To Prof R. Sooste
Best Regards
A.N. Rubinsztein SEPT 1992

BURDEN OF PROOF

A HISTORICAL AND THEORETICAL ANALYSIS OF SOME ASPECTS OF THE FOLLOWING CONCEPTS IN RELATION TO THE INTERPRETATION OF SECTION 82 OF ACT 58 OF 1962:

* INCOME,
* ASSESSMENT,
* OBJECTION AND APPEAL.

PART 1

HISTORICAL ANALYSIS:
THE PAST TOWARDS THE PRESENT

by

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Thesis presented in partial fulfillment of the requirements for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF CAPE TOWN

So too nowadays advocates who are of great skill and of a happier reputation in general law think that no fault should be found with them because at times, when questioned about the law of taxes and of defraudings, they refer their clients to those who beyond others have thought fit to perspire and to work themselves to a shadow at this branch of practice, and for that reason have ascertained precisely what holds good here in the very inner meaning of things, what has been adopted by custom, that best interpreter of decrees, what has been overshadowed by disuse and what innovations have been made in this most changeable branch of law.[1]

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[1] J Voet **The Selective Voet being the Commentary on the Pandects** translated by P Gane Durban Butterworth 1957 Book XXXIX. Title 4. Section 32.

C O N T E N T S

CHAPTER 2

BURDEN OF PROOF IN ITS CONTEXT HISTORICAL PERSPECTIVE

POST-UNION TAX LEGISLATION PRIOR TO ACT 58 OF 1962

CHAPTER 3

BURDEN OF PROOF IN ITS CONTEXT THE PRESENT TOWARDS THE FUTURE

C H A P T E R 4

ONUS OF PROOF

STATUTORY INTERPRETATION OF SECTION 82 OF ACT 58 OF 1962

RATIONALE

A clear understanding of Section 82 of the Income Tax Act No 58 of 1962 [the Act] is of great practical consequence to the tax consultant. Indeed, many a well chartered voyage in the uncertain stormy ocean of taxation litigation has floundered on some deep hidden jagged edge of the iceberg "burden of proof".

It is unfortunate that scant attention has been given to section 82 by our authorities.

The latest edition of Meyerowitz [1991], "the bible of tax consultants" does not have "burden of proof" or "onus of proof" in its index .
Section 1892 deals with onus of proof in 5 lines.
It cites three cases the latest of which was decided in 1958.

For more detail it refers to an article (1954 Taxp 222-223) of less than two pages written more than a third of a century ago. This excellent article, by Fiscus, is important and worthwhile for the interpretation of section 78 of the Income Tax Act of 1941, but is only relevant for an *in pari materia* interpretation of section 82 of the Act.

Section 1892A of Meyerowitz deals with discharge of onus in less than one page.

Silke [10th and 11th edition] a masterpiece of almost 2000 pages of concise legal argument, disposes of "Objection and appeal-onus of proof" in one paragraph [18.27] of less than three pages.

And yet onus of proof is of pervading import to many facets of our law of taxation; be it the appeal procedure, the discretionary power of the Commissioner, the *contra fiscum* rule, the controversy of capital versus income, the problems of tax evasion, the *audi alteram partem* principle of justice, the recourse available to an aggrieved taxpayer, the principle of legitimate expectation.....

Burden of proof is at the very vortex of the whirlpool of our law of taxation.

SCOPE AND METHOD

This thesis analyses section 82 of the Act.

Where necessary historical and comparative interpretation has been resorted to in order to attempt to clarify some of the doubts clouding the subject.

In the analysis of section 82 of the Act three main issues have been addressed:

1] **WHAT** is the onus in terms of section 82 of the Act. Emphasis will be placed on the differences between:

i) onus against the Commissioner's assessment

ii) onus on appeal to the specially constituted board

iii) onus on appeal to the special court

IV) onus on appeal to the Supreme Courts

2] **WHO** bears the onus in terms of section 82 of the Act at the various stages of the appeal procedure.

3] **HOW** the onus is discharged in terms of section 82 of the Act.

Those aspects of the concepts **income**, **assessment**, **objection** and **appeal** which are of relevance to the discharge of the onus of proof will be analyzed.

CRITICISMS AND CONCLUSIONS

It will be submitted that the clear and critical distinction between the burden of proof on objection to an assessment of the Commissioner, and the burden of proof on appeal against a decision of the Commissioner, has not been clearly stressed by our authorities and, as a result, some of the generally accepted implications concerning section 82 of the Act are capable of further examination.

The hallowed maxim that THE ONUS OF PROOF RESTS WITH THE TAXPAYER will be criticized as being far too sweeping.

As a practical example, three learned articles which put forward the proposition that, in terms of section 82 of the Act, the onus of establishing that a partnership exists rests with the taxpayer, have been critically analyzed.
In terms of section 82 of the Act there seems to be no justification for such a proposition.
Not one of the cases quoted as authority in these three learned articles refer to section 82 of the Act.

It will be suggested that the aggrieved taxpayer is not restricted to the appeal provisions stipulated in the Act, and that in such cases the ordinary laws of evidence prevail.

It is suggested that the burden of proof, which the taxpayer must discharge in terms of section 82 of the Act, is a reasonable one, which no honest prudent and reasonable person needs fear.

CONCLUSION:

The generally accepted proposition that the burden of proof rests on the taxpayer is , with respect, capable of further examination.

C H A P T E R 1

Every person should be able to contribute towards the expenses of running the country to which he belongs; and if there is any discrimination it should be in favour of the energetic rather than those able and contended to live in luxuriant idleness.....

A man needs here not town and country house, a shooting box, a steam yacht, a staff of flunkies, horses and carriages, etc.,etc., which in England would not render him in the least conspicuous. It follows that the higher the colonial income of the colonist above the cost of decent subsistence, the more he can afford to be taxed, and the more he should be.

Morgan O. Evans
Income Tax Law
Cape. 1904
[at page 15]

C H A P T E R 1

ONUS OF PROOF IN ITS CONTEXT HISTORICAL PERSPECTIVE

PRE-UNION TAX LEGISLATION

1.1 INTRODUCTION

Section 82 of the Income Tax Act 58 of 1962 (the Act) has a long and turbulent history. The substance and the spirit of the burden of proof concept has changed considerably over the years. An analysis of the relevant provisions of previous Income Tax Acts is useful because exposure to our legal history gives insight into the present and vision towards the future.

Legal decisions and arguments concerning onus of proof based on Income Tax Acts passed prior to the Income Tax Act 58 of 1962 may be misleading and should be treated with caution. However, some of the most powerful judgements on the issue of onus of proof have been decided long before Act 58 of 1962, and are binding **in pari materia**.

The burden of proof on appeal has shifted from establishing that the Commissioner assessment is excessive, to establishing that the decision of the Commissioner is wrong.

The changes of the onus sections of the relevant Income Tax Acts have been summarized chronologically in APPENDIX A_1. The changes in the relevant onus regulations have been summarized chronologically in APPENDIX A_2.

APPENDIX A_1 and A_2 have been combined into APPENDIX A_3 in order to make cross reference more meaningful. This may provide a bird's eye view of the relationship between the burden / onus of proof imposed on the taxpayer at the objection stage to the Commissioners assessment, with the onus imposed on the taxpayer on appeal against the final and conclusive assessment of the Commissioner.
The burden of proof at the objection stage against the assessment of the Commissioner and the onus at the appeal stage against the final and conclusive assessment of the Commissioner are separate entities with different personalities and characteristics, even though they sleep in the same bed and are in some way physically entwined in section 82 of the Act.

Out tax law is ancient, rich and profound.
Its foundation is our Civil Law, a mine of immense wealth which few have entered, perhaps because of the danger of getting lost. However with Voet as a guide, exploring this mine is safe and worthwhile.
Some of the content of The Selective Voet **TAX-FARMERS, TAXES AND FORFEITURES (Book 34, title 4.)** may no longer be of practical import to day,[1] but there is so much wisdom and relevance in Voet's works that it is worthwhile to stop and browse and be inspired.

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[1] However as Gane notes in his transalation (page 43), as late as Cape Ordinance 13 of 1917; sec.212, refers to ther "farmer or renter of such tolls"

For instance, although this may be outside the ambit of this paper, it is suggested that the Value Added Tax system has reintroduced a form of tax-farming.

Book 34, title 4 is of importance for the concept of tax, the interpretation of taxing statutes, the Roman-Dutch theory of taxation and the distinction between personal tax and real tax.

Book 22 section 3 is of importance for the burden of proof concept.

In Holland, only the States had the right to levy taxes. Once a tax has been levied all States must enforce such taxes.[2]

Tax is defined by Voet in the broadest sense as being all sums which had to be paid to the treasury on the sales of properties or, on landed estates or, on inheritances which fell due. An annual quitrent, ground rent and sometimes, every fruit and benefit which accrued from public and private property were also termed taxes.[3]

A very important distinction is made between personal and real taxes.

A personal tax is one which **cleaves to a person and follows him**.

A real tax is one which **cleaves to things and goes along with them**.

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[2] J Voet **The Selective Voet being the Commentary on the Pandects** Percival Gane 1957 39.4.10.

[3] J Voet **supra** Voet refers to Digest VII,I,59,2.

Some of the consequences of the distinction drawn by Voet are relevant for our theoretical understanding of Value added tax.[4]

The list of main subjects of taxation in Holland was considerable.[5]

Voet suggests that to make the burden of taxes more bearable, taxing enactments must be construed strictly.

Voet, however, makes a critical distinction between the interpretation of the taxing enactment itself and the interpretation of those things which are included in the list of things to be taxed.

The fact that laws introducing taxes must, in every case, be interpreted strictly, ought not to extend to those things which are included in the list of things to be taxed, especially because the Treasury had the power to describe more clearly what items are liable to tax.[6]

Voet draws a clear distinction between person exempted and things exempted from tax.[7] This distinction has been used in this thesis in the analysis of "exemption".

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4 J Voet supra 39.4.14.

5 J Voet supra 39.4.14 and 39.4.15.

6 Voet supra 39.4.18. Voet refers to a number of authorities on this point, in particular to some examples given by Antonius Matthaes, *Sales by Auction*, Bk.2, ch.4 ,nn.3 and 4.

7 Those responsible for framing taxing statutes, seem unaware of the distinction and might perhaps benefit by studying Voet.

Certain persons were exempt totally from taxation, for instance "all hospitals, houses sacred to the Holy Spirit, leper asylums and other such like institutions subsiding on alms".[8]

Some institutions were partly exempt. Thus the Dutch West India Company was exempt in certain respects, in terms of Art.37; Groet Placaat-Boek, Vol.3, p.815 and Concessions to West India Company of 1674, Arts. 9 and 10; Groot Placaat-Boek Vol. 3. p.1335.[9]

The burden of proof that a person is exempt or that the thing in respect of which he refuses to pay tax, is exempt, is upon he who claims the privilege of exemption.[10]

The burden of proof is generally on the plaintiff.[11]

Evidence must be given by he who asserts, not by he who denies, because **in the nature of things no proof is possible for one who denies a fact**.[12]

M.Adolfs, N.O v Johannesburg Market Concession and Building Co.,Ltd (3 O.R. 107) and to Elliott v Rex (1911) E.D.L.D 514 are cases relevant to Voet. [13]

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8 Voet **supra** 39.4.29

9 Voet **supra** 39.4.29

10 Voet **supra** 39.4.27

11 Voet **supra** 22.3.9

12 Voet **supra** 22.3.10

13 Voet **supra** 39.4.19, notes 2(a) and 3(b) notes by Gane

1.2 PRE-UNION TAX LEGISLATION

There are a number of pre-Union acts and ordinances prior to our first Income Tax Act[14] which deal with onus and tax. A few examples may be of interest.

Ordinance 3 of 1867 of the Orange Free State imposed a tax of "extra-recognitie" only on foreigners who owned farms not occupied by Europeans with stock.

In the case of Bredell v Government O.F.S,[15] it was held that, where a foreigner who owned a farm was sued for "extra-recognitie", the onus rested upon him to prove occupation.

This is one of the first cases in our jurisprudence which deals with the relationship between tax and onus. It is interesting to note that Gregorowski, J., dissented; he held that the onus of proving non-occupation rested with the Government.

In the case of Leith v O.F S. Government,[16] it was held that, in order to recover Poll Tax in terms of Ordinance 14 of 1878 (O.F.S.), the Government had to prove that it had satisfied all the requisites prescribed by the Act.

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[14] (Cape) Additional Act 36 of 1904

[15] Bredell v O.F.S. Government,(1885) 1 G.122;3 C.L.G. 43.

[16] Leith v. O.F.S. Government, (1879) O.F.S. 66.

In the case of R. v Mgovu Dhlamanini,[17] it was held that the Crown had discharged the onus in terms of section 5 of Ordinance 20 of 1902 (Transvaal), of proving that the failure of a native to pay his hut tax after due warning was willful and was sufficient to sustain a conviction.

Income (profit) of mines was taxed in terms of Colonial legislation as follows:

Cape Colony	**- Act 16 of 1907**
Natal	**- Act 43 of 1899**
Orange Free State	**- Ordinance 25 of 1903**
	Ordinance 9 of 1904
	Ordinance 15 of 1907
	Ordinance 24 of 1907

The acts and ordinances relating to the taxation of mines were consolidated in terms of the Mining Taxation Act 6 of 1910. This Act levies an annual tax on the profits of mining.[18] There are some provisions for exemptions and deductions.[19] What is taxed is mining profits and there is no statutory formula.

The Mining Taxation Act 6 of 1910 and Act 28 of 1914 which was the first income (profit)[20] tax of South Africa, were consolidated in terms of Act 41 of 1917.

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17 R.v Mgovu Dhlamanini (1905) T.S. 331

18 Section 3

19 Section 5,6,7 and 8.

20 As shall be argued later, profit is not the basis of taxation of Act 28 of 1914. Profit is part of "income", and income is taxed not as such, but in terms of a formula.

The Land and Income Tax Assessment Act of 1895 of New South Wales levied tax on income in terms of a **statutory procedure**.

The Cape Additional Act 36 of 1904 levied tax on income in terms of a **statutory procedure**.

The Cape Income Tax Act 21 of 1908 levied tax on income in terms of a **statutory procedure**.

Income Tax Act 28 of 1914 levied tax on income in terms of a **statutory procedure**.

Income Tax Act 41 of 1917 levied tax on income in terms of a **statutory procedure**.

The basis of income tax in terms of Act 41 of 1917 is in no significant way different from the basis of the income Act 28 of 1914. There has however been a slight change in that profit in the 1914 Act is included in income as a separate organism with its own attributes, whereas in the 1917 Act profit loses its own identity within income.

As a result the words **"The burden of proof that any income"** in section 39 of Act 28 of 1914 does not have exactly the same meaning as the words **"The burden of proof that any income"** in section 83 of Act 41 of 1917.

Before Union, taxation on the income (profit) of individuals was levied in the Cape Colony in terms of Act 36 of 1904, Act 21 of 1908 and Act 20 of 1909.

In Natal, tax was levied on the income of individuals in terms of Act No 33 of 1908, which was repealed by Act 35 of 1910.

The first onus of proof provision appears, as a proviso, in section 51 of (Cape) Act 36 of 1904.

The proviso to section 51 of (Cape) Act 36 of 1904 is not a separate general onus of proof section and the emphasis is; proof of reductions in terms of section 51. It is suggested however that it extends the burden of proof as to exemptions and non liability to the payment of taxes and to the claim that an income is subject or entitled to any deduction.

The wording of the proviso, rearranged in a slightly different guise in section 39 of (Cape) Act 21 of 1908, becomes the first general onus of proof provision in our law of taxation.

The onus of proof provision, section 7 of (Cape) Act 21 of 1908, is virtually identical to the onus of proof provision of: section 39 of Act 28 of 1914,

section 83 of Act 41 of 1917,

section 57 of Act 40 of 1925,

the first part of section 78 of Act 31 of 1941, and

the first part of section 82 of Act 58 of 1962.

The historical development of section 82 of Act 58 of 1962 is summarized in Appendix A_1 and Appendix A_2.

It is useful to look at the relevant sections of the Land and Income Tax Assessment Act of 1895 of New South Wales which is the fountainhead of our system of taxation.

1.2.1 LAND AND INCOME TAX ASSESSMENT ACT OF 1895 OF NEW SOUTH WALES (59 VICTORIA 15)

The short title is "Land and Income Tax Assessment of 1895". Land tax is likely to be of relevance to the New South Africa, it is unfortunately outside the ambit of this paper and shall not be dealt with.

For the purpose of section 1.2.1 the above Act shall be referred to as the Act.

1.2.1.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

1.2.1.1.1 What is taxed in terms of the statutory formula

The assumption that, in terms of the definition in section 68, the basis of **income** is profits and gains,[21] is with respect, not correct. What **comes in** and is considered income **includes** profits and gains.

It is absolutely clear that the other nine amounts included in the definition are neither profits nor gains.

Without discussing the distinction between profits and gains, and even assuming that gains is some form of profit, there is no justification whatsoever for assuming that the basis of taxation is profit and gains.

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21 Section 68.
"Income" includes profits, gains, rents, interest, salaries, wages, allowances, pensions, stipends, charges, and annuities.

Even if a business man's income consisted only of profits and gains, what is taxed is not his profit but the **income chargeable.**

Taxable income less exemptions equals **taxable amount.**[22]

Taxable amount less deductions allowed under the Act equals **income chargeable.**[23]

Provided that no deductions shall be made of:

"any moneys not wholly and exclusively laid out or expended for the purposes of the profession, trade, employment or vocation,-[24]

Profit, income, taxable income and taxable amount are not taxed; what is taxed is the income chargeable.

Profits and gains is not the basis of taxation in the Land and Income Tax Amendment Act of 1895 of New South Wales. Taxable amount is not defined in the Act. Section 27 gives the steps to be taken to arrive at the taxable amount on which income tax is payable, subject to deductions allowed.[25]

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[22] Section 28

[23] Section 68.
"Income chargeable" means the taxable amount less the deductions allowed under this Act.

[24] Section 29 (VI)

[25] Section 27.
For the purpose of ascertaining the sum, hereinafter termed the "taxable amount" on which (subject to the deductions hereinafter mentioned) income tax is payable, the following directions and provisions shall be observed and carried out:-

The following simplified formula is suggested.[26]

INCOME AS A STATUTORY PROCEDURE N S W ACT 1895 (59 VIC. 15)

FORMULA: FROM WEALTH TO INCOME

INTERPRETATION	STEPS
1] INCOME[27] a person Includes profits, gains rents interest salaries wages allowances pensions stipends chargers annuities	LESS: income earned outside the of Colony of New South Wales.[28] LESS: exemptions in terms of s.17.[29] EQUALS: TAXABLE AMOUNT
2] TAXABLE AMOUNT All income earned less income earned outside New South Wales less exemptions allowed in terms of section 17	LESS: deductions in terms of section 28.[30] EQUALS: INCOME CHARGEABLE
3] INCOME CHARGEABLE Taxable amount less deductions.	

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[26] There are other possible reasonable methods of presenting the formula.

[27] In terms of the inclusion definition in section 68.

[28] Section 27 (111) and subject to the directions and provisions of section 27 (1),(11) and (1V).
The terminology of section 27 is not satisfactory. Thus sub section (I) deals with the **amount of taxable income** which has a different meaning from **taxable amount**.

[29] Section 17 deals with exempt income. It is possible to include an exempt stage before the deduction stage. However section 17, where it does not deal with income derived from land, focuses on person exemption rather than income exemption. There is no suitable terminology in the Act to describe this stage.

[30] Section 16 also provides the following deduction equal to exemption:
Except in the case of a company the person liable to taxation in respect of an income exceeding two hundred pounds shall be entitled to a deduction of two hundred pounds in the assessment of such income under this Act for the purpose of such taxation.

It is abundantly clear that what is taxed has little relationship with profits and gains.

It is true that profit is included in the definition of income in section 67. But even if profit were the sole component of the definition, what is taxed is **income chargeable** which is what is left from **income** after a complex statutory process of exemptions and deductions in terms of the Act have been taken into account.

Profit as such is part of income, but income is not profit. Income chargeable is what is left of income after the various steps of a statutory formula have been followed.

1.2.1.1.2 What is an assessment

An assessment book is prepared by the Commissioners in respect of income tax. Such assessment books shall show:

i) The gross amount of the income of every taxpayer, and
ii) The taxable amounts of the income of every taxpayer,and
iii) The income chargeable, and
iv) The amount of the tax to be paid.[31]

The assessment book shows the four components, the gross amount of the income, the taxable amount of the income, the income chargeable and the amount of the tax to be paid. An assessment has a very extensive meaning, and is linked with the steps of the statutory formula.

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[31] Section 31 (III)

1.2.1.1.3 Objections to the assessment

There is no provision in the Act for the lodging of an objection by the taxpayer or by a person aggrieved by the assessment.

The Commissioners may however , direct that another assessment be made if they think that the assessment made by an assessor be unfair or incorrect.[32]

Unfair assessment

It is however not clear whether an unfair assessment is regarded as an assessment made by an assessor which the Commissioners think is unfair to the taxpayer, or whether it would also include an assessment which the Commissioners think is unfair as far as the Revenue authorities are concerned.

Incorrect assessment

It would seem that incorrect implies wrong in the sense that fairness does not come into the question.

Incorrect emphasizes the factual aspect of the assessment, whereas unfair emphasizes the ethical aspect of the assessment.

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[32] Section 32. (VI)
The wording of the marginal note reads:
If assessment wrong new one may be ordered.

The following interpretation of section 32 (VI) is suggested:

The Commissioner may direct another assessment to be made if he thinks that:

(a) the assessment is unfair as far as the taxpayer is concerned, or

(b) the assessment is wrong (e.g. an error in addition, too much or too little) both in respect of the taxpayer and the tax authorities.

