The application and constitutionality of the so-called “reverse” onus of proof provisions and presumptions in the Income Tax Act: the revenue’s unfair advantage

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Abstract
This study analyses and discusses the application and constitutionality of the general onus of proof provision (section 82 of the Income Tax Act 58 of 1962 [the “Act”]), the presumption in favour of the State when criminal sanctions are applied to an offending taxpayer (section 104(2) of the Act) and the mechanics for imposing administrative sanctions in terms of section 76(1)(b) of the Act.

The conclusion reached is that the reverse onus presumption, as provided for in terms of section 104(2) of the Act, is unconstitutional. It is penal in nature and offends against the constitutional right of an accused to a fair trial (sections 35(3) of the Constitution of the Republic of South Africa Act, 108 of 1996 [the “Constitution”]). The section 36 limitation of rights clause of the Constitution does not save it.

Section 76(1)(b) of the Act read in conjunction with the deeming provision of section 76(5) of the Act, is inextricably linked to the section 82 general reverse onus provision of the Act. Hence, when these three sections are applied together, they create a reverse onus that, prima facie, violates the right to just administrative action (section 33 of the Constitution).

Regarding the general reverse onus burden as provided for in terms of section 82 of the Act, the conclusion reached is that it is reasonable and justifiable in an open and democratic society and can therefore be regarded as constitutional.

Key words
Additional tax  Onus of proof
Burden of proof  Penalties
Constitution  Presumptions
Deeming provisions  Reverse onus

1 Introduction
Harold Wilson once remarked: “Everybody should have an equal chance – but they shouldn’t have a flying start” (Cohen 2000:150). His words aptly describe the unfair
advantage the Commissioner and the State have over the taxpayer when assessing a person to normal tax, additional tax and penalties because of the application of the so-called “reverse onus provisions and presumptions” contained in the Income Tax Act 58 of 1962 (the “Act”).

Statutorily placing the onus of proof on a taxpayer (for example, the general onus provision of section 82 of the Act) or statutorily presuming that a taxpayer has committed a tax offence with the necessary intention to evade tax (for example, the presumption of intention contained in section 104(2) of the Act), eases the administrative burden of the revenue authorities. It facilitates the assessment to tax of a taxpayer (section 82 of the Act) and the criminal conviction of a taxpayer who has committed a tax offence (section 104(1) of the Act).

In addition to criminal sanctions which may be imposed on a taxpayer by a court of law if he or she is found guilty of a tax offence in terms of section 104(1) of the Act, the revenue authorities may also impose administrative sanctions for similar tax offences in the form of “additional tax” on a taxpayer in terms of section 76(1) of the Act. Although section 76 of the Act has no ostensible reverse onus or presumption provision, section 76(5) does contain a deeming provision couched in similar wording to that used in the section 82 onus of proof provision of the Act. The deeming provision, in effect, defines what is meant as an omission from a taxpayer’s return of income for the purposes of applying section 76(1)(b) of the Act. Practically, however, it will be seen from the discussion on the application of section 76(1)(b) of the Act that the section 82 general onus of proof provision of the Act is inextricably associated with and linked to the deeming provision of section 76(5) and thus to section 76(1)(b) of the Act.

It is interesting to note that no decided tax cases specifically refer to the section 82 onus of proof provision or the presumption in section 104(2) of the Act as a reverse onus provision or presumption. However, this type of onus or presumption creates what Langa J in S v Mbatha: S v Prinsloo (1996 (3) BCLR 293 (CC) at 299, 300 and 307) referred to as a statutory “reverse” onus presumption. See also S v Zuma and Others (1995 (4) BCLR 401 (CC)) where a similar conclusion was reached.

In effect, a reverse onus provision or presumption can be described as a statutory provision that places the burden of proof on someone other than the person who is normally required to bear the burden of proof under South African common law. Sections 82 and 104(2) of the Act do exactly that. They set out to place the onus of proof specifically on the taxpayer instead of the revenue authorities.

The Income Tax Act 28 of 1914 had no general reverse onus provision such as section 82 of the present Act. The common law rules therefore applied, that is, the onus of proof was placed on the revenue authorities (CIR v Goodrick (12 SATC 279 at 295-296)). It is submitted that placing the onus of proof on the taxpayer or creating a presumption in favour of the revenue authorities, can both be considered as falling within the ambit of a “reverse” onus provision as described in S v Mbatha: S v Prinsloo (supra) and S v Zuma (supra).

2 Objective and scope of study

The objective of this study is to trace how the general onus provision of section 82 and the presumption of section 104(2) of the Act are applied in practice and to test their application against the provisions of the Constitution of the Republic of South Africa Act 108 of 1996.
Similarly, the linking by the judiciary of the section 82 reverse onus provision to section 76(5) in imposing additional tax in terms of section 76(1)(b) of the Act, will be tested against the provisions of the Constitution. Achievement of this objective necessitates a basic analysis of case law relating to the practical application of the above-mentioned reverse onus provisions and presumptions from a historical perspective and thereafter examining the impact the Constitution has had or should have had on their constitutionality in the future.

Other reverse onus provisions or presumptions created by the Act, such as those contained in section 80G (the general anti-tax avoidance regulations) or even paragraph 28(2) of the Fourth Schedule (pay-as-you-earn provisions) to the Act, are considered to be beyond the scope of this study.

As far as can be established, the constitutionality of the general reverse onus provision (section 82 of the Act) and other reverse onus presumptions contained in the Act have not been formally challenged by adversely affected taxpayers (if challenged, such challenges have not been reported) and thus have not been tested by the judiciary. Accordingly, any submissions made in relation to the constitutionality of the sections of the Act covered in this analysis are necessarily speculative, but will be based on constitutional case law from other areas of our law, such as criminal law and the law relating to insolvency, which areas our judiciary has, to some extent, already tested constitutionally.

