

Assessed losses as defined by section 20 of the Income Tax Act No. 58 of 1962 – A critical analysis of anomalies that exist under current legislation and case law together with discussions on both their possible future implications and suggestions for remedies

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## **Statement**

**Research dissertation presented for the approval of Senate in fulfilment of part of the requirement for the Post Graduate Diploma in Tax Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a program of courses.**

**I hereby declare that I have read and understood the regulations governing the submission of Post Graduate Diploma in Tax Law dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

**Signature**

**12/02/2014**

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## **Abbreviations**

The list of abbreviations used in this dissertation is stated below:

CIR – Commissioner for Inland Revenue

IFRS – International Financial Reporting Standards

IN33 – Interpretation Note No. 33 (issue 2)

ITA – Income Tax Act No. 58 of 1962

ITC – Income Tax Case

SA – SA Law reports

SARS – South African Revenue Services

SATC – South African Tax Cases Reports

SC – Senior Counsel

SCA - Supreme Court of Appeal

TAA – Tax Administration Act No. 28 of 2011

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## Introduction

Section 20 of the Income Tax Act No. 58 of 1962 deals with the determination and application of assessed losses in South African income tax. The predecessor to this section is Section 11 of the Income Tax Act, 31 of 1941.

Section 20 defines an assessed loss<sup>1</sup> as any amount by which the deductions admissible under section 11 exceeded the income in respect of which they are so admissible.

A taxpayer's assessed loss is calculated in terms of this definition as a theoretical balance, which the taxpayer can set-off against its taxable income in the following year of assessment.

Section 20 differentiates between the transferability of an assessed loss for a company and other taxpayers, where no trade was conducted or no income was derived from such a trade during any year of assessment, in subsection 2A.

Section 20 furthermore limited the application of an assessed loss calculated for a trade carried on outside of the Republic against any amount of income earned by the same taxpayer within the Republic.

Practically, an assessed loss is formalised and communicated to a taxpayer on an IT34, Income Tax Assessment issued by SARS. When this assessed loss is applied to the calculated taxable income of the following year of assessment, it is included on the IT34 under the 4303 code.

Taxpayers should always ensure that the amount calculated on the IT34 notice is accurate. Where the taxpayer is not in agreement with the IT34, the taxpayer should object to SARS, specifically stating every specific ground for the objection. The opportunity to object prescribes after three years of the

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<sup>1</sup> Section 20(2) of the Income Tax Act No. 58 of 1962

original assessment and due care should be taken by taxpayers to ensure that all necessary action is taken within this 3 year period.

Assessed losses have become very topical in South Africa, especially in the context of the current economic recession and especially in certain sectors of the South African economy for example property development, asset intensive manufacturing concerns and the agricultural sector.

Section 20 practically preserves the expenses taxpayers incurred and deducted in terms of section 11 of the ITA in previous years of assessment where these expenses exceeded the income and grant these expenses as deductions against income in years of assessment subsequent to the years in which these expenses were actually incurred.

The challenge for all taxpayers lies in the arrangement of their affairs in such a way as to not lose their balance of assessed loss, whilst possibly restructuring and adjusting their businesses in a cost effective way necessary for its survival in the current economic recession.

## Summary of the context of the dissertation

This content of this paper is focused on and divided into the following sections:

- The wording of Section 20 (*Previously section 11 of the 1941 Act*) of the Income Tax Act No 58 of 1962 and other relevant legislation.
- A discussion of applicable case law:
  - *CIR vs Loius Zinn Organisation (Pty) Ltd 1958 (4) SA 477 (A) 22 SATC 85 ("Louis Zinn")*
  - *CIR vs Datakor Engineering (Pty) Ltd 1998 (4) SA 1050 (SCA) 60 SATC 503 ("Datakor")*
  - *Conshu (Pty) Ltd v CIR 1994 (4) SA 603 (A) 57 SATC 1 ("Conshu")*
  - *ITC 1830 70 SATC 123 2008 ("ITC 1830")*
  - *CSARS v Megs Investments (Pty) Ltd & Another 2005 (4) SA 328 (SCA) 66 SATC 175 ("Megs Investments")*
- An overall conclusion on the matters discussed.

## **The wording of Section 20 of the Income Tax Act No. 58 of 1962 and other relevant documentation**

The wording of Section 20 of the ITA, Set-off of assessed losses reads as follows:

*1) For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall, subject to section 20A, be set off against the income so derived by such person--*

*a) any balance of assessed loss incurred by the taxpayer in any previous year which has been carried forward from the preceding year of assessment:*

*Provided that-- **[deleted by the Taxation Laws Amendment Act, 2012 (Act No. 22 of 2012)]***

*i)**[deleted by the Taxation Laws Amendment Act, 2012 (Act No. 22 of 2012)]***

*ii)**[deleted by the Taxation Laws Amendment Act, 2012 (Act No. 22 of 2012)]***

*iii)**[deleted by s.17 of Act No. 21 of 1995];***

*b) any assessed loss incurred by the taxpayer during the same year of assessment in carrying on any other trade either alone or in partnership with others, otherwise than as a member of a company the capital whereof is divided into shares:*

*Provided that there shall not be set off against any amount*

*a) distributed to such person by any pension fund or provident fund which is included in the gross income of such person in terms of paragraph (eB) of the definition of 'gross income' in section 1, any—*

*i) balance of assessed loss; or*

- ii) **'assessed loss'** as defined in subsection (2) incurred in such year before taking into account any amount of such distribution;
- b) derived by any person from the carrying on within the Republic of any trade, any—
  - i) assessed loss incurred by such person during such year; or
  - ii) any balance of assessed loss incurred in any previous year of assessment, in carrying on any trade outside the Republic; or
- c) that is a retirement fund lump sum benefit or retirement fund lump sum withdrawal benefit included in taxable income, any—
  - i) balance of assessed loss;
  - ii) **'assessed loss'** as defined in subsection (2) incurred in such year before taking into account that retirement fund lump sum benefit or retirement fund lump sum withdrawal benefit.

2) For the purposes of this section **'assessed loss'** means any amount by which the deductions admissible under section 11 exceeded the income in respect of which they are so admissible.

