To Prof R Sooste
With Best Regards
A.N. Rubinstein
SEPT 1992

BURDEN OF PROOF

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

* INCOME,
* ASSESSMENT,
* OBJECTION AND APPEAL.

PART 2

THEORETICAL ANALYSIS:
THE PRESENT TOWARDS THE FUTURE

by

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C H A P T E R 3

TO TAX AND TO PLEASE,

NO MORE THAN TO LOVE

AND TO BE WISE,

IS NOT GIVEN TO MEN.

Burke, Edmund

Speech on American Taxation (1774)

C H A P T E R 3

BURDEN OF PROOF IN ITS CONTEXT THE PRESENT TOWARDS THE FUTURE

3.1 INTRODUCTION

Even though Act 58 of 1962 is the culmination of a slow and complex evolution, some of the sections of the Act are virtually identical to sections of the New South Wales Act 1895 (59 Victoria 15).

It is unfortunate indeed that the framework of the Act, for the purpose of the statutory formula, is considerably inferior to the framework of Act 41 of 1917, Act 40 of 1925 and Act 31 of 1941.

The Act itself has negligible impact for the understanding and interpretation of the burden of proof in its context. The golden age of "burden of proof" is Act 31 of 1941.

Some of the erroneous conceptions concerning "burden of proof" have become so fossilized, that the interpretation of the burden of proof provisions of the Act, in terms of the language used by the Act, becomes daring and controversial.

Some of these controversial interpretations have the support of AD decisions, which decisions seem to have been overlooked or dismissed.[1]

It must be stressed that tax situations tend to be complex and that the modern world is in a constant state of flux. As facts vary, the legal implication of decisions based on one set of facts is not necessarily valid or useful for another set of facts.

The Act, however, is trustworthy and can always be relied upon.

The usual method of supporting statements by referring to decided cases or authorities is not followed.

The reason is simple, few cases or authorities support some of the contentions advanced,

The thrust of this thesis is limited to the interpretation of the Act through the Act, not through the cases.

It is an interpretation of the **"ipsissima verba"** of the Act as it relates to the burden of proof issue in its historical context.

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[1] Commissioner of Taxes v South Deeps Ltd (1918 AD 605) COT v Booysens Estates Ltd (32 SATC, 1918 AD 576) There are of course a great number of other cases which support the decision in the above two cases.

There was a **lacuna** in the 1925 Act and regulation 8, no longer contained the proviso in regulation 26 of the 1914 Act, which states that the burden of proof that the assessment is excessive shall lie on the appellant. However section 78 of Act 31 of 1941 and section 82 of Act 58 of 1962 contain a similar provision. Both the Booysens and the South Deeps case are binding **in pari materia**.

3.2 ACT 58 OF 1962

The Income Tax Act 58 of 1962 consolidates the law relating to taxation of incomes and donations.
For our purpose it is the law relating to the taxation of incomes, as it interlocks with the burden of proof concept which is of consequence and which shall be analyzed.

The English version of the Act was signed by the State President.

For the purpose of chapter 3, Act 58 of 1962 shall be referred to as the Act.

Chapter 3 and 4 of this thesis overlap to a limited extent. The thrust of chapter 3 is the evolutionary development of the burden of proof concept within the context of the Act. The thrust of chapter 4 is simply the analysis of section 82 of the Act.

3.2.1 STAGE 1 OBJECTION TO THE COMMISSIONER'S ASSESSMENT

3.2.1.1 WHAT IS TAXED IN TERMS OF THE STATUTORY FORMULA

The elegant and concise framework of section 7 of Act 31 of 1941 sets out the statutory formula in a lucid and rational manner.
It is unfortunate that the statutory formula section of Act 31 of 1941 is no longer with us as a separate structured entity.

In order to excavate the statutory formula from section 1, the interpretation section of the Act, it is now necessary to wade through; "domestic company","equity share capital", "child" etc.....

It is truly an obstacle course within a maze.

The statutory formula of the Act consists of three steps:

STEP 1: the determination of "**gross income**"
STEP 2: the determination of "**income**"
Step 3: the determination of "**taxable income**"

STEP 1

3.2.1.1.1 Gross income

The gross income step is linked with the non liability provision of section 82 of the Act.

Gross income is defined in section 1 of the Act. The changes from Act 31 of 1941 are as follows:

Section 7, Act 31 of 1941	Section 1, Act 58 of 1962
For the purposes of this Chapter-	
"gross income" means the total amount whether in cash or otherwise received by or accrued to or in favour of any person, excluding such receipts or accruals referred to in paragraphs (a) to (h) hereunder, in any year or period assessable under this Chapter from any source within the Union or deemed to be within the Union, and includes the following- (a) to (h).	"gross income", in relation to any year or period of assessment, means, in the case of any person, the total amount, in cash or otherwise, received by or accrued to in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature, but including without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely- (a) to (n).

The following points are, it is suggested, of consequence:

(a) The restriction "For the purpose of this Chapter" of Act 31 of 1941 has not been retained. This eliminates problems of interpretation. The definition binds the whole Act.

(b) The inclusion of the qualification "in the case of any person" emphasizes the relationship, and the difference, between total amount and "gross income".
The distinction between the total income in relation to a person and the total amount in relation to a person was not made in section 7 of Act 31 of 1941.

(c) "in cash or otherwise, received by or accrued to":
This has a completely different meaning from "whether in cash or otherwise received by or accrued to", of the 1941 Act.
The insertion of the comma between otherwise and received is crucial.

In the 1941 Act the total amount, whether in cash, or otherwise received by or accrued to, is the basis of gross income. The amount in cash is contrasted with amounts received by or accrued otherwise than in cash.
There are two possibilities:
i) amounts in cash
ii) amounts otherwise received by or accrued to.

In the Act there are four possible permutations:

i) **in cash** received by,

ii) **in cash** accrued to,

iii) **otherwise than in cash** received by,

IV) **otherwise than in cash** accrued to.

(d) In the Act, as in Act 31 of 1941 the "**total amount**" is the basis of gross income.

The "**total amount**" has two qualifications.
Firstly it must be in cash or quantifiable in cash.
If a receipt or accrual is not in cash, or quantifiable in cash, it is not an amount which is part of the total amount. It follows therefore that it would not be subject to section 82 of the Act, which imposes a burden of proof to be discharged in relation to an amount.
The second qualification of "**total amount**" is that it must be from a source within the Republic or deemed to be within the Republic.
It follows therefore that receipts or accruals which are not from a source within the Republic or deemed to be within the Republic are not part of the "total amounts" and as such are not "amounts". Therefore such receipts or accruals are not subject to section 82 of the Act, which deals specifically with the burden of proof of discharging that any amount is exempt or not liable to tax, or subject to certain deductions.

(e) From the "**total amount**", receipts or accruals of a capital nature are excluded.

(f) Certain amounts are specifically included in gross income. From the wording "**excluding such receipts or accruals of a capital nature as are not receipts or accruals referred to in paragraph (a) to (h) hereunder** " in section 7 of the 1941 Act, one can assume that the inclusions in paragraph (a) to (h), are of a capital nature.

In the Act however these inclusions are qualified by "whether of a capital nature or not".

With respect, this is difficult to reconcile with the definition of "gross income".

Basic analysis of the definition:

i) All amounts received or accrued are part of gross income.

ii) All receipts or accrual of a capital nature are excluded.

iii) Some receipts or accruals are specifically included.

It follows therefore that those receipts or accruals which are specifically included can only have been so included as being of a capital nature.

The qualification **(whether of a capital nature or not)** is, with respect, neither accurate nor necessary.

(g) The definition in the Act does not use the terminology of an "income nature". The terminology used is, **of a capital nature or not**. This is correct and imperative.
The terminology "**of an income nature**" which is currently used by our authorities is, with respect, meaningless and confusing. There is no such animal in terms of the Act.

The expression **of a profit nature** has the "reasonable person" meaning. It does not have a statutory meaning within the statutory formula.
It is correct to speak of a receipt or accrual of a "total amount" nature. Receipts of a "capital nature" are deducted from the "total amount" not because they are of a **non income nature** but because they are of a **capital nature**.

There is no basis whatsoever for the distinction in terms of the Act, between "**capital nature**" and "**income nature**".
The whole controversy, of revenue versus capital, is based on an elementary logical confusion.

It is true that in terms of Act 28 of 1914, **profit and gains** was part of income, and therefore the distinction between **profit and gains** and **capital** was critical; **profit and gains** was taxable, **capital** was not taxable.

This is no longer so in terms of the Act, and has not been so since Act 41 of 1917.

(h) There are a number of metaphors which are used in our tax literature, sometimes perhaps, as a substitute for clear thinking. Is it possible to read a single tax book without having to cross the Rubicon over and over again.[2]

A metaphor is not an argument. What may be true of trees and fruits need not be true of capital and income.

It is submitted that it is the use of these metaphors which is perhaps the single greatest barrier to the clear understanding of income. A metaphor may be suitable for poets, it has no place in legal thinking.

* The metaphor of the tree being capital and the fruits being income, is unsound.

* The concept that a receipt is either capital or income is not sound in terms of the Act.

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[2] These metaphors are almost always mangled beyond recognition and are almost never used correctly.
For instance:
Passing the Rubincon.When he arrived at the banks of the Rubicon, which divides Cisalpine Gaul from the rest of Italy....he stopped to deliberate....At last he cried out "The die is cast" and immediately passed the river. Plutarch: Life of Julius Caesar.[Benham's Book of Quotations]
It is not crossing the Rubicon, but rather passing the Rubicon. Caesar was making a momentous decision with a great element of risk.

* Intention has not and can have no bearing whatsoever on whether a receipt or accrual is:

(i) capital,
(ii) not capital,
(iii) income,
(iv) not income,
(v) profit or
(vi) not profit.

Intention could in certain cases be a useful tool in the process of evidence. Fingerprints left on a stolen object can in some cases help to establish that a person is guilty of theft. Fingerprints are not part of the concept "theft", neither is intention part of the concept capital.

* There is a distinction between capital and profit in ordinary language. It is appropriate to distinguish between, of a **capital nature**, and of a **profit nature**, provided it is made abundantly clear that of a **profit nature**, does not mean, of an "**income**" **nature**.

* Much of the confusion is the result that some terms, like income, have two meanings, a statutory meaning and an ordinary meaning. Some of the confusion can be lessened if an adequate terminology is used which differentiates clearly between the statutory meaning of a term and its ordinary meaning. The following suggestion is made:

"**income**" is the statutory meaning,
income is the ordinary meaning.

(b) In order to discharge the burden of proof imposed in terms of section 82 that an amount is not liable to any tax, the taxpayer will have to establish:

i) that it is not an amount received or accrued, **or**

ii) that if it is an amount received or accrued, that it was not actually received or accrued during the year or period of assessment, **or**

iii) that if it is an amount received or accrued during the year or period of assessment that it is of a capital nature, or

iv) that if it is an amount received or accrued during the year or period of assessment which is of a capital nature[3], but has been included in terms of subsection (a) to (n) of the "gross income" formula, that it ought not to have been so included.

The Commissioner will have to establish that what is received is an amount which is part of the "total amount". In order to succeed he will have to show:

(a) that the receipt or accrual is from a source within or deemed to be within the Republic, **and**

(b) that the receipt or accrual is cash or is quantifiable in money terms.

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[3] The gross income definition of the Act states **(whether of a capital nature or not)**.

(vi) Recent decisions have thrown some clarity on the concepts "receipt" and "accrual".[4]

It must be stressed however that any fluctuation in the amount in the hands of a taxpayer in any year or period of assessment which is not the result of a receipt or accrual is not subject to the burden of proof provisions of section 82. The implications are of consequence. Thus during a year or period of assessment, an increase in the total amount in the hands of a taxpayer, which is not the result of a receipt or accrual, is not subject to section 82.

Let us look at an example.

Mr Gold, a music teacher, inherited 20 years ago 500 Kruger rands. The value of these Kruger Rands was then R 1,250. In 1992, these Kruger rands are worth R 501,250 and the Commissioner assesses the taxable income of Mr Gold as being R 500,000.

Is Mr Gold subject to section 82 ?

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[4] CIR v People's Stores (Walvis Bay) (Pty) Ltd
1990 (2) SA 353 (A) 52 SATC 9.
The judgement of the Appeal Division was delivered by Hefer JA. The Lategan principle was confirmed.
[Lategan v CIR 1926 CPD 203, 2 SATC 16]

Any right (of a non-capital nature) acquired by the taxpayer during the year of assessment and to which a money value can be attached , forms part of the "gross income" irrespective of whether it is immediately enforceable or not,...
Per Hefer JA at 22.

The answer is clearly NO.

Mr Gold is not a trader in Gold coins. He has never bought or sold gold coins.

An unrealized increase is neither a receipt nor an accrual.

Even if it were decided that the increase was an accrual, then in terms of the Lategan/Walvis-Bay principle it would not form part of the gross income as it is not a right which has been acquired during the year of assessment.

As it is not an amount part of the total amount, section 82 is not relevant.

Mr Gold's objection to the Commissioner's assessment is not subject to the burden of proof in section 82 of the Act because his objection is not a claim that an amount is not liable or exempt from taxation. The R500,000 increase is neither an a receipt nor an accrual, and therefore is not an amount,

On appeal Mr Gold will not have to show that the decision of the Commissioner is wrong because his appeal is not against a decision in terms of section 82, i.e a decision that an amount is exempt or non liable to tax.

In terms of section 81 (1) Mr Gold may object to the assessment.

In terms of section 83 (1), because Mr Gold is entitled to object in terms of section 81 (1), he may appeal to the Special Court against the decision of the Commissioner.

The Commissioner will have to prove his case.

Taxpayer Mr Shrewd claims that an amount is liable to tax,[5] it will be for the Commissioner to show that it is not liable. Section 82 clearly does not deal with claims of liability to tax.

It is only in establishing non-liability of the receipt or accrual of an amount that the taxpayer must discharge the burden of proof provisions of section 82. The decision of the Commissioner would in this situation not be in relation to non liability but on the contrary to liability. It follows that the decision is not in terms of section 82, and on appeal to the Special Court, Mr Shrewd would not have to show that the Commissioner was wrong in disallowing his liability to tax. The Commissioner must prove his case.

STEP 2
3.2.1.1.2 INCOME

The income step is linked with the exemption provision of section 82 of the Act.

The definition of "**income**" is section 1 of the Act is virtually identical with the definition in section 7 of Act 31 of 1941.

"Income" means the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under **[this Chapter]** Part 1 of Chapter 2.

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[5] There are business situations where a taxpayer would be financially better off if his tax burden was increased in the current year and decreased in the following year.

There are two types of exemptions in the Act:

(a) Exemptions in terms of the Act, and
(b) Other exemptions.

3.2.1.1.2.a Exemptions in terms of the Act

Most of the exemptions are in terms of section 10(1).

The distinction between "absolute" exemptions and "partial" exemptions is of little value for the burden of proof concept. For our purpose the relevant distinction is between a person exempt from taxation and an amount exempt from taxation. The burden of proving that an "amount' is exempt, is a completely different concept from the burden of proving that a "person" is exempt.

Let us look at two examples:

EXAMPLE 1: AMOUNT EXEMPTED

Mr Soldier, as a member of the Republic Defence Force, has received an amount of R 4000 as an allowance for uniform, rations and lodging.
The Commissioner assesses the R 4000 as an amount subject to tax.
It will be for Mr Soldier to establish in terms of section 82, that the amount of R 4000 is exempt from taxation.
Mr Soldier will have to establish that the amount was received in terms of 10(1)(n). As this exemption has been deleted as from the 1 March 1992, Mr Soldier will also have to establish that the amount of R 4000 was received or accrued in his favour before that date.

EXAMPLE 2: PERSON OR BODY EXEMPTED

The TEXTILE WORKER'S INSTITUTION, has been for the last ten years, and is, a "trade union" in the opinion of the Commissioner.
The TEXTILE WORKER'S ASSOCIATION receives R 250,000 as cash contributions from its members. The Commissioner assesses the TEXTILE WORKER'S ASSOCIATION.
In terms of section 10(1)(d) a trade union is exempt from taxation. An institution is a trade union provided it is, in the opinion of the Commissioner, a trade union.
The issue here is not whether the amount of R250,000 is subject to taxation but whether the body, the TEXTILE WORKER'S INSTITUTION, is subject to taxation.

Section 82 of the Act does not refer to person exempt from tax chargeable, but to amount exempt from tax chargeable. It is submitted therefore, that before the Commissioner has established, in terms of section 10(1)(d), that the body, in his opinion, is not a "trade union" there is no burden of proof on the TEXTILE WORKER'S INSTITUTION to be discharged in terms of section 82, that the R250,000 amount is exempt. If in the opinion of the Commissioner, the TEXTILE WORKER'S ASSOCIATION is a trade union, no onus of proof will have to be discharged in any circumstances by that trade union in terms of section 82 of the Act.

In terms of section 10(3):

The exemptions provided by any paragraph of subsection (1) shall not extend to any payments out of the revenues, receipts, accruals or profits mentioned in such paragraph.

With respect, reference to "payments out of the revenues, receipts, accruals or profits" is no longer meaningful. What is relevant for the statutory formula are receipts and accruals, nothing else. Indeed anything else can only confuse.

It is important to look at this subsection historically, primarily to establish how little has changed and how momentous that change has been.

*** <u>Section 16 of New South Wales Income Tax Act OF 1895</u>**
The exemptions declared by subsections (1) to (V) hereof shall not extend to the salaries and wages of persons employed by any such corporations, company, society, or institution, although the same be paid wholly or in part out of the income, revenues, or funds thereof.

*** <u>Section 52(8) of (Cape) Act 36 of 1904</u>**
.....shall not extend to the salary and wages of person employed by any such Corporation, Harbour Board, Company, Society or Institution, although the same be paid wholly or in part out of the income, revenue or funds thereof.

*** <u>Section 5 of Act of Act 28 of 1914</u>**
.....shall not extend to the salaries, wages, allowances or pensions of persons paid out of public moneys mentioned in paragraph (a).....

* Section 11(5) (Natal) Act 33 of 1908
.....shall not extend to the salaries and wages of persons employed by any such bodies, although the same be paid wholly or in part out of the income revenue or funds thereof.

* Section 16 of Act 41 of 1917
.....shall not extend to the salaries, wages, allowances or pensions of persons paid out of public moneys mentioned in paragraph (a).....

* Section 10(2) of Act 40 of 1925
.....shall not extend to the salaries, wages, allowances or pensions of persons paid out of the revenues mentioned in paragraph (a)

* Section 10 of Act 31 of 1941
.....shall not extend to salaries, wages, allowances or pensions paid out of the revenues, receipts, accruals or profits mentioned in the said paragraph.

Until Act 31 of 1925 the emphasis on the limitation of the extension of the exemption, was to the person paid out.

From Act 31 of 1941 the emphasis of the limitation of the extension of the exemption, relates not to the person benefitting from such extension, but to the amount paid out. Therefore in terms of the Act, the taxpayer claiming non liability of the extension of an exemption will have to discharge the onus of proof in terms of section 82.

3.2.1.1.2.b Exemption in terms of other Acts

Where an exemption is granted in terms of another Act, it would seem that, in terms of the wording of section 82, the taxpayer does not have to discharge any burden of proof as to that such exemption. Section 82 clearly refers to any amount "**exempt from or not liable to tax chargeable under this Act...**". It is submitted that any amount exempted from tax chargeable under another Act is not subject section 82 of the Act.

STEP 3

3.2.1.1.3 TAXABLE INCOME

The income step is linked with the "deduction abatement and set-off" provisions of section 82.

This is the last step of the statutory formula.

The definition of "taxable income" in section 1 of the Act is in principle different from the definition in section 7 of Act 31 of 1914, as follows:

"taxable income" **[, except in part V,]** means the amount remaining after deducting from the income of any person all the amounts **[(other than abatements)]** allowed **under Part I of Chapter II** to be deducted from or set off **[under this Chapter]** against such income;

The structure of the statutory formula has been altered in a fundamental manner. In the 1941 Act, an abatement was not a deduction in the income stage of the statutory procedure.

An abatement in the 1941 Act was the last step in the last stage in the statutory formula to arrive at the taxable amount. In section 7 of Act 31 of 1941 taxable amount is defined as follows:

"taxable amount" means the amount remaining after deducting from any taxable income any abatement allowed under this Chapter;

This "taxable amount stage" which was linked with the abatement stage of the burden of proof provision is no longer with us.

Whether the abatement system is still part of the Act, and whether a rebate could be regarded as an abatement is not important for our purpose.

What is critical is whether the abatement/ rebate is deducted from the taxable income or from the tax.
An abatement/rebate deducted from an amount [as opposed to from the tax] is subject to section 82 of the Act.
The "taxable income" stage of the statutory formula corresponds with the "deduction, abatement or set off" provision of section 82 of the Act.

3.2.1.1.3.a Deduction

There are two areas which are critical for the burden of proof to be discharged in terms of section 82:
(1) is the amount not liable to tax, and
(2) is the amount subject to any deduction.
The issues are similar; basically we are dealing with the issue of **capital nature**, if the amount received is of a **capital nature** it is not liable to tax and if the expenditure is of a **capital nature** it is not subject to any deduction.

Because of its critical condition the treatment of "deduction" deserves special care.
For our purpose it is useful to distinguish between "trading deductions" and "non trading deductions"

(A) TRADING DEDUCTIONS

Trading deductions are fundamentally allowed in terms of section 11(a) and 23(g) of the Act.

The deductions allowed in determining taxable income, are expenditure and losses actually incurred in the production of the income provided these expenditures and losses are not of a capital nature and are "wholly or exclusively" laid out or expended for the purposes of trade.

The relationship between section 11(a) and 23(g) is fraught with problems of such insoluble dimensions that it is unlikely that the marriage can last much longer.

For example:

* Section 11(a) deals with deductions of expenditure and losses, while section 23(g) deals with deductions of any monies claimed. The two concepts are not only different, they are irreconcilable.

* Section 11(a) deals with the production of **the** income, whereas section 23(g) deals with the deduction **of** income. Again we are dealing with different concepts. The income is specific, income is general.

* Section 11(a) refers to the notion "actually incurred", section 23(g) deals with "laid out or expended".

To question the relationship between section 11(a) and 23(g) is like doubting that Romeo and Juliet were in love.

But were they actually, wholly or exclusively in love?

It is impossible within the confines of this thesis to deal extensively with the deduction issue. We shall limit ourselves a very the narrow area: what is the burden of proof which a taxpayer has to discharge, in terms of section 82 of the Act, in order to establish that an amount is subject to a deduction.