3 Research method

The research method adopted consists of a literature review of the relevant provisions of the Act and the Constitution, together with court decisions, published articles, reports and textbooks relating directly to the objective.

A comprehensive search was done on the LexisNexis Electronic Library (Jan./Feb. 2009) and the appropriate cases relating to the objective of this study were selected.

4 An analysis and discussion of the constitutionality of the reverse onus provisions and presumptions as applied in South African criminal law and the law of insolvency

It is considered appropriate to commence this study with an analysis and discussion of the general constitutionality of reverse onus provisions in other branches of our law. It will assist in keeping the objectives of this study in focus.

In S v Zuma and Others (supra), the Constitutional Court had to decide on whether the presumption contained in section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977, requiring an accused to prove that a confession was not freely and voluntarily made, violated the right to a fair trial as provided for in terms of sections 25(2), 25(3)(c) and 25(3)(d) of the Constitution of the Republic of South Africa Act 200 of 1993 (the “Interim Constitution”). The right to a fair trial is now essentially incorporated in section 35(3)(c) of the Constitution. The court held that the common law rules in respect to the burden of proving that a confession was made freely and voluntarily were an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. A reversal of the
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onus of proof in these circumstances undermined all these rights and thus violated the right to a fair trial of an accused.

The Court also found that the State had not been able to show that the use of the ordinary common law rules relating to the burden of proof would make it impossible, unduly burdensome or impair the administration of justice, for the State to discharge the onus of proof as normally required in terms of the common law by proving that a confession was freely and voluntarily made. The court, however, emphasised that the judgement did not decide that all statutory provisions that create reasonable presumptions in criminal cases are constitutionally invalid. The court was of the opinion that a reverse onus presumption would be valid, say, in cases where there is a pressing social need for the effective prosecution of a crime.

A similar line of reasoning was followed in S v Mbatha: S v Prinsloo (supra) where Langa J, who handed down the unanimous decision of the 11 Constitutional Court judges, held that the statutory reverse onus presumption in section 40(1) of the Arms and Ammunition Act 75 of 1969 was unconstitutional. The presumption provided that if it were proved that any arms or ammunition were on any premises, any person on the premises would be presumed to be in possession of such arms or ammunition.

The 11 judges concurred that the presumption infringed on the right of the accused to be presumed innocent in terms of section 25(3)(c) of the Interim Constitution because it could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. The State argued that the high level of crime in South Africa was linked to the proliferation of illegal arms and ammunition and that the presumption assisted in combating the rising levels of crime by ensuring effective policing. It was also submitted that the rampant crime levels had a profound, negative effect on the quality of life in communities and were a threat to social stability.

In spite of acknowledging the difficulties confronting the police in investigating crime, Langa J held that the presumption was too widely phrased and could result in innocent people being convicted. There was no inherent mechanism in the provision to exclude those who are innocent and who would otherwise be included within its reach. He ruled (at 386) that the presumption does not satisfy the requirements of reasonableness and justifiability required by the limitation of rights clause in the Interim Constitution (now embodied in section 36 of the Constitution). Furthermore, he found that the State did not demonstrate that the objective of the presumption, namely to facilitate the conviction of offenders, could not reasonably have been achieved by other means less damaging to constitutionally entrenched rights. He concluded (at 306) that the reverse onus in such circumstances is so “inconsistent with the values which underlie an open and democratic society based on freedom and equality that it cannot be said to be justifiable”.

It is submitted that the conclusion that may be reached from these two cases is that a reverse onus provision or presumption where a criminal sanction may be imposed, prima facie, violates the right of an accused to a fair trial generally (section 35(3) of the Constitution), and in particular, the right to be presumed innocent (section 35(3)(h) of the Constitution). It is also not normally reasonable or justifiable in a democratic society and thus cannot be saved by the section 36 limitation of rights clause in the Constitution.
5 The ambit and scope of the general onus of proof provision and presumptions contained in the Act and dealt with in this study: preliminary observations

5.1 Section 82 of the Act: preliminary observations

Section 82 of the Act essentially provides that the burden of proof that any amount is exempt from or is not liable to any tax chargeable under the Act, or that a deduction, abatement or set-off is permissible or that a capital gain can be disregarded or excluded in terms of the Eighth Schedule, falls upon the taxpayer. It appears to be clear from the wording of the provision that section 82 of the Act does not apply to a penalty or even an additional tax situation but only refers to the normal assessment procedure when a taxpayer claims an exemption, a deduction, an abatement, a set-off or an exclusion for capital gains tax purposes. However, as will be seen from the discussion in paragraph 5.3 below, sections 82, 76(1)(b) and 76(5) of the Act appear to have been inextricably, and perhaps even unconstitutionally, linked by the judiciary.

It is equally clear that section 82 of the Act creates a so-called “reverse” onus burden in that it places the burden of proof squarely on the shoulders of the taxpayer should he or she, say, claim a deduction (S v Zuma (supra)). Statutorily, the taxpayer is thus immediately placed in an inferior position in relation to the revenue authorities. It is submitted that this reverse onus provision, prima facie, violates at least two rights enshrined in our Constitution, namely the right to equality before the law (section 9 of the Constitution) and to just administrative action which is lawful, reasonable and procedurally fair (section 33 of the Constitution).