1.2.1.1.4 Onus of proof on objection to the assessment

The taxpayer aggrieved by a notice of assessment is afforded neither a defence nor an objection procedure in the Act.

There is therefore no onus of proof to be discharged at this stage.

In terms of section 32 (VI) The Commissioners may direct another assessment to be made if they think the assessor's assessment to be unfair or incorrect.

It would seem that this power of the Commissioners to order another assessment protects the taxpayer in certain situations.

Perhaps an objection in the hands of the taxpayer would be more effective than an objection depending on the Commissioner's discretion concerning the fairness or correctness of the assessment process by the staff under his control.

1.2.1.2 STAGE 2 APPEAL TO THE COURT OF REVIEW

In terms of section 9, provision is made for the establishment of a Court of Review. Its jurisdiction is to hear and to determine appeals from assessments.[33]

1.2.1.2.1 Nature of the assessment subject to appeal

An assessment book in respect of income tax is deposited in the office of the Commissioners. Every taxpayer is entitled to a copy of the entries relating to the assessment of his income. Such assessment book is not open to public inspection.[34]

Every year the Commissioners shall send every taxpayer with those particulars of the assessment which it considers necessary. However it must, in addition, indicate the amount of the tax payable.[35]

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[33] Marginal note: Court of Review.
Section 9.
The Governor may, by notice in the *Gazette*, declare that the Land Appeal Court or any Judge of a District Court or any Police Magistrate shall be a Court of Review within the meaning of this Act, and thereupon every Court of Review, constituted as aforesaid, shall have jurisdiction within such limits and in such cases as the Governor may prescribe in the said notice, to hear and determine subject to the provisions of this Act appeals from assessments made under this Act.

[34] Section 41.

[35] Section 42.

In terms of section 42 it is only the amount of the tax payable of the assessment which must be incorporated in the notice of assessment. In spite of the fact that the assessment books must, in terms of section 31 (III), show the gross income, the taxable amounts, the income chargeable and the amount of the tax, yet The Commissioners need only give notice of other particulars of the assessment "as shall be considered necessary".

It is true that, in terms of section 41 though the assessment books is not open to public inspection, the taxpayer concerned is entitled to a certified copy relating to the assessment of his income. However, should the taxpayer rely on the notice of assessment sent to him in terms of section 42, he may be severely prejudiced if he is not aware that the notice of assessment is not necessarily the assessment.

It is thus critical to distinguish between a notice of assessment and an assessment.

Any tax payer may within 30 days of the notice of assessment appeal to the Court of Review.[36]

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[36] Marginal note: Appeals.
44. (1) Any taxpayer may, within thirty days after the notice of assessment for land or income tax or of any altered, corrected, or additional assessment has been given, appeal therefrom to the Court of Review, upon the ground that he is not liable for the tax, or for any part thereof, or that the amount of such assessment is excessive. Every appeal shall be commenced by such notices and is such manner as may be prescribed.

The appeal is strictly limited to the grounds that the taxpayers is:

(a) not liable for the tax or part of the tax, or
(b) that the amount of such assessment is excessive.

In terms of section 31 (III) the assessment book shows the gross and taxable amounts of the income, the income chargeable and the amount of the tax. It is therefore submitted that **the amount of such assessment is excessive**, refers to all the assessments including non liability for tax.[37]

In terms of section 39 (1) in the case of a default assessment or where the Commissioner not satisfied with the return made by any person they may make an assessment of the amount upon which tax ought to be charged and the tax to be paid. In terms of section 39 (II) every such assessment is subject to appeal.

1.2.1.2.2 What are the grounds of appeal

There are two grounds of appeal to the Court of Review:

(a) the taxpayer can appeal on the ground that he is not liable to the tax or for any part thereof, or

(b) the taxpayer can appeal on the ground that the amount of the assessment is excessive.[38]

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[37] As in terms of section 42 the notice of assessment need only show the amount of the tax assessed, and as the second ground of appeal is "the amount of **such** assessment is excessive", it is possible to interpret the amount as being the amount of the tax assessed.

[38] Section 44 (I)

It must be stressed that the meaning of the term **on the ground** may be different from the meaning of the term **on the ground** in section 83 (7)(c) of Act 58 of 1962.

Whereas in Act 58 of 1962 **on the grounds** has been interpreted to mean **on the evidence** stated in the notice of objection,[39] in the New South Wales Act on the grounds means, it is submitted, **on the premise that**.

The assessment is absolute in so far as an appeal to the Court of Review is concerned except in the following two situations; the taxpayer appeals on the premise that he is not liable to the tax or any part of the tax, or he can appeal on the premise that the amount of the assessment is excessive.

The appeal on the ground that the amount of **the assessment is excessive** has an echo in future taxation Acts where the taxpayer dissatisfied with a final and conclusive assessment of the Commissioner must, on appeal to the Special Court discharge the onus of proof that **the assessment is excessive**,[40] and in recent taxation Acts, that the decision of the Commissioner is wrong.[41]

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[39] This interpretation of **on the ground** is analyzed later.

[40] Regulation 40 of Act 28 of 1914
Regulation 26 of Act 41 of 1917
There is no similar regulation in terms of Government Notice 1518 [4th September 1925] which promulgated the relevant regulations under Income Tax 40 of 1925.

[41] Second part of section 78 of Act 31 of 1941.
Second part of section 82 of Act 58 of 1962.

1.2.1.2.3 Onus of proof on appeal to the Court of Review

The Court of Review as constituted on terms of section 9 of the Act can only hear appeals from assessments made under the Act.

The power of the Court of Review are strictly limited in terms of section 44 (VI):

1) it can only alter, or order the alteration of an assessment in the assessment book,
2) it can only make an order as to costs, where the Commissioner's claim is unreasonable or where the grounds of appeal of the taxpayer is frivolous.

There is no onus of proof prescribed in the Act. The ordinary laws of evidence as per section 44 (X) shall be applicable.

1.2.1.3 STAGE 2 APPEAL TO THE SUPREME COURT

1.2.1.3.1 Appeal from the Court of Review

Where a question of law arises in a case before the Court of Review, the Court shall, if so required in writing by any of the parties, submit a case for decision by the Supreme Court.

The Court of Review may on its own motion state and submit a case for decision by the Supreme Court.[42] Even though the Court of Review has a discretion in the matter, It is clear that there is no obligation on any of the parties to state and submit a case for decision by the Supreme Court.

1.2.1.3.2 Other appeals

No provision is made in the Act for the procedure of appeal in any other circumstances.

Indeed, in terms of section 9 of the Act the Court of Review has jurisdiction only within the limits prescribed by the Governor to hear and determine appeals from assessments made under the Act.

This with respect, is crucial.

Is is submitted that there is no reason which prevents the aggrieved taxpayer from making use of the normal appeal procedure for circumstances not provided for in the Act.

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[42] Section 45.

1.2.2 (CAPE) ADDITIONAL TAXATION ACT, 36 OF 1904

The short title of the Act is " Additional Taxation Act, 1904"

The Act is based on the New South Wales Act of 1895.

The purpose of the Act is to impose Excise Duty upon Beer and Spirits and to provide for the taxation of Incomes.[43] Excise duty upon beer and spirits is outside the ambit of this paper.

For the purpose of section 1.2.2 it shall be referred to as the Act.

1.2.2.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

1.2.2.1.1 What is taxed in terms of the statutory formula

Income is defined is section 42 of the Act. It is based on the definition in section 68 of New South Wales Act.[44]

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[43] See preamble of Act

[44] It is interesting to note the pervasive influence of the New South Wales Act. Every succeeding tax Act made some slight change. Yet despite the cumulative effect of a century of mutation some of the vital force of the New South Wales Act concept of "income" can be still found in the Income Tax 58 of 1962.

The changes are as follows.

42.[In this Act,] [u] Unless the context otherwise requires,

Income **means any gains or profits derived or received** by any company or person in any year or by any means from any source within this Colony, and includes profits, gains, rents, interest, salaries, wages, allowances, pensions, stipends, charges, annuities[.], and all profits derived from mining or quarrying.

The definition is not satisfactory, it states that income means gains or profits and includes profits and gains. It would seem that the definition does not add to the meaning of income as defined in the New South Wales Act apart from restricting such income to any source within this Colony.

There are however two changes of some consequence.

The New South Wales definition of income is an **inclusion** definition.[45]

The definition of income in the Act[46] is both a **means** definition and an **inclusion** definition. The **means** part of the definition is mandatory; all gains or profits are income. The **inclusion** part of the definition is not all embracing.

The second change of some consequence is that income is no longer profits or gains, it is now gains or profits **derived or received**.

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[45] Section 68 of New South Wales Act:
"Income" includes.....

[46] Section 42 of the Act consists of two parts:
Part one: Income means.....
Part two: and includes.....

It follows therefore that a gain which is an increase but which does not qualify as "derived or received" is not income.

The definition includes gains and profits by any company or person, and yet, the term *person* is defined in section 42 as including a company. There is therefore no need to refer to company in the definition of income.

It would seem that income means "what comes in" [47], whether it be a profit, gain or other receipts as specified in the definition.

There have been decisions that a receipt is income only if it is capable of being quantified as money.[48]

It is perhaps not necessary to distinguish between profit and gain; [49] what is clear, however, is that even though profit and gain are income it does not follow that income is profit and gain. Indeed, income incorporates, in terms of the definition, receipts which are neither profit nor gain.

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[47] The ordinary meaning of income was [1904] " what comes in". The Imperial Dictionary defines income as "the annual receipt of a person.

[48] " I am of opinion that the thing sought to be taxed is not income unless it can be turned into money" Tennant v Smith, 1892, A.C. 150 per the Lord Chancellor.

[49] In Income Tax Law 'profits' and 'gains' seem to be almost identical in meaning. It is suggested however that gains is something which is acquired not in the course of trade or vocation, wherever profits is acquired in the course of trade or business.

A profit, as understood by the reasonable business person, is the excess of earning over expenditure.

In terms of section 50 of the Act **there shall be charged, levied, collected and paid to the Revenue of the Colony** income tax in respect of the **annual amount** of all **taxable income exceeding one thousand pounds.**

In terms of section 51, every person liable to taxation on an income exceeding one thousand pounds, is entitled to one reduction of one thousand pounds in the assessment of such income. A company and every shareholder, in respect of the income derived from his holding in such company, does not benefit from this reduction.[50]

Section 51 ends with a most remarkable proviso.

Provided that the onus of proof that any income is exempt from or not liable to any deduction, shall lie on the person claiming the benefit of such exemption, non-liability or deduction.

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[50] This has not been worked out accurately as in terms of section 50 a Company earning a taxable income of less than one thousand pounds is not subject to income tax and is left with the total earning.
However a company earning more than one thousand pound is taxed on the full amount and the income left could be lower than if it had earned less than one thousand pound.

EXAMPLE:	INCOME	TAX	INCOME AFTER TAX
	$ 1000	NIL	$ 1000-00
	$ 1020	$ 25-50	$ 994-50

Suddenly, out of nowhere, like a magician producing a rabbit out of the wrong hat at the wrong time, the Act formulates, as an aside, the first script of the onus of proof procedure.

This onus of proof quite clearly attempts to impose an evidential burden on the person claiming the one thousand pound reduction[51] in the assessment in his income.

This onus of proof proviso is attached and is part of section 51. There is no mention of appeal in the onus of proof proviso, and it is suggested, that it must be discharged at the assessment stage.

The burden of proof to be discharged at the appeal stage is in terms of regulation 69 whereby the burden of proof shall lie on the objector.

It must be noted that in section 51 the terminology **onus of proof** is used, whereas regulation 69 speaks of the **burden of proof**. There are few if any absolute synonyms in the English language. It is suggested that **onus** emphasizes **who**, whereas **burden** emphasizes **how much**.

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[51] This is strictly speaking not a reduction, this is an exemption; it could perhaps even be considered to be an abatement.

The onus of proof proviso, though attached to section 51, deals with onus of proof in respect of income exemption, non liability to tax or deduction qualification.

Strictly speaking the proviso to section 51 does not qualify only section 51:

The section [51] deals with a specific reduction in respect of income exceeding one thousand pounds. It is, strictly speaking, not a reduction but an exemption.

The proviso to section 51 refers to income exemption, non liability to tax and deduction qualification.

Therefore, it is submitted, that the proviso of section 51 does not apply solely in respect of section 51.

Regulation 69 is under the section APPEAL, and from the wording used, the burden of proof is clearly to be discharged on appeal to the Court of Review.

It is not, and cannot be relevant at the objection stage.

The onus of proof in terms of the proviso to section 51 is clearly relevant at the objection stage. If it were relevant to the appeal stage, it would be completely unnecessary, as regulation 69 is all encompassing.

In terms of section 52 certain incomes, revenues and funds are exempt from Income Tax.[52]

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[52] This section is based on section 17 of the New South Wales Act. There are some significant changes however, for instance income of trade unions were exempt in the New South Wales Act and are not exempt in terms of the Act.

Most of the exemptions refer to total exemptions.

There is, however, one sub-section which is not a total income exemption.[53] Here, part of the total income is exempt. Thus, the income of a non resident from Government debenture is exempt from tax.

The critical distinction between **person exempted** and **income exempted** is not made explicitly.

Where a person is exempted, for instance the Governor of the Colony and his personal staff,[54] the income **in toto** is exempted.

However for our purpose the distinction between absolute and partial exemption is not as powerful as the distinction between **person exemption** and **amount exemption**.[55]

It is suggested, and it shall be argued later, that the taxpayer may have to discharge the burden of proof in the case of an amount exemption, but that a **person exemption** is not subject to any burden of proof.

In terms of section 62, the procedure to arrive at the taxable amount is given. Section 62 is virtually identical with section 27 of the New South Wales Act.[56]

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53 Section 52.(5)

54 Section 52.(6)

55 See J Voet 39.4.14. supra page 8.

56 The proviso in S.27 (III) of the New South Wales Act:

> **No tax shall be payable in respect of income earned outside the Colony of New South Wales.**

has been eliminated.

Section 62 reads:
62. For the purpose of ascertaining the sum hereinafter termed the taxable amount on which, subject to the deductions hereinafter mentioned, income tax is payable, the following directions and provisions shall be carried out:-
(1) The amount of taxable income from all sources for the year immediately preceding the year of assessment, shall be taken as the basis of calculation.
(2) NOT RELEVANT FOR OUR PURPOSE
(3) NOT RELEVANT FOR OUR PURPOSE
(4) NOT RELEVANT FOR OUR PURPOSE
(5) In all other cases the taxable amount shall be the total amount of taxable income arising or accruing to any person from all sources within the Colony, except to the extent of the exemptions provided in section fifty-two.

There is some difficulty in interpreting section 62. Thus in section 62 (1) the taxable income is the amount from all sources. But in section 62 (5) the taxable income <u>in all other cases</u> is the total amount arising or accruing from all sources within the Colony.

There is nothing in section 62 (2),(3) or (4) which warrants or explains the qualification "<u>within the Colony</u>". Of course if 62 (5) was a separate section there would be no difficulty, but as it is framed it is part of section 62

In section 62 (5) the terminology "<u>arising or accruing to any person</u>" is difficult to reconcile with "<u>derived or received by any company or person</u>" as used in the definition of "<u>income</u>" in section 42 of the Act.

In terms of section 63, the taxpayer is entitled to certain deductions from the taxable amount.[57]

It is important to distinguish between two sets of deductions.

The first set of deduction is in terms of section 62 which even though its purpose is to ascertain the taxable amount does include a deduction in terms of sub section 62 (4) which directs the taxpayer to **deduct** from the taxable amount income derived in respect of a share in a company liable to pay income tax.[58]

The second set of deduction is in terms of Section 63, the deduction section, and is virtually identical with section 28 of the New South Wales Act.[59]

Section 63 (1) must be read together with section 64 (6) which reads:

No deduction shall in any case be made in respect of any of the following matters:-

.....

Nor as regards income derived from any trade, in respect of any of the following matters:-

(6) Any moneys not wholly or exclusively laid out or expended for the purposes of trade. [60]

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[57] This is based on section 28 of the New South Wales Act.

[58] It is difficult to understand how in terms of a section, the purpose of which is to ascertain the taxable amount, one can ascertain that taxable amount by deducting an income from that taxable amount.

[59] The main difference is that section 28.(II) has been eliminated . One of the effect of this sub section was that deductions for certain life insurance premiums on the taxpayer's or his wife's life were allowed.

[60] Section 29 of the New South Wales Act is identical with section 64 of the Act.

Section 63(1) is linked to section 64(6) as section 11(a) is linked with section 23 (g) of Act 58 of 1962. It is interesting to note that section 64 (6) is virtually identical with section 23 (g) of Act 58 of 1962.

The most important change perhaps from the New South Wales Act, is that **wholly and exclusively** becomes **wholly or exclusively**. The consequence of this change are of great consequence for the burden of proof concept.

The discharge of the burden of proof that moneys were expended wholly or exclusively for the purposes of trade is easier to achieve than if the taxpayer must establish that the moneys expended were **wholly and exclusively** for the purposes of trade.

The taxpayer will now succeed in the discharge of his burden of proof if he can establish that the moneys were wholly expended for the purpose of trade, he will also succeed if he can show that the moneys were expended exclusively for the purposes of trade.
The assumption that wholly means exactly the same as exclusively, cannot and must not be entertained.
We must assume that words have a meaning.

The following statutory formula is suggested.

INCOME AS A STATUTORY PROCEDURE (CAPE) ACT 36 OF 1904

FORMULA:FROM WEALTH TO INCOME AFTER TAX

INTERPRETATION STEPS

1] INCOME
means:
any gains or profits
and includes:
profits
gains
rents
interest
salaries
wages
allowances
pensions
stipends
charges
profits from mining
and quarrying

LESS: 1000 Pounds
EQUALS: TAXABLE INCOME

2] TAXABLE INCOME
Income less 1000 Pounds

LESS: Directions and provisions in terms of section 62
EQUALS: TAXABLE AMOUNT

3] TAXABLE AMOUNT
Taxable income
subject to provisions
direction and provisions
in terms of section 62

LESS: Deductions
in terms of section 63
and subject to section 64
EQUALS: AMOUNT ON WHICH INCOME TAX PAYABLE

4] AMOUNT ON WHICH INCOME TAX PAYABLE
Taxable amount less
deductions in terms
of section_63
provided such deductions
comply with the provisions
of section 64, in
particular 64(6) which
provides that no deduction
in respect of any moneys
not wholly and exclusively
laid out or expended for
the purpose of trade.

LESS: Tax
EQUALS: INCOME AFTER TAX

5] INCOME AFTER TAX

1.2.2.1.2 What is an assessment

In terms of section 65 the Commissioner gives the taxpayer thirty days notice to furnish returns [61] for the purpose of the assessment of income tax.[62]

Section 42 defines assessment as follows:

42. Unless the context otherwise requires, *Assessment* means an estimate of the value of the amount of any income liable to taxation under this Act as well as the amount of tax imposed thereon respectively, and includes all matters comprised in any return required by or under this Act.

An assessment, therefore, is an **estimate** which shows both the income liable to taxation and the tax imposed.[63]

In terms of section 70, the Commissioner upon the completion of the assessment books shall give notice to every taxpayer of such particular as shall be considered necessary and the amount of the tax payable.[64]

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[61] See Appendix 1 for form of notice.

[62] This is based on section 65 of the New South Wales Act. Reference to land tax has been eliminated.

[63] There is no definition of assessment in the New South Wales Act. The assessment books in terms of section 31 (III) shall show the gross and the taxable amount together with the a amount of the tax.

[64] 70. Upon the completion of the assessment books the Commissioner shall give notice to every taxpayer whose name appears therein with such particulars of the assessment as shall be considered necessary and the amount of the tax which is payable. Such notice shall be designated the Notice of Assessment of Income Tax.

The taxpayer is faced with the problem that even though an assessment incorporates both the tax payable and the income liable to taxation, the Commissioner is only obliged to give notice of the amount of the tax payable.
As far as the assessment part, which consists of the income liable to taxation, the Commissioner has a discretion. He needs reveal the income liable to taxation in his notice of assessment only **if it shall be considered necessary**.

It is true that in terms of section 69 every assessment book, though not open to public inspection, allows every taxpayer to a copy of the entries relating to the assessment of his income. The Cape, however, is a large land with a poor postal system and the taxpayer who relies on the posted notice of assessment, which does not include the income liable to taxation, may be prejudiced.

1.2.2.1.3 Objections to the assessment

In terms of section 72, a taxpayer aggrieved by reasons of an assessment, may object to such assessment.[65]

It is important to note that both the taxpayer and the Commissioner have a right of objection.

[65] Marginal note: Objections.
72. (1) Objections to any assessment under this Act may be made by any taxpayer feeling aggrieved by reason of any assessment in which he is interested or by the Commissioner in such manner and on such terms and conditions as shall be prescribed.

The fact that the taxpayer aggrieved by reason of an assessment **in which he is interested** can object to that assessment, clearly implies that the assessment need not be his own assessment.

It is submitted that taxpayer A, can appeal against the assessment of taxpayer B provided he complies with the requirements of section 72 (1):

1) he must be aggrieved by the assessment, and

2) he must be interestedd in the assessment.

1.2.2.1.4 Onus of proof on objection to the assessment

The onus of proof proviso to section 51 reads:

Provided that the onus of proof that any income is exempt from or not liable to payment of tax, or is subject or entitled to any deduction, shall lie on the person claiming the benefit of such exemption, non liability or deduction.[66]

This onus of proof proviso seems to be restricted to objections which are related directly to the first part of section 51, which deals with the taxpayer's entitlement to the reduction of one thousand pounds from income.

A strong case could be made for the interpretation that the onus of proof proviso is specific to section 51.

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[66] This has also been dealt with in the discussion on exemptions in paragraph 1.2.2.1.1.

However the word **any**[67] which qualifies deduction extends the onus of proof to all deductions . Moreover the proviso deals also with exemption and non liability which are not mentioned in section 51.

