Home Office Expenditure:

A critical analysis of the applicable law governing the deductibility of *home workspace* expenses incurred by persons in employment - given the shift to working from home.

A minor dissertation submitted to the Department of Finance and Tax, University of Cape Town, in partial fulfilment of the requirements for the degree of Master of Commerce specialising in Taxation, in the field of South African Income Tax.

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Abstract

The applicable law governing the income tax deductibility of *home workspace* expenses incurred by persons in employment has remained contentious and inconclusive. This has been heightened given the accelerated shift toward employees working from home in recent years. It is therefore necessary for there to be research conducted in resolving this heightened contention, with potential legislative amendments being recommended to National Treasury, who have acknowledged that the applicable law needs to be updated.

An exposition of the applicable law over the last fifty years is provided, which includes historical analyses and the general mechanics of the law. More complex matters relating to the interpretation of the applicable law are then highlighted and analysed in light of the applicable principles of fiscal statutory interpretation (mainly using the landmark *Endumeni approach).*

The South African Revenue Service ('SARS') has attempted to update the existing Interpretation Note ('IN') dealing with *home workspace* expenditure, for which they released two drafts, both in 2021; and finalised such IN in 2022. Although SARS' interpretations are determined to not be authoritative in terms of the law, their interpretations are analysed in terms of the applicable law to identify and analyse inconclusive matters. These matters relate to the types of *home workspace* expenses that are tax deductible, and the 'tests' under section 23(b). Some of the key findings in this regard are that the legislation does not require a separate-room *home workspace*, and that all of the 'tests' should be performed for the period which an employee is working from home, even if this period is less than a full year of assessment.

Potential legislative amendments are identified, specifically in the short-term, by looking to comparable jurisdictions, namely the United Kingdom and Canada. These jurisdictions offer taxpayers a 'simplified cost' deduction which is capped to a legislated amount. Legislating a 'simplified cost' deduction accordingly will provide the fiscus more time to adequately review the applicable law substantially, given the accelerated shift toward employees working from home and heightened contention in this regard.

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Chapter 1: Introduction

1.1 Background

The on-going global pandemic, as result of the respiratory illness called coronavirus disease 2019 ('COVID-19'), has caused much disruption in the global economy and society since March 2020. COVID-19 is the disease which is caused by the newly identified coronavirus SARS-CoV-2, which emerged in China in December 2019. The virus is easily spread,[1] and can be fatal.[2]

As a result there have been various public health measures taken to contain the spread and impact of the virus- one being stay-at-home orders. By the beginning of April 2020, more than half the world's population had been ordered to stay-at-home by their governments ('lockdown')[3] which resulted in many employees working from home. A negative impact of these lockdowns, however, is that economic activity is hindered. As a result, the global economy has been in crisis- some predicting a global economic depression- unlike any since the Great Depression.[4]

The Republic of South Africa ('South Africa') went into lockdown on 27 March 2020, being one of the strictest in the world,[5] but on 23 April 2020 a gradual and phased (in terms of 'levels') easing of the lockdown restrictions was announced. Confirmed cases rose in late November 2020, with a devastating 'second-wave' occurring over the December to January period. Lockdown restrictions were tightened and eased in anticipation and response to two

[1] The virus can be spread from person to person via droplets released into the air (or onto surfaces) when a person talks, coughs, or sneezes.
[2] Lauren M. Sauer, M.S. 'What Is Coronavirus?' *John Hopkins Medicine,* available at *https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus,* accessed on 28 November 2020.
[3] Alasdair Sandford 'Coronavirus: Half of humanity now on lockdown as 90 countries call for confinement' *Euronews*, available at *https://www.euronews.com/2020/04/02/coronavirus-in-europe-spain-s-death-toll-hits-10-000-after-record-950-new-deaths-in-24-hou,* accessed on 28 November 2020.
[4] Ian Bremmer 'The Next Global Depression Is Coming and Optimism Won't Slow It Down' *Time,* available at *https://time.com/5876606/economic-depression-coronavirus,* accessed on 28 November 2020.
[5] 'Coronavirus: South Africa eases strict lockdown as cases drop' *BBC News,* available at *https://www.bbc.com/news/world-africa-54186040,* accessed on 28 November 2020.

more ‘waves’ in 2021, but due to a widely available COVID-19 vaccination and other factors, infection and death rates have stabilised in 2022.[6]

Interestingly, as early as late 2020, corporate employers began reporting a marked boost in productivity along with other benefits[7] regarding the immediate shift to working from home for their employees.[8] Therefore, even when the restrictions eased as discussed above, many corporates adopted a ‘blended’ or hybrid model of allowing their employees to work from both the office and home.[9] Indicative of this being a more permanent solution, for example, PwC US announced in late 2021 that it ‘will allow all of its 40 000 US client services employees to work virtually and live anywhere they want in perpetuity’.[10] Many companies have followed suit across the globe, with the ‘blended’ or hybrid model now arguably being more of a norm rather than the exception.[11]

Even before the COVID-19 pandemic, ‘since the advent of a reliable and robust home broadband connection earlier this decade’, working from home has indeed been on the rise.[12] Most of the world’s economies have indeed advanced into the digital age, which allows for effective work from home for increasing sectors of the global economy. As early as 2017, the City of Cape Town began incentivising the city’s employers ‘to introduce flexible working hours and working from home to try and reduce traffic’.[13] It can therefore be

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[6] ‘COVID: New cases decline by 19% worldwide, deaths stabilise’ *Al Jazeera*, available at *https://www.aljazeera.com/news/2022/2/16/covid-new-cases-decline-by-19-worldwide-deaths-stabilise,* accessed on 23 February 2022.

[7] For employers, this is mainly cost-saving which is important in aiding their economic recovery- given the economic crises discussed above.

[8] Garth Theunissen ‘SA companies are seeing surprising benefits to remote work - and now plan for a 'blended' model’ *Business Insider SA*, available at *https://www.businessinsider.co.za/sa-companies-will-allow-their-employees-to-work-from-home-2020-9*, accessed on 28 November 2020.

[9] Ibid.

[10] Jessica DiNapoli ‘PwC offers U.S. employees full-time remote work’ *Reuters,* available at *https://www.reuters.com/business/exclusive-pwc-tells-us-employees-they-need-never-return-office-2021-09-30/,* accessed on 23 February 2022.

[11] Any sort of working from home arrangements, even if they constitute a ‘hybrid’ model, will henceforth be referred to as ‘working from home’.

[12] Rani Molla ‘How remote work is quietly remaking our lives’ *Vox*, available at *https://www.vox.com/recode/2019/10/9/20885699/remote-work-from-anywhere-change-coworking-office-real-estate*, accessed on 28 November 2020.

[13] ‘Flexi-hours and working from home to fight Cape Town’s traffic chaos: report’, *BusinessTech SA,* available at *https://businesstech.co.za/news/business/165501/flexi-hours-and-working-from-home-to-fight-cape-towns-traffic-chaos-report/,* accessed on 28 November 2020.

argued that the COVID-19 pandemic merely accelerated the global shift to working from home.

In South Africa, given this accelerated shift to working from home, there was significant contemplation around the 'opportunity for many employees who did not previously claim home office expenses as allowable [income] tax deductions, to do so for the 2021 tax year (1 March 2020 - 28 February 2021)'.[14] Regarding this income tax deduction, according to KPMG South Africa:

> "The general rule is that the deductibility of expenses relating to a home office is determined with reference to section 11, paragraphs (a), (d) and (e), read together with sections 23(b) and 23(m). This means that for a home office expense to be deductible, the requirements of sections 11, 23(b) and 23(m) must all be met." [15]

The applicable law, however, is contentious. This contention has of course been heightened in light of the accelerated shift to working from home, and has gained a political element, as discussed below. There have been many opinion pieces published in the media where applicable law is summarised, however, they vary as to the interpretation thereof and are therefore inconclusive. Thus, the heightened contention persists, with the South African Revenue Services ('SARS') issuing two drafts of updated Interpretation Notes ('IN'), related to the applicable law, in 2021. The South African Institute of Taxation ('SAIT') summarises the mounting political discourse over the last two years regarding the accelerated shift to working from home and the related tax consequences as follows:

> "The application of the Legislation as it currently reads, has the effect of being an 'elitist' provision; only those taxpayers that have the luxury of maintaining a home office which is exclusively used by one member of the household for purposes of that individual's trade, may claim their expenses. This is not acceptable in the South African context where rooms are shared by more than one person, or where rooms are multi-purpose. Although, to be fair this is not necessarily only the South African context but a world-wide shift away from 'formal' work to 'nomadic' work. That stated, from our perspective, employees who are required to work from home should not be penalised because they do not fit into an historic model that is based on an individual having exclusive use of a formal home office."[16]

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[14] 'South Africa: Tax deduction for home office expenses (COVID-19)' *KPMG,* available at *https://home.kpmg/us/en/home/insights/2020/08/tnf-south-africa-tax-deduction-for-home-office-expenses-covid-19.html,* accessed on 28 November 2020. The year of assessment ending 28 February 2021 will henceforth be known as the '2021 tax year'.

[15] Ibid.

[16] South African Institute of Taxation *Re: SAIT Comments on Draft Interpretation Note 28 (Issue 3): Deduction of Home Office Expenses Incurred by Persons in Employment or Persons Holding An Office* (Published 14 June 2021), available at

1.2 Rationale for topic

There has been a drastic shift in how employees work and where they work, over the last two decades, with the applicable law arguably not accounting for this. This was apparently identified by National Treasury in the 2021 Budget Review under the Tax research and reviews section of Chapter 4: Revenue Trends and Tax Proposals. It states:

> "In light of the large-scale migration to working at home over the past year, the National Treasury will review current travel and home office allowances to investigate their efficacy, equity in application, simplicity of use, certainty for taxpayers and compatibility with environmental objectives. In recognition of the potential effect on salary structuring, this will be a multi-year project, starting with consultations during 2021/22."[17]

Under the equivalent part of the 2022 Budget Review it was stated that 'A discussion document will be published in 2022 on a personal income tax regime for remote work.'[18] This proposal by National Treasury is in the context of them being aware of the mounting political discourse as well as other jurisdictions providing tax relief in relevant circumstances. Therefore, it can be said that this research has its relevance (and even an indirect mandate) from National Treasury.

1.3 Research question / objective

The broad objective of the research in this dissertation is to analyse the current, applicable law governing the deductibility of *home workspace*[19] expenses incurred by persons in employment, and if appropriate, to suggest amendments to the Income Tax Act[20] ('ITA'). In meeting this broad objective, the following sub-objectives will be achieved:

1) An exposition of the current law, governing the deductibility of *home workspace* expenses incurred by persons in employment, including historical analyses and the general mechanics of the relevant parts of the ITA.
2) Address any complex matters relating to the interpretation of the law, in light of the applicable principles of fiscal statutory interpretation.
3) Consider SARS IN(s), to identify and analyse SARS' interpretations.

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https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpinterpre_note_28.pdf at 4.

[17] National Treasury *Budget Review 2021,* at 52.

[18] National Treasury *Budget Review 2022,* at 50.

[19] This concept will be effectively defined in Chapter 2 specifically in 2.3.2.

[20] Act 58 of 1962. All references to 'section' in this dissertation are to the relevant sections of the ITA, unless stated otherwise or shown by the context.

4) As an alternative to SARS amending their interpretations (where they are deemed to be inappropriate), potential short-term legislative amendments will be considered (including evaluating trends in other jurisdictions).

1.4 Research method

A legal interpretative research method will mainly be employed, specifically under the doctrinal research category. Historical and reform-orientated research will also be employed. Regarding the methods of collection, this will be exclusively using the method of extracting data from documents in the form of physical or electronic sources.[21] Regarding the analysis of the data so-collected:

a) A conceptual analysis of the applicable law (and any related material) will be performed to identify the applicable principles therefrom.
b) A rigorous qualitative analysis of such principles will be performed.

A comparative study of the applicable law will be conducted with justifiably comparable countries. In carrying out the above research, there will be an application of logic to documentary evidence in a rigorous analysis of the principles of the particular area of law relating to the research question.[22]

1.5 Limitations of scope

This research is only concerned with the deductibility of *home workspace* expenses for South African tax resident employees, working in South Africa for South African tax resident employers. Any international tax implications are not considered.

Specifically included in the scope of this research are: taxpayers who seek to claim any expenditure, loss, or allowance, contemplated in section 11 (which relate to their *home workspace*), which relates to their employment (in respect of which they derive remuneration). It does not consider the situation where employers bear any costs of their employees' *home workspace* expenditure, i.e. where such employer provides items or money in the form of allowances, advances, reimbursements.

[21] All sources will be referenced via footnotes using the South African Law Journal House style.
[22] Craig West & Jennifer Roeleveld. *FTX4036S Research Methods in Tax 2020*, at section 7.1.3.

Out of the scope of this research are: agent or representative taxpayers whose remuneration is normally derived mainly in the form of commissions based on their sales or turnover attributable to them; holders of office; and taxpayers not earning employment income.

This dissertation will not deal with any capital gains tax consequences, employees tax consequences, and value-added tax implications. Such taxes as well as labour law will be held constant.

The applicable law is at 1 May 2022.

1.6 Structure of the report

This dissertation is structured as follows:

Chapter 1: Introduction – This chapter contains background information, the rationale for the topic of the dissertation, the research question/objective, the research methodology, and the limitations of the scope of this dissertation.

Chapter 2: Exposition of the Applicable Law - An exposition of the current law, governing the deductibility of *home workspace* expenses incurred by persons in employment, is provided in this chapter. This includes historical analyses and the general mechanics of the law.

Chapter 3: Substantive Interpretation of the Applicable Law - More complex matters relating to the interpretation of the law are highlighted and analysed in this chapter, in light of the applicable principles of fiscal statutory interpretation.

Chapter 4: Analysis of the Relevant Interpretation Notes and Potential Solutions – In this chapter the INs are considered to identify and analyse any of SARS' interpretations relating to the inconclusive matters analysed in Chapter 3, but also where SARS interpretations are materially different from those provided in both Chapter 2 and 3. It is also determined whether INs constitute any legal authority. Lastly, potential legislative amendments are considered.

Chapter 5: Conclusion - This chapter contains a summary of the key findings and recommendations to National Treasury.

Chapter 2: Exposition of the Applicable Law

2.1 Introduction

In this chapter an exposition of the current law, governing the deductibility of *home workspace* expenses incurred by persons in employment, will be provided. The applicable law is mainly in terms of the ITA.

2.2 General deduction formula and specific deductions and prohibitions

Section 11(a) read together with section 23(g), constitute the 'general deduction formula'[23]; and it is in terms of this formula that deductions are claimed by taxpayers in determining their taxable income. Watermeyer J eloquently summarised the requirements of the general deduction formula in *Port Elizabeth Electric Tramway Co. v. Commissioner for Inland Revenue:*

> "These two sections [namely, section 11(a) and section 23(g)] provide positively for what may be deducted and negatively for what may not be deducted [respectively] and thus furnish us with two apparent tests for determining what kind of expenditure may be deducted…The matter can therefore be put thus: if expenditure is incurred "in the production of income" and "wholly and exclusively for the purposes of trade" it is deductible, otherwise not."[24] (underlined for emphasis)

Section 23(g) has since been amended[25] to effectively allow for the apportionment of trade and non-trade use: it now does not require that expenditure be 'wholly and exclusively for the purposes of trade'. Rather, expenditure is prohibited 'to the extent… not laid out or expended for the purposes of trade'. In summary, in terms of the general deduction formula, section 11(a) provides a 'positive test' for what generally is deductible; and section 23(g) provides a 'negative test' for what generally is not deductible.[26]

2.2.1 Special deductions

There are various special deductions (generally in terms of section 11(c) to 11(x) [27]) and allowances which are applicable in particular circumstances. Consequently, they override

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[23] Phillip Haupt *Notes on South African Income Tax* 40 ed (2021) 108.

[24] [1936] 8 SATC 13 at 14 and 16.

[25] This amendment is effective as from the commencement of years of assessment ending on or after 1 January 1993.

[26] *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* [1983] 45 SATC 241 at 254-255.

[27] Section 11(x) brings into section 11 'any amounts which in terms of any other provision in this Part [sections 5 to 37H], are allowed to be deducted from the income of the taxpayer'. In other words, most of the special deductions (that are not deductible under section 11) and allowances are deductible under section 11(x).

the general deduction formula- both section 11(a) and section 23(g).[28] Further, according to section 23B, a relevant special deduction must be applied before the applicability of section 11(a) is considered. In other words, section 11(a) is only applicable if there are no special deductions applicable in a particular circumstance.

Therefore, in a particular applicable circumstance, a relevant special deduction will form the 'positive test'. One must therefore be aware of all the special deductions to determine their applicability, before applying section 11(a).

2.2.2 Specific prohibitions

Section 23 (excluding paragraph (g) and including sections 23A-23O) contain specific prohibitions that are also applicable in particular circumstances. Consequently, these specific prohibitions limit the operation of section 11(a)).[29] Whether or not they limit section 23(g) will be discussed in 2.4.1.3.

With regard to them overriding special deductions, *Silke on South African Income Tax ('Silke')* makes the following comments:

> "The extent to which the special deductions are affected by the prohibitions contained in s 23… has not yet been determined to any substantial degree, but it is submitted that the general principle is that the special deductions are available subject to the prohibitions contained in s 23. Nevertheless, the application of a particular prohibition [of section 23] will depend upon the special deduction concerned."[30]

There are several authorities that are discussed in such section of *Silke*, endorsing this statement.

2.3 Section 23(m) read together with section 23(b)

2.3.1 Section 23(m)

Section 23 begins, 'no deductions shall in any case be made in respect of the following matters', after which such matters are laid out in various subparagraphs.

[28] A de Koker, et al *Silke on South African Income Tax* § 8.1.
[29] A de Koker, et al *Silke on South African Income Tax* § 7.10.
[30] A de Koker, et al *Silke on South African Income Tax* § 8.1.

Of relevance, section 23(m) disallows the deduction of 'any expenditure, loss, or allowance, contemplated in section 11'[31] which relates to any employment of any person 'in respect of which he or she derives any remuneration, as defined in paragraph 1 of the Fourth Schedule [to the ITA]'[32].

Section 23(m) is specifically not applicable to a person who is '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'.[33]

Essentially, section 23(m) prohibits employees from claiming expenditure, subject to specific exceptions laid out in subparagraphs (i) to (iv) of the same paragraph. In terms of one of these exceptions, namely **subparagraph (ii) of section 23(m)**, employees can effectively claim:

> "any allowance or expense which may be deducted from the income of that person in terms of section 11 (c), (e), (i) or (j);"

The exception in terms of subparagraph (ii) specifically allows expenses deductible under section 11(c), (e), (i), or (j). For the purposes of this research, the types of expenses deductible in terms of section 11(e) will be dealt with.[34] This is because they are in respect of assets that are generally used in a *home workspace*, by employees, like a computer or desk.