In order to succeed the taxpayer will have to establish the following:

section 11(a)

(i) the deductions are expenditures or losses **and**

(ii) the deductions have actually been incurred **and**

(iii) the deductions have been actually incurred in the Republic **and**

(iv) the deductions have been incurred in the production of the income **and**

(v) the expenditures and losses are not of a capital nature **and**

section (23) (g)

(vi) the deductions are **wholly** for the purpose of trade
or
the deductions are **exclusively** for the purpose of trade.

It must be stressed again that the deductions referred to above are strictly for the purpose of determining the taxable income by any person from carrying out any trade. For the purpose of the burden of proof section 82 of the Act the taxpayer will have to establish that the amount is subject to any deduction by proving the above six points.

The first five points, in terms of section 11 (a), are in practice difficult to establish. The taxpayer trying to justify a deduction has to establish that all the requirements of section 11 (a) are complied with.

There are a number of issues which present problems of interpretation:

* in which way is an expenditure different from a loss,
* what are the implications of the expression "actually incurred",
* what is the meaning of "in the production the income", and in which way does it differ from "the production of income".
* what is the meaning of a capital nature.

The point of greatest practical importance is the capital nature issue. It shall be dealt with generally in chapter 4.[6] The general conclusions reached are relevant for section 11 (a).

For our purpose however, it is section 23(g) which now deserves critical analysis in order to appreciate the problems facing the taxpayer.

The difficulties which the taxpayer faces because of the current interpretation of section 23 (g) are formidable indeed.

The issues he faces are often not whether in fact the deductions are wholly or exclusively expended for the purposes of trade, but rather whether he can establish that English law is different from our law and not relevant.

[6] See in particular chapter 4, pages 268-278.

The English law interpretation favours the tax authorities. There is no need for the Act to be interpreted **contra fiscum**, there is no justification for the Act to be interpreted **pro aerario**

A brief look at the history of section 23(g) may give some practical and useful insight on the issue..

New South Wales Act (59 Victoria 15) 1895

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

.....

(VI) **Any moneys not wholly and exclusively laid out or expended for the purposes of the profession, trade, employment, or vocation,-**

It is interesting to note that the terminology has remained constant throughout 9 Acts over a period of a century.

It is important to point out that the New South Wales Act uses the terminology "wholly **and** exclusively".

(Cape) Act 36 of 1904

64. No deductions shall in any case be made in respect of any of the following matters:-

.....

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

It is crucial to note that "wholly **and** exclusively" has now become "wholly **or** exclusively".

Act 28 of 1914

15 (1) No deductions shall in any case be made in respect of any of the following matters:-

.....

(2) (a) **Any moneys nor wholly or exclusively laid out or expended for the purposes of trade;**

There has been no change from the previous Act.

Act 41 of 1917

21 (1) No deduction shall in any case be made in respect of any of the following matters:-

.....

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

There has been no change from the previous Act.

Act 40 of 1925

13 No deduction shall, as regards income derived from any trade, be made in respect of any of the following matters;-

.....

(b) **any moneys not wholly or exclusively laid out or expended for the purposes of trade;**

There has been no change from the previous Act.

Act 31 of 1941

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

.....

(f) **any moneys, claimed as a deduction from income derived from trade, which are not wholly or exclusively laid out or expended for the purposes of trade;**

The wording is virtually identical with that of the previous Act.

Act 58 of 1962

23 No deductions shall in any case be made in respect of the following matters, namely-

(g) **any monies claimed as a deduction from income derived from trade, which are not wholly or exclusively laid out or expended or the purposes of trade;**

Apart from the change in the spelling of moneys, the wording is identical with that of the previous Act.

Where the Commissioner disallows a deduction, the taxpayer in order to satisfy the burden of proof provisions of section 82 as it relates to 23(g),will have to establish:

* **That the deduction is not any "monies" claimed**

It would seem that "monies" means cash, but does not mean "cash or otherwise". If this interpretation is correct then the deduction of any deduction which is not "moneys" is not subject to the limitation of section 23(g). The onus of proof which the taxpayer will have to discharge would be limited to section 11(a).[7]

* **From income derived from trade**

There is an **inclusion definition** of trade in section 1 of the Act. What is of consequence is that the intentions, purposes or motives of the taxpayer are of no relevance whatsoever; apart from the fact that for evidence purpose the intention of the taxpayer could be pertinent to establish whether in fact the deduction is income derived from trade.

If in fact it is not income derived from trade, the intention of the taxpayer can have no bearing whatsoever.

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[7] The Shorter Oxford defines "moneys" " **as possessions or property viewed as convertible into money**"

* **wholly or exclusively laid out or expended**

As shown in the evolutionary process of section 23(g) the only change in the last 100 years has been the deliberate change by the legislature from "wholly and exclusively" to "wholly or exclusively". It is submitted that "wholly" refers to the **quantum** quality of the deduction, whereas **exclusively** emphasizes the **unique** quality of the deduction. The conjunction **"and"** is copulative whereas the conjunction **"or"** is disjunctive. **And**, as a conjunction, connects one word or idea with another word or idea. It means, as understood by the ordinary person, **as well as**, **together with**.

And is the antithesis of **or**. There is no reason whatsoever to equate the disjunctive **or** with the conjunction **and**.[B]

There are four permutations possible. The taxpayer must succeed if he proves any one of the four permutations.

The taxpayer must establish that:

the monies are wholly laid out for the purposes of trade, **OR**
the monies are wholly expended for the purposes of trade, **OR**
the monies are exclusively laid out for the purposes of trade, **OR**
the monies are exclusively expended for the purposes of trade.

[B] However the reverse is sometimes permissible. The conjunction **and** can sometimes be read as the disjunctive **or** where necessary in the context. Thus the statement **the landlord and the tenant have the right to inspect the premises** could be interpreted that the landlord can inspect or the tenant can inspect.

This has been the meaning and implication of **or** in **wholly or exclusively laid out or expended** in section 23(g), since our very first Tax Act, (Cape) Act 36 of 1904.

* **for the purposes of trade**

It is submitted that what is meant is clear, a tax payer can only claim a deduction of moneys from income derived from trade if that money has been spent for trade purposes.
It is submitted that purposes qualifies **trade** and not the taxpayer. One must distinguish between the purpose of the taxpayer and the purpose of the transaction. If to establish the purpose of the transaction one looks in any way at the taxpayer's reason, intention, motive or purpose, it can only have evidential significance useful to establish the purpose of the transaction.
To test the above analysis of section 23 (g) it is useful to analyze how "**wholly or exclusively laid out or expended for the purpose of trade**" had been dealt with in the case **CIR v Pick 'n Pay Wholesalers Ltd** [9]

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[9] 1987 (3) SA 453 (A), 49 SATC 132.

1) "Wholly or exclusively"

The majority judgement was delivered by Nicholas AJA.

Relevant South African decisions were not quoted, referred to or even mentioned.[10]

The analysis was based entirely on English Law, in terms of English decisions.[11]

Wholly and exclusively which is English law, was treated as if it meant **wholly or exclusively** which is South African law. It is true that the New South Wales Act (59 Victoria 15) 1895 uses the terminology wholly and exclusively. The New South Wales Act is the source of our law of taxation. However our very first taxation Act, (Cape) Act 36 of 1904 deliberately changed "wholly and exclusively" to "wholly or exclusively". This new terminology has remained constant for almost a century. There is no justification to assume that where our legislature states disjunctively **wholly or exclusively**, it has the meaning of the conjunctive expression **wholly and exclusively** of English law.

[10] The two South African cases cited are not relevant to the issue of "wholly or exclusively".
The case CIR v Nemojim 12984 (4) SA 935 was cited. It is relevant to establish the link up between section 11 (a) and 23 (g).
The case Hicklin v SIR 1980 (1) SA 481 AD was cited. It is relevant for the appeal provisions in terms of section 86 (a).
No South African case was quoted in relation to section 23 (g).

[11] Bentleys, Stokes and Lowless v Beeson (Inspector of Taxes)
1952 2 All ER 82 CA
Griffiths (Inspector of Taxes) v J.P Harrison (Watford) Limited 1 All ER 909 HL

It is submitted that, as far as the "wholly or exclusively" issue is concerned, the Pick 'n Pay decision is authority for English law; it is very doubtful whether it has any binding relevance for South African law.

2) For the purpose of trade.

The other issue of pertinence as far as section 23 (g) is concerned is the analysis of "for the purpose of trade"

One must distinguish clearly between the purposes of trade and the purposes of the trader. As postulated in our analysis above, what the Act means is the purposes of the transaction.

The Pick 'n Pay decision bases its interpretation of "for the purposes of trade" on English law.[12]

It is a mystery why the wealth of South African legal wisdom was not even considered.

It is with submitted, with respect, that the analysis of "for the purposes" in the Pick 'n Pay cases is not satisfactory. The purpose of the Company is of no consequence whatsoever.

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[12] Griffith (Inspector of Taxes) v J.P Harrison (Watford) Limited. See **supra**.
Bowden (Inspector of Taxes) v Russell and Russell (1965) 2ALL er 258
Edwards (Inspector of Taxes) v Warmsley, Henshall and Co 1968 1 All ER 1089
Robinson (Inspector of Taxes) v Scott Bader CO.Ltd 1981 2 ALL ER 1116
Mallalieu v Drummond (Inspector of Taxes) 1983 (1) WLR 252 CA
Mallalieu v Drummond 1983 2 ALL ER 1095 Hl

But even if the purpose of the company were of consequence, it cannot be found in the purpose of one of the directors. A company is a separate person in terms of the Act.[13] The only issue is the simple one, what are the purposes of the transaction.

The Act is not interested why a person enters into a transaction. The Act is interested in whether a certain transaction is "trade" or not. The Act does not tax intentions, it taxes income in terms of a statutory formula. The purposes of the taxpayer are of no consequence whatsoever. If the purpose of the taxpayer were of any consequence then a taxpayer who lays out or expends a great sum of money for a transaction which is not a trade transaction, but which due to his ignorance he believes is a trade transaction, would be able to make a deduction in terms of section 23 (g).

[13] Corporations have no souls.

> Lord Chancellor Thurlow said that the corporations have neither bodies to be punished nor souls to be damned; they therefore do as they like.
> Poynder's "Literary Extracts." (Benham's Book of Quotations".
>
> This saying of Lord Chancellor Thurlow, may have been relevant when judges sentenced persons to be tortured, and when priests damned sinners to an eternity of hell. It is difficult to torture a company and, as far as can be ascertained there are no companies in hell.
> This popular saying has been repeated, with some slight variations, in a surprising number of court decisions, articles and treatises on all branches of the law as being obviously correct.
> It is of no relevance to day.

All he would have to establish is that his purpose was trade.

The only way whereby the taxpayer's purpose might be of any consequence is in the process of evidence, in the sense that the purpose of the taxpayer might throw some light on the purpose of the transaction.

There is no need whatsoever to distinguish between subjective and objective purposes.[14]

Nicholas AJA, basing himself almost solely on English law uses objective factors in order to ascertain subjective factors. There is no need for the complexity of English Law to confuse the clear interpretation of our Act.

An apple is an apple, even if the taxpayer's honest purpose was to purchase a cat. It is of course possible by using subjective factors to convert the objective factors into a cat.

Conclusion:

The arguments used in The Pick 'n Pay case are highly unsatisfactory.

* English law is used even where it conflicts radically with South African Law: e.g **wholly and exclusively**.
* South African cases are virtually totally ignored.
* The Act is virtually totally ignored.
* There is confusion about the concept **purposes of trade**, which is compounded by English decisions.
* There is no analysis of the critical issue of how **laid out** differs from **expended** in section 23(g), and how **laid out or expended** relate to **actually incurred** of section 11(a).

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[14] See Mallalieu v Drummond, **supra** where Lord Brigman claimed that the test was a subjective one.

INCOME AS A STATUTORY PROCEDURE FOLLOWS ON THE NEXT PAGE

Please note:

* The first two steps have been assumed.
* The procedure has been simplified.
* The relationship between the statutory procedure and the burden of proof in terms of section 82 of the Act has been highlighted.
* The burden of proof in terms of section 82 is the obverse of the statutory procedure.

INCOME AS A STATUTORY PROCEDURE
WITH REFERENCE TO BURDEN OF PROOF S.82 OF ACT 58 OF 1962
FORMULA: FROM WEALTH TO INCOME

INTERPRETATION	STEPS
1] GROSS WEALTH RECEIVED OR ACCRUED.	LESS: receipts or accruals of no ascertainable money value EQUALS: **TOTAL RECEIPTS OR ACCRUALS**
IS The total gross wealth received or accrued from any source whatsoever including gross wealth which does not have an ascertainable monetary value.	
2] TOTAL RECEIPTS OR ACCRUALS	LESS : non Republic receipts Accruals EQUALS: **TOTAL AMOUNT**
IS All receipts or accruals with an ascertainable money value from any source whatsoever.	
3] TOTAL AMOUNT	LESS: receipts or accruals of a capital nature PLUS special inclusions EQUALS: **GROSS INCOME**
ONUS ***IS*** All receipts or accruals with an ascertainable money value from a source within the Republic or deemed to be within the Republic. An amount must have a money value from a source within the Republic.	
4] GROSS INCOME	LESS: amounts exempt from tax EQUALS: **INCOME**
OF ***IS*** All receipts or accruals with an ascertainable monetary value from a source within the Republic or deemed to be within the Republic less receipts or accruals of a capital nature but including certain amounts clearly described.	
5] INCOME	LESS: Allowable deductions or set off EQUALS: **TAXABLE INCOME**
PROOF ***IS*** All receipts or accruals with an ascertainable monetary value from a source within the Republic or deemed to be within the Republic less receipts or accruals of a capital nature and after deducting any amounts exempt from tax in terms of the Act.	
6] TAXABLE INCOME	LESS: rebated tax EQUALS: **INCOME AFTER TAX**
IS Income less allowable deduction or set off.	

[please note: NORMAL TAX LESS REBATES EQUALS REBATED TAX

8] INCOME AFTER TAX

3.2.1.2 WHAT IS AN ASSESSMENT

The heading of section 1 of the Act qualifies the interpretation section with unless **the context otherwise indicates**.

The meaning of assessment in terms of section 1 of Act 31 of 1941 has been altered to a large extent.

Assessment is to be interpreted in terms of section 1 of the Act as follows:

" assessment " means the determination by the Commissioner, by way of a notice of assessment served in a manner contemplated in section 106 (2)-
(a) of an amount upon which any tax leviable under this Act is chargeable; or
(b) of the amount of any such tax; or
(c) of any loss ranking for set-off,
and for the purposes of Part III of Chapter III includes any determination by the Commissioner in respect of any of the rebates referred to in section 6, and any decision of the Commissioner which in terms of the Act is subject to objection or appeal;

A significant change from the 1941 Act, is that the amount of the determination of any such tax is now an assessment.

For the purpose of burden of proof the fundamental change is the meaning of a decision.

3.2.1.2.1 What is a determination

An assessment is a determination by the Commissioner.

The concept determination implies a process of ascertaining. If it is guess work, for instance. it is not a determination.

If it is not a determination it can never become an assessment, in terms of the first part (a) (b) and (c) of the definition of assessment

The determination must be made by the Commissioner.
Who is the Commissioner is not always clear.
In terms of section 2 (2) of the Act, any person who in terms of a notice in the **Gazette** has been appointed to hold office as Commissioner of Inland Revenue is conclusive evidence of such appointment.
Section 2 (2) sets forth the evidence required to **confirm** who the Commissioner is. No indication is given in the Act on how to **establish** the fact of who the Comissioner is.
It must be stressed that we are dealing with evidence not fact. A Commissioner is a Commissioner provided he is a Commissioner, whether such notice has been published in the **gazette** or not.

This is crucial for the interpretation of section 82 of the Act.
Before a decision can be reversed or altered on appeal, the second part of section 82 of the Act imposes upon the appellant the burden of establishing that any such **"decision"** of the Commissioner is wrong. It could therefore be of consequence for the taxpayer to be able to establish that the **"decision"** is not that of the Commissioner.

Where the issue is whether a determination or **"decision"** is that of the Commissioner or not, it will not be sufficient for the taxpayer to establish that the notice appointing the Commissioner has not been complied with.
However, it is suggested, that in the case of such notice not having been published it will be for the person who claims to be the Commissioner to discharge the burden of proof that he actually is the Commissioner.

The powers conferred upon the Commissioner may, in terms of section 3 (1) be exercised by any officer under the control, direction or supervision of the Commissioner.
In terms of section 3 (2) any decision by such officer provided it has been issued or signed shall be deemed to have been issued or signed by the Commissioner until withdrawn or amended by the Commissioner. There seems to be no time limit.

In the case of a decision by an officer in the exercise of any discretionary power, a time limit of 2 years is prescribed provided all the material facts were known to the officer.
Where the decision was made by the Commissioner in terms of discretionary power under the provision of the Act, such written decision shall not be withdrawn if all material facts were known when he made his decision.

It is submitted that decision here means **verdict**, and not **"decision"** as per the second part of the definition of assessment in section 1 of the Act.

3.2.1.2.2 What is a notice of assessment

The definition states:

".... By by way of a notice of assessment served in a manner contemplated in section 106 (2)-"

The first qualification of assessment is that there must be a determination by the Commissioner, the second qualification is that such determination must be by way of a notice of assessment served in a clearly determined manner. Without such notice of assessment there can be no assessment.

The process whereby the notice must be served is set out in section 106 (2). It does not follow that because the steps stipulated in section 106 (2) have been followed that the person has in fact received the notice. Such person is deemed to have received such notice at the time it would normally have been received.

The Commissioner has a discretion, if he is satisfied, that in fact it has not been so received.

The problem however is that an assessment is a determination which has been served by way of a notice of assessment.

All that the Act demands is that the notice be actually served, there is no obligation for such notice to have been in fact been received.

If the notice of assessment is served in the manner contemplated in terms of the Act, and if in fact is has not been so received; it is nevertheless an assessment.

It is true that in terms of section 106 (3), if the fact or receipt or the time of receipt is in dispute, the court having jurisdiction in the matter can, if it so satisfied determine that it has not so been received.

With respect, though it is possible for a person to establish that a notice has been received late, it is not logically possible for a person to establish that it has not been received at all.

To that extent the deeming provision of section 106 (2) places an unreasonable burden of proof on such person.

The taxpayer should not have to rely upon the discretion of the Commissioner or the Court where in fact he has not received the notice of assessment, and is unable to prove that he has not received it.

Indeed the authentication and service of documents in terms of section 106 is unsatisfactory in the extreme.

Let us look at section 106 (2) (b):

If left with some adult person apparently residing at or occupying or employed at his last known abode or office or place of business in the Republic;

So the poor taxpayer is presumed to have received such notice of assessment if **some** adult person apparently **employed** in his **last known abode** has been left with the notice of assessment.

Mr Taxpayer whose last address was 27 Lastabode street Sea Point has been transferred to Durban. The Receiver of Revenue, on the 25th of November 1991, leaves the notice of assessment with the gardener who has just arrived from Sun City Transkei and is working casually for the new owners of 27 Lastabode street Sea Point. As it is Thursday afternoon there is no one else at home. Mr the gardener who is 19 but looks much older, does not speak English well and does not know the meaning of the concept taxation. He is a fine gardener, but he is not an excellent receiver of official documents. He is convinced that he has won a prize in an important lottery. He thanks the conveyer of good news and is still waiting for his prize.
Mr Taxpayer does not in fact receive the notice of taxation, yet he is deemed to have received such notice at great financial inconvenience.

This is absolutely contrary to legitimate expectation.

The taxpayer must be aware that he is not limited to the judicial process in terms of the Act.

Should he have not in fact received the notice and be prejudiced because he is deemed to have received such notice, he can appeal directly to the Supreme Court.
The legal remedies available to the taxpayer are not limited to those provided in the Act.

It is possible that a Court of Law, as opposed to a Court of Revision limited by the Act, may decide that **"evidence must be given by he who asserts, not by he who denies, because in the nature of things no proof is possible for one who denies a fact."** [Voet supra 22.3.10]

3.2.1.2.3 The five assessments in terms of the Act

3.2.1.2.3.a An amount upon which tax leviable under this Act is chargeable.

There is no change from the wording of Act 31 of 1941.
There must be an amount.

As discussed previously an amount has two major characteristics.
If it accepted that an amount is part of the total amount in terms of the definition of gross income, then for a receipt or accrual to qualify as an amount must (a) be in cash or quantifiable in cash terms and (b) subject to the deeming provisions of the Act, must be from a source within the Republic.

The amount must be tax leviable under this Act.
Thus any amount which is tax leviable under any other Acts, whether they be taxation Acts or not, cannot be a determination by the Commissioner.
Moreover not only must the amount be tax leviable under this act, it must also be chargeable under the Act.

3.2.1.2.3 b Any loss ranking for set-off as an assessment.

The wording is identical with that used in section 1 of Act 31 of 1941. The determination of any loss is an assessment only if it is a loss ranking for set-off.

3.2.1.2.3 c The amount of any such tax as an assessment

This is a fundamental change from the 1941 Act, where the amount of the tax as such was not an assessment.

It is submitted that amount in "the amount of any such taxes" and amount in "amount upon which any tax leviable...." do not have the same meaning.

An amount here means the quantity of the tax leviable and chargeable. A tax is not a receipt or accrual.

3.2.1.2.3.d Determination in respect of rebates as per section 6 as an assessment

Rebates are deductible from a person's taxable income.

However this is limited for the purposes of Part III of Chapter III which deals with objections and appeals.

For any purpose other than objections and appeals as per Part III of Chapter III the determination of rebates is not an assessment.

3.2.1.2.1.d Any decision subject to objection or appeal as an assessment.

This is an expansion of the inclusion in the assessment definition of Act 31 of 1941 of **"for the purpose of Part III of Chapter III, any determination by the Commissioner in respect of deductions referred to in Section thirteen "**.

This can be looked at as a dramatic change in the concept of assessment. This is the crucial area for assessment for the purpose of burden of proof.

It is suggested that the first part of the sentence does not qualify the second part of the sentence, in the sense that any such decision need not be for the purposes of Part III of Chapter III. The reason for this interpretation is that the determination of rebates is limited for the purposes of Part III of Chapter III, whereas the decisions are subject to objection or appeal are qualified generally in terms of the Act.

If this interpretation is accepted then an estimated assessment subject to objection and appeal in terms of section 78 (2) is a decision, even though it is not for the purpose of Part III of Chapter III.

The term decision is not defined. It has nothing to do with what the ordinary person understands by decision.

It need not be a determination; thus a Commissioner's discretion is not necessarily a determination, but if such discretion were subject to such objection or appeal it would be a decision.

The sole qualification for the concept decision is "objection or appeal".

What is a decision must therefore be ascertained by establishing "what" is subject to objections and appeals in terms of the Act.

Those determinations by the Commissioners which qualify as assessment in terms of the definition of assessment may not be decisions if in terms the Act they are not subject to objection and appeal.