The onus of proof proviso is restricted to any income which the taxpayer claims is:

1) exempt from the payment of tax, or
2) not liable to the payment of tax, or
3) entitled to any deduction.

This, with respect, is the most perfect onus of proof provision of any taxation Acts. It is simple, clear, direct and deals with the three relevant stages of the statutory formula:

(i) non liability
(ii) exemption
(iii) deduction.

A reasonable argument could be made that the onus of proof proviso to section 51, cannot extend outside section 51, as it is attached specifically and therefore qualifies uniquely section 51.

The onus of proof provision to section 51 is like a beautiful piece of music, written at the wrong time by an unkwnown composer on some forgotten instrument.

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[67] Again, it could be argued that **any** means **any such** deduction.
It is interesting to note, that the proviso to section 51 of the Act, almost certainly the single most revolutionary event in the history of our law of taxation, has not been analyzed in our literature.

The Commissioner's right to objection is, it is submitted, not subject to any onus of proof, as in terms of section 51 it lies on **the person** claiming the benefit of the exemption. The Commissioner is not a person claiming such benefit.

The Commissioner in terms of section 72 (1) has the right to object against an assessment but does not have to discharge any onus of proof.

The questions as to whether, in terms of the Act, the Commissioner has the right to object against his own assessment and whether the assessor's assessment can be considered to be the commissioner's assessment do not seem to have been dealt with in depth in our jurisprudence.

1.2.2.2 STAGE 2 APPEAL TO THE COURT OF REVIEW

1.2.2.2.1 Nature of the assessment subject to appeal

Regulation 68 provides for the appeal procedure.[68]

In terms of regulation 66 if the taxpayer gives notice within 14 days that he refuses to accept the Commissioner's reduced or altered assesment, such objection will be deemed to be a notice of appeal to the Court of Review for hearing and determination.

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[68] Regulation 68. Every objection to an assessment, or amended assessment, made by a taxpayer, of which due notice has been given to the Commissioner, and not assented to by the Commissioner or duly withdrawn by the taxpayer, shall be heard and determined by the Court of Review at the sittings next appointed to be held at the place nearest to that at which such taxpayer resides or at such other place as may be agreed upon by the parties.

Form L and M are examples of how a the notice of objection is treated automatically as a notice of appeal.[69]

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[69] In terms of Regulation not wholly set out in the text.
FORMS AND NOTICES
Regulation 14

Form L. DECISION OF COMMISSIONER, ALLOWING OBJECTION OR IN PART

I beg to inform you that the assessment for Income Tax made upon .....for the year ended 30th June, 1904, has been amended as follows:-
The Assessment Register, will be altered accordingly, unless you notify me in writing within fourteen days that you are satisfied with my decision.
If notice of dissatisfaction is duly received by me within that time, I will transmit your appeal to the Court of Review for hearing and determination at its next sitting, of which due notice will be given.

.....Commissioner of Taxes.
.....Address.
.....Date.

Form M. DECISION OF COMMISSIONER DISALLOWING OBJECTION

I beg to inform you that I have considered your obligations to the assessment for income tax for the year ended 30th June, 1904, made upon....., and that I am unable to allow them or any of them.
Your notice of objection will accordingly be treated as a notice of appeal and transmitted to the Court of Review for hearing and determination at its next sitting, of which due notice will be given.

.....Commissioner of Taxes.
.....Address.
.....Date.

1.2.2.2.2 What are the grounds of appeal

In terms of regulation 70 the taxpayer is limited to the grounds stated in his notice of objection, **or appeal**, as the case may be.[70]

Where an aggrieved taxpayer objects to an assessment and the Commissioner reduces or alters the assessment, the taxpayer may, in terms of section 66, if he is dissatisfied with such reduction or alteration and refuses to accept the Commissioner's decision, appeal to the Court of Review.

It is absolutely clear that if the taxpayer is bound by the grounds stated in his notice of objection that there cannot be other grounds in his notice of appeal unless the Commissioner allows such further grounds.

The words **grounds stated in his notice of objection, or appeal** may be interpreted as **the evidence** in his notice of objection or as **the reason why** stated in his notice of appeal.

If this interpretation is accepted then there are two sets of grounds of objection.

Grounds on objection to the assessment

The first grounds relate to section 72 (1) whereby the taxpayer objects to **any assessment**. This is the objection stage. There is, it is submitted, a burden of proof to be discharged in terms of the proviso of section 51.

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[70] Regulation 70. At such appeals before the Court of Review the taxpayer shall be limited to the grounds stated in his notice of objection, or appeal, as the case may be.

Grounds on appeal

The grounds on appeal is an entirely different concept.

Here the taxpayer objects to any **altered, amended, corrected or additional assessment** in terms of section 73 (1).

There are two separate premises upon which the taxpayer can base his objetion on appeal:

1) the taxpayer objects upon the ground that he is not liable for the tax, or

2) the taxpayerr objects on the ground that the amount of the assessment is excessive.

It is submitted that **on the grounds** in the objection section 72 (1), does not have the same meaning as **upon the ground** in the appeal section 73 (1).

Section 73 (1) qualifies the grounds of appeal as follows:

Marginal note: Appeals
73. (1) Any taxpayer may within thirty days after the notice of assessment for Income Tax or of any altered, amended, corrected or additional assessment has been given, appeal therefrom to a court especially constituted by Proclamation, upon the ground that he is not liable for the tax or for any part thereof, or that the amount of such assessment is excessive. Every appeal shall be commenced by such notices and in such manner as may be prescribed.

This section is virtually identical to section 44. (1) of the New South Wales Act No. 15 of 1895 (59 Victoria 15).

The differences are as follows:

Any taxpayer may [,] within thirty days after the notice of assessment **for [land or] [I]** income **[T]** tax or for any altered, amended, corrected or additional assessment has been given, appeal therefrom to **[the Court of Review]** **a court specially constituted by Proclamation** upon the ground that he is not liable for the tax **[,]** or for any part thereof, or that the amount of such assessment is excessive. Every appeal shall be commenced by such notices and in such manner as may prescribed.

Land tax has been excluded.

From the above it is abundantly clear that on appeal the two grounds of appeal are:

(a) non liability to the tax or part of the tax, or

(b) the excessive nature of theamount of such assessment..

The meaning of **upon the ground** clearly means on the premise that, on the basis, on the reason why. It certainly does not mean on the evidence in the notice of objection in terms of section 72.

However in terms of regulation 70, the taxpayer, on appeal to the Court of Review, is limited to the grounds stated in his notice of objection or appeal.

It is submitted that the grounds in the notice of objection is the evidence on objection to the Commissioner's assessment, whereas the grounds on appeal are the reasons why the taxpayer appeals against the altered, amended, corrected or additional assessment.

1.2.2.2.3 Burden of proof on appeal to the Court of Review

In terms of section 51 of the Act the first thousand pounds of the taxable income of certain persons liable to taxation is free from tax. There is a **proviso** to section 51 dealing with the onus of proof. It is submitted that although this proviso is attached to section 51, it is binding where a person claims that any income is exempt or non liable to payment of tax or thas he is entitled to any deduction.

It is submitted however that the onus of proof provision of section 51, refers to the objection stage and only indirectly to the appeal stage.[71]

In terms of regulation 69, on appeal before the Court of Review the burden of proof shall lie on the objector.

This is the only instance in the history of our Tax legislation where it is correct to state that on appeal the burden of proof shall lie on the taxpayer. [provided he is the objector]. This has never been the case again.

Regulation 69 states:

The general practice and procedure of the Court of Review shall be that of a Court of Resident Magistrate, in so far as the same are applicable, and the burden of proof shall lie on the objector.

It is quite clear that this burden of proof is much more extensive than the onus of proof in terms of section 51. Indeed if the "burden of proof shall lie on the objector" applied to section 51, the onus of proof proviso of section 51 is not necessary. Again if the onus of proof of section 51 is a reference to the burden of proof on appeal, there would have been no reason for specifying the onus in relation to non liability, exemption or deduction, because the burden of proof in terms of section 69 is all embracing.

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[71] On appeal to the Court of Review the taxpayer may have to establish that he has discharged the onus imposed in terms of section 51.

The onus of proof in terms of section 51 is specific to a claim that any income is exempt from tax or is not liable to tax or is subject or entitled to a deduction.
This, it is submitted, deals with the relationship between the taxpayer and the Commissioner. It is however relevant on appeal to the Court of Review to the extent that the taxpayer is restricted on appeal to the grounds on objection. It follows that the taxpayer will have to establish on appeal, in terms of regulation 69 that he discharged the onus imposed in terms of section 51.

1.2.2.3 STAGE 3 APPEAL TO THE SUPREME COURT

1.2.2.3.1 Appeal from the Court of Review

In terms of regulation 73 either party can appeal to the Supreme Court on a point of law. Notice in writing must be given by such party within twenty-one days of the decision of the Court of Review.
As the appeal is on a point of law, the onus of proof provisions of section 51 or regulation 73 are not relevant. The ordinary rules of evidence obtain.

1.2.2.3.2 Other appeals

Regulation 68 states that an objection to an assessment or amended assessment which has not been assented to by the Commissioner "**shall be heard and determined by the Court of Review**".

As the word **shall** is mandatory it follows that the taxpayer's only recourse is to appeal to the Court of Review.

However the Court of Review is only competent to hear appeals concerning objections to an assessment, or amended assessments.

It is submitted, that where the issue is outside the competence of the Court of Appeal, that the taxpayer can appeal directly to the Supreme Court.

This is so for two reasons:

(a) the competence of the Court of Review is strictly limited by section 73 and regulation 68, and

(b) where section 73 and regulation 68 are not relevant, the authority of the Supreme Court has in no way been circumscribed by the Act .

1.2.3 (CAPE) INCOME TAX ACT 21 OF 1908

The short title is " The Income Tax Act, 1908 ".

For the purpose of section 1.2.3 of this paper it shall be referred to as the Act.

The design of the Act is to provide for the taxation of income. The Act alters some of the provisions of Part II of the Additional Taxation Act, (Cape) 36 of 1904.

The Additional Taxation Act, 1904 shall be referred to, for purpose of section 1.2.3, as the principal Act.[72]

1.2.3.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

See the principal Act.

1.2.3.1.1 What is taxed in terms of the statutory formula

The definition of income in section 42 of the principal Act is substituted with the definition of income in section 8 of the Act.

In the principal Act the words **income means**, becomes in the Act, **income shall mean**.

There are two critical consequences which flow from the change in the definition. Whereas in the principal Act definitions are qualified by **unless the context otherwise requires**, this qualification is not present in the Act.

It follows, therefore, that the context cannot alter the definition of income.

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[72] This is the terminology used in the Act see Section 1

The second major consequence is that the principal Act's definition is faulty in the sense that it defines income as being profits and gains, which include gains and profits; and the rest of the definition is merely declaratory.

The definition in the Act stating that **income shall mean** is clearly peremptory. It follows that the only exceptions are those specifically provided for in the Act.

There are seven classes of income.

(a) Profits and gains derived from ownership of immovable property within the Colony.

(b) Profit and gains derived from the use and enjoyment of immovable property within the Colony.

(c) All profits arisen from interest, annuities and dividends to any person out of public Colonial revenue.

(d) Profits and gains arisen or accrued from property within the Colony.
All profits and gains arisen or accrued from any profession, trade, employment or vocation from a source within the Colony.

(e) Interest annuities and other annual profits and gains derived from any source within the Colony.

f) All wages, salaries and emoluments of every public office or employment of profit, and every annuity, pension etc.

(g) All profits and gains from any source whatsoever within the Colony.

The basis of the taxation process in the principal Act was income and not profit.

There is an attempt to make the basis of taxation of the Act profits and gains as every one of the seven classes of income is qualified, or described, as profit and gain, or as profit.

There are a number of anomalies and, with respect, some confusion.

In terms of section 8 (a) the profit of the sale of immovable property would be taxable because it is derived from ownership of the property.

In terms of section 8(b) rental is taxable. However, as it is taxed as profit, it is clear that the landlord is only taxable on the balance of what is left after relevant expenses have been deducted.

In terms of section 8(c) profits **arisen** from interest, annuities and dividends from public revenue are income.
There is a problem because in sections 8(a) and (b) the term **derived** is used whereas here the term **arisen** is used.
The term gain suddenly disappears from the definition.

The first part of the category 8(d)) seems to be a duplication of 8(a) and 8(b). However a completely new terminology is used. We are now no longer dealing with **profits and gains derived**, or **profits arisen from** but with **profits and gains arisen or accrued**
There is a difference between the meaning of the terms **derived**, **arisen**, **arisen or accrued**. Many lawyers in the next hundred years will make a good living trying to distinguish and interpret these terms.

The second part of section 8 (d) deals with profits and gains arisen or accrued from profession, trade, employment or vocation within the Colony.
The term profits is appropriate with reference to trade.
It is not accurate to refer to wages as profits. Instead of the term profit it would have been preferable to tax **income derived from employment**.

In order to understand section 8(f) of the Act it may be necessary to interpret profits as net benefits from trade, and gains as benefits from non trading activities such as profession or employment. There is unfortunately no authority for such distinction between profit and gain.

Section 8(e) deals with interest, annuities and other annual profits and gains **derived** from any source within the Colony. What is important is that in terms of section 8(c) what is taxed is interest annuities **arisen** from public Colonial revenue. In terms of section 8(e) what is taxed is very similar but is **derived** from any source within the Colony. Unless the term derived has a different meaning form arisen it would seem that section 8(e) would incorporate 8 (c).

The term **payable to any person** in section 8 (c) does not appear in 8 (e), and it is therefore difficult to determine its significance.

Section 8 (f) incorporate both section (c) and section (e). But here for the first time the term **derived**, **arisen from**, **arisen or accrued** do not qualify what is taxed. Again neither profit nor gain are taxed. The term profit appears in relation to employment as follows; **employment of profit**. It is however clear that income other than profit is taxable provided it is payable out of public revenue or by any public body, person or company.

Section 8(g) seems to encompass all the other 6 sub-sections, which indeed would not have been necessary if gain meant benefit other than profit, and if **arisen from** had the same meaning as **derived from**.

Section 8 is difficult to interpret in terms of the Act itself. It would seem however that if the aim of section (8) is to make **profit and gain** the sole basis of income, it fails because it clearly incorporates in section 8(e) income of a non profit nature.

Section 50 and 51 of the principal Act have been deleted in terms of section 9(c) of the Act, and the new definition of income in terms of section 8 of the Act is substituted for the definition in section 42 of the principal Act. [73]

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[73] Section 50 is the operative section of the principal Act. Section 50 and 51 and 42 can be considered to be the statutory procedure of the principal Act.

The basis of taxation in the Act is profits and gains. Stating however that interest is profit, or using terminology such as **employment of profit** is stretching what the reasonable person understands by profit.

Perhaps it is more accurate to state that the basis of taxation in the Act is profits as understood by the Act.

The statutory formula

Income is now **profits and gains** and **profits and gains** is income.

The first one thousand rand income reduction allowed in terms of section 51 of the principal Act, has not been retained.

Otherwise the statutory formula has not been altered.

Income is profits and gains , but what is taxed is not income, but income taxable in terms of a statutory formula.

1.2.3.1.2 What is an assessment

See principal Act.

1.2.3.1.3 Objection to the assessment

See principal Act.

1.2.3.1.4 Onus of proof on objection to the assessment

As far as Onus of Proof is concerned this is perhaps the most fundamental Act in our history. Indeed the wording of the relevant section has retained much of its structure and meaning until to-day.

There was a reference to onus of proof in section 51 of the principal Act. It was however attached, as a proviso, to the deduction section 51 of the principal Act. It is not absolutely clear whether and how it extends to other sections of the principal Act.

Section 51 of the principal Act has been deleted in terms of section 9 (c) of the Act.

The onus of proof provision is section 7 of the Act, which reads:

Marginal note: Onus of proof of exemption, etc.

7. The onus of proof that any income is exempt from or not liable to the payment of income tax or is subject or entitled to any deduction shall be on the person claiming such exemption, non-liability or deduction.

It is relevant to compare section 7 of the Act with the proviso of section 51 of the principal Act:

[Provided that t] The onus of proof that any income is exempt from or not liable to the payment of **income** tax **[,]** or is subject or entitled to any deduction **[,]** shall **[lie]** **be** on the person claiming **[the benefit of]** such exemption, non-liability or deduction.

An interesting distinction can be drawn between liability to income tax and liability to the payment of income tax.

PAYMENT OF INCOME TAX

1) **Exemption and non liability**:

Where the issue is not payment, but establishing whether the taxpayer owes income tax, then there is no burden of proof to be discharged by the taxpayer.

The Act is absolutely clear, the taxpayer must discharge the burden of proof in terms of section 7 where he claims that he is exempt from the payment or not liable to the payment of the tax.

2) **Deductions**:

Here the taxpayer must discharge the burden of proof in terms of section 7, whether he claims that he is entitled to the payment of the deduction, or whether he claims that he is entitled to the deduction. The reason , for the distinction in terms of the Act, **payment** qualifies non liability and exemption. It does not, and cannot, qualify deduction.

The principal Act refers to payment of tax, the Act refers to the payment of income tax. There is therefore no onus in the case of tax other than income tax.

The principal Act refers to the benefit of exemption, non-liability or deduction. The Act drops the word benefit.

The change is of great practical importance.

A person, for instance, claiming the benefit of an exemption need not necessarily be the person who claims the exemption itself.

Again the term benefit implies an advantage. Therefore the person who has to discharge the onus of proof in terms of section 7 can no longer claim that if there is no benefit to him that therefore the deduction is not subject to the onus of proof.

There seems to be a distinction between the concepts **subject** and **entitled** to any deduction. The relevance is not clear; however a person is entitled to an advantage and is subject to a disadvantage. If this interpretation is acceptable it would imply that in the case of a deduction a person has to discharge the onus of proof in terms of section 7 of the Act, whether it is to his advantage or not.

1.2.3.2 STAGE 2
APPEAL TO THE COURT OF REVIEW

See principal Act

1.2.3.2.1 Nature of the assessment subject to appeal

See principal Act.

1.2.3.2.2 What are the grounds of appeal

See principal Act.

1.2.3.2.3 Onus of proof

See principal Act.

1.2.3.3 STAGE 3
APPEAL TO THE SUPREME COURT

1.2.3.3.1 Appeal from Court of Review

See principal Act.

1.2.3.3.2 Other Appeals

See principal Act.

1.2.4 (NATAL) INCOME AND LAND ASSESSMENT ACT 33 OF 1908

The purpose of the Act is " To regulate the assessment of Income and Land for the purposes of Taxation"[74]

The short title is the Income and Land Assessment Act, 1908.

For the purpose of section 1.2.4 the (Natal) Income and Land Assessment Act shall be referred to as the Act.

The Act does not, for the purpose of onus of proof, fall in the evolutionary development from which has emerged section 82 of Act 58 of 1962. The Act is of theoretical interest even though it only survived for less than two years.

1.2.4.1 STAGE 1 OBJECTION OT THE COMMISSIONER'S ASSESSMENT

1.2.4.1.1 What is taxed in term of the statutory formula

The interpretation section 2 of the Act interprets income as follows:

Income means any gains or profits derived or received by any Company or person in an any year or by any means from any source and without limiting the meaning of the words includes rents, interests, salaries, wages, allowances, pensions, charges and annuities; the natural increase of live stock, trees or plants, or the mere increase in the market value of securities, investments or other property shall not, as long as the same is not disposed of, be deemed to be income.

Person in terms of section (2) of the Act includes a partnership or society, and a Company.

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74 Heading of preamble.

The definition of income makes it clear that it includes gains or profits. Neither gains nor profits are defined.
The definition does not state **profits <u>and</u> gains** but **gains <u>or</u> profits.**
In the New South Wales Act the definition section states that income includes profits, gains, rents, interest, salaries,.... It can therefore be assumed that gains is a different concept from profit, just as it can be assumed that salary is a different concept from rent.
In the Act however income is defined as gains or profits, it can therefore be assumed that profit is a form of gain.
It is also suggested that because the definition includes rents, interests, salaries, wagers, allowances, pensions, charges and annuities [75] which are not profits or gains as understood by the reasonable person that therefore the basis of taxation is not gains and profits.

The definition of income does not include the increase in the market value of property, investment or securities as long as they are not disposed of.
It does not follow however that on disposal such increase in the market value is income. Indeed section 13.(3) specifies that if the sale or exchange or other conversion of property is not in the ordinary course of business the receipt of the consideration is not deemed to be income.

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[75] This is identical with New South Wales section 67.

There is, it is submitted, difficulty in reconciling section 2 with section 13 (3). In section 2, income is a profit or increase; in section 13 (3) the price or consideration [not the increase] is considered to be or not to be income.
The inconsistency could be of practical consequence.

Example:

A property dealer purchases a property for R 100,000, and sells it for R 150,000.

In terms of section 2:	Income is R50,000 i.e. **the increase**
In terms of s 13.(3):	Income is R150,000 i.e. **the consideration**

There seem to be confusion between the elementary accounting concepts of gross profit and profit, a confusion which unfortunately still plagues us to-day.

In terms of section 26, deductions are allowed in respect of expenses actually incurred in the production of income.
It is therefore clear that profit means gross profit, otherwise the taxpayer would be able to deduct twice expenses incurred .

The definition states that a mere increase in the market value of certain goods is not income, as long those goods are not disposed of.

An interesting distinction is made between the natural increase of livestock, and the market value of the increase of property.

Whereas in the case of property, the market value of the difference is the measure of the increase, no such measure is specified in the case of livestock.

Section 2 defines **taxable income** as follows:

Taxable income **means any income not exempted by this Act from the Income Tax.**

It would seem that taxable income is not the income on which income tax is levied, but rather that income which is left after all exempt income has been removed. Because of this definition of taxable income, the only way to arrive at taxable income is by reducing income with allowable exemptions. No other deductions is allowed to be taken into account to arrive at taxable income.