Section 9(1) of the Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”. The fact that a taxpayer is placed in an inferior position in relation to the revenue authorities appears, prima facie, to violate this right. Of course, the answers to the questions of rationality, fairness, reasonability and justifiability as required by section 9 generally read together with the section 36 limitation of rights clause of the Constitution, are necessary to establish whether the provision does in fact violate the right to equality. The three-step approach outlined in Harksen v Lane, NO and Others (1997 (11) BCLR 1489 (CC)) and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, would ultimately determine whether the right to equality has actually been violated. However, it is considered to be beyond the scope of this study to discuss this right to equality any further in this study.

The potential violation of the right to just administrative action, which is lawful, reasonable and procedurally fair (section 33 of the Constitution), however, is of utmost importance in the application of section 82 of the Act. This will be discussed in greater detail in paragraph 8.3 below.

The right of an accused to a fair trial (section 35(3) of the Constitution), is only associated with criminal matters. Since section 82 does not deal with criminal matters, it cannot violate this right.
5.2 Section 104(2) of the Act: preliminary observations

Section 104(1) of the Act provides that a taxpayer shall only be guilty of an offence as listed in that sub-section if the State can prove that the taxpayer had the “intent to evade” assessment or taxation. However, the presumption contained in section 104(2) of the Act eases the burden of the State of proving an “intent to evade” taxation by the taxpayer and facilitates the conviction of the taxpayer in the case where a section 104(1)(a) or 104(1)(c) offence has taken place (makes a false statement or entry in a return or maintains false books of account or other records). This is achieved by the use of a rebuttable presumption that if one of the offences as listed in section 104(1)(a) or 104(1)(c) of the Act has been committed, the taxpayer committed the offence with the necessary “intent to evade” assessment or taxation.

It is clear from the wording of the section that a “conviction” in a court of law is necessary before any of the criminal sanctions provided for in terms of the section can be applied. The taxpayer is thus regarded as an accused if charged under this section. The constitutionality of the reverse onus presumption contained in section 104(2) of the Act is discussed in detail in section 8.1 below.

5.3 The deeming provisions of sections 76(5), 76(6) and 76(7) of the Act and the link between sections 76(1)(b), 76(5) and 82 of the Act: preliminary observations

Section 76 of the Act (the so-called “triple tax” provision), lists in sub-section (1), a number of tax offences that are administratively punishable by the revenue authorities. Committing one or more of the listed offences described therein, entitles the Commissioner to impose “additional tax” of up to 200% of the normal tax chargeable arising as a result of the offence. The section does not require any “intent to evade” taxation as is required for a conviction in terms of section 104(1) of the Act.

Section 76(5) of the Act provides that if the taxpayer, in his or her return, deducts, setoff, disregards or excludes any amount that is “not permissible” under the provisions of the Act or shows as expenditure or loss any amount that he or she has not in fact expended or lost, shall be “deemed” to have “omitted” such amount from his or her return. The effect of this deeming provision is that any omission, innocently or otherwise made in a return, is regarded as an offence under section 76(1)(b) of the Act. Although the word “presumption” is not used in section 76(5) of the Act, the word “deem” is essentially the equivalent to a presumption and is often used interchangeably (S v Zuma (supra) at 413 and 415).

It may be argued that section 76(5) of the Act does not create a reverse onus but merely defines what is “deemed” to be an omission for the purposes of section 76(1)(b) of the Act. However, section 76(5) read together with section 76(1)(b) of the Act appears to have been inextricably linked to the reverse onus provision of section 82 of the Act by the judiciary, owing to the fact that similar wording is used in both sections 82 and 76(5) of the Act. Thus, if a taxpayer is unable to discharge the section 82 onus of proof that an amount claimed in his or her return as a deduction is a “permissible” deduction in terms of the Act, then section 76(1)(b) of the Act theoretically becomes operative because of the deeming provision of section 76(5) of the Act. However, the additional tax imposed may be remitted by the Commissioner “as he may think fit” if there are “extenuating circumstances” present (section 76(2)(a) of the Act). For the general meaning of “extenuating circumstances” in tax
matters, see Goldswain (2001:123–135). These powers of decision making by the Commissioner in the imposition of an additional tax sanction are similar to those of a court judge and can thus be regarded as both quasi-judicial and penal in nature.

An apt example of the link between sections 82, 76(5), and 76(1)(b) of the Act can be found in *ITC 1725* (64 SATC 223). A tax consultant had advised the taxpayer to enter into an unconditional agreement for the purchase of cattle feed and claim the cost of such feed as a deduction in terms of section 11(a) of the Act even though the feed had not been delivered to the taxpayer by the end of his year of assessment. The Commissioner contended that the agreement was conditional, and therefore, that the expense claimed could not be deducted. He also contended that the taxpayer, by claiming an unjustified expense, had committed an offence in terms of section 76(1)(b) read together with section 76(5) of the Act, and accordingly, imposed additional tax of 100%.

The Special Court confirmed the Commissioner’s view that the cattle feed agreement had been a conditional agreement and that the taxpayer was not entitled to the deductions claimed in the relevant years of assessment. However, the court was of the opinion that although it found against the taxpayer as regards its claim, the fact that the taxpayer had claimed the deduction on the basis of professional advice honestly given, meant that such claim could not simply be treated as a form of tax evasion. Although additional tax had to be imposed in terms of section 76(1)(b) of the Act, the court used its discretion in terms of section 76(2)(a) of the Act, to remit, *in toto*, the penalty imposed by the Commissioner.

Other similar examples of the apparent linking of the section 82 general reverse onus provision to sections 76(5) and 76(1)(b) of the Act, can be found in the following decisions: *KBI v Gekonsolideerbe Sentrale Ondernemingsgroep (Edms) Bpk* (58 SATC 273 and *ITC 1576* (56 SATC 1). The question whether this apparent link is appropriate or constitutional is discussed in greater detail in paragraph 8.2 below.

