AN INTERPRETATION OF THE DEEMING PROVISIONS IN LEGISLATION IN THE CONTEXT OF A GOOD TAX SYSTEM – A SOUTH AFRICAN PERSPECTIVE

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ABSTRACT

The goal of this thesis is to analyse the relationship between deeming provisions in legislation and the principles of a good tax system. The need for a positive relationship between deeming provisions and the principles of a good tax system is demonstrated in the thesis. The research explains the historical development of deeming provisions, legal principles relevant to the interpretation of tax legislation, as well as the principles of a good tax system. Approaches to the interpretation of legislation are then described and illustrated by means of case law. Following this, the research focuses on a selection of provisions in the South African Income Tax Act, 58 of 1962, to determine whether the deeming provisions included in the Act reflect the application of the principles of a good tax system. In addition to the analysis of the selected statutory provisions, related case law is discussed, again in relation to the deeming provisions. A discussion of deeming provisions in two publications of the Organisation for Economic Co-Operation and Development (OECD) – the OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting – follows, with an analysis of two related deeming provisions in the Income Tax Act, to illustrate the international approach to deeming provisions and the principles of a good tax system. Finally, the administration of tax legislation is discussed, together with organisations whose mission is to promote the principles of a good tax system in tax administration. The research is qualitative in nature and follows a legal doctrinal research methodology. This methodology is both reform-oriented and theoretical and focuses on understanding the application of the legal concepts: deeming provisions, legal principles and principles of a good tax system. The research concludes that, from a theoretical perspective, a positive relationship exists between deeming provisions in the Income Tax Act and the OECD Model Tax Convention and the principles of a good tax system, and therefore creates a positive environment for tax compliance.

Keywords: Deeming provisions; interpretation of legislation; legal principles; Organisation for Economic Cooperation and Development (OECD), the OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting principles of a good tax system; South African Income Tax Act; taxation; tax compliance.

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CHAPTER 1

INTRODUCTION TO THE RESEARCH

It's always best to start at the beginning …

– The Wizard of Oz[1]

1.1 Introduction, background, and motivation for the research

According to Jean-Baptiste Colbert, "(t)he art of taxation consists of plucking the goose so as to obtain the most feathers with the least hissing."[2] The National Treasury (the "plucker") raises revenue from a taxpayer (the "goose") through statutory provisions in tax legislation. The Income Tax Act, 58 of 1962 ("the Income Tax Act") was enacted to achieve the objectives included in the long title of the Act. One of these objectives, the "recovery of taxes", is achieved through the "tax liability provisions or 'tax charging' provisions" of the Income Tax Act (South African Revenue Service (SARS), 2018: 4). The phrase "tax charging provision" is self-explanatory: it is a provision according to which tax is charged. In this thesis the focus is on deeming provisions included in the Income Tax Act and the purpose of this research is to determine the role of deeming provisions and the principles of a good tax system in preventing the over- and under-plucking of the taxpayer goose.

This chapter starts with a discussion of the two concepts on which this thesis is based:

- deeming provisions, their meaning and scope; and
- legal principles and the principles of a good tax system, and their role in tax collection and tax compliance.

The chapter then sets out the problem statement, the motivation for the research, and formulates the main goal and sub-goals of the research. This is followed by a brief overview of the methodological approach to the research, and the chapter concludes with a description of what is dealt with in the following chapters of the thesis.

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[1]Movie Quote DB. 2020. Wizard of Oz. [On line]. Available: https://www.moviequotedb.com/movies/wizard-of-oz-the/quote_26269.html [accessed 26/06/2020]

[2] Colbert, J. 2020. Quotable Quote. [On line]. Available: https://www.goodreads.com/quotes/724935-the-art-of-taxation-consists-of-plucking-the-goose-so, [accessed 26/06/2020].

1.2 Deeming provisions

Deeming provisions play an important role in the imposition of income tax and its enforcement. This section discusses the meaning of the word "deem", the scope of deeming provisions and the purpose of deeming provisions.

1.2.1 Meaning of "deem" – in general

The meaning of "deemed" (Lord Walker of Gestingthorpe, 2016: 184) is considered to be "ambiguous", of an uncertain nature. It represents (*R v Norfolk County Council* (1891) 60 LJQB 379, at 380) an "admission" that something "is not what it is deemed to be" but, "for the purposes of" the act under review, "is to be deemed to be that thing". Lowe and Potter (2018: 129) observe that deeming provisions:

> are legislative provisions that lay down a hypothesis on the basis of which those applying the legislation, and those to whom it applies, must proceed. These hypothetical stipulations may or may not reflect reality, and they are therefore sometimes referred to as 'statutory fictions'.

A legal fiction contradicts reality (Del Mar & Twining, 2015: xx) and resolves "trouble in the law that requires creative lawmaking" (Del Mar & Twining, 2015: 106). It can be said that deeming provisions, as a legal fiction, "balance flexibility and responsiveness with stability and predictability" (Del Mar & Twining, 2015: 227).

1.2.2 The meaning and purpose of deeming provisions from a South African perspective

The South African courts have considered deeming provisions in various fields of law. The principles included in the case law shed light on the meaning of deeming provisions.

Deeming provisions deem a "subject" to be something else that it "truly" is (*S v Tyelbooi* 1982 (4) SA 43 (E), at 46). It can also give a subject-matter a meaning "not ordinarily associated" with it (*Assign Services (Pty) Limited v National Union of*

Metalworkers of South Africa and Others (Casual Workers Advice Office as amicus curiae) [2018] JOL 40113 (CC), at 31[92].

A deeming provision is a statutory provision. The context of the deeming provision must therefore be considered (*S v Rosenthal* 1980 (1) SA 65 at 75).

An enquiry into the meaning of a deeming provision requires clarity about "what the position would have been *without* the deeming provision" [emphasis in the original] (*S v Pouroulis and Others* [1993] 3 All SA 39 (W), at 68). It is submitted that the enquiry requires the interpreter to focus on the purpose of the deeming provision. The meaning of deeming provisions must be considered together with the wording of the deeming provisions, the factors which have an impact on the interpretation of the deeming provisions, the materials known by the drafters of the provisions as well as the purpose of the deeming provisions (*Commissioner for South African Revenue Service v Marshall NO and Others* [2016], 79 SATC 49, at 58; *Standard General Insurance Co Ltd v Commissioner for Customs and Excise* [2004] 66 SATC 192, at 201[25]; *Commissioner for South African Revenue Service v Airworld CC and Another* (2007) 70 SATC 48, at 61[25]).

Sherman (1917: 11) states: "*Ex nihilo nihil fit* … 'Something does not come from nothing'." This statement was made with reference to the discussion of the origin of law. It can be said that the purpose of legislation in effect indicates *why* it was drafted. This *why* can further be said to be an indication of the origin of the legislation concerned. Applying the statement to legal provisions "something" (legal provisions, including deeming provisions) therefore do not come from "nothing".

It is important to understand the *why* (or origin) of deeming provisions, or more specifically, their purposes. De Koker and Williams (2020: § 24.177) state that the purpose of deeming provisions is, for example, to:

- nullify tax avoidance schemes which have the intention of shifting tax;
- extend or restrict the scope of a benefit; and
- deal with administrative matters.

1.2.3 The scope and interpretation of deeming provisions

Del Mar and Twining (2015: 169) observe that deeming provisions have a broad scope and that the provisions have an uncertain ("ambiguous") nature. The present research involves a legal interpretation of deeming provisions in the Income Tax Act and in the Model Tax Convention of the Organisation for Economic Cooperation and Development (OECD).

In the Appellate Division case of *Mouton v Boland Bpk* [2001] 3 All SA 485 (A) (at 489[13]), the court confirmed the following: "The intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further." The hypothesis is the legal fiction (the "as if" scenario) that is created. In *Bonfigioli South Africa (Pty) Ltd v Panaino* [2014] JOL 32441 (LAC), at 9[22], the Court remarks that "a deeming provision creates a fiction. That which is deemed to be what it is not is only so deemed for the purposes of a specific contract or statute."

Legal interpretation of legislation requires an interpreter to assess the application of the relevant provisions of the legislation under review. Legal interpretation of the application of legislation is evidenced through court decisions. This represents the first legal interpretational approach, the judiciary approach.

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) illustrates two main judicial approaches to the interpretation of legislation:

- Literal (strict) approach: this approach (*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), at 272[17]), requires the interpreter to give effect to the "ordinary grammatical meaning" of the relevant words unless this would "lead to absurdity". According to du Plessis (2002: 101, 102) this approach forms part of "interpretive formalism". Interpretive formalism suggests that a "form-related" aspect determines the meaning of a legal provisions.
- Purposive approach: this approach (*Natal Joint Municipal Pension Fund v Endumeni Municipality*), at 272[18]), requires that the interpreter considers the

context of the relevant provision and gives effect to its "apparent purpose". This approach is similar to the approach in *Secretary for Inland Revenue v Brey* [1980] 1 All SA 318, at 322. Du Plessis (2002: 111) considers contextualism to be a third judiciary approach due to variations of contextualism that also enhance literalism.

It is submitted that another theory of interpretation that applies is constitutionalism. This submission is based on the following remark made by De Ville (1999: 389) in the publication titled "Meaning and statutory interpretation":

> Interpretation should not be aimed at reproducing the text, for the text has no meaning of its own. There are no firm foundations in interpretation. The intention of the legislature, the clarity of the text and the purpose of the enactment cannot provide such a foundation. Without leaving the text, … the courts should show a willingness to use the norms of interpretation to transform society in accordance with the ideals of the Constitution (as interpreted).

Du Plessis (2012: 2C14) acknowledges constitutionalism as a theory of interpretation.

1.2.4 Determining when a provision is a "deeming" provision

Not all deeming provisions use the term "deemed". Other terminology often encountered in the legislation includes "treated as" and "as if" but have the same meaning as "deemed". In *Rex Appellant v Haffejee and Another Respondents* 1945 AD 345, at 352, the Appellate Division stated as follows with reference to deeming provisions as formulated in English case law: "It is difficult to extract any principle from these cases, except the well-known one that the court must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions." In *S v Posel* [1977] 4 All SA 551 (N), at 563, the Natal Provincial Division observes, with reference to *Rex Appellant v Haffejee and Another Respondents* 1945 AD 345 as follows:

> It is, however, obvious from the facts of that case that the judgment *[Rex Appellant v Haffejee and Another Respondents* 1945 AD 345] pertained only

> to those facts and certainly did not lay down any general principle as to how a court of law is to deal with the word "deem". In my opinion every case of legislative deeming must be dealt with in terms of the particular statute in which it occurs.

From these cases it seems that various factors will indicate whether a provision is a deeming provision.

1.3 Legal principles and the principles of a good tax system

The term "legal principles" is very wide, and in this thesis it relates to two sets of principles. The first, referred to as "legal principles", includes the principles of reasonableness, *plus valere quod agitur quam quod simulate concipitur* (the principle of substance over form), the related principle of *fraus legis* (in fraud of law), the *contra fiscum* rule (should a taxting provision reveal an ambiguity, the ambiguous provision must be interpreted in a manner that favours the taxpayer), and the principle of *ubuntu* (as entrenched in the Constitution of the Republic of South Africa). These principles are applied in the interpretation of tax statutes.

The origin of legal principles dates back to ancient times. Burdick (1938: 8) explains that Roman Law is a codified law. The Justinian Code (*Corpus Iuris Civilis*) represents an important example of a codification. It consisted of four parts: the *Digesta*, the *Codex Constitutionem*, the *Institutiones* and the *Novellae Constitutiones*. According to Berger (1953: 600) the *Novellae Constitutiones* was added subsequent to the death of Emperor Justinian. In the "Composition of the Digest", Watson (1998: xxxiii, Volume 1) observes that ancient law (the law preceding the Justinian Code) was considered to be "confused" and the purpose of the Justinian Code was to explain the law in a "clear fashion". Elliott (2002: 180) defines the term clear as "transparent". This suggests that transparency was an important principle of Roman Law in the context of the Justinian Code. Roman Law distinguished between *ius civile* and *ius gentium*. The *ius civile* applied to Roman citizens. Legal status was determined by the nationality of a person (Mousourakis, 2016: 22). In relation to the *ius gentium*, legal principles, which were observed by all nations, formed part of law

(Mousourakis, 2016: 23, 24). The *ius gentium* emphasised the importance of fairness (reasonableness), equity, honesty, and substance over form (Mousourakis, 2015: 49). Watson (1998: xlviii, xxxiv, Volume 1) observes that the Justinian Code confirms the importance of reasonableness, substance and trust. Equity is defined as "fairness" (Elliott, 2002: 356).

The second set of principles relate to the principles of a good tax system, with which tax law should comply. As early as the 18th century, Adam Smith (1776) formulated four principles or canons of taxation: equality, certainty, convenience, and the economy of taxation. These canons have recently been amended by the Davis Tax Committee (2014) to include equity, simplicity, efficiency, transparency and certainty, and tax buoyancy. The principle of simplicity possibly forms part of the principles of certainty and transparency, while tax buoyancy possibly relates to efficiency.

- Economic efficiency: this means that the tax system must not place an excessive burden on taxpayers, but must ensure economic growth is achieved.
- Administrative efficiency: this means that the administrative and compliance costs relating to the tax system must not be excessive.
- Equity: this principle ensures the fairness of the "impact (or incidence) of a tax" (Davis Tax Committee, 2014: 5). The principle firstly refers to the ability of taxpayers to pay tax. This ability is divided into "horizontal equity" and "vertical equity" (Davis Tax Committee, 2014: 5). Horizontal equity means that taxpayers must be treated similarly for tax purposes. It secondly refers to "vertical equity". This means that the economic circumstances of taxpayers will determine the degree to which they are taxed. Equity secondly refers to the "benefit principle" according to which the government apportions the tax burden of government expenditures to the taxpayers in terms of the benefit taxpayers receive.
- Fairness: this refers to the fairness of "procedure, avoidance of discrimination" and the fairness with reference to legitimate expectations.

- Transparency and certainty: this requires, amongst others, that the tax system must be understandable and that there must be an actual and perceived level of fairness.

Fairness is an important principle of a good tax system. Berger (1953: 354) indicates that "*(a)equitas*" (equity) is an important principle where the development of law is concerned. He further confirms that "*bona fides*" includes the following elements: "honesty … good faith", "equity" and "fairness". This suggests a connection between equity and fairness. According to the Davis Tax Committee (2014: 5) fairness is an important factor with reference to the principle of equity.

1.4 Trust in revenue bodies

The OECD (2010a: 30) remarks that:

> [i]t is clear that fairness and trust are important drivers for compliance. Of special interest for revenue bodies are the importance of procedural justice and its importance for building trust and in that way support voluntary compliance. This means that it is not only important *what* a revenue body does; it is also important *how* the revenue body does it. [emphasis in the original]

According to the Davis Tax Committee (2014: 5) "perceived and actual levels of fairness" are important. According to Kirchler, Hoelzl and Wahl (2008: 219) there is a close relationship between perceived fairness and trust. If there is a low level of trust in government, it is proposed this will have a negative impact on the perceived fairness in the tax system. It is important that trust in revenue bodies exists as trust leads to voluntary tax compliance (Kirchler *et al*, 2008: 220). There is a close relationship between trust in revenue bodies (which includes SARS) and voluntary tax compliance by taxpayers. The relationship between trust and tax compliance is illustrated through a "slippery slope" framework (refer to **Appendix A**). The revenue bodies (Kirchler *et al*, 2008: 213, 220) must consider various approaches ("attitudes") to address non-compliance. The "slippery slope framework" (Kirchler *et al*, 2008: 211, 212) explains the relationship between taxpayers' trust in government, the power

of the government and tax compliance by the taxpayers. Tax compliance can be voluntary or enforced. In circumstances where:

- taxpayers' trust in government is low and the power of government is weak there is minimal tax compliance: no distinction is made between enforced tax compliance and voluntary tax compliance;
- taxpayers' trust in government is low and the power of government increases there is an increase in enforced tax compliance;
- taxpayers' trust in government increases and the power of government is weak there is an increase in voluntary tax compliance; and
- taxpayers' trust in government increases and the power of government is strong there is an increase in tax compliance: no distinction is made between enforced tax compliance and voluntary tax compliance.

The framework demonstrates the relationship between trust in government and voluntary tax compliance. In the publication, "Information Note: Understanding and Influencing Taxpayers' Compliance Behaviour" (OECD, 2010a: 5), the Organisation for Economic Cooperation and Development (OECD) recognises that five drivers have an impact on taxpayer compliance: deterrence; opportunities; norms; fairness and trust; and economic factors. A sixth driver relates to the interaction between these five drivers. Long-term voluntary tax compliance requires the establishment of norms and the exercise of justness and fairness.

1.5 The problem statement

In the context of the role of equity (fairness), efficiency, transparency and certainty (as principles of a good tax system) the proposed research endeavours to address the following question: To what extent does the application of deeming provisions reflect the principles of a good tax system?

1.6 Research goals

The goal of the research is to analyse the relationship between deeming provisions in legislation and the principles of a good tax system. To address the research goal, the following sub-goals are addressed:

- obtain an understanding of the origins and importance of deeming provisions in legislation, legal principles that ensure equitable interpretation of legislation, and the principles of a good tax system, from an international and South African perspective;
- discuss the approach to the interpretation of tax legislation;
- explain the international semantic approach (theory) (Brink, 1988: 111) to deeming provisions, including the following aspects:
    - the characteristics of deeming provisions; and
    - the purpose of deeming provisions;
- obtain an understanding of the application of a selection of deeming provisions in the Income Tax Act, South African case law, the OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting, together with commentary by acknowledged experts; and
- discuss the role of tax administration in achieving the principles of a good tax system.

1.7 Contribution of the research

The title of this research reads as follows: "An interpretation of the deeming provisions in legislation in the context of a good tax system – a South African perspective". The proposed research aims to determine whether deeming provisions reflect the principles of equity, efficiency and transparency and certainty.

The OECD (2010a: 30) observes that "it is not only important *what* a revenue body does, it is also important *how* the revenue body does it." [emphasis in the original]

Tax legislation empowers "*what* a revenue body does". The Constitution of the Republic of South Africa, 1996 (the Constitution), the Promotion of Access to Information Act, 2 of 2000 (PAIA), the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), and the Tax Administration Act, 28 of 2011 (the Tax Administration Act). determine "*how* the revenue body does it".

Deeming provisions form part of tax legislation. A scrutiny of the sections in the Income Tax Act (excluding specialised taxpayers such as insurers and mines) reveals that as many as 25% of the sections in the Income Tax Act are deeming provisions or include deeming provisions. This attests to the important function these provisions perform in tax legislation, and the need for the provisions to comply with the principles of a good tax system. Deeming provisions are often subject to interpretation by the courts. It is also important that the judgments of the courts in relation to these provisions reflect the principles of a good tax system.

Research enquiring into the relationship between deeming provisions in tax legislation and the principles of a good tax system could not be traced in leading academic publications. The research therefore provides an analysis of the historical development of deeming provisions, legal principles relevant to the interpretation of tax legislation, and the principles of a good tax system.

The research includes an exposition of the approaches to the interpretation of legislation, an analysis of selected deeming provisions in the Income Tax Act and the judicial interpretation of these provisions, as well as an analysis of Articles in the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting. The administration of legislation is discussed in the research to identify whether the manner of administration reflects the principles of a good tax system.

This represents the contribution of the research to the body of knowledge.

1.8 Research design and methodology

As the present research will involve the interpretation of legislation, case law and other writings, the interpretive paradigm will be appropriate, together with the qualitative research method (Chynoweth, 2008: 30; McKerchar: 2008). According to Babbie and Mouton (2009, in Stack, 2019: 10) this is resourceful in understanding and describing data such as the documentary data involved in research in the field of taxation. One of the research methodologies falling within the field of legal research is doctrinal research, which has been described (McKerchar: 2008) as a research methodology that provides a systematic exposition of the rules governing a particular legal category and predicts future developments. The methodology asks the question "What is the law?" (Chynoweth, 2008: 30). This methodology is sometimes referred to as "black letter law" (Chynoweth, 2008: 29), as it is based purely on documentary data.

Arthurs (1983, in Chynoweth, 2008: 29) finds that, falling within the category of doctrinal research are:

- reform-oriented research, which intensively evaluates the adequacy of existing rules and recommends changes to any rules found wanting; and
- theoretical research which focuses on a more complete understanding of the conceptual basis of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.

Both a legal theory and a reform-oriented research approach will be adopted to determine whether the application of deeming provisions reflect the principles of a good tax system. This approach is considered to be appropriate for the proposed research for the following reasons:

- the legal interpretative methodology refers to the various sources of law: legislation, rules of the common law and customary law and judicial precedent (case law) (Stack: 2018a: 1);
- the proposed research represents a legal interpretation of deeming provisions and selected legal principles; legal interpretation involves an understanding of

the application of legal aspects, in the present research, the "deeming provisions" and the legal principles;

- application of the principles to the provisions requires an analysis of case law and legislation;
- the source of law will be applied to "deeming provisions" as encountered in practice (in other words, a theoretical approach); and
- the research performed will form the basis of the conclusion of the research.

The research will comply with the following requirement: "The field of interest is practical (practices), with the main purpose being to understand" (Stack, 2019: 10).

The theoretical framework will comprise equity (fairness), efficiency, transparency and certainty (as principles of a good tax system) and will be used to analyse the data, which will consist of deeming provisions in legislation. Chynoweth (2008: 30) refers to the importance of the "subjective, argument-based methodologies of the humanities". The documentary evidence will be analysed by applying natural language arguments. The concept "natural language arguments" refers to arguments presented in natural language; in other words, human language and not computer language. This approach is in accordance with qualitative research. In the case of quantitative research, the extended argument is presented in the form of symbols or figures, which forms part of a formula, a model, statistical tests, or equations.

The credibility of the research and the conclusions will be fostered by:

- adhering to the rules of the statutory interpretation as established in terms of statute and common law;
- placing evidential weight on legislation, case law which creates precedent, or which is of persuasive value (primary data) and the writings of acknowledged experts in the field;
- analysing opposing viewpoints; and
- the rigour of the arguments.

The research will be limited to publicly available data, such as legal publications, case law and other authoritative documents, and therefore no ethical considerations arise.

1.9 Structure of the thesis

The chapters of this research follow a logical and systematic approach, based on the goals of the research.

Chapter 1 discusses the background of the research. It formulates the problem statement, sets out the goals of the research, and describes the contribution made by the research. The chapter summarises the research design and methodology and concludes with a synopsis of the structure of the thesis.

Chapter 2 describes and defines the important theoretical foundations of the research. The chapter discusses deeming provisions in relation to Roman law presumptions of interpretation, and the principles of a good tax system. Aspects related to the interpretation of statutes are summarised in the chapter. The chapter observes the impact which an imbalance between deeming provisions and the principles of a good tax system has on the tax compliance behaviour of taxpayers.

Chapter 3 explains the research methodology and design applied in the present research and sets out the plan according to which the research was conducted to achieve the research objectives.

Chapter 4 discusses the origins of Roman law and the legal systems. The focus is on a South African case law approach to the Roman law principles of *plus valere quod agitur quam quod simulate concipitur* (the substance over form principle)*, fraus legis* (in fraud of law) as well as the principles of reasonableness, equity, good faith and substance. The chapter concludes with a discussion of the impact of taxation on Roman society.

The South African legal system has a hybrid nature. Chapter 5 focuses on the impact of Roman-Dutch law, the 1799 Great Britain Tax Act and the 1803 United Kingdom of Great Britain and Ireland Tax Act on the South African legal system, including tax law. The influence of the Constitution and the philosophy of *ubuntu* on the South African legal system are also explained.

The focus of Chapter 6 is on the principles of a good tax system. The principles were formulated by Smith (1776) but also have Roman law origins. Subsequent to Smith (1776) the interpretation of these principles by various institutions is described. The interpretation of the Davis Tax Committee is included in the chapter and referred to throughout the research.

In Chapter 7 the legal principles underpinning the interpretation, and approaches to the legal interpretation of fiscal legislation are explained, with reference to case law. The role of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the African philosophy of *ubuntu*, is referred to. The chapter continues with a discussion of the application of the principles of a good tax system in the interpretation process.

Chapter 8 discusses various sections of the Income Tax Act to determine whether they are deeming provisions, taking into account their characteristics and purposes. Case law and the interpretations in academic publications are discussed to determine whether the relevant deeming provisions reflect the principles of a good tax system.

In Chapter 9 selected Articles in the OECD Model Tax Convention are discussed to determine whether they constitute deeming provisions and reflect the application of principles of a good tax system. The chapter proceeds with a discussion of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The OECD/G20 implemented 15 actions that have the objective of addressing tax avoidance, forming part of the Base Erosion and Profit Shifting (BEPS) Project. Action 3 (OECD, 2015b), one of the 15 actions, "Designing Effective Controlled Foreign Company Rules", focuses on the controlled foreign company (CFC) rules. The Income Tax Act includes provisions that address the taxation of CFCs and "transfer pricing", and the associated sections 9D and 31 are discussed. These sections are anti-avoidance provisions and examples of deeming provisions.

Chapter 10 discusses the role of tax administration. Tax administration involves the Tax Administration Act, PAJA, PAIA and the Constitution. The importance is demonstrated that, like the imposition of tax in terms of legislation, the enforcement

of tax legislation complies with the principles of a good tax system. The roles of various bodies that aim to promote equitable tax administration are also discussed.

Chapter 11 concludes the research. It briefly summarises the chapters in the thesis, discusses the research findings in the context of the main goal and the relevant sub-goals, and reaffirms the contribution of the research.

CHAPTER 2

INTRODUCTORY LITERATURE REVIEW

What do researchers know? What do they not know? What has been researched and what has not been researched? Is the research reliable and trustworthy? Where are the gaps in the knowledge? When you compile all that together, you have yourself a literature review.

– Jim Ollhoff, (2011) "How to Write a Literature Review"[3]

2.1 Introduction

All research is grounded in literature and none more so than research applying a doctrinal methodology, as is the case with the present research (refer to Chapter 3). The entire thesis is based on the analysis and interpretation of literature, and therefore each chapter reviews a relevant aspect of literature. Thus, this chapter presents only a definition and discussion of the important concepts applying to the thesis.

The purpose of the present research is to analyse the relationship between deeming provisions in legislation and the principles of a good tax system. In achieving its aims, the research comprises the following:

- an analysis of the origins and development of deeming provisions; this involves a discussion of Roman and Roman-Dutch law, and the law of the Kingdom of Great Britain and Ireland, and their influence on the development of the South African legal system (Chapters 4 and 5);
- an investigation into legal principles that were developed in Roman Law and accepted into Roman-Dutch law; the effect of these legal principles on the interpretation of legislation will be demonstrated (Chapter 4);
- a description of the origins of the principles of a good tax system and their acceptance into modern tax law (Chapter 6);
- an explanation of approaches to the interpretation of legislation, including the impact of the Constitution (Chapter 7); and

[3] Ollhoff, J. 2011. "How to Write a Literature Review". [On line]. Available: https://www.goodreads.com/work/quotes/16956907-how-to-write-a-literature-review [accessed 26/06/2020].

- a brief reference to the role of principles of a good tax system in creating trust in the government and encouraging tax compliance (Chapter 10).

This chapter commences with a discussion of the literature review process, to understand its context in this research. The chapter then defines and describes the key concepts on which the research is based.

2.2 The literature review in context

In the tax field, the word "deemed" is encountered in tax legislation, journal articles and academic publications. The idea for the present research was born in tax legislation, more specifically, the Income Tax Act. It was observed that the Income Tax Act frequently makes use of the word "deemed" in its provisions. In order to understand the meaning, scope and application of a deeming provision, existing literature was consulted.

The purpose of a literature review is to analyse the existing literature and re-contextualise it from the perspective of the present research (Venter, Stack, Joubert & Tustin, 2017: § 3.5.2.1). The present research applies a qualitative research approach and the data used to perform the literature review therefore focuses on the quality, or characteristics of the documentary data (Leedy & Ormrod, 2016: 6). The literature review forms an essential link between the research question and goals of the research and arguments put forward to address these goals.

Venter *et al* (2017: § 3.5.2.1) confirm that data analysis consists of separate phases. In the present research, these phases involve the following: (a) the analysis of existing literature; (b) the identification and grouping of the main themes in the literature; (c) combining the themes to develop a critical understanding of the concepts relating to the research goals; and (d) linking the themes and concepts to existing literature.

2.3 Deeming provisions

A discussion of deeming provisions involves addressing the following questions:

- What are deeming provisions?
- Why are deeming provisions used?

How does an interpreter know that a provision is a deeming provision? Hamilton (1989: 1452) observes that deeming provisions create the impression of something that does not actually exist but, in the relevant situation, serve an analytical purpose. It was stated in *St Aubyn and Others v Attorney General (No 2)* [1952] AC 15, (at 53):

- Deeming provisions ensure that a word or phrase is interpreted in a specific manner.
- Deeming provisions ensure certainty where there would otherwise be uncertainty.
- Deeming provisions confirm "what is obvious, what is uncertain and what is, in the ordinary sense, impossible".

One of the purposes of deeming provisions is to nullify tax avoidance schemes that have the intention of shifting tax; another is to extend or restrict the scope of a benefit; and thirdly, to deal with administrative matters (De Koker and Williams, 2020: § 24.177). Lord Walker of Gestingthorpe (2016: 184) remarked that the word "deemed" is "archaic" and "highly ambiguous". This suggests that the word does not have a specific meaning. The characteristics and purposes of deeming provisions suggest that deeming provisions assist with the interpretation of certain aspects of legislation. Deeming provisions provide for consequences that would not normally have been intended (*St Aubyn and Others v Attorney General (No 2)*, at 53). A deeming provision is context driven (Lord Walker of Gestingthorpe, 2016: 185). This means that the deeming provision can only be applied to a future matter and in relation to the relevant context of the matter. Context also implies that the facts and circumstances of a matter must be analysed to determine whether a deeming provision applies. The nature of a deeming provision is prescriptive (Del Mar, 2013: 449). Deeming provisions also have a broad scope (Del Mar & Twining, 2015: 169).

A provision is not necessarily a deeming provision only when the word "deem" is used. A reference to "as if", "shall be treated as" and "shall be taken as" will have the

same effect (Lord Walker of Gestingthorpe, 2016: 183, 185). Other alternatives to "deem" are "considered" and "regarded" (*Chotabhai Appellant v Union Government (Minister of Justice) and Registrar of Asiatics Respondents* 1911 AD 13, at 33).

The inclusion of the word "deemed" (or its alternatives) in a provision does not, however, necessarily mean that the provision has a deeming nature. This was illustrated in *Chotabhai Appellant v Union Government (Minister of Justice) and Registrar of Asiatics Respondents*. The question before the court related to the lawful residency of the Appellant (an Asiatic) in the Transvaal. The court was required to interpret a deeming provision included in section 3, subsection 2 of the Transvaal Act 2 of 1907. According to this section, the individuals who were listed in the subsection were deemed to be lawfully resident in the Transvaal. The court eventually came to the decision that the provision concerned was not a deeming provision, even though it included the word "deem". The basis for the decision lay in the fact that an interpretation which favoured a deeming nature of the subsection would not be in accordance with the intention of the legislation concerned.

In the accounting and legal professions, proof is an important element. Where deeming provisions are concerned, however, proof is not an essential element required for its operation. To illustrate: when it is stated that an amount is deemed to be included in a taxpayer's taxable income (as is the case in section 7 of the Income Tax Act), the fact that the income is not actually traceable in the taxpayer's income does not negate the enforcement of the deeming provision. Kandev and Lennard (2012: 277) also refer to the lack of proof associated with deeming provisions. This does not mean that a deeming provision is not subject to limitations. In *Fowler v Revenue and Customs Commissioners* [2020] 1 WLR 2227, the Supreme Court (at 2236[27]) provides the following guidance for the interpretation and application of deeming provisions:

- The legislation in which the deeming provision appears determines the scope of the fiction that the deeming provision creates.
- The purposes of the statutory fiction, as well as the persons to which it applies, must be determined. The deeming provision must not be applied in such a way

that it leads to consequences that do not reconcile with the intended purposes of the statutory fiction (*Lord Vestey's Executors and Vestey v Commissioners of Inland Revenue; Lord Vestey's Executors and Vestey v Colquhoun (H.M. Inspector of Taxes); Lord Vestey's Executors and Vestey v Commissioners of Inland Revenue* [1949] UKHL 31 TC 1, at 110,111).

- It is not always possible to determine the scope of the statutory fiction that the deeming provision creates.
- The deeming provision must not be applied where it would lead to "unjust, absurd or anomalous results". The exception to this is where the wording of the provision is clear.
- The statutory fiction as well as the consequences of the statutory fiction must be applied. In *East End Dwellings Co. LD. Appellants; v Finsbury Borough Council Respondents* [1952] AC 109, the House of Lords observes (at 132) that:

> (I)f you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it … The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

2.4 Legal principles

Alexy (2000: 295) remarks that legal principles "are norms commanding that something be realized to the highest degree that is actually and legally possible." Raz (1972: 839) identifies five purposes of legal principles:

- Legal principles are used to interpret laws: legal principles ensure that where different laws address the same matter, these laws are interpreted in the same manner.

- Legal principles are used to change laws: laws that have been developed through precedent are subject to amendment through the use of principles.
- Legal principles are used as exceptions to laws: in a case, the facts and surrounding circumstances could indicate that a law must not be applied as it will be to the detriment of important legal principles. The non-application of the law does not have an impact on the existence of the law itself; it is only the application of the law that is affected.
- Legal principles are used to make new rules: rules are formulated on established legal principles.
- Legal principles are used to determine actions: legal principles ensure that the required actions are formulated.

In the present research the emphasis is on the first purpose – the interpretation of laws and, in particular, deeming provisions in the Income Tax Act. Goldswain (2009a: 17) observes that "(i)nterpretation, in the context of fiscal legislation, is the cornerstone on which the revenue authorities can assess and collect taxes and correspondingly, the foundation on which a taxpayer's rights are built". The application of legal principles in interpreting tax law ensures the realisation of principles of a good tax system.

The legal principles that are pertinent to the research were developed in Roman Law and are still relevant in modern South African law. These legal principles are justice, equity and good faith, taking the context of the matter into account, reasonableness, substance over form, *fraus legis* (in fraud of law), and the *contra fiscum* rule (giving the benefit of the doubt to the taxpayer). The Constitution also had a significant impact on legal principles applying to the interpretation of statutes.

As is the case with all legislation, deeming provisions are frequently subject to interpretation by the courts and others. The purpose of this interpretation is to provide meaning and scope to the provision and its application to a specific set of circumstances. The interpretation of statutes is discussed in detail in Chapter 7 and **Table 2.1** introduces the topic by summarising certain aspects relating to interpretation.

Table 2.1 Aspects relating to interpretation

A balancing of factors	Le Roux (2019: 4) remarks that *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), > forces courts to justify why … the clarity of a text (… the language used in the light of the ordinary rules of grammar and syntax …) outweighs the internal consistency of the text (… the context in which the provision appears …), the efficiency of the text (… the apparent purpose to which it is directed and the material known to those responsible for its production …), or the public policy or social justice implications of the text.
Meaning and context	According to Van der Walt (2004: 858) "(m)eaning is … decidedly public, contextual, cultural, and contingent". De Ville (1999: 376) remarks that > Context should … not be seen as a new source of stability, since the context itself is boundless … [I]nterpretation is not, and cannot be, concerned with recovering an original meaning, since there is and was no original meaning. Meaning, instead, comes into being through an interaction between the text and the interpreter. In addition to this, De Ville (1999: 383) clarifies that > (m)eaning is conditioned by the interpreter's situation in space and time. The text can be seen and read only from a position in the present. The present is, however, irrevocably influenced by preconceptions bequeathed from the past. Bishop and Brickhill (2012: 684) expand on this and remark that the court must interpret statutes "in a contextual, purposive manner that best promotes largely intangible and oft conflicting values." The words must be "… reasonably capable … of bearing" the meanings ascribed to it. > It is settled law that the process entails attributing meaning to the relevant statutory provision, in the light of the language used, the context in which the provision is set, including the material known to the drafters, and the purpose which the provision is intended to serve. These factors are not mutually exclusive. (*Commissioner for South African Revenue Service v Marshall NO and Others* [2016], 79 SATC 49). In *Jaga v Dönges, NO and another; Bhana v Dönges, NO and Another* [1950] 4 All SA 414 (A), at 421, the Appellate Division interprets the word "context". > Certainly no less important than the oft repeated statement that the words and. [sic] expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context … '[T]he context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.
Just consequences	Lenta (2004: 223) observes that "legal interpretation has important consequences and that the interpreting judge should feel obligated to ensure that his interpretation produces just consequences."

Focus on values	In *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*, 2000 (10) BCLR 1079 (CC), at 1089[22], the Constitutional Court clarifies that > [t]he purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution required that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution … There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained. Bishop and Brickhill (2012: 684) observe that *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,* confirms two aspects. The first aspect is that legislation must be interpreted in accordance with section 39(2) of the Constitution. Section 39(2) provides that "(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." The second aspect is that the judiciary must ensure that their interpretations are not "unduly strained" (Bishop and Brickhill, 2012: 684).
Interpretation and the legislature	In *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*, at 1089[24], the Constitutional Court refers to the importance of the legislature: > On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.

Source: Own summary

Deeming provisions must therefore be interpreted in a manner that reflects the values espoused in the Constitution and produce just consequences. In a tax context this interpretation must ensure that the application of the deeming provision to the facts of the case complies with the principles of a good tax system.

2.5 Principles of a good tax system

The legal principles established in Roman Law times espoused principles that resonate with principles of a good tax system – justice, equity and good faith, and reasonableness. The principles of a good tax system that have been universally adopted were first formulated by Adam Smith in 1776. These principles were stated as follows:

- Equity (Adam Smith, 1776: 1433) –

> The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate.

- Certainty (Adam Smith, 1776: 1434): "The tax which each individual is bound to pay ought to be certain and not arbitrary".
- Convenience (Adam Smith, 1776: 1435): "Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it."
- Economy (Adam Smith, 1776: 1436): "Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state."

In a South African context, the Davis Tax Committee (2016: 14) proposed that a good tax system reflects the principles of efficiency, equity, simplicity, transparency and certainty, and tax buoyancy. The principle of simplicity would probably form part of transparency and certainty, while tax buoyancy would be an aspect of efficiency. The following principles are therefore adopted for the purpose of the thesis: equity, certainty and transparency, and efficiency.

The principle of reasonableness (fairness), from a tax perspective, is considered to be an important factor (Burgers & Mosquera Valderrama, 2017: 783). The Oxford English Dictionary (OED Online, 2021) defines "reasonable" as "fair, equitable; not

asking for too much; willing to listen to or prepared to see reason". The terms fairness, reasonableness and equity are therefore synonyms. Fairness has various approaches: economical (which relates to the maxims of equality, certainty, convenience, and economy), philosophical (which relates to justice), juridical, and political (Burgers & Mosquera Valderrama, 2017: 768-772). According to Burgers and Mosquera Valderrama (2017: 767), fairness in an economical sense refers to "horizontal and/or vertical equity". Repetti and McDaniel (1993: 621) make the following remark: "neither HE [horizontal equity] nor VE [vertical equity] has any independent normative content, and that content must be supplied by reference to economic assumptions and a theory of justice." Burgers and Mosquera Valderrama (2017) include an economical (horizontal and vertical equity) element in the maxim of fairness.

Transparency has become an important principle in the tax environment. It is one of the principles of a good tax system (Davis Tax Committee, 2016: 14). From an international perspective this is evident from the existence of the Global Forum on Transparency and Exchange of Information for Tax Purposes. Transparency involves a consideration of the following aspects: informational transparency, participatory transparency, and accountability transparency (Siahaan, 2013: 5). Informational transparency suggests that information must be transparent and requires that information must be made available. Informational transparency requires that the information must be precise, well-timed, stable, and clear. Participatory transparency means that the person providing the information must understand the information needs of the receiver of the information. Accountability transparency requires that when information is provided, the provider can be held accountable.

2.6 Interpretation of statutes

Legal interpretation is important in relation to case law and requires an interpreter to determine the application of the relevant provisions of the legislation under review. Application, on its part, is evidenced through court decisions.

Court decisions illustrate two basic approaches to the interpretation of legislation: the literal (strict) approach and the contextual (purposive) approach. The differences between these two approaches are illustrated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA). The Supreme Court of Appeal (at 272[18]) referred to the purposive approach according to which the interpreter is required to consider the context of the relevant provision under consideration and to give effect to its apparent purpose. The Supreme Court of Appeal was called upon to decide whether the Endumeni Municipality was required to pay adjusted contributions to the Natal Joint Municipal Pension Fund due to the increase in members' pensionable emoluments. According to the court (at 284[44]), the municipality was obliged to pay an "adjusted contribution" to the pension fund.

In the context of the interpretation of legislation (which includes tax legislation) this court decision is significant due to the approach followed by the court. The court remarked (at 272[17]) that the strict approach requires the interpreter to give effect to the "ordinary grammatical meaning" of the relevant words unless this would "lead to absurdity". Words cannot be interpreted in isolation. Interpretation necessitates that the interpreter ascribes meaning to text. *Natal Joint Municipal Pension Fund v Endumeni Municipality* confirmed (at 272[18]) that the context within which words are used constitutes an important factor in the process of interpretation. This represents the second approach, the contextual (broad) approach. According to the court (at 278[26]), interpretation requires that the interpreter follow a sensible, objective approach which will give effect to the intended purpose of the document under review. A sensible approach to legal interpretation entails that the interpreter commences with the text under review and given the relevant context, proceeds to ascribe meaning to the text. This approach is found in the Queen's Bench Division case, *Barnes v Jarvis* [1953] 1 WLR 649 at 652: "A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered …" The Supreme Court of the United Kingdom, in the case *In re Lehman Bros International (Europe) (in administration) (No 4)* [2017] 2 WLR 1497, further confirms the importance of reasonableness in the legal interpretation of legislation as

well as a focus on the context of the statutory provision. The Supreme Court upheld the approach of Lewison LJ in the Court of Appeal in *The Joint Administrators of LB Holdings Intermediate 2 Ltd v Lehman Brothers Holdings Inc* [2016] Ch 50. The Supreme Court (at 1534) observed as follows:

> Lewison LJ thought, at paras 108 and 109 of his judgment, that "a limited solution is better than no solution at all". I would agree with that approach if the court had been simply seeking to arrive at as reasonable and commercial a result as possible: a partially unreasonable and uncommercial outcome would be preferable to a generally unreasonable and uncommercial outcome. However, when it comes to deciding the meaning of a legislative provision, judges are primarily concerned with arriving at a coherent interpretation, which, while taking into account commerciality and reasonableness, pays proper regard to the language of the provision interpreted in its context.

2.7 Tax compliance

Kirchler *et al* (2008: 220) remark that a close relationship exists between trust in revenue bodies and voluntary tax compliance by taxpayers. This relationship is illustrated through a "slippery slope" framework (refer to **Appendix A**). This framework suggests that there is a complex relationship between government power, taxpayers' trust in government and tax compliance. Depending on the exercise of government power and the degree of trust in government, tax compliance is either voluntary or enforced. The most preferred situation is voluntary tax compliance. Taxpayer trust in government is also influenced by government expenditure. In the circumstances where taxation is increased to fund government expenditure, a decrease in tax revenue is possible where the increase in taxation is perceived to be unfair. The framework applies universally and, in the context of the present research, specifically to South Africa. South African citizens and the government are in a reciprocal relationship: South African citizens are obliged to fulfil their tax obligations as prescribed in fiscal legislation and the government must ensure that it raises sufficient revenue to pay government expenditure to be applied in providing citizens with appropriate services. This does not mean that there are no limits to the raising of

revenue; the government must ensure that it complies with the requirements of fairness and effectiveness (Tickle, 2018: 255, 256). Tickle (2020) observes that, in circumstances where government expenditure is wasteful, this leads to distrust by taxpayers towards government.

If tax legislation and the actions of government are perceived to be fair (equitable) and transparent, trust in government should improve, together with tax compliance. This illustrates the link between principles of a good tax system and tax compliance.

2.8 Conclusion

In this chapter a brief introductory literature review was presented dealing with the important concepts that form part of this research: deeming provisions, legal principles underlying the interpretation of the tax legislation, the principles of a good tax system, the approaches by the courts to the interpretation of legislation, and the factors influencing tax compliance.

In the next chapter, the research methodology and design applicable to the present research is discussed. The relevant methodology provides the foundation for this research.

CHAPTER 3

RESEARCH METHODOLOGY AND DESIGN

We have to learn how scientists arrive at decisions. Once you use the scientific method, it doesn't mean that your decisions will be perfect. They'll be far more accurate than just opinions.

- Jacque Fresco[4]

3.1 Introduction

In Chapter 2 of this research a literature review was presented of a selection of key concepts relating to the research. It was found that a relationship exists between these concepts. In order to appreciate the research presented in this thesis, an understanding is required of the research methodology and design that applies to this research.

The goal of this research is to determine whether there is a close relationship between the principles of a good tax system and deeming provisions. This goal suggests that:

- The present research investigates the concepts of legal principles that apply to the interpretation of tax legislation, the principles of a good tax system, and deeming provisions, and the relationship between them.
- An understanding of these legal concepts includes the following aspects: the meaning, origins, and historic development. This involves the process of interpretation.
- Documentary data are the source of the legal concepts that are found in legislation, case law and academic publications.

The research methodology of the present research must reflect the legal foundation.

The following diagram depicts the various aspects that have a bearing on research methodology and are briefly discussed in this chapter.

[4] Fresco, J. 2020. Quote. [On line]. Available: https://www.azquotes.com/quote/728571, [accessed 26/06/2020].

Diagram 3.1 Research methodology

Source: Own diagram, based on Stack (2018a: 20).

The chapter commences with a general discussion of the various research methodologies, followed by a description of the research paradigm in which the present research is situated, as well as the research methodology applied. The data and the collection and analysis are discussed in the latter part of this chapter, together with the ethical considerations and relevant limitations of the research.

3.2 The research methodology

Research methodology relates to the question: "how can the enquirer go about finding out whatever he or she believes can be known?" (Stack, 2018a: 20).

There are two approaches to research: the quantitative research approach and the qualitative research approach. According to Leedy and Ormrod (2016: 81) these approaches differ from one another.

These differences are depicted in **Table 3.1** below:

Table 3.1 Comparisons between quantitative and qualitative research approaches

Question	Quantitative	Qualitative
What is the purpose of the research?	• To explain and predict • To confirm and validate • To test theory	• To describe and explain • To explore and interpret • To build theory
What is the nature of the research process?	• Focused • Known variables • Established guidelines • Preplanned methods • Somewhat context-free • Detached view	• Holistic • Unknown variables • Flexible guidelines • Emergent methods • Context-bound • Personal view
What are the data like, and how are they collected?	• Numerical data • Representative, large sample • Standardized instruments	• Textual and/or image-based data • Informative, small sample • Loosely structured or nonstandardized observations and interviews
How are data analysed to determine their meaning?	• Statistical analysis • Stress on objectivity • Primarily deductive reasoning	• Search for themes and categories • Acknowledgment that analysis is subjective and potentially biased • Primarily inductive reasoning
How are the findings communicated?	• Numbers • Statistics, aggregated data • Formal voice, scientific style	• Words • Narratives, individual quotes • Personal voice, literacy style (in some disciplines)

Source: Leedy and Ormrod (2016: 81)

The present research involves the interpretation of legislation, case law and other writings and therefore the interpretative paradigm will be appropriate, together with the qualitative research method (McKerchar: 2008).

3.2.1 Research paradigm

A paradigm is defined as "a basic belief system based on ontological, epistemological and methodological **assumptions**." (Stack, 2018a: 20) [emphasis in the original] Denzin and Lincoln (2018: 52) observe that: "[t]he … researcher approaches the world with a set of ideas, a framework (theory, ontology) that specifies a set of questions (epistemology), which are then examined (methodology, analysis) in specific ways."

Ontology is therefore defined as: "a "world view" and specifically the answer to the question: what is the form and **nature of reality**?" (Stack, 2018a: 20) [emphasis in

the original] Similarly, epistemology can be defined as: "the **theory of knowledge**, providing the answer to the question: what is the relationship between the knower (the researcher) and what can be known?" (Stack, 2018a: 20) [emphasis in the original] McKerchar (2008: 17) observes that:

> (t)he qualitative methodology does not lend itself to the making of statistical generalisations consistent with positivism. Instead, its proponents seek to make analytical generalisations or interpretations about a process, rather than its outcomes. They are seeking understanding and explanations rather than a definitive answer about the size and scale of a phenomenon.

Three themes are considered in the present research: deeming provisions, legal principles of interpretation, the principles of a good tax system, and the relationship between them. The research focuses on the meanings and interpretations of these themes. More specifically, the research "uses linguistic techniques such as analogies and metaphors to draw conclusions about the meaning of particular social events or texts" (Ezzy, 2002: 3).

> What is of critical importance, therefore, is the way in which those statements are made sense of, that is, interpreted. Here lies the ultimate political responsibility of the researcher. The comfortable assumption that it is the reliability and accuracy of the methodologies being used that will ascertain the validity of the outcomes of research, thereby reducing the researcher's responsibility to a technical matter, is rejected … Answers—partial ones, to be sure, that is, both provisional and committed—are to be constructed, in the form of interpretations. (Ang, 1996: 39)

The non-empirical or interpretative research paradigm applies to this research. The ontology and the epistemology of the non-empirical or interpretative research paradigm is summarised in **Table 3.2**:

Table 3.2 Ontology and epistemology: non-empirical or interpretative approach

Non-empirical or interpretative research:	
Ontology	• **Question:** *What is the form and nature of reality?* • **Answer:** Reality is socially constructed and represented by the legal system adopted by a particular social group.

Epistemology	• **Question:** *What is the relationship between the researcher and what can be known?* • **Answer:** The researcher is regarded as "subjective" and "empathetic". Although every effort is made to be objective, this may not be wholly achievable, and the subjectivity may have an impact on the research.

Source: Own summary, based on Stack (2018a: 21-22)

3.2.2 Qualitative research

Qualitative research is resourceful in understanding and describing data such as the documentary data involved in research in the field of taxation (Stack, 2019: 10). The qualitative research design essentially creates an "ideal reality" within a legal system and compares this "benchmark" with the "actual current reality" to determine the extent to which the "actual current reality" can be reformed to align more closely with the "ideal reality" (Stack, 2018b: 14).

One of the categories of research falling within the field of legal research is doctrinal research. The present research applies the legal doctrinal research methodology.

3.2.2.1 Legal doctrinal research methodology

The meaning of legal doctrine

Smits (2015: 5) defines legal doctrine as:

> research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law.

The definition of legal doctrine can be applied to the goal of the present research: the research "analyses the relationship between" deeming provisions, legal principles relation to interpretation of tax legislation, and the principles of a good tax system "with a view to solving unclarities and gaps in the existing law". The "unclarities and gaps" in the present research relate to the application of principles of a good tax system to the imposition and enforcement of deeming provisions in income tax

legislation. It is therefore submitted that the legal doctrinal research methodology is a suitable research methodology for the present research.

The elements of legal doctrinal research methodology

- The viewpoint of the doctrinal researcher is from inside the legal system

Smits (2015: 5) finds that, firstly, the doctrinal researcher analyses the legal system. In the present research the meanings, historical development and interpretation of the concepts on which this thesis are based are analysed in the context of Roman law, Roman-Dutch law, and current law.

Secondly, the legal system is the "subject" of the research as well as the "normative framework" of the research. Various deeming provisions and are included in the Income Tax Act. The Income Tax Act represents the "subject" of the research as well as the "normative framework" of the research.

- The law represents a system

According to Smits (2015: 6), law consists of elements that are "fitted together into one working whole" with the objective to resolve "internal inconsistencies". The research interprets selected provisions of the Income Tax Act with reference to case law and academic publications. This approach confirms the multi-faceted nature of the legal system.

- Legal doctrinal research methodology "*systematises* the present law"

The methodology ensures that new developments in law can be accommodated taking changes in society into account. The developments include case law and fiscal legislation. This ability to change indicates that the legal doctrinal research methodology is a "living system that aims to achieve both constancy and change in the development of the law" (Smits, 2015: 7). Chapter 10 of this research considers the impact of the Tax Administration Act, in relation to legislation, including deeming provisions. The role of the Tax Ombud and certain institutions that have the objective of promoting justice, equity and reasonableness in the administration of tax is discussed. These institutions include the Organisation Undoing Tax Abuse (OUTA),

the Tax Justice Network Africa, the African Tax Administration Forum (ATAF) and the Davis Tax Committee.

3.2.2.2 The objectives of the legal doctrinal research methodology

The objectives of the legal doctrinal research methodology are:

Description

The legal doctrinal research methodology describes (interprets) the "existing law" in a "neutral and consistent" manner. The present research discusses provisions of the Income Tax Act and refers to case law and academic publications to confirm the manner in which certain concepts are interpreted to understand the relevant statutory provisions.

Prescription

Prescription means that the doctrinal researcher must search for solutions that can be considered to be suitable by the legal system. An understanding must be acquired in the present research of the relationship between deeming provisions and the principles of a good tax system. This relationship has a bearing on tax compliance. The concept of tax compliance is intricate and various factors have an impact on the tax behaviour of the taxpayer. Kirchler *et al* (2008: 220) remark that there is a close relationship between trust in government, government power and tax compliance. The relationship between deeming provisions and the principles of a good tax system therefore has an impact on tax compliance.

Justification

Justification requires that there must be a "harmonious interrelationship" between the "principles, rules, cases and concepts that together express the coherence necessary for the legal system to function." (Smits, 2015: 11) This is concurrent with the goal of the present research. Where there is not a "harmonious relationship" between deeming provisions and the principles of a good tax system, this will have an impact on tax

compliance. If tax compliance is negatively impacted the tax system will not be able "to function" effectively.

3.2.2.3 The categories of the legal doctrinal research methodology

Arthurs (1983, in Chynoweth, 2008: 29) categorises doctrinal research as follows:

- reform-oriented research, which intensively evaluates the adequacy of existing rules and recommends changes to any rules found wanting; and
- theoretical research which focuses on a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.

In this research both a legal theory as well as a reform-oriented research approach is adopted to determine whether there is a close relationship between deeming provisions and the principles of a good tax system.

This approach is considered appropriate for the present research for the following reasons:

- the legal interpretative paradigm refers to the various sources of law: legislation, rules of the common law and customary law, and judicial precedent (case law) (Stack: 2018b: 1);
- the present research represents a legal interpretation of deeming provisions and selected the principles of a good tax system; legal interpretation involves an understanding of the application of legal concepts, in the present research, the "deeming provisions" and the principles of a good tax system;
- application of the principles of a good tax system to the provisions requires an analysis of legislation and case law;
- the source of law applies to the application of deeming provisions as encountered in practice (in other words, a theoretical approach); and
- the research performed forms the basis of the conclusions of the research.

The research complies with the following requirement: "The field of interest is practical (practices), with the main purpose being to understand" (Stack, 2019: 10).

The theoretical framework comprises legal principles applying to the interpretation of tax law and the principles of a good tax system, and is used to analyse the data that consists of deeming provisions in legislation, and the enforcement of this legislation. The data used in the present research and the analysis of the data are discussed in sections 3.4 and 3.5 of this chapter.

3.2.2.4 The contribution of the legal doctrinal research methodology

The contribution of the legal doctrinal research methodology is formulated as follows (Smits, 2015: 16):

> Valuable economic, empirical or behavioural analysis of law would be impossible without first knowing what the existing law says *and* without using legal doctrine at the end as a justification for the proposed novel solution that follows from these alternative approaches. In this respect, legal doctrine is the Alpha and the Omega of the law. [emphasis in the original]

3.3 The data used in the research

The research applies the legal doctrinal research methodology. McKerchar (2008: 18) confirms the difference between doctrinal and non-doctrinal research:

> Doctrinal research is described as the traditional or 'black letter law' approach and is typified by the systematic process of identifying, analysing, organising and synthesising statutes, judicial decisions and commentary … It is typically a library-based undertaking, focused on reading and conducting intensive, scholarly analysis. In contrast, non-doctrinal research is characterised as research 'about law' rather than 'in law' and employs the methodologies commonly used in other disciplines.

