8

CONCLUSION

“The principles of a free constitution are irrevocably lost when the legislative power is nominated by the executive” - Edward Gibbon (Cohen 2000: 93)

8.1 BRIEF OVERVIEW OF THE ORIGINATING IDEALS THAT UNDERLIE OUR FUNDAMENTAL RIGHTS

It was suggested in the introduction to this thesis that the Rosetta Stone, if one is prepared to stretch one’s imagination, represents one of the earliest and basic symbols of our Constitution. The Stone symbolises the protection of human dignity, property, privacy, freedom of religion, belief and opinion and even perhaps the right to just and fair administrative action by government officials – values that are now incorporated in and underpin our Constitution.

The theories and thoughts of philosophers such as Montesquieu, John Locke, Jean-Jacques Rousseau and Voltaire, are perhaps a better and more detailed reflection of the principles underpinning our Constitution. These philosophers identified the universally acceptable principles that are applicable to man. The principle that “all men are born free and equal in rights” found expression in the French Declaration *Des Droits De L’Homme Et Du Citoyen*, (the declaration of the rights of man and citizen). These rights were specified as liberty, private property, the inviolability of the person and resistance to oppression. These principles, all incorporated in the South African Constitution, inspired the French Revolution and served as the preamble to the French Constitution in 1791 (Britannica Online Encyclopedia: French Declaration 2010; Britannica Online Encyclopedia: John Locke 2010). To these human rights principles, the South African common law notion of *ubuntu* (“the values we need to uphold”) has been added to the values underpinning our Constitution by the Constitutional Court (*S v Makwanyane and Another* (1995 (6) BCLR 665 (CC)).

The structure for our Constitution, but especially our Bill of Rights, has closely followed the Canadian Charter. Accordingly, it is not surprising that in the early years after 1994, the interpretation of the scope and ambit of our fundamental rights was based on Canadian decisions. This included the manner in which our present section 36 limitation of rights clause of the Constitution is interpreted (*R v Oakes* (1986) 26 DLR (4th) 200 (SCC)). Generally, however, there has been a shift away from using foreign decided cases to interpret the scope and limits of our fundamental rights (see Chapter 6 in this regard). The Constitutional Court in *S v Makwanyane and Another* (*supra*) at 687) indicated that foreign law is of importance “particularly in the early stages of transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw”. South Africa, it is submitted, has progressed beyond the stages of transition and it is predicted that foreign decisions will be referred to less frequently in the interpretation of the scope and ambit of our fundamental rights in future.

In addition to our fundamental rights as guaranteed in the Bill of Rights, South Africa needs a system of taxation that synergises, recognises and complements our fundamental rights. A useful reference point for a sound system of taxation and which is accepted universally, is the system as espoused by Adam Smith (Smith 1776), the esteemed Scottish philosopher, economist and moralist. He espoused four maxims that have stood the test of time: equality, certainty, convenience and economy.

Smith was of the opinion that the levying of unwise, unfair, uncertain, unclear and arbitrary taxes could result in little return to the *fiscus* as the administrative cost to police such a tax could “eat up the greater part of the produce of the tax”. Additionally, such a tax could “obstruct the industry of the people”, which will then lead to unemployment because it destroys the funds that could employ them.

Furthermore, Smith apparently even had some sympathy for tax evaders. He was of the view that forfeitures and other penalties imposed on tax evaders frequently ruin such persons financially and “put an end to the benefit which the community might have received from the employment of their capitals”.

He also criticised “the frequent visits and the examination of odious tax-gatherers” as it exposed the population of a country in general and taxpayers in particular, “to much unnecessary trouble, vexation and oppression”.

Although Smith’s maxims cater for a theoretically acceptable system of taxes, very few world tax systems actually adhere to the principles he espoused. Prior to 1994, South Africa paid little heed to these maxims with the result that taxpayers were treated unequally, legislation was passed that was not clear and which was even arbitrary, and neither the need for convenience nor economic factors were really considered. The tax system in place and the manner in which it was administered was a reflection of the total disregard that the Apartheid government in power at the time had for human rights. Parliament was supreme and so, by extension, was SARS. This changed in 1994 with the advent of a new constitutional order in South Africa where the Constitution was declared the “supreme” law of South Africa (section 2 of the Constitution).

8.2 THE CONSTITUTION – SUPREMACY OF CONSTITUTION v SUPREMACY OF PARLIAMENT

The supremacy of the Constitution, as opposed to the supremacy of Parliament, is discussed in Chapter 2 of this thesis. Thus it is not considered necessary to repeat the discussions in this chapter other than to comment that prior to 1994 and the advent of the Constitution, there was virtually no protection for the taxpayer from some of the more draconian and discretionary powers vested in SARS in terms of the Income Tax Act. Parliament – and SARS with the explicit consent of Parliament - reigned supreme. Provided that there was legislation in place that permitted the violation of a common law or human law right, there was nothing that a taxpayer could do. The principles of equality, human dignity, privacy and the like could be violated merely by Parliament passing the necessary legislation. The administrative decisions taken by SARS were not usually reviewable, even if such decisions were palpably unreasonable, unfair or even failed to follow the rules of natural justice (*KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms.) Bpk.* (58 SATC 273); *Welz and Another v Hall and Others* (59 SATC 49); *Ferucci and Others v C:SARS and Another* (65

SATC 470); *ITC 1725* (64 SATC 223); *ITC 1758* (65 SATC 396); *ITC 1489* (53 SATC 99)). The practices of SARS, operating in a closed and secretive environment, were not open to scrutiny and it is submitted that the judiciary was a complicit partner with SARS in its endeavours to keep taxpayers in the dark. When questioning the unfair and arbitrary nature of legislation or even the actions and decisions of SARS, the judiciary often relied on the mantra that “there is no equity about tax” (*CIR v Simpson* (16 SATC 268 at 285); *New Union Goldfields Limited v CIR* (17 SATC 1 at 15); *CIR v Nemojin (Pty) Ltd* (45 SATC 241 at 267)) to justify a finding in favour of SARS, even in cases that cried out for fairness, equity and justice.