2A) In the case of any taxpayer other than a company--

- a) the provisions of subsections (1) and (2) shall *mutatis mutandis* apply for the purpose of determining the taxable income derived by such taxpayer otherwise than from carrying on any trade, the reference in subsection (1) to "taxable income derived by any person from carrying on any trade" and the reference in that subsection to "the income so derived" being respectively construed as including a reference to taxable income derived by the taxpayer otherwise than from carrying on any trade and a reference to income so derived; and
- b) the said taxpayer shall, subject to the provisos to subsection (1), not be prevented from carrying forward a balance of assessed loss merely

*by reason of the fact that he has not derived any income during any year of assessment.*

The proviso previously included in subparagraph (a) to section (1) read as follows before it was deleted with the Taxation Laws Amendment Act No. 22 of 2012:

*Provided that-*

- i.) no person whose estate has been voluntarily or compulsorily sequestrated shall be entitled to carry forward any assessed loss incurred prior to the date of sequestration, unless the order of sequestration has been set aside, in which case the amount to be so carried forward shall be reduced by an amount which was allowed to be set off against the income of the insolvent estate of such person from the carrying on of any trade; and*
- ii.) the balance of assessed loss shall be reduced by the amount or value of any benefit received by or accruing to a person resulting from a concession granted by or a compromise made with any creditor of such person whereby any liability owed by such person to such creditor has been reduced or extinguished, to the extent that –*
  - (aa) the amount advance by such was used, directly or indirectly, to fund expenditure or an asset; and*
  - (bb) a deduction was allowed in terms of section 11, in respect of such expenditure or asset;*

The second proviso is discussed in detail in the Louis Zinn case below, and therefore the need to include this proviso specifically under this heading. Please note that the Tax Law Amendment Act No 22 of 2012 replaced this second proviso with section 19 of the ITA, Reduction of debt.

The wording of section 7(5) of the ITA reads as follows:

*5)If any person has made any donation, settlement or other disposition which is subject to a stipulation or condition, whether made or imposed by such person or anybody else, to the effect that the beneficiaries thereof or some of them shall not receive the income or some portion of the income thereunder until the happening of some event, whether fixed or contingent, so much of any income as would, but for such stipulation or condition, in consequence of the donation, settlement or other disposition be received by or accrue to or in favour of the beneficiaries, shall, until the happening of that event or the death of that person, whichever first takes place, be deemed to be the income of that person.*

The wording of section 103(2) of the ITA reads as follows:

*2)Whenever the Commissioner is satisfied that--*

*a)any agreement affecting any company or trust; or*

*b)any change in--*

*i)the shareholding in any company; or*

*ii)the members' interests in any company which is close corporation; or*

*iii)the trustees or beneficiaries of any trust,*

*as a direct or indirect result of which*

*A)income has been received by or has accrued to that company or trust during any year of assessment, or*

*B)any proceeds received by or accrued to or deemed to have been received by or to have accrued to that company or trust in consequence of the disposal of any asset, as contemplated in the Eighth Schedule, result in a capital gain during any year of assessment,*

*has at any time been entered into or effected by any person solely or mainly for the purpose of utilizing any assessed loss, any balance of assessed loss,*

*any capital loss or any assessed capital loss, as the case may be, incurred by the company or trust, in order to avoid liability on the part of that company or trust or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof –*

*aa)the set-off of any such assessed loss or balance of assessed loss against any such income shall be disallowed,*

*bb)the set-off of any such assessed loss or balance of assessed loss against any taxable capital gain, to the extent that such taxable capital gain takes into account such capital gain, shall be disallowed; or*

*cc)the set off of such capital loss or assessed capital loss against such capital gain shall be disallowed.*

The wording of paragraph 71 of the 8<sup>th</sup> Schedule of the ITA reads as follows:

*71)Attribution of capital gain subject to revocable vesting*

*Where—*

*a)a deed of donation, settlement or other disposition confers a right upon a beneficiary thereof who is a resident to receive a capital gain attributable to that donation, settlement or other disposition or any portion of that gain;*

*b)that right may be revoked or conferred upon another by the person who conferred it; and*

*c)a capital gain attributable to that donation, settlement or other disposition or a portion of that gain has in terms of that right vested in that beneficiary during a year of assessment throughout which the person who conferred that right has been a resident and has retained the power to revoke that right, that capital gain or that portion thereof must be disregarded when determining the aggregate capital gain or aggregate capital loss of that beneficiary and be taken into account when determining the aggregate capital gain or aggregate capital loss of the person retaining the power of revocation.*

## ***CIR v Louis Zinn Organisation (Pty) Ltd 1958 (4) SA 477 (A) 22 SATC 85<sup>2</sup>***

The Louis Zinn court case focuses on the difference between the wording of subparagraphs (a) and (b) of subsection (1) of section 20 of the ITA, read together with the provisos to these subparagraphs, specifically the proviso to the subparagraph (a). This proviso has now been deleted with effect from 1 January 2013 and is now dealt with in section 19 of the ITA, Reduction of debt, of the ITA. Please note that the Louis Zinn case deals with years of assessment before 1962 and the equivalent of section 20 in the current ITA is section 11 in Act No 31 of 1941.

### **Background and pertinent facts of the case**

Louis Zinn, a company that conducted his trade as a clothing manufacturer, incurred a loss in its 1954 year of assessment. During the same period of assessment, the company disclosed a compromise with its creditors in the annual financial statements and the Commissioner applied section 11(3)(a)(ii) and reduced the assessed loss calculated for the 1954 year of assessment by the amount of the compromise with creditors as disclosed by Louis Zinn.

Louis Zinn contended that the application of both sections 11(4)(a) and 11(3)(a)(ii) had no application where the trading loss, which created the assessed loss to be carried forward (as opposed to the balance of assessed loss carried forward from the previous year) and the compromise with creditors come into existence in the same year of assessment.

No other matters, for example the capital or revenue nature of the loss or the trade requirement were ever under dispute in this case.

Louis Zinn's objection was disallowed by the Commissioner and the company appealed to the special court. The Special Court upheld their

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<sup>2</sup> *CIR vs Louis Zinn Organisation (Pty) Ltd 1958 (4) SA 477 (A) 22 SATC 85; The facts pertaining to the case was summarised in my own words, but in some instances crucial elements to the case and the discussion thereof could not be expressed in words other than what was included in the extract of the actual court case.*

appeal on the basis that only a *balance of assessed* loss carried forward from the preceding year of assessment can be adjusted in terms of section 11(3)(a)(ii), using a very narrow and strict application of this phrase.

The Commissioner appealed to the Appellate Division and Schreiner ACJ presiding for the full bench, allowed the Commissioner's appeal on the grounds that the adjustment to the balance of the assessed loss takes place at the stage where this balance is determined, in other word as part of the assessment which creates balance of assessed loss to be carried forward and set off against taxable income in future years of assessment.

### **Discussion**

The critical element of this case was the use of the phrase '*balance of assessed loss*' in subparagraph 11(3)(a)(ii), (Section 20(1)(a) of the 1962 Act).

The word ***balance***<sup>3</sup> read in the specific context of the phrase '*balance of assessed loss*' included in Section 11 of the Income Tax Act of 1941, (and Section 20 of the ITA) implies an amount that was previously determined and created after being subject to adjustments and now carried forward from the preceding year of assessment.

