

**AN ANALYSIS OF THE PURPOSIVE APPROACH
TO THE INTERPRETATION OF
SOUTH AFRICAN FISCAL LEGISLATION**

by

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**A dissertation submitted in partial fulfilment of the requirements for
the degree**

LLM (TAX LAW)

in the

FACULTY OF LAW

at the

UNIVERSITY OF PRETORIA

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December 2012

DECLARATION

I, PIETER ANDRIES SWANEPOEL, hereby declare that this dissertation is my own, unaided work. It is being submitted in partial fulfilment of the prerequisites for the degree of Master's in Tax Law at the University of Pretoria. It has not been submitted before for any degree or examination in any other University.

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December 2012

LIST OF ABBREVIATIONS

ACJ	Acting Chief Justice
ADCJ	Acting Deputy Chief Justice
AJA	Acting Judge of Appeal
AJ	Acting Judge
AJJA	Acting Judges of Appeal
C	Commissioner
CIR	Commissioner for Inland Revenue
CJ	Chief Justice
IRC	Inland Revenue Commissioners
ITA	Income Tax Act
ITC	Income Tax Cases
J	Judge
JA	Judge of Appeal
JJA	Judges of Appeal
JTLR	Juta Tax Law Reports
LAWSA	The Law of South Africa
SARS	South African Revenue Service
SARS Act	South African Revenue Service Act
SIR	Secretary for Inland Revenue
TAA	Tax Administration Act
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
VAT	Value-Added Tax
VAT Act	Value-Added Tax Act
ZASCA	South African Supreme Court

TABLE OF CONTENTS

DECLARATION.....	II
LIST OF ABBREVIATIONS.....	III
TABLE OF CONTENTS	IV
CHAPTER 1:INTRODUCTION AND BACKGROUND TO THE RESEARCH TOPIC	1
1.1 BACKGROUND AND HISTORY OF THE INTERPRETATION OF LEGISLATION (IN GENERAL) AS WELL AS FISCAL LEGISLATION IN THE REPUBLIC OF SOUTH AFRICA	1
1.2 CONSTITUTIONAL CONSIDERATIONS	2
1.3 DISTINCTION BETWEEN THE PRESUMPTIONS OF STATUTORY INTERPRETATION AND RULES OR CANONS OF CONSTRUCTION	5
1.4 BRIEF INTRODUCTION TO THE HISTORIC INTERPRETATION OF FISCAL LEGISLATION IN THE REPUBLIC OF SOUTH AFRICA	6
1.5 THE NEW APPROACH TOWARDS FISCAL LEGISLATIVE INTERPRETATION	7
1.6 PROBLEM STATEMENT	10
1.7 OBJECTIVES OF THE STUDY	11
1.8 SIGNIFICANCE OF THE RESEARCH	11
1.9 METHODOLOGY	12
1.10 LIMITATIONS OF THE STUDY	12
1.11 STRUCTURE OF CHAPTERS	13
1.12 REFERENCES.....	14
CHAPTER 2:THE INTERPRETATION OF FISCAL LEGISLATION PRIOR TO THE DECISION IN <i>ITC 1384</i>.....	15
2.1 THE EARLIER COURT DECISIONS.....	15
2.2 IN-DEPTH CONSIDERATION: PARTINGTON v ATTORNEY-GENERAL	17
2.3 CONTINUATION OF THE ENGLISH LAW INFLUENCE: IN-DEPTH CONSIDERATION – <i>CAPE BRANDY SYNDICATE v IRC</i>	21
2.4 OTHER <i>DICTA</i>	24
2.5 OTHER LESS STRINGENT APPROACHES	31
2.6 ANALYSIS OF THE EFFICACY OF THE EARLIER INTERPRETATION METHODOLOGY ADOPTED BY THE COURTS	34

CHAPTER 3:MORE RECENT DEVELOPMENTS IN THE PURPOSIVE APPROACH TOWARDS THE INTERPRETATION OF FISCAL LEGISLATION IN THE REPUBLIC OF SOUTH AFRICA (AND IN ENGLAND).....	37
3.1 SOUND WARNINGS AGAINST A STRICT / LITERALIST APPROACH TOWARDS LEGISLATIVE INTERPRETATION	37
3.2 THE APPELLATE DIVISION'S LIMITATION OF COMMON LAW SUBSTITUTION.....	40
3.3 THE APPROACH AWAY FROM A STRICT INTERPRETATION	41
3.4 INFLUENCES FROM ABROAD.....	43
3.5 THE DECISION IN <i>ITC 1384</i>	44
3.6 OTHER <i>DICTA</i>	46
3.7 CRITICAL EVALUATION OF THE EFFICACY OF THE MORE RECENT PURPOSIVE INTERPRETATION OF FISCAL LEGISLATION	48
3.8 CONCLUSION	50
CHAPTER 4:ANALYSIS OF THE APPROACH OF DIFFERENT AUTHORS	52
4.1 INTRODUCTION.....	52
4.2 LOCAL AUTHORS.....	52
4.3 INFLUENCES FROM ABROAD.....	55
4.4 FURTHER CONSIDERATIONS.....	57
4.5 CRITICAL EVALUATION OF THE APPROACHES ADVANCED BY THE DIFFERENT AUTHORS, AS DISCUSSED ABOVE	63
4.6 CONCLUSION	66
CHAPTER 5:MORE RECENT <i>DICTA</i> AS WELL AS OTHER INFLUENCES TOWARD A PURPOSIVE INTERPRETATION OF FISCAL LEGISLATION.....	67
5.1 INTRODUCTION: <i>CAPITA SELECTA</i>	67
5.2 <i>CAPITA SELECTA</i> – BEYOND THE SCOPE OF THE INTERPRETATION OF FISCAL LEGISLATION	67
5.3 THE TAX ADMINISTRATION ACT	71
5.4 SARS' INTERPRETATION NOTES.....	71
5.5 OTHER RELEVANT <i>DICTA</i>	72
5.6 SIMILAR CONSIDERATIONS, 60 YEARS APART	85
5.7 CONCLUSION	86
CHAPTER 6:RESEARCH FINDINGS AND RECOMMENDATIONS	89
REFERENCES	92

CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE RESEARCH TOPIC

1.1 BACKGROUND AND HISTORY OF THE INTERPRETATION OF LEGISLATION (IN GENERAL) AS WELL AS FISCAL LEGISLATION IN THE REPUBLIC OF SOUTH AFRICA

The importance and the daily relevance of the interpretation of legislation (in general), as well as fiscal legislation in particular, in a developing country like the Republic of South Africa, need not to be underscored.

An example of the contribution of the rules of interpretation of statutes appears from the following statement by the learned authors in *The Law of South Africa*¹ where it is stated *inter alia* as follows:

The rules of interpretation of statutes and constitutional interpretation form an important instrument in establishing the extent and scope of administrative powers and duties. However, these rules of interpretation do not in themselves constitute substantive rules of administrative law.

It is well recognised that the interpretation of fiscal legislation (by Courts of law as well as by legal practitioners, the South African Revenue Service² and the Commissioner for the South African Revenue Service³) is an important subject that directly or indirectly affects the lives of all the citizens of the Republic of South Africa as well as, more particularly, the taxpayer-base of the country.

¹ Joubert, W.A. (Founding Ed.) & Faris, J.A. (Planning Ed.) (Durban, Butterworths) LAWSA, Vol. 25 (1) 2nd Ed. para 73.

² SARS.

³ As defined in section 1 of the Income Tax Act No 58 of 1962 (as amended).

The evaluation and practice of fiscal legislation carries with it the necessary requirement of a balancing of competitive interests. For example, on the one hand there is the tendency towards a strict and literal interpretation, whilst another, competing approach, is that in which the interpreter ascribes towards establishment of the purpose of the relevant statutory provision(s).⁴

The following statements by Prof. du Plessis ⁵ are instructive insofar as they concern the move to adopt a purposive approach towards the interpretation of legislation:

Legal academics have been at the helm of transforming the notion of purposive interpretation into the idea of teleological interpretation.

Purposiveness nowadays seems to be becoming the substitute for clear language as the key to constitutional interpretation. This could in the course of time have (and has already had) an impact on Courts' approach to the interpretation of non-constitutional legislation too. This is especially true where legislation closely associated with socio-economic and political transformation stands to be construed and where specialist fora called into existence to deal with such legislation are involved.

1.2 CONSTITUTIONAL CONSIDERATIONS

Although the scope of the present research is focused on the purposive interpretation of local fiscal legislation, its commencement would be illogically abrupt without a consideration of the general (local) approach towards the interpretation of legislation. In the modern era the South African approach to the interpretation of legislation should reasonably commence with reference to the omission in the Constitution ⁶ of a provision whereby it is directed that when legislation can be interpreted in more than one way, at least one of which amounts to a

⁴ The contrast between establishment of the purpose of the legislation as opposed to the intention of the Legislator, constitutes a theme for discussion throughout this research.

⁵ Du Plessis, L.M. (2002). *Re-Interpretation of Statutes*. Durban: Butterworths, pp. xii.

⁶ Constitution of the Republic of South Africa, 1996.

reasonable interpretation that does not conflict with the Bill of Rights, such interpretation must be followed.⁷ The resultant effect is that the common law rule must be applied. This rule of interpretation is to be applied only when considering the constitutionality of legislation. It does not find application in the interpretation of the provisions of the Constitution.⁸

Section 39(2) of the Constitution provides expressly that when interpreting *any* legislation (and when developing the common law or customary law), every Court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights. The subsection applies at all times to the determination of the content of all rules, and its scope is *not* limited to the consideration of the constitutionality of a statute or rule.⁹

In *Du Plessis v De Klerk*,¹⁰ Kriegler J found that:

Subsection (3), in turn, says how any statute is to be interpreted and how the common law and customary law are to be applied and developed. Two points should be noted. The subsection applies to the whole body of South African law, any statute and common law and customary law in general. And what is more important, the rules of statutory or other law to which it applies are not limited to those directly struck by the provisions of the chapter.

The intention of the drafters of the Constitution in enacting s 35(3) and in adding it as the last word on chapter 3, therefore seems clear.

⁷ See in this regard the inclusion of such rule in the Interim Constitution of South Africa, Act 200 of 1993, ss 35(2) and 232(3), which sections of the Interim Constitution and the common law rule of *ut res magis valeat quam pereat* (that the thing may rather have effect than be destroyed, see *Ynuico Ltd v Minister of Trade & Industry* 1995 11 BCLR 1453 (T) at 1468G-J) had the same effect.

⁸ See *Case v Minister of Safety & Security; Curtis v Minister of Safety & Security* 1996 1 SACR 587 (CC) para 76.

⁹ See in this regard the remarks by the learned authors in *The Law of South Africa, vol. 10(1), Second Edition*, para 204, where it was opined that the provision will most probably only be applied when the constitutionality of legislation is not in issue.

¹⁰ 1996 (3) SA 850 (CC) at para 137.

*Even in those cases where the provisions of the chapter do not directly apply, the rules of law applicable are to be informed by the ‘spirit, purport and objects’ thereof.*¹¹

The irony of the learned judge’s interpretation of the very constitutional provision dealing with the prescribed manner of interpretation of statutory provisions, wherein he refers to and leans upon the derived (“afgeleide”) intention of the legislature, is evident and not insignificant.¹²

In addition, it is important to consider the provisions of section 233 of the Constitution, in terms whereof it is directed that, when interpreting any legislation, every Court,

... must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

It is to be noted that the Courts are directed in terms of this provision to also apply the international interpretation and not to merely consider same. International norms cannot therefore be disregarded – even insofar as they concern the interpretation of local fiscal legislation.

It is considered, unquestionably so, that the advent of constitutionalism in the Republic of South Africa has had a fundamental impact on the traditional understanding of the relationship between statute law and common law; the reason being that since the dawn of the constitutional era the source of supreme law in our legal system has been the Constitution.¹³

¹¹ Own emphasis.

¹² Emphasis is also directed at the learned Judge’s reference to the “intention of the drafters of the Constitution” (the Legislature), as opposed to the intention of the relevant statutory provision.

¹³ See in this regard the confirmatory remarks by the learned authors in Joubert, W.A. (Founding Ed.) & Faris, J.A. (Planning Ed.) (Durban: Butterworths) LAWSA, Vol. 25 (1) 2nd Ed., para 73.

As a starting point, the aforementioned provisions of the Constitution give guidance and direction on the interpretation of all legislation in the Republic of South Africa. The question that stands out, for purposes of the present study, is whether that direction and guidance give significant assistance when interpreting the technical, and sometimes complicated, provisions of, *inter alia*, the Income Tax Act No 58 of 1962 (as amended) (“the ITA”) and the Value-Added Tax Act No 89 of 1991 (as amended) (“the VAT Act”) as well as other local fiscal legislation.¹⁴ In the remaining chapters of this research, an effort is made to address this question.

1.3 DISTINCTION BETWEEN THE PRESUMPTIONS OF STATUTORY INTERPRETATION AND RULES OR CANONS OF CONSTRUCTION

It is considered important to distinguish between the presumptions of statutory interpretation on the one hand, and the rules or canons of construction on the other hand.¹⁵ The presumptions of statutory interpretation have obligatory force by nature of the fact that they constitute legal rules derived from the common law. The presumptions are intrinsic to the principle of legality of provisions of all statutes.¹⁶

On the other hand, the rules or canons of construction have no status as legal rules, and are conceptual models which may be applied or not by practitioners, and, more specifically, judicial officers to establish the meaning of a particular legislative provision. It is considered that the purposive methodology of interpretation forms part of the canons of construction.¹⁷

¹⁴ Including the Tax Administration Act 28 of 2011 (promulgated on 4 July 2012 having come into operation (save for a few sections in respect of which the date of effectiveness has been postponed) on 1 October 2012).

¹⁵ See in this regard the confirmatory remarks by the learned authors in Emslie, T.S., Davis, D.M., Hutton, S.J., Olivier, L. (2001). *Income Tax Cases & Materials*. 3rd Edition. Cape Town: The Taxpayer, at 15-16.

¹⁶ See Baxter, L. & Hoexter, C. *Administrative Law* (1984) 1st Edition. Cape Town: Juta & Co Ltd, at 314-315.

¹⁷ See Cowen, D.V. (1980). The Interpretation of Statutes and the Concept of the Intention of the Legislature. *THRHR*, 43, p. 374.

1.4 BRIEF INTRODUCTION TO THE HISTORIC INTERPRETATION OF FISCAL LEGISLATION IN THE REPUBLIC OF SOUTH AFRICA

In *CIR v Simpson*¹⁸ the Supreme Court of Appeal found, amongst others, that:

In construing the definition regard must be had to the cardinal rule laid down ... in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64 at 71 and approved ... in Canadian Eagle Oil Co Ltd v The King [1946] AC 119 at 140.

The *Cape Brandy Syndicate* rule was as follows:

*In a taxing Act one has to look merely at what is clearly said. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used.*¹⁹

The above quotation is that by the Appellate Division in *CIR v Simpson*. The correct quotation from the judgment by Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners*²⁰ is as follows:

*"It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.*²¹

¹⁸ 1949 (4) SA 678 (A) at 695 (also reported as 16 SATC 268).

¹⁹ The extract is from the separate but concurring judgment of Centlivres, JA.

²⁰ [1921] KB 64 at 71.

²¹ Own emphasis of the words not contained in the quotation of the excerpt by the Appellate Division in *CIR v Simpson*.

This approach is considered to be the strict approach towards the interpretation of fiscal legislation.²² Confirmation thereof that our Courts are still partial to this approach is evidenced from a reading of various reported decisions, to which reference is made below.²³

1.5 THE NEW APPROACH TOWARDS FISCAL LEGISLATIVE INTERPRETATION

A certain amelioration of this approach is evidenced from a reading of more recent decisions by our Courts; for example, the decision in *ITC 1384*²⁴ wherein Steyn J (as he then was) held, *inter alia*:

That the Estate Duty and Income Tax Acts are closely linked revenue gathering measures is clear from the frequent references to the latter in the former and from the fact that the same officers of the public service are tasked as tax-gatherers by both Acts. Where one of such closely-linked taxing measures falls to be interpreted it is, to my mind, not only permissible but also necessary to have regard to the other where the legislature has not expressed itself clearly or in sufficient detail in the measure requiring construction.

This is so because it is natural and logical to expect a similar handling of like matters especially where the same machinery of state is used for purposes of like nature. It is, therefore, proper when having to determine the assessing competence of the principal tax-gatherer in terms of the one measure to have regard to his competence as expressed in the other ... but regard must also be had to the fundamental

²² De Koker, A. & Williams, R.C. (Eds.), (2012). *Silke on South African Income Tax*. Memorial Edition, Durban: LexisNexis; Silke J. (1995). The Interpretation of Fiscal Legislation – Canons of Construction, Recent Judicial Comments and New Approaches. *Acta Juridica*, vol. 58, issue 334.

²³ *Ibid.*

²⁴ 1983 (46) SATC 95.

*principles of the common law because they comprise the basic substratum upon which all statutes in the same legal system ultimately rest.*²⁵

In *ITC 1384*²⁶ the Court further found that:

*... the statute would nevertheless have to be construed subject to the presumption of a fair, just and reasonable lawgiver's interpretation and the consonance with the 'new approach' to interpretation of fiscal statutes, in terms whereof such measures are neither to be subjected to eviscerating formalism or strictness nor to be treated with fawning respect as 'holy cows', and not as emanating from some revenue-hungry Draco, but as coming from a reasonable lawgiver intent, even in matters fiscal, upon ordering its community fairly and justly.*²⁷

This method of construction is considered to be the so-called "new approach" towards the interpretation of fiscal legislation.²⁸

In the following chapters this new approach is evaluated, commented upon, and contextualised with reference to the era in which the judgments of the various local Courts occurred, as well as with reference to the particular type of fiscal legislation concerned.

The administration of the ITA is now mainly provided for in the Tax Administration Act,²⁹ which provides that if its provisions are silent as to the administration of a tax Act and the issue is specifically provided for in the relevant tax Act, then the provisions of the latter Act

²⁵ See the judgment on p. 104. Own emphasis added.

²⁶ 1983 (46) SATC 95 at 107-8.

²⁷ Own emphasis added.

²⁸ See Silke, J. (1995) The Interpretation of Fiscal Legislation – Canons of Construction, Recent Judicial Comments and New Approaches. *Acta Juridica*, vol. 58, issue 334.

²⁹ Act No 28 of 2011 (the "TAA"). The Act came into operation on 1 October 2012, save for certain sections relating to interest. SARS' Interpretation Note No 68 of 16 November 2012 gives guidance on the identification of those provisions which have not come into operation.

apply, and in the event of any inconsistency between the Tax Administration Act and a tax Act, the provisions of the relevant tax Act will prevail.³⁰

It can now arguably be stated that the Legislature has recognised that the interpretation of fiscal legislation, *inter alia*, forms part of the administration of tax Acts. In this regard reference is made to the definition of the words “administration of a tax Act” as contained in section 1 of the Tax Administration Act, in terms whereof those words are given the meaning assigned in section 3(2) of the Tax Administration Act. The mentioned subsection provides *inter alia* that the administration of a tax Act means to:

(a) obtain full information in relation to-

(i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period;

(ii) ...

...

(d) determine the liability of a person for tax;³¹ ...