With the advent of the new constitutional order in 1994, parliamentary supremacy has given way to constitutional supremacy in terms of section 2 of the Constitution, which states that the Constitution is “the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. However, it is important to recognise that the full scope and ambit of many of the protective mechanisms for taxpayers, especially those embedded in the Constitution, have yet to be fully interpreted. The interpretation of the Constitution and, accordingly, the scope and ambit of the protection of a person’s fundamental rights, is a task specifically assigned to the judiciary by the Constitution (section 165 of the Constitution).

It is submitted that the publicity that surrounded the introduction of the new constitutional order in 1994 has meant that the general public have become more aware of their constitutionally guaranteed fundamental rights, but not specifically their rights as taxpayers. It even appears as if SARS is inclined to take advantage of taxpayers’ ignorance and even go so far as to employ unconstitutional procedures to obtain information, and assess and collect taxes. As already pointed out, there are several cases discussed in this thesis that support this controversial submission. SARS is only found out when it goes too far and the taxpayer applies to a court for relief. Instigating a search and seizure warrant for so-called “fishing expeditions”, which is not an appropriate constitutional tool for the assessment and collection of taxes, is but one extreme example of SARS’ flagrant and deliberate disregard of a taxpayer’s fundamental right to privacy.

Where SARS performs its duties strictly in accordance with the Income Tax Act and following the dictates of the founding principles of the Constitution (including the appropriate common law principles such as the *audi alteram partem* rule and the doctrine of legitimate expectation) it will, it is submitted, lead to greater respect from the general taxpaying public and consequently may lead to or contribute towards a greater tax morality. Concomitantly, there is also a constitutional demand that the organs of state allocate and spend tax revenue efficiently, economically and effectively as demanded by section 195(1)(b) of the Constitution. There is no room for corruption, cronyism or even plain inefficiencies in government or even quasi-government departments or state-run enterprises, all paid for or subsidised out of taxpayers' hard-earned income. Disrespect and distrust of the system of government and SARS, it is submitted, is already part of our culture and the old adage of economists to the effect that a rand in the hand of a taxpayer is more efficiently used than a rand in the hand of the taxman (or government), rings true. The disrespect, distrust and perhaps even the loathing of SARS is such that it may be a contributory cause of tax avoidance and even tax evasion on a large scale by South African taxpayers. SARS have estimated the tax gap to be in the region of some 15% to 30% of taxes collected (Carolissen 2010). This is in spite of the tough sanctions that may be imposed on taxpayers who have embarked on a journey of tax evasion.

SARS is a vital arm of government for the proper collection of taxes. The fact that there is allegedly bribery, corruption and inefficient use of taxpayers' money at national and local government level is probably the real reason behind the disrespect and distrust of SARS. This aspect will be discussed in greater detail below.

8.3 DISRESPECT, DISTRUST, TAX PLANNING, TAX EVASION AND THE CARROT AND STICK APPROACH

The majority of South Africa's economically active citizens are relatively unsophisticated, especially in business and legal matters. South Africa is predominantly a Third World nation with some elements of the First World being present. Even within that portion of South African society that is considered to be First World, a large number consider tax

legislation to be beyond comprehension. The majority of our population have probably never had any dealings with SARS and even if they have had some dealings with them, they have no idea of their rights.

The very fact that a government imposes tax at what is perceived by some to be levied at an unreasonably high rate on income – in relation to the reciprocal benefits and service delivery received – may perhaps be one of the causes of tax evasion on a large scale. The temptation is too great for most taxpayers who see the opportunity not to disclose their true income in the belief that they will not be caught, or if caught, will not be as severely punished as other fraudsters. One of the reasons for this attitude is that tax evasion is regarded as a white-collar crime and is tolerated, if not openly condoned, by the public at large. The *fiscus*, on the other hand, justifiably treats the collection of taxes as of prime importance and through the legislature, provides for substantial pecuniary penalties and even the sanction of imprisonment to be imposed on those taxpayers who are caught cheating on their taxes.

Taxes are not voluntary contributions but are appropriated by the state from a taxpayer. The Latin word for a tax collector is *exactor* and the word taxation is derived from it. “Exaction” is defined in the Concise Oxford Dictionary (Concise Oxford Dictionary 1982) as including, *inter alia*, an “illegal or exorbitant demand, extortion”, and gives us the basic meaning behind the word “taxation”. It is not surprising, therefore, that taxpayers dislike the tax collector and want to avoid taxes at all costs. Lord President Clyde in *Ayrshire Pullman Motor Services & Ritchie v I. R. Commrs* ((1929) 14 T.C. 754 at 763) gave judicial recognition to those taxpayers who avoid taxes when he stated that a taxpayer is not under

the smallest obligation, moral or otherwise, so as to arrange his legal relations to his business or his property as to enable the Inland Revenue to put the largest possible shovel into his stores.

The view of Lord President Clyde has been accepted as being part of South African tax law (*CIR v Estate Kohler* (18 SATC 354 at 361); *CIR v George Forest Timber Company*

Ltd (1 SATC 20); *Hicklin v CIR* (41 SATC 179 at 195)). Well planned schemes enable the rich and sophisticated to take advantage of the so-called loopholes in the tax system and can be regarded as one of the original rights of the taxpayer. However, the right to plan one's tax affairs efficiently is often also the incubator for disputes between the taxpayer and SARS and the potential by SARS to violate a taxpayer's fundamental rights in an effort to collect as much revenue as possible to feed the coffers of the state.

From the discussion so far, it is submitted that there is really no "carrot", either by government or SARS to entice taxpayers to pay their taxes and, unfortunately, SARS then has to wield the "stick" to collect the budgeted taxes – including a portion of which appears to be wasted on corrupt activities. The blind pursuit of the collection of taxes by SARS must be tempered with adherence to the principles as espoused in our Constitution. Rather than approaching the problem of the collection of taxes with the mindset that taxpayers are presumed to be dishonest and therefore applying draconian measures to extract taxes for which the taxpayer may not even be liable, SARS should presume that taxpayers are innocent as required by the Constitution (section 35(3)(h) of the Constitution) and approach its investigations and collections from that standpoint. SARS even has a moral duty to do so. After all, it is SARS who, by publishing their Client Charter, acknowledged its obligation to "protect your constitutional rights;

- by keeping your private affairs strictly confidential
- by furnishing you with reasons for decisions taken
- by applying the law consistently and impartially."

