

OVERPAYMENT OF TAX:

**When Does a Taxpayer have a
right to repayment?**

by

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Table of Contents

Part One		
	An Overview	1-15
Part Two		
	The United Kingdom	
	Statutory Provisions	16-21
	Common Law	21-35
Part Three		
	South Africa	
	Statutory Provisions in the Income Tax Act 58 of 1962	36-66
	s 102	36-61
	Excessive Assessment	40
	Error or Mistake	41-47
	Circumstances Precluding Relief	47-51
	Commissioner's Discretion & Appeal	51-58
	Obligation of Commissioner to Act	58,59
	Assessed Losses	59
	Interest	59,60
	Returns	60
	Other Overpayment Provisions	61-63
Part Four		
	South Africa	
	Refund Provisions in Other Fiscal Legislation	67-72
	Relationship Between Statutory and Common Law	72-76
	Common Law	76-91

DISSERTATION FOR THE LL.M DEGREE- UNIVERSITY OF CAPE TOWN

OVERPAYMENT OF TAX:

WHEN DOES A TAXPAYER HAVE A RIGHT TO REPAYMENT ?

PART ONE

AN OVERVIEW

A recent decision of the House of Lords in England, *Woolwich Building Society v Inland Revenue Commissioners (No 2)* (1), is of great importance for taxpayers and has impact in the fields of constitutional, public and tax law. Although a decision of the courts of England, it has great significance for our law as well, especially in the light of two important recent decisions of our Appellate Division, *CIR v First National Industrial Bank Ltd*(2) and *Willis Faber Enthoven(Pty)Ltd v Receiver of Revenue and Another*(3).

In the *Woolwich Building Society* case the Revenue had issued a demand under the Income Tax(Building Societies) Regulations 1986 to the plaintiff building society for payment of composite rate tax amounting to £56 998 221 on interest and dividends paid to investors between 30 September 1985 and 1 March 1986 and it had paid the tax claimed under protest. Plaintiff disputed the validity of the 1986 regulations but paid the amount assessed in three instalments commencing on 16 June 1986. The next day it applied for judicial review of the regulations to challenge the lawfulness of certain provisions and also issued a writ on 15 July to recover the amount paid as money had and received, together with interest thereon. In October 1990 the House of Lords confirmed that the sections of the regulations complained of were indeed ultra vires the enabling legislation(4). Plaintiff then continued its action for repayment and sought payment of interest on the capital from the dates of payment of the three instalments until judgment was given at first instance in the High Court on 31 July 1987.

Inland Revenue accepted only a moral obligation to repay the principal amount of £57 million, together with interest from the date of first judgment in Plaintiff's favour. However, the Revenue claimed that any such repayment would be a matter of administrative grace only and not of legal entitlement, with the result that no interest was due for the period between the original payment and the date of that High Court judgment.

Plaintiff would only have been entitled to recover the interest in issue if it would be able to show that it had been entitled in law to repayment of the principal sums as from the dates of their first payment.

The main issue before the House of Lords was whether, and in what circumstances, a taxpayer is entitled, as a matter of right, to recover sums paid to the Revenue pursuant to unlawful

The House of Lords held, by a three-to-two majority, that money paid by a subject to a public authority in the form of taxes or other levies pursuant to an ultra vires demand by the authority was prima facie recoverable forthwith by the subject as of right at common law together with interest thereon, regardless of the circumstances in which the tax was paid, since common justice required that any tax or duty paid by the citizen pursuant to an unlawful demand be repaid, unless special circumstances or some principle of policy required otherwise, and full effect could only be given to the fundamental principle enshrined in the Bill of Rights(5) that taxes should not be levied without the authority of Parliament if the return of taxes exacted under an unlawful demand could be enforced as a matter of right. It followed that when plaintiff paid the amount under the ultra vires regulations it immediately acquired a right to be repaid the amount so paid and was entitled to interest on the payments from the dates of the payments.

The leading majority judgment was given by Lord Goff of Chieveley and the main issues raised by him were-

- * that the appeal was of importance to the Revenue because it wished to maintain the traditional position under which the repayment of overpaid tax was essentially a matter for its own discretion.
- * that plaintiff had adopted a courageous and independent stance about the lawfulness of the underlying regulations and adopted a similar stance about the obligation of the Revenue to repay tax exacted without lawful authority.
- * that whereas money paid under a mistake of fact is generally recoverable, as a general rule money is not recoverable on the ground that it was paid under a mistake of law. This proposition has, however, been the subject of much criticism which had grown substantially during the second half of the present century. This topic had been dealt with by the Law Commission(6) and proposals for its abolition had been put forward for discussion.
- * that money paid under compulsion may be recoverable, in particular where money is paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods. Money paid to a person in a public or quasi-public position to obtain the performance by him of a duty which he is bound to perform for nothing or for less than the sum demanded by him is recoverable to the extent that he is not entitled to it.
- * that where a sum has been paid which is not due, but it has not been paid under a mistake of fact or under compulsion as explained, it is generally not recoverable and such a payment has often been called a voluntary payment. A payment is regarded as a voluntary payment and so as irrecoverable where (a) the money has been paid under a mistake of law (b) the payer has the opportunity of contesting his liability in proceedings but instead gives way and pays (c) the money has otherwise been paid in

such circumstances that the payment was made to close the transaction.

* that a payment may be made on such terms that it has been agreed, expressly or impliedly, by the recipient that, if it shall prove not to have been due, it will be repaid by him and in that event the money will be repayable. On the other hand, the mere fact that money is paid under protest will not give rise of itself to the inference of such an agreement, though it may form part of the evidence from which it may be inferred that the payee did not intend to close the transaction..

* that a formidable argument has been developed in recent years by leading academic lawyers pointing to the conclusion that money paid to a public authority pursuant to an ultra vires demand should be repayable without the necessity of establishing compulsion, on the simple ground that there was no consideration for the payment.

* that s 33 of the Taxes Management Act 1970 (which governs the repayment of overpaid tax by the Revenue to the taxpayer) has no application in the present case because the present case is not one in which an excessive assessment was made on a taxpayer through some error of fact or law as contemplated by the section. Rather, this was a case where there was no lawful basis whatever for any demand of tax to be made by the Revenue. In such circumstances the demand itself is ultra vires and is therefore a nullity. It followed that in this case there could be no valid assessment. No assessment was in fact raised on Plaintiff in the present case because the money alleged to be due by way of tax was paid, though under protest. Section 33(1) presupposes a lawful assessment which is excessive by reason of some error or mistake in a return.

* that it is for these reasons that plaintiff is not enabled or required to seek its remedy through the statutory framework but must fall back on the common law. It also followed that the common law principles, whatever they may be, are applicable to a case such as the present, unconstrained by the provisions of any statute.

* that while the vast majority of cases concerned with the recovery of tax which is not due will indeed be covered by statutory provisions regulating the right of recovery, the fact that s 33 has no application in the present case may well lead to steps being taken by the Revenue at an early opportunity to bring cases such as the present within its ambit.

* that common justice required that any tax or duty paid by the citizen pursuant to an unlawful demand be repaid unless special circumstances or some principle of policy required otherwise; prima facie, the taxpayer should be entitled to repayment as of right.

* that the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of English law enshrined in a

famous constitutional document, the Bill of Rights, 1688.

* that when the Revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state and may well entail (as in the present case) unpleasant economic and social consequences if the taxpayer does not pay. In any event it seems strange to penalise the good citizen, whose natural instinct is to trust the Revenue and pay taxes when they are demanded of him.

* that there appears to be a widely held view that some limit has to be placed on the recovery of taxes paid pursuant to an ultra vires demand as it is possible to envisage, especially in modern taxation law which tends to be excessively complex, circumstances in which some very substantial sum of money may be held to have been exacted ultra vires from a very large number of taxpayers. It may well therefore be necessary to have recourse to other defences, such as, for example, short time limits within which such claims have to be advanced. The example of a general right of recovery subject to strict time limits imposed as a matter of policy is instructive in order to solve the problem in the present case.

* that it was irrelevant in the context of the present case to consider whether the old rule barring recovery of money paid under mistake of law should be abolished because that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue.

* that, in approving the 'Woolwich principle' in the present case (ie recovery of sums of tax overpaid pursuant to ultra vires demands) this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority has misconstrued a relevant statute or regulation. The principle of recovery should not be inapplicable simply because the citizen has paid the money under a mistake of law.

From the points listed above the significance of the judgment may already be seen. Before turning to the common law and statutory provisions in South African law it is apposite to quote the following from Lord Goff's judgment(7):

'The justice underlying Woolwich's submission is, I consider, plain to see. Take the present case. The Revenue has made an unlawful demand for tax. The taxpayer is convinced that the demand is unlawful, and has to decide what to do. It is faced with the Revenue, armed with the coercive power of the state, including what is in practice a power to charge interest which is penal in its effect. In addition, being a reputable society which alone among building societies is challenging the lawfulness of the demand, it understandably fears damage to its reputation if it does not pay. So it decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation. Now, Woolwich having won that litigation, the Revenue asserts that it was never under any obligation to repay the money, and that it in fact repaid it

only as a matter of grace. There being no applicable statute to regulate the position, the Revenue has to maintain this position at common law... Stated in this stark form, the Revenue's position appears to me, as a matter of common justice, to be unsustainable; and the injustice is rendered worse by the fact that it involves, as Nolan J pointed out, the Revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action.' N Jordan and J Peacock, commenting on this case in a recent edition of the Tax Journal(8), conclude their remarks in this way:

'The precise effects of the judgments in the second Woolwich case will no doubt be analyzed at length by academic writers in the coming months. The reaction to it on the part of Whitehall, and particularly the Treasury, will be awaited with great interest. Specifically, lawyers will want to see how the Government reacts to the wider form of the principle (expressed to be obiter) under which recovery can be made of excessive sums (tax and non-tax) paid in response to intra vires demands. This is something the Government may feel that it has to override or limit in some way so as, in the magic phrase, 'to protect the security of public finances'. In our view further legislative action of some sort is now likely.'

Turning now to South African law, the first case to be considered is CIR v First National Industrial Bank Ltd(9) where the facts were that respondent had paid stamp duty on autocard transactions to appellant under protest, since it had contended that the duty was not payable. Each payment had been accompanied by a letter stating that payment had been made under protest.

Appellant had insisted that respondent bank was liable for the payment of stamp duty in terms of s 3 of the Stamp Duties Act 77 of 1968 in respect of transactions with its customers on its autocard machines.

The bank had contended that its autocard scheme did not attract stamp duty but, after an unfavourable ruling from the Registrar of Financial Institutions, and fearful of the possibility that penalties could be levied against it if it failed to pay the amounts demanded by appellant timeously, it made a series of payments. Each payment was accompanied by a letter stating:

'As we have not yet finalized this matter with the authorities, in order to avoid any penalty...., we hereby make payment, under protest, of stamp duty in respect of the....debit entries to our Auto Card holders.'

In due course the bank claimed repayment of the sum of R488 353, 80 plus interest. Appellant refused the demand and action was instituted against him.

The court a quo found for the bank, ordering the repayment of the capital sum and payment of interest.

Two issues were debated before the court a quo. Firstly, whether stamp duty was properly chargeable and accordingly whether the Commissioner was obliged to repay the capital sums

paid to his office. Secondly, if so, whether the Commissioner was bound, in addition, to pay interest on the capital sums that had to be repaid, from the respective dates on which each payment had been made by respondent to the Commissioner.

Appellant accepted the decision of the court a quo on the first but not on the second issue, hence the appeal to the Appellate Division, brought with leave of the court a quo.

The issue before the Appellate Division was, therefore, the nature of the claim for repayment for on this depended the bank's right to claim interest a tempore morae and whether, and if so from which date, the Commissioner was obliged to pay 'interest a tempore morae' on stamp duties he collected when he should not have done so and which were paid to him 'under protest'.

When respondent had initially applied for a refund it did so in terms of s 32(1)(a) of the Stamp Duties Act 77 of 1968.

The section read at the relevant time:

'1. The Commissioner may make, or authorise to be made, a refund in respect of:

(a) the amount of any overpayment of the duty or any penalty properly chargeable in respect of any instrument, if application for the refund is made within two years after the date of such overpayment.'

The court a quo had held that s 32(1)(a) was not applicable to respondent's claim for a refund and that the legal relationship between appellant and respondent was what the court described as an 'ordinary common law legal relationship flowing from unjust enrichment'. Also, according to the court a quo, respondent was entitled to interest at the legal rate in respect of each payment from the moment such payment was received by appellant.

The Commissioner contended in the Appellate Division that s 32(1)(a) not only applied but that 'it is the only possible legal and factual basis' for a refund and since the section did not expressly provide for interest, no interest was recoverable. The Commissioner also contended that the *condictio indebiti* could not lie against him since he was merely the officer responsible for carrying out the provisions of the Stamp Duties Act 77 of 1968 and no cause of action based on unjustified enrichment could lie against such an officer in respect of funds channelled into the Consolidated Revenue Fund and the *fiscus* was not liable to pay mora interest.

Respondent contended that its true claim was either the *condictio indebiti* or one under contract and that its initial reliance on s 32(1)(a) did not prejudice its claim under either head.

Nienaber AJA (with whom Corbett CJ, Botha JA and Kumleben JA concurred, Nicholas AJA dissenting) held that the claim could not be one based on statute as the relevant section of the

Stamp Duties Act referred to refunds for 'overpayments', which this was not and therefore had to be either a *condictio indebiti* or a claim based on a contract between the parties, to the effect that if the amount paid was not in fact owing it would be refunded.

Nienaber AJA rejected the first possibility and found that the claim was based on an agreement to repay the sum paid under protest by the bank. The consequence of this finding, he held, was that appellant's failure to pay when demand was made did not amount to *mora* since it was only when the claim was adjudicated, and the court had found that the stamp duty paid by the bank had not been owing, that an obligation to repay arose. No liability to pay interest *a tempore morae* had thus been incurred by appellant.

It had been argued for the bank that the *condictio indebiti* did lie for the recovery of money paid under protest- duress. The court accepted that in modern law the *condictio* can be used where the plaintiff has paid a sum of money involuntarily and that it can be granted against the *fiscus*. Nienaber AJA relied, in this regard, on *Union Government (Minister of Finance) v Gowar*(10) in which Innes CJ said:

'Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily,...but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The onus of showing that the payment had been made involuntarily and that there had been no abandonment of rights would, of course, be upon the person seeking to recover.'

Nienaber AJA was, however, of the view that in this case the payments had not been made involuntarily and that there had not been 'duress of goods'. He concluded that the bank had not been forced to pay- it had decided to do so in order to avoid the possible imposition of penalties. Further, there was no evidence that appellant had ever threatened to impose penalties if payment was not made timeously. The bank had also not requested a suspension of payment or a remission of penalties until the dispute was resolved.

Accordingly Nienaber AJA was of the view that it could not be said that improper pressure had been exerted on the bank to effect the payment timeously and in terms of the statute. The payments had been voluntarily made. The fact that the bank had made the payments expressly 'under protest' did not affect this finding. The court was, however, of the view that these words had served as a basis for an agreement between the parties that repayment would be effected by appellant should the issue be resolved in favour of the bank, and a new and independent cause of action had emerged from the agreement.

Nicholas AJA in his dissenting judgment examined the Roman origins of the *condictio indebiti* and found that the facts of the case fitted the principle(11):

'If a man pays on the understanding that if it should not prove to be due, ..the money should be returned, an action for the return will be in place, as there is a contract concluded between

the parties...'

Nicholas AJA also relied on the judgment of De Villiers AJA in the Union Government case(12) in which, after a review of the Roman-Dutch authorities, De Villiers AJA had said:

'[I]f a person pays a debt not due knowingly and voluntarily, he is not able to recover. But if he pays under protest he is entitled to recover, for the protest is inconsistent with the idea of a gift or a compromise between the parties. The other party was not bound to accept money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due...'

Nicholas AJA was of the view that the bank had, by making known its protest at payment, reserved its right to institute an action for recovery- *condicere*- and that the *condictio indebiti* was the appropriate action in the circumstances.

He reaffirmed the principle that interest is not payable under the *condictio indebiti* itself but held that appellant had been in *mora* on failure to discharge his obligation on demand, and was therefore liable for the payment of interest *a tempore morae*, that is, the date on which the bank had claimed a refund.

Carole Lewis(13) has commented in this way on the judgments in the First National Industrial Bank case:

'The dissenting judgment is, with respect, to be preferred. Surely it is not logical to suggest that a payment is made voluntarily simply because one is not coerced into making the payment with force, or the threat of it against one's person or one's property? Is it necessary for the person making payment to exhaust all avenues to discover whether it is indeed due- including taking the matter to court before he makes payment- in order for it to be 'involuntary' ? And surely the right of the commissioner to levy heavy penalties for late payment is sufficient: must he threaten to exercise the right in order for the bank to act under duress? I would think not. The pressure felt by the bank was not, in my view, 'the phantom of their own minds'... One does not take risks with the *fiscus*.

Moreover, the equities favour the payment of interest to the bank, which had been out of pocket for some considerable time, despite the fact that it had rightfully protested about the payment of the duty in question.'

The following points should be borne in mind from the First National Industrial Bank case-

* s 32(1)(a) of the Stamp Duties Act 77 of 1968 contemplated a payment made in respect of duties rightly chargeable but wrongly calculated- to the extent of any excess there would be an 'overpayment' and it would be an overpayment of duties 'properly chargeable'.

* in the instant case the payments were made by the bank and accepted by the Commissioner in respect of 'an instrument' which did not, in reality, attract duty at all; consequently this was not a case where respondent paid in excess of what it should have paid; this was a case where it should not have paid anything at all. Hence there was no overpayment of duties 'properly chargeable' and s 32(1)(a) accordingly did not apply.

* s 32(1)(a) was not the sole and exclusive vehicle for claiming repayment in a case such as the present and the section did not, either in terms or context, purport to create a comprehensive remedy and hence the section was not conclusive of the entire issue- the fact that the section was silent on the question of interest did not mean that no interest was payable at all.

* what s 32(1)(a) did was to empower the Commissioner, in particular circumstances, to make or approve a refund- but that did not mean that an aggrieved party was precluded from advancing a claim for repayment on a different basis, or that the section precluded a claim for mora interest where the overpayment was legally recoverable at common law.

* that the *condictio indebiti* did lie in general against the Commissioner as he was the authority to whom payment had to be made and, once the other requirements of the *condictio indebiti* had been satisfied, he was the obvious party from whom payment had to be recovered, whatever the ultimate administrative destination of the payments might be.

* that in our law the *fiscus* could be held liable for mora interest.

* where, as in this case, a public official demands payment in terms of a statutory provision, and payment is thereupon effected 'under protest' because the liability (or the sum) is disputed, it is more likely than not that it was tacitly understood between the parties that the sum so paid would be refunded if the official view should subsequently prove to be the wrong one.

* there was no principle of law which entitled one party to demand interest at the legal rate from another simply because the former had been deprived of the benefits and fruits of the money which he had paid to the latter.

The second South African case to be considered is *Willis Faber Enthoven(Pty)Ltd v Receiver of Revenue and Another (14)* in which the Appellate Division modified in an important respect the requirements of the *condictio indebiti* with significant resulting implications for tax law.

The facts were that *Willis Faber Enthoven(Pty)Ltd*, a company formed at the end of 1985 by the merger of two separate companies trading as insurance brokers, instituted action for the

recovery of certain payments, mistakenly made by the two companies prior to the merger, to the Receiver of Revenue.

These payments were made in the following circumstances: Section 60(1)(f) of the Insurance Act 27 of 1943 stipulates that anyone carrying on insurance business of a specified kind must pay a tax of 2 1/2 per cent of the aggregate of all premiums paid during the preceding calendar year on policies which were effected through his agency in terms of this section. From a reading of s 60 as a whole it was quite clear that insurance business 'underwritten by underwriters at Lloyds' ('Lloyds business') fell within the purview of the tax clause. Less certain, however, was whether business placed outside the Lloyd's market, but effected or renewed through a broker at Lloyds ('other business') was also targeted by s 60(1)(f). The problem was that the words 'this section' in s 60(1)(f) could be read to refer either to s 60(1) only (in which case Lloyds business only would have been meant), or to the entire s 60 (ie including s 60(2)) which would have had the effect that other business would have fallen within the ambit of the clause as well.

When the one-time financial manager of Robert Enthoven & Co (one of the pre-1985 companies) took up his post at that company he found a directive from the Registrar of Insurance which stated that the tax must be paid on both Lloyds and other business. He had misgivings and telephoned the Registrar's office to check that the tax was indeed payable on other business. The assistant registrar to whom he spoke merely referred him to the abovementioned directive. He then accepted the position as stated in the directive as authoritative and went on paying the tax. After the merger the matter was taken up again and this resulted in the present action.

The first question that arose in the appeal was whether the tax imposed in terms of s 60(1)(f) was payable, not only in respect of policies underwritten by underwriters at Lloyds but also in respect of policies not so underwritten but effected or renewed through a broker at Lloyds in terms of ss (2).

Appellant had instituted action in the Transvaal Provincial Division to recover payments of tax made by it to the Receiver of Revenue in respect of policies not underwritten at Lloyds averring that the said payments had been made under the bona fide and reasonable but mistaken belief that the said amounts were due and payable to the Receiver whereas in law and in fact the said moneys were not due nor payable to him at all and in the premises the Receiver had been unjustly enriched at the expense of appellant in the amount of R209 627, 15.

The matter came to trial before Spoelstra J in the court a quo on the issues of whether the payments in question were due in terms of s 60(1)(f) and, if not, whether appellant was entitled to recover them.

The Receiver contended that the mistake on which appellant relied was one of law and that this entailed that the payments were not recoverable.

Spoelstra J had decided the first issue in appellant's favour but upheld the Receiver's argument on the second issue and dismissed the claim. Subsequently he granted appellant leave to appeal.

Before the Appellate Division the Receiver of Revenue claimed that the tax imposed in terms of s 60(1)(f) was payable in respect of both types of business. He also contended that the mistake on which appellant relied was one of law and this meant that the payments were not recoverable.

The second question to be decided by the Appellate Division was whether appellant was entitled to recover the taxes paid in error. What remained for the court to consider was, firstly, whether a mistake of law was indeed as a rule a bar to the *condictio indebiti* and, if not, secondly, whether appellant was in the circumstances of the case entitled to recover the amounts paid.

Finally, the court had to examine the excusability of the error in the present case and in this regard the information presented to the trial court about the circumstances in which the tax had been paid took the form of a statement of agreed facts and the evidence of a single witness, being the financial manager of Robert Enthoven at the relevant time.

Hefer JA (with whom Joubert JA, Nienaber JA and Kriegler AJA concurred, Van den Heever JA dissenting) came to the following conclusions-

- * on the correct interpretation of s 60(1)(f) the tax imposed by para (f) was not payable on policies not underwritten by underwriters at Lloyds but effected or renewed through a broker at Lloyds in terms of s 60(2).
- * in any event, s 60(1)(f) was, at least, reasonably capable of such a construction and, being one in which a burden is imposed, it must be construed in the way more favourable to the subject.
- * South African law is to be adapted in such a manner as to allow no distinction to be drawn in the application of the *condictio indebiti* between mistake of law (*error juris*) and mistake of fact (*error facti*).
- * it followed that an *indebitum* paid as a result of a mistake of law can be recovered, provided that the mistake is found to be excusable in the circumstances of the particular case.
- * it was not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not.
- * all that needs to be said is that, if the payer's conduct is so slack that he does not

in the court's view deserve the protection of the law, he should, as a matter of policy, not receive it; there can obviously be no rules of thumb and conduct regarded as inexcusably slack in one case need not necessarily be so, regarded in others and vice versa.

* much will depend on the relationship between the parties, on the conduct of the defendant who may or may not have been aware that there was no debitum and whose conduct may or may not have contributed to the plaintiff's decision to pay and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.

* the onus, in a *condictio indebiti*, lies on the plaintiff to prove every element constituting his cause of action and this includes the excusability of the error in making the payment.

* there is nothing unfair in, and there is no consideration of policy or practice militating against, expecting of a plaintiff who alleges that he paid an amount of money in mistake of law to prove sufficient facts to justify a finding that his error was excusable.

* on the facts, the error on the part of Robert Enthoven was excusable in that it could not be blamed for turning to, or for accepting the ruling of, the official to whom the administration of the Act had been entrusted and to whom members of the public would naturally turn for guidance.