The section 76(6) deeming provision introduces an element of intention. It operates only when a taxpayer “wilfully” fails to disclose facts that would result in a higher taxable income should the revenue authority know the facts. However, it is submitted that this presumption does not create a reverse onus and thus can be regarded as constitutional. The onus of proof would still be on the revenue authorities to prove a “willful” failure to disclose material facts relating to the return submitted. Hence there is no necessity to discuss this provision any further.

The deeming provision of section 76(7) is also not considered important for the purposes of this study. It also does not create a reverse onus. Instead, it explains how to treat assessed losses arising from a previous year for the purposes of determining the amount omitted.

6 Prerequisites for the application of the reverse onus of proof provision and presumptions

6.1 Section 82 of the Act: prerequisites

The judiciary has indicated that before the section 82 general reverse onus becomes operative, certain prerequisites must first be present, namely:

(a) The jurisdictional facts that bring the taxpayer within the ambit of the Act or the relevant provision must first be proved by evidence produced by the *fiscus*. Only then
will the onus fall upon the taxpayer. This prerequisite puts a brake on the arbitrary exercise of power by the revenue authorities (Carlson Investments Share Block (Pty) Ltd v C:SARS (63 SATC 295); ITC 1707 (63 SATC 343); Mpande Foodliner CC v C:SARS and Others (63 SATC 46); and Traco Marketing (Pty) Ltd v Minister of Finance and Others (58 SATC 195)). For example, in the Appellate Division case of CIR v Butcher Bros (Pty) Ltd (13 SATC 21), the court held that the onus initially falls upon the Commissioner 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 that case, the Commissioner first had to prove to the court that what had accrued to the taxpayer was not merely a “conjectural value” but that the accrual had an “ascertainable money value” and since he had failed to do so, the onus had not shifted to the taxpayer. The taxpayer accordingly won his appeal.

(b) The reverse onus only applies to matters contained in the letter of assessment issued by the Commissioner and not to any other matter not contained in the letter of assessment. The judge in ITC 1682 (62 SATC 380) confirmed this view. In other words, only issues contained in the letter of assessment are subject to the section 82 reverse onus. The judge suggested that it is unreasonable and unfair for the taxpayer to bear the onus of proving not only that he is not taxable on the basis assessed but on any other basis that the Commissioner may choose to raise, not in an assessment but, for example, in the summary of the case issued immediately before the appeal is heard or even whilst the case is being adjudicated upon. The court supported the argument of the counsel for the taxpayer that, although the absence of pleadings and defined procedures in disputes brought before the Special Court was intended to expedite proceedings, it in fact compounded the difficulty of litigation in that the Commissioner raised a number of arguments which had not been canvassed in the correspondence which sets out his decision to assess. Section 82 of the Act only refers to the appeal of the “decision” of the Commissioner and the court was of the opinion that there is merit to the interpretation of the “decision” appealed against as being the “decision” contained in the letter of assessment on which the taxpayer has to bear the burden of proof. It did not apply to other matters subsequently raised. The court found support and comfort in this interpretation from the Constitution which demands that in the interpretation of statutes, the culture of justification is promoted (section 39 of the Constitution).

Although not exactly a prerequisite, it is also worth noting that the section 82 reverse onus of proof only applies to questions of facts (De Koker, Silke 2008:18.65). Any argument on the interpretation or questions of law before or even after the facts are presented, is not subject to the section 82 reverse onus of proof provision. ITC 1725 (supra) illustrates this point quite well. The taxpayer was unable to discharge the burden of proof, on the facts presented to the court, that the contract for the purchase of the cattle feed created an unconditional contract. Once the court, on the facts, found that the contract was conditional, the law was applied accordingly.

6.2 Sections 76(5) and 104(2) of the Act: prerequisites

Although, as far as can be established, there are no judicial decisions relating to the prerequisites for the application of sections 76(5) and 104(2) of the Act, it is submitted that the two aforementioned prerequisites for the application of the section 82 reverse onus of
proof provision also apply to these two sections of the Act. Section 76(5), as already discussed, is inextricably associated with and linked to section 82 of the Act by the judiciary.

The wording of section 104(2), however, appears to indicate a further prerequisite. It provides that the revenue authorities must first prove that a false statement or entry is made in a return before the presumption of intention to evade assessment or taxation becomes applicable. It is only at that stage that the burden of proof shifts to the taxpayer to prove the contrary. It is submitted that this does not create a further prerequisite but merely confirms the general prerequisite that the jurisdictional facts that bring the taxpayer within the ambit of the provision must first be proved by evidence produced by the fiscus.

7 How the reverse onus of proof is applied in practice

7.1 The standard of proof required: the general rule

Where the jurisdictional facts are present in order to discharge the onus of proof in terms of section 82 of the Act, the taxpayer must show that on a “preponderance of probabilities” (CIR v Goodrick (supra)) or on a “balance of probabilities” (Reliance Land & Investment BC (Pty) Ltd v CIR (14 SATC 47)), the Commissioner’s assessment is incorrect. In effect, “preponderance of probabilities” and “balance of probabilities” have the same meaning. It is not necessary for a taxpayer to prove any point beyond a reasonable doubt. In Bloch v SIR (42 SATC 7 at 14), Grosskopf J expressed the view that the taxpayer’s onus is to be “discharged on the ordinary basis applied in civil cases, that is, on a balance of probabilities”.

Where the court, however, comes to the conclusion that both the taxpayer and the revenue authorities have presented equally good arguments, the decision must go in favour of the revenue authorities, or in the words of the President of the Court in ITC 43 (2 SATC 115 at 116), “. . . in the case of all things being equal we are bound to decide in favour of the Commissioner”.