The ***anomaly***<sup>4</sup> created by the wording of this section of the Act is clearly illustrated by the arguments put forward by both the counsel for the appellant and the respondent. The appellant's counsel used section 11(4)(a) as the basis for adjusting the current years trading loss and therefore the balance of assessed loss carried forward to following year of assessment. The counsel for the respondent argued that there was no *balance of assessed loss* carried forward from previous years and that therefore section 11(3)(a)(i) did not apply. Clearly, these two arguments were not in conflict. The real conflict lies within the grounds of the objection of the taxpayer and the ruling of the Special Court where it was decided to use the limited operation of section

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<sup>3</sup> The Oxford Dictionary defines the word ***balance***, read in the relevant context as a predominating amount or the amount of money held in an account, ( <http://www.oxforddictionaries.com/definition/english/balance>).

<sup>4</sup> The Oxford Dictionary defines the word ***anomaly*** as something that deviates from what is standard, normal or expected, (<http://www.oxforddictionaries.com/definition/english/anomaly>).

11(3)(a)(i) in the evaluation as to whether section 11(4)(a) should be applied under the circumstances. Section 11(3)(a)(i) was clearly a limitation to future adjustments to assessed losses imposed by the legislator only where a *balance of assessed loss* existed and was carried forward. This section should however not limit the application of section 11(4)(a) when determining taxable income for a specific year of assessment. The inclusion of the word *balance* in section 11(3)(a)(i) would imply that the evaluation of a possible reduction of an assessed loss happens after the determination of taxable income and only evaluates the residual value of the assessed loss at any point in time.

This is in conflict with Schreiner ACJ's verdict in the Louis Zinn case. Schreiner ACJ concluded that the possible reduction of an assessed loss as contemplated in section 11(3)(a)(ii) takes place at the determination stage of such a *balance of assessed loss* and not the application stage. By taking this view, Schreiner ACJ effectively rendered the distinction between a *balance of assessed loss* and an *assessed loss* redundant.

The opposing view that a *balance of assessed loss* must be interpreted in a distinctly different way to an *assessed loss* is supported by the simple reality that the legislator saw the need to clearly distinguish between these two phrases in the construction of the different subparagraphs of section 11(3) (*and section 20(1) as it exists today*) and that the limitation in section 11(3)(a)(ii) **only** applies to subparagraph (a).

Schreiner's view therefore appears to be in conflict with the accepted interpretation of the words *balance of assessed loss*<sup>5</sup>.

### **Conclusion and discussion of possible implications**

With all due respect, it seems like Schreiner ACJ interpreted the words of the Act in a way to achieve a predetermined outcome. The fact that the Appellate Division (now the SCA) is limited to evaluate the merit of the decision reached in the lower courts and the fact that a different ground of appeal was

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<sup>5</sup> Also see the view on the matter of the authors of *Income Tax Cases and Materials*, Emslie & Davis, [211] CIR v Louis Zinn Organisation (Pty) Ltd, included in the footnote to this case.

not introduced at the Appellate Division might have prompted him to argue in such a way.

A different way in which a judge in the Appellate Division could have come to the conclusion that the compromise Louis Zinn reached with its creditors justified a reduction in taxable income of the year of assessment in 1954, would have been to apply section 11(4)(a) in isolation even though section 11(3)(a)(ii) had no application in this instance. It does however appear that counsel for the appellant erred in their grounds of appeal to the Special Court and this forced Schreiner ACJ to follow the above interpretation in order to achieve a result which is most accepted as being equitable and not in conflict with the *contra fiscum*<sup>6</sup> rules.

The anomaly created in this case, which still exists today is the fact that even though the word *balance* of assessed loss is included in Section 20(1)(a), it appears to have become irrelevant in the light of the above verdict, especially due to the principle hereby established that an assessed loss can be adjusted at the determination stage. This is clearly a deviation of what is expected and normal and the Act could be easily misinterpreted by someone not fully aware of Schreiner ACJ's verdict in 1958.

Please note that since the introduction of section 19, Reduction of debt, of the ITA, effective from 1 January 2013, read in combination with section 8(4)(a), the effect of the anomaly created in the Louis Zinn case has been mitigated and addressed to a certain extent where the possible adjustment to the balance of assessed loss was due to a reduction of debt. The distinction between a *balance of assessed loss* as used in section 20(1)(a) and *assessed loss* as used in section 20(1)(b) still remains in the current legislation. This section is not discussed in any further detail in this paper.

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<sup>6</sup> The *contra fiscum* rule states that where an ambiguity exists in tax law, it needs to be resolved in favour of the taxpayer. (<http://www.bdo.co.za/documents/Taxflash%20May%202007.pdf>)

## ***CIR vs Datakor Engineering (Pty) Ltd 1998 (4) SA 1050 (SCA) 60 SATC 503<sup>7</sup>***

The Datakor case deals with the ***amount or value*** of ***any benefit*** that serves as a reduction in assessed losses in terms of section 20(1)(a)(ii) (as it then existed) and the difference between the benefit received or conceded by the creditor as opposed to the benefit received by the debtor with an assessed loss, being Datakor in this instance.

### **Background and pertinent facts**

Datakor was declared commercially insolvent in 1989 and was put into final liquidation. In terms of a scheme of arrangement in terms of section 311 of the Companies Act of South Africa<sup>8</sup>, entered into between Datakor, its shareholders and its secured and unsecured creditors, Datakor become a wholly owned subsidiary of Datakor Ltd ('holding company') and funds received from the holding company were used to settle commercial debts, including a pro rata payment to concurrent creditors. The unpaid portions of the concurrent claims were to be capitalised by the taxpayer to redeemable preference share capital, including a premium portion. As part of this agreement, these preference shares were to be renounced by the creditors to the holding company.

The Commissioner applied section 20(1)(a)(ii) to reduce the taxpayer's assessed loss by the amount capitalised to the share premium account. The taxpayer objected and this objection was disallowed by the Commissioner. The taxpayer's appeal to the Special Court was upheld on the basis that the onus of establishing the *amount or value* of the benefit to the taxpayer was on the Commissioner.

The full bench of the SCA, with Harms JA presiding, concurred that there indeed was a benefit for the taxpayer in such an agreement and that section 20(1)(a)(ii) did apply. The SCA also overturned the decision of the Special

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<sup>7</sup> *CIR vs Datakor Engineering (Pty) Ltd 1998 (4) SA 1050 (SCA) 60 SATC 503; The facts pertaining to the case was summarised in my own words, but in some instances crucial elements to the case and the discussion thereof could not be expressed in words other than what was included in the extract of the actual court case.*

<sup>8</sup> *Companies Act No. 71 of 2008*

Court where it was previously decided that the onus of establishing the *amount or value* of the benefit was on the Commissioner, and thereby upheld the Commissioner's appeal.