This aspect will be elaborated upon below. Suffice it to state that it is arguable that a Court might interpret the aforementioned definition of the “administration of a tax Act” to include the interpretation of any fiscal legislation. In this regard the contention is that it can be understood from the meaning of the words “anything that may affect the liability of a person for tax” as well as from the words “(to) determine the liability of a person for tax” that same can include the interpretation of fiscal legislation. The aforesaid definition is new and there exists, at present, no reported or unreported case law pertaining thereto.

³⁰ See section 4(1), (2) and (3) of the Tax Administration Act.

³¹ The TAA and its provisions are further dealt with in Chapter 6.

1.6 PROBLEM STATEMENT

In the modern, post constitutional era in which commerce occurs in the Republic of South Africa, the inclusiveness of different cultures and races creates peculiar communication dilemmas, viewed purely from a linguistic perspective. Not to be overlooked is the fact that the Constitution recognises 11 official languages.³²

It is contended that issues of interpretation and the determination of the “correct” approach would have been prevalent despite the existence of 11 official languages. The interpretation of fiscal legislation is far more than a mere potential linguistic dilemma. The correct current approach of our Courts to fiscal legislative interpretation has an unquestionable impact on all taxpayers, as well as residents in the Republic of South Africa. It is contended that the aim should be to establish, as far as possible, a uniform recognised, fair-to-all, and consistent approach with regard to the interpretation of fiscal legislation.³³

A consideration of the following statement by Prof. du Plessis³⁴ is thought provoking and indicative of the relevance of the continued consideration of the interpretation of legislation (in general and also in respect of fiscal legislation):

*... the conviction that a statute harbours a discoverable intention of a legislature or the verdict that the language of a statute can be unambiguous and clear are themselves theoretical assumptions.*³⁵

³² See section 6(1) of the Constitution.

³³ Beven, F. (BA LLB, UCT), a plain language practitioner and former attorney in Cape Town, in *De Rebus* November 2012, pp. 44-45, in his article “*Simply Unclear*”, advances various arguments in favour of a move away from legalese, towards more plain language usage. He refers to certain recent legislation in which plain language has been stipulated including the Consumer Protection Act 68 of 2008. Notably no tax Act forms part of these Acts in which plain language has been used.

³⁴ As cited in Joubert, W.A. (Founding Ed.) & Faris, J.A. (Planning Ed.) (Durban, Butterworths) *LAWSA*, vol. 25 (1) 2nd Ed. Para 312

³⁵ Once again it is to be noted that the learned author refers to the “intention of a legislature” as opposed to the intention of the statute itself. Own emphasis added.

It is against this background that the approach by local Courts, towards the purposive interpretation of fiscal legislation, will be evaluated and commented upon.

1.7 OBJECTIVES OF THE STUDY

In considering the different approaches which have been applied by Courts in the Republic of South Africa in recent years, there is a need to investigate the Courts' approach towards the interpretation of fiscal legislation with the aim of establishing the purpose of the legislature and/or the purpose of the relevant legislative provision.

The major objective of this study is, therefore, to conduct an investigation into the historic and recent approaches by local Courts towards purposive fiscal legislative interpretation and to *inter alia* establish whether, at present, prevalence is given over a specific manner of interpretation.

An effort is made to provide clarity on the generally accepted meaning of the words "purposive approach" to the interpretation of legislation, contrasted with the aim of establishing the intention of the relevant statutory provision.

1.8 SIGNIFICANCE OF THE RESEARCH

Prior to the decision in *ITC 1384*³⁶ the approach of our Courts has consistently been to favour a more strict method of interpretation of fiscal legislation.

The aim of this study is to determine whether the relatively recent approach to a purposive methodology of interpretation has come to be adopted instead of the strict approach, or whether there is room for a co-existence of the different methods of interpretation; most notably the strict interpretation versus the purposive interpretation.

³⁶ ITC 1384 (1983) 46 SATC 95 (O).

The study also aims at establishing whether a trend can be discerned insofar as it concerns the development of the methods of interpretation of fiscal legislation.

1.9 METHODOLOGY

The methodology adopted in this study consists, in the main, of identification, evaluation and discussion of the various Courts' decisions in which the purposive interpretation of fiscal legislation was the dominant (or a prominent) feature.

In addition, the views and interpretation of various renowned authors on the subject of a purposive interpretative approach are stated and evaluated, and where required, commented upon. A specific effort is made at an in-depth consideration and contextualisation of major precedent setting *dicta*.

1.10 LIMITATIONS OF THE STUDY

This study is limited to the examination of Court decisions and the works of renowned authors. For the sake of brevity the evaluations and discussions of the Courts' decisions are limited to each case's contribution towards the issue of the purposive interpretation of fiscal legislation.

Due to the fact that there is a length limit pertaining to this study, the ideal of a more in-depth evaluation of each of the Court decisions, especially those of the Supreme Court of Appeal, is not possible. However, where required, the more leading and precedent setting Court decisions enjoy a more in-depth examination and discussion.

The aim of the research was not to reproduce a reference to the various theories of statutory interpretation, but rather to focus on our Courts' approach towards the purposive interpretation of fiscal legislation.

1.11 STRUCTURE OF CHAPTERS

CHAPTER 1: The first chapter introduces the background, purpose and scope of the study. It also explains the importance of the study, as well as the methodology followed. The limitations of the study are also discussed in Chapter 1.

CHAPTER 2: In the second chapter the emphasis falls on the Courts' approach to the interpretation of fiscal legislation, particularly the earlier precedent setting decisions of the 19th and 20th centuries, up to and including the decision in *ITC 1384*.³⁷ The origins of the Courts' approaches are identified and views expressed with regard to the efficacy of the methodology adopted by the Courts.

CHAPTER 3: More recent developments in the purposive approach towards the interpretation of fiscal legislation in the Republic of South Africa are identified and discussed. Identification and evaluation follows of what is considered to be the most important recent Court decisions, subsequent to the decision in *CIR v Simpson*,³⁸ insofar as they concern the subject of the purposive interpretation of fiscal legislation.

The Courts' approaches are identified, and views expressed with regard to the efficacy of the more recent purposive methodology of interpretation.

CHAPTER 4: In the fourth chapter the emphasis is on an evaluation of the views expressed by various renowned authors (local and abroad) on the subject of the purposive interpretation of fiscal legislation. In addition, a critical analysis of the authors' views is presented.

CHAPTER 5: In the fifth chapter the most recent Supreme Court of Appeal (and lower Courts') decisions on the subject of the purposive interpretation of fiscal legislation are

³⁷ Also reported as 1 SATC 20.

³⁸ 1949 (4) SA 678 (A) also reported as 16 SATC 268.

discussed, and their implications for future judicial interpretation of fiscal legislation are critically considered.

CHAPTER 6: The final chapter contains the author's conclusions drawn from the case law and the analysis of various academic writings. Views are expressed on what is considered to be the current favoured judicial approach to the interpretation of fiscal legislation. The researcher also makes specific recommendations with regard to what is proposed to be the role and function of the purposive methodology towards interpretation of fiscal legislation.

1.12 REFERENCES

In the last section of this work references are detailed according to the following:

- Works of local authors
- Works of foreign authors
- Articles and other academic works
- Reported South African case law
- Unreported South African case law
- Reported foreign case law
- Unreported foreign case law
- Local statutory provisions
- Foreign statutory provisions

CHAPTER 2: THE INTERPRETATION OF FISCAL LEGISLATION PRIOR TO THE DECISION IN *ITC 1384*

2.1 THE EARLIER COURT DECISIONS

Some South African Court decisions have created the impression that in the interpretation of tax Acts, in direct contrast to other statutory enactments, strict adherence to the words used is required. For example, in *CIR v George Forest Timber Co Ltd*³⁹ the Court, *inter alia*, stated that:

I apprehend the rule of construction of taxing statutes is as stated by Lord Cairns in Partington v Attorney-General (21 LT 370 at 375).⁴⁰

The Appellate Division (as it was previously known) then quoted the following formulation by Lord Cairns:

I am not at all sure that, in a case of this kind – a fiscal case – form is not amply sufficient, because as I understand the principle of all fiscal legislation, it is this:

If a person sought to be taxed comes within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction,

³⁹ 1924 AD 516. Also reported as 1 SATC 20.

⁴⁰ See the judgment at p. 531 of the Appellate Division report. Although not often commented upon, specific attention is directed at the Court's specific reference to construction of "taxing statutes". From the earlier Court decisions considered *infra* it will be noted that those decisions, in particular, distinguished clearly between the interpretation of fiscal legislation and other (general) legislation.

*certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.*⁴¹

In addition to the approval of Lord Cairns' afore stated *dictum* by the Appellate Division in *CIR v George Forest Timber*⁴² the *dictum* was cited with approval by the Appellate Division in *CIR v Wolf*⁴³ where the Court found as follows:

*Does the present case then fall within the letter of the law as set forth in sec 7(1)(f)? In my opinion it does. The sum of £20 000 received for the machinery, plant etc, is clearly a recoupment from capital expenditure, and it was received by a person carrying on mining operations.*⁴⁴

CIR v George Forest Timber Co Ltd was an appeal from a full bench of the Cape Provincial Division. The respondent company purchased land with a forest upon it and claimed to be entitled to deduct from the proceeds of its sales of timber during an income tax year, an amount representing the proportionate return to it of the capital invested in the acquisition of the forest from which the timber was cut. The respondent company also carried on business as timber merchants. The respondent company based its claim on the provisions of section 17(1)(f) of the now repealed Income Tax Act No 41 of 1917. The Court's approval of the *dictum* of Lord Cairns aforementioned is, however, preceded by the following instructive statement by Innes CJ:⁴⁵

The Legislature could never have meant to split up the ordinary gross receipts of a trading business, and the debts owed to such business for the purchase of goods,

⁴¹ At p. 531.

⁴² 1924 AD 516 at 531-532.

⁴³ 1928 AD 177 at 185.

⁴⁴ Per Solomon CJ at p. 185 (in a separate but concurring judgment, the main judgment being written by De Villiers JA, with whom Wessels JA, Curlewis JA and Stratford JA concurred).

⁴⁵ At pp. 524-525.

*into two parts – one capital and the other income. Mr. Roper pointed out some of the difficulties which such a construction of sec. 6 would involve. ...*⁴⁶

In the separate (but concurring) judgment of De Villiers JA,⁴⁷ the afore stated reference to the *dicta* by Lord Cairns in *Partington v Attorney-General* is then stated. The express reference to Lord Cairns' *dicta* can safely be construed as the incorporation of the so-called rules of interpretation of tax Acts from the English law into South African law. It was based upon the aforementioned reasoning that the Court, per De Villiers JA,⁴⁸ found that:

Except as regards income derived from mining operations, which is dealt with separately in sec. 23, the Act distinctly excludes losses or outgoings of a capital nature from being deducted. I agree that the appeal succeeds.

2.2 IN-DEPTH CONSIDERATION: PARTINGTON v ATTORNEY-GENERAL

In view of the fact that it is considered that mere reproduction without comprehensive contextualising can give rise to an incorrect evaluation and application of precedent setting *dicta*, it is suggested that Lord Cairns' afore stated *dicta* be considered in its correct context.⁴⁹

⁴⁶ Attention is directed at the Chief Justice's consideration of the intention of the Legislature ("The Legislature could never have meant ...") as opposed to the intention of (contained in) the specific statutory provision.

⁴⁷ At p. 531.

⁴⁸ At p. 532.

⁴⁹ In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 46 per Ackerman J and para 172 per Chaskalson, P, the Constitutional Court emphasised the importance of construing (constitutional) provisions in context holding that this includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and in particular the provisions entrenching fundamental rights. It is contended that contextualisation can, in the present circumstances, also serve as a useful aid in correctly interpreting major precedent setting *dicta*. It bears mentioning that the author could find no reported or unreported South African or English Court decision in which the elaborate facts of the decision in *Partington v Attorney-General* (21 LT 370 at 375) were stated and/or comprehensively evaluated and/or contextualised.

The case (*Partington v Attorney-General*⁵⁰) was decided on the 11th June 1869 in England. It was a decision of the House of Lords, on appeal from a decision of the Exchequer Chamber. The appellant (Partington) was merely the attorney of the *in nomine* appellant, one James Cook.

The relevant factual events occurred as early as 1819 when a Mrs Shard, who was a widow, died intestate. Upon her death the Crown took out administration to the estate and received under it the amount of 23,821l.⁵¹ Thereafter, in 1823, one Isabel Cook, who was at that stage the wife of Ellis Cook, both of whom were resident and domiciled in the United States of America, applied to the Crown, claiming to be the next-of-kin of Mrs Shard.

However, Isabel Cook passed away in 1825 without establishing her claim in respect of the intestate estate of Mrs Shard. During 1825, at the stage of Isabel Cook's passing, the estate of Mrs Shard, legacy duty being deducted, amounted to 22,403l. In 1830, Isabel Cook's husband, Mr Ellis Cook, passed away intestate without having taken any steps to recover the money and without having administered to his (already deceased) wife. Thereafter, only in 1855, did the children of Ellis and Isabel Cook, who were both resident and domiciled in the United States of America, apply to Mr Partington to take proceedings to recover the money from the solicitor to the Treasury. One of the said children, James Cook, authorised Partington to take out administration to the estates of both Ellis and Isabel Cook.

Accordingly, grants of administration to both those estates were, in July 1855, severally made to Partington for the use and benefit of James Cook by virtue of which grants the claim of Partington, representing James Cook, was allowed in a Chancery suit. It was found by the Chief Clerk in a certificate that the solicitor to the treasury owed the sum of 23,885l, where after the Vice Chancellor by order dated 26 June 1858 declared that 34,124l should be added to the afore stated amount, as interest at the rate of 4% *per annum* on the afore stated amount, and that, consequently the whole amount should be paid over to Partington (for the benefit of the children aforementioned).

⁵⁰ 21 LT 370 at 375.

⁵¹ As cited in the relevant text: l:£.

It was in the premise that the Commissioners of Inland Revenue claimed that the stamp duty should bear a value including all accretions, from the date of the death of Isabel Cook (1823) to the date of administration (in 1855). The Commissioners also claimed that the grant of administration for the effects of Ellis Cook, who survived his wife, should be stamped at the same rate.

On 17 June 1862 the Exchequer found that the values of the relevant deceased estates, at the time on which the Letters of Administration were obtained, were that on which stamp duty should be calculated and that Partington was therefore liable to pay duty on the whole amount (the principal amount) as increased by the subsequent addition of interest. In addition, the Exchequer, only on 30 April 1863, found that the relevant duty, in favour of the Commissioners of Inland Revenue, should be entered for the amount claimed in respect of the estate of Isabel Cook only and that no duty was payable in respect of the estate of her late husband, who passed away seven years after she passed away (in 1830).

Thereafter, in terms of a procedure of the Exchequer Chamber (the Court *a quo*), the decision, to the effect that the judgment should be entered in favour of the Commissioners of Inland Revenue in respect of the state of Isabel Cook only, was reversed and it was held that it was necessary for the next-of-kin of Ellis Cook, in order to enforce the right of his wife and to reduce the property into possession for their benefit, to take out Letters of Administration to both Ellis and Isabel Cook and, accordingly, to pay stamp duty upon each grant.

Partington then appealed to the House of Lords on behalf of the two children. The main judgment was given by the Lord Chancellor (Hatherley). The other Law Lords (Chelmsford, Westbury, Colonsay and Cairns) each gave a separate but concurring written judgment.

It is important, before reference is made to the judgment of Lord Cairns, to understand that two questions arose for decision by the House of Lords. The first being “... *whether or not, considerable delay having occurred between the death of the intestate, and the taking out of*

*the Letters of Administration, the duty should be chargeable upon the accretions of interest which had occurred in the interval;*⁵² and then, secondly,

... whether or not a double duty was payable, there having been a lady entitled, in the first instance, to administer to the intestate and entitled also to the beneficial interest in the property of the intestate, and she having predeceased her husband, and the husband also having died before taking out Letters of Administration to her, and before any were taken out by Mr Partington.

In respect of the first question (with regard to interest) Lord Cairns found as follows:

The interest is clearly payable as damages or compensation for the withholding of the principal. Whoever is entitled to the principal is entitled also to the interest as an accretion. It merges into and becomes part of the sum which has to be paid; and the whole taken together becomes the estate in respect of which the administration is granted. ...

Only thereafter did Lord Cairns make his, now famous, statement, and at p. 375 found as follows:

⁵² The astute reader will immediately recognise that a similar type of dilemma is potentially faced in present times if regard is had to the recent draft Taxation Laws Amendment Bill, 2012 which contains various proposed legislative amendments to the Income Tax Act which, if enacted, will have retrospective effect. The relevant example is section 8E of the Income Tax Act that was introduced to primarily counter tax avoidance involving preference share financing arrangements. The application of section 8E would generally result in the holder being subject to tax on the interest, while not being deductible in the hands of the issuer. Section 8E has been amended by the Taxation Laws Amendment Act 2011, with effect from April 1, 2012. Section 8E as amended by the Taxation Laws Amendment Act 2011 continues to be the governing law until the draft Taxation Laws Amendment Bill 2012 is promulgated. It is therefore possible for a taxpayer to receive a dividend in respect of a redeemable preference share that does not fall foul of the provisions of section 8E as contained in the Act. However, once the draft Taxation Laws Amendment Bill 2012 is enacted and the provisions of section 8E retrospectively amended, such dividend may then fall foul of the retrospective amendments so that it no longer constitutes a tax exempt dividend in the hands of the taxpayer, but a taxable interest as a consequence of the retrospective amendment. See in this regard the apposite remarks and references to the Indian and UK experiences, by Dachs, P. & Du Plessis, B. in their article "*The Law should not operate retrospectively*", November 2012. Available at <http://www.mondaq.com/x/208012/Income+Tax/The+Law+Should+Not+Operate+Retrospectively>.

Now, upon the form, how does this case stand? I put aside the name of Mr Partington, who is only acting as attorney. Take the name of James Cook. James Cook comes to this country. He applies to the proper forum for the grant of two Letters of Administration. These two separate grants of Letters of Administration are made to him in entire accordance with the practice of the forum in this country. According to the Act of Parliament, they are to be granted 'for or in respect of certain property' and in this case, beyond all doubt, the property 'for or in respect of which' they are granted is, in the first instance, the personal estate of Isabel Cook, which is within the jurisdiction, and in the second place the personal estate of Ellis Cook, which is also within the jurisdiction.

...

Therefore it appears to me that we have nothing more to consider in this case than this: it being admitted that there are two grants of Letters of Administration, what is the proper stamp to be affixed upon those Letters of Administration? ...

Against the aforementioned reasoning, Lord Cairns found that the appeal should be dismissed because, both on form and in substance, stamp duty had to be paid in respect of both the Letters of Administration. Lord Cairns' approach was akin to a strict and formalistic approach in terms whereof the letter of the law was to be taken and applied to the situation to obtain a certain outcome; irrespective of the hardship caused by the said outcome.

2.3 CONTINUATION OF THE ENGLISH LAW INFLUENCE: IN-DEPTH CONSIDERATION – CAPE BRANDY SYNDICATE v IRC

The local introduction of rules of interpretation in respect of tax Acts, from English judgments, is further apparent from the wide recognition of the *Cape Brandy Syndicate v IRC*⁵³ dictum. In that case the Court, per Rowlatt J found *inter alia* as follows:

⁵³ 1921 (1) KB 64.

*... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.*⁵⁴

The context of the *Cape Brandy Syndicate dictum* afore stated is as follows. The judgment was given by the King's Bench in England in October 1920. The contentious issue for consideration was whether certain profits arising from a business commencing after August 4, 1914 were chargeable to excess profits duty, in terms of the (now repealed) Finance Act No 2 of 1915.

The scheme of that Act was developed to provide for the imposition of a so-called excess profits duty in respect of profits of businesses which were made since the outbreak of World War I. The specific charge was on the amount by which profits made since the outbreak of the war exceeded what was called the "*pre-war standard of profits*".⁵⁵

The appellants appealed against assessments to excess profits duty on various grounds, including the assertion that profits arising from a business commencing after August 4, 1914 were not chargeable to excess profits duty. This point turned upon the construction of certain sections of the Finance Act aforementioned. The Court, per Rowlatt J, considered the argument advanced on behalf of the taxpayer and then held as follows:⁵⁶

It is urged by Sir William Finlay that in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those acts.

⁵⁴ Local approval of the *Cape Brandy Syndicate dicta* is to be found in, *inter alia*, *CIR v Frankel* 1949 (3) SA 733 (A) at 738 and *CIR v Simpson* 1949 (4) SA 678 (A) at 695 and *Dibowitz v CIR* 1952 (1) SA 55 (A) at 61 and *Emery v CIR* 1960 (4) SA 641 (D & CLD) at 643.

⁵⁵ In simple terms: as a result of the generally experienced higher profits during the continuation of World War I, taxpayers were charged in respect of "excess profits duty".

⁵⁶ *Cape Brandy Syndicate v IRC* 1921 (1) KB 64.

It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax.

There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

Thereafter, the Court, applying the principles enunciated in the preceding paragraph, continued, and found that it was impossible to hold that the relevant tax has been imposed by the Finance Act of 1915 upon a person who had no pre-war trade or business. The Court eventually dismissed the appellants' appeal on the basis that it was held that the Finance Act of 1916 should be read together with the Finance Act of 1915 and that, accordingly, the scope of the 1915 Act was extended by the Act of 1916 and that therefore, by necessity, Parliament intended to tax the trades and businesses commencing after August 4, 1914.⁵⁷

It is contended that, viewed in its proper context, the *dictum* by Rowlatt J in *Cape Brandy Syndicate v IRC*⁵⁸ makes it clear that the Honourable Court's proposition was rather to limit the construction often sought to be given to the maxim, "*that in a taxing Act clear words are necessary in order to tax the subject*". Significantly, the Court held in favour of the Crown, against the taxpayer, in circumstances where it was held that the afore stated maxim does not mean that words are to be unduly restricted against the Crown.

As stated by De Koker *et al.*,⁵⁹ the *dicta* in the *Cape Brandy Syndicate* decision has been quoted somewhat out of context. If one pays close attention to the words preceding the

⁵⁷ The irony of the Court's reasoning does not escape. The proposition of a strict and literal approach is advanced in the Court's finding. However, in reading such conclusion, the Court found it necessary to rely on what was assessed to be the intention of Parliament. It is respectfully contended that proper contextualisation, as is attempted hereinabove, insofar as it concerns relevant precedent setting *dicta*, is required to properly understand and apply earlier decisions pertaining to, amongst others, the judicial interpretation of fiscal legislation.

⁵⁸ 1921 (1) KB 64.

⁵⁹ De Koker, A. & Williams, R.C. (Eds.) (2012). *Silke on South African Income Tax*. Memorial Edition, Durban: LexisNexis, p. 10.

dictum it would seem that the judge wished to enunciate a warning against too literal an approach.⁶⁰

2.4 OTHER *DICTA*

In *Hulett & Sons Ltd v Resident Magistrate Lower Tugela*,⁶¹ the Court, per Innes ACJ (as he then was), in the majority judgment, found *inter alia* that:

*The question is not free from doubt; but in a taxing statute the proper course is, in cases of doubtful construction, to give the benefit of the doubt to the person sought to be charged. And I cannot think that the legislature intended first to exempt documents embodying contracts of service from the shilling stamp, and then in the same schedule to re-impose the same tax by reason of a portion of the same documents, which the law had made essential to their validity.*⁶²

The case on appeal concerned an application for an order directing a Magistrate to complete the execution of renewed indentures of Indian labourers without the tax (in the form of a one shilling stamp) being imposed upon the renewed indentures. It was held, on appeal, by the majority judgment (Maasdorp JP dissenting) that the Magistrate's declaration formed an inseparable part of an exempted document and that, consequently, no stamp duty could be imposed thereupon and thus the appeal succeeded. The decision constitutes one of the exemptions, insofar as it concerns the earlier decisions, wherein the Court did not rely upon a strict legislative interpretation but rather on the so-called *contra fiscum* rule.

⁶⁰ It is, respectfully, contended that a fairly recent example of judicial reference to the *dictum* of Rowlatt J in *Cape Brandy Syndicate v IRC*, is to be found in the decision of the Orange Free State Provincial Division in *Kommissaris van die Suid-Afrikaanse Inkomstediens v Botha* 2000 (1) SA 908 (O) at p. 916 C-E. It is apparent that the reference occurred without contextualisation.

⁶¹ 1912 AD 760 at 766.

⁶² Specific attention is directed at the Court's reference to a specific methodology of interpretation "in cases of doubtful construction". It is contended that this aspect forms part of the inherent theme addressed throughout this research study. Put otherwise: from the references to and evaluation of the Court decisions referred to in this research study, it is quite apparent that prevalence is given to adoption of a specific methodology in the interpretation of fiscal legislation in the event of an ambiguity or doubtful construction (of the relevant statutory provision(s)) being present.

In the year preceding the judgment by Innes ACJ (as he then was) in *Hulett & Sons Ltd v Resident Magistrate, Lower Tugela*, the same judge in *Mahomed NO v Union Government (Minister of the Interior)*⁶³ found *inter alia* that:

*The law-giver is presumed to legislate only for the future; and therefore a Statute which repeals another is considered not to interfere with vested rights under that other, unless it does so in clear terms. Very frequently, however, the Legislature, when it repeals one Statute and enacts another in its place, inserts a clause in the repealing enactment defining with greater or less elaboration the extent, if any, to which the repeal is to operate retrospectively. Section 1 of the Act ... is an instance of that practice; and in such cases the matter resolves itself into ascertaining the intention of the Legislature as expressed in the clause*⁶⁴

That Innes J was a proponent of a multi-faceted approach towards the interpretation of fiscal legislation is borne out from a reading of the decision of the Transvaal Provincial Division (as it was then known) in *Venter v Rex*,⁶⁵ where the Court held *inter alia* as follows:

... when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the Legislature.

It is contended that jurists and scholars should, when interpreting the earlier judgments, particularly with regard to the rules of construction as adopted by the Courts earlier in the 20th century, also consider those judgments in the legislative context which existed at the

⁶³ 1911 AD 1 at 8.

⁶⁴ Own emphasis. Although the case did not concern the interpretation of fiscal legislation, the dissenting approach followed by the particular judge remains worthy of mention.

⁶⁵ 1907 TS 910.

time. Reference is made, for example, to the Interpretation Act No 5 of 1910. That Act is replete with references to consideration of the intention of the Legislature, as alternative to certain prescribed modes of interpretation, pertaining to certain words and/or expressions.⁶⁶

In *CIR v Delfos*,⁶⁷ an appeal from two judges sitting in the then Transvaal Provincial Division on a case stated by the Special Court for hearing income tax appeals, the Court per Wessels CJ considered whether the Commissioner for Inland Revenue correctly regarded, as part of the respondent's income for the year 1930, various amounts left unpaid in previous years which make up the total of £9 900 should be referred back to the past years and an assessment(s) made of such amount for the year in which it ought to have been paid. In other words, the question was whether bad debts, when recovered in later years, should be regarded as income of the year when paid or of the year when it should have been paid.⁶⁸

At p. 253 of the judgment, Wessels CJ found *inter alia* as follows:

This brings me to the second question. Now according to the Act respondent had to pay tax on his taxable income for the year 1930. His gross receipts included the windfall of £9 900 and on that no deductions could be made, hence prima facie the £9 900 fell in his taxable income for the year ending 1930. But it has (sic) been contended that the amount of £9 900 received in the year 1930 did not form part of the gross income of that year, because we ought not to give a liberal meaning to the words 'received by or accrued to'. The taxpayer in sec. 7(1), for if we give the plain meaning to those words there may be cases in which the taxpayer may be subjected to double taxation. I do not think we are justified in rejecting the plain meaning of the words 'received by or accrued to' merely on that account. We have no right whatever to strain the language of the statute in favour of the taxpayer merely because in hypothetical cases double taxation may occur.

⁶⁶ In the circumstances it can reasonably be contended that the earlier interpretation of fiscal legislation, as well as interpretation of legislation in general, was not necessarily characterised by unique rules of construction but rather that the earlier decisions occurred, in particular, within a certain legislative framework insofar as it concerns the interpretation of statutes.

⁶⁷ *CIR v Delfos* 1933 AD 242. Also reported as 6 SATC 92.

⁶⁸ It bears mentioning that the Special Court dealt with the facts and contentions and decided in favour of the taxpayer.

The principle of interpretation laid down by Lord Cairns in Partington v Attorney General ... and accepted by this Court in Commissioner for Inland Revenue v George Forest Timber Co ... is a sound principle

I do not understand this to mean that in no case in a taxing Act are we to give a section a narrower or wider meaning than its apparent meaning, for in all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the Legislature. When, however, we are dealing with a definition which is the very basis of the Act, it can only be in very exceptional circumstances that we can modify the plainly expressed meaning of the words. In cases other than the basic definition of gross income the difficulty is not so great, but to modify the plain words of the Legislature in a crucial definition such as the one we are dealing with is to strike at the very heart of the statute. ...⁶⁹

In the reasoned approach by Wessels CJ,⁷⁰ provision was made for the main (judicial) aim; namely, to “arrive at the true intention of the Legislature”. Despite that indication, the Court resolved to adopt the “plainly expressed meaning of the (relevant) words”. Consequently the *dictum* of Lord Cairns referred to above was accepted and applied by the Appellate Division.

The separate dissenting judgment by Beyers JA bears mentioning. At p. 268⁷¹ the Honourable Judge of Appeal found *inter alia* as follows, insofar as it concerns the equitable interpretation of the relevant fiscal legislation:

Art. 7(1) bepaal nie inkomste op twee grondslae, t.w. ontvangste en toevallinge nie. Warem (sic) moet daaraan ‘n konstruksie gegee word wat tot ‘n ongerymdheid lei, en warem moet, om die ongerymdheid te neutraliseer, dan die toevlug geneem word tot ‘n ‘necessary implication’ dat die selfde bedrag nie twee maal in die hande van dieselfde belastingpligtige belas word nie?

⁶⁹ Own emphasis.

⁷⁰ Being the majority judgment with whom Curlewis JA and De Villiers JA agreed (Stratford JA and Beyers JA dissenting).

⁷¹ *CIR v Delfos* 1933 AD 242. Also reported as 6 SATC 92.

'n Billikheidsbeginsel nogal wat nie rym nie met die gevestigde opvatting in inkomstebelastingwette dat daar geen ruimte is vir 'n billikheids interpretasie nie. Maar as die billikheid kan ingeroep word vir die vermyding van dubbele belasting; warem kan dit ook nie ingeroep word vir die terugverwys van werklike ontvangste na die jaar van toevalling nie?⁷²

Another precedent setting older decision, by the Chancery in England, is that of *Bowles v Bank of England*.⁷³ Although the eventual appeal was granted against the Crown, in favour of Bowles, these decisions (the Court *a quo* decision as well as the decision on appeal) formed part of the earlier decisions, from England, in terms whereof a strict approach was adopted, as opposed to a purposive approach to the interpretation of the relevant fiscal legislation.

The history of the litigation informs a proper contextualisation. Bowles was ordered to make a return for the purpose of a super tax before the relevant super tax was imposed by Parliament. He then brought an action against the Attorney-General and the Commissioners of Inland Revenue and was represented by three counsel. He was unsuccessful in the Court *a quo*. The Court held that a return could be demanded before the tax was actually imposed.⁷⁴

Subsequent thereto the Bank of England deducted some of Bowles' dividends at source consequent upon a resolution of the House of Commons fixing the amount of income tax on dividends and an instruction by the Inland Revenue Commissioners to the bank to deduct the amount. Bowles then brought another action against the bank for a declaration that it was not entitled to deduct any of his dividends until the income tax law had been passed by Parliament itself.

⁷² That such proposed equitable interpretation was not the generally favoured approach during the time is emphasised by the fact that Beyers JA gave a dissenting (minority) judgment.

⁷³ [1913] 1 Ch 57 and see *Bowles v Attorney-General* [1912] 1 Ch 123.

⁷⁴ See the judgment in *Bowles v Attorney-General* [1912] 1 Ch 123.

This time Bowles appeared in person and was successful in that the declaration sought by him was granted with costs. In the judgment Parker J held *inter alia* as follows:⁷⁵

In a taxing Act the rule is that you get nothing by implication.

A further example of the strict interpretation approach that was adopted in English law is the decision by the House of Lords in *Inland Revenue Commissioner v Hinchy*.⁷⁶ The decision concerned section 25(3) of the Income Tax Act of 1952 of the United Kingdom, which read as follows:

A person who neglects or refuses to deliver ... a true and correct ... return which he is required under the preceding provisions of this chapter to deliver shall-

- (a) *if proceeded against by action in any Court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act.*

The Court of Appeal, per Lord Evershed, held that the aforementioned section meant:

*... that amount of tax which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return: in other words, the tax appropriate to the undisclosed income.*⁷⁷

From a reading of the judgment it appears that the Law Lords were sympathetic towards the taxpayer and reluctantly came to the conclusion in favour of the Inland Revenue Commissioners. Goodhart⁷⁸ criticised the Law Lords' decision in no uncertain terms and

⁷⁵ [1960] AC 748 (HL) at p. 130. It is interesting to note that Rowlatt J, who delivered the judgment in *Cape Brandy Syndicate v Inland Revenue Commissioners supra*, was one of the junior counsel for the Bank of England in the *Bowles* case.

⁷⁶ *Inland Revenue Commissioners v Hinchy* [1959] 2 QB 357 (CA).

⁷⁷ *Ibid*, at pp. 378.

⁷⁸ Goodhart, A.L. (1960). Treble Penalties in Income Tax Law. *LQR*, 76 215.

said, *inter alia*, that the decision would be regarded as giving strong support to what has been described as the “strict interpretation school”.

It is clear that there was wide recognition that the so-called “strict interpretation school” stood for the view that a grammatical construction of a statute had to be followed if there was to be no ambiguity, irrespective of how inconvenient or unjust the result would be.⁷⁹

If ever confirmation was needed that the strict approach to the interpretation of statutes found favour in England, in the 19th century, as well as in the 20th century, that approach is borne out by the observations of Viscount Simon LC in *R v Canadian Eagle Oil Co Ltd*,⁸⁰ where the Judge gave the following commentary in regard to *Gilbertson’s case*:⁸¹

... It was assumed in that case (a reference to Gilbertson’s case) that there was a general principle to be applied in construing the Income Tax Acts that tax is not ‘payable twice over by the same person in respect of the same thing’ ... No such supposition is legitimate. In the words of the late Rowlatt, J, whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, ‘in a taxing act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax.’⁸²

In *Colonial Treasurer v Rand Water Board*,⁸³ Innes CJ referred to the Transvaal Transfer Duty Proclamation (Proclamation No 8 of 1902) and said *inter alia* that, “... *this is a taxing statute and must be strictly construed.*”⁸⁴

⁷⁹ See for example the confirmatory remarks by Dyson, L.D. (SC) (1976) *The Contra Fiscum Rule in Theory and Practice*. *South African Law Journal*, pp. 162.

⁸⁰ [1946] AC (119) HL at 139 – 140.

⁸¹ *Gilbertson v Fergusson* (1881) 7 CBD 562.

⁸² It is apparent that the reference to Rowlatt J’s *dictum* occurs without any contextualisation.

⁸³ 1907 TS 479.

⁸⁴ See the judgment at p. 482.

The decision in *Colonial Treasurer v Rand Water Board*⁸⁵ is considered to be of great importance. The relevant enactment required transfer duty to be paid by the person becoming entitled to the fixed property by way of purchase or cession or exchange or donation or in any other manner, other than by inheritance. It was held that where a person was vested with such property by legislation he did not have to pay duty, and Innes CJ said:

*... Now this is a taxing statute, and must be strictly construed; and the Court is not only justified, but bound, if the words in themselves admit of doubt, to look to the general scope of the statute in order to ascertain its object.*⁸⁶

Bristowe J agreed with Innes CJ and found, *inter alia*, that:⁸⁷

*... it is to be observed that this is a taxing statute; ... therefore, although it is to be construed fairly on what is its true meaning, having regard to the construction of the whole of the language which the Legislature has used, still Courts have no right to extend statutes of that kind to cover cases which are not within their true intention.*⁸⁸

This decision was referred to by the Appellate Division in *Pretoria Town Council v Receiver of Revenue*,⁸⁹ where the Court, without deciding, accepted the correctness of the decision by the Provincial Division.

2.5 OTHER LESS STRINGENT APPROACHES

Despite the apparent inflow into our law of the English approach whereby a strict interpretation of the words of the taxing statute is to be followed, it is clear from the *dictum* by

⁸⁵ 1907 TS 479.

⁸⁶ See the judgment at p. 482.

⁸⁷ At p. 484.

⁸⁸ It is, respectfully, contended that the Court's loose (unspecified) utilisation of the reference to "intention" is unfortunate, by reason of the fact that it fails to distinguish between the intention of the Legislature and the intention of the relevant statutory provision.

⁸⁹ 1931 AD 178 at 185.

Wessels CJ in *CIR v Delfos*⁹⁰ that other less stringent approaches existed or, at least, were propagated. The Chief Justice stated *inter alia* as follows:

I do not understand this to mean that in no case in a taxing act are we to give to a section a narrower or wider meaning than its apparent meaning, for in all cases of interpretation we must take the whole statute into consideration and thus arrive at the true intention of the Legislature.

Despite the learned Chief Justice's statement aforementioned he went on to state, at p. 254 of the judgment that:

... however, we are dealing with a definition which is the very basis of the Act, it can only be in very exceptional circumstances that we can modify the plainly expressed meaning of the words ...

Wessels CJ's decision was supported by two other Judges, who each gave separate judgments and did not adopt the rule of interpretation stated by Wessels CJ. Furthermore, Stratford and Beyers JJA gave dissenting judgments.

Such literal and strict method of interpretation was rejected by Schreiner JA in *Jaga v Dönges NO*⁹¹ where the Court found that:

... the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.

A further example of the rejection of the literal or strict interpretation is to be found in the case of *CIR v Dundee Coal Co Ltd*⁹² which concerned the proviso to section 38(d) of the

⁹⁰ 1933 AD 242.

⁹¹ 1950 (4) SA 653 (AD) at 664.

⁹² 1923 AD 331.

Income Tax Act No 41 of 1917 in terms whereof it was enacted that, with regard to any company carrying on mining operations, any undisturbed profits which are reinvested in the business of the company and rank as capital expenditure for the redemption allowance provided by section 23 of the Act, shall not be deemed to be a dividend distributed.