In terms of another of these exceptions, namely **subparagraph (iv) of section 23(m)**, employees can effectively claim:

> "any deduction which is allowable under section 11 (a) and (d) in respect of any rent of, cost of repairs of, or expenses in connection with any dwelling house or domestic premises, *to the extent that the deduction is not prohibited under paragraph (b)."* (underlined and italicised for emphasis)

[31] As most special deductions (that are not already deductible under section 11) and allowances are deductible under section 11(x), section 23(m) is therefore limiting most deductions and allowances. The deductions and allowances so limited will henceforth be referred to as 'expenditure' or 'expenses'.

[32] Therefore, a person in employment must derive 'remuneration' (as defined in paragraph 1 of the Fourth Schedule), for section 23(m) to be applicable to them. Persons to whom this paragraph apply will henceforth be referred to as 'employees', whilst 'non-employees' refers to persons to whom the paragraph does not apply.

[33] These persons will henceforth be referred to as 'commission-earners'.

[34] These expenses will henceforth be referred to as 'section 11(e) expenses'.

The exception in terms of subparagraph (iv) specifically allows expenses deductible under section 11(a) and section 11(d). The specifically named expenses,[35] particularly 'rent' and 'cost of repairs', are submitted to be generally fixed costs[36] that relate to a *home workspace*.

2.3.2 Section 23(b)

As emphasised in italics above, subparagraph (iv) is specifically subject to the discipline of **paragraph (b) of section 23** (notwithstanding the proviso thereto), which prohibits the deduction of:

> "domestic or private expenses, including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade or of any dwelling-house or domestic premises *except in respect of such part as may be occupied for the purposes of trade*:" (underlined and italicised for emphasis)

According to *Silke*, in consequence of the exception (italicised directly above), section 23(b):

> "constitutes an effective authority for the deduction of so much of these (otherwise allowable) costs that relates to the part of the premises or house occupied for the purposes of trade..."[37] (underlined for emphasis)

It must be noted that the type of expenses which are effectively deductible in terms of subparagraph (iv) in section 23(m), read together with the exception in section 23(b), are specifically named expenses[38]; and not any and all 'domestic and private expenses'. This hasn't been decided in the courts but will be discussed further in Chapter 3. The part of a 'premises or house occupied for the purposes of trade', will henceforth be referred to as a *home workspace* to avoid any bias.[39]

Therefore, *home workspace* expenses are effectively deductible for employees in terms of the subparagraph (iv) in section 23(m) read together with the exception in section 23(b). However, these exceptions are effective authority and not actual authority for a deduction- the latter of which is granted in terms section 11(a), (d), or (e). The requirements of these sections must first be met, as they form the 'positive test'. It must still be determined if

[35] Underlined above- the 'rent' of or 'cost of repairs' of or 'expenses in connection with…'. They will henceforth be referred to as 'specifically named expenses'.
[36] An example of this is 'rent', which is usually charged on an entire premises not just a *home workspace*.
[37] A de Koker, et al *Silke on South African Income Tax* § 7.45.
[38] Notably, the wording under paragraph (b) of section 23(m) matches the wording under section 23(b). Therefore, 'specifically named expenses' henceforth refers to such expenses in terms of section 23(b) and section 23(m).
[39] The legislation has no mention of a 'home office', the use of which, it is submitted, has caused bias in terms of the interpretation of the relevant provision.

section 23(m) and section 23(b) can form the 'negative test', without section 23(g) applying. This will be discussed in 2.4.1.3.

2.4 Historical analyses

2.4.1 Section 23(b) notwithstanding the proviso thereto and notwithstanding section 23(m)

Section 23(b) in its prior (and current form), is essentially aimed at preventing taxpayers from claiming non-trade related expenses as deductions, except as it relates to certain *home workspace* expenditure.

2.4.1.1 Hickson case

It was said by Beyers JA in *CIR v Hickson,*[40] in respect of a prior equivalent to section 23(b) which did not include the proviso thereto at the time, and existed prior to the enacting of section 23(m)), that:

> ""Domestic and private expenses" are, I should say, without attempting an exhaustive definition, expenses pertaining to the household, and to the taxpayer's private life as opposed to his life as a trader. House rent and the cost of repairing the house are specifically mentioned. Other costs which come to mind are servants' wages, the cost of board and lodging, the cost of running a motorcar for private use, holiday expenses, and so forth."[41] (underlined for emphasis)

The issue in the above case was whether or not the costs, associated with the taxpayer's wife accompanying him on a business trip, were deductible in terms of a prior equivalent to section 11(a) read together with prior equivalent versions of section 23(a), (b), and (g). The court held that the costs were deductible, as the taxpayer 'could not have gone to the scene of the business operation… if it had not been for her [his wife's] assistance'.[42] The court considered the expenses to be 'in the production of his income, and… for the purposes of trade'.[43] Regarding section 23(a) and (b), Beyers JA did not consider the wife's costs to be those contemplated by those sections, therefore they did not apply. He uttered the above *obiter* in respect of section 23(b), which at the time was identical to its form quoted in 2.3.2.

[40] [1960] 1 All SA 544 (A).
[41] Ibid at 548-549.
[42] Ibid at 549-550.
[43] Ibid at 550.

2.4.1.2 Van der Walt case

About 26 years later, in 1986, the first case regarding the deductibility of *home workspace* expenses was decided in *KBI v Van der Walt.*[44] This was in respect of a prior version of section 23(b) which did not include the proviso thereto and existed prior to the enacting of section 23(m)*,* essentially the form quoted in 2.3.2.

The issue in this case was whether or not the expenses relating to a taxpayer's study ('study expenses') and the costs of periodicals, writing materials, and photostats which were all kept in that study ('additional expenses') were deductible in terms of section 11(a) read together with section 23(b), and (g). The taxpayer in the case was a University lecturer[45] who estimated that he spent more than 50 per cent of his working time in the study.[46] Notably, the study was also used for his Doctoral studies.

The Commissioner for the South African Revenue Service ('SARS') ('the Commissioner'), at the time, argued that the expenditure was not incurred 'in the production of income' in order to meet the requirements of section 11(a); and in any case the effective authority for a deduction in section 23(b) was qualified by the earlier version of section 23(g), as discussed in 2.2.[47] In terms of section 23(g) at the time, the Commissioner argued that the study was not used 'wholly and exclusively for the purposes of trade'- since it was common cause that the study was used for the taxpayer's Doctoral studies. Doctoral studies, argued the Commissioner, did not constitute the exercise of a trade by which income was earned by the taxpayer. Therefore, the Commissioner argued that the deduction was prohibited by section 23(g).[48]

However, the court held that all the expenses and costs were deductible under section 11(a); and were not precluded by section 23(b) (due the exception thereto) nor (g). In summary, according to section 10.20 of *Silke*:

> "In the court's view in *Van der Walt*, in order to discharge the employee's onus of proving that his expenditure was incurred in the production of income, he was not required to show that he was contractually obliged to maintain a study: it was sufficient for him to show that,

[44] 48 SATC 104.
[45] The court agreed with the Special Court that the taxpayer was carrying on a trade in his capacity as a lecturer. Ibid at 109.
[46] It was a requirement that he spend half of his working time conducting research.
[47] Supra note 44 at 109.
[48] Supra note 44 at 111.

> in order to fulfil his obligations under his service contract, it was necessary for him to maintain the study and incur the expenses. No more was required of him than to show that the expenditures were *bona fide* incurred for the more efficient fulfilment of these obligations. In the event, although he did not use the study exclusively for this purpose, his claim was allowed."[49] (underlined for emphasis)

The court did not express an opinion as to whether the Doctoral studies constituted the exercise of a trade by which income was earned by the taxpayer. Rather, it was essentially held that the effective authority for a deduction, as granted in section 23(b), is not qualified by section 23(g). ELOFF ADJ RP pointedly summarised the reasoning for his decision:

> "The two provisions deal with different data: the first deals with the specific case where a premises is used partly for private and partly for business purposes, and the absence of exclusivity is inherent in what is provided for; in contrast, subsection 23 (g) deals with fees which are not wholly and already spent for operational purposes. I am of the opinion that in interpreting section 23 we should apply the principle *generalia specialibus non derogant*…"[50] (translated and underlined for emphasis)

He continued regarding the mechanics of section 23:

> "The scheme of the article is to first select specific items that do not qualify as deductions, along with their exceptions (as in the case of subsection 23 (b)), and then add the general provision, subsection 23 (g), with a view to intercept the cases that have not already been specifically treated."[51] (translated and underlined for emphasis)

Thus, the deduction(s) were effectively allowed in terms of the exception in section 23(b), read together with section 11; and since section 23(b) applies, section 23(g) is not applicable. Since section 23(g) was not applicable, the study did not have to be used by the taxpayer 'wholly and exclusively for the purposes of trade'.

It is unclear from the judgement whether the additional expenses were effectively deductible in terms of the exception to section 23(b) (as the study expenses were), or rather that section 23(b) did not apply to them at all (and they are trade-related expenses). This would depend on whether it was deemed that the additional expenses are 'in connection with' the *home workspace* or not, respectively. However, the judgement does not suitably distinguish between the study and additional expenses in relevant part. This issue will be discussed further in Chapter 3.

[49] A de Koker, et al *Silke on South African Income Tax* § 10.20.
[50] Ibid.
[51] Ibid.

The decision was held in the Transvaal Provincial [Gauteng] Division and is therefore only precedential authority in that jurisdiction. However, there hasn't been a decision on this matter in the Appellate Division [Supreme Court], so it is therefore submitted that the decision holds substantial persuasive authority across South African jurisdictions.

2.4.1.3 Effect of Van der Walt case

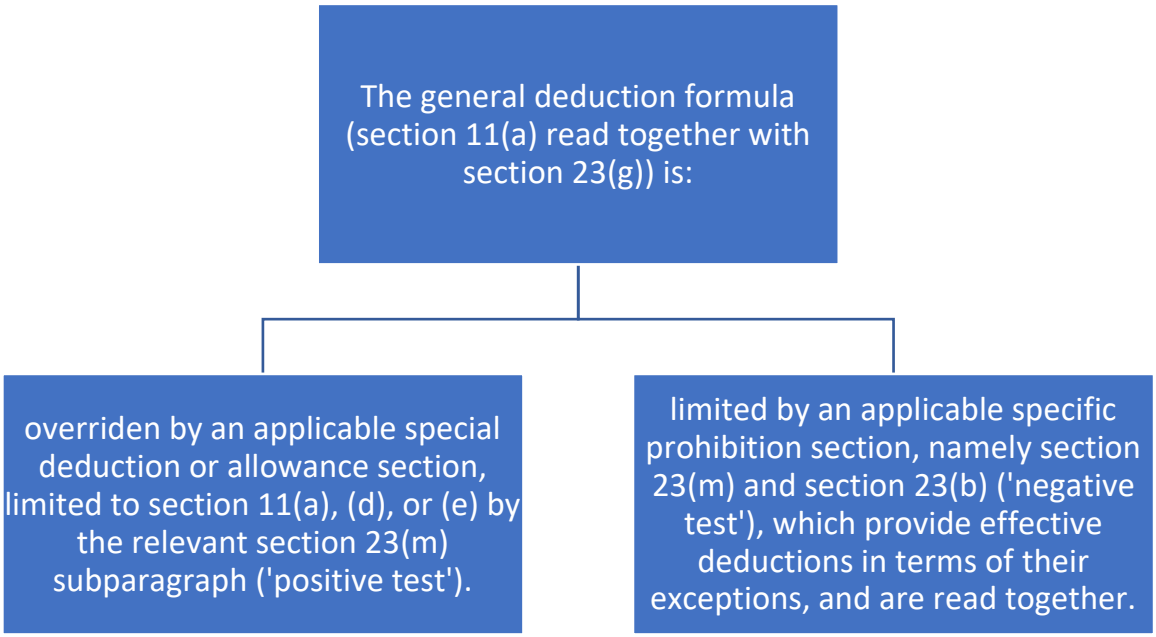
The principle of *generalia specialibus non derogant,* which if translated means that 'general laws do not prevail over specific laws' was applied in this case. This principle informs section 23B(3), which itself essentially states that special deductions (a specific law) override section 11(a) (a general law). However, as it relates to the specific prohibitions in section 23, such as section 23(b) (a specific law), versus section 23(g) (a general law), the principle as applied in the case is the only available authority.

It is however submitted that this decision was effectively accepted by the fiscus, simply as the matter was not further litigated. However, an anti-avoidance proviso was added to the exception in section 23(b) a few years after the *Van der Walt* case in the early 1990's, which will be discussed in 2.4.2. It effectively introduces an 'exclusively' requirement, *inter alia*, for a *home workspace*. Interestingly, it also introduces a 'more than 50%' requirement, which is the percentage of time the taxpayer in the Van der Walt case spent in his *home workspace* (as opposed to his work office). It is therefore submitted that the *Van der Walt* case had a direct impact on the inclusion of the proviso to section 23(b), which has not materially changed since then.

The law (albeit persuasive authority) as it relates to the application of section 23 is as follows: section 23(g) is limited by the specific prohibitions, such that the latter must be applied before the former is considered. In other words, section 23(g) is only applicable if there are no special prohibitions that apply in a particular circumstance. Therefore, in a particular circumstance, a relevant specific prohibition like section 23(b) and section 23(m) will limit section 23(g) and form the 'negative test'.[52]

In summary with the discussion in 2.2 above, as it relates to the deductibility of *home workspace* expenses for employees, the general applicable law is set out below:

[52] One must be aware of all the specific prohibitions to determine their applicability before applying section 23(g).



Further summarised, *home workspace* expenses are deductible for employees in terms of section 11(a), (d), or (e), forming the positive test; and are read together with both section 23(m) and section 23(b), forming the negative tests.

2.4.2 Section 23(b) *Home workspace* requirements

The decision in the *Van der Walt case*, as discussed in 2.4.1, 'opened the door for employees to claim all the deductions available under the various subsections of s 11'.[53] This presumably resulted in a significant increase in deduction claims as it relates to *home workspace* expenses to the fiscus. Consequently, section 23(b) was amended in 1991[54] to include a proviso. The proviso essentially provides substantive requirements in deducting *home workspace* expenses. It must be noted however that these requirements do not relate to the type of expenses effectively deductible, but rather relate to the requirements of the actual *home workspace* and how the taxpayer uses it. The type of expenses effectively deductible are specifically named in the body of section 23(b), as discussed in 2.3, which are then subject to the requirements.

[53] A de Koker, et al *Silke on South African Income Tax* § 10.20.

[54] The last amendment was in 1994 (just after one in 1993), and only this version will be considered in terms of this research.

With reference to the part of a house 'occupied for the purposes of trade'[55] it states:

> "(a) such part shall not be deemed to have been occupied for the purposes of trade, unless such part is specifically equipped for purposes of the taxpayer's trade and regularly and exclusively used for such purposes; and
>
> (b) no deduction shall in any event be granted where the taxpayer's trade constitutes any employment or office *unless*
>
> > (i) his income from such employment or office is derived mainly from commission or other variable payments which are based on the taxpayer's work performance and his duties are mainly performed otherwise than in an office which is provided to him by his employer; or
> >
> > (ii) his duties are mainly performed in such part;" (underlined and italicised for emphasis)

Essentially, all taxpayers must meet the following requirements if they want to claim their *home workspace* expenses as deductions:

1. Their *home workspace* must be:
   a. 'Specifically equipped' for the purposes of their trade, and
   b. 'Regularly' used for the purposes of their trade, and
   c. 'Exclusively' used for the purposes of their trade.
2. Their duties, relating to their trade, must be performed 'mainly' in their *home workspace*.[56]

It is implicit in these requirements that there must be a 'trade' carried on.[57] 'Trade', is defined in section 1 as including:

> "every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act or any design as defined in the Designs Act or any trade mark as defined in the Trade Marks Act or any copyright as defined in the Copyright Act or any other property which is of a similar nature;"

Employment is a 'trade' as defined in section 1, and therefore an employee, for the purposes of this research, can be said to be carrying on a trade. In other words, if an

[55] This is in reference to the exception in section 23, as discussed in 2.3.

[56] These requirements will henceforth be referred to as the 'section 23(b) requirements'. As commission-earners are out of the scope of this research, paragraph (b)(i) of the proviso is not applicable for the purposes of this research.

[57] 'Trade' is also a requirement of the general deduction formula and special deductions (discussed in 2.2).

employee meets the above requirements- they are entitled to claim their *home workspace* expenses as deductions- so long as their expenses are appropriately deductible expenditure.

It must be noted that paragraph (b) of the proviso to section 23(b) is only applicable where a 'taxpayer's trade constitutes any employment', whilst paragraph (a) of the proviso is applicable to any and all taxpayers carrying on a trade, including independent traders. Paragraph (b)(i) of the proviso essentially applies to commission-earners, whilst paragraph (b)(ii), notably more onerous, is effectively only applicable to employees. The apparent purpose of the fiscus distinguishing between these types of taxpayers, in terms of these requirements, related to the fact that each of these taxpayers have different assumption of risk and therefore the requirements applicable to each should accordingly be tailored accordingly.

2.4.3 Section 23(m)

The section 23(b) requirements presumably led to a decrease in deduction claims as it relates to *home workspace* expenses to the fiscus. This is due to what are submitted to be quite onerous requirements in claiming any *home workspace* expenses. However, it did not reduce the claims associated with other trade-related expenditure. These are *prima facie* 'domestic and private' expenses which are deemed not to be those that are specifically named in section 23(b); and are deemed to not be 'domestic or private' expenses. Again, only the specifically named expenses are subject to the section 23(b) requirements; and if an expense is proved to not be a 'domestic or private' expense, section 23(b) will not apply at all.

In other words, taxpayers would try to 'escape' the section 23(b) requirements by arguing that the relevant expense does not constitute an expense that is specifically named in section 23(b). Taxpayers would also have to argue that the expense is not a 'domestic or private' expense- for section 23(b) not to prohibit any such deduction. They would also need to prove that the general deduction formula is met. This was possible since employment is a 'trade' as defined in section 1 (as discussed above); and employees could use the precedents in terms of the *Hickson* and *Van der Walt* cases, *inter alia*, to argue that a particular expense is incurred 'in the production' of employment income and 'for the

purposes of trade'.[58] Two examples of this will be provided- where the expense relates and is unrelated to a *home workspace*:

Expense unrelated to a *home workspace*

An employee is required (per their employment contract) to wear a self-purchased suit at their job in a luxury retail store. They would have attempted to prove that the cost of the suit was incurred 'in the production' of their employment income. The employee could have used the judgment in *Hickson*, but also in *Income Tax Case 1428*[59], to support their argument. In the latter case, a deduction of interest expense on a loan to buy shares[60] was allowed against the taxpayer's employment income. This was due to the fact that, *inter alia*, the purchase of shares was a requirement of the employment contract (akin to the suit in the current example). The employee would also need to prove that the cost of the suit is not a 'domestic or private' expense, as was said about the cost of the plane tickets in the *Hickson* case[61]. It is therefore submitted that it was likely for an employee to succeed in making a deduction claim in respect of the cost of the suit.

