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INTERPRETATION OF FISCAL STATUTES BY THE COURTS: A SOUTH AFRICAN TAX LAW PERSPECTIVE

LOVEMORE TAKUDZWA KAFESU

Student Number: KFSLOV001

Cell Number: 0780922032/ 00263772331263

E-mail Address: luvazcaf@yahoo.com

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Supervisor: Professor Trevor Emslie

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I hereby declare that I have read and understood the regulations governing the submission of Masters in Commercial Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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University of Cape Town

ABSTRACT

This study examines the way in which the South African judiciary approaches the interpretation of fiscal legislation. It refers back to the use of the literal/textual approach (traditional approach), its short comings and the modification of such approach if it leads to absurdity. It also explores the purposive and contextual approaches to the interpretation of fiscal statutes. It then analyses whether the advent of the Constitution (The Constitution of the Republic of South Africa of 1996) has brought a paradigm shift from the strict literal approach to the purposive approach. The conclusion reached is that the Constitution has been a catalyst for change from the literal/textual approach to a purposive approach. However, the conclusion does not shy away from showing that, in practice; there is a continued practical application of the literal/textual approach by South African courts. Moreover, it was concluded that there is an 'interpretation game' where judges use their common sense in reaching their decisions rather than these rules of interpretation.

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CHAPTER 1: INTRODUCTION

Tax is an everyday reality of life and there is scarcely an economic act devoid of tax consequences.¹ It was once said, ‘a taxing statute provides for the lawful ‘confiscation’ of an amount of the taxpayers’ property in the form of money.’² What make taxpayers keep paying tax are their obligations under taxing statutes. However this does not mean that everything is rosy; even roses have thorns. The way in which the ‘message of legality’ is conveyed to the public by the judiciary differs from one judge to another. This has from time to time raised jurisprudential eyebrows when it comes to how fiscal statutes should be interpreted. Many questions have been raised about the approach that the judiciary uses or should use to interpret fiscal legislation.

One of the foundations of a liberal idea of the law is the fallacy that law is neutral, certain and objective.³ The South African law of statutory interpretation continues to be characterised by inconsistency and uncertainty.⁴ If each and every provision of a statute possessed certainty, a virtue often ascribed to statute law, there would be no room for its interpretation or, as it is also called, construction. There is, however, particularly in taxation matters, hardly a case where the courts, when dealing with statutory provisions, are not faced with the task of interpreting them.⁵ Interpretation, in the context of fiscal legislation, is the cornerstone on which the revenue authorities assess and collect taxes and, correspondingly, the foundation upon which the taxpayers’ rights are built.⁶

South African tax laws are ‘older’ statutes and have no built-in interpretation provisions. It accordingly rests with the courts to apply the common law rules of interpretation at their disposal to maintain them as relevant tools for determining how

¹ Trevor S Emslie, Dennis M Davis and SJ Hutton *Income Tax Cases and Material* 3ed (2001)1

² Robert C Williams *Income Tax in South Africa: Law and Practice* 4ed (2006) 2, see also TS Emslie et al *Income Tax Cases and Material* 3ed (2001) 16

³ Christa Rautenbach Rautenbach Christa, van Rensburg Linda Jansen and Venter F *Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (2004) 21

⁴ Fanyana ka Mdumbe ‘Has the literal/Intentional/Textual Approach to Statutory Interpretation been Dealt the *Coup de Grace at Last?*’ *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC): Case Note (2004) 19 2 *SA Publiekreg* 472-481 at 472

⁵ David Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 3.2 para 3.1

⁶ George K Goldswain ‘The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change’ (2008) 16 2 *Meditari Accountancy Research* 107-121 at 107, see also George Goldswain ‘Winds of Change: Strict and Literal Rule’ (2009) 23 *Tax Panning* 17-19 at 17

tax laws should be applied.⁷ The main aim of fiscal statute interpretation is to ascertain the intention of the legislature, as indeed it is with all other legislation. This is typically done by employing the rules of interpretation which can be encapsulated are, chiefly, under the following headings: the literal/textual approach, the purposive/contextual approach and Constitutional interpretation. This essay will demonstrate that the courts have established another approach to interpretation, namely the ‘common sense approach’ to interpretation of fiscal legislation.

South African judicial officers and tax practitioners involved in day-to-day construction of fiscal statutes, as are legal academics researching and teaching either Interpretation of Statutes as an academic discipline or disciplines significantly reliant on statutory interpretation (in this case tax law), have not yet devoted earnest attention to the systematization of the canons of statutory interpretation.⁸ This accounts for the lack of a clearly and explicitly recognised system for the classification of these rules of interpretation to ensure certainty, legitimacy and stability.⁹ If a single approach is not adopted in South Africa, disputes over tax issues are likely to remain a permanent feature of its tax system.

It is well known that the interpretation of fiscal statutes is not characterised by unique rules of interpretation. The rules which might at first sight appear to be special rules of interpretation applicable to fiscal statutes are in reality nothing more than the application of general principles of interpretation to tax enactments.¹⁰ These rules have no independent life of their own in relation to tax law, and are rooted in the rules of statutory interpretation common to all branches of the law.¹¹ So, fiscal statutes are not a specially privileged category of legislation and must be approached and dealt in the same manner as other statutes.

In the realm of taxation, legal interpretation is a creative act that ends in an effort to persuade others to accept one’s meanings. The practice of persuasion differs from time to time and from culture to culture.¹² This paper, backed by case law, will

⁷ Theuns Steyn ‘Tax Laws: Old Rules, New Tools’ (2009) 9 *5 Without Prejudice* 6-7 at 6

⁸ Lourence Du Plessiss ‘The (Re-) Systematization of the Cannons of and Aids to Statutory Interpretation’ (2005) 122 3 *SALJ* 591-613 at 591

⁹ Ibid

¹⁰ Ibid TS Emslie et al at 17

¹¹ Ibid

¹² Robert Benson *The Interpretation Game: How judges and Lawyers Make the Law* (2008) xv

refer to the *dicta* of the most influential judges of various times in South African tax law jurisprudence.

This paper proceeds with a discussion about the historical background of fiscal statute interpretation and interpretation in general. This will be followed by an investigation of the rationale behind studying the interpretation of fiscal statutes. At the core of this paper lies the discussion, in depth, of various rules of interpretation and their applicability in the Republic. This discussion will also encompass the impact of the Constitution of the Republic of South Africa¹³ on the interpretation of fiscal statutes. Interestingly, a discussion (the naked truth) about the interpretation game played by judges in influencing fiscal interpretation and shaping the way they think tax law can be construed follows. Finally, this essay will be enveloped by a conclusion.

1.1 Background Context of the Study

‘The life of law has not been logic: it has been experience.’¹⁴ The history of interpretation of fiscal statutes dates back to the use of the traditional literal approach which stipulates that if the words of the statute were clear, they have to be put into effect. Prior 1994, South African statutory interpretation was strongly influenced by English law and it still is in certain respects. The literal approach to statutory interpretation extends back to the case of *Waghan v Anon*¹⁵ where an English judge in 1340 stated that, ‘we cannot carry the statute further than the words of it say.’

South African courts followed the dicta posed in the famous *Partington vs. Attorney-General case*¹⁶ where Lord Cairns observed that, ‘if a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to be on the judiciary mind.’¹⁷ It also follows the English case *Cape Brandy Syndicate v Inland Revenue Commissioners*¹⁸ where Rowlatt J posed a groundbreaking dictum which will be discussed below.

¹³ The Constitution of the Republic of South Africa of 1996 hereafter referred to as ‘the Constitution.’

¹⁴ OW Holmes Jr *The Common Law* (1881) 1, see also OW Holmes Jr ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457

¹⁵ *Waghan v Anon* [1346] Year Book 20 Edward III, ii 198

¹⁶ [1869] L.R. 4 H.L. 100

¹⁷ at 122

¹⁸ [1921] 1 K.B. 64

The Appellate Division in *CIR v Simpson*¹⁹ quoted the above dictum with approval and for some time, the strict and literal rule was used as the guiding principle in interpretation of fiscal legislation by the judiciary. These early decisions of the Appellate Division tended to create the impression that fiscal legislation should be interpreted differently to other legislation- strictly as opposed to attempting to establish the purpose of the legislature.²⁰ However, almost 20 years after the *Simpson case*, Botha JA in *Glen Anil Development Corporation Ltd v SIR*²¹ rejected the notion that fiscal legislation should be interpreted differently to other legislation.²²

The strict approach had been maintained for many years both in South Africa and other jurisdictions, but it has been ameliorated as later decisions found irregularities within it.²³ In *Savage v CIR*²⁴, Shreiner JA pointed out that, although the principle (literal rule) is clear, the problem is that of application.²⁵

Some judges of the Appellate Division, as it then was, moved away from the textual/literal approach because, according to them, the intention of the legislature was not to be ascertained only by reference to the *ipssima verba* used in the legislation concerned, but also with reference to the broader context.²⁶ The purposive/contextual approach was adopted to curb the inadequacies of the literal rule and it sought to ascertain the intention of the legislature by reading an Act as a whole and placing in context the ends sought to be achieved (the purpose).²⁷

Post 1994, South African statutory interpretation is heavily influenced by the Constitution. It is interesting that the Constitution brought a paradigm shift in the

¹⁹ 1949 (4) SA 678 (A)

²⁰ GK Goldswain 'The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change' (2008) 16 2 *Meditari Accountancy Research* 107-121 at 109

²¹ 37 SATC 319

²² At page 334 he stated that the decisive and overriding principle to be used when interpreting fiscal legislation is no different from that applicable in the interpretation of all legislation. See also GK Goldswain 'The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change' (2008) 16 2 *Meditari Accountancy Research* 107-121 at 109

²³ Jonathan Silke 'The Interpretation of Fiscal Legislation- Cannons of Construction, Recent Judicial Comments and New Approaches' (1995) *Acta Juridica* 123-168 at 124

²⁴ 18 SATC 1

²⁵ *Savage v CIR* 18 SATC 1 at 9

²⁶ Fanyana ka Mdumbe 'Has the literal/Intentional/Textual Approach to Statutory Interpretation been Dealt the Coup de Grace at Last?' *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC): Case Note (2004) 19 2 *SA Publiekreg* 472-481 at 473

²⁷ Ibid GK Goldswain 'The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change' *Meditari Accountancy Research* (2008) 107-121 at 111

way in which legislation should be interpreted. The pre-1994 era was characterised by the Westminster doctrine of parliamentary supremacy or sovereignty. Parliamentary sovereignty entails that neither the courts nor another body have the power to review or strike down oppressive or *ultra vires* legislation enacted by Parliament.

According to the doctrine of parliamentary supremacy, whatever the Parliament enacted was the law and it did not matter whether the legislation violated or infringed a person's common law rights or other rights. The Westminster system and all its institutions remained intact until the Interim Constitution was promulgated in 1994.²⁸ With the Interim Constitution marking the democratic dispensation, much weight was given to the current Constitution, the Constitution of the Republic of South Africa of 1996, which is the supreme law of the land.²⁹ The Constitutional dispensation ousted the Westminster doctrine of parliamentary sovereignty with constitutional supremacy.³⁰

1.2 Problem Statement

The South African judiciary is often unpredictable about its course with regard to the interpretation of fiscal statutes. There is often uncertainty in South African courts when it comes to the approaches to be used in interpretation of tax legislation and to deal with ambiguity. It appears that there is some hesitancy in judges to move away from the traditional literal approach and to apply the purposive approach as a real alternative.³¹ It has been suggested that the unique features of tax laws, including its high level of detail, frequent revision, and largely self-contained nature, require a special set of interpretive tools and approach,³² but this is open to question.

²⁸ The Interim Constitution of the Republic of South Africa Act 200 of 1993 which came into effect on the 27 April of 1994

²⁹ Section 2 of the Constitution

³⁰ See G Goldswain 'Winds of Change III: The Constitution- A catalyst for Change' (2009) 23 *Tax Panning* 69-71 at 69, see also *In re Certification of the Constitution of the RSA* 1996 10 BCLR 1253 (CC) in para 194

³¹ E-Statute 'The Literal and Purposive Approach to Interpretation in Respect to Taxation Legislation' (2011) Available at <http://statutelaw.blogspot.com/2011/03/1-literal-and-purposive-approach-to.html> [Accessed on 10 June 2011]

³² A Srivastava 'Interpretation of Fiscal Statutes' Available at <http://www.legalserviceindia.com/articles/infs.htm>. [Accessed on 25 May 2011]

1.3 Research Questions

- a. Literal vs. Purposive approach: which approach does the South African judiciary apply when interpreting fiscal statutes? Is there order of primacy?
- b. Interpretation or misinterpretation: How do South African courts deal with ambiguity in fiscal statutes?
- c. Has the Constitution influenced or changed the way in which legislations (including fiscal legislation) are interpreted? If so, what is the approach brought by the change or such influence?