Arthurs (1983, in Chynoweth, 2008: 29) similarly observes that the "methods of doctrinal research are characterised by the study of legal texts and, for this reason, it is often described colloquially as 'black-letter law'."

The data used in the present research are a combination of primary and secondary sources (Stack, 2019: 6). The primary sources consist of statutes and decisions of the Supreme Court of Appeal. The Supreme Court of Appeal is bound by its own decisions. These decisions are also binding on the lower courts (Stack, 2019: 4). The binding force of lower courts differ from the Supreme Court of Appeal; the decisions of the Supreme Court of Appeal have binding force, but the decisions of the lower courts only have "persuasive force" (Stack, 2019: 4). This refers to the principle of judicial precedent. In **Table 3.3** the South African principles with reference to judicial precedent are summarised.

Table 3.3 The South African principles relating to judicial precedent (*stare decisis*)

The meaning	Claassen (2020) defines *stare decisis* as "(t)o stand or abide by cases already decided."
Purpose	In *Bloemfontein Town Council v Richter* 1938 AD 195, at 232. The Appellate Division observes that "a preference" of a court, allowing it to "prefer its own reasoning to that of its predecessors … would produce endless uncertainty and confusion." Wallis (2017: 520) includes two further purposes of *stare decisis:* • protection of vested rights and legitimate expectations; and • upholding the dignity of the court.
General rules	The principle of *stare decisis* includes various aspects: • The principle relates to the judgments of the superior courts. • The Tax Court and the Tax Board are bound by judgments of the superior courts. • An observation (*obiter dictum*) made by the court is not binding on a court but has "persuasive authority" (De Koker and Williams, 2020: § 25.4). • A division of the High Court is "generally bound by its own decisions", but not by the decision of "another division" (De Koker and Williams, 2020: § 25.4). Wallis (2017: § 527) indicates that a high court historically did not follow the decision of another high court but that it was "debatable" whether it still is the case. • The Supreme Court of Appeal "is not bound by the decision of any division of the High Court, although it is bound by its own decisions and will generally follow any previous decision it has given." (De Koker and Williams, 2020: § 25.4). • Wallis (2017: 520) observes that a decision or legal principle "must

	be followed by all courts of equal and inferior status, until such time as that judgment has been overruled or modified by a higher court or by legislative authority."
The impact of the Constitution	Wallis (2017: 523) refers to section 39(2) of the Constitution that provides as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." According to Wallis (2017: 523) there are three situations where the "pre-constitutional judgments on the common law" have a "post-constitutional" impact: • The common law rule conflicts with the Constitution – the High Court must depart from the former decision. • The former decision was founded on *boni mores* or public policy that differ from the constitutional values – the High Court must depart from the former decision. • The common law rule must be amended to comply with the "spirit, purport and objects of the Bill of Rights" – the High Court must adhere to the decision of the higher court.

Source: Own summary

The following statutes are used in the present research:

- Income and Property Taxes Act 1799, 39 Geo. III. c.13 (Great Britain) ("the 1799 Great Britain Tax Act");
- Income and Property Taxes Act 1803, 41 Geo. III. c.122 (United Kingdom of Great Britain and Ireland) ("the 1803 United Kingdom of Great Britain and Ireland Tax Act");
- South African Income Tax Act, 28 of 1914 ("the 1914 South African Income Tax Act");
- South African Income Tax Act, 41 of 1917 ("the 1917 South African Income Tax Act");
- South African Income Tax Act, 40 of 1925 ("the 1925 South African Income Tax Act");
- South African Income Tax Act, 31 of 1941 ("the 1941 South African Income Tax Act");
- South African Income Tax Act, 58 of 1962 ("the Income Tax Act"); and
- The South African Tax Administration Act, 28 of 2011 ("the Tax Administration Act").

The case law used in the present research illustrates the interpretation of the selected deeming provisions, legal principles, and principles of a good tax system. Wallis (2017: 470-494) differentiates between the superior courts and the lower courts. The following section describes the courts that operate in South Africa.

Table 3.4 Superior Courts and Lower Courts

Superior Courts
Constitutional Court The Constitutional Court is the highest court in South Africa and its jurisdiction relates to "constitutional issues" (Haupt, 2019: 14).
Supreme Court of Appeal The jurisdiction of the Supreme Court of Appeal includes constitutional matters. In circumstances where the matter does not relate to constitutional matters, the Supreme Court of Appeal is the "court of final instance" (Currie and De Waal, 2005: 111).
Labour Appeal Court The Labour Appeal Court is the "final court of appeal from decisions of the Labour Court" (Wallis, 2017: 479).
High Court According to sections 21(1) and (2) of the Superior Courts Act, 13 of 2013, the jurisdiction of the High Court includes the following aspects: 21(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power— (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction; (b) to review the proceedings of all such courts; (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. (2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.
Courts with a status equivalent to the High Court
• **Tax Courts** According to Wallis (2017: 488) the jurisdiction of Tax Courts concerns "appeals against assessments and certain decisions in terms of taxing statutes."
• Other courts which include the Commissioner of Patents (patents, trademarks and copyright), Competition Appeal Court, Labour Court, Land Claims Court and Electoral Court.
Lower Courts
Magistrates' Courts Wallis (2017: 494, 496-497) observes that the Magistrates' Courts are divided between district courts and regional courts. The jurisdiction of the regional and district courts includes civil and criminal matters but the value of claims in the regional court is greater than in the district courts.

Source: Own summary, based on Wallis (2017: 470-494)

The secondary sources of data consist of the decisions of the superior courts (which include the provincial and local decisions of the High Court and the Tax Court). The

secondary sources of data also consist of academic publications as well as journal articles of influential writers in tax (Stack, 2019: 7). The word "influential" must be read together with Stack (2018a: 25) where it is stated that weight must be given to "recognised experts in the field". Leedy and Ormrod (2016: 54) find that the focus must be on "publications that are likely to have credibility with experts in the field". Articles are "reviewed" by "notable scholars" before publication takes place. The degree to which the review has taken place will depend on the editors of the journal and the editorial board.

3.4 The collection of the data

McKerchar (2008: 19) observes that the legal doctrinal research methodology "is typically a library-based undertaking, focused on reading and conducting intensive, scholarly analysis."

The data used in the present research are acquired from online libraries, online search engines, online databases as well as readily available academic publications. The data acquired from online libraries, online search engines and online databases are securely stored for future reference. The data used are publicly available and not of a confidential nature.

The goal of the research is to analyse the relationship between deeming provisions and the principles of a good tax system. This necessitates an analysis of the historical development of the concepts – legal principles, the principles of a good tax system, and deeming provisions. The historical development of these concepts requires reference to the interpretations of scholars of legal history. The publications of some of these authors are not readily available in certain libraries and required various searches in the online database of Internet Archive. The other online search engines and online databases used include Elsevier, Google Scholar, Sabinet, Mendeley, Juta, LexisNexis, HeinOnline, Westlaw and the OECD.

The collection of the data falls within the category "photocopies or downloads of documents" (Stack, 2018a: 28).

3.5 Analysis of the data

The theoretical framework of the research, comprising of the principles of a good tax system, is used to analyse the data that consist of the selected deeming provisions in the Income Tax Act and publications of the OECD. A "jurisprudence-based analytical approach" is followed according to which principles identified in jurisprudence (case law) are used (Stack, 2019: 16). The goal is to determine the relationship between deeming provisions and the principles of a good tax system. Natural language arguments are employed in analysing this documentary evidence. Natural language arguments mean arguments presented in natural language. With natural language is meant human language and not computer language. This approach is suitable for qualitative research. In the case of quantitative research, the extended argument is presented in the form of symbols or figures, which forms part of a formula, a model, statistical tests, or equations. Natural language arguments support the objective of the legal doctrinal research methodology which "is concerned with the formulation of legal doctrines through the analysis of data." (Stack, 2019: 16).

3.6 The validity, reliability and credibility of the research

Stack (2018a: 48) lists approaches through which validity and reliability can be promoted in doctrinal research. **Table 3.5** refers to these approaches. The table also illustrates how the approaches have been applied in this research.

Table 3.5 The approaches to promote validity and reliability in doctrinal research

Approach	Application in research
• performing an exhaustive literature survey;	This approach is applied throughout the research. The research relates to the Income Tax Act. In conjunction with the Income Tax Act, the Tax Administration Act, case law, journal articles and SARS publicly available data (including interpretation notes) form part of the literature of this research.
• using credible sources of documentary data – legislation, case law (particularly case law establishing a precedent) and the writings of acknowledged experts in the field;	The approach is applied in each chapter of this research. This approach must be read together with the previous approach in this table ("performing an exhaustive literature survey"). The credible sources include case law, South African journal articles, academic

	books and the publication of South African and foreign institutions (eg OECD and the Office of the Tax Ombud).
• establishing or using an appropriate theoretical basis for the research; and	The principles of a good tax system form the theoretical basis for the analysis of deeming provisions and related case law.
• carrying out a rigorous analysis and interpretation of the data, based on sound arguments supported by credible evidence.	A detailed and careful analysis of the data is carried out, supported by case law and the opinions of acknowledged experts in the field.

Source: Own summary based on Stack (2018a: 48)

Leedy and Ormrod (2016: 260) suggest that the approaches illustrated in **Table 3.6** must be considered to ensure that the research is valid and reliable.

Table 3.6 Approaches relating to validity and reliability

Approaches	Discussion
Reflexivity	**What does this mean?** This means that a researcher must be able to identify the existence of possible biases that can have an impact on the research. **How this aspect is applied in the present research:** • Sufficient documentary evidence from credible authorities is obtained. • Great care is taken to consider all possible interpretations of the data.
Triangulation	**What does this mean?** Data is collected from various sources to determine whether the data is consistent or inconsistent. **How this aspect is applied in the research:** • Library searches are performed to ensure that all sources are consulted, and all viewpoints taken into account.
Data vs memos	**What does this mean?** This requires that interpretations must not be confused with observations. **How this aspect is applied in the research:** The research is limited to an interpretation of documentary evidence.
Exceptions, contradictions	**What does this mean?** It is important not only to focus on patterns but also on inconsistencies. **How this aspect is applied in the research:** • Key concepts are identified and the interpretations in favour of and against the concepts are considered.
Spend time on research sites	**What does this mean?** This relates to research where testing, questionnaires, and observations form part of the research process. **How this aspect is applied in the research:** The research is limited to an interpretation of documentary evidence. Testing, questionnaires, and observations do not form part of the present research.

Source: Own summary based on Leedy and Ormrod (2016: 260).

3.7 Ethical considerations

In this research, the data collection method is limited to publicly available documents, which include journal articles, academic publications, case law and fiscal legislation. Therefore, no ethical considerations arise.

3.8 Limitations of scope

The goal of the research is to understand the relationship between deeming provisions and the principles of a good tax system. Only selected provisions of the Income Tax Act and OECD Model Tax Convention and other publications are discussed to determine whether there is a close relationship between the principles of a good tax system and deeming provisions. Legal interpretation requires that case law must be analysed. In the research only a limited number of cases are discussed, sufficient to support the analysis and provide reasoned conclusions.

3.9 Conclusion

The goal of the research influences the research methodology and research design. In the present research, the goal of the research relates to concepts that date back to the Roman law era. To understand the relationship between deeming provisions and the principles of a good tax system, the development of these concepts must be discussed. This also has an impact on the relevant methodology and design of the research. This chapter has confirmed that the research is of a qualitative nature. The research is positioned within the interpretative paradigm. The specific research methodology that is applied is the legal doctrinal research methodology, as the thesis analyses and interprets fiscal legislation. The research data consist of legislation, case law, and the writings of experts in the field. These data are analysed and interpreted using natural language arguments. Steps are taken in the research process to promote the validity, reliability and credibility of the findings. As the documentary data are all publicly available, no ethical considerations arise. The research has certain limitations to its scope as it is not focused on completeness but aims to obtain an understanding of deeming provisions, their interpretation, and the principles of a good tax system.

In the next chapter the historical development of deeming provisions and legal principles in Roman law is discussed.

CHAPTER 4

THE ROMAN LAW ORIGINS OF "DEEMING PROVISIONS" AND LEGAL PRINCIPLES

A people without the knowledge of their past history, origin and culture is like a tree without roots.

– Marcus Garvey[5]

4.1 Introduction

The goal of the present research is to determine whether there is a link between deeming provisions and the principles of a good tax system. In Chapter 1 the argument was advanced that the interpretation of legislation, including deeming provisions in the Income Tax Act, ensures the application of principles of a good tax system. These principles include equity, transparency and certainty, and efficiency. In the process of their interpretation, the courts apply certain legal principles. Many of these legal principles were established in Roman law and include the *contra fiscum* principle, the substance over form principle, the prevention of *fraus legis*, and the principle of reasonableness (consistency and the context of a matter). There is necessarily an overlap between the principles of a good tax system and the legal principles applying to the interpretation of legislation.

The first sub-goal of the research is to acquire an understanding of the origins and importance of deeming provisions in legislation and these legal principles, from an international and South African perspective. The concepts of deeming provisions, legal principles, and the principles of a good tax system are accepted concepts in the legal field and their origins date back to ancient times. In order to understand these legal concepts in the current context it is important to take their origins (their "roots") into account. Zimmermann (1992: viii) states that knowledge of the origin of the rules and institutions of law assists in obtaining a "proper understanding of modern law". He also indicates that Roman law remains relevant where legal disputes are concerned

[5] Garvey, M. 2020. Quotable Quote. [On line]. Available: https://www.goodreads.com/quotes/280448-a-people-without-the-knowledge-of-their-past-history-origin [accessed 26/06/2020].

(Zimmermann, 1992: viii). From a South African perspective, with regard to legal disputes, Currie and De Waal (2005: 23) refer to the Roman law maxim of *ubi ius ubi remedium* which translates as "where there is a right there is a remedy". The authors refer to this maxim as "one of the most important principles of our law". South African case law represents an example where the judicial officers take the principles of Roman law into account in their reasoning. This chapter will refer to a selection of relevant case law.

For purposes of this research, the development of deeming provisions, legal principles, and the principles of a good tax system will be considered in four sections:

- Roman law (the present chapter);
- Roman-Dutch law (Chapter 5);
- English law (Chapter 5); and
- the Constitution (Chapter 6).

Roman law is the focus of this chapter. The legal systems of the *ius civile* and *ius gentium* influenced the development of Roman law. In this chapter the interpretation of selected clauses of the *Digesta* and the *Codex* (*Corpus Iuris Civilis*) are discussed. The chapter also discusses the impact of taxation on the Roman Empire.

4.2 Background

History indicates that the origin of one legal system is dependent on another legal system. From a South African perspective, van Zyl (1980: 25) observes that Roman law had an impact on the South African legal industry.

Sherman (1917: 18) explains that Babylon was "probably the real mother of law". He explains further that the Babylonian law had an impact on the development of Egyptian law which, on its part, also influenced the development of Greek law. With reference to justice (*ma'at*), Manning (2013: 114) confirms that it constituted an important aspect of the early Egyptian society. Egyptian law did not only influence Greek law, Greek law also influenced Egyptian law. Wolff (1975: 395) explains that subsequent to the invasion of Egypt by the King of Macedonia, Alexander the Great,

Greek law was applied in Egypt. In the context of ancient Greek law, the principle of justice is complex. Chroust (1946: 299) states that Greek society used justice as a measure to uphold peace. Gagarin and Cohen (2005: 395) explain that ancient Greek society initially did not have a clear formulation of the principle of justice.

Greek law influenced the development of Roman law (Sherman, 1917: 34). The influence related to Hellenistic poems (Koenen, 1976: 128) and the "lego-philosophical ideas" (Chroust, 1946: 298) of Greek society. Koenen (1976: 128) explains that Roman law was also directly influenced by Egyptian society through the idea of "kingship". Oakley (2006: 8) confirms that the Hellenistic Empire of Alexander the Great also represented an important influence in this regard. Oakley (2006: 7) explains that kings were regarded as being "sacred" or "divine".

Maine (1908: 1, 11) and Sherman (1917: 34) explain that the law of ancient societies was initially in an unwritten form. It appears that, as societies develop, they acknowledge that it is important to reduce legal and other principles to writing, in other words to codify the law. Burdick (1938: 8) confirms that the Roman law is a codified law. This thesis will commence with a discussion of the development of Roman law in the context of legal principles and deeming provisions.

4.3 Roman law

In order to understand the development of legal principles and deeming provisions in the context of Roman law, a general introduction to Roman history is required. Thomas *et al* (2000: 18-25) confirm that Roman history is divided into four periods:

- The Roman Monarchy (753-509 B.C.);
- The Roman Republic (509-27 B.C.);
- The Principate (27 B.C.-284 A.D.); and
- The Dominate (284-476 A.D.)

Sherman (1917: 29) explains that Rome was founded in 753 B.C. During the existence of the Roman law three legal systems were developed and applied:

- the *ius civile*;
- the *ius honorarium*; and
- the *ius gentium*.

Sherman (1917: 29) explains further that the *ius civile* ("the ancient Roman law") was implemented during the period of the Roman Monarchy. Thomas *et al* (2000: 30) indicate that the *ius civile* legal system applied to the Roman citizens alone. The *ius civile* is evidence of the impact of Greek law on the origin of Roman law. According to Riccobono (1926: 159), the *ius civile* legal system was archaic and its interpretation of a strict nature. MacCormack (1969: 439) and Mousourakis (2007: 21) substantiate this assertion. In view of this it is important to understand the reason for the archaic nature of the *ius civile* legal system. Raleigh (1621: 164) explains that the *ius civile* legal system consisted of a combination of Athenian law, Grecian law, ancient Roman customs as well as regal laws. In conjunction with this, Long (1848: 33) and Mousourakis (2007: 21) observe that the legal system of the ancient Roman society focused on form and not substance. This, according to Brown (1937: 362,363), indicates, in essence, the presence of positivistic elements or, in the words of Mousourakis (2007: 21) "extreme formalism". It therefore appears that the excessive focus on form, rather than the substance of a matter under consideration, had a significant impact where the adjudication of a matter was concerned.

Thomas *et al* (2000: 20) confirm that the office of the *praetor urbanus* (a Roman official appointed to adjudicate matters between Roman citizens) was instituted in 367 B.C. Sherman (1917: 36) elaborates on this and confirms that the praetor was tasked to administer the *ius civile*. In administering the *ius civile*, the praetor was required to adjudicate a matter in the context of the surrounding facts and circumstances. Adjudicated matters represented precedent for subsequent matters. The interpretation of the praetor developed into the second legal system of Roman law, the *ius honorarium*. According to Berger (1953: 529), the "*ius honorarium"* represented the law the praetor (or magistrate) developed to "support … or correct the existing law …", the *ius civile*. Riccobono (1926: 161) explains that the application of the *ius honorarium* ensured that reasonableness was achieved. It can be noted that certain

interpretations suggest that the *ius honorarium* did not constitute a legal system. According to Long (1848: 33), these interpretations describe the *ius honorarium* as a method through which the third legal system, the *ius gentium*, was implemented. According to this interpretation, the *ius honorarium* linked the *ius civile* and the *ius gentium*. Whether the *ius honorarium* did or did not constitute a separate legal system is beside the point. The importance of the *ius honorarium* relates to the fact that it enabled the development and implementation of the *ius gentium*.

The growth and development of Rome caused an increase in trade between citizens and foreigners (*peregrini*). The impact of this development was described by Long (1848: 33) in the following manner:

> This development was a thing of necessity, not of caprice or choice, but it was favoured by the nature of the Roman mode of administering justice. The merit of the Romans consisted in modifying, extending, and adapting a very narrow and rigorous system to the progressive wants of society; in keeping to the form and letter of the law as far as they could, and reconciling it with the change of circumstances.

Long (1848: 31) explains that the early Roman society was considered to be practical (not theoretical); Roman society acknowledged that it was necessary to adopt "notions of rule of law" rather than "the strict Roman rules" (the *ius civile*). The *ius civile* only applied to Roman citizens and matters relating to foreigners also required adjudication. Sherman (1917: 32-33) states that, in view of the fact that the legal system lacked clarity for foreigners, it had firstly the effect that the Law of the Twelve Tables was adopted in 450-449 B.C. The Law of the Twelve Tables was based on the *ius civile* and published in the Roman Forum. Portions of the Law of the Twelve Tables were reproduced. According to Melville (1915: 7) these reproductions indicate that the principles included in the Law of the Twelve Tables were of a formalistic nature and not suitable for the developing Roman society. Thomas *et al* (2000: 30) confirm that the significance of the Law of the Twelve Tables, in essence, relates to the fact that it represented the first codification of the Roman law.

The *ius civile* had a second effect. Thomas *et al* (2000: 20) refer to the fact that the office of a second praetor (the *praetor peregrinus*) was instituted in 242 B.C. The *praetor peregrinus* adjudicated matters between foreigners or where foreigners and citizens were involved. According to Berger (1953: 448), the *praetor peregrinus* and the *praetor urbanus* issued edicts (singular: "*edictum*") during their one-year period in office. Thomas *et al* (2000: 32) refer to the fact that the edicts of the *praetor urbanus* applied to Roman citizens and the edicts of the *praetor peregrinus* to foreigners. These edicts subsequently constituted precedent for succeeding praetors. As the *ius civile* did not apply to foreigners, the *praetor peregrinus* was required to adjudicate a matter with reference to the relevant facts and circumstances. According to Sherman (1917: 3) there was an acknowledgement that the need for justice exceeded the need for more law. The *ius gentium* legal system developed in due course. Sherman (1917: 38) explains that the *praetor peregrinus* was the creator of the *ius gentium*; this legal system combined the *ius civile* and the law universal to nations.

4.3.1 Principles of equity, good faith and substance

The principles of equity (Riccobono, 1926: 159) and good faith *(bona fides)* (Thomas *et al*, 2000: 30) were elements of the *ius gentium*. Berger (1953: 354) confirms that "*(a)equitas*" (equity) represents an important principle where the development of law is concerned. Berger (1953: 374) confirms further that *"bona fides"* includes elements of "honesty … good faith", "equity", "confidence" and "fairness". Berger (1953: 354) explains that equity and the law were closely connected. Stevenson and Soanes (2010: 235362) define "equity" as "the quality of being fair and impartial". The authors further define confidence as "the feeling or belief that one can have faith in or rely on someone or something" and faith is defined as "complete trust or confidence in someone or something". Honesty suggests, according to the authors, an element of frankness. When a person is frank, it requires a person to be open with others. Openness implies that secrecy does not exist. It is therefore apparent that openness is associated with transparency. There is therefore a close connection between equity and good faith.

Berger (1953: 721) explains that the element of substance ("*substantia*") requires that the "nature" of something must be taken into account. Berger (1953: 354) explains that in the earlier Roman society, the *ius civile* had the effect that substance could only override form where it was equitable ("*Aequus (aequum)*"). Through the development of the *ius honorarium* and, subsequently the *ius gentium*, substance developed into an important principle.

Many of these principles established in Roman law are also reflected in the principles of a good tax system set out by Adam Smith (1776) (discussed in Chapter 6).

Riccobono (1926: 161) indicates that equity was achieved through various measures which included, amongst others, "fictions … legal constructions, interpretations". A more detailed understanding is required of these measures.

4.3.2 Fictions

Berger (1953: 470) defines fictions ("*fictio*") as: "(t)he assumption of the existence of a legal or factual element, although such an element does not exist. The purpose of a fiction is to cause certain legal consequences which otherwise would not occur."

Hamilton (1989: 1452) explains that the definition recognises that:

- a legal fiction represents a legal falsehood;
- the person who applies the legal fiction is aware of the falsehood; and
- the person who applies the legal fiction deliberately regards the legal fiction to be true in the given circumstances.

Long (1848: 30) finds that fictions formed an integral part of Roman society:

> Thus fictions were introduced, in devising which the Romans showed no small ingenuity. This people had a talent for administration and a sense of fair dealing which led them to the right end, but they respected what was established, and so made their innovations take the form of that which was honoured by time and observance.

Hamilton (1989: 1458) explains that the Roman law legal fictions were used as part of the adjudication process to ensure that justice was attained. Legal fictions also constituted a helpful instrument to resolve matters in an expeditious manner.

Sherman (1917: 69, 114) acknowledges the contributions of Roman jurists in the development of the Roman law. These jurists included Ulpian, Paulus, Gaius and Papinian. The *Corpus Iuris Civilis* (529-534 A.D.) reflects the contributions of these jurists to the development of the Roman law. The *Corpus Iuris Civilis* was a codification of the Roman law during the reign of Justinian, the Emperor of the Eastern Roman Empire. Berger (1953: 392, 436, 505) confirms that the codification consisted of three parts:

- *Digesta* ("*digesta iustiniani*") – this was a summary of the writings of classic jurists;
- *Codex Constitutionem* – this was a summary of the imperial constitutions; and
- *Institutiones* – this was an elementary manual for first-year law students.

Berger (1953: 600) confirms further that subsequent to the death of Emperor Justinian a fourth part, the *Novellae Constitutiones*, was added to the *Corpus Iuris Civilis*. The *Novellae Constitutiones* (or "*Novellae Iustiniani*") was a collection of the statutes promulgated during the reign of Emperor Justinian.

The *Corpus Iuris Civilis* made use of a large number of legal fictions. For illustrative purposes, a few examples of legal fictions included in the *Digesta* are:

Agency

Digesta 3.3.1 provides (Watson, 1998: 86, Volume 1) that one person (referred to as a "procurator") enters into business transactions on the authority of another person (referred to as the "principal"). *Digesta* 1.19.1 (Watson, 1998: 37, Volume 1) refers to the legal consequences of this relationship where it is provided that the actions of a procurator are regarded to be those of his principal (in the context of *Digesta* 1.19.1 the principal is regarded to be the emperor). The fact that the actions of the procurator are regarded to be those of the principal for all practical purposes represents a legal

falsehood. The parties to the relationship, as well as the third parties involved in the transactions with the procurator, know that a legal fiction exists but for legal purposes acknowledge the binding effect.

Fulfilment of conditions

Digesta 35.1.24 provides (Watson, 1998: 185, Volume 3) that where a condition cannot be fulfilled in view of the fact that a person, who will benefit from the non-fulfilment of the condition, "prevents" its fulfilment, the condition is treated as if it has been fulfilled.

Where an impossible condition is imposed on a legacy, *Digesta* 36.2.5.4 regards (Watson, 1998: 259, Volume 3) the legacy to be of an unconditional nature.

Fulfilment of contracts

In instances where a guarantor makes a promise to a creditor on behalf of a principal, *Digesta* 2.14.24 treats (Watson, 1998: 68, Volume 1) the guarantor as the "principal debtor".

It is acknowledged (Watson, 1998: 150, Volume 2) in *Digesta* 21.1.19.5 that where parties enter into a barter transaction, the parties to the transaction are treated as both the purchaser and the seller.

Digesta 6.2.13.2 makes provision (Watson, 1998: 214, Volume 1) for a situation where a person acquires an asset from a pupil and approval for the pupil's disposal was given by another person, falsely creating the impression that the other person is a tutor of the pupil (a "false tutor"). Where the acquirer proves that the "false tutor" deceived the acquirer to acquire the asset from the pupil, the acquirer is "deemed" to have acquired the asset in good faith. The fact that the acquisition is deemed to be legal constitutes a legal falsehood. Because the acquirer acted in good faith, the legal falsehood is deemed to be true.

Partnerships

Digesta 17.2.73 provides (Watson, 1998: 53, Volume 2) that where the expenditure incurred and gains made in a partnership are treated as the expenditure incurred and gains made by both partners, the expenditure incurred "in honour" of the children of one of the partners is also treated as being expended on behalf of both the partners.

Admissions and transgressions

In circumstances where a defendant admits liability, *Digesta* 42.1.56 provides (Watson, 1998: 56, Volume 4) that the defendant is treated as if judgment was found against him.

Where a person alienates property (whilst having knowledge of the existence of creditors), *Digesta* 42.8.17.1 provides (Watson, 1998: 78, Volume 4) that the person is regarded as having the intention to commit fraud against the creditors.

According to *Digesta* 42,8.4 a person is regarded to have acted fraudulently if the person has failed to do what he should have done (Watson, 1998: 74, Volume 4).

The defence of *res judicata*

Digesta 44.2.4 provides that the defence of *res judicata* is regarded to include "all persons who bring a matter to trial" (Watson, 1998: 138, Volume 4). According to Claassen (2020) the principle of *res judicata* means that

> [a] case or matter is decided. Because of the authority with which in the public interest, judicial decisions are invested, effect must be given to a final judgment, even if it is erroneous … [T]he enquiry is not whether the judgment is right or wrong, but simply whether there is a judgment.

Law of succession

Digesta 34.4.24 (Watson, 1998: 168, Volume 3) provides that where a legacy, subject to a condition, is transferred, it is regarded that the transfer of the legacy is subject to the same condition. The transfer will not be subject to the condition where the condition related to the person of the original legatee.

Digesta 34.8.2 refers (Watson, 1998: 177, Volume 3) to a situation where effect cannot be given to a testamentary provision. The relevant provision is "treated" as unwritten (*pro non scripto*). The remaining provisions are interpreted independently of the unwritten provision.

Digesta 34.5.2 (Watson, 1998: 171, Volume 3) indicates that where a legacy or fideicommissum is given to the citizens it is regarded as being given to the city.

Obligations and performances

In terms of *Digesta* 44.7.52, a person is "of necessity" regarded to be bound by consent when the person accepts something (Watson, 1998: 161, Volume 4).

According to *Digesta* 46.3.5, a secured debt is regarded to be more onerous than an unsecured debt (Watson, 1998: 216, Volume 4).

Digesta 46.3.70 "What is promised for a certain day may indeed be given at once; for the whole intervening period is regarded as open to the debtor for paying." A debtor therefore can pay the whole outstanding debt at once even though it is only due at a later stage (Watson, 1998: 226, Volume 4).

In terms of *Digesta* 46.4.16, a co-debtor is discharged from debt where another co-debtor was released from payment in view of the fact that the other co-debtor is regarded to have made performance (Watson, 1998: 237, Volume 4).

These legal fictions are clearly examples of deeming provisions.

4.3.3 Deeming provisions

In Chapter 2 of this research it was indicated that the purposes of deeming provisions are to:

- nullify tax avoidance schemes which have the intention of shifting tax;
- extend or restrict the scope of a benefit; and
- deal with administrative matters.

The following Roman law maxims will be discussed: *plus valere quod agitur quam quod simulate concipitur* and *fraus legis*. These maxims fall within the ambit of the first two purposes as set out above.

4.3.4 Plus valere quod agitur quam quod simulate concipitur *and* fraus legis *and their acceptance in South African case law*

This thesis demonstrates that Roman law, Roman-Dutch law and English law form part of the South African legal system. In Tables 4.1 and 4.2, this section therefore describes the Roman law maxims of *plus valere quod agitur quam quod simulate concipitur* and *fraus legis* and their acceptance into South African law in terms of case law.

Table 4.1 The maxim *plus valere quod agitur quam quod simulate concipitur*

The maxim is present in the following passage of the *Corpus Iuris Civilis*	*Plus valere quod agitur quam quod simulate concipitur* is set out in *Codex* 4.22.3 (Frier, Connolly, Corcoran, Crawford, Dillon, Kehoe, Lenski, McGinn, Pazdernik, Salway (2016: 888)). In certain instances, the maxim is quoted as *plus valet quod agitur quam quod simulate concipitur*.
The translation of the maxim	Frier *et al* (2016: 887) translate this as "What is Done Has Greater Value Than What Is Contrived In Pretence".
The purpose of the maxim	According to this maxim the focus must be on the substance of a transaction and not its form; "the court will give effect to the real intention of the parties and not their simulated agreement" (Williams, 2015: 687).
The maxim as applied in South African case law	
• **Reality and genuineness, not simulation**	In the *Treasurer General v Lippert* (1883-1884) 2 SC 172, at 175, the Supreme Court of the Cape of Good Hope emphasised that the fact that the form of a transaction differs from the objective (purpose) of the transaction does not change the nature of the transaction. Effect is given to the objective of the transaction. The Appellate Division confirms this approach in *Roodt en 'n Ander v Sekretaris van Binnelandse Inkomste* (1973) 36 SATC 1, where an agreement for the exchange of properties was substituted with an agreement according to which the properties concerned were partitioned. The real (true) purpose of this transaction was to avoid the payment of transfer duty. In other words, to obtain a tax benefit. The Appellate Division, in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, at 558, remarks that the focus must be on the "substance rather than the form of a transaction, and

	should strip off any disguise which is intended to conceal its real nature". In *Zandberg v Van Zyl* 1910 AD 302, at 309, the Appellate Division observes that there must be a "real intention, definitely ascertainable, which differs from the simulated intention." Williams (2015: 699) uses the words "honestly intend" and "genuinely intend". The Supreme Court of Appeal confirms that simulation is a question of the *genuineness* of the transaction under consideration. If it is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction. (*Commissioner, South African Revenue Service v Bosch and another* [2015] 1 All SA 1 (SCA), at 18) [emphasis added]. In *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* [2019] 1 All SA 106 (SCA), at 122[61], the Supreme Court of Appeal refers to the above extract from *Commissioner, South African Revenue Service v Bosch and another*.
• **Context is important**	In *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and others* [2014] 2 All SA 654 (SCA), at 659[10], the Supreme Court of Appeal states that the enquiry into whether a transaction represents a simulation rests upon an analysis of the facts of a particular case. The Supreme Court of Appeal refers to *Zandberg v Van Zyl* 1910 AD 302, at 310, where the Appellate Division stated that in considering whether the real nature of any particular contract is different from its ostensible form, we must endeavour *from all the circumstances* to get at the actual meaning of the parties. Each case must *depend upon its own facts*; no general rule can be propounded which will meet them all. [emphasis added]. In *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* [2019] 1 All SA 106 (SCA), at 121[59], the Supreme Court of Appeal states that the judgment "pointed out merely that in order to establish simulation … simulation was to be established not only by considering the terms of the transactions but also the probabilities and the context in which they were concluded."
• **Motive and purpose vs intention**	In *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* [1992] 1 All SA 398 (A), at 405, the Appellate Division states that Motive and purpose differ from intention. If the purpose of the parties is unlawful, immoral or against public policy the transaction will be ineffectual even if the intention to cede is genuine. That is a principle of law. Conversely, if their intention to cede is not genuine because the real purpose of the parties is something other than cession, their ostensible transaction will likewise be ineffectual. That is because the law disregards simulation. But where, as here, the purpose is legitimate and the intention is genuine, such intention, all other things being equal,

	will be implemented. *Commissioner for South African Revenue Service v NWK Ltd* [2011] 73 SATC 55, does not refer to this distinction between purpose (what is "lawful") and intention (what is "simulated") (Hutchison and Hutchison, 2014: 85).
• **Intention is a factual enquiry**	In *Zandberg v Van Zyl* 1910 AD 302, at 309, the Appellate Division states > For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be … The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. Hutchison and Hutchison (2014: 82) remark that the enquiry into whether a transaction represents a simulation is of a subjective nature; the subjective intention of the parties is deduced from the objective factors.
• **Consensus to disguise**	> Not infrequently, however, … the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. (*Zandberg v Van Zyl* 1910 AD 302, at 309) The Appellate Division, in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd*, 1941 AD 369, at 395, states that a disguised transaction means that the parties to the transaction "honestly intend" the transaction to have the effect according to this intention. The court interprets whether the transaction falls "within or without the prohibition or tax" (*Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd*, at 394). According to Hutchison and Hutchison (2014: 76) a transaction is simulated where the intention is "faked (i. e. dishonest, or fraudulent)". Hutchison and Hutchison (2014: 71) observe that simulation rests on an intention not being genuine. A transaction that is genuine (or honest) will therefore, it is submitted, not fall within the ambit of a simulation. This aspect is closely related to the maxim *fraus legis* that is discussed in **Table 4.2**.
• **Simulation and commercial substance**	The Supreme Court of Appeal expands the maxim to include another element. A transaction is regarded as a simulation where it does not make commercial sense (or there is no commercial substance to the transaction). In *Commissioner for South African Revenue Service v NWK Ltd* [2011] 73 SATC 55, at 71[55], the Supreme Court of Appeal states as follows: > In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a

	transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the *commercial sense* of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the *evasion* of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation. [emphasis added] In *Bosch and another v Commissioner, South African Revenue Services* [2013] 2 All SA 41 (WCC), at 68[7], it is observed that the reference to "evasion" in the extract should read "avoidance" as tax avoidance and tax evasion are different concepts. Surtees (2013: 46) also refers to this in his analysis of *Bosch and another v Commissioner, South African Revenue Services* [2013] 2 All SA 41. *Commissioner for South African Revenue Service v NWK Ltd* has been the subject of different views: • According to Williams (2015: 699) the requirement of commercial substance is not consistent with the principle laid down in *Zandberg v Van Zyl* 1910 AD 302. • The court was only required to consider the "real transaction" (Williams, 2015: 700) and it was therefore not necessary to consider whether there was "commercial substance" present. Williams, it is submitted, is of the view that the court overcomplicated the matter under consideration with the inclusion of an additional element. • Legwaila (2012: 121) remarks that the impact of *Commissioner for South African Revenue Service v NWK Ltd*, is not that substance not only refers to the transaction but also to the nature of the relevant transaction. In other words, it is submitted that it requires the interpreter to consider whether the transaction takes place in the ordinary course of business. Substance is required in relation to all steps of the transaction (Legwaila, 2016: 118). It is submitted that, even though *Commissioner for South African Revenue Service v NWK* represents an important case in which simulated transactions were considered, the approach of the courts, prior to that decision did, to some extent, take the commercial substance of transactions into account. The difference is that commercial substance did not represent a separate element as is the case in *Commissioner for South African Revenue Service v NWK Ltd*. The following case law illustrates this statement: • The *Treasurer General v Lippert* (1883-1884) 2 SC 172, at 175, refers to the "unusual" use of the term "guarantee" by the parties to the agreement.

	• In *Erf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue* [1996] 58 SATC 229, at 235, the Appellate Division remarks that > [a]ffiliated companies are of course at liberty to structure their mutual relationships in whatever legal way their directors may prefer; but when, *for no apparent commercial reason*, a third party is interposed in what might equally well have been an arrangement between affiliates, it is not unnatural to seek the motive elsewhere. [emphasis added]. • In *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369, at 383, the Appellate Division refers, among others, to the "most unusual stipulations" relating to the cost price of the materials and the fact that the risk relating to the sale of the material did not pass to the owner, the manufacturer. It is further submitted that *Commissioner for South African Revenue Service v NWK Ltd* represents an approach that requires the interpreter to apply common sense. In essence, *Commissioner for South African Revenue Service v NWK Ltd* requires the interpreter to apply the approach of an accountant.
• **Not a panacea**	In matters where the parties intend the agreement to have the effect as formulated, the agreement must be applied (Legwaila, 2012: 116). > The doctrine of the disguised transaction is not a panacea for appellant to ignore agreements where the parties in fact and in law intend that they must be given their legal effect. This is precisely what occurred in the instant case and accordingly there exists no basis to ignore such agreements. (*Commissioner for South African Revenue Service v Cape Consumers (Pty) Ltd* [1999] 61 SATC 9,1 at 103). According to Clegg (2020: § 26.6), the form of a transaction (and not the substance) must be given effect to where the form is "clear and does represent the intention of the parties". It is submitted that, in this case, the form represents the substance. It will therefore not be required to analyse the substance of the transaction.

Source: Own summary

Table 4.2 The maxim *fraus legis*

The maxim is present in the following passages of the *Corpus Iuris Civilis*	*Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit* (*Digesta* 1.3.29). *Fraus enim legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit: et quod distat hryton apo dianoias, hoc distat fraus ab eo, quod contra legem fit* (*Digesta* 1.3.30).

	Non dubium est in legem committere eum, qui verba legis amplexus contra legis nititur voluntatem: nec poenas insertas legibus evitabit, qui se contra iuris sententiam scaeva praerogativa verborum fraudulenter excusat, nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente (*Codex* 1.14.5).
The translation of the maxim	According to Watson (1998: 13, Volume 1) *Digesta* 1.3.29 provides that "It is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense." Claassen (2020) defines the maxim *in fraudem legis* as "in fraud of the law". *Digesta* 1.3.30 (Watson, 1998: 13, Volume 1) is translated to read: Fraud on the statute is practiced when one does what the statute does not wish anyone to do yet which it has failed expressly to prohibit. And what separates "words from meaning" separates cheating from what is done contrary to law. Frier *et al* (2016: 261) hold that the maxim in *Codex* 1.14.5 provides that [t]here is no doubt that he who seizes upon the words of a law but strives against its spirit does it wrong; and he who deceitfully refutes the intention of a law by perversely giving preference to its wording will not escape the penalties contained in the laws. For We desire that no pact, no agreement, no contract shall appear to have been made between those who make a contract that the law prohibits them from making.
The purpose of the maxim	The maxim indicates transactions that are in fraud of the law.
The maxim as applied in South African case law	
• **Involves a statutory test**	In *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, at 533, the Appellate Division remarks that the "exact scope of prohibition" must be determined through taking into account not only the "particular words of a particular section"; the "whole Act" must be considered. In *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369, at 371, the Appellate Division indicates that the test for determining whether a transaction is *in fraudem legis* is to "adopt such a construction of the statute in question as will avoid the possibility of evasions which may perpetuate the mischief."
• **Not an independent rule but a branch of the maxim *plus valet quod agitur quam quod simulate***	*Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, at 547. states that the rule is merely a branch of the fundamental doctrine that the law regards the substance rather than the form of things, --- a doctrine common, one would think, to every system of

concipitur	jurisprudence and conveniently expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*. Derksen (1990: 518) observes that the *fraus legis* rule was not an independent legal rule (Afrikaans: "selfstandige regsreël") in Roman law but represented a form of statutory interpretation.
• **Designedly disguise**	In *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, at 545, the Appellate Division classified transactions *in fraudem legis* as those "which in truth came within the operation of the law, but which had been designedly disguised so as to evade its language." The Appellate Division, in *Van Eck NO and Van Rensburg NO v Etna Stores* [1947] 3 All SA 143 (A), at 150, states that where a person exercises a power but uses it for a purpose which differs from the statutory provision, the person acts *contra legem*. In circumstances where a person "professes" to use the power "for its legitimate purpose, while in fact using it for another" purpose the person acts *in fraudem legis*. In *Madrassa Anjuman Islamia v Johannesburg Municipal Council*, 1919 AD 439, at 443, the Appellate Division also distinguishes between these concepts: Coming now to the Roman law a clear distinction is drawn on the one hand between what is *contra legem*, *i.e,* what is forbidden by the law and on the other hand what *is in fraudem legis, i.e,* while not forbidden by the law, the law does not wish to be done. *Van Eck NO and Van Rensburg NO v Etna Stores* was directly referred to in *Gauteng Gambling Board and another v MEC for Economic Development Gauteng Provincial Government* [2013] 3 All SA 370 (SCA), at 383. More recently, the Gauteng Division, Pretoria, indirectly referred to *Van Eck NO and Van Rensburg NO v Etna Stores* in *Commissioner of the South African Revenue Service v Public Protector and others* [2020] 2 All SA 427 (GP), at 435. Transactions where there is an element of dishonesty present, are considered to be *in fraudem legis* (in fraud of the law) and the court considers "what the parties actually intended" (Williams, 2015: 692). In *Erf 3183/1 Ladysmith (Pty) Ltd v Commissioner for Inland Revenue* [1996] 58 SATC 229, at 243, the Appellate Division confirms the statement in *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd*, at 396, that an "unexpressed agreement or tacit understanding" must be present in order to confirm that the transaction is *in fraudem legis*. There is "something wrong" where a disguise is present and the purpose is to evade tax or avoid a "peremptory rule of law" (*Commissioner for South African Revenue Service v NWK Ltd*, at 67[42]).

• **Affects the spirit (intention) not the words**	In *Dadoo Ltd and Others v Krugersdorp Municipal Council*, at 545, the Appellate Division remarks that transactions *in fraudem legis* represent infringements of the spirit of the law; not infringements of the letter of the law.

Source: Own summary

4.3.5 Provisions dealing with administrative matters

In the *Digesta* there are provisions that indicate that they deal with administrative matters. These provisions relate to the majority rule (*Digesta* 50.1.19), that two negative statements in a provision are observed to indicate a permission not a prohibition (*Digesta* 50.16.237), and the company considered to be a person (*Digesta* 3.4.7). Although the examples provide certainty about the application of these aspects, they do not meet the standard characteristics of a deeming provision.

4.3.6 The principle of "reasonableness"

The concept "*bonus pater familias*" was instituted in the Roman law. Berger (1953: 377) defines "*bonus pater familias"* as:

> The average type of an honest, prudent (*prudens*) and industrious (*diligens, studiosus*) man (father of a family), whose behaviour in relations with other citizens is given as a pattern of an upright man and may be required from anyone. Acting contrary to what a *bonus pater familias* would do in a given situation may serve as a basis for measuring his culpability and liability in a specific case.

Fanton (1869: 4) explains that the Law of the Twelve Tables referred to the concept "*patria potestas*". Berger (1953: 621) defines "*patria potestas*" as "[t]he power of the head of a family … over the members". Fanton (1869: 4) explains that the *patria potestas* represented one of the powers of the *pater familias*.

The principle of reasonableness originated in the Law of the Twelve Tables which was based on the *ius civile* and published in the Roman Forum. The concepts of fairness (reasonableness, equity, and trust), transparency, and substance over form are

closely related to one another. The overriding element that underlies these concepts is reasonability. One of the Roman jurists, Ulpian, made an observation in this regard. The observation was subsequently included in the *Digesta* 1.1. According to Ulpian (Watson, 1998: 1, Volume 1):

> the law is the art of goodness and fairness … we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties but also indeed under allurement of rewards, and affecting a philosophy which, if I am not deceived, is genuine, not a sham.

This is a fitting introduction to the *Digesta* of Justinian. It confirms that legal principles are required to ensure the efficient functioning of the legal system.

Berger (1953: 377) defined the *bonus pater familias* as the average type of an honest, prudent (*prudens*) and industrious (*diligens, studiosus*) man. Del Mar and Twining (2015: 3, 47) explain that the honest, prudent, and industrious man can also be referred to as a "reasonable person" and "reasonable man". The principle of the reasonable person (or reasonable man) requires that the actions (or inactions) of a person are measured against the characteristics to be expected from a person in similar conditions (the reasonable person). The reasonable person, in essence, represents a benchmark.

In South Africa, the concept of reasonable person was discussed in various court decisions. In *Herschel v Mrupe* [1954] 3 All SA 414 (A), at 435, the Appellate Division explains the concept "*bonus pater familias*" as

> not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise.

The Appellate Division indicated in *Weber v Santam Versekeringsmaatskappy Bpk* [1983] 1 All SA 179 (A), at 205, that the question relating to the reasonable person should not be extended to the various professions, for example, a reasonable adult, a

reasonable child due to the fact that the reasonable person is a fictive measure, not a physical person. Only one objective measure must be considered – the reasonable person. According to Neethling, Potgieter and Visser (2006: 129) the reasonable person is a "juridiese personifikasie" (translated in English: a legal personification) of the characteristics that a community expects of its members when the members communicate with other persons.

Neethling and Potgieter (2004: 607) remark that a reasonable person can also be fearful: "Precisely because of the often complete disrespect for life, limb, dignity and property, it is no longer realistic to expect of … the average prudent person … not to be a nervous, timorous faintheart, often in trepidation lest he or others suffer some injury, and to act accordingly."

4.3.7 Taxation and Roman Society

The reference to tax farmers (*Digesta* 39.4.1) requires an understanding of the tax system of Roman Society. The tax system of Roman Society developed alongside the development of the legal system. Berger (1953: 745) indicates that the tax was referred to as *tributum soli* and constituted a land tax. According to Berger (1953: 745) the taxes ("*tributum*") collected were utilised to ensure that the Roman army could be sustained and that the necessary war equipment was made available to them. After the war, the taxes collected were refunded to the taxpayers if the property ("booty and contribution") acquired during the war was sufficient to cover the expenses incurred.

Hopkins (1980: 122) explains that the government made use of the mechanism of tax farming to ensure that tax was collected efficiently. Tax collection agents, known as tax farmers, were appointed in the provinces from within the classes of the Roman élite and Roman sub-élite. The advances made to the government by tax farmers constituted loans granted to the government, to be recouped from taxpayers. The economy of the Roman society was cash-based and, according to Hopkins (1980: 122) largely dependent on supply/demand (Hopkins, 1980: 103). Grain constituted an essential element of the Roman economy. Hopkins (1980: 122) makes reference to the

fact that the tax farming mechanism developed to such an extent that it constituted a profit-making enterprise for the tax farmers. The disregard (Jones, 1968: 11) for equity (fairness, reasonableness) was evident:

> Oppression and extortion began very early in the provinces and reached fantastic proportions in the later republic. Most governors were primarily interested in acquiring military glory and in making money during their year of office, and the companies which farmed the taxes expected to make ample profits. There was usually collusion between the governor and the tax contractors and the senate was too far away to exercise any effective control over either. The other great abuse of the provinces was extensive moneylending at exorbitant rates of interest to the provincial communities, which could not raise enough ready cash to satisfy both the exorbitant demands of the tax contractors and the blackmail levied by the governors.

Roman citizens were initially not subject to taxation and only the countries that were conquered by the Roman army were subject to tax. The only manner in which these countries could pay the Roman government was through supplies of, amongst others, grain. Hopkins (1980: 103) explains that these supplies were mainly consumed by the Roman citizens. An increase in tax rates was experienced. The government eventually attempted to increase its revenue through whatever means possible.

These attempts had the following consequences:

- tyranny by soldiers to secure payment in kind (Hopkins, 1980: 123); and
- the rates of taxation were uncontrolled (Hopkins, 1980: 123).

These consequences reflect the impact of the Roman government's disregard for legal principles and the presence of injustice (Hopkins, 1980: 121).

These developments did not go unnoticed and the taxpayers' reactions, for example, included consuming their own produce (Hopkins, 1980: 123).

4.4 Conclusion

The first sub-goal of the present research was to acquire an understanding of the origins and importance of deeming provisions in legislation, legal principles applying to the interpretation of tax legislation, and the principles of a good tax system, from an international and South African perspective. In this chapter, the focus was on the Roman origin of law. Roman law represented an important period in the development of law. Sherman (1917: 11) indicates that the development of the existing law requires an understanding of its origin. This chapter illustrates this view.

The importance of deeming provisions, legal principles, and the principles of a good tax system

The origins and importance of deeming provisions, legal principles, and the principles of a good tax system in Roman law are closely related to the concept of "legal fictions". In Roman law, legal fictions included both deeming provisions and legal principles. This chapter indicated that legal fictions ensured that justice was achieved and that matters were settled in a quick and effective way. This suggests the importance of legal principles and deeming provisions in forming an integral part of Roman society and its legal system.

In Chapter 1 it is stated that deeming provisions have three purposes:

- to nullify tax avoidance schemes that have the intention of shifting tax;
- to extend or restrict the scope of a benefit; and
- to deal with administrative matters.

The maxims of *fraus legis* and *plus valet quod agitur quam quod simulate concipitur* are discussed as reflecting these purposes in a Roman law, as well as from a South African case law perspective, and the discussion indicates that these Roman law principles are still relevant in South Africa in relation to the Income Tax Act, the relevant statutory provisions of which are analysed in Chapter 8 of this research.

Although the principles of a good tax system were formulated in 1776 by Adam Smith, these principles also applied in Roman law, including the principles of equity,

transparency and certainty, and efficiency. These principles as formulated by Adam Smith and expanded on by the Davis Tax Committee, are discussed in Chapter 6.

The relationship between law and legal principles in a Roman law context

This chapter has found that a balance between law and the application of legal principles is required. The early Roman law was represented by the *ius civile*. During this early period there was an imbalance between form and substance as the *ius civile* favoured form over substance. This caused Roman law to be rigid.

Roman law indicates further that justice is an important aspect. This was achieved through the development of the *ius gentium*. The difference between the *ius civile* and the *ius gentium* related to the inclusion of legal fictions. This chapter has indicated that legal fictions, in the context of Roman law, included both deeming provisions and legal principles. The *ius gentium* restored the balance in the relationship between law and legal principles, which includes the principle of substance over form.

Taxation and Roman society

The chapter indicated that the manner and the degree to which the Roman government attempted to increase revenue had an impact on Roman society. Roman law indicates further that the government had a significant impact on the economic existence of the Roman Empire. The later period of Roman law was characterised by excessive taxation. It was found that excessive taxation and active tax evasion activities of Roman society occurred. In this regard, Sherman (1917: 6) remarked that "the tax-gatherer was more destructive to the Roman Empire than all the barbarians together." There were, however, problems prevalent at the time that contributed to the fall of the Roman Empire, such as the barbarian attacks (Jones, 1964: 1068) and military collapse (Ferrill: 1988).

Even though the Roman Empire fell, Roman law continued to exist. The next chapter will continue with the first sub-goal of this research. In the chapter the focus is on the development of Roman law into Roman-Dutch law, in a South African context.

CHAPTER 5

THE DEVELOPMENT OF ROMAN-DUTCH LAW "DEEMING PROVISIONS" AND LEGAL PRINCIPLES IN A SOUTH AFRICAN CONTEXT

> *Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change … (C)ontinual changes in the circumstances of social life demand continual new adjustments … If we seek principles, we must seek principles of change no less than principles of stability … (A)lmost all of the vexed questions of the science of law prove to be phases of this same problem.*
>
> - Pound (1923: 1)

5.1 Introduction

This chapter builds on the findings in Chapter 4, which presented the first phase in addressing the first sub-goal – obtaining an understanding of the origins and importance of deeming provisions in legislation, legal principles that ensure equitable interpretation of legislation, and the principles of a good tax system, from an international and South African perspective. In Chapter 4 legal fictions were discussed in the context of the origin and the development of Roman law. Legal fictions include both deeming provisions and legal principles. Chapter 4 established that:

- The *ius civile* applied in early Roman law. The *ius civile* was found to be rigid and only applied to Roman citizens.
- The adoption and development of the *ius gentium*, which applied to both Roman citizens and foreigners, had a significant impact on Roman law. The *ius gentium* was characterised by the inclusion of legal principles.
- Excessive taxation occurred during this period and taxpayers engaged in tax evasion activities.

The purpose of the present chapter is to continue the discussion of the origin and application of deeming provisions, legal principles, and the principles of a good tax system.

In this chapter an understanding will be obtained of:

- the reception of Roman law in Europe;
- the meaning of law from a Roman-Dutch perspective;
- the meaning and scope of Roman-Dutch law;
- the hybrid nature of South African law; and
- the discussion of the South Africa perspective of the *contra fiscum* rule and *ubuntu* as legal principles that are relevant in the interpretation of legislation, in promoting a good tax system; the *contra fiscum* rule and *ubuntu* are discussed with reference to principles established in case law.

5.2 The reception of Roman law in Europe

According to Thomas *et al* (2000: 62), the economy flourished and was transformed during the late middle ages in Northern Italy. This led to the development of universities. According to Zajtay and Hosten (1969: 183) the "rebirth" of Roman law started in the School of Bologna and thereafter extended to other universities. Thomas *et al* (2000: 62) remark that these developments also continued on the European continent, where Roman and Canon law were studied in law schools. The rulers of, and traders in various European countries applied and enforced Roman law in these countries. According to Coing (1986: 483) this European *ius commune* was a uniform system of law and consisted mainly of the *Corpus Iuris Civilis*. Lee (1915: 3) remarks that Roman law was a "system logical, coherent, and complete." Wessels (1908: 125) observes that the

> monarchs of the fifteenth century saw in the introduction of the Roman law their only hope of reducing into one system the divergent customs that prevailed in their provinces. It was the only means at their disposal to obtain some general law for all their subjects.