The situation is complex.

It is useful to distinguish a **"decision"** at the objection stage from a decision on appeal.

<u>Objection stage</u>

An assessment which is not objected to within thirty days after the date of the assessment in terms of section 81 (1) is a decision, because it is subject to objection.

After 30 days, if no objection has been made, it retains its quality of assessment but loses its quality of decision.

If an objection is made which is not delivered in time, then such objection shall not be entertained by the Commissioner in terms of section 81 (1). As a result the determination is still an assessment but no longer a decision.

The Commissioner in terms of section 81 (2) has a discretion if he is satisfied that reasonable grounds exist for the delay in lodging the objection. The exercise of this discretion is subject to objection and appeal and therefore though neither a determination nor an assessment, is a decision.

Unfortunate 81 (2) uses the terminology " provided that any decision of the Commissioner .....**shall be subject to objection and appeal"** and as result confuses the two meanings of decision. The ordinary meaning of decision is **verdict**, whereas the meaning in terms of the Act is the "what" which is subject to objection and appeal.

Thus the proviso in section 81 (2) states that a decision is a decision. What is meant is that a **decision** [in the ordinary sense of verdict] of the Commissioner in the exercise of his discretion, is a **"decision"** [in terms of the Act-i.e subject to objection and appeal.]

If for any reason the assessment becomes final and conclusive and is not capable of being objected against, then provided there is no right of appeal, it no longer is a decision.

Appeal stage

In terms of section 83 (1) if a person who is entitled to make an objection, and objected , and is not satisfied with the Commissioner's alteration, reduction or disallowance of the objection in terms of section 81 (4), then such person has the right to appeal to a special court or to a specially constituted board.

Again there is confusion because of the way the term decision is used. It must be stressed that not all **decisions**

The Act contrasts "any decision of the Commissioner which in terms of the Act is subject to objections and appeal" with other decisions.

Thus section 83 (1) states **" a person dissatisfied with any decision of the Commissioner....can appeal therefrom..."**

Again here the term **decision** is used in its ordinary meaning of verdict.

A **decision** which is appealable against is a **"decision"**.

A **decision** which is not appealable against is not a "decision".

It is the quality of "appeal and objection" which is the very basis of the concept **"decision"**.

In terms of section 78 (1) the Commissioner may in certain cases estimate the taxable income of any person.

Where such estimate are subject to objection and appeal in terms of section 78 (2) then such estimate are "decisions".

Where such estimate are not subject to objection or appeal in terms of section 78 (2) then such estimate are not decisions.

3.2.1.3 OBJECTIONS TO THE ASSESSMENT

Section 81 (1) is virtually identical with section 77 (1) of Act 31 of 1941.

The changes are as follows:

81 (1) Objections to any assessment made under this Act **[,]** may **[, subject to the provisions of sub-section (2),]** be made within **[twenty-one]** **30** days after the date of the assessment **[notice]**, in the manner and under such terms prescribed by this Act by any taxpayer who is aggrieved by any assessment in which he is interested.

The change of period from 21 days to 30 days is in terms of an amendment by Act 70 of 1989 with effect from the commencement of years of assessment ending on or after 1 January 1990. This change is of little theoretical consequence.

However the change from **the date of the assessment notice to the date of the assessment is critical**.

What is of consequence is that the period of thirty days starts after the date of the assessment not the assessment notice as in terms of the 1941 Act.
This is highly unsatisfactory and indeed must be closely examined in terms of section 77 of the Act.
The taxpayer who must discharge the burden of proof in terms of section 82, must first have the right to object.
His objection will not be entertained by the Commissioner if it is not received by the Commissioner within the time limit specified in the Act.
There are three dates specified in the assessment form.
The processing date: which is the date of issue.
The due date: this is the date of assessment.
The second date: This is the tax payment date.
The thirty days within which the taxpayer can object start form the due date. The first and the last day are excluded in the counting of the thirty days.

Section 81 (2) is virtually identical to section 56 (1) of Act 40 of 1925 and identical to section 77 (4) of Act 31 of 1941, apart from a very recent proviso.

The changes from Section 77 (4) of Act 31 of 1941 are as follows:

81 (2) No objection shall be entertained by the Commissioner which is not delivered at his office or posted to him in sufficient time to reach him on or before the last day appointed for lodging objections, unless the Commissioner is satisfied that reasonable grounds exist for the delay in lodging the objections [.] **: Provided that any decision of the Commissioner in the exercise of his discretion under this subsection shall be subject to objection and appeal.**

The proviso was inserted by Act 70 of 1989 with effect from years of assessment ending on or after 1 January 1990.

The criticisms made in the analysis of the 1925 and the 1941 Act are valid here too. It is true that some relief has been given to the taxpayer because the **decision** of the Commissioner not to condone as late return is subject to objection or appeal.

The Commissioner must receive the notice of objection but only needs to send the notice of assessment.

The one point which perhaps needs emphasis is that where the notice of assessment is send to taxpayer A, that in terms of section 81 (1) taxpayer B who is aggrieved by the assessment of Taxpayer A in which he is interested may very well lose his right of objection because the notice of objection is not sent to him. He will be prejudiced should he be made aware by taxpayer A of the content of the notice of assessment more than 30 days after due date.

3.2.1.4 BURDEN OF PROOF ON OBJECTION TO THE ASSESSMENT

See chapter 4.

3.2.2 STAGE 2 APPEAL TO THE SPECIAL COURT

3.2.2.1 NATURE OF THE ASSESSMENT APPEALED AGAINST

Section 83 (1) is identical to section 79 (1) of Act 31 of 1941, which is identical to section 58 (1) of Act 40 of 1925 which is virtually identical to section 54 (1) of Act 41 of 1917, which is virtually identical to section 24 (1) of Act 28 of 1914.

Section 83 (1) reads as follows:

Any person entitled to make an objection who is dissatisfied with any decision of the Commissioner as notified in terms of subsection (4) of section ***eighty-one*** may appeal therefrom to a special court for hearing income tax appeals, constituted in accordance with the provisions of this section.

The appeal can only be made by the person who was entitled to make an objection. The person who is entitled to make **an objection** obviously does not have to be the same as the person who actually made **the objection**.

The distinction between **a person** entitled to make an objection and **the person** who actually makes the objection can be of consequence. The appeal is in relation to any decision which has been notified in terms of section 81 (4), which deals with a very limited area.

Section 81 (4) reads as follows:
(4) On receipt of notice of objection to an assessment the Commissioner may reduce or alter the assessment or may disallow the objection and shall send the taxpayer notice of such alteration, reduction or disallowance, and record any alteration or reduction made in the assessment.

The steps are clear and simple:

(a) a notice of objection is received by the Commissioner,

(b) the Commissioner considers the notice of objection,

(c) the Commissioner may reduce, alter or disallow the objection,

(d) the Commissioner sends notice to the taxpayer of such reduction, alteration or disallowance.

It is the notice of reduction, alteration or disallowance which is the assessment against which the taxpayer can appeal to the Special Court.

In terms of section 83 (7) (b) for the notice of appeal to be of any force or effect, it must be delivered to the Commissioner within the prescribed time for lodging appeals.

The Commissioner has a discretion in the case of a delay in the lodging of the notice of appeal. The **decision** [verdict] of the Commissioner in the exercise of his discretion is subject to objection and appeal.

A point of little consequence perhaps, is that section 81 (4) deals with alteration, reduction or disallowance whereas section 81 (5) does not refer to disallowance. It could be argued that the right to appeal in the case of disallowance can therefore never be subject to any limitation as it never becomes final and conclusive.

3.2.2.2 WHAT ARE THE GROUNDS OF APPEAL

The main part of section 83 (7) (c) has stood the ravages of time.

83 (7) (c) At any such appeal the person who made the objection shall be limited to the grounds stated in his notice of objection,

Grounds of appeal has many meanings. There are however two basic types of meanings.

Meaning 1: * The grounds of action

* The basis of the suit

* The cause of action

* The right which a person has in terms of the law to seek legal relief

* The basis of the action

Here the grounds of appeal means primarily the reason why legally the plaintiff has the right to appeal.

The emphasis is not the facts or the evidence, but rather the reason why legally the person seeking relief has the right to seek relief in a court of law.

Meaning 2: * The evidence

* The facts which gives a person the right to appeal.

The main difference between **meaning 1** and **meaning 2** is that meaning 1 emphasize the **legal why** whereas meaning 2 emphasize the **facts why**.[15]

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[15] For the meaning of grounds:
Fernandez v S.A.R. & H 1926 AD 65.
Act No 32 of 1917 Order XXX Rule 2 (4) b, replaced by Act No 32 of 1944 rule 47 (6) (ii)

The meaning of grounds is of the utmost importance for the taxpayer's ability to discharge the burden of proof in terms of section 82. The 1989 amendment to section 83 (7) (c) gives some relief to the taxpayer in the sense that the limitation to the grounds stated in the notice of objection can be waived by the Commissioner if he agrees to an amendment of these grounds. Moreover the Court may, on good cause shown at the hearing of the appeal permit an amendment to the notice of objection.

83 (7) (c).....unless the Commissioner agrees to the amendment of such grounds: Provided that the special court may, on good cause shown at the hearing of the appeal, permit such person to amend his notice of objection....[16]

SUGGESTED INTERPRETATION of grounds of appeal as they relate to the burden of proof provision of section 82.

Three general observations

(i) The commissioner is free to raise any grounds. The only restriction is that he must inform the taxpayer in time of his intention to raise any such grounds.[17]

(ii) The court can base its decision on other grounds [than those advanced by the Commissioner] subject to the *audi alteram partem* rule.[18]

(iii) If the appellant has not stated his grounds of objection and appeal clearly, the court has a discretion to determine what could be considered to be the grounds of objection and appeal.[19]

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[16] There is doubt as to the effective date of the proviso. This is no longer of great consequence.

[17] ITC 721 17 SATC 485

[18] Bailey v CIR 1933 AD 204 [at 220], 6 SATC 69

[19] Regulation B 12

Analysis

With respect, the cross the taxpayer has to bear with respect to the restriction imposed by section 83 (7) (c) has been grossly exaggerated. It is imperative to split the burden imposed in terms of section 82 into its two components:

(i) the burden of proof on objection, and

(ii) the proof required on appeal.

At the objection stage the taxpayer must specify in his notice of objection in detail the grounds upon which it is based.

81 (3) Every objection shall be in writing and shall specify in detail the grounds upon which it is made.

There may be some doubt about the precise meaning of grounds, but the very fact that they must be specified in detail seem to suggest that the grounds incorporate both the reason why and the evidence.

On appeal however there are two different issues completely. The first issue is whether the taxpayer has discharged the burden of proof at the objection stage to establish that he is for example entitled to a deduction. There seem little doubt that, whatever the meaning of grounds, the taxpayer is bound by the grounds specified in terms of section 81 (2). The Special Court is a court of review and all it can do is review the evidence and basis of action of the taxpayer.[20]

[20] Subject of course to the proviso contained in section 83(7)(c)

There is however another issue which has only been recently[21] been introduced in the burden of proof requirements.

82.....and upon the hearing of any appeal of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.

This has absolutely nothing to do with the grounds specified in detail in the notice of objection.
There could very well be no way, whereby the taxpayer using the grounds specified in detail in his notice of objection, by which the taxpayer could establish that the Commissioner is wrong.

It is submitted that the taxpayer in order to show that the Commissioner is wrong, can bring any evidence he requires, whether it was originally incorporated in the notice of objection or not.

It must be reiterated that the grounds in the notice of objection relate specifically to objection to the assessment. It has nothing to with establishing that the Commissioner is wrong.

---

[21] Recently in the time scale of the history of section 82.
The proviso that the appellant must show that the Commissioner is wrong only appears for the first time in the equivalent section 78 of Act 31 of 1941.

There is nothing in the Act which requires the taxpayer to specify in his grounds of objection that the Commissioner is wrong.

Should the taxpayer be denied his rights to bring evidence relating to an issue which has no direct bearing to the grounds in his notice of objection, he can insist on his rights by appealing to a Court of Law.

Let us assume that the Commissioner made an error in his assessment because his calculating machine is faulty.

In order to establish that the decision of the Commissioner is wrong, there is no reason whatsoever why the taxpayer should not be able to bring evidence to show that the calculating machine was faulty.

3.2.2.3 Burden of proof on appeal to the Special Court

See chapter 4

3.2.3.4 Appeal to the specially constituted Board

In terms of section 83A any appeal referred to in section 83 (1) must, in certain cases, be heard in the first instance by the specially constituted Board.[22]

The Board is a tribunal of the first instance, which will only hear appeals if:

1) the tax in dispute does not exceed R20,000, or

2) the Commissioner and the appellant agree thereto, or

3) no objection to the jurisdiction has been made before the hearing.

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[22] Inserted by Act 129 of 1991.

As it relates to an appeal in terms of section 83 (1) there seem to be no change as far as the burden of proof concept is concerned.[section 83A(11)]

Section 10 (g) provides that if the appellant has failed to state the grounds of his objection and appeal in definite terms, that the Board may decide what shall constitute the grounds of objection and appeal.

It seems almost certain that the introduction of this Board is a step to the disadvantage of the taxpayer as far as burden of proof is concerned.

The Commissioner can go all the way to the AD to prove his point. The insignificabt taxpayer can only go as far as his resources will allow. The more steps of appeal, the more likely the taxpayer will fail to discharge the burden of proof imposed by section 82.

Practically the issue of costs is very worrying for the taxpayer appealing to the Board. In practice costs are hardly ever awarded. It is true that there are cases on record where costs were awarded.[23]

The reason for costs being awarded was, that the claim was frivolous, and frivolous was given the meaning of **manifestly futile**.[24]

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[23] ITC 1316 42 SATC 229

[24] However in ITC 1399 47 SATC 85, frivolous was held to mean more than unreasonable. Frivolous means if the conduct border on the vexatious.

It is not relevant for our purpose to analyze section 83 (17) of the Act, except for the fact that the taxpayer in practice is not concerned about the possibility of an order as to costs where he appeals to the special court. There is no equivalent protection given on appeal to the Board.

Section 83 (17) does not apply to appeal to the Board because it states "the court shall not make any order as to costs save...". The cost factors is a real practical issue for the burden of proof concept. If the risk of "costs" are high, many taxpayers will prefer to pay the disputed taxes on the disputed amounts. The Board is not a court.

3.2.3 STAGE 3 APPEAL TO THE SUPREME COURT

3.2.3.1 APPEAL FROM THE SPECIAL COURT

As a result of section 86A, there is no distinction to be drawn between questions of law and facts for the purpose of appeal.[25] The burden of proof is on the appellant to show that the decision of the special court was faulty.

3.2.3.2 OTHER APPEALS

There is no change of any significance, since Act 31 of 1941
(I) Where there is no appeal with the Special Court [or Board], or where the Special Court is incompetent to hear such appeal, the taxpayer can use any remedy offered by the legal system.
(II) There is only one situation where the taxpayer **must** use the Special Court [Board] revision system: where, in terms of the Act, the taxpayer has the right to appeal to the Special Court and where in terms of the Act he **shall** so appeal.

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[25] The distinction between questions of law and facts remains of crucial importance for the purposes of the relationship between capital, income and amount, and burden of proof.
It also retains relevance for some sections of the Act, for instance section 83 (15).

C H A P T E R 4

"[T]he use , without proper definition of the term onus.....has, I believe, been a source of some confusion"

Per Corbett JA

South Cape Corporation (Pty) Ltd
v Engineering Management Services (Pty) ltd
1977 (3) SA 534 (A) at 547-8

C H A P T E R 4

ONUS OF PROOF

STATUTORY INTERPRETATION OF SECTION 82 OF ACT 58 OF 1962

C H A P T E R 4

The present relevant Income Tax Act is Act 58 of 1962.

The long title reads as follows:

To consolidate the law relating to the taxation of incomes [1] and donations, to provide for the recovery of taxes on persons and the incomes of persons levied by the provinces [2] on income tax payers, to provide for interest to be paid on late payments of such provincial taxes, to provide for certain provisions to be applied for the purposes of any ordinance of a provincial council imposing a tax on persons or the income of persons,[3] to provide for the deduction by employers of amounts from the remuneration of employees in respect of certain tax liabilities of employees, and to provide for the making of provisional tax payments and for the payment in to the Consolidated Revenue Fund and the various provincial revenue funds of portions of the normal tax and the said provincial taxes (excluding the normal tax imposed on companies) and interest and other charges in respect of such taxes.

The long title makes the crucial distinction between a tax on persons and a tax on the income of persons.

The English text was signed by the State President and assented to on the 25th of May 1962.

For the purpose of chapter 4, Act 58 of 1962 shall be referred to as the Act.

4.1 INTRODUCTION

4.1.1 FROM GROSS WEALTH TO INCOME AFTER TAX

It is proper that the taxpayer be taxed in terms of the words expressed clearly and unambiguously in section 82 of the Act.[4]

It is submitted, that section 82 tends to be interpreted ***pro aerario*** rather than ***contra fiscum.***

The contentions in this paper, however controversial they may be, are based on a strict interpretation of the Act.
The conclusion reached is that the generally accepted interpretation of section 82 by our authorities is, with respect, capable of further examination.
The thrust of the analysis is the Act itself.

Emphasis shall be placed on the meaning of the terms "total amount", "gross income", "income" and "taxable income" within their relationship with the burden of proof provisions of section 82 if the Act.

There is no definition of **total receipt or accrual, total amount, gross income, income, taxable income** and **income after tax** in the Act.

The **interpretation section** of the Act gives strict instruction [shall mean] on the method to be used in order to determine gross income. When a chef follows a cooking recipe to produce *crepe suzette*, that cooking recipe is not a definition of crepe suzette; neither is the gross income recipe in terms of the interpretation section of the Act a definition of gross income.

The Act must be read carefully and one must be extremely cautious about the interpretation given by our authorities which tend to be *pro aerario*.

The correct interpretation of total amount as it relates to gross income is critical for the taxpayer as it affects the onus of proof he has to discharge.

The recipe for gross income clearly states that gross income is the total amount received or accrued during a period of assessment from a source within the Republic, excluding certain receipts and accruals and including certain specified amounts.[5]

Even though this is abundantly clear from a reading of the interpretation section of "gross income", this does not coincide with the accepted perception of our authorities and jurists.

Silke for example[6] states, that in order to arrive at "gross income" one must deduct from the "total amount" all receipts and accruals of a capital nature from a source outside the Republic.

This is the accepted view. This is not what the Act states.

There is no justification whatsoever to deduct non Republic receipts or accruals from the total amount in order to formulate the total amount.
Non Republic receipts or accrual never form part of the total amount unless they are deemed, in terms of the Act, to be from a source within the Republic.

The following flow diagram from gross wealth to taxable income shows that non Republic receipts or accruals are part of **the total receipts or accruals** but are not part of **the total amount**.

The flow diagram also throws some light on abatements and burden of proof.
Thus if abatement has the same meaning as rebate, then the provisions of section 82 do not apply because abatement would then be a ***quantum*** of tax and not a **quantum** of amount. The very basis of the burden of proof imposed in terms of section 82 is that the **amount** is the sole issue.

Section 82 deals specifically with one situation: the burden of proof that an **amount** is not liable to tax, is exempt from tax or is subject to deductions abatements or set off. Section 82 has nothing to do with tax itself. Thus there would be no burden of proof to discharge, in terms of section 82, that a tax is subject to a reduction; for the simple reason that a tax is not an amount.

FORMULA: FROM WEALTH TO INCOME [7]

INTERPRETATION	STEPS
1] GROSS WEALTH RECEIVED OR ACCRUED. The total gross wealth received or accrued from any source whatsoever including gross wealth which does not have an ascertainable monetary value.	LESS: receipts or accruals of no ascertainable money value EQUALS: **TOTAL RECEIPTS OR ACCRUALS**
2] TOTAL RECEIPTS OR ACCRUALS All receipts or accruals with an ascertainable money value from any source whatsoever.	LESS: non Republic receipts or accruals EQUALS: **TOTAL AMOUNT**
3] TOTAL AMOUNT ONUS All receipts or accruals with an ascertainable money value from a source within the Republic or deemed to be within the Republic. An amount must have a money value from a source within the Republic.	LESS: receipts or accruals of a capital nature PLUS special inclusions [8] EQUALS: **GROSS INCOME**
4] GROSS INCOME OF All receipts or accruals with an ascertainable monetary value from a source within the Republic or deemed to be within the Republic less receipts or accruals of a capital nature but including certain amounts clearly described.	LESS: amounts exempt from tax [9] EQUALS: **INCOME**
5] INCOME PROOF All receipts or accruals with an ascertainable monetary value from a source within the Republic or deemed to be within the Republic less receipts or accruals of a capital nature and after deducting any amounts exempt from tax in terms of the Act.	LESS: Allowable deductions [10] LESS: Set-off add stock at end less stock at beginning EQUALS: **TAXABLE INCOME** *NORMAL TAX* *less : rebates* [11] *equals: REBATED TAX*
6] TAXABLE INCOME [12] Income less allowable deduction or set off.	LESS: rebated tax EQUALS: **INCOME AFTER TAX**
7] INCOME AFTER TAX	

4.1.2 CRITICISM OF STANDARD INTERPRETATION OF S. 82

The interpretation of section 82 of the Act, and of the Act generally, is difficult, primarily because the terminology used by our authorities tends not to be consistent.

The expression, **the amount of an income**, presents problems of intepretation because the terms **amount** and **income** have both ordinary and statutory meanings.

It is suggested that, where the distinction between the ordinary and statutory meaning is of consequence, the statutory term be printed in bold type and placed in inverted commas, and the term used in its ordinary meaning be printed in bold type and underlined.
Thus, "**income**" would have its statutory meaning, and **income** would have its ordinary meaning.
A great number of permutation of meanings can be expressed by the often used phrase, *the amount of an income*:

(a) the amount of an income,
(b) the "**amount**" of an **income**,
(c) the "**amount**" of an "**income**",
(d) the **amount** of an "**income**",
(e) the **amount** of an **income**.

Let us look at the meaning of (a) and (c).

The meaning of (a) as a tax concept is indeterminate.

The meaning of (d) is clearly a quantum of receipts and accruals with an ascertainable monetary value from a source within the Republic or deemed to be within the Republic.[13]

3.1.3 PARTNERSHIPS AND ONUS OF PROOF IN TERMS OF SECTION 82

The burden of proof the tax payer has to bear in terms of section 82 is not as onerous as is generally assumed.

The validity of the accepted proposition that the effect of s 82 is, that an amount received by the taxpayer on which an assessment has been made by the Commissioner is taxable unless the taxpayer shows that it is not income, is queried.