University of Cape Town

CHAPTER 2: THE INTERPRETATION OF FISCAL STATUTES

2.1. Introduction

Interpretation of statutes (including fiscal statutes) deals with the body of rules and principles which are used to construct the correct meaning of legislative provisions to be applied in practical situations.³³ Since all taxes are imposed by statute, all questions of tax are ultimately ones that involve the interpretation and application of the statute.³⁴ Tax lawyers always had to grapple with the interpretation of tax statutes. An important role of tax lawyers is to advise their clients as to the likelihood that a contemplated return³⁵ position will be upheld in litigation.³⁶ A lawyer advising on a proposed transaction that will give rise to tax consequences in a certain jurisdiction needs to understand how the courts in that jurisdiction are likely to react.³⁷

Statute law is the will of the Legislature; and the object of all judicial interpretation of it is to determine what intention is either expressly or by implication conveyed by the language used, so far as it is necessary for the purpose of determining whether a particular case or state of facts which is presented to the interpreter falls within it.³⁸

2.2. The Rationale behind the Interpretation of fiscal statutes

No government body interferes more in the private affairs of individuals than the South African Revenue Authority (SARS). Virtually, as Goldswain noted, every provision in the Income Tax Act, *prima facie*, interferes with a person's fundamental rights as embodied in the Bill of Rights.³⁹ It has been mentioned above that, South African courts had been strongly influenced by English law in interpreting fiscal legislation. Like their English counterparts, the courts viewed their function in interpreting statutes to be to ascertain the intention of the legislature as express or

³³ Jacques De Ville 'Meaning and Statutory Interpretation' (1999) 62 *THRHR* 373-389 at 374, see also Botha *Statutory Interpretation: An Introduction for Students* 3ed (1998) 2

³⁴ John Avery Jones, Peter Harris and David Oliver *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (2008) 8

³⁵ That is, the manner in which it is proposed to report a planned transaction on the tax return

³⁶ Victor Thuronyi *Comparative Tax Law* (2003) 133

³⁷ *Ibid* at 133

³⁸ Peter Benson Maxwell *On the Interpretation of statutes* (1875) 1

³⁹ *Ibid* GK Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 118, see also Goldswaine 'Winds of Change-V: Concluding Issues' (2009) 23 *Tax Planning* 98-99 at 98

implied in the legislation concerned and then to give effect to that intention and to protect the rights of both, revenue authorities and the taxpayer.⁴⁰

There are myriad reasons why the subject of fiscal interpretation is very significant. Statutes are complex and difficult subjects, they tend to mix legal and technical subject-matter. Most are drafted by more than one draftsman, sometimes resulting in incoherence.⁴¹ Statutes anticipate the future and often use indeterminate terms. Words are an imprecise way of communication, they can have different meanings, the duty is cast upon the courts to determine the 'appropriate' interpretation or meaning thereof.⁴²

Botha reiterated that, 'the written and spoken word are imperfect renderings of human thought, and in the case of legislation.... courts are obliged to use specific rules of interpretation to construe the meaning legislations.'⁴³ The aim of interpretation is to discover the correct meaning of the words used and, for Botha, the original meaning of a word is lost in the linguistic act and which has to be recaptured through the aid of the rules of interpretation.⁴⁴

Fiscal statutes are voluminous and complex and some of them have been repeatedly amended⁴⁵ over a long period of time.⁴⁶ Tax statutes are too long, too obscure, and they are becoming longer, more obscure and more complex.⁴⁷ There is a need to be well equipped about the know-how of how to interpret them. The bright minds of the tax court judges must be blessed with the wisdom of interpretation, so that they can be able to articulate, without anomalies, what was meant and intended by the sculptors of the Acts, the Legislature.

Interpretation of fiscal statutes is also important in that it seeks to address the issue of ambiguity. If legislation is ambiguous, the rules of interpretation enlighten a

⁴⁰ Ibid Fanyana ka Mdumbe (2004) 19 2 *SA Publiekreg* 472-481 at 473

⁴¹ Wikipedia 'Purposive Rule' Available at http://en.wikipedia.org/wiki/purposive_rule [Accessed on 27 June 2011]

⁴² Ibid

⁴³ Christo Botha *Statutory Interpretation: An Introduction for Students* 3ed (1998) 2, see also J De Ville 'Meaning and Statutory Interpretation' (1999) 62 *THRHR* 373-389 at 374

⁴⁴ J De Ville 'Meaning and Statutory Interpretation' (1999) 62 *THRHR* 373-389 at 374

⁴⁵ The first Income Tax Act of South Africa was the Cape Additional Taxation Act 36 of 1904 and it was repealed by various other Acts until to the current Income Tax Act 58 of 1962, see also D Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 2.1B

⁴⁶ *Standard General Insurance Co Ltd v Commissioner of Customs and Excise* 2005 (2) SA 168 at para 22

⁴⁷ Hubert H Monroe *Intolerable Inquisition? Reflections on the Law of Tax* (1981) 35

clear understanding of the provision under scrutiny and remove the vagueness. Interpretation of fiscal legislation also enables the courts to prevent clauses, sentences or words from being superfluous, void or insignificant.⁴⁸ The *contra fiscum* rule is advantageous to the taxpayer because it propounds that if the courts are in doubt or faced with any ambiguity, taxpayer will be given benefit of the doubt.⁴⁹

2.3. The intention of the Legislature

The objective of the ‘intention of the legislature’ rule is to ascertain the legislature’s policy in enacting the provision and interpreting it in a manner so as not to defeat the policy.⁵⁰ This may mean, in appropriate circumstances, giving an expansive meaning, and in other cases, a restrictive meaning to a word or phrase, depending on the policy of the legislature in enacting such legislation.⁵¹ In *CIR v Kuttel*⁵² for example, a restrictive meaning was given to the words ‘ordinarily resident’ by the Appellate Division on the basis that the policy of the legislature was to extent the interest exemption concessions to those persons not ordinarily resident in the Republic so as to encourage them to invest in the country. The court held that there was no reason to extend the meaning of ‘ordinarily resident’ so as to defeat the policy which would have been the case should an expansive meaning has been applied.⁵³

The *Kuttel* case illustrates that one of the main objective of the judiciary when interpreting fiscal legislation is to ascertain the intention of the legislature. The problem is how should the determination of the ‘intention of the legislature’ be done? Where do we draw the line?⁵⁴

Lessons can be drawn in *CIRv Delfos*⁵⁵ case, where Wessels CJ said that, ‘... in no case in a taxing Act are we to give a section a narrower or wider meaning than its apparent meaning, for in all cases of interpretation we must take the whole statute

⁴⁸ See J Silke ‘The Interpretation of Fiscal Legislation- Canons of Construction, Recent Judicial Comments and New Approaches’ (1995) 58 *Acta Juridica* 123-168 at 153

⁴⁹ Ibid T S Emslie et al at 17

⁵⁰ See *Glen Anil Development Corporation v SIR* 37 SATC 19

⁵¹ GK Goldswain ‘The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change’ (2008) 16 2 *Meditari Accountancy Research* 107-121 at 112

⁵² 54 SATC 298

⁵³ Ibid GK Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 112

⁵⁴ See G Goldswain ‘Winds of Change II: Absurd Results’ (2009) 23 *Tax Panning* 44-45 at 45

⁵⁵ 1933 AD 242 at 254

into consideration and so arrive at the true intention of the legislature.’ In support of this case, Botha JA in *Glen Anil Development Corporation Ltd v SIR*⁵⁶ said that, ‘... it is clear from the remarks of Wessels CJ in the *Delfos* case... that even in the interpretation of fiscal legislation the true intention of the legislature is of paramount importance, and, I should say decisive.’⁵⁷ However, Froneman J in *Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others*⁵⁸ viewed that, the concept of the ‘intention of the legislature’ does not apply in a system of judicial review based on the supremacy of the Constitution because the Constitution and not Parliament, is sovereign.⁵⁹

2.4. Ambiguity and Obscurity

2.4.1. General

Meyerowitz reiterated that problems of interpretation only arise where the provision in question is ambiguous or obscure.⁶⁰ He goes on to say that, if the meaning of words of a section is perfectly clear, the problem of interpretation does not arise.⁶¹ The literal approach is the primary rule of interpretation however, if the rule fails to clear up the ambiguity or vagueness, then this rule is departed from allowing interpreters to resort to evidence outside the text itself.⁶² This is also known as the ‘golden rule’ of interpretation. The court will turn to the so-called ‘secondary aids’⁶³ to interpretation to find the intention of the legislature. If the ‘secondary aids to interpretation could not ascertain the intention of the legislature, courts will apply the ‘tertiary aids’⁶⁴ of interpretation to legislation.⁶⁵

Ambiguity has been regarded by the courts as the threshold for inviting contextual factors such as the preamble of an Act, long title, headings, purpose, the

⁵⁶ 1975 (4) SA 715 (A) at 334, 37 SATC 19

⁵⁷ See also K Jodaarn *et al*, *SILKE: South African 2007 Income Tax* (2006) 9

⁵⁸ 1994 (3) BCLR 80 (SC) at page 87

⁵⁹ GK Goldswain ‘The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change’ (2008) 16 2 *Meditari Accountancy Research* 107-121 at 114

⁶⁰ D Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 3.2 para 3.1

⁶¹ Ibid D Meyerowitz (2006-2007) 3.2 para 3.1, see also *New Union Goldfield Ltd v CIR* 1950 (3) SA 392 (A) at 404, *Enerst v CIR* 1954 (1) SA 318 (A) at 324

⁶² Robert Benson *The Interpretation Game: How judges and Lawyers Make the Law* (2008) 12

⁶³ For example the long title of an Act, preamble of the Act, the schedules, the headings to chapters and sections, dictionary meaning, etc

⁶⁴ For example the common law presumptions

⁶⁵ C Rautenbach *et al Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (2004)

presumptions, etc.⁶⁶ ‘Ambiguity’ is defined in the *Oxford English Dictionary* as ‘the quality of being open to more than one interpretation, inexactness.’⁶⁷ The word derived from the Latin word ambiguous which means ‘going here and there, uncertain, doubtful.’⁶⁸ However, it must be borne in mind that what seems an absurdity to one man does not seem absurd to another and that it is dangerous to speculate as to the intention of the legislature.⁶⁹

2.4.2. The *Contra fiscum* rule

The *contra fiscum* rule⁷⁰ of interpretation states that, where any statutory provision which makes inroads on the rights of the individual is ambiguous, the ambiguity must be resolved in favour of the individual whose rights are thereby diminished.⁷¹ In other words, when a provision of the Act is reasonably capable of two constructions, the court will place the construction upon it that imposes the smaller burden on the taxpayer.⁷²

Meyerowitz, in his article, ‘Has the *Contra Fiscum* Rule Vanished’, noted that there is ample South African authority (of which it is not necessary to cite all) evidencing the existence of this rule.⁷³ In the *Hulett*⁷⁴ case in 1912, Innes ACJ, as then he was, said that, ‘... in a taxing statute the proper course is, in cases of doubtful construction, is to give the benefit of the doubt to the person sought to be charged.’ In *Estate Reynolds v CIR*⁷⁵ it was said, ‘... in a matter of doubt we are bound to invoke the rule of interpretation *contra fiscum*.’ In *Shell’s Annadale Farm Pty Ltd v CIR*⁷⁶, the court extended the *contra fiscum* rule to cases not only where there is an ambiguity in the wording of an Act in question but also where there is an ambiguity

⁶⁶ J De Ville ‘Meaning and Statutory Interpretation’ (1999) 62 *THRHR* 373-389 at 374

⁶⁷ Catherine Soanes and Sara Hawker *Compact Oxford English Dictionary for Students* (2006)

⁶⁸ In principle, therefore, ambiguity does not differ from polysemy (that is the existence of several meanings in a single word), see J De Ville ‘Meaning and Statutory Interpretation’ (1999) 62 *THRHR* 373-389 at 386

⁶⁹ See De Villiers JA in *Shenker v The Master & Another* 1936 AD 136 at 143

⁷⁰ This principle literally mean ‘against the fiscus’, see RC Williams *Income Tax in South Africa: Law and Practice* 4ed (2006) 9 para 9.3

⁷¹ Ibid TS Emslie et al at 17

⁷² K Jodaarn et al *SILKE: South African 2007 Income Tax* (2006) 9, see also RC Williams ibid at 9

⁷³ David Meyerowitz ‘Has the *Contra Fiscum* Rule Vanished?’ (1995) 58 334 *Acta Juridica* 79-88 at 79

⁷⁴ *Hulett & Sons Ltd v Resident Magistrate, Lower Tugela* 1912 AD 677

⁷⁵ 1937 AD 57 at 70, see also Centlivres CJ in *Israelsohn v CIR* 1952 (3) SA 529 (A) at 540, and also Lord Tinkerton in *Inland Revenue Commissioners v Ross & Coulter and Others* 1948 1 All ER 616 at 625, and also D Meyerowitz ‘Has the *Contra Fiscum* Rule Vanished?’ (1995) 58 334 *Acta Juridica* 79-88 at 79

⁷⁶ 1999 (C), 62 SATC 97

about the intention of the legislature, even if there was no obvious ambiguity in the wording.