It is interesting to observe that the Client Charter did not specifically include a very important constitutional safeguard as provided for in the section 33 right to just administrative action – for SARS to make decisions that are based on "reasonableness". A copy of the SARS Client Charter was printed on the back of each tax return sent to a taxpayer for completion (Forms IT12 and IT14) until a few years ago. Unfortunately, a recent search of the SARS' website reveals that a transcript of the Client Charter is nowhere to be found – not even in their archival records. This is not only surprising, but also

disturbing. One can only assume that the top management of SARS has taken a conscious decision to withdraw the Client Charter without any proper notification to the taxpaying public of its withdrawal. Is this an indication that SARS does not want to make known to the taxpayer SARS' formal constitutional obligations or is there a perfectly innocent explanation? Perhaps SARS can explain it away by arguing that its new Service Charter (SARS 2012b) takes the place of the Client Charter – but the Service Charter does not even mention the word “Constitution” and specifically does not mention that SARS will protect the constitutional rights of taxpayers.

Even if SARS is reluctant to formally acknowledge its obligations to uphold the fundamental rights of taxpayers, the judiciary is there to protect the taxpayer. Thus, the remainder of this chapter will focus on a summary of the conclusions reached, recommendations made and areas of taxpayers' rights that need further research, bearing in mind the values underpinning the Constitution, which is the supreme law of South Africa. A final word synthesising the chapters that constitute this thesis will be presented in the last paragraph of this thesis.

8.4 SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The starting point or foundation for the exploration, analysis and discussion of taxpayers' rights is the Constitution. However, the Constitution and the rights of taxpayers that arise from it, still need to be fully interpreted by the judiciary. The approach to the interpretation of fiscal legislation must be done strictly in accordance with the dictates of the Constitution (section 39(2) of the Constitution). The approach to be followed in interpreting fiscal legislation is discussed in Chapters 2 and 3 and the conclusions reached in those two chapters are summarised in the next sub-paragraph.

8.4.1 The winds of change – the purposive approach to interpreting fiscal statutes and fingerprinting the judicial aids used in such an approach

The Constitution is not merely another piece of legislation. It is the centre of the South African legal system. Virtually every matter that proceeds to court, including fiscal

challenges, has some or other constitutional connotation if one digs deep enough. The Constitution is the supreme law of South Africa and it dictates how statutes are to be interpreted (section 39(2) of the Constitution). It also prescribes and determines the scope and ambit of any executive or administrative action that may be taken by government and the organs of government (section 33 of the Constitution which ideals are embodied in the Promotion of Administrative Justice Act and the Promotion of Access to Information Act (Act No. 2 of 2000)).

The interpretation of statutes in terms of the Constitution requires an approach by the judiciary that takes into account the founding values of the Constitution, namely the protection of the liberty of a person, his or her property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. The approach advocated by the Constitution to the interpretation of legislation is the antithesis of the approach that was adopted, especially in fiscal matters, during the era of parliamentary sovereignty prior to 1994.

Chapters 2 and 3 of this thesis were a journey of discovery as regards the interpretation of fiscal legislation. Chapter 2 commenced with an analysis of some of the earlier decided cases that postulated that fiscal legislation was to be interpreted differently to other legislation. A “strict and literal” approach was followed and the judiciary justified the approach on the basis that there is “no equity about taxation” (*CIR v Simpson (supra)* at 285; *New Union Goldfields Limited v CIR (supra)* at 15; *CIR v Nemojin (Pty) Ltd (supra)* at 267)). This notion was questioned from time to time by the judiciary but inevitably, they returned to the “strict and literal” approach to interpreting fiscal legislation until the adoption of the Interim Constitution in 1994, which compelled a change in the approach. It became generally accepted by the judiciary, thereafter, that the so-called “purposive” approach to the interpretation of legislation, which, with a little modification to conform to the founding principles of the Constitution, is the approach that must be followed (*S v Makwanyane and Another (supra)* and approved in *S v Zuma and Others* (1995 (2) SA 642 (CC) at 651); *Minister of Land Affairs v Slamdien* (1999(4) BCLR 413 (LCCC)). The “purposive” approach to interpreting legislation is similar to the approach espoused by the

old Roman-Dutch authorities and is thus part of our common law. Unfortunately, the common law approach to the interpretation of fiscal legislation prior to 1994 had been corrupted by the English “strict and literal” approach to the interpretation of fiscal legislation.

It is ironical, therefore, that whilst the South African judiciary continued, generally, to follow the “strict and literal” approach to the interpretation of fiscal legislation, the English judiciary, with Lord Denning leading the way, migrated to the “purposive” approach in the 1970s, some 20 years earlier than when the South African judiciary was compelled to follow suit (*Davis v Johnson* ([1978] 1 All ER 841; *Pepper (Inspector of Taxes) v Hart* ([1993] 1 All ER 42)). It is submitted that the South African judiciary, prior to 1994 when the Apartheid regime governed the country, was actively complicit in the pollution of our common law. Its judgements were particularly executive-minded and it even appeared to have tolerated and accepted legislation that violated human rights principles generally. The protection of taxpayers’ rights was not high on the judiciary’s agenda but every so often the judiciary would surprise by handing down a judgement that took into account fairness, justice and equity in fiscal disputes.

The “purposive” approach to the interpretation of statutes requires something more than just establishing the “intention of Parliament”. The history of the provision, its broad objects, the constitutional values that underlie it and its interrelationship with other provisions of the statute, whilst not violating the precise wording of the provision, must all be considered in establishing the purpose of the statute (*Minister of Land Affairs v Slamdien*) (*supra*).

Where the wording of the legislation was clear, the “strict and literal” approach to its interpretation was relatively simple. However, where the wording was unclear or where it led to absurd results, the judiciary then attempted to establish the “intention of Parliament”. To do this, certain aids, both internal and external, and centuries-old common law presumptions were used to assist in the process.