The reception of Roman law in the Netherlands was further encouraged through the establishment of the Great Council (*De Groote Raad*) at Mechlin (Lee, 1915: 3). Wessels (1908: 126) confirms this and refers to the Great Council as the Supreme Court of Mechlin. According to Wessels (1908: 126), the judges and the advocates

practising in the Supreme Court of Mechlin were educated in Roman law. The reception of Roman law ensured the development of a uniform European legal science consisting of basic principles (Thomas *et al*, 2000: 63). The basic principles contributed towards an approach that consisted of, firstly, considering a legal principle and thereafter applying it to the facts and circumstances of a matter to find a solution (Thomas *et al*, 2000: 63). According to Hilton (2009: 120), the publications of writers, which included Vinnius, Grotius, Groenewegen van der Made, Leeuwen, Voet and Huber, ensured that the legal system was "flexible and comprehensive". Zajtay and Hosten (1969: 194) confirm that the reception in South Africa of common law (which includes Roman-Dutch law and English law) "was extensive enough to justify the classification of South African law as a hybrid system (partly common law and partly civil (Roman-Germanic) law)".

5.3 The unique nature of the South African law

South Africa has a hybrid legal system (Hahlo and Maisels, 1966: 13), and a brief history of South Africa is required to understand its unique nature.

The Dutch East India Company commissioned Jan van Riebeeck to establish a refreshment station at the Cape of Good Hope for ships travelling to the East (Thomas *et al,* 2000: 105,111; Hahlo and Maisels, 1966: 1,2). Van Riebeeck "took possession" of the Cape of Good Hope in April 1652 (Hahlo and Maisels, 1966: 1). The refreshment station led to the permanent establishment of the Cape Colony (Hahlo and Maisels, 1966: 2), and a number of the servants of the Dutch East India Company were "released" from their contracts with the Dutch East India Company and allowed to settle at the Cape as farmers, artisans, and traders. Immigrants from France, Germany and the Netherlands also settled permanently in the Cape Colony (Hahlo and Maisels, 1966: 2).

In 1795 Britain occupied the Cape Colony (Thomas *et al*, 2000: 108-109; Hahlo and Maisels, 1966: 2). This occupation came to an end in 1803, but Britain once again occupied the Cape Colony from 1806. According to Sanders (1981: 329) Roman-Dutch law was the "general law" of the Cape and the British introduced English law

by means of legislation. On 1 January 1801, the United Kingdom of Great Britain and Ireland was established by means of the "*British* Statute 39, 40 G. 3. C. 67 and the *Irish* Statute 40 G. 3. C. 38" (Eyre and Strahan: 1804). In 1814 the Cape Colony was ceded to the United Kingdom of Great Britain and Ireland (in terms of the Convention of London of 1814), following the defeat of Napoleon (Hahlo and Maisels, 1966: 2). The Cape was a British colony from 1806 to 1910. The territory of occupation by the Cape citizens extended to the East and the North and, in 1835, the "Great Trek" to the North occurred by groups of White families who were, among other reasons, not willing to "submit to British rule" (Hahlo and Maisels, 1966: 3). The Orange Free State ("Oranje-Vrijstaat Republiek") and the Transvaal ("Zuid-Afrikaanse Republiek") (Thomas *et al*, 2000: 114) were established by these families. These "Republics" acknowledged Roman-Dutch law (Thomas *et al*, 2000: 113). The Orange Free State and the Transvaal remained independent from the United Kingdom of Great Britain and Ireland until their defeat in 1902 in the Anglo-Boer War (1899-1902) (Hahlo and Maisels, 1966: 4). Roman-Dutch law was acknowledged as the legal system of the four British Colonies in 1902 and no changes occurred in 1909 in the South Africa Act, 1909 (9 Edw. VII c. 9) (Thomas *et el*, 2000: 115). On 31 May 1910, the Union of South Africa was established, consisting of the four British colonies (the Cape of Good Hope, Natal, Transvaal and the Orange Free State). In terms of the Statute of Westminster in 1931, South Africa received "sovereign independence", and in 1960 South Africa became a Republic (Hahlo and Maisels, 1966: 4).

5.4 Roman-Dutch law

Wessels (1920: 265) states that Roman-Dutch law is based on "the old customary laws of Holland", various legislative enactments, and the Roman law of Justinian.

Grotius and Fockema Andreae (1895: XI) indicate that

> [e]en ding beklaag ik my, dat ik dit werk maakende, weinig Boeken en andere behulpmiddelen by my heb gehad; ook geen ommegang met andere menschen, die my noodig zouden zijn geweest, om met de zelve te spreken

> van de Hollandsche Coustumen en Gebruiken. Zoekt daarom kennisse met ervaren Rechtsgeleerden te maken, om 't geene hieraan mag ontbreeken, daaruit te vervullen. Neemt dit middelertijd aan als eene erffenisse, alzoo mij de andere middelen die ik u had behooren na te laten, met groote onregt benomen zijn. Hebt altijd God voor oogen, ende weet dat hem de rechtvaardigheid lief is.

According to Scholtens (1959: 80) Grotius explained in the extract that the *Inleidinge tot de Hollandsche Rechts-Geleerdheid* "contained the Roman law as in use in Holland *and the indigenous law as far as it was known to the author from old statutes, judgments and other evidence*." [emphasis added]. Holland was one of the provinces of the Dutch Republic of the Seven United Provinces (Koopmans and Huussen, 2007: 184) and the other six provinces were Gelderland, Zeeland, Utrecht, Friesland, Overijssel and Groningen.

In Chapter 4 it was indicated that the Roman law maxims of *plus valet quod agitur quam quod simulate concipitur* [literally: what is done is worth more than what is considered a pretence] and *fraus legis* [fraud of law] are deeming provisions. These maxims also apply in Roman-Dutch law (Derksen, 1990: 503). The *fraus legis* maxim is, as is the case with Roman law, was not an independent rule (Derksen, 1990: 503). Nathan (1904: 686), in the *Common Law Treatise of South Africa, based on the Commentaries on the Pandects of Voet*, confirms the application of the *plus valet quod agitur quam quod simulate concipitur* maxim as a "rule of law". Voet and Buchanan (1880: 31) refer to the *fraus legis* maxim in Voet 1.3.20:

> (s)till the right of interpretation should not be wholly denied to Jurisconsulta or Judges, even if not the force of law: whether they extend the operation of the law to similar cases, or its general words to the particular cases indicated: or explain doubtful words and remove the doubtful meaning of the law. Here certain general rules must be observed ... Not such which circumvents the intention of the law to attain that which the law did not desire, although it has not expressly forbidden it.

According to Gane (1958: 52), "the law is applied not only against those who act contrary to it, but also against those who do aught in fraud of it: *Dig*. I, 3, 29 and 30; *Code* I,14,5."

The "legislative enactments" that formed part of Roman-Dutch law refer to the "statutory law in force in the Provinces of North and South Holland and West Friesland" (Wessels: 1920, 265). Wessels (1920: 265) refers to the "Corpus Juris of Justinian", on which Roman-Dutch law was also based. This is the *Corpus Iuris Civilis* discussed in Chapter 4 of this research. Wessels (1908: 358) explains that the statute law caused "confusion" at the Cape as it was received from various sources. These sources consisted of the "*placaats* of the States-General and the States of Holland", sources from the "Governor-General in Batavia", and from the "Governor and Council at the Cape".

English law had an impact in South Africa, including in the fields of criminal law, company law, procedure and mercantile law (Hahlo and Maisels, 1966: 12; Sanders, 1981: 330). In the next section the 1799 Great Britain Tax Act and the 1803 United Kingdom of Great Britain and Ireland Tax Act are discussed.

5.5 Income Tax Legislation: Great Britain and its successor, the United Kingdom of Great Britain and Ireland

According to Harris (2006: 1):

> it is certain that much of the content of Britain's 1799 income tax law was derived directly from earlier English direct tax laws stretching back 700 years and more. To a more limited extent, the same is true of former British colonies. The taxes that ultimately developed into or were the precursors of the income tax were influenced by a greater variety of factors. The early tax systems of the colonies were influenced by each colony's own peculiar circumstances, other colonies with which they were affiliated, other colonial powers to which they may have been subject and, of course, Britain. Importantly, however, colonies were most prone to importation of tax laws in the early days of their founding. Accordingly, the tax

> system of a colony founded at a particular date was more prone to be influenced by the tax law of say Britain at that time than another colony.

In section 5.3 of this chapter it is stated that Britain occupied the Cape Colony during the period 1795 until 1803. The 1799 Great Britain Tax Act was promulgated during this period. In view of the occupation of Britain in the Cape Colony as well as the statement of Harris (2006: 1) it is relevant to discuss the 1799 Great Britain Tax Act.

The United Kingdom of Britain and Ireland had an impact on the 1914 South African Income Tax Act. In *Koffyfontein Estates, Ltd. v Commissioner of Taxes* 1917 TPD 259, at 261, the Transvaal Provincial Division states that "[o]ur Act [the 1914 South African Income Tax Act] appears to have been taken over from the New South Wales Act (59 Vict. No. 15) the Land and Income Tax Assessment Act of 1895." The Appellate Division confirmed this in *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* [1993] 55 SATC 198 (A), at 200, when it indicated that the 1895 New South Wales Tax Act was "used as the model by the officials responsible for the drafting of the first Union Income Tax Act, 1914."

There is therefore a link between the 1914 South African Income Tax Act and the 1895 New South Wales Tax Act, which in turn, according to Broomberg (2008: 291), was influenced by the Income Tax Act, 1842 (5 & 6 Vict c. 35) (referred to in this thesis as the "1842 United Kingdom of Great Britain and Ireland Tax Act"). Turnier (2003: 213, 214) states that the 1803 United Kingdom of Great Britain and Ireland Tax Act was repealed in 1816. According to Emory (1965: 317) changes were made to the 1803 United Kingdom of Great Britain and Ireland Tax Act in 1805 and 1806. Emory (1965: 313), however, also indicates that the "tax in England today [1965] remains strikingly similar to this early legislation." This statement is based on the following passage (Anon, 1920: 4):

> The Act of 1799, introduced by Pitt, was a tax which was imposed directly upon the taxpayer who was in receipt of the income; the principle of taxation at the source was not present … That tax … was replaced in 1803 by another scheme of taxation which really is the foundation of the Income Tax law of the present time. From the collection point of view, the leading fact in regard

> to the Act of 1803 was that the tax was collected at the source … The tax went on in that form until shortly after Waterloo, when it was repealed, and we were without income taxation in this country until 1842. *In 1842 Peel's Act was introduced. It was founded, to a very large extent, upon the Act of 1803, and, subject to amendments from time to time, forms the basis of the Income Tax law which was consolidated last year in the Income Tax Act of 1918, the Act which came into force on the 6th April of this year*. [emphasis added].

The 1799 Great Britain Tax Act represents the first Income Tax Act in Great Britain (Thuronyi, 20013: 26). Stebbings (2006: xi) records that the 1799 Great Britain Tax Act was formally known as the "Income and Property Taxes Act 1799, 39 Geo. III. c.13". The 1803 United Kingdom of Great Britain and Ireland Tax Act, formally known as the "Income and Property Taxes Act 1803, 41 Geo. III. c.122", replaced the 1799 Great Britain Tax Act. The present chapter discusses the following:

- the 1799 Great Britain Tax Act and its successor, the 1803 United Kingdom of Great Britain and Ireland Tax Act, that were introduced in Great Britain; and
- the subsequent development of the 1917 South African Income Tax Act, the 1925 South African Income Tax Act and the 1941 South African Income Tax Act.

Cousins (2018: 159) explains that Great Britain made use of sinking funds to repay long-term debt incurred to pay for wars waged in the Eighteenth Century. Increases in debt were accompanied by corresponding increases in finance charges. In order to meet the increase in finance charges, the government was obliged to increase the levels of taxation. Stebbings (2006: 2) notes that William Pitt announced the first act levying tax on income in 1799. The following section focuses on the development of this first income tax act.

5.5.1 The First Income Tax Act of 1799

Stebbings (2006: xi) indicates that the First Income Tax Act was formerly known as the "Income and Property Taxes Act 1799, 39 Geo III c.13" ("the 1799 Great Britain Tax Act"). Cousins (2018: 160) explains that commercial transactions constituted a

significant source of revenue in Great Britain, and government acknowledged that taxation of commercial income would assist it to repay its long-term debt. The 1799 Great Britain Tax Act repealed the Triple Assessment Act of 1798 (38 Geo III. c.16) ("the Triple Assessment Act"). According to Seligman (1914: 79) the Triple Assessment Act differed from the 1799 Great Britain Tax Act in that the former was calculated on the expenditure of a taxpayer and the latter on total income. This change was significant. The preamble to the 1799 Great Britain Tax Act provided that the Triple Assessment Act:

- did not sufficiently address situations where citizens evaded making contributions towards the wartime expenses; and
- failed to assess citizens in proportion to their means, indicating the absence of the legal principle of reasonableness and equity.

In Anon (1799a: 3) it is stated that "an effective and certain mode of enforcing the just principle of equal taxation" was an important consideration for the Legislature of Great Britain.

Cousins (2018: 161) indicates that society opposed the proposed Income Tax Act, but that the basis for the opposition is not clear and society asserted that the proposed income tax breached their right to privacy. According to Cousins (2018: 161) the assertion does not seem reasonable taking the context of the surrounding facts and circumstances into account. Cousins (2018: 161) concluded that the true opposition against the income tax was apparently founded on the fact that the government:

- did not obtain the consent of society to levy the income tax;
- implemented a new form of taxation that limited the control that society had over their income; this related to the risk that government would have a significant level of inquisitorial power; and
- would be able to obtain more contributions from society through tax than in the past.

According to Stebbings (2006: 35) the 1799 Great Britain Tax Act was unique as it was a "break with the fiscal tradition that taxes should be voluntary".

An overview is provided of certain provisions of the 1799 Great Britain Tax Act to demonstrate its approach to principles of a good tax system and deeming provisions.

Table 5.1 The 1799 Great Britain Tax Act, deeming provisions, and the principles of a good tax system

The scope of the 1799 Great Britain Tax Act	In the Preamble to the 1799 Great Britain Tax Act it is provided that > the Provisions made … by an Act of the last Session of Parliament [Triple Assessment Act] … have in sundry Instances been greatly evaded [by the taxpayers], and that many Persons are not assessed under the said Act in a just Proportion to their Means of contributing to the Publick Service. Section X of the 1799 Great Britain Tax Act further provides that > … any subject of his Majesty, whose ordinary residence shall have been in *Great Britain*, and who shall have departed from *Great Britain* and gone into any parts beyond the seas for the purpose only of occasional residence at the time of the execution of this act, shall be deemed, notwithstanding such temporary absence, a person chargeable in respect of his or her income, as a person actually residing in *Great Britain*, and shall be assessed and charged accordingly … upon the whole amount of his or her income, whether the same shall arise from property in *Great Britain* or elsewhere, or from any profession, office, pension, stipend, employment, trade, or vocation, in *Great Britain* or elsewhere.[Emphasis added]. Anon (1799a: 2,3) indicates that expenditure (used in the Triple Assessment Act) could not be used as criterion for taxation. The Triple Assessment Act > failed to enforce its principle, by compelling a disclosure of Income: it left each individual to interpret the rules, and to estimate his Income, without control, according to his private bias; it involved the honest and loyal, whilst the dishonest escaped under their own interpretation. The remedy for this (or the policy relating to the section), in terms of the observations relating to the 1799 Great Britain Act, was through > personal taxation, in proportion to the means of the individual; and by a familiar determination to suffer the prejudice, arising from the apprehension of a disclosure of circumstances, to subside in favour of an effective and certain mode of enforcing the just principle of equal taxation. (Anon, 1799a: 3). Taking into account the policy underlying section X and the Preamble to the 1799 Great Britain Tax Act, section X amounts to a deeming provision as it relates to the

	extension of the tax base of Great Britain. According to Harris (2006: 389), Adam Smith was a "constant source of reference for Pitt" (Pitt refers to William Pitt, the Prime Minister of Britain in 1799). With reference to the principles of a good tax system it is submitted that section X, in the context of the accompanying observations, takes into account Adam Smith's principles of a good tax system, more specifically, equity and efficiency. The principle of equity requires that residents must contribute to government "in proportion to their ability to do so" (Davis Tax Committee, 2016: 14). Anon (1799a: 3) refers to "personal taxation, in proportion to the means of the individual".
A deeming provision held to be reasonable	Section XLIV of the 1799 Great Britain Tax Act provides that where a general notice of assessment was affixed to a public place such as the doors of a church, chapel and the market house of a city, town, parish, or place, the: > general notice shall, from the time when the same shall be affixed as aforesaid, be deemed sufficient notice to all persons resident in such city, town, parish, or place, and the affixing the same in manner before directed shall be deemed good service of such notice, notwithstanding such notices as are herein-before directed shall not actually have been left at the house of any householder … In Chapter 1 it was indicated that deeming provisions have three purposes. One of these purposes is to deal with administrative matters. Section XLIV focuses on proof that a notice has been served. This is an administrative matter since it ensures that the 1799 Great Britain Tax Act is applied effectively. In South Africa, section 253 of the Tax Administration Act, 28 of 2011 ("the Tax Administration Act") focuses on the service of notices. In this respect section 253 of the Tax Administration Act uses the words "regarded as" in comparison with "deemed" in section XLIV of the 1799 Great Britain Tax Act. The principles of a good tax system include the principle of transparency and certainty. This principle refers to tax rules and tax procedures as well as the manner in which tax is collected and calculated (Davis Tax Committee, 2016: 14). This provision clearly places an onerous obligation on a taxpayer to ensure that he or she complies with the provisions of the Act.
Confidentiality of statements of income of traders made to Commercial Commissioners	Section XCVI of the 1799 Great Britain Tax Act provides that: > in case any person or persons residing in Great Britain, and engaged in any trade or manufacture therein … shall be desirous of being assessed by the commercial

	commissioners …, it shall be lawful … to deliver the same [the statement of income] to the said commissioners. Section XCIX of the 1799 Great Britain Tax Act provides, with reference to the issue of assessments by commercial commissioners, that: when and as soon as the amounts thereof [the assessments] shall be ascertained, the respective commissioners … shall cause the same to be entered in a book to be by them respectively and privately kept … These sections (section XCVI and section XCIX) suggest that they relate to administrative matters. The sections provide certainty in relation to the administration of the 1799 Great Britain Tax Act and affect tax procedures. It is submitted that the sections focus on the principle of transparency and certainty. The sections use the word "shall". The sections oblige the taxpayers and the commercial commissioners to comply with the provisions. Cousins (2018: 173) suggests that the failure of the first income tax act was caused by commercial evasion, based on the secrecy of the income of traders. The risk associated with secrecy is that "external checks" cannot be performed. The first income tax act, therefore, failed to apply the principle of transparency. This would have an impact on the principle of efficiency, as the tax system cannot "produce sufficient income" for government (Davis Tax Committee, 2016: 14). Secrecy is not compatible with transparency. The tax rules and procedures can also not be applied consistently. This means that the first income tax did not adhere to the principles of transparency and certainty. In Anon (1799b: 27) this is confirmed by the following statement: *wherever concealment is not necessary, it is objectionable*. Not only a door would be opened, by that means, to fraud and evasion (which, in spite of every regulation to prevent it, you must expect will exist to a certain degree) but the public would be precluded from the knowledge of what is the contribution of the higher orders of society. [emphasis in the original]

Source: Own summary

The objectives of the 1799 Great Britain Tax Act included the assurance that society would contribute to the government "in just proportion to their means", and the prevention of tax evasion. The provisions of the Act itself proved to conflict with these objectives. Tax evasion eventually represented a significant factor that lead to the repeal of the 1799 Great Britain Tax Act in 1802 (Cousins, 2018: 183). According

to Stevenson and Soanes (2010: 241111), the term "evade" relates to the situation where persons "escape paying (tax or duty), especially by illegitimate presentation of one's finances". Stevenson and Soanes (2010: 343629) further define the term "illegitimate" as "not in accordance with accepted standards or rules" and Stevenson and Soanes (2010: 611354) find that "rule" represents "a law or principle that operates within a particular sphere of knowledge, describing or prescribing what is possible or allowable". Based on this it can be concluded that tax evasion negates the principles of a good tax system. The 1803 United Kingdom of Great Britain and Ireland Tax Act succeeded the 1799 Great Britain Tax Act. A brief summary of certain aspects of the act follows.

5.5.2 The Second Income Tax Act of 1803

Stebbings (2006: xii) states that the Second Income Tax Act was formerly known as the Income and Property Taxes Act 1803, 43 Geo III c.122 ("the 1803 United Kingdom of Great Britain and Ireland Tax Act"). According to Fremont-Barnes and Fisher (2004: 185), May 1803 represented the "opening phase of the Napoleonic wars". Seligman (1914: 89) explains that the wars broke out in 1803 and Prime Minister Addington introduced the 1803 United Kingdom of Great Britain and Ireland Tax Act.

Seligman (1914: 90) further explains that the 1803 United Kingdom of Great Britain and Ireland Tax Act differed from the 1799 Great Britain Tax Act in certain respects. Taxpayers were assessed in terms of the 1799 Great Britain Tax Act directly on their total income as a "lump sum". In terms of the 1803 United Kingdom of Great Britain and Ireland Tax Act, the income of the taxpayers was divided into separate schedules and each schedule was taxed according to the source of the income. According to Seligman (1914: 90), this method of assessment was also applied to the levying of employees' tax, where the employer deducted the employees' tax from the remuneration of the employee. It is evident that this approach (as illustrated in the 1803 United Kingdom of Great Britain and Ireland Tax Act) constitutes the origin of

the modern South African tax practice of deducting employees' tax from employment income.

The differences between the 1799 Great Britain Tax Act and the 1803 United Kingdom of Great Britain and Ireland Tax Act are summarised as follows:

- In Anon (1803: 1) – The 1799 Great Britain Tax Act constituted a "Tax on Income", whilst the 1803 United Kingdom of Great Britain and Ireland Tax Act was a "Tax on Property and Productive Industry".

- In Anon (1803: 3,5) – The 1803 United Kingdom of Great Britain and Ireland Tax Act acknowledged that four sources of profit existed:

    - landed property: according to Anon (1803: 6) it related to profits arising from land;
    - funded property: in Anon (1803: 19) it is stated that it related to "annuities, dividends, and shares of annuities, payable out of the public revenue";
    - productive income from a profession, trade, or activities of a trading nature; and
    - "[o]ffices held under [g]overnment, and the Public Institutions of the Kingdom".

- Likhovski (2011: 876) – The 1803 United Kingdom of Great Britain and Ireland Tax Act introduced a "scheduler system" according to which the different sources of income were declared in separate income tax returns and assessed by different assessors. Through this measure the taxpayer's total income was kept confidential and the risk that information would be disclosed reduced to a significant degree.

- Anon (1803: 24) – The office of the Commercial Commissioners was abolished in the 1803 United Kingdom of Great Britain and Ireland Tax Act.

- Anon (1803: 24) – The 1803 United Kingdom of Great Britain and Ireland Tax Act provided that additional Commissioners must be appointed where it

was “deemed expedient”, with the purpose of assisting the existing Commissioners to make just assessments. The additional assessors were in the same office as the existing Commissioners and would have the necessary information at their disposal. The 1799 Great Britain Tax Act provided for a separate body of Commissioners of Appeal. In terms of this income tax act, these Commissioners did not have all the necessary information at their disposal. The second income tax act, therefore, ensured that assessments would be just (fair).

Even though the scheduler system was experienced as more confidential than the 1799 Great Britain Tax Act, a tax revolt occurred in 1816. The taxpayers regarded the income tax to be against the British Constitution, which ensured the right to privacy (Seligman, 1914: 110).

The 1803 United Kingdom of Great Britain and Ireland Tax Act constituted an attempt to ensure a more effective tax administration and reduce the risk of tax evasion. The scheduler system was regarded as reasonable on account of its confidential nature. These factors ensured the existence of the 1803 United Kingdom of Great Britain and Ireland Tax Act until 1816, when the perceived unreasonableness of the existence of income tax was the cause of its abolishment.

5.6 Interpretations by the Dutch jurists

In a Roman-Dutch context, the contribution of the Dutch jurists who constituted the interpreters of Roman-Dutch law, provide significant guidelines on its interpretation. The contributions of Dutch jurists are also evident in South African case law. It is therefore important that a discussion of Roman-Dutch law includes the contribution of Dutch jurists. The scope of the present research does not justify a detailed discussion of all Dutch jurists and is limited to a discussion of three prominent Dutch jurists.

Thomas *et al* (2000: 62) submit that the reception of Roman law in Italy (and thereafter in Western Europe) constituted the rebirth of Roman law. In section 5.2 of this chapter this aspect was referred to. Dutch jurists contributed to the reception of

Roman law and its development into Roman-Dutch law. The three Dutch jurists to be considered are Hugo Grotius, Johannes Voet and Cornelis van Bijnkershoek. Thomas *et al* (2000: 77-80) indicate that these jurists contributed significantly to the development of Roman-Dutch law. This section commences with a discussion of the contribution of Hugo Grotius.

5.6.1 Hugo Grotius (1583-1645)

Koopmans and Huussen (2007: 101) indicate that Hugo Grotius (referred to as Grotius) was a theologian and jurist. He was arrested for being part of the Protestant movement, the Remonstrants, a movement in conflict with the orthodox Calvinists. Grotius escaped from imprisonment in a "book chest" to Sweden and France. Grotius contributed significantly to the development of Roman-Dutch law. Dugard (1994: 11) recognises the contribution of Grotius when he refers to Grotius as the "'father of international law'". Thomas *et al* (2000: 78) state that Grotius published a number of works, which included:

- *Inleidinge tot de Hollandsche Rechtsgeleertheid;*
- *De Iure Belli ac Pacis*.

The *Inleidinge tot die Hollandsche Rechtsgeleertheid* constituted a summary of the local law, Roman law, as well as the natural law. Through this publication Grotius achieved the creation of a unified system of law. The publication *De Iure Belli ac Pacis* addressed international law and natural law and represented the basis for Grotius' title as "'father of international law'".

Van der Vyfer (1989: 158) indicates that the natural law doctrine originated in Greek philosophy. In terms of the doctrine certain principles apply naturally and do not require "human intervention" or a "law-creating act". The principles are of a legal and ethical nature. Du Plessis (2002: 406) expands on this and explains that the basis of natural law was either "human reason" or "divine inspiration". It was noteworthy that the sixteenth and seventeenth century application of the natural law doctrine used

"human reason" as basis. Du Plessis states that Grotius favoured "divine inspiration" over "human reason" as basis for the natural law doctrine.

Van der Vyfer (1989: 159) refers to the four principles that Grotius indicated related to natural law:

> One should refrain from taking other people's property, and return that which belongs to someone else to its rightful owner; one should honour one's promises; one should compensate those who have suffered loss on account of one's fault; and punishment among persons is warranted.

Du Plessis (2002: 406) explains that equity was interpreted in two ways during the sixteenth and seventeenth centuries:

- The first method was to compare the concepts *epieikeia* and *aequitas* with one another;
- The second method was to interpret and apply the concepts *epieikeia* and *aequitas* separately from one another in legal practice.

Du Plessis (2002: 402) explains that *epieikeia* represented the Greek equivalent of the Latin concept *aequitas*. In this regard it is important to understand the origin of *aequitas*. Du Plessis (2002: 402) indicates that Greek philosopher Aristotle differentiated between two broad classes of justice:

- Justice firstly has a general meaning.

  This refers to the characteristics of a "good person" which include: "courage, honesty, loyalty and virtues such as sobriety".

- Justice also has a specific meaning.

  Du Plessis indicates that Aristotle in this regard differentiates between two types of justice:

  - distributive justice, which implies that "benefits and burdens" are distributed fairly in a society; and

- corrective justice, which implies that the balance between two parties is corrected or, in the words of Du Plessis, corrective justice "maintains or restores" imbalances.

Ross (1925: 1137[b]) translates from a passage of Aristotle's work, *Nicomachean Ethics*:

> The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice – not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality.

It is proposed that:

- The principles of a good tax system (with justice as an example) constitute measures to ensure that law is in balance.
- Principles fill a void that exists in law.
- Law is not the sole measure to correct an imbalance, which requires a careful consideration of legal principles. In the context of international law Dugard (1994: 13) confirms this when he states that: "(r)ules and principles of law constitute the flesh, blood, organs, and bones of international law".
- Legal interpretation must take account of the context of a matter under consideration. This is confirmed by Aristotle (1925: 1137[b]) through the use of the words: "… what the legislator would have said had he been present, and

would have put into his law if he had known". This also refers to the reasonable man principle.

Du Plessis (2002: 403) continues to explain that St Thomas Aquinas, an Italian philosopher-theologian, expanded on Aristotle's interpretation of justice and states that justice is achieved when a person fulfils a promise.

Taking account of justice as an example of a principle of a good tax system, it is important to understand the Grotius' interpretation of principles. In this regard the publication *De Iure Belli ac Pacis* (English translation: On the Law of War and Peace) is used as illustration. In this publication Grotius determines whether war is just. As the purpose of the present research is to determine whether the application of deeming provisions reflect the principles of a good tax system, it does not include an evaluation of Grotius' interpretation of the justifiability of war. Grotius (1625) provides an English translation of the publication *De Iure Belli ac Pacis*. The following examples indicate the manner in which Grotius interprets principles:

Table 5.2 Grotius and the interpretation of principles (*De Iure Belli ac Pacis*)

Method over outcome	Grotius (1625: 20) holds that the outcome of a matter on occasion benefits "unjust enterprises". The most important consideration is not the outcome but the "fairness of the cause". It can be suggested that the statement requires a person to act reasonably.
Consider law and principles	Grotius (1625: 20) states that a person must have regard "for law, for the right, and for good faith". This indicates that principles and the law have equal value. Grotius (1625: 23) further quotes from the tragedy *Phoenician Maidens* of the tragedian Euripides: Mother, these words, that I have uttered, are not Inwrapped with indirection, but, firmly based On rules of justice and of good, are plain Alike to simple and to wise. Newman (1961: 15) confirms the Greek philosopher Aristotle's statement that the facts and circumstances relevant to a matter must be considered where "equitable justice" is applied to the "rigid rules" of a matter. Hocking (1926: 2) states the following regarding the relationship between principles and law: "the end of law is so bound up with the rest of man's mental and moral universe that to get a fair view of the part, one has no choice but to consider the whole." Newman (1961: 16) expands on the statement of Hocking:

	> The idea of ethical right is always present in lawmaking, and when it is finally unveiled it can be seen as having been present from the first. It comes to light only by degrees, and the history of law is the record of its slow emergence to explicit consciousness. In view of these statements, that the law and principles must, for purposes of interpretation, be considered together, is clear.
Law is just	Grotius (1625: 34) indicates that law is a synonym of just. This statement is also formulated in a negative form: "that being lawful … is not unjust".
"Aptitude" (worthiness) is synonymous with fairness	Grotius (1625: 36) refers to Greek philosopher Aristotle's use of the term "aptitude" as a synonym of worthiness. Grotius (1625: 36) also refers to Michael of Ephesus' use of the same term as a synonym of fairness. Grotius confirms that fairness constitutes something that is "fitting" and "suitable".
Law relates to all virtues	Grotius (1625: 38) confirms that law does not only relate to justice but to all "virtues". When something is found to be right in terms of law, it is just. Thus, law and principles are closely connected. Newman (1961: xv) states that: • society expresses a need for more "universal principles" rather than for more "local rules"; • legal principles (equity is used as an example) and law (or rules) must form part of one system. It is not in the interests of justice that these aspects remain in a "double system of law and equity".
Law is reason	Grotius (1625: 38) states that: > (t)he law of nature is a dictate of right reason, … which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity … Dugard (1994: 11) concludes that the "dictate of right reason" reflects the *ius gentium* system as developed in Roman Law.
Law is flexible	Grotius (1625: xxxiv) indicates that: • When law benefits society it is just. • The society must conform to the interests of the individuals. • Law is subject to the demands of society; thus, the demands of society must be evaluated continuously in view of the fact that they may change over time. It is therefore important that law is flexible to meet the requirements of society. • The society evaluates the law through the application of "right reason". Pound (1938: 30) states that: > (j)ustice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and

	to adjust the relations of every man with his fellows so as to accord with the moral sense of the community.

Source: Own summary

The second Dutch jurist that contributed to the development of Roman-Dutch law is Johannes Voet.

5.6.2 Johannes Voet (1647-1713)

Koopmans and Huussen (2007: 236) and Thomas *et al* (2000: 79) explain that Johannes Voet (referred to as Voet) was appointed as law professor at the universities of Utrecht and Leiden. Voet published a two-volume work, *Commentarius ad Pandectas* (English translation: Commentary on the Pandects), in the period 1698-1704. The publication is a commentary on the Pandects, which formed part of the *Corpus Iuris Civilis* (the codification of Emperor Justinian). The commentary is a significant source of Roman-Dutch law: it is a combination of Roman law, taking the context of Roman-Dutch law into account.

Voet (1880: 1) confirms, in his opening statement of the Commentary, that law and principles are important: "Surveying the origin and growth of mankind, he shows it has never been without rules as to the right and honest, neither in primitive ages, nor in more corrupt times".

Domanski (2013: 253) refers to the publication, *The Selective Voet being the Commentary on the Pandects*, the 1955 translation of Judge Percival Gane. The following passage constitutes the 1955 translation of the opening statement:

> …in no place, and in no time, did it exist without laws regulating the right and the honourable (*bonum et aequum*) … there remained in the hearts of men some remnants of an imprinted, inborn divinity: some rules of justice and equity, divinely engraved and inborn: dictating unto each one what was lawful and what was unlawful, what to do, and what to avoid.

These versions confirm that:

- the term "honest" is synonymous with the term "honourable" and Berger (1953: 377) defines "*bonum et aequum*" (the Latin translation for "honourable" as "(r)ight and equitable, fair (ness) and just (ice)";
- the phrase "laws regulating the right and the honourable" suggests that the law and principles are closely connected; and
- principles originated with law, developed alongside law, and still remain relevant.

The publication indicates that Voet (1880) interprets law and principles in the following manner:

Table 5.3 Voet and the interpretation of principles (*Commentarius ad Pandectas*)

Principles are the foundation	Voet (1880: 1) concludes that principles constitute the foundation of "(j)udgments, exceptions" and "restitutions".
Need for principles	Voet (1880: 2) indicates that there is a need for principles not "strict law". This will apply where there is a void in law.
Interpretation requires principles	Voet (1880: 2) requires judicial officers to: "follow equity in construing the written law, and not be bound too strictly by its words in opposition to its sense …" Domanski (2013: 258) confirms that the law requires that a person follows its "force and power" not "its words". This indicates that the context of a matter must be taken into account. Justice and equity, as principles, are closely linked to natural law. Voet (1880: 10) holds that law in general, as well as written law, require the application of principles. Principles assist the law to identify situations where the law must be changed to address inequities identified.
Law is flexible	Voet (1880: 2) confirms the interpretation of Grotius to the effect that law must take heed of the needs of society. Voet states that justice constitutes an important consideration where the law is concerned. Stevenson and Soanes (2010: 374265) define "justice" as "the quality of being fair and reasonable". Voet (1880: 2) states that justice constitutes a "constant and perpetual desire" and that justice does not: • constitute perfection and does not require continuance; • change when law changes. Voet considers that law is: "the mantle of Justice. The mantle does not change the man; so with Justice. The true man is ever constant to the law as it stands."

Justice is either *expletrix* or *attributrix*	Voet (1880: 2) holds that: • *Expletrix* justice constitutes justice to which a person is bound by virtue of equity and natural reason. Law *can* enforce *expletrix* justice. The right of ownership falls within the ambit of *expletrix* justice. [emphasis added] • *Attributrix* justice constitutes justice to which a person is bound by virtue of equity and natural reason. Law *cannot* enforce *attributrix* justice. Charity projects of wealthy individuals fall within the ambit of *attibutrix* justice. [emphasis added]
Principles: a standard of living	Voet (1880: 3) indicates that principles (with justice as an example) constitute a standard of living and apply to everyone, including judicial officers.
Principles and law are closely related	Voet (1880: 9) explains that it is important to distinguish between "'just'" and "'unjust'" and between "'lawful'" and "'unlawful'". It is also stated that "'good'" and "'just'" are closely related. This means that law and principles are closely related. Voet (1880: 9) states that law: is certainly the art of what is good and just, its priests profess a knowledge of what is good and just, our judges decide from what is good and just, adjudicate, assess, and interpret according to it …
Principles are the purpose of law	Voet (1880: 12) confirms that justice (as a principle) constitutes the purpose of law. The aim of Jurisprudence is justice, the most perfect of all the virtues, and as it were their joiner together: it is rightly defined as "the constant and perpetual desire to render unto everyone his own".
Law is reason	Voet (1880: 15) confirms that: natural law … is nothing else than what natural reason dictates to those who have real understanding, and that without any previous effort of the mind, but which they assent to as just, as matters of necessary and evident consequence, without any prolix argumentation or intervening difficulty of conclusion. Provided that the subject of this natural reason is a man of intelligence, using his reason, having … a right reason dwelling in his mind, which reason he has in common with his God.

Source: Own summary

The remaining jurist who will be discussed in this thesis is Cornelis van Bijnkershoek.

5.6.3 Cornelis van Bijnkershoek (1673-1743

Koopmans and Huussen (2007: 23) indicate that Cornelis van Bijnkershoek (referred to as van Bijnkershoek) was a Dutch jurist whose contributions relate to civil law and international law. Landheer (1946: 586) explains that van Bijnkershoek regarded "good faith" as a significant factor and that its weight exceeded the importance of the enforceability of law. Dugard (1994: 12) confirms that the publications of van Bijnkershoek indicate that consent constituted the foundation of international law.

According to Phillipson (1908: 28) the publications of van Bijnkershoek reveal that an interpreter must take the following into account for purposes of interpretation:

- complicated scenarios must be accurately analysed;
- the focus must remain on clarity of explanations;
- in matters where conflict exists the interpreter must exercise impartiality;
- principles (in this context Phillipson refers to fairness and justness) must be applied;
- "historical and legal allusions" substantiate the legal opinion of an interpreter. In this regard the interpreter must take heed that the references to these allusions do not overshadow the interpretation. The interpretation must therefore not constitute mere duplicates of existing authority. Interpretation requires an element of ingenuity;
- interpretation does not constitute "metaphysical ingenuity", but to the contrary, requires the interpreter to apply "reason and common sense" and reveals a deep understanding of the context of a matter; and
- the interpreter must follow a "middle course", consisting of "actual practice", supplemented by reason and the facts and circumstances relating to the matter. Phillipson (1908: 29) states that, for an interpreter: "general utility is his determining principle, and the positive method his constant guide, the application of which is marked by a sound judgment, an active intellect, and wide learning."

The following aspects, as discussed by Phillipson (1908), are unique to the publications of van Bijnkershoek:

Table 5.4 Van Bijnkershoek and the interpretation of principles

Take heed of society	Phillipson (1908: 32) indicates that van Bijnkershoek regarded the "express or implied" "will of nations" to constitute the overall factor, not a mere interpretation of theory. This confirms that the context of a matter must be taken into account. Society changes over time and law must be flexible in order to accommodate change.
Consent is express	Phillipson (1908: 32) states that consent must be given expressly. Consent must not be implied. This is an important statement and reflects the presence of principles, which include reasonableness and fairness. Express consent is especially of a significant nature where consent will affect the rights of a person materially.
Reason is important	Phillipson (1908: 32) confirms the opinions of Voet and Grotius when he states that: "(t)he rules laid down by our laws and treaties are not alone sufficient to establish the law of nations; in order to be just and valid they must be consonant with reason." This statement confirms that principles, reason, and the law must be applied consistently. Van Bijnkershoek also recognised that reason does not constitute an exclusive factor. Westlake (1982: 67) furnishes an English translation of a Latin phrase of van Bijnkershoek which is included in the publication *Quaestiones Juris Publici*: > In the law of nations no human authority can prevail against reason, but where reason is doubtful, as is often the case, that law must be judged of by nearly constant practice (*ex perpetuo fere usu*).
Roman law is important but…	Phillipson (1908: 33) explains that: > the Roman law, though the most admirable system of ancient jurisprudence, has been too much resorted to for the extraction of analogies; old codes, no matter how systematically and with what *elegantia* they have been constructed, do not necessarily fit new times and circumstances. The consent of modern States is far more important than the decisions enshrined in the Digest. Modern practice displaces ancient decrees. This extract confirms the importance of context. Roman-Dutch law constitutes a combination of Roman law as amended by Dutch local law and custom. The statement reflects practice. Roman law constituted the roots of Roman-Dutch law and, in order to understand the origin of Roman-Dutch law, an in-depth understanding of Roman law is required. The following statement of Sherman (1917: 11) confirms this requirement: "*Ex nihilo nihil fit* … 'Something does not come from nothing'."

Source: Own summary

5.7 Legal principles of interpretation: the *contra fiscum* rule and *ubuntu*

The *contra fiscum* rule and the Constitutional value of *ubuntu* are important legal principles discussed in this chapter.

Goldswain (2008: 115) indicates that Roman-Dutch writers applied the purposive approach to interpretation; this approach included the principle of equity. In Chapter 4 of this research the *Corpus Iuris Civilis* was discussed. The following statement is made in *Digesta* 49.14.10 (Watson, 1998: 392, Volume 4): "I do not think that a person who in debatable questions heedlessly gives replies against the interests of the imperial treasury commits an offense." In *Gabriel v Rex* [1938] EDL 346 at 350, the court states that "when there is a doubt the decision must go against the Treasury (*Digest* 49.14.10)." It is submitted that the statement in *Digesta* 49.14.10 represents the *contra fiscum* rule (or maxim). Goldswain (2008: 115) indicates that the *contra fiscum* rule relates to the principle of equity. Haupt (2019: 11) remarks that the *contra fiscum* rule means that "when in doubt (*dubio*), interpret the law in favour of the taxpayer where possible. In other words, give the benefit of the doubt to the taxpayer."

5.7.1 The contra fiscum rule and a good tax system

This research discusses the principles of equity, efficiency and transparency, and certainty. Moosa (2018b: 77) remarks that "the contra fiscum rule gives effect to the principle of equity or fairness, and minimises, as far as is reasonably possible, the degree to which an affected taxpayer is impacted by a particular taxing provision." This remark is substantiated by the following statement in *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* [1983] 45 SATC 241, at 267, where the Appellate Division states

> there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and from the point of view of the *fiscus*. And it may be fairly inferred that such a result is in conformity with the intention of the Legislature.

The Davis Tax Committee (2016: 14) observes that the principles of transparency and certainty relate to certainty in the manner in which taxes are collected and the tax liabilities are calculated. The relevant tax rules and procedures must be transparent and applied consistently. Tax can only be imposed by the "clear wording" of an empowering provision in a tax act (Moosa, 2018b: 73). Tax legislation must therefore be drafted in a manner that enhances certainty. It is suggested that the elements of transparency and consistency are closely related to certainty since ambiguities in tax legislation will have an impact on its application. The purpose of the *contra fiscum* rule is to address ambiguities in tax legislation. Taking this into account, the *contra fiscum* rule is relevant in a good tax system.

Although the *contra fiscum* rule is a Roman principle and applied by Roman-Dutch jurists (for example, Simon Groenewegen, Johannes Voet and Ulrik Huber), it is also applicable in South African case law. In view of this, it is submitted that the *contra fiscum* rule is relevant from a South African perspective.

5.7.2 The contra fiscum rule and case law

The following case law has dealt with the *contra fiscum* rule:

a. Estate Reynolds and Others v Commissioner for Inland Revenue [1936] 8 SATC 203

In *Estate Reynolds and Others v Commissioner for Inland Revenue*, at 213, the Appellate Division observes that it is "bound" to apply the *contra fiscum* rule where doubt exists in the interpretation of a taxing act. This is in agreement with the Appellate Division case of *Borcherds, N.O. v Rhodesia Chrome & Asbestos Co. Ltd.* 1930 AD 112, where it was stated (at 119) that "(i)n a case of doubt a court of law *would* have to construe such an Ordinance against the larger imposition." [emphasis added]. The Appellate Division confirms this approach of *Borcherds, N.O. v Rhodesia Chrome & Asbestos Co. Ltd.* in *Israelsohn v Commissioner for Inland Revenue* [1952] 18 SATC 247, at 258. Van Wyk (1976: 455) observes that the South African courts (with *Estate Reynolds and Others v Commissioner for Inland Revenue* indicated as an example) have applied the *contra fiscum* rule where

the interpretation of legislation levying taxes and legislation imposing fines are concerned. According to Van Wyk (1976: 455), the Roman-Dutch jurists accepted the *contra fiscum* rule but did not apply it to legislation levying taxes. Clegg (2020: § 2.3) and De Koker and Williams (2020: § 25.1A), two of a number of authors, confirm this link between tax legislation and the *contra fiscum* rule.

b. Badenhorst & Others v Commissioner for Inland Revenue [1955] 20 SATC 39

According to the Appellate Division in *Badenhorst & Others v Commissioner for Inland Revenue*:

- "Hardship" and "inequity" cannot be used in such a manner that the meaning of the "plain terms" of the fiscal legislation is altered.
- The court interprets fiscal legislation *contra fiscum* where there is ambiguity present in fiscal legislation. This approach does not require the "considerations of inequity".
- "Taxes are burdens and what the Court will not do is to set out to construe a taxing statute so as not to impose a burden, by a process of allowing considerations of equity to create a supposed ambiguity where none otherwise exists".

c. Park Geboubeleggings en Wynkelders, Bpk. v Stadsraad van Vanderbijlpark, 1965 (1) SA 849 (T)

The Transvaal Provincial Division in *Park Geboubeleggings en Wynkelders, Bpk. v Stadsraad van Vanderbijlpark*, at 851, states that the *contra fiscum* rule does not only apply to direct taxation (which includes income tax). "The principle is one that is to be applied to all legislation that seeks to impose burdens." The court further states (on the basis of Voet 18.1.27) that

> (t)he author of an ambiguous agreement has only himself to blame for not having expressed himself more distinctly and therefore in case of ambiguity the construction must be against him … It should not be beyond the wit of those responsible to devise language which will be comprehensible both to those who have to administer the tariff and those who are consumers.

d. *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* [1975] 4 All SA 620 (A)

In *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue*, the Appellate Division (at 626) remarks that the *contra fiscum* rule represents a "specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of ambiguity, be construed in favour of the subject". The Appellate Division finds that the interpretation of fiscal legislation does not, other than the application of the *contra fiscum* rule, differ from the interpretation of other legislation. The Appellate Division confirms, with reference to *Delfos v Commissioner for Inland Revenue* 1933 AD 242, that "even in the interpretation of fiscal legislation the true intention of the Legislature is of paramount importance, and … decisive". According to Clegg (2020: § 2.3), the general rule to which the court refers is found in *Digesta* 50.17.56: "…'*semper in dubiis benigniora praeferenda sunt*' (where there is doubt the more lenient interpretation must always be preferred)."

e. *Commissioner of Taxes v Ferera* [1976] 38 SATC 66

In *Commissioner of Taxes v Ferera*, at 71, the court states that, in matters where an anti-avoidance provision is interpreted,

> so far as the language permits and without stretching it … to ensure that the legislature's intention to suppress the mischief succeeds and to this end suppress 'subtle inventions and evasions for the continuance of the mischief' and 'add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*'. Clearly the courts must not, by their interpretation of the provisions of the section, deprive them of their efficacy.

Legwaila and Ngwenya (2013: 1073) interpret the decision of *Commissioner of Taxes v Ferera* (referred to in the article as "*Commissioner for Taxes v Ferreira* (1976 2 SA 653 (RAD) 657") to mean that a "wide interpretation" must be applied where an anti-avoidance provision is concerned to give effect to the intention of the legislature. Legwaila and Ngwenya (2013: 1073) conclude that the *contra fiscum* rule does not apply where an anti-avoidance provision is interpreted.

f. Shell's Annandale Farm (Pty) Ltd v Commissioner for South African Revenue Service [1999] 62 SATC 97

According to the Cape of Good Hope Provincial Division in *Shell's Annandale Farm (Pty) Ltd v Commissioner for South African Revenue Service*, at 108, the *contra fiscum* rule can only be applied to a statutory provision where:

- there is an ambiguity in relation to the intention of the Legislature. In this regard, Meyerowitz (1995: 87) observes that the *contra fiscum* rule can only be applied where the statutory provision concerned reveals an ambiguity with reference to the intention of legislature.
- The "ambiguity … is neither contrived nor artificial and which follows a reasonable reading of the text."

Goldswain (2008: 116) remarks that the interpretation of the Cape of Good Hope Provincial Division expands the *contra fiscum* rule to relate not only to matters where there is an ambiguity in the wording of the statutory provision but also to matters where there is an ambiguity in the intention of the legislature. Moosa (2018: 79) remarks that parliament's intention is no longer relevant in the application of the *contra fiscum* rule. This remark is based on *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262, at 274[20], where the Supreme Court of Appeal states that the expressions "the intention of the legislature or the draftsmen" and also "the intention of the contracting parties" are "misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the Legislature or the contracting parties … [T]he enquiry is restricted to ascertaining the meaning of the language of the provision itself."

g. NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue [2000] 62 SATC 301

In *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue*, the Supreme Court of Appeal states (at 308) that where the uncertainty present in a statutory provision can be decided "by an examination of the language used in its context", the relevant provision must be interpreted in this manner. The *contra fiscum* rule

cannot be applied "merely because that construction would be less onerous on the subject".

h. *Marshall NO and Others v Commissioner for South African Revenue Service* [2018] 80 SATC 400

In *Marshall NO and Others v Commissioner for South African Revenue Service*, at 404[6],[7], the Constitutional Court of South Africa confirms, with reference to the South African Revenue Service Interpretation Notes, that "evidence of the interpretive practice need not necessarily conflict with the *contra fiscum* rule". The Constitutional Court uses the following dictum of *Commissioner for South African Revenue Service v Bosch and Another* [2014] 77 SATC 61, at 73[17], as basis

> There is authority that, in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it may be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted that … fortifies the taxpayers' contentions.

i. *Telkom SA SOC Limited v Commissioner for the South African Revenue Service* [2020] 2 All SA 763 (SCA)

The Supreme Court of Appeal, in *Telkom SA SOC Limited v Commissioner for the South African Revenue Service*, indicates (at 771[20]) that the *contra fiscum* rule can only be applied "after an interpretational analysis results in an irresoluble [sic] ambiguity as to the meaning of the particular provision in the fiscal statute." According to this statement, it is submitted that the first step is to analyse the provision concerned. Where an ambiguity exists, the next step is only then to apply

the *contra fiscum* rule. The Supreme Court of Appeal in *Telkom SA SOC Limited v Commissioner for the South African Revenue Service,* finds, at 778[37]), that there is no ambiguity applicable and the *contra fiscum* rule is not applicable.

5.7.3 The Constitutional value of ubuntu

In a South African context, the spirit and values of *ubuntu*, long practised among African people, have gained wide acceptance. In the following table the aspects related to *ubuntu* are illustrated:

Table 5.5 The philosophy of *ubuntu*:

Not easily definable	Mokgoro (1998: 2) observes that (t)he concept *ubuntu*, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach … defy the very essence of the African world-view and can also be particularly elusive. Bennett (2011: 30) observes that "(t)he most obvious translations [of *ubuntu*] were the calques … humanity … personhood … or … humaneness". Bennett (2011: 30) clarifies that the word "calque or translation implies that the meaning is borrowed rather than the foreign word itself".
It addresses a need in society	According to the postamble to the Constitution of the Republic of South Africa, 1993, "(t)here is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation."
An individual but part of a community	In *S v Makwanyane* 1995 (6) BCLR 665 (CC), at 751[224], the Constitutional Court observes that *ubuntu* is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. According to Mokgoro (1998: 3) the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings.

A commitment to restore justice	The Truth and Reconciliation Commission (1998: 126) reports that *ubuntu* represents "a commitment that included the strengthening of the restorative dimensions of justice." According to the Truth and Reconciliation Commission (1998: 126), restorative justice has the following objectives: • Redefines crime: Crime is regarded as "violations against human beings, as injury or wrong done to another person." According to the Constitutional Court, in *S v Makwanyane*, at 752[225], > The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*. • Focuses on reparation: the process is aimed at the restoration and healing of the victims, the offenders, the families of the victims and of the offenders and the community in general. • Encourages the direct involvement of the victims, offenders and the community to resolve conflict. The government and legal professionals are involved as facilitators. • Focuses on "offender accountability, full participation of both the victims and offenders and making good or putting right what is wrong."
It represents a value system	According to the Truth and Reconciliation Commission (1998: 127), "[*u*]*buntu*, generally translated as 'humaneness', expresses itself metaphorically in *umuntu ngumuntu ngabantu* – 'people are people through other people'. [emphasis in the original]. In *S v Makwanyane*, at 771[308], the Constitutional Court observes that *umuntu ngumuntu ngabantu* emphasises the > significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

Source: Own summary

The Constitution does not refer directly to *ubuntu*. In section 39, guidelines are formulated for the interpretation of the fundamental rights forming part of the Constitution:

1. When interpreting the Bill of Rights, a court, tribunal or forum -

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
b. must consider international law; and
c. may consider foreign law.

2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Mokgoro (1998: 9) remarks that

> (s)ection 39(2) of the Constitution provides that in the interpretation of the Bill of Rights or any legislation, courts have a specific injunction to develop indigenous law taking into account the spirit, purport and object of the Bill of Rights. Since the values of the Constitution and at least the key values of *ubuntu(-ism)* do seem to converge, indigenous law may need to be aligned with these converging values. It is however, not only the system of indigenous law which needs this re-alignment. South African law as a whole is constantly placed under the scrutiny of the constitution. The values of *ubuntu* can therefore provide it with the necessary *indigenous impetus*. [emphasis in the original]

This confirms the connection between *ubuntu* and the Constitution. The Constitution has an impact on the interpretation of tax legislation. Moosa (2018b: 71) states that the value of *ubuntu* can be applied to ambiguous tax legislation. *Ubuntu* "favours a finding that the provision is not to be interpreted contra fiscum, but rather against the taxpayer who must then pay the greater amount of tax permissible under the taxing provision, unless the taxpayer can show compelling reasons why a construction contra fiscum" must be applied. Moosa (2018b: 89) remarks that taxpayers must comply with their tax obligations and government is required to effectively administer tax in order to ensure that government is "functionally stable or financially able to fulfil its constitutional mandate." Moosa (2018b: 89) links ambiguous fiscal legislation with

the use of the *contra fiscum* rule to pay the "least permissible amount of tax". According to the suggested approach of Moosa (2018b: 89), *ubuntu* will ensure that the "transformative objects" of the Bill of Rights (in the Constitution) will be achieved through requiring the taxpayer to pay "for the communal benefit, the highest permissible amount of tax under the ambiguous provision."

5.7.3.1 The relevance of *ubuntu* to the discussion of the principles of a good tax system

The discussion in the previous paragraph indicates that *ubuntu* relates to the principle of equity since it addresses the requirement that "(a)ll residents must contribute to the fiscus in proportion to their ability to do so" (Davis Tax Committee, 2016: 14). This is substantiated by the statement of Moosa (2018b: 89) that taxpayers must pay the "highest permissible amount of tax". *Ubuntu* further relates to the principle of efficiency in view of the fact that government must be "functionally stable or financially able to fulfil its constitutional mandate" (Moosa, 2018b: 89). The principle of efficiency requires "sufficient income for the state, with minimum distortions to the economy" (Davis Tax Committee, 2016: 14). *Ubuntu* lastly relates to the principle of transparency and certainty in view of the fact that it is consistent with section 39(2) of the Constitution, which requires that "(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." The principles of transparency and certainty require certainty relating to the collection and calculation of tax, as well as the consistent application of tax rules and procedures.