Meyerowitz also viewed that there is the continued existence and application of the *contra fiscum* rule which appears to have lost some if not all its significance.⁷⁷ Dennis Davis noted in *The Taxpayer*, an extract from the late Rex Welsh, an outstanding tax advocate, who wrote that the old-fashioned maxim *contra fiscum* must be amended to read *pro fisco omnia praesumuntur*, meaning that everything should be presumed in favour of the *fiscus*.⁷⁸ However, it must be noted that when interpreting anti-avoidance legislation, the *contra fiscum* rule has limited application.⁷⁹ As was recognised in the *Glen Anil Corporation*⁸⁰ case where the court averred that, an anti-avoidance provision should ‘... be construed... in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed.’

In a nutshell, the *contra fiscum* rule has been and still remains part of the South African common law and is not in conflict with the Constitution. In fact, it contemplates the principles underpinning the Constitution by ensuring an element of equity in the interpretation of fiscal legislation.⁸¹

⁷⁷ David Meyerowitz et al ‘The Contra Fiscum Rule’ (2006) 55 2 *The Taxpayer* 36-37 at 36

⁷⁸ Ibid

⁷⁹ See David Clegg ‘Purposive Approach: Interpretation of Tax Law’ (2008) 22 *Tax Planning* 26-27 at 27

⁸⁰ 1975 (4) SA 715 (A), 37 SATC 319 at 334

⁸¹ GK Goldswain ‘The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change’ (2008) 16 2 *Meditari Accountancy Research* 107-121 at 116

CHAPTER 3: CANONS OF INTERPRETATION AND THE CONSTITUTION

3.1. Introduction

The canons of construction are interpretive directives or way-marks, deriving from English common law and forming part of present-day case law and statute law.⁸² They carry varying degrees of weight depending on their closeness to preferred or privileged approaches to interpretation of fiscal statutes in the South African legal system, and they are relied on to justify, explain and lend legitimacy to the outcomes of reasoned constructions of statutes and of the Constitution.⁸³

They form part of the South African common law and they have no status as legal rules; they are just conceptual models applied by judges and others interpreters (for example, revenue authorities or customs officers) grappling with the meaning of particular legislative provisions.⁸⁴ Failure to ‘follow’ or ‘apply’ a rule of statutory interpretation is not an appealable or reviewable error. Although bad interpretations may be appealed or revealed, the error lies in failing to interpret the statute correctly, not in failing to apply a particular statutory interpretation rule.⁸⁵

The rules of interpretation are important for several reasons. They inform interpreters what values and factors to take into account when dealing with a legislative text. They supply the vocabulary in which texts are analysed and explained, and they shape the arguments used by interpreters in defending their preferred interpretation and by judges in justifying their decisions;⁸⁶ thus bringing certainty into the judiciary about the subject of interpretation of statutes. However, it has been said that for every canon pointing that way, there is bound to be another one pointing another way. This has been referred to as them ‘hunting in pairs’.⁸⁷

⁸² Loorence Du Plessis *Re-Interpretation of Stautes* (2005) 128

⁸³ Ibid Du Plessis

⁸⁴ T Emslie et al *Tax Cases and Materials* 3ed (2001) 15

⁸⁵ Ruth Sullivan *Statutory Interpretation* 2ed (2007) 30

⁸⁶ Ibid Sullivan at 2

⁸⁷ ⁸⁷ TS Emslie, DM Davis and SJ Hutton *Income Tax Cases and Material* 3ed (2001) 15-16, see also Lawrence Baxter *Administrative Law* 315, and also Llewellyn (1950) 3 *Vanderbilt Law Review* 395, quoted in MacCormack *Legal Reasoning and Legal Theory* (1978) 207

In *Glen Anil Development Corporation Ltd v SIR*,⁸⁸ it was held that the interpretive aids used by the courts in interpreting other statutes also apply to the interpretation of tax Acts. Trevor Emslie in *The Taxpayer* highlighted that the law of taxation, possibly more so than other branches of the law, requires constant interpretation and re-interpretation of the legislation in terms of which it is levied, principally due to the fact that the legislation is- in the case of most taxes- amended each and every year, giving rise annually to a fresh statute as amended.⁸⁹

It is important to note Dennis Davis in *The Taxpayer* who viewed that, although the Darwin's theory in respect of the evolution of mankind is accepted by many it still remains controversial. He noted that the same can be said in regard to the evolution of interpretation of statutes, from literal reading of the language used to the purposive approach which is gaining ground, particularly as applicable to taxing statutes.⁹⁰

Be that may be, the rules of interpretation can never bring certainty in the interpretation of fiscal statutes. Emslie reiterates that the ideal of certainty in tax law remains as elusive as ever, and the challenge facing students, teachers and practitioners alike is to 'manage' uncertainty as to the tax consequences of economic acts [and the interpretation thereof] in as prudent and professional a manner as possible.⁹¹

3.2. The Traditional/Orthodox Approach: The Literal/Textual Approach

3.2.1. General

The principal canon of interpretation in respect of taxation of statutes, indeed of all statutes, often called the cardinal rule, is the literal/textual approach.⁹² According to the literal/textual approach, the true meaning of a statutory provision is to be sought

⁸⁸ Supra

⁸⁹ David Meyerowitz, Trevor S Emslie and Dennis M Davis 'The So-called Method of Purposive Construction of Legislation' (2008) 57 12 *The Taxpayer* 224-228 at 224

⁹⁰ David Meyerowitz Trevor S Emslie and Dennis M Davis 'The Evolution in the Interpretation of Tax Statutes' (2008) 57 9 *The Taxpayer* 161-163 at 161

⁹¹ T Emslie and D Davis *et al Supplement to Income Tax Cases and Materials* (2008) preface

⁹² HR Hahlo and Ellison Kahn *The South African Legal System and its Background* (1968) 180, see also D Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 3.4 para 3.6

virtually exclusively in the very words used by the legislature.⁹³ There is no doubt that the literal or textual approach takes precedence above all other approaches when interpreting fiscal legislation. The ordinary grammatical and literal meaning of words is also referred to as the primary rule of interpretation.⁹⁴ The ordinary meaning of a word or a group of words is not their dictionary meaning, but the meaning that would be understood by a competent language user upon reading the words in their immediate context.⁹⁵

The rationale of the literal/textual approach is twofold. First is that, 'words themselves are the surest, safest evidence of the author's actual subjective intentions (intention of the legislature).'⁹⁶ The second rationale is objective, it states that 'the law has to be objectively knowable so that people can rely upon it in planning their affairs' and it is plain to all reasonable people.⁹⁷ Nicholas JA, delivering the judgement of the Appellate Division, as it then was, in *R Koster & Son Pty Ltd & another v CIR*⁹⁸ said that the rule is well established 'that in construing a provision of an Act of Parliament the plain meaning of its language must be adopted ...'⁹⁹

The premises of the literal meaning approach in South Africa is the maxim, *judicis est ius dicere sed non dare*. This maxim entails that, the judicial function is passive, to 'interpret, discover or state' the law rather than to 'make it'.¹⁰⁰ Interpretation is in general to ascertain the intention of the legislature (law maker) from a study of the provisions in question and if the intention of the legislature is not expressed, there is a *casus omissus* which cannot be supplied by the courts whose sole duty is to interpret the Act as it stands.¹⁰¹

⁹³ Linda van Schalkwyk and Bernard Geldenhuys 'Section 80A(c)(ii) of the Income Tax Act and the Interpretation of Tax Statutes in South Africa' (2009) 17 2 *Meditary Accountancy Research* 167-185 at 170 see also George E Devenish *Interpretation of Statutes* (1992) 26, and also EJP Smit and AV Naude *Law, Government and People* (2007) 36

⁹⁴ Ibid GK Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 111

⁹⁵ R Sullivan *Statutory Interpretation* 2ed (2007) 50

⁹⁶ R Benson *The Interpretation Game: How judges and Lawyers Make the Law* (2008) 8

⁹⁷ Ibid

⁹⁸ 47 SATC 24 at 32

⁹⁹ See also K Jodaarn et al *SILKE: South African 2007 Income Tax* (2006) 9

¹⁰⁰ Ibid TS Emslie et al at 16

¹⁰¹ *Louis Zinn Organization Pty Ltd* 1958 (4) SA 477 (A) at 485H, see also *New Union Goldfield* case at 407 and also *Summit Industrial Corporation v Jade Transporters* 1987 (2) SA 583 (A) at 596J-597B

The literal approach dates back from the aforementioned case of *Partington v Attorney General*¹⁰² where in his dictum, Lord Cairns state that, ‘if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be...’¹⁰³ This dictum had been approved by the South African courts, for example, de Villiers JA did approve and followed this dictum in *CIR v George Forest Timber Co*¹⁰⁴ and ever since, it has been referred to South African cases repeatedly.¹⁰⁵

Also the Appellate Division in the *Simpson*¹⁰⁶ case, followed the *dicta* in *Cape Brandy Syndicate* case where Rowlatt J state that, ‘... in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about tax... one can only look fairly at the language used.’¹⁰⁷ Silke on *South African Income Tax* viewed that the above statement means that, ‘the court must administer the Act (Income Tax) according to its plain language, and if the language is plain, it must be given effect to even if the result to the taxpayer is harsh and unfair.’¹⁰⁸

Meyerowitz viewed that a grammatical and logical construction must be placed on the words in a statute.¹⁰⁹ The words must be read in light of their popular or ordinary and natural sense, carelessness in drafting notwithstanding, and the context must not be ignored.¹¹⁰ At the same time ‘considerations which may serve to interpret expressions which are obscure or ambiguous cannot be invoked so as to stigmatise words which are plain’.¹¹¹ However, it must be borne in mind that ‘what seems an absurdity to one man does not seem absurd to another.’¹¹² The absurdity must be glaring, not just a mere likelihood.¹¹³

¹⁰² Supra

¹⁰³ *Partington v Attorney General* 1869 21 LT 370 at 375, LR 4 HR 100 at 122

¹⁰⁴ 1924 AD 516, 1 SATC 20

¹⁰⁵ *CIR v Wolf* 1928 AD 177 at 185, *New Era Consolidated Ltd v CIR* 1951 (3) SA 211 (T) at 215, *CIR v Estate Kohler* 1953 (2) SA 584 (A) at 592, *Loewenstein v COT* 1956 (4) SA 766 (FC) at 772

¹⁰⁶ supra

¹⁰⁷ *Cape Brandy Syndicate* case at 71

¹⁰⁸ Ibid K Jordaan at al at para 25.1, see also T Steyn ‘Tax Laws: Old Rules, New Tools’ (2009) 9 5 *Without Prejudice* 6-7 at 6

¹⁰⁹ D Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 3.5 para 3.10

¹¹⁰ *New Union Goldfield Ltd v Ltd* 1950 (3) SA 392 (A) at 404, *CIR v SA Fire and Accident Insurance Co Ltd* 1960 (3) SA 1 (A) at 9

¹¹¹ *New Goldfield* case at 405

¹¹² *Savage’s* case at 408-9

¹¹³ Ibid Meyerowitz at 109

There is no equity about a tax.¹¹⁴ The extent of the taxpayer's liability must of necessity be determined with reference to the language of the statute unaided by equitable considerations.¹¹⁵ The South African judiciary has indicated that, when applying the literal rule of interpretation, the ordinary, grammatical wording is decisive about the legislature's intention; there is no necessity to look further.¹¹⁶ There is no mystique about tax law and the intention of the legislature is determined by looking fairly at the language used.¹¹⁷ In the *Partington*¹¹⁸ case above, it was submitted that the strict and literal rule of interpretation was incorrectly perceived by the judiciary as a mechanism to protect a taxpayer from poorly drafted, unclear, uncertain and arbitrary provisions.

However, the literal rule's application may often be difficult, for what is the 'literal meaning'?¹¹⁹ Still on this point, Shreiner JA in *Savage v CIR*¹²⁰ remarked that,

... what seems clear to one man may not seem clear to another. This consideration must also, I think, be borne in mind where one refers to the literal, ordinary, natural or primary meaning of words or expressions. The "literal" meaning is not something revealed to judges by sort of authentic dictionary; it is only what individual judges think is the literal meaning,...¹²¹

With this, it is important to highlight the short comings of the literal approach.