* there was insufficient information before the court to justify a finding that the mistake was excusable on the part of Willis Faber- its position being not as clear since there was no direct evidence of the circumstances in which it paid the tax.

* appellant was entitled to recover the amount unduly paid by Robert Enthoven only, being an amount of R165 278 according to the statement of agreed facts.

Van den Heever JA, in her dissenting judgment, said(15):

`We are not dealing with a situation where the mistake relied on is one affecting only the rights of individual immediate parties to a relationship. What is in issue is the interpretation of a statute. One of the parties is the State, not in a one-to-one- say, for example, contractual-relationship with appellant, but the State in its more customary, authoritarian guise applying a general law. The matter accordingly has a far more general dimension and affects both the State itself and large numbers of others who arrange or have arranged their affairs on a certain view of that law.

The citizen in his relationship with the State, though no longer expected to be legally omniscient, has a duty to acquaint himself with the various laws or regulations applicable to the particular occupation in which he engages...

Although the test applied in the criminal law in assessing the culpability of a citizen's ignorance has refinements not relevant to the present matter, the cases following on *R v De Blom* 1977(3)SA 513(A) are instructive. The duty to take reasonable steps to discover the law is a real one. Mere casual enquiry will not suffice to excuse ignorance... The interests of the community as a whole require there to be certainty as to the law. I can think of no reason why the citizen should have a more onerous duty when his liberty is at stake than when it is merely his money that matters.'

In a most unusual case, *CIR v Bowman* NO(16), the facts were that for the years 1977 to 1982 the taxpayer rendered returns reflecting taxable income despite its knowledge that such returns were fictitious. The company was well aware that in none of the tax years in question did it make any taxable income whatsoever.

The company was assessed to tax on these returns and the amounts so assessed were paid.

Upon liquidation of the company the liquidator of the taxpayer company, relying on s 26(1) of the Insolvency Act 24 of 1936 sought to recover the aggregate value of the tax paid in the years in question on the ground that the payments constituted a disposition of property not made for value.

It was argued on behalf of the Commissioner in the Appellate Division that (i) having regard to the provisions of the Income Tax Act 58 of 1962 the company did receive value for its payments, ie its release from the lawful obligation to pay to appellant the amounts assessed by him (ii) the provisions of the Income Tax Act 58 of 1962 are such as to make assessments of income tax final and conclusive, not only as against the taxpayer but also, on insolvency, as against a liquidator or trustee and (iii) the only manner in which an assessment can be questioned is by way of objection under s 81 and appeal under s 83 of the Income Tax Act. Goldstone AJA (as he then was) (with whom Corbett CJ, Smalberger AJ, Milne AJ and Friedman AJA concurred) held that the payments of tax in question constituted dispositions of property not made for value in terms of s 26(1) of the Insolvency Act 24 of 1936 as 'no benefit or value is or has been received or promised as a quid pro quo.' Moreover, the payments of tax were made in circumstances where there was no underlying obligation to pay any amounts at all to the appellant; there was no income earned by the company and therefore no normal tax was assessable or payable under the Income Tax Act 58 of 1962.

Goldstone AJA observed that if a lawful obligation to pay the money in fact existed, then the obvious benefit which the taxpayer received in return for such payment was a discharge from his liability to pay. Such a payment decreases his assets but at the same time it diminishes his liabilities and in transactions which are entered into in the ordinary course of business such a discharge from a liability would be value for the payment made.

It was further held in the *Bowman* case-

* that an assessment to which no objection has been made becomes final and

conclusive as between the Commissioner and the taxpayer and persons privy to the taxpayer, eg his executor- being the effect of s 81(5) of the Income Tax Act.

* that the liquidator of a company is not privy to the company in liquidation- being a third party- and, consequently, assessments of income tax on the company are not final and conclusive on insolvency against the liquidator or trustee.

* that there was nothing in the Income Tax Act 58 of 1962 which, in any way, was inconsistent with the provisions of s 26(1) of the Insolvency Act 24 of 1936 and there was consequently no basis upon which the Insolvency Act could be said to have been overridden by the Income Tax Act.

FOOTNOTES

(1) [1992] 3 All ER 737.

(2) 1990(3)SA 641(A); 52 SATC 224.

(3) 1992(4)SA 202(A); 54 SATC 427.

(4) s 343(1A), Income and Corporation Taxes Act 1970.

(5) 1688.

(6) 'Restitution of Payments made under a Mistake of Law', (1991) Law Com no 120.

(7) [1992] 3 All ER 737 at 759.

(8) 'The Tax Journal', Issue no 181, 24 September 1992, 5 at 7.

(9) 52 SATC 224.

(10) 1915 AD 426 at 433-4.

(11) Digest 12.6.2.

(12) supra at 445-6.

(13) 1990 Annual Survey of South African Law at 124-5.

(14) 54 SATC 427.

(15) 54 SATC 427 at 444.

(16) 1990(3)SA 311(A), 52 SATC 69; see also Bowman NO v KBI 1989(4)SA 63(T), 51 SATC 159.

PART TWO

THE UNITED KINGDOM

Statutory provisions governing the repayment of overpaid tax by the Revenue

Taxes Management Act 1970

s 33

'(1) If any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than six years after the end of the year of assessment (or, if the assessment is to corporation tax, the end of the accounting period) in which the assessment was made, make a claim to the Board for relief.

(2) On receiving the claim the Board shall inquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief in respect of the error or mistake as is reasonable and just: Provided that no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made.'

Section 33 of the Taxes Management Act 1970 makes provision for the recovery of overpaid Income Tax, Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax where there is an excessive assessment by reason of 'error or mistake' in any tax return. Thus, it is not a general right to recover tax not due, but depends on proof of 'error or mistake'. It applies to errors and mistakes both of fact and law but is limited in that no relief is to be given 'in respect of an error or mistake as to the basis on which the liability...ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made.' (1) This important limitation is designed to preclude recovery where many persons are affected by the same error and a right to recover might thus disrupt the conduct of Revenue business or even of government finances.

Applications for relief are made to the Board of Inland Revenue which is required to give such relief as is 'reasonable and just.' (2)

The Board is directed by s 33(3) to 'have regard to all the relevant circumstances...and in particular...whether the granting of relief would result in the exclusion from charge to tax of any part of the profits of the claimant, and for this purpose the Board may take into consideration the liability of the claimant and assessments made on him in respect of chargeable periods other than that to which the claim relates.' This is designed to ensure that the taxpayer does not gain a windfall benefit from recovery.

The question of what relief is 'reasonable and just' is a matter for the Board itself to decide subject to appeal to the Special Commissioners.

There is no general right to require a case to be stated on a point of law where relief is sought under the section, which includes the question of what constitutes reasonable and just relief. Although it is possible that a court could determine this question on an application for judicial review for error of law.

It appears that relief is normally given and the section is regarded as affording a prima facie right to relief where it applies.

Value Added Tax

Section 24 of the Finance Act 1989 provides that 'where a person has paid an amount to the [Customs and Excise] Commissioners by way of value added tax which was not tax due to them, they shall be liable to repay the amount to him'(3) on a claim being made for the purpose.(4)

This provision gives a general right to recover a tax not due which does not depend on the circumstances of payment. It is irrelevant, for example, whether the payment was made under a mistake.

The limitation period is six years from the date on which the payment was made. But where the payment is made by reason of mistake a claim may be brought at any time within the expiry of six years from the time the claimant discovered the mistake, or could with reasonable diligence have discovered it. There appears to be no legal right to interest on the amount repaid.

It is a defence to any claim under the section that repayment 'would unjustly enrich' the claimant(5).

The section specifically states that there is to be no liability to repay by virtue of the fact that it was not tax due except under the section(6).

Excise Duty and Car Tax

Section 29 of the Finance Act 1989 governs the recovery of overpaid excise duty and car tax. It provides that proceedings for restitution of such amounts 'shall not be dismissed by reason only of the fact that the amount was paid by reason of a mistake of law'(7). The intention appears to be that such payments made under a mistake of law should be recoverable on the same basis as payments made under a mistake of fact. In contrast with s 24 concerning VAT, s 29 only applies to mistaken payments and does not apply to all cases where the payment is not lawfully due.

In the case of car tax it appears that interest should be payable on any sum repaid but it is not so clear whether it would be legally payable in respect of overpaid excise duty.

The section specifically provides that the defence of 'unjust enrichment' shall be available(8) as

it is under s 24.

Inheritance Tax

Limited provision is made for the recovery of overpaid Inheritance Tax in s 241 of the Inheritance Tax Act 1984. Section 241(1) provides that where it has been proved to the Board that too much tax has been paid the Board is required to repay the excess. This right of recovery is not dependent on proof of any error by the payer.

The provision is, however, limited in a similar way to s 33 of the Taxes Management Act 1970. Section 255 of the Inheritance Tax Act provides effectively that there shall be no recovery where the payment is made and accepted 'on a view of the law then generally received or adopted in practice'(9).

Interest is payable on the amount returned(10).

There is no obligation to repay where the claim for repayment is made more than six years after the payment of the tax in respect of which recovery is sought(11).

Stamp Duty

Section 13(4) of the Stamp Act 1891 confers a right to the recovery of Stamp Duty which has been paid in conformity with an erroneous assessment. The right does not depend on any error by the payer. The court is empowered to award interest on the amount recovered.

Social Security Contributions

There is a provision in the Social Security(Contributions) Regulations 1979 which gives a right to the recovery of National Insurance Contributions paid in error. This provision applies whether the mistake is one of fact or law.

Community Charge and Non-Domestic Rates

With respect to the Community Charge and non-domestic rates general provision has been made in regulations for the recovery of overpayment. These provisions apply where there has been an overpayment following an excess demand in a notice issued by the charging authority and so do not depend on proof of a mistake by the payer.

Import Duties

The recovery of import duties not lawfully payable is governed by s 127 of the Customs and Excise Management Act 1979. The dispute must arise before the delivery of the goods and s 127 simply provides for a method of challenge, as an alternative to that of withholding payment, which is not permitted. The importer must pay the amount demanded but may then require the

matter to be referred to the High Court or, where the issue concerns the valuation of goods, to a referee. If on such a reference it is determined that there has been an overpayment, the amount overpaid shall be repaid together with interest. An application to the High Court or a referee must be made within three months of the date of the payment. With respect to matters not covered by s 127, there is no right to recover except in so far as provided by the common law. However, an express discretion to repay is given to the Commissioners by the section.

Relationship between statutory provisions and the common law

In *Woolwich Equitable Building Society v IRC*(12) Butler-Sloss LJ stated that significantly the legislative structure which governs taxation only provided for repayment of overpayment under *intra vires* regulations. He said:

'No structure is in place to deal with the demand for and payment of tax which has been unlawfully demanded under legislation found to be *ultra vires*. To deal with that eventuality the courts are thrown back upon the common law and precedent.'

The comment has been made(13):

'The argument that the legislative structure only deals with overpayment under *intra vires* regulations does not address the position of overpayment made directly under a statute where no regulations have been made. It is surely arguable that the statutory remedy applies whenever there has been payment of a sum which, under the statute, is not due, although such payment in a sense is *ultra vires*. If so a somewhat unsatisfactory distinction would exist between payments by reason of an unauthorised demand not backed by regulations and payments by reason of an unauthorised demand contained in regulations. Furthermore, it does not explain why statutory rights of recovery covering payments 'by reason of a mistake', where tax was 'not tax due' or, where 'a lesser or no amount was properly payable' are not appropriate to cover all relevant payments, whether *intra vires* or *ultra vires*.'

However, the reference in the Taxes Management Act 1970, s 33, to an 'assessment' which 'was excessive by reason of some error or mistake' could possibly be seen as confined to an assessment which, other than being excessive by reason of an error or mistake in the return, is for all other purposes final and conclusive and accordingly *intra vires*(14).

In *Woolwich Building Society v IRC*(No 2)(15) Lord Keith of Kinkel said:

'To give effect to Woolwich's proposition would, in my opinion, amount to a very far reaching exercise of judicial legislation. That would be particularly inappropriate having regard to the considerable number of instances which exist of Parliament having legislated in various fields to define the circumstances under which payments of tax not lawfully due may be recovered, and also in what situations and on what terms interest on overpayment of tax may be paid. Particular instances are s 33 of the Taxes Management Act 1970 as regards overpaid income tax, corporation tax, capital gains tax and petroleum revenue tax; s 24 of the Finance Act 1989 as

regards value added tax; s 29 of the Finance Act 1989 as regards excise duty and car tax; s 241 of the Inheritance Tax Act 1984 as regards inheritance tax; and s 13(4) of the Stamp Act 1891 as regards stamp duty.'

He continued(16):

'It seems to me that formulation of the precise grounds on which overpayment of tax ought to be recoverable and of any exceptions to the right of recovery, may involve nice considerations of policy which are properly the province of Parliament and are not suitable for consideration by the courts. In this connection the question of possible disruption of public finances must obviously be a very material one. Then it is noticeable that existing legislation is restrictive of the extent to which interest on overpaid tax (described as 'repayment supplement') may be recovered. A general right of recovery of overpaid tax could not incorporate any such restriction. I would add that although in the course of argument some distinction was sought to be drawn between overpayment of tax under regulations later shown to be ultra vires and overpayment due to the erroneous interpretation of a statute, no such distinction can, in my view, properly be drawn.'

In contrast, Lord Goff of Chieveley said(17):

'...it is first necessary to have regard to the impact of any relevant statutory provisions governing the repayment of overpaid tax by the Revenue to the taxpayer. Statutory regulation of such repayments is a commonplace of our law, not only in the case of overpaid income and corporation tax, but also in the case of other taxes (such as value added tax, capital gains tax and inheritance tax) and other duties and charges..

However, there is, in my opinion, a more fundamental reason why the section [s 33 of the Taxes Management Act 1970) has no application in the present case. This is because the present case is not one in which an excessive assessment was made on a taxpayer, through some error of fact or law, as is contemplated by s 33(1). This is a case where there is no lawful basis whatever for any demand of tax to be made by the Revenue. In such circumstances, the demand itself is ultra vires and is therefore a nullity. It follows that in a case such as the present there can be no valid assessment. No assessment was in fact raised on Woolwich in the present case, because the money alleged to be due by way of tax was paid, though under protest... If the assessment is alleged to have been made (as here) under ultra vires regulations, the proper course is to take proceedings by way of judicial review to quash the aberrant regulations and the assessment made thereunder, not by way of an appeal under procedure which presupposes that the assessment, although it may be erroneous, is basically lawful. Just as the appeal procedure presupposes a lawful assessment, so does s 33(1) of the Taxes Management Act 1970, which is concerned with a lawful assessment which is excessive by reason of some error or mistake in a return... It is for these reasons that Woolwich is not enabled or required to seek its remedy through the statutory framework, but must fall back on the common law. It also follows that the common law principles, whatever they may be, are applicable to a case such as the present, unconstrained by the provisions of any statute.'

Lord Goff noted that historically it may be correct that statutory provisions creating a discretionary regime for the repayment of taxes or charges presuppose that the common law principles give no right to recovery, however, having, where applicable, overlaid and replaced the common law principles, whatever those principles may be, they become neutral in their effect when the development of those principles is considered by the courts. It was also noted that the vast majority of cases concerned with the recovery of tax which is not due will indeed be covered by statutory provisions regulating the right of recovery. It was also suggested that, if it should be held that s 33 had no application in the Woolwich Building Society case, steps could easily and may well be taken 'at an early opportunity to bring cases such as the present, which are in any event likely to be very rare, within its ambit.'

Lord Goff went on(18):

'But in my opinion they cannot, in the last analysis, touch the point of principle, which is that we are here concerned with the question of the basis of the common law right of recovery in these circumstances, on which statute law has no direct impact.'

Common law

The traditional approach of English law has been to regard payments made to another which are not legally due as generally irrecoverable and then to seek to define those particular cases in which such payments may be recovered in a restitutionary action. Situations in which it is recognised that recovery is allowed include cases where a payment is made under duress, fraud or undue influence; where it is made as a result of a mistake of fact; or where it is made for a consideration which has failed, as where a payment is made under a contract which is invalid. Where recovery is allowed the common law mechanism has traditionally been expressed in the language of the old forms of action, here the action for money had and received.

The mere fact that a payment is made under a mistake of law is not a ground for recovery.

In a number of cases the question has arisen as to whether a citizen may recover a payment which he has made in response to a demand by the government or a public authority which there is no power to make. The demand may be for the payment of tax or for payment of a fee for the provision of goods or services. It may be invalid because the government misconstrued the provision providing for a particular type of payment; because the provision relied on is itself invalid, for example where the charge is imposed by delegated legislation which is outside the terms of the enabling statute; or because there is no provision for such a charge at all. A demand may be invalid because it infringes the principles of domestic administrative law, or of European Community Law. A similar problem arises where the payment is made before there has been a demand but in respect of a charge which there is no power to levy.

Although the common law has been substantially modified by statute, as has been seen, the general principle on which it is based remains important. There are two approaches. The first, generally accepted to be the law prior to the decision of the House of Lords in Woolwich

Building Society v Inland Revenue Commissioners (No 2)(19) is that any ultra vires payments are recoverable on the same basis as any other payments made to another which are not lawfully due. The payer will be able to recover if he can show that one of the ordinary grounds for restitution exists. Thus he will be able to recover if he can show, for example, that the payment was made as a result of a mistake of fact; or under duress; or pursuant to an agreement that the sum would be repaid if it were found not in fact to be due. The second approach, now enshrined in the majority decision in the *Woolwich Building Society* case, recognises a general right to restitution in cases of payments in response to ultra vires demands by government or public authorities.

The *Woolwich Building Society* case concerned the return of payments made by the building society in respect of deposits with it which were held not to be due as the regulations pursuant to which the payments were made were found to be ultra vires.

The general right to restitution set out in the *Woolwich Building Society* case is, however, subject to a number of limitations, including one based on the mistake of law rule.

Under both approaches, therefore, a payment made under mistake of law is irrecoverable in the absence of another ground for restitution.

The applicability of the ordinary private law has been illustrated in various cases over the years.

In *Slater v Burnley Corporation*(20) the corporation had demanded from the plaintiff a higher water rate than the relevant statute required him to pay. He had objected but paid. It was argued that recovery should be allowed simply because of the unlawful nature of the demand. However, it was held that there could be no recovery in the absence of a distinct ground for restitution, such as duress. Both *Cave and Wills JJ* held that the payment was a voluntary one. Although the corporation had power to cut off the water supply in the event of non-payment of rates it had not threatened to do so. *Wills J* observed that the case was simply the ordinary one of a person raising a contention when a demand was made of him, which was not sufficient to constitute duress.

In *William Whiteley Ltd v R*(21) the plaintiff sought to recover payments for licences claimed by the Revenue in respect of certain canteen workers employed by the plaintiff, on the basis that they were 'male servants' under the legislation. The plaintiff disputed this interpretation and contended that no licences were needed but nevertheless paid the charges. Eventually he successfully disputed the Revenue's interpretation in the courts and sought to recover the overpayments. *Walton J* rejected the contention that money unlawfully demanded by a public official may automatically be recovered and held that there could be no recovery since none of the ordinary grounds for recovery had been made out, the payments were voluntary and therefore irrecoverable and he rejected the submissions of the plaintiffs that they were paid (i) in discharge of an illegal demand *colore officii* or (ii) in any event under duress. Although *Walton J* referred on two occasions to the suppliants being under a mistaken belief that they were bound to pay the duties it is clear from his findings that in relation to at least the last three payments they were in considerable doubt as to their liability and he said:

'The suppliants knew all the facts. They had present to their minds plainly, when these payments were made, that there was a question as to whether upon such servants as those in question duty was payable. They themselves raised that question and they paid the duties. They could have resisted payment. They must have known if proceedings were taken for penalties it would be open to them in such proceedings to raise the question as to whether the duties were payable or not, as they did, in fact, in 1906. They must have known and must have had present to their minds all that.'

Earlier the judge, after referring to the rule that money paid under mistake of law is irrecoverable had said:

'There is no doubt as to the general rule stated in Leake on Contracts[5th ed pp622-623] to which I have already referred, that money paid voluntarily- that is to say, without compulsion or extortion or undue influence, and, of course, I may add without any fraud on the part of the person to whom it is paid, and with knowledge of all the facts, though paid without any consideration, or in discharge of a claim not due, or a claim which might have been successfully resisted, cannot be recovered back.'

In *Mason v New South Wales*(22) the High Court of Australia was prepared to find duress when the plaintiffs paid a fee for a licence to carry goods, under a scheme which was later held to be unconstitutional. The duress was said to lie in the fact that the state might have seized the plaintiffs' vehicles had they operated without a licence (a power which they appeared to have under the legislation), although it seemed that such seizure had in fact been rare in the past and certainly had not been explicitly threatened.

In *National Pari-Mutuel Association Ltd v R*(23) the suppliant company claimed repayment of betting duty which they had paid for three years in respect of the operation of a totalisator. In proceedings involving another such operator the House of Lords had held that on a proper construction of the relevant legislation there was no liability to pay the duty. The argument for the suppliants was concerned only with whether the mistake under which they had paid the duty was one of fact or of law. Branson J and the Court of Appeal held that the mistake was a mistake of law and that the payments were not recoverable.

In the Scottish case *Glasgow Corp v Lord Advocate*(24) the corporation had for a number of years paid purchase tax on stationery manufactured by it and used in its various departments. Finally it raised an action for declarator that it was not liable to purchase tax on such stationery and for recovery of past payments. It was held that the corporation was not liable to purchase tax on stationery manufactured by it and supplied to its public service departments but was liable to the tax on stationery supplied to its trading departments. The claim to recovery of past payments was dismissed by Lord Wheatley and the First Division unanimously. The first ground on which recovery was sought was based on the constitutional argument that since Parliament had not authorised the collection by the Customs and Excise Commissioners of the tax the corporation was entitled to recover the amounts illegally exacted from it.

The Lord President(Lord Clyde) stated two reasons for rejecting the argument.The first was that there was no authority for it.He added(25):

'Indeed, the elaborate statutory provisions in various Finance Acts regarding the precise circumstances in which income tax already paid may be reclaimed would have been quite unnecessary if the conclusion sought to be drawn by the corporation was sound.'

The second reason he gave as:

'It would, in my opinion, introduce an element of quite unwarrantable uncertainty into the relations between the taxpayers and the Exchequer if there could be a wholesale opening up of transactions between them whenever any court put a new interpretation upon an existing statutory provision imposing a tax.'

The second ground for recovery was based on the *condictio indebiti*.In relation to this ground it was held unanimously that the *condictio* did not apply to the case of an error in law in interpreting an Act of Parliament.

In *Sebel Products Ltd v Customs and Excise Comrs*(26) a claim to purchase tax in respect of one of their products was made against the plaintiffs.They brought an action for a declaration that the product was not so liable and while the action was awaiting trial they paid the sum claimed.The circumstances under which they did so do not appear from the report of the case.The plaintiffs succeeded in their action for a declaration, but the defendants refused to repay the money.Vaisey J held that they were bound to do so.

He said(27):

'By the Crown Proceedings Act, 1947, s 21(1), the defendants are placed in the same position as the ordinary subjects of the Crown and I see no reason why they should not in appropriate cases refuse to refund money paid to them voluntarily under a mistake of law as the revenue authorities were held to be entitled to do in the case of *William Whiteley, Ltd v R* and *National Pari-Mutuel Asscn Ltd v R*.At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons.First, because the defendants, being an emanation of the Crown, which is the source and fountain of justice are, in my opinion, bound to maintain the highest standards of probity and fair dealing comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control.'