It was during the years 1909 – 1911 that the respondent company raised the sum of £83 705 by the issue of debentures, which were used for the purpose of capital expenditure as defined in the 1917 Income Tax Act. In 1917 the directors of the respondent company paid over, from the profits of the year, the sum of £21 410, to the trustees of the debenture holders, for the redemption of debentures. A Full Bench of the Natal Provincial Division consisting of three Judges held that the sum of £21 410 was not a dividend distributed in terms of the proviso and therefore was not liable to taxation. In the majority judgment (Juta JA dissenting) the Court interpreted the statutory provision in favour of the appellant and held *inter alia* that:⁹³

... In my opinion, it would be an abuse of language to say that profits appropriated to the payment of a debt have been spent on the sinking of a shaft. If it were so, a strange result would follow.

And at p. 339:

... if we find that a construction placed upon one section leads to such a startling result in the interpretation of another section, that certainly is some ground for preferring a construction which does not land us in such a difficulty.

In *Commissioner for Inland Revenue v Wolf* 1928 AD 177 at 184 – 185 the Court, per Solomon CJ held, with express reference to the *dictum* in *Partington v The Attorney-General*, that the salient issue for consideration was whether “*the present case then fall within the letter of the law as set forth ...*”. At p. 187 the learned Chief Justice found expressly that “*there is no good ground for cutting down the express words of the section*”. It

⁹³ At p. 338.

is therefore clear that the Court declined to deviate from the strict approach towards the interpretation of the relevant legislation.

In *Dadoo Ltd v Krugersdorp Municipal Council*⁹⁴ the Court found *inter alia* as follows:

Now prima facie the intention of the Legislature is to be deduced from the words which it has used. It is true that owing to the elasticity which is inherent in language it is admissible for a Court in construing a statute to have regard not only to the language of the Legislature, but also to its object and policy as gather from a comparison of its several parts, as well as from the history of the law and from the circumstances applicable to its subject-matter.

2.6 ANALYSIS OF THE EFFICACY OF THE EARLIER INTERPRETATION METHODOLOGY ADOPTED BY THE COURTS

It is considered unquestionably so that the earlier decisions whereby a strict, formalistic and literal approach towards the interpretation of statutes were advanced, were informed in no small measure by the decisions in *Partington v Attorney-General*⁹⁵ and *Cape Brandy Syndicate v IRC*.⁹⁶

From a reading of the earlier local judgments it appears that the Courts' references to the *dicta* in *Partington v Attorney-General* and *Cape Brandy Syndicate v IRC* occurred, on many occasions, without a restatement of the particular context within which those judgments were given.

It is contended that the move away from a purely linguistic and strict word-based methodology of the interpretation of fiscal legislation, towards an approach that makes use

⁹⁴ 1920 AD 530 at 554.

⁹⁵ 21 LT 370.

⁹⁶ 1921 (1) KB 64.

of the establishment of the intention of the Legislature, as an aid towards the interpretation of the relevant fiscal legislation, constitutes an approach that is more at ease and harmonised with the present constitutional era.

It is considered that the move away from a strict interpretation of fiscal legislation would carry the benefit of a potentially more just and fair judicial interpretation.⁹⁷

The proposition advanced below is that the consideration of the (potential) intention of the Legislature, in enacting a specific statutory provision(s), should serve at best as a guide to be adopted in determination of the meaning and import of the statutory provision. The further proposition advanced below is that the establishment of a Legislature's intention (the so-called purposive approach towards interpretation of legislation) should not be elevated to anything more than a useful co-method of interpretation of the meaning of fiscal legislation.⁹⁸

This view accords with the aforementioned view by Du Plessis,⁹⁹ where he stated *inter alia* that "... the conviction that a statute harbours a discoverable intention of a Legislature or the verdict that the language of a statute can be unambiguous and clear are themselves theoretical assumptions."

Derksen¹⁰⁰ also states in this regard that:

Daardie 'bedoeling van die wetgewer' moet egter uiteraard 'n fiksie wees aangesien een van die bronne waarin die inhoud daarvan gevind mag word (naamlik die beginsel van die wet) onafhanklik is van wat die wetgewer inderdaad bedoel het.

⁹⁷ See in this regard the separate dissenting judgment by Beyers JA in *CIR v Delfos* 1933 AD 242 at 268, where the learned Judge of Appeal in 1933 already, although in the minority, proposed adoption of an approach towards fairness ("*'n billikheidsbeginsel'*").

⁹⁸ See also section 1.3 above.

⁹⁹ See section 1.6 above, footnote 34.

¹⁰⁰ Derksen, A.G. (1989). *'n Benadering tot die Uitleg van Wette, met Besondere Verwysing na die Inkomstebelastingwet 58 van 1962 en Vermydingskemas*, Unpublished Doctoral Thesis, University of South Africa at 290. Derksen's view are considered further *infra* (section 4.2 and notes 157 and further).

Hieronder sal dan ook aangedui word dat 'n bepaling van die wetgewer se bedoeling nie as die resultaat van die uitleg proses beskou behoort te word nie.

CHAPTER 3: MORE RECENT DEVELOPMENTS IN THE PURPOSIVE APPROACH TOWARDS THE INTERPRETATION OF FISCAL LEGISLATION IN THE REPUBLIC OF SOUTH AFRICA (AND IN ENGLAND)

3.1 SOUND WARNINGS AGAINST A STRICT / LITERALIST APPROACH TOWARDS LEGISLATIVE INTERPRETATION

A critical evaluation of the views expressed by different authors on the subject of interpretation of legislation (in general) reveals that the major criticism is that directed at (against) a strict and/or literal approach towards interpretation of legislation. No significant criticism is to be found directed at the methodology of interpretation of legislation that favours the establishment of the intention of the Legislature or the intention of the statutory provision itself.¹⁰¹

Silke¹⁰² gives the following apposite warning:

It is, in conclusion, important to bear in mind that when South African Courts so frequently and freely quote Lord Cairns and the Partington case, they are quoting the approach in England in 1869 and ignoring everything that has happened since.

¹⁰¹ It should be emphasised that the generally favoured judicial approach is that a purposive interpretation is allowable in those circumstances where the wording of a statute is not clear and/or presents an ambiguity. It is contended that substantive criticism against the purposive methodology of interpretation is absent by reason of the fact that such an approach carries with it a natural inquisitorial evaluation. It is further contended that the volume of criticism against a too literal / strict methodology of interpretation is based upon the “matter of fact” outcome that is “produced” as the “result” of such an approach, over which the interpreter has absolutely no control. The strict approach also goes against the advantages to be gained from a consideration of the relevant statutory provision, with due regard to all relevant circumstances and factors (including the intention of the Legislature / statute).

¹⁰² Silke, J. (1995). The Interpretation of Fiscal Legislation – Canons of Construction, Recent Judicial Comments and New Approaches, *Acta Juridica*, vol. 58, issue 334 at 168.

Similarly, insofar as construction of South African taxation Acts are concerned, the warning by Dyson ¹⁰³ is worthy of consideration:

Great care must be exercised in applying English principles of construction to South African taxation Acts.

Lord Greene MR in *In re Bidie* ¹⁰⁴ gave a strong warning against an approach that was too literal, insofar as the establishment of the meaning of a statute is concerned:

... I think, in construing particular words in a section of an Act of parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context.

Steyn ¹⁰⁵ warns that the interpreter of a statutory provision should not go beyond the presence of the words contained within the statutory provision. The learned author states as follows:

*... Die bepalings van die wet strek alleen sover as die woorde daarvan. Waar die woorde ophou, daar hou ook die bepalings op.*¹⁰⁶

Cockram ¹⁰⁷ warns that:

The function of the Courts is to interpret the law, not to legislate.

¹⁰³ Dyson, L.D. (1976). The Contra Fiscum Rule in Theory and Practice, *South African Law Journal*, at 161.

¹⁰⁴ [1994] 1 Ch 121 (CA) at 129.

¹⁰⁵ Steyn, L.C. (1981). *Die Uitleg van Wette*. 5th Edition Cape Town: Juta, at pp. 9-10.

¹⁰⁶ See the text at p. 9.

¹⁰⁷ Cockram, G.M. (1975). *Interpretation of Statutes*. Cape Town: Juta, at pp. 1-2.

The learned author then states that:

*Jus dicere non dare is the function of the Court, and the language of an Act of Parliament must neither be extended beyond its natural sense and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case.*¹⁰⁸

Kentridge AJ regarded the language of the Constitution as superior to its values and stated as follows:

*We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the law-giver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.*¹⁰⁹

Perhaps the most gruesome apprehension against a too literal approach is that referred to by Lord Steyn in *Sirius Insurance Co v FAI General Insurance*¹¹⁰ at p. 58 where he stated:

What is literalism? It will depend on the context. But an example is given in the words of William Paley (1938 Ed), Volume III, p. 60. The moral philosophy of Paley influenced thinking on contract in the 19th century. The example is as follows: the tyrant Temures promised the Garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all

¹⁰⁸ The learned author then refers to the judgment by the Appellate Division (as it then was known) in *R v Tebetha* 1959 (2) SA 337 (AD) at 346, where Hoexter JA (in the majority judgment), in a criminal appeal, declined to adopt an interpretation of the provisions of the Criminal Procedure Act 56 of 1955 (now repealed) beyond the scope of the words contained in the statutory provision.

¹⁰⁹ *S v Zuma and Others* 1995 (2) SA 642 (CC), paras. 17-18. The meaning of the word "divination" is given as follows in the Oxford Advanced Learner's Dictionary (International Student's Edition) (7th Edition) at 429: "divination 'the act of finding out and saying what will happen in the future.'"

¹¹⁰ [2004] UKHL 54.

*alive. That is literalism. If possible it should be resisted in the interpretative process.*¹¹¹

In *CIR v Nemojim (Pty) Ltd*¹¹² Corbett JA (as he then was) commented upon the strict approach enshrined in the statement, “*there is no equity about a tax*” and pleaded for “*a result which seems equitable.*”

The decision in *Delfos*,¹¹³ and especially the rule of interpretation favoured by Wessels CJ¹¹⁴ has largely been ignored by the Courts in South Africa. For example, in *Stellenbosch Farmers’ Winery Ltd v Distillers Corporation(SA) Ltd*¹¹⁵ the Court held, per Wessels AJA, that:

In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly ... with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the state as well as the ‘matter of the statute, its apparent scope and purpose, and, within limits, its background’.

3.2 THE APPELLATE DIVISION’S LIMITATION OF COMMON LAW SUBSTITUTION

In *Trust Bank van Afrika Bpk v Eksteen*,¹¹⁶ the Appellate Division ruled that no Court, not even the Appellate Division itself, had jurisdiction to substitute the common law of any other

¹¹¹ It should be noted that Lord Steyn’s example and his citation against literalism occurred fairly recently and only after the judiciary in England had transformed, over a period in excess of a century, away from a strict / literal interpretative methodology.

¹¹² 1983 (4) SA 935 (A), 45 SATC 241 at 267.

¹¹³ *CIR v Delfos* 1933 AD 242.

¹¹⁴ Referred to above.

¹¹⁵ 1962 (1) SA 458 (AD) at 476.

¹¹⁶ 1964 (3) SA 402 (AD).

country for that of our own. It is said that this ruling was given because of a tendency by Courts in the past to follow the English law of estoppel.¹¹⁷ The Appellate Division's ruling was given because of a tendency to follow a branch of the English law. It is contended that as the interpretation of statutes constitutes common law rules, it is arguable that the Appellate Division's ruling applies equally insofar as the interpretation of statutes, including fiscal legislation, is concerned.

3.3 THE APPROACH AWAY FROM A STRICT INTERPRETATION

The approach away from a strict interpretation is evident from a reading of the judgment by Centlivres, JA in his separate but concurring judgment in *CIR v Simpson*¹¹⁸ at 695 where the Honourable Judge of Appeal, with reference to the aforementioned rule as stated by the Court in *Canadian Eagle Oil Co Ltd v The King*¹¹⁹ said that:

I shall assume that the above rule should be qualified by saying that even in taxing statutes something may have to be implied by necessity.

Thereafter the Judge held that no statutory provision existed which would justify the Court in holding that the respondent's husband must be deemed to have derived basic profit prior to June 30, 1939 and that the words in the applicable statute were held to be construed against the interpretation contended for on behalf of the appellant.

Devenish directs attention to the fact that Courts in the United Kingdom as well as in the Republic of South Africa have in the past adopted a very strict approach towards the interpretation of fiscal legislation. He comments that this has changed in the United

¹¹⁷ See Dyson, L.D. (1976). The Contra Fiscum Rule in Theory and Practice. *South African Law Journal*, at 161.

¹¹⁸ 16 SATC 268

¹¹⁹ 1946 AC 119 at 140.

Kingdom where the “Courts seek to strike a fair balance between the two sides and do not exclusively favour the taxpayer”.¹²⁰

Silke¹²¹ states that the approach by Corbett JA (as he then was) in *CIR v Nemojim (Pty) Ltd*¹²² may well have been:

Cautiously initiating the ‘fair balance’ approach into South African law without seeking to override any of our existing rules of interpretation.

In *S v Conifer (Pty) Ltd*¹²³ the Court resolved to determine the *ratio legis*¹²⁴ and stated *inter alia* as follows:

The mischief aimed at ... was the ability of lessors ... to flout a rent board determination, for example by effecting some alterations ... in my view the aforementioned ‘broad contextual theme’ (a phrase which has respectable antecedents in this Court) impels the conclusion that the Legislature also intended the proviso to apply to cases under sec. 10(1)(a), where a lessor relies on a claimed change of identity in the premises.

In *Bhyat v Commissioner for Immigration*,¹²⁵ Stratford JA, in giving the Court’s judgment, said that:

¹²⁰ Devenish, G.E. (1992). *Interpretation of Statutes*. Cape Town: Juta, at pp. 169-171.

¹²¹ Silke, J. (1995). Interpretation of Fiscal Legislation - Canons of Construction, Recent Judicial Comments and New Approaches. *Acta Juridica*, vol. 58, issue 334 at p. 128.

¹²² 1983 (4) SA 935 (A), 45 SATC 241.

¹²³ 1974 (1) SA 651 (A) at 657G-658A.

¹²⁴ Defined in Gonin, H.L. & Hiemstra, V.G. *Trilingual Dictionary*. 3rd Edition. Cape Town: Juta, at p. 275 as the: “reason for passing of a law”.

¹²⁵ 1932 AD 125 at 129.

The plain meaning of the language must be adopted ... The words of a statute never should, in interpretation, be added to or subtracted from, without almost a necessity.

In this regard Kellaway ¹²⁶ contends that the latter words “*without almost a necessity*” as used by Stratford JA in *Bhyat v Commissioner for Immigration* appear to have opened the way for interpretation to modify language where the purpose of the enactment is clear and the statutory provision unclear.

Lord Steyn’s aforementioned criticism against literalism (in 2004) is evidence of the transformation in English law, away from a strict / literalist interpretative methodology.¹²⁷

3.4 INFLUENCES FROM ABROAD

Greenberg ¹²⁸ confirms that the English judicial pronouncements that strongly resisted any interpretative approach that involved the Court attempting to find out the intention of Parliament have been relegated to history.

The learned author states that even in those cases where the Courts are prepared to supply the deficiencies of the Legislature by inferring the making of provision which was not in fact made, the Courts do so not because they are assuming the role of the Legislature, but because they consider it plain from what is provided that the Legislature actually intended to do something, “*the parameters of which are beyond doubt or argument ...*”¹²⁹

The author then states that:

¹²⁶ Kellaway, E.A. (1995). *Principles of Legal Interpretation, Statutes, Contracts & Wills*. Durban: Butterworths), at p. 100.

¹²⁷ See the reference in section 3.1 above to Lord Steyn’s *dictum* in *Sirius Insurance Co Ltd v FAI General Insurance* [2004] UKHL 54.

¹²⁸ Greenberg, D. (2004). *Craies on Legislation*. 8th Edition. London: Sweet & Maxwell, at pp. 562-564.

¹²⁹ See the author’s remarks on p. 563.

The result of this is that the Courts will be at their boldest in applying a purposive interpretation to legislation in cases where there is ample and clear evidence of what the legislation was actually intended to achieve by all those involved.

Stevens¹³⁰ described the new approach followed by Courts in England, and stated *inter alia*:

In many ways the most dramatic change of direction during the period was in tax law. ... A third of the House's work was in tax ... Yet a dramatic change had taken place. In the mid-fifties the accepted approach to tax legislation was that, being penal in nature, the legislation had to be read narrowly and unless the actual transaction or income was 'charged', i.e., covered by the exact words of this section, taxation was not payable. By the mid-nineteen sixties the situation had changed noticeably. ... The House had come to read tax legislation like other legislation and while still chary of taxing by analogy, the law lords sought the meaning of tax provisions by looking to the whole purpose of the section or the Act, rather than at the actual words used.

3.5 THE DECISION IN *ITC 1384*¹³¹

A good example of an earlier application of the new (local) approach towards the interpretation of fiscal legislation is to be found in *ITC 1384*. The decision related, *inter alia*, to the Commissioner's right to levy certain additional assessments in respect of estate duty.

The facts were that the deceased held a certain amount of government stock which qualified for deduction in terms of the Estate Duty Act No 45 of 1955.

¹³⁰ Stevens, R. (1979). *In Law and Politics – The House of Lords as a Judicial Body 1800 – 1976*. London: Weidenfield & Nicolson, at p. 600 and further.

¹³¹ 1983 46 SATC 95.

The deceased's executors included this amount as part of the residue of the estate which was left to charity and was deductible in terms of the provisions of the Estate Duty Act at that stage.

The executors of the deceased's estate submitted the estate duty return which reflected these two deductions (first, the deduction in respect of the amount held as government stock as well as the same amount in its capacity as part of the residue of the estate that was left to charity that was, again, deductible in terms of the Act). The Master accepted the submission as being correct and the amount of estate duty which was payable was agreed upon and paid by the executors.

Thereafter the estate was distributed and the Master's file closed. More than a year later the Master issued an additional assessment whilst claiming that the double deduction had been allowed in error and that a further amount, together with interest, was due.

The President of the Orange Free State Special Court, M.T. Steyn J described the relationship between the Estate Duty Act and the Income Tax Act as follows:

The Estate Duty and Income Tax Acts are closely linked revenue gathering measures ... Where one of such closely linked taxing measures falls to be interpreted it is, to my mind, not only permissible but also necessary to have regard to the other where the Legislature has not expressed itself clearly¹³² or in sufficient detail in the measure requiring construction. ...

It is, therefore, proper when having to determine the assessing competence of the principal tax gatherer in terms of the one measure to have regard to his competence as expressed in the other ... but regard must also be had to the fundamental principles of the common law because they comprise the basic substratum upon which all statutes in the same legal system ultimately rest."

¹³²

It is contended that the Court's qualification is important. It follows that the method of interpretation directed by the Court was to occur only "where the Legislature has not expressed itself clearly ...". (Own emphasis.)

At p. 106 of the judgment Steyn J held as follows with regard to the approach towards the interpretation of the relevant fiscal legislation:

*But even if the Legislature was mindful of the common law rule and therefore satisfied that a competence to issue additional assessments on the same return was by necessary implication conferred in the Act, the statute would nevertheless have to be construed subject to the presumption of a fair, just and reasonable lawgiver's intention and in consonance with the 'new approach' to (the) interpretation of fiscal statutes, in terms whereof such measures are neither to be subjected to eviscerating formalism or strictness nor to be treated with fawning respect as 'Holly Cows', and not as emanating from some revenue-hungry Draco, but as coming from a reasonable lawgiver intent, even in matters fiscal, upon ordering its community fairly and justly.*¹³³

At p. 107 to 108 the learned Judge held, with particular reference towards the specific interpretation of fiscal legislation as follows:

Fiscal statutes are, as stated above, not a specially privileged category of legislation and must be approached and dealt with in the same manner as other statutes. ...