3.2.2. Short comings of the literal/textual approach

The literal approach's road to fame had been clouded by various shortcomings resulting in the adoption of other rules of interpretation, chiefly the purposive approach. First and foremost, the primary rule can be departed from if the ordinary grammatical language gives rise to absurdity. In such a case, the court is justified

¹¹⁴ See the *dictum* of Rowlatt J in *Cape Brandy Syndicate* case supra at 71

¹¹⁵ Ibid TS Emslie et al at 16

¹¹⁶ G Goldswain 'Winds of Change II: Absurd Results' (2009) 23 *Tax Panning* 44-45 at 44

¹¹⁷ These are the words of Coetzee J in *SIR v Kirsch* 1978 (3) SA 93 (T)

¹¹⁸ Supra

¹¹⁹ D Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 3.5 para 3.9

¹²⁰ 1951 (4) SA 400 (A) at 410

¹²¹ See also T Steyn 'Tax Laws: Old Rules, New Tools' (2009) 9 5 *Without Prejudice* 6-7 at 6

from departing from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature.¹²²

‘A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used’, these are the words of Holmes in one of his opinions for the United States Supreme Court in the case of *Towne v Eisner*.¹²³ Word ‘meanings are cultural artefacts produced in the course of history’¹²⁴ and ‘there can never be a dictionary of all words in all contexts because contexts are infinite as culture itself and culture is constantly inventing new things for words by using them in new contexts.’¹²⁵

In addition, Goldswain noted that, owing to the very nature of, and more specifically, the translation of legislation from Afrikaans to English or the *vice versa*, the meaning of words in legislation are often not entirely clear and the legislature’s intention is not manifest.¹²⁶ For example, in *Geldenhuis v CIR* 14 SATC 419, the court had to decide on the meaning of the words ‘received by’ as used in the definition of the ‘gross income’ of section 1 of the Income Tax Act.¹²⁷ Fortunately, the meaning attributed by the court to the words ‘received by’ bore little relationship to its ordinary grammatical meaning. If the court had not restricted its meaning to ‘received by the taxpayer on his own behalf and for his own benefit’, it would have led to absurd results, for example, loans should have been taxable and amount received by agents on a principal’s behalf would have been taxable in the hands of the agent.¹²⁸

Professor Emslie, in his book *Tax Cases and Materials* viewed that ‘the literal meaning to the interpretation of statutes is a convenient fiction’ and that ‘it is

¹²² GK Goldswain ‘The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change’ (2008) 16 2 *Meditari Accountancy Research* 107-121 at 111, see also *Venter v R* 1907 TS 910, *M v COT* 21 SATC 16

¹²³ *Towne v Eisner* (1918) 245 U.S 418 at 425

¹²⁴ R Benson *The Interpretation Game: How judges and Lawyers Make the Law* (2008) 74

¹²⁵ *Ibid* R Benson at 34

¹²⁶ GK Goldswain ‘The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change’ (2008) 16 2 *Meditari Accountancy Research* 107-121 at 112

¹²⁷ 58 of 1962

¹²⁸ *Geldenhuis v CIR* 14 SATC 419 at 430, see also GK Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 112

naive to believe that statutes can be interpreted literally.¹²⁹ He goes on to say that, linguistic philosophers such as Wittgenstein have pointed out that words, sentences and texts can never have meaning in themselves: they are used in the context that they have meaning.¹³⁰ Moreover, judges who purport to lay down the ‘literal meaning’ of a legislative provision in reality resort to a device which justifies their construction rather than informs it.¹³¹

Plain language meaning lost the way in the case of *Commissioner, SARS v Airworld CC & Another*¹³² where Combrinck JA found out that the word ‘beneficiary’ was capable of attributing various different meanings if construed in its ordinary meaning.¹³³ Doubt has been cast on whether the strict and literal interpretation rule was ever part of the South African common law even long before the adoption of the Constitution.¹³⁴ Devenish support this point by giving reference to a teleological methodology of interpretation used by the popular Roman-Dutch scholars such as De Groot and Voet, who advocated a purposive methodology against the background of natural law.¹³⁵

Goldswain noted that, since the advent of the Constitution, arguments against the continued application of the strict and literal rule have gained momentum. Many commentators, including the judiciary, have suggested that a purposive approach should be followed.¹³⁶ In *Du Plessis & Others v De Klerk & Another*¹³⁷, it was viewed that constitutional interpretation is concerned with the recognition and application of Constitutional issues and not with the literal meaning of legislation.

¹²⁹ TS Emslie et al *Income Tax Cases and Material* 3ed 16

¹³⁰ Ibid *Income Tax Cases and Material* 3ed 16, see also *The Interpretation Game: How judges and Lawyers Make the Law* (2008) 35

¹³¹ Ibid TS Emslie et al at 16, see also Dennis V Cowen ‘The Interpretation of Statutes and the Concept of “The Intention of the Legislature”’ (1980) 43 *THRHR* 374

¹³² 2008 (3) SA 335 (SCA) at 340

¹³³ See D Clegg ‘Purposive Approach: Interpretation of Tax Law’ (2008) 22 *Tax Planning* 26-27 at 26, and also TS Emslie and DM Davis *Supplementary to Income Tax Cases and Materials* (2008) 4

¹³⁴ G Goldswain ‘Winds of Change III: The Constitution- A catalyst for Change’ (2009) 23 *Tax Panning* 69-71 at 69

¹³⁵ George E Devenish ‘Teleological Evaluations: A Theory and Modus Operandi of Statutory Interpretation in South Africa’ (1991) 6 1 *SA Public Law* at 375, see also ‘Winds of Change III: The Constitution- A catalyst for Change’ (2009) 23 *Tax Panning* 69-71 at 69-70

¹³⁶ G Goldswain ‘Winds of Change III: The Constitution- A catalyst for Change’ (2009) 23 *Tax Panning* 69-71 at 70

¹³⁷ 1996 (5) BCLR 658 (CC) at 722

3.3. The Modern Approach: Purposive/Contextual Approach

The purposive and contextual approaches are regarded as the new or modern approaches to the interpretation of fiscal statutes and other legislations in general. These approaches were adopted by the courts in its willingness to go beyond the literal grammatical meaning of words in order to ascertain the intention of the legislature. The purposive approach and the contextual approach are intertwined in that, the ‘purposive approach’ attributes meaning to a legislative provision in the light of the purpose it seeks to achieve and the ‘contextual approach’ is used to establish that purpose.¹³⁸

The purposive approach has become a staple of modern interpretation. It is used not only when the language of a text is found to be ambiguous but in every case and at every stage of interpretation. This reliance is justified why the interaction between language and purpose that is present in all communication, including legislation.¹³⁹ The interpreter, listener or reader infers the purpose from what is being said and the circumstances in which it is being said, and at the same time understands what is being said in light of the purpose.¹⁴⁰

The purposive approach’s primary objective to the interpretation of fiscal statutes is to determine the purpose of the legislation.¹⁴¹ Consequently, the application and utilisation of the presumptions and the various aids to interpretation are very important tools for the interpreters in the quest for the scope and purpose of the legislation concerned.¹⁴²

Trevor Emslie in *The Taxpayer* is of much authority when he state that, ...when one bears in mind that the object of all statutory interpretation is to ascertain the legal fiction that we label “the intention of the legislature”, there can clearly be no quarrel with the notion that the “purpose” of the legislation- as a whole, and with reference to the particular words being interpreted- should be used as a guide in ascertaining the intention of the Legislature.¹⁴³

¹³⁸ L Du Plessis *Re-Interpretation of Statutes* (2002) 96-7 and 111, see also WA Joubert and JA Faris *The Law of South Africa* (2001) 285 and 297

¹³⁹ R Sullivan *Statutory Interpretation* 2ed (2007) 194

¹⁴⁰ Ibid Sullivan

¹⁴¹ Devenish at 35

¹⁴² Botha *Statutory Interpretation: An Introduction for Students* 3ed (1998) 31-32

¹⁴³ D Meyerowitz et al ‘The So-called Method of Purposive Construction of Legislation’ (2008) 57 12 *The Taxpayer* 224-228 at 225

‘Legislative purpose’ refers to a number of different things, but chiefly, it refers to the primary aim or object of an enactment, that is, the effect the legislature hopes to produce through the operation of its rules or scheme.¹⁴⁴ It also refers to the function performed by a provision or a series of provisions in a legislative scheme, or the contribution a provision make to an existing body of law. It is assumed that every word of the legislation, every feature of a legislative text, is there and takes the form it does because it contributes in some particular way to the scheme of the Act or the body of existing law. This contribution is its purpose, its *raison d'être*.¹⁴⁵

Davenish, in supporting the purposive over the literal approach, explains that ‘interpretation should not depend exclusively on the literal meaning of words according to semantic and grammatical analysis. A purposive methodology looks beyond the manifested intention. The purposive theory has its ratio in the fact that a statute is a legislative communication between the legislature and the public that is inherently purposive. The interpreter must endeavour to infer the design and purpose which lies behind the legislation. In order to do this the interpreter should make use of an unqualified contextual approach which allows an unconditional examination of all internal and external sources’.¹⁴⁶

Furthermore, Shreiner JA in his minority decision in *Jaga v Donges* said that, ‘Certainly no less important than the oft repeated statement that the words and expressions used in the statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context’.¹⁴⁷ In addition, the judge explained that the language of the statute, the subject-matter of the statute, its apparent scope and purpose and its background, all constituted the context against which legislation ought to be interpreted.¹⁴⁸

The courts may modify or adapt the initial meaning of the text to harmonise it with the purpose of the legislation. The role of the courts is flexible and it is not

¹⁴⁴ This objective could be a social or economic goal, such as tax exemption, tax benefit, preventing double taxation, job creation or a deduction allowance.

¹⁴⁵ R Sullivan *Statutory Interpretation* 2ed (2007) 195-6

¹⁴⁶ GE Devenish *Interpretation of Statutes* 1st ed (1992) para 35.6, see also D Meyerowitz, TS Emslie and DM Davis ‘The Evolution in the Interpretation of Tax Statutes’ (2008) 57 9 *The Taxpayer* 161-163 at 162

¹⁴⁷ *Jaga v Donges* 1950 (4) SA 653 (A) at 662G, see also C Botha *Statutory Interpretation: An Introduction for Students* 4ed (2005) 51

¹⁴⁸ *Supra Jaga v Donges* at 662G-H, see also Fanyana ka Mdumbe (2004) 19 2 *SA Publiekreg* 472-481 at 474

limited to mere textual analysis and mechanical application of the legislation.¹⁴⁹ As opposite to the *judicis est ius dicere sed non dare* maxim, Botha argues that during statutory interpretation, the judiciary has an ‘inherent lawmaking discretion’.¹⁵⁰ However, this discretion can be qualified by the prerequisite that modification of the meaning of the text is possible only if and when the scope and purpose of the legislation is absolutely clear, and also supports such modification.¹⁵¹

The purposive approach’s affluence had been informed by the canons of taxation which includes necessity, equality or equity, certainty etc. In addition, other common law principles and presumptions had made this approach viable and made it a dream come true in South African judiciary upon which fiscal statutes should be construed. A good example is the *contra fiscum* rule discussed above and the presumption against double taxation to be discussed below.

Goldswain considers that the judiciary has accepted the purposive approach to the interpretation of legislation as the correct one to follow in principle.¹⁵² The following are recent case law decisions highlighting the acceptance of the purposive approach by the South African judicial.

3.3.1. *De Beers Marine Pty Ltd v CSARS*¹⁵³

In *De Beers Marine* case Nienaber JA emphasised the cardinal importance of the context in the words or phrases are used when interpreting tax statutes.¹⁵⁴ At paragraph 7, Nienaber JA when dealing with the meaning of the word ‘export’ for the purpose of section 20(4) of the Income Tax Act- which draws a distinction between export and home consumption- stated that the word must ‘take its colour, like a chameleon, from its setting and surrounds in the Act’. Nienaber JA thus prescribed a modern (purposive) approach to the interpretation of tax statutes.¹⁵⁵

¹⁴⁹ Botha at 31-32, see also J De Ville ‘Meaning and Statutory Interpretation’ (1999) 62 *THRHR* 373-389 at 377

¹⁵⁰ *Ibid* Botha 3ed (1998) 31-32

¹⁵¹ *Ibid* Botha

¹⁵² GK Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 117, see also Goldswain ‘Winds of Change IV: Some Guidelines’ (2009) 23 *Tax Planning* 77-78 at 77

¹⁵³ 2002 (3) All SA 181 (A)

¹⁵⁴ Linda van Schalkwyk and Bernard Geldenhuys ‘Tainted Element-II : Misuse and abuse-A Modern Approach’ (2010) 24 31 *Tax Planning: corporate and Personal* 31-32 at 31

¹⁵⁵ See D Meyerowitz et al ‘The So-called Method of Purposive Construction of Legislation’ (2008) 57 12 *The Taxpayer* 224-228 at 224, see also L van Schalkwyk and B Geldenhuys (2009) 17 2 *Meditary Accountancy Research* 167-185 at 171,

3.3.2. *Standard General Insurance Company v CCE*¹⁵⁶

In this case, Nugent and Lewis JJA reference the dictum of Shreiner JA in the case of *Jaga v Donges* N.O157 and Nienaber JA in *De Beers* case¹⁵⁸ as authority of the application of the modern approach to the interpretation of tax statutes. At paragraph 25, instead of attempting to draw inferences about the drafter's intention, from an uncertain premise, the judges found great assistance in drawing their conclusion by considering the extent to which the meaning given to the words achieves or defeats the apparent scope and purpose of the legislation.¹⁵⁹

3.3.3. *CSARS v Airworld CC and Another*¹⁶⁰

In this case, Hurt AJA favoured a purposive construction to tax statutes. As authority for this view, he cited the dictum of Nugent J and Lewis JA in *Standard General Insurance Company Ltd v CCE*¹⁶¹. Hurt AJA required that the purpose of a provision be established and used 'in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention'.¹⁶² He thus prescribed a modern (purposive) approach to the interpretation of tax statutes.