Vaisey J also said(28):

'...I ask myself, first, with what intention the plaintiffs paid the money, and,secondly, with what intention the defendants received it? If the intention was the same on both sides, the result, in my judgment, was that an agreement was made between the parties by implication.The intention of the plaintiffs was, to my mind, clear.They expected to recover the money if they won their

action. What was the intention of the defendants? It is irrelevant to speculate on what, if anything, was in the mind of the clerk or other subordinate officer who actually received the money or in the mind of the officer who paid it into the bank to the defendants' credit and I must assume the existence of some person in the defendants' employment who accepted and appropriated the money with a full knowledge of all the facts, particularly the discussion which had preceded the institution of the action and the pending of the action itself, who knew and realised that the right of the defendants to receive the money was at the moment sub judice, and, indeed, on the point of coming before this court for decision. What would that hypothetical person have thought about it? In my judgment, he would inevitably have come to the conclusion, as a matter of necessary inference, that the plaintiffs were paying and the defendants accepting the money subject to repayment if the action resulted in the plaintiffs' favour. If, however, he had entertained any doubt on the matter, I feel sure that he would as a matter of courtesy have refused to accept the money until the position had been made clear to him. What is, to my mind, incredible, is that he could ever have supposed that the money was being either paid by the plaintiffs or received by the defendants on the footing that the defendants were to keep it in any event. I come, therefore, to the conclusion that the intentions of the plaintiffs and the defendants were identical. In other words, I find that there was an agreement.'

Nolan J in *Woolwich Equitable Building Society v IRC*(29) said:

'I would say more generally that whenever money is paid to the Revenue pending the outcome of a dispute which, to the knowledge of both parties, will determine whether or not the Revenue are entitled to the money, an agreement for the repayment of the money if and when the dispute is resolved in the taxpayer's favour must inevitably be implied unless the statute itself produces that result, as it does, for example, in cases falling within para 10(4) of Sch 20 to the Finance Act 1972.'

In *Tower Hamlets London BC v Chetnik Developments Ltd*(30) the House of Lords had occasion to consider s 9(1) of the General Rate Act 1967 which provides, so far as is material:

'...where it is shown to the satisfaction of a rating authority that any amount paid in respect of rates, and not recoverable apart from this section, could properly be refunded on the ground that...(e) the person who made a payment in respect of rates was not liable to make that payment, the rating authority may refund that amount or part thereof.'

The House considered a local authority's exercise of a statutory discretion to refund an overpayment. Judicial review was sought of the authority's refusal to return an overpayment of rates, a decision made in the exercise of an express statutory discretion to refund in the General Rate Act 1967. The action succeeded and Lord Bridge stated that, under the statute, the fact that the payment was made under a mistake of law was not a consideration which would justify refusing recovery. Nor could recovery be refused because of the special financial difficulties which would otherwise be faced by the authority. Lord Bridge said(31):

'So it emerges from these authorities that the retention of moneys known to have been paid under

a mistake at law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as a 'high-minded thing' to do, but rather as a 'shabby thing' or a 'dirty trick' and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take...I in no way dissent from this reasoning, but I should myself have been content to derive the same conclusion from the broader consideration that Parliament must have intended rating authorities to act in the same high-principled way expected by the court of its own officers and not to retain rates paid under a mistake of law, or on an erroneous valuation ...unless there were, as Parliament must have contemplated there might be in some cases, special circumstances in which a particular overpayment was made such as to justify retention of the whole or part of the amount overpaid.'

In this case the discretionary power to refund payment of rates for which the person who made the payment was not liable had been expressly conferred on local authorities by Parliament.

Lord Keith of Kinkel observed in the Woolwich Building Society case(32):

'But it is not open to serious doubt that central Revenue departments have a similar discretionary power to make refunds of tax payments which were not legally due.Indeed, it is a power of that nature which the Revenue claim to have exercised in the present case, in the course of their general function of managing and administering the tax system.So if the Revenue had refused in the exercise of their discretion to make the repayment they did in the present case I am of opinion that in the absence of any other remedy it would have been open to Woolwich to claim repayment in proceedings for judicial review, and there would appear to be no reason why such proceedings would not have been successful.'

In the Tower Hamlets case Lord Bridge also said(33):

'But, to articulate the apparent principle underlying the section more precisely it is surely envisaged in each of the five cases where the section authorises refunds of amounts paid in respect of rates which would otherwise be irrecoverable that the ratepayer who has paid rates in compliance with a demand note which he might have successfully resisted may appropriately be relieved of the consequences of his oversight.'

Hence in the Tower Hamlets case the House concluded that the refusal of the council to make a refund was not in accordance with the statutory intention and so affirmed the decision of the Court of Appeal allowing the ratepayers' claim for judicial review of the decision.

Lord Goff in the Woolwich Building Society case commented(34):

'It is plain that those principles cannot apply where the discretion is not exercised pursuant to a statutory power.If, therefore, in the present case the Revenue was under no contractual obligation to repay the money, and had refused to exercise such residuary discretion as it had to repay, it is difficult to see on what ground its refusal to repay could have been challenged, except on very narrow grounds such as bad faith...'

Maskell v Horner(35) concerned unlawful demands for market tolls. On the plaintiff's refusal to pay seizure took place and thereafter on his solicitor's advice the plaintiff paid under protest. Later when the plaintiff challenged the defendant's demands seizure either took place or was threatened. Some years later it appeared from a decision in the Chancery Division that the tolls had been unlawfully demanded and the plaintiff sued for their recovery. It was held that as he had only paid to avoid seizure of his goods and never voluntarily nor intending to give up his rights to the sums paid nor to close the transactions, he was entitled to recover those payments which were not barred by the statute of limitation. Lord Reading CJ drew a distinction between payments made to close a transaction and those made to avoid seizure(36):

'If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction.'

Air Canada v British Columbia(37) concerned a claim by the airline to recover taxes levied under unconstitutional legislation. It was argued that recovery should be allowed because the payments had been made as a result of a mistake of law. Recovery was in fact denied for a number of reasons specific to the particular facts and context of the case, and it was thus strictly unnecessary for the court to determine whether there was a general right to recover a payment made as a result of a mistake of law. Four members of the panel of six who participated in the judgment clearly expressed the view that such a right existed in Canadian law.

Wilson J, in a dissenting judgment, said(38):

'It is, however, my view that payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule.'

La Forest J who delivered the leading judgment on behalf of the majority concluded that(39)-

'the rule should be against recovery of ultra vires taxes, at least in the case of unconstitutional statutes' and went on(40) to reject the proposition that payment under an ultra vires statute constituted compulsion.

It was held in the Air Canada case, by a majority, that there was no right to recover tax paid under a statute later found to be unconstitutional. La Forest J, dealing with the argument that the

tax had been paid under compulsion, said(41): 'What the rule of compulsion seems to require is that there is no practical choice but to pay in the circumstances, or to put it another way, before a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment...'

Wilson J disagreed, saying(42):

'It is, however, my view that payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay... The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments "under protest". Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so.'

In the American case *Atchison Topeka and Santa Fe Rly Co v O'Connor*(43) Holmes J, delivering the judgment of the circuit court for the district of Colorado, was of the opinion that the illegal tax paid by the plaintiff was paid under duress. If the plaintiff had not paid he would not only have been subject to legal proceedings for recovery of the tax but would have been liable to forfeiture of his business until it had been paid.

It would appear that the case does not vouch the proposition that a mere illegal demand for tax by a public authority is a sufficient ground for recovery of payment under it.

The *Atchison Topeka* case was one to recover taxes paid under duress and protest, the plaintiff contending that the levying statute was unconstitutional and the defendant contending that the payment was voluntary.

Holmes J said(44):

'It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refused to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages

by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.'

The serious disadvantages to which the plaintiffs could have been put in the Atchison Topeka case were (i) the possible forfeiture of their right to do business within the state until the tax was paid and (ii) the incurring of a penalty which would continue to accrue and accumulate pending litigation should the plaintiff's ultimately fail.

Holmes J considered that in these circumstances the payment was made under duress.

ANALYSIS

1. A payment may be made because it is believed that there is a legal obligation to make it, but this belief turns out to be based on an erroneous view of the law and in fact no such legal obligation exists; the error may relate to a statutory obligation, as where a person pays a tax or charge to the government when no such charge is legally due.
2. It is generally accepted that in English law the fact that a payment is made under a mistake of law is not of itself a ground for the recovery of the payment. By contrast a payment made under a mistake of fact is recoverable. This is clearly so where the mistake is as to a fact which, if true, would make the payer liable to pay or where it is 'fundamental' and there is support for a wider test under which any mistake of fact which causes the payment creates a prima facie entitlement to recovery based on unjust enrichment. Recovery is in principle possible 'however careless the party paying may have been, in omitting to use due diligence to inquire into the fact.'
3. The courts are required to draw a distinction between questions of law and questions of fact.
4. The rule that payments made under a mistake of law are irrecoverable has been the subject of dissatisfaction for a long time.
5. The main argument for reform is that the current rule allows the payee to retain money in circumstances in which it seems unjust for him to do so as against the payer. The payee is enriched by the receipt of the payment which the mistaken payer did not intend him to have and would not have been made but for the mistake, ie the payment was involuntary. In the context of mistake of fact the consequence is that the payee's enrichment is prima facie unjust and recoverable in accordance with established rules.
6. It has been argued that the rule precluding recovery of payments made under a mistake of law is justified, in the instance of overpaid taxes, on the basis that it could not be guaranteed that all relevant cases could be identified and unfairness in the treatment of payers might result; if payments made as a result of a mistake of law were generally recoverable, it could be argued that, since such mistakes are frequent, there will often be recovery of payments and payees generally will not be able to rely on their receipts.

7. It has been stated (45) that sums paid to a public authority pursuant to an unlawful rating demand, although they might be irrecoverable if an action were brought for repayment, could be set off against sums owed by the payer to the same authority. This 'rule' seems to produce an anomaly in allowing a set-off but not a direct action for recovery. However, this rule may be questionable.

8. Where there is no right in restitution to the recovery of an invalidly demanded payment, there may be a discretion to make a repayment and such a discretion has been exercised in practice: eg prior to the introduction of a legislative right to recover, it had been the practice to repay excess payments of VAT though made under an error of law. In some cases there may be an express statutory discretion (46) and in others the authority's right to repay will depend on the general law concerning the making of ex gratia payments (47). Where there is discretion, whether conferred specifically by statute or not, it is reviewable according to the usual principles of judicial review. In exercising it the authority must take into account only relevant considerations and must not act for improper purposes or in bad faith.

9. At common law the position of payments made by way of taxes or charges which turn out not to be lawfully due will generally be irrecoverable if made under a mistake of law, that is if paid in the belief that there is or may be liability to pay when in fact there is no such liability under the relevant provision properly construed. In other cases payment may be made in circumstances where liability is denied. The traditional approach only allowed recovery where duress could be shown or where there was an implied agreement to repay the sum.

10. The effect of the House of Lords decision in the Woolwich Building Society case is that a person who makes a payment in response to an unlawful demand for tax, or any like demand from a public official, ie a demand for which there is no basis in law, immediately acquires a prima facie right to be repaid the amount as money had and received.

11. Having reached the view that a general right should be recognised, Lord Goff summarised his judgment by holding (at p 681) that-

'...money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand...is prima facie recoverable...as of right...'

He then went on, obiter, to hold that such a principle should apply equally where tax or another levy has been exacted as a result of an intra vires but excessive or erroneous demand.

Lords Browne-Wilkinson and Slynn delivered concurring judgments. Lord Slynn specifically agreed that 'the Woolwich principle' could equally apply to intra vires as well as ultra vires demands.

12. The minority judgments in the Woolwich Building Society case given by Lords Keith and Jauncey both recorded varying degrees of reluctance in denying a legal right to recovery, yet both felt that the present state of the law could not justify a finding for the Woolwich. In the words

of Lord Keith at p 668:

'...the...authorities [satisfy] me that they afford no support for Woolwich's major proposition...'

This led his Lordship to hold at p 699, that:

'...to give effect to Woolwich's proposition would, in my opinion, amount to a very far-reaching exercise of judicial legislation...'

13. In approving the 'Woolwich principle' (recovery of sums of tax overpaid pursuant to ultra vires demands) Lords Goff and Slynn go on, strictly obiter, to suggest that the principle should apply to all situations where other levies (presumably licence fees, charges and penalties of a public law nature) are paid pursuant to ultra vires demands and even where taxes or levies are paid pursuant to excessive or erroneous, but intra vires, demands.

14. All five Law Lords cast considerable doubt on the validity and utility of the 'mistake of law' rule. Under the Woolwich principle recovery is grounded in the unlawfulness of the demand and not in any mistaken belief of the payer.

15. Lords Goff and Slynn have given notice that they do not regard the private law concept of duress or compulsion as fixed, so that it may, for example, extend to encompass what may be portrayed as 'deemed or presumed duress' by a public body of a citizen, in circumstances in which the public body has a number of statutory remedies open to it should the citizen fail to pay as demanded. This is a concept drawn from the United States, particularly the judgment of Mr Justice Holmes in the *Atchison Topeka* case (to whom all of the majority referred).

16. Lord Slynn, in the *Woolwich Building Society* case, stated at p 783 that there was no statutory provision on which Woolwich could rely to reclaim the taxes overpaid or any interest. Section 33 of the Taxes Management Act 1970, even if it applied to composite rate tax, was not applicable for a number of reasons, not least that no valid assessment could be made under an invalid regulation, that no assessment was in fact made and that, even if made, the assessment could not on the facts of the present case have been said to be 'excessive by reason of some error or mistake in a return.' In other areas Parliament has specifically provided that tax paid which was not lawfully due to be paid may be recovered and it has laid down the machinery and the conditions for repayment, including the payment of interest. None of these other statutory provisions applies to the *Woolwich Building Society* case.

17. Lord Slynn said at p 783:

'I do not consider that the fact that Parliament has legislated extensively in this area means that no principle of recovery at common law can or should at this stage of the development of the law be found to exist. If the principle does exist that tax paid on a demand from the Crown when the tax was the subject of an ultra vires demand can be recovered as money had and received then, in my view, it is for the courts to declare it. In so doing they do not usurp the legislative

function. I regard the proper approach as the converse. If the legislature finds that limitations on the common law principle are needed for reasons of policy or good administration then they can be adopted by legislation, eg by a short limitation period, presumptions as to validity, even a power in the courts to limit the effects of any order for recovery comparable to that conferred on the Court of Justice of the European Communities by art 174 of the EEC Treaty.'

18. Lord Slynn said at p 787:

'I find it quite unacceptable in principle that the common law should have no remedy for a taxpayer who has paid large sums or any sum of money to the Revenue when those sums have been demanded pursuant to an invalid regulation and retained free of interest pending a decision of the courts.'

19. While the Bill of Rights contained the constitutional principle that only such taxation as is authorised by Parliament may be levied, it was inconsistent to allow the Revenue to achieve by the back door (collecting taxes without authority) what it could not achieve by the front.

20. For the first time, as a result of the Woolwich principle, the taxpayer has been placed in the same position as the government- which can already recover sums overpaid by it, as of right.

21. The House of Lords' pronouncement in the Woolwich Building Society case that a taxpayer is entitled to recover as of right meant that interest would run under the Supreme Court Act 1981.

22. The Woolwich's initiative in bringing the case provided a unique opportunity to recognise developments in the law by declaring the existence of a right to restitution in such circumstances. No reliance could be placed on the government to introduce legislation to the same effect, unless it was pushed into it, because the present unsatisfactory condition of the law was in the Treasury's interest. The government's reaction to the wider form of the principle (expressed to be obiter) under which recovery can be made of excessive sums (tax and non-tax) paid in response to *intra vires* demands, is also awaited as it may feel it has to override or limit in some way so as to 'protect the security of public finances.' Further legislative action (even retrospective) may now be likely in response to the Woolwich case.

23. There should be uniformity of approach to overpayments in statutory provisions. Some existing legislation gives a right to recover based simply on the unlawful nature of the levy, eg provisions on VAT, Rates and also those on Inheritance Tax. It seems inconsistent to allow a right of recovery based solely on invalidity in these cases, whilst requiring proof of mistake in others.

24. Many commentators believe that there should be a right to recover overpaid taxes based simply on the fact of overpayment. What is needed is a general right against public authority payees, rather than, as in the case of private law, one based on the circumstances of the payer.

25. Statutory reform could involve elaborate legislation since it would require the identification and solution of a number of issues-

- * disruption to public finances
- * payments in accordance with the prevailing general practice
- * compromises or submissions to claims
- * defences such as change of position/estoppel
- * special limitation periods for public authorities

26. Disruption of public finances could ensue if a levy which is made is declared invalid and has to be returned. When a large number of payments have to be returned the authorities will have to make up the shortfall. A distinction would have to be drawn between different types of invalid decisions and this approach has been adopted in a number of statutory rights of recovery, in particular Income Tax and Corporation Tax, Capital Gains Tax, Petroleum Revenue Tax and Inheritance Tax which preclude recovery of charges levied in accordance with general practice.

FOOTNOTES

(1) Proviso to s 33(2).

(2) s 33(2).

(3) s 24(1).

(4) s 24(2).

(5) s 24(3).

(6) s 24(7).

(7) s 29(2).

(8) s 29(3).

(9) s 255.

(10) s 235.

(11) s 241.

(12) [1989] 1 WLR 137.

(13) 'Restitution of Payments Made Under a Mistake of Law', *The Law*

Commission(Consultation Paper No 120) at 84-5.

(14) see Simon's Taxes, Division A3.901.

(15) [1992] 3 All ER at 750.

(16) Ibid, at 750-1.

(17) Ibid, at 756-7.

(18) at 758.

(19) [1992] 3 All ER 737.

(20) (1888) 59 LT 636.

(21) (1909) 101 LT 741.

(22) (1959) 102 CLR 108.

(23) (1930) 47 TLR 110.

(24) 1959 SC 203

(25) at 230.

(26) [1949] 1 All ER 729.

(27) at 731-2.

(28) at 731.

(29) [1989] 1 WLR 137; STC 111 at 119.

(30) [1988] 1 All ER 961.

(31) at 969-70.

(32) [1992] 3 All ER at 743.

(33) [1988] 1 All ER 961 at 967.

(34) [1992] 3 All ER at 758-9.

(35) [1915] 3 KB 106.

(36) at 118.

(37) [1989] 1 SCR 1161; (1989) 59 DLR(4th) 161 at 169.

(38) at 169.

(39) at 196.

(40) at 199.

(41) at 199.

(42) at 169.

(43) (1912) 223 US 280.

(44) at 285-6.

(45) Blackpool and Fleetwood Tramroad Co v Bispham with Norbreck UDC [1910] 1 KB592.

(46) Customs and Excise Management Act 1979, s 127.

(47) The Crown has a general power under the common law to make ex gratia payments.

PART THREE

SOUTH AFRICA

Statutory provisions

Section 102 is the only section in the Income Tax Act 58 of 1962 dealing with 'Refunds' and provides that:

'102.(1) If it is proved to the satisfaction of the Commissioner that any amount paid by a taxpayer was in excess of the amount properly chargeable under this Act, the Commissioner may authorize a refund to such taxpayer of any tax overpaid: Provided that no amount paid in respect of an assessment accepted by the taxpayer and made in accordance with the practice generally prevailing at the date of that assessment shall be deemed to have been otherwise than properly so chargeable.

(2) The Commissioner shall not authorize any refund under this section unless the claim therefor is made within three years after the date of the assessment under which such tax was payable or, where such tax was chargeable and was payable under this Act otherwise than under an assessment, the date of payment of such tax (which date shall for the purposes of this subsection be deemed to be the date of the official receipt acknowledging such payment or, where more than one such payment was made, the date of the official receipt acknowledging the latest of such payments).

(3) If in respect of any year of assessment of any taxpayer (other than a company) ending on or after 28 February 1983-

(a) the taxpayer's income for such year consisted solely of any amount or amounts of remuneration as defined in the Fourth Schedule;

(b) a period of at least three years has elapsed since the end of such year of assessment; and

(c) the taxpayer was not required under any provision of this Act to furnish a return of income for such year of assessment and did not render such a return during the period referred to in paragraph (b),

the Commissioner shall not authorize a refund of any amount of employees tax deducted or withheld from such remuneration under the provisions of the said Schedule unless the claim therefor is made within the period referred to in paragraph (b).'

Comment and interpretation

Section 102 is effective in this form in respect of all claims for refunds made on or after the date of promulgation of the Income Tax Act 69 of 1975: 23 July 1975.

Section 102(1) has been in its present form for more than fifty years, being largely unaltered since its predecessor, s 89, in the Income Tax Act 31 of 1941(1). The section covers all taxes provided for in the Income Tax Act 58 of 1962 as the word 'tax' is defined in s 1 of the Act as meaning 'any levy or tax leviable under this Act' and for the purposes of Part IV of Chapter 111 includes any levy or tax leviable under any previous Income Tax Act or any tax on persons or the incomes of persons leviable under any ordinance of a provincial council.

Section 102(2) was expanded by s 28(1) of the Income Tax Act 1975 and its wording corresponds with that of s 79. The amendment followed upon the decision in *Stroud Riley & Co Ltd v SIR(2)* where it was held that neither the mere inaction of the Secretary nor his tacit acceptance of a return accompanying payment of non-resident shareholders' tax could operate as an assessment and that there was consequently no limiting period within which a claim for a refund of this tax had to be made.

Although there is a formal procedure laid down for objection and appeal against an assessment for tax, it very often happens in practice that, for one reason or another, taxpayers do not lodge an objection against an assessment in the stipulated period. This may be due to a lack of knowledge on the taxpayer's part that he has sufficient grounds for objection, or it may be due simply to carelessness or inefficiency. Whatever the reason for the delay, it is very important to know and understand what other remedy is available to the taxpayer should he fail to follow correctly the procedure for objection.

On receipt of an assessment and after scrutiny a taxpayer is dissatisfied with it, there are a number of steps to be taken if a taxpayer wishes to ensure that he has, at least, a chance of lessening his liability for tax. Even where a taxpayer intends to object to an assessment, he is still required to pay the full amount of tax owing by the date shown on the assessment as the date for payment. If the objection or appeal is successful, any tax paid in excess of the taxpayer's true liability will be refunded together with interest.

The first function of s 88 is to ensure that the obligation to pay and the right to receive and recover any tax chargeable under the Act will not be suspended by any appeal or pending the decision of a court of law under s 86A unless the Commissioner so directs. The second function of s 88 is to provide that, if an assessment is altered on appeal or in conformity with any such decision or in conformity with the Commissioner's decision to concede an appeal to the Special Court or such a court of law, a 'due adjustment' must be made. Amounts paid in excess must be refunded with interest at the 'prescribed rate' as defined in s 1, calculated from the date proved to the satisfaction of the Commissioner to be the date on which the excess was received. Amounts shortpaid are recoverable with interest calculated as provided in s 89.

In *CIR v NCR Corporation of South Africa(Pty)Ltd(3)* it emerged that, under the law as it then stood, a taxpayer could not claim interest on a refund of tax overpaid unless the refund resulted from a successful appeal to a court or was made in conformity with a decision of a court. Should Inland Revenue have conceded the issue before court proceedings commenced or

have withdrawn from the action before a judicial decision was handed down, the taxpayer would have been entitled to no interest. The practice of Inland Revenue, however, had been to pay interest if it made a refund of tax when it withdrew from a case before it was heard, and the court in the case referred to considered it desirable that the practice and the law be brought into conformity with each other. In fact, though, the amendment(4) went further and authorized not only the payment of interest to the successful taxpayer in such circumstances but also a refund of the tax overpaid ahead of a court decision.

A taxpayer should first check his assessment to ensure the accuracy of the arithmetical calculations in it. The taxpayer must ensure that all the information given in the return is correctly reflected in the assessment. A copy of the return must be available for this purpose.

The following provisions of the Act describe the assessing function and objection to it-

Section 77(1) provides that all assessments required to be made under the Act shall be made by the Commissioner or under his direction.

Section 78(1) enables the Commissioner to estimate a person's taxable income where such person is in default in furnishing any return or information or the Commissioner is not satisfied with the return or information furnished by any person.

Section 81(1) provides for objections to be made to assessments and s 81(5) provides that where no objection is made to any assessment, subject to the right of appeal, it becomes final and conclusive.

Section 83 provides for appeals against decisions of the Commissioner to a special court for hearing income tax appeals.

Section 88 provides that pending an appeal the obligation to pay income tax shall not, unless the Commissioner so directs, be suspended.

Section 89(1) provides that the Commissioner will determine the date on which income tax chargeable shall be paid and s 89(2) provides for interest payable on overdue payments.

Section 91(1)(a) deems income tax payable to be a debt due to the State and s 91(1)(b) empowers the Commissioner, where income tax or interest has not been paid, to file with the clerk or registrar of any competent court a certified statement setting forth the amount of income tax or interest due and provides that such statement thereupon has the effect of a civil judgment.