Accordingly, in Chapter 3, the aids and presumptions that were used in establishing the “intention of Parliament” under the “strict and literal” approach to the interpretation of statutes were fingerprinted and analysed to determine the part that such aids and presumptions could play under the “purposive” approach. The analysis indicated that all the aids, both internal and external, and presumptions used under the “strict and literal” approach to the interpretation of statutes, are still valid aids under the “purposive” approach. In fact, the use of certain aids, for example, the use of the Hansard Reports, which were prohibited under the “strict and literal” approach (*More v Minister of Co-operation and Development* (1986(2) SA 102(A)), would now seem to be valid aids to assist in the interpretation of a statute under the “purposive” approach.

Statutes are passed by Parliament. Accordingly, the punctuation, the preamble, the long and short titles of a statute, the definitions – unless the context indicates otherwise – and even an unofficial language version of a statute – English or Afrikaans – may be used as a so-called internal aid to the interpretation of a statute. The Constitution and precedent-setting judicial decisions that interpret legislation, however, still remain the most important external aids. Textbooks and dictionaries are also often consulted.

The “purposive” approach to the interpretation of statutes lends itself to the criticism that the judiciary has it in its power to make law. This criticism is only superficially true. In order to meet the dictates and founding principles of the Constitution, the power given to the judiciary to interpret legislation can never be regarded as a power to make law. It is rather the power to interpret legislation in accordance with the founding principles of the Constitution. Where, for example, the judiciary is called upon to interpret legislation that was originally interpreted under the “strict and literal” approach but now needs to be reinterpreted in the light of the founding principles of the Constitution, this is not “making law” but rather adhering to the presumption that a statute is “always living”.

Aids and presumptions are not normally used in isolation. They are rather used to reinforce and support the underlying purpose of a provision and thus the interpretation decided upon. They are the building blocks upon which decisions are based. These aids add depth to the analysis of the scope and ambit of a statute. Their expeditious use is a vital

ingredient in the interpretation of legislation that usually leads to a logical and fair interpretation of a statute.

The overall conclusion of Chapters 2 and 3 can be summed up as follows: statutes must now be interpreted in a “purposive” manner to conform to the dictates of the Constitution. Any interpretation that leads to unfairness, inequality, loss of human dignity or injustice is unacceptable and may be challenged by the taxpayer in a higher court. Aids, both internal and external, and presumptions, are used to assist in establishing the “purpose” behind the legislation. The common law presumptions that are used are value-based and conform to the founding values of the Constitution. There are no “holy cows” and even precedent-creating decisions of the past can be overturned when they are in conflict with the principles underpinning the Constitution. If the spirit and purport of the Constitution are being upheld, then an element of justice and equity automatically follows. The endorsement of administrative or even judicial expediency in the interpretation of statutes should never take priority over justice, fairness and equity.

8.4.2 Revenue’s unfair advantage – practical application and constitutionality of reverse onus of proof provisions and presumptions contained in the Income Tax Act and the Tax Administration Act

Chapter 4 of this thesis analysed the constitutionality of some the more important so-called reverse onus of proof provisions contained in the Income Tax Act, namely –

- the general reverse onus of proof provision contained in section 82;
- the imposition of additional tax or administrative penalties in terms of section 76; and
- the imposition of criminal sanctions in terms of section 104.

The core of the chapter is based on an accredited journal article published in 2009 when it was concluded that the three reverse onus of proof provisions of the Income Tax Act analysed, *prima facie*, infringed upon one or more fundamental rights of taxpayers.

The chapter concluded that the reverse onus of proof provisions of the Income Tax Act that provide for administrative penalties or additional tax to be imposed (section 76(5)) and for the imposition of criminal sanctions (section 104(2)) were constitutionally unsound and it was recommended that those sections should be amended to bring them into line with the Constitution. No recommendation was made in respect of the general onus of proof provision as contained in section 82 as it was concluded that the provision would probably pass constitutional muster as being reasonable and justifiable in an open and democratic society (section 36 of the Constitution).

Some three years after the publication of the core article to this chapter, the Tax Administration Act was promulgated. The new legislation replaces the administrative provisions of the Income Tax Act and several other revenue statutes with effect from 1 October 2012. The general onus of proof provision contained in section 82 of the Income Tax Act has been taken over, virtually intact, by section 102(1) of the Tax Administration Act. Thus, there has been no change. The reverse onus of proof remains and thus the conclusion reached in the core article is the same – it is *prima facie* unconstitutional but probably passes constitutional muster on the basis that it is a reasonable and justifiable limit on a taxpayer's fundamental rights.

There has, however, been a welcome shift in the onus of proof provisions of the Income Tax Act that relate to the imposition of administrative additional tax or penalties (section 76). Section 104(2) of the Tax Administration Act provides that the onus of proof is on SARS as from 1 October 2012 to justify any administrative penalty imposed in terms of sections 221 to 223 of that Act. A behavioural table in section 223(1) prescribes the extent of the penalty to be imposed.

There are still some constitutional concerns regarding section 235 of the Tax Administration Act, which provides for criminal penalties and sanctions to be imposed on a taxpayer who is involved in tax evasion. This new section corresponds to section 104 of the Income Tax Act, which also provided for criminal sanctions to be imposed. Unfortunately, section 235(2) of the new legislation includes a presumption that the taxpayer is guilty of tax evasion unless he or she can prove that there is a reasonable possibility that he or she

was ignorant of the falsity of the statement made and that the ignorance attributed to the statement was not due to negligence on his or her part. Although SARS dismisses this constitutional concern calling it merely an “evidentiary” burden, the constitutional implications will still have to be decided upon by the judiciary.

Chapter 4 also attempted to compare the practical application of the imposition of administrative penalties in terms of section 76 of the Income Tax Act to the new penalty regime, which has as its basis a behavioural table in the form of a matrix. The conclusion reached is that the use of the new behavioural table contained in section 223 of the new legislation will lead to a dramatic decrease in the level of administrative penalties that may be imposed by SARS. It will lead to a fairer and more equitable regime that is in line with the founding principles of the Constitution.

The overall conclusion for Chapter 4 can be summarised as follows: the general reverse onus of proof provision remains intact under the Tax Administration Act with all the constitutional concerns remaining. The change in the onus of proof provision regarding the imposition of administrative understatement penalties theoretically protects a taxpayer from unjust administrative action, decisions and conduct by SARS. It is not merely a cosmetic change but is a real and welcome change. However, there is still a concern in relation to the reverse onus of proof presumption created by section 235(2) of the new legislation where criminal penalties and sanctions are imposed for tax evasion activities by the taxpayer. The judiciary will ultimately have to determine its constitutionality, if challenged by a taxpayer.