The court *a quo* found that the word 'beneficiary' could have more than one meaning and in this case, Hurt AJA applied the method of purposive construction. The learned judge reiterated that, 'in recent years courts have placed emphasis on the purpose with which the Legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention'.¹⁶³

¹⁵⁶ 2004 (2) All SA 376 (SCA)

¹⁵⁷ 1950 (4) SA 653 at 662

¹⁵⁸ Supra at para 7

¹⁵⁹ See also L van Schalkwyk and B Geldenhuys 'Tainted Element-II : Misuse and abuse-A Modern Approach' (2010) 24 31 *Tax Planning: corporate and Personal* 31-32 at 31

¹⁶⁰ 2008 (2) All SA 593

¹⁶¹ Supra at para 35

¹⁶² At para 25, see also T Steyn 'Tax Laws: Old Rules, New Tools' (2009) 9 5 *Without Prejudice* 6-7 at 6, and also L van Schalkwyk and B Geldenhuys (2009) 17 2 *Meditary Accountancy Research* 167-185 at 171, and See D Clegg 'Purposive Approach: Interpretation of Tax Law' (2008) 22 *Tax Planning* 26-27 at 27

¹⁶³ At 235, see also D Meyerowitz et al 'The So-called Method of Purposive Construction of Legislation' (2008) 57 12 *The Taxpayer* 224-228 at 224

3.3.4. Metropolitan Life Ltd v CSARS¹⁶⁴

In Metropolitan Life Ltd case, Davis J approved the dictum of Hurt AJA in *Airworld* case¹⁶⁵. At page 170, he indicated that the Act and its amendments should be ‘interpreted purposively and holistically and that provisions should be given a clear meaning whenever plausible’. He then approved the modern (purposive) approach to the interpretation of tax statutes.¹⁶⁶

The above recent tax decisions confirms that the modern purposive approach to the interpretation of the tax statutes is already authoritative in South Africa. The wording of section 1 of the Income Tax Act 58 of 1962, with the heading ‘Interpretation’, reads as follows, ‘[i]n this Act, unless the ‘context’ otherwise indicates-...’ (Emphasis provided).

This approach is keeping with what the legislature can be expected to intend against the background of the values of the constitutional democracy based on the Bill of Rights, than the heavy hand of unyielding authority implicit in the traditional, strict approach to the interpretation of taxing statutes¹⁶⁷ by ascertaining the intention of Parliament by reading an Act as a whole and placing in context the ends sought to be achieved (the objective) and the relationship between the individual provisions of the Act (the scheme).¹⁶⁸ However, in the South African judiciary, there have not been step by step guidelines on how to apply the purposive approach to interpretation in practice.

3.4. The Mischief rule

This rule was developed in the famous *Heydon* case¹⁶⁹ and it is regarded as the forerunner of the purposive/contextual approach to interpretation.¹⁷⁰ The ‘mischief

¹⁶⁴ (2008) 70 SATC 162

¹⁶⁵ Supra at para 25

¹⁶⁶ See L van Schalkwyk and B Geldenhuys (2009) 17 2 *Meditary Accountancy Research* 167-185 at 171, see also L van Schalkwyk and B Geldenhuys ‘Tainted Element-II : Misuse and abuse-A Modern Approach’ (2010) 24 31 *Tax Planning: corporate and Personal* 31-32 at 31

¹⁶⁷ T Steyn ‘Tax Laws: Old Rules, New Tools’ (2009) 9 5 *Without Prejudice* 6-7 at 6, see also Dennis Davis ‘Democracy: Its influence upon the Process of Constitutional Interpretation (1994) 10 *SAJHR* 103 at 104, and also Lourence Du Plessis and Jacques De Ville ‘Bill of Rights Interpretation in the South African Context’ (1993) 4 *Stell LR* 63 at 199 and 356

¹⁶⁸ See G Goldswain ‘Winds of Change II: Absurd Results’ (2009) 23 *Tax Panning* 44-45 at 44

¹⁶⁹ [1584] 76 ER 637

¹⁷⁰ C Rautenbach *et el Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (2004) 24

rule' applies to any statutory provision designed to suppress a particular form of mischief which the legislature perceives as harmful to the public interest.¹⁷¹

According to this rule, in order to arrive at the purpose or meaning of the legislature, four questions had to be asked, namely:

- What was the law before the measure under consideration was passed?
- What was the mischief or defect for which the law as it stood before the measure in question had not being passed had not provided?
- What remedy had the legislature created?
- What is the reason for that remedy?

Monroe¹⁷² viewed that, 'it is an accepted and salutary principle when interpreting a written law to start by identifying the mischief which the law was designed to remedy.' Monroe goes on to say that it make sense, therefore, to 'approach the law of tax by looking first at the circumstances in which income tax entered the law. What were the considerations which governed its shape and its structure?'¹⁷³ In supporting the mischief rule, the Appellate Division, as it then was, in *Glen Anil Development Corporation v CIR*¹⁷⁴, viewed that section 103 of the Income Tax Act should be construed '... in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed.'¹⁷⁵

3.5. The Common Law Presumptions of Statutory interpretation (tertiary aids)

There is no presumption as to a tax.¹⁷⁶ However, presumptions are legal rules derived from the common law and they are intrinsic to the principle of legality because they qualify Parliament's legislative enactments and exist side by side with the provisions of all statutes.¹⁷⁷ They are described as assumptions that the courts take into account

¹⁷¹ HR Hahlo and E Khan *The South African Legal System and its Background* (1968) 182-186, see also T Emslie *Income Tax Cases and Material* 3ed 17

¹⁷² Ibid HH Monroe at 2

¹⁷³ Ibid

¹⁷⁴ 1975 (4) SA 715 (A) at 334

¹⁷⁵ See also T Steyn 'Tax Laws: Old Rules, New Tools' (2009) 9 5 *Without Prejudice* 6-7 at 6

¹⁷⁶ Supra *Partington* case

¹⁷⁷ Baxter *Administrative Law* (1984) 314-5, see also TS Emslie et al *Income Tax Cases and Material* 3ed (2001) 15

in interpreting statutory provisions.¹⁷⁸ According to Botha, all the intra-textual and extra-textual aids as well as the presumption assist in determining the purpose of the legislation.¹⁷⁹

Cowen viewed that,

[P]resumptions are legal principles, comprising a basic or fundamental part of the legal system. Statutes are not isolated phenomena but should be integrated or harmonised with the whole legal system of which they form a part. It follows, therefore, that such presumptions should be taken in to account by the interpreter, right from the outset, no matter how seemingly clear, the words of the enactment may seem considered in isolation. Furthermore, when all the relevant contextual considerations have been duly weighed, the interpreter should again test his conclusions in the light of the presumptions.¹⁸⁰

In *ITC 1384*¹⁸¹ the Free State High Court believed that the legislature is presumed not to have intended an unfair, unjust or unreasonable result and that a taxing statute must be so interpreted as to be as unoppressive as possible.¹⁸² In this case, the judge considers public interest and stress that public affairs, on fiscal level, must be administered fairly, reasonable and justly. Moreover, it was put forth that, taxing acts have by their very nature great social import and may therefore cause great damage to vital social requirements if unwisely framed and improperly administered.¹⁸³

In trying to construe the meaning of the word ‘beneficiary’ in the *Airworld*¹⁸⁴ case reliance was placed on various cases¹⁸⁵ for the proposition that there is a presumption or reasonable supposition that the same words or expressions in the same Act are intended to bear the same meaning where no indication to the contrary is given.¹⁸⁶

¹⁷⁸ Lovemore Madhuku *An Introduction to Zimbabwean Law* (2010) 160

¹⁷⁹ Ibid Botha at 18 and 77, see also J De Ville ‘Meaning and Statutory Interpretation’ (1999) 62 *THRHR* 373-389 at 378

¹⁸⁰ DV Cowen ‘The Interpretation of Statutes and the Concept of the Intention of the Legislature’ (1980) 43 *THRHR* 374 at 392

¹⁸¹ 46 SATC 95 at 101 and 106

¹⁸² See T Steyn (2009) 9 5 *Without Prejudice* 6-7 at 7, see also J Silke *The Interpretation of Fiscal Legislation-Canons of Construction, Recent Judicial Comments and New Approaches* (1995) 58 *Acta Juridica* 123-168 at 123

¹⁸³ Ibid J Silke at 126

¹⁸⁴ *Supra*

¹⁸⁵ See *Minister of Interior v Machadodorp Investments Pty Ltd* 1957 (2) SA 395 (A) at 404D, *Consolidated Textile Mills Ltd v President of the Industrial Court* 1989 (1) SA 302 (A) at 308C-D

¹⁸⁶ TS Emslie and DM Davis *Supplementary to Income Tax: Cases and Materials* (2010) 2

The presumption against double taxation expresses the notion that when interpreting fiscal statutes, the interpreter have to take heed of the principle of equality by not taxing the very little income of the taxpayer twice. This presumption is embedded and it informs the purposive approach.

3.6. Constitutional Interpretation: The Constitution of the Republic of South Africa

Before the advent of the new constitutional dispensation the literal approach continued to dominate the judicial approach to the interpretation of fiscal legislation. The role of taxation had changed over centuries, from the mere collections of taxes to support a sovereign ruler and his or her courtiers in earlier times to collection of taxes to achieve social, economic and other objectives in a modern democracy.¹⁸⁷ Constitutional interpretation is therefore not concerned with a search to find the literal meaning of legislation, but the recognition and application of Constitutional values.¹⁸⁸

Fiscal legislation, in modern times, have always have a purpose and this is particularly so in South Africa at present, where there is need to uplift the previously oppressed and disadvantaged population.¹⁸⁹ It therefore makes sense when interpreting legislation, to establish the purpose behind the enactment of any legislation. The coming of the Constitution led the strict interpretation of fiscal legislation to give way to a more equitable approach in line with the principles of the Constitution (purposive and contextual approach).¹⁹⁰

Section 39 of the Constitution contains the interpretation clause and section 39(1)(b) read out that when interpreting the Bill of Rights, a court, tribunal or forum, 'must consider international law.' Article 31 of the Vienna Convention on the Law of Treaties of 1969 favours a purposive approach and it states that, 'a treaty shall be

¹⁸⁷ GK Goldswain 'The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change' (2008) 16 2 *Meditari Accountancy Research* 107-121 at 114

¹⁸⁸ G Goldswain 'Winds of Change III: The Constitution- A catalyst for Change' (2009) 23 *Tax Panning* 69-71 at 70

¹⁸⁹ Ibid Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 114

¹⁹⁰ Silke 1995 at 136, see also GK Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 114, and also D Davis 'Democracy- Its Influence upon the Process of Constitutional Interpretation' (1994) 10 *SAJHR* 103, and Du Plessis and De Ville 'Bills of Rights Interpretation in the South African Context' (1993) 4 *Stell LR* 63, 199 and 356 and John Murphy 'The Constitutional Review of Taxation' (1995) 58 *Acta Juridica* 89 at 89

interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose.¹⁹¹

Section 39(2) states that, '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' This provision does not state that the Bill of Rights should be consulted only if the wording used in the statute is not clear or if strict literal interpretation would be inconsistent with the Constitution. It requires the interpreter to consider the external context of legislation (the values and principles contained in the Bill of Rights) right from the outset.¹⁹² The above entails that, interpretation of statutes starts with the Constitution and not the legislative text.¹⁹³

In effect, in interpreting legislation, the judiciary is obliged to promote, amongst other things, the protection of liberty of a person, their property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. Unfairness, inequality and unreasonableness are no longer tolerated in either the legislation (including fiscal statutes) or the conduct of public officials.¹⁹⁴ These qualities are central to the purposive theory to the interpretation of statutes.