### **Discussion**

In the light of the above situation and facts, it is important to firstly evaluate whether section 20(1)(a)(ii) is indeed applicable.

The element of this section over which the most doubt could possibly exist is whether the benefit was indeed resulting from a concession granted or a compromise made with *his* creditors. This clearly indicates that the legislator intended a very narrow application of section 20(1)(a)(ii). It limits the required evaluation to the relationship between the taxpayer and its own trading creditors only. In this instance the taxpayer's trade creditors gave up their right to claim payment of the residual value of their claims, in exchange for redeemable preference shares. This type of share is an instrument which will only burden the taxpayer to make a payment where the taxpayer is in a position to do so. The holder of such an instrument is not in a position to claim any payment up until the point where the majority of the shareholders are in agreement to a dividend declaration or share buy-back, only after such an action was proposed to all shareholders by the taxpayer's directors who in turn are responsible for the overseeing that the company meets the necessary solvency and liquidity requirements as required by the Companies Act. The rights these concurrent creditors received in return for the right to claim payment for the residual balance of their claims, bore the characteristics of equity shareholders, and therefore the exchange of asset by them should be regarded as a concession from their side. They have in effect accepted a ranking lower in the payment pecking order than what they had previously. The fact that these preference shares could possibly provide a greater return than a once off claim in the event where the company becomes profitable, does not detract from the fact a concession was made by entering into an agreement to exchange one right for a very different right.

Please note that the creditors' arrangement with the holding company to renounce these shares should not be brought into contention due to the required narrow application of the wording of the section.

The second element of section 20(1)(a)(ii) that should be evaluated is whether *any benefit*<sup>9</sup> accrued to the taxpayer Datakor. This element of the section requires a very wide application, by virtue of the inclusion of the word *any*. In evaluating the financial position of Datakor in isolation, before and after the arrangement with its secured and unsecured creditors, there could be little doubt that *any benefit* accrued to them. They would have gone from commercial insolvency, to not only being solvent but also having support from a new holding company.

The *amount or value* of such a benefit accruing to Datakor is the last element necessary to qualify for an adjustment to the balance of assessed loss in terms of section 20(1)(a)(ii). As with the definition of gross income, the words *amount or value* should be interpreted in the same way as described by Watermeyer J in the court case *Lategan v CIR*<sup>10</sup>. He described these words to have a wider application than only money, but all form of property, whether corporeal or incorporeal, which has a monetary value.

The real challenge in this case would be to prove the actual monetary value of the accrued benefit to Datakor, which could be a very subjective and complicated calculation. In the Datakor case the SCA chose to not use the authority of *Butcher Brothers (Pty) Ltd, CIR v (1945 AD)*<sup>11</sup> in order to establish the value of the accrued benefit. The SCA avoided dealing with the valuation matter by using the grounds of the original taxpayer's objection, or the lack of including the valuation matter specifically in his grounds of objection, and to use the amount argued by the Commissioner as the *amount or value* of the benefit by default. The Commissioner argued that the accounting entry to increase the share premium account was the fixed amount of the accrued benefit. It remains debatable whether this amount

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<sup>9</sup> The Oxford Dictionary defines a **benefit** as an advantage or profit gained from something, (<http://www.oxforddictionaries.com/definition/english/benefit>).

<sup>10</sup> *Lategan (WH) v CIR (1926 CPD 203) 2 SATC 16*

<sup>11</sup> *Butcher Brothers (Pty) Ltd, CIR v (1945 AD) 13 SATC 21*

constitutes the true *amount or value* of the accrued benefit. This would probably have been an accurate estimate of the accrued benefit in the instance where there were no shares or other instruments issued by Datakor in exchange for these claims. Datakor did however issue redeemable preference shares to these concurrent creditors, but the full bench of the SCA did not include this fact in their verdict.

### **Conclusion and discussion of possible implications**

No doubt exists as to the fact that there indeed was an accrued *benefit* to Datakor. The anomaly created with the Datakor case has two elements. Firstly, that no consideration was given to the fact that redeemable preference shares, with current and future cost implications to the taxpayer, were issued by Datakor to its concurrent creditors and secondly on a technical decision, by not including the valuation matter in the taxpayer's original objection, the crux of this case, the valuation of the accrued benefit, was avoided and dismissed with a clearly inequitable result as a consequence.

It could be argued that by practical operation of the assessment process, the Commissioner accepted the onus of proving the amount or value of the *benefit* by proposing a Rand value to the adjustment to the assessed loss. But even if the onus was on the taxpayer to prove the amount or value of the benefit accrued, by dismissing the verdict of the lower court, without addressing the valuation matter, the SCA did not fulfill its obligation to deal with the valuation matter as a natural consequence of the judicial order of event in this case.

A better approach would have been for the SCA to order the taxpayer to get a valuation of the redeemable preference shares done by a sworn independent valuator and use this as a reduction in the face value the amount of outstanding claims capitalised to share premium in order to establish the accrued *benefit* to Datakor. This approach would be appropriate where there is a definite cost to the taxpayer in order for him to be relieved of his obligations, such as the concurrent creditors' claims.

Another solution could be for the Act to be amended to give guidance as to how these benefits should be valued. Alternatively, the view of the special court should not be ignored and that the use of precedent set in *Butcher Brothers (Pty) Ltd, CIR v (1945 AD)* should be used to determine such an amount.

Please note that section 19 of the Income Tax Act no 58 of 1963 was introduced effectively from 1 January 2013, together with the removal of section 20(1)(a)(ii). The application of section 19 would not have been different to that of section 20(1)(a)(ii), except for the fact that it specifically defined to “reduction amount” to include costs or consideration applied for such a reduction. Furthermore, this section is specifically read with section 8(4)(a) and to the extent that the reduction amount exceeds the balance of the assessed loss, this residual amount will be included in taxable income in terms of section 8(4)(a).

The anomaly that remains in current legislation is that SCA is in the power to avoid the crux of a legal matter based on the fact that this was not included in the taxpayer’s original notice of objection. This can give rise to inequitable results in the SCA where matters which are generally accepted to be part of the context of important arguments submitted, but are not formally documented in the taxpayer’s objection or its appeal to the Tax Court and therefore not considered. Taxpayers should take due care to formalise all matters, not only the argument which addresses the principle which the Commissioner is disputing when lodging a case to the Tax Court.

## ***Conshu (Pty) Ltd v CIR 1994 (4) SA 603 (A) 57 SATC 1<sup>12</sup>***

This case deals with the practical application of section 20(1) of the ITA, when it is found that an agreement entered into by the shareholders of the company falls within the ambit of section 103(2).