Section 92 makes it incompetent for any person in any proceedings in connection with any statement filed in terms of s 91(1)(b) to question the correctness of any assessment on which such statement is based, notwithstanding that objection and appeal may have been lodged thereto.

Section 94 provides that the production of any document under the hand of the Commissioner purporting to be a copy of an extract from any notice of assessment shall be conclusive evidence of the making of such assessment and, except in the case of appeal proceedings, shall be conclusive evidence that the particulars of such assessment are correct.

Section 102(1) providing for repayment of income tax proved to the satisfaction of the Commissioner to have been overpaid and s 102(2) which provides that the Commissioner may not authorise such repayment unless the claim therefor is made within three years after the date of the assessment in question.

It is against the background of these provisions that s 102 must be seen to operate. Its importance lies in the fact that it creates a 'last opportunity' for the taxpayer to be able to attack an assessment. The rights of a taxpayer are of the utmost significance in this set of circumstances.

It must be stressed that the finality of an assessment is made subject to the provisions of s 102 and so is subject to the three-year limitation rule in the section. It is interesting to note that s 81(5), which provides for 'final and conclusive' assessments (where no objections are made to any assessment or where objections have been allowed or withdrawn) makes no mention of the provisions of s 102.

If a taxpayer discovers that an assessment is excessive after the expiry of the appeal period or the determination of an appeal and where there is no possibility of having the assessment amended by making a late appeal, the only way to recover the excessive tax paid is by making a valid claim for error or mistake relief under s 102. The purpose of the section is to allow for situations where a taxpayer has made a bona fide mistake in a return. The need for a right to relief, rather than a mere administrative discretion to give it, is clear but a fair balance has to be achieved between equity and administrative convenience. There is no doubt that protection should be given to the taxpayer who has overstated his income and therefore subjected himself to a larger tax than he was liable to because many taxpayers do not understand all the intricacies and complications of the documents they are sent. People make mistakes because of complexity of the tax system and overpayments arise 'in consequence of some slip of memory or some failure to appreciate the reading of the very difficult forms we have to fill up.'

It cannot, however, be said, on an analysis of s 102, that the section gives the taxpayer equal rights (or any thing like it) with the tax collector in regard to rectifying cases of over-assessment. The section, as will be seen, is tightly drawn and by no means all who have overpaid tax can obtain relief.

Section 102 provides that the Commissioner MAY authorize a refund of any tax overpaid. However, it must be proved to HIS satisfaction that an amount in excess of that properly chargeable was paid. The exercise of his discretion has NOT been made subject to objection and appeal, which means that unless he does not apply his mind properly to a

particular application, there is nothing that can be done if he refuses it. This should be contrasted with a taxpayer's rights under the procedure laid down for objection and appeal, where a taxpayer may appeal against the Commissioner's decision to the Income Tax Special Court and against that court's decision, on a point of law, to higher courts. Clearly, it is preferable to make a valid objection rather than to rely upon an application for a refund.

The pre-requisites for a valid claim under s 102 are:

- (1) an excessive assessment
- (2) tax charged under it
- (3) payment of that tax by the claimant
- (4) an error or mistake in a return and
- (5) a causal link between that error or mistake and the excessive assessment.

Tax paid by the claimant on an excessive assessment

It is clear from the wording of s 102 that relief is unavailable if the tax has not already been paid. It is also clear that an assessment must have been made but will not be fatal where the tax was chargeable and payable otherwise than under an assessment (eg as in the case of non-resident shareholders' tax).

The term 'assessment' is defined in s 1 as meaning 'the determination by the Commissioner, by way of a notice of assessment served in a manner contemplated in s106(2), (a) of an amount upon which any tax leviable under the Act is chargeable or (b) of the amount of any such tax or (c) of any loss ranking for set-off.

In *Irvin & Johnson(SA)Ltd v CIR(5)* Watermeyer CJ said:

'Now the word 'assessment' is defined in the Act as 'the determination of an amount upon which any tax leviable under this Act is chargeable' unless the context otherwise indicates. An examination of various sections will show that the word is used in the Act in more senses than one. The word may denote something subjective, ie, the mental process or act of determining such amount, but it is more usually used to denote something objective, ie the visible representation by word and figures of that mental process. Subjectively, an assessment is an abstraction which has no real existence until it is published by being expressed in symbols which convey a meaning to others. So long as it is locked up in the mind of the assessing officer, who is not necessarily the Commissioner, it cannot be dealt with as required by the Act. Its particulars cannot be recorded by anyone except the assessing officer, they cannot be filed...the Commissioner cannot issue the assessment...nor can he alter it. It seems clear, therefore, that in most places in the Act the word 'assessment' does not mean the unexpressed thoughts of the assessing officer, but the written representation of those thoughts.'

It is at the assessment stage, then, that questions of liability would ordinarily arise and the

legislature contemplated that at that stage they should be settled.

An error or mistake

A taxpayer may apply for a refund under s 102 if he neglected to claim a deduction to which he was entitled, for example, if he did not claim an investment allowance on machinery or plant used in a process of manufacture or similar process. He may apply if an amount has been included in his income that he considers should not have been, for example, because it was of a capital nature or from a source outside South Africa. He may also apply if all that has happened is that a mistake was made in his assessment.

Section 102(1) merely uses the words 'in excess of the amount properly chargeable under this Act'. Its wording is much wider than s 33 of the Taxes Management Act 1970 which uses the words '...the assessment was excessive by reason of some error or mistake in a return.'

Silke(6) states:

'Tax overpaid under a mistake of law as well as of fact is refundable, subject to the provisions of s 102.'

Meyerowitz(7) states:

'The provision clearly covers a mistake of law on the part of the taxpayer, who would otherwise be without remedy. If there was such a mistake of law, it would even not matter that the taxpayer failed timeously to raise an objection. In *Crown Mines Ltd v CIR*(8) the Appellate Division did not decide, as there was no necessity to do so, whether the provision also extended to a mistake of fact although the Court a quo whose judgment was confirmed held so... There is, however, no indication, it is considered, that the provision is intended to apply only to a mistake of law. Where the Legislature wants to distinguish between fact and law, it says so, see eg section 86(1).'

In *Crown Mines Ltd v CIR*(9) Innes CJ said:

'Now it is at the assessment stage that questions of liability would ordinarily arise, and the legislature contemplated that at that stage they should be settled. Elaborate provision is made for lodging objections to an assessment, for the settlements of disputes arising therefrom, and for an appeal in all questions of law to the Superior Courts... And the position of a taxpayer, like the appellant company, who had failed timeously to raise an objection to the assessment, and who alleged an overpayment under a mistake of law, would ordinarily be hopeless. For no remedy by way of *condictio* would be open to him. Whether such a remedy would lie under similar circumstances in respect of an overpayment made under a mistake of fact is a point on which it is unnecessary to express an opinion.'

The dispute in the *Crown Mines* case related to a question of law and Innes CJ remarked-

'...and in the absence of such consideration as fraud, the taxpayer would, apart from section 95,[now s 102] be without remedy.'(10)

So too, the dispute in *Stroud Riley & Co Ltd v SIR*(11) concerned a mistake of law. In ITC 1544(12) Melamet J said:

'The claim for a refund was made in terms of s 102(1) of the Act alleging that the amount paid was in excess of the amount properly chargeable, in which event the Commissioner would be obliged to refund the overpayment irrespective of whether such overpayment was made under a mistake of law or fact.'

And Cloete J said in the *Stroud Riley* case(13):

'A careful reading of s 102(1) reveals that the intention of the enacting part thereof was clearly to empower the respondent to authorize a refund in all cases where it is proved to his satisfaction that there has been a payment in excess of the amount properly chargeable.'

In dealing with the equivalent s 95 of Act 41 of 1917 Innes CJ said in the *Crown Mines* case(14):

'Its terms have been substantially set out above, but its scope and object will be better realized when we consider the position which it occupies in the scheme of the Act. Speaking generally, assessment must precede payment; the obligation to pay only arises upon a due assessment.'

It should be noted that s 33 of the Taxes Management Act 1970 does not provide for a general right to recover tax not due but the right depends on proof of 'error or mistake.' It applies to errors and mistakes both of fact and law. In contrast, s 102, it is submitted, does provide for a general right to recover tax not due, subject, of course, to the parameters of the section.

Both the Taxes Management Act and our Income Tax Act give no direct guidance as to what is meant by an 'error or mistake' and there is very little case law on the subject in England and South Africa.

It would be safe to say that there must be some inaccuracy or incorrect belief, or some misconception, misunderstanding or false or mistaken view.

It has been said(15) that the words 'error or mistake' have a very wide meaning and although it would be impossible to describe all the circumstances they cover, the following would seem to be included-

- Omissions, eg some allowable expense may not have been deducted in the profit and loss account.

- Errors in original entries in the accounting records
- Arithmetical errors, eg errors in stock sheets
- Inadvertant errors of principle concerning tax law, eg a capital receipt counted as income
- A misunderstanding concerning the relevant facts relating to a transaction or event

In the Crown Mines case(16) the appellant asked the Supreme Court to review the statutory decision of the Commissioner refusing a refund of certain payments of dividend tax for the years 1917 and 1918 and to set aside the relative assessments for those years in so far as they related to those payments and to compel the Commissioner to authorize a refund of the amounts in question.

Some ten years back the company borrowed a million of money which had been used for purposes of 'capital expenditure' as statutorily defined. This debt was liquidated in the following year by the proceeds of debentures issued to cover the exact amount. These debentures were in course of redemption by the company at the rate of about £80 000 per annum. The company was assessed for dividend tax on these redemptions for the years 1917, 1918 and 1919. The tax in dispute was assessed and paid for the first two years in 1919 and for the third year in 1920.

The company's claim for a refund of the tax paid on the redemption amounts for the three years was fully debated at interviews between special representatives of the parties. It was advanced on various grounds. Two of them depended on the frame of the accounts and the third was based on the terms of s 38 of Act 41 of 1917.

The first two contentions were rejected in toto by the Commissioner and the third was allowed in respect of the 1919 assessment, because of the special provisions of the Income Tax Amendment Act of that year, but disallowed as regards the years 1917 and 1918.

As far as the merits of the alleged overpayment was concerned, s 38 defined the 'dividend distributed' upon which by an earlier clause (35) a tax at a specified rate was levied. The points which arose were whether the redemption amounts for the years in question fell outside the taxable limits as defined by the Act and, if so, whether the statutory decision of the Commissioner to the contrary could be disturbed.

In the Stroud Riley case(17) the taxpayer, a company resident in the United Kingdom, had paid non-resident shareholders' tax for certain years in excess of that properly chargeable in terms of the Income Tax Act read with the relevant provisions of the Double Taxation Agreement between the Republic of South Africa and the United Kingdom. The company had claimed a refund of all the tax overpaid.

Between the years 1965 to 1971 overpayments totalling R23 393 had been made by the

applicant's subsidiary company in respect of non-resident shareholders' tax on dividends declared by the subsidiary and payable to the applicant. It would seem that the tax was wrongly calculated and paid at rates between 7 1/2% and 15% in terms of s 45 of the Income Tax Act 1962, instead of at the rate of 5%, which was the maximum permissible rate under the relevant Double Taxation Agreement between the Republic of South Africa and the United Kingdom.

In ITC 1544(18) a Dutch company had held most of the shares in a company incorporated in South Africa. From its South African subsidiary it derived dividend income, from which non-resident shareholders' tax had been withheld in terms of s 42(1) of the Income Tax Act. It claimed a refund of this tax in terms of s 102(1).

The basis of its claim was that, as a non-South African company required to pay the tax on dividends received from a South African subsidiary, it was being discriminated against, since a South African company in similar circumstances would not be required to pay the tax. It accordingly claimed the protection of art 25 of the tax treaty between South Africa and the Netherlands.

This provides that the nationals of one of the states, whether they are residents of that state or not, are not to be subject in the other state to any taxation more burdensome than the taxation to which nationals of that other state in the same circumstances are subjected.

Melamet J, President of the Transvaal Special Court for Hearing Income Tax Appeals, noting that the sole criterion for the imposition of non-resident shareholders' tax in terms of s 42(1) is the taxpayer's nationality, held that this manifested a discrimination against the taxpayer and was offensive in terms of art 25. Moreover, s 108 of the Income Tax Act made that Act itself subject to the terms of a double taxation treaty once statutory status has been conferred on the treaty.

It followed that, in terms of art 25, which, in the light of s 108 governs s 42(1), no non-resident shareholders' tax was payable by the Dutch company as a national and resident of the Netherlands on the dividends that were paid to it by its South African subsidiary.

The taxpayer-company had claimed a refund in terms of s 102(1) of an amount of R1 330 833, 54 being the NRST it paid in terms of s 42(1) over the period 8 October 1987 to 30 June 1990 on dividends it received from a subsidiary company.

The Commissioner had rejected the claim and the taxpayer had raised an objection against his rejection and on this not being upheld it noted an appeal to the Special Court.

Although not discussed in the case, it is submitted that the facts revealed an error of law on the part of the Commissioner.

In CIR v City Deep Ltd(19) the taxpayer-company had been the holder of a right to mine

under a Bewaarplaats, granted in terms of s 52(2) of the Precious and Base Metals Act 35 of 1908(Transvaal).The consideration payable under this grant consisted of seventeen annual payments of £6, 560.In his assessment of the company for normal income tax, the Commissioner disallowed the deduction of this payment, as being an outlay of a capital nature.The company accepted this disallowance as being correct up to the year of assessment ended 30th June 1920, but appealed against the disallowance in respect of the year 1921.

The Special Court allowed this appeal and per incuriam made its order, amending the assessment, apply also to the 1920 year of assessment, the assessment for that year being before it on other grounds.

The Commissioner did not carry the question further, but refunded the appropriate amounts in respect of the years 1920 and 1921.The company then applied for a refund in respect of the year 1919 under the provisions of s 95 of Act 41 of 1917, the precursor to s 102.This application was refused by the Commissioner.

A few English cases will also demonstrate the application of 'error or mistake' relief.

In *Heastie v Veitch*(20) a firm of accountants carried on business from premises owned by the senior partner and although rent of £1 250 was paid each year, only £705(being the annual value of the premises) was deducted in the accounts.It was successfully claimed that the rent paid was deductible and that as a consequence error or mistake relief was due in respect of previous years.

In *Radio Pictures Ltd v CIR*(21) the company had a licence under which it could exploit motion pictures provided that it paid 70 per cent of the gross receipts to its American parent.Its accounts were prepared and audited on the basis that transactions with the parent company were sterling transactions, and the resulting profit was assessed accordingly.The company subsequently contended that the accounts were mistaken in showing the debts as sterling debts and claimed that corrected accounts showed heavy losses had been incurred.The company's contentions regarding the interpretation of the contract with its parent were successful, and consequently error or mistake relief was allowed for the years in which accounts had reflected some misapprehension or misconstruction of the document by the accountant.

In *Carrimore Six Wheelers Ltd v CIR*(22) the claim related to rents from the hiring out of an advertisement hoarding on part of the company's business premises.From 1931 to 1941 three consecutive firms of accountants acting for the company had deliberately, and with the knowledge and consent of the Inspector of Taxes, treated the rents as part of the trading profits.Assessments had been made accordingly.This treatment was for convenience of computation and assessment, but it was incorrect because the rent should have been assessed under the old Schedule A on the tenant.Indisputably there had been incorrect entries in the company's returns.

In 1941 the company adopted the correct treatment of the rental income and made an error or mistake claim for all years after 1934-35. The Revenue refused this claim on the grounds that the assessment had been made on a basis which had been deliberately adopted by the company and acceded to on behalf of the Crown, and that therefore they were not excessive by reason of any error or mistake by the company.

In the English provision an error or mistake by the Revenue is not the subject of this relief. This should be contrasted with s 102 where, it is submitted, a mistake made by the Revenue would also fall within the ambit of the section.

It is submitted that there is no need to distinguish, in terms of s 102, between a deliberately incorrect entry in a return from one made through sheer carelessness or ignorance.

In the English law unless a claim relates to an error or mistake in a return, no relief will be available. It is submitted that this is not the case in our law where s 102 provides much wider relief. Moreover, in England, because relief is only available where an assessment was excessive by reason of some error or mistake in a return, there has to be some causal link between the return and the excessive assessment, and not merely some arithmetical error in the assessment.

In our law the taxpayer only has to satisfy the Commissioner that he has paid an amount which was in excess of the amount properly chargeable under the Act. It would be obvious, though, that under our law there would also usually be a causal link between the return and the excessive assessment. However, in terms of s 102, it is submitted that the taxpayer would not be confined to relief only by reason of some error or mistake in a return.

By contrast, in Australia, it has been only for assessments for the year commencing on 1 July 1985 and subsequent years, that the Commissioner can now amend assessments to correct mistakes of law(22a).

Section 170 of the Income Tax Assessment Act 1936 gives the Commissioner a discretion to amend, subject to the section, at any time, any assessment by making such alterations therein or additions thereto as he thinks necessary, notwithstanding that tax may have been paid in respect of the assessment(23).

An amendment effecting a reduction in the liability of a taxpayer under an assessment is not to be made after the end of four years(24).

A taxpayer is able to obtain an amendment that will reduce his tax liability and this may come about by the taxpayer requesting the Commissioner to act on certain information provided by him and issue an amended assessment(25).

The Commissioner is empowered to amend an assessment by making such alterations to it or additions as he thinks necessary to correct an error in calculation or a mistake of fact or to

prevent avoidance of tax as the case may be(26).

Under the self-assessment system operating in Australia special provisions have been added to provide the Commissioner an extended time in which to review amendments favourable to taxpayers, where the Commissioner has relied on a taxpayer's statement. This provision allows the Commissioner to undo what was previously implemented under a taxpayer's self-assessment action(28).

Circumstances precluding relief

There are two limitations imposed on the Commissioner's power to grant a refund. Firstly, if an assessment was made in accordance with the practice generally prevailing at the time and was accepted by the taxpayer, no refund may be claimed. The practice referred to is the practice of the Department of Inland Revenue and is something more than the particular approach to assessments of a single Receiver's office. A true departmental practice is a means of filling a gap in the tax law or of interpretation of an unsettled matter or of granting a concession that is fairly widely adopted by offices throughout South Africa. For example, certain professional men who were once taxed on the so-called 'receipts basis' instead of the 'accruals basis'.

Secondly, a claim for a refund must be made within three years from the date of the assessment under which the tax was payable or, where such tax was chargeable and was payable under the Act otherwise than under an assessment, the date of payment of such tax, which date shall, for the purposes of s 102(2) be deemed to be the date of the official receipt acknowledging such payment or, where more than one such payment was made, the date of the official receipt acknowledging the latest of such payments. The term 'assessment' must be given the meaning it bears in the definition in s 1 of the Act and the 'date of assessment' is defined in s1 as the date specified in the notice of assessment as the due date, or, when no due date is specified, the date of the notice. The three-year period runs from the date of assessment and the Commissioner is prohibited from authorizing a refund if the claim for it is made after the three-year period. It is important to note that the restriction does not apply to the last three years of assessment. In fact, an assessment notice may be issued many years after the year of assessment to which it relates, or it may be a revised or additional assessment that takes the place of an original assessment issued some years ago. Any number of years of assessment may thus be involved as long as the dates of the relevant assessment notices fall within the three-year period.

In England a written notice of claim to relief has to be made to the Board of Inland Revenue not later than six years after the end of the tax year or accounting period in which the assessment was made. An assessment is made when the inspector signs the certificate in the assessment book and not when the notice of assessment is issued.

No guidance is given in s 102 on the form the claim should take, the section merely uses the word 'claim'. Clearly, the claim for a refund should provide the fullest possible information to

enable it to receive proper consideration.

Section 102(1) provides that

'no amount paid in respect of an assessment accepted by the taxpayer and made in accordance with the practice generally prevailing at the date of that assessment shall be deemed to have been otherwise than properly so chargeable.'

Silke states(29):

'The "practice generally prevailing" at the time, it is submitted, is the practice known to and applied by the Commissioner, whether it is founded on his own interpretation of the law or upon the then existing judicial interpretation of the law. Furthermore, it is considered that a "practice generally prevailing" is one that has been authorized by the Commissioner and is being applied throughout the country. For example, it cannot be said that a practice that has its origin in a local office of a receiver of revenue falls within the concept of a "practice generally prevailing". And it will not avail a taxpayer to invoke a new interpretation of the courts in support of a claim that earlier assessments made by the Commissioner were wrong, since, if those earlier assessments were made in accordance with the established practice of the Commissioner, the taxpayer has no right to a refund in terms of s 102.'

A recent decision of the Appellate Division, *CIR v SA Mutual Unit Trust Management Co Ltd*(30), deals with the question of what constitutes a 'practice generally prevailing'.

The question for determination in this case was whether the Commissioner was entitled to reopen an assessment and raise an additional assessment in terms of s 79(1) of the Income Tax Act in circumstances in which the taxpayer contended that he was precluded from doing so, since the original assessment allowing the deduction in full of the cost price of certain shares was issued 'in accordance with the practice generally prevailing' at the date it was issued. More particularly, the Appellate Division was called upon to determine whether, in the assessment of taxpayers who had carried on dividend-stripping operations at the relevant time, there was a generally prevailing practice that dividend-stripping losses should be allowed.

The soundness of the taxpayer's case depended upon the meaning to be attached to the words 'practice generally prevailing' and upon the evidence whether the taxpayer had discharged the onus of showing that a relevant practice generally prevailed at the time of the original assessment, on or about 1 April 1982, under which the Commissioner allowed dividend-stripping losses.

In his judgment in the Special Court, Berman J held that the words 'practice generally prevailing' related to-

'a practice which is both known to the Commissioner and which he has authorized for application by the various Receivers of Revenue in the Republic.'

He also held that the burden of proving the existence of such a 'practice generally prevailing' rested upon the taxpayer, who had

'to prove, on a preponderance of probabilities, that a practice generally prevailed at the time of [the taxpayer's] 1981 assessment allowing for losses such as that claimed by [the taxpayer] as a legitimate deduction.'

In his judgment Berman J had relied on 'Silke'(31).

The taxpayer led evidence at the hearing before the Special Court to the effect that it was the Commissioner's practice to allow such a deduction. Witnesses testified to circumstances in which such deductions had been allowed. But an official in the Commissioner's office testified that it was not the practice of Inland Revenue to allow losses incurred in dividend-stripping operations. In those instances in which such losses had been allowed, Inland Revenue had adopted a new system of assessment referred to as the 'auditing system', under which a taxpayer's return was initially accepted at its face value and an assessment issued accordingly. Thereafter, within the ensuing three years, the return would be thoroughly checked and investigated in order to determine whether the original assessment was correct.

The witness called by the Commissioner was at the time a member of the Law Interpretation section in the Commissioner's office. His section advised the Commissioner in tax matters. He explained how a practice became established within Inland Revenue. His evidence was summed up by Corbett CJ in this way:

'When Receivers experience a problem in assessment it is referred to the Commissioner's office. The Law Interpretation section then evaluates the problem and advises the Receivers what approach to adopt. This is done by circular minutes distributed to Receivers throughout the country. Subsequently the point is included in the official income tax handbook, distributed within the Department. The handbook is not available to the public. Receivers are not permitted to establish practices on their own.'

It was also of importance to note that, while there were some thirty receivers' offices in the country, the admissible evidence led by the taxpayer related to the allowance of such losses by only one such office, namely, the Johannesburg office.

On the meaning of a 'practice generally prevailing' Corbett CJ said:

'At all events, a practice "generally prevailing" is one which is applied generally in the different offices of the Department in the assessment of taxpayers and in seeking to establish such a practice in regard to a particular aspect of tax assessment it would not be sufficient to show that the practice was applied in merely one or two offices. Moreover, the word "practice" in this context, means "a habitual way or mode of acting" ...and consequently, in general, it would also not be sufficient to show that, in regard to an aspect of assessment, a certain attitude had been adopted by the assessors concerned only in some instances.'(32)

He was critical of the approach of Berman J in the Special Court(33):

'It seems to me, with respect, that what was stated by Berman J, as set forth above, places insufficient emphasis upon what is actually done in the different offices of the Department of Inland Revenue in the assessment of taxpayers. I also am of the view that it may be misleading to suggest as a requisite personal knowledge and approval of the practice on the part of the Commissioner. Although in terms of s 2(1) of the Act the Commissioner is the official responsible for carrying out the provisions of the Act, under s 3(1) the powers and duties thereby imposed upon him may be exercised or performed by him personally or by any officer engaged in carrying out the provisions of the Act 'under the control, direction or supervision of the Commissioner'.