However, it must be noted that, virtually every provision of the Income Tax Act, *prima facie*, interferes with a person's fundamental rights in the Bill of Rights.¹⁹⁵ In fact, the very imposition of tax violates the right not to be deprived of one's property.¹⁹⁶ Tax audits, investigations and search and seizure procedures undermine the right to privacy¹⁹⁷ as well as with possibly with the right to dignity.¹⁹⁸ Answering written inquiries or attending a judiciary inquiry and being compelled to answer questions, could offend against the right to remain silent and not to be compelled to

¹⁹¹ Article 31(1)

¹⁹² Ibid Fanyana ka Mdumbe (2004) 19 2 *SA Publiekreg* 472-481 at 475

¹⁹³ C Rautenbach *et al Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (2004) 27

¹⁹⁴ G Goldswain 'Winds of Change III: The Constitution- A catalyst for Change' (2009) 23 *Tax Panning* 69-71 at 70

¹⁹⁵ RC Williams *Income Tax in South Africa: Law and Practice* 4ed (2006) 9

¹⁹⁶ Section 25 of the Constitution

¹⁹⁷ Section 14 of the Constitution

¹⁹⁸ Section 10 of the Constitution

give self-incriminating evidence.¹⁹⁹ The right to equality²⁰⁰ clashes with sections that provide, for example, that taxpayer over the age of 65 are entitled to a larger medical deduction or tax rebate than those under the age of 65.²⁰¹

Despite such inconsistency and actions, these rights are not absolute. They are subject to a limitation in terms of section 36 of the Constitution which states that the rights in the Bill of Rights may be ‘limited in terms of law of general application to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality, freedom taking into account all relevant factors...’ This limitation of rights provision is a major obstacle for taxpayers wishing to contest the violation of their constitutional rights.²⁰² Moreover, In *Law Society of Zimbabwe v Minister of finance*²⁰³ the Supreme Court of Zimbabwe expressed the view that the constitutionality of a tax cannot be questioned simply because it is actually or potentially harsh.

The significance of the Constitutional injunction to the courts can be fully understood if it is read together with the supremacy clause²⁰⁴ and the application provision which determines that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of the state.²⁰⁵ The effect of these provisions, read together, is that the courts cannot ignore section 39(2), which is couched in peremptory terms, in favour of the common law approaches, for the reason that the Constitution is the *lex fundamentalis* of South Africa’s new legal order and must inform the courts’ approach to statutory interpretation (including fiscal statutes).²⁰⁶

In addition, the judicial authority of the Republic is vested in the courts.²⁰⁷ The courts are formally vested with the power to test the Constitutional validity of a government or parliamentary action, including legislation passed by that body. Moreover, in terms of section 167(5) of the Constitution, only the Constitutional

¹⁹⁹ Section 35(3)(j) of the Constitution

²⁰⁰ Section 9 of the Constitution

²⁰¹ See also GK Goldswain ‘The Purposive Approach to the Interpretation of fiscal Legislation- the Winds of Change’ (2008) 16 2 *Meditari Accountancy Research* 107-121 at 118

²⁰² Ibid Goldswain (2008) 16 2 *Meditari Accountancy Research* 107-121 at 118

²⁰³ 61 SATC 458 (SCZ)

²⁰⁴ Section 2 of the Constitution

²⁰⁵ Section 8(1) of the Constitution

²⁰⁶ Ibid Fanyana ka Mdumbe at 475

²⁰⁷ Section 165(1) of the Constitution

Court may make a final decision on whether an Act of Parliament is constitutional. It must confirm an order of invalidity made by another court before that order has validity.²⁰⁸

Constitutional interpretation is similar to, but not identical to ‘ordinary’ statutory interpretation. The difference was explained by Fronman J in the *Matiso*²⁰⁹ case. The judge viewed that, interpretation of the Constitution is directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of other legislation is directed at ascertaining whether that legislation is capable of an interpretation which confirms with the fundamental values or principles of the Constitution.²¹⁰

However, the above discussion does not mean that the rules of interpretation are no longer relevant. It should be emphasised that they now play a secondary role in the process of interpretation.²¹¹

3.7. Is there order of primacy?

Professor Du Plessis note that in South Africa, it appears that interpreters of fiscal legislation (judicial officers, practitioners and academics) tend to arrange the rules of interpretation in a mostly inarticulate, hierarchical order of primacy.²¹² In interpretive reasoning the justificatory weight of any specific canon of construction derives from its ranking in this order of primacy, which also tends to determine the manner and sequence in which canons are invoked in course of interpretive endeavours.²¹³

The canons of interpretation which express the paramountcy of the intention of the legislature in interpretation of fiscal statutes, as well as the pre-eminence of (clear and unambiguous) language in conveying that intention, rank highest in the order of primacy.²¹⁴ Other less primary (or more secondary), lower-level canons of

²⁰⁸ G Goldswain ‘Winds of Change III: The Constitution- A catalyst for Change’ (2009) 23 *Tax Panning* 69-71 at 69

²⁰⁹ *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) 597G-H

²¹⁰ See C Rautenbach *et al Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (2004) 14

²¹¹ *Ibid* Fanyana ka Mdumbe at 475

²¹² L Du Plessis ‘The (Re-) Systematization of the Canons of and Aids to Statutory Interpretation’ (2005) 122 3 *SALJ* 591-613 at 591

²¹³ *Ibid*

²¹⁴ *Ibid* Du Plessis (2005) 122 3 *SALJ* 591-613 at 592

construction may be invoked only in instances where the language of a provision lets an interpreter down (because it is vague or ambiguous, for instance).²¹⁵

However, the canons of interpretation are non-hierarchical in nature. Interpretation is determined by interpreters, as shall be discussed in the next chapter. Meaning is not discovered in a text, but is made in dealing with the text.²¹⁶

There is a view that not all canons of interpretation are legal rules, for instance, Wiechers argues that the (common law) rules of statutory interpretation are not really legal rules, but they are grounds of deduction on which the courts rely when they interpret statutes (fiscal), in other words, recognised process of thinking which a court will probably follow, although not obliged to do so.²¹⁷ In contrast, the presumptions of statutory interpretation are, according to Wiechers, common law legal rules.²¹⁸

Du Plessis qualifies the above view when he notes that it is not significant to decide whether all or only some of the canons of interpretation are legal rules.²¹⁹ All these canons do carry interpretive weight- how much (rightly or wrongly) depends on each one's ranking in the conventional order of primacy.²²⁰ Moreover, the canons of construction form part of either the common law or legislation that 'every court, tribunal or forum' must interpret and develop in a manner promoting the 'spirit, purport and objective of the Bills of Rights'.²²¹ The Constitution does not rank the common law with any order of primacy.

3.8. The Anti-Avoidance Transactions and Section 80A(c)(ii) of the Income Tax Act

It has been said that the most controversial issues in tax law interpretation arise in the context of tax avoidance transactions.²²² Every day, taxpayers structure transactions so as to minimise tax liability. The question is: when does this activity cease being

²¹⁵ Ibid

²¹⁶ L Du Plessis *The Re-interpretation of Statutes* (2002) 7-9 and 99-100

²¹⁷ Marinus Wiechers *Administratiefreg* 2ed (1984) 42-45

²¹⁸ Ibid

²¹⁹ Ibid Du Plessis (2005) 122 3 SALJ 591-613 at 593

²²⁰ M Wiechers *Administratiefreg* 2ed (1984) 128-129

²²¹ See section 39(2) of the Constitution

²²² V Thuronyi *Comparative Tax Law* (2003) 133

legitimate tax minimization and become tax avoidance which the law prohibits?²²³

The tax avoidance transactions are contained in the general anti-avoidance rule which was enacted in section 103(1) of the Income Tax Act 58 of 1962, as amended (the Income Tax Act). This section was repealed by section 36(1)(a) of the Revenue Laws Amendment Act²²⁴ and replaced by a new general anti-avoidance rule, sections 80A to 80L, which targets the impermissible tax avoidance arrangements.²²⁵ Section 80A identifies four requirements to determine whether an arrangement is an impermissible tax avoidance arrangement namely:

- a. An avoidance arrangement is entered into or carried out,
- b. It results in a tax benefit,
- c. Any one of the following ‘tainted elements’ is present:
 - Abnormality regarding means, manner, right or obligations;
 - A lack of commercial substance in whole or in part and
 - Misuse or abuse of the provisions the Income Tax Act.
- d. The sole main aim is to obtain a tax benefit.

The misuse or abuse requirement is contained in section 80A(c)(ii) of the Income Tax Act. The concept of misuse or abuse is new to South African income tax environment.²²⁶ According to the Revised Proposals on Tax Avoidance and section 103 of the Income Tax Act, the rationale behind the insertion of section 80A(c)(ii) was to reinforce the modern approach to the interpretation of tax statutes ‘in order to find the meaning that harmonizes the wording, spirit and purpose of the provisions of the Income Tax Act’.²²⁷ However, it seems that the section is self-serving for SARS.²²⁸

The Explanatory Memorandum to the Revenue Laws Amendment Bill of 2006 states that the legislature relied on, among others, the Canadian precedent in introducing the ‘misuse or abuse’ concept.²²⁹ Section 80A(c)(ii) of the Income Tax

²²³ Ibid

²²⁴ 21 of 2006

²²⁵ L van Schalkwyk and B Geldenhuys ‘Section 80A(c)(ii) of the Income Tax Act and the Interpretation of Tax Statutes in South Africa’ (2009) 17 2 *Meditary Accountancy Research* 167-185 at 167

²²⁶ Ibid at 168

²²⁷ South African Revenue Services (SARS) ‘Tax Avoidance and section 103 of the Income Tax Act: Revised Proposal’ (2006) Available at <http://www.sars.co.za>. [Accessed on 10 August 2011]

²²⁸ The spirit of tax law is, of course, what SARS think it should be.

²²⁹ Ibid L van Schalkwyk and B Geldenhuys(2009) 17 2 *Meditary Accountancy Research* 167-185 at 168

Act seem to have its roots from the Canadian general anti-avoidance rule, which is contained in section 245 of the Canadian Federal Income Tax Act of 1985.²³⁰ The *Canada Trustco Mortgage Company*²³¹ case is regarded as the leading case on section 245(4) of the Canadian Income Tax Act²³² which provides a basis for distinguishing between legitimate tax planning and abusive tax avoidance.²³³

As stated above, section 80A(c)(ii)'s rationale is to reinforce the modern approach (the purposive and contextual approaches) to the interpretation of tax statutes. This entails that the modern approach is already authoritative in South Africa as discussed above. 'Reinforce' implies strengthening or supporting an existing concept or structure.²³⁴ This begs the following question: Does section 80A(c)(ii) strengthen (increase) or support (maintain) the modern approach?²³⁵

Van Schalkwyk and Geldenhuys viewed that section 80A(c)(ii) of the Income Tax Act does not require the court to look for some inner and spiritual meaning in the legislation that will not become apparent in a normal contextual and/or purposive approach to the interpretation of tax statutes. The section, thus, does not 'strengthen', but merely 'support' the modern approach to the interpretation of tax statutes in South Africa.²³⁶ However, this just begs the question as to what the purpose of the provision is.

Section 80A(c)(ii) is crucial to the operation of section 80A since it applies both to situations 'in the context of business' and situations 'in a context other than business'.²³⁷ Cilliers indicates that this section can be described as, 'the heart of section 80A'.²³⁸ The section can be utilised against any avoidance arrangement presumed by SARS to directly or indirectly misuse or abuse any of the provisions of

²³⁰ C Cilliers 'Thou Shall not Peep at thy Neighbour's Wife: Section 80A(c)(ii) of the Income Tax Act and the Abuse of Rights' (2008) *The Taxpayer* 85-92 at 86, see also D Clegg and R Stretch *Income Tax in South Africa* (2007) 26 at para 3.5 and also A De Koker *SILKE on South African Income Tax* (2007) 19.7

²³¹ *Canada Trustco Mortgage Company v Canada* 2005 SCC 54 at para 54

²³² R.S.C 1985, c.1

²³³ Ibid De Koker at 19.7 see also D Meyerowitz et al 'Tax Avoidance: Section 80A(c)(ii)' (2007) *The Taxpayer* 147

²³⁴ *The New Oxford Dictionary of English* (2001) 1565

²³⁵ Ibid L van Schalkwyk and B Geldenhuys (2009) 17 *2 Meditary Accountancy Research* 167-185 at 170

²³⁶ Ibid at 183

²³⁷ Ibid

²³⁸ Ibid C Cilliers (2008) *The Taxpayer* at 85-86

the Income Tax Act.²³⁹ This could lead to implications to taxpayers and tax officers in South Africa notably; in order to avoid section 80A(c)(ii), taxpayers could be required to adhere to a purposive theory when construing the provisions they rely upon. Similarly, when contemplating the application of section 80A(c)(ii), tax officers could be obliged to base 'misuse or abuse' allegations on a purposive theory.²⁴⁰ Nevertheless, the purposive theory itself can easily lead to begging the question of what the purpose is.