Expense related to a *home workspace*

An employee is required to purchase their own stationery that is used by them in their *home workspace* for work. It can be argued that such stationary relates to a *home workspace*. The stationery would easily be proved to be 'in the production' of their employment income, given they only use it for work. The employee would then need to prove that the cost of stationery is not an expense 'in connection with' a *home workspace*; and further, that the expenses are not 'domestic or private' expenses . If we look to the decision in the *Van der Walt* case, 'writing materials' or stationery is allowed as a deduction, but it is not explicitly stated if it was allowed in terms of the exception in section 23(b) as an expense 'in connection with' a *home workspace;* and if so, that the expenses are not 'domestic or private' expenses. The former will be discussed further in Chapter 3, whilst the latter would easily be proved given the stationery is only used for work. It is therefore

[58] This is assuming none of the special deductions or specific prohibitions are applicable.
[59] 50 SATC 34.
[60] These shares were for investment purposes, and therefore not deductible from exempt dividend income.
[61] Supra note 40 at 548-549.

submitted that it was possible for an employee to succeed in making a deduction claim in respect of the cost of their stationery.

In light of the above two examples, deduction claims from employees likely increased; and these claims presumably put a burden on the tax administration system, and perhaps even the courts. Consequently, the fiscus introduced section 23(m) in 2002, which according to *Silke* was:

> "unashamedly aimed at preventing the erosion of the tax base… by prohibiting the deduction by employees of all but a few categories of expenditure incurred by them, which would otherwise be deductible under the various sub-sections of s 11."[62]

The effect of this was that employees could not claim any and all deductions against their employment income- including any expenses related to their *home workspace*.[63]

2.4.3.1 Proposal for section 23(m)

The Explanatory Memorandum on the Taxation Laws Amendment Bill, 2002 ('2002 EM'), which relates to the Act that introduced section 23(m), states:

> "It was proposed in the Budget Review this year that the taxation system of employment income be simplified by limiting employee deductions. This is one step in the phased approach to introduce a separate Schedule to the Income Tax Act that will deal exclusively with the taxation of employment income. It was furthermore proposed that this limitation should not apply where an employee's remuneration is mainly derived in the form of commission based on sales or turnover."

No separate 'Schedule' has been introduced to date, but the proposal of a separate Schedule gives an indication of the apparent need, and commitment to, the overhauling of the taxation of employment income- the first step being limiting employee deductions.

The apparent purpose of the fiscus limiting employee deductions is that there is less risk involved in employment, which translates to less expenditure incurred in respect of employment income. Consequently, there should be less expenditure allowed as deductions from employment income (when compared to other forms of trade).

The assumption is that employers, which are usually companies, will incur such expenses; and these companies are of course entitled to claim such expenses so long as the requirements of the general deduction formula (or any special deductions) are met. The

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[62] A de Koker, et al *Silke on South African Income Tax* § 10.20.

[63] There were only a few exceptions to section 23(m) when it was first introduced, one essentially being equivalent to subparagraph (ii) of section 23(m), discussed in 2.3.2.

company would still of course need to argue that such expenses are not 'private or domestic' for section 23(b) to prohibit such deduction. The assumption for employees is therefore that they will not bear any costs related to their employment- even if they work from a *home workspace*.

This is indeed a problematic assumption, as it effectively prescribes that employers bear the relevant costs, which is not always the case. Businesses can choose to bear the relevant costs or may require that their employees do so. Of course this analysis, applies to expenses related to a *home workspace*, since employees are generally never expected to bear the costs of direct business expenses- like raw materials.

According to SAIT:

> "…the practical distinctions between commission earners and salaried workers are no longer intact, the different legislative treatment section 23(b) and section 23(m) of the Act, is no longer appropriate. For example, a salaried worker subject to 'remote working', similarly incur expenses in the production of income (as was historically solely the case for commission employees).[64] ('SAIT commentary 2022')"

2.4.3.2 Exceptions to section 23(m)

The apparent solution to the above issue was the introduction of a further exception to section 23(m) from 2005, namely subparagraph (iv).

The Explanatory Memorandum on the Revenue Laws Amendment Bill, 2005 states:

> "The limitation in section 23 of miscellaneous deductible business expenses incurred by salaried employees, has the unintended impact of denying certain legitimate home office expenses where employees are forced by their employer to bear the cost of maintaining a home office as their central business location. As was announced in the Budget Review this year, the rules will be changed to allow employees to deduct these legitimate expenses should they comply with section 11(a) or (d) and this amendment gives effect to that proposal."

Therefore, as it relates to subparagraph (iv), which was discussed in 2.3, it was effectively decided that prohibiting employees from claiming any and all of their incurred *home workspace* expenses was too strict. Subparagraph (iv) was, however, made subject to the section 23(b) requirements; and so it was likely determined that the substantive section

[64] South African Institute of Taxation *SAIT Response to Call for Comment on Draft Interpretation Note 28 (Issue 3): Deductions of Home Office Expenses Incurred by Persons in Employment or Persons Holding an Office* (Published 14 January 2022), available at: *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2022_technical/sars_submission/draft_interpreinterp_note_28.pdf* at 2.

23(b) requirements are sufficient at controlling deduction claims in this regard. According to *Silke,* by introducing subparagraph (iv) there is an acknowledgement [by the fiscus] of:

> "the possibility that the taxpayer might work at or from home, whether part-time or full-time, and authorizes, again in a roundabout way, the apportionment, on a 'trade/non-trade' basis, of domestic or private expenses, rent, the cost of repairs and other property-related expenses."[65]

Therefore, in summary, and as discussed in 2.3.2:

Subparagraph (iv)

An employee can effectively claim, in terms of subparagraph (iv) of section 23(m), 'any deduction which is allowable under section 11 (a) or (d) in respect of any rent of, cost of repairs of or expenses in connection with any dwelling house or domestic premises'. This exception is subject to the discipline of section 23(b), which essentially constitutes meeting the section 23(b) requirements.

Subparagraph (ii)

An employee can effectively claim, in terms of subparagraph (ii) of section 23(m), 'any allowance or expense which may be deducted from the income of that person in terms of section 11 (c), (e), (i) or (j)'. This exception is not subject to the discipline of section 23(b), which essentially constitutes meeting the section 23(b) requirements. This hasn't been decided in the courts but results from the application of the *Endumeni approach*[66] that will be discussed in Chapter 3.

2.5 Conclusion

An exposition of the law (as contained in the ITA), governing the deductibility of *home workspace* expenses for employees, was provided in this chapter. This included historical analyses.

In order for *home workspace* expenses to be claimed as deductions by an employee, the requirements of a relevant paragraph of section 11 must be met and the prohibitions under section 23(b) and section 23(m) must not apply- rather their exceptions must apply. The

[65] A de Koker, et al *Silke on South African Income Tax* § 7.45. This section contemplates the section 23(b) requirements, but it is submitted that the following comment is applicable here too.
[66] This will be effectively defined in Chapter 3.

exception under the latter section refers to the former, which constitutes the section 23(b) requirements. All three of these sections must be considered; and section 23(g) is only applicable if section 23(b) and section 23(m) do not apply.

The above constitutes the general mechanics of the relevant parts of the ITA, however, more complex matters relating to the interpretation of the applicable law still need to be addressed.

Chapter 3: Substantive Interpretation of the Applicable Law

3.1 Introduction

In Chapter 2 an exposition of the current law (mainly in terms of the ITA), governing the deductibility of *home workspace* expenses for employees, was provided. Historical analyses and the general mechanics of the relevant parts of the ITA were provided.

However, more complex matters relating to the interpretation of the law has remained contentious and inconclusive. Therefore, these matters will be highlighted and analysed in this chapter, in light of the applicable principles of fiscal statutory interpretation.

3.2 Fiscal Statutory Interpretation

In terms of the South African legal system[67] legislation (like the ITA), as enacted by the Parliament of South Africa,[68] is the authoritative source of law after the Constitution of the Republic of South Africa, 1996 ('the Constitution'), and before case law.

However, where the interpretation of a legislative provision is unclear and there is no relevant definition in the legislation, or existing case law, the courts[69] are tasked to interpret such provision. This is in terms of the judicial authority granted to them by section 165(1) of the Constitution. Furthermore, section 165(5) of the Constitution states that 'an order or decision issued by a court binds all persons to whom and organs of state to which it applies'[70]. Therefore what a court decides is the correct interpretation of a provision may constitute a judicial precedent.[71] If so, it is added to the existing body of case law, and may be applicable to a matter with a similar set of facts, if in the same jurisdiction.

Therefore, the courts lay down precedents in resolving any issues of interpretation (from legislation such as the Act(s)) that are brought before it. This is why the decisions in various cases were discussed in Chapter 2- the current legislation must be read together with any relevant and applicable court decision in determining the ultimate law.

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[67] South Africa is a 'mixed' legal system based on English common law and Roman-Dutch law.
[68] The Parliament of South Africa is the legislative branch of government of South Africa.
[69] The courts of South Africa constitute the judicial branch of government.
[70] These court proceedings are through litigation involving two or more parties.
[71] This depends on the court adjudicating the judgement. The Constitutional Court, the Supreme Court, and the High Court lay down precedents in their respective jurisdictions. Magistrate Courts, and special courts like the Tax Court, do not lay down precedents.

In interpreting legislation, the courts follow the principle of fiscal[72] statutory interpretation, which itself is established by prior judicial precedents. In other words, fiscal statutory interpretation is a legal construct that is in terms of judicial precedents. However, in terms of the South African legal system discussed above, fiscal statutory interpretation is subject to any statutory interpretation provisions and definitions contained in a relevant Act and the Interpretation Act[73].

According to *Silke*, the principles of fiscal statutory interpretation:

> "…have undergone evolutionary changes over many decades. This has occurred as a result, not only of changes in judicial philosophy, but also (in South Africa) in response to such monumental legal events as the coming into force of a democratic constitution which proclaims that all law inconsistent with it is invalid, and which incorporates a Bill of Rights. That tectonic shift is the implicit basis of the decision of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) [SA 593 (SCA) since cited and applied in numerous subsequent decision]…
>
> Consequently, dicta from old, and particularly pre-constitutional, judicial decisions on issues of interpretation, and South African judicial decisions that predate the *Natal Joint Municipal Pension Fund* judgment must be viewed with caution."[74] (underlined for emphasis)

Further, according to *Income Tax in South Africa: Cases & Materials,* the judgement in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[75]:

> "'…is a watershed judgement regarding the principles governing the interpretation of legislation or of a contract that will henceforth be cited as the *locus classicus* on the modern law in this regard in South Africa.
>
> The language of the judgement leaves no doubt that the Supreme Court of Appeal is deliberately drawing a line in earlier decisions in this regard and is trenchantly declaring that what is laid down in this judgement (see para [19]) 'is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.'"[76] (underlined for emphasis)

Finally, it was said in *Silke* that:

[72] Given that this is a study in the field of tax, the interpretation of statutes in general will not be considered.
[73] Act 33 of 1957.
[74] A de Koker, et al *Silke on South African Income Tax* § 25.1.
[75] (920/2010) [2012] ZASCA 13 (15 March 2012).
[76] RC Williams *Income Tax in South Africa: Cases & Materials* 4 ed (2015) at 13.

> "The approach to statutory interpretation, delineated in the *Natal Pension Fund* decision, and captured in the quoted passages, above, has been affirmed and applied in numerous subsequent decisions."[77]

Therefore, the analyses provided in this Chapter will utilize the dicta and principles laid down in the *Endumeni* case in interpreting the legislation notwithstanding any prior cases and their related principles, and this will be referred to as the *Endumeni approach*. In respect of this, it was said by *Silke* that:

> "All prior judgments of the South African courts regarding the principles of statutory interpretation must now be re-evaluated, in the light of this ground-breaking decision; to the extent that any prior judgment is inconsistent with this decision, it must be regarded as no longer reflective of the current law. In particular, all prior judicial references to the need to determine and give effect to 'the intention of the legislature' now require close scrutiny to determine whether they are inconsistent with this decision."[78] (underlined for emphasis)

It must be highlighted that *Silke* is referring to principles from judgements relating to statutory interpretation, and not other principles (which constitutes the majority of tax case law). For these other principles, even if the principle was established by the judge employing a form of interpretation that is not consistent with the *Endumeni approach*, it is submitted that such principle is still the prevailing law. The principle can, however, now be challenged in a court of law, where the court will now be bound to employ the *Endumeni approach*.

In summary, the *Endumeni approach* is what the courts are now subject to: if a matter goes to court now it can be assumed that the judge will employ the *Endumeni approach* in interpreting the legislation. The court's interpretation of a matter will of course then constitute judicial precedent, and establish the ultimate law.

Therefore, a judicial precedent that will be set when a matter of the interpretation of the ITA goes to court can be approximated by applying the *Endumeni approach*. As such, for the purposes of this dissertation, the *Endumeni approach* must be employed in interpreting matter(s) of interpretation relating to the deductibility of *home workspace* expenditure. This then will result in the correct interpretation of the applicable law.

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[77] A de Koker, et al *Silke on South African Income Tax* § 25.1B. The *Endumeni approach* was most recently endorsed in the *Telkom SA SOC Limited v Commissioner for the South African Revenue Service* 2020 (4) SA 480 (SCA) case, where it was essentially held that only if the *Endumeni approach* results in two equally plausible meanings will the *contra fiscum* rule apply.

[78] A de Koker, et al *Silke on South African Income Tax* § 25.1C

3.3 *Endumeni approach*

3.3.1 Background

Consistent yet precedent to the *Endumeni approach*, the 'purposive approach' came to prominence, in light of the Constitution. According to *Silke*:

> "Even prior to the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality,* noted above, and under the influence of the constitutional Bill of Rights, South African courts moved away from the strict literal approach towards a purposive construction of legislation, according to which the purpose or object of the legislation must be ascertained from the words used in it, viewed in their proper context, and the legislation must then be interpreted in such a way as to advance the purpose for which the provision in question was apparently enacted."[79]

The reason for the move to the 'purposive approach', was commented on by *Silke* as follows:

> "The principal catalyst for this change in approach is s 39(2) of the Constitution, which provides that when interpreting any legislation, and when developing the common law or customary law, 'every court, tribunal or forum must promote the spirit, purport *and objects* of the Bill of Rights'. Under the influence of s 39(2), the Constitutional Court has held that legislation must be interpreted purposively to promote the spirit, purport and objects of the Bill of Rights; courts are under a duty to examine the objects and purport of an Act and to read the provisions of legislation, so far as is possible, in conformity with the Constitution."[80] (footnotes omitted)

It must be noted that during the period before the Constitution, Parliament at the time was the supreme authority and there was no section 39(2) of the Constitution or equivalent thereof. Therefore, it makes sense that what preceded the 'purposive approach', being 'the intention of the legislature', featured prominently as a principle of fiscal statutory interpretation. This principle is commented on by *Silke* as follows:

> "For many years, where there was uncertainty, ambiguity or absurdity in the language used in legislation, the courts departed from the strict literal approach, and instead, sought to determine and give effect to the so-called 'intention of the legislature'."[81]

The *Endumeni approach* calls this expression, and its counterpart in a contractual setting, misnomers, 'insofar as they convey or are understood to convey that interpretation involves

[79] A de Koker, et al *Silke on South African Income Tax* § 25.1D
[80] Ibid.
[81] A de Koker, et al *Silke on South African Income Tax* § 25.1C

an enquiry into the mind of the legislature or the contracting parties.'[82] The court comments that the sole benefit of expressions like 'the intention of the legislature' is to:

> "…serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say."[83]

However, the judge concludes that the disadvantages of such expression 'far outweigh that benefit'.[84] He states that:

> "there is no such thing as the intention of the legislature in relation to the meaning of specific provisions in a statute, particularly as they may fall to be interpreted in circumstances that were not present to the minds of those involved in their preparation."[85]

This point is best explained by a hypothetical example as follows:

Before the advent of motor vehicles in the early 1900's, horse-drawn carriages were widely used in cities which would have been regulated by a statute, namely (for example) the Transportation Act. A possible requirement of such Act would be that the responsibility of cleaning up after the horses falls on the coachmen of such horse-drawn carriage. If the 'intention of the legislature'[86] was applied in interpreting this responsibility as applying to owners of motor vehicles once they were invented, for example, there would be absurdity. The legislature would have not been aware of the advent of motor vehicles upon drafting the Transportation Act; and therefore, could not have intended such statutory responsibility to apply to owners of motor vehicles.[87]

Therefore, the 'intention of the legislature' is useless in interpreting the Transportation Act in this example. Rather, as stated in the judgement, the proper approach is 'objective not subjective'.[88] Such approach is summarised in the judgement as follows:

> A. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

[82] Supra note 75 at para 20.
[83] Supra note 75 at para 24.
[84] Supra note 75 at para 24.
[85] Supra note 75 at para 21.
[86] Particularly insofar as it conveys that interpretation involves an enquiry into the mind of the legislature.
[87] This is expanded upon from the footnote 23 in para 20 of the judgement, with reference to a book published in 1930. Supra note 75 at para 20.
[88] Supra note 75 at para 18.

B. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[89] (underlined for emphasis, footnotes omitted, and 'A.' and 'B.' are added)

3.3.2 Factors

Therefore, in carrying out the *Endumeni approach* one must weigh each alternative interpretation against the other- if alternative interpretations do indeed exist. It is submitted that this exercise must be done using the factors underlined above in B. Commentary[90] on each of these factors are submitted as follows:

"Consideration must be given to:	Comments regarding the interpretation of a particular word or phrase (as contained in a 'provision'), specifically as it relates to the ITA:
1. the language used in the light of the ordinary rules of grammar and syntax	According to the Merriam-Webster Online Dictionary[91] ('dictionary'), grammar is 'the study of the classes of words, their inflections, and their functions and relations in the sentence'. A subset of the grammatical study of language is syntax, which according to the dictionary, constitutes 'the way in which linguistic elements (such as words) are put together to form constituents (such as phrases or clauses). In weighing this factor, a basic understanding of grammar and syntax should be employed, given the word 'ordinary' is used.
2. the context in which the provision appears	'Context' according to the dictionary refers to 'the parts of a discourse that surround a word or passage and can throw light on its meaning'. The discourse which 'surrounds' a word or phrase can

[89] Supra note 75 at para 18.

[90] These comments were formed from attendance in various lectures, on the relevant topic, at the Department of Finance and Tax (University of Cape Town) during 2019-2021. These lectures were provided by both Darron West and Rudi Oosthuizen.