7.2 Application of the section 82 reverse onus of proof provision

7.2.1 The effect of honesty and reliability in discharging the burden of proof

In CIR v Gribnitz (50 SATC 127), the taxpayer had purchased several properties which he subsequently sold. He claimed that the profits on the sale of the properties were capital in nature and therefore not subject to taxation. The lay members of the Special Court found the taxpayer to be a totally honest witness who gave satisfactory answers and explanations during his testimony as to his intention. They thus found that he had discharged the burden of proof resting on him and that the profit so arising was capital in nature. They paid little attention to the fact that the taxpayer had a prior history of purchasing and selling property at a profit and had for many years been an estate agent. Instead, they relied solely on the taxpayer’s perceived honesty in coming to the conclusion that he had discharged the burden of proof. On appeal, Eloff AJP reversed the decision of the Special Court on the basis that the taxpayer’s verbal evidence, although regarded as honest, could not be regarded as reliable because it was inconsistent with and was outweighed by the circumstances of the case.
At the hearing, the counsel for the taxpayer argued that to reverse the decision of the Special Court would have the effect of labeling the taxpayer a dishonest witness. Eloff AJP rejected this reasoning as not necessarily true. He quoted with approval, the opinion of Grosskopf J in *Malan v KBI* (43 SATC 1) that a finding adverse to the taxpayer’s evidence does not necessarily involve a finding that he was dishonest. He justified his reasoning on the basis that evidence given by a taxpayer, although honest, is often unreliable after the event.

Murray J in *ITC 743* (18 SATC 294 at 297-298) approached the question of honesty slightly differently. He was of the opinion that there may be cases where probability will have to yield to the credibility of a witness. In spite of the improbabilities in the evidence of a witness, if his testimony is found to be honest, the court may find that any burden of proof resting on him has been discharged. It is submitted that his approach, albeit given many years before the advent of our Constitution, is more in line with the tenants of our present Constitution than Eloff J’s decision in *Gribnitz’s* case.

The right of an accused to a fair trial including the right to be presumed innocent (section 35(3) of the Constitution) is not a right which is associated with a noncriminal action. However, Murray J’s reasoning, in effect, gave cognisance to this original common law presumption of innocence. His views, it is submitted, are also in line with the right to just administrative action that is lawful, reasonable and procedurally fair (section 33 of the Constitution).

It is further submitted that the taxpayer’s honesty should only be questioned if he or she testifies or certifies documents and the court finds such testimony or certification implausible, dubious or far-fetched. However, where the probabilities are evenly balanced, a finding of credibility might well be the determining factor.

### 7.2.2 The practical application of the section 82 reverse onus of proof provision

Cram J in *N LTD v COT* (24 SATC 657 at 660) neatly summarised the approach adopted by the judiciary concerning the general reverse onus of proof burden. He was clear that the onus is upon the taxpayer to show by satisfactory evidence, as required in a civil suit, that the assessment be reduced or set aside. He was of the opinion that if the taxpayer kept no records, any assessment made by the Commissioner would be a mere guess. But the guesswork involved in the assessment did not mean that the taxpayer was then relieved of his duty to discharge his onus. The estimated amount assessed by the Commissioner would remain, *prima facie*, correct until the taxpayer shows that it is wrong, not only in a negative sense but also positively by showing what correction should be made to make it right. In his reasoning, he concluded that the legislature did not intend that the taxpayer be granted the valuable privilege or defence of merely stating that he lost either his memory or his books and therefore that he had discharged his onus. Something more was required.

In *ITC 980* (25 SATC 48), Fieldsend QC, in dismissing the taxpayer’s appeal, followed much the same approach as Cram J. He stated that a series of unsubstantiated assumptions presented as evidence by the taxpayer, do not make the Commissioner’s estimates less correct. Accordingly, the taxpayer had not discharged the onus.

In *ITC 91* (3 SATC 235 at 235-236), Maritz J suggested that the onus would shift to the Commissioner if the taxpayer produces financial statements that are correctly drawn and certified by an auditor of repute. The Commissioner would then have to produce evidence criticising the accounts or the auditor’s *bona fides*. 

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De Koker, Silke (2008:18.65) comments that the production of correctly drawn and
certified accounts may assist the taxpayer in discharging the onus falling on him or her but
that it does not shift the onus on to the Commissioner. There is certainly merit in this
argument since the primary purpose of audited financial statements is not to determine or
assist the revenue authorities in assessing a taxpayer’s tax liability. Instead, the audit
opinion expresses a view as to whether the financial statements have been prepared in all
material respects in accordance with an acceptable financial reporting framework (SAICA
Handbook 2008/2009: ISA 200, paragraph 2) such as the International Financial Reporting
Standards (“IFRS”) framework promulgated by the International Accounting Standards
Board (SAICA Handbook 2008/2009: ISA 200, paragraph 41). The opinion does not claim
that the financial statements are error free, but provides instead reasonable assurance that
the financial statements, taken as a whole, are free of material misstatement whether due to

The revenue authorities, and the judiciary for that matter, assuming the integrity of the
auditor, should be able to rely on the signed audited financial statements to the extent that
there should be no material errors in the statements. Although audited financial statements
do not include a full and detailed tax calculation, the tax liability as reflected in the income
statement, should have been checked for reasonableness and materiality during the audit
process.

A problem may arise, however, where a detailed expense schedule submitted in support
of a tax return has not been audited and there are possible misallocations between, say,
expenditure regarded as revenue in nature and expenditure regarded as capital in nature.
Although such misallocations, even if revealed during an audit, may not be material for the
purposes of presenting the financial statements fairly in accordance with an acceptable
financial reporting framework, they may become material for the purposes of determining
the ultimate tax liability from the perspective of the revenue authorities.