However in terms of section 26, deductions are allowed in respect of various expenses incurred by the taxpayer in the production of his income. It would seem that such deductions are allowed even if not for the purpose of trade. It is submitted that an expense incurred in respect of the earning of a salary is deductible.

The definition of **taxable income** is crucial, yet unsatisfactory. It does not tell us what taxable income is, it tell us what it is not.

In terms of section 9 (1) of the Act.[76] income tax is chargeable on taxable income. This is difficult to reconcile with section 26 which allows the taxpayer to deduct from the taxable income certain expenses [losses and outgoings] incurred by the taxpayer in the production of his income.

It is within the Commissioner's discretion to determine whether the sale of property is for the purpose of realizing capital, and therefore not income, or whether the sale is in the ordinary course of business and therefore income.

Section 11 deals with exemptions from tax. The critical distinction between person exempted and income exempted is not made. Indeed most of the exemption are person exemption. There are no abatements.[77]

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[76] 9. Subject to the provisions of this Act there shall be assessed and levied in and for each year ending on the 30th of June and paid to the Consolidated Revenue Fund taxation as follows, that is to say :-
(1) Income Tax upon all taxable incomes at such rate in the pound sterling as is fixed from time to time by Acts to be passed for that purpose.

[77] With the exception that a person who is not a company whose income derived in part from sources outside the Colony is subject to similar taxation as in the Act is entitled to an abatement to the extent of the tax paid abroad. Section 12. (4)

The following summary is suggested:

INCOME AS A STATUTORY FORMULA: (NATAL) ACT 33 OF 1908

FORMULA: FROM WEALTH TO INCOME

INCOME	**IS**	All gains and profits.[78]
TAXABLE INCOME	**IS**	Income of person or land not exempted.[79]
ASSESSED INCOME[80]	**IS**	Taxable income less deductions in terms of section 26 and 27.

In terns of the Act what is taxed is not gains and profits. It is true that **gains and profits** is part of income, however it is not correct to state that income is **profits and gains**. For the purpose of the Act the following suggestion is perhaps apposite:

a gross profit is the increase in a person's assets in the ordinary course of business. It is the mark up.

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78 With the proviso that increase in the value of property and increase of market value of securities, investments and other property is not income as long as not disposed of.
In terms of section 15 any benefit or advantage of any kind is income, including the estimated value of board and residence.

79 Section 11.

80 This is a suggested terminology.

If a trader purchases goods for R100,000 which he sells for R175,000 he will make a gross profit of R75,000 which is his taxable income. From his taxable income the trader can deduct expenses in order to arrive at his assessed income.[this will approximate his net profit]

1.2.4.1.2 What is an assessment

In terms of section 44 an assessment is prepared for the purpose of ascertaining the amount upon which tax is levied. The assessment is entered in the assessment rolls which are not open to public inspection. The taxpayer however is entitled to a copy of the of the entries relating to the assessment of his income. An assessment therefore refers to the amount on which the tax is levied and does not refer to the amount of the tax itself. The Commissioner must in terms of section 47 (1) give the taxpayer a notice in writing of such assessment. Failure to comply with this requirement does not invalidate the assessment.

1.2.4.1.3 Objections to the assessment

The relevant sections are:

Marginal note: Objection
49. (1) Objections to any assessments under this Act may be made by any taxpayer feeling aggrieved by reason of any assessment in which he is interested in such manner and on such terms and conditions as may be prescribed.

49. (4) Every assessment to which no objections are duly lodged shall upon the expiry of the prescribed time become final and conclusive, but without prejudice to the powers given to the Commissioner of bringing any assessment before a judge of the Supreme Court or before an assessment Board.

The aggrieved taxpayer can object to the assessment. If he does not object within the prescribed time, the assessment becomes final and conclusive.

The commissioner is not prevented from bringing such assessment before a judge of a supreme court.[81]

1.2.4.1.4 Onus of proof on objection to the assessment

There is no objection of proof provision in the Act at the assessment stage. The only requirement is for the objections to have been duly lodged.

1.2.4.2 STAGE 2
APPEAL TO THE COURT OF REVIEW

There are two types of appeal; in the case of income assessment the appeal against the decision of the Commissioner is to a judge of the Supreme Court, in the case of appeal against land assessment it is to the Assessment Board.

Land assessment appeals, is outside the scope of this thesis.

There is no Court of Review or Appeal constituted in terms of the Act.

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[81] In the case of land assessment to the assessment board.

1.2.4.3 STAGE 3 APPEAL TO THE SUPREME COURT

Section 51 specifies the method whereby the Supreme court shall hear appeals.

The court may make any alteration to the assessment roll and may make an order as to costs.[82]

The confirmed or altered assessment roll is final and conclusive.[83]

1.2.4.3.1 Nature of the assessment appealed against

The relevant sections of the Act reads:

Marginal note: Decision on objections: appeals.
50. The Commissioner shall consider all objections which have been duly lodged with him and shall determine therein and shall alter the assessment and amend the Assessment roll or he shall confirm the assessment and notify the taxpayer accordingly.
In the case of Income Tax the taxpayer may within thirty days after receiving such notice give to the Commissioner and to the Registrar of the Supreme Court notice in writing of his attention to appeal to a judge of the Supreme Court. The procedure in such appeals shall be prescribed by the rules of the Supreme Court.
In the case of Land Tax an owner of land may within a like time give to the Commissioner notice in writing requiring him to lay his objections before the Assessment Board hereinafter referred to.

It is clear that the Commissioner has great discretion in considering objections to his original assessment. It is this altered or confirmed assessment notified to the taxpayer which can be appealed against by the taxpayer.

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[82] Section 51.(4)

[83] Section 51.(5)

The taxpayer can only appeal within thirty days of receiving such altered or confirmed assessment.

The taxpayer is in an invidious position, not only does the Commissioner not have to give any reason for his altered or confirmed assessment, but there is not time limit within which such notice must be given to the taxpayer, whereas the taxpayer has only thirty days within which to appeal.

However section 52 protects the taxpayer in so far that the obligation to pay income tax is suspended by an appeal.

This eminently reasonable and fair provision could, with respect, be considered by tax legislators of the future.

1.2.4.3.2 What are the grounds of appeal

The relevant section is Section 50 reads:

.....

Every notice of appeal to a Judge and every notice requiring objections to be brought before an Assessment Board shall set forth the grounds upon which it is founded, which must be one of the following reasons-

(1) That the appellant is not liable.
(2) That the amount of the assessment is excessive.
(3) That the assessment is incorrectly calculated.

A minor change form the New South Wales Act [84] is that, non liability in part, as distinct from non liability *in toto*, is not specified as a ground for objection.

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[84] Section 44. (1) reads:.....upon the ground that he is not liable for the tax, or for any part thereof, or that the amount of such assessment is excessive.
See also supra page...

This is perhaps of little consequence, it could perhaps be argued that non liability *in toto* include non liability in part.

The ground of objection that the assessment is incorrectly calculated is new and was not incorporated in the New South Wales Act. This certainly increases the taxpayer's rights of defence, as it allows the taxpayer a right to challenge the Commissioner' assessment, where it is difficult or perhaps even impossible to establish that the Commissioner's assessment is excessive, and yet grounds exist which can establish that the assessment was incorrectly calculated.
This is a step towards alleviating the burden of establishing an excessive assessment towards establishing a wrong assessment.
The term grounds of appeal are referred to in section 50 **which must be one of the following reasons.**
The terms grounds of appeal here clearly means reason, not evidence. There is nothing to prevent the taxpayer from leading evidence which was not used when he objected to the original assessment.

1.2.4.3.3 Onus of proof on appeal

There is no provision as to the onus of proof on appeal, and therefore the ordinary rules of evidence apply.

CHAPTER 2

Harassed by the Receiver of Revenue? Perhaps we could all profit by following the advice of a Zimbabwean taxpayer who wrote to the Collector of Taxes in Harare, thus: "Dear Sir. I have to refer to the attached form, I regret so grave I am unable to complete the form as I do not know what is meant by filling this form. However, I am not interested in this income service. Would you please cancel my name in your books as this system has upset my mind and I do not know who has registered me as one of your customers."

FINANCIAL MAIL AUGUST 4 1989

C H A P T E R 2

ONUS OF PROOF IN ITS CONTEXT HISTORICAL PERSPECTIVE

POST-UNION TAX LEGISLATION PRIOR TO ACT 58 OF 1962

2.1 INTRODUCTION

Legal decisions and arguments concerning onus of proof based on Income Tax Acts passed prior to the Income Tax Act 58 of 1962 may be misleading and should be treated with caution. However some fundamental AD decisions on the issue of onus of proof have been determined long before Act 58 of 1962 and are binding *in pari materia*.

In the post-Union Tax legislation the burden of proof on appeal to the special court has shifted from establishing that the Commissioner's assessment was excessive to establishing that the Commissioner was wrong in his assessment.

The changes of the onus sections of the relevant post Union Acts have been summarized chronologically in APPENDIX A_1. The changes in the relevant onus regulations have been summarized chronologically in APPENDIX A_2.

To make cross reference more meaningful and to give a bird's eye view of the relationship between the onus imposed on the taxpayer in his objection to the Commissioner's assessment at the assessment stage and the onus imposed on the taxpayer on appeal to the special court against the final and conclusive assessment/decision of the Commissioner, APPENDIX A_1 and A_2 have been combined as Appendix A_3.

2.1.1 PROPOSED CONVENTION

There is, with respect, a certain element of confusion in tax writings because some basic terms have both an ordinary meaning and a statutory meaning.

The following convention is proposed.

Where a word or expression is used specifically in terms of its statutory definition or interpretation it shall be printed bold in inverted coma. Where a word or expression is used specifically in terms of its ordinary meaning it shall be printed bold and underlined.

Thus "**income**" is contrasted with **income**.

2.1.2 THREE BURDENS OF PROOF

In the historical analysis of post-Union Income Tax legislation we shall focus on the development of three distinct burdens of proof.

BURDEN OF PROOF 1

The burden of proof imposed on the taxpayer/defendant at the objection stage that the profit/income/amount is not liable to tax as per the assessment of the Commissioner.

There are four concepts which will be analyzed:

1.1 What is the profit/income/amount which is assessed.

1.2 What is an assessment. How is it assessed.

1.3 What is an objection.

1.4 What is the burden of proof on objection at the assessment stage.

BURDEN OF PROOF 2

The burden of proof at the Special Court stage that the assessment/decision of the Commissioner is excessive/wrong.

There are three concepts which will be analyzed.

2.1 What is the nature of an assessment/decision subject to appeal to the Special Court.

What assessments/decisions are not competent to be heard by the Special Court.

2.2 What are the grounds for appeal.

What is the meaning of grounds of appeal.

2.3 What is the burden of proof imposed on the appellant.

What is the relevance of the distinction between 'the assessment is excessive'[1] and 'the decision is wrong'[2]

BURDEN OF PROOF 3

Where the commissioner or the taxpayer appeals to the Supreme Court two different scenarios will be examined:

3.1 Appeal from a decision of the Special Court.

3.2 Other appeals to the Supreme Court.

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[1] See regulation 40 of Act 28 of 1914 and regulation 26 of Act 41 of 1917.

[2] See section 78 of Act 31 of 1941 and section 82 of Act 58 of 1962.

The burden of proof at the objection stage against the assessment of the Commissioner and the burden of proof[3] at the appeal stage against the final and conclusive assessment of the Commissioner now sleep in the same bed and are inextricably entwined in section 82 of the Act; they are however separate entities with different personalities and characteristics.

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[3] In section 82 of Act 58 of 1962 it is more accurate to use the terminology "showing that the decision of the Commissioner is wrong". The Act does not use the term "burden of proof" in the second part of section 82.

2.1.3 TAXATION METHODS

There are four agents of production, land, labour, capital and entrepreneurship [organization]. Tax on land is outside the scope of this thesis, and therefore shall not be analyzed.

The reward for labour is wages, the reward for capital is interest, the reward for entrepreneurship is profit.
The State in order to perform its functions needs resources. It can steal from the past, borrow from its neighbours or mortgage the future.

It can also endeavor to obtain the necessary resources needed to perform the state functions, by taxing those who produce wealth within the umbrella of the state structure. In order to tax wealth produced, the state has a number of alternatives, some of those relevant for our purpose will be summarized.

It is useful to distinguish taxation of wealth created by entrepreneurship (profit) from taxation of other form of wealth creation.

Taxation of wealth created by entrepreneurship.[4]

Example: An entrepreneur purchases stock for R1,000,000 which he sells for R1,500,000, both of which transactions take place during the same tax year.

He pays R100,000 wages for work done in the pursuance of his trade and R50,000 interest on money borrowed to finance his enterprise.

TAXATION METHOD 1

The state can tax gross profits without taxing separately those who have been rewarded for providing capital or labour.

The taxing authorities will tax the entrepreneur on the gross profits, that is R500,000. The lender and the wage earner will not be taxed. The entrepreneur will have to subsidize "tax wise" the lender and the wage earner. He will take this into account when he determines his mark-up, his wage and his interest structure.

The entrepreneur who challenges the Commissioner will have to discharge the onus of proof that the stock was purchased at R1,000,000 and sold at R1,500,000.

ENTREPRENEUR TAXABLE INCOME:	R500,000
WAGE EARNER TAXABLE INCOME:	NIL
LENDER TAXABLE INCOME:	NIL

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[4] It is submitted that capital does not create wealth. The organization and use of capital by entrepreneurs create wealth. The cliche that capital is the tree and income is the fruit is unsound and useless.

The basis of income tax here is profits.

Income is gross profits, and gross profits is income.

This taxation method has not been used in any post-Union tax legislation.

TAXATION METHOD 2

The state taxes gross profit, taking into account expenses incurred in earning the gross profit. The lender would be taxed on the interest earned, and the wage earner would be taxed on the wage received.

There are two ways this can be achieved:

2.1 the state can decide to tax net profit as per the taxpayer balance sheet.

2.2 the state can decide to tax gross profit as per the taxpayer balance sheet, less deduction in terms of a formula.

TAXATION METHOD 2.1

NO FORMULA

The entrepreneur's net profit is his taxable income.

Both the wage earner and the lender are taxed.

The tax situations are as follows:

ENTREPRENEUR TAXABLE INCOME:[net profit]	**R350,000**
WAGE EARNER TAXABLE INCOME:	**R100,000**
LENDER TAXABLE INCOME:	**R 50,000**

This method has not been used in our jurisprudence.

TAXATION METHOD 2.2

PARTIAL FORMULA

The entrepreneur's gross profit is the starting point of income for tax purposes.

Taxable income is arrived at by deducting, in terms of a formula, certain expenditures, allowances and abatements from the gross profit.

The wage earner and the lender are taxed.

ENTREPRENEUR TAXABLE INCOME: **R350,000**

gross profit	R500,000	
less deductions allowed		
wages	R100,000	
interest	R 50,000	R150,000
TAXABLE INCOME		R350,000

WAGE EARNER TAXABLE INCOME: **R100,000**

LENDER TAXABLE INCOME: **R 50,000**

This is a simplified model of income as perceived by some of our Income Tax Acts previous to Act 41 of 1917

The entrepreneur has to discharge the onus of that the deductions are allowed in terms of the Act and that any amount not included as gross profits are exempt from taxation.

TAXATION METHOD 3

TOTAL FORMULA

Here the tax authorities do not accept the entrepreneur's gross profit or net profit, as such, as the starting point for income calculation.

The whole process of taxable income determination is based on a statutory formula of the following nature:

ENTREPRENEUR TAXABLE INCOME: R 350,000

Total receipts [IN COME]	R 1,500,000	
less outlays [OUT COME]	R 1,000,000	
	R 500,000	
less deductions allowed in terms of Act:		
Wages: R100,000		
Interest: R 50,000	R 150,000	
TAXABLE INCOME	R 350,000	

WAGE EARNER TAXABLE INCOME R 100,000

LENDER TAXABLE INCOME R 50,000

There are of course a number of possible permutations in the manner in which outlays or deduction or exemption are capable of being deducted from the total amount [money/or capable of being quantified in money terms] coming in.

The entrepreneur who challenges the commissioner's assessment [taxable income/ tax payable] will have to discharge an onus of proof that any receipts [in come] not declared are exempt and that all deductions [out come] claimed, whether they be allowances, exemptions, abatements or other reductions are deducible in terms of the Act.

All Income Tax Act since Act 41 of 1917 are based to a large extent on this format.

The view that for the first time Income Tax Act 41 of 1917 levied tax on income, in terms of a statutory procedure, as opposed to tax on profit as in the case of Income Tax Act 28 of 1914 is challenged. Both the 1914 and the 1917 Acts tax income in terms of a statutory formula. The only change in the 1917 Act is that **profit** as such is no longer part of gross income.

As far as the entrepreneur is concerned the basis of all income tax acts since the Cape Additional Act 36 of 1904 has remained basically income as a procedure as opposed to profit as understood by the reasonable person.

The partial formula has matured into a total formula.

Taxation of wealth created by non entrepreneurs.

As far as non entrepreneurs are concerned the changes in our income tax has been minimal and of no great theoretical importance..

Profits has never been the basis of any post Union Income Tax Acts.

Though it is true that before Act 41 of 1917 profit was part of income, it must be stressed that taxable income was never profit.
What was taxed was always income, in terms of a statutory formula.

The change in the concept of profit for the purpose of determining income in Act 41 of 1917 is however of some consequence because the words **"The burden of proof that any income"** in section 39 of Act 28 of 1914 may not have the same meaning as the words **"The burden of proof that any income"** in section 83 of Act 41 of 1917 or any of the Income Tax Acts which follow.

The changes which Act 41 of 1917 brought to the concept of income were insignificant. The taxable income of the entrepreneur in terms of Act 41 of 1917 Act would have been virtually the same as in terms of Act 28 of 1914.

The total statutory formula to determine the taxable income of an entrepreneur in terms of Act 41 of 1917 is a minor extension of the partial statutory formula of Act 28 of 1914 and brings an element of certainty in the assessment of taxable income.

2.2 POST-UNION TAX LEGISLATION

2.2.1 ACT 28 OF 1914

The first relevant Income Tax Act of South Africa was Act 28 of 1914. This Act bears the title " **To Provide for the Taxation of Incomes**" and was signed by the Governor-General in English. This Act was based on the Income Tax Assessment Act of New South Wales of 1895 (59 Victoria,15)

For the purpose of section 2.2.1 it shall be referred to as the Act.

2.2.1.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

2.2.1.1.1 What is taxed in terms of the statutory formula

Income in terms of section 49 of this Act means not only any gains or profits, but also rents interest wages.

Income is defined is section 49 as follows:

" income " shall, in relation to any person, mean any gains or profits derived by, or accrued to or in favour of, such person in the year for which the assessment is made, from any source within the Union, and, shall include profit, gains, rents, interest, salaries, stipends, wages, allowances, the estimated annual value of any quarters or board or residence or any other benefit or advantage of any kind whether in money or otherwise granted to him in respect of his employment, or any pension, stipend, charge or annuity ;

Income certainly does not mean " **what comes in** ".

A gross profit is the difference between certain amounts coming in **[in come]** and certain amounts going out **[out come]**.

So in the case of gross profit, income is not what comes in, it is the difference between certain income and certain outcome, which difference is calculated in terms of accounting/business principles, not in terms of income tax principles.

The definition of income in section 4(2) of the Act is very similar to the definition of income in section 42 of Act 36 of 1904 [5]

A distinction is drawn between a taxable income and a taxable amount as follows:

In section 4(2) **"taxable income"** is defined as an income exceeding one thousand pound.

In terms of section 4(3) the **"taxable amount of the taxable income"** is arrived at by deducting one thousand pounds from the taxable income.

In terms of section 4(4) **"income tax"** is rated in respect of the **"taxable amount of the taxable income".**

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[5] The terms profit, gains, rents, interest, salaries, wages, allowances, stipends are also used.

The definition of **income** in section 8 of Act 21 of 1908 is framed differently and here it can be said that profits and gains, as understood by Act 21 of 1908, is the basis of income.

Section 4(1) however states that the income tax is levied in respect of any "**taxable income**" subject to such conditions, exemptions and abatements as provided.

Section 14(1) states that for the purpose of ascertaining the taxable income there shall be deducted from the **"gross amount"** of the taxpayer's income, losses and certain outgoings, specified categories of sums expended, and such sums as the Commissioner think just and reasonable as representing depreciation.....

With respect it is not easy to reconcile section 4 with the terminology of section 14, as in terms of section 4 **"taxable income"** is income received by or accrued to, whereas in section 14 **"taxable income"** is the gross amount of the taxpayer's income less certain deductions.

The following formula is suggested:

INCOME:
MEANS
Any gains or profits [6]
AND SHALL INCLUDE .
[GROSS] Profit [7]
Gains
Rents
Interest
Salaries
Stipends
Wages
Allowances
Estimated value of benefit granted in respect of employment. [8]

GROSS AMOUNT OF THE INCOME EXCEEDING ONE THOUSAND POUNDS
LESS
Deductions as per section 14
EQUALS
TAXABLE INCOME

TAXABLE INCOME
IS
Gross amount of the income exceeding one thousand pounds less deductions as per section 14. [9]

TAXABLE INCOME
LESS
One thousand pounds as per section 4 (3)
EQUALS
TAXABLE AMOUNT

TAXABLE AMOUNT:
IS
Taxable income less one thousand pounds.

Taxable amount
LESS
TAX CALCULATED ON SLIDING SCALE
EQUALS
INCOME AFTER TAX

6 7 8 9

[6] The inclusion part of this definition is virtually identical with the definition of income in section 68 of the New South Wales Act. The total definition is virtually identical with the definition of income in (Cape) Act 36 of 1904.