But, is a legislative authority (section 80A(c)(ii)) to reinforce the modern approach necessary in South Africa? Fortunately, this question is answered in affirmative because, first, the modern approach to the interpretation of tax statutes is inherently embedded in the Income Tax Act. This is so because the definition section of the Income Tax Act (section 1) contains the following proviso; 'unless the context otherwise indicates'.²⁴¹ However, regardless of the above, it is doubtful whether the proviso to the definition section of the Income Tax Act can serve as a legislative authority for applying the modern approach to the interpretation of tax statutes. Moreover, the definition section in the Income Tax Act, and even other fiscal statutes, had always been there and it shows that the so-called modern approach is not so modern after all.

Second, a legislative authority is necessary in South Africa because of the effect of the Constitution. As highlighted above, the Constitution is the supreme law of the Republic and is superior to all other legislation. Section 39(1) of the Constitution gives specific instructions on how to interpret the Bill of Rights. Section 39(2) deals with the interpretation of any other legislation. These sections command a similar interpretive approach to both the Constitution and other statutes. In effect, constitutional interpretation determines and shapes statutory interpretation.²⁴²

²³⁹ Ibid Meyerowitz et al (2007) *The Taxpayer* at 160, see also Davis Dennis, Olivier L, Urquhart G, Ferreira P and Roeleveld J *Juta's Income Tax* (2007) 80G-I

²⁴⁰ Ibid L van Schalkwyk and B Geldenhuys (2009) 17 2 *Meditary Accountancy Research* 167-185 at 173

²⁴¹ See L van Schalkwyk and B Geldenhuys (2009) 17 2 *Meditary Accountancy Research* 167-185 at 177

²⁴² L Du Plessis *Reinterpretation of Statutes* (2002) 133

CHAPTER 4: THE COURTS, 'VEIL PIERCING'

4.1. The continued dominance of the literal/textual approach

In practice, the state of play in the South African judiciary is different and it is interesting. There is a continued dominance of the literal approach in South African courts despite being regarded as an orthodox approach. This is so because the courts deviate from the so-called 'plain meaning' of the text only if it is unclear or ambiguous, and the eventual application of the other rules of interpretation depends on how clear the text may seem to the particular interpreter.²⁴³ Even so, sometimes an ambiguity lies more in the mind of the judge than in the 'literal' language of a statute.²⁴⁴

Recent case law also shows the continued dominance of the literal approach. The words of Zulman J in *Welch's Estate v Commissioner, SARS*²⁴⁵ is instructive to this regard. The learned judge viewed that, it is incorrect to 'generalise about the intended reach of revenue legislation. Its reach must be determined by the language which the Legislature has chosen to express its will.' In addition, in its comments on statutory interpretation, the court in the case of *Commissioner, SARS v Executor Frith's Estate*²⁴⁶ stated that the primary rule in construction of statutory provision is to ascertain the intention of the legislature and this is achieved, in the first instance, by giving words their ordinary grammatical meaning.

The reluctance of the courts to abandon the literal approach to interpretation of statutes was also figured in the *Standard Bank Corp*²⁴⁷ case where, in responding to the contention that the literal rule was on fade, the court held that, '[m]indful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the legislature, the purpose of a statutory provision can provide a pointer to such interpretation where there is ambiguity.' In this regard, the court viewed that the

²⁴³ Botha *Statutory Interpretation: An Introduction for Students* 3ed (1998) 30, see also J De Ville 'Meaning and Statutory Interpretation' (1999) 62 *THRHR* 373-389 at 377

²⁴⁴ See D Meyerowitz 'Has the *Contra Fiscum* Rule Vanished?' (1995) 58 334 *Acta Juridica* 79-88 at 88

²⁴⁵ 2005 (4) SA 173 (SCA) at 186

²⁴⁶ 2001 (2) SA 261 (SCA) at 273 para 2

²⁴⁷ *Standard Bank Corporation v Competition Commission* 2000 (2) SA 797 (SCA) at para 21

purpose and the context of legislation becomes relevant when the literal meaning of words has failed to establish the intention of the legislature.²⁴⁸

Moreover, the courts' faith in the literal approach was also expounded in the *East London Municipality v Abrahamse*²⁴⁹, where Harms JA, writing for the majority, had this to say about interpretation: 'Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.' More resilience was also shown in the *Public Carriers Association*²⁵⁰ case where Smallberger JA stated that, 'the notion of what is known as a "purposive approach" is not entirely alien to our law.' Instead, Smallberger JA preferred to follow the literal interpretation approach as being entrenched in South African law and he sought not to challenge it.²⁵¹

4.2. Rationale for the literal/textual approaches' resilience

The main justification for the continued dominance of the literal approach is the effect of the judicial precedent doctrine. This doctrine is also called the doctrine of *stare decisis* and it entails that a decision established in a previous judgement is binding upon a lower court, and that courts of equal rankings must follow their own previous decisions.²⁵² Judges and magistrates in lower courts, if they encounter a case resembling previous cases, in facts or by rule of law, they are confident that it will be decided the same way. The Constitutional Court and the Supreme Court of Appeal are not forced to adhere to their own precedents, but it is rare not to do so.²⁵³

Case by case, judges 'weave the seamless web of the law from the thread of previous cases; the basic structure, the fundamental principles, remain the same.'²⁵⁴ Like relay, the literal/textual approach's baton stick is passed on from one judge to another, from court to court, whether higher or lower. This justifies the continued existence of the literal approach in the judiciary. In as much as the Constitution favours the purposive approach, the roots of the literal approach are still spreading in

²⁴⁸ See Fanyana ka Mdumbe (2004) 19 2 SA Publiekreg 472-481 at 477

²⁴⁹ 1997 (4) SA 613 (SCA) at 632G

²⁵⁰ *Public Carriers Association & Others v Toll Road Concessionaries Pty Ltd & Others* 1990 (1) SA 925 (A) at 943

²⁵¹ At 943

²⁵² Ibid K Jodaarn *et al* at 8

²⁵³ See R Benson *The Interpretation Game: How judges and Lawyers Make the Law* (2008) 18

²⁵⁴ Ibid at 18

the South African judiciary because they are embedded in case law precedents. The very precedents followed by the judiciary in the Republic are the very case law containing the ‘virus’, the literal/textual approach. It is impossible to imagine South African law without the doctrine of stare decisis and the literal/textual approach; they are firmly rooted in its history and practice.

4.3. The ‘Common sense approach’ or the ‘judicial/free approach’

It has been said above that if the intention of the legislature is not expressed, there is a *casus omissus*²⁵⁵ which cannot be supplied by the courts whose sole duty is to interpret the Act as it stands.²⁵⁶ Judges do not create the law but they interpret the law.²⁵⁷ Since the law is to be found in texts, the job of the interpreter is to dig out the meanings placed in those texts by their authors. The interpreter (judges), thus find the law others have written, and do not make it.²⁵⁸

However, in practice, ‘the interpreters of a law are not really constrained by legal language, precedents, rules, doctrines or principles, because these are not the reins of a horse that could control the reader’s behaviour. They are more like artist’s materials which the interpreter uses to create meanings.’²⁵⁹ The naked truth is that judges do make the law and they use their common sense to interpret legislation. In the case of *WJ Fourie Beleggings v Commissioner of the South African Revenue Services*,²⁶⁰ Leach AJA held that ‘although common sense had been described as “that most blunt of intellectual instruments”, it remained the most useful tool for deciding whether an amount was of a capital or of a revenue nature.’ The discussion below assumes a high level of competence and integrity on the part of tax judges.

Professor Benson in his book *The Interpretation Game: How judges and Lawyers make the Law* viewed that, judges and lawyers do make the law and that they do not follow the rules of interpretation.²⁶¹ With this, Benson noted that:

²⁵⁵ A matter or contingency not catered for in the Act

²⁵⁶ *Louis Zinn Organization Pty Ltd* 1958 (4) SA 477 (A) at 485H, see also *New Union Goldfield* case at 407 and also *Summit Industrial Corporation v Jade Transporters* 1987 (2) SA 583 (A) at 596J-597B, See also RC Williams *Income Tax in South Africa: Law and Practice* 4ed (2006) 8

²⁵⁷ *Judicis est ius dicere sed non dare*

²⁵⁸ R Benson *The Interpretation Game: How judges and Lawyers Make the Law* (2008) 6

²⁵⁹ *Ibid* at xv

²⁶⁰ 71 SATC 125

²⁶¹ *Ibid* R Benson at ix (foreword)

... interpreters never discover the meaning of a law by finding the “holding” of a case, the “literal words” of a document, the “legislative intent” of a statute, or the “original intent”, “structure”, or “purpose” of a Constitution. These simply are not things that can be discovered like buried treasures. They are cultural fictions, rather like the Santa Claus myth, useful or not depending upon what the reader and society wish to do with them.

The modern understanding of language and culture shows us that ‘meaning is not something that texts possess. It is something that interpreters [judges] produce and laws are no exception. The meaning of a law, whether it is a regulation, statute, case precedent, Constitution, contract, will or other legal document, does not reside in its text, but in the interpreters who give it meaning.’²⁶² Thus interpretation is not, and cannot be, concerned with recovering an original meaning, since there is and was no original meaning. Meaning, instead, comes into being through an interaction between the text and the interpreter.²⁶³

When judges interpret legislation, they purport to discover its meaning by reading the language of the text and to decipher the intention of the legislature. Judges work with texts whose wording was fixed in the past, but when reconstructing its meaning they draw current knowledge and their own understanding, experience and skills into consideration.²⁶⁴ They are both archaeologists (in theory) and artists (in practice) of the law. Archaeologists in that they locate meanings fixed in the past and artists in that they create new meanings to words.²⁶⁵

Lord Denning in *Seaford Court Estates v Asher*²⁶⁶ viewed that,

[A] judge must not alter the material of which the Act is woven but he can and should iron out the creases. When a defect appears, a judge cannot just fold his hands and blame the draftsmen. He must set to work on the constructive task of finding the intention of the Parliament and then he must supplement the written words so as to give force and life to the intention of the Legislature.

Over centuries, judges discovered bedrock principles of justice, the rights and duties required of human beings living in a complex society, and wove upon them the great webs of the common law of tax, torts, criminal and other areas of law, thus

²⁶² Ibid Benson at xv (preface)

²⁶³ J de Ville ‘Meaning and Statutory Interpretation’ (1999) 62 *THRHR* 373-389 at 376

²⁶⁴ R Sullivan *Statutory Interpretation* 2ed (2007) 29

²⁶⁵ Ibid

²⁶⁶ [1949] 2 All ER at 55

an accomplishment of the judges alone in which the legislative and executive played little role.²⁶⁷

In his post-script for lawyers, Professor Benson gave an interesting example when he said that, when a lawyer runs into a colleague who regales him with news of an interesting case he had just filed, the first question he will ask him is: “Who is the judge?”²⁶⁸ This highlights the fact that the law depends upon the interpreter and judges are the interpreters, they determine the way any fiscal statute is to be interpreted.

Judges in *bona fidei*, use ‘common sense’ when arriving at decisions and when interpreting legislations including fiscal legislation. Lord Atkins in *Donoghue v Stevenson*²⁶⁹ reiterated that, it is ‘an advantage to make it clear that the law ... is in accordance with sound common sense.’ In determining the various test used to inquire whether a particular receipt is one of revenue or capital nature, Friedman J in *ITC 1450*²⁷⁰ remarked that, ‘... one should not be led to a result in one’s classification of a receipt as income or capital which is, as I had occasion previously to remark, contrary to “sound commercial and good sense.”’

Moreover, In the determining whether the Pick ‘n Pay Trust had engaged in a profit making scheme in *CIR v Pick ‘n Pay Employee Share Purchase Trust*²⁷¹ case (leading case), Smalberger JA delivering the majority judgement of the court held that, on ‘a common sense approach’ the Trust had not been carrying on a business of trading in shares. The activities of the Trust were therefore not part of a scheme of profit making.²⁷²

Du Plessis²⁷³ view this approach as judicial activism. He argues that statutory interpretation is seen not as a science, but rather as an art that essentially involves making choices. Courts and other interpreters do not and cannot really rely on canons of construction to find the one and only correct or feasible meaning inherent in a text, but they do so to justify, explain and lend legitimacy to the interpretive outcome at

²⁶⁷ Ibid Benson at 18, see also J De Ville ‘Meaning and Statutory Interpretation’ (1999) 62 *THRHR* 373-389 at 379

²⁶⁸ Ibid R Benson at 140

²⁶⁹ 1932 UKHL 100

²⁷⁰ 51 SATC 70 at 76

²⁷¹ 1992 (4) SA 39 (A) at 56

²⁷² See also TS Emslie et al *Income Tax Cases and Material* 3ed (2001) 289

²⁷³ L Du Plessis *Re-Interpretation of Statutes* (2002) 97-8

which they arrive. The interpretation outcome is predetermined by the interpreting judge's pre-understanding.²⁷⁴

The 'common sense approach' is embedded in the South African judiciary; a good example where the South African courts applied this approach is where they handled the issue of 'apportionment'. The acceptable basis upon which an apportionment should be made is that which is 'fair and reasonable.' In *SIR v Guardian Assurance Holdings*²⁷⁵ case, the expenditure in question was apportioned on a 'sensible basis' which was held to be 'logical and fair.'²⁷⁶ In the *Tuck*²⁷⁷ case, the court suggested apportionment on a 50/50 basis as fair and reasonable.