5.7.3.2 *Ubuntu* and case law

The following case law has dealt with the principle of *ubuntu*:

a. *S v Makwanyane* 1995 (6) BCLR 665 (CC)

According to the Constitutional Court in *S v Makwanyane*, at 672,

> *Ubuntu* translated into humaneness, personhood and morality. It enveloped the key values of group solidarity, compassion, respect, human dignity and collective unity. It embraced respect and value for life in the concept of humanity, and gave meaning and texture to the principles of a society based on freedom and equality … The [Interim] Constitution committed the State to base the worth of human beings on the values espoused by open democratic societies the world over.

Goldswain (2011: 6) remarks that the term *ubuntu* is incorporated in the Constitution through the words "spirit, purport and objective of the Constitution".

In *S v Makwanyane*, at 785[364], the Constitutional Court further states that "(t)he secure and progressive development of our legal system demands that it draw the best from all the streams of justice in our country … Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice."

b. *Carmichele v Minister of Safety and Security Another* 2001 (10) BCLR 995 (CC)

According to the Constitutional Court in *Carmichele v Minister of Safety and Security Another*, at 1013[54], "the influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."

c. *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC)

In *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court indicates, at 1288[37], that

> (t)he spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

According to Davis and Klare (2010: 411), section 39(2) of the Constitution represents a mandate "to re-imagine all law in the spirit of ubuntu.".

d. *Beadica 231 CC and others v Trustees for the Time Being of the Oregon Trust and others* 2020 (9) BCLR 1098 (CC)

In *Beadica 231 CC and others v Trustees for the Time Being of the Oregon Trust and others*, the Constitutional Court states, at 1126[72], that "(i)t is clear that public policy imports values of fairness, reasonableness and justice. *Ubuntu*, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy."

In the tax field, case law could not be identified where *ubuntu* was applied, although Himonga, Taylor and Pope (2013: 374) remark "*ubuntu* can be applied to virtually any area of law". If the interpretation of Goldswain (2011: 6) that *ubuntu* is represented by the phrase "spirit, purport and objective of the Constitution" is accepted, this would mean that the South African courts possibly have implicitly taken *ubuntu* into account in their decisions, although it was not specifically referred to in case law relating to matters of taxation. Himonga *et al* (2013: 385) indicate that *ubuntu* is a complex concept with "lengthy lists of values … which … may … be unhelpful in providing the concept with an adequately precise legal valence." The interpretation of Moosa (2018b: 89) is very different to the approach in terms of the *contra fiscum* rule. The criticism against the application of *ubuntu* includes the possibility that there is no sufficient proof that "*ubuntu* is entirely compatible with the Bill of Rights" (Himonga *et al*, 2013: 416). Moosa (2018b: 89) has to an extent discussed the compatibility between *ubuntu* and the Bill of Rights (through section 39(2) of the Constitution). The application of *ubuntu* in the tax field is still to be determined in the South African courts.

5.8 Conclusion

The South African legal system has a hybrid nature. In this chapter the focus was firstly on Roman-Dutch law and its impact on South African law. English law also

had an impact on South African law, and this impact was illustrated through the 1799 Great Britain Tax Act and the 1803 United Kingdom of Great Britain and Ireland Tax Act.

Roman-Dutch law is relevant in South Africa. Firstly, Roman-Dutch law forms part of the legal system. Secondly, principles originating from Roman law and applied in Roman-Dutch law form part of the rule of law. The *contra fiscum* rule is one of the principles forming part of the South African legal system. Development of law is ongoing and the values of *ubuntu* form part of the Constitution. It was indicated that *ubuntu* represents a principle that focuses on the individual forming part of a community.

This chapter indicated that the 1799 Great Britain Tax Act was the first tax act in Great Britain. The 1803 United Kingdom of Great Britain and Ireland Tax Act (the United Kingdom of Great Britain and Ireland was the successor in title of Great Britain) was important. Not only was it the second tax act, it was also the basis of the 1842 United Kingdom of Great Britain and Ireland Tax Act. It was indicated in the chapter that the occupation of Britain in the Cape Colony had an impact on South Africa. In view of this occupation, the 1799 Great Britain Tax Act is relevant legislation from a South African perspective, and the tax legislation of Great Britain / United Kingdom of Great Britain and Ireland influenced South African tax law.

The first sub-goal of the present research was to acquire an understanding of the origins and importance of deeming provisions in legislation and the principles of a good tax system, being equity, efficiency and transparency, and certainty. These principles were discussed from a South African perspective. In Chapter 4 the first sub-goal was considered in a Roman law context.

The origins of Roman-Dutch law

Roman law constituted a significant period in the development of law. The economic fall of the Roman Empire did not have a lasting effect on Roman law. Roman law developed into Roman-Dutch law, and this chapter continued with a discussion of the first sub-goal, but from a Roman-Dutch law context. Thomas *et al* (2000: 51) show

that Roman law experienced a "second life" after the fall of the Roman Empire. This chapter explains how Roman law was reborn and developed into a new form: Roman-Dutch law. The term "Roman-Dutch law" suggests that it constitutes a combination of Roman law and Dutch law. This confirms that Roman-Dutch law has a unique nature – it constitutes something old (Roman law) and something new (Dutch law).

The importance of deeming provisions and the legal principles in a Roman-Dutch law context

The Roman law maxims, *plus valet quod agitur quam quod simulate concipitur* and *fraus legis*, were discussed in Chapter 4. These maxims are considered to be deeming provisions. The maxims also apply in Roman-Dutch law. Chapter 4 was important in other respects, however, and particularly the application of legal principles applying to the interpretation of legislation. The importance of these principles in a Roman-Dutch law context is illustrated in the writings of the Dutch jurists, as well as the relationship between legal interpretation and the relevant principles. In view of the fact that the Dutch jurists applied the principles, the writings of three of these jurists were discussed: Hugo Grotius, Johannes Voet and Cornelis van Bijnkershoek.

The impact of Dutch jurists on the development of Roman-Dutch law

Dutch jurists formed a significant link in the development of Roman-Dutch law. The individual contributions of the jurists reflect in their publications and the many academic publications to date. As an "entity" the Dutch jurists confirm that:

- Law requires the application of principles to operate effectively and efficiently.
- Principles form part of the daily existence of society.
- Law must be flexible to ensure that it addresses the needs of society and, in this regard, principles constitute important guidelines.
- Law must not be interpreted in a vacuum but must take the context of a matter into account.
- In matters where there is a void in law, the void does not necessarily have to be filled with more law. Principles are important considerations in this regard.

This is an important aspect in the context of the present research. There must always be a balance between law and principles. In matters where there is an imbalance, it has a negative impact on society.

- The purpose of law is justice. Justice, it has been found, constitutes a principle. In effect, the jurists established the following: law equates to principles. This confirms that there is a close connection between law and principles.

The relationship between legal interpretation and principles

The chapter confirms that Roman-Dutch sources recognised the importance of legal interpretation. Legal interpretation is therefore not an invention of modern law; it was already in existence in the middle ages. The chapter briefly referred to the interpretation of law. In Chapter 7 the methods of interpretation are discussed in more detail. This chapter therefore represents only an introduction to legal interpretation. In the context of this chapter it can be concluded that interpretation represents an important measure to ensure that there is a balance between principles and law. It is also important to acknowledge that interpretation is part of law and principles of a good tax system.

The next chapter discusses the principles of a good tax system as formulated by Adam Smith (1776) and their further development, from a South African case law perspective.

CHAPTER 6

THE PRINCIPLES OF A GOOD TAX SYSTEM

This sense of fictions being an instrument via which, incrementally, the law gropes its way towards a principle is important.

- Del Mar (2013: 450)

6.1 Introduction

The principles of a good tax system discussed in this research form part of the canons of a good tax system as formulated by Adam Smith (1776) and expanded on by the Davis Tax Committee (2014). Although Adam Smith's canons of taxation are universally acknowledged, as early as in Roman law times, certain of these principles were established and formed part of that legal system. Based on these principles as subsequently developed for the modern context, equity, certainty and transparency, and efficiency are adopted for the purpose of this research.

In this chapter, Roman law and the relevant Roman law principles are first discussed. The chapter then analyses the principles of a good tax system as formulated by Adam Smith (1776) and adapted in modern systems. Finally, the principles recognised in the Constitution are discussed, together with the related case law.

6.2 Roman law principles

This section deals with the principles of equity, transparency and certainty, and efficiency, from the perspective of Roman law.

6.2.1 Transparency and certainty

According to the Davis Tax Committee (2014: 13) this principle requires certainty about the manner of tax collection and the calculation of tax liabilities. Transparency and consistency is required where tax rules and procedures are concerned.

In Roman law Macdonnel (1850: 287) translates the legal maxim *ubi jus incertum ibi jus nullum* as "(w)here the law is uncertain, there is no law … No legal decision can properly be made on vague and undefined enactment." The original author of the maxim could not be identified. *Seneca Epistulae*, 94, 38 provides *"Legem enim brevem esse oportet, quo facilius ab imperitis teneatur"* (Gummere, 1925: 36). Gummere (1925: 37) translates this as: "For a law should be brief, in order that the uninitiated may grasp it all the more easily." It is submitted that a brief law is not necessarily an understandable law. Some legislation requires more detail in order to understand the purpose, meaning and application.

According to Lötscher (2005: 131) "incomprehensibility implies inequality … [c]omprehensibility … can contribute to the acceptance of laws: only a law that can be understood by the average citizen is perceived to be a fair law". The reference to "fair law" by Lötscher (2005) relates to the following publication: Kindermann, H. 1986. Gesetzessprache und Akzeptanz der Norm, in Öhlinger (ed.), Recht und Sprache (Wien, Manz), pp.53-68. *Codex* 1.14.9, *Corpus Iuris Civilis (*Frier *et al* (2016: 262) provides:

> Leges sacratissimae, quae constringunt omnium vitas, intellegi ab omnibus debent, ut universi praescripto earum manifestius cognito vel inhibita declinent vel permissa sectentur, si quid vero in isdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri duritiamque legum nostrae humanitati incongruam emendari.

Frier *et al* (2016: 263) translate this as:

> The most sacred laws that bind the lives of all must be understood by all, so that by more clearly recognizing their precepts everyone may either avoid what is prohibited or follow what is permitted. If, though, something prescribed in these laws is perhaps obscure, it should be clarified by the interpretation of the Emperor, and any harshness of the laws inconsistent with Our Compassion should be corrected.

The Digesta 34.5.21(22).1 also includes the following statement: Effect is given to a contract entered into in good faith. Effect is not given to provisions that are contrary to law (Watson, 1998: 175, Volume 3).

6.2.2 Equity

According to the Davis Tax Committee (2014: 13), this principle requires that the contributions of taxpayers to the *fiscus* must be proportionate to their ability to pay. The principle includes both vertical and horizontal equity.

***Digesta* 50.17.90** (Watson, 1998: 476, Volume 4) provides that "in every context but particularly in the law, equity must be considered."

The following is stated in ***Digesta* 50.15.5** with reference to taxation:

> If in order to expedite the affair a single owner is prosecuted under the law of taxation, the man who is prosecuted is allowed by the imperial treasury actions against the others whose estates are equally liable, of course, so that all may contribute the tax money according to the size of their estates. Nor are the actions allowed to no purpose, although the imperial treasury has recovered its money, since the sum is regarded as received from the debts of sellers.

The *Digesta* also includes the following statements:

- ***Digesta* 4.1.7.1**: Reason and equity require that when a person is defrauded by another person, assistance must be given to the defrauded person (Watson, 1998: 113, Volume 1).
- ***Digesta* 1.3.25**: The interpretation of law that is favourable to the interests of a person cannot be interpreted against the interests of the person (Watson, 1998: 13, Volume 1).
- ***Digesta* 9.4.30**: Where a person to an action is absent in good faith, the person is afforded, on principles of reasonableness and equity, the opportunity to lodge a defence (Watson, 1998: 303, Volume 1). This illustrates the natural justice principle of *audi alteram partem*. Riley (1891: 31) explains that the principle requires you to take into account the statements of all parties to a matter before making a decision.

- ***Digesta* 50.17.183**: Established principles must be changed where equity demands (Watson, 1998: 482, Volume 4).
- ***Digesta* 41.1.9.3**: When effect is given to the wishes of a person, it illustrates practically the principle of equity (Watson, 1998: 4, Volume 4).
- ***Digesta* 16.3.31**: Parties to a contract must act in good faith towards one another "in the highest degree" (Watson, 1998: 19, Volume 2). In terms of the principle of equity, good faith requires that the interests of all parties who are affected by a contract must be taken into account (Watson, 1998: 20, Volume 2).
- ***Digesta* 16.3.32**: A person is not acting in good faith where the person takes less care with reference to the affairs of someone else than he would with his own affairs (Watson, 1998: 20, Volume 2).
- ***Digesta* 47.10.1**: When a judgment is unfair or unjust there is no justice and the judgment is unlawful (Watson, 1998: 285, Volume 4).

6.2.3 Efficiency

According to the Davis Tax Committee (2014: 13) this principle requires that the tax system must provide revenue for the government whilst also ensuring that it does not have a negative impact on the economy (tax neutrality).

***Digesta* 50.15** (Watson, 1998: 445, Volume 4) is dedicated to taxation ("censuses"). The following have been identified as examples that could illustrate the nature of efficiency:

***Digesta* 50.15.3** and ***Digesta* 50.15.4** (Watson, 1998: 446, Volume 4) indicate, among others, as follows:

- The ages from when women and men were liable for tax (***Digesta* 50.15.3**).
- The ages from when women and men were exempted from tax (***Digesta* 50.15.3**).
- Poll-tax (***Digesta* 50.15.3**) and land tax (***Digesta* 50.15.4**) were important forms of tax.
- Land tax was based on the location (territory) of the land (***Digesta* 50.15.4**).
- In certain cases, exemption from land tax was granted where there was damage to crop (***Digesta* 50.15.4.1**).

The Digesta includes the following statements:

- ***Digesta* 49.14.5:** In matters where the imperial treasury acquires property; the fiscal procurator is required to act in an honest and careful manner. The price of the property must be fair and in accordance with market value (Watson, 1998: 391, Volume 4).
- ***Digesta* 39.4.1:** Where a tax farmer or his familia has, in the capacity as representative of the government, illegally taken possession of funds and did not return the funds, judgment was granted against the tax farmer for double the relevant amount (Watson, 1998: 403, Volume 3). The concept "familia", in the context of the paragraph, included not only family but also parties related to the tax farmer. This provision therefore constituted a penalty provision. The nature and the impact of the penalty illustrate the gravity of the actions of the tax farmer in view of the fiduciary capacity of the tax farmer.

6.3 The principles of a good tax system

Adam Smith (1776) formulated four principles of a good tax system. These principles have been expanded on over time in a modern context and are still relevant as guidelines for a good tax system.

It is submitted that the principle of justice is the foundation for the legal principles applying to the interpretation of legislation and the principles of a good tax system. Du Plessis (2002: 402) indicates that Greek philosopher Aristotle differentiated between two broad classes of justice:

- Justice firstly has a general meaning. This refers to the characteristics of a "good person" which include: "courage, honesty, loyalty and virtues such as sobriety".
- Justice also has a specific meaning. Du Plessis indicates that Aristotle in this regard differentiates between two types of justice:
    - distributive justice, which implies that "benefits and burdens" are distributed fairly in a society; and
    - corrective justice, which implies that the balance between two parties is corrected or, in the words of Du Plessis, corrective justice "maintains or restores" imbalances.

Section 173 of the Constitution provides that "(t)he Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice." In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat,* 1999 (4) SA 623 (CC), at 797[46], the Constitutional Court clarifies that the term "interests of justice" represents "a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned."

The principles of a good tax system as formulated by Adam Smith (1776) are described in **Table 6.1**.

Table 6.1 The principles of a good tax system as formulated by Adam Smith

Principle	Important aspects of the principle
Equity (Smith, 1776: 423)	• There is a connection between the contribution of a taxpayer to the fiscus and the taxpayer's ability to pay tax. • The purpose of the contribution is to "support … government". • The principle requires the collective effort of taxpayers. Smith (1776: 423) compares taxpayers with "joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate." • The "observation or neglect" of the principle is connected with the "equality or inequality of taxation" (Smith, 1776: 423). • Goldswain (2012b: 12) observes that this principle requires the imposition of tax to be "equal and in accordance with the ability to pay".
Certainty (Smith, 1776: 424)	• The taxpayer must have certainty about the following aspects of tax payable: "time of payment, the manner of payment" and "the quantity to be paid" (Smith, 1776: 424). • Uncertainty has a negative impact. Smith (1776: 424) refers to the following examples: the aggravation of tax, corruption, extortion. • "A very considerable degree of inequality … is not near so great an evil as a very small degree of uncertainty" (Smith, 1776: 424). • According to Goldswain (2012b: 12) this principle requires laws to be "certain, clear, plain and not arbitrary".
Simplicity (Smith, 1776: 424)	Government must levy tax at a time or in the manner that is "most likely to be convenient for the contributor to pay it." (Smith, 1776: 424). Goldswain (2012b: 12) observes that the principle requires the payment of tax to be convenient.
Efficiency (Smith, 1776: 425)	• The principle requires a balance between the tax levied and the growth of the economy (Smith, 1776: 425).

	• When the tax levied has a negative impact on the economy, the following can be the consequences: wasteful expenditure by government, and a reduction in employment opportunities in the business industry • According to Goldswain (2012b: 12) the principle of efficiency requires the imposition of tax to be economically justified.

Source: Own summary

The principles have been applied and developed by academics and institutions ever since the principles were formulated by Smith (1776).

According to the Davis Tax Committee (2016: 14), in the modern context, a good tax system reflects the following principles:

- efficiency;
- equity;
- simplicity;
- transparency and certainty; and
- tax buoyancy.

The principle of simplicity would probably form part of transparency and certainty, while tax buoyancy would be an aspect of efficiency. The following principles are therefore adopted for the purpose of the thesis: efficiency, equity and certainty and transparency.

The following table, **Table 6.2**, discusses the principle of efficiency as interpreted by selected institutions and individuals.

Table 6.2 The principle of efficiency

Entity	Discussion
The Organisation for Economic Co-operation and Development (OECD)	• The principle requires that "compliance costs and administrative costs for governments should be minimised as far as possible." (OECD, 2014: 30). • The "enforceability" of the tax rules is associated with the "collectability and the administerability of taxes" (OECD, 2014: 31).
The American Institute of Certified Public Accountants	• The aspect of efficiency is associated with economic growth (AICPA, 2001: 11). • The principle requires a balance between the "productive

(AICPA)	capacity of the economy" and the efficiency of the tax system. • The principle is regarded to be related to "the principle of neutrality" (AICPA, 2001: 11).
The Association of Chartered Certified Accountants (ACCA)	• The purpose of an efficient tax system is to "secure the revenue due and to prevent tax leakage and the development of a black economy." (ACCA, 2011: 7). • An efficient tax system must also enable the taxpayer to comply with its requirements (ACCA, 2011: 7).
1978 Meade Report on the Structure and Reform of Direct Taxation	• A tax system must reduce the "clash between the criteria of economic sufficiency … and of vertical redistribution". Economic sufficiency means that low marginal tax rates are required. Vertical redistribution means that high average tax rates are required (Meade Committee, 1978: 12).
Alley and Bentley (2005)	• Similar to the interpretation of the OECD, government must reduce compliance and administration costs. • The principle further requires that the "payment of tax should be as easy as possible" (Alley and Bentley, 2005: 622).
Davis Tax Committee	• The tax system must ensure that it produces "sufficient income for the state, with minimum distortions to the economy (Davis Tax Committee, 2016: 14). • The principle of efficiency requires the tax system to be neutral. (Davis Tax Committee, 2016: 14)

Source: Own summary

It is suggested that a tax system cannot be efficient if government does not receive revenue from taxpayers. In *Commissioner for Inland Revenue v Estate Garlick* 1934 AD 263, at 268, the Appellate Division states: "As Parliament has given a Provincial Council power to levy a tax upon income, it must be taken to have authorised the Council to create the machinery necessary for executing the power --- *cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit*."

In *Lydenburg Gold Farms Limited v Commissioner for Inland Revenue* [1925] 1 SATC 160, the court states, at 162, that:

> Act 41 of 1917 was a taxing statute. The legislature wished to cast its net as far and as wide as possible for revenue purposes. It was not concerned with technicalities, it was on the look out to tax all monies which a company paid or distributed to or amongst its shareholders or members as such, whether such monies would or would not technically fall under the term "dividend".

In *Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue*, at 508, the Appellate Division states "(t)his is the idea of effectiveness --- that is of ability to collect the tax." The Appellate Division further states (at 507):

> (t)here is one further general remark to make on the equitable principles generally found to underlie liability for income tax. In some countries residence (or domicile) is made the test of liability for the reason, presumably, that a resident, for the privilege and protection of residence, can justly be called upon to contribute towards the cost of good order and government of the country that shelters him. In others (as in ours) the principle of liability adopted is "source of income" again presumably the equity of the levy rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient of it may live. In both systems there is, of course, the assumption that the country adopting the one or the other has effective means to enforce the levy. In considering, therefore, the phrase "from any source within the Union" the two principles I have mentioned --- which I may call shortly equitable and effective --- must be borne in mind in endeavouring to ascertain the intention of the Act.

The basis of taxation in South Africa is currently not source but residence. At the time of the decision South Africa applied source-based taxation.

In *Pienaar Brothers (Pty) Ltd v Commissioner for South African Revenue Service and Another* [2017] 80 SATC 1, at 27[36], the court took into account the importance of the "effective collection of revenue" that was "essential to the provision of services to ordinary South Africans" (at 27[36]). The court referred to *Metcash Trading Limited v Commissioner for South African Revenue Service and Another* [2000] 63 SATC 13, at 41[60], where the Constitutional Court confirmed, in the context of section 40(5) of the Value Added Tax Act, 89 of 1991

> the public interest in obtaining full and speedy settlement of tax debts in the overall context of the Act is significant. In their affidavits the Commissioner and the Minister mentioned a number of public policy

> considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes. Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose.

In *Pienaar Brothers (Pty) Ltd v Commissioner for South African Revenue Service and Another* the court again referred to the importance of efficiency when it stated (at 28) that "(i)n the context of tax statutes specifically, rigidity is not to be expected and the *fiscus* must be able to function effectively, taking into account changing demands of society". At 57 it is further observed that "(a) State cannot exist without taxes. Society receives benefits from them. Taxes are not penalties. Neither can they, without any qualification, be regarded as unjust deprivation of property use." The court stated (at 39) "[w]hat the *fiscus* is entitled to is what the law provides."

The following table, **Table 6.3**, discusses the principle of equity as interpreted by selected institutions and individuals.

Table 6.3 The principle of equity

Entity	Discussion
The American Institute of Certified Public Accountants (AICPA)	• This principle means "similarly situated taxpayers should be taxed similarly" (AICPA, 2001: 9). • The principle of equity can be associated with the term fair tax where a "tax system is *perceived* to be fair." [emphasis in the original] (AICPA, 2001: 9).
The Association of Chartered Certified Accountants (ACCA)	• A fair tax policy will have a positive impact on taxpayers as "[p]aying tax may never be fun" (ACCA, 2011: 5).
1978 Meade Report on the Structure and Reform of Direct Taxation	• The tax system must be "horizontally equitable" (Meade Committee, 1978: 12). This means that it "should treat like with like." According to Musgrave (1990: 113), horizontal equity requires "equal treatment of equals". • The tax system must also be able to vertically redistribute "between rich and poor" (Meade Committee, 1978: 12). This requires the tax system to be vertically equitable. Vertical equity requires "an appropriate differentiation among unequals" (Musgrave, 1990: 113)
Alley and Bentley (2005)	• According to Alley and Bentley (2005: 622) equity is associated with fairness. • Equity has a horizontal and vertical element. • The fairness of the tax system depends on the perception of taxpayers. • Alley and Bentley (2005: 622) observe that inter-nation

	equity must be considered where international aspects are involved. Alley and Bentley (2005: 602) define "inter-nation equity" as "the equitable division of tax revenue between countries."
Davis Tax Committee	• Taxpayers must contribute "in proportion to their ability to do so" (Davis Tax Committee, 2016: 14). • Equity is both horizontal and vertical. • There must be a balance between "the benefits of the public good received" and "the tax burden imposed" (Davis Tax Committee, 2016: 14). • According to the Davis Committee (2016: 11), the principle of equity consists of two elements: (1) the ability- to-pay-principle and (2) the "benefit" principle. The benefit principle (Davis Tax Committee, 2016: 11) means that "taxes should be based on the willingness of taxpayers to pay for the benefits received from public goods. The ability-to-pay-principle (Davis Tax Committee, 2016: 11) means that taxes must be regarded as "a sacrifice for which there is no direct public service *quid pro quo* and which focuses on determining what an equitable burden per taxpayer would be, relative to their wealth."

Source: Own summary

The findings in court decisions indicate that the courts at times acknowledged the principle of equity but focused on the words of the statute. This approach demonstrates the literal interpretation of fiscal legislation. A few of the cases are referred to in this section as illustrations.

In *Concentra (Pty) Ltd v Commissioner for Inland Revenue* [1942] 12 SATC 95, at 101, the Cape Provincial Division indicates that "the existence of a hardship or even an absurdity is not sufficient to cause a departure from the clear words of a statute unless of such a nature that the Legislature could not have so intended." Thus equity was not a consideration.

In *Partington v The Attorney-General* (1869) 21 LT 370 at 375, Lord Cairns of the House of Lords remarks:

> If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. 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, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.* [emphasis added].

This extract firstly suggests that the principle of equity is acknowledged, but nevertheless the literal approach was followed. The House of Lords secondly confirms that interpretation must "adhere to the words of the statute". Jones (1996: 70) remarks that the statement by Lord Cairns is "usually quoted out of context" in view of the fact that the House of Lords found in favour of Revenue on both form and substance. According to Jones, Lord Cairns applied the purposive approach in other cases.

The statement of the House of Lords in *Partington v The Attorney-General*, at 375, is confirmed by the Appellate Division in *Commissioner for Inland Revenue v George Forest Timber Company Limited* [1924] 1 SATC 20, at 29, to be the "rule of construction of taxing statutes". This approach has also been applied in other cases, which include *Income Tax Case No 268* (1933), 7 SATC 159 (U), and *Platt v Commissioner for Inland Revenue* 1934 NPD 74. In *Lategan v Commissioner for Inland Revenue*, at 205, the Cape of Good Hope Provincial Division states that "[i]f the meaning of the words of the Act are doubtful, an equitable view should be taken."

In *Income Tax Case No 762* (1952) 19 SATC 107 (T), at 109, the Court states that "equities alone without the necessary legal backing are not sufficient … The Court is bound to apply the literal meaning of the Act and if the taxpayer falls within its terms he must be taxed whatever the inequities of the situation may be." The court based its finding on *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 K.B. 64, at 71, where the King's Bench Division (Court of Appeal (England and Wales)) indicated 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. 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. [emphasis added]

In *Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487, at 507, the Appellate Division refers to the "assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient of it may live." This decision illustrates the need for equity in relation to a country's right to tax non-residents earning income in South Africa.

In *Pienaar Brothers (Pty) Ltd v Commissioner for South African Revenue Service and Another,* at 38[65], the Gauteng Division stated that "tax legislation … is enacted for the benefit of the *fiscus* and thus the country and the public as a whole." The court, at 28[38], observed that

> (i)f … companies are treated equally in the context of having to pay STC on the distribution of income to their shareholders, it is indeed difficult to argue one particular company resulting from an amalgamation process is being treated so unfairly that a court would … say that a retrospective tax statute could not have been intended to be applied to its factual circumstances.

According to the court (at 8) there was possible harm to the *fiscus* due to the loophole in section 44 prior to the inclusion of (the repealed) section 44(9A). It is interpreted that the loophole would have resulted in disproportionate contributions to the *fiscus*:

> there was an unintended loophole in the Income Tax Act created by s 44(9) of the Act and SARS considered … that a 'flood' of … transactions would occur and that there was a real risk that the national fiscus would suffer extensive and permanent harm. It was … submitted that it was eminently rational to close the loophole with retrospective effect.

The following table, **Table 6.4**, discusses interpretations of the principle of transparency and certainty.

Table 6.4 The principle of transparency and certainty

Entity	Discussion
The Organisation for Economic Co-operation and Development (OECD)	• Tax rules must be clear and taxpayers must understand the rules. • Informed decisions and the implementation of "intended policy choices" are possible when the tax system is certain and simple (OECD, 2014: 30).
The American Institute of Certified Public Accountants (AICPA)	• "The tax rules should specify when the tax is to be paid, how it is to be paid, and how the amount to be paid is to be determined" (AICPA, 2001: 9). • The importance of certainty is that it ensures tax compliance. • Certainty is associated with "clear statutes as well as timely and understandable administration guidance that is readily available to taxpayers" (AICPA, 2001: 10).
The Association of Chartered Certified Accountants (ACCA)	• Transparency requires that taxpayers "understand what they are paying, why they are paying it, and what the benefits of paying it will be" (ACCA, 2011: 5). • The application of tax policy must be transparent (ACCA, 2011: 5). • Transparency is required from the payment of tax through to the utilisation of the funds by government (ACCA, 2011: 5). • Taxpayers must be able to "look at legislation to come to the same interpretation of the law … Taxpayers must have certainty over Revenue authorities' interpretations. Authorities should establish a proper and efficient clearing mechanism for complex anti-avoidance provisions." (ACCA, 2011: 6)
1978 Meade Report on the Structure and Reform of Direct Taxation	• The tax system must be "coherent, simple and straightforward." (Meade Committee, 1978: 18). • The taxpayer must have certainty regarding "what is and what is not taxable" (Meade Committee, 1978: 18).
Alley and Bentley (2005)	• Alley and Bentley (2005: 622) group certainty and simplicity. • Similar to the other interpretations, Alley and Bentley (2005: 622) indicate that tax rules must be "clear and simple to understand". They expand on this confirming that there is a reason for obtaining an understanding about the tax rules. The reason is that "taxpayers can anticipate in advance the tax consequences of a transaction including knowing when, where and how the tax is to be accounted." • The principle of transparency is required in relation to the "design and implementation of the tax rules." (Alley and Bentley, 2005: 622).
Davis Tax Committee	• The principle requires certainty about the manner of tax collection and also the calculation of tax liabilities (Davis Tax

	Committee, 2016: 14). • Transparency and consistent application is required in relation to tax rules and procedures (Davis Tax Committee, 2016: 14).

Source: Own summary

In *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 K.B. 64, at 71, the King's Bench Division refers to the aspect of clarity when it is stated that "in a taxing Act clear words are necessary in order to tax the subject."

In *Income Tax Case No 273* (1933), 7 SATC 232 (U), at 234, the court stated that, in the calculation of the doubtful debt allowance in terms of section 11(2)(g) of the 1925 South African Income Tax Act, "no circumstances have been gone into, and no application of the mind to the particular debts has been made" and the Commissioner "was simply proceeding on an arbitrary basis of 25 per cent. irrespective of the merits of the debts in question". The court referred to the practice of previous years with reference to the taxpayer and indicated (at 234) that it is "not satisfied that any good reason was shown … why in this particular tax year there has been a departure from the amount allowed in previous years.".

In *Income Tax Case No 91* (1927), 3 SATC 235 (U), at 235, 237, the court stated, with reference to the correct method of determining the deduction in respect of annual wastage of crockery in terms of section 11 of the 1925 South African Income Tax Act:

> There could be no question that when an appellant came with a properly drawn balance sheet which answered all the rules and tests of accountancy, which satisfied the scrutiny of able business men, and was signed by an auditor of repute (and the business carried on by the appellant was a reputable business), it was necessary for the Commissioner to produce evidence that while on the surface everything might appear to be in order, there was this and that criticism to offer, or that there was a lack of *bona fides*, or this or that fact had to be considered. But in the absence of such evidence, or any effort on the part of the Commissioner to combat the accuracy of the balance sheet as produced, the Court would not take the burden upon itself, a burden which the law did not intend to place upon it,

> of questioning the accounts placed before it. *There seemed little reason for accepting a figure which was entirely arbitrary, when there was one which was not arbitrary but which had been arrived at according to strict principles of accountancy …* It [the figure calculated by the Commissioner] could, even from the Commissioner's point of view, be described as much more arbitrary than the figure of the appellant, which was in fact not arbitrary at all, because it was derived from a balance sheet drawn up in accordance with facts and properly audited. [emphasis added].

In *Pienaar Brothers (Pty) Ltd v Commissioner for South African Revenue Service and Another,* the court, at 7, confirmed that government is required to "act in accordance with laws, but also that the laws must have a certain essential quality, namely, in the present context, that laws should be reasonably clear, accessible and prospective in their operation." According to the court, at 26[33], "one cannot, by a process of inference, argue that the Legislature intended the amendment to have meaning incompatible with its express and clear language." The court found that "the amendment is clear, its purpose is rational and is applied to all transactions including completed transactions" (at 28[38]). It can be interpreted that the reference to "all transactions" is a confirmation of consistency. This can be read together with the court's remark at 28[38].

6.4 Principles of a good tax system and the Constitution

Principles of a good tax system are also given recognition in the Constitution. These principles and their interpretation in case law are discussed below.

6.4.1 Transparency and certainty

In terms of section 32 of the Constitution,

> (1) Everyone has the right of access to
> (a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

In *Brümmer v Minister for Social Development*, 2009 (11) BCLR 1075 (CC) at 1095[62], the Constitutional Court states that the importance of the right of access to information

> in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. *Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency ... must be fostered by providing the public with timely, accessible and accurate information*." [emphasis added].

Transparency is therefore connected to the right of access to information.

In terms of the rule of law the government institutions are required to "act in accordance with the law" (Currie and De Waal, 2005: 10). This includes the obligation to obey the law and to exercise power within the limits of the law.

In *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC), at 272[85], the Constitutional Court indicates:

> It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The rule of law requires more than legality. It also focuses on the content of law and the conduct of government (Currie and De Waal, 2005: 12). In *Bel Porto School Governing Body and others v Premier of the Province, Western Cape & another* [2002] JOL 9413 (CC), at 90[164], the Constitutional Court states that

> the concept of justifiability requires more than a mere rational connection between the reasons and the decision … Although a rational connection would certainly be necessary, it would not on its own be sufficient. All exercises of public power have to have a rational basis, this is one of the foundations of legality, or lawfulness.

The Constitutional Court confirmed in *President of the RSA and Others v SARFU and Others* 1999 (2) BCLR 175 (CC), at 187[39], that aspects that are "void for vagueness … fall within the scope of the doctrine of legality and are … constitutional issues."

6.4.2 Equity

Section 8 of the Constitution provides that:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> (3) When applying a provision of the Bill of Rights to a natural person or juristic person in terms of subsection (2), a court –
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

The section applies to both the relationship between government and persons (vertical application) as well as the relationship between persons (horizontal application) (Currie and De Waal, 2005: 43).

Section 36 of the Constitution is also an important consideration. In terms of this section:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Section 36 requires a balance between a Constitutional right and the limitation of the relevant right. The balancing requirementss are included in section 36(1)(a) to (e). The proportionality-requirement is also included in the principles of a good tax system as stated by the Davis Tax Committee.

6.4.3 Efficiency

Section 33 of the Constitution, relating to just administrative action, states that:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

6.4.4 Reasonableness

In the discussion of section 36 of the Constitution above, reference was made to reasonableness. Reasonableness was also an important aspect in Roman law. It is still an important aspect in South African law, taking into account the reference to reasonableness in section 36.

The principle of reasonableness comprises the following elements:

- Reasonableness requires a holistic approach:

In *Vanderbijlpark Health Committee v Wilson*, 1950 (1) SA 447 (A), at 458, the Appellate Division clarified that "the test is not merely the decision of a reasonable man but of a reasonable man 'applying his mind to the condition of affairs'. I think that means 'considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide''.

In *Income Tax Case 945* (1960) 24 SATC 455 (T), at 456, 459, the court states that a broad approach is required, according to which the person:

- considers the circumstances of a matter; and
- disregards actions that do not reflect reasonableness.

- Reasonableness requires a balanced objective approach:

The reasonable person is not someone with a "timorous faint-heart" (*Herschel v Mrupe* [1954] 3 All SA 414 (A), at 435). In the performance of a person's activities he or she "takes reasonable chances … [and] reasonable precautions" (*Herschel v Mrupe*, at 435). This is also confirmed in *S v Burger* [1975] 4 All SA 734 (A), at 736:

> One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense.

While "reasonableness" was not one of Adam Smith's canons of a good tax system, or the principles suggested by the Davis Tax Committee, it can be argued that in achieving equity, certainty and efficiency, reasonableness is an important principle. In the interpretation of legislation by the courts, a reasonable approach is paramount.

6.5 Conclusion

In this research the following principles are discussed in relation to deeming provisions in the Income Tax Act: efficiency, equity, and transparency and certainty. In view of this, the present chapter analyses the development of these principles. A South African perspective has been included in this chapter through a discussion of case law.

Principles of a good tax system were evident even in Roman law times. These principles, which included equity, transparency and certainty, and efficiency, form the first part of the discussion. The principles of a good tax system were formulated by Adam Smith in 1776 and consisted of equity, certainty, simplicity and efficiency. Since the formulation of the principles of a good tax system in 1776, the principles have been included and interpreted in various reports, and applied in case law. One of the most recent reports is the Davis Tax Committee Report (2014). The principles of equity, transparency and certainty, efficiency and reasonableness were also discussed from the perspective of the Constitution, together with related case law.

The principles of a good tax system indicate that:

- justice as a principle, is the basis of all other principles of a good tax system;
- the time and manner of tax collection, and the calculation of the tax liability must be certain and not arbitrary;

- transparency and consistency is required where tax rules and procedures are concerned;
- taxpayers must contribute to the *fiscus* in proportion to their ability to do so;
- both horizontal and vertical equity as between taxpayers must be ensured in tax legislation;
- the tax system must provide sufficient revenue for government purposes;
- taxes must be based on the willingness of taxpayers to pay for the benefits they receive from public goods;
- an equilibrium is required between the production of sufficient revenue by government and the growth of the economy; and
- in achieving the principles of equity, transparency and certainty, and efficiency, a reasonable approach is needed.

An important element of the present research is interpretation. The next chapter is dedicated to understanding the various approaches to interpretation and the effect of these approaches on the principles of a good tax system.

CHAPTER 7

THE INTERPRETATION OF "DEEMING PROVISIONS" IN SOUTH AFRICAN LAW

Words without context mean nothing.

- Wallis JA (*Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] 4 All SA 417 (SCA) at 425[28]

7.1 Introduction

Section 39(2) of the Constitution states that the interpretation of legislation and the development of the common law or customary law must "promote the spirit, purport and objects of the Bill of Rights." Section 2 of the Interpretation Act, 33 of 1957, defines "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". In this research the focus is on deeming provisions in the Income Tax Act. The Income Tax Act is an example of an "Act of Parliament". Clegg (2020: § 2.1) remarks that "(i)ncome 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." All legislation, including fiscal legislation, is therefore interpreted by, among others, the judiciary, revenue officials, scholars and professionals.

This chapter discusses the approaches to the interpretation of tax law and the application in this interpretation of legal principles and the principles of a good tax system.

This chapter therefore completes the discussion of the first three goals of the research:

- obtaining an understanding of the origins and importance of deeming provisions in legislation and the principles of a good tax system, from an international and South African perspective;
- discussing the approach to the interpretation of tax legislation; and
- applying the international semantic approach (theory) (Brink, 1988: 111) of deeming provisions, including:

- the characteristics of deeming provisions; and
- the purposes of deeming provisions.

Part of the fourth goal states: to demonstrate the relationship between deeming provisions and the principles of a good tax system, an understanding is obtained of the application of a selection of deeming provisions in the Income Tax Act and their interpretation in South African case law. This part of the fourth goal is addressed in Chapter 8.

The remaining part of the goal (the OECD Model Tax Convention, and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) is the subject of Chapter 9.

7.2 Interpretation

Stevenson and Soanes (2010: 359525) define "interpretation" as "the action of explaining the meaning of something". Goldswain (2009a: 17) observes that "(i)nterpretation, in the context of fiscal legislation, is the cornerstone on which the revenue authorities can assess and collect taxes and correspondingly, the foundation on which a taxpayer's rights are built". Krever and van Brederode (2014: 1) state that interpretation is "the most crucial step in the application of law, interpreting the meaning of the words that communicate law to the persons governed by law as well as those who administer and enforce the laws". They elaborate in relation to tax law (2014: 1):

> Interpretation of tax law is a subset of legal interpretation, a concept that has two aspects: it is *interpretation* – giving meaning to an object, sign, or, for our subject, the words used in a statute to communicate ideas – but done so in a way that is distinctly *legal* in nature. Interpretation is *legal* when it not only provides a shared understanding of the ideas intended by text, but in the process of delivering that explanation actually establishes valid law, creating the rules that govern individual behaviour.

Devenish (1991: 78) lists three phenomena that are linked to statutory interpretation:

- **Linguistics**. According to Stevenson and Soanes (2010: 405953) "linguistics" relate to "language and its structure … grammar, syntax, and phonetics".
- **Statute law and common law**. Devenish (1991: 78) indicates that common law refers to "presumptions of interpretation".
- **Jurisprudence**. Stevenson and Soanes (2010: 374069) define "jurisprudence" as "the theory or philosophy of law".

In Chapter 4 legal principles were identified that were established in Roman law and accepted into Roman-Dutch law. These legal principles are "presumptions of interpretation" and are briefly summarised below.

Table 7.1: Roman law development of legal principles

Principle	Origins
Justice	Du Plessis (2002: 402) indicates that the Greek philosopher Aristotle differentiated between two broad classes of justice: • Justice firstly has a general meaning. This refers to the characteristics of a "good person" which include "courage, honesty, loyalty and virtues such as sobriety". • Justice also has a specific meaning. Du Plessis indicates that Aristotle in this regard differentiates between two types of justice: - distributive justice, which implies that "benefits and burdens" are distributed fairly in a society; and - corrective justice, which implies that the balance between two parties is corrected or, in the words of Du Plessis, corrective justice "maintains or restores" imbalances. It is submitted that justice is the basis of the equitable interpretation of legislation by the courts.
Equity and good faith	The principles of equity (Riccobono, 1926: 159) and good faith *(bona fides)* (Thomas *et al*, 2000: 30) were elements of the *ius gentium*. Berger (1953: 374) confirms further that *"bona fides"* includes elements of "honesty … good faith", "equity", "confidence" and "fairness".
The context of the matter	Sherman (1917: 36) confirms that the praetor was tasked to administer the *ius civile*. In administering the *ius civile*, the praetor was required to adjudicate a matter in the context of the surrounding facts and circumstances.
Reasonableness	Riccobono (1926: 161) explains that the application of the *ius honorarium* ensured that reasonableness was achieved.
Substance *versus* form	Berger (1953: 721) explains that the element of substance ("*substantia*") requires that the "nature" of something must be taken into account. Through the development of the *ius*

	honorarium and, subsequently the *ius gentium*, substance developed into an important principle. The legal principle of *plus valere quod agitur quam quod simulate concipitur* is translated by Frier *et al* (2016: 887) as "What is Done Has Greater Value Than What Is Contrived In Pretence". "[T]he court will give effect to the real intention of the parties and not their simulated agreement" (Williams, 2015: 687).
Fraus legis	According to Watson (1998: 13, Volume 1) *Digesta* 1.3.29 provides that "It is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense." Claassen (2020) defines the maxim *in fraudem legis* as "in fraud of the law". Derksen (1990: 518) observes that the *fraus legis* rule was not an independent legal rule (Afrikaans: "selfstandige regsreël") in Roman law but represented a form of statutory interpretation.
The *contra fiscum* rule	It is stated in *Digesta* 49.14.10 (Watson, 1998: 392, Volume 4): "I do not think that a person who in debatable questions heedlessly gives replies against the interests of the imperial treasury commits an offense." In *Gabriel v Rex* [1938] EDL 346, at 350, the court states that "when there is a doubt the decision must go against the Treasury (*Digest* 49.14.10)." It is submitted that the statement in *Digesta* 49.14.10 represents the *contra fiscum* rule (or maxim). In *Digesta* 50.17.56 it is stated: "*semper in dubiis benigniora praeferenda sunt"* (where there is doubt the more lenient interpretation must always be preferred).

Source: Own summary

In Chapter 5, the impact of the Constitution in relation to the interpretation of statutes was highlighted, and in particular section 39(2), which provides 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 objects of the Bill of Rights. Section 39(2) is also relevant in connection with the acceptance of the philosophy of *ubuntu* into South African law and its interpretation.

The courts will apply these legal principles in tax disputes, and particularly when following the purposive interpretational approach (discussed below), to achieve the principles of a good tax system – equity, certainty, and in cases involving tax avoidance or evasion, to protect the *fiscus.* The decisions of the judges are not always unanimous, but the judgments reflect the application of the legal principle of reasonableness. The application of these legal principles in the interpretation of tax

legislation therefore promotes the achievement of the principles of a good tax system, and the two are closely connected.

Goldswain (2009a: 17) refers to the fact that the judiciary, on a "daily basis", is involved in the interpretation of legislation. Court decisions illustrate the importance of statutory interpretation and serve as guidelines where the meaning of sections must be established. The purpose of the present research is to determine whether there is a close relationship between deeming provisions and the principles of a good tax system. Deeming provisions must be interpreted and, therefore, in the context of the current research it is important to understand the interpretation of fiscal legislation. Silke (1995: 124) differentiates between two approaches to the interpretation of fiscal legislation: the strict (traditional) approach and the "new approach". These approaches are discussed separately with reference to the applicable court decisions.

7.2.1 Strict (traditional) approach to the interpretation of fiscal legislation

Goldswain (2008: 111) explains that the strict (traditional) approach obliges the interpreter to apply the "ordinary grammatical and literal meaning" to text. Goldswain finds that this approach is the "primary rule of interpretation". Haupt (2019: 11) justifies this approach as follows: "… and as the law is drafted by the Legislature, a literal interpretation is the starting point".

The strict (traditional) approach was applied in the following court decisions:

Partington v The Attorney General (1869) 21 LT 370

The House of Lords (at 371) was required in 1869 to determine whether the calculation of stamp duty also included accrued interest on estate assets. In the relevant matter before the court, the Commissioner for Inland Revenue claimed that the calculated stamp duty included accrued interest. The plaintiff, Partington, represented the children of the late Mr and Mrs Cook. The court found (at 370) that the accrued interest did form part of the value on which the stamp duty must be calculated on account of the fact that "the interest … merged into and became part of

the sum which had to be paid, and the whole amount taken together became the estate in respect of which the administration was granted". Lord Cairns (at 375) made the following remark in relation to the interpretation of fiscal statutes:

> I am bound to say that I myself have arrived without hesitation at the conclusion that the judgment ought to be affirmed. I do so both upon form and also upon substance. 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 the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. 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, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The extract of the reasoning of Lord Cairns illustrates that:

- Equity does not exist in a tax matter. Only the wording of a statute must be considered in the process of interpretation.
- A strict approach must be followed when a fiscal statute is interpreted.

De Villiers v The Cape Divisional Council (1875) 5 Buch 50

The court was required to interpret the provisions of a Proclamation dated 6 August 1813, read in conjunction with section 3 of Act 10 of 1864 and section 11 of Act 9 of 1858. Devenish (1991: 91) claims that the decision in *De Villiers v The Cape Divisional Coun*cil was of a "watershed" nature on account of the dictum of the case. The court held (at 64, 65) that:

> [i]f the rules of the Roman Dutch law (following those of the Roman law) for the proper construction of statutes were to guide this Court, there would be no difficulty in construing the clause … But in construing statutes made in this Colony after the cession to the British Crown, this Court should, in my

> opinion, be guided by the decisions of the English Courts, and not by the Roman-Dutch authorities … [B]ut as it officially issued from an English Governor in the English language, it must be subject to the rules of construction laid down for English statutes by the decisions of English Courts of Law. Some of the older decisions of these Courts lay down rules which bear a close similarity to those of the Civil Law … There seems no doubt, however, that the enlarged or extensive interpretation of statutes which was admitted in former times has given way (except it would appear in old statutes) to a strict observance of the literal and grammatical sense of the words employed. The current of modern decisions seems to be in favour of considering the literal meaning of the words in which the statute is expressed as the primary index to the intention with which the statute was made, and to abide by the literal meaning even where it varies from the other indications of the actual intention of the Legislature.

It is suggested that the extract illustrates the following:

- The literal approach is favoured over an "enlarged or extensive interpretation". The conclusion can be made that the words "enlarged or extensive" are a reference to the contextual (purposive) approach.
- The court equated the contextual approach to Roman-Dutch law and the literal approach to English common law.
- The interpretation of the "intention with which the statute was made" is complex. The court confirms this when it indicates that it must "abide by the literal meaning even where it varies from the other indications of the actual intention of the Legislature". This, it is suggested, is an acknowledgement on the part of the court that the literal approach does not necessarily reflect the "actual intention of the legislature".

Devenish (1991: 91) explains that the court decision was important due to the fact that it had a significant effect on the subsequent interpretation of legislation. He expands on this and indicates that the South African judiciary applied English common law. Devenish states that English law, in general, followed a "textual" approach in contrast with Roman-Dutch law which had a "contextual" or purposive approach.

Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 K.B. 64

The case, *Cape Brandy Syndicate v Inland Revenue Commissioners*, was adjudicated in the King's Bench Division (Court of Appeal (England and Wales)). The King's Bench Division (at 65) firstly had to decide whether the profits of the Appellants (Cape Brandy Syndicate) from the sales of a quantity of Cape brandy represented a "trade or business" that the Appellants carried on. The Appellants sold on a commission basis in London. If this was the case, the court secondly had to determine whether the profits were subject to excess profit duty. According to the Appellants (at 65) the profits were of a capital nature. The Appellants stated in the alternative that, if the profits were found to arise from a trade or business, the profits would not be chargeable to excess profit duty as the trade or business only commenced in 1916. According to the charging section, section 38, sub-section 1 in Part III of the Finance (No. 2) Act of 1915:

> there shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended August 4, 1914, and before July 1, 1915, exceeded, by more than 200*l*., the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to 50 per cent. of that excess.

An important aspect of the court decision was the interpretation of the words "pre-war standard". Section 40, subsection 2 of the Finance (No.2) Act of 1915 provided that the pre-war standard referred to "the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer". The judge (at 71) observed that:

> The respondent's contention involves an extremely artificial construction of the words and imports into the expression 'pre-war standard' something having no connection with anything to which the term 'pre-war' can properly be employed. 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. 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.

According to Clegg (2020: § 2.1) the first three sentences of the observation provide context. Clegg (2020: § 2.1) states that the purpose of the three sentences is to "enunciate a warning against too literal an approach." This remark of Clegg confirms that even in case law context must be considered.

It is proposed that the extract indicates that:

- The court applied the literal approach over the "wide and fanciful construction". The latter represents the purposive approach.
- Similar to the *Partington v The Attorney General* case, the court made the remark that there is no equity in tax.
- The interpreter is only required to focus on the wording of legislation.

Even though the court, through Judge Rowlatt, confirmed that it applied the literal approach during the process of interpretation of the legislation, it appears that the context indicates that it also applied the purposive approach. In the court's determination of whether the Appellant carried on trade, Judge Rowlatt (at 69) held that: "the question whether the appellants carried on a trade or business was a question of fact and that there was evidence before the Commissioners entitling them to find as they did." To determine whether the Appellants had traded, the court was required to take the facts and circumstances of the matter into account. Stevenson and Soanes (2010: 149758) define "context" as "the circumstances that form the setting for an event, statement, or idea, and in terms of which it can be fully understood". This suggests that there is a close connection between context and "facts and circumstances". Boulle (1988: 80) observes that "(f)urthermore, it is important in finding the ratio of a case to identify the material facts on which it is based" and, whilst discussing a specific case (at 81), "(t)he ratio is the above principle of law within the context of the material facts". It can therefore be concluded that the

reference to “facts” in the judgment of Judge Rowlatt is an indirect acknowledgement that the court did apply the contextual approach. It is therefore evident that Judge Rowlatt did not apply a pure literal approach in the court decision.

In the court decision *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] 2 All SA 523 (SCA) at 533[39], Harms DP made the following remark in relation to the importance of evidence with reference to interpretation: “... interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses”. It is true that it is the function of the court to interpret law in order to make a decision in a matter, however, facts (the context of a matter) have an impact on interpretation. The matter of *Coopers & Lybrand and Others v Bryant* [1995] 2 All SA 635 (A) illustrates the importance of facts (context).

Coopers & Lybrand and Others v Bryant [1995] 2 All SA 635 (A)

This was not a tax matter. The focus will therefore only be limited to certain extracts. The Respondent (Bryant) had entered into a transaction based on the professional advice that the chartered accountants, Coopers & Lybrand (the Appellant), had provided to the Respondent. The Appellate Division was required to determine whether the scope of a deed of cession was wide enough to enable the Respondent to lodge a claim for damages against the Appellant. The court observed (at 640) that the ordinary meaning of a word is determined with reference to the dictionary. In this matter the court used the Oxford Dictionary. The court (at 640) made the following remark in relation to the interpretation of statutes:

> According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.

The court (at 640) further observed that:

- “(t)he mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself.”

- the interpreter must "have regard to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract …".

It is suggested that the above extracts confirm that the literal and purposive approach are not mutually exclusive. The literal approach has also been applied to court decisions that relate to the interpretation of deeming provisions.

Commissioner for Inland Revenue v Simpson [1949] 16 SATC 268

The court decision (at 268) related to the interpretation of the word "income" as defined in section 9(2) of the 1941 South African Income Tax Act. Section 9(2) of the 1941 South African Income Tax Act provided that:

> [a]ny income received by or accrued to or in favour of, or deemed to have been received by or accrued to or in favour of, a woman married with or without community of property and not separated from her husband under a judicial order or written agreement of separation shall be deemed for the purposes of this Act to be income accrued to her husband.

The Respondent had commenced with a trade prior to her marriage to her husband. The Commissioner for Inland Revenue (at 268) had deemed the husband of the Respondent to have acquired the business of the Respondent from the date of their marriage and assessed the husband of the Respondent for excess profit duty. The calculation of the excess profit duty did not take the assessed loss into account that the Respondent suffered during the period prior to the marriage. The court was therefore required to determine the income of the Respondent that was subject to the deeming rule. The court determined (at 269) that the accumulated losses of the Respondent and her husband had to be taken into account in the calculation of the excess profit duty. The husband of the Respondent effectively replaced the Respondent as taxpayer subsequent to the marriage (at 274). The court (at 282) took into account the rule laid down by Halsbury, Laws of England which stated that: "(i)f a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning." The court further found (at 281) that:

> [i]t is clear from these provisions that, as in the case of Rule 16 in England, it was only the gains or profits of a married woman that were deemed to accrue to her husband, i.e., to use the language of the present Act 'income' less all permissible expenditure incurred in the production of the income.

The court decision confirmed (at 283) that the purpose of the deeming provision was to include the income of the Respondent in the tax return of the husband of the Respondent. The court further observed (at 283) that:

> [t]hough sec 9(2) of Act 31 of 1941 provides that a wife's income is deemed for the purposes of that Act to have accrued to the husband and though sec 58(1) directs the husband to include her income in his income tax returns yet this deeming clause does not operate to make it his income for all purposes. Many sections of the Act recognise that it is the income of two persons which is being assessed and that the wife is liable for her share of the joint tax.