Indeed it shall be argued that such conclusion cannot be derived legally or logically from the wording used in section 82 and that there is no **general statutory presumption in favour of the validity of an assessment made by the Commissioner.**[14]

It is imperative that section 82 be interpreted strictly in terms of the words used.

PRACTICAL EXAMPLE: AN ANALYSIS OF SOME RECENT PAPERS DEALING WITH PARTNERSHIP AND ONUS OF PROOF

The generally accepted proposition that the onus lies on the taxpayer in terms of section 82 of the Act to prove that he was engaged in a partnership, does not seem to have been challenged.

It it pertinent to examine papers by Botha,D., Haupt,P. and Gillooly,T which deal directly with this issue and which quote cases to support their contention.

These three papers have been selected because they have been produced recently, are, with respect, of a high standard and are frequently quoted.

PAPER 1

Botha,D

"..., the onus remains on the taxpayer in terms of s.82 of the Income Tax Act to prove that he was in fact engaged in partnership business." [15]

The following cases are referred to:

ITC 248 / Deary v. Deputy CIR / Kirsch v. CIR and Hoheisen v. CIR.

The following categorical statement is the conclusion::

Be it as it may the onus of proof that a membership exists remains not with the Commissioner but with the "member"'.

PAPER 2

Haupt,P

" The onus of establishing that a partnership exists, rests upon the taxpayer in terms of s 82 of the Income Tax Act and as evidenced in the cases below " [16]

This outstanding essay does not refer critically to section 82. It does analyze closely the following cases:

ITC 248/ Kirsch v CIR (1946 WLD) / Deary v Deputy CIR (1920 CPD) / ITC 315 / ITC 634 and ITC 1083.

PAPER 3

Gillooly,T

" In income tax cases it must be remembered that the onus of proving the conclusion of a valid contract of partnership rests upon the taxpayer " [17]

Reference is made to section 82 of the Income Tax Act and to the following cases:

Hoheisen v. CIR / ITC 248 / ITC 315 and ITC 444

The cases referred to in the above three articles will be analyzed to test the relationship between partnership and the onus of proof.

The *ratio decidendi* of each of the above cases as far as partnership and section 82 shall be extracted. This will be followed by criticism and comments.

At the outset it must be stressed that despite the reference to section 82 **not a single one of the cases** mentioned above deals with section 82 of the Act.

Indeed no case mentioned in evidence by any of these three writers deals with Act 58 of 1962.

Six of the nine cases were decided by the special court which is not a court of law.[18] It has no inherent jurisdiction. Its rulings are not binding on the Commissioner.

Its rulings have no limiting authority on any courts. The special court is a court of revision, it is not a court of appeal. [19]

The decision of a special court may be of some legal interest but has no legal consequence.

It is strange that not a single AD decision was quoted by any of the above three writers.

The cases which have been quoted as evidence are as follows:

		Botha,D	Haupt,P	Gillooly,T
1) Deary v Deputy CIR	1920 CPD	#	#	
2) Hoheisen v CIR	1931 CPD	#	#	#
3) ITC 248	1932		#	#
4) ITC 315	1934		#	#
5) ITC 434	1939			#
6) ITC 444	1939			
7) Kirsch v CIR	1946 WLD	#	#	
8) ITC 634	1947		#	
9) ITC 1083	1966		#	

ANALYSIS OF THE ABOVE NINE CASES

1) Deary v Deputy CIR 32 SATC 92, 1920 CPD 541

The following quotations from the case are relevant:

"It seems clear from authority that in order to determine whether a particular agreement does or does not constitute a partnership it is not sufficient to enquire whether the alleged partner does or does not enjoy a share in the profits facts that he receives a share is not conclusive, the real intention of the parties as deduced from the whole agreement must be looked to".[20]

" I may add that in any event it seems to me that the onus is on Deary to show that this share of profits is not income. Section 83, Act 41, 1917 provides that the burden of proof that any income or dividend is exempt from or not liable to any tax chargeable under this Act shall be on the person claiming such exemption or non liability" [21]

Comment

There is nothing in the judgement of Benjamin J. or the concurring judgement of Gardiner J. which is of any relevance whatsoever as to the relationship between the onus of proof provision in terms of section 83 of Act 41 of 1917 and partnership. Section 83 is not even referred to.

The case Deary v. Deputy C.I.R cannot be used as authority that it is the taxpayer who must prove the existence of a partnership in terms of the burden of proof provision, section 83, Act 41, 1917.

The case does not deal with section 82 of the Act.

2) Hoheisen v CIR 5 SATC 207, 1931 CPD

In terms of section 60 (1) of Act 40 of 1925 an appeal from a special court lay only on a question of law.

Reference is made to the Special Court verdict as follows:

"Now under sec.57 of Act 40 of 1925 the burden of proving that any part of the profit of $23,512 was exempt from taxation lay upon the appellant.
In other words he had to satisfy the Special Court in this case that a partnership existed between himself and his son. As I read the judgement of the Special Court he failed to discharge that *onus*, and failed upon the facts, not upon the law" [22]

Comment

This is eminently correct. Section 57 of Act 40 of 1925 imposes a burden of proof to be discharged by the taxpayer that a certain amount is exempt from taxation.
Where in order to discharge the burden of proof that the amount is exempt from taxation, it is necessary to establish that a partnership exist, then obviously that burden must be discharged.

But this is a far cry from stating that the onus of proving that a partnership exists rest on the taxpayer.

There may be situations where in order to discharge the burden of proof in terms of section 82 of the Act, the taxpayer must prove that his wife is 65 years old.
To state that therefore **the burden of proof of establishing the age of the taxpayer's wife is on the taxpayer** is obviously an absurd general proposition.

Section 82 of the Act was not referred to.

3) ITC 248 (1932) VOL 6 Page 379 (U)

We feel that we cannot accept his bare statement without corroboration that his sons actually became partners and acted as such. In other words, the appellant has not established the existence of a partnership to our satisfaction.
Under these circumstances we find that the appellant has not discharged the burden of proving that a partnership existed which is imposed upon him, and the assessment is confirmed. [23]

Comment

It is important to note that no reference is made to the onus of proof provision section 57 of Act 40 of 1925.
The burden of proof is simply one imposed on a person making a claim and having to prove his claim.
No reference is made to section 82 of the Act.

4) ITC 315 (1934) VOL 8 PAGE 163 (U)

So far as we can derive anything definite from the statement of the applicant, this partnership was entered into when the stepdaughter was a minor. There is no definite statement that it was ratified when she became of age. If she was a minor at the date of entering into the partnership, then the constitution of such a partnership presents considerable difficulties, upon which it is not necessary to enlarge.
The result is, as the onus is entirely upon the appellant, the court has come to the conclusion that the appellant has failed to discharge the *onus* of proving that the stepdaughter is entitled to one-third of the income derived by him. [24]

The *ratio decidendi* has been clearly stated:

"Although we give full credence to the statement of the appellant and his stepdaughter, we cannot find that he has discharged the burden of proving the case which the law imposes on him. [25]

Comment

If the proposition that the onus is entirely upon the appellant, then obviously he has to discharge all claims.

There is nothing in the case which has any bearing on the relationship between burden of proof and partnerships as such.

No reference is made to section 82 of the Act.

5) ITC 434 (1939) VOL 10 PAGE 447 (U)

Ratio decidendi

These transactions were in their nature in the ordinary course of the appellant's firm business.
That being the case, it is clear that these transactions were on income account. As the debts were clearly irrecoverable, the position is really more that one of mere doubt as to the recoverability of its debts.
In these circumstances, the Court must allow the appeals as to the deduction of what has been described as a doubtful debt, though it is really a bad debt. Each appellant is allowed his or her share of the partnership losses in respect of these debts and the assessment must be amended accordingly.

There is no justification to quote this case for the proposition that the onus of proving the existence of a partnership rests upon the taxpayer.

There is no reference to section 82 of the Act.

6) ITC 444 (1939) VOL 11 PAGE 81 (U)

Ratio decidendi

There is an *obiter dictum* as follows:

It seems to us that the burden of proof lies on the appellant to establish that there was a partnership between him and the widow and, having regard to the terms of sec. 57 of Act 40 of 1925, this has not been satisfactorily discharged. [26]

It is important to note that the *ratio decidendi* is as follows:

" There was either a partnership, though as to this we are not sure, but even if there was not a partnership, then the agreement amounted to a lease of the widow's interest in the business.
In either event then (a) if the widow was a partner, the payments were properly made to her as a partner, or (b) is she was not a partner, then the payments were properly deducted as rent.
Whatever view we take of the matter, the Commissioner has not established his contentions. The appeal must be allowed and the assessments amended accordingly.

Comment

A very guarded *obiter dictum.*

The ratio decidendi is not based on the existence or proof of partnerships at all. On the contrary it clearly states that whether there was a partnership or not the Commissioner had not established his contentions.

No reference is made to section 82 of the Act.

7) Kirsch v CIR 14 SATC 72, 1946 WLD

If the question whether or not a partnership was constituted by the agreement of 1st April had been left to my determination.....The question, however need not be pursued because it is abundantly clear from the decisions in *Joubert v. Tarry & Co., Hart v. Pickles*(1929, T.H. 244), and *Walker v. Hirsch* (27 Ch. 460) that no partnership was created. [87]

Comment

The issue of burden of proof, as it relates to partnership, is irrelevant for the decision in this case.

No reference is made to section 82 of the Act. .

8) ITC 634 (1947) VOL 15 PAGE 114 (U)

Ratio decidendi

In the present case it is clear that a valid partnership was created between the appellants and his brother from 1934 onwards and that each contributed to it the payment of the rent and their services till 1936. There is no evidence that such partnership was dissolved by mutual agreement and consent.

The **ratio decidendi** of the case speaks for itself.

There is no reference in the case to section 82 of the Act.

9) ITC 1083 (1966) VOL 28 PAGE 157 (R)

Ratio decidendi
In my opinion the evidence established the existence of an equal partnership between the three brothers and the appeal succeeds.

At the outset it must be stressed that we are not dealing with South African tax legislation, but with Rhodesian tax legislation. The burden of proof section 52 of the Rhodesian Act [CHAPTER 181] is in many ways different from section 82 of the Act.

In some ways it is superior, as for instance it clearly states that it deals not only with objections but also with appeals.[28]

But even assuming there is some relevance **in pari materia**, which relevance not been established or hinted at, it is difficult to extrapolate from the ratio decidendi of the case that the onus of proving the validity of a partnership rests upon the taxpayer.[29]

General comments:

* Not a single AD decision was quoted. Why?
* Most of the decision were special Court Cases. Why?
* The South African cases were at least 40 years old. Why ?
* The only case which was decided reasonably recently [a quarter of century ago] was a Rhodesian decision. Why ?
* Not one of the cases deals with, or refer to, section 82 of the Act. If the Acts, the cases refer to, are relevant **in pari materia**, there is no attempt whatsoever to reason why and how they are relevant. Why ?

The answer is simple, there is no burden of proof in terms of section 82 to establish the existence of a partnership as such, and any attempt to find cases to support this proposition is extremely difficult.[30]

It is supposed to be gospel truth, but the sceptic is entitled to demand to see the gospel's chapter and the gospel's verse.

The proposition that in terms of section 82, a partnership has the onus of proving that it is a partnership, has been repeated at nauseam, and yet the wording used in section 82 cannot conceivably be interpreted to substantiate such a conclusion.

The basis of section 82 is the burden imposed on the taxpayer to prove that an amount is not taxable, is exempt from taxation or is subject to deductions. A partnership is not an amount in terms of section 82.

Conclusions:

1) The proposition that the taxpayer has to establish the existence of a partnership **in terms of section 82 of the Act** is not susbstantiated.

2) The proposition that the taxpayer has to establish the existence of a partnership **in terms of the interpretation of section 82 by our courts** is not substantiated.

3) It is true that there are situations where the taxpayer in order to prove his case may have to establish the fact that he is, or is not, a member of a partnership.
There are also situations where the taxpayer in order to prove his case may have to establish that he wears size 8 shoes.

4) Not one of the cases quoted above deals with section 82 of Act 58 of 1962.
Not one of the cases quoted above deals with Act 58 of 1962.
Not one of the cases quoted above is authority for the proposition that the onus is on the taxpayer to prove the existence of a partnership in terms of section 82 of the Act.[31]

4.2 INTERPRETATION OF SECTION 82

4.2.1 THE BURDEN OF PROOF

4.2.1.1 INTRODUCTION

Not all tax cases or tax situations are subject to section 82 of the Act.

A few examples follow:

(a) In criminal tax cases neither the onus of proof nor the quantum of proof imposed by the Act are relevant.

(b) In civil tax cases which are subject to other Acts, the onus and the quantum of proof may have to be discharged be in terms of these other Acts.

(c) In tax cases subject to the Act, section 82 is relevant only where the matter at issue is a question of fact. Section 82 is not relevant where the matter at issue is a question of law.

Section 82 is not relevant in the determination of the question whether the issue is one of law or fact as this determination itself is a matter of law.

(d) Section 82 is relevant only where the taxpayer attempts to establish, in terms of the Act, that:

(1) at the objection stage, [***by burden of proof***]
(i) any amount is not exempt to any tax
(ii) any amount is not liable to any tax
(iii) any amount is subject to any deduction
(iv) any amount is subject to any abatement
(v) any amount is subject to any set off.

(2) at the appeal stage, [***by showing***]
(i) the Commissioner is wrong concerning his decision concerning (i) to (v)

Where the matter at issue is not strictly one of the above situations, section 82 is not pertinent. Moreover on appeal to the Special Court, the taxpayer need not **show** that the Commissioner is wrong, where the remedy granted is neither the reversion nor the alteration of the Commissioner's decision. Where the special court has no jurisdiction, the taxpayer can appeal directly to Courts of Law outside the constraint of the Act, where the rules of evidence undisturbed by section 82 of the Act pertain.

(e) The starting point for section 82 is **any amount** . Section 82 is not relevant to the question as to whether a receipt or accrual is an amount.

(f) Showing by the taxpayer upon the hearing of an appeal that the Commissioner's decision is wrong is not necessarily equivalent to the discharge of a burden of proof. Indeed the very fact that the term **burden of proof** is used in the first part of section 82 and not in the second part of section 82 militates against such an interpretation.

Summary of situations where burden of proof in terms of section 82 of the Act are not or may not be relevant.

CRIMINAL CASES

Section 82 not relevant

CIVIL CASES

* **Other Acts**
  Section 82 not relevant

* **The Act**

  Questions of law
  No burden of proof

  Questions of facts
  - Section 82 is not relevant as to what constitutes an amount and as to whether there is an amount.

  - Section 82 relevant:
    BUT
    at the objection stage burden of proof limited to exemptions, non-liability, deduction, abatement or set off.
    at the appeal stage showing that the decision of the Commissioner is wrong re decision at the objection stage only relevant for verdict of reversion or alteration.
    The decision the taxpayer must show is wrong is, not any decision in terms of the Act, but strictly a decision at the objection stage re non liability, exemption, deduction, abatement or set-off.

* **Alternative jurisdiction**
  - No burden of proof where Special Court is not competent to hear appeal, and taxpayer appeals directly to Courts of Law outside the constraint of the Act.

  - Even where the Special Court is competent to hear appeal it does not necessarily have a monopoly.

4.2.1.2 THE MEANING OF BURDEN OF PROOF

The cardinal rule of evidence is that the burden of proof lies with the person who assets the affirmative.

Ei incumbit probatio qui dicit, non qui negat. [32]

This is a rule of logic, fairness and convenience.
The true negative, that is the negative in substance not the grammatical negative, cannot be established as simply as the affirmative. Indeed the negative may in logic not be capable of being proved at all. It is also fair that he who makes a claim must prove his claim.

There are in practice problems arising because it is often possible to confuse an affirmative with a grammatical negative. Thus an alteration in the pleadings can give an issue a negative or affirmative form.
An excellent rule of thumb devised to establish what is the true affirmative substance of the issue is, and on whom the burden of proof lies is:

"...the proper test is, which party would be successful if no evidence at all were given " [33]

The term burden of proof has two distinct meanings; the onus of proof regarding the whole case and the onus of proof regarding some particular facts.

The general burden of proof lies on the party against whom judgment would be given if no evidence were adduced. However the particular burden of proof can shift repeatedly as a result of evidence being given.

The particular burden of proof deals with the onus as to a particular fact at issue.

The relationship between the general and the particular burden of proof and the shifting of the onus as a consequence has been analyzed clearly in the English case Abrath v North Eastern RY.CO:[34]

The test, therefore, as to burden of proof or onus of proof, whichever term is used is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus shifts, and at which the tribunal may have to say that if the case stops there it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests.

In the great majority of cases decided by our Special Courts the taxpayer has been unable to discharge the burden of proof imposed by section 82.

Judgements of our Special Courts which are not courts of appeal, and whose decisions are not binding should be considered with great caution.

The distinction between the general burden of proof and the particular burden of proof even though, it is submitted logically relevant, is not in the process of evolution in our jurisprudence.

The term burden of proof is used mainly in two different ways in our jurisprudence. It is critical for an analysis of section 82 to have clarity about the distinction between the substantive and the procedural meaning of onus of proof.
It is submitted that if such a distinction is clearly drawn it will be possible to interpret section 82 more meaningfully.

4.2.1.2.1 Substantive law meaning

The primary meaning of the concept burden of proof has been clearly defined as follows:

" The duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence as the case may be.....In Brand v Minister of Justice 1959 (4) SA 712 (A) at 715 Ogilivie Thompson JA called it the "overall onus". In this sense the onus can never shift from the party upon whom it originally rested".

South Cape Corporation (Pty) Ltd v Engineering Management services (Pty) Ltd 1977 (3) SA 534 (A), per Corbertt JA at 548.

4.2.1.2.2 Procedural law meaning ("weerleggingslas")

Onus of proof also means the duty to give evidence.

Thus Supreme Court rule 39(11) uses the terminology '**onus of adducing evidence**'.

We are here dealing with the evidential burden.

Even though in many cases the two meanings will occur simultaneously, this is not necessarily so.

4.2.1.2.3 Degree of burden of proof

The Special Court has been created by statute and therefore has no authority outside what is specifically laid down in the Act. It is strictly speaking not a court of law,[35] it is a court of revision.[36]

Schedule PART B4 reads:

Save as in these regulations is otherwise provided, the general practice and procedure of the Court shall be that of a magistrate's court in so far as such practice are applicable.

Thus the only information available from the Act from which one can establish the quantum of proof needed in the discharge of section 82:

a) **the Special Court it is a creature of stature,**

b) **the procedure of a magistrate's Court is sometimes applicable.**

There has been a number of cases and articles which seem to indicate that the onus must be discharged on a preponderance or on a balance of probabilities.

The situation however is not simple, not only because of the interrelationship between quantum of proof and evidence, but also because there are two stages, the objection stage and the Special Court stage.

Objection stage: There is little emphasis in the tax litterature on this topic.

The taxpayer can object to the Commissioner's assessment. Just like the Special Court the Commissioner is a creature of statute.

How is the taxpayer to discharge his burden of proof.

In terms of section 81 (3) the objection must be in writing and must specify in detail the grounds upon which it is made.

As the Commissioner is a creature of statute, he is bound by the provisions of the Act, and therefore cannot entertain an objection which is not in writing.

Again, the objection must specify in detail the grounds upon which it is made. Thus an objection in writing which does not contain the grounds of the objection cannot be entertained by the Commissioner.

But what if the objection is in writing and specifies in detail the grounds upon which it is made; on what basis does the Commissioner reduce, alter or disallow the objection ?

What is the degree of onus, the quantum of onus which the Commissioner requires in order to decide on a reduction, alteration or disallowance?

Is the quantum different for a reduction than for a disallowance?

Has the Commissioner, a creature of Statute, absolute freedom ?

Can the Commissioner, insist on evidence beyond reasonable doubt ?

Does the power conferred in terms of section 81 (4), **"the Commissioner may....."** mean that he can do as he feels fit, that his discretion is absolute and that there is no accountability at all to the public.

The following suggestion is tentatively proposed.

A distinction must be made between **the what** and **the how** of the Commissioner's decision as to reduction, alteration or disallowing of an objection.

It is submitted that as the Commissioner's decision can be appealed against to the Special Court, that therefore the quantum of proof on objection to the Commissioner cannot be greater than on appeal to the Special Court. It would follow therefore that if the burden of proof at the Special Court must be discharged on a preponderance of probability that the Commissioner cannot insist on the taxpayer discharging his burden of proof on objection, on a beyond reasonable doubt principle. The taxpayer can appeal to the Special Court [in certain circumstances:- the Board] against the decision of the Commissioner. He is appealing against **the what** of the decision.

Should however the Commissioner decide that for him to alter the assessment he requires evidence beyond reasonable doubt, or should he decide on his alteration by guess work, or make his decision when he is under the influence of drugs , the taxpayer has two remedies.

He can appeal to the Special Court against **the what** of the assessment in which case he will have to discharge the burden in terms of section 82 on a preponderance of probability.

He can also appeal against **the how** of the assessment.

Here is not appealing against what the Commissioner has "decided", he is appealing against the method and the procedure used by the Commissioner to reach the decision.

Should the Special Court have no jurisdiction, and the taxpayer appeals to a Court of Law outside the constraint of the Act, then the quantum of burden of proof will depend on whether it is a civil or criminal case.

Appeal stage

It would seem to be settled law that the burden of proof in terms of section 82 must be discharged on a balance or preponderance of probabilities.[37]

The terminology preponderance of probabilities is perhaps preferable to the metaphor balance of probabilities.

The danger with the metaphor **balance of probabilities** is that one may be tempted to look at a balance with equal weights of probabilities on each side.

The scale is evenly balanced and the credibility of the taxpayer is then added in his scale which leads to the scale tilting in his favour. The **scale metaphor** is suspect: the likelihood of the scale balancing equally is remote, moreover the credibility of the taxpayer is part of the evidence and should have been in the balance already.

The relationship between evidence and the preponderance of probabilities can be analyzed in two distinct situations.

1) **The burden of proof that any amount.....**

Here, on appeal, in order to discharge the burden of proof on a preponderance of probabilities, the defendant is limited to the grounds stated in his notice of objections.[38] The grounds must be stated in writing, but there is no reason whatsoever why the evidence itself should be in writing, provided that it was specified in the grounds.

The death sentence, in some legal systems, can be based on verbal evidence. Verbal evidence is in no way inferior to written evidence as far as credibility is concerned. It may be inferior as far as certainty and reliability is concerned. There is nothing magical about writing which confers any credibility to the written word over and above that of the spoken word. Thus at the appeal stage, the defendant is bound by the written grounds in his notice of objections. There is no restriction to verbal evidence provided it is referred to in the notice of objection. The defendant must discharged his burden of proof on a preponderance of probabilities.