Significantly, he added(34):

'The factum probandum was whether in the assessment of taxpayers who had carried on dividend-stripping operations there was a generally prevailing practice, in the sense described above, that dividend-stripping losses be allowed. The existence of such a practice could be established by showing that the Commissioner, or someone in the Department with the necessary authority, had issued a departmental directive to that effect and that this directive was being followed generally in the assessment of taxpayers; or by showing that in the general process of assessment dividend-stripping losses were consistently allowed in a sufficient number of cases to lead to the inference that such a practice was authorized and generally prevailed. These are factual matters to be decided by the court; and they are not matters in respect of which assistance may be derived from expert evidence as such.'

He held that the taxpayer had failed to discharge the onus of showing that as at the time of assessment there was a practice generally prevailing in terms of which the Commissioner allowed dividend-stripping losses. He continued(35):

'In my opinion, [the taxpayer] failed to discharge this onus. The general impression created by the evidence is that there was a measure of uncertainty in the Department, or in certain sectors of the Department, about the general question of the taxation of dividend-stripping operations, but that at the same time there are indications that the policy was to disallow tax losses incurred by companies in this way. There is certainly not proof, in my view, of a consistent and generally prevailing practice to allow dividend-stripping losses.'

Corbett CJ accordingly found that it had not been shown that the original assessment for the 1981 year was made in accordance with a practice generally prevailing at the time. Consequently, the Commissioner was not precluded by proviso (iii) to s 79(1) from issuing a revised assessment for that year.

In ITC 1495(36) evidence was given on behalf of the Commissioner by the Deputy Director of the Law Interpretation section of Inland Revenue, who testified that he knew of no practice prescribing that the provision for accrued leave was to be allowed as a deduction. He said that

recovery where many persons are affected by the same error and a right to recover might thus disrupt the conduct of Revenue business or even of government finances.

In the case of *Rose Smith & Co Ltd v CIR*(39) the company held railway wagons under hire purchase agreements and used them for the purposes of its trade. The accounts showed a deduction for hire spread evenly over the period of the agreements, (the 'even-spread method'). An alternative method of calculation, (the 'actuarial method'), would have resulted in greater deductions in the earlier years of the hire purchase agreements and lesser deductions in the later years. Shortly after the Special Commissioners had decided in another case that the 'actuarial method' was allowable for tax purposes, the company claimed error or mistake relief on the grounds that it had mistakenly used the 'even-spread method'. The Revenue admitted that for the future the company was entitled to be assessed on the basis of the 'actuarial method', but argued that as the practice generally prevailing at the time the company made its returns was the 'even-spread method', no relief was due for prior years.

Evidence was given by an Inspector from Head Office who provided a copy of the instructions to local inspectors which specified that only the 'even-spread method' be used, and who stated that in his experience these instructions were generally followed. This was confirmed by the inspector dealing with the company. The Special Commissioners accepted this evidence, were satisfied that the practice generally prevailing had been the 'even-spread method', and refused the claim.

The only other case in England in which the question of the practice generally prevailing reached the courts was *Arranmore Investment Co Ltd v IRC*(40).

In that case a land investment company had entered into transactions prima facie liable to tax under certain provisions now obsolete and its accountants had submitted computations relating to these transactions based on their understanding of the legislation. Assessments were raised accordingly, but after they had become final and conclusive the Special Commissioners decided in a certain case that no liability attached to the type of transactions entered into by the company. The Revenue accepted this decision and acted upon it in similar cases. On hearing of this a s 33 claim was submitted by the company's accountants, but was refused by the Board on the grounds that the 'practice generally prevailing rule' prevented relief.

When the case came before the Special Commissioners evidence was given by an official from HM Chief Inspector of Taxes (Property) of his experience of assessments made under the relevant charging provisions. He produced a copy extract of the relevant instructions to local inspectors and stated that in his experience not only had those instructions been generally followed, such that before any inspector departed from them he would refer to the Chief Inspector for advice, but also there were many taxpayers who had accepted the liability negotiated at local level in accordance with the interpretation of the law reflected in those instructions. The local inspector dealing with the company gave evidence supportive of the assertions of his Head Office colleague.

guidelines were laid down only when a discretion had to be exercised. He also testified that there was nothing in the official Handbook dealing specifically with leave pay. Moreover, not all precedents quoted in it indicated a departmental practice. It and various circulars were intended for departmental use only and were not available to the general public.

Melamet J found that the taxpayer had failed to prove that there was a 'practice generally prevailing' at the time when the original assessments were issued precluding the subsequent issue of the additional assessments.

He observed that the words 'practice generally prevailing' do not have a technical meaning and must bear their ordinary grammatical meaning. The onus rested on the taxpayer to prove the existence of the practice at the time the disputed assessments were issued. It was required to show, on a balance of probabilities, that such expenditure was routinely allowed by receivers of revenue throughout the country, with the Commissioner's knowledge and consent.

In England, even though all the conditions and formalities for a valid claim for a refund of tax have been satisfied, no relief will be given 'in respect of an error or mistake as to the basis on which the liability...ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made.' (37)

Interestingly, our s 102 dates the practice generally prevailing at the date of the assessment, whereas the English provision dates it at the time when the return was made.

D Stopforth (38) comments:

'This restriction [the proviso to s 33(2)] was apparently inserted to meet the type of case where a generally accepted practice, thought by the taxpayer and the Revenue to be in accordance with the law at the time of making the return, is later shown to be incorrect as a result of a decision in the courts or legal advice given to the Revenue. Although such a decision or advice might necessitate legislation to correct the position for the future, many taxpayers will have agreed their assessments on the basis of the previous view of the law. Because of this, it was decided in 1923 that taxpayers who had been assessed in accordance with the original practice, and whose assessments had become final and conclusive before the change of practice, should not be allowed to base error or mistake claim on what was subsequently shown to be their mistaken view of the law.'

On the meaning of the words 'the practice generally prevailing' he writes (39):

'...it appears there is a practice if there is an established way of dealing with a particular type of transaction, (as may be shown from Revenue instruction manuals), it prevails if it is most frequent, and it is general if it is widely used.'

It is clear that this limitation appearing in both s 102 and s 33(2) is designed to preclude

Given this evidence the Special Commissioners found

'that there was a practice which prevailed generally during the relevant...periods, namely, that...[in] instructions issued by the Chief Inspector of Taxes, [and that] the effect of that practice was the charging and acceptance of liability to tax in circumstances such as existed in the present appeals'.(41)

An interesting aspect is the issue of practice notes by the Commissioner, especially where they reflect a changed view of the law. The question is whether that changed view is only effective from the day of the announcement. It would be normal to state that the revised practice only applies to assessments which have not become final and conclusive and say nothing about error or mistake relief. Relief under s 102 may be available in such circumstances.

The Commissioner's discretion and appeal

As has been seen, s 102 provides that the Commissioner may authorize a refund of any tax overpaid but it must be proved to HIS satisfaction that an amount in excess of that properly chargeable was paid. The exercise of his discretion has not been made subject to objection and appeal.

There are many circumstances in which the Income Tax Act makes an issue depend on the opinion of the Commissioner.

The words 'in the opinion of' are equivalent to the words 'the discretion of the Commissioner' or 'when the Commissioner is satisfied.'

Silke states(42):

'It is trite law that when a matter is left to the discretion of an official, his decision, even if erroneous, cannot be interfered with, provided that he has applied his mind to the point and has exercised his discretion bona fide and his decision was not in conflict with statutory provisions or the decisions of competent courts of law. The Commissioner, in exercising a discretionary power under the Income Tax Act, may not deliberately disregard the provisions of a statute; neither may he ignore the law as laid down by a competent court of law. Such action on his part would constitute evidence that he had not applied his mind to the matter. These considerations apart, the Commissioner's discretion, bona fide and honestly exercised, is free and unfettered.

And(43):

'When he has exercised a discretionary power conferred upon him, the question is not whether he was right or wrong. The sole question is whether he has duly considered the matter. As long as there is no decision of a competent court to the contrary, he has not disregarded the provisions of a statute and his bona fides in the view he took of the matter

cannot be questioned, he is not only entitled but bound to give effect to his opinion.'

Section 102 falls within that category of discretionary power where the exercise of the Commissioner's discretion is not made subject to appeal but at the same time appeal has not been expressly excluded. The result of this is that the Commissioner's discretionary powers are subject to examination by the Special Court. However, in contrast to the position where a decision of the Commissioner is expressly, in terms of the Act, subject to objection and appeal and where there would flow a re-examination of the facts by the Special Court and a decision on those facts, in this case where the discretionary decision of the Commissioner is not expressly stated to be subject to objection and appeal, the taxpayer can object in terms of the general provisions of s 81 and, thereafter, appeal to the Special Court in terms of s 83(1). In such a case the appeal is in reality a review of the Commissioner's decision on the normal grounds of review(44).

It must now be considered as being settled that the Special Court does have the jurisdiction to conduct a review of the exercise by the Commissioner of an administrative discretion.

Meyerowitz and Spiro state(45):

'The Special Court has power to review the exercise of the Commissioner's discretion. Having regard to the ratio of the cited decisions, it would seem that the taxpayer who wishes to take the Commissioner on review to the Special Court would, despite the fact that the discretion is not made subject to objection, have to follow the same procedure envisaged by objection and appeal in order to avoid the assessment becoming final and binding in terms of s 81(5), namely to lodge an objection within the time limit stipulated for objection setting out the ground for review and thereafter appealing should the objection not succeed. Where the taxpayer is not aware of the reasoning or motivation of the Commissioner in exercising his discretion (as may well happen) he may have to safeguard himself by contending for more than one possible ground of review.'

Where a taxpayer wishes to bring review proceedings under s 102 before the Special Court, the approach would still have to be by way of the objection and appeal provisions in the Income Tax Act. However, in these circumstances, the taxpayer must be careful, when drafting his objection, to raise appropriate grounds for review. One cannot simply approach the Special Court by way of a conventional appeal.

The grounds on which the court will review an exercise of an administrative discretion were described by Innes ACJ in *Shidiack v Union Government (Minister of the Interior)*(46):

'There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of the statute- in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the

decision inequitable or wrong.'

It will immediately be seen that the taxpayer faces formidable hurdles when attacking the Commissioner's discretion as exercised in terms of s 102(1).

Once the Commissioner has duly and honestly considered and determined the matter entrusted to him, his decision is final and this means that no remedy lies on the merits and the correctness or equity of the decision cannot be questioned.

The case of *Crown Mines Ltd v CIR*(47) well-illustrates these issues.

The facts were that the taxpayer company, which had carried on the business of mining for gold, had been assessed for dividend tax under the provisions of ss 35 and 38 of Act 41 of 1917 in respect of the years 1917 and 1918 and had paid the amounts of tax so assessed. In May 1920 the taxpayer, considering on further review of these assessments that they had been wrongly made, submitted a claim for refund to the Commissioner, requesting him to exercise, in favour of the company, the powers conferred on him by the then s 95 of the Act, the predecessor to s 102.

The Commissioner, after discussion with the representatives of the taxpayer company, in the exercise of the discretion conferred on him by s 95, refused the application for the refund of the amounts paid.

The taxpayer company then applied to the Witwatersrand Local Division of the Supreme Court for an order declaring that the assessments had been incorrectly made and requiring the Commissioner to exercise in its favour the powers of refund conferred on him.

The Witwatersrand Local Division, while expressing the opinion that the sums paid were not properly chargeable under the Act, held that the terms of the section left the decision whether a refund should be made to the discretion of the Commissioner, whose decision, made after going honestly into the facts and hearing the arguments of the taxpayer, could not be interfered with by the court.

The Appellate Division held, dismissing the appeal with costs, that the provisions of s 95 clearly revealed that it was the intention of the legislature that such a case as the present, in which the taxpayer had accepted and paid the assessment and now contended that it had been wrong in law, should be left in the hands of the Commissioner, who was empowered to authorize a refund, but only if it was proved to his satisfaction that there had been a payment in excess of the amount properly chargeable; his judgment was to be the sole test and in the absence of any fraud or failure on his part to apply his mind to the point at issue, neither of which conditions was present in the instant case, his decision was final.

Innes CJ(with whom De Villiers JA and Juta JA concurred) said:

'Now it is at the assessment stage that questions of liability would ordinarily arise, and the legislature contemplated that at that stage they should be settled. Elaborate provision is made for lodging objections to an assessment, for the settlement of disputes arising therefrom, and for an appeal in all questions of law to the Superior Courts... And the position of a taxpayer, like the appellant company, who had failed timeously to raise an objection to the assessment, and who alleged an overpayment under a mistake of law, would ordinarily be hopeless. For no remedy by way of *condictio* would be open to him. Whether such a remedy would lie under similar circumstances in respect of an overpayment made under a mistake of fact is a point on which it is unnecessary to express an opinion.'(48)

The Chief Justice continued:

'The dispute here relates to a question of law, and in the absence of such consideration as fraud, the taxpayer would, apart from section 95, be without remedy. It was in view of that position that the clause in question was inserted. And its terms clearly reveal the mind of the lawgiver. The intention was to leave such a case in the hands of the Commissioner; he is empowered to authorize a refund, but only if it is proved to his satisfaction that there has been a payment in excess of the amount properly chargeable. His judgment is to be the sole test. The language used is not intended to give effect to a legal right; and it is wholly inconsistent with the idea that the taxpayer is entitled to demand anything except that the Commissioner shall consider the case. Having considered it, his decision is final.'(49)

Innes CJ's statement that the language used in s 102 (formerly s 95) is not intended to give effect to a legal right and was wholly inconsistent with the idea that a taxpayer was entitled to demand anything except that the Commissioner should consider the case, goes to the heart of the taxpayer's disadvantage when seeking relief under s 102. It is submitted that the taxpayer's position is extremely weak in relation to the Commissioner's in the operation of the section as in drafting the legislation administrative considerations favourable to the Commissioner were allowed to dominate. The Crown Mines case clearly illustrates the unfairness of the position where a court, whether it be the Supreme Court, or the Special Court, comes to the conclusion that amounts paid by the taxpayer were not properly chargeable under the Act but is powerless to overthrow the Commissioner's decision because there is no express right of objection and appeal accorded to the taxpayer in terms of the section.

It is submitted that s 102 should be amended to provide expressly for a right of objection and appeal to the taxpayer so that the full impact of the relief superficially offered by the section can be put into effect.

Innes CJ was of the view that the rule laid down in *Shidiack's* case governed the case and that the question of a refund

'has been left by the statute to the judgment of the Commissioner, and that the Court cannot interfere with the result of a due expression of such judgment.'(50)

Innes CJ noted that the taxpayer's counsel 'strove hard to bring the case within the operation of such circumstances'. He said(51):

'He[the Commissioner] has no right to authorize a refund until satisfied that there has been a payment "in excess of the amount properly chargeable under this Act"; he must, therefore, ascertain what that amount is- a process which necessarily involves an interpretation of the statute. Nor is there ground for holding that he disregarded any express provision of the Act; his attention was pointedly called to section 38, and even if he misinterpreted it, that would not prove that he disregarded it. I can find nothing to show that either in procedure or otherwise he disregarded any express statutory provision.'

It was also argued that 'the facts were so clear that no reasonable man could doubt that there had been an excess payment of tax'. But the court was not prepared to say that the conclusion arrived at on that point was so unreasonable as to justify the inference that there had been no real exercise of judgment.

In another case, CIR v City Deep Ltd(52), also an Appellate Division judgment, and also one dealing with refunds under s 95 of Act 41 of 1917, the taxpayer had applied for a refund and the application had been refused by the Commissioner. Thereupon, on a motion to the Transvaal Provincial Division, for an order compelling the Commissioner to review his decision, cancel the assessments and refund the tax paid, the taxpayer obtained an order referring the matter back to the Commissioner with a direction to exercise his discretion with due regard to the views expressed by the court as to the meaning and object of s 95.

In accordance with this order the Commissioner reconsidered the application, but advised the company that he was not satisfied that the amounts paid by the company were in excess of the amounts properly chargeable under the Act, and was, therefore, unable to accede to the request for a refund.

On receipt of this decision the company once more moved the Transvaal Provincial Division for an order in similar terms to that previously claimed, on the grounds that the Commissioner had disregarded the directions given in the order granted by the court and then obtained a mandatory order setting aside the assessments made and ordering a refund. The Commissioner appealed against this order.

It was held, allowing the appeal, that the Commissioner's discretion under s 95 was free and unfettered and that so long as his exercise of that discretion was bona fide and his decision was not in conflict with statutory provisions or the decisions of competent courts of law, it was not subject to review.

De Villiers JA said(53):

'Undoubtedly the Commissioner could not disregard deliberately the provisions of a Statute any more than he could be allowed to ignore the law as laid down by a competent court of

law. To have done so, would, in the absence of explanation, be evidence that he had not applied his mind to the matter. But apart from that the Commissioner's discretion, bona fide and honestly exercised, was free and unfettered. He was not bound by the ruling of the Special Court, which, though a competent court to decide the issues between the parties, was not a Court of law. The question was not whether the Commissioner was right or wrong. The sole question was whether he had duly considered the matter. As there was no decision of a competent Court to the contrary and his bona fides in the view he took of the nature of the annual payment was not questioned, he was not only entitled but bound to give effect to his opinion. Any other course would be in direct conflict with the Statute casting the duty of decision upon him.'

However, in ITC 1544(54), where the taxpayer claimed a refund in terms of s 102(1) of NRST paid in terms of s 42(1) of the Act, and the Commissioner had rejected the claim, the taxpayer successfully noted an appeal to the Transvaal Special Court for a refund.

Interestingly, Melamet J approached the hearing as an 'appeal' and made no mention in his judgment of the fact that the matter was before him on review. He also made no mention of the ground of review that he was applying in the circumstances of the case. He merely set out the grounds of appeal. On appeal no evidence was led and the facts in the matter were not in dispute.

At the conclusion of his judgment he states:

'In the result the appeal succeeds and the Commissioner is ordered to refund to the appellant the amounts paid to him as NRST on behalf of the appellant during the period 8 October 1987 to 30 January 1990.'

However, once the Special Court has found that an administrative discretion was improperly exercised, the matter must be remitted to the Commissioner to enable him to exercise his discretion correctly. The court cannot, in these circumstances, substitute its own decision for that of the Commissioner.

If a taxpayer wishes to bring review proceedings before the Special Court, he must ensure that one of the grounds of his objection clearly indicates that, to the extent that the assessment under objection is dependent upon the exercise of a discretionary power, such a decision is assailable on one or other of the usual review grounds.

Melamet J's approach must be viewed in the light of the fact that withholding taxes are payable other than under assessment but, it is submitted, the Commissioner's discretion to refund in terms of s 102(1) would still be operative.

The approach of the court in *Stroud Riley & Co Ltd v SIR*(55) accords with the procedures set out in s 102. In that case the Commissioner had satisfied himself that the amount of tax paid was in excess of the amounts properly chargeable under the Act.

Another feature of this case has been dealt with in *The Taxpayer*(56):

'As a result of this decision[ITC 1544] numerous taxpayers are now applying for a refund of NRST in terms of section 102(1) of the Act in so far as NRST has been paid within the last three years. Although section 102(1) provides that no amount paid in respect of an assessment which has been accepted by a taxpayer and made in accordance with the practice generally prevailing at the date of that assessment shall be deemed to have been otherwise than properly so charged, withholding taxes are payable other than under assessment. Hence the defence of the proviso to section 102(1) is not open to the Revenue. Furthermore, it does not appear that the recent amendment of section 42(1) has been made retrospective.'

It is quite correct that the proviso is limited to 'an amount paid in respect of an assessment' and NRST is payable under the Act otherwise than under an assessment.

The Taxpayer(57) makes a further interesting comment:

'It could also be argued that as payment of NRST had been made under a mistake of law and not because of a practice generally prevailing, companies which wrongly paid NRST can recover the tax under the common law remedy of the *condictio indebiti*, the Appellate Division in *Willis Faber Enthoven(Pty)Ltd v Receiver of Revenue* and another 1992(4)SA 202(A) having recently held that a mistake of law was not a bar to this remedy. Having said all this, we understand that the Revenue Department is making refunds on application.'

The relationship between the statutory provision, s 102, and the common law, will be discussed in a later section. Suffice it to say that the operation of a statutory provision providing for a refund may supersede a taxpayer's common law remedy (cf the *Woolwich Building Society* case.).

Lastly, mention must be made of s 3(2) which limits the period during which the Commissioner can withdraw or amend a discretionary decision to two years from the date of the written notification of such decision or of the notice of assessment giving effect thereto, if all the material facts were known to the officer when he made his decision.

In terms of s 102(2) a claim for a refund must be made within three years of the date of an assessment under which the tax was payable or, where the tax was chargeable and was payable other than under an assessment, the date of payment of the tax. Then, a taxpayer claiming a refund in those periods, must bear in mind that, he must note his objection within two years of receiving the Commissioner's notice of refusal of the claim, otherwise, in terms of s 3(2), it would no longer be competent for the Commissioner to further revise his original decision which has to stand.

In England if the claim for a refund is valid, the formalities have been satisfied, and the return was not in accordance with the practice generally prevailing at the time it was made, the Board is required by s 33(2) of the Taxes Management Act to inquire into the matter and

give relief by repayment of such an amount as is reasonable and just. Relief is by repayment without adjustment of the excessive assessment, as no power is given in the section to alter an assessment which has become final and conclusive.

In terms of s 81(5) of our Act-

'Where no objections are made to any assessment or where objections have been allowed or withdrawn, such assessment or altered or reduced assessment, as the case may be, shall, subject to the right of appeal hereinafter provided, be final and conclusive.'

It is submitted that s 102 does not interfere with the finality of assessments in the sense that in our law, as well, relief is by way of refund and there is no provision in the Act providing for an adjustment of an excessive assessment.

Obligation of the Commissioner to act

In *Stroud Riley & Co Ltd v SIR*(58) the court, having decided that the company was entitled to claim a refund of the NRST that had been overpaid, held(58):

'It seems to me that in dealing with a matter of this nature the respondent[the Commissioner] is required firstly to enquire into the facts. If after such enquiry he is satisfied that the amount paid is in excess of the amount properly chargeable under the Income Tax Act, he is bound, as a matter of duty, to authorize the refund to the taxpayer. This seems to be the clear effect of the decisions quoted above. In the latter respect he has no discretion in the matter in spite of the use of the word 'may' in the section which authorizes him to make a refund.'

In dealing with a similar provision in the Australian legislation, it was held in *Finance Facilities(Pty)Ltd v Federal Commissioner of Taxation*(59):

'If the Commissioner, having considered the matter, is satisfied of facts out of which the power to allow the rebate arises, he cannot nevertheless refuse to allow it.'

In the *Stroud Riley* case Cloete J continued(60):

'In the present case the respondent[the Commissioner] has satisfied himself that the amount of tax paid was in excess of the amounts properly chargeable under the Act. The facts have therefore been established by him out of which his power to authorize a refund has been established and in terms of the authorities quoted above there now rests upon him a duty to authorize the refund.'

In *CIR v City Deep Ltd*(61) De Villiers JA in dealing with s 95 of the Income Tax Act of 1917, the predecessor of the present s 102(1), said:

'Section 95 of the Income Tax Act of 1917 casts a duty upon the Commissioner to authorize

a refund to any taxpayer of any tax overpaid where it has been proved to his satisfaction that the amount paid is in excess of the amount properly chargeable under the Act.'

He then said(62):

'The sole question is whether the Commissioner has duly considered the matter. Now as there is no decision of a competent court of law to the contrary and the commissioner's bona fides in the view he takes of the nature of the annual payment is not questioned, he is not only entitled but bound to give effect to his opinion. Any other course would be in direct conflict with the Statute which casts upon him the duty of authorizing a refund only in the case where it has been proved to his satisfaction that the amount paid is in excess of the amount properly chargeable under the Act. And that disposes of the matter.'

The provisions of s 102 empower the Commissioner to take action and, in fact, amount to a directive to take action.

Assessed losses

What happens if a taxpayer discovers that an assessed loss that he incurred in a particular year should have been a larger amount than that calculated by the Commissioner?