[91] Merriam-Webster, available at *Merriam-Webster.com ,* accessed on 28 October 2021.

	be interpreted in terms of the ITA as a whole[92], but also in terms of the section or sub-section that the word or phrase appears in.
3. the apparent purpose to which it is directed	This essentially constitutes the 'purposive approach'. For fiscal statutes the 'apparent purpose' could be determined by analysing the relevant Explanatory Memoranda[93], if not apparent from the statue itself. It must be noted, however, that Explanatory Memoranda are not strong persuasive evidence as they are prepared by the National Treasury (a part of the executive branch of government). In order to properly analyse the Explanatory Memoranda, one must have an understanding of the law prior to and upon the drafting of the relevant amendment, including the jurisprudence up till that point.
4. the material known to those responsible for its production"[94]	In determining the 'apparent purpose' of a word or phrase of the ITA per factor 3 above, it is only appropriate that one looks at the circumstances under which the particular amendment was enacted, which is essentially what constitutes factor 4. The legal developments and opinions thereon must be consulted as well as the legislative cycle relating to a particular amendment. The resulting Explanatory Memorandum can be better

[92] This is specifically contemplated in the preceding sentence of paragraph 18 of the judgement. Supra note 75 at para 18.

[93] Explanatory Memoranda accompany the annual Amendment Acts, which are promulgated by the Parliament of South Africa, amending the current legislation each year. According to SARS website, Explanatory Memoranda 'provide background on proposed new legislation, reasons for proposed changes to existing legislation and further explanations or examples where necessary'. 'Explanatory Memoranda' *SARS*, available at *https://www.sars.gov.za/legal-counsel/preparation-of-legislation/explanatory-memoranda/,* accessed on 28 October 2021.

[94] Supra note 75 at para 18.

	analysed thereafter. It must be noted, however, that Explanatory Memoranda are not strong persuasive evidence as discussed in factor 3.

It is submitted that the first two factors essentially constitute an expansion to the first underlined phrase of part A above, whilst the latter two factors constitute an expansion of the second underlined phrase of part A above. The four factors are then re-summarised in the last sentence of paragraph 18 as follows:

> "The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[95] (footnotes omitted)

This highlights the nature of the *Endumeni approach* not being a rules-based approach, but rather a unitary and integrated approach, utilising the four factors as apparent objective tests. The entire judgement related to interpretation is around ten pages, where the judge goes into a lot of detail, some of which has been summarised above. However, the *ratio decendi*, regarding an issue of the interpretation of government ordinances and regulations, is best described in terms of paragraph 18. Therefore, the *Endumeni approach* will be applied based on the exercise described above, using the four factors and commentary provided.

3.4 Application of the *Endumeni approach*

3.4.1 Section 23(b) read together with section 23(m)

In 2.3.2 it was said that the types of expenses that are effectively deductible, in terms of the exception in section 23(b), were those specifically named in section 23(b); and that what are not deductible, are any and all 'domestic and private expenses'.[96] Opinion pieces,[97][98] however, have effectively perpetuated the interpretation that all 'domestic and private

[95] Supra note 75 at para 18.

[96] This will be known as the *main interpretation.*

[97] 'It's official: Stay out of office till October, and SARS will let you claim home office costs' *Business Insider South Africa*, available at *https://www.businessinsider.co.za/how-to-claim-home-office-expenses-2020-7*, accessed on 28 Novemeber 2020.

[98] 'Can salaried workers in South Africa also claim home office tax relief?' *BusinessTech*, available at *https://businesstech.co.za/news/business/482645/can-salaried-workers-in-south-africa-also-claim-home-office-tax-relief/,* accessed on 5 May 2021.

expenses' if they are 'in respect of' a *home workspace*, can effectively be deductible in terms of the exception in section 23(b).[99]

The *alternative interpretation* widens the scope of the types of expenses that are effectively deductible in terms of section 23(b), to not only those that are specifically named, but all 'domestic and private expenses' that are 'in respect of' a *home workspace*. What is not always highlighted is the negative effect of the alternative interpretation, which is that all such 'domestic and private' *home workspace* expenses will be subject to the section 23(b) requirements. This is not the case with the *main interpretation*, as only the specifically named expenses are subject to the section 23(b) requirements under it.

In determining the correct interpretation, we must first look to the historical progression of the applicable law, as discussed in Chapter 2, and summarised below:

Before 1962: the prior equivalent to section 23(b) read, 'domestic or private expenses including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade, or of any dwelling house or domestic premises except in respect of such part as may be occupied for the purposes of trade.'[100]

1962-1991: section 23(b) read, 'domestic or private expenses, including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade or of any dwelling-house or domestic premises except in respect of such part as may be occupied for the purposes of trade.'

1991: Consequent to the *Van der Walt* case, which deemed that section 23(g) is limited by section 23(b), the section 23(b) requirements were introduced to control all *home workspace* deduction claims with substantive requirements relating to a *home workspace*.

1992: Section 23(g) is amended to allow for the apportionment of expenses- for trade and non-trade use. Before this amendment, section 23(g) and its prior equivalent did not allow for the apportionment of expenses, which is *inter alia* is why the Commissioner denied the deduction claim in the *Van der Walt* case.

[99] This will be known as the *alternative interpretation.*
[100] Income Tax Act 31 of 1941.

2002: Section 23(m) is introduced to disallow majority of deduction claims from employees-including *home workspace* deduction claims.

2005: Subparagraph (iv) of section 23(m) is introduced to specifically and effectively allow an employee to claim *home workspace* expenses, which are deductible under section 11(a) or (d). This is subject to the section 23(b) requirements.

Thus, the four factors of the *Endumeni approach* will be applied to the following underlined issues, in the context of the historical progression of the law. This is to determine whether the *main interpretation or the alternative interpretation* is correct.

3.4.1.1 The language used in the light of the ordinary rules of grammar and syntax and the context in which the provision appears

‘In respect of’

Firstly, if it were that all ‘domestic and private expenses’ were effectively deductible, then there would not need to be the specific inclusion of the specifically named expenses. This is because the specifically named expenses are clearly ‘domestic or private expenses’, especially in the context that they are provided, being that they are in relation to ‘any premises not occupied for the purposes of trade’ i.e., a *home workspace*.

In terms of the *alternative interpretation*, the phrase ‘in respect of’ is presumably interpreted as the phrase that allows all ‘domestic and private expenses’ to be effectively deductible, i.e., all domestic and private expenses are deductible if they are ‘in respect of’ a *home workspace*.[101]

The meaning of ‘in respect of’ has in fact been dealt with by the courts numerous times.[102] It was said in *Income Tax Case 1340*[103] that ‘it is necessary to examine the context to ascertain the sense in which [in respect of] is used’[104]. In the present context, it is submitted that ‘in respect of’, together with ‘except’, is helping set up the construct of a *home workspace:* it is occupied for the ‘purposes of trade’, and it is located in and as a ‘part’ of a ‘domestic premises’. Before the word ‘except’, section 23(b) is a prohibitive such that the specifically

[101] Therefore, the negative effect of the *alternative interpretation*, is that all such ‘domestic and private’ *home workspace* expenses will be subject to the *section 23(b) requirements*.
[102] A de Koker, et al *Silke on South African Income Tax* § 25.7A.
[103] (1980) 43 SATC 210.
[104] Ibid at 212–13.

named expenses are not deductible as they generally relate to a 'domestic premises'. However, the exception together with 'in respect of such part', envisage that there can be a part of the 'domestic premises' that is 'occupied for trade', and therefore the specifically named expenses can be deductible 'in respect of' such 'part'.

Further, as submitted in 2.3.1, the specifically named expenses are generally 'fixed costs' that relate to a 'domestic premises' as a whole, the apportionment of an expense 'in respect of' the domestic premises and 'in respect of' the *home workspace* are necessary. This is the sense in which 'in respect of' is used here, and not to imply a relationship existing between the expense and the *home workspace*, which is suitably implied by the general nature and context of the specifically named expenses.

Further still, if all 'domestic and private expenses' were effectively deductible in terms of the exception in section 23(b), this would be worded differently, perhaps with the phrase 'as it relates to', which is more encompassing. For example, the legislation may have read:

> "domestic or private expenses, including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade or of any dwelling-house or domestic premises *except [as it relates to] such part as may be occupied for the purposes of trade."*

Comma

It must be noted that there is no comma before 'except in respect of'. This would have created a clause that may have resulted in the *alternative interpretation* being plausible as with the extra comma, section 23(b) would read[105]:

> "No deductions shall in any case be made in respect of the following matters, namely- domestic or private expenses except in respect of such part as may be occupied for the purposes of trade."

There is no such comma, however. Interestingly, the prior equivalent to section 23(b) did not include a comma after 'domestic or private expenses'[106], whilst the current version does. It is submitted that this strengthens the argument for the *main interpretation*, the comma presumably being included to separate from 'private and domestic expenditure'

[105] This includes the introduction of section 23 and excludes the clause so-created.
[106] Income Tax Act 31 of 1941.

what follows; and no comma was presumably included before 'except' so as to create a clause as described. This will be discussed further below.

Section 23(b) requirements

As discussed in 2.4.2, the latest amendments to section 23(b) in the early 1990's were to introduce the proviso, which constitutes the *section 23(b) requirements.* These relate to the requirements of an actual *home workspace* and how the taxpayer uses it. Given that the proviso follows the specific inclusion of the specifically named expenses, the nature and context of which is discussed above, it is therefore submitted that only the specifically named *home workspace* expenses are effectively deductible in terms of the exception in section 23(b).

Application

The first and second factor of the *Endumeni approach*, in which consideration is given to 'the language used in the light of the ordinary rules of grammar and syntax' and 'the context in which the provision appears', respectfully, can be applied to the above analyses. If done so, it is submitted that the weighting for the *alternative interpretation* is low compared to the *main interpretation*.

3.4.1.2 The apparent purpose to which it is directed and the material known to those responsible for its production

Construction of section 23(b)

Before 1962, when the prior equivalent to section 23(b) existed, and subsequently between 1962-1992, section 23(g) (and its prior equivalent) did not allow for the apportionment of expenses between trade and non-trade use. Therefore, notwithstanding the effective deduction granted by the exception in section 23(b), it is submitted that the stricter section 23(g) would not be limited by section 23(b) and therefore it would disallow any apportionment of expenses. Consequently, a taxpayer who incurred *bone fide home workspace* expenses such as 'rent', being one of those specifically named, would not be able to claim any of these expenses as deductions. This is because such expenses, as submitted in 2.3.1, 'rent' is generally a fixed costs that relates to a 'domestic premises' as a whole. It would be difficult to argue that such a fixed cost was paid 'wholly and exclusively' even if it was paid partly for trade purposes i.e. the taxpayer used a *home workspace*. It is therefore

submitted that section 23(b), and its prior equivalent, was specifically constructed to allow the specifically named expenses to be effectively deductible if 'in respect of' a *home workspace* during a time when apportionment was not allowed by section 23(g). Therefore, given this apparent purpose, the *main interpretation* is supported with reference to the discussion on 'in respect of' under 3.4.1.1.

Distinguishment of the expenses in section 23(b)

As discussed in 2.4.1.1, the judge in the *Hickson* case made the following comment:

> "House rent and the cost of repairing the house are specifically mentioned. Other costs which come to mind are servants' wages, the cost of board and lodging, the cost of running a motorcar for private use, holiday expenses, and so forth."[107]

It is submitted that the judge effectively distinguishes between the specifically named expenses, those being related to a *home workspace*; and those that are 'other' 'domestic and private' expenses. This distinguishment accords with the *main interpretation* and not the *alternative interpretation*, the latter of which combines both types of expenses as being effectively deductible in terms of the exception in section 23(b). This distinguishment is *obiter* and was held on the prior equivalent to section 23(b). However, this case immediately preceded the enacting of the current ITA, in which a comma was added, with reference to the discussion on the 'comma' under 3.4.1.1.

The distinguishment by the judge, albeit part of the judiciary, is submitted to have informed the legislative drafters of the current ITA to include the comma in drafting the legislation. In other words, the distinguishment would have formed part of the jurisprudence at the point of the drafting of the provision, therefore would have been known to the legislative drafters at that point. This may have influenced them to include such a comma in the legislation, to accordingly make such distinguishment[108]. This supports the *main interpretation*, in which there is a distinguishment between the specifically named expenses, those being related to a *home workspace*; and those that are other 'domestic and private' expenses. The former are effectively deductible, in terms of the exception in section 23(b) if 'in respect of' a *home workspace*; and the latter are not.

[107] Supra note 40 at 548-549.

[108] This is analysis is indicative of 'the apparent purpose to which [the provision] is directed' or 'the material known to those responsible for [the provision's] production'.

It must be noted that there were no Explanatory Memoranda issued with amendments to the ITA until 1997 which may have provided non-persuasive evidence of the influence the jurisprudence had on the legislative drafters.[109]

Taxpayers being distinguished by the section 23(b) requirements

As noted in 2.4.2, the actual *section 23(b) requirements* do not mention the type of expenses effectively deductible, and rather relate to the requirements of the actual *home workspace* and how the taxpayer uses it. The section 23(b) requirements do, however, effectively distinguish between employees, commissioner-earners, and independent traders in terms of the sub-requirements that are applicable. The apparent purpose of this distinguishment was discussed in 2.4.2.

This distinguishment may have been what has contributed to the *alternative interpretation*: people assuming that since there is separate treatment for the relevant taxpayers in terms of the section 23(b) requirements, the types of expenses effectively deductible by each are also distinguishable. The substance of this interpretation would be since independent traders are not mentioned in the section 23(b) requirements, the *alternative interpretation* would apply to them, and the *main interpretation* would apply to other taxpayers. This is submitted to be a *prima facie* reading of the ITA, and not taking into account the actual law. The actual law is that only in terms of the applicability of the section 23(b) requirements are the taxpayers distinguished, and not in terms of the body of section 23(b), therefore the main interpretation is applicable to all taxpayers. Thus, any argument for the *alternative interpretation* is invalid and the *main interpretation* is supported. Admittedly, however, the interplay between the parts of section 23(b), and/or section 23(m) are confusing, especially if the interpreter is not aware of the historical progression of the applicable law.

Misinterpretation of section 23(m)

The alternative interpretation relies on another *prima facie* reading of the ITA. This is that since subparagraph (iv) of section 23(m) only mentions the specifically named expenses, whilst section 23(b) has the phrase ‘domestic and private expenses’, it is only employees that are limited to claiming these expenses ‘in respect of’ a *home workspace*. In other

[109] In general, the application of factor 3 and 4 of the *Endumeni approach*, is limited when looking at legislation enacted prior to 1997.

words, by this subparagraph only mentioning the specifically named expenses, employees are only able to effectively claim such expenses in terms of section 23(b), whilst non-employees are effectively allowed to deduct all 'domestic and private expenses' that are 'in respect of' a *home workspace*.

This is categorially untrue, as all taxpayers are subject to section 23(b) (which itself also mentions the specifically named expenses). It is the section 23(b) requirements where a particular taxpayer may not be subject to a particular requirement thereunder. Specifically for employees, they are subject to the discipline of section 23(b) via subparagraph (iv) of section 23(m). In terms of subparagraph (iv), employees may only claim the specifically named *home workspace* expenses that are deductible under section 11(a) and (d); and which are effectively deductible in terms of section 23(b). Therefore, employees are limited to the deductions under section 11(a) and (d), whilst non-employees are entitled to deduct all expenses, in relevant part. This is the actual law, and the apparent purpose of this was discussed in 2.4.3.2.

It is finally submitted that the reference to section 23(b) in section 23(m) is merely an alternative to the legislature reproducing the section 23(b) requirements under the subparagraph. In other words, presumably to avoid adding repetition to the legislation (and perhaps to ensure simplicity), the reference to section 23(b) was made instead of reproducing the words of the section 23(b) requirements.

Ironically, the reference to section 23(b) has caused much confusion. However, the historical progression of the law helps to clarify the actual law and not a *prima facie* reading of the law, as described above. Therefore, the argument for the *alternative interpretation* above is invalid and the *main interpretation* is supported.

Application

The first and second factor of the *Endumeni approach*, in which consideration is given to 'the apparent purpose to which [the provision] is directed' and 'the material known to those responsible for [the provsion's] production', respectively, can be applied to the above analyses. If done so, it is submitted that the weighting for the *alternative interpretation* is low compared to the *main interpretation*.

Therefore, the *Endumeni approach* has been applied; and the *main interpretation* has been shown to be the correct one in terms of such approach.

3.4.1.4 Main interpretation

Considering the analysis of the *alternative interpretation*, the effect of the main interpretation is that only the specifically named expenses 'in respect of' a *home workspace* are subject to the *section 23(b) requirements;* and if those are met, the expenses are effectively deductible. It must again be noted that this applies to all taxpayers, as all taxpayers are subject to section 23(b).

As discussed, employees are subject to the discipline of section 23(b) via subparagraph (iv) of section 23(m). Non-employees, however, are not subject to section 23(m). In summary, they may claim:

1. specifically named *home workspace* expenses which are deductible under all deduction sections, and
2. Other *prima facie home workspace* expenses, which they must prove are not any of the specifically named expenses for the section 23(b) requirements not to apply. Further, they must prove that the expense is not a 'domestic or private' expense, for section 23(b) not to apply. This is possible, for example, in the stationery example discussed in 2.4.3. An expense being 'domestic or private', or not, is a question of law; and the question was answered in the *Hickson* case as discussed in chapter 2, for example.

The above discussion, as it relates to the distinction in the applicable law between employees and non-employees, can best be summarised in a table:

'Domestic and private expenses'

Taxpayer type	**The 'rent of, cost of repairs of or expenses in connection with' a *home workspace***	**Other[110] 'domestic and private expenses'**

[110] In other words, not 'rent of, cost of repairs of or expenses in connection with' a *home workspace*. For clarity, it is submitted that examples of expenses would be: stationery, internet, and telephone costs.

Employees	Effectively deductible in terms of subparagraph (iv) of section 23(m), if deductible under section 11(a) and (d), read together with the exception in section 23(b).	Not deductible, as section 23(m) disallows all deductions from employment income, with specific exceptions, one being in the prior column.
Non-employees	Effectively deductible in terms of the exception in section 23(b); and are not limited to expenses only deductible under section 11(a) and (d).	Only deductible if proven to not be 'domestic and private expenses'.

The above is submitted to be the substantive and correct interpretation of section 23(b) and section 23(m), including where these sections are read together. In terms of the above discussion, the specifically named expenses in section 23(b) (and section 23(m)) were dealt with in aggregate, for the reason that they all relate to a 'domestic premises'. The 'rent of' and 'cost of repairs of' are specific, however the 'expenses in connection with' is quite broad; and there is no specific definition in the ITA to be able to determine which expenses are envisaged, and which are not. Further, what is meant by the phrase in the present context, has not been defined by the courts; and is therefore open to interpretation in such context.