2) .....<u>unless it is shown by the appellant that the decision is wrong.</u>

The situation here is different because in terms of section 81 (3) the notice of objection has to be in writing and must specify in detail the grounds upon which the objection is made. Section 81 is specific to objections to assessments.

There are two separate scenarios in section 82:

<u>scenario one</u>: The taxpayer is objecting to the assessment of the Commissioner; to discharge the burden of proof in terms of section 82 he must advance evidence relevant to the assessment.
<u>scneario two</u>: The taxpayer is challenging the decision of the Commissioner; to succeed he must advance evidence to show that the decision of the Commissioner is wrong.

The two issues are different, and the relevant evidence to succeed in **scenario one**, is not necessarily the same as the relevant evidence required to succeed in **scenario two.**

Indeed the taxpayer is not given any opportunity to query the decision of the Commissioner before the appeal to the Special Court.

Where the taxpayer has to discharge on a preponderance of probability that the Commissioner is wrong, he is not limited to the grounds of appeal specified in the notice of objection.

He can produce any evidence to discharge the burden that the Commissioner is wrong, with the proviso that no such evidence can be produced if it would have been necessary for the objection of the Commissioner's assessment, and ought therefore to have been included in the notice of objection.

However, it is submitted, that evidence of an error in the arithmetical computation by the Commissioner which the taxpayer discovers after his objection to the assessment, can be used to establish on appeal that the Commissioner is wrong.

The denial of the right of the taxpayer to defend himself, with relevant pertinent evidence not subject to section 81 (3), would be contrary to legitimate expectation.
The Commissioner could make any decision, leave it to the taxpayer to show that the decision is wrong and refuse to allow the taxpayer the right to produce evidence which would enable the taxpayer, on a preponderance of probabilities, to show that the decision is of the Commissioner is wrong.

4.2.2 THAT ANY AMOUNT

4.2.2.1 The danger of "pro aerario" interpretation.

Some of the conclusions reached in this thesis are possibly controversial.
These conclusions are based on a strict interpretation of the Act, in terms of the words used in the Act.
The standard interpretation by our courts and by our authorities is pro aerario, in the sense that emphasis is placed on what the legislator meant for the purpose of taxing the individual. If in any doubt, it must be pro aerario, i.e. for the benefit of the treasury.

The general view taken by our authorities is, with respect, still based on the old Roman law **contra fiscum pro aerario** maxim. The **fiscus** was the Emperor's private purse, whereas the **aerarium** was the exchequer or the treasury.

Contra fiscum meant that in the case of doubt any taxes, levies or other form of extortion would not be for the benefit of the emperor's purse but **pro aerario** i.e. for the benefit of the exchequer or state treasury.

Even though in Classical Roman Law already the **fiscus** and the **aerarium** were combined, the expression **contra fiscum** survived to plague us up to the present day.
Contra fiscum does not mean in favour of the taxpayer or against the state, it implies that it is **pro aerario**, that is for the benefit of the state treasury.

The taxpayer does not need a **contra fiscum** interpretation of the Act. The taxpayer must insist that the Act is not interpreted **pro aerario**, that is in favour of the department of revenue.

4.2.2.2 EXAMPLE OF INTERPRETATION TO THE PREJUDICE OF THE TAXPAYER

The accepted interpretation, by our authorities, of **amount** in the expression **any amount** in section 82 of the Act is, to the prejudice of the taxpayer, and is contrary to the clear meaning expressed by the words used in the Act.

Example.

Silke states that in order to arrive at "gross income" one must deduct from the "total amount":

(i) all receipts and accrual of a capital nature, and

(ii) all receipts and accruals from a source outside the Republic.[39]

This interpretation is shared by all the leading authorities.

With respect this is not what the Act states.

The language of the Act is clear; the "total amount" includes receipts and accrual from within the Republic, or deemed to be within the Republic.[40]

If the taxpayer is taxed in terms of the words clearly used in the Act, the burden of proof he has to bear in terms of section 82 is not as onerous as is generally assumed.

4.2.2.3 ANALYSIS OF "ANY AMOUNT" AND IMPLICATION OF ANALYSIS.

There is no justification whatsoever to treat non Republic receipts or accruals as part of the **total amount**.

Non Republic receipts or accruals is not a component of the **total amount**. This is critical for the purpose of burden of proof to be discharged by the taxpayer.

The suggested interpretation is as follows:

TOTAL RECEIPTS AND ACCRUALS

LESS (I) NON CASH RECEIPTS

(2) NON REPUBLIC RECEIPTS

EQUALS **TOTAL AMOUNT**

LESS RECEIPTS OR ACCRUALS OF A CAPITAL NATURE

EQUALS **GROSS INCOME**

Analysis:

It is reasonable to assume that the meaning of **amount** in **any amount** in section 82 of the Act has the same meaning as **amount** in **total amount** in the interpretation section 1 of gross income. There is authority for this reading [41]

Thus any amount is part of the total amount.

It follows that, as the burden of proof only relates to amounts which are part of the total amount, that therefore any receipts or accruals which are not part of the total amount are not subject to the provision of section 82.

Conclusions:

(1) Where the receipt or accrual is not cash or cash quantifiable it is not an amount, and therefore section 82 is not relevant.

(2) Where the receipt or accrual is from a source outside the Republic, [subject to the deeming provisions of the Act] it is not an amount and therefore is not subject to the burden of proof provisions of section 82 of the Act.

There are, as far as I have been able to ascertain, no case or authority on the point.

4.2.2.3 "AMOUNT" AND THE SIX STAGES OF INCOME

An important aspect of this study is the meaning of the terms "total amount", "gross income", "income" and "taxable income" as construed in terms of the interpretation section of the Act and as they relate the burden of proof.

The burden of proof is linked to the statutory formula. Indeed the burden of proof section 82 is the obverse of the statutory formula; every step of the statutory formula is linked directly with a burden of proof prescription in terms of section 82 of the Act.

The accepted perception of our authorities concerning the meaning of **gross income** as it relates to the concept **total amount** is, with respect, capable of further analysis.

The following flow diagram is suggested:

1] TOTAL RECEIPTS OR ACCRUAL:	*LESS* Non Republic receipts or accruals *EQUALS* TOTAL AMOUNT
2] TOTAL AMOUNT Section 82 non liability stage	: *LESS* Receipts or accruals of a capital nature **PLUS** Special amounts *EQUALS* GROSS INCOME
3] GROSS INCOME Section 82 exempt stage	: *LESS* amounts exempt from tax **EQUALS** INCOME
4] INCOME Section 82 deduction stage set-off stage	: *LESS* Allowable deductions *add* stock at end *less* stock at beginning *EQUALS* TAXABLE INCOME
5] TAXABLE INCOME Section 82 abatement stage	: *LESS* normal tax on taxable income **PLUS** rebates/abatements *EQUALS* INCOME AFTER TAX
6] INCOME AFTER TAX	

4.2.3 IS EXEMPT FROM OR NOT LIABLE TO ANY TAX CHARGEABLE UNDER THIS ACT

4.2.3.1 INTRODUCTION

Exemption and non liability, even though braced together are entirely different concepts. Exemption means being immune from tax in terms of section 10 of the Act.

An exempt amount is part of gross income , it has the quality of gross income but does not form part of income.
As income is gross income less amounts exempts from tax it is a contradiction in terms to speak of an exempt income. What is exempted has never become part of income. It is correct to speak of an exempt amount.
From the total non Republic receipts or accruals of an ascertainable monetary value is deducted receipts or accrual of a capital nature, that is non liable amounts.
Total amount less non liable amounts equals gross income.
Gross income less exempt amounts equals income.

It is suggested, with respect, that as amounts can only be exempted from gross income after deduction of non liable amounts from the total amount, that therefore the correct order should have read "**any amount not liable or exempt from any tax**"

We are dealing with issues of some legal complexity.
These issues deserve careful analysis.

Unfortunately there is confusion in our literature mainly because the distinction between terms having a statutory content and terms having an ordinary content is not made. If the convention mentioned ***supra*** is complied with, it will become evident that:

(a) income or capital :- is indeterminate for our purpose

(b) "**income**" or **capital** :- is a logical impossibility, and

(c) **income** or **capital** :- may have some meaning, which meaning is of little relevance for our purpose.

4.2.3.2 IS EXEMPT FROM

4.2.3.2.1 Exemptions granted in terms of the Act.

Exemptions are granted in terms of section 10.

Exemptions in terms of section 10 will be examined from a burden of proof context.

For our purpose it is useful to distinguish between an amount exempt form tax and a person exempt from tax.[42]

4.2.3.2.1.1 Amount exempt from tax

Where a taxpayer claims that an amount is exempt from tax, he will be subject to the onus of proof provisions of section 82. Thus in terms of section 10 (1) (gB) any disability pension paid under section 39(1)(c) or (d) of the Workmen's Compensation Act 30 of 1941 is exempt from tax. The onus of proof in terms of s. 82 that an amount is exempt from tax in terms of section 10(gA) must be discharged by the taxpayer.

4.2.3.2.1.2 Person exempted from tax

A person is not an amount in terms of the Act.

It follows therefore that the onus of establishing, that the taxpayer is a person exempt from tax, is not subject to section 82 of the Act. Thus in terms of section 10 (1) (f) all the receipts and accruals of an ecclesiastical institution of a public character are exempt from tax. The onus of establishing that a particular body is an ecclesiastical institution of a public character is not subject to section 82.

It is submitted therefore that the onus of proving that a person is an ecclesiastical institution of a public character falls on the Commissioner, but having done that, the onus is then on the taxpayer to establish that the amount in dispute is exempt.

4.2.3.2.2 Exemptions granted in terms of other acts

There are exemptions granted by a great number of Acts.[43] These exemptions are important for the burden of proof concept. Many of these exemptions override the provisions of the Act by providing for instance that "notwithstanding anything to the contrary contained in any law, there will be exempt from any tax or income, profit or gain..."[44]

But even if an exemption granted in terms of another act did not contain a clause such as "notwithstanding anything to the contrary contained in any law" section 82 would not be relevant as the exemptions are qualified by **"as chargeable under this Act".**[45]

It is also clear that exemptions in terms of previous income tax acts are not exemptions in terms of the Act. Section 82 clearly refers to Act 58 of 1962. It is submitted that exemptions in terms of previous income tax acts would have to be dealt with for the purpose of burden of proof in terms of those previous acts.

4.2.3.2.3 Claim of non exemptions

Let us assume that a taxpayer in order to arrange his affairs as efficiently as possible decides that it would be preferable that an exemption is not claimed in the current year when his taxable income is likely to be low. His tax consultant has advised him that it would be preferable to claim this exemption in year 2 when in his opinion the exemption would be legally claimable and when his taxable income is likely to be high.

Section 82 clearly imposes a burden of proof on the taxpayer to establish that an amount is exempt from tax. There is no burden of proof imposed on the taxpayer by section 82 to establish that an amount is not exempt from tax.

4.2.3.3 OR NOT LIABLE TO

4.2.3.3.1 Introduction

The interpretation of gross income in section 1 of the Act excludes receipts or accruals of a **capital nature** from gross income.

Some inclusions of **a capital nature** are in terms of paragraphs (a) to (n) of the interpretation of **"gross income"** allowed provided that the scope of the interpretation of **"gross income"** is not limited thereby.

It would seem that in order for a receipt or accrual to be **"not liable to any tax"** it must have the quality of being of a capital nature. Receipts or accruals of a capital nature form part of the **"total amount"** but do not form part of **"gross income"**[46] and never acquire the attributes of **"gross income"**.

There are therefore two main scenarios:

(a) the Commissioner assesses an amount, and the taxpayer objects to the assessment claiming that such amount is of a capital nature and therefore not liable,

(b) the Commissioner assesses an amount, and the taxpayer objects to the assessment claiming that such amount is not covered by the inclusions (a) to (n) in section 1 of the interpretation of **"gross income"** and is of a capital nature. A taxpayer therefore who objects to the assessment of an amount as an annuity[47], will first have to establish [in terms of section 82] that the amount is not an annuity and then will have to establish that the amount is of a capital nature.

4.2.3.3.2 Of a capital nature

The terms **capital** or of a **capital nature** are not defined or interpreted in the Act and retain therefore their ordinary meaning.

The taxpayer who objects to the amount of an assessment because of non liability, on the basis that the amount is of a capital nature, is unlikely to be able to discharge the burden of proof in terms of section 82

He may lose his case not because the amount is not of a capital nature, but because he cannot establish that it is of a capital nature.

The reason why a taxpayer will find it almost impossible to establish that an amount which is of a capital nature is in fact of a capital nature, is because our authorities have insisted on an alien, antediluvian, cabalistic ritual which has nothing to do with the Act and is based on the dogmatic doctrine that the earth is flat.

4.2.3.3.3 Income and capital

The distinction between income and capital as understood by the accountant, the business person or the reader of the financial page of a newspaper, is of little consequence for the interpretation of the Act.

The Act does not deal with income or capital, the Act deals with the concept "**income**" and with the concept **capital nature**.

The term **income** means basically profit, the term "**income**" in terms of the Act has little to do with profit.
Indeed where the concept profit is meant by income the Act is specifically clear, for example:

* **section 8A- gains by directors in respect of rights to acquire marketable securities,**
* **sixth schedule- gains in respect of insurance policies,**
* **section 24B- gains or losses on foreign exchange transactions,**
* **section 9A (8) (c)- profit of a foreign investment company.**

"**Income**" is not profit, even though profit is sometimes "**income**".

The Act does not deal with **capital** in the interpretation section, but with **receipts or accruals of a capital nature.**

There is nowhere in the interpretation section of the Act reference to the concept of an **income nature**.
And yet the contrast between a receipt or accrual of an **income nature** and a receipt or accrual of **capital nature** is the accepted exposition.[48]

The issue of capital and income is so confused that a short exposition of what is considered the traditional approach is given in the following footnote.[49]

The above account in footnote 49 is completely meaningless. Yet some readers may accept it as a reasonable exposition of the issue capital versus revenue, especially as it can be considered without much trepidation, and agrees with some of the accepted pre-conceived myths.

Indeed there is not a single paragraph in footnote 49 which makes legal or logical sense.

Some of the issues will be dealt with hereunder.

4.2.3.2.4 Towards clarification of the income capital issue as far as burden of proof is concerned

4.2.3.2.4.a Question of law versus question of facts

Where and if an amount of a capital nature, is a question of law,[50] the intention of the taxpayer as such is irrelevant. To the extent therefore that the issue is a question of law section 82 is not relevant.

4.2.3.2.4.b The tree is capital the fruit is income

A metaphor is not an argument, even if expressed in Latin.

A metaphor is a substitute for clear thinking and often responsible for obvious certainty, and inevitable confusion.

The capital is the tree and the fruit is income, might have some significance in legal systems where profits are taxed and capital is not taxed.[51] Even at the most simplistic level capital is not the source of income.

It is perhaps pertinent to ask whether the tree truly produces the fruit; perhaps it is accurate to state that the fruit contains the seed which generates the tree.

4.2.3.2.4.c Capital or "income"

Most of the reported tax cases deal with the issue "income" or income versus capital. Most of the reported cases where the taxpayer fails to discharge the onus of proof in terms of section 82 revolve around the issue of capital versus "income".

The principle that an amount which is not capital must be income and that there is no half way house[52] must, with respect, be queried.

A strict dichotomy between capital and profit might be justifiable, in taxation systems where capital is taxed and profit is not taxed.

But even if it were appropriate in a strict *profit taxation system* to have a rigid distinction between capital and profit, such distinction is certainly not valid in our legal system, where profit is not the basis of taxation and where "income" is the product of a statutory procedure.

Moreover, what is excluded from the "total amount" in order to reach the stage of "gross income" is not capital at all, what is deducted are receipts or accruals of a capital nature

The distinction between capital and receipts of a capital nature is crucial. Neither capital nor an increase in capital which is not a receipt or accrual, are of any consequence for the interpretation of "total amount", "gross income", "income" or "taxable income".

To state that a receipt or an accrual, is either of an "income"/income nature or of a capital nature is misleading. There is no such thing as a receipt or accrual of an "income" or income nature in our legal system.

Let us look at the logical fallacy implied in the terminology of an income nature.
If, of an income nature, meant of a profit nature then it is meaningless in our tax system which taxes "taxable income" in terms of a statutory formula.

If the term of an income nature implies "income" of the quality taxable in terms of the Act then, it cannot be contrasted with capital nature.

Let us assume that "TOTAL AMOUNT" is **T** , that CAPITAL NATURE is **C** and "GROSS INCOME" IS **G**.
The Act gives the following formula: **T−C=G**
It follows therefore that the only way to compute "gross income" is to deduct from "total amounts" receipts or accruals of a capital nature. There is no quality of "gross income" as such.

"Gross income" is qualified entirely by the two variables "total amount" and receipts or accruals of a capital nature.

"Income" and "taxable income" are derived strictly in terms of a statutory formula which does not refer to "income" nature.

It follows therefore that it is incorrect and misleading to use the terminology of an "income" nature with reference to the Act.

It is possible of course that what is intended is profit nature or revenue nature as opposed to capital nature. If this be so, the terminology used is confusing.
It would also defeats the great achievement of the statutory formula which brought some clarity and certainty to the taxpayer as to what is taxed. If the interpretation that what is of capital nature is what is not of a profit nature, then the whole majestic edifice of the statutory formula will crumble.
The result of such an interpretation is simply that what is taxed is:

	EVERYTHING
LESS	EVERYTHING WHICH IS NOT PROFIT
EQUALS	TAXABLE INCOME

It would follow therefore that what is taxed is profit.

4.2.3.2.4 d The test of intention

Before proceeding with the issue of intention it may be useful to look at a recently discovered dialogue on intention attributed to Socrates.[53]

The fountainhead of the intention principle is Californian Copper Syndicate Ltd & reduced v Harris.[54] This Scottish decision is based on a tax system structure entirely different from ours.[55]

The first South African case which deals with **intention** is COT v Booysens Estates Ltd.[56]

The court espoused the principle of intention in Californian Copper Syndicate Ltd & reduced v Harris.

It must be stressed that the test suggested by the court was not a subjective one. The approach by the court was, with respect, absolutely sound:- in order to determine objectively whether a receipt or accrual is of a capital nature one has to look at all the facts. The subjective intention of the taxpayer is one of the facts.

The next case of importance is CIR v Stott[57]. The court regarded the intention of the taxpayer in acquiring the asset as an important factor in determining whether proceeds on disposal were of a capital or income nature.[58]

Form then on the alien disease of **intention** spread through the South African legal system like the plague.

The cure is simple, interpret the Act in terms of South African law.

There are a number of AD decision which make it absolutely clear that the subjective intention of the taxpayer is not the issue.

It is not the subjective state of mind of the taxpayer which is of concern, it is the purpose of the transaction. The subjective intention of the person is of import in criminal law where intention is part of the crime. If a transaction is of a capital nature the subjective intention of the person cannot change its character.

If the transaction is not of a capital nature the subjective intention of the taxpayer cannot change the ***intention of the transaction.***

Ad decisions have made this abundantly clear. Perhaps the clearest reading by our AD is:

In an enquiry as to the intention with which a transaction was entered into for the purpose of the law relating to income tax, a court of law is not concerned with what kind of subjective state of mind required for the purposes of the criminal law, but rather with the purpose for which the transaction was entered into.[59]

With the greatest of respect, a distinction between the purpose of a transaction and the purpose for which a transaction is entered into, is of consequence.

This, of course, is not a criticism of one of the most momentous decision in our law of taxation as the distinction was not relevant for the decision of the case.

As the intention of the taxpayer is not the issue it follows that the ***ipse dixit*** of the taxpayer is not only of little consequence,[60] it is also unreliable as it is evidence given after the event.[61]

In any case the intention of the taxpayer, however honest, however reliable cannot change the nature of a receipt or an accrual.[62]

4.2.3.2.4.e The claim that an amount is liable to tax[63]

This is practically and theoretically of consequence.
An example may elucidate some of the implications, in terms of section 82, where a taxpayer claims that an amount is liable to tax.

EXAMPLE

In tax year 1992, Mr Peter purchases 500 kruger rands at 1150 rand each. In tax year 1992 he sells 15 kruger rands at 1250 rand each. Mr Peters is concerned that in tax year 1993 should he emigrate he would have to sell the balance of his kruger rands. Should the kruger rand price drop to 800 rand, he would normally not be able to take tax advantage of the considerable loss he would incur. He feels that it would pay him to treat the 1992 transaction as being not of a capital nature and therefore liable to taxation. This would be a form of insurance that should he sell the kruger rands in 1993 the precedent might make it easier for him to be considered a trader.

He would then attempt to claim the loss as a "set- off" against the income he expects in 1993.

The burden of proof that any amount is liable to taxation is not upon the taxpayer in terms of section 82.

Should the Commissioner decide that the amount is not liable to tax and Mr Peter appeals he does not have to show that the decision of the Commissioner is wrong. As shall be argued in section 3.2.12 the appellant must show that the Commissioner is wrong concerning a decision which refers to exemption, non liability, deduction abatement or set-off.

In this case as Mr Peter's objection is not that he is not liable but on the contrary that he is liable; it follows therefore that there is no burden of proof to be dicharged in terms of section 82. Mr Pete may however have to show on appeal to the Special Court, that the Commissioner's decision is wrong.

The issue of "set-off" is not relevant for Mr Peter's 1992 tax year.

4.2.3.2.4.f Is there a presumption that a receipt or accrual is capital

It is suggested that any receipt or accrual which is not the result of "trade" as interpreted in section 1 of the Act is presumed to be of a capital nature.

The next question is whether there is any presumption as to trading activities or otherwise.

There are situations where **prima facie** there is a presumption that the activity is not of a trading nature.

The casual receipt of a gift would be an example.[64]
It is suggested that an accrual which is the result of a mere change of investment, is presumed to be of a capital nature if the person concerned is not a trader in this type of investments. There were a number of AD decisions which seemed to support this view.[65] It is difficult, however, to find recent cases to bolster such notion.

4.2.4 OR IS SUBJECT TO ANY ABATEMENT, DEDUCTION OR SET-OFF IN TERMS OF THIS ACT

In section 83 of Act 41 of 1917 Act the terminology used was "subject or entitled to". In section 57 of Act 40 of 1925 "subject or entitled to" becomes "subject to".
It is difficult to find an example, but it is conceivable that where **subject to** does not have the same implications as **entitled to** that some problem of interpretation could occur. Thus if the taxpayer can establish that he is entitled to a deduction but is not subject to a deduction, he would not be subject to the burden of proof in terms of section 82.
The above is perhaps of little practical consequence.
The deduction, abatement or set-off must be in terms of this Act. Thus any deduction in terms of any previous Income Tax Acts, or in terms of any other Acts is not subject to section 82 of the Act.

4.2.5 SHALL BE UPON

This is mandatory. There is no exception.