In ITC 580 (14 SATC 103 at 105), Ingram KC was not impressed that the taxpayer did
not place any evidence before the court, other than mere unsupported statements in a letter,
in his attempt to discharge his onus. The court questioned why the taxpayer did not at least
appear before the court and give evidence on oath or even sign an affidavit if he elected not
to appear, as to the truthfulness of the statements made in the letter. The failure to use either
of these two alternatives compelled the court to conclude that the taxpayer had not
discharged his onus in a case that called for an enquiry and an explanation.

In contrast to the taxpayer in ITC 580, the taxpayer in ITC 1778 (66 SATC 334)
successfully discharged the burden of proof resting on him in resisting the assessment
issued by the Commissioner on the basis of an alleged unsatisfactorily explained increase in
his capital of R733 285. He verbally testified under oath that the increase in his capital was
the result of an interest-free loan of R880 097 advanced to him by a friend. The friend, who
lived overseas, made a special trip to South Africa to corroborate the taxpayer’s contention
under oath. The court found his friend’s corroborating evidence to be honest and that the
increase in his capital was as a result of a loan and not of undisclosed income of a revenue
nature.

The taxpayer should be able to account satisfactorily to the court for the absence of a
witness who could be expected to testify on his or her behalf and corroborate his or her
evidence. The same would apply for the failure to produce the relevant documentation to
support his or her evidence. Without supporting evidence, the revenue authorities could
use, with impunity, the increase of capital or net worth method (method used by the Commissioner in ITC 1778 (supra) to determine the alleged “omission” of taxable income), analysing the taxpayer’s expenditure, examining the taxpayer’s bank deposits, the mark-up method and even interpolation, to estimate the taxpayer’s income, all inherently unreliable methods and based more on guesswork than any scientific calculation, but satisfactory for the purposes of raising an estimated assessment.

It is submitted in conclusion that in the determination of the normal tax position, the practical position as far as the general onus of proof provision is concerned, is aptly summed up Surtees (1991:114): “In order to succeed, the taxpayer has, by means of evidence, probability based on the facts and credibility, to convince the court that the decision of the Commissioner is wrong.”

7.3 Application of the deeming provision as contained in section 76(5) of the Act

The facts dealt with in ITC 1758 (65 SATC 396) illustrate a disturbing and unfair consequence that may arise as a result of the failure by the taxpayer to discharge the section 82 burden of proof resting upon him. As discussed in paragraph 5.3 above, section 76(5) of the Act deems that an amount is “omitted” from a return if it is disregarded or excluded from the return. Hence the taxpayer’s failure to discharge the burden imposed on him in terms of section 82 of the Act may result in the Commissioner imposing additional tax in terms of section 76(1)(b) read together with the deeming provision of section 76(5) of the Act (ITC 1725 (supra) – the “cattle feed” case). Only once the additional tax has been imposed, will “extenuating circumstances” be considered for the remission of any additional tax imposed in terms of section 76(2) of the Act.

The taxpayer, in ITC 1758 (supra), when challenged by the revenue authorities, acknowledged that he would not be able to produce sufficient evidence to discharge the onus of proving that an amount of R580 000 on which the Commissioner had levied normal tax, had been brought into South Africa as his capital when he fled Angola as a refugee at a time of the civil war in that country. He accordingly did not contest the inclusion of that amount in his income but instead came to an agreement with the revenue authorities whereby he was assessed to normal tax on the R580 000 allegedly not disclosed. Immediately after, the Commissioner imposed a 100% additional tax levy in terms of section 76(1)(b) for the amount deemed to be “omitted” in terms of section 76(5) of the Act from his return of income. The taxpayer appealed against the imposition of the penalty. Following the decision of Van Heerden JA in Da Costa v CIR (47 SATC 87 at 95), the court held that the Special Court must “exercise its own, original discretion” in imposing additional tax. It found “extenuating circumstances” to be present and remitted the additional tax to a far more acceptable level of 50%.

It is submitted that there is good reason to believe that additional tax would not have been able to be imposed on the taxpayer in the circumstances as outlined in ITC 1758 (supra) if section 76 of the Act did not contain the section 76(5) deeming provision which, in effect, creates a reverse onus provision when applied together with section 82 of the Act. The common law rule would have applied and the onus would have rested on the revenue authorities to prove that the money had not been brought into South Africa as capital at the time he fled Mozambique. After all, the taxpayer gave a reasonable and probable reason and explanation for the increase in his capital by R580 000 and it would have been
impossible for the Commissioner to prove otherwise unless he had compelling evidence to contradict the taxpayer’s explanation.

A further example of the inequity or unfairness of the section 76(5) application in an administrative penalty situation, can be found in *ITC 1489* (53 SATC 99). The taxpayer’s auditor had applied a 50% cost-of-stock method of valuation, which had been used for the valuation of stock since the inception of the company. The contention by the taxpayer was that the valuation was done in accordance with accepted accounting principles applied at that time, and was therefore in accordance with section 22(1) of the Act. Although Mr Carl Schweppenhauser, a former Commissioner for Inland Revenue and a former Deputy Director in the Department gave evidence in favour of the taxpayer to the effect that prior to 1984, taxpayers had adopted various and different methods of valuing stock, which valuation had been accepted by the revenue authorities, Conradie J held that the valuation of stock in terms of section 22(1) of the Act requires proper disclosure, and to merely refer to the value of the closing stock figure as “net realisable value” is an “incorrect statement” or an omission for the purposes of section 76(1)(b) of the Act. He accordingly found that the taxpayer had culpably failed to enquire from his accountant why the year-end stock had been valued at only half its cost because that figure should have “leapt” from the financial statements at any businessperson who could read.