8.4.3 The taxpayer’s quest for administrative justice and the protection of other fundamental rights – clean hands, good facts, due legal process and the human element

Although the 1996 Constitution makes no reference to the principle of direct or indirect application of the Bill of Rights (unlike the Interim Constitution where such distinction was made), the judiciary still appears to adhere to this principle. It still first looks to apply indirectly the founding principles of the Constitution to legislation (such as the Income Tax Act and the Promotion of Administrative Justice Act) by reading down and adapting the

legislation to the constraints of the Constitution rather than declaring the legislation unconstitutional and therefore invalid by direct application of the Constitution and possibly creating a legal vacuum.

The principle of indirect application is probably one of the main reasons why taxpayers, with one exception (*First National Bank of SA Ltd t/a Wesbank v CIR and Another* (64 SATC 471)), have had little success in attacking the constitutionality of fiscal legislation to date. Furthermore, if the judiciary should interpret fiscal legislation directly, SARS is able to argue that the legislation, although violating a taxpayer's fundamental right, is "reasonable and justifiable in an open and democratic society" (section 36 of the Constitution), thereby meeting the expectations of the Constitution. Designedly, however, the section 36 limitation of rights clause only applies to laws and does not apply to the conduct of government officials who are empowered to implement the laws. Many legislative provisions provide for a government official to exercise his or her discretion in a particular manner. Where the discretion granted to a government official is too wide – usually because the draftsman of the provision finds it difficult to articulate what the legislature really intends – the legislature is relying on the good sense of the official to make the right decision.

Where any official, including an official of SARS, exercises his or her discretion in an unreasonable, unfair, unjust or unlawful manner, it could violate one or more of a person's fundamental rights but usually this would be a violation of the section 33 constitutional right to just administrative action as embodied in the Promotion of Administrative Justice Act. Any unreasonable decision, action or conduct by SARS cannot be saved by the section 36 limitation of rights clause.

Chapter 5 of this thesis, therefore, argued that if the taxpayer approaches the court with clean hands and good facts, the judiciary finds this an irresistible combination. Where clean hands and good facts are presented to the court by the taxpayer in support of his or her application for relief, it is submitted that the conduct, action or decision-making process of SARS, *prima facie*, is probably flawed and thus unreasonable. Reasonableness, it is further

submitted, is the cornerstone of the section 33 right to just administrative action if applied directly and is also embodies the principles of natural justice. The word “reasonable” is thus also the cornerstone of the Promotion of Administrative Justice Act when the provisions of that Act are applied indirectly to the values underpinning the Constitution in general and the right to just administrative action in particular. It is important to reiterate at this point that in an indirect application of the provisions of the Constitution, the provisions of the Income Tax Act and other revenue legislation as well as Promotion of Administrative Justice Act are applied first before resorting to applying the provisions of the Constitution directly. In *Carephone (Pty) Ltd v Marcus NO* (1998 (10) BCLR 1326 (LAC) at 1336F–1337B), a case decided before the promulgation of the Promotion of Administrative Justice Act and where the court, therefore, had to apply the provisions of section 33 of the Constitution directly, it was held that the word “just” as used in section 33 meant “able to be legally or morally justified, able to be shown to be just, reasonable or correct”.

Where, however, the taxpayer approaches the judiciary for relief from a decision or action of SARS, such as a decision to apply the so-called pay-now-argue-later provisions (sections 88 and 91 of the Income Tax Act but now embodied in sections 164 and 169 of the Tax Administration Act), the appointment of an agent to collect outstanding taxes on behalf of SARS (section 99 of the Income Tax Act but now embodied in section 156 of the Tax Administration Act), obtaining a search and seizure warrant (section 74D of the Income Tax Act but now embodied in sections 59 to 62 of the Tax Administration Act) or even deciding to search and seize the property of a taxpayer without a warrant as provided for in terms of section 63 of the Tax Administration Act, the taxpayer is unlikely to obtain the relief sought if he or she has dirty hands. There is one exception to this: where SARS does not strictly follow the procedures as set out in the legislation, which amounts to procedural unfairness. A court will set aside the decision made no matter how convincing the merits of SARS’ arguments may appear to be. Thus, dishonest taxpayers may be able to rely on the due process or procedure of law to obtain relief from, for example, an investigation by SARS that calls for an audit, the supply of information or even a search and seizure warrant. Normally, however, the relief is only temporary in nature. SARS will then have to pursue other avenues of attack if it so wishes after having corrected the procedural deficiencies.

The dirty hands concept is not one-sided. SARS should be careful, in its endeavours to administer fiscal legislation, not to cross the threshold of reasonable, fair, just and lawful behaviour. If SARS crosses the threshold of what constitutes constitutional behaviour, it may also be accused of dirty hands when attempting to defend its actions. So-called “fishing expeditions”, where SARS employs the most draconian procedures to search and seize the property of a taxpayer without first exploring other less invasive procedures falls into this category. The provision for a warrantless search in terms of section 63 of the Tax Administration Act now ostensibly aids, it is submitted, SARS in conducting “fishing expeditions” to see what it can find to implicate a taxpayer in a tax offence. Warrantless searches must be able to stand up to the same standards as a judicially sanctioned search warrant and the judiciary is obliged to police this aspect with great care.

The taxpayer can exercise or protect his or her fundamental rights, when they are violated, by applying to the High Court for the granting of remedies such as interdicts and declaratory orders against SARS (*Singh v C:SARS* (65 SATC 203), which remedies are now also provided for in terms of the Promotion of Administrative Justice Act. Attacking the unfair, unreasonable, unjust or unlawful actions on the part of SARS by application to a High Court is far easier and more quickly resolved than a direct attack on the constitutionality of legislation, which could take years of litigation to resolve. But an application to a court is an expensive exercise for a taxpayer. Unfortunately, the Tax Court, at present, has no jurisdiction to hear constitutional issues or to grant remedies such as interdicts and declaratory orders (*ITC 1806* (68 SATC 117)). It is recommended that the jurisdiction of the Tax Court should be extended to constitutional issues and the granting of interim or even final relief to taxpayers. After all, the Tax Court is presided over by a judge of the High Court. The empowerment of the Tax Court could alleviate the present lengthy time and cost issues involved in attacking the constitutionality of legislation only through the High Court.