[7] The term **gross profit** is not used in the Act. It is however abundantly clear that this is the meaning of the legislator. If profit were to mean **net profit** then the entrepreneur would be able to deduct those expenses specified in section 14 twice. Once in terms of accounting and business principle in order to arrive at net profit and then in terms of section 14 in order to arrive at income. Section 14 (1) confirms this interpretation by using the terminology "gross amount" of the taxpayer's income.
It is also significant that **gains or profits** must be regarded as a totality concept quite distinct from its components profit, gains, rents etc. Thus the term profit is in the singular in the enumeration of what is included in **gains or profits** and is also positioned before gains.

INCOME AFTER TAX:

This could be considered as the embryo of our present statutory formula.

Even though this formula is very simple, it is not correct to state that profit is the basis of taxation in the Act.

It is correct to state that profit in the sense of "gains or profits" is income and there is some justification in stating that income is profit, yet what is taxed is in terms of a statutory procedure.

The taxable amount is neither income nor profit.

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[8] The expression **gains or profits** means, an increase in wealth whether by trade or otherwise or in any way specified in the Act. One must not attach separate meaning to its components. This explains why **"profit, gains"** and not **"profit or gain"** appear in the list of what the Act includes under gains or profits. The term **"gains of profits"** as understood by the ordinary person is a general concept and there is no difficulty in including within this concept profits gains or any other forms of wealth increase.
It is submitted that profit as an increase of wealth which is the result of trade and industry, whereas gain is an increase in wealth which is not the result of trade or industry, nor the reward of labour or capital. Winning a million rand in a lottery would not be a profit but could be considered to be a gain.
If the above interpretation is reasonable, an allowance is a **"gains or profits"**.

[9] There is some difficulty in framing the statutory formula as in section 4(2) of the Act "taxable income" means an income exceeding one thousand pounds. Whereas in section 14 (1) "taxable income" is ascertained by making certain deductions from the gross amount of the taxpayer's income. It is possible to incorporate a "gross amount stage" in the formula. It is not necessary for our purpose, and is not justified as the concept "gross amount" is probably used as a description not as a stage.

The taxable amount may have little relationship with the profit or gain actually earned.[Net profit]

Income tax is calculated in respect of the taxable amount.

COT V Booysens Estates, Ltd 32 SATC 10, 1918 AD 576

This is the first AD case relevant to burden of proof and is also, with respect, a foundational decision.

> **The expression " any gains or profits" cannot be taken in its widest and most literal sense. The Act imposes a charge upon income only, not upon capital; and the definition cannot be read as to cover accruals which are real capital. The gains and profits referred to must be gains and profits in the nature of income.[10]**

With the greatest respect, an analysis of the distinction between gains and profits would have been helpful.

It would seem however that gain is treated as profit. Thus whereas profit or gain is the issue dealt with, the term profit is used.

Innes CJ analyses the ways profit or gain are made, but refers only to profit:

> **Profit or gain may be made in many ways; men may earn it by their labour, by their wits, by their capital. Many of the forms of profit specified in the definition are the result of skill or labour; but, speaking generally, profit otherwise derived must be in whole or in part the product of capital if it is to be of the nature of income, and thus included in the definition.[11]**

There is, with respect, some inconsistency in the terminology used.

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[10] At 594, 32 SATC 10 per Innes CJ.

[11] At 594/595, 32 SATC 10 per Innes CJ.

Whereas from the above it is clear that profit must be, in whole or in part,[12] the product of capital[13] to be of the nature of income; Innes CJ later in his judgement refers to "a mere realization of capital" as follows:

The resulting profit, therefore, is not income, and is not liable to tax.[14]

A mere realization of capital cannot be a resulting profit, if it were a profit it would be income.

Maasddorp, JA summarizes the issue clearly as follows:

I come to the conclusion that when Booysens Estates sold its property to the Robinson deep it received nothing more from the latter company than the enhanced value of their capital.[15]

The importance of this decision is the clear distinction made between the realization of capital which is not income and the product of capital which is income.

The apportionment issue between capital and income receipts is not analyzed.

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[12] The insight and restraint displayed is remarkable. There is a hint of the apportionment issue between capital and income which is not developed because presumably it is not necessary for the case.

[13] For some reason, difficult to comprehend, there seems to be a general perception that profit is the product of capital. This view is simply not correct.
The theory that capital is the product of income is possibly more accurate. Entrepreneurship and organization can produce income without capital. Entrepreneurship and income can produce capital. Capital on its own cannot produce anything.

[14] At 598, 32 SATC 10 per Innes CJ.

[15] At 604, 32 SATC 10.

COT v South Deeps, Ltd 1918 AD 605

This case is similar to the Booysen's case. Here even though there were six prior sales it was held that the transaction was nothing more than the realization of capital.

Randfontein Estates and G.M. Co. v COT 1917 TPD 278

It was held that expenditure incurred in producing exempted income **must** be deducted from the gross amount of the taxpayer's income. However expenditure which is not of a recurrent nature must be considered capital expenditure and is therefore disallowed.

This with respect is difficult to reconcile with the clear wording of the Act. In terms of section 14 **there shall be deducted** certain losses, outgoings and expenditure from the gross amount of the taxpayer's income. The exemptions allowed in terms of section 14 shall not be deducted if they fall within the ambit of section 15 which clearly and peremptorily [no deduction shall...] lists the exceptions to section 14.

It is absolutely clear that the expenses incurred by Randfontein estates to maintain its transfer office in and outside the Union were moneys laid out or expended for the purpose of trade.[16]

[16] Section 15 (2) No deduction shall, as regards income derived from any trade, be made in respect of any of the following matters:-

(a) Any moneys not wholly or exclusively laid out or expended for the purposes of trade;

It is interesting that the wording of section 15(2)(a) has remained unchanged in so many taxation acts and yet still causes immense interpretation problems.

In terms of section 14 these expenses are deductible, and they do not fall within the general peremptory exceptions specified in section 15.

COT v William Dunn and CO.,Ltd 1918 AD 607

It was held that interest received as a result of employment in a foreign country where the person used his own capital in his own business was not received from a source within the Union and therefore not taxable income in terms of section 4 of the Act.

An important issue for our enquiry was not dealt with.

Who has the onus of establishing, in terms of section 4 (2), whether income received by a person residing in the Union from a prima face source outside the Union is or is mot taxable income..

Robinson v COT, 32 SATC 41, 1917 TPD 542

It was held that certain activities like remaining in the Union for two and a half years, occupying a house as a ordinary resident would were signs of residence.

As a resident therefore section 5 (f) of the Act, which exempt certain income of persons not resident in the Union was not applicable.

The important issue of onus was not dealt with.

It is true that it was held that there was nothing to show that Mr Robinson ever fixed a specific time for his stay.

The critical issue as to why and how the burden of proof in terms of section 39 is relevant to residence has not been dealt with directly as such. Section 39 deals with income deduction and exemptions, it does not deal with residence. It is suggested that, following the reasoning of the Booysen Estate and South Deeps AD decision, the Commissioner has the onus to establish non residence, and it is only then that the taxpayer has to discharge the onus of being entitled to the exemption.

COT v Messina (Transavaal) Development Co.,Ltd.,1915 TPD 537

It was held that loss incurred outside the Union could not be deducted in terms of section 14 (1). It was held further by Wessel, J. that the loss was prima face a capital loss and therefore not deducible.

2.2.1.1.2 What is an assessment

Section 49 defines assessment as follows:

" assessment " shall mean an estimate of the amount of any income liable to taxation under this Act as well as the amount of the tax imposed in respect of such income and shall further include all matters comprised in any return required by or under this Act;

This definition is very similar to section 42 of (Cape) Act 36 of 1904 .[17]

[17] The changes are as follows:
" assessment " shall mean[s] an estimate of the value of the amount of any income liable to taxation under this Act as well as the amount of the tax imposed [thereon respectively] in respect of such income and shall further include[s] all matters comprised in any return required by or under this Act.

If "taxable amount" of that taxable income in terms of section 4 (3) does not have the same meaning as amount of any income liable to taxation in terms of section 49,[18] there is, it is suggested, room for confusion.

It is assumed that what is meant is any taxable amount.

Both income assessment and tax assessment are estimate.

There are three components to this definition of assessment:

1] An estimate of any income liable to taxation.

2] An estimate of the tax imposed.

3] Matters required in any return under the Act.

It is relevant that in terms of the definition in section 49 an "assessment" covers both an income assessment and a tax assessment.

2.2.1.1.3 Objections to the assessment

Section 23. (1) reads;

Objections to any assessment made under this Act may, within twenty-one days after the date of the assessment notice, be made, in the prescribed manner and under prescribed terms, by any taxpayer who is aggrieved by any assessment in which he is interested.[19]

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[18] Section 49 definition of "assessment"

[19] Section 72.(1) of Act 36 of 1904 (Cape) is virtually identical as far as objections by any taxpayer feeling aggrieved by reason of any assessment in which he is interested.
There is a provision in the 1904 Act which provides for objection by the Commissioner, this has not been retained in the Act.

There are a number of unresolved areas in the objection section 23. The objection must be made within 21 days of the date of the assessment notice. This notice in terms of section 21 (3) **shall** be seni by registered post or in such other convenient manner as decided by the Commissioner.

The first problem is that there is no provision which deals satisfactorily with the case where the Commissioner is dilatory in sending such assessment notice, or where the taxpayer receives such notice late due to communication delay.

It is true that in terms of section 23 (2) the Commissioner can entertain an objection where he is satisfied that reasonable grounds exist for delay in the lodging of the objection. Greater protection than the Commissioner's discretion is a reasonable desideratum for the law abiding taxpayer.

The reasonable taxpayer can expect that the time restriction of twenty one days allowed for objection to an assessment, should begin from the day he receives such notice of assessment, provided that the notice arrives reasonably within the twenty one day allowed for objection.

Indeed should the reasonable taxpayer be prejudiced because the time restriction of twenty one days from the date of posting be reduced by postal delays, he can use the defence of legitimate expectation and bypass the Commissioner and the Special court by appealing directly to the Supreme Court.

EXAMPLE

If the registered notice of assessment is received 25 days after posting and the Commissioner is not satisfied that reasonable grounds exist for the consequent delay in lodging of the objection. If the late receipt is in no way due to the fault or negligence of the taxpayer, he can, it is submitted, appeal to a Court of Law outside the constraint of the Act on the ground of legitimate expectation.

Another case to be considered is where the Commissioner fails to send such notice.

The Commissioner has no discretion; section 21.(3) clearly states that the notice of assessment **shall** be sent or delivered.

The taxpayer, it is submitted, does not have to object until the Commissioner has complied with the peremptory requirements of section 21, and this is so even if such notice is entered in the assessment register, from which the taxpayer is entitled to certified copies.

It is submitted that the taxpayer can compel [e.g. order of court] the Commissioner to comply with his obligations in terms of the Act.

There is nothing in the Act which in any way restricts the taxpayer from making use of the ordinary legal remedies. where the Special Court has no jurisdiction.

Another issue is that in terms of section 21 (2) such notice is sent to the taxpayer whose income has been assessed. However in terms of section 23 (1) it is clear that any taxpayer who is aggrieved by any assessment in which he is interested has a right of objection.

This taxpayer need not be the same person as the taxpayer whose income has been assessed and to whom only a notice of assessment has been sent in terms of section 31. More than one person can be aggrieved and interested in a particular assessment.

How can a person who is a taxpayer and is aggrieved by the Commissioner's **"decision"** in relation to an objected assessment, object to the assessment, if he is not the person to whom the assessment is sent.

2.2.1.1.4 **Burden of proof on objection to the assessment**

The burden of proof section (39) is virtually the same as the burden of proof section of (Cape) Income tax Act No. 21 of 1908.

The marginal note of section 39 reads:

" Burden of proof as to exemptions, reductions or abatement."

Section 39 however does not deal only with exemptions, reductions and abatements, it also deals with non liability.

Section 39 reads:

The burden of proof that any income is exempt from or not liable to the tax or is subject or entitled to any deduction or abatement shall be on the person claiming such exemption, non-liability or deduction.[20]

The potential and interesting problem inherent in the 1904 Act as to whether there is a difference between liability to the payment of income tax and liability to the tax itself, as the words "payment of income" have been deleted.

Abatement has been added in a manner which, with respect, is incomplete and confusing.

The qualification of income for the purpose of burden of proof is exemption, non liability, deduction or abatement.

The claim by the taxpayer however is limited to exemption, non liability or deduction. No mention here is made of abatement.

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[20] This is based almost verbatim on section 8 of (Cape) Act 21 of 1908. The changes are as follows:

> The **[onus of proof]** burden of proof that any income is exempt from or not liable to the **[payment of income]** tax or is subject or entitled to any deduction or **abatement** shall be on the person claiming such exemption, non-liability or deduction.
>
> Onus of proof becomes burden of proof.
> There few true synonyms in the English language.
> It is submitted that the concept **onus** emphasizes the person of the evidence, whereas the concept **burden** emphasizes the weight of the evidence. The **onus** emphasizes the **who** of the evidence, the **burden** emphasizes the **what** of the evidence.
> It is unlikely that the changed terminology is of substantial legal significance.

Where "abatement" has a different meaning from "deduction" then, it is submitted, the burden of proof of establishing an abatement claim would not be the responsibility of the person making such claim.

The burden of proof in terms of section 39 is one imposed on the person claiming exemption or non liability from the Commissioner's assessment, it is however not clear that such person must be the taxpayer himself.

The burden of proof on objection is not all embracing.

It certainly does not mean that "the burden of proof is on the taxpayer" or that "the burden of proof is on a partnership to establish that it is a partnership" or that "the burden of proof is on the taxpayer to establish the size of shoes he wears".

The burden of proof section of our income tax Acts have for some strange reasons been interpreted *pro-aerario* by our jurists and authorities as a total onus, and this despite the clear wording of all the post-Union taxation Acts.

2.2.1.2 STAGE 2
APPEAL TO THE SPECIAL COURT

A taxpayer dissatisfied with the Commissioner's decision as to his objection, can before such objection is deemed to be determined in terms of section 24 (1) appeal to a specially constituted court.

The fact that the defendant is restricted to the grounds stated in his notice of objection [21] implies that the Special Court is not truly a court of appeal but a court of revision. Much of the procedure of appeal against the decision of the Commissioner is dealt with in the regulations under the Income Tax Act No 28 of 1914. In terms of section 48 the Governor General may make regulations specifically for purposes clearly designated [48 a, b, c, d and e] and generally for giving effect to the objects and purposes of the Act. These regulations may not be inconsistent with the Act. Section 48 (e) authorizes the Governor General to make regulations for the purpose of prescribing the procedure to be observed in the conduct and hearing of objections and appeals.

2.2.1.2.1 Nature of the assessment subject to appeal

It is submitted, that the burden of proof on appeal against a decision of the Commissioner concerning an altered, reduced or disallowed objection is a completely different concept from the burden of proof to be discharged on objection against the assessment of the Commissioner.

Section 24 (1) reads:
Any taxpayer dissatisfied with the Commissioner's decision as notified in the notice of alteration or reduction of an assessment or disallowance of an objection may appeal therefrom to a special court which the Governor General is hereby authorized to constitute by proclamation in the *Gazette*. Unless the taxpayer gives notice of such appeal within the period prescribed by sub-section (3), his objection shall be deemed to be determined.

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[21] Section 24.3

THE STEPS FROM ASSESSMENT TO DECISION SUBJECT TO APPEAL:

1 An assessment is made under the Act by the Commissioner.

2 If no objections are made against the assessment this shall be the assessment. [section 23 (5)]

3 Where an objection to an assessment has been allowed or withdrawn such altered or reduced assessment shall be the assessment. [section 23 (5)]

4 The burden of proof at the objection stage as to exemptions, reductions or abatements must be discharged by the person claiming such exemptions reductions or abatements.[section 39]

5 A Commissioner's **decision** as to disallowance reduction or alteration to an objection to an assessment can be appealed against in terms of section 24 (1).

2.2.1.2.2 What are the grounds of appeal

The relevant part of Section 24.3 reads:

At any such appeal the taxpayer shall be limited to the grounds stated in his notice of objection.[22]

The objections referred to are those specified in section 23 (3) as follows:

Every objection shall be in writing and shall be specify in detail the grounds upon which such objection is made.

The fact that the taxpayer must specify **in detail** the grounds for his objection is an indication that what is meant is **the evidence**.

The taxpayer is limited to the evidence stated in his notice of objection to the assessment.

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[22] The wording of section 24.(3) which refer to the limitation of grounds on appeal has been repeated verbatim in all subsequent tax legislation.

A reasonable case however could be made for the term **grounds** to mean **the reason** as opposed to **the evidence**.[23]

Not only was this the clear meaning given to **grounds** in [Natal] Act 33 of 1908, there is also a plethora of authorities for this interpretation.

For instance in the case Fernandez v S.A.R., (1926) A.D., it was held that "the grounds of the charge" refers to the particular of the offence and not the evidence in support of the charge.

The terms grounds is understood in legal parlance to mean the right which a person has, to institute a legal proceeding. In this sense it means the cause of action, the ground of the charge.[24]

Should this view find favour, the taxpayer whose cause of action, as stated in his notice of objection, is that he is entitled to a certain deduction, cannot claim on appeal against the decision of the Commissioner that he is entitled to an abatement. He is bound by the grounds stated in his notice of objection.

There would however be no limitation to the evidence he could use on appeal to try to establish his right to the deduction.

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[23] See for example section 50 of Act 33 of 1908 [Natal] See also discussion **supra** at 1.2.2.2.2.

[24] See Act No 32 of 1917/ Order XXX /Rule 2(4) b replaced by Act 32 of 1944 rule 47(6)(ii).

It is submitted, with respect, that the Special Court is only competent to hear an 'appeal' in terms of section 24(1) and regulation 39. Its jurisdiction is very limited.[25] There is an element of difficulty because section 24 (1) states that the taxpayer **"may appeal"** against the decision of the Commissioner, whereas regulation 39 uses the terminology **"shall be heard or determined"**.

A possible interpretation is that where the taxpayer may appeal, in the sense that he has the right to appeal, then should he decide to appeal he has to appeal to the Special Court. This appeal must be heard and determined by the Special Court.[26]

2.2.1.2.3 Burden of proof on appeal to the Special Court

The burden of proof section 39 must be read together with regulation 39 and 40.

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[25] In terms of section 48 (e) the Governor-General may make regulations prescribing the procedure in the conduct and hearing of appeal before the Special Court provided such regulations are not inconsistent with the Act.

[26] There is a problem with the above interpretation because the appeal in terms of regulation 39 is not necessarily the same as the appeal in terms of section 24 (1).
Regulation 39 deals primarily with appeals against objections not assented to by the Commissioner.
Section 24 (1) deals specifically with only three situations , alteration, reduction or disallowance of the objection.
But for all practical purposes the differences between the two appeals are insignificant.

Indeed it is the failure to read together the burden of proof section with the appeal regulation, which is the main reason why it is generally assumed that there is one onus of proof concept and that 'the burden of proof is on the taxpayer'

Regulations 39 and 40 under the Income Tax Act of 1914 read as follows.

39. Every objection to an assessment or amended assessment made by a taxpayer, of which due notice has been given to the Commissioner, and not assented to by the Commissioner or duly withdrawn by the taxpayer, shall be heard and determined by the Special Court at the sittings next appointed to be held at the place nearest to that at which such taxpayer resides or at such other place as may be agreed upon by the parties.

40. The general practice and procedure of the Special Court shall be that of a Court of a Resident Magistrate, in so far as the same is applicable, and the burden of proof that the assessment is excessive shall lie on the appellant.[27]

A taxpayer who is not satisfied with the Commissioner's decision may appeal to the special court in terms of section 24. He will have to establish that he discharged the burden imposed in terms of section 39 when he objected to the assessment of the Commissioner.

This follows from the fact that on appeal the taxpayer is limited to the grounds stated in his notice of objection.[28]

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[27] The burden of proof in terms of section 39 and the burden of proof in terms of regulation 40 are entirely different concepts. I have been unable to find any discussion in our tax literature on the relationship between regulation 40 and section 39 of the Act.

[28] Assuming that "grounds" means evidence.

It is abundantly clear that in the case of an appeal to the Special Court against the final and conclusive assessment of the Commissioner the burden of proof shall be on the appellant to show that the assessment is excessive.
Whatever the meaning of the term "excessive" may be: it is not all embracing.

Where the appellant's appeal to the Special Court is on an issue other than the excessive nature of the Commissioner's final assessment the burden of proof provision in regulation 40 is not relevant, and the ordinary rules of evidence apply.

The definition of "assessment" in section 49 reads:

"assessment shall mean an estimate of the amount of any income liable to taxation under this Act as well as the amount of the tax imposed in respect of such income and shall further include all matters comprised in any return required by or under this Act;

The consequences of this definition are crucial.
At the appeal stage the appellant's onus of proof in terms of regulation 40, refers to the assessment which in terms of the definition quoted above, includes both the amount of the tax imposed and the amount of the income liable to taxation.
However in terms of section 39 the burden of proof at the objection stage refer clearly only to income and does not include the amount of the tax itself.

The situation is complex. If however some AD decisions, which **may** seem to be no longer relevant, but which it is submitted are binding *in pari materia* are considered, the situation will become clearer.

COT v Booysen's Estate, Ltd 1976 TPD 278.

Wessels,J stated that the onus of proof is on the Commissioner to establish that the transaction was not a capital realization as follows:[29]

I think, therefore, that it is the duty of the Commissioner to prove that what *prima face* appears to be an ordinary mining venture (land acquired for the purpose of being exploited, when the opportunity offered, for the purpose of deriving a revenue from it) was in reality a land speculation. It is for the Commissioner to prove that the real business of the Company was not to mine but to sell land at a profit.

COT v Booysen' Estates, LTD 32 SATC 10, 1918 AD 576

This AD decision confirms the previous TPD decision. It is with respect the most important decision on the issue of burden of proof.