This case has been interpreted in subsequent case law to represent the strict (literal) approach to interpretation. The case law includes, among others, *Income Tax Case No 1119* [1968] 30 SATC 59 (EC), at 160; *Glen Anil Development Corporation Limited v Secretary for Inland Revenue* [1975] 37 SATC 319, at 333; and *Income Tax Case No 1584* [1994] 57 SATC 63, at 69. There have also been academics who have found that elements of the purposive approach were present in *Commissioner for Inland Revenue v Simpson*. Goldswain (2012a: 44) observes that in the case the "historical context" of section 9(2) of the 1941 South African Income Tax Act was taken into account. Thackwell (2016) observes that Watermeyer CJ, in his judgment, did not apply the literal approach to interpretation but rather a "purpose-oriented approach … gathered from his reference to surrounding contextual factors, for example, … the history of the provision, and … other provisions in the Act." The reference to the "history of the provision" can be interpreted to mean section 11 of the 1914 South African Income Tax Act (*Commissioner for Inland Revenue v Simpson,* at 281, 282) and the "other provisions in the Act" can be interpreted to mean the other sections in the 1941 South African Income Tax Act (*Commissioner for Inland Revenue v Simpson* at 282, 283). The reference in the above extract to "many sections" indicates that the interpreter must not rely solely on a certain provision of a statute but also the context of the

statute, which includes other provisions. The following extract (at 285) from the case substantiates this:

> '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.' 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.

It is suggested that the extract indicates that interpretation requires the interpreter to take the context of a tax matter into account. The court referred to the fact that equity does not exist in tax. The court thereafter qualified this statement to indicate that certain aspects must be "implied by necessity". The question is whether this is not an acknowledgment by the court that principles, of which equity is an example, are important factors where interpretation is concerned. A possible answer to this question will be attempted in the next section where the purposive approach is discussed.

7.2.2 Purposive approach to the interpretation of fiscal legislation

Goldswain (2009b: 44) explains that the purposive approach relates to the intention of the legislator with reference to a provision within the context of:

- the objective of the statute concerned; and
- the remaining provisions of the statute.

The court has applied the purposive approach in several court decisions. The following cases are discussed as an illustration.

Income Tax Case No 1384 (1983), 46 SATC 95(O)

The Orange Free State Special Court was required (at 95) to determine whether double deductions were claimed in terms of sections 4(h)(i) and 4(l)(i) of the Estate Duty Act, 45 of 1955. The executor of a deceased estate had claimed a deduction in terms of section 4(l)(i) of the Estate Duty Act for public stock. According to the

Revenue Laws Amendment Act, 104 of 1976, the now repealed section 4(l)(i) provided that a deduction was allowed for: "so much of the aggregate amount of the value or the proceeds … of any public stock and bonds (excluding bonds the interest on which is exempt from income tax in terms of section 10 of the Income Tax Act, 1962 (Act No. 58 of 1962)) …". The public stock also formed part of a deduction claimed for donations bequeathed for charitable purposes in terms of section 4(h)(i) of the Estate Duty Act. The court (at 100) referred to two principles of statutory interpretation. The first principle, the main enquiry, was to determine the intention of the legislator when it drafted the relevant statute. This intention was dependant on the words used in the statute. The second principle is that where the wording is not clearly formulated there is a presumption that the legislator did not intend an "unfair, unjust or unreasonable result". Worded differently, the second principle is the *contra fiscum* rule. The *contra fiscum* rule was discussed in Chapter 5 of this research. Haupt (2019: 11) interprets this rule, also known as the maxim "*in dubio contra fiscum*", to mean that "when in doubt (*dubio*), interpret the law in favour of the taxpayer where possible. In other words, give the benefit of the doubt to the taxpayer". It is suggested that the court was required to balance the interests of the taxpayer (to have access to the deductions in both sections 4(h)(i) and 4(l)(i)) against those of the Commissioner (the loss of revenue due to the application of both sections 4(h)(i) and 4(l)(i)). The court held (at 111) that the context of the relevant sections indicated that deductions were allowed in terms of both sections. It is submitted that this is, in essence, an application of the *contra fiscum* rule.

It is evident that the second principle formulated in *Income Tax Case No 1384* (there is a presumption that the legislator did not intend an "unfair, unjust or unreasonable result") contrasts with the principle formulated in *Cape Brandy Syndicate v Inland Revenue Commissioners,* where the court (at 71) found that "(t)here 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". In the discussion of *Commissioner for Inland Revenue v Simpson,* at 285, it was observed that the court found that certain aspects must be "implied by necessity". The relevant statement was possibly an acknowledgment by the court that principles, of which equity is an

example, are important factors where interpretation is concerned. It is suggested that the second principle (formulated in *Income Tax Case No 1384*, to the effect that the legislator did not intend an "unfair, unjust or unreasonable result") supports this viewpoint. In the Appellate Division case of *Commissioner for Inland Revenue v Nemojim (Pty) Ltd* [1983] 45 SATC 241, Corbett JA confirms this (at 267) with the following dictum:

> It has been said that 'there is no equity about a tax'. While this may in many instances be a relevant guiding principle in the interpretation of fiscal legislation, there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and from the point of view of the *fiscus*. And it may be fairly inferred that such a result is in conformity with the intention of the legislature.

The next case that will be discussed is *Commissioner for South African Revenue Service v Airworld CC and Another* [2008] 70 SATC 48.

Commissioner for South African Revenue Service v Airworld CC and Another [2008] 70 SATC 48

This case related to the interpretation of the repealed section 64C(1)(c) of the Income Tax Act, a provision that deemed certain persons to be "recipients" of a dividend.

The purpose of section 64C of the Income Tax Act was to prevent the avoidance of secondary tax through the use of connected persons and trusts. Section 64C(2) and (3) of the Income Tax Act included deeming rules. These rules ensured that section 64C was effective in preventing these avoidance schemes. Section 64C(1)(c)(1) of the Income Tax Act clarified, in terms of a company, which persons are considered to be a recipient. Section 64C(1)(c) provided that the word "recipient":

> (1) For purposes of this section 'recipient', in relation to any company, means-
>
> (a) any shareholder of such company;
>
> (b) any relative of such shareholder; or
>
> (c) any trust of which such shareholder or relative is a beneficiary.

In *Commissioner for South African Revenue Service v Airworld CC and Another* it is indicated (at 59[19]) that the Respondent (Airworld CC) made payments to the Marius Smit Retief Familietrust. The Appellant (the Commissioner for the South African Revenue Service) regarded these payments as falling within the ambit of section 64C(1)(c) of the Income Tax Act. The Supreme Court of Appeal had to determine (at 59[20]) the meaning of the word "beneficiary" in the context of section 64(1)(c). The importance of the case relates to the process that must be followed when a provision is interpreted. In relation to the majority judgment, Hurt JA remarked (at 60[25]) as follows:

> The first part of the process of interpretation must be to consider the words ... of subs (1) to decide whether their meaning is clear … [T]he word 'beneficiary' could have more than one meaning… Most of the rules of interpretation have been devised for the purpose of resolving apparent ambiguity and arriving at an interpretation which accords as well as possible both with the language which the Legislature has used and with the apparent intention with which the Legislature has used it. In recent years courts have placed emphasis on the purpose with which the Legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention.

The extract indicates that the intention of the legislature with the wording of a statutory provision must be considered together with the provision itself. Hurt JA acknowledged that the context of a matter is important. In this regard he referred to the following dictum of the Supreme Court of Appeal case of *De Beers Marine (Pty) Ltd v Commissioner for South African Revenue Service* [2002] 3 All SA 181 (SCA), where Nienaber JA was required to determine the meaning of the word "export" in terms of section 20(4)(d) of Customs and Excise Act 92 of 1964. Nienaber JA made the following remark (at 187[7]): "Export" in section 20(4) of the Customs Act must in my opinion take its colour, like a chameleon, from its setting and surrounds in the Act."

This remark implies that:

- words do not have only one meaning;
- the meaning of a word is not static but must adapt as and when circumstances require; and
- the interpreter must determine the meaning of a word in the context ("setting and surrounds") of legislation.

The majority of the judges in *Commissioner for South African Revenue Service v Airworld CC and Another* found (at 64[31]) that the intention of the legislator was that the word "beneficiary" must be afforded a broad interpretation. This was because the provision was an anti-avoidance provision and any other interpretation would have the effect that taxpayers would possibly avoid secondary tax on companies. A restrictive interpretation of the word "beneficiary" was not in accordance with the intention of the legislator. The court made the following remark (at 62[28]):

> In my view, and considering the word in the light of the provisions of ss 64B and 64C, the indications are clear that when the legislator used the word 'beneficiary' in sub-s (1)(c), it did not intend that word to be given a restricted meaning. I consider that to give it its 'ordinary meaning' of 'a beneficiary named as such in the trust deed' satisfactorily achieves the legislator's object in enacting the deeming provisions of s 64C.

The judgment illustrates that the trust deed of the trust was an important aspect of the matter. The court considered (at 64[32]) the wording of the trust deed to determine who were regarded as the beneficiaries of the trust. A further important aspect was the administration of the business activities of the trust. The court took the following factors into account (at 64[32]):

- Mr Retief was a trustee of the Marius Smit Retief Familietrust. The trust deed authorised Mr Retief (and the other trustee of the trust) to appoint a successor trustee.
- Mr Retief was involved where the termination of trusteeship of the other trustees of the trust was concerned.

- According to the trust deed the beneficiaries of the trust were Mr Retief, his spouse, as well as their children. The court remarked that, even though the trust deed indicated that the trustees had the discretion to determine to whom distributions had to be made, the trust deed imposes a limit on the trustees.
- The trust would be terminated within six months after the death of the survivor of Mr Retief and Mrs Retief.
- The trustee, Mr Retief, had a strong personality and the decisions of the trustees therefore had to be those of Mr Retief. The court compared this with the decision of *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA). In this case (at 261[10]) the court referred to the fact that the respondent had complete control of the assets of the trust concerned and that the respondent had used the trust as a "vehicle for his business activities".

The court found (at 65[32]) that payments made to the Marius Smit Retief Familietrust were, in essence, payments made to Mr Retief. Because of this, the court found that payments made to the trust fell within the ambit of section 64(1)(c) of the Income Tax Act. It can be concluded that the decision:

- illustrates the importance of context; and
- confirms that the interpretation of provisions requires the context and purpose of the provision to be considered; in the relevant case a deeming element formed part of a statutory provision that was interpreted, and the case illustrates that statutory provisions must be interpreted according to a purposive approach.

Natal Joint Municipal Pension Fund v Endumeni Municipality is an important court decision that illustrates the impact of the purposive approach on a matter that is adjudicated by a court.

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA)

This case was not a tax matter but involves important principles to be applied in interpreting fiscal legislation. The Supreme Court of Appeal (at 262) was required to determine whether contributions that were paid by the Endumeni Municipality in relation to the Pension Fund of the employees were recoverable in terms of regulation 1(xxi)(h) of the Natal Joint Municipal Fund, read together with section 12(1) of the Pension Funds Act, 24 of 1956. The court acknowledged (at 272[17]) that a "proper approach" was required in order to interpret provisions. The court remarked (at 272[18]) that:

> [interpretation] is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors … The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The … inevitable point of departure is the language of the provision itself …, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

Wallis (2019: 21) observes that the extract represents one of the principles established in the case. The extract illustrates that:

- the starting point of statutory interpretation is the wording of the relevant statutory provision. Wallis (2019: 20) observes that

> text and context go together in the process of interpretation; that one starts with the language and the rules of grammar and syntax, but always viewed in the light of the context, the apparent purpose of the document and, where there is relevant knowledge, the material known to those responsible for its coming into existence.

- interpretation applies a "sensible" approach;
- various factors are involved in the process of interpretation; these factors are the context of a matter;
- interpretation must be in accordance with the intention of the legislator;
- interpretation is not legislation;
- equal regard must be had of the wording of a provision and the context of the provision; neither one is ranked above the other; and
- the context of a provision is an integral part of the process of interpretation.

Le Roux (2019: 4) stresses that

> the clarity of the law must be contextually justified against equally pressing demands for greater consistency, efficiency and social justice in the application of the law. *Endumeni* seems to embrace all four these foundational values of the legal order as co-equal aims of the interpretive process, without ranking them in any order of priority.

According to Le Roux (2019: 4):

- The judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* indicates that the four aspects of clarity of the law, consistency, efficiency and social justice in the application of the law are "difficult to harmonise".

- "(C)omplex compromises" between the four aspects "lie at the heart of the interpretive process".
- The compromises between the four aspects are illustrated in the following extract of *Natal Joint Municipal Pension Fund v Endumeni Municipality* at 272[18]:

> Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax [the clarity of the text]; the context in which the provision appears [the "internal consistency of the text"]; the apparent purpose to which it is directed and the material known to those responsible for its production [the "efficiency of the text"].

The Davis Tax Committee (2016: 14) indicates that the principles of a good tax system consist of efficiency, equity, simplicity, transparency and certainty and tax buoyancy. The interpretation of Le Roux (2019: 4) suggests the application of the principles of a good tax system. Efficiency, as a principle of a good tax system, requires that the "tax system must produce sufficient income for the state, with minimum distortions to the economy" (Davis Tax Committee, 2016: 14). Efficiency, as interpreted by Le Roux (2019: 4), refers to the purpose of the provision. Equity (Davis Tax Committee, 2016: 14) is both vertical and horizontal, and also takes into account "the benefits of the public good received in relation to the tax burden imposed." Le Roux (2019: 4) refers to the "public policy or social justice implications of the text". These aspects to which le Roux refers therefore relate to the principles of a good tax system.

Wallis (2019: 21) concludes that the other principles of *Natal Joint Municipal Pension Fund v Endumeni Municipality* are as follows:

- Presiding officers are required to provide "linguistic and contextual" reasons for their decisions.
- A "single reasonably clear standard for the interpretation of documents" is required. Wallis (2019: 7) stresses that "(t)here is an obvious advantage … to courts having a single reasonably clear standard by which to approach

> questions of interpretation, without the need to trawl through a mountain of inconsistent judgments and *dicta*."

According to Wallis (2019: 17), "(w)hen dealing with a statute, context does not involve guesswork as to the intention of the legislature, but a reasoned assessment of the broad purpose underlying its enactment" Wallis (2019: 20) further mentions that "(c)ontext must be apparent from the material placed before the court or matters in regard to which it is legitimate to take judicial notice, that is, matters of relatively common knowledge."

Perumalsamy (2019: 3) is of the view that the case has not solved the problems associated with statutory interpretation. It is not sufficient that the court merely suggests that the context must be determined. The contextual considerations that must be considered must also be limited. Perumalsamy (2019: 4) suggests that the legislative history must not be regarded as a contextual factor. This seems to suggest that context must be specifically defined to ensure consistent application in future. This appears to be a valid point. The principle of transparency and certainty requires the consistent application of tax rules and procedures.

In *Natal Joint Municipal Pension Fund v Endumeni Municipality,* the court further acknowledged (at 277[24]) that it is important that the legislative and the judicial functions must be separated:

> The sole benefit of expressions such as "the intention of the legislature" or "the intention of the parties" is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretative spectrum.

In circumstances where a provision may have more than one meaning the Supreme Court of Appeal acknowledged (at 278[26]) that the following approach must be followed:

> In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

The extract suggests that the purposive approach requires the interpreter to follow a practical, reasonable approach. This confirms that interpretation is multifaceted and various factors are involved in order to ensure that a provision is interpreted correctly and accurately.

The third approach to the interpretation of legislation is referred to as the teleological approach.

7.2.3 Teleological approach to the interpretation of legislation

Stevenson and Soanes (2010: 711274) define "teleology" as "the doctrine of design and purpose in the material world." According to Du Plessis (2011: 323) this approach is closely related to the purposive approach but, in addition to this, it:

> aspires to a realisation of the "scheme of values" on which the legal order is premised … It is "value-activating interpretation", … in other words, going not only by the design or purpose which lies behind an individual provision, but by the scheme of values informing the legal and constitutional order in its totality.

In terms of this approach, statutory interpretation commences with section 39(2) of the Constitution (Mupangavanhu, 2019: 8).

Du Plessis (2011) concludes that the case law has been very limited with reference to the teleological approach. The previous sections of this chapter have indicated that context is an important factor when a provision is interpreted. The teleological approach focuses on values. Brugger (1996: 243) refers to the fact that courts apply the teleological approach for the "common good" of the citizens, which include "legal certainty, legitimacy, and practicality". Du Plessis (2011: 323) observes that the

limited case law that illustrates the teleological approach deals with Constitutional matters. The following paragraphs will briefly summarise the important principles that were formulated in these cases.

According to Mupangavanhu (2019: 4) "in legal research a normative framework is relevant to providing a justification for a judgement as to why the law is good or bad in context." In terms of the teleological approach the "constitutional values" as formulated in section 39(2) of the Constitution "provide a normative value system (a context) against which all law, all actions, including decision-making processes are to be measured and evaluated." (Mupangavanhu, 2019: 6). The application of section 39(2) of the Constitution is relevant to all legislation and not only to the interpretation and the application of Chapter 2 (Bill of Rights) (Mupangavanhu, 2019: 7).

In *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officers, Port Elizabeth Prison* 1995 (10) BCLR 1382 (CC), Sachs J (at 1403[46]) makes the following remark:

> In my view, faithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-orientated framework. The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct.

In *African Christian Democratic Party v The Electoral Commission and Others* 2006 (5) BCLR 579 (CC), at 593[34], the Constitutional Court remarked (at 593[34]) that:

> in approaching the interpretation of provisions … , courts … must understand those provisions in the light of their legislative purpose within the overall … framework. That framework must be understood in the light of the important constitutional rights and values that are relevant.

Le Roux (2006: 386, 387) concludes that the remark of the Constitutional Court represented the "best" formulation of the teleological approach. He adds the following remark:

> the broader (read purposive) approach which the Court favours includes the following distinct steps: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that 'understands' (read promotes) its central purpose; and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights … This reference to fundamental values implies that every statutory provision must be read as part of and integrated into a principled legal whole.

From the discussion of the cases it can be concluded that the interpretation of legislation, which includes fiscal legislation, requires the interpreter not only to take account of the text of a provision, it also requires the interpreter to consider the context of the provision and to promote the fundamental values of South African society. Stevenson and Soanes (2010: 762485) define "value" as "principles or standards of behaviour". The requirement that the fundamental values of South African society must be promoted is therefore an acknowledgment by the legislator that legal principles must be applied when legislation is interpreted.

Mupangavanhu (2019: 11) defines the concept "transformative constitutionalism" as "the influence of the overarching values of the Constitution on the legal culture of interpretation to align it with the normative value system." According to Langa (2006: 353)

> [t]he Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.

The purpose of the present research is to determine whether the application of deeming provisions reflect the principles of a good tax system. The following principles are the focus of the research: equity, efficiency and transparency and certainty. It was indicated in the first section of this chapter (7.1) that interpretation is important in relation to statutory provisions. Deeming provisions are examples of statutory provisions. The next section will discuss the importance of principles in a general and a tax context.

7.3 Principles of a good tax system

Stevenson and Soanes (2010: 558806) define "principle" as "a fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning". It can therefore be inferred that principles are the benchmarks against which actions are measured. Principles of a good tax system are important in a general as well as a tax context. The Constitution also had an impact on the application of these principles.

7.3.1 Principles of a good tax system and the Constitution

Section 39(2) of the Constitution provides that: "(w)hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

In section 158(b)(i) of the Companies Act, 71 of 2008 ("the Companies Act") it is provided that the Commission [Companies and Intellectual Property Commission], the Panel [Takeover Regulation Panel], the Companies Tribunal or a court is required to promote the "spirit, purpose and objects of this Act [the Companies Act]. Mupangavanhu (2019: 6) clarifies that the phrase "spirit, purposes and objects" of the Act [the Companies Act] "imply the 'context' in which the provisions of the Act must be understood and applied … This has been correctly understood to mean the text-in-context approach or a purposive approach to the interpretation of the provisions of the Act".

Moosa (2018a: 7) acknowledges that there is no clear interpretation for the phrase "spirit, purport and objects", but suggests that, in general, it could possibly refer to "the normative standards, values, ethos and principles underlying the Constitution". Moosa submits that:

- Spirit is related to values. These values include, amongst others, justice, freedom, equality, democracy and democratic values. In the previous section of the present research (section 7.2) it was observed that values equate to principles and it can therefore be confirmed that the spirit of the Bill of Rights is related to legal principles.
- Purport relates to the fact that the Bill of Rights applies, in the context of section 8(1) of the Constitution, "to all law, and binds the legislature, the executive, the judiciary and all organs of state". The Bill of Rights, in the context of section 8(2) of the Constitution "binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".
- The objects of the Bill of Rights relate to the fundamental rights and values.

Section 39(2) therefore illustrates the close connection between interpretation and the principles of a good tax system.

The Constitution includes another important provision in section 36, the limitations clause. Section 36(1) provides that:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

In *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC), Mokgoro J observed (at 752[104]) that:

> the "law of general application" requirement is merely a precondition to the applicability of section 33(1). If a limitation is in substance ill-advised, that will be caught by the rigours of the limitation test itself. To conclude, the Presidential Act is an exercise of constitutional power in the form of general, publicly accessible rules which affect the rights of individuals. In my view, that is sufficient to fall within "law of general application" for the purposes of section 33(1).

Section 33(1) was the limitations clause of the Interim Constitution of the Republic of South Africa, 1993. The approach of Mokgoro J (as formulated in *President of the Republic of South Africa v Hugo*, at 752[104]) to the meaning of "law of general application" has been interpreted as follows:

- Law "includes rules of legislation, delegated legislation and common law …" (Currie and De Waal, 2005: 172). Rautenbach (1996: § 1A45.2) expands on this and includes the provisions of the Constitution and "law which the courts create through interpretation, application and the development of the common law."
- Rautenbach (1996: § 1A45.2) limits "law" to that which is "*accessible, comprehensible and predictable*". [emphasis in the original]. This view is based on *President of the Republic of South Africa v Hugo,* at 751[102], where the Constitutional Court remarks that "[t]he need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law …, and
- … [F]urther, laws should apply generally, rather than targeting specific individuals." Currie and De Waal (2005: 172) observe that a rule will qualify as a "law of general application" if it is "accessible, precise and of general application". According to Rautenbach (1996: § 1A45.3) the legislature may not limit the rights of a "specific person" or provide for "a single or unique set of circumstances".

- The words “in terms of law of general application” means that law must authorise all limitations (Rautenbach, 1996: § 1A45.1).

In this context, a statutory provision is a “law of general application” because it is “accessible, precise and of general application”. A deeming provision is a statutory provision and it follows that it qualifies as a “law of general application”. In the context of section 36(1) of the Constitution, this means that when the effect of a deeming provision is that a right in the Bill of Rights is limited, the limitation must be “reasonable and justifiable in an open and democratic society”. More specifically, the deeming provision must meet the requirements of the principles of a good tax system. This confirms that, in the context of the Constitution, there is a close link between deeming provisions and the principles of a good tax system. Section 7.3.2 will discuss the importance of these principles in a general context.

7.3.2 The importance of the principles of a good tax system in a general context

Humberto (2007: 35) confirms that:

> principles set forth an ideal state of affairs to reach (*Idealzustand*), through which judges must inspect the appropriateness of the behavior chosen or to be chosen to protect such state of affairs. *State of affairs* can be defined as a situation defined by certain qualities. The state of affairs becomes a *purpose* when one aspires to obtain, enjoy or have the qualities in that given situation. [emphasis in the original]

In this sense, the principles of a good tax system, therefore, are benchmarks against which behaviour is measured to determine whether it meets the required standards set by these principles. The judiciary is obliged to apply the principles of a good tax system to the facts and circumstances of a matter. In this regard refer to the discussion in this chapter of *Huijink-Maritz v Municipal Manager Matjhabeng Municipality and Another* 2018 (5) SA 614 (FB).

The principles of a good tax system that apply to taxation are important in various legal fields. For illustrative purposes only two fields other than the tax field are

discussed in this section: criminal law and administrative law. There is no specific reason for selecting these two legal fields. The two legal fields only serve as examples of the importance of the principles of equity, certainty and transparency, and efficiency. The judiciary made the following remarks with reference to these principles.

Criminal law

In *S v Makwanyane* 1995 (6) BCLR 665 (CC) the Constitutional Court (at 769[302]) held that:

> [w]ith the entrenchment of a Bill of Fundamental Rights and Freedoms in a supreme constitution, however, the interpretative task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text. The Constitution makes it particularly imperative for Courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive.

The extract refers to the Bill of Fundamental Rights and Freedoms. This reference relates to Chapter 2 of the Constitution, which recognises that there are fundamental principles (or values) that must be protected. Section 36(1) of the Constitution confirms the importance of principles and values in the Constitutional context and provides that a right included in the Bill of Rights can only be limited "to the extent that" it is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors". In *S v Makwanyane* the Constitutional Court (at 769[302]) not only confirmed that principles are important but indicated that the judiciary is obliged to develop these principles. Stevenson and Soanes (2010: 735010) define "transparent" as "open to public scrutiny". The *S v Makwanyane* case (at 769[302]) as well as section 36(1) of the Constitution refer to "an open and democratic society". The word "open" can

therefore be interpreted as "transparent". The principle of transparency is one of the principles of a good tax system that form part of this research. The *S v Makwanyane* case (at 769[302]) substantiates the importance of these principles with the following words: "The Constitution makes it particularly imperative for Courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society". The Court acknowledges that principles based on fundamental rights and values are established elements in the legal field.

Administrative law

In *Huijink-Maritz v Municipal Manager Matjhabeng Municipality and Another,* 2018 (5) SA 614 (FB), the Free State Division, Bloemfontein, considered the interpretation of a deeming provision included in PAIA. The court had to determine (at 616[1]) whether there was a difference between a deemed refusal and an actual refusal. The relevant deeming provision that formed the basis of the case was included in section 27 of PAIA where it is provided that:

> [i]f an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25 (1), the information officer is, for the purposes of this Act, regarded as having refused the request.

The court confirmed (at 621[19]) that the purpose of section 27 was to ensure certainty where uncertainty would otherwise have prevailed. The provision likened the failure to adhere to the prescribed timeframe to refusal. The purpose of the provision is to deal with administrative matters and deals with the outcome of a request for information.

The court (at 626[34]) observed that PAIA requires throughout that when an official of a public body refused to provide the record of information to the requester, the official was required to justify the reason for not providing it. Section 27 did not include this requirement. The court found therefore that the deemed refusal was invalid on account of this. This case did not relate to a tax matter, however, PAIA applies to all information held by the government and any other person, which has an

impact on the protection of the rights of a person. The principles of equity and certainty were also applied in the case. From a tax perspective "tax rules and procedures should be transparent and applied consistently" (Davis Tax Committee, 2016: 14). Where there is uncertainty about whether or not information will be provided it is difficult to interpret the rules and procedures as being transparent and consistent.

Article 9 of the Code of Judicial Conduct, Government Gazette No. R.865, 18 October 2012 (Department of Justice and Constitutional Development, 2012: 22) requires that the judiciary, in resolving dispute, is required to ("must") make findings of fact and apply "the appropriate law in a fair hearing". This relates to the principles of natural justice which includes the *audi alterem partem* rule. Section 34 of the Constitution provides that "(e)veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." Section 39(2) of the Constitution further provides, with reference to the interpretation of the Bill of Rights, that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." These sources suggest that the judiciary is required to apply the principles of equity and certainty.

Section 27 of PAIA did require judicial interpretation. In *Huijink-Maritz v Municipal Manager Matjhabeng Municipality and Another,* at 617[10], the court referred to section 32 of the Constitution where it is provided that:

> (1) Everyone has the right of access to —
> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

In the preamble to PAIA it is provided that one of its purposes is to: "foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information". The court also referred to sections 6(3) and 8(2) of PAJA. These sections provide that where a decision was not taken, the court or tribunal was authorised to grant an order that is "just and equitable". The provisions of these two Acts reflect the importance of the application of the principles of justice, equity and certainty. The court relied (at 618[11]-[12]) on the following two court decisions when it referred to the importance of the principles of transparency and fairness. The first case to which the court referred was *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC), where the Constitutional Court (at 346[62]) confirmed, in relation to the principles of openness, accountability and responsiveness, that:

> [t]he importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that … transparency 'must be fostered by providing the public with timely, accessible and accurate information'.

The second court decision is *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T), where the Transvaal Provincial Division (at 850) made the following remark in relation to section 23 of the Constitution, which deals with the right to information:

> In my view, s 23 entails that public authorities are no longer permitted to 'play possum' with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in s 23, is to subordinate the organs of State, including municipal authorities, to a new regimen of openness and fair dealing with the public.

The court concluded (at 629[45]) that: "(p)ublic bodies have a constitutional duty to give people access to information so that they can exercise their rights. When they try

to subvert a person's constitutional right by being unresponsive and playing possum, their conduct should be deprecated."

7.3.3 The importance of the principles of a good tax system in a tax context

In the tax field there have been divergent interpretations in relation to the importance of the principles of a good tax system. At the one end of the spectrum are cases that find that these principles do not apply to the tax field.

- In *Commissioner for Inland Revenue v Simpson* [1949] 16 SATC 268 at 285 the court observed as follows:

> '[i]n 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.' 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.

According to Clegg (2006: 3), it is his view that "morality has no place in the *application* of tax law since morality is largely subjective. Where it has a place, is in the *writing* of tax law in such a way that it is both clear and equitable, within the context of its tax-raising purpose." [emphasis in the original]. This means that the focus must be on the process *preceding* the enactment of the legislation. The Income Tax Act obliges taxpayers to pay the tax due. This is in accordance with the principle of efficiency which requires the government to "produce sufficient income" (Davis Tax Committee, 2016: 14). The principle of efficiency, however, does not stop at this requirement. The second aspect of the principle requires that the process of raising revenue must accompany "minimum distortions to the economy". This suggests that the tax rules and procedures must balance the raising of revenue with the protection of the economy.

De Koker and Williams (2020: § 25.1A) observe that

> [s]ince the coming into force of South Africa's Constitution, any reference to the irrelevance of 'equity' in the application of tax legislation must be read as

> subject to the overarching constitutional protection of the rights laid down in the Bill of Rights, many of which are based on notions of fairness.

Interpreting the views of Clegg (2006) and De Koker and Williams (2020) it can be said that in the drafting of legislation, tax rules and procedures, the principles of a good tax system must be considered. In applying the provisions of tax legislation, tax rules and procedures, in general, the extent to which the principles of a good tax system apply is determined by the relevant tax legislation, tax rules and procedures. The overarching rule is that the application of tax legislation, tax rules and procedures remains subject to the provisions of the Constitution.

Commissioner for Inland Revenue v Simpson had a significant effect on the tax field and certain recent court decisions, of which the following are examples, still apply the principle formulated in *Commissioner for Inland Revenue v Simpson*.

- In *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Services* [2017] JOL 37365 (KZD), footnote 26 to the judgment reads "… [e]quitable construction … generally no longer finds favour as a general rule of construction". Moodley J observes (at 10[31]), whilst discussing the publication of EA Kellaway, cited as (1995) *Principles of Legal Interpretation* (1995: 341), that: "[a] taxing Act is not to be interpreted according to "the spirit of the law", nor words be extended so as to operate against the subject."

- In *XYZ v Commissioner, South African Revenue Service* [2012] JOL 28881 (GNP), Fabricius J observed (at 17[13]) 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. Interpretation concerns the meaning of 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.

- In *New Adventure Shelf 122 (Pty) Ltd v Commissioner, South African Revenue Services*, 2017 (5) *SA* 94 (SCA), the court (at 104[28]) remarked that:

> even if in certain instances it may seem 'unfair' for a taxpayer to pay a tax which is payable under a statutory obligation to do so, there is nothing unjust about it. Payment of tax is what the law prescribes, and tax laws are not always regarded as 'fair'. A tax statute must be applied even if in certain circumstances a taxpayer may feel aggrieved at the outcome.

At the other end of the spectrum are court decisions which directly or indirectly acknowledge the importance of the principles of a good tax system.

- In *Hulett & Sons Ltd. Appellant, v Resident Magistrate, Lower Tugela, Respondent* 1912 AD 760, the Appellate Division made the following remark (at 764):

> 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 doubt 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.

It is suggested that this is an acknowledgement that legislation is not formulated with the purpose of being inequitable or unreasonable.

- In *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA), the Supreme Court of Appeal was required to determine whether the Commissioner for the South African Revenue Service provided the taxpayer with adequate reasons. The court found (at 561[30]) that reasons had an important purpose. In the context of the court decision, the provision of reasons:
    - were closely related to the principle of openness (transparency);

- informed the public about why a case was decided in a certain manner; and
- guided the public in how similar matters will be adjudicated in future.

- In *ABC (Pty) Ltd v the Commissioner for South African Revenue Services,* Case number 13356 (2 December 2013), the Special Tax Court, Johannesburg, the court remarked (at [41]) that:

> Principles emanating from judgments are meant to be applied to different facts otherwise the law would be a static process. A sensible objective observer looking at the judgment in its entire context would note the import of the principles of allowing the deductions of a wide variety of fees and the like.

This remark confirms that the principles of a good tax system make the law more flexible. It can therefore be suggested that the principles of a good tax system assist the law to take account of the facts and circumstances prevailing at the time a matter is reviewed.

- An interesting dictum is the Afrikaans version of the case *Commissioner for Inland Revenue v Delfos* [1933] 6 SATC 92. The court interpreted section 7(1) of the 1925 South African Income Tax Act, which provided that the definition of "gross income" means:

> the total amount whether in cash or otherwise received by or accrued to or in favour of any person, other than receipts or accruals of a capital nature, in any year or period assessable … from any source within the Union or deemed to be within the Union …

De Villiers JA observed (at 116) that:

> [a]rt. 7(1) bepaal nie inkomste op twee grondslae, t.w. ontvangste en toevallinge nie. Waarom moet daaraan 'n konstruksie gegee word wat tot 'n ongerymdheid lei, en waarom moet, om die ongerymdheid te neutraliseer, dan die toevlug geneem word tot 'n "necessary implication" dat dieselfde bedrag nie tweemaal in die hande van dieselfde

> belastingpligtige belas sal word nie? – 'n Billikheidsbeginsel nogal wat nie rym nie met die gevestigde opvatting in Inkomstebelastingwette dat daar geen ruimte is vir 'n billikheidsinterpretasie nie. Maar as die billikheid kan ingeroep word vir die vermyding van dubbele belasting, waarom kan dit ook nie ingeroep word vir die terugverwys van werklike ontvangste na die jaar van toevalling nie? Die wet is, m.i. duidelik genoeg ten gunste van respondent om in elk geval so 'n inroeping onnodig te maak.

Expressed in English, the dictum confirms that income is taxed either when it is received or when it accrues. De Villiers JA referred to the application of the principle of reasonability which required that income cannot be taxed when it is received and again when it accrues. It can only be taxed once. The interesting aspect of the dictum is that De Villiers JA observes that the principle of reasonability must not only be applied during the interpretation of possible double tax but also when the receipt or accrual aspect of income is considered. This suggests that legal principles (of which equity and reasonability form part) must be applied holistically and not selectively. Although De Villiers JA found that it was not necessary to apply the principle of reasonability in the matter, his remark still remains important and confirms the importance of the principles of a good tax system.

7.4 Conclusion

This chapter discussed the approaches to the interpretation of tax law and the application in this interpretation of legal principles and the principles of a good tax system. The chapter commenced by providing a brief summary of the legal principles developed in Roman Law that apply to the interpretation of statutes, these principles being justice, equity and good faith, the context of a matter, reasonableness, substance *versus* form, *fraus legis*, and the *contra fiscum* rule. In South Africa, the Constitution, and particularly section 39(2), which provides that the interpretation of legislation and the development of the common law or customary law must "promote the spirit, purport and objects of the Bill of Rights", together with the philosophy of *ubuntu,* has

a significant impact on the interpretation of statutes. The courts apply these legal principles in tax disputes, particularly in the application of the purposive interpretational approach, to achieve the principles of a good tax system – equity, certainty and transparency, and in cases involving tax avoidance or evasion, to protect the *fiscus.* The decisions of the judges are not always unanimous, but reflect the application of the legal principle of reasonableness. These legal principles therefore promote the achievement of the principles of a good tax system, and the two are closely connected.

Natal Joint Municipal Pension Fund v Endumeni Municipality and the Constitution have had a profound impact on the interpretation of legislation. The interpretation of legislation starts with the wording of the legislation, but it does not stop at the wording. In terms of *Natal Joint Municipal Pension Fund v Endumeni Municipality* the interpreter must also take the context (purpose) of the legislation into account. There are different views regarding context. The problem associated with context is the factors that must be considered. At one end of the spectrum is the statement that the factors must be limited; at the other end is the requirement that the focus must be on the Constitution.

In this chapter the following sub-goals were discussed:

- Discuss the approach to the interpretation of tax legislation; and
- Apply the international semantic approach (theory) (Brink, 1988: 111) of deeming provisions, which include:
    - the characteristics of deeming provisions; and
    - the purpose of deeming provisions.

The approaches to the interpretation of tax legislation

This chapter was dedicated to understanding the various approaches to interpretation. It was found that there are effectively three approaches to the interpretation of legislation:

- The strict (traditional) approach, which focuses on the text of statutory provisions. This approach was applied in older court cases (and in some recent cases).
- It was observed that text cannot be taken into account in isolation. Interpretation requires something more than mere text. This something is the purposive approach. The purposive approach takes the text of a provision into account in conjunction with its context, including its purpose. This is a more balanced approach and it was demonstrated that this balanced approach in effect acknowledges the importance of principles of a good tax system.
- The third approach is a new approach to legal interpretation: the teleological approach. It is an extension of the purposive approach but with an increased focus on values. This is a further acknowledgement of the impact of principles of a good tax system.

The approaches confirm that the text of the provision (this will therefore also include a deeming provision) is important. The approaches differed in relation to the importance of the principles of a good tax system. The purposive approach is more reflective of these principles due to the fact that it takes the context and purpose of the provision into account; the strict approach focuses more on the text of the statutory provision. Although the wording of the provision concerned is important, it is submitted that the context and purpose of the provision, and the principles of a good tax system, must also be taken into account.

In this chapter selected case law was discussed to illustrate the different approaches to interpretation. The importance of deeming provisions (statutory provisions) and the principles of a good tax system was confirmed in the context of the various approaches to legal interpretation. The following aspects were identified in case law:

- The principles of a good tax system require a sensible and logical approach, but do not require that extraordinary measures must be taken.
- The principles of a good tax system must be applied in a holistic manner and not selectively.

- The legal fields, in general, acknowledge the importance of the principles of a good tax system.
- The Constitution had an important impact on the interpretation of statutory provisions. It acknowledges that the principles of a good tax system are the root of law and that courts must take these principles into account when a matter is adjudicated.
- Earlier, the interpretation of statutes in the tax field was affected in a significant manner by the principle formulated in *Commissioner for Inland Revenue v Simpson*, where it was found that there is no equity in tax. This tendency can also be seen in certain more recent decisions. The purposive approach to the interpretation of statutes has become more prevalent and reflects the principle of equity.

The next chapter continues with a discussion of the role of the principles of a good tax system. To demonstrate the relationship between deeming provisions and the principles of a good tax system, an understanding will be obtained of a selection of deeming provisions in the Income Tax Act and their interpretation in case law.

CHAPTER 8
A SELECTION OF DEEMING PROVISIONS IN THE SOUTH AFRICAN INCOME TAX ACT

The hardest thing in the world to understand is the income tax.

- Albert Einstein, physicist (quoted by the IRS)[6]

8.1 Introduction

This chapter addresses part of the fourth goal: to demonstrate the relationship between deeming provisions and the principles of a good tax system, an understanding is obtained of a selection of deeming provisions in the South African Income Tax Act and their interpretation in South African case law. The remaining part of the fourth goal (the OECD Model Tax Convention, and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) is the subject of the following chapter.

This chapter discusses the following provisions in the 1962 South African Income Tax Act (referred to as the "Income Tax Act", unless otherwise specified): the deemed date on which a legislative amendment comes into effect, the definition of "gross income" in section 1 of the Income Tax Act, section 7, section 7C, sections 13, 13*bis*, 13*quin* and 13*sex*, and sections 80A - 80L.

First it is established whether the provisions are deeming provisions and their relationship with the principles of a good tax system. Secondly, relevant case law that interprets certain of these provisions is referred to, and the extent to which their interpretation reflects the application of the principles of a good tax system is discussed.

8.2 The provisions and their interpretation

In the House of Lords decision of *St Aubyn and Others v Attorney General (No 2)*, Lord Radcliffe found (at 53) that deeming provisions:

[6] www.irs.gov>newsroom>taxquotes

- are means to ensure that a word or phrase is interpreted in a specific manner; or
- ensure certainty where uncertainty will otherwise prevail; or
- ensure comprehensiveness with reference to "what is obvious, what is uncertain and what is, in the ordinary sense, impossible".

In Chapter 1 it was indicated that deeming provisions have three purposes:

- to nullify tax avoidance schemes which have the intention of shifting tax;
- to extend or restrict the scope of a benefit; and
- to deal with administrative matters.

In the recently enacted sections 80A to 80L, dealing with impermissible tax avoidance schemes, section 80L defines an "avoidance arrangement" (which is widely defined) as "an arrangement that . . . results in a tax benefit". A "tax benefit" is defined in section 1 of the Income Tax Act to include any "any avoidance, *postponement* or reduction of any liability for tax" [emphasis added]. This wider definition of an avoidance arrangement will be applied in this chapter.

These characteristics and purposes of deeming provisions will be applied to the various tax provisions discussed in this chapter, to substantiate the claim that the relevant provisions are deeming provisions. The principles of a good tax system were described in Chapter 6 of this thesis. The selection of provisions in the Income Tax Act will be analysed to determine whether they reflect the application of one or more of these principles.

8.3 Deeming provisions and income tax

This section discusses selected provisions in the Income Tax Act and their judicial interpretation, for the purpose of determining whether they are deeming provisions and whether the provisions and their interpretation comply with the principles of a good tax system.

The individual sections of the Income Tax Act include the following phrase immediately after the relevant section or subsection: "… deemed to have come into operation on …". Botha (1998: 75) declares that there is a presumption in the interpretation of legislation against retrospectivity but that this presumption will be refuted if the legislation specifically provides to the contrary. The dictum of Lord Radcliffe can be applied to the phrase and it can be observed that it ensures certainty regarding when a section or subsection applies, thus the interpretation of the relevant section. It can be concluded that the phrase "… deemed to have come into operation on …", in addition to the use of the word "deem", is a deeming provision. Furthermore, the phrase "deemed to have come into operation on . . ." has the purpose of dealing with an administrative matter.

8.3.1 Section 1 – the definition of "gross income"

The definition of "gross income" in section 1 in the Income Tax Act is one of the most important provisions. In *Delfos v Commissioner for Inland Revenue* 1933 AD 242, Wessels CJ stated (at 254) that it [the definition of "gross income"] was at the heart of all matters concerning the then Income Tax Act. The definition sets out the conditions under which amounts will be included in gross income for the purpose of calculating the taxable income of a person. The definition states that "gross income":

> in relation to any year or period of assessment, means–
>
> (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
>
> (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic,
>
> during such year or period of assessment, excluding receipts or accruals of a capital nature, but including (whether of a capital nature or not) so received or accrued as are described hereunder … Provided that where during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of such year, that amount shall be deemed to have accrued to the person during such year.

It is suggested that the definition includes certain aspects that can be regarded as deeming provisions. To determine whether the definition is a deeming provision and whether it reflects the principles of a good tax system, the following three-part enquiry is carried out:

- Identify whether a deeming provision exists.
- Determine whether the deeming provision complies with the principles of a good tax system.
- If the provision requires judicial interpretation, does this reflect the need to apply the principles and does the interpretation then reflect these principles?

What is the purpose of the provision?

The definition in section 1 of the Income Tax Act determines what constitutes "gross income". Gross income is the starting point for the determination of taxable income, which is calculated by deducting from gross income amounts that are exempt from tax and all allowable deductions, adding specific inclusions into the resulting "income", and adding to taxable income capital gains determined in terms of the Eighth Schedule to the Income Tax Act.

Is the provision of a deeming nature based on its title or through other means?

The definition of "gross income" does not have a separate title. Other means must therefore be used to determine the nature of the section.

As remarked by Lord Radcliffe in *St Aubyn and Others v Attorney General (No 2)* (at 53), deeming provisions ensure consistent interpretation of words, ensure certainty, and ensure comprehensiveness in relation to "what is obvious, what is uncertain and what is, in the ordinary sense, impossible". Deeming provisions furthermore have the purpose of nullifying tax avoidance schemes (which in the wider South African context include any avoidance, *postponement,* or reduction of any liability for tax), extending or restricting the scope of a benefit, and dealing with administrative matters.

To determine the extent to which the definition of "gross income" is a deeming provision, the following aspects of paragraphs (i) and (ii) of the definition are considered.

- The first aspect relates to the words: "the total amount in cash or otherwise". Amounts in the form other than cash would need to be valued for the purpose of inclusion in gross income. In *Commissioner for Inland Revenue v Butcher Bros (Pty) Ltd,* 1945 AD 302, 13 SATC 21, it was held that the amount should have an ascertainable money value. The court also confirmed that the onus was on the Commissioner to determine a value. Goldswain (2009: 68) states that the Commissioner for Inland Revenue is required "to prove the jurisdictional fact that an … amount … for the purposes of the general definition of … gross income … in the Act, has accrued to the taxpayer". In terms of section 102 of the South African Tax Administration Act, 28 of 2011 (the Tax Administration Act), the onus is then on the taxpayer to establish an alternative amount. The phrase "total amount in cash or otherwise", although the word "deeming" is not used, is a deeming provision if the dictum of Lord Radcliffe in *St Aubyn and Others v Attorney General (No 2)* and the purposes of deeming provisions are taken account of. The phrase ensures certainty and comprehensiveness in relation to the meaning of "total amount".

  Both the phrase "the total amount in cash or otherwise" and the interpretation by the court in *Commissioner for Inland Revenue v Butcher Bros* comply with the principles of a good tax system, and more specifically equity, and certainty and transparency. The valuation of the amount at its ascertainable money value ensures a fair and equitable valuation, and equity is achieved between a taxpayer receiving an amount in the form of cash and one receiving it in a form other than cash. The interpretation by the court also ensures certainty and transparency.

- The following aspect to be considered is the words "received by … or in favour of". Not only amounts physically received by a person are included in

"gross income" (Jansen van Rensburg, 2008: 37). In *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd*, 1955 AD, 20 SATC 113, it was stated (at 122):

> … borrowed money is not received … within the meaning of 'gross income' … It is difficult to see how money obtained on loan … can be part of the income of the borrower, any more than the value of the tractor which a farmer borrows is to be regarded as income received otherwise than in cash … It is certainly not every obtaining of physical control over money or money's worth that constitutes a receipt … If, for instance, money is obtained and banked by someone as agent or trustee for another, the former has not received it as his income, At the same moment that the borrower is given possession he falls under an obligation to repay.

Jansen van Rensburg (2008: 45) observes in this regard that the fact that the borrower of the money becomes the owner of the loan capital does not convert the transaction into a receipt in terms of the definition of "gross income".

The words "received by" do not constitute a deeming provision as the meaning is clear, but the words "in favour of" constitute a deeming provision, as they ensure that amounts are interpreted in a specific manner, ensure certainty, and ensure comprehensiveness with reference to what may be uncertain. The inclusion of the words "in favour of" also have the purpose of nullifying tax avoidance schemes that involve amounts that are not received directly by the taxpayer, but are "credited in account or re-invested or accumulated or capitalised or otherwise dealt with in his name or on his behalf ..." (*Liberman v Commissioner for Inland Revenue* 1923 CPD 233 (C), at 236, albeit in relation to the terms "received by or accrued to or in favour of" – see below).

The expression "received by … or in favour of", together with the interpretation of the phrase in *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* and the comment in *Liberman v Commissioner for Inland*

Revenue reflect the application of the principle of equity by ensuring that both amounts actually received and those dealt with in favour of a taxpayer are included in gross income, as well as certainty and transparency regarding what is to be included in gross income.

- The following aspect relates to the words "accrued to". In *Liberman v Commissioner for Inland Revenue*, at 236, the Cape of Good Hope Provincial Division was required to interpret section 4(2) of the 1914 South African Income Tax Act. The section defined the phrase "taxable income" and provided that taxable income "shall mean, an income … which has been received by, accrued to or in favour of, any person wheresoever residing, from any source whatever in the Union, during the twelve months …". The court found (at 236) as follows:

  > There is no definition of "accrued to or in favour of" given in the Acts, but from sec. 4(5) of the Act of 1914 we can, I think, derive the idea involved in the use of these words: it says "Income shall be deemed to have accrued to a person within the meaning of this Act, though the same be not actually paid over to such person, but be credited in account or re-invested or accumulated or capitalised or otherwise dealt with in his name or on his behalf."

  The definition of gross income in the current Income Tax Act is similar to the section referred to above, except that the current definition does not use the word "deemed" in relation to accrual. In *WH Lategan v Commissioner for Inland Revenue* [1926] 2 SATC 16, the Cape Provincial Division held (at 20) that "accruals to or in favour of" meant that a taxpayer became "entitled to" the income. The decision in *Mooi v Commissioner for Inland Revenue*, 1972 AD, 34 SATC 1, extended the "entitled to" principle to include amounts to which the taxpayer becomes unconditionally entitled.

  In *Income Tax Case No 189* (1930), 5 SATC 284 (U), at 286, the Court finds that interest accumulated in a loan to a company represented an accrual for purposes of section 8 of the 1925 South African Income Tax Act, being the

"amount of income properly due" in terms of the contract between the taxpayer and the company. The interest accumulated in the loan account therefore formed part of the gross income of the taxpayer.

It is suggested that *WH Lategan v Commissioner for Inland Revenue* and *Income Tax Case 189* confirm the *dictum* in *Liberman v Commissioner* that "accrued to or in favour of" has a deeming nature, as does the decision in *Mooi v CIR*. As was held in *St Aubyn and Others v Attorney General (No 2)*, it ensures consistency in the interpretation, certainty with regard to the meaning, and comprehensiveness in relation to "what is obvious, what is uncertain and what is, in the ordinary sense, impossible", regarding the amounts to be included in gross income for a particular year of assessment. The expression "accrued to" also has the purpose of ensuring that tax avoidance schemes are prevented that rely on the inclusion in gross income of only amounts that are actually received and delay (postpone) the tax liability on amounts that accrue.

The inclusion in gross income of the words "received by or accrued to or in favour of" raises the possibility of double taxation. In *Commissioner for Inland Revenue v Delfos* [1933] 6 SATC 92, the Appellate Division (at 107) remarked as follows:

> Nor can I find any substance in the fear of double taxation if "gross income" be given the meaning which is assigned to it by sec 7(1): not if the Act is administered in a reasonable and practical manner, and if it is borne in mind that a person's income for any year is liable to only one taxation and that therefore any item which forms part of his taxable income for one year cannot again be charged with tax in a subsequent year. I cannot conceive that any difficulty can arise in regard to double taxation which could not be obviated in practice.

It is doubtful whether the terms "accrued to" and its interpretation by the courts comply with the principle of equity, as taxpayers are taxed on amounts that they have not received during the year of assessment, causing cash flow

problems. The discussion below relating to the proviso to the definition of "gross income" further supports this conclusion. Van Zyl (2015: 113) submits that the word "accrued", taking into account "the principle of just administrative action and all external aids" in terms of the purposive approach, should rather mean "due and payable … (an amount is taxed at the time for payment stipulated in the agreement)". According to Van Zyl (2015: 114) this is an "equitable alternative".

- Paragraph (ii) of the definition of "gross income" applies to the income received by non-resident taxpayers, which is based on the source of the income. This is the next aspect to be considered. The predecessors to the Income Tax Act phrased paragraph (ii) differently. In this regard section 6 of the 1917 South African Income Tax Act can be used for illustrative purposes. Section 6 defined gross income as "the total amount received by or accrued to or in favour of any person other than receipts or accruals of a capital nature, in any year or period assessable under this chapter from any source within the Union or deemed to be within the Union …". The extract indicates that the previous version of the Income Tax Act included a deeming provision in relation to the source of income. The word "deemed" in relation to the gross income of non-residents in the current Income Tax Act was removed with effect from 1 January 2012.

  Residents are taxed on their world-wide income, while non-residents are taxed on income from a South African source. The current wording of paragraph (ii) of the definition of gross income must be read together with section 9 of the Income Tax Act, which was introduced into the Income Tax Act also on 1 January 2012. Section 9(2) provides that an amount is "received by or accrues to a person from a source within the Republic", if it meets the requirements set out in section 9. Where a class of income is not referred to in section 9, for example, services rendered, or the rental of property, or business income, case law must be referred to. The *dictum* in *Commissioner for Inland Revenue v Lever Brothers & Unilever Ltd*, 1946 AD 441, 14 SATC 1, is relevant in most instances. The case established that

the source of receipts received as income is not the quarter from where they come, but the originating cause – the work done by the taxpayer to earn them, which may be a business that the taxpayer carries on, an enterprise he or she undertakes, an activity he or she engages in or the employment of his or her capital. Two questions are relevant: What is the originating cause? And where is it located? This *dictum* is one of the most frequently referred to *dicta* in determining the source of income. Other cases deal specifically with various classes of income. Stack, Grenville, Poole, Harnett and Horn (2015: 173) observe that *Commissioner for Inland Revenue v Lever Brothers Ltd*, which dealt with the source of interest, has "lost some of its relevance" for a number of reasons. These reasons included the shift from source-based taxation to residence-based taxation and the inclusion of sub-sections (6) and (7) of section 9 of the Income Tax Act. The decisions in *Millin v CIR*, 1928 AD 207, 3 SATC 170, *CIR v Epstein*, 1954 (3) SA 689 (A), 19 SATC 221, and *COT (SR) v Shein*, 1958 (3) SA 14, 22 SATC 12, are authority for the principle that the originating cause of income from services is the services themselves (Williams, 2015: 56). In *Millin v CIR*, Solomon CC pointed out (at 218) that: "It was the exercise of her wits and labour that produced the royalties. They were employed in the Union [of South Africa] …". The source of income earned from the rental of property is generally where the asset is situated (*COT v British United Shoe Machinery (SA) (Pty) Ltd*, 1964 FC, 26 SATC 163). Haupt (2019: 38), however, cautions that this is not a universal rule and that "[i]n many rental situations the business operations may be dominant", rather than the asset. In relation to the source of business income Haupt (2019: 39) states that it is "generally where the business is carried on or where the business capital is employed, whichever is dominant".

The definition of "resident" in section 1 of the Income Tax Act (discussed below) provides for persons (including natural persons, companies and other organisations) that are considered residents (and therefore taxed on their income from a world-wide source).

Paragraph (ii) of the definition of "gross income", where it refers to "from a source within the Republic", together with section 9, in the context of the *dictum* of Lord Radcliffe in *St Aubyn and Others v Attorney General (No 2)* suggests that it has a deeming nature. The reference to a source within the Republic and the provisions in section 9 ensure certainty with reference to the interpretation of gross income in relation to a non-resident.

The following comments by Stratford CJ in *Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue*, 1939 AD, 10 SATC 363, (at 380) attest to the principle of equity in relation to the source of income:

> There is one further general remark to make on the equitable principles generally found to underlie liability for income tax. In some countries residence (or domicile) is made the test of liability, for the reason, presumably, that a resident, for the privilege and protection of residence, can justly be called upon to contribute towards the cost of good order and government of the country that shelters him. In others … the principle of liability adopted is "source of income", again, presumably, the equity of the levy rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient may live.

Thus, taxing residents on their world-wide income and non-residents on income from a source within the Republic represents the application of the principle of equity. Stack *et al* (2015: 170) consider that the reference in *Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue*, at 380, to "the equity of the levy", represents the principle of "efficiency", one of the principles of a good tax system. This principle "is based on the assumption that the country has effective means to enforce the levy, that is, whether the country has control of the source and therefore the ability to collect the tax."

- The definition of "gross income" refers to persons resident and non-resident in South Africa. The definition of a "resident" in section 1 of the Income Tax

Act has three components – natural persons who are "ordinarily resident in the Republic"; natural persons who are not "ordinarily resident" but who are physically present in the Republic for a certain number of days over a period of five years (the so-called days present test); and a "person (other than a natural person) incorporated, established or formed in the Republic or which has its place of effective management in the Republic". The definition excludes "any person who is deemed to be exclusively resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation". The deeming nature of these Double Tax Agreements is discussed in Chapter 9 of this thesis.