The overall conclusion for Chapter 5 can be summarised as follows: the section 33 right to just administrative action as embodied in the Promotion of Administrative Justice Act, through the intervention of the judiciary, humanises the Constitution. Where a taxpayer fails in his or her endeavours to have legislation declared unconstitutional, the judiciary, it is submitted, can always apply the right to just administrative action where fairness, justice and equity are demanded. Effective government and the proper collection of taxes are important. But so too are the rights of taxpayers.

8.4.4 Are some taxpayers more equal than others? – judge for yourself: An appraisal of the ambit of the constitutional right to equality in South African tax law and its practical application

“Discrimination” and “racism” are two ugly words associated with South Africa’s political and social history. Chapters 6 and 7 of this thesis examined the thorny issue of equality from a fiscal point of view.

In Chapter 6, the theoretical framework underlying the ambit of the section 9 right to equality within a fiscal context was analysed and discussed. Unfortunately, there have been no judicial decisions to date that have focussed exclusively on the right to equality from an income tax perspective. There have been decisions, however, from closely allied areas of law (insolvency law and the imposition and collection of municipal rates and taxes) that, it is submitted, enable an extrapolation of the ambit of the right to equality into the income tax arena. The right to equality was discussed more from a substantive law point of view than from the blatantly obvious discriminatory provisions that were scattered throughout the Income Tax Act until 1994 and even beyond that date until repealed.

In Chapter 7, a decision tree was developed from the Constitutional Court judgement handed down in *Harksen v Lane, NO and Others* (1997 (11) BCLR 1489 (CC)) that assists – by extrapolation from insolvency law – in determining whether a piece of legislation contained in the Income Tax Act or other revenue legislation fails or passes the test of constitutionality. It is referred to as the *Harksen* three-step approach and has been endorsed

in subsequent Constitutional Court decisions. Section 23(m) of the Income Tax Act is one piece of legislation that was targeted for analysis in Chapter 7 as it appears discriminatory and unfair. Section 23(m) prohibits an employee taxpayer who receives remuneration, other than remuneration derived wholly or mainly in the form of commission, from claiming certain deductions associated with his or her trade. The section does not deny other taxpayers, such as employees who earn their income wholly or mainly in the form of commission or as sole traders, who do not fall into the category of employees and who earn their remuneration wholly or mainly in the form of a salary, from claiming exactly the same or similar expenditure as a deduction.

In Chapter 6, which discussed the theoretical framework for determining the ambit of the right to equality, several conclusions were reached, namely:

- Unequal treatment by the state or any other person does not only refer to discriminatory legislation but extends to discriminatory practices or conduct by a state official. Furthermore, the section 36 limitation of rights clause can never save an action, decision or conduct by a state official that is discriminatory if it is also unfair (*City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)) and also Chapter 5 generally).
- The violation of the right to equality is not limited to one or more of the 17 grounds of discrimination listed in section 9(3) of the Constitution. This is particularly the case where human dignity is involved (*Harksen v Lane*) (*supra*).
- The right to equality extends to juristic persons in the appropriate circumstances.
- It appears permissible that the state may introduce legislation in terms of section 9(2) of the Constitution as a positive measure to right the wrongs and injustices of the past (*City Council of Pretoria v Walker* (*supra*)). The Income Tax Act is not excluded from this positive measure. However, to date, no such legislation has been introduced in the Income Tax Act.

- The minority judgement of O'Regan J in *Harksen v Lane (supra)* is considered a precedent for determining how to apply the section 36 limitation of rights clause in the Constitution relating to equality challenges of legislative provisions.
- “Arbitrary” legislation has been found not to be “reasonable or justifiable” and thus cannot be saved by the section 36 limitation of rights provision (*First National Bank of SA Ltd t/a Wesbank v CIR and Another (supra)*).
- Unequal taxation provisions on the basis of gender, marital status, sexual orientation and religion have been removed from the Act. A few sections relating to age remain. However, there are good reasons for some of these discriminatory sections to remain.
- Foreign decisions by countries with similar constitutions to that of South Africa have played a major role in the interpretation of fundamental rights in South Africa while the Constitution was still in its infancy, but this no longer appears to be the case. It is submitted that the South African judiciary is increasingly refraining from using foreign decisions to interpret the right to equality, as the South African Constitution is more liberal than most foreign constitutions, and it is difficult to match the spirit of *ubuntu* and the object of recognising the injustices of the past to foreign constitutions. However, foreign decisions remain a starting position if there is no South African decision on the point.
- The core of the right to equality for a natural person is human dignity (*Harksen v Lane (supra)*), and a wide meaning should be attributed to human dignity. Alibertyn's (2007: par 4.8.22(h)) view that distinctions made on the basis of working status, poverty or geographic location impair a person's dignity, is endorsed. Her view accords with the stated objective of the Constitution to recognise the injustices of the past, and gives substance to the right to equality.

- Unfair or discriminatory decisions, actions or conduct of SARS in obtaining information from a taxpayer, assessing such person to taxes and collecting taxes due, may fall foul of the section 9 right to equality as well as to the section 33 right to just administrative action (see also Chapter 5 in this regard). The section 33 right to just administrative action as embodied in the Promotion of Administrative Justice Act can also be advanced to prevent SARS from making decisions or applying legislation in a manner that treats taxpayers unequally or where there is an element of discrimination involved.
- The South African concept of “equality” may evolve over time, and what is now considered fair discrimination may be regarded as unfair discrimination in future.

In Chapter 7, the relationship between a “rational connection to a legitimate government purpose” enquiry and the “justification” clause in terms of the section 36 limitation of rights clause of the Constitution was examined. The conclusion reached was that policy choices, political interference, unreasonableness or even inappropriateness, probably do not detract from a legitimate government purpose and are only addressed at the justification stage. Arbitrary differentiation, on the other hand, is not a legitimate government purpose and any legislation that is arbitrary immediately violates the right to equality – as well as other rights such as the right to property - and it is not necessary to take the process further. Arbitrary legislation can never be saved under the section 36 limitation of rights clause of the Constitution.