3.4.2 'In connection with'

As discussed in 2.4.1.2, it is unclear from the judgement in the *Van der Walt* case whether the additional expenses[111] were effectively deductible in terms of the exception to section 23(b) (as the study expenses were), or rather that section 23(b) did not apply to them at all (and they are trade-related expenses). The version of section 23(b) in that case was the

[111] The additional expenses were akin to stationery, therefore the stationery example discussed in 2.4.3 is relevant here.

same as the current version, without the section 23(b) requirements and section 23(m).[112] So, if the former situation is true, the additional expenses would have effectively been held to be 'in connection with' the *home workspace*. This arguably imputes a meaning on the meaning of the phrase 'in connection with' in this context. However, it is submitted that this cannot be a principle of the case, given that it was not an issue in which the court dealt with directly.

In contexts other than in terms of section 23(b) and section 23(m), 'in connection with' has received much attention from the courts. The latest case dealing with the phrase is *Income Tax Case 1340*[113]*,* which was cited above in terms of the discussion of the phrase 'in respect of'. *Income Tax Case 1340* refers to prior cases dealing with both phrases, one being *SIR v Wispeco Housing (Pty) Ltd,*[114] *which states:*

> "No doubt the expression 'in respect of' must, in certain contexts, be restricted to a direct or causal relationship (cf eg *De Villiers v CIR* 1929 AD 227 at 229); but, as was pointed out in *CIR v Butcher Bros (Pty) Ltd* 1945 AD 301 at 320, the expression 'in respect of' does not necessarily or invariably indicate such relationship. In that case, it was held to be used in the sense of 'in relation to' or 'in reference to'. The expression 'in connection with' *prima facie* extends the ambit of matters comprehended *in casu*, the consideration upon which duty is payable. As Kitto J put it in Berry's case [*Berry v Federal Commissioner of Taxation* (1953) 89 CLR 653] supra at 658,80,
>
> > a consideration may be "in connection with" more things than that "for" which it is received.
>
> As appears from all the aforegoing, the context wherein the expressions 'in respect of' and 'in connection with' occur is of vital importance."[115] (underlined for emphasis)

The judge in *Wispeco* admitted that sometimes the phrases indicate a direct relationship between the words that precede and succeed them, whereas other times they indicate a broader relationship, with the context being important for both phrases.

It is submitted that the context under section 23(b) (and section 23(m)) is indicative of 'in connection with' constituting a direct relationship with the words that succeed it- effectively a *home workspace*. This is because under section section 23(b) (and section 23(m)), 'in connection with' immediately follows the specifically named expenses- namely 'rent' and

[112] Therefore, employees were essentially subject only to section 23(b) only, as non-employees are now.
[113] Supra note 103 at 212–13.
[114] 1973 (1) SA 783 (A)
[115] Ibid at 792.

'cost of repairs'- which arguably have a direct relationship to a *home workspace*.[116] It is submitted that this effectively amounts to the principle of *eiusdem generis* as applied in *Ovenstone v Secretary for Inland Revenue.*[117]

However, this can be compared to *COT v Swaziland Ranches Ltd,*[118] where according to *Income Tax in South Africa*:

> "it was held that a building on a farm which was used for domestic purposes of persons who were not employed on farming operations, was not used 'in connection with' those operations, whereas a domestic building used by farm workers would be used 'in connection' with those operations."[119] (underlined for emphasis)

In the above case, a domestic building which was used by farm workers (as opposed to non-farm workers) was held to be used 'in connection' with the farming operations. Similarly, it is submitted, that typical domestic expense items (for example, stationery) which are used by an employee for their employment trade (as opposed to a non-trader) in a *home workspace*, are used 'in connection with' such *home workspace*. In other words, whom the item is used by will indicate if the item is used in 'in connection with' a *home workspace* or not. This admittedly constitutes a broad relationship to a *home workspace*.

Therefore, 'in connection with' in terms of section 23(b) (and section 23(m)) can be interpreted as constituting a broad or direct relationship to a *home workspace*. As such, there has been contention as it relates to the interpretations of the type of expenses which are effectively deductible in terms of subparagraph (iv) of section 23(m), read together with the exception in section 23(b).

However, whatever expenses are interpreted to be 'in connection with' a *home workspace* must apply to all taxpayers, as all taxpayers are subject to section 23(b). The effect of this for all taxpayers is that whatever expense is deemed to be 'in connection with' a *home workspace*, the section 23(b) requirements will need to be met in respect of that expense. This is because the requirements of section 23(b) (and section 23(m) for employees) will be

[116] For clarity, it is submitted that examples of expenses with a broad or indirect relationship with a *home workspace* are: stationery, internet, and telephone costs. Office equipment and furniture and fittings are effectively dealt with separately in terms of the law, as discussed in 3.4.3
[117] 1980 (2) SA 721 (A), 42 SATC 55 .
[118] 1974 (3) SA 28 (A), 36 SATC 71.
[119] D Clegg, et al *Income Tax in South Africa* § 2.9A

triggered given that the expense is one that is specifically named in such section. This becomes contentious as it relates to the deductibility of section 11(e) expenses.

3.4.3 Subparagraph (ii) of section 23(m)

With reference to subparagraph (ii) and (iv), provided in 2.3.1, in 2.4.3.2 it was submitted that for employees subparagraph (ii) of section 23(m) is not subject to the discipline of section 23(b)- which essentially constitutes meeting the *section 23(b) requirements.* Therefore, section 11(e) expenses are not required to meet the section 23(b) requirements in relevant part. However, Opinion pieces[120][121] have perpetuated the interpretation that section 11(e) expenses are required to meet the section 23(b) requirements. This interpretation, in substance, would be as follows: if a section 11(e) expense which is effectively deductible in terms of subparagraph (ii) of section 23(m), relates to an item that is used in a *home workspace*, it is deemed to be 'in connection with' a *home workspace*. The effect of this is that the taxpayer is subject to the section 23(b) requirements, which are triggered accordingly.

Indeed, it can be said that the relevant section 11(e) expenses are technically and effectively deductible under both section 23(m) and section 23(b). However, according to section 23B(1), where an amount qualifies for 'a deduction or an allowance'[122] under more than one provision of the ITA, it 'shall not be allowed… more than once in the determination of the taxable income'. Therefore, the section 11(e) expense to the employee may only be deductible once, effectively under section 23(b) or effectively under section 23(m), and not both.

Further, applying the principle of *generalia specialibus non derogant* in a similar way that was applied by the judge in *Van der Walt,* amongst other cases,[123] it is submitted that

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[120] 'It's official: Stay out of office till October, and SARS will let you claim home office costs' *Business Insider South Africa*, available at *https://www.businessinsider.co.za/how-to-claim-home-office-expenses-2020-7*, accessed on 28 Novemeber 2020.

[121] 'Can salaried workers in South Africa also claim home office tax relief?' *BusinessTech*, available at *https://businesstech.co.za/news/business/482645/can-salaried-workers-in-south-africa-also-claim-home-office-tax-relief/,* accessed on 5 May 2021.

[122] The wording here implies that the provision does not exclude effective deductions, as per the ones allowed in terms of section 23(b) and section 23(m). In other words, it does not only contemplate a 'deduction in terms of section 11', for example.

[123] *Income Tax Case 1558* (1992) 55 SATC 231. *Sentra-Oes Kooperatief Bpk v KBI* 1995 (3) SA 197 (A), 57 SATC 109 at 115.

section 23(m) is applicable and section 23(b) is not applicable. This is because, as it relates to *home workspace expenses* for employees, section 23(m) is more specific than section 23(b), in that section 23(m) is specifically for employees where as section 23(b) applies to all taxpayers. It is finally submitted that an employee is still entitled to apportion their section 11(e) expense in terms of section 23(g).

Another way of analysing the issue is applying the *Endumeni approach*. Reading subparagraph (ii) in the context of the section 23(m) as a whole, it is apparent that subparagraph (iv) specifically refers to section 23(b), whilst subparagraph (ii) does not. It can be argued that if subparagraph (ii) was subject to the discipline of section 23(b), there would be reference to it, as is the case in subparagraph (iv). The second factor of the *Endumeni approach*, in which consideration is given to 'the context in which the provision appears', can be applied briefly applied to this analysis. If done so, it is submitted that the weighting for it is high compared to any other interpretation. Therefore, it is finally submitted that the types of expenses deductible in terms of section 11(e) by employees, are effectively deductible under subparagraph (ii) of section 23(m) only; and are not subject to the *section 23(b) requirements.*

For non-employees where 23(m) is not applicable there is still contention as follows: if an asset in respect of a section 11(e) expense is deemed to be 'in connection with' a *home workspace*, it could be argued that the non-employee is subject to the section 23(b) requirements. This is because the requirements of section 23(b) will be triggered given that the expense is one that is specifically named in such section.

However, it is submitted that a section 11(e) expense is not 'in connection with' a *home workspace*, it being generally in respect of a specific and identifiable capital asset. Unless the capital asset is well integrated with the *home workspace*, it is not 'in connection with' a *home workspace*. Therefore, as it relates to these section 11(e) expenses, the section 23(b) requirements will not need to be met for all taxpayer types.

3.4.3 Section 23(b) requirements

With reference to the section 23(b) requirements, as discussed in 2.4.2, each of the quoted terms therein are effectively 'tests' and will henceforth be referred to as such. Each of the terms are not defined in the ITA, nor have they been defined by the courts in the present

context. The term 'mainly', however, was considered albeit in a different context, in *Sekretaris vir Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk*.[124] It was held that, 'the word "mainly" prescribed a purely quantitative standard of more than 50%'.[125] Therefore, if such principle is applied from the case, in the present context more than 50% of the taxpayer's duties must be performed in their *home workspace.*

Other than this case, there is not much to rely on as it relates to the above terms. It is submitted that since these terms are effectively 'tests', and there does not appear to be any commentary on them in the relevant Explanatory Memoranda relating to section 23(m), applying the *Endumeni approach* to them may not be useful. Further, as it relates to the section 23(b) specifically, the section 23(b) requirements were introduced before the existence of Explanatory Memoranda.

Notably, SARS has provided their interpretations of each of the above terms, via their IN, quite comprehensively. Therefore, these interpretations will be analysed in Chapter 4, broadly in terms of the applicable principles of fiscal statutory interpretation.

3.5 Conclusion

More complex matters relating to the interpretation of the law were highlighted and analysed in this Chapter, in light of the applicable principles of fiscal statutory interpretation. The outcome of this is that the substantive interpretation of the relevant parts of the ITA has been provided, with two main matters remaining inconclusive. These relate to the meaning of 'in connection with' and the meaning of each of the tests under the section 23(b) requirements.

Any relevant SARS INs must be considered to identify and analyse any of SARS' interpretations relating to the inconclusive matters in this Chapter, but also where SARS interpretations are materially different from those provided in this Chapter. It must first, however, be determined whether INs constitute any legal authority.

[124] 1966 (4) SA 434(A), 28 SATC 233
[125] Ibid at 245.

Chapter 4: Analysis of the Relevant Interpretation Notes and Potential Solutions

4.1 Introduction

The applicable law (including the applicable principles of fiscal statutory interpretation) has been established in Chapter 2 and Chapter 3, with two main matters remaining inconclusive.

In 2005, SARS issued an IN which essentially constitutes their interpretation relating to the law governing the deductibility of *home workspace* expenses for employees, with a second issue released in 2011. However, in response to the heightened contention due to the COVID-19 pandemic and the accelerated shift to working from home, two drafts of a third issue were published in 2021. This third issue was finalised in March 2022.

The relevant INs must be considered to identify and analyse any of SARS' interpretations relating to the inconclusive matters analysed in Chapter 3, but also where SARS interpretations are materially different from those provided in both Chapter 2 and 3. It must first, however, be determined whether INs constitute any legal authority.

This analysis will be done to determine whether SARS' interpretations in the relevant INs are appropriate in terms of the applicable law (including the applicable principles of fiscal statutory interpretation) as established in Chapter 2 and Chapter 3. As an alternative to SARS amending their interpretations (where they are deemed to be inappropriate), potential legislative amendments will be considered.

4.2 Authority of SARS' Interpretation Notes

According to the SARS website:

> "Interpretation Notes are intended to provide guidelines to stakeholders (both internal and external) on the interpretation and application of the provisions of the legislation administered by the Commissioner."[126]

The term 'interpretation note' forms part of the definition of an "official publication" in section 1 of the Tax Administration Act[127] ('TAA'). In terms of section 5 of the TAA, 'a practice generally prevailing is a practice set out in an official publication regarding the

[126] 'Interpretation Notes' *SARS,* available at *https://www.sars.gov.za/legal-counsel/legal-advisory/interpretation-notes,* accessed on 5 March 2022.
[127] Act 28 of 2011.

application or interpretation of a tax Act.' Therefore, the information provided in an IN constitutes, with some exceptions, a 'practice generally prevailing'. The phrase appears elsewhere in the TAA, mainly as it relates to the period of limitation for the issuance of assessments by SARS, in terms of section 99 of the TAA.[128] The law essentially favours the taxpayer as it relates to prescription, when they have relied upon information that is provided in an IN.

More generally, however, INs are not statutory instruments promulgated by the legislature. Rather they are issued by SARS, which is an organ of the state and essentially part of the executive branch of government albeit administratively autonomous.[129] Therefore, INs do not generally constitute any authority in terms of South Africa's legal system.

Whether or not a court may have regard to an IN in determining the proper interpretation of a particular provision of a statute was mooted in *Marshall and Others v Commissioner, South African Revenue Service*[130]. In the *court a quo,*[131] being the Supreme Court of Appeal, Dambuza JA stated:

> "These Interpretation Notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question. Interpretation Note 39 has been in circulation for years and has not been brought into contention until now."[132]

Froneman J admitted that the *court a quo* interpreted the relevant provisions 'independently of the Interpretation Note... its reference to it only served to confirm its interpretation'.[133] However, he criticised such confirmation, and the consideration of the relevant Interpretation Note at all in the judgement, by stating:

> "Missing from this reformulation is any explicit mention of a further fundamental contextual change, that from legislative supremacy to constitutional democracy. Why should a unilateral practice of one part of the executive arm of government play a role in the determination of the reasonable meaning to be given to a statutory provision? It might conceivably be justified where the practice is evidence of an impartial application of a

[128] In terms of section 99(1)(d)(i)(bb), for example, an additional assessment cannot be made 'if the full amount of tax which should have been assessed under the preceding assessment was, in accordance with the practice [generally prevailing], not assessed.'
[129] 'Interpretation Notes' *SARS,* available at *https://www.sars.gov.za/about/how-we-collect-tax/accountability/#:~:text=The%20mandate%20of%20SARS%20is,protection%20and%20facilitate%20legitimate%20trade*, accessed on 5 March 2022.
[130] [2018] ZACC 11.
[131] *Commissioner, South African Revenue Service v Marshall NO* [2016] ZASCA 158; 2017 (1) SA 114 (SCA).
[132] Ibid at para 33.
[133] Supra note 130 at 4.

> custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided."[134] (underlined for emphasis and footnote omitted)

Essentially, he is stating that IN are only appropriately considered if the taxpayer had effectively acquiesced to the 'practice' contained in the IN, i.e., there is evidence that the taxpayer applied the law in terms of SARS' IN. Therefore, it is submitted if a taxpayer had acquiesced to a relevant IN, such IN can feature as a part of the unitary *Endumeni approach*. It would only be a factor in such approach, and not in any way decisive.

Therefore, IN are not authoritative in terms of the law; and can feature as one component of interpretating the law, crucially, only in a specific circumstance.

4.3 Interpretation Note 28

In an attempt to ease the contention surrounding the deductibility of *home workspace* expenditure for employees, SARS issued an IN with the subject 'Deductions: Home office expenses incurred by persons in employment or persons holding an office'[135] in 2005, immediately after section 23(m) was introduced. The second issue of IN28[136] ('prior IN28') was issued in 2011. Prior IN28 was in issue for almost 10 years, until a draft of a third issue[137]('draft IN28') was released in May 2021. This was in response to the heightened contention due to the COVID-19 pandemic and the accelerated shift to working from home, as discussed in Chapter 1. This was done ahead of the 2021 Tax Season[138] which commenced on 1 July 2021 for individuals. This draft was available for public comment until 14 June 2021, and presumably much of the public sent their comments to the designated email address (policycomments@sars.gov.za), with the media providing commentary via various newspaper and magazine articles.

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[134] Ibid at para 10.
[135] SARS *Interpretation Note 28* (issued on 18 February 2005).
[136] SARS *Interpretation Note 28 (Issue 2)* (issued on 15 March 2011).
[137] SARS *Draft Interpretation Note 28 (Issue 3)* (published in May 2021).
[138] For individuals, this was in respect of years of assessment ending 28 February 2021, which was the first year of assessment concurrent with the COVID-19 pandemic.

4.3.1 SAIT Commentary

SAIT released their comments relating to draft IN28, which were quite critical, in a document ('SAIT commentary 2021')[139] on 14 June 2021. In their introductory remarks, they provided their view that:

> "… SARS' interpretation of certain requirements of section 23(b) of the Act has the effect that a large percentage of employees who were required to work from home during 2020 (and who still continue to work from home), will be unable to claim a deduction for home offices expenses that they have incurred."[140]

They then expanded upon their concerns, with technical but also political statements, an example of the latter being:

> "…only the elite group of taxpayers who are in a position to establish a home office that is regularly and exclusively used for purposes of their trade will benefit."[141]

They concluded their commentary as follows:

> "We realise that SARS is in a tough position in that the legislation has not yet changed to keep pace with the reality of working life in South Africa. However, National Treasury has given the indication that consideration will be given to shifting the underlying policy to address the large-scale migration to working from home. Moreover, the focus will be on the "efficacy, equity in application, simplicity of use, certainty for taxpayers and compatibility with environmental objectives". Whilst we all wait for the new round of legislative amendments; we request that SARS consider interpretations that takes cognisance of the new paradigm."[142] (underlined for emphasis)

Essentially, SAIT is acknowledging that the legislation has not changed since the onset of the accelerated shift toward working from home. However, they are attempting to hold SARS responsible to interpret the legislation in terms of such accelerated shift and National Treasury's indication of the relevant law being reviewed in the 2021 Budget Review which they presume will result in legislative amendments.

It is pre-emptive to assume that the legislation will be amended, given that National Treasury has merely indicated that they will 'review' the relevant provisions. Also, these concluding comments are not in terms of the *Endumeni approach*. The 'new paradigm' and

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[139] South African Institute of Taxation *Re: SAIT Comments on Draft Interpretation Note 28 (Issue 3): Deduction of Home Office Expenses Incurred by Persons in Employment or Persons Holding An Office* (Published 14 June 2021), available at: *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpretation_note_28.pdf.*

[140] Ibid at 2.

[141] Ibid at 2.

[142] Ibid at 3.

what National Treasury has said in a Budget Review, is not relevant to the interpretation of a provision promulgated in the past. It is submitted that this future-looking method of interpretation is akin to that of 'intention of the legislature', but rather 'what the legislature would have promulgated if they were aware of the current context'. This undermines the legislative authority as follows: any provision enacted by Parliament today can be revisited in the future and be interpreted within the current context at that time.