The common sense approach is in line with the concept of reasonableness. Judges are reasonable persons; they use common sense during fiscal statute interpretation. A reasonable person does not have any extremes such as 'Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity or the agility of an acrobat'; he is just a person of ordinary prudence or has prudent common sense.²⁷⁸

However, it is important to note that the above view does not deny the existence of the common law canons of interpretation but it inspires that, when 'sucking their judicial thumbs', judges interpret fiscal statutes using their common sense. This entails that, if a literal/textual approach is appropriate or reasonable, judges considers it and they will apply it, and so is the purposive and contextual approach. Because the text being interpreted is legal, ordinary intuitions and common sense must be informed by these common law legal rules or principles.

4.4. Rationale for the Common sense approach

During interpretation, 'interpreters (judges) have extraordinary licence, and are influenced by their own psychological character, values and personal contexts. In this sense, legal interpretation is subjective. It differs widely with individual

²⁷⁴ Ibid Du Plessis at 126, see also De Ville *Constitutional and Statutory Interpretation* 29-33

²⁷⁵ 1976 (4) SA 522 (A) at 533E-534A

²⁷⁶ Ibid TS Emslie et al at 384

²⁷⁷ *CIR v Tucks* 1988 (3) SA 819 (A) at 835, see also TS Emslie et al *Income Tax Cases and Material* 3ed (2001) 287

²⁷⁸ See Holmes JA in *S v Burger* 1975 (4) SA 877 (A) at 879E, see also Van Den Heever in *Hershell v Mrupe* 1954 (3) SA 464 (A) at 490F

personalities.²⁷⁹ There are several reasons justifying the above view that judges determine interpretation of fiscal statutes without reference to the rules of interpretation but through their common sense. *Inter alia*, they are as follows:

4.4.1. The nature and the shortcomings of the rules of interpretation

It had been said above that the canons of construction are interpretive directives or way-marks which form part of the South African common law and they have no status as legal rules. They are just conceptual models applied by judges and others interpreters grappling with the meaning of particular legislative provisions.²⁸⁰ Failure to 'follow' or 'apply' a rule of statutory interpretation is not an appealable or reviewable error.

Professor Benson viewed that the intrinsic cannons of interpretation are too contradictory and enigmatic to be called rules, and are ignored as often as they are used by the courts because one [judge] to the other can apply them and justify any result they would like to reach.²⁸¹ He compared them to proverbs and aphorisms: there seem to be wise advice in them for every situation, but nothing can one really pin down, and nothing can one have to pay attention to if he/she does not want.²⁸²

What and whose context or purpose? How does someone define the borders of purpose/context from various purposes or contexts? Similar interpreters will arrive at different purposes when they construe the same provision. Contexts are boundless, it can never be determined fully in advance within which contexts a statutory provision will in future be applied (for example history, present circumstances, parts of the statutory texts, the Constitution).²⁸³ Botha notes that the purpose of the legislation appears to be nothing but a metaphor for the thoughts of the author.²⁸⁴ The purposive approach seems to suppress the *contra fiscum* rule.²⁸⁵ The short comings of the strict literal approach to the interpretation of fiscal statutes had been dealt up with in chapter 3 above.

²⁷⁹ R Benson *The Interpretation Game: How judges and Lawyers Make the Law* (2008) xv

²⁸⁰ TS Emslie et al *Income Tax Cases and Materials* 3ed (2001) 15

²⁸¹ Ibid R Benson at 37

²⁸² Ibid

²⁸³ J De Ville 'Meaning and Statutory Interpretation' (1999) 62 *THRHR* 373-389 at 376, see also Jonathan Culler *On Deconstruction: Theory and Criticism after Structuralism* (1982) 123

²⁸⁴ Botha *Statutory Interpretation: An Introduction for Students* 3ed (1998) 77, see also J De Ville 'Meaning and Statutory Interpretation' (1999) 62 *THRHR* 373-389 at 377

²⁸⁵ See D Meyerowitz et al (2008) 57 9 *The Taxpayer* 161-163 at 162, where it was viewed that the purposive approach may have the effect of consigning the *contra fiscum* rule to the dust heap.

The rules of interpretation had been said that they ‘hunt in pairs’, as stated above, in that for every rule pointing in one direction there is sure to be another pointing in some other direction (for every canon, there is a counter).²⁸⁶ If the literal approach or the ordinary meaning supports one outcome, while the purposive/contextual approach support another, the interpreter rely on his or her judgement to decide which outcome is better.

In *Pyott* case²⁸⁷, it has been said that anomalies should, if possible, be avoided in the construction of a tax statute. But this is not always possible, because whatever canon of interpretation is adopted, there will be anomalies.²⁸⁸ Centlivres AJA, as then he was, stated that,

If the words “any tax” at the beginning of section 8 (of the then Income Tax Act) are given their ordinary grammatical meaning they would include both the personal and provincial income tax; whether these words are construed literally or restrictively anomalies arise....²⁸⁹

The canons of construction exaggerate the degree to which the intention of the legislature may be discovered from the words of a statute and they at times misled presiding officers when construing fiscal statutes.²⁹⁰ A good example of such dilemma is portrayed in *The Taxpayer*, where Davis commented that when the design and purpose lying behind a taxing statute is to raise revenue, to apply the purposive approach to language of the provisions of the Act which do not literally impose a liability for tax, holds the danger that the Courts may interpret a provision to fall within the design and purpose although the wording of the provision does not support the construction.²⁹¹

Furthermore, an approach of having regard to the design and purpose which lies behind the legislation could also have consequences of a Court making good a *casus omissus* where there appears to be no good reason for the statute not having dealt with the circumstance.²⁹² It has been noted above that a tax Act deprives a taxpayer of portions of his funds and that the Act must clearly state the

²⁸⁶ L Baxter *Administrative Law* (1984) 315, see also T Emslie et al at 15-16

²⁸⁷ *Pyott Ltd v CIR* 1925 AD 298 at 315

²⁸⁸ D Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 3.8 para 3.16

²⁸⁹ *CIR v Brownstein* 1939 AD 156 at 164-5

²⁹⁰ *Ibid* HH Monroe at 62

²⁹¹ D Meyerowitz et al ‘The Evolution in the Interpretation of Tax Statutes’ (2008) 57 9 *The Taxpayer* 161-163 at 162

²⁹² *Ibid* at 163

circumstances in which the State may do so. There should be, however, as little as possible need to resort to the design and purpose of the Act to arrive at the taxpayer's liability.²⁹³

Moreover, the canons of interpretation also exaggerate both the certainty and the universality of the common law as a body of principles applicable, in the absence of statutes, to all possible cases.²⁹⁴ In addition, they minimise the possibility that the judge can, in his work of interpretation, fully use his common sense and reasonable analysis of each tax case at hand.

4.4.2. Ever-changing process of interpretation

Interpretation of legislation is ever-changing and so is fiscal legislation. Interpretation is a dynamic process, which can never be completed, since circumstances, perceptions, values and legislations always change. The Income Tax Act of South Africa had been repeatedly amended and repealed to the current one, even the current one is subject to yearly amendments.²⁹⁵ There can never be one final canon of interpretation cast in stone.²⁹⁶

Honourable Sachs J explained this ever-changing process of interpretation in *S v Mhlungu*²⁹⁷ as follows:

'I regard the question of interpretation to be one to which there can never be an absolute and definite answer and that, in particular... how to balance out competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this Court [Constitutional Court], then between our Court and other Courts, the legal profession, law schools, Parliament, and indirectly, with the public at large.'

4.4.3. Judicial discretion

Each case has its facts, which can influence the decision in a particular direction. It is believed that courts are the guardian of Constitutional rights and values, but not another super legislature. However where to draw the line during

²⁹³ Ibid

²⁹⁴ Ibid

²⁹⁵ See D Meyerowitz *Meyerowitz on Income Tax* (2006-2007) 2.1B

²⁹⁶ C Rautenbach *et al Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (2004)

²⁰

²⁹⁷ 1995 (3) SA 867 (CC) para 129

interpretation and application is one of the vexing questions still facing courts.²⁹⁸ Judicial discretion is the power of the courts to make some judicial decisions according to their discretion.²⁹⁹ This concept emerges from the doctrine of separation of powers which informs that the judicial is independent from the other spheres of the government, namely, the executive and the legislature.³⁰⁰

The judicial authority of the South Africa is vested in the courts and they are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour and prejudice.³⁰¹ No person or organ of the state may interfere with the functioning of the courts.³⁰² The common sense approach is heavily inspired by judicial independence. Judges are free to express themselves without any other organ of the state intervening; so long it is *intra vires*.

Had anyone ever wondered why judges split in deciding a case, rendering a majority versus a minority decision? It is also important to note that even when judges use their own discretion, neither do they arrive at the same decision nor do they use similar rules of interpretation. This is so because they are not born by a single parent nor are they programmed computers, in short, they are different. They are not just different physically but in many respects; way of thinking or ideology, background, beliefs, values and so forth. The case law has never been stable,³⁰³ there are rare cases held unanimously by judges in the South African tax law jurisprudence. Suited in their symbolic robes, the judges presiding in the Supreme Court of Appeal in Bloemfontein use different interpretive tools (chiefly common sense, though sometimes this is open to doubt) to reach certain (similar or different) conclusions upon interpretation of a similar tax statute (even a similar provision).

²⁹⁸ C Rautenbach *et al Politics, Socio-Economic Issues and Culture in Constitutional Adjudication* (2004)

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²⁹⁹ Wikipedia 'Judicial Discretion' Available at http://en.wikipedia.org/wiki/Judicial_discretion [Accessed on 10 July 2011]

³⁰⁰ It is important to note that in practice, this does not actually happen. Smit and Naude call it 'foolproof'. EJP Smit and AV Naude *Law, Government and People* (1997) 6

³⁰¹ Section 165(1) and (2) of the Constitution

³⁰² Section 165(3) of the Constitution

³⁰³ Ibid R Benson at 62

CHAPTER 5: CONCLUSION

With everything that has been said, this paper does not shy away from the conclusion that, in South African tax courts, the search for a unified theory of interpretation is a misguided quest and it is just a pipe dream because the rules of interpretation are just conceptual models applied by judges and others interpreters to justify their findings. Judges are the ones who determine how fiscal legislation must be construed and their determination differs from case to case. They, in creating meanings, have extraordinary license, and are inescapably influenced by their own psychological character, values and personal contexts. The 'interpretation game' will inevitably continue to pose vexed questions and, equally inevitably, result sometimes in vexed judicial 'solutions'.

Statutory interpretation is not, and can never been, a judicial science- it will remain a patchwork of different approaches. The best that one can hope for is that the scope for interpretational surprises will narrow, but even this is probably too much to hope for. Judges do their best, but there is no such thing as a right or a one-and-only answer.

The above discussion of case law and section 39(2) of the Constitution confirm that interpretation of fiscal legislation does not differ from the interpretation of other statutes. Judges are independent; it is not possible to predict with certainty how the courts might resolve a particular case and which rule of interpretation they are going to apply. Rules of statutory interpretation in each jurisdiction contain contradictory maxims, and because many situations require judgement, it is difficult to predict with certainty how a particular case will be decided. However, one can form a view as to probabilities. Such a view is informed by judicial style, judicial choice and judicial precedent.

It is important to conclude that, in theory, the automatic application of the strict literal approach to the interpretation of fiscal legislation is no longer a viable option for the judiciary especially in cases where inequitable, unreasonable and unjust consequences arise as a result of applying such approach. However, in practice, courts still have faith in this approach and it is still being applied. In as much as the coming into effect of the Constitution of the Republic of South Africa of 1996, suggested the application of the purposive approach over the strict literal

approach, the literal rule is still the first port of inquiry used by the courts when interpreting fiscal statutes and if it results to absurdity, that is where the courts deviate from this rule. It is also important to note that there is no order of primacy within the application of the rules of interpretation, primacy is determined by interpreters and it differs from one another.

University of Cape Town

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