Although s 102 authorizes a refund 'of any tax overpaid' and consequently does not appear to apply to an assessment that shows an assessed loss rather than an amount of tax due, the Commissioner does permit an assessed loss of an earlier year to be increased, even if no refund of tax is involved.

The three-year limit would still apply in these circumstances, although the Commissioner has been known to grant a refund of tax overpaid on an assessment made within the three-year period as a result of the understatement of an assessed loss brought forward from earlier assessments. In other words, he has adjusted the balance of assessed loss brought forward to the first assessment in the three-year period to allow for errors made in assessments before the three-year period. Silke states(63):

'Since s 102(1) refers to a refund 'of any tax overpaid' , it clearly provides for a situation in which a taxpayer actually paid tax. If a taxpayer had an assessed loss and consequently never paid tax in a particular year, it seems that s 102 cannot apply.'

However, Silke then goes on to describe the Commissioner's practice.

Interest

A taxpayer is not entitled to interest on any overpayment refunded to him in terms of s 102. Section 102 contains no provision for the payment of interest by the Commissioner on amounts refunded.

Interest is paid by Inland Revenue on a refund of tax resulting from the withdrawal of the Commissioner from a case prior to its being heard by the Special Court, that is, after an appeal has been lodged.

Section 88 provides-

'...but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the special court or such court of law a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate, such interest being calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received....'

It could be argued, however, that in circumstances where the taxpayer has paid interest on overdue payments in terms of s 89(2) and they are subsequently refunded by the Commissioner in terms of s 102, no interest would be paid on the tax refunded.

Returns

As has been seen, in England error or mistake relief is only given 'by reason of some error or mistake in a return'. Section 102 accords relief if it is proved to the Commissioner's satisfaction that the taxpayer has paid an amount in excess of the amount properly chargeable under the Act.

However, the importance of the return in determining error or mistake in South Africa must not be under-estimated.

The statutory requirements for returns must also, then, be borne in mind.

As is stated by Meyerowitz (64):

'The medium through which the assessment, ie determination of the amount upon which income tax is leviable, is arrived at is the "return".'

He continues to observe that there is no definition of the term 'return' in the Income Tax Act and that 'return' must be distinguished from 'form of return' with which it is often confused. In s 66(1)(a) the Act speaks of 'returns for the assessment of the tax' and frequently reference is made to the 'return of income' which must be 'full and true'.

Meyerowitz(65) attempts his own definition of a 'return' in this way:

'In the premises "return", it is considered, means the information required of, or given by, the taxpayer, as the case may be, which is necessary to enable the Commissioner to determine the income subject to tax for the year of assessment.' A return must be accompanied by all such balance sheets, trading accounts, profit-and-loss accounts and other accounts of whatever

nature as are necessary to support the information contained in the return.

Where there is an error or mistake in a return there will be a causal link between the return and the excessive assessment, and not merely some arithmetical error in the assessment.

Other overpayment provisions in the Income Tax Act

If a taxpayer's income for any tax year ending on or after 28 February 1983 consisted solely of 'remuneration' and he was not required to and did not render a return of income for that tax year he would not be entitled to a refund of any employees' tax deducted or withheld from his remuneration unless he lodged his claim for the refund within three years from the end of the relevant tax year.

Even then, he would not be entitled to a refund unless the employees' tax deducted or withheld from his remuneration exceeded his actual liability for tax by at least R2. By the same token, the Commissioner is not allowed to recover tax underpaid by the taxpayer where his actual liability for tax falls short of the amount of employees' tax deducted or withheld from his remuneration unless the shortfall is at least R10. (Section 102A)

If in respect of any year of assessment the amount of employees' tax deducted or withheld (plus any provisional tax paid for that year plus any amount standing to the taxpayer's credit) exceeds the amount of his total liability for the taxes against which it is to be set off, the excess must be refunded to him. If there is a shortfall, the taxpayer must pay the excess as provided in the assessment notice. If an amount in excess of the amount due to the taxpayer is refunded, the Commissioner may recover the excess as if it were a tax and the excess must forthwith be repaid. (Paras 28(1) and 28(7) of the Fourth Schedule to the Income Tax Act 58 of 1962.)

Should it emerge at the end of a tax period that an employee's net remuneration from his employer was subject only to SITE but the total employees' tax actually deducted by the employer exceeds the SITE required to be deducted, the employer will be obliged to repay to the employee the excess of the employees' tax deducted by him over the SITE required to be deducted. He may then deduct the refund from any subsequent payment of employees' tax due by him to the local receiver of revenue, alternatively, it will be refunded to him by the local receiver.

Should the amount of employees' tax deducted differ from the amount of SITE that ought to have been deducted by no more than 2%, it will be deemed to be correct and no adjustment need be made. (Paras 11B and 29 of the Fourth Schedule.)

An employer is required to determine the annual tax (SITE) in accordance with the form setting out personal particulars or fresh form furnished by the employee. It can be seen that SITE is not refundable, in other words, a taxpayer will not receive a refund should the SITE amount exceed his assessed liability. This could happen, eg, where the employee has not

furnished his true personal particulars to his employer or is entitled to an exemption or deduction not taken into account in determining his remuneration for employees' tax.

The Fourth Schedule uses the words-

'shall be deemed to be an amount of SITE correctly determined under those provisions.'

In an article in the Taxpayer(66) it is stated:

'Employees should furthermore be informed that the SITE determination which is done annually at the end of February or at the end of a tax period is also based on the particulars contained on the latest IRP 2 form submitted and that such SITE determination at the end of the tax year or tax period is final. The Receiver of Revenue may in certain circumstances, redetermine SITE but NOT WHEN AN EMPLOYEE HAS NEGLECTED TO SUBMIT OR UPDATE HIS PERSONAL PARTICULARS on the prescribed IRP 2 form in which case a refund of any possible tax overdeductions cannot be considered.'

It has not been considered whether s 102, which authorizes a refund of amounts paid that are in excess of the amount properly chargeable, would be of application in these circumstances.

It has been submitted(67) that an employee who has overpaid SITE will have resort to s 102 in order to obtain a refund of his overpayment.

It is submitted that the fact that SITE is deemed to be correctly determined under certain circumstances does not preclude the taxpayer from invoking s 102. This situation must be contrasted with s 81 which provides that an assessment, under certain circumstances, will be final and conclusive, yet s 102 is operative.

Section 102 refers to 'any tax overpaid' and 'tax' is defined in s 1 as any levy or tax leviable under the Act.

Although para 11B of the Fourth Schedule contains no provision entitling a taxpayer who is liable solely to SITE to demand to be assessed to tax, it is submitted that s 102(2) provides for the situation where tax is chargeable and payable under the Act otherwise than under an assessment.

Although a SITE determination may be amended by the Commissioner only under the provisions of para 11B(4), it is submitted that his discretionary power under s 102 is not thereby excluded.

Finally, it is submitted that a taxpayer's rights under s 102 can only be excluded where the Act expressly so excludes its operation or the circumstances of the refund do not fall within the ambit of the Act.

Alternatively, under the common law, there may well now be relief for employees who have mistakenly or in error furnished the wrong particulars to their employer on form IRP 2. This can be submitted in the light of the recent Appellate Division decision of Willis Faber Enthoven (to be discussed further).

It is also submitted that because an employer may be acting on behalf of an employee or representing him in relation to the Commissioner, this on its own would not preclude an employee from making an error or mistake claim under s 102 or under the common law.

Section 102(2)- application to taxes

Section 102(2), providing for taxes otherwise than under an assessment, includes

- * non resident shareholders' tax
- * withholding tax on royalties and 'know-how' payments
- * donations tax

FOOTNOTES

(1) See also s 95 of the Income Tax Act 1917.

(2) 1974(4)SA 534(E), 36 SATC 143.

(3) 1988(2)SA 765(A), 50 SATC 9.

(4) s 17(2) of the Income Tax Act 70 of 1989 retroactively sanctions any interest paid by the Commissioner in violation of the provisions of s 88 prior to its amendment by s 17(1) of that Act. It comes into operation if, prior to the commencement of s 17(1) of that Act (that is, prior to 9 June 1989), the Commissioner conceded an appeal 'in accordance with generally prevailing practice.' If he in consequence paid the taxpayer concerned interest, that will be deemed to have been properly payable under s 88, notwithstanding anything to the contrary it contained prior to its amendment by s 17(1) of Act 70 of 1989.

(5) 1946 AD 483 at 486; 14 SATC 24.

(6) Silke on South African Income Tax 11 Memorial ed by C Divaris and M L Stein para 18.34 at 18-85.

(7) Meyerowitz and Spiro on Income Tax by D Meyerowitz and E Spiro, para 1988 at 879.

(8) 1922 AD 91 at 100-1.

(9) 32 SATC 190 at 195.

(10) Ibid, at 195.

(11) 36 SATC 143.

(12) (1992) 54 SATC 456 at 459.

(13) 36 SATC at 149.

(14) 32 SATC 190.

(15) Stopforth, 'Error or Mistake Relief' (1989) 5 BTR 151; Simon's Taxes, Division A 3.10.

(16) 32 SATC 190.

(17) 36 SATC 143.

(18) (1992) 54 SATC 456.

(19) 1 SATC 18.

(20) (1933) 18 TC 305.

(21) (1937) 22 TC 106.

(22) (1944) 28 TC 422.

(22a) See further Commissioner's Ruling IT 2444, where he sets out his policy for the exercise of this new power.

(23) s 170(1).

(24) s 170(3).

(25) s 170(3).

(26) s 170(2).

(27) Taxation Laws Amendment(Self Assessment)Act 101 of 1992 has inserted s 170(1A) into the Income Tax Assessment Act 1936.

(28) see further Australian Income Tax Law and Practice (12 ed) Vol 9 (1991).

- (29) Silke on South African Income Tax 11 Memorial ed para 18.34 at 18-84.
- (30) 1990(4) SA 529(A), 52 SATC 205.
- (31) Silke on South African Income Tax(1982) 10ed para 18.34; (1989) 11 ed para 18.34 at 18-84.
- (32) 52 SATC at 216.
- (33) 52 SATC at 215-6.
- (34) 52 SATC at 218.
- (35) 52 SATC at 222.
- (36) (1990) 53 SATC 216.
- (37) s 33(2) proviso, Taxes Management Act 1970.
- (38) 'Error or Mistake Relief' by D Stopforth, 5 BTR (1989) 151 at 161.
- (39) (1933) 17 TC 586.
- (40) [1973] STC 195.
- (41) [1973] STC at 200.
- (42) Silke on South African Income Tax 11 Memorial ed para 18.29 at 18-69.
- (43) Ibid, at 18-69.
- (44) KBI v Transvaalse Suikerkorporasie Bpk 1985(2)SA 668(T), 47 SATC 34.
- (45) Meyerowitz and Spiro on Income Tax, supra, at para 1945.
- (46) 1912 AD 642 at 651.
- (47) 32 SATC 190.
- (48) at 195.
- (49) at 195.
- (50) at 195.

- (51) at 195-6.
- (52) 1 SATC 18.
- (53) 1 SATC at 19-20.
- (54) (1992) 54 SATC 456.
- (55) 36 SATC 143.
- (56) *The Taxpayer*, Vol 41 No 11(November 1992) at 211.
- (57) *supra* at 211.
- (58) Per Cloete J, 36 SATC at 151.
- (59) (1971) 2 ATR 573 at 578.
- (60) 36 SATC at 151.
- (61) 1 SATC 18 at 19-20.
- (62) 1 SATC 18 at 19-20.
- (63) Silke on South African Income Tax 11 Memorial ed para 18.34 at 18-85.
- (64) Meyerowitz and Spiro on Income Tax paras 1733-4.
- (65) Meyerowitz and Spiro, *supra*, at para 1735.
- (66) *The Taxpayer* Vol 41 No 11 November 1992.
- (67) 'SITE Refunds', *Income Tax Reporter* Vol 29(1990) at 40-1.

PART FOUR

REFUND PROVISIONS IN OTHER FISCAL LEGISLATION - South Africa

1. The Value-Added Tax Act 89 of 1991

Section 44 is the general provision dealing with refunds. The Commissioner, on application by the person concerned, is required to refund

(a) any amount of tax, additional tax, penalty or interest paid by any person in terms of this Act to the Commissioner that was in excess of the amount of tax, additional tax, penalty or interest, as the case may be, that should properly have been charged under this Act;

or

(b) any amount refunded to a vendor in terms of subsection (1) was less than the amount properly refundable under that subsection.

The Commissioner, in such circumstances -

'shall ... refund the amount of tax, additional tax, penalty or interest paid in excess of the amount by which the amount refunded was less than the amount properly refundable, as the case may be.'

When the aggregate amount of input tax deductible by a vendor exceeds the amount of output tax that must be accounted for by him the excess is refundable to the vendor by Inland Revenue. (s 16(5) and 44(1)).

A refund must be made if the amount actually refunded by Inland Revenue is less than that which should have been refunded. (s 44(2)(b))

If, however, a vendor has failed to pay any amount of tax, additional tax, penalty or interest due by him within the period prescribed for payment or owes any amount of tax, interest or penalty under ANY Act administered by Inland Revenue, e.g. income tax or transfer duty, then Inland Revenue is empowered to set off a VAT refund due to the vendor against any of the amounts referred to in the section that are outstanding (s 44(6)).

Even though a refund may be due to a vendor in accordance with the provisions of the Act, Inland Revenue may refuse to make a refund where the claim for the refund is not made within five years after the end of the relevant tax period to which the refund relates (s 44(1)(i)) or where the amount to be refunded is R100 or less. When faced with a claim for a refund of any tax, penalty or interest paid in excess of the amount properly chargeable, Inland Revenue may, again, refuse to make the refund if the claim is not made within five years after the date on which payment of the tax, penalty or interest was made -

'Provided that if the Commissioner is satisfied that such payment was made in accordance with the practice generally prevailing at the said date, no refund shall be made unless the claim for any refund is made within six months after that date...' Should Inland Revenue refuse to authorise a refund, it is required to give the vendor written notice accordingly, (s 44(8)). If the vendor is dissatisfied with this refusal, he may lodge an objection, (s 32(1)(b)), and should it be disallowed, he may appeal to the specially constituted Board for hearing income tax appeals established by s 83A(2) of the Income Tax Act 58 of 1962 or, if appropriate, the Income Tax Special Court (s 33A and 33(i)).

Section 44 contains several interesting features which are not present in s 102 of the Income Tax Act 58 of 1962:

- *this provision gives a general right to recover tax not due which does not depend on the circumstances of payment.

- *The refund provision is not made subject to the discretion of the Commissioner; he must, on application by the person concerned, refund the excess.

- *The claim for a refund must be made within five years after the end of the relevant tax period.

- *Where the Commissioner is satisfied that payment was made in accordance with the practice generally prevailing, the period of five years is reduced to six months.

- *There is provision for set off of a VAT refund due to the vendor against any amount owing under any Act administered by Inland Revenue.

- *There is direct procedure for appeal on the merits of the refund - with none of the limitations of review procedure in S 102.

- *Where the vendor has failed to furnish a return for any tax period, the Commissioner may withhold payment of any amount refundable to him or any amount of interest on delayed refunds payable to him until he has furnished the return.

- *Where the Commissioner refuses to make or authorise a refund he must, at the request of the vendor concerned, give him written notice of such refusal.

- *Where the Commissioner does not refund within 21 business days after receipt of the vendor's return for a tax period, interest is payable on the refundable amount at the rate fixed for this purpose by the Minister of Finance from time to time by notice in the Gazette.

From the features of s 44 highlighted above, it is submitted that the section contains valuable provisions which could well be incorporated into a revised and redrafted S 102 which would greatly benefit the taxpayer and, at the same time, not compromise or prejudice the Commissioner For Inland Revenue.

2. Sales Tax Act 103 of 1978

Although no longer in force, it is of interest to note certain features of the refund provisions in this legislation, for the purpose of this study. Here again the relevant section in the Act, s 32, gave the Commissioner a discretion to authorize a refund if it was proved to his satisfaction that an amount of sales tax, penalty or interest paid by any person was in excess of the amount properly chargeable under the Act or sales tax had been borne by a purchaser or importer solely by reason of the fact that he, in circumstances where in the opinion of the Commissioner he acted in good faith, did not comply with the provisions of s 14(2).

A person who was dissatisfied with the Commissioner's refusal to authorize a refund could, in terms of s 20(1), request that the matter be referred to a sales tax advisory committee for an opinion whether the refusal was justified. If he was dissatisfied with the opinion of the sales tax advisory committee about the correctness of the Commissioner's refusal to authorize a refund, he could lodge an objection in terms of s 21(1).

The claim for a refund under s 32(1)(a) had to be made within three years after the date upon which the payment of the amount claimed to be refundable was made. However, there were two exceptions to this rule, one of which had the effect of extending this period in appropriate circumstances and the other could impose a more stringent time limit.

The proviso to s 32(2)(a) prohibits the Commissioner from authorizing a refund of an amount that he is satisfied was paid in accordance with the practice generally prevailing at the date of the payment unless the claim for the refund was made within six months after that date.

The learned authors of Juta's General Sales Tax Manual state at 1-162:

'The determination whether a person has paid sales tax in excess of the amount properly chargeable or has borne tax that is refundable is within the discretion of the Commissioner. The Commissioner's discretion is free and unfettered. If the exercise of his discretion is bona fide and his decision is not in conflict with statutory provisions or the decisions of competent courts of law, it is not subject to review. Since the Special Court is not a court of law, the Commissioner is not bound to follow its decisions in exercising his discretion. Nevertheless, once the Commissioner has satisfied himself, as he is required to do, that an amount of tax has been paid in excess of the amount properly chargeable under the Act, he is obliged to authorize a refund.'

Section 32 contains no provision for the payment of interest by the Commissioner on the amounts refunded in terms of the section.

Section 32 follows the format of s 102 of the Income Tax Act.

The Sales Tax Act contained a system of taxation that relied very heavily on the discretion of the tax collector. Such a situation is not only potentially prejudicial to taxpayers or to some taxpayers but was also a danger for the authorities themselves who would be swamped by the task of interpreting the law or, in the task of applying the law to individual taxpayers, may have lost sight of the principles underlying the law.

Section 26A(c) was a most unusual provision to be found in a taxing Act. It effectively permitted the Commissioner for Inland Revenue to waive any amount of sales tax or any penalty or interest that would otherwise be payable by a person who genuinely believed he was exempt but, on applying to or as a result of an investigation by the Commissioner, discovered that the Commissioner did not share his view about the exemption.

It was strange that an amount of tax properly payable should be waived (that is, if the Commissioner's view was correct.) Perhaps it was going too far to suggest that under s 26(A)(c) ignorance of the law was an excuse, but the provision favoured the taxpayer whose interpretative powers were weaker than those of a taxpayer who in the same circumstances would have paid the tax.

A taxpayer would have been anxious to investigate the available provision for the refund of sales tax overpaid where he found himself without recourse to a sales tax advisory committee or to the Special Court for Hearing Income Tax Appeals because he could not manage to be served with a notice of intention to assess or a notice of assessment. It was a question that would also arise when, whether carelessly or in desperation, he had paid sales tax either in the normal course or in response to the irregular type of 'letter of demand' issued by the Department of Inland Revenue. The taxpayer's remedies in the Sales Tax Act were sadly deficient, especially in the case of the Department's practice, when it considered that sales tax ought to have been paid in respect of a particular transaction, of sending the taxpayer concerned a demand for the tax and, very often, penalties as well.

3. Stamp Duties Act 77 of 1968

Section 32 provides, in so far as is relevant here:

(1) The Commissioner may make, or authorize to be made, a refund in respect of:

(a) the amount of any overpayment of the duty or any penalty properly chargeable in respect of any instrument, if application for the refund is made within two years after the date of such overpayment:

(b)...

This section came into focus in the case of CIR v First National Industrial Bank Ltd 1990(3)SA 641(A), 52 SATC 224.

Nienaber AJA (with whom Corbett CJ, Botha JA and Kumleben JA concurred) had occasion to examine the section and comment on its meaning and ambit. The following observations were made by the learned judge of appeal:

*s 32(1)(a) contemplated a payment made in respect of duties rightly chargeable but wrongly calculated - to the extent of any excess there would be an 'overpayment' and it would be an overpayment of duties 'properly chargeable'.

*In the present case the payments were made by the bank and accepted by the Commissioner in respect of 'an instrument' which did not, in reality, attract duty at all; consequently this was not a case where the bank paid in excess of what it should have paid; this was a case where it should not have paid anything at all; hence there was no overpayment of duties 'properly chargeable' and s 32(1)(a) accordingly did not apply.

*s 32(1)(a) was not the sole and exclusive vehicle for claiming repayment in a case such as the present and the section did not, either in terms or context, purport to create a comprehensive remedy and hence the section was not conclusive of the entire issue - the fact that the section was silent on the question of interest did not mean that no interest was payable at all.

*What S 32(1)(a) did was to empower the Commissioner, in particular circumstances, to make or approve a refund, but that did not mean that an aggrieved party was precluded from advancing a claim for repayment on a different basis, or that the section precluded a claim for more interest where the overpayment was legally recoverable at common law.

These observations have an important bearing not only on the interpretation of S 32(1)(a), but also on the relationship between the common law and statutory provisions, to be discussed later.

This refund provision does not contain a discretionary power but empowers the Commissioner to make a refund in the specified circumstances. Its wording is also preferable to that of s 102.

4. Transfer Duty Act 40 of 1949

Section 20 provides:

'If it is proved to the satisfaction of the Commissioner that duty has been paid in respect of an acquisition of property by a person who is or has become, in terms of this Act or any other law as in force on the date of the acquisition, exempt from the payment of duty in respect of that acquisition, or that the amount of duty which has been paid is in excess of the amount payable, he may authorise refund of the duty paid or of so much of the duty as has been overpaid, as the case may be.'

This provision also accords with the traditional discretionary mode of refund clauses to be found in our fiscal legislation.

5. Customs and Excise Act 91 of 1964

Sections 75-77 provide specific rebates, drawbacks and refunds of duty. They provide for the discretionary power of the Commissioner, in most instances, to grant a refund. Phrases such as 'the Commissioner may in his discretion investigate,' 'Notwithstanding anything to the contrary in this Act contained, the Commissioner may in his discretion and subject to such conditions ... as he may in each case impose,' and 'If the Commissioner is satisfied...'

6. Estate Duty Act 45 of 1955

Estate Duty may be refunded to the executor or the person liable for the duty as a result of a successful appeal to the courts.

However, an executor who has overpaid estate duty under a mistake of law and has not lodged an objection and appeal timeously as required by law appears to have no remedy and not to be entitled to a refund in terms of the Act.

If, however, he has made an overpayment of estate duty as a result of a mistake of fact, for example, an incorrect calculation, he may claim a refund, but must lodge his claim within three years of the date of the overpayment, failing which the provisions of the Prescription Act will bar any claim.

The recent Appellate Division decision of Willis Faber Enthoven may provide relief to an executor who has made an overpayment of estate duty under a mistake of law. There being no statutory provision for a refund in the Estate Duty Act, the executor would have no difficulty in proceeding under the common law.

7. Regional Services Councils Act 109 of 1985

Levypayers are entitled to claim a refund of any amount of levy or interest paid in excess of the amount legally payable. The application must be made in writing within two years after the date of the overpayment.

The levypayer must be notified by the council in writing of a refusal to make a refund. There is no obligation on the council to furnish reasons for its refusal to make a refund.

A council is entitled to allow the levypayer to offset an amount refundable against any levies due by him instead of making the refund in cash.

No provision is made for the payment of interest on overpayments of the levies that are refunded. (Paras 12(1), (2), (3) and (4)).

Relationship between statutory and common law.

1. Section 102(1) of the Income Tax Act 58 of 1962 commences with the words: 'If it is proved to the satisfaction of the Commissioner that any amount paid by a taxpayer was in excess of the amount properly chargeable under this Act, the Commissioner may authorise a refund to such taxpayer of any tax overpaid ...'

It further goes on to provide that: 'The Commissioner shall not authorize any refund under this section unless the claim therefor is made within three years after the date of the assessment under which such tax was payable ...'

2. The first issue to be determined is whether the statutory provisions which appear in most areas of the tax code relating to and regulating refunds of overpaid tax by Inland Revenue are of application in the given set of circumstances.