As was eloquently said in the *Endumeni* case, '…in a broad sense legislation in a democracy is taken to be a reflection of the views of the electorate expressed through their representatives.'[143] Representatives in the present case refers to Members of Parliament, the legislature, who essentially express the views of the electorate by voting for and passing legislation. Therefore, the only way that legislation can be changed to account for the current context, for example, is by Members of Parliament enacting new (or amending) legislation. The judiciary is then tasked with interpreting legislation, and the executive branch of government is tasked with administering legislation. Indicating that the current context has a bearing on fiscal statutory interpretation is problematic, however, it is submitted these comments by SAIT were in conclusion to their more substantive comments which featured in the body of the document, and overlaps with some of the analyses in term of this research.

In any case, the SAIT commentary 2021 appeared to have resulted in a sort of validation of the heightened contention relating to the relevant law. Perhaps in response, on 8 July, 2021 SARS hosted a webinar, which was live on YouTube, titled 'The SARS Home Office Tax Requirements Event'[144] ('SARS webinar'). The webinar featured a presentation on the law relating to the deductibility of *home workspace* expenses and the application thereof, a presentation regarding where to find the space for *home workspace* expenses on a tax return, and a panel discussion based on the questions received by the public. The purpose of the webinar was to 'to equip [taxpayers] with all the relevant information and knowledge to claim for working from a home office.'[145] However, the heightened contention persisted,

[143] Supra note 75 at 17-18.
[144] SARS *The SARS Home Office Tax Requirements Event*, available at: *https://www.youtube.com/watch?v=JOCnHA7FFzU.*
[145] Ibid.

and SARS released a revised draft IN 28[146] ('draft 2 IN28') in November 2021; and such draft was finalised[147] ('IN28') in March 2022.

4.3.2 Analysis of the Interpretation Notes

The relevant SARS INs must be considered to identify and analyse any of SARS' interpretations relating to the inconclusive matters analysed in Chapter 3, but also where SARS interpretations are materially different from those provided in both Chapter 2 and 3.[148]

As concluded in 4.2, IN are not authoritative in terms of the law. However, they do constitute SARS' interpretation of the relevant law. As SARS is South Africa's sole revenue authority, as well as the administrator of South Africa's tax laws, their interpretation has much impact. Firstly, it can be argued that the average taxpayer will not be aware of the lack of authority of INs as discussed in 4.2, and may deem the IN as law. Secondly, SARS' interpretation may provide clarity on how they will administer the applicable law, which is relevant to taxpayers for the current years of assessment.[149] Lastly, it can be said that if a taxpayer complies with IN28, they are unlikely to have to go through the objection and appeal process. This is because it is unlikely that SARS will take issue with an interpretation which matches theirs.

Thus, SARS' interpretations must be analysed in order to determine whether they are appropriate in terms of the applicable law (including the applicable principles of fiscal statutory interpretation). There is a notable risk here in that the old IN28 was issued before the *Endumeni* case was heard, and IN28 (including the draft IN28 and draft 2 IN28) are largely based on the prior issue, so inconsistencies may have been carried forward.

4.3.2.1 Background

All four versions of IN28 state their purpose as to provide 'clarity on the deductibility of home office expenses incurred by persons in employment or persons holding an office.'[150]

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[146] SARS *Draft Interpretation Note 28 (Issue 3)* (published in November 2021).
[147] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022).
[148] In conducting such analyses, the entire INs will not be considered, rather only these relevant parts.
[149] Any legislative amendments, if any, promulgated during the current legislative cycle will likely only be applicable in future years of assessment. Until then taxpayers are subject to the current applicable law, which SARS provides its interpretations to in IN28 for the 2023 year of assessment.
[150] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 1.

From draft IN28 it is stated that, 'The effect of section 23(b) and 23(m) on the deductibility of home office expenditure for employees and holders of an office is the main focus of this Note.'[151] Also from draft IN28, the shift to working from a *home workspace* is acknowledged, but the COVID-19 pandemic and the digital age are not mentioned.[152] From draft 2 IN28, SARS effectively provides what is submitted to be an indirect response to the SAIT commentary 2021. It states that:

> "It is important to note that the interpretations reflected in this note are based on the provisions of section 23(b) and section 23(m) which have not been amended since the onset of these developments. Some people may consider the provisions to be overly strict; however, absent legislative amendment they are the provisions which must be applied."[153] (underlined for emphasis)

IN28 adds to this, after 'strict' above, 'inequitable and unaccommodating of the modern work environment,…'.[154] SARS is therefore rejecting any responsibility imputed on them to interpret the legislation in terms of the current context at the time, as was done in terms of the SAIT commentary 2021.

4.3.2.2 Types of home workspace expenses

After stating that the applicable law is provided in an Annexure, all four versions of IN28 have the heading 'What constitutes home office expenditure?' under which it is stated, in 4.1 of the prior IN28, that:

> "Typically, home office expenditure will be the type of expense referred to in section 23(b), namely –
>
> • rent of the premises;
>
> • interest on bond;
>
> • cost of repairs to the premises; and
>
> • other expenses in connection with the premises."[155] ('first list')

It must be noted that, except for 'interest on bond', the above list constitutes the same expenses that are specifically named in section 23(b). Thereafter, 'other typical home office expenditure' is listed as follows:

> "• phones;

[151] SARS *Draft Interpretation Note 28 (Issue 3)* (published in May 2021) at 1.
[152] Ibid.
[153] SARS *Draft Interpretation Note 28 (Issue 3)* (published in November 2021) at 3.
[154] SARS *Interpretation Note 28 (Issue 2)* (issued on 15 March 2011).
[155] SARS Interpretation Note 28 (Issue 2), issued on 15 March 2011 at 2.

- stationery;
- rates and taxes;
- cleaning;
- office equipment; and
- wear-and-tear."[156] ('second list').

By splitting the two lists as they did, it could be interpreted that the second list constitutes expenses that SARS deems to be 'in connection with' a *home workspace*, and therefore potentially deductible. This is because the second list appears directly after 'other expenses in connection with the premises', the proposed conclusion being that the second list expands on 'in connection with', which is broad. This conclusion is evident in the media, with opinion pieces varying with respect to whether or not phone expenses are deductible, one even claiming that data usage (assumingly on a cell phone) is claimable.[157] It is submitted that this is not what SARS intended to portray, as they attempted to clarify their position from draft IN28 by inserting the word 'maintaining' and amending the second list, as follows:

> "other typical expenditure that could be incurred in <u>maintaining</u> a home office may include–
>
> - phones;
> - <u>internet;</u>
> - stationery;
> - rates and taxes;
> - cleaning;
> - office equipment, furniture and fittings, and repairs thereto; and
> - general wear-and-tear."[158] [159] (underlined for emphasis)

The effect of this, it is submitted, is that SARS is clarifying that the second list constitutes expense items which are not incurred necessarily 'in connection with' a *home workspace* (with a result being that they are potentially deductible). Rather, these expenses are merely incurred in 'maintaining' a *home workspace*, a word in which SARS is appears to be

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[156] Ibid.
[157] 'Been working from home? You can get money back from Sars' *IOL.com*, available at: *https://www.iol.co.za/personal-finance/tax/been-working-from-home-you-can-get-money-back-from-sars-ddf8380d-6d9d-46f2-9ee6-d0f1e1776f10,* accessed on 15 May 2021.
[158] SARS *Draft Interpretation Note 28 (Issue 3)* (published in May 2021) at 2.
[159] Internet is added to the list.

portraying as broader than 'in connection with'. This is submitted to be appropriate, as the heading of the section is 'what constitutes home office expenditure', and not 'what types of expenses are deductible in terms of the relevant law'.

This position is confirmed from draft 2 IN28 as follows:

> "The two lists above do not reflect expenditure that is necessarily deductible, the lists reflect the types of expenditure that may typically be incurred in relation to maintaining a home office."[160]

From draft 2 IN28, both lists are amended as follows:

> "Typically, home office expenditure includes the types of expenses referred to in section 23(b), namely –
>
> • rent of the premises;
>
> • cost of repairs to the premises; and
>
> • expenses in connection with the premises, <u>which could include</u> –
>
> -interest on a mortgage bond;
>
> -rates and taxes;
>
> -cleaning costs; and
>
> -electricity.
>
> In addition to these types of expenses, other typical expenditure that could be incurred in maintaining a home office may include –
>
> • phones;
>
> • internet;
>
> • stationery;
>
> • office equipment, furniture and fittings, and repairs thereto; and
>
> • general wear-and-tear."[161]

Therefore, SARS provides more specifically which expense items they deem 'could be'[162] incurred 'in connection with' a *home workspace*. It is submitted that the result is that 4.1 of IN28 constitutes two lists as follows:

[160] SARS *Draft Interpretation Note 28 (Issue 3)* (published in November 2021) at 4.
[161] Ibid at 3-4.
[162] Is submitted that SARS, by using the word 'could', is envisaging that other expenses may be deemed to be 'in connection with' a *home workspace*; and therefore that the list is not conclusive. This is evident with SARS mentioning security costs and insurance in paragraph (b) of 4.6.2 of draft 2 IN28. Ibid at 17.

- The first list constitutes expenses which are specifically mentioned in section 23(b), including what 'could be' incurred 'in connection with' a *home workspace*; and are therefore potentially deductible.
- The second list constitutes expenses which SARS admits are incurred in 'maintaining' a *home workspace*, but are not incurred 'in connection with' a *home workspace*; and therefore may not be deductible.

IN28 did not differ materially from draft 2 IN28, however, it being the most current issue, it will henceforth be referred to. SARS states in 4.1 of IN28 that 'The deductibility of home office expenditure is considered in 4.2 – 4.6.2.'[163] Taxpayers are therefore directed by the updated wording and structure in 4.1 of draft 2 IN28 to engage with the entire IN and not just the two lists.

In 4.6.2 of IN28, titled 'Permitted expenditure', SARS expands on their interpretations of what is meant by the phrase 'in connection with'. They also provide discussions relating to expense items they deemed in 4.1 'could be' incurred 'in connection with' a *home workspace*; and discussions relating to expense items on the second list, which they call 'other expenses'. Therefore, it is submitted that SARS has corrected what they deemed to be a misinterpretation by taxpayers regarding the prior two lists. However, the lists may similarly be interpreted by taxpayers as what type of expenses are deductible and what are not deductible in relevant part; and this is not conclusive in terms of the law. The type of expenses that is deductible depends, *inter alia*, on the interpretation of 'in connection with'.

<u>'Expenses in connection with'</u>

It was concluded in 3.4.2 that 'in connection with' in terms of section 23(b) (and section 23(m)) can be interpreted as constituting broad or direct relationship to a *home workspace*. Under paragraph (b) of 4.6.2 of IN28, SARS provides an admittedly comprehensive discussion on what is meant by 'in connection with'. Thereunder SARS refers to the *dicta* from various cases, mainly the *Wispeco* case as discussed in 3.4.2.[164] SARS states that, 'it is critical to consider the context in which the words are used'.[165] However, SARS does not

[163] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 4.
[164] Supra note 114.
[165] Ibid at 15.

distinguish the *Swaziland Ranches Ltd* case, which as applied to the current context in 3.4.2 results in the meaning of 'in connection with' constituting a broad relationship to a *home workspace* in relevant part. Interestingly, SARS referenced *Income Tax Case 885*,[166] in which it was stated that:

> "One must give to the phrase 'a wide and comprehensive meaning' but not so wide and comprehensive as to embrace a remote and indirect connection."[167]

It is submitted that the expenses with a broad or indirect relationship to a *home workspace* (i.e. stationery, internet, and telephone costs) are not expenses which have a 'remote' connection to a *home workspace*. Therefore, SARS' conclusion that 'a more direct relationship with the physical premises is required'[168], is at least not conclusive.

As discussed in 3.4.1, and if SARS' interpretation of 'in connection with' prevails, non-employees would potentially be able to deduct other expenses (i.e. stationery, internet, and telephone costs), whilst employees are not. The apparent purposes of distinguishing employees and non-employees in terms of the relevant law (and current practicality) was discussed in 2.4.2 and 2.4.3.1. The SAIT Commentary 2021 argues that the result of employees and non-employees being treated differently by SARS, as it relates to the types of *home workspace* expenses deductible, amounts to a 'very narrow interpretation'[169].

<u>Subparagraph (ii) of section 23(m)</u>

As discussed in 3.4.3, section 11(e) expenses are not required to meet the section 23(b) requirements in relevant part; and this applies to all taxpayers. From paragraph (c) of 4.6.2 of IN28, section 11(e) expenses are distinguished from the other expenses as follows:

> "Capital costs such as equipment and furniture which meet the requirements of and qualify for a wear-and-tear allowance under section 11(e) are excluded from the prohibition in section 23(m)."[170]

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[166] (1959) 23 SATC 336(C).
[167] Ibid at 338.
[168] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 16.
[169] South African Institute of Taxation *Re: SAIT Comments on Draft Interpretation Note 28 (Issue 3): Deduction of Home Office Expenses Incurred by Persons in Employment or Persons Holding An Office* (Published 14 June 2021), available at: *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpinterpre_note_28.pdf* at 4.
[170] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 17. The footnote to this quote refers to 'section 23(m)(iv)', but it is submitted that the reference should be 'section 23(m)(i)'.

Therefore, IN28 accords with the conclusion in 3.4.2. However, an interesting issue comes up in an example provided in IN28,[171] relating to the 'exclusivity test'. In such example, 'space and equipment' are said to be shared between spouses who are required to work from home by their respective employers. SARS' result is provided as follows:

> "The space and equipment is not exclusively used by X or Y, therefore the exclusivity requirement is not met for either X or Y and no deduction is permitted."

In concluding that 'the space and equipment' are not 'exclusively' used by either spouse, SARS relies on the fact that the workspace and the equipment are used by both spouses. Section 23(b) in relevant part effectively requires the *home workspace* as a whole to be used 'exclusively', and not specifically the 'equipment'. This example may cause taxpayers to again confuse section 11(e) expenses to be subject to the section 23(b) requirements.

4.3.2.3 Apportionment

As discussed in 3.4.1.1, the apportionment of a *home workspace* expenses may be necessary where such expense is a 'fixed cost', such as rent. In 4.6.1 of IN28 titled 'Apportionment', SARS effectively concedes to this as it is stated that:

> "SARS accepts that the correct method to calculate the proportion of expenditure attributable to a part of a premises occupied for purposes of trade, is apportionment based on floor area of the premises."[172]

Apportionment and methods of apportionment are commonly provided via SARS IN for a specific issue in the ITA.[173] In IN28, SARS' highlights the apportionment of expenses by way of various Examples. In terms of Example 9 of IN28[174], the taxpayer only works from home for eleven months of the year of assessment, and SARS' result is that the taxpayer may claim *home workspace* expenses for those eleven months they so worked from home. It is stated that the taxpayer 'qualifies for a home office deduction', so it is assumed that *all* the section 23(b) requirements tests were met for the eleven months only.[175] Notably, it is stated in Example 9 that expenses for the eleven months must be based on actual expenditure, and

[171] Ibid at 9.
[172] Ibid at 13.
[173] One example of this is an IN dealing with 'The interpretation and application of the foreign employment remuneration exemption in section 10(1)(o)(ii)', whereby SARS provides a formula. SARS *Interpretation Note 16 (Issue 4)* (issued 28 June 2021).
[174] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 13.
[175] The tests would of course not be met for the other month as the taxpayer was not working from home for that month.

'cannot be apportioned for the part of the year of assessment that the home office was used for purposes of trade'.[176] In terms of example 1 of IN28,[177] the taxpayer works from home for ten months of the year of assessment, and SARS's result is that the taxpayer 'satisfies the regularity test and could qualify for a home office deduction in respect of expenditure incurred during that period'. It is submitted that, if based on the full year of assessment, the 'regularity' test (as well as the 'specifically equipped', and 'exclusively' tests) would not be met in both examples.

Therefore, in terms of these two examples, a period of less than a year of assessment is essentially used to perform the tests under the section 23(b) requirements. Then, the total expenditure incurred in such period is accounted for and may only be apportioned based on the floor area of the entire premises in which the *home workspace* is located, in other words, 'time apportionment' of expenditure is not allowed nor is necessary.[178] For example, assuming that all the other section 23(m) requirements are met in relevant part, and the taxpayer worked from home only for ten months out of the year, the taxpayer cannot take the total expenses for the year and apportion it to those ten months.

Regarding performing the tests under the section 23(b) requirements, SARS' demonstrates a contradictory view as it relates to the performance of the 'mainly' test. It is stated in IN28 that:

> "The test is performed for the year of assessment even if the employee works for only a portion of the year for an employer that permitted services to be rendered at a home office."[179]

Therefore, according to SARS, as it relates to the 'mainly' test, even if the taxpayer works from home for a period less than the full year of assessment (as is the case in Example 1 and 9), the full year of assessment is accounted for in performing such test. SARS reasoning for this view includes a reference to the *Lourens Erasmus (Edms) Bpk* case, discussed in 3.4.3, where it was held on a different provision that that the meaning of 'mainly' is 'more than 50%'; and that in determining whether such test is met a 'determination must be made with

[176] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 13.
[177] Ibid at 7.
[178] Ibid at 14.
[179] Ibid at 10.

reference to the current year of assessment'.[180] In concluding on the applicability of this case, SARS states that:

> "taking the wording of the preamble to proviso (b) to section 23(b), the purpose of the requirement and the consistency in approach with paragraph (i) of proviso (b), the assessment must be performed for the year of assessment."[181]

Neither the preamble to proviso (b) to section 23(b), nor the wording of paragraph (i) of proviso (b) to section 23(b) include any direct or indirect reference to a year of assessment. Further, it is submitted that, SARS does not adequately apply the case to the current matter of interpretation.

In Example 7 of IN28,[182] only working days (and not leave days) are accounted for in performing the 'mainly' test. This is not explained in IN28, but the apparent purpose for this interpretation lies in the wording of the provision related to the 'mainly' test. Thereunder, it states that the '[taxpayer's] duties are mainly performed' in the *home workspace*. Consequently, it is only necessary to account for the days that the taxpayer was required to perform their such duties (in either a *home workspace* or not), and this is generally not on weekends and leave days. Similar to Example 1 and 9, it is stated that the taxpayer worked from a home for nine months of the year of assessment, and the rest of time at the employer's premises. SARS' result includes a calculation which is based on the full year of assessment, albeit including only working days for the particular year of assessment (and excluding the taxpayer's leave days).[183]

This is clearly contrary to the other tests under the section 23(b) requirements, as per Example 1 and 9, where a period of less than a year of assessment is essentially used to perform such tests. It is therefore submitted SARS' interpretation regarding the relevant part of the 'mainly' test is inappropriate; and congruity's sake, as well as the lack of adequate reasoning from SARS (as discussed above), there should be periodic testing by all the section 23(b) requirement tests. This period should be the period in which the taxpayer worked from home, which can be less than a full year of assessment. So, in Example 7 of

[180] Supra note 124.
[181] Ibid at 10.
[182] Ibid at 11.
[183] This is referred 'working time' in IN28. Ibid at 11.