Case law has provided guidance on the meaning of "ordinarily resident", which is not defined in the Act. Williams (2015: 18) refers to Interpretation Note 3 (SARS: 2002), where it is confirmed that the concept was interpreted in *Cohen v Commissioner for Inland Revenue*, 1946 AD 174, 13 SATC 362, and *Commissioner for Inland Revenue v Kuttel*, 1992 (3) SA 242 (A), 54 SATC 298, to mean "the country to which a person would naturally and as a matter of course return from his/her wanderings. It might therefore be called a person's usual or principal residence and it would be described more aptly, in comparison to other countries as the person's real home." The phrase, as interpreted in case law, appears to be a deeming provision as it attempts to ensure that the term "resident" (and therefore non-resident) is interpreted in a specific manner to ensure certainty and comprehensiveness. Based on the comments of Stratford CJ in *Kergeulen Sealing and Whaling Co Ltd* (at 380), it is equitable that a resident "for the privilege and protection of residence, can justly be called upon to contribute towards the cost of good order and government of the country that shelters him". The comments also ensure the efficiency of tax collections. The application of the principles of a good tax system are therefore confirmed.

The "days-present test" is clearly a deeming provision as it deems a natural person who is not ordinarily resident to be a resident, based on the number of

days present in South Africa. This, too, reflects the application of the principle of equity (and efficiency) as, in the words of Stratford CJ in *Kergeulen Sealing and Whaling Co Ltd* (at 380): "the equity of the levy rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient may live".

In the case of a non-natural person, the phrase "incorporated, established or formed in the Republic or which has its place of effective management in the Republic" describes the place of residence. The meaning of the terms "incorporated, established or formed" is clear, but the "place of effective management" has been the subject of extensive discussion. Haupt (2019: 30) refers to Interpretation Note 6 (Issue 2) (SARS: 2015a) and states that, in line with the OECD Model Convention: "Generally, this is the place where 'key management and commercial decisions that are *necessary* for the conduct of (the company's) *business as a whole* are in *substance* made. This is different from 'day-to-day' management". [emphasis in the original] The definition of the residence of a non-natural person, as interpreted by the OECD and confirmed by SARS, is a deeming provision as it represents a means to ensure that "resident" is interpreted in a specific manner, to ensure certainty and comprehensiveness. Based on the comments of Stratford CJ in *Kergeulen Sealing and Whaling Co Ltd*, it complies with the principles of equity and efficiency.

As a whole, therefore, the definition of a "resident", like many definitions, is a deeming provision that complies with the principles of a good tax system.

- A further aspect relates to the proviso to the definition of "gross income" which reads: "[p]rovided that where during any year of assessment a person has become entitled to any amount which is payable on a date or dates falling after the last day of such year, *that amount* shall be deemed to have accrued to the person during such year". [emphasis added] The proviso describes the situation where an amount accrues to a taxpayer in one year of assessment

but is only received in a following year of assessment. The purpose of the proviso is to ensure that amounts that accrue during the year of assessment, but are not received, are included in gross income at their face value. The decision in both *WH Lategan v Commissioner for Inland Revenue* and *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd*, 1990 (2) SA 353 (A), 52 SATC 9, confirmed that debts in respect of transactions that were entered into during the year of assessment and that are payable after the end of the year of assessment accrue to the taxpayer and are included in "gross income". In *WH Lategan v Commissioner for Inland Revenue*, however, it was held (at 21) that:

> ... the instalments had to be regarded as gross income but something had to be deducted from their face value to allow for the fact that they were not payable at the close of the year of assessment. Assuming that the right to receive the instalments had not been converted into money by sale or otherwise during the year of assessment the value to be fixed (apart from the question whether the debt was good or bad) would be the *present worth* of the instalments at the end of the year. [own emphasis]

This was confirmed in the *People's Stores (Walvis Bay) (Pty) Ltd* case. It was following this case that the proviso was added to the definition of gross income. The proviso uses the word "deemed" and as was held in *St Aubyn and Others v Attorney General (No 2)*, as it ensures that the word "accrued" is interpreted in a specific manner and ensures certainty, it is a deeming provision. The purpose of the proviso is to nullify tax avoidance schemes in the context of the broader definition. This provision clearly goes against the principle of equity as it ignores the fact that the market value of the debt is lower than its face value.

- The final confirmation that the definition of "gross income" is a deeming provision is the words in the definition: "excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder ...". Even though these amounts referred

to are of a capital nature, in order to provide certainty and comprehensiveness (*St Aubyn and Others v Attorney General (No 2)*), they will be included in "gross income", thus the amount is "deemed" to be "gross income". Paragraphs (a) to (n) of "gross income" have the purpose of ensuring that certain types of income that may, according to the general definition, have escaped liability for tax or been taxed in the more favourable manner applying to capital gains, are included in gross income. Examples are an annuity (paragraph (a)) where a capital sum is converted into an annuity, amounts relating to employment (paragraphs (c), (d) and (f)) where lump-sum awards could have been classified as capital, and remuneration that is paid to persons other than the employee could have escaped taxation in the hands of the employee, paragraphs (cA) and (cB), which include restraint of trade payments to labour brokers, personal service providers and natural persons, which could have been classified as capital amounts, and paragraph (g) which deals with lump-sum lease premiums, which could also have been classified as capital amounts. These sub-paragraphs of the definition of gross income have the purpose of nullifying tax avoidance schemes that re-characterise amounts that are of a revenue nature as capital receipts in order to reduce the amount of tax payable, or shift the liability to other persons.

All these inclusions in gross income, that would normally not have qualified as "gross income", reflect the principles of a good tax system, more specifically equity, certainty and transparency, and it could be argued, efficiency of tax collections.

The three-part enquiry has been carried out:

- Identify whether a deeming provision exists – the definition of "gross income" in section 1 of the Income Tax Act has been demonstrated to be a deeming provision. The characteristics and purpose of the section support this conclusion.
- Determine whether the deeming provision complies with the principles of a good tax system – except for the proviso to the definition, the definition of gross

income and the judicial interpretation of terms used in the definition reflect the application of the principles of a good tax system.

- If the provision requires judicial interpretation, does this reflect the need to apply the principles of a good tax system and does the interpretation then reflect these principles? The interpretation of "gross income" and its elements has been considered in various tax cases. The discussion of the case law dealing with the interpretation by the courts of the definition of "gross income" indicates that, other than possibly the "accrued to" requirement, the court decisions reflect the principles of a good tax system.

Section 7 is another example of a deeming provision and is discussed in the next section.

8.3.2 Section 7

Section 7 of the Income Tax Act determines the circumstances in which "income is deemed to have accrued or to have been received". Haupt (2019: 795) remarks that section 7 represents an anti-avoidance provision the purpose of which is to tax income which flowed from donations and other similar dispositions.

The heading and the subsections of section 7 include the word "deemed". This indicates that the section is a deeming provision. To confirm this, the relevant subsections of section 7 will be analysed, followed by their application in case law.

Section 7(1)

The subsection provides that:

> Income shall be deemed to have accrued to a person notwithstanding that such income has been invested, accumulated or otherwise capitalized by him or that such income has not been actually paid over to him but remains due and payable to him or has been credited in account or reinvested or accumulated or capitalized or otherwise dealt with in his name or on his behalf, and a complete

> statement of all such income shall be included by any person in the returns rendered by him under this Act.

Section 7(1) acknowledges the accrual principle in "gross income" in section 1 of the Income Tax Act and confirms that income accrues to a taxpayer irrespective of the manner in which it has been applied, and that income does not have to be "actually paid" to the taxpayer for section 7(1) to apply.

The 1914, 1917, 1925 and 1941 South African Income Tax Acts included provisions similar to section 7(1) of the Income Tax Act. In *Liberman v Commissioner of Inland Revenue,* 1923 CPD 233 (C), at 236, the Cape of Good Hope Provincial Division stated, with reference to the meaning of the phrase "credited in account" (in section 4(5) of the 1914 South African Income Tax Act) that it does not "think" that the provision "would be necessary, and can be given a fair meaning, if the contention is to prevail that "receipt" and "accrual" are the same." The Court further states that it is

> of opinion that all these expressions "credited in account," "reinvested," "accumulated" and "capitalised" refer to a dealing by one person for the benefit of and in the interest of the other person (namely, the person whose liability for income tax is being considered): and the general words "or otherwise dealt with" which follow the expressions referred to, do not appear to me [the Court] to extend the effect of the section, but to refer to dealings *ejusdem generis*.

In *Lategan v Commissioner for Inland Revenue,* 1926 CPD 203 (C), at 205, the Cape of Good Hope Provincial Division states (in relation to section 7(6) of the 1917 South African Income Tax Act, a provision that is similar to section 4(5) of the 1914 South African Income Tax Act) that whether an amount represents a "re-investment" is a question of fact.

Clegg (2020: § 4.16.1) remarks that section 7(1) appears to be "superfluous or at the very most, inserted *ex abundundae cautela*". This is in view of the fact that the definition of "gross income" in section 1 of the Income Tax Act addresses the aspects to which section 7(1) of the Income Tax Act applies.

In view of the purpose of section 7 of the Income Tax Act as an anti-avoidance provision, subsection (1) represents a deeming provision. Section 7(1) demonstrates the characteristics of a deeming provision, as it ensures that the word "accrued" is interpreted in a specific manner, and ensures certainty and comprehensiveness. The section also complies with the principle of equity, as all amounts are to be included in income, irrespective of the manner in which the amounts have been dealt with, and, it can be argued, also complies with the principle of effectiveness of tax collection.

Section 7(2)

The section provides that income of a person married in or out of community of property to his/her spouse, will be deemed to be the income of the other spouse where:

- the one spouse made a donation to the other spouse with the purpose to reduce, postpone or avoid tax liability; or
- the one spouse received income, or it accrued, from a trade of which the other spouse formed part, or the other spouse is a member of or is the main (or one of the principal) shareholder(s) of a private company, and the income exceeds the amount to which the spouse "would reasonably" have been entitled to when the nature of the trade, the extent of the spouse's participation in the trade, and the services rendered by the spouse is taken into account.

This subsection is clearly a deeming provision as was held in *St Aubyn and Others v Attorney General (No 2)*: it ensures certainty regarding income allocation between spouses. The purpose of the subsection is clearly to prevent the splitting of income to reduce the joint tax liability of the spouses, and thus to nullify a tax avoidance scheme. The subsection also demonstrates the application of the principles of a good tax system as it ensures the principle of equity between taxpayers earning the same income who do and do not "split" their income, and efficiency of tax collection.

Section 7(2A)-(2C)

These subsections are closely related to section 7(2). They deal with the income of spouses married in community of property. The aspects included in the section, amongst others, are:

- Income received by or accrued to a spouse from carrying on a trade is deemed to be the income of that spouse.
- Income received by or accrued to the spouses carrying on a joint trade is deemed to accrue to the spouses in the proportion agreed between them.
- Income received or accrued from non-trade income, or the letting of immovable property, is deemed to be the income of the spouses in equal shares.
- Retirement fund benefits and purchased annuities are deemed to be the income of the spouse to whom it is payable.

Like the previous subsection, these subsections are deeming provisions as they use the word "deemed" and ensure certainty in relation to the joint or separate income of spouses married in community of property. The purpose of the subsections is clearly to prevent the "splitting" of certain categories of income on a 50/50 basis, to nullify tax avoidance schemes and restrict the scope of the benefit of income splitting. The subsections comply with the principle of equity, as they ensure that the income of spouses in a community of property marriage is taxed in according to the tenets of this form of union.

Sections 7(3) – 7(6) and 7(8)

These subsections all deal with a "donation, settlement or other disposition". A donation is defined in section 55 of the Income Tax Act as "any gratuitous disposal of property, including any gratuitous waiver or renunciation of a right". Haupt (2019: 797) states that a "settlement" is a "gratuitous disposal of property, subject to specific terms and conditions, usually to the trustees of a trust." Donation and settlement therefore have similar meanings. The term "other disposition" was interpreted in

Ovenstone v the Secretary for Inland Revenue, 1980 (2) SA 721, 42 SATC 55, as *ejusdem generis* (having the same meaning as) donation and settlement.

- Section 7(3) deems income of a minor child to be the income of his/her parent or stepparent as a result of a "donation, settlement or other disposition" by the parent or stepparent to the minor child with the purpose to maintain, educate or benefit the child, or accumulate it for the benefit of the child.
- Section 7(4) provides for reciprocal donations, where income is deemed to be that of the parent of a minor child or stepchild that is received by or accrued to or in favour of that child:

> by reason of any donation, settlement or disposition made by any other person, … if such parent or his or her spouse has made a donation, settlement or other disposition or given some other consideration in favour directly or indirectly of the said other person or his or her family.

- Section 7(5) provides for donations, settlements or other dispositions by any person (or any other person) that are subject to a stipulation or condition

> to the effect that the beneficiaries thereof or some of them shall not receive the income or some portion of the income thereunder until the happening of some event, whether fixed or contingent, so much of any income as would, but for such stipulation or condition, … be received by or accrue to or in favour of the beneficiaries, shall, until the happening of that event or the death of that person, whichever first takes place, be deemed to be the income of that person.

- Section 7(6) provides that where a donation, settlement or other disposition is made to another person and the donor retains the power to revoke or confer rights to income that is received or accrues, the income is deemed to be received by, accrued to or be in favour of the donor for as long as he or she retains the power to revoke or confer the rights.
- Section 7(8) provides that where a donor (a resident of South Africa) makes a donation, settlement or other disposition and an amount that relates to the

donation, settlement or other disposition accrues to a non-resident, the amount is deemed to have been received by or accrued to the donor.

Section 7(7)

Section 7(7) provides for instances where a person (the donor) cedes the right to receive income generated by an asset to another person, but remains the owner of the asset. or has the right to regain ownership of the asset in the future. The section deems the income to be that of the person ceding the rights.

To determine whether section 7 in its entirety is a deeming provision and, if so, whether it reflects the principles of a good tax system, the following three-part enquiry is carried out:

- Identify whether a deeming provision exists.
- Determine whether the deeming provision complies with the principles of a good tax system.
- If the provision requires judicial interpretation, does this reflect the need to apply the principles of a good tax system and does the interpretation then reflect these principles?

Firstly: identify whether a deeming provision exists

What is the purpose of the provision? Section 7 is an anti-avoidance provision. De Koker and Williams (2020: § 24.177) state that the purpose of deeming provisions is, for example, to nullify tax avoidance schemes which have the intention of shifting tax. The section deals with situations where income is not actually paid to the taxpayer, but is dealt with by investing it, accumulating it, capitalising it, or dealing with it in some other manner, or the income is "split" (in other words "shifted") between persons, to reduce the tax burden of the person dealing with the income in a manner that avoids inclusion in gross income. The section provides that the amounts will form part of the income of the taxpayer or donor. "Income" is defined as: "the amount remaining of the gross income of any person for any year or period of

assessment after deducting therefrom any amounts exempt from normal tax …". Section 7 ensures certainty and comprehensiveness in relation to when an amount will form part of the income of a taxpayer. The heading of the section uses the word "deemed" as do the subsections, and the characteristics and purposes of the section substantiate its deeming nature.

Secondly: determine whether the deeming provision complies with the principles of a good tax system

The section reflects the application of the principle of equity between persons who earn the same amounts, by preventing the exclusion of the amounts from "income" of persons shifting income by way of a donation, settlement, or other disposition, or dealing with it in a manner to avoid inclusion in gross income. It also reflects the principle of efficiency in relation to the collection of tax.

Thirdly: if the provision requires judicial interpretation, does this reflect the need to apply the principles of a good tax system and does the interpretation then reflect these principles?

A discussion of two cases heard in relation to section 7 follows.

In *Income Tax Case No 1328* (1980), 43 SATC 56 (N), the Natal Special Court (at 56) was required to interpret sections 7(1) and 7(5) in a matter where a father (the Appellant) donated 100,000 shares to each of the two trusts of his daughters. In the 1973 to 1975 tax years, one of the trusts received interest income and the other trust received dividend income. The trusts were assessed for the relevant tax years. The Commissioner for Inland Revenue issued additional assessments for these tax years in terms of which the Appellant was taxed on the interest and dividends in his capacity as donor. The Commissioner for Inland Revenue relied on section 7(5) as the basis for the additional assessments. The Appellant (at 58) lodged objections against the additional assessments based on the fact that the income was "not received by, nor did it accrue to the appellant" in terms of section 7(5). The Commissioner (at 58) disallowed the objections and the Appellant lodged an appeal to the Tax Court. The

Tax Court considered both sections 7(1) and 7(5). The court found (at 61) that when income is deemed to have accrued to a taxpayer in terms of section 7(1) it does not accrue to the taxpayer in terms of section 7(5) because it would lead to double taxation. The court relied on the following dictum of *Estate Dempers v Secretary for Inland Revenue* [1977] 39 SATC 95, where the Appellate Division (at 107) stated as follows:

> In the case of donations, the hypothesis is that the deed of donation contains a stipulation to the effect that the beneficiaries thereof or some of them shall not receive the income thereunder, or some portion thereof, until the happening of some event, whether fixed or contingent. If it does, then (and here I ignore the case of income deemed to accrue or to be received) so much of any income as would in consequence of the donation, but for the stipulation, be received by or accrue to or in favour of the beneficiaries is deemed to be the income of the donor until the happening of the event or the death of the donor, whichever first takes place. It would seem that the mischief which the subsection is designed to combat is a certain type of tax avoidance.

The court found (at 61) that the interrelationship between sections 7(1) and 7(5) indicated that the income vested in the beneficiaries in terms of section 7(1) and that, on account of this, section 7(5) did not apply. According to the court (at 61), either section 7(1) or 7(5) will apply, not both:

> I now pass to the next question, namely, whether if the income in question is deemed to have accrued to the beneficiaries in terms of subsec(1) it can be deemed to have accrued to the appellant in terms of subsec(5). I think it is plain that it cannot. In the first place it is not the intention of the Act to impose double taxation by means of these provisions.

Does the case reflect the principles of a good tax system? As the decision provides for equity in that the subsections may not impose double taxation in respect of the same amounts, it reflects the application of a principle of a good tax system.

In *Commissioner for South African Revenue Services v Woulidge* [2002] 63 SATC 483, the Supreme Court of Appeal was required to determine whether the

Respondent's disposal of shares in four companies to the two trusts of his children was a sham transaction and whether the transaction fell within the ambit of section 7(3) of the Income Tax Act.

Section 7(3) of the Income Tax Act provides that:

> Income shall be deemed to have been received by the parent of any minor child or stepchild, if by reason of any donation, settlement or other disposition made by that parent of that child–
>
> (a) it has been received by or has accrued to or in favour of that child or has been expended for the maintenance, education or benefit of that child; or
> (b) it has been accumulated for the benefit of that child.

According to the facts of the case (at 486[2]), the Respondent granted credit finance to the trusts to enable the trusts to acquire the shares from the Respondent. The agreement between the Respondent and the trust provided that the Respondent was authorised to charge interest on the unpaid purchase price of the shares, but he did not do so. The Appellant, the Commissioner for the South African Revenue Service, regarded the decision not to charge interest on the unpaid purchase price as a "donation, settlement or other disposition" by the Respondent to his children. The Supreme Court of Appeal found that the decision not to charge interest on the unpaid purchase price fell within the ambit of section 7(3) of the Income Tax Act. In this regard the court relied on the following dictum as formulated in the Appellate Division case, *Commissioner for Inland Revenue v Berold* [1962] 3 All SA 454 (A), where the court found (at 457) in relation to the Respondent taxpayer's disposal of assets to a related company that:

> [w]hen the taxpayer sold and transferred a large number of valuable assets to Luzen, he did so on credit and without charging interest on the purchase price. In effect he lent a substantial sum of money to Luzen, and as long as he refrained from compelling Luzen to repay that sum, there was a continuing donation by him to Luzen of the interest on that loan. This donation benefited the shareholders of Luzen, but initially the taxpayer was the sole shareholder and the donation did not alter his financial position. When, however, he donated

> his shares in Luzen to the five trusts which he had created, those trusts obtained the benefit of his continuing donation to Luzen, and it was, of course, for this very purpose that he donated the Luzen shares to the trusts.

West and Surtees (2002: 262, 267) remark that the following principles can be associated with *Commissioner for South African Revenue Services v Woulidge*:

- An amount which accrues to a minor child must be apportioned between the gratuitous and non-gratuitous elements.
- The extent to which a gratuitous element can be apportioned in a transaction is limited. The parent is taxed on the gratuitous portion of the disposition.

Does the interpretation of the deeming provision in these two cases reflect the principles of a good tax system? Section 7(3) requires that there must be a link between the benefit obtained (the non-payment of interest) and the donation made for the section to apply. The interpretation provides for equity between taxpayers who donate sums of money to benefit trust beneficiaries and taxpayers who provide a benefit by selling the asset on loan account without charging interest. The principle of efficiency of tax collection also applies. The interpretation by the courts of the deeming provision in section 7(3) reflects the application of principles of a good tax system.

Section 7 is therefore a deeming provision that complies with principles of a good tax system. The interpretations by the courts of the two subsections referred to above extend the principles of equity and efficiency.

Section 7C is a further important addition to the Income Tax Act, designed to legislate the *Woulidge* decision in a broader context. The next section of the chapter will discuss this section to determine whether the section falls within the ambit of a deeming provision.

8.3.3 Section 7C

Haupt (2019: 844) observes that the purpose of section 7C is to prevent estate duty being avoided by taxpayers. This indicates that section 7C is a further example of an anti-avoidance provision.

Subsection 7C(3) of the Income Tax Act provides that:

> If a trust or company incurs—
>
> (a) no interest in respect of a loan advance or credit referred to in subsection (1) or subsection (1A); or
> (b) interest at a rate lower than the official rate of interest,
>
> an amount equal to the difference between the amount incurred by the trust or company during a year of assessment as interest in respect of that loan, advance or credit and the amount that would have been incurred by that trust or company at the official rate of interest must . . . be treated as a donation made to that trust by the person referred to in subsection (1)(a) or subsection (1A) on the last day of that year of that year of assessment of that trust.

Subsection (1) states that section 7C applies in respect of any loan, advance or credit provided directly or indirectly to a trust or a company, if at least 20 per cent of the equity shares are held, directly or indirectly, or the voting rights in that company can be exercised by the trust, whether alone or together with any person who is a beneficiary of that trust, or a spouse of that beneficiary, or any person related to that beneficiary or that spouse within the second degree of consanguinity. The loan, advance or credit referred to must be provided by a natural person, or at the instance of that person, a company in relation to which that person is a connected person (as defined in section 1(d)(iv)).

Subsection (1A) refers to the acquisition of a claim to an amount owing by a trust or company in respect of a loan referred to in subsection (1), in which case the person is treated as having provided a loan, advance or credit to the trust or company on the date the claim was acquired, that is equal to the amount of the claim acquired. The

subsection also applies on the date the person (who was not a connected person) becomes a connected person of the trust or company.

Subsection (3) uses the words "be treated as" a donation. Section 7C(1A) also includes the words "treated as". The words "treated as" therefore indicate that section 7C is a deeming provision. Earlier it was noted that not all provisions that use the word "deemed" or "treated as" are necessarily deeming provisions. To determine whether section 7C is a deeming provision and, if so, whether it reflects the principles of a good tax system, the three-part enquiry is carried out.

Firstly: identify whether a deeming provision exists

Is the provision of a deeming nature based on its title or through other means? The title of section 7C reads: "Loan or credit advanced to a trust by a connected person" and does not reflect the existence of a deeming provision. Section 7C(3), however, which is the charging provision, uses the words "must … be treated as a donation . . .". The effect of section 7C is that it deems the interest on a low-interest or interest-free loan or advance to be a donation. The section also provides for certainty and comprehensiveness regarding the effect of interest-free loans to a trust, as the case of *Commissioner for South African Revenue Services v Woulidge*, where the non-charging of interest was held to be a donation, was only heard in respect of section 7(3) and in the situation where the loan agreement provided for interest, but no interest was charged. Section 7C now extends the *Woulidge* principle to all interest-free or low-interest loans to a trust in the circumstances provided for in the section.

What is the purpose of the provision? Section 7C is an anti-avoidance provision. Its purpose is to prevent instances of tax avoidance. The section gives rise to donations tax in the hands of the connected person providing the loan to the trust. In addition, section 7C(5) provides for situations where the loan, advance or credit will not be treated as a donation, including subsection (5)(b), which deals with the acquisition of a vested interest in the trust by the person granting the loan, advance or credit, and where the beneficiaries of the trust, in aggregate, hold a vested interest in all the receipts, accruals and assets of the trust (and are therefore taxed on these receipts,

accruals and assets). Therefore, if the grantor of the loan, advance or credit and the beneficiaries of the trust do not have vested rights to the income and assets of the trust and these beneficiaries fall within the relevant categories identified in section 7 (discussed above), income earned by the trust is, in addition, deemed to be the income of the donor.

Based on the characteristics and purpose of the section, section 7C is a deeming provision.

Secondly: determine whether the deeming provision complies with the principles of a good tax system.

The section ensures that the principle of equity applies, between taxpayers making no, or low-interest loans or advances to a trust avoid the payment of donations tax, and taxpayers charging of a market related rate of interest on loans or advances to a trust. Section 7C(3) specifies the notional rate of interest on the loan or advance to be the "official rate of interest" (which is either the South African repurchase rate plus 100 basis points or, in the case of a debt denominated in any other currency, the equivalent). Section 7C therefore also applies the principle of equity regarding the rate of interest and, it could be argued, certainty and transparency.

Thirdly: if the provision requires judicial interpretation, does this reflect the need to apply the principles of a good tax system and does the interpretation then reflect these principles?

No cases have been adjudicated in terms of section 7C.

The next series of sections to be analysed are sections 13, 13*bis*, 13*quin* and 13*sex*.

8.3.4 Sections 13, 13bis, 13quin and 13sex

Many sections in the Income Tax Act include anti-avoidance provisions, these sections often providing for allowable deductions. Sections 13, 13*bis*, 13*quin* and 13*sex* all provide for allowances on buildings – section 13 for buildings used in a process of manufacture, section 13*bis* for buildings used by hotel keepers, 13*quin* for commercial buildings, and 13*sex* for certain residential units. Although these sections are not deeming provisions, they all include almost identical deeming provisions. The provision in subsection 13(1A) is used as an example and states as follows:

> Where any building in respect of which any deduction is claimed in terms of this section was during any previous financial year or years used by the taxpayer for the purposes of any trade carried on by such taxpayer, the receipts and accruals of which were not included in the income of such taxpayer during such year or years, any deduction which could have been allowed during such previous year or years in terms of this section shall for the purposes of this section be deemed to have been allowed during such previous year or years as if the receipts and accruals of such trade had been included in the income of such taxpayer.

In section 13*bis*, the provision is in subsection 13*bis*(3A), in section 13*quin* in subsection 13*quin*(3) and in section 13*sex* in subsection 13*sex*(4).

All the subsections use the word "deemed". The purpose of the provisions is anti-avoidance, as a taxpayer is deemed to have claimed an allowance in respect of previous years of assessment where the receipts and accruals from the taxpayer's trade were not included in the taxpayer's income. The taxpayer will therefore not be permitted to claim allowances for these years of assessment. The subsections ensure certainty regarding the non-deduction of an allowance during years of assessment when receipts and accruals from the taxpayer's trade were not included in income.

The subsections also provide for equity, as the allowance can only apply when the taxpayer's receipts and accruals from carrying on a trade are included in income, as well as efficiency of tax collections. In this context it is suggested that the deeming provisions comply with the principles of a good tax system.

If the provisions require judicial interpretation, does this reflect the need to apply the principles of a good tax system and does the interpretation reflect these principles? In a recent case, *XYZ CC v The Commissioner for South African Revenue Service* [2019] JOL 46064 (TC), adjudicated in the Tax Court of South Africa, Gauteng Local Division, Johannesburg, the court was required (at 2[2]) to determine whether the taxpayer was entitled to claim a commercial building allowance in terms of section 13*quin* for the 2007 to 2012 years of assessment. The taxpayer acquired the commercial building during August 2001. The building was used for the rental activities of the taxpayer. According to the facts (at 2[5]) the taxpayer made capital improvements to the building during the period 2007 to 2012 but did not claim the allowance during the period 2007 to 2012. The taxpayer submitted that this was because it did not receive adequate advice from its former accountants in this regard. The taxpayer therefore claimed the allowance during the 2013 and 2014 tax years of assessment. The Commissioner for the South African Revenue Service only granted the allowance relating to the 2014 year of assessment. The taxpayer requested that it be placed in the same position as other similar entities and that the Commissioner for South African Revenue Service should grant the allowance. The taxpayer contended that section 13*quin* was formulated ambiguously and the section should thus be interpreted in its favour. In other words, the taxpayer (at 3[8]) requested the court to apply the *contra fiscum* rule.

The court did not agree (at 5[12]) that section 13*quin*(3) was formulated vaguely and found that:

> [t]he provisions of subsection (3) are clear and plain and need not be interpreted any further than the words used in the provision itself. It is clear that if the receipts and accruals were not included in the income of the taxpayer during the previous year of assessment, any deduction which could have been allowed in terms of section 13*quin* during that year shall be deemed to have been allowed in that year. I therefore hold the view that it would [be] distorting the meaning of the deemed provision in subsection (3) of section 13*quin* to interpret it otherwise.

The tax court in *XYZ CC v The Commissioner for South African Revenue Service* found as follows (at 8[17]):

> I am of the respectful view that it does not make any business sense for the appellant to claim a lump sum after having incurred the expenses over a period of five years. The deeming provisions, in my view, were inserted in section 13*quin*(3) to prevent taxpayers from delaying in applying for these deductions and to avoid unnecessary cash flow problems.

Does the interpretation in the case of the deeming provision, section 13*quin*(3), reflect the principles of a good tax system? The interpretation of section 13*quin*(3) of the Income Tax Act in *XYZ CC v The Commissioner for South African Revenue Service* provides an equitable solution to the deduction of allowances, reflecting the application of a principle of a good tax system.

Like the sections discussed above, sections in the Income Tax Act that provide for wear-and-tear or depreciation allowances (sections 11(e), 12B, 12C, 12D, 12DA, and 12F) all include a similar anti-avoidance subsection. All of these building and wear-and-tear and depreciation allowances therefore include deeming provisions that comply with the principles of a good tax system.

The following sections in the Income Tax Act that will be considered relate to the general anti-avoidance provisions in sections 80A to 80L.

8.3.5 General anti-avoidance provisions (sections 80A to 80L)

The need for a general anti-avoidance provision

Krever and van Brederode (2014: 11) refer to the adoption of a general anti-avoidance rule (GAAR) as:

> the most significant instance of legislative delegation … a legislative measure that has spread widely in recent years. Most commonly, a GAAR provides authority for the characterisation of a transaction in a way that nullifies a tax benefit if two conditions are met. The first is a conclusion that access to the benefit for the particular transaction was not an intended outcome from the

> law. The second is that the taxpayer's dominant motive for structuring the transaction in the form taken was to obtain the tax benefit.

South Africa, too, has introduced a GAAR in the form of sections 80A to 80L, the anti-avoidance provisions that replaced section 103(1) in the Income Tax Act.

The first general anti-avoidance provision was included in section 90 of the 1941 South African Income Tax Act. The only tax case in relation to section 90 is *Commissioner for Inland Revenue v King* [1947], 14 SATC 184. The following aspects are identified in the case:

- The Commissioner for Inland Revenue does not have an "absolute discretion to exercise at his will the powers conferred upon him" by section 90 (*Commissioner for Inland Revenue v King*, at 186).
- Section 90 "imposes an obligation to take action" in terms of section 90 if the Commissioner "was satisfied as to the nature of any such transaction as is specified in the section" (*Commissioner for Inland Revenue v King*, at 186).
- Section 90 requires the tax avoidance to be the "dominant" and not an "incidental" purpose of the transaction (*Commissioner for Inland Revenue v King*, at 186).
- The scope of section 90 only extends to transactions that relate to the avoidance of "liability for taxation on income which was in reality the income of the taxpayer". The reason for this is that it is "reducing the tax liability of the taxpayer by depriving him of the income upon which such further tax might have been assessed". The section does not address "transactions which are the result of the alienation of capital". (*Commissioner for Inland Revenue v King*, at 186).

Kujinga (2014: 440) states that "the absence of a precise and universally accepted definition of impermissible tax avoidance has led to the creation of wide GAARs, for example section 90 of the 1941 Act [the 1941 South African Income Tax Act]." Kujinga (2014: 440) remarks that section 90 "failed … because, *inter alia*, taxpayers have a right to avoid tax."

De Koker and Williams (2020: § 19.32) explain that section 90 was replaced with section 103(1) of the Income Tax Act subsequent to the judgment of *Commissioner or Inland Revenue v King*, in view of the "very restricted interpretation" given to section 90 of the 1941 South African Income Tax Act.

While tax evasion is illegal and, according to Haupt (2019: 627), involves "the use of illegal means to reduce a tax liability, e.g. falsification of books, suppression of income, fraudulent non-disclosure of income, [and] overstatement of deductions", tax avoidance is not. The distinction between the two concepts has been aptly described by the former Chancellor of the Exchequer in the United Kingdom, Denis Healy, who stated that "the difference between tax avoidance and tax evasion is the thickness of a prison wall" (Elliffe, 2011: 3).

The South African and foreign courts have repeatedly emphasised that a taxpayer is not under the "smallest obligation, moral or other, so to arrange his legal relations to his business or his property as to enable the Inland Revenue to put the largest shovel into his stores" (*Ayrshire Pullman Motor Services and Ritchie v Commissioners*, (1929) 14 TC 754). Lord Cairns in *Partington v The Attorney-General* (1869) 21 LT 370, at 375 famously stated:

> If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. 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 may otherwise appear to be. In other words if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you simply adhere to the words of the statute.

In *IRC v Duke of Westminster* ((1936) 19 TC 490), Lord Tomlin stated that any taxpayer is entitled to arrange his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be. The principle was confirmed in South African courts by Centlivres CJ in his minority judgment in *Commissioner for Inland Revenue v Estate Kohler* ((1953) 18 SATC 354), and in the judgment in *Hicklin v Secretary for Inland Revenue* ((1980) 1 All SA 301 (A)).

In *Commissioner of Taxes v Ferera* [1976] 38 SATC 66, at 69, by contrast, MacDonald JP (at 69) referred to the statements made by Lord Tomlin when he stated that there "are *dicta* in judgments in English income tax cases which are open to the construction that the avoidance of income tax should properly be regarded as a respectable contest between the *fiscus* and the taxpayer concerned, should not 'strictly speaking' attract 'moral censure' and, by necessary implication, should not be regarded as an evil". In this case the judge expressed the opinion that the avoidance of tax is an evil because it also placed an additional burden on those taxpayers who made no attempt to escape tax, and this was expressed strongly in his judgment (at 555) in the following statement:

> I endorse the opinion expressed that the avoidance of tax is an evil. Not only does it mean that a taxpayer escapes the obligation of making his proper contribution to the *fiscus*, but the effect must necessarily be to cast an additional burden on taxpayers who, imbued with a greater sense of civic responsibility, make no attempt to escape or, lacking the financial means to obtain the advice and set up the necessary tax-avoidance machinery, fail to do so. Moreover, the nefarious practice of tax avoidance arms opponents of our capitalistic society with potent arguments that it is only the rich, the astute and the ingenious who prosper in it and that 'good citizens' will always fare badly. While undoubtedly the short term effects of the practice are serious, the long term effects could be even more so.

Nevertheless, whether tax avoidance is an "evil" or not, the legislature has deemed it necessary to introduce a GAAR.

In the opinion of Krever and van Brederode (2014: 12), "[i]n almost every case the GAAR is invoked, an alternative solution would have been a legislative restructure to avoid the need for the rules that have been abused by the taxpayer. Under this viewpoint, the artificial process would be unnecessary if the law had been better drafted in the first place." The South African Income Tax Act has a plethora of anti-avoidance provisions (referred to as a "sniper" approach), but as early as the Income Tax Act, 31 of 1941, a GAAR has been included (in the form of section 90) – the "shotgun" approach aimed at preventing avoidance transactions not caught by other

provisions. The problem, it is proposed, with enacting legislation to prevent specific tax avoidance transactions is that these provisions often provide the opportunity for other more sophisticated tax avoidance schemes.

Sections 80A – 80L

Section 80A of the Income Tax Act provides that a transaction falls within the ambit of the definition of an "impermissible tax avoidance arrangement" if the taxpayer entered into the transaction with the intention to obtain a tax benefit and:

- the transaction was, in the context of business, entered into in such a manner that does not qualify as a *bona fide* business purpose or the transaction does not, whether in whole or in part, have commercial substance;
- if the transaction was not in the context of business, the transaction does not serve a *bona fide* purpose; and
- whether or not the transaction is in the context of business, the transaction creates rights and obligations which would not normally be associated with the type of transaction or, in a direct or indirect manner, leads to the abuse or misuse of the provisions of the Income Tax Act.

Section 80A does not, at first sight, give the impression that it is a deeming provision. It was established in the present chapter that a provision is not a deeming provision solely due to the use of the word "deemed", or any alternatives for the word. The context of the provision must be taken into account to determine whether or not a provision is a deeming provision. In this chapter the dictum of Lord Radcliffe in *St Aubyn and Others v Attorney General (No 2)* was applied in relation to the selected statutory provisions in the Income Tax Act to determine whether these sections are deeming provisions. The same approach can be applied to section 80A. Section 80A sets out the circumstances in which a transaction will be an "impermissible tax avoidance arrangement". The section, in this context:

- ensures that a transaction will be interpreted as an impermissible tax avoidance arrangement when these elements are satisfied;

- ensures certainty where uncertainty could otherwise have prevailed; and
- ensures that it is comprehensive enough to assist an interpreter to determine whether a transaction is an impermissible tax avoidance arrangement.

Lord Walker of Gestingthorpe (2016: 185) stated that a provision will be of a deeming nature where it is conveyed in such a manner that its context indicates that future transactions will be interpreted similarly and have similar consequences to the transaction. The purpose of sections 80A to 80L is to prevent tax avoidance arrangements and to provide the Commissioner with remedies to counter these arrangements. The sections provide certainty in relation to the instances where transactions will fall within the ambit of "impermissible tax avoidance arrangements", and promote the efficiency of tax collections.

Section 80L defines an arrangement in the widest possible sense to include any enforceable or unenforceable transaction, operation, scheme, agreement or understanding, including all steps or parts of the arrangement, and any arrangement involving the alienation of property. An avoidance arrangement is one that results in a tax benefit. Parties to an arrangement include persons, partnerships, joint ventures, any permanent establishment in the Republic of a non-resident and any permanent establishment outside the Republic of a resident. Tax includes any tax, levy or duty imposed under ant Act administered by the Commissioner. These all-inclusive definitions ensure consistent interpretation of the terms, provide for certainty, and ensure comprehensiveness,

Sections 80A, 80C (which describes arrangements that lack commercial substance), section 80D (which deals with round-trip financing), and section 80E (which describes accommodating or tax-indifferent parties) include a wide range of impermissible avoidance arrangements. As these arrangements would otherwise be legitimate, these sections "*deem*" them to be impermissible.

Section 80B sets out the consequences of impermissible tax avoidance and confers on the Commissioner the power to determine the tax consequences of these arrangements by disregarding, combining or re-characterising any steps or parts of the arrangement, disregarding any accommodating or tax indifferent party, or treating them as one and

the same person, deeming connected persons to be one and the same person, reallocating any gross income, receipt or accrual of a capital nature, expenditure or rebate amongst the parties, or re-characterising gross income, receipts or accruals of a capital nature or expenditure, or treating the arrangement as if it had not been entered into or carried out, or in such manner as the Commissioner may deem appropriate to prevent or reduce the tax benefit. Section 80B therefore creates a deeming "situation" by conferring these powers on the Commissioner.

Sections 80F and 80H explain the application of the treatment of connected persons and accommodating or tax indifferent parties, and the application of the provisions to steps in or parts of the arrangement. The Commissioner therefore has the power to *deem* an arrangement to be something other than what it is.

Section 80G creates the presumption of purpose that an avoidance arrangement was entered into or carried out for the sole or main purpose of obtaining a tax benefit, unless and until the party proves that, reasonably considered in the light of the relevant facts and circumstances, this was not the purpose. The section therefore *deems* a tax avoidance purpose unless the parties can prove otherwise.

The remaining sections permit the Commissioner to apply the provisions of sections 80A to 80L in the alternative for, or in addition to any other basis for raising an assessment (section 80L), require the giving of notice by the Commissioner prior to determining any liability (section 80J) and prohibit the Commissioner from exercising the discretion not to direct the charging of interest (section 80K).

Taken as a whole, therefore, it can be concluded that sections 80A to 80L are deeming provisions. But do they reflect the application of principles of a good tax system? While the effect of the sections may be draconian for the parties involved in the arrangement, in a broader sense they are equitable as against taxpayers who do not engage in arrangements to reduce their taxes, possibly for moral or ethical reasons, but possibly simply because they cannot afford the costly advice of tax advisors. Section 80A, which deals with arrangements not normally employed for *bona fide* business purposes or that would not be entered into in a manner not normally employed for a *bona fide* purpose other than obtaining a tax benefit, and section 80C,

which describes arrangements that lack commercial substance as those that result in a significant tax benefit without any significant effect on business risk or net cash flows of a party, are clearly aimed at achieving an equitable result. Section 80C also describes the characteristics of an avoidance arrangement to include avoidance arrangements where the legal substance or effect as a whole is inconsistent with or differs significantly from its individual steps, thus complying with the principle of substance over form (discussed in section 4.3.4).

In *Commissioner for South African Revenue Service v NWK Ltd* [2011] 73 SATC 55, the Supreme Court of Appeal was required (at 55) to determine whether a structured finance loan facility was a simulated transaction. The Supreme Court of Appeal (at 78[91]) made the following remark in relation to the repealed section 103(1) of the Income Tax Act (the predecessor to sections 80A to 80L):

> [I]f satisfied that a transaction has been entered into which has the effect of avoiding or reducing liability for tax, and would not normally be employed for *bona fide* business purposes, the Commissioner shall determine liability for tax as if the transaction had not been entered into.

The extract confirms that the section requires the Commissioner for the South African Revenue Service to be "satisfied" that the transaction is an impermissible tax avoidance arrangement.

Section 80G places the burden on a taxpayer to prove that the sole or main purpose of the avoidance arrangement was not to obtain a tax benefit. The legislator has included an element of equity in the section with the inclusion of the words "reasonably considered" and "in light of the relevant facts and circumstances". According to Stevenson and Soanes (2010: 622073) "satisfy" requires that a person must "provide [someone] with adequate or convincing information or proof about something". This means that the word "satisfied" requires something more than mere suspicion. This ensures that the principles of equity and certainty will have to be applied when section 80G is interpreted. Section 80B(2) confirms that the Commissioner must be "satisfied" that the measures undertaken are "necessary and appropriate to ensure the consistent treatment of all parties to the impermissible avoidance arrangement". This

is additional confirmation that the principles of equity and certainty apply to the section.

As a whole, sections 80A to 80L also promote the principle of efficiency in the collection of tax, by preventing tax avoidance schemes.

In *Commissioner for the South African Revenue Service v NWK Ltd*, the court took account of the principle of substance over form. The court remarked (at 67[42]) as follows:

> It is trite that a taxpayer may organise his financial affairs in such a way as to pay the least tax permissible. There is, in principle, nothing wrong with arrangements that are tax effective. But there is something wrong with dressing up or disguising a transaction to make it appear to be something that it is not, especially if that has the purpose of tax evasion, or the avoidance of a peremptory rule of law … (O)ne must distinguish between the principle that one may arrange one's affairs so as to 'remain outside the provisions of a particular statute', and the principle that a court 'will not be deceived by the form of a transaction: it will rend aside the veil in which the transaction is wrapped and examine its true nature and substance'.

The decision in this case confirms the application of the principles of equity and substance over form.

Sections 80A to 80L of the Income Tax Act, like the repealed section 103(1) that applied when the case was heard, require a link between the impermissible avoidance arrangement and the benefit obtained, thus having the purpose of restricting a benefit. This link must, it is suggested, be determined through an equitable approach and this approach requires the input of a reasonable person. The specific reference in section 80G (presumption of purpose) to "reasonably considered" and "relevant facts and circumstances" require the Commissioner to apply his mind and are additional confirmation of the importance of the principle of equity.

Barring in relation to the principle of substance over form, to date no cases have been heard in connection with sections 80A to 80L. One possible reason could be that the anti-avoidance provision is not yet "strong" enough for the Commissioner to have the

confidence to attack these schemes. In the publication *Tax Strategy* (Broomberg & Kruger, 1998, 249), in relation to section 103(1), the predecessor to the present GAAR, the authors state:

> If more taxpayers would heed the advice of their accountants, the Commissioner for Inland Revenue would be able to reign, virtually as a dictator, in the territory of tax. The reason is that so many accountants seem to consider that the general anti-avoidance measures contained in the South African Income Tax Act are so potent and comprehensive that it is dangerous to even admire any transaction that has the effect of saving tax.

The most probable reason is the introduction in 2011 of section 212 of the Tax Administration Act, which imposes a mandatory disclosure penalty with regard to a reportable arrangement. Participants in tax avoidance schemes and intermediaries in these schemes who fail to disclose the required information in respect of a reportable arrangement are liable for a penalty for each month, up to 12 months, that the failure continues:

- R50 000 in the case of a participant or an intermediary; and
- R100 000 in the case of the promoter of the arrangement.

Tha amount is doubled if the anticipated tax benefit for the participant exceeds R5 million, and tripled of it exceeds R10 million. This truly draconian penalty is likely to prevent many of the more speculative arrangements.

8.4 Conclusion

In this chapter it was demonstrated that deeming provisions are important measures which the government uses to ensure that tax is imposed equitably, and provide for certainty and efficiency of tax collections. A selection of provisions in the Income Tax Act was analysed, together with available court decisions.

The definition of “gross income”, arguably the most important provision in the Income Tax Act, requires extensive interpretation by the courts as the words and phrases used in ”gross income” are not defined in the Income Tax Act. The terms

“amount in cash or otherwise”, “received by or accrued to or in favour of”, “from a source within the Republic” and “receipts or accruals of a capital nature” were discussed in terms of their interpretation by the courts. All these terms and phrases, as interpreted, were shown to be deeming provisions as they ensure the specific manner in which they are to be interpreted, provide certainty, and ensure comprehensiveness. Other than, possibly, the terms “accrued to” and the related proviso to the definition of “gross income”, the definition of “gross income” reflects the application of the principles of a good tax system.

As examples of the specific anti-avoidance provisions (so-called sniper provisions) in the Income Tax Act, sections 7 and 7C were analysed. Section 7, as a whole, was shown to be a deeming provision. Section 7(1) expands on the “accrued to” principle in gross income by deeming income to have accrued to a person, notwithstanding the way the income has been dealt with. Section 7(2) deems the income arising from an asset donated between spouses to be the income of the donor spouse, while section 7(2A) and (2C) regulate the taxation of the joint income of spouses in community of property marriages. Section 7(3) to 7(6) and 7(8) deal with the donation, settlement, or other disposition of assets under certain circumstances and deem the income arising from the assets to be the income of the donor. Section 7(7) deals with the donation of the income, but not the underlying asset, and deems this income to be that of the donor. All these subsections include the word “deem” and were further shown to be deeming provisions by virtue of the fact that they ensure that the donations and the resulting income referred to are interpreted in a specific manner, provide certainty and ensure comprehensiveness. They all share the purpose of nullifying tax avoidance schemes and/or restricting the scope of a benefit. They also conform with the principles of a good tax system as they prevent the splitting of income by a donor, whereas other taxpayers would be taxed on the total income at progressive rates of tax.

Section 7C provides for interest-free or low interest loans or credit advanced to a trust by a connected person and deems the difference between the “official rate of interest” and the interest rate charged to be a donation and subject to donations tax. This is clearly a deeming provision as it provides for certainty, having extended the principle

established in *Commissioner for South African Revenue Services v Woulidge*, to apply to all loans or credit provided to trusts by connected persons. The section also complies with the principle of equity in addressing this type of avoidance transaction, as it places taxpayers who make a donation to a trust and taxpayers who advance interest-free or low interest loans to a trust on an equal footing.

Examples of capital allowances on buildings used for the purposes of trade provided for in the Income Tax Act in the form of sections 13, 13*bis*, 13*quin* and 13*sex* were referred to. To prevent these allowances from being deducted during periods when the income of the taxpayer was not included in taxable income, each of these sections includes an anti-avoidance subsection deeming the deductions to have been claimed during these periods. These subsections (and similar subsections in sections providing for wear-and-tear or depreciation allowances on other assets) are clearly deeming provisions that provide for certainty regarding when the deductions may be claimed. They have the purpose of restricting the scope of a benefit. They also comply with the principle of equity as they prevent the deduction of lump-sum amounts in respect of years in which no income was taxed, and ensure the efficiency of tax collections.

Having illustrated the deeming nature of these selected "sniper" anti-avoidance provisions, the "shotgun" GAAR in sections 80A to 80L was discussed. As an introduction to the discussion of sections 80A to 80L, section 90 of the 1941 South African Income Tax Act was briefly referred to, together with the related tax cases. Section 90 was the first general anti-avoidance provision included in a South African Income Tax Act.

Like all anti-avoidance provisions, which included section 90 of the 1941 South African Income Tax Act, the GAAR (in terms of sections 80A to 80L) was demonstrated to have the effect of a deeming provision. Arrangements, as defined in section 80L, that have the sole or main purpose of obtaining a tax benefit that would otherwise not have been subject to attack by the revenue authorities, are deemed to be inadmissible avoidance arrangements and dealt with by the Commissioner in a manner that would prevent the mischief. Sections 80A to 80L enable the Commissioner to "untangle the web" referred to in the quotation from Walter Scott

(Feinstein, 1998:1): “Oh what a tangled web we weave, when first we practice to deceive”, a quotation that is often used by tax advisors when warning their clients of the dangers of tax planning, avoidance, and evasion. The sections comply with the principle of equity, as well as certainty and efficiency of tax collections and the principle of substance over form, as they prevent the loss of revenue to the *fiscus* due to “artificial” arrangements, as well as providing for equity between taxpayers who do and do not use these means to reduce their tax liability.

Watermeyer CJ (at 191) in *Commissioner for Inland Revenue v King* (1947) 14 SATC 184 (A), remarked (at 208), a remark that remains valid even though specifically relating to section 90 of the Income Tax Act 31 of 1941:

> There are many ... ordinary and legitimate transactions and operations which, if a taxpayer carries them out, would have the effect of reducing the amount of his income to something less than it was in the past, or of freeing himself from taxation on some part of his future income. For example, a man can sell investments which produce income subject to tax and in their place make no investments at all, or he can spend the proceeds in buying a house to live in, or in buying shares which produce no income but may increase in value … He might even have conceived such a dislike for the taxation under the Act that he sells all his investments and lives on his capital or gives it away to the poor in order not to have to pay such taxation.

The chapter identified section 212 of the Tax Administration Act, which imposes a draconian penalty on participants, intermediaries in, and the promoters of avoidance arrangements, as the probable reason why no matters relating to sections 80A to 80L have come before the South African courts.

The analysis of the provisions in the present chapter confirmed that:

- Statutory provisions are not of a deeming nature merely because the word “deemed”, “treated as”, or words of a similar nature are included. The context of the provision will be a more accurate indicator of the nature of the provision. In this regard the characteristics of a deeming provision formulated in the English case, *St Aubyn and Others v Attorney General (No 2)*, were used

as a comparative measure to determine whether the provisions were of a deeming nature, together with a consideration of the purposes of the provisions.

- The principle of substance over form is an acknowledgement that the context of a matter must be taken into account. The principle of substance over form, as a principle of a good tax system, forms an integral part of taxation.

- There must be a balance between deeming provisions and the principles of a good tax system to ensure that the imposition of tax is equitable.

The next chapter will focus on the more current developments in South African and international tax with reference to deeming provisions in Double Taxation Agreement and the Income Tax Act, and the application of principles of a good tax system.

CHAPTER 9

THE INTERPRETATION OF "DEEMING PROVISIONS" IN THE CONTEXT OF DOUBLE TAX CONVENTIONS

Sometimes what you see is not real, and the reality is not what you see. Somewhere between both these reasoning resides a fact: where there is a lack of trust and confidence, perception will always differ with reality.

- Ashish Patel [7]

9.1 Introduction

The purpose of this research is to determine whether the application of deeming provisions reflect the principles of a good tax system.

The fourth sub-goal of this research is to demonstrate the relationship between deeming provisions and the principles of a good tax system, by gaining an understanding of the application of a selection of deeming provisions in the South African Income Tax Act (referred to as "the Income Tax Act"), South African case law, the OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, together with commentary by acknowledged experts. In Chapter 8 the first part of the fourth sub-goal was discussed; Chapter 8 focused on an understanding of a selection of deeming provisions in the Income Tax Act and their interpretation in South African case law. This chapter addresses the final part of the fourth sub-goal: to obtain an understanding of the application of a selection of deeming provisions in the OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, together with sections 9D and 31 in the Income Tax Act, which deal with aspects of international tax.

The OECD formulated a model tax convention (OECD, 2017) that can be used by countries as a basis when they enter into double tax conventions with one another. A

[7] Patel, A. 2020. Quotes. [On line]. Available: https://goodreads.com/author/quotes/10211736.Ashish_Patel [accessed 26/06/2020].

further development was the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (OECD, 2016b). These tax conventions include deeming provisions.

The objective of the 2017 OECD Model Tax Convention (OECD, 2017: 4) is to eliminate double taxation and prevent tax avoidance and evasion. The OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (OECD, 2016b: 1) addresses the "pressing issue … not only for industrialised countries but also for emerging economies and developing countries" of "base erosion and profit shifting". The convention also refers to the existing double taxation agreements between countries. In Chapter 1 of this research the three objectives of deeming provisions are formulated. One of these objectives is to nullify tax avoidance schemes that have the intention of shifting tax. The 2017 OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting include provisions that have deeming elements. In view of the presence of deeming elements in the conventions, together with the objective of the prevention of tax avoidance and evasion, the 2017 OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Based Erosion and Profit Shifting are discussed in this chapter.

The chapter also discusses two provisions in the Income Tax Act designed to regulate trade with foreign countries, with the aim of determining whether these provisions, too, can be considered to be deeming provisions and, if so, whether they comply with the principles of a good tax system. These sections are section 9D, which deals with the income of Controlled Foreign Companies, and section 31, which addresses transfer pricing transactions entered into between connected persons in South Africa and a foreign jurisdiction.

9.2 International Law in a South African Context

Modern international law has an impact on South African law. The activities of the OECD are important in the context of international taxation. The OECD Model Tax

Convention (OECD, 2017) is discussed below. South Africa has entered into approximately 80 Double Tax Agreements (DTAs), most of them based on this convention. De Koker (2020: § 1.3) observes that:

> Although it is not a member state of the OECD, South Africa has, to a significant extent, adopted the OECD Model Convention as the basis for its international tax treaties and has generally made only minor adjustments to the text. The Commentary to the OECD Model Convention consequently has persuasive force in the interpretation of the double tax agreements concluded by South Africa which are based on this model.

Steenkamp (2017) refers to the importance of the OECD for non-OECD countries through the OECD BEPS project. The aspects relating to the OECD BEPS project are included in the double tax agreements. Steenkamp (2017: 84) states that "…the BEPS initiative was endorsed by the governments of the G20 countries, which extended its application to some non-OECD countries." In South Africa the Davis Tax Committee focused on the OECD BEPS project. It can be concluded that South Africa forms part of the "some non-OECD countries".