3. The statutory provisions are primarily concerned with overpayment of tax pursuant to *intra vires* errors, such as excessive assessment. They may not be material to a case of *ultra vires* demand, that is, the case where there is simply no legal foundation for the demand at all.

4. This distinction is well-illustrated in the South African case of *CIR v First National Industrial Bank Ltd* 1990 (3) SA 641(A), 52 SATC 224 where the respondent had paid stamp duty on autocard transactions to the appellant under protest, since it contended that the duty was not payable. Each payment had been accompanied by a letter stating that payment was made under protest.

5. The issue before the Appellate Division was the nature of the claim for repayment, for on this depended the bank's right to claim interest *a tempore morae*.

6. The decision of the majority of the court (Nicholas AJA dissenting) was that the claim could not be one based on statute as the relevant section of the Stamp Duties Act referred to refunds for 'overpayments', which this was not, and therefore had to be either a *condictio indebiti* or a claim based on a contract between the parties, to the effect that if the amount paid was not in fact owing it would be refunded.

7. As the wording of s 32(1)(a) of the Stamp Duties Act 77 of 1968 is very similar to that of s 102 of the Income Tax Act, the observations on the meaning and ambit of that section by Nienaber AJA are very relevant.

8. Nienaber AJA stated that what s 32(1)(a) contemplated was a payment made in respect of duties rightly chargeable but wrongly calculated. To the extent of any excess there would be an 'overpayment' and it would be an overpayment of duties 'properly chargeable'. The taxpayer could then claim, and the Commissioner would be empowered to authorize, a repayment in terms of the section without recourse to the technicalities of a common law *condictio*.

9. However, in this case, the court *a quo* found that the payments were made by the Bank and accepted by the Commissioner in respect of 'an instrument' which did not, in reality, attract duty at all.

10. This was not, therefore, a case where the bank paid in excess of what it should have paid; this was a case where it should not have paid anything at all. Hence there was no overpayment of duties 'properly chargeable'. Section 32(1)(a) accordingly did not apply.

11. Nienaber AJA then went on to make the significant statement:

'Section 32(1)(a), moreover, is not the sole and exclusive vehicle for claiming repayment. The section does not, either in terms or context, purport to create a comprehensive remedy. What it does is to empower the Commissioner, in particular circumstances, to make or approve a refund. But that does not mean that an aggrieved party is precluded from advancing a claim for repayment on a different basis, or that the section precludes a claim for mora interest where the overpayment is legally recoverable at common law (at 231).

12. It is clear from Nienaber's statement that it can be said that s 102 is also not the sole and exclusive vehicle for claiming repayment of overpaid tax. A taxpayer would, therefore, not be precluded from advancing a claim for repayment on a different basis. Moreover, there will also be circumstances not covered by s 102, as was the position in the First National Industrial Bank case, in relation to s 32(1)(a).

13. Hence, it is submitted, where the Commissioner makes a demand for tax where no tax at all is legally payable in the circumstances, there would have been no overpayment of tax 'properly chargeable' and s 102(1) would not be of application.

14. Where s 102 is not of application at all, the legal relationship between the Commissioner and the taxpayer is an ordinary common law legal relationship flowing from unjust enrichment, contract or whatever. It is not a relationship created by any statutory provisions.

15. It is also submitted that even in circumstances where a taxpayer can proceed in terms of s 102, he is not precluded from advancing a claim for repayment of overpaid taxes on a different basis. For example, the Taxpayer (November 1992) contends (at 211) that where a payment of NRST has been made under a mistake of law and not because of a practice generally prevailing, companies which wrongly paid NRST could recover the tax under the common law remedy of the *condictio indebiti*, the Appellate Division in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992(4)SA 202(A)* having recently held that a mistake of law was not a bar to this remedy.

16. If a taxpayer has a choice of remedies for claiming a refund, it could be argued that he may be in a better position proceeding under the common law than in terms of s 102 (see the next section, *The Common Law*).

17. In *Crown Mines Ltd v CIR 1922 AD 91, 32 SATC 190*, Innes CJ pointed out that speaking generally, assessment must precede payment and that the obligation to pay only arises upon a due assessment. An assessment must be determined before payment can be demanded from taxpayers. Whereas a taxpayer, who had failed

timeously to raise an objection to an assessment, and who had alleged an overpayment under a mistake of law, would ordinarily have been in a hopeless situation as no remedy by way of *condictio* would have been open to him, he would nevertheless have obtained relief by means of s 102. However, with the *Willis Faber Enthoven* decision, a taxpayer would have relief at common law in addition to his statutory option under s 102.

18. The reasoning of Innes CJ in the *Crown Mines* case, therefore, it is submitted, clearly accepts that a taxpayer may have more than one remedy when reclaiming payment of tax overpaid.

19. Innes CJ also clearly acknowledged that the language used in s 102 is not intended to give effect to a legal right and said: 'it is wholly inconsistent with the idea that the taxpayer is entitled to demand anything except that the Commissioner shall consider the case (at 195).

20. It is also submitted that the legislature, by enacting s 102, did not intend to remove from the taxpayer any legal right he may have had to reclaim payment of overpaid tax under the common law. If it had intended s 102 to be an exclusive or comprehensive remedy, it would have so provided in the section.

21. In England, s 33 of the Taxes Management Act 1970 provides that 'if any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return ...'

22. In *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 it was held that s 33 was not of application in the circumstances of the case because 'the present case is not one in which an excessive assessment was made on a taxpayer, through some error of fact or law, as is contemplated by s 33(1). This is a case where there is no lawful basis whatever for any demand of tax to be made by the Revenue. In such circumstances, the demand itself is *ultra vires* and is therefore a nullity. It follows that in a case such as the present there can be no valid assessment. No assessment was in fact raised on Woolwich in the present case, because the money alleged to be due by way of tax was paid, though under protest (at 757).

23. It was pointed out that s 33(1) presupposed a lawful assessment which was excessive by reason of some error or mistake in a return. Where an assessment is alleged to have been made under *ultra vires* regulations the proper course would be to take proceedings by way of judicial review to quash the aberrant regulations and the assessment made thereunder.

24. It was for these reasons that Woolwich was not enabled or required to seek its remedy through the statutory framework, but had to fall back on the common law.

Lord Goff said:

'It also follows that the common law principles, whatever they may be, are applicable to a case such as the present, unconstrained by the provisions of any statute' (at 757).

He conceded that statutory provisions creating a discretionary regime for the repayment of taxes or charges presuppose that the common law principles give no right of recovery and went on to state: '... but having, where applicable [i.e. statutory provisions], overlaid and replaced the common law principles, whatever those principles may be, they become neutral in their effect when the development of those principles is considered by the courts.'

25. As there is, as yet, no ground of restitution in England based on mistake of law, and, in any event, the circumstances in the case did not amount to an error of law on the part of the taxpayer, it was not necessary for the House of Lords to decide whether a taxpayer had a right to proceed under the common law as well as in terms of statute, should the statutory provision also be of application.

26. It is submitted, however, that the wording of s 33(1) differs materially from that of s 102(1) in that it provides expressly for certain specific circumstances, i.e. 'If any person who has paid tax charged under an assessment ... 'Whereas s 102(1) merely empowers the Commissioner, in particular circumstances, to make or approve a refund. It could be argued that the wording of s 33(1) precludes a taxpayer from advancing a claim for repayment on a different basis where the circumstances are covered by the section.

27. In conclusion, it may be submitted that s 102 does not preclude the taxpayer's right to common law remedies, these being available to a taxpayer, in addition.

28. It is submitted that a South African court faced with the facts in the Woolwich Building Society case could also have found that s 102(1) was not of application in the circumstances as the 'overpayment' had not been an overpayment of taxes 'properly chargeable' as the Building Society was not obliged to pay anything at all. There had been no overpayment of taxes 'properly chargeable'.

29. Although s 102(2), unlike s 33(1), does provide for refund of a tax which is chargeable and payable under the Income Tax Act 58 of 1962 otherwise than under an assessment, the facts in the Woolwich Building Society case did not reflect a situation in which an excessive demand is made on a taxpayer through some error of fact and law as contemplated by s 102. Rather, the Woolwich Building Society case was one in which there was no lawful basis whatever for any demand of tax to be made by the Revenue.

The Common Law

In South African law the general requirements for liability for enrichment are:

(a) the defendant must be enriched

- (b) the plaintiff must be impoverished
- (c) the defendant's enrichment must be at the expense of the plaintiff and
- (d) the enrichment must be justified.

Where one person's estate has been increased unjustifiably at the expense of another, then from the mere fact of such increase an obligation arises in certain circumstances for the person enriched to restore the increase to the person at whose expense the increase has been taken. Hence enrichment itself is the source of the obligation. In Roman law this idea did not give rise to a general enrichment action, but it constituted the basis of a number of 'enrichment actions', particularly in the form of *condictiones* which have survived to the present day and are still applied in South African law.

The best known of the *condictiones* is the *condictio indebiti* for the recovery of undue payment.

It has been said that the object of the *condictio indebiti* is to recover money or other property transferred in intended payment of a non-existent debt (1) and that the requirements for its application are:

- *there must have been a *datio* of money
- *there must have been no legal or natural obligation to give it
- *transfer must have been given in the mistaken belief that the debt was due or involuntarily under duress or by a person of limited capacity to act.
- *the *condictio indebiti* lies where property has been transferred *solvendi animo per errorem*. Generally speaking the mistake must be one of fact and not of law (see on this aspect later).

Professor W de Vos has described the *condictio indebiti* in Roman law in this way: 'By this action a person claimed back a *solutio indebiti*, provided that he had made the payment *per errorem facti* and not as a result of an *error iuris* or as a result of an inexcusable *error facti*. Again, the action lay for the recovery of corporeal property plus fruits and accessions, but not for interest on money, or, where the property could not be returned, then for its value to the extent that the receiver was still enriched. There are even some texts allowing the *condictio* of the value of incorporeals, e.g. D. 12.6.65.7 where the value of *habitatio* is *condicted*. That this was an enrichment action hardly needs pointing out.'

The application of the *condictio indebiti* in situations where taxes or other dues have been paid to the State when there has been no legal obligation to pay them on the part of the payer, has as its starting point in our case law the case of *Union Government (Minister of Finance) v Gowar* (2) where Innes CJ stated:

'It would be in the highest degree inequitable that the Treasury should be permitted to retain what it had no right to claim; and the question is whether the law will allow it to take up such a position ... It seems to me that money wrongly exacted by the

possessor of goods from the true owner as a condition precedent to their delivery, and paid by the latter not as gift, but in order to obtain possession of his own property and with a reservation of his rights would be recoverable by a *condictio* ... Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The onus of showing that the payment had been made involuntarily and that there had been no abandonment of rights would, of course, be upon the person seeking to recover.'

Wessels AJA, in a concurring judgment stated (3):

'I think we may well take the further step and hold that a payment is involuntary and, therefore, recoverable, even though it was not made *metus causa* in the Roman law sense, but was made under pressure at the demand of one in authority who had it in his power to withhold the property or to suspend the rights of the person making the payment.'

It would therefore appear that the *condictio indebiti* is not confined to the recovery of an *indebitum solutum* which was involuntary because it was paid by mistake. It is now also available when the payment (or indeed any performance), although deliberate, perhaps even advised, was nevertheless involuntary because it was effected under pressure and protest.

In *CIR v First National Industrial Bank Ltd* (4) the Commissioner for Inland Revenue had insisted that the bank was liable for the payment of stamp duty in terms of s 3 of the Stamp Duties Act 77 of 1968 in respect of transactions with its customers on its autocard machines. The bank had contended that its autocard scheme did not attract stamp duty, but after an unfavourable ruling from the Registrar of Financial Institutions, and fearful of the possibility that penalties could be levied against it if it failed to pay the amounts demanded by the appellant timeously, it made a series of payments. Each payment was accompanied by a letter stating:

'As we have not yet finalized this matter with the authorities, in order to avoid any penalty ... we hereby made payment, under protest, of stamp duty in respect of the ... debit entries to our Auto Card holders.'

In spite of these facts Nienaber AJA concluded that the payments had not been made involuntarily and that there had not been 'duress of goods'. He was of the view that the bank had not been forced to pay but had decided to do so in order to avoid the possible imposition of penalties.

It is submitted that Nienaber AJA's approach was a set-back for the taxpayer who is pressured by the Revenue 'armed with the coercive power of the state, including what is in practice a power to charge interest which is penal in its effect. (5) Force, or the threat of it against one's person or property should not be the only criteria for an involuntary payment. A taxpayer, in his relationship with the Revenue, is often

under severe pressure and coercion to pay and his rights are virtually non-existent unless he resorts to the courts, with all its uncertainties and attached risks. There was certainly pressure on the bank to pay and the same pressure would be prevalent on most taxpayers.

In his minority judgment Nicholas AJA found that the facts of the case fitted the principle set out in Digest 12.6.2 that:

'If a man pays on the understanding that if it should not prove to be due, ... the money should be returned, an action for the return will be in place, as there is a contract concluded between the parties ...'

Nicholas AJA also relied on the judgment of De Villiers AJA in the Union Government case (*supra*) in which, after a review of the Roman-Dutch authorities, De Villiers AJA had said (6):

'If a person pays a debt not due knowingly and voluntarily, he is not able to recover. But if he pays under protest he is entitled to recover, for the protest is inconsistent with the idea of a gift or a compromise between the parties. The other party was not bound to accept money so paid, but if he accepts it he must be considered to have agreed that it should be recoverable if not due ...'

Where the Revenue makes an unlawful demand for tax and the taxpayer is convinced that the demand is unlawful and has to decide what to do, he is faced with the coercive power of the state together with its right to levy interest and penalties. In addition, where the taxpayer is a reputable financial institution it would understandably fear damage to its reputation if it does not pay. So it decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation. Can it not be said that a taxpayer is acting under duress in these circumstances?

It was precisely because the court in the First National Industrial Bank case was not able to find that the taxpayer had acted under duress in making payment that it found that the words 'under protest' had served as a basis for an agreement between the parties that repayment would be effected by the Commissioner should the issue be resolved in favour of the bank, and a new and independent cause of action had emerged from the agreement.

Nienaber AJ therefore found that a contract for the repayment of the duty, if it proved not to have been payable, had been concluded between the parties, and that the probable basis for the contract had been their tacit agreement. He said (7):

'Where, as in this case, a public official demands payment in terms of a statutory provision, and payment is thereupon effected "under protest" because the liability (or the sum) is disputed, it is more likely than not ... that it was tacitly understood between the parties that the sum so paid would be refunded if the official view should subsequently prove to be the wrong one; such would certainly have been the taxpayer's intention and since the official, bound as he is by the statute, would have had no statutory justification to retain what he should never have claimed, he can

scarcely have held a contrary view. In those circumstances one would be on safe ground, I think, in referring a tacit agreement between the parties along the lines suggested by counsel for the bank.'

Nienaber AJA also said:

'But there are other features supporting the contention of counsel for the Bank that it was in effect agreed between the parties, because the payments were made under protest, that the Commissioner would be obliged to repay the sums so paid should it be determined that the duties had never been due: thus the payments were made during the course of a continuing and genuine debate between them about the correct interpretation of the statute governing such payments; the Commissioner, who insisted on payment in accordance with his own view, consequently knew that the phrase 'under protest' accompanying each payment was not just an empty gesture; the Commissioner was the public official entrusted with the administration of that very statute (S 2(1)); since he derived his authority from the statute itself, it follows that if his reading of it should prove to be wrong, he would not be empowered to retain, and hence would be obliged to refund, what was wrongly paid to him.'

The last part of the above quotation is of the utmost importance to the rights of a taxpayer when seeking a refund of taxes overpaid; i.e. if the Commissioner's reading of a fiscal statute proves to be wrong, then he would not be empowered to retain and hence **WOULD BE OBLIGED TO REFUND WHAT WAS WRONGLY PAID TO HIM.**

This understanding of the law by Nienaber AJA is in itself a great advance on the common law position in England before the House of Lords stepped in to protect the taxpayer in the Woolwich Building Society case.

It is submitted that Nienaber AJA's reasoning is, in essence, an application of the payment under duress procedure provided for in the *condictio indebiti*.

A further important feature of this case is that the Appellate Division confirmed that the Commissioner was the authority to whom payment had to be made and, once the other requirements of the *condictio indebiti* had been satisfied, he was the obvious party from whom payment had to be recovered, whatever the ultimate administrative destination of the payments might be. It was not, in the opinion of the court, legitimate to differentiate for this purpose between various functionaries and departments of State. In other words, the *condictio indebiti* lay against the Commissioner once all the other requirements had been satisfied.

The court also held that to be in *mora* there must be a debt and the debt must be forceable. The Commissioner could not be in *mora* as regards repayment until such time as it was decided that a duty to repay existed. That was the very point of their understanding, i.e. that the money would only be refundable once it had been established (by a tribunal or by compromise) that the Commissioner had misconstrued the statute and was obliged to repay the money. The Commissioner was not in *mora* and so could not be liable for interest *a tempore morae*.

The court was accordingly of the view that no interest was recoverable by the bank from the Commissioner prior to the decision of the court a quo that no stamp duties were payable. Only then would interest become payable.

It is submitted that the First National Industrial Bank case is a milestone decision for the rights of taxpayers when claiming a refund for taxes overpaid. It is only a great pity that the circumstances of the case were not felt appropriate by the Appellate Division for inclusion within the *condictio indebiti*.

A taxpayer will only truly obtain a clear right in these circumstances when our Appellate Division recognises a general enrichment action in our law. These sentiments have been well-expressed by D H van Zyl (9):

'The time has indeed arrived to give full recognition to a general enrichment action in South African law ... I believe there is a very real need for this action alongside the classical enrichment actions, which need not disappear since they have developed over a long period of time and doubtless still have a useful role to play.'

Another landmark decision recently handed down was that in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* (10) where the appellate Division dealt with the question whether money paid in error of law was recoverable.

In the court a quo the trial Judge regarded himself bound by the decisions of the Full Court of the erstwhile South African Republic in *Rooth v The State* (11) and of the Appellate Division in *Benning v Union Government (Minister of Finance)* (12) to the effect that such an error was as a rule a bar to the *condictio indebiti*.

In this case both Willis Faber and Robert Enthoven paid the tax because they laboured under the mistaken impression that they were legally obliged to do so. There was no misconception of any fact and the mistake was purely one of law. What had to be considered was therefore, firstly, whether a mistake of law was indeed as a rule of bar to the *condictio* and, if not, secondly, whether the appellant was in the circumstances of the case entitled to recover the amounts paid.

Hefer JA said (13):

'What is immediately apparent is that there is no logic in the distinction between mistakes of fact and mistakes of law in the context of the *condictio indebiti*. This *condictio* has since Roman times always been regarded as a remedy *ex acquo et bono* to prevent one person being unjustifiably enriched at the expense of another. (Even those favouring the distinction concede that this is so.) Bearing in mind that the remedy lies in respect of the payment of an *indebitum* (i.e. a payment, without any underlying civil or natural obligation), it is clear that, where such a payment is made in error, it matters not whether the error is one of fact or of law: in either case it remains the payment of an *indebitum* and, if not repaid, the receiver remains enriched. the nature of the error thus has no bearing either on the *indebitum* or on the enrichment. The same result is achieved when the *condictio indebiti* is viewed (as it often is) as one of the *conditiones sine causa*. Again it matters not whether the

error is one of fact or law for in both cases the payment is made sine causa ...'

Hefer JA continued (14):

'Considered as a matter of simple justice between man and man, there is no conceivable reason why the receiver of money paid in error of fact should in the eyes of the law be in a better position than one who has received money paid in error of law.'

The court noted that there was no evidence of a general application of the *ignorantia juris* rule in South African civil law. On the contrary, there were many cases in which it was not applied. The law relating to the renunciation of rights was a good example. As early as 1891 De Villiers CJ said in *Watson v Burchell* (15) that 'no doctrine is better settled in our law than that a person cannot be held to have renounced his legal rights by acquiescence unless it is clear that he had full knowledge of his rights and intended to part with them.'

On the question of legal policy Hefer JA said (16):

'But the administration of law suffered no ill effects as a result of the decision in *De Blom's* case; and it cannot seriously be suggested that it would if the distinction between errors of law and fact were to be abolished for purposes of the *condictio indebiti*, which affects no one but the payer and payee. Nor can legal policy stand in the way of its abolition; on the contrary, legal policy would seem to demand rather than preclude the abolition of a principle that is manifestly unjust in the majority of cases. Taking account further of the complexities of contemporary legal and commercial practices which differ *toto caelo* from those followed in earlier times, I would accordingly rule that the fact that money was unduly paid in error of law is not by itself a bar to its recovery by way of the *condictio indebiti*.'

Accordingly, the Appellate division was of the view that our law was to be adopted in such a manner as to allow no distinction to be drawn in the application of the *condictio indebiti* between mistake in law (*error juris*) and mistake of fact (*error facti*). It followed that an *indebitum* paid as a result of a mistake of law may be recovered provided that the mistake is found to be excusable in the circumstances of the particular case.

However, the court was not prepared to define the circumstances in which an error of law could be said to be excusable or, conversely, to supply a compendium of instances where it is not.

Hefer JA said (17):

'All that need be said is that, if the payer's conduct is so slack that he does not in the court's view deserve the protection of the law, he should, as a matter of policy, not receive it. There can obviously be no rule of thumb; conduct regarded inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the

defendant who may or may not have been aware that there was no debitum and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment. (Consider, for example, the case of person who, whilst in doubt as to whether money is legally due, pays it not caring whether it is and without bothering to find out.) There are only a few considerations that come to mind; others will no doubt manifest themselves with the passage of time as claims for the recovery of money paid in error of law come before the courts.'

What finally remained to be examined by the court was the excusability of the error in the present case. In this regard Hefer JA summarised the evidence as follows (18):

'I have no doubt that the error on Robert Enthoven's part was excusable. The company was faced with exhibit A. Initially the directives therein were followed and when Vaux questioned their validity he was assured that the tax was indeed payable. He cannot be blamed for turning to, for accepting the ruling of, the official to whom the administration of the Act has been entrusted and to whom members of the public would naturally turn for guidance. As Vaux said in his evidence, he accepted the Registrar's view as the most authoritative. It was not a view that could be dismissed as patently wrong; respondent's counsel supported it with confidence and great conviction even in this court. Moreover, the Registrar's view was not only shared by the Receiver of Revenue, but accepted and acted upon without demur for many years by every broker registered to do Lloyds' business. Bearing in mind that failure to pay the tax carries a criminal sanction, it comes as no surprise that Robert Enthoven followed suit. It is idle to suggest that it could and should have been paid under protest - an expedient usually resorted to when a person is confronted with a demand for money that he believes not to be due. This is not what Vaux believed.'

The important aspects of the evidence revealed:

*because the taxpayer found the provisions of the Act to be unclear, its financial manager, Vaux, at one stage telephoned the Registrar's office and enquired whether the tax was payable.

*the taxpayer continued paying the tax since he was reasonably satisfied that it was payable 'after having cleared the matter up with the Registrar.'

*Initially the taxpayer followed the necessary directives and when he questioned their validity, he was assured that the tax was indeed payable.

*the Registrar's view was not only shared by the Receiver of Revenue, but was accepted and acted upon for many years by every broker registered to do Lloyds business.

The Appellate Division was, therefore, of the view that the taxpayer deserved the protection of the law in these circumstances.

The following requirements for establishing excusability of the error may be ascertained:

*evidence disclosing the source of the error

*evidence of enquiries made or other steps taken to explore the position and ascertain the extent of the company's liability.

*evidence of how the belief came to be entertained and what steps were taken to verify it.

D P Visser (19) made the following observations on the excusability of error requirement:

'Could it not be said that our highest court opted for excusability of error in order that it might serve as a vehicle through which policy considerations may be introduced to control the limits of liability under the *condictio indebiti*? If this were so, I would have no quarrel with the basic sentiment underlying such an approach. I would only say that the element of excusability is a very artificial and limiting way of achieving this perfectly defensible goal. It is, after all, clear that the difference between the judgment of the majority (who decided that in cases the error - at least in so far as the former Robert Enthoven & Co was concerned - was excusable) and the dissenting judgment of Van den Heever JA (who held that it was not) can ultimately be explained by a difference in policy regarding the relative rights of the state vis-à-vis the individual. Why not rather state openly that in all enrichment actions the retention will only be classified as *sine causa* if there are no policy considerations which militate against such a conclusion? This would pave the way for open debate about the factors which should determine the ambit of liability for unjustified enrichment and so contribute to a properly justifiable development of this part of our law. Perhaps the acknowledgement of a general enrichment action at some future date could serve as an appropriate time to give renewed attention to the problem canvassed here. I hope that will be the case, and then, perhaps, the dispute about error will be finally settled in our law.'