IN28, only the nine months of the year of assessment that the taxpayer was working from home should be accounted for when performing the 'mainly' test.

This further makes sense in the context of lockdown restrictions related to the COVID-19 pandemic, where some taxpayers had to go back and forth between working from home, which taxpayers had no control over. Therefore, some taxpayers went back and forth for periods to working from home, and those periods should be tested.

This lastly makes sense in terms of an employee, during a particular year of assessment, starting employment (from a non-employment trade) or switching employers (i.e. changes jobs) where the new employer may have a different 'work from home' policy. If in terms of either situation they are allowed or required to work from home, it is submitted only such period working from home should be tested.

4.3.2.4 Section 23(b) requirements

As noted in 3.4.3, SARS has provided their interpretations of each of the tests under the section 23(b) requirements, via their IN. Their interpretations are provided under respective sub-headings of IN28, as follows:

- 'Specifically equipped' is dealt with in section 4.5.2
- 'Regularly' and 'exclusively' are dealt with in section 4.5.3
- 'Mainly' is dealt with in section 4.5.4

Again, SARS' interpretations as it relates to the above terms must be analysed broadly in terms of the applicable principles of fiscal statutory interpretation.

<u>'Specifically equipped'</u>

In establishing the meaning of 'specifically equipped', SARS references dictionary meanings.[184] The following conclusion is then made by SARS:

> "…in order for a part of a private home to be considered "specifically equipped" for the purposes of trade, that part must be <u>fitted with the instruments, tools and equipment required to conduct that trade</u>."[185] (underlined for emphasis)

[184] According to SARS, 'The Collins English Dictionary defines the word "specific" to mean "relating to a specified or particular thing". The same dictionary defines the word "equip", of which "equipped" is the adjective, to mean "to furnish with"' (footnotes omitted). Ibid at 6.
[185] Ibid at 6.

It is submitted that this is a fair and practical interpretation; and SARS goes on to state that the definition will be applied on a 'case-by-case basis… dependent on [a taxpayer's] specific trade'. However, in providing examples, SARS contemplates mechanics, architects, and doctors, as well as 'office-type work'. It is submitted that the language used by SARS in this version of IN28 provides a more subjective approach[186], as opposed to prior versions, where SARS was more prescriptive. In 4.5 of the prior IN28, for example, SARS stated that 'A separate office would need to be equipped and maintained'.[187] This is inappropriate, at least as it relates to the term 'specifically equipped', which comprises of two adverbs essentially describing what is located within a *home workspace;* and there is no contemplation of the 'separateness' of the *home workspace*.

'Regularly'

In establishing the meaning of 'regularly', SARS references the dictionary meaning,[188] however, it is stated that:

> "As each case will have to be decided on its own merits, it is not possible to define what would be *acceptable* as regular usage for the purposes of trade. However, a home office that is maintained and is only used occasionally, for example, once on a weekend due to the taxpayer maintaining separate business premises, is not used frequently enough to constitute "regular" use."[189] (underlined for emphasis)

It is submitted that once a weekend, so long as it Is every weekend, could be considered to be 'regular' use, so this example is inappropriate. However, the body of SARS' interpretation above accords with the subjective approach provided in terms of the 'specifically equipped' test; and if applied accordingly, is submitted to be a fair and practical interpretation.

'Exclusively'

In establishing the meaning of 'exclusively', SARS references the dictionary meaning.[190] This requirement was narrowly interpreted in the prior IN28, with SARS essentially interpretating overall that a *home workspace* constitutes a separate room'.[191] It is however submitted that a separate room is not required in terms of the law, which merely requires a 'part' of a

[186] In other words, based on the facts and circumstances of a specific taxpayer.
[187] *SARS Interpretation Note 28 (Issue 2),* issued on 15 March 2011 at 3.
[188] This is "done or happening frequently". SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 7.
[189] Ibid.
[190] This is "excluding or not admitting other things; excluding all but what is specified". Ibid at 7.
[191] *SARS Interpretation Note 28 (Issue 2),* issued on 15 March 2011 at 3.

domestic premise to be 'exclusively' used for trade purposes[192]. This could be, for example, a dedicated desk and chair in the corner of a bedroom or lounge that is used as a *home workspace*. SARS acquiesced to this in the IN28, where it is stated that:

> "A deduction is not permitted if the taxpayer or any other person conducts any activities that are not part of the taxpayer's trade (for example, activities of a private nature) in the part used for trade. For this reason, although a part of a room constitutes a part of a premises, it is submitted that taxpayers will have great difficulty satisfying the burden of proof that the part was used exclusively for purposes of trade,.." (underlined for emphasis)

SARS' caution that 'taxpayers will have great difficulty satisfying the burden of proof' is submitted to be inappropriate. The burden of proof in terms of section 102(1) of the TAA indeed lies with the taxpayer, however, SARS' opinion on how 'difficult' it is to satisfy such burden of proof is not relevant in terms of the law. The taxpayer is entitled to satisfy the burden of proof despite how difficult SARS may think it is to do so. Effectively, it is ultimately up to a court of law, not SARS, to decide if the burden of proof is satisfied. This applies to all the tests under section 23(b) requirements.

SARS is evidently carrying forward their prior interpretations of the applicable law, which were interpretated at a time where taxpayers who were afforded the then privilege of working from home were generally wealthier, and therefore would have the means to have a separate-room *home workspace*.[193] This is not the case today, where not only is it more of a norm to work from home, but also people tend to live in smaller houses, and apartments, even 'micro-apartments', of course without separate-room *home workspaces*.[194] Taxpayers who do not have the means or chose to have smaller homes, without separate-room *home workspaces,* should not be penalised in this regard. This is against the taxation principle of equity, and the progressive nature of South Africa's overall tax system. It must be

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[192] A part-of-a-room is submitted to constitute a 'part' of a domestic premises.

[193] The facts of the *Van der Walt* case, consequent to which the section 23(b) requirements were promulgated, is submitted to accord with these comments.

[194] This has in part been contemplated by SAIT in terms of their commentary (SAIT commentary 2021 and SAIT commentary 2022) discussed in Chapter 1, 2, and this Chapter. South African Institute of Taxation *SAIT Response to Call for Comment on Draft Interpretation Note 28 (Issue 3): Deductions of Home Office Expenses Incurred by Persons in Employment or Persons Holding an Office* (Published 14 January 2022), available at: *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2022_technical/sars_submission/draft_interpreinterp_note_28.pdf* at 2. South African Institute of Taxation *Re: SAIT Comments on Draft Interpretation Note 28 (Issue 3): Deduction of Home Office Expenses Incurred by Persons in Employment or Persons Holding An Office* (Published 14 June 2021), available at *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpinterpre_note_28.pdf* at 4.

emphasised here, to avoid any imply that these comments are made in establishing the applicable law which would be against the *Endumeni approach*, that the applicable law allows an interpretation which accords with these comments.

Therefore, it is finally submitted that expenses in respect of a part-of-a-room *home workspace*, if the other section 23(b) requirements are met, can be claimed in respect of that part. SARS' apportionment method provided for in 4.6.1 of IN28 is still applicable. For example, the taxpayer can measure the floor space of the corner of a room, and apportion this based on the floor area of the entire premises.

An example of part-of-room deduction is actually provided for in Example 5 of IN28, where spouses divide a room into 'two distinct parts and each one uses only the separate part of the room allocated to them,'[195] with SARS' result being that the 'exclusivity' test is met. However, SARS concludes:

> "Practically, since X and Y have separated their respective home office areas which are appropriately equipped for each trade, X and Y may find it easier to provide evidence supporting the position that these requirements have been met and discharging their burden of proof."[196]

SARS deems this to be an 'exceptional case', but it is not stated how it is distinct in terms of the law from a room split between a *home workspace*, and say, a bedroom. Whether the other part-of-the-room is used by another employee for their trade, or is used for private purposes, such other part-of-the-room is not used 'for purposes of the taxpayer's trade'. Therefore, it is submitted that principles present in this example, that a part-of-a-room *home workspace* must merely be 'separate' and 'distinct' from the rest of the room, are applicable to all part-of-room *home workspaces*.

SAIT made an interesting submission, in its commentary regarding the 'exclusively' test. It is that only the time in which the employee is required to be working ('working hours') should be tested under this test. According to SAIT, 'This will allow limited private use of the home office by other members of the household, after hours or over weekends'[197].

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[195] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 9.
[196] Ibid.
[197] South African Institute of Taxation *Re: SAIT Comments on Draft Interpretation Note 28 (Issue 3): Deduction of Home Office Expenses Incurred by Persons in Employment or Persons Holding an Office* (Published 14 June 2021), available at:

Working hours is not appropriate here as there is no reference to 'duties' in proviso (a) to section 23(b), as is the case with proviso (b)(ii) to section 23(b) (as discussed below). It is also unnecessary to prove that an entire room is used 'exclusively' for trade, it is just the 'part' that must be used 'exclusively' for trade (as discussed above). For example, if a part of a room is used as a *home workspace*, and another part is used by the employee's kids on weekends, so long as kids do not use the *home workspace* part, that part will pass the 'exclusively' test.

It must be noted that SARS acknowledges that:

> "… the law does not concern itself about trifles (Represented by the maxim *de minimis non curat lex* – see *Municipal Council of Bulawayo v Bulawayo Waterworks Co Ltd* 1915 AD 611) and so inconsequential private use, such as, for example, answering a private telephone call in the home office whilst working, or walking through the home office after work to an outside patio, will not render the use to be not exclusively for purposes of trade."

Overall, it is submitted that SARS' interpretation regarding the 'exclusively' test is inappropriate.

'Mainly'

In establishing the meaning of 'mainly', SARS references the *Lourens Erasmus (Edms) Bpk*[198] case, which was discussed in 3.4.3 and 4.3.2.3. In paragraph (b) of 4.5.4, SARS concludes that, 'In the context of proviso (b) to section 23(b) "mainly" is also interpreted to mean "more than 50%"'[199]. It is unclear which context SARS is referring to here (it is not specified), however this is submitted to be a fair interpretation. Then, under the same part of IN28, SARS makes what are submitted to be problematic statements.

Firstly, it is stated that 'to satisfy the "mainly" requirement the employee must spend more than 50% of his or her working time… rendering employment services at the home office'.[200] 'Working time' is not contemplated in the legislation, rather there is reference to 'duties', in relevant part. However, SARS makes what is submitted to be the correct conclusion with respect to the burden of proof in terms of the 'mainly' test as follows:

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https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpinterpre_note_28.pdf at 3.

[198] Supra note 124.

[199] Underlined for emphasis. SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 10.

[200] Ibid.

> "This wording [of proviso (b)(ii) to section 23(b)] postulates an objective factual enquiry as to whether the employee actually performed more than 50% of the employment duties in such part."[201] (underlined for emphasis)

Therefore, it is finally submitted that working time (hours or days, for example) is but one measurement that can be employed under this test.[202] In modern times, the performance of an employee's duties in terms of their employment contract is not always measured (by their employers) based on the time an employee spends working, but rather on the quality and quantity of the employee's output. Especially where an employee works from home, an employer may not require an employee to account for their hours worked, and/or an employee may be working more hours than what is required in their employment contract[203]; and their employer measures their performance based on their output. Therefore, it is submitted that such an employee could apply the 'mainly' test based on where more than fifty per cent of their output is produced.

As a practical example, an employee may go into the employer's office three days a week (say for the entire year of assessment), but at least a quarter of that time is spent socialising and connecting with their colleagues. On the other two days, where they work from home, they are solely completing their substantive employment tasks. If the 'mainly' test was applied based on time (say days) they would fail the test, but if it was applied based on output, they would pass.

What constitutes appropriate and sufficient proof of the 'mainly' test being met, however, is submitted to be a challenge given the private nature of working from home. In this regard, SARS states under the same part of IN28, that:

> "Employers sometimes issue letters to employees confirming that they performed their duties mainly in a home office. SARS is unable to accept such letters as absolute proof of the fact that the employees worked mainly in their home office. An employer is ordinarily only able to confirm –
> • that the employee is permitted under the employment agreement to render employment services away from the employer's premises; and
> • the number of days that the employee was present at the employer's premises (if the employer kept records of this). For example, many employers operate security-controlled entrance and exit points at their premises and are able to provide written confirmation of

[201] Ibid.
[202] Working days was employed in Example 7 of IN28, as discussed in 4.3.2.3. Ibid at 11.
[203] With the lack of distractions that occur from socialising in the office, but also the lack of commutes to work, there are more hours spent working on substantive tasks, when compared to the total working hours in terms of their employment contract as would have been adhered to before working from home.

> the days that their employees were in the office for those employees to submit to SARS."[204]

Essentially, SARS argues that letters from an employer confirming an employee worked from home is not absolute proof that the 'mainly' test is met, as an employee could work from a coffee shop or a location which is not the employee's *home workspace*. However, it is submitted there is an assumption by SARS here that the employee is in fact allowed to work at places other than their *home workspace*, which may not be the case. An employee, for various reasons, could be required via their employment contract or other agreement that they are only allowed to work from their designated *home workspace*.[205] Taxpayers under this sort of control should especially be entitled to easily claim their self-incurred *home workspace* expenditure.

As provided as an example by SARS in IN28, employers can provide written confirmation of the days an employee was at the office, based on their security control systems or, it is submitted workplace management system ('WMS')[206]. There is a Protection of Personal Information Act 4 of 2013 risk with respect to records of employee whereabouts being submitted to SARS, especially if there is confidentiality risk within SARS' internal controls. Perhaps the risk will be minimised if employers only provide information on the number of days the relevant employee accessed the office.

Where the above is not the case, it is accepted that the employer cannot confirm that the employee worked from home. However, it is submitted that they can provide that they were allowed to work from home. SARS acknowledges this in part 5 of IN28 where a list of 'documentation… required to support [a claim for a deduction for home office expenses]' is provided, one being a:

> "Letter from the employer, on the employer's letterhead, confirming that the employee was permitted to work from home, including the periods that the employee was permitted to work from home and, if available, those periods that the employee did not report to the office."[207]

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[204] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 11.
[205] This could be monitored by the employer, for example, via a global positioning system ('GPS'). GPS is usually a feature of an employee-provided laptop; and employers could set up a programme to measure if their employees are working from their designated *home workspaces* via GPS.
[206] Due to the ongoing COVID-19 pandemic, in terms of their WMS, many employers require their employees to fill out a COVID-19 screening form before they are granted access to the office, to monitor any symptoms but also to monitor the amount of people in the office on any given day.
[207] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 24.

Understandably SARS may be concerned about fraudulent letters from employers being requested and submitted[208] by employees, their close relationship admittedly increasing such risk, however this no excuse. If it is an issue of reliability of the letter, then perhaps a letter from a senior person (such as a CEO) of an employee's company, or an employment contract being amended to provide that the employee is required to work from their *home workspace* (whichever applicable), will increase the reliability.

In any case, SARS' opinion on how 'difficult' it is to satisfy such burden of proof is not relevant in terms of the law, as discussed above. The taxpayer is entitled to satisfy the burden of proof despite how 'difficult' SARS may think it is to do so. Furthermore, it is rare an occasion in the tax system where 'absolute proof' is required to be submitted, even by SARS in their IN.

For example, as it relates to claiming a "business purposes reduction" from a travel allowance under section 8(1), a taxpayer submitting a self-prepared "logbook" is accepted.[209] The legislation in respect of each of the relevant reduction methods actually requires the reduction to be based on 'actual distance', and depending on the method, 'accurate data [must be] furnished [to SARS]'. What is furnished could be fraudulently accounted for by the taxpayer, but it is still generally accepted by SARS in making an assessment of a taxpayer, which they could obviously scrutinise further via audit or verification. The important point here is that a "logbook" is not absolute proof in claiming business reduction from a travel allowance. Therefore, any implication that the 'mainly' test requires absolute proof is incorrect.

Section 23(b) does not even have any comparable compliance requirements and therefore the taxpayer is not required to submit an equivalent "logbook", as is suggested in part 5 of IN28, being a:

> "Schedule of dates detailing when the employee worked from home during the year of assessment, and a calculation proving that the employee worked mainly from the home office during the year of assessment."[210]

[208] Further, it can be argued that SARS is concerned about the administrative burden on them in this regard.
[209] SARS even provides an "e-Logbook" on their website. 'Travel e-log book' *SARS,* available at *https://www.sars.gov.za/types-of-tax/personal-income-tax/travel-e-log-book/,* accessed on 7 March 2022.
[210] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 25-26.

Therefore, it is finally submitted that without any apparent alternatives, a *bone-fide* letter from an employer confirming that the employee was allowed to work from home, a schedule of dates, or any of the other items on the list in part 5 of IN28 will help to satisfy the burden of proof that a taxpayer satisfies the 'mainly' test. Notably, however, that these are not specifically required in terms of the legislation or existing case law.

Overall, it is submitted that SARS' interpretation regarding the 'mainly' test is inappropriate.

4.3.2.5 Evidence

In part 5 of IN28, SARS states that:

> "It is essential that any claim for a home office deduction is supported by sufficient evidence proving that all the requirements that are necessary to claim a deduction have been met."[211]

SARS then admits that there is 'no closed list of documents or evidence that can prove a claim for home office expenses'; but then provides a list of documentation which 'would typically be required to support such a claim in circumstances where the taxpayer's home office is a separate room'. It is submitted again that, in terms of the law, a *home workspace* need not be a separate room. Therefore, it is inappropriate for SARS to limit the application of the list to that circumstance. In any case, the list is quite comprehensive, although it is submitted that it would entail a significant administrative burden for the taxpayer and SARS. This is because the various written documentation includes not only schedules, but also 'floor plans' and even 'photographs of the home office'. How SARS will validate these documents will arguably be challenging.

It is lastly admitted by SARS, that the items on the list in part 5 of IN28 are '…neither comprehensive nor exclusive, and each employee may provide whatever evidence supports his or her particular factual position.'[212] This statement is appropriate given that it is ultimately up to a court of law and not SARS to decide if the burden of proof is satisfied, as discussed above. Overall, however, SARS' interpretations with regards to evidence are inappropriate and at times contradictory.

[211] Ibid.
[212] Ibid.

4.4 The Way Forward

In terms of the analyses in this chapter, it is evident that SARS' interpretations in IN28 are not appropriate overall, and are submitted to be quite aggressive, in terms of the applicable law (including the applicable principles of fiscal statutory interpretation). The applicable law has evolved over the past fifty years, and SARS arguably has not accordingly accounted for this. It must be emphasised here, to avoid any imply that this comment is made in establishing the applicable law which would be against the *Endumeni approach*, that the applicable law allows an interpretation which accords with these comment.