In *AB LLC and BD Holdings LLC v C:SARS* (13276) [2015] ZATC 2 (15 May 2015), at 14, the tax court remarked that

> (t)he OECD Model, it seems, has served as a basis for many double taxation treaties concluded by South Africa and its trading partners ... The three model treaties share many similarities and in some cases contain the same articles. If any treaty contains the same article as that of the OECD Model then it would not be uncommon to rely on the commentary of the OECD Model to interpret that article.

In *Income Tax Case No 1878* (2015), 77 SATC 349, at 353, the Tax Court referred, in the context of the interpretation of the double taxation agreement between Switzerland and South Africa, to the use of the Commentary on the OECD Model Tax Convention. According to the tax court

> the explanations provided in the OECD Commentary are of immense value in understanding or interpreting any article contained in the treaty and, in fact,

> Corbett JA in *SIR v Downing* 37 SATC 249 drew on the Commentary on the OECD Model Tax Treaty to interpret the provisions of a treaty between South Africa and Switzerland on double taxation and, more recently, the Supreme Court of Appeal in *C:SARS v Tradehold Ltd* 74 SATC 263 emphasised the need to interpret international treaties in a manner which gives effect to the purpose of the treaty and which is congruent with the words employed in the treaty.

Based on the discussion above, it is clear that the OECD Model Convention is relevant in relation to tax in South Africa.

Section 108(1) of the Income Tax Act provides that:

> The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and such other country.

Double tax treaties are therefore of cardinal importance in achieving an equitable solution to the potential double taxation of income, gains and donations in South Africa and the country with which the DTA is concluded. Section 108(2) states:

> As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the *Gazette* and the arrangements so notified shall thereupon have effect as if enacted in this Act.

Section 231(2) of the Constitution provides that "an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces", and section 231(4) confirms that "any international agreement becomes law in the Republic when it is enacted into law by national legislation".

This confirms the status of a DTA, once approved by Parliament (section 231(2) of the Constitution) and enacted into law by legislation (section 231(4) of the Constitution). In addition, section 233 states 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."

As a result of this, the DTA will take precedence over the South African source rules and, in this sense, certain articles in the DTA will constitute deeming provisions. In *St Aubyn and Others v Attorney General* (No 2) [1952] AC 15, (at 53), it is stated that deeming provisions ensure certainty where there would otherwise be uncertainty.

The local tax legislation of a contracting state accords it taxing rights. In a situation where both contracting states have taxing rights to the same income in terms of their local tax legislation, this could lead to uncertainty regarding the taxation of the relevant income. The DTA, as a mutual agreement between the contracting states, provides certainty between South Africa and the other contracting state regarding the taxing rights to the income concerned. The relevant articles in the DTA constitute deeming provisions that comply with the legal principle of equity in protecting residents earning income abroad and non-residents earning income from a South African source, from double taxation.

In *Commissioner, South African Revenue Service v Tradehold* [2012] 3 All SA 15 (SCA), at 16, the Supreme Court of Appeal held that the term "alienation", as used in the DTA between South Africa and Luxembourg, did not only refer to an actual alienation but also included a deemed alienation. This seems to suggest that double taxation agreements include deeming elements.

The reference in section 231 of the Constitution to "enacted into law by national legislation", includes the Income Tax Act, as an example of "national legislation". This suggests that the provisions of the DTA will have precedence over the Income Tax Act, which includes the source provisions in section 9. In Interpretation Note 18 (Issue 4) (SARS, 2020: 19), relating to the rebate and deduction for foreign taxes on income, SARS indicates that: "Section 9 overrides the common law position … in

cases of conflict. However, the articles of a tax treaty … override section 9 and the common law in cases of conflict."

De Koker (2020: § 13.2.1) refers to the fact that the 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." An interpretation consistent with international law ensures certainty.

The determination whether the DTA or domestic legislation prevails, depends on mutual agreement between the contracting states. De Pietro (2015: 78) observes as follows:

> The structure and functioning of the OECD Model, as reflected in article 3(2), excludes that the occurrence of a tax treaty override is simply a matter of relationship between national and international law in terms of prevalence. The problem is not merely whether an international provision must (or must not) prevail on a domestic one but how a treaty provision has regulated the coordination between national and international law. Establishing whether a case of tax treaty override has occurred is essentially a matter of interpretation. It is the agreement, i.e. the will of states, that determines when a tax treaty override occurs. Thus, a treaty can permit unilateral amendments to domestic law by avoiding that these amendments affect the treaty itself (i.e., avoiding that a tax treaty override occurs). Thus, the OECD Model requires to build the notion of tax treaty override in terms of coordination and coordination is based on the will of the contracting states. This is a fundamental conclusion which concerns the structure – and therefore the notion – of tax treaty override but which has effect on its legitimacy as well. In fact, the natural consequence of such an interpretative approach is that, even when subsequent amendments to domestic law affect a tax treaty (i.e., cause a tax treaty override), they are permissible to the extent that the contracting states have agreed on this possibility.

Du Plessis (2015: 1201) refers to the importance of the Constitution in establishing the status of the DTAs of South Africa. The interpretation of the DTAs is subject to the provisions of the Constitution.

There are, therefore, a number of factors to be considered in relation to the interaction between domestic legislation and DTAs.

9.3 The Organisation for Economic Co-Operation and Development

On 14 December 1960, in Paris, a number of countries, among them the United Kingdom and the United States of America, signed the Convention on the Organisation for Economic Co-Operation and Development. According to the United Nations (1973: 181), the Convention came into force, together with two supplementary protocols (numbered 1 and 2 respectively), on 30 September 1961. The United Nations (1973: 183) provides in Article 1 that the OECD has the following objectives:

> to promote policies designed:
>
> (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
> (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The OECD achieves the stated objectives through various measures and in various fields. This research is limited to the contributions of OECD in the tax field. De Koker (2020: § 1.3) remarks that the "most prominent" model tax conventions are:

- OECD: Model Tax Convention on Income and Capital;
- United Nations (UN): United Nations Model Double Taxation Convention between Developed and Developing Countries; and
- United States (US): United States Model Income Tax Convention.

The ATAF Model Tax Agreement (ATAF, 2020) represents an additional model tax convention. According to De Koker (2020: § 1.3), "South Africa has, to a significant

extent, adopted the OECD Model Convention as the basis for its international tax treaties and has generally made only minor adjustments to the text." In view of this, the next section discusses selected provisions of the 2017 OECD Model Tax Convention.

9.3.1 2017 OECD Model Tax Convention

The OECD formulated a model tax convention to assist countries with the drafting of double tax conventions with one another. The title to the OECD Model Tax Convention (OECD, 2017: 4) states that its objective is "… the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance." This objective is not a new concept. The League of Nations Committee of Technical Experts on Double Taxation and Tax Evasion issued a report during April 1927 titled "Double Taxation and Tax Evasion". The League of Nations observed (1927: 23) as follows:

> From the very outset, the Committee realised the necessity of dealing with the questions of tax evasion and double taxation in co-ordination with each other. It is highly desirable that States should come to an agreement with a view to ensuring that a taxpayer shall not be taxed on the same income by a number of different countries, and it seems equally desirable that such international co-operation should prevent certain incomes from escaping taxation altogether. The most elementary and undisputed principles of fiscal justice, therefore, required that the experts should devise a scheme whereby all incomes would be taxed once, and once only.

This extract confirms that:

- There is a presumption against double taxation.
- Tax evasion must be prevented.
- The presumption against double taxation and the prevention of tax evasion is linked with legal principles; the extract refers to the "principles of fiscal justice" dictating that income must be "taxed once" (the words "taxed once" suggest that income cannot escape being taxed) and "once only" (the words

> "once only" suggest that it is presumed that the same income cannot be taxed more than once, therefore it is a presumption against double taxation). The words "principles of fiscal justice" suggest that there must be a balance between tax and the principles of a good tax system.

In this chapter, the 2017 OECD Model Tax Convention is discussed. The 2017 OECD Model Tax Convention consists of thirty-two articles. Articles 1 to 5 (OECD, 2017: 5-10) present the definition clauses. In Chapter 8 of the present research it was found that the Income Tax Act includes definitions that can be regarded as deeming provisions. The principles of a good tax system must be applied to their interpretation. The same conclusion can be made regarding most of the definition clauses of the 2017 OECD Model Tax Convention. In Article 3, for example, the definitions of a "person", "company", "enterprise", a "national", and "resident" in Article 4, may impose ("deem") a meaning that is different to the meaning in the Income Tax Act. The definition of a "permanent establishment" in Article 5 has been incorporated directly into the Income Tax Act. As these definitions represent a means to ensure that a word or phrase is interpreted in a specific manner, and ensure certainty and comprehensiveness, they are deeming provisions. As the definitions, like the Model Tax Convention itself, aim to provide for reasonable, equitable and transparent principles of international trade, they comply with the principles of a good tax system.

Articles 6 to 21 (OECD, 2017: 10-18) deal with the taxation of the different types of income and Article 22 (OECD, 2017: 18) deals with the taxation of capital; the articles determine which country will have the right to tax the income and capital concerned. The articles ensure certainty, consistent interpretation of words and comprehensiveness in relation to "what is obvious, what is uncertain and what is, in the ordinary sense, impossible" (*St Aubyn and Others v Attorney General* (No 2) [1952] AC 15, (at 53)). The Articles therefore have the characteristics of deeming provisions.

9.3.1.1 A comparison between the approaches of the OECD Model Tax Convention and the Income Tax Act

To illustrate the application of the OECD Model Tax Convention in the context of South Africa, Articles 10, 11, 12, 13 and 15 are compared with relevant provisions in the South African Income Tax Act.

In Chapter 8 of this thesis the definition and interpretation of the term "resident" was discussed. Residence is an important factor in the OECD Model Tax Convention. Section 1(1) of the Income Tax Act provides, in the definition of "resident", that a person, whether a "natural person" or "a person other than a natural person", is not considered to be a South African tax resident where the person "is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the governments of the Republic and that other country for the avoidance of double taxation". It is clear that this extract ensures certainty with reference to the residency of a person. In addition to the use of the terms "deemed", this suggests that the extract represents a deeming provision. It is further concluded that the extract confirms the interaction between the OECD Model Tax Convention and the Income Tax Act.

Article 10 of the OECD Model Tax Convention

The article determines the taxing rights over dividends paid by a company in a country to a resident of another country.

Table 9.1 Article 10 of the OECD Model Tax Convention

The approach of the OECD Model Tax Convention	The Double Tax Convention applies both residence-based and source-based tax: • The dividend can be taxed in the country in which the recipient resides (residence-based taxation). • The alternative to this is that the country, of which the company paying the dividend is a resident, can tax the dividend (source-based taxation). In relation to source-based taxation the withholding tax is either 5% or 15%. The 5% withholding tax applies on condition that the "beneficial owner" of the shares holds at least 25% of the share capital of the company paying the dividend for a period of more than 365 days, which includes the day on which the dividend is paid. The 15% withholding tax applies otherwise.
The approach of the	• Paragraph (k) of the definition of "gross income" in section 1

Income Tax Act	provides that local and foreign dividends form part of the gross income of a taxpayer. • According to section 9(4)(a), foreign dividends are not considered to be from a South African source. • In terms of section 9(2)(a), dividends received from a South African company are considered to be from a South African source. • Section 10B(2) exempts foreign dividends where the taxpayer holds more than 10% of the total equity shares and voting rights of the foreign company, foreign dividends paid to foreign companies, foreign dividends subject to section 9D (discussed below), and dividends and dividends *in specie* declared by foreign companies listed on the Johannesburg Stck Exchange (the JSE). • Section 10B(3) also exempts a portion of a foreign dividend from South African tax. The percentage exemption applying is dependent on the taxpayer concerned, whether a natural person, deceased or insolvent estate, a person other than a natural person or an insurer. • Section 64E provides for the levying of a dividends tax (as a withholding tax) at the rate of 20 percent of the amount of any dividend. Certain exemptions are provided for in section 64F for South African resident companies and other organisations. Section 64G(3)(b)(i) provides for the withholding of tax at a reduced rate "as a result of an agreement for the avoidance of double taxation" – thus reduced to 5 or 15 percent in terms of treaties based on the OECD Model Tax Convention. • Section 6*quat* provides a rebate in relation to foreign income "received by or accrued to" resident taxpayers that is included in taxable income.

Source: Own summary

Article 11

The article determines the taxing rights where interest originates in one country but is paid to a resident of another country.

Table 9.2 Article 11 of the OECD Model Tax Convention

The approach of the OECD Model Tax Convention	The article acknowledges both source-based and residence-based tax: • Residence-based tax applies where the interest that originates in one country is taxed in the country in which the recipient resides. • Source-based tax applies where the country in which the interest originates withholds the tax from the interest before the interest is paid to the recipient of the other country. In this case the withholding tax must not be more than 10% of the gross amount of the interest.
The approach of the Income Tax Act	• The definition of "gross income" in section 1 includes "the total amount" of receipts and accruals in the gross income of a resident taxpayer. Interest represents an "amount" received or accrued.

	• An annual exemption applies for interest income in terms of section 10(1)(i) for individual taxpayers. • Section 50B provides for a 15% withholding tax on interest paid to or in favour of a non-resident, "if the interest is regarded as having been received or accrued from a source within the Republic in terms of section 9(2)(b)." In terms of section 50D, a number of exemptions apply, including interest payable by a bank. Section 50E(3)(b)(i) provides for a reduced rate "as a result of the application of an agreement for the avoidance of double taxation", thus reduced to 10 percent in terms of treaties based on the OECD Model Tax Convention. • In terms of section 6*quat*(1)(a), a rebate applies to resident taxpayers where the origin (source) of the income received or accrued to the taxpayers is from outside South Africa.

Source: Own summary

Article 12

The article determines the taxing rights where royalties originate in one country but are paid to a resident of another country.

Table 9.3 Article 12 of the OECD Model Tax Convention

The approach of the OECD Model Tax Convention	Royalties are taxed in the country of which the resident, the beneficial owner, is a taxpayer. Where the resident taxpayer carries on a business by means of a permanent establishment in the other country in which the royalties originate and there is an effective connection between the permanent establishment and the right or property in respect of which the royalties are paid, the royalties are taxed in the other country and not in the country of which the resident is a taxpayer.
The approach of the Income Tax Act	• According to section 9(2)(c), royalties are from a South African source where the royalty payment is incurred by a resident person, unless it is attributable to a permanent establishment situated outside South Africa. • Section 9(2)(d) provides that royalties are considered to be from a South African source where the intellectual property is used, or the right to use the intellectual property is in South Africa. • Section 9(4)(c) provides that a royalty is not from a South African source where it does not fall within the ambit of sections 9(2)(c) and 9(2)(d). • Section 49B levies a withholding tax of 15% on royalties paid to or for the benefit of any foreign person that are from a source within the Republic in terms of section 9(2)(c) or (d). Section 49E(3) provides for a reduced rate of tax "as a result of the application of an agreement for the avoidance of double taxation."

Source: Own summary

Article 13

The article determines the taxing rights where capital gains arise from the disposal of immovable property situated in another country.

Table 9.4 Article 13 of the OECD Model Tax Convention

The approach of the OECD Model Tax Convention	The type of asset disposed of must be considered: • *Immovable property*: Capital gains "may" be taxed in the country in which the property is situated. • *Movable property forming part of permanent establishment in the other country*: The country in which the permanent establishment is situated "may" tax the gains from the disposal of the property. This taxing right will also apply where the permanent establishment (alone or together with the entire enterprise) is disposed of. • *Ships or aircraft in international traffic and related movable property*: The country of which the enterprise is a resident "shall" tax the gains from the disposal of these assets. • *Shares or comparable interests*: The other country (the source country) "may" tax the gains if more than 50% of the value of the shares or comparable interests are derived directly or indirectly from immovable property situated in the source country during the 365 days prior to their disposal.
The approach of the Income Tax Act	Gains on the disposal of all assets (except where specific exclusions apply) are taxed in terms of the Eighth Schedule to the Income Tax Act and included in taxable income in terms of section 26A of the Act. The disposal of assets comprising trading stock are included in income in terms of section 22. In order to avoid double taxation, section 6*quat* provides a rebate for foreign tax paid on foreign income. The rebate also applies to capital gains. Section 12Q(2)(b) exempts capital gains and capital losses of an "international shipping company" with reference to a "South African ship" involved in "international shipping".

Source: Own summary

Article 15

The article determines the taxing rights where a resident of one country earns income from employment in another country.

Table 9.5 Article 15 of the OECD Model Tax Convention

The approach of the OECD Model Tax Convention	Employment income is taxable in the country in which the taxpayer is resident if the following conditions are fulfilled: • The taxpayer is present in the country for 183 days in aggregate in a twelve-month period which begins or ends in the tax year. • The taxpayer's remuneration is paid by, or on behalf of a resident employer. • The taxpayer's remuneration does not relate to a permanent establishment of the employer in the other country. When the taxpayer, as member of the "complement of a ship or

	aircraft", earns remuneration originating from the activities of a ship or aircraft in "international traffic", the employment income "shall" only be taxed in the taxpayer's country of residence.
The approach of the Income Tax Act	Income arising from employment is, in terms of the decision in *Millin v CIR*, taxed in South Africa when the activities are performed here. Section 10(1)(o)(ii) provides that the taxpayer will be exempt from tax in South Africa where: • the income from foreign employment does not exceed R1,25 million in a year of assessment (this applies from 1 March 2020), • the taxpayer is not present for more than an aggregate number of 183 days in South Africa, and • the taxpayer is not in South Africa for a continuous period of more than 60 days during the period of 12 months. According to section 10(1)(o)(iA) the employment remuneration of a taxpayer is exempt from South African tax when the taxpayer is engaged as an "officer or crew member" of a "South African ship", which is "mainly engaged in international shipping" or in "fishing outside South Africa" (defined in terms of section 12Q(1) of the Income Tax Act).

Source: Own summary

Articles 23A and 23B (OECD, 2017: 19-20) make provision for a contracting company to address double taxation by means of the exemption method (article 23A), (the exemptions in certain subsections of section 10 in the Income Tax Act apply), and the credit method (Article 23B) (in the case of the Income Tax Act, rebates in terms of section 6*quat* and 6*quin*). Articles 24, 28, 30, 31 and 32 (OECD, 2017: 20, 21, 25, 27, 28) address the following aspects: non-discrimination, the taxation of members of diplomatic missions and consular posts, territorial extension, entry into force as well as termination of the agreement.

From the summaries above, it is clear that many of the Articles "deem" amounts to be subject to tax in a manner that differs from the legislative provisions of the countries entering into the double tax agreements. The Articles in DTAs ensure certainty, consistent interpretation of words and comprehensiveness in relation to what is obvious, what is uncertain and what is, in the ordinary sense, impossible. As DTAs are designed to prevent the incidence of double taxation, they comply with the principle of equity.

9.3.2 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

On 24 November 2016, the OECD adopted the Multilateral Convention. The OECD (2016b: 1) explained that the mission of the Multilateral Convention is:

> to ensure swift, co-ordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context … to ensure that existing agreements for the avoidance of double taxation on income are interpreted to eliminate double taxation with respect to the taxes covered by those agreements without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in those agreements for the indirect benefit of residents of third jurisdictions) … to implement agreed changes in a synchronised and efficient manner across the network of existing agreements for the avoidance of double taxation on income without the need to bilaterally renegotiate each such agreement.

The Multilateral Convention is a deterrent used by governments to prevent base erosion and profit shifting. In the introduction to Part 1 of the Multilateral Convention, the drafters use words which include: "aggressive international tax planning", "artificially shifting" of profits, "pressing issue", "tax-treaty related measures", "address artificial avoidance", "prevent", "ensure swift, co-ordinated and consistent implementation", "treaty-shopping".

Various writers have reacted in favour of and raised concerns about the Multilateral Convention, which was signed by South Africa. Although the following reactions in favour of and the concerns raised in relation to the Multilateral Convention are from an international perspective, it is submitted that it applies to South Africa as co-signatory to the Multilateral Convention.

9.3.2.1 Reactions in favour of the Multilateral Convention

Avi-Yonah and Xu (2018: 157) remark that "in the academic world as well as in practice, there has been increasing recognition of the need for a multilateral tax

treaty". Avi-Yonah and Xu (2018: 157, 158) list three reasons why multilateral tax conventions must be preferred over bilateral tax conventions:

- Multilateral tax conventions are feasible on condition that countries are permitted to "opt out of" certain articles included in the convention.
- The wording of various treaties has progressively become similar.
- There has been an increase in incidences of treaty shopping and incidences where residents of a country enter into transactions with a third country; these transactions have an impact on a treaty but do not fall within the ambit of the treaty.

According to Avi-Yonah and Xu (2018: 158), the Multilateral Convention:

> is not a full-fledged multilateral tax convention covering all the areas that are usually covered by bilateral tax treaties. Instead, it is a global consensual treaty override designed to apply the results of Base Erosion and Profit Shifting (BEPS) simultaneously to all the tax treaties where the countries involved agree.

Avi-Yonah and Xu observe (2018) that the Multilateral Convention accomplished the following:

- the development of provisions to prevent treaty abuse; these provisions include the limitation of benefits and the Principal Purpose Test;
- standardised Country-by-Country reporting; the reporting enhances transparency of Multinational Enterprises;
- set a minimum standard that addresses harmful tax practices;
- set a minimum standard that ensures progress regarding dispute resolution;
- changes the Transfer Pricing Guidelines; the purpose is to align economic activity with the taxation of profits; and
- introduces measures to limit base erosion and to prevent hybrid mismatches (which occur due to the difference in tax treatments of entities in different tax jurisdictions) that will have a negative impact on the tax base of the parties.

Other authors have also expressed the view that a multilateral tax convention must be favoured over the existing bilateral tax conventions.

Thuronyi (2001: 1641) observes that the nature of bilateral tax conventions has:

> inherent flaws which have become more serious as the network has grown. The treaty network has become cumbersome and inflexible and, in many instances, has spawned opportunities for tax avoidance. This bilateral approach seems anomalous in an era where taxpayers have become global and many other regulatory areas increasingly are being dealt with globally by governments.

He observes (at 1644) that:

> [i]n contrast to the existing network of bilateral treaties, which has become ossified, a multilateral treaty would provide a vehicle for continual renewal as problems arise with the functioning of the international tax system, allowing amendment or interpretation of its terms to affect all countries at the same time. A multilateral treaty also would provide a framework for continuous review of the relevance of those weaknesses that remain. It would allow consideration of solutions … that cannot be applied on a bilateral basis alone. A multilateral treaty would be able to handle triangular cases and treaty shopping much better than a bilateral network.

He acknowledges (at 1645) that all existing tax conventions could possibly not be replaced with a singular multilateral tax convention but that he supports a "situation where countries enter into a commitment to negotiate all future treaties based on such a text (and over a transitional period to bring existing treaties into a format that is based on this text)". Kim (2015: 273) also concludes that the "proposed Multilateral Instrument may be a desirable and feasible tool to reflect the necessary changes resulting from BEPS works". He observes (at 237) that where a multilateral treaty is concerned, there "needs to be as many parties as possible". This suggests that the success of the Multilateral Convention requires the support of countries. It should be noted that the observations of Kim (2015) and Thuronyi (2001) were made prior to the publication of the Multilateral Convention.

The Multilateral Convention consists of thirty-nine articles; according to the Explanatory Statement (OECD, 2016a: 3) the Multilateral Convention includes two Base Erosion and Profit Shifting (BEPS) minimum standards: countering tax treaty abuse (Action 6) and the improvement of dispute resolution mechanisms (Action 14). Countries may select not to apply a provision in the Multilateral Convention but if the provision is a minimum standard it is more difficult to do so; a country would only be able to avoid applying a minimum standard if the country's Covered Tax Agreements (the existing tax conventions) address the standard sufficiently.

9.3.2.2 Concerns raised in relation to the Multilateral Convention

Even though the Multilateral Convention is an achievement in the international tax field, it is also important to note that certain academics have voiced their concerns about various aspects of the Multilateral Convention. The following concerns have been raised:

- Oguttu (2018: 2). The involvement of developing countries in the development of the Multilateral Convention was either limited or none; she expands (at 15) on this and observes that the interests of developing countries were initially not included during the BEPS project and the Multilateral Convention therefore mainly relates to the concerns of OECD countries.
- Oguttu (2018: 2). Many countries did not select certain provisions; this had an impact on the effectiveness of the Multilateral Convention.
- Oguttu (2018: 2). The Multilateral Convention is complex and its interpretation and "practical application" are problematic and uncertain; Oguttu (2018: 14) expands on this where she remarks that many developing countries do not have the required experience where multilateral conventions are concerned (even though they have signed the Multilateral Convention).
- Oguttu (2018: 13). The developed countries have not applied all the Multilateral Convention provisions; this causes uncertainty in developing countries and may have a negative impact on the BEPS Project. It is suggested it means that the developing countries are dependent on the selections made by

the developed countries; the selections of developing countries are therefore linked to the selections that the developed countries make. Gulati (2020) remarks that there is a "lack of intent" present among countries: the countries give the impression that they "stand together" against BEPS, yet they do not accept all the Multilateral Convention provisions.

- Oguttu (2018: 13). The provisions dealing with a "reservation and option mechanism" are formulated in a complicated manner and are "highly technical". According to the Multilateral Convention an article applies where the parties to the Multilateral Convention have not made reservations to opt out of the article (Oguttu, 2018: 3).
- Oguttu (2018: 14). The articles included in the Covered Tax Agreements are in certain instances connected to other articles and where the provisions of the Multilateral Convention have an impact on the articles of the Covered Tax Agreements, there could possibly be uncertainty in this regard.
- Oguttu (2018: 15). There are concerns that the OECD will become a "de facto international tax organisation".
- Silberztein and Tristram (2016: 353). It is uncertain what weight the local judicial institutions will give to the Multilateral Convention; this therefore involves an issue in relation to interpretation.
- Silberztein and Tristram (2016: 353). The Multilateral Convention amends a large number of Covered Tax Agreements and, due to this, the level of detail included in a bilateral tax convention cannot be provided in the Multilateral Convention.
- Silberztein and Tristram (2016: 348). The BEPS Project, which included Action Plan 15 (Developing a Multilateral Instrument to Modify Bilateral Tax Treaties), was "carried out in an unprecedented time-pressured environment … [and] risks creating a false consensus around vague standards that have not been adequately considered".
- Gulati (2020) expands on this and raises the question why countries have decided to implement the Multilateral Convention; his concerns are related to the possibility that "the subjectivity under the [Multilateral Convention]

provisions is perilous for the taxpayers because it provides a potent weapon to the tax authorities to harass genuine taxpayers". He observes that the phrase "object and purpose" not only applies to taxpayers but also to the tax authorities.

- Gulati (2020) questions whether the "multilateral approach to build consensus is practically possible"; in this regard he refers to the fact that it is often difficult for two persons to agree on relevant terms, and questions whether it will be possible for "different countries" to agree on the same terms. It is suggested that this is an important question that will only be answered in future.
- Kleist (2018: 34). In instances where the provisions of the Multilateral Convention do not reconcile with the provisions of a Covered Tax Agreement, the provisions of the Multilateral Convention will prevail; Silberztein and Tristram (2016: 352) observe that this type of provision, referred to as a compatibility clause, could pose practical problems due to the vast number of existing bilateral tax conventions and their differences in languages.

The preamble to the Multilateral Convention states that there is a need "to ensure swift, co-ordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context"; this suggests that there must be agreement between the countries concerned. The remarks in favour of and the concerns in relation to the Multilateral Convention create the impression that there is no agreement. It is suggested that this has an impact on the interpretation of the articles of the Multilateral Convention, which will determine whether its objectives will be achieved and its overall effectiveness.

Article 31(1) of the Vienna Convention on the law of Treaties ("the Vienna Convention"), concluded at Vienna on 23 May 1969, provided that: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Article 32 further provided that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

It is submitted that these articles remain important in the context of the interpretation of the Multilateral Convention. The relevant articles of the Multilateral Convention will not be discussed and only one of the articles, Article 7 ("Prevention of Treaty Abuse"), will be referred to in the context of its importance as an anti-avoidance provision in the Multilateral Convention.

The objective of Article 7

The objective of Article 7 is to provide certainty in relation to the manner in which treaty abuse will be prevented. Ernst and Young (2020) observe that the implementation of the minimum standard, BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, is the "most significant impact" of the Multilateral Convention in relation to the international tax field. Article 7 of the Multilateral Convention addresses the prevention of tax treaty abuse. Paragraphs 1 and 2 of Article 7 provide as follows:

> 1. Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.
>
> 2. Paragraph 1 shall apply in place of or in the absence of provisions of a Covered Tax Agreement that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal

> purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits.

Like other anti-avoidance measures, Article 7 is a deeming provision that characterises arrangements or transactions as treaty abuse, denying the benefits that a DTA would confer. For countries that enter into a Multinational Convention, Article 7 would override the relevant provisions in their DTAs. Avi-Yonah and Xu (2018: 176) remark that Article 7(1) is intended to be broader than the narrower principal purpose test provisions. Del Mar and Twining (2015: 169) state that "deeming provisions are often created with a broader ambit from the outset".

The reasonableness test and the principal purpose test

Weber (2017: 48) observes that paragraph 1 of Article 7 suggests two tests: the principal purpose test (a subjective test) and the reasonableness test (an objective test). According to Weber the two tests must be considered together. The reasonableness test relates to the words "it is reasonable to conclude, having regard to all relevant facts and circumstances". Weber remarks (2017: 49) as follows in relation to the link between the tests: "to know the subjective intention of a taxpayer or arrangement, an objective analysis must be made of the (objective) facts and circumstances." It is suggested that the principal purpose test is a deeming provision in that it assumes that an agreement was reached, or an arrangement was made to obtain a benefit. Weber explains (2017: 58) that the reasonableness test:

> emphasises that the tax administration must substantiate their assessment that obtaining a benefit is one of the principal reasons of an arrangement on the basis of an objective analysis of objective circumstances. Assumptions are not permitted. Moreover, an assessment based merely on the effects of an arrangement is not sufficient … when a tax treaty is applicable, a taxpayer may invoke the benefits of this treaty, unless, but this must be based on an objective analysis of the facts and circumstances, that obtaining a tax benefit is one of the principal reasons of an arrangement.

Chand (2018: 21) remarks that the burden of proof in relation to the principal purpose test differs from the burden of proof in relation to the reasonableness test. The principal purpose test, formulated in paragraph 1 of Article 7, requires that the taxpayer must "establish" that "granting the benefit would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement". Stevenson and Soanes (2010: 238272) find that "establish" means to "show (something) to be true or certain by determining the facts." It is suggested that this implies that the taxpayer must follow a "show me" approach; the taxpayer is required to submit evidence and a mere statement will not bear sufficient weight. Chand (2018: 21) observes that the reasonableness test, also formulated in paragraph 1, places a lower burden of proof on the competent authorities; when it is "reasonable to conclude" that the "benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit", the competent authorities will have discharged the burden of proof placed on them. This approach suggests a lack of balance in the application of reasonableness. The conclusion that the principal purpose of a transaction was to obtain a benefit is significant. It is therefore submitted that the conclusion should, at a minimum, be substantiated by objective evidence. Chand (2018: 21) is of the opinion that when the court reviews matters in relation to these tests, the "benefit of the doubt" must be in favour of the taxpayer where it is not clear whether abuse or tax avoidance is present (the *contra fiscum* legal principle). The different approaches with reference to the burden of proof is a significant risk and illustrates an imbalance between deeming provisions and the legal principles of reasonableness and equity.

Conclusion: Multilateral Convention

The Multilateral Convention is therefore a deterrent used by governments to prevent base erosion and profit shifting. Although the objectives of the OECD with the Convention are clear, the interpretation of the Multilateral Convention is a concern. According to Kleist (2018: 47), the Multilateral Convention is "extensive, detailed, and technical in nature". This remark is troublesome, especially in the context of the Vienna Convention. It is not only the competent authorities who will interpret the

provisions of the Multilateral Convention, multinational companies will also be required to take the provisions of the Multilateral Convention into account when transactions are entered into. This is especially important in the context of the principles of a good tax system, as originally formulated by Smith (1776). Jarczok-Guzy (2017: 72) lists the principles as: "equality, certainty, convenience, and the economy of taxation". The concept of equality relates (as stated by the author, at 73) to two concepts: benefit and the ability of the taxpayer to pay his/her portion to the competent authorities. According to the OECD Action 1 Report: "Addressing the Tax Challenges of the Digital Economy" (OECD, 2015a), the OECD observes (at 20) that certainty requires tax rules to:

> be clear and simple to understand, so that taxpayers know where they stand. A simple tax system makes it easier for individuals and businesses to understand their obligations and entitlements ... Complexity also favours aggressive tax planning, which may trigger deadweight losses for the economy.

The wording of the Multilateral Convention is complex; the remark of the OECD in relation to complexity, taken together with the principles of a good tax system, indicates that there is a risk that the Multilateral Convention will fail to comply with these principles.

This chapter has mainly focused on the international perspective. The OECD/G20 implemented 15 actions with the objective of addressing base erosion and profit shifting. During 2015, the OECD issued a final report on Action 3 called "Designing Effective Controlled Foreign Company Rules" (OECD, 2015b). Action 3 (OECD, 2015b: 9) introduces "building blocks" which will ensure that the jurisdictions "design … effective CFC rules". The OECD report (OECD, 2015b: 9) recommends six building blocks:

- the term CFC (controlled foreign company) must be defined;
- the exemptions and requirements applying to CFCs must be clear;
- the term income, in the context of CFCs, must be defined;
- the manner in which the CFC income is calculated must be determined;
- the attribution of income must be determined; and

- double taxation must be prevented and eliminated.

The South African Income Tax Act addresses the impact of base erosion and profit shifting in sections 9D and 31. The following section focuses on the South African perspective.

9.4 Applying the OECD/G20 Base Erosion and Profit Shifting Project to the Income Tax Act

In the final report of the Davis Tax Committee on Base Erosion and Profit Shifting (Davis Tax Committee, 2016: 48), the Committee referred to important anti-avoidance provisions included in the Income Tax Act which address base erosion and profit shifting (BEPS). Action 3 of the OECD Action Plan (Davis Tax Committee, 2016: 21) focuses on the formulation of "effective Controlled Foreign Companies (CFC) rules". The Income Tax Act includes sections addressing BEPS. Two of these sections are discussed in this chapter: sections 9D and 31.

9.4.1 Section 9D of the Income Tax Act

In order to determine whether a provision includes deeming elements the purpose of the provision must be taken into account. Haupt (2019: 602) observes that the purpose of section 9D is to tax foreign "passive income, as well as 'diversionary' income" which taxpayers earn through foreign companies. Passive income includes, among others, interest, rental income, royalties, and dividends. Diversionary income relates to "suspect transactions between a controlled foreign company (CFC) and a South African resident" (Haupt, 2019: 602).

Section 9D is one of the tax measures designed to address BEPS issues. In terms of section 9D a proportional share of the income of a CFC is attributed to a South African resident, in circumstances where it has not been received by or accrued to the person. Section 9D therefore attributes a portion of the income of a CFC to a resident. According to Interpretation Note 63 (Issue 2) (SARS, 2015b: 17) "attribution" is the term used to refer to this "*deemed* income inclusion" [emphasis added]. Without this

section, the South African tax base will be eroded and the profit shifted away from South Africa. It is proposed that section 9D nullifies tax avoidance schemes which have the intention of shifting tax. Section 9D therefore includes deeming elements.

Annexure 3 to the Davis Tax Committee Report (2016: 16) analyses the OECD building blocks in the context of CFC legislation in South Africa. The report also discusses section 9D of the Income Tax Act. Section 9D is discussed with a focus on the building blocks.

The definition of the term "CFC"

The OECD (2015b: 9) recommends that the definition of a CFC must "determine when shareholders have sufficient influence over a foreign company for that company to be a CFC".

A controlled foreign company (CFC) is defined in section 9D(1) as:

> any foreign company where more than 50 per cent of the total participation rights in that foreign company are directly or indirectly held, or more than 50 per cent of the voting rights in that foreign company are directly or indirectly exercisable, by one or more persons that are residents other than persons that are headquarter companies.

The exemptions and requirements applying to CFCs

The OECD (2015b: 9) requires that the CFC rules apply where the tax rates of the CFCs are lower than the rates of the parent jurisdiction. Section 9D(2A) applies this recommendation where it is confirmed that the net income of a CFC is deemed to be nil where the foreign tax payable by a CFC is 67.5% of the normal tax that is payable in South Africa.

Subject to section 9D(9A), section 9D(9)(b) excludes income from a foreign business establishment of the CFC from the calculation of the net income of the CFC. Section 9D(9A) provides that this exemption does not apply to diversionary income, which

includes capital gains from disposals (or deemed disposals) of intellectual property and sales, purchases and services rendered by a CFC to a connected person.

The definition of the term "income", in the context of CFCs

The OECD (2015b: 9) requires that the types of income which fall within the ambit of CFC income must be stipulated in the CFC legislation. The net income of the CFC is considered to be the equivalent of the taxable income of a resident taxpayer (section 9D(2A)). Section 9D(9)(b) confirms that the income attributable to a foreign business establishment of a CFC is not included in the calculation of the net income of a CFC.

The manner in which the CFC income is calculated

The OECD (2015b: 10) observes that the losses of a CFC must be set off against profits of the CFC in the parent jurisdiction. Section 9D(2A) focuses on the calculation of the net income of the CFC. Section 9D(2A)(a) provides that the CFC cannot create losses. This means that the deductions and allowances are limited to the income of the CFC. Interest, royalties, rentals, and related income are excluded from the calculation of net income of the CFC in terms of section 9D(9)(fA), where it is received from another CFC in the same group of companies. Section 9D(2A)(c) in this regard provides that the other CFC is may not deduct interest, royalties, rentals, and related expenses in respect of payments to another CFC if the other CFC did not include the items in its income. The extent to which foreign dividends are attributed to the resident taxpayer will depend on sections 10B and 9D(9)(f) of the South African Income Tax Act. Section 10B includes a participation exemption, according to which dividends are exempted where a resident taxpayer is the holder of at least 10% of the equity shares and voting rights of a foreign company. The section furthermore exempts a portion of the dividends received according to the nature of the resident taxpayer – natural persons and trusts, non-natural persons, and insurers. Section 9D(9)(f) provides that foreign dividends are excluded from the calculation of the income of the CFC to the extent that the dividend does not exceed the income that would have been attributed to the resident taxpayer in terms of section 9D.

The attribution of income

The OECD (2015b: 10) recommends that the "attribution threshold should be tied to the control threshold and that the amount of income to be attributed should be calculated by reference to the proportionate ownership or influence".

According to section 9D(2), the net income of the controlled foreign company is attributed to a resident taxpayer in proportion to the participation rights of the resident taxpayer in the CFC.

Double taxation must be prevented and eliminated

The OECD (2015b: 10) recommends that the "jurisdictions with CFC rules allow a credit for foreign taxes actually paid … It also recommends that countries consider relief from double taxation on dividends …".

Section 9D(2A) provides that the net income of a CFC will be deemed to be nil where the aggregate amount of foreign tax payable with reference to the CFC "is at least 67,5 per cent of the amount of normal tax that would have been payable in respect of any taxable income" of the CFC if it had been a resident during the foreign tax year. The net income will also be deemed to be nil where the receipts or accruals relate to a foreign business establishment of the CFC and need not be taken into account in terms of section 9D(9A). Section 9D(2A)(l)(ii)(aa) provides that the aggregate foreign tax payable must be calculated after taking into account double tax conventions and other credits and rebates.

It is submitted that section 9D addresses the recommended building blocks of the OECD. The Davis Tax Committee (2016: 36) remarks as follows with reference to CFC legislation (which therefore also includes section 9D): "South Africa's CFC legislation is very sophisticated and comparable to other G20 countries; there is no need to strengthen this legislation at this stage".

From the discussion it is clear that section 9D, as an anti-avoidance section, is a deeming provision, as the section attributes (deems) a proportional share of the

income of a controlled foreign company to a South African resident, where it has not been received by or accrued to that person. De Koker and Williams (2020: § 24.177) state that the purpose of deeming provisions is, for example, to nullify tax avoidance schemes which have the intention of shifting tax. The section also complies with the principles of equity and certainty and protects the South African tax base. Provisions in the section provide relief where the net income of a CFC is deemed to be nil when the foreign tax payable by a CFC is 67.5% of the normal tax that is payable in South Africa, and in the case of a foreign business establishment, exempts the foreign business establishment of the CFC in the calculation of the net income of the CFC. Section 9D also ensures equity by preventing certain taxpayers from carrying on business through a controlled foreign company and deferring the taxation of a proportional share of its income until the company distributes a dividend, which in any event would enjoy the participation exemption in terms of section 10B(2) of the Income Tax Act as the person holds a participation right of more than 50% in the company.

9.4.2 Section 31 of the Income Tax Act

The Davis Tax Committee (2016: 14) observes that "CFC rules can be said to complement transfer pricing rules and *vice versa*". From this statement the importance of section 31, which addresses transfer pricing, is apparent. The Davis Tax Committee (2016: 14) remarks that the rules relating to transfer pricing "are meant to restore the taxing rights of all jurisdictions". It ensures that the terms and conditions of transactions entered into between connected persons reflect transactions entered into between "independent persons dealing at arm's length" (section 31(2)). The concept "affected transaction" is important for the application of section 31. It addresses the following aspects:

- the type of relationships to which it applies;
- the tax benefit that results from the transaction; and
- the presence or absence of arm's length terms and conditions in the transaction.

The following relationships are provided for:

- a resident and a non-resident person;
- a non-resident and a non-resident person with a permanent establishment in South Africa;
- a resident and another resident with a permanent establishment outside South Africa;
- a non-resident and a person that is a CFC in relation to a resident.

The section is summarised as follows:

Table 9.6 Section 31 of the Income Tax Act in summary

Section 31(2)	According to the section, the taxable income of a person who "derives a tax benefit … must be calculated as if that transaction, operation, scheme, agreement or understanding had been entered into on the terms and conditions that would have existed had those persons been independent persons dealing at arm's length".
Section 31(3)	Where an affected transaction exists between a South African resident and a non-resident and there is a difference between an amount: • taken into account in the taxable income of a resident, and • that would have been taken into account in the taxable income of a resident in the absence of the terms and conditions (which are not at arm's length and create a tax benefit for a person), the difference will be deemed, on the last day of the six-month period following the end of the year of assessment: • *In the context of a South African resident company:* to be a dividend *in specie* by the South African resident company to the non-resident. • *In the context of a South African resident other than a company*: to be a donation made by the South African resident to the non-resident.
Section 31(5)	The section provides that it does not apply to headquarter companies where the transactions relate to the "granting of financial assistance" as well as the use of intellectual property (as defined in section 23I of the South African Income Tax Act) between a headquarter company and a foreign company. Section 9I of the Income Tax Act applies to headquarter companies. These companies are South African companies that hold equity shares and voting rights of at least 10% in a foreign

	company. The Income Tax Act regards headquarter companies to be non-residents (Haupt, 2019: 619). Each of the shareholders (alone or together with a company forming part of the same group of companies) must hold 10% or more of the equity shares and voting rights of a headquarter company. Section 9I also requires that 80% of the cost of the assets of the headquarter company must be associated with the equity shares, debt, or intellectual property in relation to a foreign company.
Section 31(6)	Haupt (2019: 578) observes that this subsection identifies the situations where the transfer pricing rules will not apply to residents that are not headquarter companies. These exclusions relate to: • the granting of financial assistance, or the granting of the use of intellectual property (as defined in section 23I) to a CFC by a resident, provided the CFC has a foreign business establishment • CFCs with a high tax rate (Haupt, 2019: 579). The calculated foreign tax of the CFC must be more than 67.5% of the tax that it would have paid if the CFC was a resident. This calculation is determined after taking the relevant double tax convention and other rebates into account. The calculation does not take losses of the CFC into account.
Section 31(7)	The transfer pricing rules do not apply to transactions where a resident company granted financial assistance to a foreign company and the following conditions apply to the transaction: • the debt (loan) must be repaid in full within 30 years from the date that it is incurred; • the market value of the assets of the foreign company must exceed the market value of its liabilities; and • the debt is interest-free during the year of assessment.

Source: Own summary

Section 31(2) is a charging provision and provides for the calculation of the taxable income or the tax payable of a person who derives a tax benefit, as if the transaction, operation, scheme, agreement or understanding had been entered into on the terms and conditions that would have existed between independent persons dealing at arm's length. This is the first adjustment.

Section 31(3), which is a further charging provision, provides for a secondary adjustment and deems the difference between an amount that would have been taken into account in the taxable income of a resident, and an arm's length amount, to be either a dividend *in specie* and subject to the payment of dividends tax at the rate of 20% in the case of a company, or a donation subject to donations tax at the rate of

20% where the amount does not exceed R30 million or 25% where it does, in the case of a person other than a company.

The purpose of the section is to prevent the international shifting of tax and the section is therefore a deeming provision. It complies with the legal principle of equity by preventing the person involved from reducing its taxable income by channelling income abroad to connected foreign entities. The section also protects the South African tax base.

9.5 Conclusion

The fourth sub-goal of this research was to demonstrate the relationship between deeming provisions and the principles of a good tax system. This was achieved by understanding the application of a selection of deeming provisions in the Income Tax Act, South African case law, the 2017 OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, together with relevant commentaries. The first part of the fourth sub-goal was addressed in Chapter 8. The present chapter discussed the second part of the sub-goal: the application of a selection of deeming provisions in the OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. Measures to address base erosion and profit shifting in the Income Tax Act were analysed. The commentary by acknowledged experts was also referred to.

9.5.1 The relationship between deeming provisions and the principles of a good tax system

This chapter confirms that international tax developments remain important. To be economically sustainable, cooperation between countries is important. The cooperation between member states is regulated by international institutions, which include the OECD. To ensure fair dealing and good faith between the countries, the countries enter into bilateral agreements with one another with the purpose of ensuring that they benefit from the cooperation. The OECD Model Tax Convention is

a template that countries can use as basis for their double tax agreements. The Model Tax Convention deals with the problem of double taxation, where a resident of one country earns income in another country, and is taxed in both jurisdictions. It provides rules that determine the taxing rights of the countries antering into the double tax agreement.

The Model Tax Convention therefore includes deeming provisions to regulate these taxing rights, and it was established that principles of a good tax system apply to these deeming provisions. The title of the OECD Model Tax Convention (OECD, 2017: 4) states that its objectives relate to the "elimination of double taxation" and the "prevention of tax evasion and avoidance". This suggests that the objective to eliminate double taxation in essence confirms that the principles of a good tax system apply.

Due to the impact of the growing trend of globalisation, involving multi-national companies, the bilateral agreements entered into between countries must be updated in order to address the changes. In response to this, the OECD published the Multilateral Convention; its purpose is to ensure that it serves as a template with which countries in the world can mutually comply. Countries are permitted to inform the OECD which articles of the Multilateral Convention they do not wish to apply to their covered tax agreements. It was found in this chapter that, although the objectives with the Multilateral Convention are appropriate, the interpretation of the Multilateral Convention may pose a problem. The Multilateral Convention is drafted in a complex manner and the risk exists that the interpreters will not apply the provisions of the Multilateral Convention correctly and accurately.

Article 7 of the Multilateral Convention, which aims to prevent treaty abuse, was briefly discussed. It was found that the article also constitutes a deeming provision, and that it applies the principles of a good tax system. Deeming provisions serve three purposes: to ensure certainty, comprehensiveness, and consistency. Due to the complex wording of the Multilateral Convention, taken together with the purposes of deeming provisions, the risk exists that the deeming provisions of the Multilateral Convention may not achieve these purposes.

9.5.2 The relationship between the OECD/G20 Base Erosion and Profit Shifting Project and the Income Tax Act

International tax developments have an impact on South African legislation. The OECD Base Erosion and Profit Shifting (BEPS) Project focuses on tax avoidance measures. The Income Tax Act includes both general and specific anti-avoidance provisions. Sections 9D and 31 are specific anti-avoidance provisions that address the BEPS concerns. Section 9D focuses on the taxation of the income of controlled foreign companies (CFCs) by attributing the income (excluding foreign business establishment income) to residents who hold participation rights in these CFCs. Section 31 addresses transfer pricing; this relates to transactions between related persons in South Africa and a foreign jurisdiction, where the terms and conditions associated with the transaction do not reflect those associated with independent persons at arm's length. The section adjusts the taxable income or the tax payable by a person by the difference between the benefit conferred by the transaction and the benefit that would have ensued between independent parties contracting at arm's length. The section also treats the difference between the income relating to the transaction and the income that would arise in an arms-length transaction as either a dividend *in specie* in the hands of a company (subject to dividends tax of 20%), or a donation in the hands of persons other than a company (subject to donations tax of 20% or 25%, depending on the amount). Both section 9D and section 31 were shown to be deeming provisions that comply with the principles of a good tax system.

In the next chapter the focus is on the enforcement of deeming provisions. To ensure that legislative provisions are complied with, certain institutions are required to enforce these provisions; in the case of South Africa this institution is SARS, which enforces legislation in terms of the Tax Administration Act and certain provisions in taxation Acts. Other institutions ensure that the enforcement of provisions is equitable. The next chapter discusses the role of the following institutions: the Office of the Tax Ombud, the Organisation Undoing Tax Abuse (OUTA), the Tax Justice Network Africa, and the African Tax Administration Forum (ATAF). The chapter also briefly discusses the report of the Davis Tax Committee dealing with tax administration.

CHAPTER 10

THE ENFORCEMENT OF TAX LEGISLATION AND PRINCIPLES OF A GOOD TAX SYSTEM

Equal weights at equal distances are in equilibrium and equal weights at unequal distances are not in equilibrium but incline towards the weight which is at the greater distance.

- Archimedes [8]

10.1 Introduction

In the previous chapters the focus has mainly been on deeming provisions in the Income Tax Act and the OECD Model Tax Convention. This does not, however, address the practical aspect of enforcement in relation to these provisions, which can only become effective through enforcement. The previous chapters have concentrated on the development of legal principles and principles of a good tax system and the application to deeming provisions and their interpretation. While this chapter continues the discussion, the focus shifts towards the application of the principles of a good tax system in the administration of tax. This chapter therefore focuses on the fifth sub-goal: a discussion of the role of tax administration in achieving the principles of a good tax system.

The provisions in the Tax Administration Act deal with the administration of tax Acts, and the purpose of the provisions in the Tax Administration Act is to ensure its effective application. Certain of these statutory provisions can be viewed as deterrents: provisions relating to requests by SARS for information, the carrying out of an audit or an investigation, searches and seizures, the issuing of jeopardy assessments, the "pay now argue later" rule, the levying of interest on outstanding debts, administrative non-compliance and understatement penalties, criminal offences and sanctions, and the reporting of unprofessional conduct. It is important that these deterrents and their imposition reflect the principles of a good tax system – equity, certainty and transparency, and efficiency.

[8] Archimedes. 2020. Quotes. [On line]. Available: https://www.azquotes.com/quote/1272469 [accessed 26/06/2020].

There are also institutions that ensure that a balance is achieved between the application of administrative provisions and the principles of a good tax system. In this chapter, the focus will be on a selection of these institutions as well as comments by other writers. The institutions discussed in this chapter are the Office of the Tax Ombud, provided for in the Tax Administration Act, the Organisation Undoing Tax Abuse (OUTA), the Tax Justice Network Africa, and the African Tax Administration Forum (ATAF). The visions and missions of these institutions are to promote a just, equitable and efficient tax system, thus to promote the principles of a good tax system. The Constitution has had a significant impact on the administration of tax Acts, together with PAIA and PAJA, which were promulgated in response to the Constitution. The Davis Tax Committee and its terms of reference, together with the report on the administration of tax Acts, also addresses these principles.

The chapter commences by briefly discussing certain provisions in the Tax Administration Act and then proceeds to indicate the role played by the Constitution, the PAIA and the PAJA in promoting equitable, transparent and efficient administration of tax Acts. The Office of the Tax Ombud is discussed and its function and reports regarding tax administration. OUTA, the Tax Justice Network Africa, the ATAF, and the Davis Tax Committee are dealt with in the context of just and equitable administration. Finally, the importance of trust in the government and the effect on tax compliance, and thus tax collections, is briefly highlighted.

10.2 The Tax Administration Act, 28 of 2011

The preamble to the Tax Administration Act states: "To provide for the effective and efficient collection of tax …". This is repeated in section 2, which provides that "[t]he purpose of the Act is to ensure the effective and efficient collection of tax …". This is to be achieved by (section 2):

> (a) aligning the administration of the tax Acts to the extent practically possible;
> (b) prescribing the rights and obligations of taxpayers and other persons to whom this Act applies;

(c) prescribing the powers and duties of persons engaged in the administration of a tax Act; and
(d) generally giving effect to the objects and purposes of tax administration.

Section 3 provides for the administration of tax Acts by SARS under the control and direction of the Commissioner. The section sets out the manner in which this is to be done:

- obtaining full information regarding "anything that may affect the liability of a person for tax in respect of a previous, current or future tax period", regarding a taxable event, or "the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act";
- ascertaining whether a person has filed or submitted correct returns, information or documents;
- establishing the identity of a person for the purpose of determining the liability of the person for tax;
- determining the liability of the person for tax, collecting tax debts and refunding overpayments of tax;
- investigating whether a tax offence has been committed, laying criminal charges, and assisting in investigating and prosecuting the tax offence; and
- enforcing SARS' powers and duties under a tax Act to ensure that an obligation has been complied with.

In addition, section 3 provides that SARS will give effect to an international tax standard and comply with the obligation to provide assistance under an international tax agreement.

According to the SARS Service Charter (2018: 1), SARS adheres to the "values of accountability, fairness, honesty, integrity respect, transparency and trust", thus the principles of a good tax system.

The Tax Administration Act provides SARS, through the Commissioner, with a wide range of powers, including:

- the right to conduct an inspection, without prior notice, to determine the identity of the person occupying the premises, whether the person is registered for tax, and whether the person is maintaining records as required (section 45);
- requesting relevant material (section 46);
- carrying out a field audit or a criminal investigation (section 48);
- carrying out a search for, and seizure of relevant material, a computer or storage device, making extracts from or copies of the material, and requiring an explanation from a person regarding the material (section 61);
- issuing estimated assessments where a return has not been submitted, or an incorrect or inadequate return or material has been submitted, or there has been a failure to respond to a request for material (section 95);
- issuing jeopardy assessments in advance of the due date for the return where the Commissioner suspects that the collection of tax would be in jeopardy (section 94);
- imposing non-compliance penalties (section 213) and understatement penalties (section 223);
- applying the pay-now-argue-later principle (included in section 172 and read in conjunction with section 164);
- issuing a third-party notice (section 179(1)) in terms of which the third party, that holds funds on behalf of the taxpayer, is obliged to pay the tax due to the South African Revenue Service);
- issuing a preservation order (section 163);
- withholding tax clearance certificates (section 256(3)(a)); and
- reporting unprofessional conduct to controlling bodies of tax practitioners (section 241).

As a counterbalance, taxpayers have to right to object against an assessment or decision of the Commissioner (section 104) and appeal against an assessment or decision where the objection has been disallowed (section 107). The appeal can be made to the Tax Board, the Tax Court, and finally to the Supreme Court of Appeal, if all other appeals fail (sections 104 to 141). Taxpayers can also enter into a settlement

with SARS in respect of either the facts involved in the dispute or the law (sections 142 to 150).

Taxpayers also have recourse to the Tax Ombud in relation to any complaint regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS. The Tax Ombud is discussed below.

10.3 The Constitution, Promotion of Access to Information Act, 2 of 2000, and the Promotion of Administrative Justice Act, 3 of 2000

In addition to the Tax Administration Act, in administering the tax Acts, SARS must also take the Acts referred to in **Table 10.1** below into consideration.