### **Background and pertinent facts**

Conshu had a balance of assessed loss for the year ended 1984 of approximately R 5,900,000 and this loss increased to approximately R 9,900,000 at the end of the 1985. On the last day of the 1985 year of assessment Conshu's shareholders at the time entered into an agreement which clearly fell into the ambit of section 103(2). As a result of this agreement, Conshu earned substantial taxable income in the 1986 year of assessment and the Commissioner disallowed the set off of the balance of assessed loss against the tainted taxable income for the 1986 year of assessment.

Conshu objected to the Commissioner against these assessments but after this objection being disallowed, not only appealed to the Special Court but applied for leave to introduce further grounds of objection. All grounds of appeal to the Special Court was dismissed and Conshu appealed to the Appellate Division, only to clarify the matter as to whether the Commissioner can apply the provisions of section 103(2) for the first time in a subsequent year of assessment to the year when this agreement falling into the ambit of this section was concluded.

The full bench of the Appellate Division, in a split decision with Harms JA presiding for the majority, ruled against Conshu and determined that the Commissioner was within his rights to only apply section 103(2) for the first time in subsequent years and the appeal was dismissed.

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<sup>12</sup> *Conshu (Pty) Ltd v CIR 1994 (4) SA 603 (A) 57 SATC 1*; The facts pertaining to the case was summarised in my own words, but in some instances crucial elements to the case and the discussion thereof could not be expressed in words other than what was included in the extract of the actual court case.

## Discussion

Due to the fact that this was a split decision, especially 3 judges versus 2 judges, it is important to evaluate the provisions of sections 20(1) and 103(2) closely, before applying these two sections to the context of the case.

Section 103(2) permits the Commissioner to disallow the set-off of assessed losses or the balance of assessed losses in the certain specific circumstances where a change of shareholding has taken place in terms of an agreement between shareholders (ignoring the use of close corporations and trusts for this argument), and as a direct or indirect result of this agreement income or a capital gain accrues to the taxpayer.

The conflict within the interpretation of section 103(2) is created by the wide application of the phrases 'balance of assessed loss' or 'assessed loss' by adding the word 'any' to section 103(2)(b)(B)(aa) and section 103(2)(b)(B)(bb). This stands in contrast, even if this is not always very apparent, with the nature and the construction of a balance of assessed loss or assessed loss as defined and introduced into the legislation in section 20.

It was held by EM Grosskopf JA, presiding for the minority judgement in the Conshu case, that an assessed loss had a notional existence for a single year of assessment only. This implies that a new assessed loss comes into existence every year.

This interpretation by EM Grosskopf JA creates conflict with the wording of section 103(2) and the opportunity for different views, where the set-off of **any** assessed loss is disallowed. This section also includes the words **at any time** earlier in the same subparagraph when referring to the agreement subject matter of this section, which clearly indicates that the legislator designed this section to have a very wide scope.

However, the word **any** is followed by the word **such**<sup>13</sup> in both subparagraphs (aa) and (bb). The inclusion of the word **such** narrows the scope of these limiting subparagraphs to assessed losses utilised in the set-

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<sup>13</sup> The Oxford Dictionary defines the word **such** as of the type previously mentioned, (<http://www.oxforddictionaries.com/definition/english/such>).

off against tainted income or capital gain created by virtue of the agreement to change the shareholding. The word **such** in this context would determine the outline of the scope of such a subparagraph with the word **any** making all items included in this determined scope applicable.

The critical question in this case is whether the words **any such** would include any new assessed loss, created in subsequent years and whether the timing of the conclusion of the agreement that creates the tainted income or capital gain can limit the assessed loss set-off in future years.

Applying this to the Conshu case, the only assessed loss or balance of assessed loss in existence at the time of the conclusion of the agreement to change shareholding, was the assessed loss brought forward from the 1984 year of assessment. The trading losses incurred in the 1985 year of assessment might well have been known to the parties to the agreement, but did not fit the definition of either a balance of assessed loss or an assessed loss as contemplated by section 103(2).

Harms JA, presiding for the majority in this case followed quite a robust approach in not evaluating the limitation set by section 103(2) having its existence in the word **such**, to the specific assessed losses applicable under this section and found in favour of the Commissioner.

Furthermore, Harms JA tried to use a different definition for the term “**income**” as included in section 20 than the definition specifically included in the definitions included in section 1 of the ITA. This revised definition seems to be the court’s effort to limit the existence of an assessed loss to one year only and to never accumulate, which is not in line with common sense, previous case law or the Commissioners practice<sup>14</sup>.

### **Conclusion and discussion of possible implications**

In every split decision by the SCA, there is a need to have a much closer look at the facts of the case, the context and position of the both parties’ view

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<sup>14</sup> Also see the view on this matter of the authors of *Income Tax Cases and Materials*, Emslie & Davis, [223] *Conshu (Pty) Ltd v CIR*, included in the footnote to this case.

and the state of the legislation and case law which was in existence at the time of the decision.

In this instance, my view is that the legislation and the case law was in a state where the taxpayer Conshu put forward a very good and well prepared case in order to prove that they did not fall foul of section 103(2) to the extent the counsel for the Commissioner contended, on a technical basis, the argument being that the Commissioner was entitled to only apply section 103(2) to the balance of assessed loss or assessed loss that existed at the time of concluding the agreement.

One can only speculate, but that possibly could be the reason why the agreement was indeed concluded on the last day of the 1985 year of assessment as opposed to the first day of the 1986 year of assessment. This could have been done based on professional advice at the time.

The uncertainty and reason for the split decision in my view is because of the lack of clarity in the drafting of section 103(2). This section is not particularly clear as to which assessed loss, in other words, the assessed loss existing at what point in time is being '*ring fenced*'<sup>15</sup> in terms of this section and perhaps needs clarification. This is after accepting the words of EM Grosskopf JA that any assessed loss has a notional existence for a single year of assessment only, by the construction of any particular assessed loss in terms of section 20.

The approach followed by Harms JA seems to be an overly robust approach, where he not only tried to use a different definition of income than the definition formalised and included in section 1 of the ITA but also dismissed the principle that an assessed loss has a limited life as determined by section 20. This was probably done in his efforts to come to a fair and equitable result based on his view of the intention of the legislator. I would tend to agree that section 103(2) was never drafted with the intention that the manipulation of the timing of the conclusion of such an agreement could

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<sup>15</sup> Wikipedia defines the term ring fencing as an event that occurs when a portion of a company's assets or profits are financially separated without necessarily being operated as a separate entity, (<http://en.wikipedia.org/wiki/Ringfencing>).

allow taxpayers to circumvent or limit the effect of the provisions of section 103(2).

But on the other hand, judges, especially judges in the SCA, are obliged to interpret the legislation in its current form and cannot try and anticipate the intention of the legislators. Tax avoidance is not prohibited by the ITA or any other Act in South Africa, and in this case it seems like legitimate tax planning and avoidance by Conchu was dismissed by the SCA without proper grounds.