COT v South Deeps LTD. 1918, AD 605

Innes, CJ summarizes with great depth the issue as follows:

No doubt the fact that there were six prior sales, instead of only one, strengthens to some extent the position of the Commissioner. But making all due allowance for that, I am not satisfied that the transaction challenged was anything more than a realization of capital. The *onus* was upon the Commissioner to establish that proposition. And regarding the circumstances, in the light of his admission, I cannot find that the *onus* has been discharged.[30]

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[29] See COT v Booysens estate, Ltd *supra* at page 584.

[30] Commissioner of Taxes v South Deeps Ltd.(1918, AD at p.606)

Are these AD decisions binding *in pari materia* on subsequent taxation acts ?

There are two issues to be analyzed.

ISSUE ONE

In the 1914 Act the words " **and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown that by the appellant that the decision is wrong**" were not present. This requirement was added in section 78 of Act 31 of 1941 and retained in section 82 of Act 58 of 1962.

It must be stressed that regulation 40 of Act 28 of 1914 has the following requirement which is virtually identical " and the burden of proof that the assessment is excessive shall lie on the appellant". In terms of section 49 of the Act assessment comprises both the amount of the income liable to taxation and the amount of the tax. Indeed the requirement to show that **the assessment is excessive** is possibly even more demanding than the requirement to show that **the commissioner is wrong**.

It would seem that where the challenge is the procedure or the discretion of the Commissioner then the term **wrong** will impose a greater burden on the taxpayer,than the term excessive.

Where however the issue is the amount of the assessment the term **excessive** imposes a greater onus on the taxpayer than the term **wrong** because it is not sufficient for the taxpayer to show that the Commissioner was wrong.

It is also necessary for the taxpayer to establish that the assessment [income or tax] is excessive.[31]

Conclusion: the addition to section 78 of Act 31 of 1941 to the onus of proof provision that the onus is on the taxpayer to establish that the Commissioner is wrong is for the purpose of **assessment of income** a lesser burden than the onus imposed in terms of regulation 40 of the Act, and cannot therefore in any way diminish the authority of these AD decisions for subsequent Acts.[32]

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[31] Section 190(b) of the Australian Income Tax Act 1936 imposes on the taxpayer the onus of proving that the assessment is excessive. The meaning of the term excessive has been analyzed in a great number of cases. In the Australian case of FCT v Dalco (1990) 20 ATR 1370 the High Court held that the term "excessive" refers to the amount of the assessment and not to any unauthorized steps in the process of calculation.
In this respect the concept of **excessive** may not be as all encompassing as the concept **wrong** as it would not include the discretion of the Commissioner.
However where one deals with the amount of an assessment by the Commissioner as opposed to the procedure used by the Commissioner then the term excessive imposed a greater burden on the taxpayer. Thus it was unanimously held in the Dalco case that it is not sufficient for a taxpayer to establish that the Commissioner has erred because this does not prove that the taxpayer's taxable income was less than the amount per the assessment, it is " necessary for the taxpayer to make good the proposition that is income [is] less." 90 ATC 4088 per Toohey J. at p.4098
To discharge his onus that the assessment is excessive it is not sufficient for the taxpayer to show that the assessment is somewhat wrong he must establish what alteration must be made to correct the assessment. See Trautwein v. F.C. of T. (No 1) (1936) 56 C.L.R. 63 per Latham C.J at pp.87-88.

[32] With the possible exception of Act 40 of 1925 which does not have the equivalent regulation and does not yet incorporate the decision is wrong requirement.

ISSUE TWO

In the two AD cases discussed above, there was an admission by the Commissioner that the Company's primary object was gold mining. The question is whether such an admission which created a *prima face* case that the sale of the fixed investment of the company was a mere change of investment had a bearing on the onus of proof issue.

This admission has no bearing whatsoever on who has to discharge the onus of proof that the transaction challenged was anything but a capital realization.

One must distinguish clearly between who has to bear the burden of proof and how this burden of proof is to be discharged. It is true that had the Commissioner not made the admission, he might have been able to discharge the onus imposed on him, but of course this is a far cry from stating that had he not made such admission that the onus would have been on the taxpayer. From the two AD decisions discussed above it is clear that there is no presumption that all moneys incoming are part of the taxpayers taxable income.

The Act imposes a charge upon income only, not upon capital; and the definition cannot be read so as to cover accruals which are really capital.[33]

The onus of proof provision refers to income exemption or deductions from such income. Where a transaction is **prima face** a capital transaction it is for the Commissioner to establish that it is income and it is only then that the taxpayer has to discharge his onus as to income.

[33] Commissioner of Taxes v Booysens Estates, LTD per Innes, CJ, page 594.

Conclusion: The admission by the Commissioner had no bearing whatsoever on the binding nature of these AD decisions. Had the Commissioner not made such an admission, he would still have had to discharge the onus to establish the proposition that the transaction was not a realization of capital. It is true of course that the Commissioner's discharge of his onus might have been easier had he not made such admission.

These AD decisions are binding on all subsequent taxation Acts, with the possible exception of Act 40 of 1925.[34]

The crucial issue, however, is whether an accrual is "**income**" or **capital** [**of a capital nature** !] is a question of law or fact. As "**income**" is defined in the Act in terms of a statutory formula, there is no doubt that issues relating to the definition of income are questions of law.

Capital is not defined and therefore it is submitted that whether an amount is **capital** tends to be a question of fact. There are presumptions that certain amounts of a specific nature have the quality capital.

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[34] Act 40 of 1925 which does not have the equivalent of regulation 40 of Act 28 of 1914 nor the addition to section 78 of Act 31 of 1941 which imposes upon the taxpayer the onus of showing that the Commissioner's decision is wrong.

Thus, an amount which has the nature of a gift could in certain circumstances be presumed to be capital.[35]

If the generally accepted view is taken, that an amount is either "**income**" or **capital** in the sense that the one is the obverse of the other, then the question as to whether an amount is "**income**" or **capital** is a question of law.

The view taken in this thesis is that the statement an **"amount is either capital or income"** is confusing, if not fallacious.

It is submitted that:[36]

(a) there are no amounts which are either **capital** or "**income**",
(a) there are amounts which neither **capital** nor "**income**",
(b) there are amounts which are both **capital** and "**income**".

The two relevant questions therefore are:

(a) is the amount **capital** ? a question of fact,
(b) is the amount "**income**" ? a question of law.

Of course the facts needed to establish whether any amount is **capital** or "**income**" are questions of fact.

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[35] Beynon v Thorpe, (1928) 97 LJKB 705, 14 T.C. 1 (at page 706)
Lindus and Hortin v IRC (1933) 17 TC 442 (at page 448,449)
ITC 458, 11 SATC 178
ITC 374, 9 SATC 323 etc.
It must be pointed out that the situation is complex. A gift does not necessarily qualify as having the quality of capital, [or capital nature]. Thus if a gift takes the form of an annuity it would be taxable in terms of Act 58 of 1962 in terms of section 1, definition of gross income, paragrapgh (a).

[36] The terminology used:
Meaning in terms of the Act: "**income**"
Ordinary meaning : **income**

Whether a question itself, is a question of fact or law, is a question of law.

In the case of a question of law, the burden of proof provisions of the Act do not apply.

2.2.1.3 STAGE 3 APPEAL TO THE SUPREME COURT

2.2.1.3.1 Appeal from the Special Court

In terms of section 24 (9) any decision [of fact] of the Special Court is final and without appeal.

However in terms of section 25, where a question of law arises, an appeal shall lie from the decision of the Special Court to the provincial division having jurisdiction in the area.

From that decision an appeal shall lie with the Appellate Division.

As the onus of proof on a question of law is not restricted by section 39 of the Act, there is no need to discuss the onus of proof situation. The ordinary rules of evidence obtain.

The onus is clearly on the appellant to establish that the decision of the special court or of the Supreme Court, as the case may be, was incorrect.

2.2.1.3.2 Other appeals

It is submitted that there is nothing whatsoever in the Act which prevents the taxpayer [or the Commissioner] from appealing directly to the Supreme Court in those cases where it is not mandatory to appeal first to the Special Court.

It must be stressed that the Special Court is, in terms of section 24 of the Act, constituted by the Governor-General. It is a creature of statute.

Its functions are to **revise** the decision of the Commissioner and therefore, its decisions are in no way binding, on any future decisions of the Commissioner or on any Courts of Law.

Any dissatisfied taxpayer may appeal against the Commissioner's decision to the Special Court, for revision. Section 24 uses the terminology **may appeal**, which implies that the taxpayer has a right of appeal. The implication is clear: the assessment of the Commissioner is not absolute, and the taxpayer has some right of recourse by appealing for revision to the Special Court.

However should the taxpayer decide to appeal he is bound by regulation 39 which states that such objection which have not been assented to by the Commissioner **shall be heard** by the Special Court.

The meaning is clear; where the taxpayer has the right to appeal against the objected assessment of the Commissioner, this appeal must be heard by the Special Court.

The Special Court's jurisdiction is severely limited both in content and extent. It can only hear those matters which it is specifically authorized by the Act to revise.

It is submitted, that where the Special Court has no jurisdiction, the taxpayer has the right to appeal directly to the Supreme Court. There is nothing in the Act which prevents or which in any way circumscribe the right of the taxpayer to do so.

COT v Booysens Estates Ltd 32 SATC 10, 1918 AD 576

As an obiter Innes, CJ made the following comments:

Sec. 25 authorizes the submission of a question of law for the decision of the Provincial Decision. And it follows that the facts, in connection with which the question of law arises, are to be found and stated by the special court. A number of facts were so stated but were evidently considered insufficient, because by consent of parties the record of proceedings before the special court was annexed and incorporated in the case. That proceeding was irregular, and should be avoided in future. All the facts necessary for the determination of the legal question, whether found by the Court or admitted by the parties, should be set out; but the evidence upon which those facts, or any of them depended should not be detailed.

It is clear that what is required are that all the facts be stated [not the evidence] which are necessary for the determination of the legal issue.

2.2.2 ACT 41 OF 1917

The Mining Taxation Act No. 6 of 1910 consolidated the laws relating to the taxation of mining and bears the title:

" To consolidate and amend the Laws in force in the Union relating to the Taxation on the Profits of Mining"

The act was signed by the Governor-General in English.

It is important to note that the term "profits" and not "income" is used in the title. Section 3 and 4 of the Act makes it quite clear that it is profits in the commercial sense which is taxed.

Section 13 (1) of the Act provides for an arbitration procedure as follows:

" If the amount of any assessment made under the last preceding section be in dispute, the person liable to the tax may, within one month after the notice of the assessment and on payment of the amount assessed, call on the Commissioner to have the amount of liability determined by arbitration"

The wisdom and imagination of Section 13 (1) is worthy of further examination.

Act 41 of 1917 bears the title:

" To provide for the taxation of incomes and dividends and for the levy of a duty upon certain excess profits "

The Act was signed by the Governor-General in English.

For the purpose of section 2.2.2 it shall be referred to as the Act.

The Act consolidated the laws relating to income tax (Income Tax Act of 1914) and the laws relating to mining taxation (Mining Taxation Act of 1910).[37]

2.2.2.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

2.2.2.1.1 What is taxed in terms of the statutory formula

In terms of section 48 of Act No 28 of 1914 profit and gain are included in the definition of income.

Section 3 and 4 of the Mining Taxation Act 6 of 1910 clearly deals with profit. In terms of section 6 of Act 41 of 1917 income acquires a statutory meaning which has no correlation whatsoever with what the reasonable business man understands by profit. It must be stressed that section 6 clearly states that the definitions are **for the purposes of** chapter 2 of the Act.

Dividend tax and excess profit duty were introduced.

The changes which Act 41 of 1917 effected on the concept of income are slight indeed.

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37 The argument of E B Broomberg in the S.A.L.J. Vol 89 May 1972 page 185 that **" Now this 1917 Act was a consolidation statute. There is thus a strong presumption that it did not bring any amendment to the law at all"** must be weighed against the fact that the main purpose of the Act was the consolidation of mining taxation with income taxation.
The amendments to Act 1914 as far as "Income" are practically of insignificant consequence.

One of the element of the definition of income in the 1914 Act was profit and gain which was determined in terms of a partial statutory definition; in terms of the 1917 Act profit as such no longer appears in the definition. However profit is taxed in terms of a total statutory definition. The practical difference are very slight.

Let us compare the basic elements of the two definitions:

Section 6 of Act 41 of 1917	Section 49 of Act 28 of 1914
gross income means	income shall mean
total amount **includes**	gains or profits **includes**
	profits gains
rents interest salaries stipends wages allowances	rents interest salaries stipends wages allowances
the estimated annual value of any quarters or board or residence or any other benefit or advantage of any kind	the estimated annual value of any quarters or board or residence or any other benefit or advantage of any kind granted
in respect of employment whether in money or otherwise	in respect of employment whether in money or otherwise
or any pension stipend charge annuity	or any pension stipend charge annuity

2.2.2.1.2 What is an assessment

The clear interpretation of assessment in terms of section 49 of Act 28 of 1914 is missing.

THE MAIN POINTS

(1) In terms of section 65 (1) all persons liable to taxation must furnish "returns for the assessment of tax"

(2) In terms of section 65 (9) the return of income made by any person shall be based on the amount of gross income received by or accrued to the person during the last twelve month period which ended the 30th of June.

(3) In terms of section 70 where the taxpayer makes default in furnishing a return, or if the Commissioner is not satisfied with his return, the Commissioner has a discretion to make an assessment. The discretion is not absolute because it is limited by:

"as in the Commissioner's judgement ought to be charged in accordance with the Act,"

The discretion of the Commissioner is limited by the condition that he must use his judgement and that his judgement must be in accordance with what ought to be charged in accordance with the Act.
In terms of section 70 such estimated assessment is subject to objection or appeal.

(3) In terms of section 71 if any person is unable to furnish an accurate return of his income[38], the Commissioner may agree with such person as to the amount of the taxable amount of such income.

(4) If it appears to the Commissioner that a taxpayer has omitted any amount which ought to have been included in his return, the Commissioner may make an assessment as to the income of such taxpayer.

What is an assessment is not clear at all. Is it gross income, income, taxable income, tax payable ?

Our interpretation will be based indirectly on section 72 (1) which reads:

The particular of every assessment and the amount of tax payable thereon shall be entered in an assessment register, which shall be kept in the office of the Commissioner.

A distinction is made between an assessment and the amount of tax payable on the assessment.

The particular of every assessment shall be entered into the assessment register, and the amount of the tax payable must be entered into the assessment register.

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[38] In terms of section 65 (9) returns of the income is based on the amount of gross income. Nothing in the Act as such shows how gross income of the taxpayer becomes income for assessment purpose in his return for the assessment of the tax. See however form of returns, Form C to M.

It follows therefore that tax payable is not an assessment.[39]

If this interpretation is correct this is a fundamental departure from the definition of assessment in section 49 of Act 28 of 1914, where an assessment meant both an estimate of income and the tax imposed on such income.

There are three possible interpretations.

Interpretation 1: An assessment is the taxable income as determined by the Commissioner.

Interpretation 2: An assessment is (a) the taxable income as determined by the Commissioner and (b) the tax assessed on such taxable income by the Commissioner.

Interpretation 3: An assessment is the determination of the tax itself.[40]

2.2.2.1.3 Objections to the assessment

Section 82.(1) reads:

Objections to any assessment made under this Act may, within twenty-one days after the date of the assessment notice, be made, in the prescribed manner and under prescribed terms, by any taxpayer who is aggrieved by any assessment in which he is interested.

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[39] The terminology used in section 65.(1) ".....returns for the assessment of the tax...." is difficult to interpret in terms of the above. The following suggestion is made: the determination of the taxable income is the assessment, such assessment is made in order to assess the tax.

[40] There is a strong argument for this view. For example in section 65 the terms "returns for the assessment of the tax" is used. The particulars of every assessment in section 72 (1) would then not refer to any assessment but to the information which enabled the Commissioner to make his assessment of the tax.

Section 82 (1) is identical to section 23 (1) of Act 28 of 1914.

The interpretation of assessment is, with respect, not clear.

2.2.2.1.4 Burden of proof on objection to the assessment

Even though the marginal note of section 83 reads "burden of proof as to exemptions, deductions or abatement " and is identical to the marginal note of section 40 of Act 28 of 1914, the content of section 83 is different as follows:

The burden of proof that any income **or dividend** is exempt from or not liable to **[the]** **any** tax **chargeable under this Act** or is subject or entitled to any deduction or abatement shall be upon the person claiming such exemption, non-liability or deduction.

Some of the significance of this definition are analyzed below.

(a) Dividend has been included.

(b) "The tax" has now become "any tax chargeable under this Act". This Act means, it is submitted, Act No 41 of 1917.

All other previous income tax Acts are excluded.

All other Acts or laws administered by the Commissioner of Taxes or a Deputy Commissioner of Taxes are excluded.

The language used in the Act makes this clear beyond doubt.[41]

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[41] For a contrary approach in tax legislations see for instance section 103 of Income Tax Act 58 of 1962 which deals with the issue of previous Income Tax Acts and other law administered by the Commissioner.
Thus in terms of Section 103 (a) previous income tax Acts are specifically included, and in terms of section 103 (c) any other law administered by the Commissioner is also specifically included.

It follows therefore that whereas in terms of section 39 of act 28 of 1914 it could be argued that the burden of proof had to be discharged in respect of the law, which is general; now in terms of section 83 of Act 41 of 1917 the burden of proof is only of consequence where the tax is chargeable in terms of the Act.

If the tax is not chargeable under the Act, section 83 does not impose any burden of proof on the taxpayer.

(c) In terms of section 6 of the Act, there is now a total statutory procedure.

The partial procedure of Act 28 of 1914 has now become the total procedure of Act 41 of 1917.

Moreover profit as a separate entity within income has been eliminated.

A great number of cases still deal with income as if it were profit. Many authorities confuse both concepts. It is submitted that if the term "income" were used in terms of its statutory meaning some of the confusion and difficulty we are facing to day with the concepts capital, "income" and burden of proof would be of less consequence.

It is important to note that "income" in section 41 of the Act does not mean exactly the same as "income" in terms of the corresponding section 39 of act 28 of 1914.

Profit is no longer part of income as a separate entity.

Section 83 deals with burden of proof at the objection stage. Section 83 is positioned just after section 82 which deals with objections. Section 84 deals with appeal, after the objection stage. The onus of proof on appeal is dealt with separately in regulation 40.

The burden of proof imposed on the taxpayer on objection in terms of section 83, is entirely different from the burden of proof imposed on the taxpayer on appeal in terms of Regulation 40.

That section 83 imposes a burden of proof on the taxpayer at the objection stage is, without a doubt, the view taken by the Inland Revenue Department at the time.

In the departmental instruction issued on the Income tax Act No 41 of 1917.[42] section 129 states :

The burden of proof in support of any application for any reduction in assessment rests with the tax-payer (section eighty-three of the Act)

Is is therefore absolutely clear that the Inland Revenue Department's interpretation of the Act and departmental instruction, is that section 83 refers to the objection stage.[43]

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[42] Union of South Africa Inland Revenue Department. Income Tax 1917 as amended together with Regulations, Interpretation and Departmental Instructions. Published for Departmental use only. 1923. Page 164 section 129.

[43] Of course the Inland Revenue Department's views and instructions do not have the force of legal precedent!

2.2.2.2 STAGE 2
APPEAL TO THE SPECIAL COURT

2.2.2.2.1 Nature of the assessment subject to appeal

Section 84 (1) is identical to section 24 (1) of Act no 28 of 1914. What is appealed against is the decision of the Commissioner as notified in his notice of alteration, reduction or disallowance of an objection to an assessment. The taxpayer may generally appeal against any decision of the Commissioner which is subject to objection and appeal.

2.2.2.2.2 What are the grounds of appeal

The relevant part of section 84 (3) is identical to the relevant part of section 24 (3) of Act No 28 of 1914.

2.2.2.2.3 Burden of proof on appeal to the Special Court

Regulation 26 of the Act which is virtually identical to regulation 40 of Act 28 of 1914.

There are however some significant changes.

The heading "OBJECTIONS AND APPEALS" becomes "APPEALS". It is now quite clear that the section deals with appeals only and not with objections.

Regulation 26 differs from regulation 40 of Act No 28 of 1914 as follows:

The general practice and procedure of the Special Court shall be that of a **[Court of a resident]** Magistrate **[,]** 's Court, in so far as the same is applicable, and the burden of proof that the assessment is excessive shall lie on the appellant.

2.2.2.3 STAGE 3 APPEAL TO THE SUPREME COURT

2.2.2.3.1 Appeal from the Special Court

Regulation 39 reads:

CASES FOR THE SUPREME COURT
In the event of either party to an appeal requiring a case to be stated on a point of law, notice in writing shall be given by such party within thirty days after the decision of the Special Court.

In terms of section 86 where a question of law arises in a case before the special court it shall, if required in writing by any of the parties or may on its own motion, state a case for determination by the provincial or local division having jurisdiction in the area.

From the decision of the provincial or local division an appeal shall lie to the Appellate Division.

There is no burden of proof in terms of the Act which can or does alter the ordinary rules of evidence on such appeal.

It is however submitted that the taxpayer will have to establish, where necessary, that he actually did discharge the burden of proof imposed on objection by section 83, and the burden of proof on appeal to the special court in terms of regulation 26.

2.2.3.3.2 Other appeals

Where the matter at issue is outside the jurisdiction or competence of the Special Court, the taxpayer can, it is submitted, appeal directly to the provincial or local division which has the necessary jurisdiction.

The Act provides a revision system in certain case. The revision system **shall be used** in those specified situations. There is, it is submitted, nothing in the Act which prevents the taxpayer from appealing directly to courts outside the umbrella of the Act, where the procedure provided by the Act is not adequate.