Table 10.1 The Constitution, The Promotion of Access to Information Act ("PAIA"), and the Promotion of Administrative Justice Act ("PAJA")

The Constitution	The second chapter of the Constitution, the Bill of Rights, sets out the fundamental rights (principles) that apply to natural persons and juristic persons. These rights include equality (section 9), human dignity (section 10), life (section 11), privacy (section 14), access to information (section 32), just administrative action (section 33), and access to courts (section 34). Section 39(2) of the Constitution requires that the "spirit, purport and objects of the Bill of Rights" must be promoted when any legislation is interpreted. The spirit, purport and objectives of the Bill of Rights are the fundamental principles. Section 36 of the Constitution is the limitation of rights clause and requires that relevant factors must be taken into account when the rights in the Bill of Rights are considered. These factors include: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. According to section 36(1), the limitation must firstly be "in terms of law of general application" and secondly, "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". The phrase "law of general application" applies also to the Income Tax Act, which applies to all South African taxpayers and is therefore a "law of general application". The Income Tax Act and the Tax Administration Act will impose a "reasonable and justifiable" limitation of a right in the Bill of Rights if these requirements are taken into account.

	• The nature of the right. • The importance of the purpose of the limitation – the purpose must "worthwhile and important in a constitutional democracy" (Currie and De Waal, 2005: 179). The purposes of the Income Tax Act and the Tax Administration Act include the taxation of income and the recovery of tax. These purposes are important in view of the fact that government requires revenue to achieve its objectives. This relates to the principle of efficiency (Davis Tax Committee, 2016: 14). • The nature and extent of the limitation – in terms of this factor, "[i]s the limitation a serious or relatively minor infringement of the right?" (Currie and De Waal, 2005: 181). Taking the limitation of the right and the purpose of the limitation into account, the Income Tax Act and the Tax Administration Act do not impose an unjustifiable limitation. • The relationship between the limitation and its purpose – there must be a "good reason for the infringement." (Currie and De Waal, 2005: 183). • Less restrictive means to achieve the purpose – "a limitation of a fundamental right must achieve benefits that are in proportion to the costs of the limitation." (Currie and De Waal, 2005: 183). The Income Tax Act and the Tax Administration Act impose, in accordance with section 36(1) of the Constitution, a "reasonable and justifiable" limitation "in an open and democratic society based on human dignity, equality and freedom". When SARS imposes and administers the provisions of the Income Tax Act ("any legislation"), the fundamental principles of the Bill of Rights must be applied.
PAIA	Section 32(1) of the Constitution provides that "everyone has the right of access to information" at the disposal of the government and any other person. Access is required to the information in order to "exercise" or protect the rights of a person. Section 32(2) of the Constitution provides that national legislation must be passed to give effect to the fundamental principle of access to information. PAIA represents this "national legislation". In the preamble, PAIA acknowledges that public and private bodies must exercise transparency and accountability. In the context of tax administration, PAIA is important due to the fact that a taxpayer may request information from SARS in accordance with section 18 of PAIA. Section 35(1) of PAIA provides that SARS cannot grant access to information relating to the collection of revenue. In terms of section 35(2) of PAIA SARS "may not" refuse to disclose information to a taxpayer (or an agent of the taxpayer) where the information relates to the taxpayer.

PAJA	In terms of section 33 of the Constitution, administrative action must be "lawful, reasonable and procedurally fair" (section 33(1)). In circumstances where the administrative action "adversely affected" the rights of a person, the person may request written reasons for the relevant administrative action (section 33(2)). Section 33(3) requires that national legislation must be passed to give effect to the fundamental principle of the right of access to just administrative action. PAJA represents the national legislation as required in section 33(3) of the Constitution. Section 3(1) of PAJA provides that: "(a)dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair". In a tax administration context PAJA is important. The Short Guide to the Tax Administration Act (SARS, 2018: 11) expands on this requirement: tax administrative actions that materially and adversely affect taxpayer rights must, in the absence of exceptions provided for in PAJA, adhere to fairness requirements such as— • Prior notice of the intended decision; • A prior hearing before the decision is taken; • Clear grounds for the decision; and • Adequate notice of the right to request reasons for the decision. SARS may depart from certain requirements; this departure must still comply with the requirements of fairness (SARS, 2018: 11).

Source: Own summary

The brief discussion above confirms that adhering to the principles of a good tax system is important in tax administration.

10.4 The Office of the Tax Ombud

The Office of the Tax Ombud was created to serve as a means of redress for taxpayers who are aggrieved by an action of SARS and where all other remedies internal to SARS have been exhausted. Section 16(1) of the Tax Administration Act provides as follows

> The mandate of the Tax Ombud is to-
>
> (a) Review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS; and

(b) Review, at the request of the Minister [of Finance] or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of this Act or procedural or administrative provisions of a tax Act.

Section 16(2) further provides that the Tax Ombud must, in order to discharge his duties:

(a) review a complaint and, if necessary, resolve it through mediation or conciliation;
(b) act independently in resolving a complaint;
(c) follow informal, fair and cost-effective procedures in resolving a complaint;
(d) provide information to a taxpayer about the mandate of the Tax Ombud and the procedures to pursue a complaint;
(e) facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints; and
(f) identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers.

The vision of the Office of the Tax Ombud (2021, "Vision"), is "to strengthen taxpayers' confidence in tax administration." The Office of the Tax Ombud (2021) states that its office "is committed to being an efficient, independent, impartial and fair redress channel for taxpayers." According to the Office of the Tax Ombud (2020) a key responsibility of the Office is to "maintain a balance between SARS' powers and duties, on the one hand, and taxpayer rights and obligations on the other." The Office of the Tax Ombud (2021: 20) states that "all taxpayer complaints are resolved promptly and efficiently."

The Office of the Tax Ombud includes fairness as one of its core values and confirms (2020: 20) that it "continues to be committed to achieving the highest level of good corporate governance and subscribes to the principles of responsibility,

accountability, transparency and fairness". The Office of the Tax Ombud (2021) further confirms that when a balance is achieved between SARS' powers and duties and the rights and obligations of taxpayers, it will "enhance the degree of equity and fairness in tax administration and improve taxpayers' perception of the country's tax system as being fair and equitable."

According to the Office of the Tax Ombud (2020: 42) transparency and consistency indicates efficacy, one of its "strategic outcome-oriented goals". The purpose of the strategic outcome-oriented goals is to ensure that taxpayers trust and have confidence in tax administration (Office of the Tax Ombud, 2020: 42). The Office of the Tax Ombud explains the manner in which it ensures transparency and certainty: "[c]onsistently achieving a taxpayer service promise"; and "[e]ngaging taxpayers through easy-to-understand, simple, transparent and quick processes".

The role of the Office of the Tax Ombud is therefore to ensure that the principles of a good tax system apply to the administration of tax Acts. The 2018/2019 Annual Report (Office of the Tax Ombud, 2019: 11) refers to the Office of the Tax Ombud's "material contribution towards a fair collection of tax by SARS". The Report (Office of the Tax Ombud, 2019: 11) acknowledges that it is not only in "monetary terms" that the impact of the Office of the Tax Ombud must be measured but also "by ensuring that taxpayers do not pay more than their fair share to SARS." The Report (Office of the Tax Ombud, 2019: 9) also indicates that: "(i)n the Tax Ombud, taxpayers have a free, independent and impartial avenue though which to have their complaints against the South African Revenue Service (SARS) expeditiously resolved." Visser (2020a) observes that the role of the Tax Ombud is "critical" because it provides a balance between the "extensive" powers of SARS and taxpayers who perceive that they are treated unfairly. The Report (Office of the Tax Ombud, 2019: 9) confirms this. In a message of the Minister of Finance, the Honourable Mr Tito Titus Mboweni, he states that there has been an improvement "within the revenue collector … partly attributable to the work done by the OTO [Office of the Tax Ombud], which has helped promote a healthy balance between SARS' powers and duties, on the one hand, and taxpayers' rights and obligations, on the other." (Office

of the Tax Ombud, 2019: 9). This indicates that this, firstly, confirms that the Office of the Tax Ombud is a necessary link between SARS and taxpayers and, secondly, it confirms that the principles of a good tax system are important in the administration of tax legislation. The Report (Office of the Tax Ombud, 2019: 12) acknowledges that an improved tax administration system will ensure improved public trust in SARS and this will eventually have the effect that taxpayers realise they have the obligation to pay tax.

The 2018/2019 Annual Report (Office of the Tax Ombud, 2019: 13) states that, at present, the lack of "structural (i.e. juristic) independence" of the Office of the Tax Ombud "hampers its work and compromises its reputation" as the approval of the Minister of Finance is required in relation to the proposed structure of the Office of the Tax Ombud. In the 2020 Budget Review, the National Treasury (2020: 37) acknowledges that: "[t]he Office of the Tax Ombud has proved effective in ensuring that taxpayers are not prejudiced by SARS. Government will strengthen the ombud and separate it financially and operationally from SARS." Section 16(2)(b) of the Tax Administration Act provides that the Office of the Tax Ombud must: "act independently in resolving a complaint". It is clear that, until the Office of the Tax Ombud is separated financially and operationally from SARS, its dependency on SARS does not comply with the provisions of section 16(2)(b) of the Tax Administration Act and that this dependency has a negative impact on the Tax Ombud's effectiveness. In this section of the chapter it was observed that the Office of the Tax Ombud is a link between SARS and taxpayers; when the Office of the Tax Ombud is not perceived to be independent, there is a significant risk that an imbalance will occur and this imbalance will be in favour of SARS, given its extensive power. In these circumstances, the principles of a good tax system will not prevail.

In a media statement (Office of the Tax Ombud, 2017a), issued on 27 March 2017, the Office of the Tax Ombud confirmed that it had obtained approval from the Minister of Finance to investigate complaints from taxpayers about the "alleged prevalent undue delays by the South African Revenue Service in paying out tax refunds." The Office of the Tax Ombud issued a final report (Office of the Tax Ombud, 2017c) on 28

August 2017. In its report, the Office of the Tax Ombud takes the interests of taxpayers as well as SARS into account. The following examples, included in the final report, illustrate the important function of the Office of the Tax Ombud.

- SARS indicates that the complaints of the taxpayers only represent a small portion of the refunds processed (Office of the Tax Ombud, 2017c: 16). The Office of the Tax Ombud acknowledges in its report that, although this may be true, it does not take the context into account. The "withholding of these refunds may have a significant impact on the collected revenue, and a devastating negative impact on the finances of individual taxpayers in varying degrees." (Office of the Tax Ombud, 2017c: 17). This confirms that the interpretation of administrative provisions must reflect the application of equity, one of the principles of a good tax system.

- The Office of the Tax Ombud (2017c: 21) refers to the use of "special stoppers" by SARS in situations where refunds must be paid to the taxpayers. The special stoppers refer to the request that taxpayers verify their bank details in person at a branch of SARS. According to SARS, the request is made to "mitigate" "possible fraud" (Office of the Tax Ombud, 2017c: 23). The request aims to ensure that SARS fulfils its duties as set out in legislation. The Report (Office of the Tax Ombud, 2017c: 18) indicates that the request by SARS to verify banking details has the effect that refunds payable to taxpayers are delayed. This illustrates that the application of an administrative provision may be unreasonable and inequitable. The Report (Office of the Tax Ombud, 2017c: 18) finds that the intention of SARS to prevent possible fraud is not a factor when it must be determined whether a delay in refunds has occurred; the existence of a delay is the determining factor.

- Where taxpayers are repeatedly requested to furnish supporting documentation during an audit, there were complaints that the numerous requests lead to unreasonable delays in receiving refunds from SARS (Office of the Tax Ombud, 2017c: 43). According to SARS, the requests for additional documentation and information depended on the information received from

taxpayers (Office of the Tax Ombud, 2017c: 45). The Office of the Tax Ombud recommended that SARS should attempt to request all the necessary documentation and information during its initial request. Further requests (Office of the Tax Ombud, 2017c: 45) must be done "within limits" The response of the Office of the Tax Ombud to this statement of SARS confirms that the principle of fairness (equity) must be applied when SARS performs its statutory duties.

At the 6th Annual Fiduciary Institute of Southern Africa Conference held on 25 August 2016 in Johannesburg, the Tax Ombud, Judge Bernhard M Ngoepe, addressed the "Ethical Behaviour by Taxpayer and Tax Collector". In his address (Office of the Tax Ombud, 2016), the Tax Ombud confirmed aspects of the relationship between taxpayers and SARS, including the following:

- Maximum tax compliance requires that taxpayers must be motivated to pay tax (Office of the Tax Ombud, 2016: 1).
- Taxpayers and SARS must both exhibit ethical behaviour (Office of the Tax Ombud, 2016: 2).
- The Tax Ombud (Office of the Tax Ombud, 2016: 2) remarked that:

> While it is accepted the world over that tax authorities need to have immense powers to fight fraudulent conduct, one of the insurances against the abuse of such powers is an ethical approach on the part of the officials. Here we widen the concept to include amongst others fairness, equal treatment of the like, etc. Taxpayers would be hesitant to open up to a tax authority with a dubious and unethical track record. In my experience, a number of taxpayers are, rightly or wrongly, distrustful of at least some of the tax officials; sometimes they perceive them as being corrupt, malicious, and even vindictive. Very often these negative perceptions afflict the entire system.

This remark confirms that where power is concerned it should be countered by adherence to ethical principles. Where there is an imbalance in favour of power, it has a negative impact on the application of the principles.

- An efficient tax system requires a balance between the power of SARS and the rights of taxpayers: "If [the] tax morality level increases, perceived imbalances between taxpayer rights and the powers of a tax authority as well as frustrations experienced by all parties in the equation, would decrease." (Office of the Tax Ombud, 2016: 4).

The Office of the Tax Ombud clearly performs an important function in ensuring a balance between the rights of taxpayers and the power of SARS. The independence of the Office of the Tax Ombud remains a matter of concern given the impact that perceptions have on trust and tax compliance.

10.5 Other organisations promoting equity in tax

There are a number of other organisations and writers that are engaged in ensuring the equitable administration of tax Acts.

10.5.1 Organisation Undoing Tax Abuse

The Annual Report for 2018-2019 of the Organisation Undoing Tax Abuse (OUTA) (2019: 4) indicates that OUTA is a "civil activist organisation". Its vision (OUTA, 2019: 5) is "[a] prosperous country with an organised, engaged and empowered civil society that ensures responsible use of tax revenues throughout all levels of Government". OUTA (2021) states that its mission is to:

- question and challenge "the squandering, maladministration and corrupt use of taxes";
- hold "those responsible for the maladministration and/or corruption, to account for their behaviour and actions" and
- challenge "the taxation policy and the regulatory environment (as a whole or part), as and when deemed as being irrational, unfit or ineffective for their intended purpose."

In its 2015-2016 Annual Report, OUTA (2016: 7) expresses the opinion that trust is "[t]he social glue required for effective governance" and that "[h]eightened mistrust

in leadership lowers productivity, and places a hidden tax on every transaction. Gross levels of mistrust lead to a fragile state of affairs and causes positive energy and input to escape from the system of good governance".

Visser (2017:1) relates the following conversation with Duvenage, the CEO of OUTA, who confirms that where the government misuses funds and fails to hold the transgressors accountable, the impact it has on its relationship with taxpayers is significant; the reaction of taxpayers could include "litigation and protest action to put the state under pressure to correct itself".

OUTA will therefore, in the pursuit of "effective governance", challenge tax policies and actions of SARS that do not comply with the principles of a good tax system.

10.5.2 African Tax Administration Forum

Muller (2011: 26) explains that the African Tax Administration Forum (ATAF) was established in response to the International Conference on Taxation, State Building and Capacity Development in Africa, that was held in Pretoria during August 2008. The 2010 Annual Report of ATAF (2010: 7) discloses that the vision of the Forum is to: "promote efficient and effective tax administration to improve the living standards of the people of Africa." Its mission is to: "provide a platform to improve the performance of tax administration in Africa. Better tax administration will enhance economic growth, increase accountability of the state to its citizens, and more effectively mobilise domestic resources." ATAF (2010: 7) formulates its objectives, including the following:

- Strengthen African tax administrations to improve domestic resource mobilisation for economic development.
- Enhance the professionalism of African Tax Administrations through international dialogue and interaction.
- Innovate, share, develop, and implement best practices in African Revenue Administration.
- Combat tax evasion and avoidance through mutual co-operation between African Tax Administrations and international institutions.

- Develop key relations with civil society, improve good governance and accountability between state and citizens.
- Ensure greater synergy and co-operation in capacity development among all relevant stakeholders in order to reduce duplication and give greater support for laying a strong basis for a new approach to African taxation, state building and capacity development to African Tax Administrations.
- Provide a mechanism for African perspectives on tax issues to inform and influence the global dialogue on tax issues.

It is suggested that the mission, vision, and objectives of ATAF illustrate that effective tax administration by government is linked to its relationship with its citizens. Fundira (2015: 5) makes the following remark:

> Maintaining community and business trust in governments is one of the essential components of well-functioning domestic and international tax systems. Taxpayers and businesses either have to pay more tax or accept a reduced level of government services in instances where the tax burden is not spread fairly or there are loopholes in tax laws that allow some companies to avoid paying their fair share.

The mandate of the ATAF (2021a) acknowledges the importance of efficiency through the strategic objectives which have been formulated for the period 2021-2025. The ATAF (2021a) specifically includes, as part of its objectives, "[t]echnical assistance fostering efficient and effective tax administrations." The ATAF "aims to contribute to efficient and effective African policy authorities". The ATAF (2021a) acknowledges the importance of "African tax administrations to achieve their revenue objectives" and aims to "improve revenue collection". This aligns with the Davis Tax Committee (2016: 14) statement that the principle of efficiency requires that "[t]he tax system must produce sufficient income for the state".

The OECD (2010b) observes in the context of the impact of ATAF that: "[e]qual treatment of taxpayers is central to boosting the credibility of revenue administration, simplifying tax systems, broadening the tax base and encouraging voluntary compliance by local and multinational taxpayers." SARS had a significant impact on the formation of the ATAF (SARS, 2020) and is still a member. The Commissioner

for SARS, Mr Edward Kieswetter, is the Vice-Chairperson of ATAF (ATAF, 2021b). ATAF has a further South African connection in that its headquarters are situated in Pretoria.

The Road Back to Kampala: The story of the African Tax Administration Forum and its first decade (ATAF, 2019: 8) ("the African Tax Administration Forum Yearbook") acknowledges that

> [e]fficient and fair tax systems and the collection of revenues are the key to economic self-reliance and continental development. ATAF's role is to assist its member countries develop their tax administrations, improve their tax systems, reform their tax policies, promote knowledge sharing and peer learning and provide a clear African voice which protects African interests and changes the terms of the debate in the fast moving global tax environment.

One of the objectives of ATAF (2010: 7) reads: "[i]nnovate, share, develop, and implement best practices in African Revenue administration".

10.5.3 Tax Justice Network Africa

The Tax Justice Network Africa Report (2011: iii), "Tax Us if You Can: Why Africa Should Stand up for Tax Justice" ("the Tax Justice Africa Report"), states that the Tax Justice Network Africa was established in 2007. The Tax Justice Network Africa forms part of the international Tax Justice Network. The Tax Justice Network Africa (2021) envisions "[a] new Africa where tax justice prevails and ensures an equitable, inclusive and sustainable development." According to Tax Justice Network Africa (2021) its mission is "[t]o spearhead tax justice in Africa's development by enabling citizens and institutions to promote equitable tax systems through research, capacity-building and policy-influencing." Its objective is to ensure "socially just, democratic and progressive tax systems in Africa." The Tax Justice Network Africa Report (Tax Justice Network Africa, 2011: 5) lists the elements of a good tax system as follows:

- raise revenues equitably;
- redistribute income and wealth to address poverty and inequality;

- reprice goods and services – especially critical in the context of health and climate problems;
- representation of taxpayers as citizens.

According to the Tax Justice Network Africa (2021) it challenges "harmful tax policies and practices that on one hand facilitate illicit resource outflows and on the other hand favour the wealthy while aggravating and perpetuating inequality." According to the Tax Justice Network Africa (2021) it "advocates for tax policies with pro-poor outcomes and tax systems that curb public resource leakages and enhance domestic resource mobilisation.".

Representation is considered an important factor (Tax Justice Network Africa, 2011: 6): "History has shown that unjust tax systems create tax resistance and non-compliance, and that equitable tax systems only emerge through tax bargaining between the concerned parties. Representation and citizenship are often the missing ingredients in good tax policy." The requirement that revenue must be raised equitably means that: "[a] good tax system should ... treat taxpayers in the same situation equally, tax local and multinational enterprises according to similar rates, and tax all sources of income equally to create a level playing field." This requirement confirms that the principles of a good tax system should form part of a tax system. The following examples confirm this obligation of the government towards taxpayers: "no undue cost" must be imposed on taxpayers; taxpayers must "with reasonable certainty" know what is due to the government; taxpayers have "access to information"; and taxes are "openly and transparently accounted for and state spending is budgeted and accounted for through democratic and transparent processes." These examples illustrate the relationship between taxpayers and the government. Certainty and transparency are principles of a good tax system; taxation must be applied transparently (Tax Justice Network Africa, 2011: 53): "Citizens have the right to know how taxes are collected, where tax has been levied, and how it affects them as taxpayers either directly or indirectly. This is because all tax ultimately belongs to the people."

10.5.4 Davis Tax Committee

The former Minister of Finance (Ministry: Finance, 2013: 1), Pravin Gordhan, requested the Davis Tax Committee during 2013 to "inquire into the role of the tax system in the promotion of inclusive economic growth, employment creation, development and fiscal sustainability." The Terms of Reference for the South African Tax Review Committee (Ministry: Finance, 2013: 2), require the Davis Tax Committee to make recommendations to the Minister of Finance in relation to the performance of its work. According to the Davis Tax Committee (2021), it was required to:

- determine the "role of the tax system in the promotion of inclusive economic growth, employment creation, development and fiscal sustainability";
- "make recommendations to the Minister of Finance", which could lead to future tax proposals; and
- evaluate the South African tax system against "international tax trends, principles and practices, as well as recent international initiatives to improve tax compliance and deal with tax base erosion."

The Davis Tax Committee acknowledges the importance of the following tax objectives (Davis Tax Committee, 2016: 14):

- "Revenue-raising to fund government expenditure is the primary objective of taxation".
- "Social objectives, building a cohesive and inclusive society can be met partially through a progressive tax system and by raising revenue in order to redistribute resources."
- "Taxes and tax incentives are sometimes used in targeted ways to encourage higher levels of investment to help facilitate economic growth."

One of the aspects the Davis Tax Committee investigated related to tax administration in South Africa. The purpose of the 2017 Tax Administration Report (Davis Tax Committee, 2017: 2) was to identify whether the structure and operations of SARS

were sufficient to address matters, which include the Base Erosion and Profit Shifting (BEPS) measures.

In the Tax Administration Report (Davis Tax Committee, 2017), the Committee confirms the importance of the relationship between the activities of SARS and its relationship with taxpayers. This Report establishes that SARS (in enforcing statutory provisions) is required to apply the principles of a good tax system. The Davis Tax Committee Report:

- confirms that taxation poses an obligation on taxpayers; in this context it is important that SARS adheres to the fundamental principles formulated in the Constitution (2017:5);
- refers to the administration of High Net Worth Individuals and tax scandals that were identified in relation to these individuals and the Report observes that: "[w]hile these scandals suggest that some who have vast wealth may obscure their affairs, SARS must be careful not to generalise, and must guard against adopting a combatant and hostile approach to administering the [High Net Worth Individuals] segment." (2017: 38);
- acknowledges that distrust between taxpayers and SARS is created due to the following:
    - Taxpayers perceive SARS as "targeting" them whilst other non-compliant taxpayers are not held accountable.
    - SARS withdraws funds from the bank accounts of taxpayers in an arbitrary manner, and SARS did not communicate with the taxpayers on the merits of matters but proceeded with the practice of withdrawing funds from the bank accounts.
    - SARS "[d]elays of refunds to taxpayers when rightly due", and this statement is linked to the Tax Ombud Report (Tax Ombud, 2017c). In the Tax Ombud Report (Tax Ombud, 2017c: 16), however, the delay in refunds only related to a small percentage of the refunds payable to taxpayers.

- SARS does not make decisions timeously or in equal manner in relation to all taxpayers.

- The Davis Tax Committee Report (2017: 49) states that the SARS Strategic Plan 2016/17-2020/21 indicates that "research has shown that taxpayer's attitudes towards compliance, and their willingness to comply, is influenced by how their taxes are to be utilized." Trust is an important factor where tax compliance is concerned. The Report confirms this and suggests that it is important that the government apply the principles of a good tax system when it utilises the funds of taxpayers. This confirms that there should be close relationship between the activities of the government and the application of the principles of a good tax system.

- The Davis Tax Committee Report (2017: 50) refers to the SARS Strategic Plan 2016/17-2020/21, where SARS confirms that it has strategic core objectives which include: "[i]mproved tax compliance"; "[i]ncreased ease and fairness of doing business with SARS" and "[i]ncreased public trust and credibility."

- The Davis Tax Committee Report (2017: 53) states that, in order to ensure tax compliance of High Net Worth Individuals, SARS cannot "rely solely on threat of audit and potential penalties to increase tax compliance." The following observation confirms this:

  > [d]eterrence can … destroy norms if used in the wrong way. The actions of the revenue body (deterrent or others) will be more effective if interventions or treatments are perceived as procedurally fair and if there exists a high level of mutual trust between the revenue body and taxpayers. (OECD, 2010a: 35).

  The Report therefore confirms the observation that there must be a balance between the actions of SARS and procedural fairness of a tax system.

- The Davis Tax Committee Report (2017: 54) observes that: "as part of its compliance enforcement, SARS needs to respect and honour those taxpayers'

rights, while government needs to demonstrate that it can be trusted, both procedurally and retributively."

- The Davis Tax Committee Report (2017: 63) acknowledges that, where the relationship of the taxpayer with tax authorities is concerned, "there is a disproportionate bias of power and entitlement in favour of tax authorities ... This bias often overrides taxpayer's rights, which are in most instances unknown to the taxpayers." The Report acknowledges that it is important to take the rights of taxpayers into account.

- The Davis Tax Committee Report (2017: 63) observes that:

> tax compliance cannot [only] be for the outcome of repression, but for the positive implication of voluntariness, education and high levels of fiscal citizenship. That presumes that the taxpayer will not be just "conceived as", but actually treated as a *person*, with his/ her/its individual dignity, as the centre of the assignment of rights and obligations, from a perspective of cooperation, not juxtaposition. [emphasis in the original]

  This observation suggests that it is important that taxpayers voluntarily comply with their tax obligations.

- The Davis Tax Committee Report (2017: 77) confirms that: "The fundamental asymmetry in the relationship between revenue authorities and the taxpayer community can lead to public dissatisfaction, erosion of confidence in the tax system, decreasing levels of voluntary compliance and ultimately loss of revenue."

The Davis Tax Committee Report (2017) illustrates the following:

- SARS must ensure that taxpayers comply with fiscal legislation.
- The actions of SARS have an impact on tax compliance and the trust of taxpayers.
- Even though SARS has the power to enforce legislation, the principles of a good tax system must be applied in the exercise of the power.

10.6 Tax compliance and trust in the government

A number of writers have identified that trust in the government is essential for tax compliance. Visser (2017: 2) reports that Williams, partner at the law firm Bowman Gilfillan, observes that "non-compliance in the form of resistance represents defiant and aversive taxpayers; disengagement in the form of taxpayers who do not want to be part of the system; and game-playing where taxpayers seek 'loopholes' or other avoidance strategies."

Tickle (2018: 252) believes that corruption is "to some extent" the cause of "irregular" and "wasteful" government expenditure. Tickle (2018: 255) refers to the relationship between government and citizens; citizens must pay the required taxes to the government and the government must ensure that sufficient revenue is raised. When the government raises revenue, it is important to take into account that it must be done in a "fair and effective manner". Government's actions must therefore not be at the expense of the principles of a good tax system.

The OECD (2010a: 35) remarks that:

> [D]eterrence, norms and fairness are interlinked and … they cannot be treated and used as separate drivers behind behaviour. The different factors influence each other and the best effect on compliance is achieved when they are working aligned and in support of each other.

In the OECD Observer, the former Secretary-General of the OECD, Donald J. Johnston, makes the following remark (2003: 3):

> The lesson is simple: trust pays. We live in a multilateral, networked, world. It requires rules, of course, but as a former lawyer, I can reaffirm that these will never be strong without a system based on principles and values. In many ways, an increasing reliance on rules and regulations to guide behaviour has lowered sights from what is ethical and appropriate to what we can get away with, even within the rules, as though there were no need for other basic considerations, like ethics … Yes, we need rules. But leaders need to turn to the important, difficult task of restoring principles, ethics and values so that we can rebuild trust.

According to an article by Pascal Saint-Amans, the Director, OECD Centre for Tax Policy and Administration, in the OECD Observer (2013: 68,69): "[t]ax is all about trust … [N]othing we have accomplished…could have been achieved without … trust".

Fritz and van Zyl (2019: 237) observe that whilst resources available to the state:

> may be limited, the state cannot be absolved from fulfilling its obligation when the lack of adequate resources is due to the corrupt activities and mismanagement of government administration, organs of state and public enterprises. The Constitution itself does not allow government to be absolved as section 195(1) [of the Constitution] provides that government administration, organs of state and public enterprises must be accountable and resources must be used in an efficient, economic and effective manner.

This discussion confirms the importance of trust in government institutions (including SARS). Trust is based on fairness – in other words equity. When the level of trust in the government is high, tax avoidance and evasion will be less prevalent, thus protecting the *fiscus*. This further confirms the role of the principles of a good tax system in the administration of tax.

10.7 Conclusion

This thesis discusses the relationship between deeming provisions and the principles of a good tax system. Tax legislation, including deeming provisions, needs to be enforced. In South Africa, the Tax Administration Act deals with the enforcement of tax Acts. The Tax Administration Act confers wide powers on SARS, in the person of the Commissioner. These powers include requests by SARS for information, carrying out an audit or an investigation, searches and seizures, issuing jeopardy assessments, the "pay now argue later" rule, levying interest on outstanding debts, administrative non-compliance and understatement penalties, criminal offences and sanctions, and the reporting of unprofessional conduct. It is important that these deterrents and their imposition reflect the principles of a good tax system – equity, certainty and transparency, and efficiency. The Tax Administration Act also imposes certain

obligations and duties on taxpayers and provides taxpayers with certain remedies, including the right to object to and appeal decisions by SARS and to resort to alternate dispute resolution.

The application of the principles of a good tax system ensures a balance between the power of SARS and the rights of taxpayers. To ensure justice in the manner in which taxes are enforced and that enforcement complies with the principles of a good tax system, certain bodies and organisations have a role to play. The Office of the Tax Ombud is established in terms of the Tax Administration Act (sections 15 to 21). The Office of the Tax Ombud is an independent institution and assists taxpayers with their complaints against SARS. The following aspects were highlighted by the reports of the Office of the Tax Ombud and a presentation by the Ombudsman:

- Where an institution is required to be independent, its structure must support this objective. An institution will probably not be perceived to be independent where its financial and operational structure is dependent on an institution it is required to investigate.

- SARS ensures that the provisions of fiscal statutes are enforced, and this right must be exercised in a reasonable manner.

Gangl *et al* (2015) observe that it is important that governments exercise fairness towards and build a long-term relationship with taxpayers. The Constitution had a profound effect of the administration of legislation, including tax legislation, together with PAIA and PAJA, in ensuring the application of principles of a good tax system in tax administration.

In the context of income tax, the relationship between SARS and the taxpayer, at best, is a long term one. In this relationship, trust is an important factor because it has an impact on tax compliance. Various institutions ensure that a balance is achieved between the enforcement of statutory provisions by SARS and the application of the principles of a good tax system. In this chapter, the role of following institutions was discussed: the Organisation Undoing Tax Abuse (OUTA), the Tax Justice Network

Africa, the African Tax Administration Forum (ATAF), and the Davis Tax Committee.

The objective of OUTA is to ensure that the government uses the tax revenues of taxpayers responsibly. Its mission is to question and challenge maladministration and corrupt use of taxes, hold those responsible to account, and challenge the taxation policy and the regulatory environment when deemed as being irrational, unfit or ineffective for their intended purpose. In its 2015-2016 Annual Report, OUTA (2016: 7) expresses the opinion that trust is "[t]he social glue required for effective governance" and that "[h]eightened mistrust in leadership lowers productivity, and places a hidden tax on every transaction. Gross levels of mistrust lead to a fragile state of affairs and causes positive energy and input to escape from the system of good governance".

The objective of the ATAF is to ensure that the tax administration by revenue authorities is fair and efficient. The ATAF operates in an African context and collaborates with the Tax Justice Network Africa to promote fair taxation and ensure tax compliance in Africa. In the context of this thesis, the activities of the Forum confirm that tax compliance can only be increased when tax is enforced fairly.

The Tax Justice Network Africa advocates that progressive tax systems in Africa are reasonable and democratic. From the discussion of the institution, certain points can be emphasised:

- Taxation must be applied openly and transparently. Taxpayers therefore have the right to information about the application of tax revenue and the direct and indirect impact which tax has on them.
- The government and taxpayers are in a trust relationship and have mutual obligations towards one another.

One of the aspects which the Davis Tax Committee investigated related to tax administration in South Africa. The 2017 Tax Administration Report raised the following important points:

- Taxpayers and the South African Revenue Service have mutual obligations: taxpayers are required to pay the tax due and the South African Revenue Service must comply with the fundamental principles formulated in the Constitution.

- Tax compliance is closely connected to the manner in which tax revenue is utilised.

- Tax compliance will not be increased through deterrence (enforcement) only. SARS is required to apply the principles of a good tax system.

Institutions play an important role in the relationship between taxpayers and government. In this sense, the institutions become the voice of the taxpayers who are often not experts in the field of tax and rely on the input of these institutions. An inherent imbalance exists in the relationship between the taxpayer and SARS, which can be to the detriment of taxpayers. The relationship between taxpayers and SARS is of a long-term nature. Due to this it is important that the principles of a good tax system are applied to ensure that taxation is enforced fairly, effectively, and efficiently.

The discussion of the viewpoints of various writers confirms that distrust and perceptions of the government are important factors in taxpayer non-compliance. From the discussion in this chapter, it has become clear that the principles of a good tax system will only be effective when the application of statutory provisions reflects these principles.

In the next chapter, an overall conclusion is presented to demonstrate how the goals of the research were achieved, including the main goal of determining the extent to which the theoretical and the practical application of deeming provisions reflect the principles of a good tax system.

CHAPTER 11

CONCLUSION

Life may not always fall into neat chapters, and you may not always get the satisfying ending you're looking for, but sometimes a good explanation is all the rewrite you need.

- Harlan Coben[9]

11.1 Introduction

Research can often be compared to Harlan Coben's quote about life. Research will also not always "fall into neat chapters". This final chapter is an attempt to "rewrite" the research findings in a concise manner.

The goal of the research is to analyse the relationship between deeming provisions in legislation and the principles of a good tax system. This involves a determination of the extent to which deeming provisions and their interpretation reflect legal principles and the principles of a good tax system in the context of the South African Income Tax Act. The chapter commences with an overview of the chapters leading up to this concluding chapter, demonstrating the development of the research argument. A detailed discussion of the findings follows, structured according to the sub-goals of the research that address the main goal. The chapter concludes with a brief discussion of the contribution of the research to the body of knowledge.

11.2 Overview of the research

Chapter 1: ***The background of the research:***

- The context in which the research was carried out was briefly described, together with the main concepts underpinning the research: deeming provisions, legal principles applying to the interpretation of tax legislation, and the principles of a good tax system.

[9] Coben, H. 2021. Quote. Available: https://www.brainyquote.com/quotes/harlan_coben_475880 [accessed 18/03/2021].

- The problem statement was formulated, and the main goal and sub-goals of the research set out.
- A brief summary was presented of the research design and methodology.
- The chapter concluded with a synopsis of the structure of the thesis.

Chapter 2: ***Introductory literature review:***

- The chapter dealt with deeming provisions, legal principles, principles of a good tax system, interpretation of legislation, and tax compliance.
- The literature review referred to the purpose and meaning of deeming provisions and legal principles in general. The general discussion of the legal principles was followed by a specific focus on the principles of a good tax system.
- Aspects of interpretation were included with a focus on the interpretation of statutes.
- Lastly, the literature review discussed the link between the principles of a good tax system and tax compliance.

Chapter 3: ***Research methodology and design:***

- The chapter described the research methodology and research design that applied to the research. This presented the plan according to which the research was carried out.
- The research paradigm was identified as "interpretative", the methodology as doctrinal, and the method as qualitative, based only on documentary evidence.

Chapter 4: ***The Roman law origins of "deeming provisions" and legal principles:***

- The origins of Roman law and the impact of taxation on Roman society was discussed.

- The remainder of the chapter emphasised the Roman law principles of *plus valere quod agitur quam quod simulate concipitur, fraus legis,* as well as the principles of reasonableness, equity, good faith and substance. These legal principles were discussed with a focus on South African case law.

Chapter 5: ***The development of deeming provisions and legal principles in a South African context:***

- The hybrid nature of the South African legal system was described. Roman-Dutch law formed part of South African law, which was also influenced by the 1799 Great Britain Tax Act and the 1803 United Kingdom of Great Britain and Ireland Tax Act.
- The impact of Roman-Dutch law on South African law through the work of the Dutch jurists was described.
- The philosophy of *ubuntu* and the Constitution had a profound influence on the South African legal system and the explanation represented the final aspect of the chapter.

Chapter 6: ***The principles of a good tax system:***

- The principles of a good tax system forming part of the research (equity, certainty and transparency, and efficiency) were analysed in the following contexts: Roman law, the formulation by Adam Smith, as well as subsequent interpretations by various institutions and entities, including the Davis Tax Committee.
- The contribution of the Constitution and the philosophy of *ubuntu* to these principles, and a discussion of the principle of reasonableness, concluded the chapter.

Chapter 7: ***The interpretation of deeming provisions in South African law:***

- The legal principles that apply to the interpretation of legislation were summarised.
- The emphasis in the chaptr was on a discussion of the approaches

to the interpretation of fiscal legislation – the strict literal approach, the purposive contextual approach, and the teleological approach.

- A selection of court decisions was discussed, illustrating these approaches to interpretation.
- The importance of the application of the principles of a good tax system in the process of interpreting legislation was demonstrated though case law.

Chapter 8: ***A selection of deeming provisions in the South African Income Tax Acts:***

- A selection of provisions in the Income Tax Act were analysed to establish whether they are deeming provisions, based on their characteristics and purposes.
- The following provisions were selected for this purpose: the definition of "gross income", section 7, section 7C, sections 13, 13*bis*, 13*quin* and 13*sex,* and sections 80A to 80L.
- Case law and interpretations in scholarly publications were discussed in order to determine whether these deeming provisions and their interpretation reflect the principles of a good tax system.

Chapter 9: ***A selection of deeming provisions in the context of double tax conventions:***

- A selection of articles in the OECD 2017 Model Tax Convention was discussed to illustrate their deeming nature and role in promoting the principles of a good tax system.
- The OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting was briefly referred to, and one article analysed.
- The OECD/G20 Base Erosion and Profit Shifting (BEPS) Project also has an impact on South African tax legislation. In this

regard, sections 9D (Controlled Foreign Companies) and 31 (non-arm's length international transactions) of the Income Tax Act were analysed to establish their deeming nature and adherence to principles of a good tax system.

Chapter 10: ***The enforcement of tax legislation and principles of a good tax system:***

- The enforcement of tax legislation in terms of the Tax Administration Act was discussed, which provides for far-reaching powers of SARS, as well as the duties of taxpayers.
- The Tax Administration Act is subject to the Constitution, PAJA, and PAIA, which were briefly discussed.
- The role of the Office of the Tax Ombud in providing an avenue for redress for taxpayers and ensuring that the principles of a good tax system are adhered to by SARS, was explained.
- Other institutions and entities aim to ensure that the principles of a good tax system are applied. The institutions and entities that were discussed were the Organisation Undoing Tax Abuse (OUTA), the African Tax Administration Forum (ATAF), the Tax Justice Network Africa, and the Davis Tax Committee.

11.3 Summary of the findings of the research

The main goal of the research is to analyse the relationship between deeming provisions in tax legislation and the principles of a good tax system. In achieving this goal, several sub-goals were identified. These sub-goals were set out in Chapter 1.

Chapter 2 defined and described the concepts that underpin the research. These concepts are deeming provisions (their characteristics and purposes), legal principles (that apply in the interpretation of tax legislation), principles of a good tax system (equity, transparency and certainty, and efficiency), approaches to the interpretation of tax legislation, and the link between trust in the government and tax compliance.

Chapter 3 discussed the research methodology and research design that applied to the research, presenting the plan according to which the research was carried out.

The remaining chapters of the thesis dealt with the sub-goals of the research.

11.3.1 Obtain an understanding of the origins and importance of deeming provisions in legislation, legal principles that ensure equitable interpretation of legislation, and the principles of a good tax system, from an international and South African perspective.

The research revealed that the origins of the South African legal system consist of Roman-Dutch law (with its origins in Roman law) and aspects of English law (Chapters 4 and 5). The legal system has also been further developed by the Constitution and the values of *ubuntu* (Chapter 5). This indicates the hybrid nature of the South African legal system.

Although the legal principles of *fraus legis, plus valere quod agitur quam quod simulate concipitur* (Chapter 4) and the *contra fiscum* rule (Chapter 5) have Roman law and Roman-Dutch law origins, their application in South African case law illustrates their importance in the South African legal system. These legal principles, together with the principles of justice and reasonableness, ensure that the interpretation of legislation reflects the principles of a good tax system.

The origins and modern adaptation of the principles of a good tax system were discussed in Chapter 6. Adam Smith's 1776 principles of a good tax system were described as:

- Equity (1776: 1433) – "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state."
- Certainty (1776: 1434): "The tax which each individual is bound to pay ought to be certain and not arbitrary".

- Convenience (Adam Smith, 1776: 1435): “Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it.”
- Economy (Adam Smith, 1776: 1436): “Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state.”

In a South African context, the Davis Tax Committee (2016: 14) proposed that a good tax system reflects the principles of efficiency (which would include Adam Smith’s principle of economy), equity (both horizontal and vertical equity), simplicity, transparency and certainty, and tax buoyancy. The principle of simplicity would probably form part of transparency and certainty, while tax buoyancy (the flexibility of a tax system in order to meet the demands of government expenditure) would be an aspect of efficiency. The principles of equity, and certainty and transparency, and efficiency were therefore adopted for the purpose of the thesis.

From the discussion of legal principles and principles of a good tax system it was clear that there is a measure of overlap between them. Justice and reasonableness, while also legal principles that apply to the interpretation of legislation, also underpin all the principles of a good tax system.

11.3.2 Discuss the approach to the interpretation of tax legislation.

Interpretation is associated with the approaches to the interpretation of fiscal legislation. Chapter 7 first provides a summary of legal principles – “presumptions of interpretation” (**Table 7.1**) developed in Roman Law. These principles comprise justice, equity and good faith, consideration of the context of the matter, substance over form, *fraus legis*, and the *contra fiscum* rule. Section 39(2) of the Constitution provides 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 objects of the Bill of Rights. The philosophy of *ubuntu* is also entrenched in the Constitution. All of these principles continue to apply to the interpretation of tax legislation.

Chapter 7 then discusses the three common approaches to the interpretation of tax statutes – the strict (traditional) approach, which applies the letter of the law, the purposive approach, which takes the context of the provision and the legislative purpose into consideration, and the teleological approach, which, according to Du Plessis (2011: 323) is an approach closely related to the purposive approach but, in addition to this, "aspires to a realisation of the 'scheme of values' on which the legal order is premised." The teleological approach thus espouses the values of the Constitution and *ubuntu*. The three approaches to interpretation are illustrated by means of case law, also establishing the transition to the purposive approach following the advent of the Constitution.

The chapter finally links the interpretation of legislation with the principles of a good tax system. These links are explored in terms of the Constitution and the Bill of Rights, in a general context, illustrated by examples in criminal and administrative law, and in tax law. The discussion of these links is accompanied by examples from case law.

11.3.3 Discuss the application of the international semantic approach (theory) of deeming provisions, including the following aspects: (a) the characteristics of deeming provisions; and (b) the purpose of deeming provisions.

The characteristics of deeming provisions are described in Chapter 2. Hamilton (1989: 1452) observes that deeming provisions create the impression of something that does not actually exist but, in the relevant situation, serve an analytical purpose. It was stated in *St Aubyn and Others v Attorney General (No 2)* [1952] AC 15, (at 53) that deeming provisions ensure that a word or phrase is interpreted in a specific manner; deeming provisions ensure certainty where there would otherwise be uncertainty; and deeming provisions confirm "what is obvious, what is uncertain and what is, in the ordinary sense, impossible".

Deeming provisions have three purposes. These purposes are described in Chapter 2 as: (1) to nullify tax avoidance schemes which have the intention of shifting tax; (2) to extend or restrict the scope of a benefit; and (3) to deal with administrative matters. A

provision includes an element of deeming where an existing policy is interpreted to apply to new facts and circumstances.

11.3.4 Obtain an understanding of the application of a selection of deeming provisions in the Income Tax Act, South African case law, the OECD Model Tax Convention and the OECD Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting, together with commentary by acknowledged experts.

Chapters 2, and 4 to 7 represent the theoretical underpinning of the research. Chapters 8 to 10 deal with the practical application of these theoretical perspectives.

The Income Tax Act

The analysis of selected provisions in Chapter 8 reveals that these provisions comply with the characteristics and purposes of deeming provisions as described in Chapter 2. The foundation of taxable income is the definition of "gross income" in section 1 of the Income Tax Act. As most of the expressions included in this definition – "the total amount", "in cash or otherwise", "received by or accrued to or in favour of", "amounts of a capital nature", and "residence" – are not defined in the Income Tax Act, case law has provided meanings for the expressions. The case law analysis has established that these expressions are deeming provisions and that, except possibly for the term "accrue" and the proviso to the definition stating that these accruals must be included in gross income at their face value, comply with the principles of equity and certainty and transparency. As the terms "accrue" and the proviso include amounts in gross income (and therefore taxable income) that have not yet been received, this could pose cash-flow problems, and include amounts that have a lower market value than the "book" value.

The analysis of sections 7 and 7C confirm their deeming characteristics and their purpose of preventing tax avoidance. Section 7 deals with the splitting of income between taxpayers, and section 7C deems interest on interest-free or low interest loans granted to trusts to be donations subject to donations tax. This ensures the application

of the principle of equity between taxpayers engaging in these schemes and those not doing so, and the application of certainty and transparency. An anti-avoidance subsection common to sections 13, 13*ter*, 13*quin* and 13*sex* prevents the deduction of depreciation allowances when the income from the properties concerned has not been included in taxable income. These are therefore deeming provisions that ensure the principles of equity and certainty and transparency apply.

While the sections discussed above represent the "shotgun" approach to anti-avoidance, sections 80A to 80L represent a general anti-avoidance rule. As a whole, these sections are shown to be deeming provisions that ensure equity between taxpayers engaging in tax avoidance schemes and those who do not, together with providing certainty and transparency regarding their application. All of these anti-avoidance provisions also serve to protect the *fiscus* and ensure tax efficiency.

The OECD

Chapter 9 deals with the international perspective of South African Income Tax. Double taxation arises when a person is taxed on the same income in more than one jurisdiction. Double Tax Agreements (DTAs) are entered into between countries and aim to prevent or mitigate double taxation. The OECD Model Tax Convention is used as a model for most of South Africa's DTAs. The OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting provides for agreements between multiple countries. A selection of articles in the OECD Model Tax Convention was analysed and it was established that they amount to deeming provisions. The analysis of one article in the Multilateral Convention was also found to be a deeming provision. As DTAs provide a measure of equity, certainty and transparency, they comply with principles of a good tax system. As they also protect the tax base of participating countries, they promote tax efficiency.

The influence of the OECD/G20 Base Erosion and Profit Shifting Project (BEPS) is reflected in the inclusion of sections 9D and 31 in the Income Tax Act. Section 9D deals with Controlled Foreign Companies (CFCs) and attributes non-business related income of the CFC to South African participants in these companies. The fact that income is imputed to South African resident participants, rather than only taxing

dividends that are declared, indicates the deeming nature of the section. Section 31 deems the income arising from agreements between resident and non-resident connected persons to be the income that would have been generated in an arm's length transaction between independent parties, adjusting the taxable income or tax liability of the South African taxpayer accordingly. A second "adjustment" is made based on the difference between the income prior to and after adjustment. This difference is deemed to be a dividend *in specie* in the hands of a South African company, and subject to dividends tax at the rate of 20%, and a donation in the hands of all other South African taxpayers, and subject to donations tax at the rate of 20% or 25%, depending on the amount. This section is also a deeming provision. Both sections are designed to promote equity between taxpayers engaging in these transactions, and those who do not, to ensure certainty and transparency, and protect the *fiscus*.

11.3.5 Discuss the role of tax administration in achieving the principles of a good tax system.

The achievement of the principles of a good tax system is dependent on equitable tax administration. The Tax Administration Act must also be applied together with PAIA, PAJA and the Constitution. The Tax Administration Act confers a wide range of powers on SARS, in the person of the Commissioner, including the right to search a taxpayer's premises and seize documents, the right to carry out random audits, to issue jeopardy assessments, to impose penalties and criminal sanctions, and to report tax practitioners to their professional associations. It also provides for the rights and duties of taxpayers, including the right to object to and appeal assessments and decisions of the Commissioner.

To provide an avenue for recourse for taxpayers against inequitable administrative actions of SARS, the Tax Administration Act provides for an Office of the Tax Ombud. The Ombudsman has the power to investigate the complaints of taxpayers, negotiate agreements with SARS, and report matters to the Minister of Finance. As the Office of the Tax Ombud is not fully independent of SARS, its powers to redress

grievances are limited. In addition, the Organisation Undoing Tax Abuse (OUTA), the Tax Justice Network Africa, and the African Tax Administration Forum (ATAF) all have visions and missions to promote a just, equitable and efficient tax system, and thus to promote the principles of a good tax system. A discussion of the Davis Committee Report on tax administration confirms findings of the Office of the Tax Ombud, and completes the discussion. The work of all these bodies emphasises the need for an ethical, fair and efficient tax administration.

11.4 Other findings that emerged from the research

In section 1.5 of Chapter 1, the relationship between trust, power and tax compliance is illustrated through the "slippery slope" framework (refer to **Appendix A**). According to this framework there is a relationship between trust in government, the power of government and tax compliance by the taxpayers. Tax compliance is either voluntary or enforced. Where trust in the government is eroded through corruption, fraudulent and wasteful expenditure or the failure to deliver services, taxpayers' willingness to pay their taxes decreases and tax evasion is the result. Compliance with the principles of a good tax system will help to engender a climate of trust and tax compliance.

11.5 Contribution of the research

In Chapter 1 of this research the following observation of the OECD (2010a: 30) is quoted: "it is not only important *what* a revenue body does, it is also important *how* the revenue body does it." [emphasis in the original]. What a revenue body is empowered to do is set out in tax legislation, how the revenue body does it is based on the Constitution, the PAIA and the PAJA. Deeming provisions forming part of tax legislation should comply with the principles of a good tax system, as must the administrative enforcement of the legislation. Deeming provisions are often subject to interpretation by the courts and their judgments should also reflect principles of a good tax system. The importance of taxation based on the principles of a good tax system is summarised as follows: "[t]he benefits of an efficient and fair tax

administration system that taxpayers trust are immense; so are the consequences of a system they distrust" (Office of the Tax Ombud, 2017b: 7). Research enquiring into the relationship between deeming provisions in tax legislation and the principles of a good tax system could not be traced in leading academic publications. The present research therefore relied on the following, with the goal of identifying the relationship between deeming provisions and the principles of a good tax system:

- analysing the historical development of deeming provisions;
- identifying and describing legal principles applying to the interpretation of tax legislation;
- identifying and describing the principles of a good tax system;
- providing an exposition of approaches to interpreting legislation;
- analysing selected deeming provisions in the Income Tax Act and their judicial interpretation;
- analysing selected articles in the OECD Model Tax Convention; and
- discussing the role of the administration of the legislation.

This therefore represents the contribution of this thesis to the body of knowledge.

11.6 Final remarks

From the earliest times legal principles and principles of a good tax system have been established, refined and applied. When legislation or the manner of its enforcement does not reflect these principles, taxpayers enter into various forms of resistance, ranging from tax evasion to open revolt.

According to Bacon (2021)[10] "(r)easoning draws a conclusion, but does not make the conclusion certain, unless the mind discovers it by the path of experience." This research, it is submitted, by the application of both reasoning and the practical experience embodied in legislation and its interpretation, has demonstrated that, in general, there is a close relationship between deeming provisions, their interpretation in the courts of law and the principles of a good tax system.

[10] Bacon, R. 2021. Quote. Available: https://www.brainyquote.com/quotes/roger_bacon_192802 (accessed 18/03/2021).

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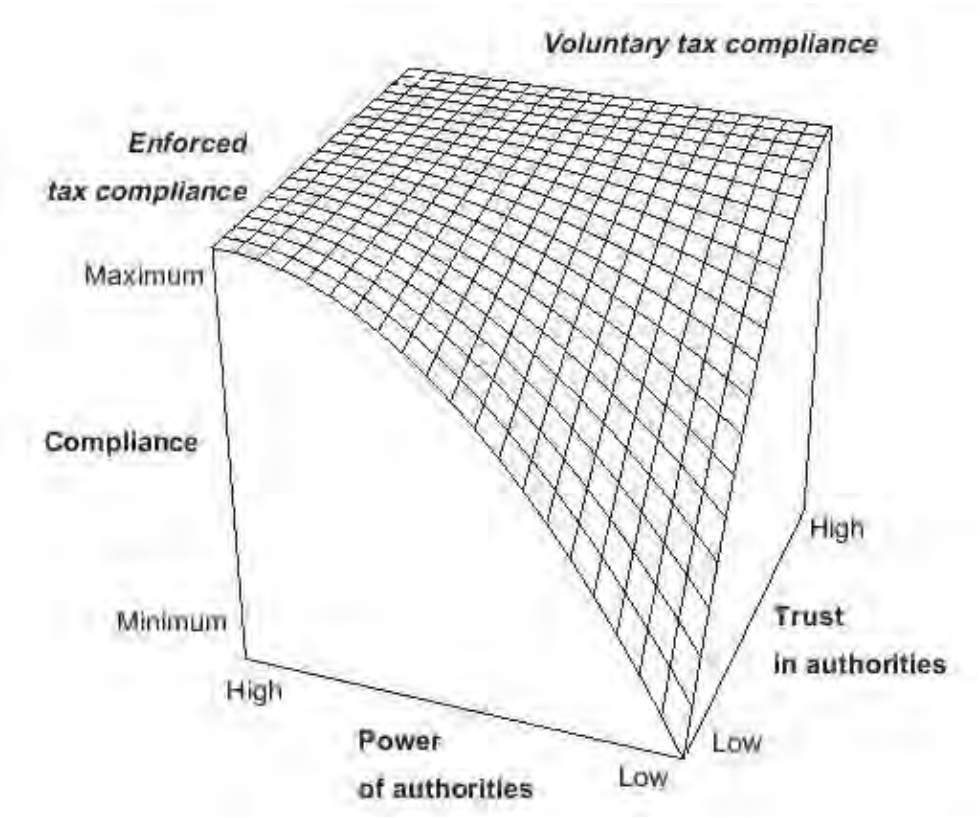
APPENDIX A: THE "SLIPPERY SLOPE" FRAMEWORK



Source: Kirchler *et al*, 2008: 212

The "slippery slope" framework illustrates (Kirchler *et al*, 2008: 212) that where:

- taxpayers' trust in government is low and the power of government is weak there is minimal tax compliance: no distinction is made between enforced tax compliance and voluntary tax compliance;
- taxpayers' trust in government is low and the power of government increases there is an increase in enforced tax compliance;
- taxpayers' trust in government increases and the power of government is weak there is an increase in voluntary tax compliance;
- taxpayers' trust in government increases and the power of government is strong there is an increase in tax compliance: no distinction is made between enforced tax compliance and voluntary tax compliance.