4.2.6 THE PERSON CLAIMING SUCH EXEMPTION, NON-LIABILITY, DEDUCTION ABATEMENT OR SET-OFF

4.2.6.1 The person claiming

There is no definition of person in the interpretation section of the Act.

Section 1 of the Act specifies that a "person" includes the estate of a deceased estate.

In terms of section 81 of the Act only an aggrieved taxpayer can make an objection to an assessment in which he is interested. A taxpayer is described in section 1 as any person chargeable with any tax leviable under the Act.

The person claiming such exemption etc need not be the taxpayer himself. The term used in section 82 is the person, whereas in section 81 (1) the right to the objection is conferred to any taxpayer.

It follows therefore that any taxpayer can make an objection to an assessment. The assessment need not be his. The only qualification is that the objector is a taxpayer and that he is aggrieved by the assessment and that he is interested in the assessment.

The person who must discharge the onus of proof in terms of section 82 must be the taxpayer who has objected to the assessment.

As the taxpayer objecting need not be the person assessed, it follows therefore that the burden of proof does not necessarily have to be discharged by the person assessed.

4.2.6.2 EXEMPTION

This has been dealt with under section 4.2.3.2.

4.2.6.3 NON LIABILITY

This has been dealt with under section 4.3.3.3

4.2.6.4 DEDUCTION

This has been dealt in detail in chapter 3, section 3.2.1.1.3.a pages 190-202

4.2.6.5 ABATEMENT

The system of abatements which was in force until Act 40 of 1925, was rejected by Act 31 of 1941.

Rebates are similar to abatements. It is not necessary for, our purpose, to distinguish between rebates and abatements. It is submitted however that where an abatement is a reduction of the tax payable, then it is not subject to the burden of proof constraints of the first part of section 82. Section 82 clearly deals with a **scenario** where the sole artists are **amounts**; **tax** may think she is the **prima dona**, but she is not fit to appear as a substitute in scene 82.

The determination of the tax payable in terms of section 1 of Act 31 of 1941 was not an assessment[66]. In terms of the interpretation of assessment in section 1 of the Act there is no doubt that the determination of a tax is an assessment. But as a tax is not an "**amount**" it is therefore not subject to the burden of proof provisions in terms of section 82. Where an abatements is taken off the taxable income in order to arrive at the taxable amount, then section 82 is relevant as we are dealing with an "amount".

SUMMARY:

Abatements or rebates: deducted from normal tax.
* A tax is an assessment
* An abatement or rebate are determinations, and therefore qualify as decisions which can be appealed against.
* If the rebate or abatement reduces the amount of tax, even though it might qualify as a decision , it is not subject to section 82 of the Act, which deals only with amounts.

Abatements or rebates: deducted from taxable amounts.
Section 82 is relevant.

The relevant distinction is between a **tax abatement** and an **amount abatement**.

4.2.7 AND

4.2.7.1 INTRODUCTION

The interpretation of the word "and" is pivotal to the critical understanding of section 82.

Section 82 consists of two parts joined by "and" as follows:

Part 1	**THE ASSESSMENT STAGE**	The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act, shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off,
		and,
Part 2	**THE APPEAL STAGE**	upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.

The interpretation which follows is based on the words actually used.

4.2.7.2 Part 1
THE ASSESSMENT STAGE

The **assessment stage** is distinct from the **appeal stage**. Section 82 clearly distinguishes between "upon the hearing of any appeal" situation from "the person claiming such exemption" situation.

Part 1, the **assessment stage**, applies to objections to the assessment before it becomes final and conclusive.

Section 81 (1) (2) (3) and (4) deal with the method of lodging objections to an assessment by any taxpayer.

Section 81 (5) and 83 (1) deal with the right of appeal against the assessment once it has reached the final and conclusive stage. Indeed in terms of section 81 (5) a final and conclusive assessment is subject to a right of appeal.

In terms of section 82 the **burden of proof** against the assessment of the Commissioner before it becomes final and conclusive is on the person claiming non-liability.

It must be stressed that the Act distinguishes clearly between objections generally and those objections where the burden of proof lies with the objector.

Thus in terms of section 81 (1) any taxpayer is granted a general right of objection without any burden of proof accountability.

Section 82, however, imposes a burden of proof on a person claiming exemption, non-liability, deduction, abatement or set-off to any tax chargeable under this Act.

Perhaps the clearest framing of this burden of proof at the assessment stage is the following confidential information to the Receiver of Revenue [Act 41 of 1917] (Gov.Notice No 1111 of 1919]

129. The burden of proof in support of any application for any reduction in assessment rests with the taxpayer (section *eighty-three* of the Act)

SUMMARY:

During the assessment stage any taxpayer has the right to object to any assessment under this Act.

Only where the objection is against an assessment dealing with exemption, non-liability, deduction, abatement or set-off, is the burden of proof on the person claiming such exemption, non-liability, deduction, abatement or set-off.

4.2.7.3 Part 2 THE APPEAL STAGE

The following summary show the interrelationship between the objection stage and the appeal stage.

OBJECTION STAGE	
ASSESSMENT PROCESS	The Commissioner assesses
OBJECTION	The taxpayer objects
	The taxpayer is subject to burden of proof in terms of section 82
DECISION	Final and conclusive assessment
	Decision
	Subject to right of appeal
APPEAL STAGE	
THE BOARD	Taxpayer limited to grounds
THE SPECIAL COURT	specified in notice of objection
	Taxpayer must show that decision is wrong.

Section 82 has, with respect, been generally misinterpreted by our authorities.

Let us look at a typical example.[67]

In terms of s 82 the onus of proof regarding the non taxability of an amount lies with the person claiming non liability for tax, i.e. the taxpayer.

The above statement can be found, with insignificant variations, in most treatises which mention burden of proof in terms of section 82. This is not correct in so far as the objection stage or any of the appeal stages.

The standard analysis of burden of proof is faulty because:

* It is asserted, without justification, that the person claiming non liability, exemption etc., is the taxpayer.

* No distinction is made between the objection stage and the appeal stages of section 82.

* The distinction between "**burden of proof**" at the objection stage and "**showing**" at the appeal stage is not made.

* Only some specific decisions of the Commissioner are subject to section 82.

* On appeal against those specific decisions, there is no general obligation on the defendant to show that the Commissioner is wrong.

* On appeal against those specific decisions, there is no general obligation on the defendant to show that the decision of the Commissioner is wrong.

* The second part of section 82 is addressed to the Special Court [Board], not the defendant. It instructs the Special Court not to reverse or alter the decision unless the appellant **shows** that the decision is wrong.

* There is no instruction to the Special Court as to the action to be taken where the appellant does not, or cannot **show** to its satisfaction that the decision of the Commissioner is wrong. In such a case the Special Court can, for instance, remit such a decision to the Commissioner.[68]

ON APPEAL TO THE SPECIAL COURT OR BOARD

Four basic interpretations of section 82 are possible.

The first three interpretations are taken verbatim from various tax reference works.

[1] "**The burden of proof is on the taxpayer**".

This interpretation is simple, popular and false.[69]

There is no justification whatsoever for this view. It is difficult to understand how even a **pro-aerario** interpretation of the Act could possibly lead to such conclusion.

This interpretation leads to propositions such as the following, which propositions are given as gospel truths:

" In income tax cases it must be remembered that the onus of proving the conclusion of a valid contract of partnership rests upon the taxpayer "

There is no justification in the Act for such a proposition. It is difficult to find cases where the ***ratio decidendi*** corroborates this proposition.[70]

[2] "**The burden of proof lies on the appellant to establish any fact, moreover he must show that the Commissioner's decision is wrong**".

There is some merit in this approach, as it distinguishes the two stages of section 82. It also uses the correct terminology "burden of proof" and "show". The general assertion however is much too sweeping.

[3] The appellant must show that the Commissioner is wrong.

This popular misconception will be analyzed under [4]

[4] "The appellant on appeal to the Special Court [Board] against the Commissioner's decision, [71] as contained in his notice of reduction alteration or disallowance to the objection to the assessment, must show that the Commissioner decision is wrong to empower the Court to reverse or alter such decision".

This is, with respect, a reasonable interpretation.

(i) The word "and" in ***and upon the hearing of any appeal....*** separates the hearing of any appeal from a situation which is not the hearing of an appeal. "And" has here its ordinary meaning,

(ii) It is clearly stated that we are dealing with an appeal ***from any decision of the Commissioner.***

(iii) Again, clearly the appellant must show that ***the decision*** of the Commissioner **is** ***wrong.*** There is nothing in the wording of section 82 which imposes a burden of proof on any one to show that the Commissioner is wrong. What the second part of section clearly and unambiguously states is that the decision of the Commissioner shall not be reversed or altered unless the appellant shows that the decision is wrong. On appeal to the Special Court [or the Board] the issue as to whether the Commissioner is right or wrong is of no consequence whatsoever.

In certain clearly defined cases the defendant must **show** that the **decision** of the Commissioner is wrong.

There is no reason whatsoever to assume, that the defendant, on appeal against the decision of the Commissioner must discharge the type of burden of proof imposed on him in the objection stage in terms of the first part of section 82.

Indeed the words **to show** do not have the meaning of **burden of proof**.

It is possible that on appeal the defendant might have to establish that he has in fact discharged, in the objection stage, the burden of proof in terms of the first part of section 82, and this may have a bearing in **showing** that the Commissioner is wrong.[72]

(iv) The decision of the Commissioner which is subject to section 82 on appeal, is his decision concerning an objection to an assessment concerning am **"amount"** exempted or non liable to any tax or his decision in regards to the objection to an assessment concerning an **"amount"** subject to a deduction, abatement or set-off.

Any other decision of the Commissioner is not subject, on appeal, to section 82.

Where, for instance the decision of the Commissioner is that an amount is exempt from taxation, the appellant who appeals against such decision of the Commissioner is not subject to section 82. Again, section 82 is not relevant where the appellant claims that the quantum of the tax is greater than it should be. A tax is not an **"amount"**.

(v) The second part of section 82 is, strictly speaking, an instruction to the Special Court not to **reverse or alter** the decision unless the appellant shows that it is wrong.

Thus the Special Court can remit the decision to the Commissioner, even if the appellant cannot show that the Commissioner is wrong.

4.2.8 UPON THE HEARING OF ANY APPEAL

Meaning of appeal in terms of section 82 of the Act

It is only on appeal to the Board or to the Special Court that the appellant must show that the decision of the Commissioner is wrong.

From the wording of section 82 it is clear that the person concerned does not have to show that the Commissioner decision is wrong at the objection stage.

Appeal to the board

In terms of section 83 A of the Act, an appeal must in the first instance be heard by the Board where the amount of the tax in dispute does not exceed R20.000.[73]

The burden of proof in terms of section 82, has absolutely nothing to do with the quantum of the tax. It is true that an objection can be raised against the determination of the tax itself;[74] but what is in dispute, in terms of section 82, is not the quantum of the tax at all, it is the quantum of the "amount". Obviously there need to be no relationship between the two. Thus the determination of the tax may be R50 and the quantum of deduction claimed may be R 100,000, or vice versa the determination of the tax may be R 500,000 whereas the set-off claimed could be R 200. It is submitted, that where it is not the amount of the tax which is in dispute , the Board has no automatic jurisdiction to hear appeals relating to section 82. With the proviso that in terms of section 83 A (1) (b) the Commissioner and the appellant can agree to the jurisdiction of the Board.

Appeal to the Special Court

4.2.9 FROM ANY DECISION OF THE COMMISSIONER

'Any decision' clearly means any decision in respect to the exemption, non liability, deduction, abatement or set-off of any amount.

In terms of section 2 (1) of the Act, the Commissioner is responsible for carrying out the provision of the Act.

Proof of the appointment is by notice in the **gazette.**

It there is a dispute as to whether a person is the Commissioner or not, such notice in the gazette will be a presumption that he is, and the burden of proof will be on the person who queries the appointment of the Commissioner to show that he is not the Commissioner. However, it is suggested that where no notice has appeared in the **gazette** that a person is the Commissioner it does not mean that such person is not the Commissioner. The burden of proving that the person is the Commissioner would then be, it is suggested, on the person who claims to he the Commissioner.

In terms of section 3 (1) the power of the Commissioner may be exercised by any officer under the control, direction or supervision of the Commissioner.

Any decision of such officer may be withdrawn or amended by the Commissioner or by the officer concerned. No time limit is specified in the Act. A decision made by an officer under any discretionary power shall not be withdrawn or amended after the expiration of two years **if all the material facts were know** to the said officer.

It is submitted that this provision is contrary to legitimate expectation. It is difficult to accept why the taxpayer should be kept on a leash forever, if for instance the/officer concerned was negligent in obtaining the relevant information. There must be finality.

It is also of consequence that there is no reference to the decision being in writing.

In terms of section 3 (3) any **written** decision by the Commissioner in the exercise of any discretionary power shall not be withdrawn or amended if all the relevant facts were know when he made his decision.

It would seem that the Commissioner may withdraw or amend any of his own decisions, which is not in the exercise of any discretionary power, at any time, whether he knew all the material facts or not.

With respect, this is contrary to legitimate expectation, and it is doubtful whether such a amendment to a decision five years after the decision would be valid.

4.2.10 THE DECISION SHALL NOT BE REVERSED OR ALTERED

Section 82 states that any decision of the Commissioner shall not be **reversed or altered** unless the appellant shows that the decision is wrong. There can be no doubt whatsoever that this means that on appeal, where the appellant cannot show that the decision of the Commissioner is wrong, the Special Court may not reverse or alter the Commissioner's decision.

However the Special Court may in the case of any assessment under appeal, order such assessment to be:

1) (a) amended
   (b) reduced
   (c) confirmed

2) <u>if it thinks fit</u> refer the assessment back to the Commissioner for further investigation and assessment.[75]

Section 82 refers to reversion or alteration and it is therefore absolutely clear that on appeal it is only in the case of a verdict warranting reversion or alteration of the Commissioner's decision that the appellant must show that the decision of the Commissioner is wrong.

<u>Referring the assessment back to the Commissioner for further investigation and assessment</u> is not specified in section 82 and in no way can be interpreted as falling within the meaning of reversion of alteration.

If for instance the taxpayer establishes that an amount assessed is exempt from taxation, but cannot show that the decision of the Commissioner is wrong, the Special Court may, if it thinks fit, refer the assessment back to the Commissioner for further investigation and assessment.

The generally accepted proposition[76] that upon the hearing of an appeal the taxpayer must show that the Commissioner's decision is wrong is, with respect, capable of further analysis.

Where a taxpayer appeals against the amount of the additional charge imposed by the Commissioner in terms of subsection (1) of section 76 the court may :

1) reduce the amount of the additional charge
2) confirm the amount of the additional charge
3) increase the amount of the additional charge.[77]

Here the taxpayer will have to show that the commissioner's is wrong as no provision is made for the court to refer the assessment back to the Commissioner

The court however does not have the power to reverse the decision of the Commissioner even if the taxpayer shows that the Commissioner is wrong.

It is submitted that, where the remedy the taxpayer is seeking is the reversion of the Commissioner's additional charge, the taxpayer can appeal directly to the Supreme Court as section 83 (7)(b) does not provide him with such right.

The taxpayer here is not claiming that the amount of the additional charge imposed by the Commissioner is too high, he is not appealing against the amount of the additional charge but against the additional charge as such. It would be contrary to legitimate expectation to have a dictatorial Commissioner imposing additional charge without the taxpayer having any remedy whatsoever should he want to challenge the additional charge as such, (as against the amount of such charge)

4.2.11 UNLESS IT IS SHOWN BY THE APPELLANT

The person who appeals against the decision of the Commissioner need not necessarily be the person who claims exemption, non-liability, deduction, abatement or set-off.

In terms of section 83 (1) any person entitled to make an objection who is dissatisfied with any decision of the Commissioner notified to him in terms of section 81 (4) may appeal therefrom to the special court. The appellant to the special court must, in terms of section 83 (1), satisfy four criteria:

1) he must be a person
2) he must be entitled to make an objection
3) he must be dissatisfied with any decision of the Commissioner
4) the decision must have been conveyed to him in terms of section 81 (4).

In order to qualify as a person entitled to make an objection, he must, in terms of section 81 (1) be a taxpayer aggrieved by any assessment in which he is interested.

It is thus conceivable that a person, entitled to make an objection, who is dissatisfied with a decision of the Commissioner relating to the assessment of another taxpayer may have the right to appeal to the special court in respect of the assessment of such other person.

4.2.12 THAT THE DECISION IS WRONG

4.2.12.1 THE AUSTRALIAN EXPERIENCE

The concept **the assessment is excessive** of regulation 40 of Act 28 of 1914 and regulation 26 of Act 41 of 1917 becomes **the decision is wrong** in section 78 of Act 31 of 1941 and section 82 if Act 58 of 1962.[78]

Even though the term **excessive** is used in the onus section 190(b) of the ITAA, which is the section corresponding to our section 82 where the term **wrong** is used. there is considerable analysis in Australian jurisprudence which is relevant and worthwhile to our understanding of the concepts excessive [79] and of the concept wrong. [80]

Indeed the two concepts are so closely related that they are sometimes confused.

To imply that it is for the taxpayer to prove that the assessment is wrong and that the Commissioner is not obliged to prove that the assessment is correct [81] is with respect not precise.

Section 190 of (Australia) Income Tax Amendment Act 1936 (the ITAA) reads as follows:

190 In proceeding under this Part on a review before a Tribunal or on appeal to a court-
(a) the taxpayer shall, unless the Tribunal or court otherwise orders, be limited to the grounds stated in his objection; and
(b) the burden of proving that the assessment is excessive shall lie upon the taxpayer. [82]

The word "excessive" has been interpreted as exceeding the amount of the taxpayer's true liability. [83]

In the case of Trautwein v F.C. of T. (NO.1) [84] it was held that it is not sufficient to show that the assessment is in some way wrong, the taxpayer must go further, he must positively establish what alterations must be made to the assessment in order to rectify it. The taxpayer must show what the correct assessment should be.

It is not sufficient for the taxpayer to establish that the Commissioner is wrong, it is "necessary for the taxpayer to make good the proposition that his income [is] less"[85]

This is of great consequence because the burden of substantiating that an assessment is excessive is considered here to be a greater burden than the discharge of showing that the assessment is wrong. In a recent case[86] it was held that a taxpayer may establish that the assessment is excessive by establishing that the prerequisites of making the assessments are not complied with.

The meaning of the concept **the assessment is excessive** has been considered in a number of important cases and throws light on the concept **the assessment is wrong**.

It is important to note that **excessive** has been considered to be a process. **Excessive** qualifies the **assessment** and is therefore not just the end result of a calculation.

In the case of **McAndrew v FCT**[87] Taylor J held that the word excessive had a much wider meaning than the submission that it was limited to questions relating to the quantum of the assessment.[88] His Honor stated:

There is no reason for thinking that an assessment, made in purported but not justifiable exercise of a statutory power, may not properly be described as excessive; it purports to impose a specified liability, and upon appeal, the claim of the appellant is that he is not liable to pay any part of it. Whether the particular ground upon which he seeks to escape or reduce the liability merely touches the accuracy of the assessment or assails its validity as an assessment, he is, in the words of s 185 "dissatisfied with" the assessment because it purports to impose upon him a liability in excess of that to which he may lawfully be subjected and I can see no reason why, in either case, his complaint may not be accurately described as a complaint that his assessment is excessive.[89]

The above passage was approved in the case F J Bloemen Pty Ltd v FCT where it was stated that the exercise of statutory power could properly be described as excessive. [90]

4.2.12.2 RELEVANCE OF THE AUSTRALIAN EXPERIENCE

The decision is wrong has two aspects.

i) The decision is wrong because **as a process** it is faulty.

ii) The decision is wrong because **the determination** is wrong. Should the defendant show that the process is wrong, it will not be necessary for him to establish what the decision ought to have been.

4.3 SUMMARY

The generally accepted proposition that **"The onus lies upon the taxpayer to prove that the assessment is wrong"** [91] cannot be reconciled with the clear wording of the Act.

The concept that the "**onus lies upon the taxpayer**" is the secret weapon of the Receiver of Revenue. Indeed this so called onus is admitted by counsel for the defendant in almost every income tax case where the issue arises.

The reason is simple; this is what is taught, this is what is written in the textbooks, this is what is believed explicitly.

More tax cases have been lost because of this false doctrine than for any other reason. It is difficult to find a single criticism of the proposition in our literature.

It is unquestionably not what the Act states.

The complete defence to this secret weapon is simply the careful interpretation of section 82 of the Act.

MAIN POINTS

1] Section 82 is not relevant in criminal cases.

2] Section 82 is not, or may not, be relevant to tax issues in civil cases not subject to Act 58 of 1962.

3] Section 82 is not relevant to questions of law.

4] Section 82 is only relevant to objections against the assessment of any amount or appeal against the decision of the commissioner in relation to the assessment of such amount.

4.1] An amount is a receipt or accrual which has an ascertainable value from a source within or deemed to be within the Republic.

4.2] The burden of establishing that there is an amount rests on the Commissioner.

4.3] Where the Commissioner has established that there is an amount, the taxpayer is subject to section 82.

5] It is submitted that the AD decisions of Cot v Booysens estates and Cot v South Deeps are binding.[92]

5.1] The criticisms that the above decisions were based on an onus of proof section which did not have the second part of section 82 is not valid because it does not take into account regulation 40 of Act 28 of 1914 which if anything imposed a greater burden on the taxpayer.

6] The second part of section 82 is an instruction to the Special Court not to reverse or alter the decision of the Commissioner unless the appellant shows that the decision is wrong.

6.1] Where the defendant cannot show that the Commissioner's decision is wrong, the Special Court has full power to make any determination provided it is not a reversion or alteration of the decision.

6.2] The distinction between **showing** that the Commissioner's decision is wrong, and the **burden of proof** to establish that the Commissioner's is wrong, is tentatively suggested.

7] The Australian experience suggests that the **decision** can be wrong because the decision as a process is faulty, or because as a determination it is wrong.

NOTES ON CHAPTER 4

1 The word income is in the plural. It follows therefore that the Act does not tax income generally but rather specific incomes.

2 As from the year of assessment ended 29 February 1971 the provinces have been denied such rights.

3 The long title makes the crucial distinction between a tax on persons and a tax on the income of persons. This distinction is useful for the interpretation of the relationship between onus of proof and abatement.