## ***ITC 1830 70 SATC 123 2008***

This Tax Court case involves a taxpayer, not being a taxpayer other than a company as defined in section 20(2A)(b), who wanted to carry forward an assessed loss to a year in which it derived no income from trade.

### **Discussion**

The provisions of section 20(2A) was inserted into the ITA during 1973. It would seem that due to the fact that this section only applies to taxpayers other than a company as defined in the act, by implication, the opposite would apply to taxpayers who are indeed companies. However, the ITA is not clear about the position of companies and the Commissioner's practical application, as seen in this case, is a narrow one.

During 2010 the Commissioner issued Interpretation Note No 33 (issue 2) in order to document SARS's view on both the '**trade**' and '**income from trade**' requirements embodied in the provisions of section 20. SARS have recognised that the narrow application of either of these two requirements could possibly have some unintended results and have indicated that they will not follow the precedent set in ITC 1830. In the case of companies, each case will be decided on its own merit and where a company do not earn income from his trade, they will be burdened with the onus to prove trading activities during the year of assessment and the extent of their trading activities could be decisive as to whether they are allowed to carry forward a balance of assessed loss to a year of assessment where they have received no income from trading activities.

The IN 33 is by no means law and the SCA are obliged to comply with the *stare decisis*<sup>16</sup> principle and to follow previous court cases which have set the precedent in the past. No clear precedent currently exists in the South African case law in terms of the **income from trade** requirement, and hence the need for IN 33 was identified by SARS in 2010. The SCA would however not be bound by a decision of the Tax Court for example *ITC 1830*.

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<sup>16</sup> Wikipedia defines the term **stare decisis** as a legal principle by which judges are obliged to respect the precedent established by prior decisions, ([http://simple.wikipedia.org/wiki/Legal\\_precedent](http://simple.wikipedia.org/wiki/Legal_precedent)). Also see Pretorius, Lizl A critical analysis of recent Supreme Court of Appeal judgements that have deviated from the state decisis principle, 2012.

## Conclusion and discussion of possible implications

The anomaly and confusion that is embodied in our current legislation and case law is not so much linked to the definition or application of the **trade** or **income from trade** requirement but rather with the possible relief from SARS's narrow application of these terms, by virtue of IN 33, when deciding on whether or not an assessed loss can be carried forward to a subsequent year of assessment.

One can't help but feel that taxpayers should be advised to still arrange their tax affairs in a way that does not require them to rely on IN 33. The fact that this relief is not incorporated into the ITA makes it insufficient and troublesome.

To illustrate the conundrum such a taxpayer could possibly face, I sketch the following scenario: A company taxpayer who operates as a developer of residential property units, arrive at the stage in a project where the property units are completed, and the ones which were not previously sold, go up for sale. During this time and as it happened in 2008, the property market collapses and these property units are impossible to sell at an acceptable profit margin. At the end of the year of assessment when these units became impossible to sell, the company is obliged to write down its closing stock, representing unsold property units, to the net realisable value and recognises a loss for income tax purposes. The taxpayer then prepares itself for a tough time because the property market is not expected to recover sufficiently within the next 5 years and needs to make a decision as to pursue one of the following options. Firstly, it can decide to rent out these units in the meantime, earn rental income and mitigate the running costs of the units up until the point where the market recovers, and in this way earn income from a trade and keep the assessed loss alive. Leasing is specifically included in the definition of **trade**<sup>17</sup> in section 1 of the ITA. This option has a VAT risk attached to it, in terms of section 18(1) of the VAT Act No 89 of 1991, where the Commissioner can make a possible output VAT adjustment if it is found

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<sup>17</sup> Section 1 of the ITA defines **trade** as includes every profession, trade, business, employment, calling, occupation or venture, including the letting of any property, and the use of or grant of permission to use any patent as defined in the Patents Act or any design as defined in the Designs Act or any trade mark as defined in the Trade Marks Act or any copy right as defined in the Copy Rights Act or any other property which is of a similar nature.

that the taxpayer has then applied these units wholly for a purpose other than making taxable supplies. Secondly, the taxpayer can choose to just maintain these units, without entering lease agreements with tenants and without earning rental income. This second option involves the risk of the taxpayer not being able to carry forward and set-off the assessed loss created when the stock was written down to its net realisable value in subsequent tax years in order to utilise this assessed loss when the property market recovers and the units are sold at an acceptable margin.

The above scenario illustrates the possible unintended results, where a fatal interruption in the ***income from trade*** requirement takes place with no intention of the taxpayer to cease trading, as referred to by IN 33. In order for this relief, as envisaged by the designers of this Interpretation Note, to have a real effect on any commercial decision a taxpayer needs to make from time to time, this proposed wider application of the ***income from trade*** requirement for company taxpayers needs a formal introduction into the current tax legislation.

***CSARS v Megs Investments (Pty) Ltd & Another 2005 (4) SA 328 (SCA) 66 SATC 175<sup>18</sup>***

This case dealt with the issue of whether company taxpayers' balance of assessed loss could be set-off against non-trading investment income earned by the same taxpayers.

**Background and pertinent facts**

The taxpayers traded as agents for various retail supermarket outlets on the procurement side. Their activities involved negotiations with suppliers on behalf of the retail outlets, in order to obtain volume rebates and also included the back office management of the procurement cycle on behalf of its customers, including accounting for, reconciliation of and settlement of suppliers' accounts.

In 1996, the taxpayers sold their businesses to Shoprite Checkers and in the period when the funds for the purchase price were suspended in a trust bank account, earned interest together with further interest on an investment after the funds were released and placed at a financial institution in the short term.

The taxpayers continued trading during 1996, by ways of pursuing similar opportunities in other African countries including Namibia and Angola as well as looking to exploit their wholesale liquor and firearm licences which were not included in the sale transaction but did not earn any income from this trade.

Only interest income was earned in the 1996 year of assessment and the taxpayers were looking to set-off their balances of assessed loss against the interest income earned.

The Commissioner disallowed this in terms of section 20(1) and the taxpayers appealed successfully to the tax court. The Commissioners appeal to the Orange Free State Provincial Division was unsuccessful and appealed to the SCA.

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<sup>18</sup> *CSARS v Megs Investments (Pty) Ltd & Another 2005 (4) SA 328 (SCA) 66 SATC 175; The facts pertaining to the case was summarised in my own words, but in some instances crucial elements to the case and the discussion thereof could not be expressed in words other than what was included in the extract of the actual court case.*

Jonas AJA held that section 20(1) did not permit the set-off of a balance of assessed loss against income from non-trading activities, for example earning income from investments and therefore upheld the Commissioners appeal.