The ordinary rules of evidence would apply in such cases.

2.2.3 ACT 40 OF 1925

Act No. 40 of 1925 bears the title:

" To provide for the taxation of incomes and to consolidate and amend the law relating thereto "

The Act was signed by the Governor-General in English.

For the purpose of section 2.2.3 Act 40 of 1925 shall be referred to as the Act.

2.2.3.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

2.2.3.1.1 What is taxed in terms of the statutory formula

The contrast in the Act is between the statutory procedure to arrive at "**taxable amount**" and **profit** as understood by the reasonable person.

"**Gross income**" is dealt with in section 7 (1) of the Act.

Section 7 (1) is not a general interpretation section.

It deals with the various steps leading from "**gross income**" to "**taxable amount**".

Section 7 (1) of the Act is the statutory formula.

It also refers to what is included in "**trade**".[44]

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[44] Apart from the definition of trade which unfortunately spoilt the balance of the section.

The marginal note is identical to the marginal note of section 6 of Act 41 of 1917 and reads:

Definitions for the purposes of this chapter.

It is important to note the following points about section 7 of the Act:

(a) it is headed **For the purposes of this Chapter–**[45]

The terms which are defined in section 7 and which are used in chapter 3 need not necessarily have the same meaning as they have in chapter 2.

(b) Section 7 is not a general definition or interpretation section. Just like Section 6 of Act 41 of 1917 it deals strictly with the steps to be followed in order to determine the taxable amount.

Section 7 is a statutory formula which clearly imposes the procedure to be observed in order to distill from the **"total amount"** received by or accrued in favour of a person the **"taxable amount"** upon which such person shall be taxed.

(c) Unfortunately the word "trade" is now included in section 7(1), whereas it was absent from section 6 of Act 41 of 1917. With respect, it would have been preferable for the word "trade" not to have been mentioned at all.

The inclusion of the "trade" in section 7(1) upsets the balance of the statutory formula.

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[45] This is identical with the wording of the equivalent section 6 of Act 41 of 1917.

It is like an ingredient specified in a cooking recipe which remains on the shelf after the dinner has been cooked to perfection.

Whereas **"gross income"**, **"income"**, **"taxable income"** and **"taxable amount"** are peremptorily defined by using the term **means**, the term **"trade"** is clearly not part of the formula, it is an inclusion explanation.

"trade" includes every profession, trade, business, employment, calling, occupation or venture including the letting of any property.

Even though the intrusion of "trade" is unnecessary, section 7(1) of Act 40 of 1925 is an almost perfect exposition of the statutory formula. One only has to compare the pure elegance of section 6 of Act 41 of 1917 and section 7(1) of Act 40 of 1925 with the confused morass of section 1 of Act 58 of 1962.

GROSS INCOME

The **"gross income"** definition is very similar to the definition in section 6 of Act 41 of 1917. There are however two changes, both of importance. Firstly the definition is now broken up into parts. The first part deals with what gross income is, the second part deals with inclusions.

The changes in the first part are as follows:
"gross income" means the total amount **whether in cash or otherwise** received by or accrued in favour of any person, other than receipts or accruals of a capital nature, in any year or period assessable under this Chapter from any source within the Union, or deemed to be within the Union,. ...

The "**total amount**" is now qualified by in cash or otherwise.

The second change in the "**gross income**" definition is the structure of the definition. Whereas in section 6 of Act 41 of 1917 the inclusions flowed into the definition, now the inclusions are clearly separated as follows:

and include the following-

(a)
(b)
(c)
(d)
(e)
(f)
but the generality of the definition shall not be deemed to be limited by anything contained in paragraph (a) to (f);

This framing of the definition separating the inclusions from the rest of the definition is, with respect useful, because as the inclusions become more complex they can now to be dealt with as separate entities within the framework of the general definition.

Inclusion (e) merits some examination.

In section 6 Act 41 of 1917

the estimated annual value of any quarters or board or residence or any other benefit or advantage of any kind granted in respect of employment whether in money or otherwise,

is the inclusion.

In section 7 (1) (e) of the Act the estimated value becomes **the annual value** and the qualification **whether in money or otherwise** has been left out.[46]

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[46] 7(1) (e) **the annual value of any quarters or board or residence or of any other benefit or advantage granted in respect of employment;**

The consequence of such slight changes on the burden of proof to be discharged by the taxpayer are immense.

It is perhaps apposite, in passing, to look at some of the implications the change **from the estimated value** to the **annual value** has produced.

As far as the Commissioner is concerned he no longer has a discretion to estimate the value of the benefit, he must actually determine the value. This seems to confer some advantage to the taxpayer.

As far as the taxpayer is concerned he may no longer estimate the value of such advantage, he must prove clearly the value of these benefit, should he want to discharge an onus of proof requirement in terms of 40 of the Act.

to estimate the value of such benefit.

The second step in the section 7(1) formula is "**income**". The definition is very similar to that of section 6 of Act 41 of 1917. The changes are as follows:

"income" means the amount remaining of the gross income of any person for any such year or period after deducting therefrom any amount exempt from normal tax **[in the hands of such person]** **under this Chapter**.

The change is significant in the sense that it is conceivable that from the "**gross income**" of taxpayer A it is now possible to deduct in certain circumstances an amount exempt from normal tax in the hands of taxpayer B in order o derive the "**income**" of taxpayer A.

The definition of "**taxable income**" has changed considerably. It is with respect clearer and simpler. The changes from the 1917 Act are as follows:

"taxable income" means **[an amount exceeding three hundred pounds for any such period of twelve months]** <u>**the amount**</u> remaining after deducting from the income of any person all the amounts <u>(other than abatements)</u> allowed **[as deductions]** <u>**to be deducted or set off**</u> under this chapter;.

The limitation of three hundred pounds for an amount to be considered taxable income has been removed.

A distinction is made between an amount to be deducted and an amount to be set off.

The next step is the calculation of the "**taxable amount**"

There is no change from Act 41 of 1917.

"taxable amount" means the amount remaining after deducting from any taxable income any abatement allowed under this Chapter;

Section 7 (2) states:

The taxable amount shall be the amount upon which the tax to be paid by any person shall be calculated.

The wording is identical to the wording in section 7 of Act 41 of 1917.

There is however a change in the structure of section 7 of the Act compared with section 6 of Act 41 of 1917.

By dividing section 7 into 2 separate parts:

(a) the statutory formula section in section 7(1), and
(b) the peremptory instruction to the Commissioner on the basis upon which the tax shall be calculated in section 7(2),

the Act has achieved an almost perfect, clear and logical statutory formula.

There is, as has been mentioned above, the criticism that even though the word "trade" is not defined as a **mean definition** it would have been preferable not to have been mentioned there at all.

The following simplified basic statutory formula[47] based on section 7(1) is suggested.

It shows clearly that the statutory formula is the obverse of the burden of proof formula.

The Commissioner must assess the tax payer in terms of the formula.

The taxpayer objects to the assessment on the premise that the assessment is not in terms of the formula.

The taxpayer must discharge the burden of proof that some of the steps have not been complied with.

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[47] The statutory formula will be discussed in detail in the treatment of Act 31 of 1941.

The relationship between the steps of the formula in terms of section 7 and the burden of proof in terms of section 57 are as follows:

Statutory formula	Onus of proof formula
(1) **Gross income step** Receipts or accruals of a capital nature excluded	(1) Not liable
(2) **Income step** Gross income less exemptions	(2) Is exempt from
(3) **Taxable income step** Income less deductions	(3) Subject to deduction Subject to set off
(4) **Taxable amount step** Taxable income less abatements	(4) Subject to abatement

The relevant onus of proof requirements to be discharged by the taxpayer in terms of section 57 of the Act relate to exemption, non liability, deduction, abatement or set off. These five terms have been highlighted in the statutory formula above.

Whereas in the summary above the relationship between statutory formula and the onus of proof formula was based on the steps specified in section 7 of the Act, it may be interesting to summarize the relationship based on the steps of the burden of proof formula.

STAGES OF SECTION 57

(1) NON LIABILITY STAGE

GROSS INCOME	**IS**	Total amount received or accrued from any source other than receipts or accruals of a capital nature but including certain amounts clearly specified

(2) EXEMPTION STAGE

INCOME	**IS**	Gross income less amounts exempt from normal tax

(3) DEDUCTION AND SET OFF STAGE

TAXABLE INCOME	**IS**	Income less amounts allowed to be deducted or set off

(4) ABATEMENT STAGE

TAXABLE AMOUNT	**IS**	Taxable income less abatements allowed. Tax to be paid is calculated on taxable amount

Section 7(1) of the Act is truly an outstanding model of tax legislation, as far as the statutory formulation is concerned.

There are however a number of minor issues which need clarification.

(a) This procedure in terms of section 7 (1), is only for the purpose of chapter II of the Act. It is not entirely clear how it applies to chapter III part III which deals with objections and appeals.

(b) Whereas quite clearly "**gross income**", "**income**" and "**taxable income**" are amounts related to **any person**, there is no mention of **any person** in "**taxable amount**".

The interpretation that the taxable amount is not calculated on "the taxable income of any person", but can be calculated on "any taxable income", in the sense that a person may have more than one taxable income is perhaps far fetched.

It is suggested that in the definition of "taxable amount", the wording "from the taxable income of any person" would have been clearer than "from any taxable income".

2.2.3.1.2 What is an assessment

Assessment is defined [interpreted] in section 72 as follows:

"assessment" means the determination of an amount upon which any tax leviable under this Act is chargeable, and includes the determination of any loss ranking for set-off.

This definition is of great consequence.

In section 49 of Act 28 of 1914, an assessment **"shall mean an estimate"** of the amount of income liable to taxation.

The word **determination** clearly eliminates the right of the Commissioner to estimate, unless this right is specifically specified in the Act.

It is submitted that the amount liable to taxation is to be determined strictly in terms of section 7(1) of the Act.

Section 7(2) of the Act refers to the taxable amount, as the amount upon which tax is to be calculated.

It is submitted that **tax leviable** in the definition of assessment in section 72 of the Act has the same meaning as **tax to be paid** in section 7(2).

The determination of a loss ranking for set-off is also an assessment.

However the amount of the tax, which was an assessment in terms of section 49 of Act 28 of 1914, is not an assessment.

Neither is any return required by the Act, an assessment.

Section 46 (3) is similar in effect with section 72 (1) of Act 41 of 1917.

Section 43 (3) reads:

Upon entering any assessment the Commissioner shall give notice of the assessment and of the tax payable thereon to the taxpayer assessed.

Just as in the 1917 Act there is a clear distinction between assessment and tax payable. Tax payable is not an assessment in terms of the definition in section 72.

Section 46 (3) reinforces the above distinction, by separating notice of the assessment from notice of the tax payable.

One of the consequence is that the taxpayer who objects to the assessment cannot object against the amount of the tax payable.

In terms of section 7(2) the tax to be paid is calculated upon the **"taxable amount"**.

In terms of section 46(1) every **"taxable amount"** shall be assessed by the Commissioner or under his direction.

The Commissioner shall enter the particular of the assessment and the amount of the tax payable thereon into a register of assessment and the Commissioner shall give notice of the assessment and of the tax payable thereon to the taxpayer assessed.[48]

The distinction between the assessment and the tax payable thereon, is also relevant because nothing is stated about how the tax payable is to be calculated. An assessment is a determination, the tax payable on the assessment could be an estimate.

Even though in terms of section 72 an assessment is a determination, yet in terms of section 43 (1) the Commissioner may estimate the taxpayer's **"taxable income"** in two situations; (1) where the taxpayer makes default in making a return, or (2) if the Commissioner is not satisfied with the return of the taxpayer.

However in terms of section 7 (2), it is the **"taxable amount"** and not the **"taxable income"**, which shall be the amount upon which the tax to be paid by any person shall be calculated.

It follows that as **"taxable amount"** is **"taxable income"** less abatements, that therefore the Commissioner cannot in terms of the 43(1) of the Act estimate the amount of the abatement.

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[48] Section 46 (2) and 46 (3)

2.2.3.1.3 Objections to the assessment

Section 56.1 reads:

Objections to any assessment made under this Act may, within twenty one days after the date of the assessment notice, be made, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he is interested.

Section 56 (1) of the Act is identical with section 82 (1) of Act 41 of 1917.

2.2.3.1.4 Burden of proof on objection to the assessment

The marginal note to the burden of proof section 57 reads:

The burden of proof as to exemptions, deductions or abatements.

The wording of the marginal note to section 57 of the Act, is virtually the same as that of the marginal note of section 83 of Act 41 of 1917.[49]

The changes are, it would seem, of no consequence; burden of proof becomes the burden of proof and abatement becomes abatements.

The content of section 57 is however dramatically different:

The burden of proof that any amount is exempt from or not liable to the tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act, shall be upon the person claiming such exemption, non-liability deduction, abatement or set-off.[50]

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[49] The burden of proof as to exemptions, deductions or abatements.

[50] The burden of proof that any [income or dividend] amount is exempt from or not liable to [any] the tax chargeable under this Act or is subject [or entitled] to any deduction [or], abatements or set-off in terms of this Act, shall be upon the person claiming such exemption, non liability [or] , deduction [.] , abatement or set-off.

The main changes from the 1917 Act are as follows:

(a) The term "amount" has been substituted for "income" in section 7 (1) of the Act.

"Income and dividend" in section 83 of Act 41 of 1917 has been altered to "amount".

In the case of Deary v CIR [1920 CPD 541] the taxpayers contented that where an accrual was, part in payment of capital, and part in payment of income, the onus of proof rested on the Commissioner to make the apportionment.

The contention was upheld by the Court.

It would seem that the changes in the wording from "income or dividend, to amount" in section 57, and from "income" to "amount" in section 7 (1) of the Act were made in order to eliminate the onus which the Commissioner has to bear in terms of the Deary decision. It is correct to state that in the case of a payment, which is part capital and part income, the Commissioner will no longer have to bear the onus of proof of apportioning between income and capital.

It is submitted, that while it is correct that where an amount, or part of an amount, is not income the burden facing the taxpayer is more onerous; however where income is not an amount the onus imposed in terms of section 57 is of no relevance. Whether it is conceivable for income not to be an amount depends on the meaning of the concept amount.

Amount is not defined in the Act. It is submitted that amount here does not mean a **quantum** but rather a part of the "total amount" as per the definition of "**gross income**".

(b) Section 30 of Act 28 of 1914 refers to "the tax"
Section 83 of Act 41 of 1917 refers to "any tax"
Section 57 of Act 40 of 1925 refers to "the tax"

The term "any" includes more than the specific "the", it would include tax imposed by acts other than the Act, were it not qualified by **"chargeable under this Act"**.
The implication of the change of meaning brought about by the substitution of **the** [1917 Act] for **any** is difficult to fathom.

(c) The term "abatement" has been added to the second part of the sentence.
It is now without doubt that it is the taxpayer's burden of proof to establish abatement. This has clarified a difficulty inherent in section 83 of Act 41 of 1917.

(d) The term "entitled" of section 83 of Act 41 of 1917 has been left out.

It follows therefore that whereas previously the taxpayer's burden of proof was relevant where he was " subject or entitled " now the burden of proof is relevant only where he is "subject". A person is subject to a disadvantage but is entitled to a benefit.
There seems to be no authority on this point.

It is submitted that if it is accepted that "entitled to" is not synonymous with "subject to" that the taxpayer's burden of proof is to that extent alleviated.

(e) Set-off has been included for the first time in the burden of proof provision.
In terms of the definition of "**assessment**" in section 72 the determination of any loss ranking for set-off is an assessment.

(f) The words **"tax chargeable"** clearly imply that the burden which the taxpayer has to discharge is not limited to "income tax".[51] The burden of proof imposed in terms of section 57 relate to establishing that any amount is exempt from the tax, provided the tax is chargeable under the Act.

(g) Where the issue whether profits realized by the sale of land are or are not of a capital nature, rests upon the conduct of the taxpayer then the onus of proof of advancing such evidence rests with the Commissioner.[52]

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[51] Ochberg v Commissioner for Inland Revenue (5 SATC at page 102 1931 AD)

[52] **Commissioner for Inland Revenue v Scott** (3 SATC 253 1928 AD). This was the full bench decision of the Natal Provincial Decision. This particular point was however not decided in the AD.
Commissioner of Taxes v South Deeps, Ltd (1918 AD 606)

There is a presumption that any receipt or accrual which is the result from an ordinary change of investment is of a capital nature. It is for the Commissioner to establish that it is not of a capital nature.

2.2.3.2 STAGE 3 APPEAL TO THE SPECIAL COURT

2.2.3.2.1 Nature of the assessment subject to appeal

Section 56 (4) reads:

On receipt of a notice of objection to an assessment the Commissioner may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and shall record in the assessment register any alteration or reduction made in the assessment.

This section is identical to section 23 (4) of Act 28 of 1914 and to section 82 (4) of Act 41 of 1917.

Section 58(1) reads:

Any taxpayer dissatisfied with any decision of the Commissioner as notified to him in terms of sub-section (4) of section fifty-six of this Act may appeal therefrom to a special court for hearing income tax appeals, constituted in accordance with the provision of this section.

There is a change from the wording of section 54 (1) of Act 41 of 1917. The Commissioner's decision becomes <u>any decision</u> of the Commissioner. It would seem that the range of objections to a decision by the Commissioner has been widened as a result.

The implication of the change seems however minimal, as section 58 (1) refers to section 56 (4) which is identical to section 82 (4) of Act 41 of 1917.

In the case of an appeal to the Special Court his appeal lies against any decision of the Commissioner.[53]

Any **"decision of the Commissioner"** is qualified by **"as notified to him by in terms of sub-section (4) of section fifty- six"**. It would seem therefore that **decision** means the notice of the altered, reduced or disallowed objection sent to the taxpayer by the Commissioner in terms of section 46(4).

The term decision does not increase the scope of the concept assessment, nor does it increase the scope of the taxpayer right of appeal.

2.2.3.2.2 What are the grounds of appeal

Section 58 (7) reads:

At any such appeal the taxpayer shall be limited to the grounds stated in his notice of objection.

The identical wording is found in section 84 (3) of Act 41 of 1917.

The grounds specified are those mentioned in 56 (3).[54]

It is submitted that the grounds here mean the evidence which the taxpayer brought forwards in his objection to the assessment.

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[53] Section 58 (1)

[54] Every objection shall be in writing and shall specify in detail the grounds upon which it is made.

It is also submitted that the taxpayer in specifying in detail the grounds for his objection to the assessment has to discharge the onus of proof in terms of section 57.

2.2.3.2.3 Burden of proof on appeal to the Special Court

Regulation 8 of Regulations under the Income Tax Act, 1925 [No 1518 1925 4th September, 1925] is virtually identical with regulation 26 of Act No 41 of 1917 as far as the first part which deals with practice and procedure.

The burden of proof part has been omitted.

The changes in regulation 8 of Act No 40 of 1925 as compared with regulation 26 of Act No 41 of 1917 are as follows:

Save as in these regulations is otherwise provided, [T] the general practice and procedure of the Special Court shall be that of a Magistrate's Court in so far as such practice and procedure are applicable. [, and the burden of proof that the assessment is excessive shall lie on the appellant]

For the short period between Act 41 of 1917 and Act 31 of 1941 the taxpayer/appellant did not have to discharge on appeal the onus of proof that the assessment/decision of the Commissioner was excessive/wrong.

It is submitted however that though on appeal to the special court the appellant will not have to discharge the onus of establishing that the assessment was excessive, yet he will still have to establish that he has discharged in his objection to the Commissioner's assessment the burden in terms of section 57 that the amount appealed against was not liable or exempt, or that it was subject to deduction abatement or set-off.

It is peremptorily stated in section 58 (7) that at any such appeal the taxpayer shall be limited to the grounds stated in his notice of objection. As the defendant cannot bring new evidence, all he can do is to demonstrate that he had discharged, in his objection evidence, the burden of proof in terms of section 57.

Section 58 (13) states:

Subject to the provision of this Act, the court may order any assessment under appeal to be amended, reduced or confirmed, or may, if it thinks fit, refer the assessment back to the Commissioner for further investigation and assessment.[55]

The new power of the court to, if it thinks fit, refer the assessment back to the Commissioner for further investigation, may have little relevance for the interpretation of section 57 of the Act, but will be of crucial significance for the interpretation of section 78 of Act 31 of 1941 and section 82 of Act 58 of 1962.

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[55] Section 84 (8) of Act 41 of 1917 only allows the special court the following power:

The court may alter, or order the alteration of, the assessment book in accordance with the decision given on any appeal.....

2.2.3.3 STAGE 3 APPEAL TO THE SUPREME COURT

2.2.3.3.1 Appeal from special court

Regulation 20 is virtually similar in its effect, as regulation 39 of Act 41 of 1917 as follows:

CASES FOR THE SUPREME COURT
In the event of either party to an appeal requiring a case to be stated on a point of law, notice in writing shall be given by such party within thirty days after **[the decision of the Special Court.]** **the date of the notification issued by the clerk of the Court advising the parties of the decision of the Special Court**.

This change protects the party who wants to appeal where there is late notification of the Special Court's decision. The relevant date is now not thirty days after the decision of the Special Court but thirty days after the issue of notification of the decision.

There is however an important situation which has not been dealt with: the difference between the date the notification is issued, and the actual date of notification.

It is submitted that the taxpayer could be seriously prejudiced if thirty days after issue of the notification, he has in fact, through no fault of his own, not been notified.

There is no mechanism in the Act to protect the taxpayer in such a case over and above the discretion of the Commissioner himself.

Therefore the taxpayer prejudiced in such circumstance can appeal directly to the Supreme Court. The ordinary rules of evidence will obtain. The burden of proof section and regulation of the Act are only relevant to the Act itself and cannot bind the Supreme Court.

As an appeal from the decision of the Special Court can only be on a point of law, the burden of proof provision of section 57 of Act do not apply.