4 The method of interpretation used in chapter 3 is simple: what has the legislature stated.
The intention of the legislature, whether expressed in the words used or not, has not been considered as a separate entity. The words are the intention.
Intention is a dangerous animal and must be kept carefully under lock and key.
In a written contract the intention of the parties is of little relevance, the parties are bound by the terms used. There is one method of interpretation for all written legal instruments whether they be statutes, wills, contracts or negotiable instruments: what has been stated legally is what must be given effect to.
The taxpayer needs no privileges. There is no need, for our purpose, to distinguish between different types of statutes. There is no justification in using different canons of construction for different types of statutes.
The taxpayer must not rely on the ***contra fiscum*** rule.
The ***contra fiscum*** was not part of Roman Law in the sense it is interpreted to day. In classical Roman law one must distinguish between the ***fiscus*** and the ***aerarium***. The distinction being that all fines and confiscated property accrued to the private treasury of the Emperor whereas all taxes accrued the State Treasury. The rule was ***contra fiscum pro aerario.***
The ***contra fiscum*** rule was applied in Roman Dutch Law in the similar sense as in Roman Law i.e in the case of legislation imposing fines and confiscation of property.
[The source of the above observations concerning the ***contra fiscum*** rule is "Equity in tax law with special reference to the interpretation of tax statutes" a thesis for Magister Legum by I.C. Prinsloo, University of the Witwatersrand 1986. page 46-49]
Our AD has very seldom interpreted a fiscal statute ***contra fiscum.*** A taxpayer who relies on a ***contra fiscum*** interpretation does so at his own risk.
Unfortunately fiscal statutes have been and are interpreted ***pro aerario.*** This might be a remnant of the

Roman Law interpretation; it has no validity to day as even in Roman times the ***fiscus*** and the ***aerarium*** merged.

There is at present a number of interpretation theories:
- The literal interpretation
- The intention interpretation
- The literal intention interpretation
- The subjective interpretation
- The will interpretation
- The free law theory interpretation
- The objective interpretation
- The hermeneutic interpretation
- The normative transposition interpretation
- Etc, etc, etc....

In a contract what the parties have recorded in writing is what is binding provided the document complies with the statutory provisions and the common law. A agreement of sale of immovable property must be in writing and signed by the parties and must be lawful in order to be a contract.
Similarly in **a plain meaning** interpretation one must be aware that the legislature is not absolutely free to legislate. An act of parliament must be in writing and must be promulgated for the benefit of society. It must comply with the legitimate expectation of society.
This is the only limitation to literal interpretation.
If an order or parliament is not for the benefit of society it is not binding as a law.
Should an Act of parliament be construed as a law simply because it has been promulgated by parliament then, Hitler was in the right, his right, acting in the name of the law, his law. If this be true the countless innocent children crucified, in the name of the law, in the concentration camps of history all perished in vain.
If this be true law is but a toy for tyrants, the tool of dictators. If this be true.
No, law is not the debased coinage of kings, the dishonored promises of politicians, the purchased judgements of purchased officials. Law the inevitable concomitant of a free society, is more than an order of Parliament backed by punishment if disobeyed. For an order of Parliament to be clothed with the sanctity of law it must be for the benefit of the people.

[5] Section 1

[6] 10th Edition Page 5 Section 1.12

[7] There are many ways of structuring this flow diagram. It is suggested that this structure relates the statutory interpretation of income to the economic interpretation of gross wealth.

By reversing the steps 7 to 1 it may be possible to calculate the gross wealth created by a taxpayer or by all taxpayers. 300
Thus formula is not complete in the sense that strictly speaking one could start from wealth created by the taxpayer by deducting from gross wealth those costs incurred in creating that gross wealth. For our purpose this could lead to confusion as there would be two separate sets of deductions: statutory deductions and economic deductions.

8 In terms of paragraphs (a) to (n) of the definition of gross income in section 1 of the Act.
The Act is not consistent. It qualifies the included amounts : **whether of a capital nature or not**.
The only amounts which can logically be included are some of the amounts which have been excluded from the total amount because of their capital nature.
If **amount** does not have the same meaning as in **total amount** the only possible inclusions of a non capital nature are non Republic receipts or accruals or receipts or accruals which do not have an ascertainable monetary value.

9 In terms of section 10 of the Act

10 General deductions in terms of section 11 to 20 read with section 23.
Specific deductions, for example if the Commissioner is satisfied that certain capital expenditure has been incurred by a taxpayer for the purpose of scientific research, the taxpayer may deduct a certain percentage of such expenditure provided that the Council for Scientific and Industrial Research certifies that the research was carried out and that it was financed by the capital expenditure in that year.[Section 11 (q)]

11 Tax payable are reduced by rebates.
There are three types of rebates:
(a) Primary rebates-for example in terms of section 6 (2)(a) a married person is allowed to reduce normal tax by a specified amount.
(b) Secondary rebates-for example in terms of section 6 (3)(a) a natural person who is not a married woman can deduct from normal tax payable a certain amount in respect of each child or step child alive during a portion of the year of assessment.
(c) Special rebates-for example in terms of section 6 *bis* a rebate is provided for foreign tax paid on royalties derived from non Republic source.

12 Or assessed loss. If the deductions allowed in terms of the Act exceed the income the balance is an assessed loss.

13 From hereon any word used in terms of the statutory formula shall be placed in inverted commas and every word used in its ordinary meaning shall be underlined.

14 Indeed the contrary is likely to be true. There are presumptions in favour of the taxpayer.
For example:
* **Commissioner for Inland Revenue v Scott** 3 SATC 253; 1928 AD.
Where the issue is whether the *profits* realized as a result of a sale of land is of a capital nature or not it was held in that the onus of adducing evidence of the taxpayer that he embarked on a scheme of profit making rests on the Commissioner.

* **Commissioner of Taxes v South Deeps Ltd** 1918 AD 606
Where the issue on whether a receipt or accrual is of capital nature or not, depends on a new business having been embarked upon, the onus is on the Commissioner to establish that a new business has been embarked upon. This is an important case, it is indeed one of the monument of our tax heritage. It has been referred to and cited in a great number of AD cases. For example **Commissioner for Inland Revenue v Lydenburg Platinum** 4 SATC 1929 AD at page 17.

* **CIR v Lunnon, 1924 AD 94**
A gift is intrinsically of a capital nature and therefore the onus is on the Commissioner to establish that it is not of a capital nature.

* **Melrose Trust, Ltd v CIR**, TPD 7 SATC 201
The intention of a company in respect to the acquiring of property raises a question of law because it depends to a large extent on the construction of legal documents, such as the memorandum of association.

15 Botha,D. A technical report presented to the Department of Accounting -University of Cape Town 1988. **Selected aspects of the taxation of partnerships.** Chapter 1 Par 6

16 Haupt,P. An essay presented to the Department of Accounting -University of Cape Town 1984.
Tax and other legal consequences inherent in the choice of business vehicle. Page 18

17 Gilloly T. **Partnership and its tax consequences** (SATJ) 1986 (Vol 1 page 72)

18 CIR v City Deep Ltd 1924 AD 298, 6 SATC 69.

19 Bailey v CIR 1933 AD 204, 6 SATC 69.
Rand Ropes (Pty) Ltd v CIR 1944 AD 142,13 SATC 1

20 Per Benjamin, J. at page 96

21 Per Gardiner,J at page 99

22 Per Watermeyer,J.at page 209

23 Per Dr. Manfred Nathan,K.C. at page 388

24 Per Dr. Manfred Nathan,K.C. at page 165

25 Per Dr. Manfred Nathan,K.C. at page 165

26 Per Dr. Manfred Nathan,K.C. at page 84

27 Per Malan,J.at page 74-75

28 It is interesting to note, though not necessary for our purpose, that the [Rhodesia] Zimbabwe Tax legislation has recognized, and has dealt with many burden of proof issues in a very imaginative manner.
The amendment effective from year of assessment beginning 1 April 1988 whereby "credit" is substituted by section 12 of 1988 for "abatement" wherever it occurs in section 52, solves at one stroke of the pen the following two major issues:
i) abatement is not relevant within the burden of proof concept.
ii) there are situations where the taxpayer may claim an increase in amount received or accrued. Previous to this amendment, such increase was not subject to the onus of proof provision 52 the Income Tax [Chapter 181] 1967.

29 The case rested perhaps more on the issue **validity of the partnership** than on the issue **existence of the partnership.**

30 It does not follow, of course, that because these three excellent papers did not manage to find a single judicial decision to bolster their case, that such decision cannot be found.

31 Indeed where the existence of a partnership is a question of law, the Commissioner will have to establish the existence or otherwise of such partnership.

32 Dig. Lib. 22, tit. 3,1,2.

33 Amos v. Hugues Nisi Prius. 1835. 1 M.& Rob.464 per Alderson, B.

34 Abrath v North Eastern RY.CO 47 J.P. per Brett,M.R.

35 CIR v City Deep ltd 1924 AD 298 (1 SATC 18)
Here it was held that though the Special Court was a competent Court to decide certain issues, it was not a Court of Law.

36 Bailey v CIR 1933 AD 204 (6 SATC 69)
Per Curlewis, J.A. on page 76

".....a Special Court under the Income Tax Acts is not a Court of Appeal in the ordinary sense; it is a Court of revision...."

37 There are a great number of cases on the point.
Reliance Land and Investment Co (Pty) Ltd v CIR 146 WLD 171 [see page 177], 14 SATC 47
CIR v Goodrick 1942 OPD 1 [see page 20] 12 SATC 279.

38 Section 83 (7) (c)

39 This interpretation of Silke has remained immutable through 11 editions.
e.g. the first edition (page 4, section 11) paragraph 11) any source outside the Union, becomes in next ten editions any source outside the Republic.
e.g the tenth edition (page 5 Section 1.12)

This, of course, is not a criticism of Silke, this is the standard view, and it is accepted as correct by most, if not all, treatises on the law of taxation.

There is however a danger that tax books of the nature of Silke, Meyerowitz, and De Koker, only incorporate changes which are the result of current legislation and interpretation by our courts in the period before the printing of the new edition, and therefore are unlikely to analyze what is old and forgotten.
What is ancient and discarded may, with a little stirring, provide useful solutions.

40 Interpretation of gross income in section 1 of Act 58 of 1962.

41 CIR v Butcher Bros (Pty) Ltd 1945 AD; 13 SATC 21.
Amount was interpreted as part of the total amount,not as a quantum. As a result of this decision paragraph (h) was added to the inclusion in the gross income interpretation of gross income.

As a result of paragraph (h) a receipt or accrual which is not an amount, in the sense that it is not ascertainable in terms of cash, can be valued by the Commissioner.
The receipt or accrual is the improvements made to

leased property in terms of a lease agreement, provided there was a legal obligation to effect such improvements..

There are four issues of consequence:

1) If no quantum is stipulated in the agreement the Commissioner has a discretion which is unassailable provided "it is in his opinion" the "fair and reasonable value of the improvement". The taxpayer has no right of appeal if the Commissioner in his opinion is fair.

2) There is some confusion in section (h) because the terms amount in **the amount stipulated** is used as meaning simply a quantum of money.

3) It is difficult to understand how the Commissioner can value, what our AD in one of our most illustrious decision, established could not be valued by the Commissioner. A fair and reasonable value is still a valuation.

4) In Butcher's case the onus of proof of establishing the value of the improvement had to be discharged by the Commissioner. Now not only is the Commissioner released from his burden of proof obligation, but the taxpayer is denied the right of appeal.

42 The standard distinction between absolute and partial exemption, although useful, concentrates on the amount of the exemption. The *quantum* however is not the only relevant factor. The distinction between who is exempt and what is exempt is, for our purpose, meaningful.

43 Some examples of exemptions in terms of other acts:
Public Service Act 54 of 1957
Republic of South Africa Constitution Act 32 of 1961 section 84 (1)(f)
Judges' remuneration Act 91 of 1978. Section 1 (2)

44 Finance and Financial Adjustments Acts Consolidation Act 11 of 1977 Section 61

45 Chargeable under this Act is interpreted as qualifying both **amount exempt from** and **amount not liable to**.

46 With the exceptions of amounts of a capital nature specifically included in paragraph (a) to (n) of the interpretation of "**gross income**". However it is clearly stated that such inclusions do not limit the scope of the definition.

47 Interpretation of gross income, Section 1 of the Act.

Annuity is inclusion (a).

48 See for instance Silke 3.1

49 **CAPITAL AND REVENUE**
THE TRADITIONAL APPROACH

1 ONUS OF PROOF

In terms of section 82, the onus of proof that an amount is not taxable rests with the taxpayer.

The onus is extremely difficult to discharge.
In practice most of the income tax disputes and cases relate to the capital and revenue issue.

A high percentage of the decisions have in the past been decided in favour of the CIR.

In the case of an appeal the taxpayer is faced with the additional burden of having to establish that the Commissioner's decision was wrong.

2 INTENTION

2.1 To determine whether a receipt is CAPITAL or REVENUE our courts have devised the dominant test of INTENTION.

There are three points of time when intention can be relevant:
(a) intention on acquisition
(b) intention on disposal
(c) intention change between acquisition and disposal.

2.2 The first case where intention was used as the dominant test was **CIR v Stott (1928 AD)**.

The question which the court had to decide was whether land sold gave rise to a receipt of a capital or revenue nature.

It was clearly stated by Wessels JA that intention at the time of purchase was an important factor, but that there could be changes of intention of relevance in the intervening period prior to the sale.

It is sufficient to say that the intention is an important factor and unless some other factor intervenes to show that when the article was sold it was sold in pursuance of a scheme of profit making, it is conclusive in determining whether it is capital or gross income.

2.3 The taxpayer at the time of the acquisition of the asset may have had a revenue intention or a capital intention.

If the original intention was capital, and there was no change of intention in the interim period before disposal then the receipt or accrual resulting from such disposal will be capital.

If the original intention was income and there was no change of intention in the interim period before disposal then the receipt or accrual resulting from such disposal will be income.

Where at the time of acquisition the taxpayer had a mixed intention, it is necessary to establish what his dominant intention was. **COT v Levy, 1952 AD**

2.4 Where the taxpayer at the time of acquisition was a natural person, the courts have devised a number of clear tests to establish his intention.

i) was the taxpayer engaged in carrying out a trade or business,
ii) was the buying or selling a part of the profit making scheme,
iii) if the answer is yes, then the original intention was income.
CIR v Strathmore Consolidated Investments Ltd 1959 AD at 477

Where the original intention was capital but there was a change of intention in the interim period before disposition and that change of intention was to convert the capital asset into an income asset then the profit made on realization would be revenue.
CIR v Lydenburg Platinum LTD (1929) AD

Where the taxpayer original intention was not clear, the court will determine his dominant intention.
Commissioner of Taxes v Levy (1952) AD

2.5 Where the taxpayer is a company or a legal person the tests for intention seem simpler.

A company has to comply with the requirements of the Company Act. The intention of a company must be evidenced by formal acts, in particular the memorandum of association, the articles of association, the resolution of its members and most importantly the minutes of directors.

In CIR v Richmond Estates (Pty) Ltd (1950 AD) Centlivres CJ made the following often quoted observation:

A company is an artificial person 'with no body to kick and no soul to damn' and the only way of ascertaining its intention is to find out what its directors acting as such intended.

It is the intention of the directors which is the key to the intention of the company. Other tests or acts of the company must be examined very carefully. The fact for example that the memorandum of the company has an object clause which states that the company has the right to engage in an income type of operation does not necessarily result in income for such company.

The memorandum is one of the factors over and above the directors intention which the courts may rely upon. **COT v Booysens Estate Ltd (1918 AD)**

2.6 An important difference between the approach of our courts in the case of companies and individuals, in the capital and income conflict, is the relevance of continuity.

A single transaction by a company does not imply necessarily a capital transaction. If the company has been formed for the purpose of gain, any act by such company is likely to be interpreted as having a business motive.

In the case of an individual, continuity is not of the same force in indicating a capital intention. However where the individual is clearly engaged in a business venture, the fact that the transaction was an isolated one will not transform the capital nature of his receipt into a revenue receipt. Stephen v CIR (12919 WLD)

2.7 The concept of change of intention is crucial for the determination of capital or revenue.
The mere fact that a taxpayer has received more for his sold asset than he actually paid for it, even if originally he purchased the asset for revenue purpose, does not necessarily imply that the transaction was one of a revenue nature.
The relevant question is whether the capital asset has been sold in a scheme of profit making or whether the sale of the capital asset leads to the profit.

In the words of Wessels JA in CIR v Stott (1929 AD):

Every person who invests his surplus funds in land or stock or any other asset is entitled to realize such

asset to best advantage and to accommodate the asset to the exigencies of the market in which he is selling. The fact that he does so cannot alter what is an investment of capital into a trade or business for earning profits.

2.8 Three crucial AD decisions are relevant to the understanding of the **intention test** and **change of intention test**.

2.8.1 Natal Estates Ltd v SIR (1975 AD)

The facts: i) Land originally acquired for capital purposes. Intention clear.
ii) Land sold considerably later.
iii) Because of methods whereby land sold, court held that by its actions company converted capital asset into trading stock.
iv) "**Something more**" had happened than just disposal of capital asset.
v) Had gone beyond what was necessary to realize asset to best advantage. Changed intention now: township developer.

In his judgement Holmes JA justifies the "something more" as follows:

On the facts of this particular case the court found that the taxpayer had in fact "crossed the Rubicon" and that the land had become its trading stock. The income accruing from the sale, therefore, fell into gross income and was taxable.

2.8.2 Berea West Estates (Pty) Ltd v SIR (1976 AD)

The facts; i) Company formed to realize land part of deceased estate.
ii) Company subdivided land and sold subdivided plots at a profit.
iii) Court held that this was a case of mere realization of a capital asset to best advantage.
iv) Company had not "crossed the Rubicon".

2.8.3 **Elandsheuwel Farming (edms) Bpk v SBI** (1978 AD)

The facts: i) Land acquired as long term investment.
ii) Land held for considerable period.
iii) Change in shareholding of company.
iv) Court held that new shareholders were

property speculators and that therefore there had been a change of intention.

v) Capital asset had become revenue asset and proceeds taxable.

2.9 In order to determine whether the intention of the taxpayer is capital or revenue the court will take the following factors into consideration.

Reason for sale The court must establish why the taxpayer disposes of an asset. The longer the asset was held before disposal the more likely that his intention was capital.

There are decisions which seem to indicate that should the taxpayer have had the intention to hold the asset for a short period then it is unlikely to be a capital asset. ITC 1418 (1987)

Frequency of dealing If the taxpayer deals frequently with that type of asset the court is likely to hold that he intention was revenue. But even if the taxpayer deals only once with this particular type of asset, if a scheme of profit making can be established the frequency test will not be relevant. Stephen v CIR (1919 WLD)

Taxpayer "ipse dixit" Heavy reliance is placed on the *ipse dixit* of the taxpayer in order to establish his intention. It would seem that the taxpayer *ipse dixit* may be conclusive in determining his intention where the facts of the case are not in conflict with the *ipse dixit*. Malan v KBI (1983 AD)

The nature of the asset Where the assets concerned are the fruits, real or civil, of other assets, the disposal of such fruits are of an income nature.
CIR v George Forest Timber CO Ltd (1924) AD

The sale of certain assets are taken to be *prima facie* of an income nature when they are of the nature of trading stock.
The type of assets would include:
* shares, especially where the dividend is low,
* undeveloped land, as the inference is that the land could not have been acquired to produce an income,
* assets which by their nature are not income producer
* perishable goods which are normally held as stock in trade,e.g coffee, tea.

The inference is not absolute and can be rebutted. Such rebuttal will have to establish that such assets have the quality of being used as fixed assets in the taxpayer's business or trade. The rebuttal procedure

for a non business or trader is not clear.
ITC 1222 37 SATC 17
ITC 612 (1945) 14 SATC 385
ITC 862 (1958) 22 SATC 30
ITC 874 (1959) 23 SATC 96 (unsuccessful rebuttal)
ITC 1283 41 SATC 36

The nature of the taxpayer There is a direct inference from the nature of the taxpayer to the nature of the asset. The asset of a land dealer is *prima facie* of an income nature. This can be rebutted as there is nothing preventing a land dealer holding a track of land as a capital asset.
CIR v Richmond Estate (Pty) Ltd 1956 (1) SA 602 (A)

Other facts of the nature of the taxpayer have been taken into consideration in order to help establish the nature of the asset.
Age, health, knowledge, expertise of the taxpayer have all been taken into account.
It is relevant to mention that in the case of expertise of the associate of the taxpayer this was successfully rebutted as relevant in the case of ITC 944 (1960) 24 SATC 451

The holding period This is a subsidiary test which is not conclusive, but can, and has been taken into account. The logic of the **holding period test** is that a short holding period leads to a reasonable inference that the asset is trading stock and therefore of a revenue nature. The rebuttal of such an inference is not easy.
Barnato Holdings Ltd v SIR 1978 (2) SA 440 A SATC 207

A long holding period is a weak inference that the asset is of a capital nature. In Natal Estates the holding period was over 40 years, yet the land concerned was considered to be revenue.

The financing method The main issue here is leverage. If the cost of borrowing is greater than the earning structure of the taxpayer a reasonable inference is that the asset is purchased for purpose of income.
An example would be the purchase of shares where the yield is very low and where the taxpayer has to borrow money from a financial institution at a much higher rate.. In **ITC 1222 27 SATC** a taxpayer who borrowed money at a much higher rate than the return of the shares purchased was held to have acquired shares as stock in trade.

Treatment of assets prior and during realization When there is a lack of significant activity in relation to an asset prior to realization, an inference might be

draw n that the asset is held a trading stock.
ITC 115 (1967) 30 SATC 22.

Method of realization of asset. This is often a potent factor in the determination as to whether an asset is of a capital or revenue nature. Thus pressure from creditors, poor business conditions, emigration is often of considerable consequence in establishing the nature of the proceeds. ITC 743 (1951) 18 SATC 294

Subsequent treatments of proceeds.Such subsequent treatment could be of consequence in order to discover the intention of the taxpayer, and as such may be of help in establishing the nature of the proceeds.
T v COT 1978 (4) SA 665 (R) 40 SATC 179

50 SIR v The trust Bank of South Africa Ltd 1975 (3) SA 652 (A), 37 SATC 87 at 108.
This is confirmed and exemplified by a plethora of AD decisions.

51 But even for those alien legal system the metaphor might very well be fallacious. The capital can be increased by the income. Indeed some trees produce fruits but fruits produce seeds which produce trees.

52 Crowe v CIR 1930 AD 122 4 SATC 133
Pyott v CIR 1945 AD 128, 13 SATC 121.

53 **A walk with Socrates**

Socrates and his good friend the carpenter were walking and talking. It was early afternoon, the sun was shining and the breeze was pleasant.

Socrates: If you had to formulate a test to discriminate chairs from "non chairs", how would you go about it ?

The Carpenter: I think that it would be reasonable, first, to be clear about what a chair is.

Socrates: This makes sense to me. I am not sure that such things as "non-chairs" exist at all. Perhaps one should contrast a chair with "not a chair". But even if the concept "non-chair" has a meaning it can only be ascertained, as you have just said, if one is clear about what a chair is.
You are a fine carpenter could you perhaps tell me what a chair is ?