## Discussion

In order to evaluate whether the taxpayers were rightfully not allowed to apply the provisions of section 20(1), one has to carefully analyse the wording of section 20(1). This section is constructed with two primary requirements being firstly, the **trade** requirement embodied in the phrase 'from carrying on any **trade**' and secondly, the **income from trade** requirement embodied in the phrase 'be set off against the income **so** derived'. There is a crucial link between these two requirements by virtue of the legislator using the word **so** in the second phrase.

On this basis the court found in the negative that the balance of assessed loss carried forward from 1995 could not be set-off against the investment income. This serves as further precedent that the earning of passive investment income like interest is not included in the definition of **trade** as defined in section 1 of the ITA.

This finding was in a similar theme to judgements relating to irrecoverable loans, for example in the court case of *Burman v CIR*<sup>19</sup>, where Goldstone JA held that a taxpayer who did not lend money as their main business activity could not argue that a loan made ancillary to its main line of business could be interpreted as part of its trading activities and could therefore not be of a revenue nature.

Important to note is that the SCA were not asked to decide whether set-off is indeed permissible where a **trade** was conducted in the particular year of assessment but that no income was derived from that specific **trade**. This matter was also left undecided in *SA Bazaars (Pty) Ltd v CIR*<sup>20</sup> ('SA

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<sup>19</sup> *Burman v CIR* 1991 (1) SA 533 (A) 53 SATC 63

<sup>20</sup> *SA Bazaars (Pty) Ltd v CIR* 1952 (4) SA 505 (A) 18 SATC 240

*Bazaars*’) and *Robin Consolidated Industries Ltd V CIR*<sup>21</sup> (*Robin Consolidated*’).

### **Conclusion and discussion of possible implications**

One can’t help but feel that the reluctance of the SCA to give a verdict on the matter as to whether the **income from trade** requirement is critically necessary in order for section 20 to apply is due to the fact that not in any of the *Megs Investments*, *SA Bazaars* or *Robin Consolidated* cases this court was required to do so. In two of the three of the cases, the taxpayers did not succeed in proving the presence of trading activities and therefore did not succeed in proving the trade requirement in section 20.

Interestingly in the case of *Megs Investments*, trading activities were clearly present. The reason why the SCA did not have to give a verdict on the above matter in this instance lies in the construction of the taxpayers’ objection to Commissioners assessment and the arguments submitted by counsel for the taxpayers in the Tax Court. The fact that counsel for the taxpayer did not submit an argument to say that immediate income from trading activities was not necessary in order for section 20 to apply, constituted a concession that the drafting of the wording of section 20 was perhaps too narrow and that this argument was out of the question. They clearly felt that their only chance to succeed in this case was to prove that the taxpayers have changed their primary trading activities upon selling its business to an investment company with interest as its trading income.

This concession made by counsel for the taxpayer however is in contrast with the subsequent action taken by SARS to issue IN 33. In IN 33, SARS concede that the narrow wording and the strict application of section both requirements of section 20 may have some unintended or undesired results.

Such possible unintended results can be illustrated in the *Megs Investments* court case. The taxpayers made the decision to sell the majority, but not all of its assets. The proceeds on the sale of these assets typically would not be available immediately at the disposal of the taxpayers upon the conclusion of

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<sup>21</sup> *Robin Consolidated Industries Ltd v CIR 1997 (3) SA 654 (SCA) 59 SATC 199*

such an agreement. These funds would normally be held in trust for the duration of the period within which all the suspensive conditions included in the contract are being fulfilled, for example a due diligence process, Competition Commissioners approval and other negotiated conditions. This process could be a lengthy one which could have the duration of more than one financial year. Inevitably, taxpayers entering into an agreement to sell the majority of its assets would therefore earn interest on the proceeds held in trust for such a period. One can understand that the unfortunate result, where a business is sold lock, stock and barrel, would be that the company taxpayer would lose his balance of assessed loss in the year of assessment subsequent to selling the business and any interest earned in such a period would be taxable without such a trading assessed loss shield. In the case of *Megs Investments* however, this unfortunate result should not have come into play. This is due to the fact that *Megs Investments* clearly carried on trading. The mere fact that no income from these specific trading activities were earned in the first year of assessment, should not have disrupted the application of the set-off as intended by the legislator in section 20.

It seems quite unfortunate that counsel for *Megs Investments* did not follow this argument as opposed to the arguments submitted. This could well have forced the SCA to interpret section 20 in this context and give more clarity on the matter. Such clarity could have made the issue of In 33 in 2010 unnecessary but in the absence of such clarity, my view is that an amendment to section 20 is required to clear up the confusion.

Please note that the SCA did not err in their decision to not give a verdict on this matter, it was just not necessitated by the arguments submitted by counsel for the respondent<sup>22</sup>.

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<sup>22</sup> Also see the view on this matter of the authors of *Income Tax Cases and Materials*, Emslie & Davis, [216] *CSARS v Megs Investments (Pty) Ltd & Another*, included in the footnote to this case.

## Overall conclusion

In summary, I highlight the anomalies existing in each of the cases discussed above:

- Louis Zinn* – There appears to be uncertainty in current legislation and case law as to whether there should be a clear distinction between the two phrases **balance of assessed loss** and **assessed loss**. This type of uncertainty can lead to confusion in all courts where two parties take a different view on this matter and use this particular court case as a precedent. The SCA would be bound to the *stare decices* principle and would not be able to ignore the Louis Zinn case. A judge could however interpret the phrase **balance of assessed loss** in a specific scenario as being very different to an **assessed loss** as intended by the legislator. This is an undesirable situation and needs some urgent clarity. A possible remedy for this anomaly is for both of these phrases to be clearly defined in either section 1 or section 20 of the ITA.
- Datakor* – The anomaly that remains in the current legislation and case law, even after the introduction of section 19 of the ITA, is the basis of how the critical element of **valuation of a benefit** is not dealt with in such a case. In this regard, the TAA was introduced and made effective from 1 October 2012. Chapter 9 of this Act deals with dispute resolution and taxpayers should take due care to comply with this Act when dealing with any disputes, objections, appeals and the establishment of the burden of proof. Interesting to note is that in *ITC 1785*<sup>23 24</sup>, the court decided in favour of the taxpayer in the circumstances where SARS issued revised assessments and as part of the dispute process against these revised assessments, the taxpayer discovered a mistake on their tax return in their favour. The court held that the taxpayer may object to their own omission as part

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<sup>23</sup> *ITC 1785 2004 67 SATC 98*

<sup>24</sup> Also see Haupt, Phillip Notes on South African Income Tax 2014, Chapter 33.12, for a discussion on this Tax Court case.

of the dispute against the revised assessments issued by SARS. This gives further emphasis to the due care a taxpayer should take when issuing any documentation to SARS, including tax returns and objections. It is understood that the introduction of the TAA will clarify and emphasise a lot of these practical anomalies, but the fact that these practical matters are included in a completely separate act to the relevant tax act is not ideal.