It is submitted that it appears easier for the taxpayer to attack the constitutionality of discriminatory legislation on the basis that the discrimination legislated for is not reasonable and justifiable in an open and democratic society (section 36 of the Constitution), rather than relying on the rationality enquiry. Perhaps the rationality enquiry is superfluous and can be dispensed with because the justifiability test in terms of section 36 is the ultimate deciding factor or tie-breaker as to whether the discriminatory legislation is constitutional or not.

The relationship between administrative capacity, rationality and justification was also examined in Chapter 7. The conclusion reached was that discriminatory fiscal legislation introduced merely to alleviate the administrative burden, such as staff or skills shortages, or to save costs, rather than to pursue a legitimate government purpose such as the stimulation of the economy, is not considered important enough on its own, to override a person's constitutional rights. The Constitution and the fundamental rights associated with it would not be worth the paper it is written on if the administrative capacity argument by SARS or any other state department is sustainable. In effect, SARS would never have to defend or properly justify any discriminatory revenue legislation other than to advance the argument that the purpose of the legislation introduced was to ease the administrative burden.

Section 23(m) of the Income Tax Act, as already mentioned, was tested against the decision tree developed in this thesis based on the decisions of the Constitutional Court in terms of the application of the *Harksen* three-step approach to the determination of whether a piece of legislation violates a person's right to equality. The acknowledged reason for section 23(m) being introduced is to alleviate the administrative burden of SARS and it is for this reason that section 23(m) should fail the section 36 "justifiability" test of the Constitution and be declared unconstitutional. Section 23(m) is too rigid and overbroad and is therefore incapable of justification and may not even pass the "rationality" test as the legislation, when examined closely, has been shown to be "arbitrary" in certain situations.

The decision tree was also used as an aid to determine whether the tax regime of a progressive rate of taxation for individuals is constitutional. It was concluded that progressive rates of taxation do not impair the dignity of a taxpayer and thus the differentiation is fair.

The overall conclusion for Chapters 6 and 7 can be summarised as follows: equality transcends mere procedural equality that is patently obvious and delves into the subtle shades of discrimination or inequality that is not so obvious. The substantive meaning of equality provides a basis for a taxpayer to challenge legislation and the actions and conduct

of SARS officials when the taxpayer's fundamental right to equality is violated. The legislature in general and SARS in particular, should never attempt to subvert the founding principles and the fundamental rights as guaranteed by the Constitution by claiming, as they did when introducing section 23(m) of the Income Tax Act, that the purpose for the introduction of the discriminatory legislation is to assist SARS in overcoming administrative capacity such as a staff or skills shortage or even to act as a cost-cutting exercise. The protection of fundamental rights should never give way to administrative expediency.

8.5 AREAS WHERE FURTHER RESEARCH IS NECESSARY

In the various chapters that constitute this thesis, several recommendations were made for further research to be conducted into taxpayers' rights in areas that were considered to be beyond the scope of this thesis. Further research is necessary so that a complete picture can be obtained regarding the fundamental rights of a taxpayer during the course of a tax investigation by SARS and the potential imposition of penalties, especially criminal penalties, either in terms of section 235 of the Tax Administration Act or even common law fraud arising from the tax investigation.

The other areas identified for further research (not in order of importance) in this regard, include, *inter alia* -

- the demand for information from a taxpayer by SARS – by letter or even requiring the attendance of the taxpayer at an inquiry (previously sections 74B and 74C of the Income Tax Act but now embodied in sections 45 to 58 of the Tax Administration Act);
- the powers of search and seizure by SARS – the procedural law issues rather than the substantive law issues that have been discussed in Chapter 5;
- the *audi alteram partem* doctrine and the admissibility of hearsay evidence;

- the freezing of a taxpayer's bank account without reference to or authority from the judiciary;
- the applicability of privileged communications, especially between an attorney or advocate and his client and between spouses (section 14(d) of the Constitution);
- the right of access to documents and evidence in the possession of SARS in terms of the Promotion of Access to Information Act and the discovery of documents;
- the Alternative Dispute Resolution procedures;
- the awarding of costs of litigation by the Tax Court;
- the constitutionality of granting a tax amnesty;
- the lifting of the corporate veil in tax avoidance and tax fraud cases;
- the right to remain silent and not being compelled to give self-incriminating evidence (section 35(1)(a) of the Constitution);
- when criminal charges may be brought against taxpayers;
- the right of access to courts (section 34 of the Constitution);
- how, when and where tax audits may be conducted;
- the right not to be tried twice for the same offence; and
- the legitimate expectation of a taxpayer, the common law right of estoppel and the finality of assessments including the prescription of assessments and debts due to the State.

8.6 OVERALL CONCLUSION, SYNTHESIS AND THE FINAL WORD

No apology is offered for basing this thesis on an analysis and discussion of taxpayers' rights and generally siding with the taxpayer when appropriate. After all, the general objective of the research done for this thesis has been to identify, analyse and appraise the scope and ambit of the rights of taxpayers from a constitutional perspective and discuss how

and when these rights are protected by the judiciary. If there is any perceived bias in favour of the taxpayer as a result of meeting the objectives of this thesis, it is only to the extent that revenue legislation and the actions of SARS, objectively analysed, infringe taxpayers' rights in terms of the Constitution generally and the Bill of Rights specifically, including any reasonable and justifiable limitations on these rights. Usually this occurs when SARS interprets its powers too widely or does not evaluate the factual situation with any great care.

The law and the facts are the two vital components of any legal challenge. Two chapters of this thesis (Chapters 2 and 3) covered the law, specifically the interpretation of fiscal statutes within a constitutional environment. The next chapter (Chapter 4) covered the facts, specifically regarding the application of the onus of proof provisions contained in the Income Tax Act and the new Tax Administration Act. Chapter 5 also dealt with the facts, especially where clean hands and good facts are involved when judicial relief is sought from unreasonable, unfair, unjust and even illegal decisions of SARS in terms of the section 33 right to just administrative action. The final two chapters (Chapters 6 and 7) dealt with both the facts and the law in the context of the section 9 right to equality.