3.6 OTHER DICTA

Another example of an approach which concerned, *inter alia*, the consideration of the intention of the Legislature, is *De Beers Holdings v Commissioner for Inland Revenue*¹³⁴ where the Court considered *inter alia* the definition of the words "trading stock" in the Income Tax Act.¹³⁵ The Court¹³⁶ leaned towards acceptance of "*the plain meaning of the words*

¹³³ Own emphasis.

¹³⁴ 1986 (1) SA 8 (AD) at 33A-D/E.

¹³⁵ Act 58 of 1962 (as amended).

¹³⁶ Per Corbett JA (as he then was) with whom Muller JA, Hoexter JA, Galgut AJA and Nicholas AJA (as he then was) concurred at p. 32I-J.

used'. However, in the following argument ¹³⁷ the Court expressly referred to the decision by the Supreme Court of Appeal in *R v Debele* ¹³⁸ where the Court had no quarrel with reliance upon the intention of the Legislature in enacting a specific term.

In *SIR v Consolidated Citrus Estates Ltd*, ¹³⁹ a case which concerned the question as to whether the respondent was entitled to an exporter's allowance in terms of section 11*bis* of the Income Tax Act, ¹⁴⁰ the Court relied expressly on the purpose of the relevant statutory provision and found *inter alia* as follows:

There can be no doubt that the purpose of the exporter's allowance, introduced by sec 11bis, was to act as an incentive to manufacturers and producers to export their 'goods'. ¹⁴¹

And on p. 508 it was held:

In this sub-section the word 'directly' is where one expects it to be if it is intended by the Legislature to refer to the subjects specially mentioned. Clearly the Legislature intends not to allow expenditure to be deducted which is only indirectly related to the subjects set out. If in sec 11bis(4) the Legislature had intended the word 'directly' to govern the words 'expenditure incurred', it would in a natural manner have put the word 'directly' where it would have given effect to that intention ¹⁴²

¹³⁷ At p. 33A-C.

¹³⁸ 1956 (4) SA 570 (A) at 575 – 576.

¹³⁹ 1976 (4) SA 500 (A) (also reported as 38 SATC 126 at 148).

¹⁴⁰ No 58 of 1962 (as amended).

¹⁴¹ See the judgment on p. 517H.

¹⁴² It is to be noted that the last quoted extract of the judgment is from the minority judgment of Rumpff CJ at p. 508F-H. It is respectfully contended that it appears from a reading of the minority judgment as well as that of the majority, that the Court was open to an approach which included the relevant consideration of the meaning of the words contained in the statute together with a consideration of the intention of the relevant statutory provision.

3.7 CRITICAL EVALUATION OF THE EFFICACY OF THE MORE RECENT PURPOSEIVE INTERPRETATION OF FISCAL LEGISLATION

It is contended that the warnings by, *inter alia*, the learned authors referred to in section 3.1 above, are well-founded and that too strict an approach towards the interpretation of fiscal legislation can give rise to unwarranted and unjust conclusions. It is further contended that the important limitation by the Appellate Division in *Trust Bank van Afrika Bpk v Eksteen*,¹⁴³ against substitution of the common law of any other country for that of our own, should be borne in mind in the interpretative process.

Despite the ostensible movement towards adoption of a purposive approach of the interpretation of fiscal legislation, the inherent pitfalls of such an approach must also be recognised. The most apparent criticism is that an unnecessary effort to establish purpose or intent (of the Legislature or of the relevant statutory provision) can give rise to a negation of the meaning of the express words used in a particular statute.

For what is considered to be a healthy criticism against over enthusiastic effort to establish the intention of the Legislature / a particular statutory provision, reference is made to the decision by Fabricius J in *XYZ v The Commissioner for the South African Revenue Service*, in the Tax Court (held at Pretoria) Case No 12895 (as yet unreported) (judgment given on 15 June 2011), where the learned Judge on p. 17, para [13], with reference to the *dictum* by Schutz JA in *Standard Bank Investment Corporation Ltd v Competition Commission 2000* (2) SA 797 SCA at 810 – 811, stated as follows:

One cannot subvert the words chosen by Parliament either in favour of the spirit of the law, or by referring to background policy considerations that were not reflected in the language of the particular statute itself. The legislative authority of the government is vested in Parliament. Parliament exercises its authority mainly by enacting Acts. Acts are expressed in words.

¹⁴³ 1964 (3) SA 402 (AD).

Interpretation concerns the meaning of words used by the Legislature and is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.

It is further contended that the decision by the Court in *ITC 1384* constitutes an important move away from the unnecessarily strict interpretation of the exact language used in a statute. From a reading of Steyn J's judgment ¹⁴⁴ it is evident that the learned Judge had due regard to the common law rule in his approach towards the interpretation of the fiscal statute. If regard is had to the commentary by Stevens ¹⁴⁵ it follows that also in England the narrow, strict approach towards interpretation of fiscal legislation was relaxed towards a more purposive approach. ¹⁴⁶

It is considered that the outflow of warnings against too strict an approach towards interpretation is based on the argument that the result of such an approach may "produce" unwarranted results. In this regard the gruesome example of the tyrant Temures aforementioned ¹⁴⁷ serves as a good (although ancient) example.

It should be borne in mind that the aforementioned references to local case law constitute but a small *capita selecta*. Confirmation thereof that our Courts, even in the pre-constitutional era, adopted a favourable attitude towards a purposive interpretation approach, is to be found in the decision of *Administrator, Cape v Raats Röntgen & Vermeulen (Pty) Ltd* ¹⁴⁸ where the Court had to consider, *inter alia*, whether the State was

¹⁴⁴ At p. 106 and further.

¹⁴⁵ Stevens, R. (1979). *Law and Politics – The House of Lords as a Judicial Body 1800-1976*. London: Weidenfield & Nicolson, at 607.

¹⁴⁶ *Ibid.* Attention is, however, directed at Stevens' reference to a "... looking to the whole purpose of the section or the Act, ..." rather than reference towards the intention of the Legislature.

¹⁴⁷ In section 3.1 above.

¹⁴⁸ 1992 (1) SA 245 (A) at 258D-E.

bound by provisions of the Medicines and Related Substances Control Act¹⁴⁹ and General Regulations promulgated thereunder.

The Court considered, extensively, the objectives of the Act as well as the intention of the Legislature.¹⁵⁰ At p. 258 the Court held *inter alia* as follows:

The interpretation contended for by counsel for the respondent necessitates reading into the definition of 'cell' in s 1 of the Act conduct ludicrously beyond the limits of sensible or purposive interpretation.

3.8 CONCLUSION

This chapter is concluded with the contention that there was a clear and definite transition towards the adoption of the purposive approach of statutory interpretation, even prior to the advent of the constitutional era in the Republic of South Africa.

It should, however, be borne in mind that the unequivocal adoption of a purposive approach towards interpretation of fiscal legislation is premised thereupon that it should only be practiced in circumstances where the express wording of a statutory provision is not clear or where the adoption of the clear wording of a particular statutory provision would give rise to an ambiguity or a result(s) that could clearly not have been contemplated by the Legislature.¹⁵¹

A further important consideration is to recognise that the establishment of the purpose (of a Legislature or of a statutory provision), does not mean that a *carte blanche* is granted to the

¹⁴⁹ Act 101 of 1965.

¹⁵⁰ See the judgment on pp. 257 to 258.

¹⁵¹ See *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse* 1997 (4) SA 613 SCA at 632 G-H, where Harms JA, in the majority judgment, found amongst others, as follows:

“Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.”

interpreter to be utilised in the interpretative process. Even prior to the Republic of South Africa's new constitutional era, this feature of purposive interpretation was recognised by the Supreme Court of Appeal in *Public Carriers Association v Toll Road Concessionaries*¹⁵² where the Court¹⁵³ found as follows:

The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is now well-established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it

It should therefore be recognised that the South African move away from a strict / literalist approach towards the interpretation of (fiscal) legislation, meant no more than that the purposive approach is recognised as a useful aid in the interpretative process. Adoption of this approach does in no way mean that the meaning of words contained in a statute should be disregarded and/or negated and/or that no cognisance should be taken of the express words contained in a particular statutory provision.¹⁵⁴

¹⁵² 1990 (1) SA 925 AD at 042.

¹⁵³ Per Smalberger JA, in the minority judgment, with whom M.T. Steyn JA concurred.

¹⁵⁴ The researcher could find no reported or unreported case law to the effect that the adoption of a purposive approach towards the interpretation of fiscal (or other) legislation carries with it the necessary concomitant that the words contained in a particular statutory provision (which forms the subject matter of the interpretative process) should be disregarded and/or negated.

CHAPTER 4: ANALYSIS OF THE APPROACH OF DIFFERENT AUTHORS

4.1 INTRODUCTION

It is considered a *sine qua non* for research of the present nature to include a critical analysis of the views of various academics. The local reported case law is replete with references to the views of various authors on the subject matter of a purposive (local) approach towards the interpretation of fiscal legislation.¹⁵⁵

In what follows the aim is to critically evaluate the views of learned authors (limited to the subject of an interpretative approach of legislation and, more particularly, fiscal legislation).

4.2 LOCAL AUTHORS

In *The Law of South Africa*¹⁵⁶ the learned authors make the following apposite statement with regard to the meaning of determining the purpose of legislation:

The legislative function is a purposive activity: the real question is what did the Legislature intend to achieve with the particular legislative instrument? In determining the purpose of legislation one is seeking the clear or manifest purpose – in other words one is actually seeking the object, aim, ambit or function of the statute as determined by the use of legally recognised rules of interpretation. The most important rule of statutory interpretation is that the interpretation must ultimately reflect the purpose of the legislation.

¹⁵⁵ See for example the decision by the Constitutional Court in *Investigating Directorate: SEO v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) at 568, footnote 44 and see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) at 554, footnote 112 and see *Wesbank v Martin* 2012 (3) SA 600 (WCC) at 605, footnote 6.

¹⁵⁶ Joubert, W.A. (Founding Ed.) & Faris, J.A. (Planning Ed.) (Durban, Butterworths) LAWSA, vol. 25 (1) 2nd Ed., para 130.

Derksen ¹⁵⁷ sounds warning against a strict literal interpretation of fiscal legislation. The learned author stated as follows in this regard:¹⁵⁸

Die vraag sou gevra kon word of daar nie in hierdie proefskrif, in plaas van die begrip ‘moontlike woordbetekenis’, bloot die begrip ‘letterlike betekenis’ aangewend kon gewees het nie. Kon daar nie met ander woorde bloot gesê gewees het dat ‘n hof ‘n uitleg mag gee wat van die ‘letterlike betekenis’ van die woorde van die wet mag afwyk nie? Die antwoord is nee. Die probleem met die laas genoemde uitdrukking is dat dit twyfel laat oor die vraag of die uitleg wat gegee word nog een of ander verband moet hou met die spektrum van betekenis wat ‘n woord in die omgangstaal of volgens die woordeboeke kan hê. Die indruk word soms gelaat dat daar met ‘letterlike betekenis’ bloot bedoel word die meer algemene betekenis van ‘n woord. By implikasie sou ‘n nie-letterlike betekenis dus wees ‘n minder algemene betekenis, maar een wat moontlik wel van tyd tot tyd in die omgangstaal of in ‘n woordeboek aan die woord gegee word. ...

The learned author expressly stated ¹⁵⁹ that “*die woorde van (die) wet is wel ‘n uitleg hulpmiddel wat in ag geneem moet word, en dit dien ook as uitgangspunt van die uitleg proses.*”¹⁶⁰

Insofar as it concerns a purposive interpretation of fiscal legislation, Derksen ¹⁶¹ commences the sub-chapter in his doctoral thesis by making the following apposite remark:

¹⁵⁷ Derksen, A.G. (1989). *’n Benadering tot die Uitleg van Wette, met Besondere Verwysing na die Inkomstebelastingwet 58 van 1962 en Vermydingskemas*. Unpublished LLD thesis, University of South Africa, at p. 282.

¹⁵⁸ At pp. 282-283.

¹⁵⁹ At pp. 282-283.

¹⁶⁰ This approach corresponds, to a certain (limited) extent, with the proposition by Steyn, L.C. (1981). *Die Uitleg van Wette*, 5th Edition. Cape Town: Juta, at pp. 9 -10, where the learned author warns that the interpreter of a statutory provision should not go beyond the presence of the words contained within the statutory provision and where the learned author stated that:

“... Die bepalings van die wet strek alleen sover as die woorde daarvan. Waar die woorde ophou, daar hou ook die bepalings op.”

¹⁶¹ At p. 289 and further.

*Die klousules van 'n wet wat deur die wetgewer geformuleer word, is die produk van die wetgewer se gedagtes. Die klousules behoort met ander woorde, in ideale omstandighede, 'n weerspieëling van die bedoeling van die wetgewer te wees. Tydens die formulering behoort die wetgewer in sy gedagtes die beginsel waarop hy die wet baseer voor oë te hê. Die beginsel word egter nie direk in die woorde van die wet vervat nie, maar is slegs 'n deel van die agtergrond daartoe. Die woorde van die wet is dus nie 'n poging om die beginsel van die wet in woorde uit te druk nie, maar wel 'n poging om die bedoeling van die wetgewer in woorde uit te druk.*¹⁶²

The learned author then proposes that the interpreter of a statute need not ascertain the principle which the Legislature had in mind at the time of formulating the statute. The learned author stated that the interpreter of the legislation is entitled to ascertain the principle without considering what the intention of the Legislature was.¹⁶³

Derksen is emphatic in his contention that the principle of a statute, on the one hand, does not encapsulate the so-called intention of the Legislature.¹⁶⁴

He expresses his views in this regard as follows:

*Dat die beginsel van die wet nie as dieselfde konsep as die bedoeling van die wetgewer beskou is nie, blyk reeds uit die betekenis van die eg begrip soos in die hoofteks hierbo aangedui.*¹⁶⁵

¹⁶² The learned author's reasoning is considered apposite because it goes to the very heart of determining what constitutes a reference to a "purposive approach". One interpretation is that it constitutes a reference towards the intention of the Legislature. Another interpretation is that it constitutes a reference towards the intention of the statutory provision itself.

¹⁶³ See Derksen, A.G. (1989). *'n Benadering tot die Uitleg van Wette, met Besondere Verwysing na die Inkomstebelastingwet 58 van 1962 en Vermydingskemas*, Unpublished Doctoral Thesis, University of South Africa at p. 289. Derksen refers to Voet 1.3.20:

"[it] may [sometimes] be gathered that the Legislature did intend to forsake the proper meaning of terms. This may be inferred on the one hand from the preceding and later words of the law, or from the preface, the epilogue and so forth; on the other from the principle of the law [ratio legis], underlying the law itself ...".

¹⁶⁴ See the text at p. 289 and see the commentary in footnote 55 at p. 380.

The learned author then continues by criticising the consideration by Steyn¹⁶⁶ where that author regards the intention of the Legislature and the principle of the statute as analogous.

Wiechers¹⁶⁷ considers the purpose of the Legislature to be a fiction by reason of the fact that one of the sources (“*bronne*”) in which the content of the so-called intention of the Legislature may be found, is independent of what the Legislature actually intended. Wiechers¹⁶⁸ makes the following statement:

Oppervlakkig beskou, wend die hof [die reëls van uitleg van wette] aan om die bedoeling van die wetgewer vas te stel. Die bedoeling van die wetgewer is 'n fiksie want in alle gevalle word ons howe in die reël nie toegelaat om kabinetsnotules, parlementêre verslae, ens, by die uitleg van wette te gebruik nie. Wat die howe dus inderdaad met die reëls van uitleg van wette doen, is om die betekenis van die wet vas te stel.

It is with the last-mentioned quotation from the work of Wiechers that Derksen agrees.¹⁶⁹

4.3 INFLUENCES FROM ABROAD

Austin¹⁷⁰ regards the “*ratio legis*” of a statute to be:

¹⁶⁵ It is, respectfully, contended that the learned author’s distinction between the intention of the Legislature and the intention of a specific statutory provision constitutes a sound and necessary distinction. I propose that, in this regard, one rationale in support of the distinction contended for by Derksen is the following: The intention of a Legislature may undergo change. However, once promulgated, the intention of a particular statutory provision (“die beginsel van die wet”) cannot change, as it remains entrenched in the provision itself (whilst enacted). Derksen, A.G. (1989). *’n Benadering tot die Uitleg van Wette, met Besondere Verwysing na die Inkomstebelastingwet 58 van 1962 en Vermydingskemas*, Unpublished Doctoral Thesis, University of South Africa.

¹⁶⁶ Steyn, L.C. (1981). *Die Uitleg van Wette*. 5th Edition. Cape Town: Juta & Co Ltd, at p. 35.

¹⁶⁷ Wiechers, M. (1984). *Administratiefreg*. 2nd Edition. Durban: Butterworths, Chapter 4, p. 42 footnote 3.

¹⁶⁸ At 43.

¹⁶⁹ At p. 300, footnote 137.

The scope or determining cause, of a statute law: that is to say, the end or purpose which determines the law-giver to make it, as distinguished from the intention or purpose with which he actually makes it. For the intention which is present to his mind when he is constructing the statute, may chance to differ from the end which moves him to establish the statute.

Dworkin,¹⁷¹ with regard to the differentiation between the intention of the legislature on the one hand, and the policy and object of a statute on the other hand, discusses the “*intention of the Legislature*” as well as the “*policy and object of (the) statute*” as separate “*rules of construction*” and states that the intention of the Legislature dominates.

Dworkin¹⁷² further contends for an interpretation aimed at establishing the object of the statute.¹⁷³

Maxwell¹⁷⁴ contends that in *Heydon’s case*¹⁷⁵ it was resolved that for the interpretation of all statutes four things are to be discerned and considered:

The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy ... consideration of the ‘mischief’ or object of the enactment is common, and / or often provide the solution to a problem of interpretation.

¹⁷⁰ Austin, J. (1861). *Lectures on Jurisprudence*. New York: Burt Franklin, at 332 and further.

¹⁷¹ Dworkin, G. (1967). *Oggers’ Construction of Deeds and Statutes*. 5th Edition. London: Sweet & Maxwell, at 240-252.

¹⁷² At 245-249, and specifically at 247.

¹⁷³ It is contended that the learned authors express reference towards the establishment of the object of the statute (as opposed to the intention / object of the Legislature) constitutes a sound distinction. In this regard I ascribe to the reasoning of Derksen (see the content of paragraph 4.1 above and see the work of Derksen, A.G. (1989). *’n Benadering tot die Uitleg van Wette, met Besondere Verwysing na die Inkomstebelastingwet 58 van 1962 en Vermydingskemas*, Unpublished Doctoral Thesis, University of South Africa, at 289-290) to the effect that whilst the intention of the Legislature may undergo change(s), the express intention contained in the statute itself remains.

¹⁷⁴ Langan, P, St J. (1969). *Maxwell on the Interpretation of Statutes*. 12th Edition. London: Sweet & Maxwell, at p. 40.

¹⁷⁵ (1584) 2 *Coke’s Reports* 18 Part III 7 (3).