2.2.3.3.2 Other appeals

The Act provides for an appeal procedure from the decision of the Commissioner in certain circumstances.

There are two issues which are of importance;

a) is the appeal procedure the only legal avenue open to the taxpayer, and

b) where the circumstances for the appeal procedure in terms of the Act are not present, has the taxpayer any judicial legal recourse.

It is submitted that even where the taxpayer is afforded the right of objection, and appeal to the Special Court in terms of the Act, [56] that if the appeal to the Special Court is not peremptory [57] an alternative direct appeal to the Supreme Court may be available in some circumstances.

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[56] See section 58 (1) of Act 40 of 1925

[57] Such prohibition might in any case be **ultra vires**.

Section 58 (1) states that the taxpayer **may** appeal it does not state that the taxpayer **shall** appeal. This confers a right,[58] it does not impose an obligation.

Where the Act provides that the taxpayer **may** appeal and provides a mechanism whereby he **shall** appeal, then the taxpayer if he decides to appeal must appeal through the mechanism provided by the Act. Where the Act provides that the taxpayer **may** appeal, but does not provide a mechanism whereby he **shall** appeal, then the taxpayer can appeal using the appeal procedure outside the Act.

Where the Act does not provide the taxpayer with the right of appeal, then even if the Special Court were competent to hear such appeal, the taxpayer can appeal using the mechanism provided outside the Act.

Thus where the taxpayer is not afforded an appeal recourse in terms of the Act, it is submitted that an appeal to the Supreme Court cannot be denied.

This is of relevance for our purpose, where the assessment is in terms of a discretion of the Commissioner, which is not subject to objection and appeal.

In the case of a direct appeal to the Supreme Court, whether on a question of law or a question of fact, the burden of proof in terms of section 57 of the Act are of no relevance and the ordinary rules of evidence apply.

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[58] Subject to those cases where the Act states that the taxpayer **shall** appeal.

2.2.4 ACT 31 of 1941

Act 31 of 1941 bears the title:

To provide for the taxation of incomes and to consolidate and amend the law relating thereto.

This wording is identical to that of Act 40 of 1925.

The Act was signed by the Governor-General in English.

For the purpose of section 2.2.4, Act 31 of 1941 shall be referred to as the Act.

2.2.4.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

2.2.4.1.1 What is taxed in terms of the statutory formula

The Act taxes the taxable amount of the taxpayer in terms of a statutory formula, the steps of which are clearly specified in section 7 of the Act.

Section 7 of the Act is not a general interpretation section.[59] It is the basic framework of the statutory formula.

It is unfortunate that, just as in section 7 of Act 40 of 1925 there is an **inclusion** definition of "**trade**", which is of no relevance whatsoever; the term **trade** does not appear anywhere else in section 7.[60]

[59] Section 1 is the general interpretation of the Act.

[60] With the proviso that section 7 (d) as amended by Act 26 of 1943, section 2 contains the words trade marks.

This, to an extent, disturbs the beautiful harmony of the statutory formula framework, so carefully assembled in section 7 of the Act.

Just as in the case of section 6 of Act 41 of 1917 and section 7 of Act 40 of 1925, the definitions are clearly limited for the purposes of Chapter II as follows:

Definitions for purposes of Chapter II

7. For the purposes of this Chapter.

2.2.4.1.1.a Gross income

For the purposes of chapter II gross income is defined as follows:

" gross income " means the total amount whether in cash or otherwise received by or accrued to in favour of any person, excluding such receipts or accruals of a capital nature as are not receipts or accruals referred to in paragraphs (a) to (h) hereunder, in any year or period assessable under this Chapter from any source within the Union or deemed to be to be within the Union, and includes the followings-
(a)
(b)
(c)
(d)
(e)
(f)
(g)
(g)bis[61]
(h)

The definition of "gross income" in section 7 (1) of Act 40 of 1925 is similar.

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[61] Added by Act 34 of 1942, section 2.

The changes are as follows:

"gross income" means the total amount whether in cash or otherwise received by or accrued to or in favour of any person, **[other than]** **excluding such** receipts or accruals of a capital nature **[,]** **as are not receipts or accruals referred to in paragraph (a) to (h) hereunder,** in any year or period assessable under this Chapter from any source within the Union or deemed to be the Union, and includes the following-

The difference between the two definitions is fundamental for the purpose of the burden of proof concept.

In terms of section 7 (1) of Act 40 of 1925, receipts or accruals of a capital nature were never part of gross income.

In terms of clauses (a) to (f) of the definition certain specific receipts, accruals, benefits, advantages and amounts ranking for redemption in terms of section twenty-three of the Act were included even though they might be of a capital nature.

In terms of section 7 of Act 31 of 1941 receipts or accruals of a capital nature are part of the total amount.

By excluding receipts or accruals of a capital nature one is left with gross income. Certain specific receipts, amounts, awards , contributions etc are in terms of clauses (a) to (h) of the definition included in gross income , even though they might of a capital nature .

In terms of Act 40 of 1925, gross income is the total amount received or accrued **other** than receipts or accrual of a capital nature, but includes some amounts which are defined and which might be capital in nature.
Therefore no receipts or accrual of a capital nature formed part of the total amount of the gross income.

In terms of Act 31 of 1941 capital receipts or accrual are **excluded** but some amounts which are defined and which may be capital in nature are included.
Therefore receipts or accrual of a capital nature are part of the total amount of gross income.

1925 ACT

GROSS INCOME: Total amounts in cash or otherwise received and accrued which are **not** of a capital nature.

1941 ACT

TOTAL AMOUNT: Total receipts or accrual in cash or otherwise. [including receipts or accruals of a capital nature]

GROSS INCOME: Total amount less receipts or accruals of a capital nature.

Gross income is the non liability stage of the statutory procedure.

2.2.4.1.1.b Income

Section 7 of Act 31 of 1941 defines income as follows:

"income" means the amount remaining of the gross income of any person for any such year or period after deducting therefrom any amount exempt from normal tax under this Chapter;

This definition is identical to the definition in section 7 (1) of Act 40 of 1925.

Income is the **exempt stage** of the **statutory procedure**.

2.2.4.1.1.c Taxable income

Taxable income is defined in section 7 as follows:

"Taxable income" means the amount remaining after deducting from the income of any person all the amounts (other than abatements) allowed to be deducted or set-off under this Chapter;[62]

This definition is identical to the definition in section 7.(1) of Act 4) of 1925.

Taxable income is therefore the **deduction stage** (other than abatements) of the **statutory procedure**.

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62 The words (other than abatements) were not repealed but were ineffective in respect of later tax acts. The analysis is confined to Act 31 of 1941, it is impossible to deal with subsequent acts prior to Act 58 of 1962 within the limited scope of this paper.

2.2.4.1.1.d Taxable amount

Taxable amount in terms of section 7 of Act 31 of 1941 is defined as follows:

" Taxable Amount " means the amount remaining after deducting from any taxable income any abatements allowed under this chapter.[63]

The definition is identical to the definition in section 7 (1) of Act 40 of 1925.

The term taxable amount as defined in the Act seems to occur only twice in the Act:
1) section 6 (1) (e) which deals with additional tax from gold mining income, and
2) section (2) (b) which deals with the abatement relevant to such income.

However, for our purpose, the taxable amount stage is critical because of the relationship of the statutory formula with the burden of proof provisions of the Act.

The Taxable amount is the abatement stage of the statutory procedure.

A summary of the statutory formula based on section 7 of the Act follows on the nest page.

The relationship between the onus of proof provisions of section 78 of the Act and the statutory formula are emphasized.

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[63] The concept of taxable amount although not repealed became ineffective in terms of subsequent acts prior to Act 58 of 1962. In the limited scope of this paper it is impossible to deal in detail with all the changes which occurred between 1941 and 1962.

INCOME AS A STATUTORY PROCEDURE
WITH REFERENCE TO ONUS OF PROOF SECTION 78 OF ACT 31 OF 1941
FORMULA: FROM WEALTH TO INCOME

INTERPRETATION	STEPS
1] GROSS WEALTH RECEIVED OR ACCRUED.	LESS: receipts or accruals of no ascertainable money value EQUALS: **TOTAL RECEIPTS OR ACCRUALS**
IS The total gross wealth received or accrued from any source whatsoever including gross wealth which does not have an ascertainable monetary value.	
2] TOTAL RECEIPTS OR ACCRUALS	LESS: non Union receipts or accruals EQUALS: **TOTAL AMOUNT**
IS All receipts or accruals with an ascertainable money value from any source whatsoever.	
3] TOTAL AMOUNT	LESS: receipts or accruals of a capital nature PLUS special inclusions EQUALS: **GROSS INCOME**
ONUS ***IS*** All receipts or accruals with an ascertainable money value from a source within the Union or deemed to be within the Union. An amount must have a money value from a source within the Republic.	
4] GROSS INCOME	LESS: amounts exempt from tax EQUALS: **INCOME**
OF ***IS*** All receipts or accruals with an ascertainable monetary value from a source within the Union or deemed to be within the Union less receipts or accruals of a capital nature but including certain amounts clearly described.	
5] INCOME	LESS: Allowable deductions or set off EQUALS: **TAXABLE INCOME**
PROOF ***IS*** All receipts or accruals with an ascertainable monetary value from a source within the Union or deemed to be within the Union less receipts or accruals of a capital nature and after deducting any amounts exempt from tax in terms of the Act.	
6] TAXABLE INCOME	LESS: abatements EQUALS: **TAXABLE AMOUNT**
IS Income less allowable deduction or set off.	
7] TAXABLE AMOUNT	LESS: tax calculated on taxable amount EQUALS: **INCOME AFTER TAX**
IS Taxable income less abatements.	
8] INCOME AFTER TAX	

2.2.4.1.2. What is an assessment

In terms of section 1 of Act 31 of 1941 an assessment is defined as:

"assessment" means-
(a) the determination of an amount upon which any tax leviable under this Act is chargeable; or
(b) the determination of any loss ranking for set-off; or
(c) the determination of the amount of the taxable income or income subject to super tax of a private company, apportionable among the shareholder of such company;[64]
and includes,for the purpose of PART III of Chapter III, any determination by the Commissioner in respect of the deductions referred to in Section thirteen;

The wording of part (a) and (b) of this definition is virtually identical with the definition in section 72 of Act 40 of 1925.[65]

The (c) part of the definition is of little consequence to day and will not be analyzed.

The implications of the changes in the concept of assessment as defined in section 72 of Act 40 of 1925 are of some consequence.

In the 1925 Act, the determination of an amount upon which tax is leviable is the main thrust of the assessment.

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[64] The (c) part of the definition although not repealed were ineffective in respect of further income tax Acts previous to Act 58 of 1962.

[65] "assessment' means -a the determination of any amount upon which any tax leviable under this Act is chargeable [, and] or (b) the determination of any loss ranking for set-off [,] ;or (c) the determination of the amount of the taxable income or income subject to super tax of a private company, apportionable among the shareholders of such company;

The determination of any loss ranking for set-off was also considered as part of the one general assessment.

In the 1941 Act there is one assessment for the determination of an amount for which tax is leviable, and another assessment for the determination of any loss ranking for set-off.

2.2.4.1.3 Objections to the assessment

Section 77 (1) reads as follows:

Objections to any assessment made under this Act, may, subject to the provisions of sub-section (2), be made within twenty-one days after the date of the assessment notice, in the manner and under the terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he is interested.

The wording is virtually identical to section 56 (1) of Act 40 of 1925. The only difference is the reference to **being subject to sub-section (2)**, which deals with super tax of private companies and is of no relevance to day.

Section 77 (4) gives the Commissioner a discretion where there is a delay in lodging the objection as follows:

No objection shall be entertained by the Commissioner which is not delivered at his office or posted to him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the Commissioner is satisfied that reasonable grounds exist for delay in lodging the objection.

The wording is identical to section 56 (4) of Act 40 of 1925, and the criticism made supra is equally valid here. Indeed it is strange that such an obvious unfair bureaucratic imposition had not been debated in the interim and changed in a reasonable manner. The taxpayer must insist on depending as little as possible on the discretion of the Commissioner.

The second criticism *supra* is also relevant.

How does one reconcile the fact that the taxpayer aggrieved by the assessment in which he is interested need not necessarily be the taxpayer to whom the assessment is sent.

2.2.4.1.4 Burden of proof on objection to the assessment

The marginal note to the burden of proof section 78 is identical to that of section 57 of Act 40 of 1925 and reads as follows:

The burden of proof as to exemptions, deductions or abatements.

The marginal note is misleading because section 78 introduces a completely new concept which alters the very substance of the burden imposed on the taxpayer.

The burden of proof section 73 can be analyzed in two parts.

Part 1

The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off,.....

The first part of the section is virtually identical with section 57 of Act 40 of 1925.[66]

There is however one change which might have some legal significance:

a) **"the tax" of the 1914 Act became "any tax" in the 1917 Act, which changed back to "the tax" in the 1925 Act, which has now become again "any tax" in the 1941 Act. The legislator certainly does not make the life of the lawyer an easy one.**

Part 2

The new part reads:

" and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong."

The word "and" which joins the two parts together must be interpreted critically.

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[66] The burden of proof that any amount is exempt from or not liable to [the] any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act, shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off [.] , and .....

It is clear that the first part imposes on the tax payer the burden of proving exemption or non liability . It is also clear that any decision of the Commissioner will not be altered on appeal unless the appellant establishes that the decision is wrong.

What is not clear is the type of decision which is referred to. It is submitted that section 78 should be interpreted strictly in terms of the meaning conveyed by the words used. The word "and" can be and therefore must be interpreted in its ordinary sense.

There are two scenarios connected with the little word AND.

Scenario 1

* The Commissioner assesses the taxpayer, in the sense that he determines the income subject to tax.
* The taxpayer objects to the assessment.
* The Commissioner is not satisfied that the taxpayer has discharged the burden of proof in terms of section 78.
* The Commissioner disallows the objection.[decision]

A N D

Scenario 2

* The taxpayer appeals against the decision of the Commissioner.
* The taxpayer must show that the decision of the Commissioner in disallowing the objection was wrong.
* Unless the taxpayer can show that the Commissioner's decision to disallow the objection was wrong, the Court of Review shall not reverse or alter such decision.

The word **and** marries and entwines the two scenarios, without diminishing their identities.

It is the decision in scenario 1 which on appeal in scenario 2 must be shown to be wrong.

The burden of proof in **scenario 1** has nothing to do with the burden of proof in **scenario 2**.

They are different burdens of proof serving different purposes.

Of course in order to show that the Commissioner is wrong the taxpayer may have to establish that he has discharged the burden of proof imposed in **scenario 1**.

The term "decision" is related directly to an amount which a person has attempted to establish is not chargeable or is subject to a deduction.

Thus, for example, any decision by the Commissioner concerning liability for tax which was not claimed by the tax payer as an exemption or non liability, will not be subject to the burden of proof on appeal in terms of section 78 of the Act.

The second part of section 78 shall be analyzed under the burden of proof in the Special Court.

2.2.4.2 STAGE 2 APPEAL TO THE SPECIAL COURT

2.2.4.2.1 Nature of the assessment appealed against

Section 79 (1) of the Act reads:

79 (1) Any person entitled to make an objection who is dissatisfied with any decision of the Commissioner as notified to him in terms of sub-section (6) of Section seventy-seven may appeal therefrom to a special court for hearing income tax appeals, constituted in accordance with the provisions of this section.

This is virtually identical to section 56 (4) of Act 40 of 1925. There is however one change; the words **entitled to make an objection** have been added. This places a limit on who can object. In terms of the 1925 Act, any one dissatisfied with the decision of the Commissioner could appeal.

In terms of the 1941 Act in order to be entitled to appeal not only must one be dissatisfied with the decision of the Commissioner one must also be entitled to make an objection. Even though it is not clearly stated, it would seem that the person who is appealing because he is dissatisfied with the decision of the Commissioner must be the person who had the right to object against the assessment which was disallowed. It is submitted that there must a link between the person who has the right to object against the assessment of the Commissioner, and the decision appealed against.

Even with this extra requirement there is no provision preventing more that one person appealing against the decision of the Commissioner.

There is no reason whatsoever why a number persons should not have the right to object to an assessment and be dissatisfied with a particular decision relating to that assessment.

Section 77 (6) throws light on the nature of the decision appealed against.

72 (6) On receipt of a notice of objection to an assessment the Commissioner may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.

This is identical to the wording of section 56 (4) of 40 of 1925, except for an insignificant change, [for our purpose]. The 1925 states that the Commissioner **shall record any alteration** whereas the act states **record any alteration**

In order to establish the nature of the assessment appealed against it is necessary:

1) to establish the fact that it is the decision of the Commissioner concerning the alteration, reduction or disallowance of an objection to an assessment, and

2) to establish the nature of an assessment in so far as it relates to a decision of the Commissioner.

The two basic elements of assessment as defined in the Act are:

i) the determination of an amount upon which tax is leviable or

ii) the determination of any loss ranking for set-off.

The determination of the tax payable is not an assessment.

As the determination of the tax payable is not an assessment it follows therefore that it is not subject to objections. If it is not subject to objection it cannot be appealed against because in terms of section 79 (1) the person who appeals must have the right to object, and in terms of section of section 78 (6) no objection to the determination of tax can be entertained by the Commissioner as such determination is not an assessment.

Therefore the following are the characteristics of the decision which is subject to appeal in terms of section 79.

(1) The Commissioner determines the amount on which tax is leviable, and determines any loss ranking for set-off. [Assessment]

(2) The taxpayer objects to the assessment.

(3) The Commissioner reduces, alters or disallows the objection.[Decision]

(4) The person who appeals must be dissatisfied with the decision of the Commissioner and must have the right to make an objection.

(5) The decision which is appealed against, is the reduced, altered or disallowed objection.

2.2.4.2.2 What are the grounds of appeal

In terms of Section 79 (7):

At any such appeal the person who made the objection shall be limited to the grounds stated in his notice of objection.

Section 79 (7) is identical to section 58 (7) of Act 40 of 1925 and section 84 (3) of the 1917 Act.

In terms of section 77 (5):

Every objection shall be in writing and shall specify in details the grounds upon which it is made.

The meaning of grounds is complex. It is not defined in the Act. In legal parlance it has a number of meanings. It could mean the reason or it could mean the evidence.
The fact that the grounds must be specified in detail seem to indicate that what is meant is the evidence.

2.2.3.2.3 Burden of proof on appeal to the Special Court

The first part of section 78 of the Act is identical to section 40 of Act 40 of 1925.
Regulations 28 of Act 40 of 1914, and 26 of Act 41 of 1917, imposed on the appellant, on appeal to the Special Court, the burden of proof to establish that the assessment is excessive.

In the 1925 Act there is a lacuna, nothing is stated in the Act or the Regulations as to the burden of proof on appeal.

Act 40 of 1925 does not impose in terms of any of the sections of the Act, or in terms of any of the regulations under the Act, the onus or burden on the taxpayer to establish that:

i) the assessment is excessive, or
ii) the assessment is wrong, or
iii) the Commissioner is wrong, or
iv) the decision of the Commissioner is wrong.

In the 1917 Act it is clear that in terms of regulation 26 the appellant must establish that the assessment is excessive. By assessment here it is assumed that what is meant is the tax levied in terms of the final and conclusive assessment of the Commissioner.

The Act has in some measure incorporated in the second part of section 78 the burden of proof requirements specified in regulation 26 of Act 41 of 1917.

There are a few changes:

Regulation 26 [Appeals] Act 41 of 1917	Section 78 Act 31 of 1941
....and the burden of proof that the assessment is excessive shall lie on the appellant.	.....the decision not be reversed or altered unless it is shown by the appellant that the decision is wrong.

As the wording, and the legal consequences of Section 78 of Act 31 of 1941 is identical to section 82 of Act 58 of 1962, the burden of proof on appeal shall be discussed in detail in chapter 4 of this thesis.

2.2.4.3 STAGE 3 APPEAL TO THE SUPREME COURT

2.2.4.3.1 Appeal from the Special Court

In terms of section 81 (1) of the Act there is no right of appeal against any decision of the Special Court on a question of fact.

However if either party is dissatisfied with the Special Court's verdict on a question of law, he may require the Special Court to state a case setting out the facts , the contentions of the parties and the determination of the Special Court for appeal to the Supreme Court.

The burden of proof whether the question is one of law or fact, is not determined by section 31 of the Act. It is neither an amount in terms of the first part of section 78 not a decision of the Commissioner in terms of the second part of section 78 of the Act.

On appeal to the Supreme Court it is the appellant who must prove that the decision of the Special Court was wrong.

2.2.4.3.2 Other appeals

Virtually all income tax cases seem to follow the same pattern:

* objection to Commissioner's assessment

** appeal to Special Court against Commissioner's decision

*** appeal to the Supreme Court [or AD] on question of law

**** appeal to AD.

This is strange indeed.

The taxpayer seems to assume that the only access to tax justice is through this narrow, dark, unsafe tunnel.

And yet, there is often another path which is within reach of the burdened taxpayer; a path which is safe direct and secure, a path which because it is hardly ever used is full of weeds and difficult to find.

The competence of the Special Court is extremely limited.

Even within its limitation it does not always follow that the taxpayer must make use of the judicial procedure laid down by the Act. Indeed there are situations where the taxpayer has a choice between the judicial procedure in terms of the Act and the normal judicial procedure.

Ii is only in those situations where the decision of the Commissioner is challengeable in terms of the Act, and where it is stated that an appeal shall lie to the Special Court, that this specific judicial route must be followed.

Where the matter at issue is outside the competence of the Special Court, there is no doubt whatsoever that the taxpayer can appeal to a Court of Law.

There is nothing in the Act which prevents such action.

Unless the jurisdiction of the legal system outside the confines of the Act, is specifically excluded by the Act; it is there for the protections of all persons including taxpayers, who after all are also persons.