Although the court remitted the R90 000 additional tax initially imposed by the Commissioner to a more reasonable amount of R45 000 because there was no evidence of a tax evasion scheme, the court astonishingly and, it is submitted, incorrectly, found that the evidence given by the former Commissioner for Inland Revenue diminished the culpability of the accountant rather than the taxpayer. Goldswain (2001:141) contends that if the accountant’s culpability is diminished by the testimony of the witnesses, it stands to reason that the taxpayer’s culpability would also diminish, provided that the taxpayer had no intention to evade tax. After all, a taxpayer should be able to rely on his or her professional advisor.

*ITC 1778* (*supra*) also illustrates the potential unfairness of the application of the deeming provision of section 76(5) if carried to the extreme. In that case, the taxpayer had excluded or omitted the amount sought to be taxable by the Commissioner from his return of income. He contended that since the amount excluded was a loan from a friend, it did not require disclosure. If he had not been able to bring his friend to South Africa to testify and corroborate his evidence that he had made a loan to the taxpayer, it is submitted that the taxpayer would not have been able to discharge the burden of proof imposed on him in terms of section 82 of the Act that the amount sought to be taxed was not taxable. As previously discussed, the mere fact that a taxpayer is not able to discharge the section 82 burden of proof for normal tax purposes means that sections 76(5) and 76(1)(b) of the Act theoretically become operative immediately, and the Commissioner may impose additional tax.

At a present maximum marginal rate of tax of 40%, the tax on R733 285 would have amounted to approximately R293 000 and additional tax of 200% would have amounted to R586 000, resulting in a total tax liability of R879 000 with the taxpayer still having to repay the loan to his friend. This type of scenario could lead to the complete economic ruin of the taxpayer and his family.

In conclusion, it is submitted that the case law discussed (especially *ITC 1489* (*supra*)) here shows that section 76(5) of the Act is inextricably associated with and linked to the
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reverse onus of proof in terms of section 82 of the Act. The application of the deeming provision can lead to unfair and even irrational decisions against the taxpayer. Unfair or irrational results, prima facie, may violate the right to fair administrative action (section 33 of the Constitution) as further explained and discussed in paragraph 8.2 below. Fortunately, there is a mitigating feature in this process, namely the power of the judiciary to remit unfairly imposed administrative penalties as provided for in terms of section 76(2)(a) of the Act.

7.4 Application of the section 104(2) presumption

Section 104(1) of the Act requires “intent” on the part of any person to evade assessment or taxation before he or she can be convicted criminally, on one of the tax offences listed in that subsection. If charged under section 104(1) of the Act, he or she is considered to be an accused person.

If the revenue authorities can prove that a false statement or entry is made in the return submitted by the taxpayer, in terms of section 104(2) of the Act, until the contrary is proved, he or she is presumed to have made the false statement or entry with the intent to evade assessment or taxation. With the necessary intention presumed, sections 104(1)(a) and (c) of the Act immediately become applicable. It does not matter that the false statement or entry in the return was made innocently or negligently. The onus of proof is on the accused to rebut the presumption that the statement or entry made is not false.

To be relieved of the burden of proving that the accused made a false statement or entry in a return with the necessary intention, assists the state in obtaining a conviction. The section 104(2) of the Act presumption is similar to the presumption contained in section 40(1) of the Arms and Ammunition Act 75 of 1969, which provided that if it were proved that any arms or ammunition were on any premises, any person on the premises would be presumed to be in possession of such arms or ammunition. As indicated earlier, section 40(1) was found to be unconstitutional by all 11 judges of the Constitutional Court in the S v Mbatha: S v Prinsloo (supra).

It is submitted that the application of the section 104(2) of the Act presumption will be challenged by an affected accused in the appropriate circumstances in the future, based on the decision of S v Mbatha: S v Prinsloo (supra) as well as on the opinion of the Katz Commission Report (1994:77-78), both of which are discussed in greater detail in paragraph 8.1 below.

8 Reverse onus of proof and the Constitution

8.1 Constitutionality of the reverse onus of proof presumption imposed in terms of section 104(2) of the Act

It was recommended as far back as 1994 in the Katz Commission Report (1994:77-78) that the reverse onus presumption contained in section 104(2) should be amended to bring it into line with the Constitution. The Katz Commission Report recognised that the section 104(2) presumption relieves the State from proving an essential element of the offence committed beyond reasonable doubt, namely that it was committed with intent to evade assessment or taxation. The report concludes that the presumption prima facie violates the
constitutional right “of an accused to be presumed innocent . . . and not to testify during trial” by casting the onus on an accused person to prove the contrary. It acknowledges that the general “right to a fair trial” is denied.

The report also considered whether the prima facie violation of these rights might be justifiable and thereby be limited in terms of section 33(1) of the Interim Constitution (replaced with a similar limitation of rights clause, section 36, in the Constitution). The report finally concludes that if the Commissioner is confronted with a challenge to the section 104(2) presumption on the test enunciated by Dickson CJC in the Canadian case of R v Oakes ((1986) 26 DLR(4th) 200(SCC)), a court is unlikely to uphold the limitation because of the simple fact that . . . an accused may be convicted for having failed to discharge the onus on a balance of probabilities that he did not intend to make a false statement and thereby be convicted, despite the existence of a reasonable doubt.

The Katz Commission’s conclusion in regard to the unconstitutionality of section 104(2) is also supported by the later Constitutional Court decision in S v Mbatha: S v Prinsloo (supra).

The Katz Commission Report also recommended a legislative amendment to section 104(2). Van Schalkwyk (2001:296) endorsed this recommended amendment. However, nearly 15 years later, the necessary legislative change has not been made.