Any of the matters analysed in this chapter can be challenged by a taxpayer in a court of law. In terms of the thorough research conducted in this chapter and Chapter 2 and 3, it is submitted that there are good prospects of a taxpayer making a compelling argument in a court of law, which SARS will have to defend effectively. This will entail costs for SARS, with no guarantee that their interpretations will prevail. Further, the list of evidence provided for by SARS in part 5 of IN28,[213] which for the reasons discussed above are not decisive in terms of the applicable law, but in any case, would require a significant administrative burden (and therefore cost) for both the taxpayer and SARS.

In these contexts, SARS should note that with their employees working from home, an employer's office costs will likely be less,[214] and therefore their related deduction claims will also decrease. Therefore, any increase in bone fide *home workspace* expenditure for employees, under the current context, should theoretically be matched by a decrease in employer office claims. SARS should perform a more rigorous analysis in this regard, which may help to inform the approach they take to their interpretations in IN28 as being less aggressive; and more appropriate in terms of the applicable law (including the applicable principles of fiscal statutory interpretation).

It is therefore recommended that SARS align its interpretations with the applicable law as analysed in prior chapters. However, this is unlikely given IN28 has had two prior drafts before being finalised and SARS making a comment in IN28 essentially rejecting any

[213] Ibid.
[214] For example, costs such as electricity and water, and even stationery costs.

responsibility imputed on them, referring the responsibility to legislation.[215] Therefore, it is assumed that SARS has finalised their interpretation of the applicable law.

4.4.1 Longer-term solution

National Treasury on the other hand, as discussed in Chapter 1, first acknowledged that there are issues with the applicable law in the 2021 Budget Review. Therefore, it is submitted that National Treasury acknowledges that the applicable law needs to be updated 'in light of the large-scale migration to working at home',[216] which will likely continue indefinitely. It is submitted that they intend to conduct a full review of the applicable law that may result in a substantial amendment to the legislation, which will result in a substantive change in the applicable law.

However, there has been no indication of the 'consultations'[217] being started during 2021 or 2022. This is notwithstanding it being unclear to what extent, if any, National Treasury participated in the drafting of the two IN28 (published in 2021) and the finalisation of IN28 (issued in 2022). In any case, there were no legislative changes proposed in the 2021 Tax Bills, and in the 2022 Budget Review. All that was said in Chapter 4 of the 2022 Budget Review was that 'A discussion document will be published in 2022 on a personal income tax regime for remote work.'[218] No such document has been published to date.

Areas recommended for National Treasury to review in drafting a potential legislative amendment are as follows:

- a deduction based on 'simplified cost' is offered to taxpayers akin to the travel and subsistence allowance regime under section 8(1) of the ITA.
- a deduction based on the travel allowance regime under section 8(1) or right of use of motor vehicles fringe benefit regime under the Seventh Schedule.

[215] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 3.
[216] National Treasury *Budget Review 2021,* at 52.
[217] National Treasury *Budget Review 2021,* at 52.
[218] National Treasury *Budget Review 2022,* at 50.

4.4.2 Public Criticism

In response to draft 2 of IN28, at end of 2021 an article titled 'Still time to comment on "elitist" provision regarding home office expenses' was published by the experienced financial journalist Amanda Visser. The author scathingly stated that:

> "In the past two years we have seen unprecedented changes in the way we live, work, shop and interact with each other. However, legislation governing many of these human activities remains stuck in the 1960s. One such example is the legislation governing home office expenditure."[219]

She uses an example of the 'exclusivity' requirement to effectively echo the point that was made in the SAIT commentary 2021 that 'only the elite group of taxpayers who are in a position to establish a home office that is regularly and exclusively used for purposes of their trade will benefit.'[220] She also pointed out that, 'Despite promises in the 2021 Budget Review… nothing has changed'. The article as a whole received much attention from potential taxpayers, with four public comments receiving 126 likes in aggregate.

It is submitted that the author has a point, given the historical analyses conducted in Chapter 2, specifically that the facts of the *Van der Walt* case, consequent to which the section 23(b) requirements were promulgated, the latter of which have not materially changed since then. What has changed, as commented on in this Chapter, is how and where employees work. Also, as discussed in Chapter 2, according to the SAIT commentary 2022 '…the practical distinctions between commission earners and salaried workers are no longer intact'[221] given the accelerated shift to working from home.

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[219] Amanda Visser 'Still time to comment on 'elitist' provision regarding home office expenses' *Moneyweb*, available at *https://www.moneyweb.co.za/mymoney/moneyweb-tax/still-time-to-comment-on-elitist-provision-regarding-home-office-expenses/*, accessed on 12 December 2021.

[220] South African Institute of Taxation *Re: SAIT Comments on Draft Interpretation Note 28 (Issue 3): Deduction of Home Office Expenses Incurred by Persons in Employment or Persons Holding An Office* (Published 14 June 2021), available at: *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2021_technical/sars_submissions_/draft_interpinterpre_note_28.pdf* at 4.

[221] South African Institute of Taxation *SAIT Response to Call for Comment on Draft Interpretation Note 28 (Issue 3): Deductions of Home Office Expenses Incurred by Persons in Employment or Persons Holding an Office* (Published 14 January 2022), available at: *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2022_technical/sars_submission/draft_interpreinterp_note_28.pdf* at 2.

4.4.3 SARS' Current Administration Approach

Following the release of draft IN28, and ahead of its related webinar on 'Home Office Tax Requirement',[222] on 9 July 2021, SARS published an update on its website relating to *home workspace* expenses (on 1 July 2021). In such update it was stated that 'there is a high likelihood that a taxpayer who claims home office expenses for the first time will be selected for verification or audit.' It appears that SARS implemented this strict approach in in its administration during 2021 tax year. It was reported that SARS commissioner Edward Kieswetter told MPs on 4 March 2022 that SARS has 'disallowed R1.8bn of the R2.9bn claims for home office expenses made to date in the 2021/2022 tax year'.[223]

4.4.4 Short-term solution

Given that there will likely not be any updates to IN28 by SARS, SARS' strict administrative approach for the 2021 tax year, mounting political criticism, and that there has likely not been any work done to amend the applicable legislation substantially all as discussed above, it is recommended that National Treasury should offer a temporary or short-term solution during the 2022 or 2023 legislative cycle. The solution should address the following risks of increased costs to the fiscus, as highlighted above:

- Avoiding taxpayers and SARS going to court over their interpretations of the applicable law, for which the taxpayer has a reasonably compelling case against the fiscus.
- Minimising the administrative burden resulting from the evidence SARS provides for in IN28.

A short-term solution would also provide the fiscus more time to adequately review the applicable law substantially, given the new context of working from home. Looking to other jurisdictions, specifically the United Kingdom of Great Britain and Northern Ireland ('UK') and Canada. South Africa and Canada[224] both being former British colonies, have their legal systems based (in part for South Africa) on English common law. English law has and

[222] SARS *The SARS Home Office Tax Requirements Event*, available at: *https://www.youtube.com/watch?v=JOCnHA7FFzU.*
[223] 'Sars disallows R1.8bn of R2.9bn in home office expense claims' *BusinessDay*, available at *https://www.businesslive.co.za/bd/national/2022-03-06-sars-disallows-r18bn-of-r29bn-in-home-office-expense-claims/,* accessed on 14 March 2022.
[224] Canada is not a republic- the head of state of Canada is Elizabeth II, Queen of the UK.

continues to contribute to South African law, with many South African judges referring to English case law. This is likely due to the two countries' shared past, common culture, and them being consistently major trading partners. With regards to tax law court decisions, English and Canadian case law precedents are often referred to in South African courts albeit being persuasive authority in terms South African law. Therefore, given the commonality of all three jurisdictions, there is a research justification for looking to their tax law in relevant part.

In the UK, employees can claim tax relief on *home workspace* expenses, according to gov.uk, at or on:

- "£6 a week from 6 April 2020 (for previous tax years the rate is £4 a week) - you will not need to keep evidence of your extra costs
- the exact amount of extra costs you've incurred above the weekly amount - you'll need evidence such as receipts, bills or contracts."[225]

Therefore, in terms of UK tax law, taxpayers are offered to claim their home office expenses based on their exact costs (as taxpayers are in South Africa), or can claim a 'simplified cost' of £6 a week. In Canadian tax law, a 'simplified cost' deduction is also offered at $2 per day worked from home (with a maximum claim of $500 per year in 2021 and 2022).[226]

The reasoning for this simplified cost deduction offered by these two fiscus' is likely to avoid the administrative burden when actual costs are claimed, but also limiting the costs those taxpayers can claim to what their fiscus deems is appropriate in terms of quantum, i.e. the taxpayer's claim is 'capped'. Taxpayers may in fact incur more (or less) than this amount, but the amount claimed in this regard is constant, so the net effect to the fiscus is viewed as likely naught. The overall benefit to the fiscus (and taxpayers) is that it has more certainty over the claims increasing ease of administration. Notably, a deduction based on 'simplified cost' is offered to taxpayers in terms of the travel and subsistence allowance regime under section 8(1) of the ITA and the right of use of motor vehicles fringe benefit regime under the Seventh Schedule.

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[225] 'Claim tax relief for your job expenses' *Gov.uk*, available at *https://www.gov.uk/tax-relief-for-employees/working-at-home*, accessed on 12 April 2022.
[226] 'Home office expenses for employees' *Government of Canada,* available at *https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/line-22900-other-employment-expenses/work-space-home-expenses/expenses-can-claim.html,* accessed on 12 April 2022.

It is therefore finally submitted that National Treasury should legislate a 'simplified cost' deduction ('proposed amendment') as soon as possible, using the UK and Canadian *home workspace* deduction regimes as bases in drafting the proposed amendment. They may also look to other parts of our tax law, as discussed above, for how to word the proposed amendment but also for the actual value of the 'simplified cost'.[227]

A 'simplified cost' deduction will control *home workspace* deductions, as taxpayers will likely opt for this choice to avoid having to account and prove to SARS their actual expenses, and will view it as way to be more certain of their deductions. SARS will benefit as they will not have to administer the account and proof of taxpayer's actual expenses and will be more certain of the relevant claims. Therefore, it is submitted that it is less likely that assessments will be objected to by taxpayers, avoiding matters going to court, with the risk of SARS losing a particular case.

The above will provide the fiscus more time to adequately review the applicable law substantially, given the new context of working from home.

4.5 Conclusion

The relevant INs were considered to identify and analyse any of SARS' interpretations relating to the inconclusive matters analysed in Chapter 3, but also where SARS interpretations are materially different from those provided in both Chapter 2 and 3. It was determined that INs are not authoritative in terms of the law.

It was determined SARS' interpretations in IN28 are not appropriate overall, and are submitted to be quite aggressive, in terms of the applicable law (including the applicable principles of fiscal statutory interpretation). As an alternative to SARS amending their interpretations, areas recommended for National Treasury to review in drafting potential legislative amendments, specifically potential short-term legislative amendments, were considered (including evaluating trends in other jurisdictions).

[227] The subsistence allowance amounts are generally updated every legislative cycle, and provide a good basis for a 'simplified cost' for *home workspace* deductions.

Chapter 5: Conclusion

5.1 Introduction

One of the effects of the on-going pandemic is that it accelerated the already present global shift to working from home for employees. This acceleration heightened the contention around the tax deductibility of *home workspace* expenditure for South African employees, in terms of the applicable law. There has been significant public debate in this regard ever since March 2020. SARS has attempted to update the existing IN dealing with *home workspace* expenditure, for which they released two drafts and hosted a related webinar, all in 2021; and finalised such IN in 2022. It was submitted that National Treasury acknowledges that the applicable law needs to be updated, however, there have been no developments in this regard to date.

5.2 Summary of key findings

In Chapter 2, an exposition of the current law governing the deductibility of *home workspace* expenses incurred by persons in employment was provided. Thereunder it was determined that in order for *home workspace* expenses to be claimed as deductions by an employee, the requirements of a relevant paragraph of section 11 must be met and the prohibitions under section 23(b) and section 23(m) must not apply- rather their exceptions must apply. It was further determined that all three of these sections must be considered; and that the current section 23(g) is not applicable if section 23(b) and section 23(m) apply.

In light of the historical analyses conducted in Chapter 2,[228] it has been argued that the 'legislation governing many of these human activities remains stuck in the 1960s'[229] and that '…the practical distinctions between commission earners and salaried workers are no longer intact'[230] given the accelerated shift to working from home.

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[228] Specifically the facts of the *Van der Walt* case, consequent to which the section 23(b) requirements were promulgated, the latter of which have not materially changed since then.

[229] Amanda Visser 'Still time to comment on 'elitist' provision regarding home office expenses' *Moneyweb*, available at *https://www.moneyweb.co.za/mymoney/moneyweb-tax/still-time-to-comment-on-elitist-provision-regarding-home-office-expenses/*, accessed on 12 December 2021.

[230] South African Institute of Taxation *SAIT Response to Call for Comment on Draft Interpretation Note 28 (Issue 3): Deductions of Home Office Expenses Incurred by Persons in Employment or Persons Holding an Office* (Published 14 January 2022), available at: *https://cdn.ymaws.com/www.thesait.org.za/resource/resmgr/2022_technical/sars_submission/draft_interpreinterp_note_28.pdf* at 2.

The law, in any case, must be interpreted in terms of the applicable principles on fiscal statutory interpretation (mainly using the *Endumeni approach*), which was done regarding more complex matters of interpretation, in Chapter 3. The exposition of the current law, including the historical analyses, in Chapter 2 allowed for the appropriate application of the *Endumeni approach* in Chapter 3. This resulted in the substantive interpretation of the relevant parts of the ITA, with two main matters remaining inconclusive. These relate to the meaning of 'in connection with' and the meaning each of the tests under the section 23(b) requirements.

The relevant INs were considered in Chapter 4 to identify and analyse any of SARS' interpretations relating to the inconclusive matters analysed in Chapter 3, but also where SARS interpretations are materially different from those provided in both Chapter 2 and 3. It was also determined in Chapter 4 that INs are not authoritative in terms of the law. In analysing SARS' interpretations in IN28 in terms of the applicable law (including the applicable principles of fiscal statutory interpretation) it was submitted that:

- Expenses with a broad or indirect relationship to a *home workspace* (i.e. stationery, internet, and telephone costs) are not expenses which have a 'remote' connection to a *home workspace*. Therefore, SARS' conclusion that 'a more direct relationship with the physical premises is required'[231], is at least not conclusive.
- Section 11(e) expenses, which are effectively deductible in terms of subparagraph (ii) of section 23(m) for employees, are not subject to the section 23(b) requirements.
- All of the tests under the section 23(b) requirements, including the 'mainly' test, should be performed for the period which an employee is working from home, even if this period is less than a full year of assessment. The 'mainly' test involves only accounting for working days.
- The 'specifically equipped' test does not require a separate-room *home workspace*.
- The 'regularly' test must be applied subjectively to a particular taxpayer.

[231] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 16.

- The ‘exclusively’ test does not require a separate-room *home workspace.* A room can be apportioned for the part of such room used by an employee, albeit ‘exclusively’, as a *home workspace.* The ‘exclusively’ test cannot however be applied for ‘working hours’ only.
- The ‘mainly’ test can be applied based on where more than fifty per cent of output is produced, as well as based on ‘working time’.
- SARS’ opinion on how ‘difficult’ it is to satisfy such burden of proof is not relevant in terms of the law, rather it is effectively up to the court to decide if the burden of proof is satisfied.

It was finally submitted that in terms of the analyses in Chapter 4, SARS’ interpretations in IN28 are not appropriate overall, and are submitted to be quite aggressive, in terms of the applicable law (including the applicable principles of fiscal statutory interpretation). In light of this, SARS will have to defend any of the arguments made against it in a court of law, which will entail costs for it. Further, in terms of the list of evidence provided for by SARS in part 5 of IN28,[232] there is a significant administrative burden (and therefore cost) for both the taxpayer and SARS. In these contexts, SARS should note any increase in bone fide *home workspace* expenditure for employees, should theoretically be matched by a decrease in employer office claims. SARS should perform a more rigorous analysis in this regard, which may help to inform the approach they take to their interpretations in IN28 as being less aggressive in terms of the applicable law (including the applicable principles of fiscal statutory interpretation).

5.3 Recommendations to National Treasury

Given that National Treasury acknowledges that the applicable law needs to be updated, and that it is unlikely that SARS will update IN28,[233] areas were recommended for National Treasury to review in drafting potential legislative amendments are as follows:

- a deduction based on ‘simplified cost’ is offered to taxpayers akin to the travel and subsistence allowance regime under section 8(1) of the ITA.

[232] SARS *Interpretation Note 28 (Issue 3)* (issued 4 March 2022) at 25-26.
[233] Ibid at 3.

- a deduction based on the travel allowance regime under section 8(1) or right of use of motor vehicles fringe benefit regime under the Seventh Schedule.

Given that there will likely not be any updates to IN28 by SARS,[234] SARS' strict administrative approach for the 2021 tax year,[235] mounting political criticism,[236] and that there have been no developments regarding National Treasury in updating the applicable law, it was recommended that National Treasury should offer a short-term solution during the 2022 or 2023 legislative cycle. It was finally submitted in this regard that National Treasury should legislate a 'simplified cost' deduction as soon as possible, using the UK and Canadian *home workspace* deduction regimes as bases in drafting the proposed amendment. This, it was submitted, will reduce the administrative and legal costs for SARS. It will also provide the fiscus more time to adequately review the applicable law substantially, given the accelerated shift toward employees working from home.

5.4 Final remarks

As a society we have witnessed an accelerated global shift to working from home for employees in the last few years, which arguably has been unprecedented. The tax consequences of this have been contentious, however, have presented the opportunity to conduct the research contained in this dissertation.

The broad objective of the research in this dissertation was to analyse the current, applicable law governing the deductibility of *home workspace* expenses incurred by persons in employment, and if appropriate, to suggest amendments to ITA. This objective was met by achieving various sub-objectives, as discussed above, but also by identifying potential amendments categorised as long-term and short-term solutions. The potential amendments identified in terms of this dissertation are potential areas for future study.

It is hoped that this dissertation will provide some clarity and perhaps affirmation, of course based on rigorous research so conducted, on the tax deductibility of *home workspace*

[234] Ibid at 3.
[235] 'Sars disallows R1.8bn of R2.9bn in home office expense claims' *BusinessDay*, available at *https://www.businesslive.co.za/bd/national/2022-03-06-sars-disallows-r18bn-of-r29bn-in-home-office-expense-claims/,* accessed on 14 March 2022.
[236] Amanda Visser 'o on 'elitist' provision regarding home office expenses' *Moneyweb*, available at *https://www.moneyweb.co.za/mymoney/moneyweb-tax/still-time-to-comment-on-elitist-provision-regarding-home-office-expenses/*, accessed on 12 December 2021.

expenses. In conjunction with any necessary further academic study, and appropriate practical analyses by SARS and/or National Treasury, it is hoped that this dissertation will in relevant part result in a more contemporary (and ideally more equitable) *home workspace* tax regime for employees working from home in South Africa.

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