The major overall conclusions reached are as follows:

- Although the Constitution does not differentiate between direct and indirect application of the provisions of the Constitution, the judiciary still prefers to make the distinction and apply the underlying values of the Constitution in its interpretation of legislation indirectly ("reading down") in the first instance before resorting to applying the provisions of the Constitution directly and declaring legislation unconstitutional and therefore invalid, which thereafter may create a legal vacuum.
- In the same way, when adjudicating on whether the decisions, actions and conduct of the officials of SARS measure up to the standards of behaviour demanded by the Constitution, the judiciary also apply the provisions of the Constitution indirectly wherever possible. The judiciary would rather find a non-constitutional remedy first before resorting directly to constitutional remedies. Thus, for example, the remedies

contained in the Income Tax Act, the Tax Administration Act and the Promotion of Administrative Justice Act are applied first before resorting directly to the provisions of the Constitution.

- Although the concept of the rule of law is often quoted as a precept that should be adhered to by any legal system, the concept, whether it is interpreted narrowly or broadly, means different things in different countries. The underlying values and principles of the South African Constitution accord almost exactly with the internationally accepted definition of the rule of law. Thus, when the judiciary refers to the rule of law in South Africa, it is submitted that it is also complying with the principles and values that underpin the Constitution.
- Statutes must now be interpreted in a “purposive” manner to conform to the dictates of the Constitution. There are no “holy cows” and even precedent-creating decisions of the past can be overturned when they are in conflict with the principles underpinning the Constitution. Administrative or even judicial expediency in the interpretation of statutes should never take priority over justice, fairness and equity.
- The general reverse onus of proof provision remains intact under the Tax Administration Act but there has been a welcome change to the onus of proof provisions especially where administrative understatement penalties are involved. There are still constitutional concerns where criminal penalties are involved and ultimately the judiciary will have to determine the constitutionality of any reverse onus of proof or presumptions remaining in the Income Tax Act or now included in the Tax Administration Act.
- The section 33 right to just administrative action as embodied in the Promotion of Administrative Justice Act “humanises” the Constitution. Where an official of SARS makes a decision or decides on a course of action that is unreasonable and results in unfairness or injustice, the judiciary is inclined to rescue the taxpayer especially where the taxpayer has clean hands and good facts to support his or her application

for relief. The judiciary should not permit SARS, of course only when it is brought to its attention by a taxpayer, to exercise its powers at the expense of human rights.

- The substantive meaning of equality provides a basis for a taxpayer to challenge legislation and the actions and conduct of SARS officials when his or her fundamental right to equality is violated. Introducing discriminatory or unfair legislation because of a staff or skills shortage should not be permitted. To permit such legislation strikes at the heart of the values of the Constitution.

The overall conclusions reached in this thesis are all but redundant if the taxes collected by SARS are not utilised properly. The proper use of taxes collected fuels the economy. That the government of the day uses the taxes collected in an efficient, economic and effective manner as prescribed by the Constitution (section 195(1)(b)), is a constitutional right of a taxpayer. Bribery, corruption or even just plain mismanagement or inefficiency on the part of government and state organs should be challenged by all citizens of the country.

The onus is on the judiciary to protect the rights of all people living in South Africa by looking over the shoulders of the legislature, the government and the SARS' officials who collect and administer the finances of the country. The judiciary should not be afraid to clip their wings where appropriate. It is also important that the judiciary be prepared to grant the appropriate constitutional remedy, whether directly or indirectly, where a person's fundamental rights have been infringed. If they are not prepared to do so, then they will be guilty of betraying the principles underlying the Constitution. They will be no different to those judges who stood back during the Apartheid era and permitted gross human rights violations by the government in power at that time to take place. The judiciary, together with the legislature and the executive, has the authority to determine an equitable, fair and just administrative system of taxation that also takes into account administrative efficiency based on the founding values of the Constitution. The foundations, it is submitted, have been laid but the rights of taxpayers in terms of the Constitution are only as wide or restrictive as the judiciary permits them to be. However, the wideness or restrictiveness of the rights of taxpayers can only be determined by litigation. It is acknowledged that the cost

of litigation is expensive and is therefore out of reach of the majority of taxpayers, but if the litigation option is not exercised, SARS will not take the concerns of taxpayers seriously and constitutional protection will have no real meaning. Only by litigation will the extent of taxpayers' rights be determined. It is submitted that there is still a long road to travel in this regard.

Tax is part of the price paid for living in a regulated society. Therefore, the unequivocal acknowledgement and application of taxpayer's rights is part of the price that the state – and SARS - has to pay for a fair, just and efficient tax system.

Marcus Tullius Cicero (Quoteland 2012), *circa* 44 B.C., explained the executive role of government as follows:

The administration of government, like a guardianship ought to be directed to the good of those who confer, not of those who receive the trust.

Du Toit (Financial Mail 1999), a member of the Katz Commission, sums up the administrative role of SARS after 1994 as follows:

“The overall job of revenue administration is not to get in the money at all costs; it is to administer our tax laws with efficiency and dispassionate objectivity. That involves both collection from, and protection for, the taxpayer.”

It is submitted that should the government heed the words of Cicero and SARS the words of du Toit, then the founding values of the Constitution will be fulfilled. Government and SARS will then have the moral high ground. It is an iniquitous situation where the government of the day is seen to be corrupt at the worst but inefficient at the least and with SARS being perceived as using unconstitutional methods to collect taxes that feed the corruption and inefficiencies of government whilst still requiring taxpayers to pay their so-called “fair share of taxes”.

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The four articles reproduced in this thesis were published in two different peer reviewed accredited journals. Although both journals used the Harvard method of referencing, there are slight variations in their presentation. This bibliography consolidates the list of references of the four reproduced articles as well as the list of references used in the unpublished articles and the synthesizing paragraphs between chapters. Thus, for the purposes of consistency, the presentation of the bibliography that follows, although also using the Harvard method of referencing, may differ slightly from the bibliographies or reference lists presented in both the published and unpublished articles used as the core articles for the chapters of this thesis.

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