The Carpenter: I have made chairs all my life, and if anyone knows what a chair is, I do. A chair is a movable seat made out of wood. It has four legs . It has a back.

People acquire chairs with the intention of sitting in them.

Socrates: I like your definition. But tell me if the seat is made of a material which is not wood, would you still call it a chair ?

The Carpenter: Of course, it would be a chair. I obviously have not considered your question seriously enough.
Indeed, I have made excellent chairs using canvas for the seat. A chair does not have to be made out of wood.

Socrates: I am still a little confused. You say that a chair has four legs. Could you conceive of a chair with three legs?

The Carpenter: I was stupid! The number of legs has nothing to do with the concept chair. It is true that most chairs have four legs but excellent chairs have been made which have only three legs. In fact, the best chairs for maids milking cows have three legs because ....

Socrates: O.K., O.K! We shall remove the number of legs as a criterion for a chair. But coming back to these three legged chairs you make for milk maids, do they have a back?

The Carpenter: No, they do not have a back. If they did it would make it difficult to milk those cows... Oh, I see what you mean! I was just plain silly, it is not a requirement for a chair to have a back.

Socrates: You say that one of the characteristic of a chair is that it is a movable seat. But tell me, do you remember last night we had a glass of wine in that pub where we sat on objects made out of wood which had four legs and a back. These objects were fixed on the floor to prevent some of us who had a pint too many taking them home with us.
Were these "no chairs" because they were fixed to the floor?

The Carpenter: I have a feeling that I am not too sure what a chair is.

Socrates: Some of your tests seem to fail. Assume you made a sculpture out of wood which had four legs, was movable and had a back, but was so made that it is not possible to sit in it comfortably or otherwise. Would this be a chair ?

The Carpenter: This is easy. If you cannot sit in it

then it is not a chair "finnish and klaar."

Socrates: Just a minute, one of your tests was "intention".
What if a blind man bought it with the intention of sitting in it, would his intention transform the sculpture into a chair?

The Carpenter: Of course not. If "intention" could change the nature of things, I would not be a poor struggling carpenter and my wife would be as exciting as Marilyn Monroe.
Look, good friend, I am no longer too sure I know what a chair is.
I am worried that if you go for walks with my customers they will not know what chairs are and I shall have to close business. Perhaps I'll become a lawyer. After all it is easier to talk about chair than to make them.

Socrates: Good carpenter, of course you know what a chair is.
The very fact that you can say that there are chairs made with a canvas seat shows that you know what a chair is. The difficulty lies in devising an objective test which establishes whether an object is a chair. Perhaps all one can say is that a chair is what a reasonable person, having taken all the relevant factors into account concerning form and function, understands is a chair.

The Carpenter: I am not sure that I agree with you.
It is true that I know what a chair is, but I just a humble carpenter am not able to define that chair of which a perfect model must be in heaven.
But what about lawyers ? They are so clever.
Why do not you ask them ?

Socrates: I do not have much faith in them.
They formulate tests which are meaningless, and use terms and expressions which they pretend to understand.
A good society would be better off without them ....

The Carpenter: Please, good friend, I know you do not like lawyers but do you not think you are a bit unfair?
Do not insult them too readily. They are powerful and could cause you harm.

Socrates: The main test lawyers use to test a chair is intention. According to them, if you purchase something with the intention of purchasing a chair then it is a chair, provided it complies with their definition of chair. If you change your intention later on, then it no longer is a chair.

The Carpenter: You must be joking. If it is a chair how can intention change its nature? How can intention be relevant at all ?

Socrates: Intention could be relevant where it is part of the nature of the concept. Thus, killing without intention is culpable homicide, whereas killing with the intention to kill is murder. Intention is what differentiates culpable homicide from murder.....

The Carpenter: I can understand intention being part of the concept murder. But even here can the murderer later claim that he changed his mind about his intention and that therefore he was only guilty of culpable homicide?.

Socrates: Of course not, intention in the case of murder is inherent at the time of the killing.
What a truly fine lawyer you would have made !

The Carpenter: So, "intention" is not relevant to the concept chair at all?

Socrates: You are right, intention has no relevance to the concept chair. It could, however, be a useful tool where proof is needed to establish whether the object is a chair.
If, for instance, the object burned down and for legal purposes it was necessary to establish whether the object which burned down was a chair, then the intention of the buyer when acquiring the object could help in determining whether it was a chair.
Let me draw two simple diagrams in the sand.

The Carpenter: This is so obvious, that I cannot understand how anyone could disagree with you. As intention is not part of the concept chair, how can intention at purchasing time or any other time make any difference?

Socrates: How? let me tell you a little story.
Petrach went to an auction sale with the intention of buying a chair. He bid for a beautiful chair. There was a slight misunderstanding with the auctioneer and he got an elephant.
The tax department, as you know, imposes a tax on chairs and claimed that the elephant was a chair. After all it had four legs, had a movable seat, could be sat upon and more important at all Petrach admitted that when he bid at the auction his intention was to buy a chair.
The four requirements which had to be present at the same time were complied with. So the elephant was a chair.
On appeal Petrach's clever lawyer convinced the Judge with a brilliant argument that the elephant was not a

chair because the elephant had a tail. The lawyer quoted the important decision of Taxomania versus Circus (Pty) Ltd., which was undisputed authority for the proposition that the tail of the elephant could be considered to be a fifth leg. Therefore the four legs test failed and one had to accept that the elephant was an elephant even though the taxpayer had intended to buy a chair.
The judge agreed that the elephant was not a chair and that no tax was payable, even though Petrach intended purchasing a chair. As a result of this important case it is now settled law that an elephant is not a chair. 315

The Carpenter: It seems to me that the lawyers are confusing the nature of what is being tested with the test itself. Am I right?

Socrates Yes, the lawyers and jurists are using rigid magical cabalistic formulas to define objects and concepts and end up by believing that the formulas are the realities.
It is not because I intend to dream that I therefore dream.
In other fields they make the same obvious mistake; thus for instance in psychology they claim that intelligence is what the I.Q. test tests, another example is the Receiver of Revenue which claims that income is what is taxed.

The Carpenter: Enough ! I am tired. How about a game of backgammon? Look these three old amphoras in the shade invite us. Let us sit on the two small one and use the big one as a table.

54 1904 41 SLR, 5 TC 159

55 Natal Estates v SIR 1975 (4) SA 177 (A), 37 SATC 193 at 216 per Holmes JA

56 1918 AD 576, 32 SATC 10

57 1928 AD 252, 3 SATC 253

58 It must be pointed out however that this factor of intention was introduced at a stage where the court had already decided on an objective basis that the amount was of a capital nature.

59 SIR v Trust Bank of Africa Ltd 1975 (3) SA 652 (A), 37 SATC 87 at 106 per Botha JA

60 ITC 1071 (1963) 27 SATC 185 at 187

[61] Malan v KBI 1981 (2) SA 91 (C), 43 SATC 1 at 7

[62] ITC 1432 (1985) 50 SATC 70
Barnato Holddings Ltd v SIR 1978 (2) SA 440 (A)

[63] Section 52 of the Income Tax Act 1967 [Chapter 181] of Rhodesia has been altered by section 12 of Act 16 of 1988 to read :

.....or is subject to any deduction in terms of this Act or credit....

There is therefore provision made for burden of proof to be discharged in the case of a credit claimed.

[64] Income Tax case 74; 3 SATC 7.

[65] Commissioner for Inland Revenue v Scott (3 SATC 253; 1928 AD 252)

[66] CIR v Taylor, 1934 AD 387: 7 SATC 1.

[67] It is not necessary to mention the author, this can be found in virtually all the tax treatises.

[68] Any verdict is competent in such a case provided that it is not a reversion or alteration of the decision.

[69] It is only once in the long history of <u>burden of proof</u> that this interpretation might have been reasonable. Regulation 69 of (Cape) Act 36 of 1904 states:

.....and the burden of proof shall be on the objector.

This general burden of proof becomes in regulation 40 of Act 28 of 1014:

.....and the burden of proof that the assessment is excessive shall lie on the appellant.

Since Act 28 of 1914 there is no general absolute burden of proof on appeal. See appendix A2.

[70] Please refer to chapter 4, pages 235-245 for analysis.

[71] As we are dealing with section 82, the decision must be in relation of a claim that an amount is exempt or of not liable to tax chargeable under the Act. It will also be a decision relating to an amount being subject to a deduction, abatement or set-off.

to tax chargeable under the Act.

72 Regulation 40 of Act 28 of 1914 and regulation 26 of Act 41 of 1917 state:

".....and the burden of proof that the assessment is excessive shall lie on the appellant",

In terms of the second part of section 82, the defendant has an easier task, he need only **show** that the decision of the Commissioner is wrong.

73 In terms of section 83 (A)(c) if the amount of the tax exceeds R20,000 the Commissioner and the taxpayer may agree to refer an appeal to the Board.

74 The determination of the tax is an assessment in terms of the interpretation section 1 of the Act.

"assessment" means the determination .....
(b) of the amount of any such tax;

Unfortunately the word amount is used, where it would have been preferable to use the term quantum.

75 Section 83 (13) (a)

76 As far as I have been able to ascertain all the authorities state categorically that on appeal the appellant must show that the Commissioner's decision is wrong.
This is not correct.

77 Section 83 (13) (b)

78 There is no such provision in any section or regulation of Act 40 of 1925.

79 See regulation 40 of Act 28 of 1914 and regulation 26 of Act 41 of 1917.

80 See section 78 of Act 31 of 1941 and section 82 of Act 58 of 1962.

81 See for instance Macmine Pty Ltd v F.C. of T. 79 ATC 4133 ;(1979) 9 ATR 638 per Stephen J at ATC 4146-4148 ATR 652-654.

82 Amendment by No 112 of 1986, s.30 by substituting court for Supreme court in paragraph (a).
Amendment No 48 of 1986, s.81, by substituting "in proceedings under this Part on a review before the Tribunal or on appeal to a Supreme Court" for "Upon every such reference or appeal" and by inserting "unless the Tribunal or Court otherwise orders," in paragraph (a)

Gauci and Masi v FCT (1975) 5 ATR 672 at 676-7
McCormack v FCT (1979) 9 ATR 610
MacMine Pty Ltd v FCT (1979) 9 ATR 638

[83] F.C. of T. v Dalco 90 ATC per Brennan J pages 4093-4094. Scallan v F.C. of T. 90 ATC 4250, per Lockhart J at page 4252.

[84] Trautwein vc. F.C.of T.(No.1) 1936 56 C.L.R. 63 pages 87-88, per Latham C.J.

[85] F.C.of T. v Dalco 90 ATC 4088, per Toohey J at 4098.

[86] FCT v Jackson (1990) 21 ATR 1012.

[87] McAndrew v FCT (1956) 98 CLR 263; 6 AITR 359.

[88] See ***supra*** (CLR) 282; (AITR) 371.

[89] See ***supra*** (CLR) 282; (AITR) 371.

[90] F J Bloemen Pty Ltd v FCT (1981) 147 CLR 360 at 365; 11 ATR 914 at 922 by Mason and Wilson JJ.

[91] See for instance Meyerowitz section 1955. As this is gospel truth there is no reference to section 82, section 83 A (11) or to any other section of the Act to substantiate this proposition.

C O N C L U S I O N

THE GENERALLY ACCEPTED PROPOSITION THAT,

The onus is on the taxpayer to prove that one of the causae giving rise to a receipt or accrual results in the conclusion that some portion of the amount is of a capital nature or is not from a source within the Republic.[1]

IS, WITH RESPECT, CAPABLE OF FURTHER EXAMINATION

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[1] Trevor Emsley and Richard Jooste
"Causation and the Concomitant Issue of Apportionment with reference to gross income in South African Income Tax Law.
The South African Law Journal. Vol 106, part 2,1989.
A **pro aerario** interrpretation.
Section 82 is referred to for this claim.
As section 82 does not state this, it might have been useful to have been presented with the reasoning which warrants such verdict.
There is nothing, absolutely nothing, which justifies such absolute conclusions.
There are two parts to this assertion which deserve some comments.
1) **The onus that some portion is of a capital nature**,
There are some situations where this might be correct.
2) **The onus that some portion of the amount is not from a source within the Republic.**

It is difficult to conceive of a situation where this is correct. An "amount" as per the "Gross income" definition in section (1) of the Act, only includes receipts or accruals from from a source within or deemed to be within the Republic. A non Republic receipt or accrual is not an amount and therefore is not subject to section 82 of the Act.

Semper enim quod postremum adjectum sit, id rem totam, videtur traxisse.

Often that which has come latest on the scene seems to have accomplished the whole matter.

Livy.
27,45.

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Leith v O.F.S. Government, (1879) O.F.S. 66						*10*
R. v Mgovu Dhlamanini, (1905) T.S. 331						*11*
South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd			1977	AD	534	*251*

ACT 28 OF 1914

CASES	SATC VOL	PG	YEAR	DIV	PG	REF
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COT v Messina (Tvl) Development Co., Ltd.,			1915	TPD	537	*93*
COT v William Dunn and CO., Ltd	32	33	1918	AD	607	*92*
Randfontein Estates and G.M. Co v COT			1917	TPD	278	*91*
Robinson v COT	32	41	1917	TPD	542	*92*

ACT 41 OF 1917

CASES	SATC VOL	PG	YEAR	DIV	PG	REF
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A P P E N D I X A

The inherited characteristics and family tree of section 82 of Act 58 of 1962.

Section 82 and regulation B4 have a long and intimate relationship.

Appendix A1 shows the historical development of section 82.

Appendix A2 shows the historical development of regulation B4.

Appendix A1 and Appendix A2 have been combined as Appendix A3, to give a bird's eye view of their youth, romance and marriage of convenience.[1]

General explanatory notes:

[aaaaaaaaaa] Words in bold type in square brackets indicate omissions from previous Act.

bbbbbbbbbbb Words in bold type underlined with a solid bold line indicate insertions in present Act.

APPENDIX A1

THE FAMILY TREE OF SECTION 82

SECTION OF ACT	MARGINAL NOTES OR HEADINGS	TEXT OF RELEVANT BURDEN OF PROOF SECTION
Proviso to Section 51 of (Cape) Act 36 of 1904	Deductions	51. .....: Provided that the onus of proof that any income is exempt from or not liable to payment of tax, or is subject or entitled to any deduction, shall lie on the person claiming the benefit of such exemption, non-liability or deduction.
Section 7 of Act (Cape) 21 of 1908	Onus of proof of exemption, etc.	The onus of proof that any income is exempt from or not liable to **the** payment of **income** tax **[,]** or is subject or entitled to any deduction **[,]** shall **[lie]** **be** on the person claiming **[the benefit of]** such exemption, non-liability or deduction.
Section 39 of Act 28 of 1914	Burden of proof as to exemptions, deductions or abatement.	39. The **[onus of proof]** burden of proof that any income is exempt from or not liable to the **[payment of income]** tax or is subject or entitled to any deduction **or abatement** shall be on the person claiming such exemption, non-liability or deduction.
Section 83 of Act 41 of 1917	Burden of proof as to exemptions, deductions or abatement.	83. The burden of proof that any income **or dividend** is exempt from or not liable to **[the]** **any** tax **chargeable under this Act** or is subject or entitled to any deduction or abatement shall be upon the person claiming such exemption, non-liability or deduction.

SECTION OF ACT	MARGINAL NOTES OR HEADINGS	TEXT OF RELEVANT BURDEN OF PROOF SECTION
Section 57 of Act 40 of 1925	The burden of proof as to exemptions, deductions or abatements.	57. The burden of proof that any [income or dividend] amount is exempt from or not liable to [any] the tax chargeable under this Act or is subject [or entitled] to any deduction [or], abatement or set-off in terms of this Act, shall be upon the person claiming such exemption, non-liability [or], deduction [.] , abatement or set-off.
Section 78 of Act 31 of 1941	The burden of proof as to exemptions, deductions or abatements.	78. The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off [.] , and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.
Section 82 of Act 58 of 1962	[The b]Burden of proof as to exemptions, deductions or abatements.	78. The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.

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APPENDIX A2

THE FAMILY TREE OF **REGULATION B4**

REGULATION UNDER THE INCOME TAX ACT	HEADING	TEXT OF RELEVANT REGULATION
Regulation 69 of (Cape) Act 36 of 1904	Appeals	69. The general practice and procedure of the Court of Review shall be that of a Court of Resident Magistrate, in so far as the same are applicable, and the burden of proof shall lie on the objector.
(Cape) Act 21 of 1908 [2]	Same	Same
Regulation 40 of Act 28 of 1914	OBJECTIONS AND APPEALS	40. The general practice and procedure of the **[Court of Review]** **Special Court** shall be that of a Court of **a** Resident Magistrate, in so far as the same is applicable, and the burden of proof that the assessment is excessive shall lie on the appellant.
Regulation 26 of Act 41 of 1917	APPEALS	26. The general practice and procedure of the Special Court shall be that of a **[Court of a Resident]** Magistrate**'s Court**, in so far as the same is applicable, and the burden of proof that the assessment is excessive shall be lie the appellant.

REGULATION UNDER THE INCOME TAX ACT	HEADING	TEXT OF RELEVANT REGULATION
Regulation 8 of Act 40 of 1925	APPEALS	8. Save as in these **regulations is otherwise provided,** [T] the general practice and procedure of the Special Court shall be that of a Magistrate's Court in so far as such practice and procedure are applicable. [, and the burden of proof that the assessment is excessive shall lie on the appellant.]
Regulation 6 of Act 31 of 1941	APPEALS	6. Save as in these regulations is otherwise provided, the general practice and procedure of the Special Court shall be that of a Magistrate's Court in so far as such practice and procedure are applicable.
Regulation B4 of Act 58 of 1962	Appeals **to the Court**	B4. Save as in these regulations is otherwise provided, the general practice and procedure of the [Special] Court shall be that of a [M] magistrate's [C] court in so far as such practice and procedure are applicable.

APPENDIX A3

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THE FAMILY TREE OF SECTION 82

SECTION OF ACT	MARGINAL NOTES OR HEADINGS	TEXT OF RELEVANT BURDEN OF PROOF SECTION
Proviso to Section 51 of (Cape) Act 36 of 1904	Deductions	51. .....: Provided that the onus of proof that any income is exempt from or not liable to payment of tax, or is subject or entitled to any deduction, shall lie on the person claiming the benefit of such exemption, non-liability or deduction.
Section 7 of Act (Cape) 21 of 1908	Onus of proof of exemption, etc.	The onus of proof that any income is exempt from or not liable to the payment of income tax [,] or is subject or entitled to any deduction [,] shall [lie] be on the person claiming [the benefit of] such exemption, non-liability or deduction.
Section 39 of Act 28 of 1914	Burden of proof as to exemptions, deductions or abatement.	39. The [onus of proof] burden of proof that any income is exempt from or not liable to the [payment of income] tax or is subject or entitled to any deduction or abatement shall be on the person claiming such exemption, non-liability or deduction.
Section 83 of Act 41 of 1917	Burden of proof as to exemptions, deductions or abatement.	83. The burden of proof that any income or dividend is exempt from or not liable to [the] any tax chargeable under this Act or is subject or entitled to any deduction or abatement shall be upon the person claiming such exemption, non-liability or deduction.

THE FAMILY TREE OF REGULATION 84

REGULATION UNDER THE INCOME TAX ACT	HEADING	TEXT OF RELEVANT REGULATION
Regulation 69 of (Cape) Act 36 of 1904	Appeals	69. The general practice and procedure of the Court of Review shall be that of a Court of Resident Magistrate, in so far as the same are applicable, and the burden of proof shall lie on the objector.
(Cape) Act 21 of 1908 [2]	Same	Same
Regulation 40 of Act 28 of 1914	OBJECTIONS AND APPEALS	40. The general practice and procedure of the [Court of Review] Special Court shall be that of a Court of a Resident Magistrate, in so far as the same is applicable, and the burden of proof that the assessment is excessive shall lie on the appellant.
Regulation 26 of Act 41 of 1917	APPEALS	26. The general practice and procedure of the Special Court shall be that of a [Court of a Resident] Magistrate's Court, in so far as the same is applicable, and the burden of proof that the assessment is excessive shall be lie the appellant.

SECTION OF ACT	MARGINAL NOTES OR HEADINGS	TEXT OF RELEVANT BURDEN OF PROOF SECTION
Section 57 of Act 40 of 1925	The burden of proof as to exemptions, deductions or abatements.	57. The burden of proof that any [income or dividend] amount is exempt from or not liable to [any] the tax chargeable under this Act or is subject [or entitled] to any deduction [or], abatement or set-off in terms of this Act, shall be upon the person claiming such exemption, non-liability [or], deduction [.] , abatement or set-off.
Section 78 of Act 31 of 1941	The burden of proof as to exemptions, deductions or abatements.	78. The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off [.] , and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.
Section 82 of Act 58 of 1962	[The b]Burden of proof as to exemptions, deductions or abatements.	78. The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.

REGULATION UNDER THE INCOME TAX ACT	HEADING	TEXT OF RELEVANT REGULATION
Regulation 8 of Act 40 of 1925	APPEALS	8. Save as in these regulations is otherwise provided, [T] the general practice and procedure of the Special Court shall be that of a Magistrate's Court in so far as such practice and procedure are applicable , [, and the burden of proof that the assessment is excessive shall lie on the appellant.]
Regulation 6 of Act 31 of 1941	APPEALS	6. Save as in these regulations is otherwise provided, the general practice and procedure of the Special Court shall be that of a Magistrate's Court in so far as such practice and procedure are applicable.
Regulation 84 of Act 58 of 1962	Appeals to the Court	84. Save as in these regulations is otherwise provided, the general practice and procedure of the [Special] Court shall be that of a [M] magistrate's [C] court in so far as such practice and procedure are applicable.

[1] The marginal notes and headings of the sections and regulations have also been quoted and compared. This is not the place nor the time to discuss the validity of the rule of interpretation "**rubrica non est lex**". If they are not of legal consequence, they are of legal interest.

[2] In terms of section 1 of (Cape) Act 21 of 1908, all the regulations of (Cape) Act 36 of 1904 (the principal Act) shall apply, **"as far as they are not repugnant to or inconsistent with the amendments"** by the Act. Both Acts are to be read as one.

There is no amendment to regulation 69 of the principal Act. It is assumed therefore that section 69 of the Principal Act, as such, has not been altered. This is subject however to section 13, which reads:

13. Proceedings in any superior or inferior court for the recovery of income tax charged under this Act shall be deemed to be proceedings for the recovery of a liquid debt.
In any action or proceeding for the recovery of income tax it shall not be competent for the defendant to question the correctness of the assessment book or any certified extract therefrom.