D P Visser (20) also dealt with the consequences of the Willis Faber Enthoven case on taxation practice in this way:

'The fact is that the bar to recovery of payments made under a mistake of law has had the (unintended) result of effectively shielding taxing authorities from having to repay wrongly paid taxes, for such payments are more often than not the result of some mistake in the interpretation of the law. No doubt Hefer JA is correct, for the great majority of cases, when he says that the *condictio indebiti* 'affects no one but the payer and payee', but when the payee is the Receiver of Revenue (or some other taxing authority) this does not hold true. Whenever a court reinterprets a tax provision, anyone who has made a mistaken payment under the earlier interpretation will in principle (in so far as he or she is not barred by the rules of prescription and the error is 'excusable') be able to reclaim such payment.'

Visser also predicts that the legislature will seek to nullify the effect of the Willis Faber decision so far as it impinges on taxation. He adds (2):

'One hopes, however, that the Government will in this instance show restraint and not rush into legislation which will cause unnecessary hardship to the individual, possibly without any real benefit to the treasury. After all, the court qualified the right to reclaim a payment made in error of law by imposing the same restriction as that on the right to recover payments made under an error of fact: the error has to be reasonable. That means that after a court has reinterpreted a tax provision, each person who would want to rely on the new interpretation to recover his or her mistaken payment will have to show that his or her mistake was reasonable.'

On the effect of the Willis Faber judgment Visser states (21):

'First, the fact that it allows a whole new class of claim to be brought before the courts inevitably raises the question whether it will affect the administration of justice by producing an unmanageable flood of cases. It is indisputable that erroneous payments stem from an error of law in a large variety of instances - not the least of which is the payment of tax and now the recovery of all such payments may be sought before the courts. The Appellate Division was, however, convinced that the decision in the present case would not adversely affect the administration of justice. And rightly so. After all, the number of instances in which a factual error will lead to a mistaken payment is infinitely greater than that in which an error of law will do so, and the courts have always dealt comfortably with undue payment cases resulting from factual errors.'

Visser remarks (22) that the judgment might have an effect on the management of the state's coffers, for in each case where the accepted interpretation of a tax statute is overturned, those who have paid in reliance on its correctness will be able to bring an action for the return of that payment.

The inconvenience that this might occasion could persuade the government to neutralize this decision by legislative changes to the tax law. Visser (23) warns, however, that to take such a course would be an overreaction, quite apart from the fact that it would represent an unacceptable disregard for the rights of the individual. In terms of the judgment, each claimant will have to prove that his or her error was 'reasonable', and this requirement alone should have the effect of limiting mass repayments by the Receiver of Revenue.

In her minority judgment Van den Heever JA takes up a harsh attitude to the individual vis-à-vis the state by stating (24):

'The citizen in his relationship with the State, though no longer expected to be legally omniscient, has a duty to acquaint himself with the various laws or regulations applicable to the particular occupation in which he engages.'

She also said (25):

'We are not dealing with a situation where the mistake relied on is one affecting only

the rights of individual immediate parties to a relationship. What is in issue is the interpretation of a statute. One of the parties is the State, not in a one-to-one say, for example, contractual relationship with appellant, but the State in its more customary, authoritarian guise applying a general law. The matter accordingly has a far more general dimension and affects both the State itself and large numbers of others who arrange or have arranged their affairs on a certain view of that law.'

The Willis Faber case undoubtedly ushers in a new dimension to the rights of the taxpayer vis-a-vis the Receiver of Revenue and the full impact of the decision is still to be seen. It is to be hoped that the legislature will not nullify the effects of the decision.

The argument is made that a rule which allows recovery, whether based on mistake of law or the ultra vires nature of the levy, might lead to serious disruption of public finances. When a large number of payments must be returned, the expenditure has to be recouped by the authority, either by raising more revenue in a different manner, or by cutting expenditure in the future. On balance, however, in the majority of cases, it will be fairer to allow recovery than to refuse it.

One way of dealing with disruption to public finances might be discriminating between different types of invalid decisions. Both in England and South Africa there is a statutory limiting provision that no amount paid in respect of an assessment accepted by the taxpayer and made in accordance with the practice generally prevailing at the date of that assessment shall be deemed to have been otherwise than properly so chargeable. To the extent that such provisions preclude recovery where there has been a change in the understanding of the law because of a judicial decision, the question arises whether an action based on mistake of law should be excluded in these circumstances. The question to be posed is whether the 'general practice' restriction should apply where the Revenue is demonstrably wrong in its interpretation.

The statutory limitation was inserted to meet the type of case where a generally accepted practice, thought by the taxpayer and the Revenue to be in accordance with the law at the time of making the return, is later shown to be incorrect as result of a decision in the courts or legal advice given to the Revenue.

It is submitted that a taxpayer, proceeding by way of the common law, should not be limited by a 'general practice' restriction.

Rulings made by the Commissioner for Inland Revenue 'personally' are governed by s 3(3) of the Income Tax Act 58 of 1962. This provision provides that:

'Any written decision made by the Commissioner personally in the exercise of any discretionary power under the provisions of this Act or of any previous Income Tax Act shall not be withdrawn or amended by the Commissioner if all the material facts were known to him when he made his decision.'

This provision deals only with decisions made in the exercise of a discretionary

power.

There is also doubt whether a ruling issued by the Commissioner or his officers on a general non-discretionary matter has any legal standing at all, for the Income Tax Act does not deal specifically with the effect of these rulings.

On 1 March 1985 the Commissioner for Inland Revenue instituted a new policy by publishing Practice Note 1, dealing with deemed dividends.

Those Practice Notes have no legal validity and are not binding on either the authorities or the taxpayer through any specific provision of the Acts, other than to the extent that they may be construed as representing a decision made by the authorities in the exercise of a discretionary power (in which event they will be governed by the limitations imposed on the tax authorities) or to the extent that they may represent a 'practice generally prevailing.'

Various provisions enable the Minister of Finance to issue regulations, notices and schedules.

Over the years Inland Revenue has compiled its own 'Income Tax Assessing Handbook' purely for internal use, to provide guidance to the Revenue staff and to achieve consistency in practices within the various revenue offices.

Hence, the Practice Notes, the regulations and the Revenue Handbook constitute existing guides as to what a 'practice generally prevailing' might be.

It is submitted that an error of law or misconstruction of a statute may occur in any of these guides and in terms of the Willis Faber Enthoven decision, a taxpayer may proceed under the common law enrichment action alleging mistake of law in any of these sources.

The Margo Commission (26) recommended that the protection afforded a taxpayer against error by the Commissioner, in the exercise of his discretionary powers, should be strengthened by a reduction in the number of discretionary powers that are not subject to objection and appeal. Those powers relating to tax liability should be made subject to objection and appeal.

The Commission also recommended:

*That the Commissioner should continue to lay down guidelines for the exercise of discretionary powers by receivers of revenue to ensure the greatest degree of uniformity.

*Greater use should be made by the Commissioner of the practice of issuing information bulletins (practice notes), setting out the guidelines he usually follows in the exercise of his discretionary powers.

*The Commissioner should be required to advise individual taxpayers how the

taxable income has been determined.

*The Commissioner should establish a manual containing the regulations published by him from time to time. They would set out the interpretation that he accords to various provisions of the Act. He would be bound by them, but the taxpayer would be at liberty to challenge any of them.

A number of problems concerning specific and general rulings issued by the tax authorities have been identified. The potential exists for rulings to be inconsistent; the legal status of rulings is not clear; the legal redress of taxpayers against unfavourable rulings is often severely restricted; there is a general shortage of information available on what constitutes a generally prevailing practice; no comprehensive set of regulations on the Act is available to taxpayers; and tax authorities are frequently reluctant to issue rulings.

The source of an error of law may therefore be found in a ruling, regulation or practice note issued by the Commissioner for Inland Revenue.

In the Willis Faber Enthoven case the facts were that Willis Faber Enthoven (Pty) Ltd, a company formed at the end of 1985 by the merger of two separate companies trading as insurance brokers, instituted action for the recovery of certain payments to the Receiver of Revenue mistakenly made by the two companies prior to the merger.

These payments were made in the following circumstances:

Section 60 (1)(f) of the Insurance Act 27 of 1943 stipulated that anyone carrying on insurance business of a specified kind must pay a tax of 'two and a half per cent of the aggregate of all premiums paid during the preceding calendar year on policies which were effected through his agency in terms of this section.' From a reading of s 60 as a whole it was quite clear that insurance business 'underwritten by underwriters at Lloyds' (Lloyds business') fell within the purview of the tax clause. Less certain, however, was whether business placed outside the Lloyd's market, but effected or renewed through a broker at Lloyd's ('other business'), was also targeted by s 60(1)(f).

The problem was that the words 'this section' in s 60(1)(f) could be read to refer either merely to s 60(1) (in which case Lloyds business only would have been meant) or to the entire s 60 (i.e. including s 60(2)), which would have had the effect that other business would have fallen within the ambit of the clause as well.

When the one-time financial manager of Robert Enthoven & Co (Pty) Ltd (one of the pre-1985 companies) took up his post at that company, he found a directive from the Registrar of Insurance which stated that tax must be paid on both Lloyds and other business. He had misgivings and telephoned the Registrar's office to check that the tax was indeed payable on other business. The assistant registrar to whom he spoke merely referred him to the abovementioned directive. He then accepted the position as stated in the directive as authoritative and went on paying the tax.

After the merger the matter was taken up again and this resulted in the ensuing action. in the court a quo it was held that the tax payments in respect of other business were in fact not due, but that they were not recoverable on the basis that they were paid under a mistake of law. On appeal it was confirmed that other business fell outside the provisions of s 60(1)(f), but the ruling of the court a quo (based on the authority of Rooth's and Benning's cases) in regard to the non-recoverability of money paid in error of law was overturned, subject to the important qualification that the error must be excusable.

The Appellate Division, in interpreting s 60, referred to the principle that an onerous provision reasonably capable of different constructions, should be construed in favour of the subject, citing two tax cases, *Israelsohn v CIR* (27) and *Glen Anil Development Corporation Ltd v SIR* (28). A taxpayer may now challenge the legal validity of a ruling or practice note, after having paid the tax claimed in terms of that ruling or practice note.

FOOTNOTES

- 1.The Law of South Africa 'Enrichment' by J G Lotz S66 Vol 9 (ed W A Joubert) 1979.
- 2.1915 AD 426 at 433-4.
- 3.at 453.
- 4.S2 SATC 224.
- 5.See The Woolich Building Society case, at 759.
- 6.at 445-6.
- 7.at 652 D-G.
- 8.at 651-2.
- 9.D H van Zyl 'The General Enrichment Action is Alive and Well' 1992 Acta Jurdica 115 at 130.
- 10.1992(s) SA 202(A), S4 SATC 427; See D P Visser 'Error of Law and Mistaken Payments: A Milestone', (1992) SALJ 109 at 177 ff.
- 11.(1888) 2 SAR 259.
- 12.1914 AD 420.
- 13.54 SATC 427 at 438.
- 14.54 SATC at 438.
- 15.9 SC 2 at 5.
- 16.54 SATC at 441.
- 17.54 SATC at 442.
- 18.54 SATC at 443.
- 19.'Error of Law and Mistaken Payments: A Milestone', (1992) SALJ 109 at 185.
- 20.Ibid, at 183.
- 21.1991 Annual Survey of South African Law at 119.
- 22.Ibid, at 119.

23. Ibid, at 119.

24. 54 SATC at 444.

25. at 444.

26. The Margo Report at para 28.55.

27. 1952(3)SA 529 (a) at 540 F-H.

28. 1975(4) SA 715(a) at 727 F-G.

CONCLUSIONS

1. That in South Africa a taxpayer who has overpaid tax and seeks a refund may proceed for such a refund under s 102 of the Income Tax Act 58 of 1962 but this section by no means affords a taxpayer a clear right to a refund-

- * the determination whether a taxpayer has paid an amount in excess of the amount properly chargeable is within the discretion of the Commissioner for Inland Revenue and such discretion has not been made subject to objection and appeal, although objection and appeal has not been expressly excluded by the section.

- * the Commissioner for Inland Revenue is empowered to authorize a refund only if it is proved to his satisfaction that there has been a payment in excess of the amount properly chargeable.

- * the section does not give effect to a legal right on the part of the taxpayer- it is wholly inconsistent with the idea that the taxpayer is entitled to demand anything, except that the Commissioner shall consider the case, having considered it his decision is final.

- * the section only contemplates a payment made in respect of taxes rightly chargeable but wrongly calculated- to the extent of any excess there would be an 'overpayment' and it would be an overpayment of duties 'properly chargeable'.

- * where no taxes are due at all, ie the taxpayer should not have paid anything at all, there is no overpayment of taxes 'properly chargeable' and s 102 would not apply.

- * s 102 does not, either in terms or context, purport to create a comprehensive remedy- it merely empowers the Commissioner, in particular circumstances, to make or approve a refund.

- * an aggrieved party is not precluded from advancing a claim for repayment on a different basis and the section does not preclude a claim for mora interest where the overpayment is legally recoverable at common law.

- * s 102 is not applicable where there is no lawful basis whatever for any demand of tax to be made by the Revenue; in such circumstances the demand itself is ultra vires and is therefore a nullity; in such a case there can be no valid assessment.

2. That in circumstances where s 102 is not applicable a taxpayer is not enabled or required to seek its remedy through the statutory framework but must fall back on the common law. Common law principles, whatever they may be, would then be applicable, unconstrained by the provisions of any statute.

3. That statutory provisions creating a discretionary regime for the repayment of taxes or charges do NOT presuppose that the common law principles give no right to recovery.

4. That statutory provisions, although they may have overlaid and replaced the common law principles, whatever those principles may have been, they become neutral in their effect, when the development of common law principles are considered by the courts.

5. That statutory provisions in fiscal legislation providing for the refund of overpayments of tax do not exclude common law remedies available to the taxpayer.

6. That, while a general enrichment action has not as yet been recognized in our law, important steps have been taken towards achieving this goal-

* our Appellate Division has recognized that money paid in error of law is recoverable only if such mistake is 'excusable in the circumstances of the particular case.'

* our Appellate Division has acknowledged that the Commissioner for Inland Revenue, as the public official entrusted with the administration of fiscal legislation, and since he derived his authority from the statute itself, it followed that if his reading of it should prove to be wrong he would not be empowered to retain, and hence would be obliged to refund, what was wrongly paid to him.

* the Commissioner for Inland Revenue, a public official, bound as he is by statute, would have no statutory justification to retain what he should never have claimed.

7. That where the Revenue has made an unlawful demand for tax, and the taxpayer is convinced that the demand is unlawful, he may well decide to pay first, asserting that he will challenge the lawfulness of the demand in litigation.

8. That in the case of any tax or duty paid by the citizen pursuant to an unlawful demand, common sense seems to require that tax to be repaid unless special circumstances or some principle of policy require otherwise; prima facie the taxpayer should be entitled to repayment as of right.

9. That the retention by the state of taxes unlawfully exacted is particularly obnoxious-taxes should not be levied without the authority of Parliament and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right. When the Revenue makes a demand for tax that demand is implicitly backed by the coercive powers of the state and may well entail unpleasant economic and social consequences if the taxpayer does not pay.

10. The Revenue is not entitled to lawfully retain sums unlawfully raised as this would conflict with, inter alia, Parliament's monopoly of taxation.

11. If the Revenue cannot retain the money, the taxpayer would have to establish either duress, mistake of fact or mistake of law to recover the money.

12. The common law does NOT provide a general right to recover payments where the recipient would otherwise be unjustly enriched.

13. In England the 'Woolwich Principle' has recognized that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand...is prima facie recoverable...as of right.

14. The House of Lords went even further, obiter, to hold that such a principle should apply equally where tax or another levy has been exacted as a result of an intra vires but excessive or erroneous demand.

15. Their Lordships in the Woolwich case have given notice (particularly Lords Goff and Slynn) that they do not regard the private law concept of duress or compulsion as fixed, so that it may, for example, extend to encompass what may be portrayed as 'deemed or presumed duress' by a public body of a citizen, in circumstances in which the public body has a number of statutory remedies open to it should the citizen fail to pay as demanded. This is a concept drawn from the United States, particularly the judgment of Mr Justice Holmes in *Atchison Topeka & Santa Fe Railway Co v O'Connor* (1912) 223 US 280 and developed in Australia in *Mason v New South Wales* (1959) 102 CLR 108 but which has not hitherto been recognised in English law.

16. All five Law Lords in the Woolwich case cast considerable doubt on the validity and utility of the 'mistake of law' rule. In particular, the majority here declared that it should not apply to situations otherwise falling within the ambit of the Woolwich principle. This is because, under that principle, recovery is grounded in the unlawfulness of the demand and not in any mistaken belief of the payer. The whole status of this 'rule' is currently being considered by the Law Commission and the second Woolwich case certainly moves it further towards elimination.

17. In the Woolwich case the House of Lords emphasised its willingness, in appropriate cases, to reconsider long-established lines of authority so as to give effect to important underlying principles. Such development of the law by reference to justice and principle rather than precedent provides an example of the House operating at its best. This statement is equally applicable to our Appellate Division which has also based its decisions in the *First National Bank* case and the *Willis Faber Enthoven* case on justice and principle, opening new avenues to the taxpayer and strengthening his rights in relation to those of the fiscus.

18. The statutory provisions which appear in most areas of the tax code to regulate the repayment of tax by the Inland Revenue had no application in the circumstances of the Woolwich case as they are concerned with overpayment of tax pursuant to intra vires errors, such as excessive assessment. They are not material to a case of an ultra vires demand, that is, the case where there is simply no legal foundation for the demand at all.

19. It was recently underlined in the case of *Namex(Pty)Ltd v CIR* 1992(2)SA 761(C) 54 SATC 307 that it was a long and firmly established principle of our law that public officials entrusted with the duty of collecting taxes cannot forego the taxes due to the State nor any part of them. The court stated that the Commissioner was required by the Income Tax Act to administer its provisions and to collect taxes. His rights and duties under the Act cannot be 'transferred' to another. He must carry out his duties as required by the Income Tax Act either personally or through officers under his control. Moreover,

the claim of the Commissioner for income tax cannot be ceded. He is, in relation to all matters of tax, akin to a delectus persona and he may not dispose of his rights or his duties. The rights and duties of a local authority to collect rates and taxes have similarly been held not to be capable of waiver or remission. Where the Legislature intends the Commissioner to have the power to remit moneys due to the State, the power to do so is expressly and specifically given. Thus, in terms of s 76 of the Income Tax Act the Commissioner may remit a penalty or allow payment by instalments. Nowhere in the Income Tax Act is the Commissioner given a general power to reduce, waive, cede or otherwise alienate a claim for tax.

Selikowitz J states at 321-2:

'In the Cape Central Railways case it was held that our common law in many instances treated the State as it did a minor. In the Netherlands the rule was adopted and extended to the fiscus as the custodian of the public treasury. Thus, waivers, errors and even negligence in claiming taxes are not regarded as a bar to the defendant [the Commissioner] when he later seeks to carry out his duty to collect taxes.'

20. In CIR v Delfos 1933 AD 242 it was said by Wessels CJ at 248 that:

'It seems quite clear that the appellant [the Commissioner] has no choice in the matter. He must assess according to the provisions of the Act. The principle that an officer appointed to carry out the provisions of a revenue Act cannot by contract remit taxation or moneys due to the Crown is clear...'

21. It is submitted that the general rule that one cannot waive a statutory right which exists in no way contradicts the contention that the Commissioner has an obligation to refund taxes not due in terms of the relevant fiscal statute. In other words, the Commissioner's duty of collecting taxes and his obligation not to forego taxes due to the State in no way prevents him from refunding overpayments of tax where there is clearly no obligation to pay the tax in question on the part of the taxpayer.

22. By the same token, the Commissioner is not empowered to refund taxes to a taxpayer in circumstances where he has no such power granted to him in terms of the Act. He cannot decide that it would be more equitable or not to remit taxes where the tax in question is clearly due in terms of the legislation. He cannot retrospectively release taxpayers from an obligation to pay a tax in terms of the Act unless he has been granted that power by Parliament.

23. The Commissioner has NO inherent power to remit taxes. However, it is submitted that he cannot demand or retain taxes already paid for which there is no foundation in the enabling fiscal legislation. This is based on the principle that the revenue is not entitled to lawfully retain sums unlawfully raised as this would conflict with, inter alia, Parliament's monopoly of taxation.

24. In the Woolwich Building Society case Lord Keith of Kinkel stated at 743-

'But it is not open to serious doubt that central Revenue departments have a similar discretionary power to make refunds of tax payments which were not legally due. Indeed, it is a power of that nature which the Revenue claim to have exercised in the present case, in the course of their general function of managing and administering the tax system. So if the Revenue had refused in the exercise of their discretion to make the repayment they did

in the present case I am of opinion that in the absence of any other remedy it would have been open to Woolwich to claim repayment in proceedings for judicial review, and there would appear to be no reason why such proceedings would not have been successful.'

25. However, the problem that faced the Woolwich Building Society was that Inland Revenue had accepted only a moral obligation to repay the principal amount of 57 million pounds, together with interest from the date of first judgment in the Woolwich's favour, which had been in the High Court in 1987. However, the Revenue claimed that any such repayment would be a matter of administrative grace only and not of legal entitlement, with the result that no interest was due for the period between the original payment and the date of that High Court judgment. The effect of the Revenue's argument would have been that it was rewarded for its own unlawful behaviour with what Mr Justice Nolan described in the High Court as 'a very large, interest-free loan.' The Woolwich could only recover the interest in question- later agreed to be some 6.7 million pounds- if it could show that it had been entitled in law to repayment of the principal sums as from the dates of their first payment.

26. An important decision of our Appellate Division, *Administrator, Transvaal, and Others v Traub and Others* 1989(4)SA 731(A) approves the principle of 'legitimate expectation' in the context of our law. An aspect of the change in the scope of judicial review in England was the evolution of the legitimate expectation principle and it was evolved in the social context of the age in order to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the particular circumstances of the case. It has also been found necessary, or at any rate desirable, to extend the scope of judicial review to include cases of legitimate expectation in Australia and New Zealand and Corbett CJ was of the view that there was a similar need in this country.

27. There are many cases which one can visualise in this sphere where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse.

28. The courts, in determining where the doctrine of legitimate expectation applies, will have to bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by a public authority and the contrary desirability of avoiding undue judicial interference in their administration.

29. A consideration of the taxpayer's legitimate expectations in the context of overpayments of tax- whether unlawful or through error- must be viewed in terms of some substantive benefit or advantage or privilege which the taxpayer concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing and, at other times, in terms of a legitimate

expectation to be accorded a hearing before some decision adverse to the taxpayer concerned is taken. Thus, the taxpayer concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing.

30. A frequently recurring theme in English cases concerning legitimate expectation is the duty on the part of the decision-maker (ie the Commissioner) to 'act fairly'. This is simply another and preferable way of saying that the decision-maker must observe the principles of natural justice. Many features will come into play including the nature of the decision and the relationship of those involved before the decision was taken and a relevant factor might be the observance by the decision-maker in the past of some established procedure or practice. It is in this context that the existence of a legitimate expectation may impose on the decision-maker a duty to hear the person affected by his decision as part of his obligation to act fairly.

31. In South Africa in recent years there have been a number of cases in Provincial Divisions in which the traditional scope of the principles relating to the observance of natural justice has been extended to decisions affecting a person who has no existing right, but merely a legitimate expectation.

32. It is submitted that a taxpayer, dependent on the Commissioner's discretion in all aspects of overpayments of tax, could greatly benefit by the application of the doctrine of legitimate expectation when dealing with the Commissioner in the sense that he has a legitimate expectation that he will be afforded a fair hearing preliminary to the tax in question being refunded. He could legitimately expect overpaid tax to be refunded.

33. In conclusion, it may be noted, that the underlying message of this thesis is that the taxpayer is in an unenviable position vis a vis the Commissioner when claiming refunds of tax overpaid.