Voet ¹⁷⁶ stated that:

[Interpretation of the law must not be] such as circumvents the meaning of the law, since it may happen that the law did not expressly prohibit what it did not wish to be done ... nor must the proper meaning of the words be departed from, except when it is clear that the Legislature so intended.

4.4 FURTHER CONSIDERATIONS

Kellaway ¹⁷⁷ confirms that Courts in the Republic of South Africa, under the influence of English law, stuck to the concepts of literalism by paying more attention to grammar and syntax than to the intention and purpose of the legislation. The learned author refers to the tendency of South African Courts to, early in the 20th century, slavishly follow the English law that a Court had no power to redraft or alter the language of a statutory provision as:

... it was to construe the language of the Legislature and arrive at its intention in that way. ¹⁷⁸

Kellaway contends ¹⁷⁹ that such pedanticism resulted in judicial construction which remained vague as to how to construct the language of a statute. He further contends that what the judiciary was in fact saying, in adopting such a strict literalist approach, was that the “meaning” of a statutory provision was confined to the very wording of the provision; thereby ignoring the inevitable fact that such confinement produced its own problems and was not destined to remain a universal rule.

¹⁷⁶ Voet 1.3.20 (the interpretation is that of Gane, vol. 1, p. 53, as used in *S v Naidoo* 1985 (1) SA 36 (N) at 40F-G as used in *Keeler Lodge (Pty) Ltd v Durban Rent Board and Others* 1965 (1) SA 308 (N) at 318B-C.

¹⁷⁷ Kellaway, E.A (1995). *Principles of Legal Interpretation Statutes, Contracts & Wills*. Durban: Butterworths, at p. 100.

¹⁷⁸ See the remarks by the learned author on p. 100 and the quotation from the decision by the Appellate Division (as it was then known) in *Ex Parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 480.

¹⁷⁹ At pp. 100-101.

Kellaway¹⁸⁰ refers to the earlier stage of the development of the principles of statutory interpretation by Courts in the Republic of South Africa and refers to the maxim *'jus dicere sed non jus facere'* (say what the law is, not make it) and stated further that a Court may not read into a provision words which are not there, and further concluded that the intention of the Legislature (as opposed to the intention of the statutory provision itself) can be derived only from the wording of the statutory enactment itself.¹⁸¹

Kellaway¹⁸² contends that the literal theory (which concentrates on the meaning of actual words or a provision of a statute as being the dominant factor in statutory interpretation) runs contrary to the Roman-Dutch law theory of interpretation which, concisely stated, is that the intention, and not the words, makes the law.

In this regard the learned author refers to *Donellis* who states clearly that the law is not what is written but what the law-giver intends.¹⁸³

De Koker and Urquhart¹⁸⁴ contend that:

Income tax is essentially the creature of statute, and the principles of construction which apply to statutes generally apply equally to the interpretation of taxation statutes. However, the interpretation of statutes is often a difficult task, and the rules of construction, which vacillate from a literal application based on the aims and context of the legislation, are not applied consistently.

¹⁸⁰ At p. 100 and further.

¹⁸¹ See p. 100 and see footnote 36 where reference is made to the decision by the Appellate Division (as it was then known) in *More v Minister of Cooperation and Development* 1986 (1) SA 102 (A1) at 116.

¹⁸² At 138 and further.

¹⁸³ See Kellaway, E.A (1995). *Principles of Legal Interpretation Statutes, Contracts & Wills*. Durban: Butterworths, at p. 138 and see footnote 334 where reference is made to Steyn, L.C. (1981). *Die Uitleg van Wette* 5th Edition. Cape Town: Juta at 56.

¹⁸⁴ De Koker, A.P. & Urquhart, G.A. (2012). *Income Tax in South Africa*. Durban: Butterworths. Service Issue No 40, at para. 2.1.

The learned authors contend that the prevailing view appears to be that in the interpretation of tax Acts, the Court must adhere strictly to the words of the Act and that deviation from the literal interpretation should not readily occur.¹⁸⁵

De Koker and Urquhart further state that the Income Tax Act is an example of a voluminous and complex statute that has been repeatedly amended by various drafters over a long period of time and that the approach of the Supreme Court of Appeal in *Standard General Insurance Co Ltd v CSARS*¹⁸⁶ should be followed in the interpretation of the Income Tax Act. The learned authors expressly state that such a method of interpretation will accord with the “purposive” trend in the interpretation of statutory provisions.

In *Standard General Insurance Co Ltd v CSARS* the Supreme Court of Appeal had to decide whether a clearing agent incurred liability for the payment of duty in terms of section 18A of the Customs and Excise Act,¹⁸⁷ and whether it incurred liability pursuant to the special bond apart from any liability that it might have incurred in terms of section 99(2) of the said Act. The Court held *inter alia* as follows with regard to attribution of an intention to the drafter of legislation:

In our view some caution is required before attributing an intention to the drafter of legislation by inference. Giving meaning to particular words by drawing upon language that is used elsewhere in a statute is no more than the application of a process of logical reasoning – it is usually reasonable to infer that the compiler of a single document has used language consistently throughout. But where a voluminous and complex statute has been repeatedly amended, probably by various drafters, over a long period of time – as in this case – that inference will not necessarily be sound.”¹⁸⁸

Then at pp. 200 – 201 the Court found as follows:

¹⁸⁵ See the text at para 2.1.

¹⁸⁶ 66 SATC 192.

¹⁸⁷ Act No 91 of 1964 (as amended).

¹⁸⁸ See the judgment on p. 200, para [22].

*Rather than attempting to draw inferences as to the drafter's intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation.*¹⁸⁹

It is further relevant to draw attention to the fact that the Supreme Court of Appeal, in *Standard General Insurance Co Ltd v CSARS* had no quarrel in referring to “the object of the Act” in the latter portion of its judgment.¹⁹⁰

Steyn,¹⁹¹ in considering statutory provisions, contends that in the interpretation of fiscal legislation the *contra fiscum* rule finds application and that accordingly “*interpretatio contra fiscum adhibenda*”.¹⁹² The learned author¹⁹³ criticises the decision by the Supreme Court of Appeal in *Commissioner for Inland Revenue v Simpson*¹⁹⁴ and states that there seems to be little reason to, in considering fiscal legislation as opposed to other legislation, require such a particular strictness of interpretation.

The learned author contends that:

¹⁸⁹ See the judgment on pp. 200 – 201, para [25]. It bears mentioning that the Court referred to the judgment of Schreiner JA in *Jaga v Dönges NO and Another: Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G-H, where the Court placed specific emphasis on interpretation of the ordinary meaning of words contained in a statute as well as the particular context of the words contained in the statute.

¹⁹⁰ See the judgment on p. 201, para [27]. It is respectfully contended that this serves as example of a multi-facetted approach whereby prevalence is given to the meaning of particular words contained in a statute together with its context and, if possible and necessary and required in the circumstances, a (further) consideration of the “object of the Act”. It is contended that the reference by the Supreme Court of Appeal to “the object of the Act” in para 27 on p. 201 is important (as opposed to a general reference which may have been “the object / intention of the Legislature”).

¹⁹¹ Steyn, L.C. (1981). *Die Uitleg van Wette*. 5th Ed. Cape Town: Juta, at pp. 110-113.

¹⁹² Hiemstra, V.G. & Gonin, H.L. (1992). “*The interpretation should go against the treasury*”, *Trilingual Dictionary, 3^d Edition*. Cape Town: Juta, at p. 211. The learned author also refers to Holl Cons 3 (2), p. 685, footnote 12, where it was stated that: “*Hy wat by twyfel teen die fiscus uitspraak gee, gee nie 'n slegte uitspraak nie.*”

¹⁹³ *Ibid*, at 111.

¹⁹⁴ 1949 (4) SA 678 (A) at 695.

Ook hier gaan dit in die eerste plek om die bedoeling van die wetgewer.

In making this statement the learned author relies upon the statement by Wessels CJ in *Commissioner of Inland Revenue v Delfos*,¹⁹⁵ where the learned Chief Justice stated *inter alia* as follows, after referring to the aforesaid well-known *dicta* in the *George Forest Timbers*¹⁹⁶ case:

I do not understand that to mean that in no case in a taxing Act are we to give a section a narrower or wider meaning than its apparent meaning ... In all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the Legislature.

Devenish¹⁹⁷ contends that the role and meaning of legislative intention has become increasingly problematic in the interpretation of statutes. The learned author states *inter alia* that:

The term 'the intention of the Legislature' is so often used by the Courts that it has become a legal cliché.

The learned author contends that although it is generally accepted that the ascertainment of legislative intention is the cardinal aim of statutory intention, the term is open to misunderstanding and is in no way synonymous with the intention of an individual concerning the general and particular effects of a document which he prepares and signs.

Landis¹⁹⁸ distinguishes between two senses of intent; namely, in the first instance, what he terms to be 'specific intent' which is applicable when the Legislature specifically foresaw "*the*

¹⁹⁵ 1933 AD 242 at 254.

¹⁹⁶ 1924 AD 516 at 531 to 532.

¹⁹⁷ Devenish G.E. (1992). *Interpretation of Statutes*. Cape Town: Juta & Co Ltd.

¹⁹⁸ Landis, J. (1930). A note on Statutory Interpretation. *Harvard Law Review*, 43, pp. 886.

problem in issue and meant to resolve it in a certain way”, and in the second instance, “*intent in the sense of the general purpose or aim behind the legislation*”.

It is with reference to such distinguishment between different meanings of intention of a Legislature, within the scheme of the interpretation of statutory provisions, that Devenish contends that such possible meanings are the cause of the confusion with regard to the applicable terminology forming the spine of the interpretation of legislation.

Van Heerden and Crosby¹⁹⁹ specifically contend that a factor that complicates statutory interpretation in South Africa is the fact that the 1983 Constitution provided that all legislation should be drafted in both official languages.²⁰⁰ The learned authors contend that it is a difficult task to formulate an Act in two languages so that every word in one language carries exactly the same meaning as the corresponding word in the other.

De Ville²⁰¹ echoes sentiments in favour of an approach whereby, in the case of “clear” wording of a particular provision, there should be a reluctance to adopt a purposive approach.²⁰² Cassidy²⁰³ refers to SARS’ proposal that there is “*a broad movement towards the so-called ‘modern’ approach to interpretation which requires a ‘contextual and purposive approach’ ...*”.²⁰⁴ The learned author contends that “*... the common law approach in South Africa does not echo the modern purposive approach found in other jurisdictions such as Australia and Canada.*”²⁰⁵

¹⁹⁹ Van Heerden, F.J. & Crosby, A.C. (1996). *Butterworths Key to Knowledge - Interpretation of Statutes*. Durban: Butterworths, at pp. 6-7.

²⁰⁰ See in this regard the provisions of section 35 of the now repealed South Africa Constitution Act 110 of 1983.

²⁰¹ De Ville J.R. (2000). *Constitutional & Statutory Interpretation*. Cape Town: Interdoc Consultants.

²⁰² See the text at p. 249.

²⁰³ Cassidy, J. (2012). *Stellenbosch Law Review*, (2012) vol. 23 no 2 at p. 319 and further.

²⁰⁴ P. 330 and further of her article in *Stellenbosch Law Review* (2012) vol. 23 no. 2, and see SARS (2006) Tax Avoidance and Section 103 of the Income Tax Act, 1962: Revised Proposals, p. 16.

²⁰⁵ See Cassidy, J. (2012). *Stellenbosch Law Review*, (2012) vol. 23 no 2 at pp. 330 – 331. Footnote references in the quoted section not repeated. It is respectfully contended that the

The learned author describes this modern purposive approach in the following language:

*... under this modern purposive approach, the primary rule is no longer the literal rule of interpretation. Rather, the default position is to ascertain the purpose underlying a provision in all cases. Thus this form of modern purposivism prevails over literalism in all cases, not just cases of absurdity or ambiguity. In turn, this purposive approach and its use of extrinsic aids such as explanatory memoranda and practice notes, may not only clarify any uncertainty, but also simply confirm the otherwise apparent meaning of the statute.*²⁰⁶

The learned author also refers to the “... legislative directive in section 80A(c)(ii) to adopt a purposive interpretation of the tax legislation ...” and contends that this legislative directive goes beyond the echoing of modern South African jurisprudence.²⁰⁷

4.5 CRITICAL EVALUATION OF THE APPROACHES ADVANCED BY THE DIFFERENT AUTHORS, AS DISCUSSED ABOVE

It is contended that the differentiation by the various learned authors between a consideration of the intention of a Legislature (Parliament), on the one hand, and the intention of the statute, on the other hand, is of importance. It is further contended that a

learned author (Cassidy) is correct in her contention. This is borne out with reference to the common law approach in South Africa, as evidenced from a reading of the older reported decisions referred to hereinabove. See in this regard the decisions referred to in section 2.4.

²⁰⁶ Attention is directed at the learned author’s differentiation between the intention of Parliament and the meaning of a statute. It is contended that this differentiation is sensible in the circumstances, as it recognises the fact that the principle (purpose) of the statutory provision is independent of the intention of the Legislature. See in this regard the confirmatory remarks by Derksen, A.G. (1989). *’n Benadering tot die Uitleg van Wette, met Besondere Verwysing na die Inkomstebelastingwet 58 van 1962 en Vermydingskemas*, Unpublished Doctoral Thesis, University of South Africa at 290.

²⁰⁷ See the article on p. 331.

purposive interpretation is not the remedy for all disease or ills insofar as it concerns a literalist interpretation of fiscal legislation.²⁰⁸

It is contended that when regard is had to the views expressed by various academics, the time frame during which those views were expressed should be considered so as to distinguish between pre- and post-constitutional commentary. See in this regard the remarks by the Supreme Court of Appeal in *Ngcobo v Salimba CC; Ngcobo v Van Rensburg*,²⁰⁹ in which case the Supreme Court of Appeal was concerned with the application of section 39(2) of the Constitution and specifically whether the word “and” in the subject provision could be read disjunctively as “or”, and where the Court stressed the need to maintain a literal interpretation of the provision in the absence of “*compelling reasons*” where the alternative result would be “*unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights*”. It is to be noted that on the facts of that case, no such compelling reasons existed and the Court gave the word “and” its normal meaning and read it as conjunctive.

This case highlighted the fact that section 39(2) of the Constitution requires legislation to be interpreted in the light of the spirit, purport and objects of the Bill of Rights. See the remarks by Cassidy at p. 337, where she confirms that the Constitution “... *does not dictate that legislation is to be interpreted in light of that provisions or legislation’s purpose*”.

For a discussion of the pre-constitutional use of the purposive approach in our Courts towards interpretation of legislation, it is useful to note the commentary by De Ville²¹⁰ and particularly the learned author’s conclusion where he stated as follows:

*Where the wording of the provision concerned is however regarded by the Court as ‘clear’, it appears that there is a reluctance to adopt a purposive approach.*²¹¹

²⁰⁸ See in this regard the confirmatory remarks by Du Plessis, L.M. (2002). *Re-Interpretation of Statutes*, Durban: Butterworths, at p. 247, where the learned author also proposes that purposiveness and contextualism “best go hand in hand”.

²⁰⁹ 1999 (8) BCLR 855 (SCA) para 11.

²¹⁰ De Ville, J.R. (2000) *Constitutional and Statutory Interpretation* Cape Town: Interdoc Consultants, at 244-250.

Franszen²¹² is of the view that a statutory (fiscal) provision should be interpreted in accordance with its plain meaning, if the provision is not ambiguous. The learned author refers to the *dicta* in *CIR v George Forest Timber Co*²¹³ and *CIR v Delfos*²¹⁴ in which references were made to the aforesaid *dicta* by Lord Cairns in *Partington v Attorney-General*.²¹⁵

These different approaches by academics, given in South Africa's pre- and post-constitutional dispensation, evidence a clear lack of uniformity in approach towards fiscal (and non-fiscal) legislative interpretation.²¹⁶

It is contended that it is important to distinguish between those circumstances where no ambiguity exists in the particular statutory provision (which forms the subject matter of interpretation) and, on the other hand, those circumstances where there is a clear ambiguity or a particular concern which compromises the particular statutory interpretation.

²¹¹ See the text at p. 249.

²¹² Franszen, R.C.D. (1990) *'n Regskritiese Ondersoek na Hereregte in Suid-Afrika*. Unpublished doctoral thesis. Stellenbosch University, at p. 23 and further.

²¹³ 1924 AD 516.

²¹⁴ 1933 AD 242 (also reported as 6 SATC 92).

²¹⁵ 21 LT 370 at 375.

²¹⁶ It is respectfully contended that the lack of uniformity in approach is not limited to the writings of academics. In this regard, by way of example, reference is made to the judgment by the High Court in *Real People Housing (Pty) Ltd v City of Cape Town* 2010 (1) SA 411 (C) where the Court, per Yekiso at 419, para [23] found as follows:

“*Venter v R* 1907 TS 910 is regarded as the *locus classicus* insofar as the approach to interpretation of statutes by the Courts is concerned. In that judgment, the then Transvaal Supreme Court, as far back as the beginning of the 20th century, stated the aim of interpretation as being-

“...to ascertain the intention which the Legislature meant to express from the language which it employed. By far the most important rule to guide Courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, where the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.”

It bears mentioning that the Court, as part of its judgment in the afore quoted section, refers to the work of De Ville at 51.

4.6 CONCLUSION

Although it cannot be argued that there exists a uniformity in approach, with regard to the aforementioned views of different academics / authors, it is contended that no general disapproval of the utilisation of a purposive methodology of interpretation exists. It is considered important to recognise the particular era in which an author / academic advanced a particular proposition.

With regard to the more recent influences ²¹⁷ it is clear that a more relaxed adoption of the purposive approach towards interpretation of fiscal legislation exists.

However, this recognition does not mean anything more than that the purposive approach towards interpretation is more liberally recognised as a useful tool in the interpretative process.

²¹⁷ See for example the consideration in section 4.4 above of the views expressed by Steyn, L.C. (1981). *Die Uitleg van Wette*. 5th Edition Cape Town: Juta, and De Koker, A.P. & Urquhart, G.A. (1989) *Income tax in South Africa*. Durban: Butterworths.

CHAPTER 5: MORE RECENT *DICTA* AS WELL AS OTHER INFLUENCES TOWARD A PURPOSIVE INTERPRETATION OF FISCAL LEGISLATION

5.1 INTRODUCTION: *CAPITA SELECTA*

The intention in this chapter is not to merely reproduce relevant *dicta* but rather to refer to a *capita selecta* of relevant reported (and unreported) decisions which are then particularly evaluated and commented upon.

Based on this reasoning it follows that one of the difficulties in completion of this research study (and particularly this chapter) was to decide which references not to include in the text of this study. In what follows the researcher has endeavoured to include the most prevalent decisions insofar as they concern the purposive approach towards the interpretation of fiscal (and other) legislation.

5.2 *CAPITA SELECTA* – BEYOND THE SCOPE OF THE INTERPRETATION OF FISCAL LEGISLATION

In *CSARS v Airworld*²¹⁸ the Supreme Court of Appeal considered the meaning of the term “beneficiary” in the context of ss 64D and 64C of the Income Tax Act. The Court noted that these sections dealt with a tax that was *sui generis* and that the settings and surrounds were therefore quite restricted. The term “beneficiary” appeared as part of an anti-avoidance provision and was therefore construed in a manner that would enable all possible variations of the intended mischief to be dealt with in the context of those sections.

²¹⁸ 2007 70 SATC 34 (also reported as 2007 SCA 147 (RSA)).