- *Conshu* - One can understand the intention of the legislator to design an anti-avoidance provision in the ITA, like section 103(2) with a scope as wide as possible to be able to achieve its purpose and address the tax avoidance contemplated. The problem with the use of the word **any**, read together with the word **such**, is that the scope of a phrase containing these words is determined with reference to limiting effect of the word **such** and that the word **any** do not increase the scope at all. Its only effect is to increase the possible application of an item included in the determined scope. The anomaly in this case therefore exist in the verdict of Harms JA, using the word **any** to scope in an assessed loss as determined in a subsequent tax year into the application of section 103(2), without giving cognisance to the limitation imposed by the word **such**. The word **such** in this case refers to assessed losses utilised solely or mainly for the purpose of avoiding the payment of any tax. Inherently this section is limited to a **balance of assessed loss** or **assessed loss** which was in existence at the time the agreement was entered into or effected and does not include all future determined assessed losses. The fact that a **balance of assessed loss** is not defined in the ITA and that the definition of an **assessed loss** in section 20 is very vague in defining its practical existence, is problematic and creates the opportunity for different interpretations. Harms JA seems to have used this opportunity to come to a result in this case which was his best interpretation of the intention of the legislator and an equitable result. The possible remedy for anomaly is to have clear definitions of these two phrases in section 1 of the ITA as discussed above and to integrate the practical

existence of an assessed loss as embodied in the TAA into the ITA in order to bridge the gap between the theory of an assessed loss and its application in practice.

- *ITC 1830* – The nature and the enforceability of IN 33 issued by SARS is problematic and creates uncertainty amongst taxpayers when looking to arrange their affairs in a legal and tax efficient manner. The anomaly exists in the contradiction between the view taken on the **income from trade** requirement by the designers of IN 33 and the designers of section 20 (2A) of the ITA. This subsection of the Act inherently includes an implication that the relief this section grants to any taxpayer other than a company, does not apply to companies themselves. The lack of clarity was increased by SARS issuing the IN 33 in 2010. The remedy to clear out the confusion is possibly for a subparagraph in section 20 to deal with company taxpayers specifically, incorporating the current view from SARS included in the IN 33 into the ITA.
- *Megs Investments* – The **income from trade** requirement for a company taxpayer came to the fore again in this case, but in a slightly different context. This case was heard before the issue of IN 33 and probably was part of the reason why SARS was inclined to issue IN 33. This case clearly proved that the **income from trade** requirement was possibly drafted and interpreted in a too narrow way, specifically where a company taxpayer, with various assets found itself in a transitional phase between operating and two different businesses and not earning income from its new trading venture. On the assumption that SARS will strictly apply their view documented IN 33, a taxpayer in this or a similar situation would have some, but not sufficient comfort to be able to determine with great certainty what the outcome of a SARS assessment in this situation would be.

The anomalies and uncertainties discussed above lead to the question as to whether such anomalies provide enough grounds to put forward a proposal for section 20 to be redrafted, specifically the words highlighted in bold above? Or perhaps, should there be a consideration of the merit to redraft the whole ITA?

In order to answer these two questions, and more specifically the second question, I investigate and discuss two more critical sections of the ITA.

Firstly, the dividend definition as included in section 1 of the ITA has been notorious for numerous changes since 1964. These include changes for this definition to be adjusted in line with IFRS requirements as well as a further significant revamp and simplification of this section in 2012. A completely new ITA could possibly get rid of the legacy of the changes in the ITA of 1962 and the case law giving guidance as to how the court should interpret the anomalies which exists at the time.

Secondly, I compare the drafting of the anti-avoidance provisions included in section 7 of the ITA to the similar anti-avoidance provisions included in the 8<sup>th</sup> Schedule to the ITA. For this purpose I compare section 7(5) with paragraph 71 of the Eight Schedule. Paragraph 71 contains phrases like for example 'confers a right' and 'power of revocation' which is not included in section 7. The issue is the fact that these two sections of the ITA are designed to achieve the same result, yet are distinctly different in the drafting of their respective wording and could lead to differing interpretations. A revised ITA, incorporating the content of the 10 Schedules in the body of the Act will possibly solve this issue.

Based on the above, my answer to the questions will have to be in the affirmative. The legislator found it necessary to redraft the Companies Act No. 71 of 2008 after the previous Companies Act was in existence for 35 years. A revision of the ITA after 52 years would not be out of line with the expectation of the general tax community.

## **Bibliography**

Primary sources

### **Cases**

*Burman v CIR 1991 (1) SA 533 (A) 53 SATC 63*

*Butcher Brothers (Pty) Ltd, CIR v (1945 AD) 13 SATC 21*

*CIR vs Loius Zinn Organisation (Pty) Ltd 1958 (4) SA 477 (A) 22 SATC 85*

*CIR vs Datakor Engineering (Pty) Ltd 1998 (4) SA 1050 (SCA) 60 SATC 503*

*Conshu (Pty) Ltd v CIR 1994 (4) SA 603 (A) 57 SATC 1*

*CSARS v Megs Investments (Pty) Ltd & Another 2005 (4) SA 328 (SCA) 66 SATC 175*

*ITC 1785 2004 67 SATC 98*

*ITC 1830 70 SATC 123 2008*

*Lategan (WH) v CIR (1926 CPD 203) 2 SATC 16*

*SA Bazaars (Pty) Ltd v CIR 1952 (4) SA 505 (A) 18 SATC 240*

*Robin Consolidated Industries Ltd v CIR 1997 (3) SA 654 (SCA) 59 SATC 199*

### **Statutes**

Companies Act No.71 of 2008

Income Tax Act No. 58 of 1962

Tax Administration Act No. 28 of 2011

Value Added Tax Act No. 89 of 1991

The Taxation Laws Amendment Act No. 22 of 2012

## Secondary sources

### **Books**

Haupt, Phillip *Notes on South African Income Tax 2014* 33 Edition H & H Publications, South Africa.

Emslie, TS and Davis, DM *Income tax cases and material* Third Edition The Taxpayer, South Africa.

### **Internet sources**

Tax flash May 2007, BDO Spencer Stewart, available at <http://www.bdo.co.za/documents/Taxflash%20May%202007.pdf>, accessed 12 February 2014.

Wikipedia, the free encyclopaedia, available at [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page), accessed 12 February 2014.

The Oxford Dictionary, available at <http://www.oxforddictionaries.com/>, accessed 12 February 2014.

### **Other**

SARS Interpretation note: No 33 (issue 2) – 30 June 2010

Pretorius, Lizl *A critical analysis of recent Supreme Court of Appeal judgements that have deviated from the stare decisis principle* Dissertation submitted in partial fulfilment of the degree of Higher Diploma in Taxation, 2012.