Although it can be argued that the judgment is at present of academic value only, in view of the fact that the definition of the term “recipient” in section 64C(1) had been deleted with effect from 22 December 2003, the importance of the judgment, for present purposes, lies *inter alia* in the content of paragraph [10] of the judgment by Combrink JA, with whom Farlam JA concurred (the minority judgment), where it was expressly found that “*fiscal legislation is to be interpreted by ascertaining what the Legislature intended in using the words it chose to use ..*”. This sentiment is further echoed in the majority judgment, in para [24], where the Court expressly held that “*the crucial question in this appeal: what did the Legislature intend ...?*”.

In *Standard General Insurance Co Ltd v CSARS* ²¹⁹ the Supreme Court of Appeal had to consider whether a reference in the Customs and Excise Act ²²⁰ to a “person who exports” contemplated an “exporter” as that word was defined in the Act, which included any person who acts on behalf of an exporter. In considering this difficulty, the Supreme Court of Appeal observed as follows:

Caution is required before attributing an intention to the drafter of legislation by inference. Giving meaning to particular words by drawing upon language that is used elsewhere in a statute is no more than the application of a process of logical reasoning – it is usually reasonable to infer that the compiler of a single document has used language consistently throughout. But where a voluminous and complex statute has been repeatedly amended, probably by various drafters, over a long period of time, that inference will not necessarily be sound.

Thereafter the Court also found as follows:

... rather than attempting to draw inferences as to the drafter’s intention from an uncertain premise, we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation.

²¹⁹ 66 SATC 192.

²²⁰ 91 of 1964.

In view of the decision in the *Hyundai* case ²²¹ referred to below, it is contended that any differentiation between fiscal legislation and other statutory provisions, insofar as the interpretation thereof is concerned, constitutes an unnecessary and impractical and a false differentiation. Consequently, in what follows, the approach of the Supreme Court of Appeal and the High Court in more recent decisions pertaining to the purposive methodology of interpretation of legislation (not limited to fiscal legislation) will be considered.

The reminder by Harms DP (with whom Nugent JA, Lewis JA, Bosielo JA and K Pillay AJA concurred) in *Minister of Safety and Security v Sekhoto and Another*,²²² is apposite. The learned Deputy President commenced, although not in the sense of considering fiscal legislation, by posing a reminder of the manner in which statutes must be interpreted; namely, in the light of the content of the Bill of Rights. The Deputy President refers to the remarks by Langa CJ in *Hyundai* ²²³ that, when interpreting legislation a Court must promote the spirit, purport and objects of the Bill of Rights and said that all statutes must be interpreted through the prism of the Bill of Rights.

The learned Deputy President referred to the guidelines given by Langa CJ in *Hyundai* ²²⁴ and drew attention to the distinction between interpreting legislation in a way which promotes the spirit, purport and objects of the Bill of Rights, and the process of reading words into or severing them from a statutory provision (under section 172(1)(b) of the Constitution) following upon a declaration of constitutional invalidity under section 172(1)(a) of the Constitution. Such interpretation commences with a first process being an interpretative process limited to what the text is reasonably capable of meaning. The second process can only take place after the statutory provision is found to be constitutionally invalid.

²²¹ *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).

²²² 2011 (5) SA 367 SCA at 375-377.

²²³ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) paras 21 – 26.

²²⁴ *Ibid.*

Accordingly it follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance.²²⁵

In *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others*²²⁶ (a case which concerned amongst others the utilisation of farm workers by employers to provide private security services for remuneration, reward, a fee or benefit, and whether such constituted security service providers with the concomitant requirement to register in terms of the provisions of the Private Security Industry Regulation Act 56 of 2001), Mokgoro J (in the majority judgment with whom Langa CJ, Moseneke DCJ, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred) emphatically stated that “*our Constitution requires a purposive approach to statutory interpretation*”.²²⁷ The learned Judge, however, warned that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute.²²⁸

It should be recognised that in the modern era some Acts expressly provide for the manner in which its interpretation should be given effect. For example, section 2(1) of the National Credit Act²²⁹ provides:

*This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.*²³⁰

²²⁵ See the judgment by Harms DP in *Minister of Safety and Security v Sekhoto and Another* at 376, para [15].

²²⁶ 2010 (2) SA 181 (CC)

²²⁷ See the judgment on p. 192, para [21].

²²⁸ See the judgment on p. 193, para [22].

²²⁹ Act No 34 of 2005 (as amended).

²³⁰ This provision was expressly recognised by the Supreme Court of Appeal in *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at 585, para [2] and also by Gorven J in *Silver Flacon Trading 333 (Pty) Ltd and Others v Nedbank Ltd* 2012 (3) SA 371 KZP at 378, para [12].

5.3 THE TAX ADMINISTRATION ACT

The Tax Administration Act (TAA) ²³¹ is replete with references to the purpose of the statute and/or the purpose of a part or section of the statute. A consideration of the definition of the words “administration of a tax Act” as contained in section 1 of the TAA reveals that, with reference to section 3(2) of the said Act, it can arguably be stated that the Legislature intended expressly to include as part of the administration of a tax Act the interpretation thereof.²³²

It is emphasised that, to date, no reported or unreported decisions exist that pertain to any of the provisions contained in the Tax Administration Act, let alone those provisions which may give guidance with regard to the nature and extent of the interpretation of fiscal legislation and, particularly, whether the interpretative process should be understood as forming part of what is defined to be the administration of a tax Act.

5.4 SARS’ INTERPRETATION NOTES

In the modern era, tax practitioners and Courts are also potentially confronted with SARS’ own interpretation notes. It is, however, settled law that practice notes or interpretation notes are not law.²³³ In this regard in *ITC 1675* ²³⁴ the representative of the Commissioner went so far as to argue that SARS is not bound by its own practice notes.

²³¹ Act 28 of 2011 (the TAA).

²³² Such (potential) inclusion can be of particular importance insofar as it concerns the remedies available to a taxpayer. Should an argument be upheld to the effect that the interpretation of a tax Act is to be considered part of the administration thereof, it may very well be held that a taxpayer’s remedy is provided in the Promotion of Administrative Justice Act No 3 of 2000.

²³³ See in this regard the commentary by the learned authors in *South African Income Tax: Legislation and Commentary* Juta’s Tax Library (August 2012) at p. 1-6.

²³⁴ 62 SATC 219.

Although SARS' own interpretation notes are not regarded as legally binding, it is considered unquestionably so that these interpretation notes serve as a useful guide amongst practitioners to understand the particular reasoning behind the introduction of a new or changed statutory provision(s).

5.5 OTHER RELEVANT *DICTA*

In October 2005 the Supreme Court of Canada considered the provisions of section 245(4) of the Canadian Federal Income Tax Act which provides that the Canadian GAAR applies to a transaction only if it may reasonably be considered that the transaction would, if the Act were read without the reference to the subsection, result directly or indirectly in a misuse of the provisions of certain stipulated Acts and Rules as well as a tax treaty or whether it would result directly or indirectly in an abuse having regard to those provisions other than the section read as a whole.²³⁵ In *Canada Trust Co Mortgage Co v Canada* and *Mathew v Canada*²³⁶ the Court held *inter alia* that the section requires a single unified approach to the textual, contextual and purposive interpretation of the specific provisions of the legislation that are relied upon by the taxpayer in order to determine whether it was an abusive tax avoidance.

The learned authors in *South African Income Tax: Legislation and Commentary*²³⁷ contend that the misuse or abuse test provided for in the *Canada Trust Co* and *Mathew* cases provide an authority, “*if not imperative, to apply the purposive approach*” as opposed to the rule of statutory interpretation which requires adherence to the plain words of the statute.

²³⁵ See *Canada Trust Co Mortgage Co v Canada* 2005 (SCC 54) and *Mathew v Canada* 2005 (SCC 55).

²³⁶ *Ibid.*

²³⁷ Olivier, L., & Roeleveld, J. (current authors); Davis, D.M. & Urquhart G. (founding authors) (2007). *Juta's Income Tax*. Revision Service 12. Cape Town: Juta, at p. 80A-11.

In *Metropolitan Life Ltd v CSARS*²³⁸ Davis J had opportunity to interpret various provisions of the VAT Act²³⁹ and found *inter alia* as follows:²⁴⁰

“Faced with competing meanings to both sections 11(2) and 14(5), a Court should follow the approach of Hurt AJA in *SARS v Airworld CC and Another*(2007) SCA 147 at para 255:

In recent years Courts have placed emphasis on the purpose with which the Legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the Legislature’s intention. Thus, in *Standard General Insurance Co Ltd v Commissioner for Customs and Excise, Nugent and Lewis JJA* said:

*‘Rather than attempting to draw inference as to the drafter’s intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation’. As pointed out by Nienaber JA in *De Beer’s Marine* when dealing with the meaning of ‘export’ for the purpose of s 20(4) – which draws a distinction between export and home consumption – the word must ‘take its colour, like a chameleon, from its setting and surrounds in the Act.’²⁴¹*

The learned Judge then reached the conclusion that, based upon the aforesaid *dictum* by Hurt AJA in *CSARS v Airworld CC and Another*, the provisions of the VAT Act and the 1997

²³⁸ Case No A232/07, a decision by the High Court against the judgment of the Special Income Tax Court. 2009 (3) SA 484 (C) 70 SATC 162.

²³⁹ Act No 89 of 1991 (as amended).

²⁴⁰ At para [31].

²⁴¹ Own emphasis.

amendment thereof should be interpreted “*purposively and holistically and that provision should be given a clear meaning whenever plausible*”.

It was based on this favoured mode of interpretation that the learned Judge held that the imported services rendered in that case were assessed correctly as charged to VAT in terms of section 7(1)(c) of the VAT Act and found that the basis for taxation at a zero rate which the appellant sought to invoke in terms of the provisions of section 11(2)(a) of the VAT Act, is inapplicable to such kind of service hence the appeal was dismissed with costs including the costs of two counsel.

In *Commissioner for the South African Revenue Service v Airworld CC*,²⁴² the Court per Hurt AJA, in the majority judgment²⁴³ held²⁴⁴ expressly that the purpose (of the Legislature) is used in conjunction with the appropriate meaning of the language of a provision as a guide in order to ascertain the intention of the Legislature.

This research is alive to the fact that the decisions of the Tax Court (formerly known as the Special Court for the hearing of Income Tax Appeals) constitute decisions by a creature of statute and that that the Court has no jurisdiction except that which is expressly conferred on it by the provisions of the applicable tax legislation, including the Income Tax Act and, more recently, the Tax Administration Act. Such Court is further not a Court of Appeal in the ordinary sense. Unlike the High Court, it has no inherent jurisdiction and consequently the Tax Court is competent only to decide the issue between the parties and its judgments have no further binding force and that Court is also not bound by its own judgments.

Its judgments do have persuasive value.²⁴⁵ It is also noted that this research is alive to the fact that the doctrine of *res judicata* is not applicable to the decisions of the Tax Court.²⁴⁶

²⁴² 2007 (SCA) 147 (RSA).

²⁴³ With whom Howie P and Lewis JA concurred.

²⁴⁴ At para [25].

²⁴⁵ See: *CIR v City Deep Ltd* 1 SATC 18 (for a contrary view that is clearly wrong, so it is contended, see 1833 69 SATC 200).

As recently as 1 October 2012 the Supreme Court of Appeal in *Armgold / Harmony Freegold Joint Venture (Pty) Ltd v The Commissioner for the South African Revenue Service*²⁴⁷ considered *inter alia* the operation of the scheme of the Income Tax Act in relation to the deduction of mining capital expenditure. Although the case did not in express terms relate to consideration of a particular manner of interpretation of fiscal legislation, it is to be noted from the wording of the unanimous judgment of the Court, per Leach JA, particularly in paragraph 12 on pp. 6 to 7, that the Court clearly considered the intention of the Legislature in the promulgation of section 36(7F).²⁴⁸

In *CSARS v De Beers*²⁴⁹ the Supreme Court of Appeal's judgment serves as illustration of the ongoing importance of the interpretation of fiscal legislation. In the majority judgment by Van Heerden JA²⁵⁰ in upholding the appeal, the Court rejected a submission on behalf of the respondent to the effect that the definition of the word "enterprise" in the VAT Act carries the necessary concomitant that there were two categories of enterprise encapsulated in paragraph (a) of the definition of the word.

It was argued on behalf of the respondent that once a vendor falls within the ambit of the definition of "enterprise", any activity whatsoever of that enterprise forms an integral part and parcel of the enterprise unless such activity is excluded in terms of paragraph (v) of the proviso thereof. The Court, in the majority judgment, rejected the argument as being "wholly

²⁴⁶ See in this regard the decision in *Estate Brownson (deceased) v President and Members of the Income Tax Special Court* and CIR 1933 WLD 116, 6 SATC 166.

²⁴⁷ Unreported, Case No 703/2012 at para 8, p. 5 – para 12, p. 7.

²⁴⁸ From a reading of the Court's judgment, particularly para [24] on pp. 11 – 12, it follows that the Court also had regard to the purpose of the statutory provision itself. In this regard it was found that:

"Section 36(7F) envisages the capex deduction of each mine to be determined by having regard to the taxable income derived from that mine, an objective that will be defeated if the operating expenses incurred of one mine are to be taken into account in respect of another."

In the same paragraph the Court had no difficulty in, as part of its attempt to interpret the relevant statutory provisions, refer to the content of the Explanatory Memorandum on the Income Tax Bill, 1990. It is respectfully contended that this type of approach by the Supreme Court of Appeal evidences a multi-faceted approach towards the interpretation of fiscal legislation.

²⁴⁹ Commissioner for the SARS v De Beers 2012 ZA SCA 103 (1 June 2012).

²⁵⁰ With whom Southwood AJA, Leach JA and McLaren AJA concurred.

without merit” and found that upon interpretation of the relevant fiscal legislation the word “including” indicates that what follows is illustrative of what precedes it. The Court also found that,

*... there is no room for an interpretation that two categories of ‘enterprise’ are envisaged and that even though a company can engage in a number of different activities, the discreet ‘investment category’ sought to be relied upon in relation to DBCM’s Anglo American PLC Shareholding is untenable.*²⁵¹

In *Distell Ltd v The Commissioner for the South African Revenue Service*²⁵² the Court was concerned with the classification of beverages under tariff headings in terms of the Customs and Excise Act 91 of 1964. The appeal turned on whether the products in question were fermented or distilled (spirituous) beverages. On behalf of the appellants it was contended that they were fermented and accordingly classifiable under a specific tariff heading. The respondent contended that the products in question were spirituous and therefore classifiable under a different tariff heading. The Court *a quo* referred to the purpose of the correct tariff headings, namely to determine the excise duty payable in terms of the Act.

Recently, in *Commissioner for the South African Revenue Service v Tradehold Ltd*²⁵³ the Court held that the crisp issue for determination was whether the term “alienation” as used in the relevant Double Taxation Agreement includes within its ambit gains arising from a deemed (as opposed to an actual) disposal of assets.

²⁵¹ It is contended that this serves as illustrative recent example of the Supreme Court of Appeal’s methodology of interpretation, in circumstances where there exists no ambiguity and/or potential invalidity of a section or subsection. It is apparent that the Court merely resolved to interpret the meaning of the words contained in the legislation. No more and no less.

²⁵² [2012] ZASCA 88 (31 May 2012).

²⁵³ [2012] ZASCA 61 (8 May 2012).

The Court found ²⁵⁴ that the term must be given a meaning that is congruent with the language of the Double Taxation Agreement “having regard to its object and purpose”.

The Court consequently found that the term “alienation” as used in the Double Taxation Agreement is not restricted to actual alienation and that it is a neutral term having a broad meaning, comprehending both actual and deemed disposals of assets giving rise to taxable capital gains. Consequently, the Supreme Court of Appeal found that the Tax Court was correct in holding that the Commissioner had incorrectly included a taxable gain resulting from the deemed disposal of Tradehold’s investment in its income for the 2003 year of assessment and the appeal was dismissed.²⁵⁵

Recently in *CSARS v M B Beginzel NO and Others* ²⁵⁶ the main question for determination was “*whether or not SARS is to be treated as a preferent creditor in business rescue proceedings.*”²⁵⁷ The Court considered this issue mainly in the light of the wording of sections 96 to 102 of the Insolvency Act ²⁵⁸ read with the provisions of the Companies Act, ²⁵⁹ which came into operation on 1 May 2011. From a reading of the Court’s judgment it appears that the contention advanced on behalf of SARS was rejected. In this regard the Court held *inter alia* as follows:

In my view, SARS’ construction of the provisions of section 145(4) of the Act, is not only contrary to the ordinary grammatical meaning of the words used in the said section, but also leads to an illogical result that fails to balance the rights and interests of all relevant stakeholders, as envisaged in section 7(k) of the Act. ²⁶⁰

²⁵⁴ At para. [23], p. 11 of the judgment.

²⁵⁵ See the judgment on p. 12, paras [24 – 27].

²⁵⁶ A decision by Fourie J in the Western Cape High Court, Cape Town, Case No 15080/2012 (as yet unreported), delivered on 31 October 2012.

²⁵⁷ See the judgment on p. 12, para [21].

²⁵⁸ Act 24 of 1936 (as amended).

²⁵⁹ No 71 of 2008.

²⁶⁰ See the judgment on p. 13, para [22].

The Court further held as follows insofar as it concerns the interpretation of the relevant statutory provisions:

*In my opinion, the wording of section 145(4) is clear and unambiguous and leaves no room for the artificial and strained interpretation that SARS wishes to place on it.*²⁶¹

It is contended that the Court's approach was, correctly, premised on the basis that the relevant statutory provisions were unambiguous and clear and called for mere consideration and interpretation. Consequently, so it appears from a reading of the judgment, it was not necessary for the Court to consider any potential purposive approach towards the interpretation of the relevant legislation.

A relatively recent example of the application of the so-called new approach in the interpretation of fiscal legislation is to be found in the judgment of Seligson AJ in *ITC 1584*.²⁶² In that case, the Commissioner for Inland Revenue, in determining the taxable income of B prior to her remarriage and that of her second husband, subsequent thereto, included in their taxable income in respect of the years of assessment 1988 and 1989, the amounts paid by a trust as maintenance for three minor children born out of the marriage of the deceased (A) with B, and those amounts were assessed to tax in terms of amended additional assessments for the 1988 tax year and an original assessment for the 1989 tax year, as annuities received from the trust by B. The first issue for determination in the appeal was therefore whether the exemption from income tax provided for in section 10(1)(u) of the Income Tax Act was applicable to maintenance paid in respect of minor children by the estate of a deceased's former spouse in order to comply with a maintenance obligation imposed by an order of Court.

²⁶¹ See the judgment on p. 15, para [25].

²⁶² 1994 57 SATC 63.

The Court found ²⁶³ *inter alia* that, to interpret the relevant exemption as applicable when maintenance is paid by a former spouse, but not by such spouse's deceased estate, would create a glaring anomaly with inequitable results.

The following extract from the Court's judgment is opposite insofar as it reveals clearly the methodology of interpretation adopted by the Court:

... Moreover, it does not accord with the context or object of the exemption provision, which is to exempt from tax amounts paid to a spouse or former spouse by way of maintenance for herself of any children inter alia pursuant to divorce proceedings instituted after the date mentioned in the exemption. Whether such maintenance is paid by the spouse's estate rather than by the spouse himself should consequently make no difference. Accordingly, in my judgment, the construction adopted in ITC 1119 could never have been intended by the Legislature when it enacted the exemption in s 10(1)(u).

As confirmation of a recent favoured approach by the High Court, in circumstances where there was no ambiguity and/or invalidity, in respect of the statutory provision forming the subject matter of interpretation, reference is made to the decision by Olivier J in *Haigh v Transnet Ltd* ²⁶⁴ where the Court held that there was no room for a so-called purposive interpretation absent an ambiguity or invalidity.²⁶⁵

In *CSARS v South African Custodial Services (Pty) Ltd* ²⁶⁶ the Supreme Court of Appeal had to determine whether the respondent's activities fell within the terms of section 22(2A) of the Income Tax Act. In disposing of a preliminary argument, the Court ²⁶⁷ stated to the effect

²⁶³ At pp. 70 – 71.

²⁶⁴ 2012 (1) SA 623 (NCK) at 631A-B, para [22].

²⁶⁵ The Court referred to the decisions by the Supreme Court of Appeal in: *Standard Bank Investment Corporation Ltd v Competition Commission and Others*; *Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at 810 and *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA), para 15.

²⁶⁶ [2011] ZASCA 233 (30 November 2011).

²⁶⁷ Per Plasket AJA (with whom Brand, Maya, Cachalia and Mhlantla JJA concurred) at para [41].

that the section deems what may not be trading stock to be trading stock and that it, in this sense, overrides the provisions of section 11(a).

The Court held as follows in this regard:

*I am of the view that this interpretation is not correct when consideration is given to the purpose of the section. It is necessary to deem materials to be trading stock for purposes of the benefit provided by the section because, having acceded to the land upon which they have been built, the materials in question ceased to be owned by the person who had acquired them.*²⁶⁸

It assists to refer to that part of the judgment²⁶⁹ where the Court, with approval, referred to the decision by Marais JA in *Richards Bay Iron and Titanium (Pty) Ltd and Another v Commissioner for Inland Revenue*²⁷⁰ where the learned Judge of Appeal dealt *inter alia* with the reason for the existence of various provisions in the Income Tax Act, including the definition of “trading stock” and held as follows:

*The rationale for the existence of these provisions is neither far to seek nor difficult to comprehend. The South African system of taxation of income entails determining what the taxpayer’s gross income was, subtracting from it any income which is exempt from tax, subtracting from the resultant income any deductions allowed by the Act, and thereby arriving at the taxable income. It is on the latter income that tax is levied. The concepts involved are defined in the Act.*²⁷¹

²⁶⁸ See the judgment in para [41].

²⁶⁹ Para [39].

²⁷⁰ 1996 (1) SA 311 (A) at 316F-317C.

²⁷¹ Further indication thereof that the Court leaned towards the establishment of the intention of the Legislature is derived from a reading of the judgment on p. 318B-D, where Marais JA held:

“There is no reason to doubt that it was for these reasons that the South African legislation too requires opening and closing trading stock to be taken into account when determining taxable income derived from carrying on any trade in any year of assessment. Certainly, no other reasons have been suggested.”

In *CSARS v Foodcorp Ltd*²⁷² the Court had to consider what constitutes a mining property in terms of section 37 of the Income Tax Act. More particularly, the essential question was whether the provisions of section 37 read with paragraph (j) of the definition of “gross income” in section 1 of the Income Tax Act, applied to an amount of R22 million received by the respondent during the 1989 year of assessment.

The case is a particular example of an instance where the Supreme Court of Appeal utilised the “proper meaning” of words contained in a statutory provision together with a purposive methodology of interpretation.

In this regard, reference is made to the decision by Melunsky AJA²⁷³ at para 16, where it was held as follows:

Counsel for the Commissioner contended that the mineral rights and the other mining assets which the Respondent transferred to Douglas constituted a mining property within the meaning of that expression in s 37. It was therefore submitted that the transfer of a right to carry on mining operations amounted to a transfer of a mining property. It may be accepted, as counsel argued, that one of the objects of the section is to enable the Commissioner to apply a value to development assets where the parties to an agreement do not do so. This, however, is no justification for extending the sense of the words in the section beyond their proper meaning. There are clear indications in the section that the Legislature intended the phrase to apply only to land on which mining was carried on. For the purposes of this judgment I leave aside the question of whether the word ‘ownership’ in the section might be applied to all rights, both personal and real, and also to the physical property.²⁷⁴

²⁷² 62 SATC 243.

²⁷³ With whom Grosskopf, Zulman, Streicher JJA and Mthiyane AJA concurred.

²⁷⁴ Own emphasis.

In *Commissioner SA Revenue Service v Executor, Estate Late Frith*²⁷⁵ the Court²⁷⁶ had to determine the issue on appeal; namely how section 4(q) of the Estate Duty Act²⁷⁷ is to be construed.

In the majority judgment the Court held as follows:

The primary rule in construction of statutory provisions is (as is well established) to ascertain the intention of the Legislature (as is equally well-established) one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so, would lead to an absurdity so glaring that the Legislature could not have contemplated it.

*Boland Bank Ltd v The Master and Another 1991 (3) SA 387 (A). Literal interpretation is thus a firmly established principle.*²⁷⁸

It is respectfully considered that the majority judgment by the Court is correct insofar as it makes provision for the co-existence of a literal interpretation (on the one hand) in the event of no potential absurdity and/or outcome contrary to the contemplation of the Legislature and the (to be established) intention of the Legislature.

Very recently²⁷⁹ the Western Cape High Court in *Bosch and Another v The Commissioner for the South African Revenue Services*,²⁸⁰ in a matter on appeal against an order of the Income Tax Court pursuant to an appeal confirming the taxation of gains received by or which accrued to certain participants in the Foschini 1997 Share Option Scheme, referred to

²⁷⁵ 2001 (3) JTLR 82 (SCA).

²⁷⁶ Per Plewman JA, which whom Hefer ADCJ and Mpati AJA (as he then was) concurred (Brand AJA (as he then was) and Chetty AJA dissenting). This quote is *verbatim*.

²⁷⁷ No 45 of 1955.

²⁷⁸ See the judgment at p. 92 para [2].

²⁷⁹ On 20 November 2012.

²⁸⁰ Case No A94/2012 in the High Court of South Africa (Western Cape High Court, Cape Town) (as yet unreported).

the decision by Marais JA in *Nissan (Pty) Ltd v CIR*²⁸¹ where the learned Judge found that, if there is at least room for the interpretation in the language of the provision concerned, such interpretation is the one which has been accorded to the words for sufficiently long, and without being gainsaid, this provides a good reason for concluding that that is what the phrase was intended to mean.

The Western Cape High Court²⁸² importantly held that:

*A further interpretive aid is to have recourse to s 8C which, on 26 October 2004 superseded s 8A.*²⁸³

The Court eventually considered the provisions of s 8C of the Income Tax Act and found that, on the facts, with reference to the relevant scheme shares which were acquired by the appellant outside the meaning of the section before 26 October 2004 that the particular additional assessments for the relevant years of assessment should be set aside.²⁸⁴

In *Commissioner for the South African Revenue Service v Tradehold Ltd*,²⁸⁵ the Supreme Court of Appeal, in an appeal by the Commissioner for SARS from a decision of the Tax Court, Cape Town, wherein the respondent had successfully appealed against an additional assessment raised by the Commissioner based on a taxable capital gain which, according to the Commissioner, arose from a deemed disposal by the respondent of its shares in a particular company in terms of paragraph 12(1) of the Eighth Schedule to the Income Tax Act, had to determine whether the term “alienation” as used in the relevant Double Taxation Agreement includes within its ambit gains arising from a deemed (as opposed to an actual) disposal of assets.²⁸⁶

²⁸¹ 1998 (4) SA 860 (A) at 870.

²⁸² Per Davis J with whom Baartman J concurred.

²⁸³ See the judgment on p. 31, para [60].

²⁸⁴ See the judgment on pp. 53 – 54, paras [95] – [97].

²⁸⁵ [2012] ZASCA 61 (8 May 2021).

²⁸⁶ See the judgment on p. 11, para [23].

The following extract of the judgment of Boruchowitz AJA ²⁸⁷ is instructive with regard to the Court's approach to the issue at hand:

*... As mentioned above, the term (a reference to the term 'alienation' as used in the relevant Double Taxation Agreement) must be given a meaning that is congruent with the language of the DTA having regard to its object and purpose.*²⁸⁸

In *Stellenbosch Farmers' Winery v Commissioner for SARS* ²⁸⁹ the Supreme Court of Appeal had to, amongst others, consider whether a receipt by the taxpayer of a sum of money was of a capital or a revenue nature. The Court ²⁹⁰ referred with approval to the reliance, by the taxpayer's counsel, on the decision by the Supreme Court of Appeal in *Secretary for Inland Revenue v Eaton Hall (Pty) Ltd* ²⁹¹ where it was held that accounting practice cannot override the correct interpretation of the provisions of the Act and their application to the facts of the matter.

Insofar as it concerns potential conflict that may exist between domestic law and an international trade agreement, domestic law prevails. In this regard, the Supreme Court of Appeal in *AM Moola Group Ltd v CSARS* ²⁹² decided that, where the law in terms of which the agreement is entered into is subsequently changed, the agreement should be interpreted according to the amending legislation and not the legislation as it stood at the time the agreement was entered into.

²⁸⁷ With whom Nugent, Cachalia, Malan & Tshiqi JJA concurred.

²⁸⁸ See the judgment, p. 11, para [23]. Once again, the approach of the Court is to be recognised where provision is made for consideration of both the language of the particular provision as well as consideration of the relevant "object and purpose".

²⁸⁹ [2012] ZASCA 72.

²⁹⁰ Per Kroon AJA (with whom Brand, Van Heerden and Tshiqi JJA and Boruchowitz AJA concurred) at para. [35] of the judgment.

²⁹¹ 1975 (4) SA 953 (A) at 958B-D.

²⁹² 65 SATC 414.

This decision, with its incumbent element of international law, is referred to because of the criticism by the learned authors Olivier and Honiball,²⁹³ on the basis that the Court's decision did not take recognition of section 233 of the Constitution in that it is not in conformity with international law.

5.6 SIMILAR CONSIDERATIONS, 60 YEARS APART

Despite the apparent different approaches adopted by the Supreme Court of Appeal and the High Courts, as well as the Tax Court in the Republic of South Africa, it is contended that the current law, insofar as it concerns the validity of a purposive approach towards the interpretation of (fiscal) legislation can conveniently be summed up by reference to the following two decisions (that were given more than 60 years apart):

In *Bhyat v Commissioner for Immigration*²⁹⁴ it was held by the Appellate Division (as it was then known) that:

The cardinal rule of construction of a statute is to arrive at the intention of a law-giver from the language employed in the enactment. That is a trite statement of the law, but does not assist us to ascertain the intention when the language has made it obscure. Hence there has evolved a number of subsidiary rules of construction, which are enunciated and applied in the decisions of our Courts ... but there is undoubtedly an older and less qualified rule of construction and that is that in construing the provisions of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which form the consideration of the enactment as a whole a Court of law is satisfied the Legislature could not have intended.

In *Land en Landboubank van Suid-Afrika v Rousseau NO*²⁹⁵ it was held that:

²⁹³ Olivier, L. & Honiball, M. (2011). *International Tax A South African Perspective*. 5th Ed. Cape Town: Siber Ink, at p. 317.

²⁹⁴ 1932 AD 125.

*The general rule is that the words of a statute must be given their ordinary, grammatical meaning unless to do so would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations that the Court is justified in taking into account. In that event the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the Legislature.*²⁹⁶

5.7 CONCLUSION

It is contended that the decisions by the Supreme Court of Appeal and the Constitutional Court²⁹⁷ constitute the overreaching precedent setting *dicta*.

It is to be noted that the researcher could not find a single reported or unreported South African Court decision in terms whereof it was held that a distinction should be drawn between the interpretation of fiscal legislation (on the one hand) as opposed to legislation (in general). It is contended that no such distinction is merited.

In *XYZ v The Commissioner for the South African Revenue Service*,²⁹⁸ a judgment by Fabricius J granted on 15 June 2011, the Court considered an appeal against the respondent's decision to reject the objection of the appellant to its 2008 assessment. The Court referred to the respondent's contentions that:²⁹⁹

²⁹⁵ 1993 (1) SA 513 (A).

²⁹⁶ Attention is particularly directed at the Court's references to the intention of the Legislature (as opposed to the intention of the particular statutory provision).

²⁹⁷ See for example *CSARS v Airworld* 2007 (70) SATC 34 and *Standard General Insurance Co Ltd v CSARS* 66 SATC 192 and *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 SCA and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).

²⁹⁸ Case No 12895 in the Tax Court (held at Pretoria) (as yet unreported).

²⁹⁹ At p. 17, para [12].

The plain wording of any words used by the Legislature is central to the interpretation of all Statutes, and this applies to tax legislation as well.

The Court then held, with reference to the decision by the Supreme Court of Appeal in *Standard Bank Investment Corporation Ltd v Competition Commission*³⁰⁰ that legislation must “*have its language respected*” and that legislation does not mean whatever we might wish it to mean and that,

... one cannot subvert the words chosen by Parliament either in favour of the spirit of the law, or by referring to background policy considerations that were not reflected in the language of the particular statute itself.

The Court concluded by finding as follows:

*Acts are expressed in words. Interpretation concerns the meaning of words used by the Legislature and is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later.*³⁰¹

At p. 18 the Court expressly found that:

It is also abundantly clear that although it has been said that our law is an enthusiastic supporter of ‘purposive construction’, the purpose of a statutory provision can provide as reliable pointer to the intention of the Legislature but only, where there is an ambiguity.

It is contended that the approach by the Supreme Court of Appeal in *Mankayi v Anglogold Ashanti*³⁰² is apposite, where the Court held that:

³⁰⁰ 2000 (2) SA 797 (SCA) at 810 – 811.

³⁰¹ See the judgment on p. 17, para [13].

³⁰² 2010 (5) SA 137 (SCA) at 154.

*Interpretation seeks to give effect to the object or purpose of legislation. It involves an enquiry into the intention of the Legislature. It is concerned with the meaning of words without imposing a view of what the policy or object of the legislation is or should be. ...*³⁰³

It is contended that the more recent adoption of purposive methodology of interpretation of fiscal legislation is indeed evident from a reading of the aforementioned decisions by the Constitutional Court and the Supreme Court of Appeal, as well as various divisions of the High Court. The importance of the various Court decisions are, in my view, that at no stage was the interpretative process of fiscal legislation elevated to anything more than a mere assistant methodology in the process of interpretation of legislation. In addition, it is considered important to note that, in none of the reported or unreported decisions did the Courts distinguish between the interpretation of fiscal legislation (on the one hand) and legislation in general (on the other hand).

³⁰³ It is considered important to recognise the distinction between ascertainment of the intention of the Legislature as opposed to the purpose of a specific statutory provision.

CHAPTER 6: RESEARCH FINDINGS AND RECOMMENDATIONS

A consideration of the earlier decisions ³⁰⁴ leads to the inevitable conclusion that the reception into South African law of the decisions by the English Courts in *Partington v Attorney-General* ³⁰⁵ and the decision in *Cape Brandy Syndicate v Inland Revenue Commissioners* ³⁰⁶ clearly influenced the earlier South African Court decisions.

This influence leads towards a strict and literal approach in the (local) interpretation of fiscal legislation. A glaring aspect of the earlier decisions is that the aforesaid English Courts' *dicta* were usurped in circumstances where appropriate contextualisation never occurred.

Despite the apparent following of the English Courts' strict and literal approaches towards the interpretation of fiscal legislation, a clear trend became discernable early in the 20th Century, if regard is had to, for example, the decision by Innes CJ in *CIR v George Forest Timbers Co Ltd* ³⁰⁷ where the learned Chief Justice clearly considered the potential intention of the Legislature as a method of interpretation of the relevant statutory provisions. This approach is further evidenced with reference to another decision, by the same Judge, in *Mahomed NO v Union Government (Minister of the Interior)* ³⁰⁸ where a clear aspect that emanated from the Court's judgment was the "ascertaining (of) the intention of the Legislature as expressed in the clause ...".

³⁰⁴ Referred to in sections 1.1 and 2.1 to 2.4 of the text above.

³⁰⁵ Referred to in section 2.1 of the text above.

³⁰⁶ Referred to in section 1.2 and 2.1 of the text above.

³⁰⁷ 1924 AD 516 at 531 to 532.

³⁰⁸ 1911 AD 1 at 8.

This trend was continued by Wessels CJ in *CIR v Delfos*³⁰⁹ where the Court, despite the adoption of the principle enunciated in *Partington v Attorney-General*, referred to the establishment of “*the true intention of the Legislature*”.³¹⁰

From this study it is further glaringly apparent that there was a definite shift away from a strict and literal approach of interpretation towards an approach which aimed at establishing the intention of the Legislature. In *ITC 1384*³¹¹ the President of the Court, Steyn J, had no quarrel in stating that the “reasonable law-giver’s intention” constituted part of the interpretation of fiscal statutes.³¹²

It is contended that the Courts’ transformation towards an acceptance of adoption of a purposive approach towards the interpretation of fiscal legislation is in harmony with the constitutionally valid approach dictated by the Supreme Court of Appeal as well as the Constitutional Court.³¹³

It is contended that a mere purposive approach towards the interpretation of fiscal legislation, in itself, cannot be said to constitute a constitutionally valid interpretative approach. The additional requirements dictated by Langa CJ in the *Hyundai* decision³¹⁴ must still be adhered to. In this regard the direction by the Constitutional Court is that, when interpreting legislation, a Court must promote the spirit, purport and objects of the Bill of Rights. In addition, the direction is that all statutes must be interpreted through the prism of the Bill of Rights.

³⁰⁹ 1933 AD 242 (also reported as 6 SATC 92).

³¹⁰ See the judgment at p. 253 and see the excerpts above in section 2.4.

³¹¹ In this regard reference is made to the tone-setting judgment in *ITC 1384* (1983 46 SATC 95).

³¹² See the judgment at p. 106 as well as the judgment at pp. 107 to 108 where the Court expressly held that there should be no distinction between the manner in which the purpose of fiscal legislation and other statutes fell to be approached.

³¹³ In, for example, *CSARS v Airworld* (2007) 70 SATC 34 and the *Hyundai* decision referred to in Chapter 5 above.

³¹⁴ See the judgment at pars 21 - 26.

It is on these premises that the researcher concludes by stating that the purposive methodology towards interpretation of fiscal (and other) legislation cannot be regarded as anything more than an aid or a rule which forms part of the canons of construction.³¹⁵ It should be recognised that, although the establishment of the purpose of the Legislature (alternatively the purpose of a particular statutory provision) constitutes a recognised aim in the interpretative process, the first step in (potentially) ascertaining such purpose would be to have regard to the clear meaning of the words contained in a particular statutory provision. The prevalence towards a purposive approach does not therefore exclude the continued consideration of the clear meaning of words contained in a statute.

³¹⁵

This contention is fortified with reference to the remarks by the learned authors in *Income Tax Cases & Materials* (2012) at pp. 15 – 16, where it is expressly stated that “*the rules or canons of construction, on the other hand, have no status as legal rules and are merely conceptual models applied (or not applied), as the case may be by judges grappling with the meaning of particular legislative provisions.*” Emslie, T.S., Davis, D.M., Hutton, S.J., Olivier, L. (2001). *Income Tax Cases & Materials*. 3rd Edition. Cape Town: The Taxpayer.

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