The conclusion that can be reached is that it is only a matter of time before the section 104(2) reverse onus provision is challenged by an affected taxpayer on the strength of the arguments and reasoning put forward in the S v Mbatha: S v Prinsloo (supra) decision. The comment aired in S v Zuma (supra) that, in criminal cases, not all statutory provisions create a reverse onus are unconstitutional, is limited to cases where the presumption is reasonable, such as where there is a pressing social need for the effective prosecution of crime. It is debatable whether there is a direct pressing social need to prosecute tax offenders in terms of section 104(1)(a) or (c) of the Act. The fact that not many taxpayers have been prosecuted under this provision belies this social need. To punish errant taxpayers, the revenue authorities use the additional tax provisions of section 76(1) instead. In Van der Walt v S (52 SATC 186), the court came to the conclusion that the imposition of additional tax in terms of section 76(1) of the Act was sufficient sanction and that no further material criminal punishment or penalties should be imposed for the offence of common law fraud.

8.2 Constitutionality of the deemed provision relating to omissions in returns created in terms of section 76(5)

Senior South African Revenue Services (SARS) staff, who often have little or no judicial training, have delegated to them by the Commissioner, in terms of section 3 of the Act, the power to impose administratively, additional tax in terms of section 76(1) of the Act. This is in spite of the fact that the administratively imposed additional tax has the potential to far outweigh any monetary penalty that may be imposed by a court of law on an accused for contravening any provision stipulated in section 104(1) of the Act. The question of whether it is legally possible for the Commissioner to delegate his powers to lower ranking SARS staff or even a so-called “penalties committee” in penalty situations, is questionable in the light of the common law maxim “delegatus non delegare potest”, which
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presumes that judicial and quasi-judicial penalties may not be delegated. See Da Costa v CIR (supra) at 93 where Van Heerden JA found it unnecessary for the Appellate Division to decide on the point since the taxpayer did not contend that the Commissioner had acted improperly when delegating his authority to a “penalties committee”. However, this question is considered to be beyond the scope of this study and merits further detailed research to draw a proper conclusion in this regard.

In view of the questionable nature of whether powers may be delegated in penalty situations, it is surprising that the Katz Commission Report failed to consider and thus comment on the constitutionality of the deeming provision created in terms of section 76(5) of the Act.

As discussed in paragraph 7.3 above, section 76(5) read together with section 76(1)(b), is inextricably linked to the section 82 reverse onus provision of the Act. Where the deeming provision of section 76(5) is applicable, the revenue authorities are immediately empowered to impose additional tax in terms of section 76(1)(b) of the Act. If the normal tax that may be imposed on undisclosed taxable income is R40 000, then the maximum theoretical additional tax that may be imposed is R80 000. The 200% additional tax imposed may only be reduced or remitted if “extenuating circumstances” are found to be present (section 76(2)(a) of the Act).

It is interesting to note that the Adjustment of Fines Act 101 of 1991 provides that on conviction of a criminal offence, a person may be sentenced to undergo a prescribed maximum period of imprisonment or, in the alternative, to pay a fine. Where the maximum amount of the fine is not prescribed, the maximum fine which may be imposed must be determined at a ratio as set out in that Act, by taking into account the maximum period of imprisonment prescribed by such law. Currently, the maximum amount of the fine is determined at a ratio equivalent to R60 000 where the maximum period of imprisonment prescribed is three years and R300 000 where the period of imprisonment prescribed is 15 years. Hence one year of imprisonment equates to a R20 000 fine. In the example provided above, additional tax of R80 000 imposed in terms of section 76(1)(b) of the Act would equate to four years of imprisonment.

It is submitted that it is undesirable, unreasonable and unjustifiable that the deeming provision created in terms of section 76(5) of the Act can spawn a situation in which subordinate SARS staff, usually without a legal background, can impose a relatively large administrative “penalty”. There is no onus on SARS staff to offer proof that a section 76(1)(b) of the Act offence has been committed.

For all intents and purposes, the additional tax imposed is a penalty. Schreiner JA supported this view in CIR v McNeil (22 SATC 374 at 382). He refers to additional tax as “in essence a penalty” following the judgement in Israelshon v CIR (18 SATC 247), which also held that additional tax is a “penalty”. Most cases subsequently dealing with section 76 refer to additional tax as a “penalty” or use the words interchangeably. These cases support the conclusion that section 76(1) is quasi-judicial and penal in nature.

It is further submitted that the fact that SARS staff, other than the Commissioner himself, may impose an administrative penalty of such large magnitude without being judicially qualified, based on the deeming provision of section 76(5) of the Act, prima facie, violates the right to just administrative action that is lawful, reasonable and procedurally fair (section 33 of the Constitution). However, unlike the section 104(2) of the Act presumption, it does not offend against the right of an accused to a fair trial and the
presumption of innocence (section 35(3)(h) of the Constitution). The Special Court in ITC 1825 (70 SATC 68) held that a taxpayer who is subject to administrative penalties imposed in terms of section 76(1) of the Act is not an “accused” person – hence there can be no violation of the right to a fair trial. The court reasoned on the basis that the taxpayer is not a person facing criminal prosecution, nor is he called upon to answer a criminal charge when section 76(1) of the Act is applied. Furthermore, the proceedings could not culminate in a conviction with a concomitant criminal record; nor was there any likelihood of the taxpayer being sentenced to a term of imprisonment or of being deprived of his liberty.

Should section 76(5) of the Act be challenged constitutionally on the basis that the taxpayer’s right to just administrative action has been violated (section 33 of the Constitution), assuming that section 76(5) is found to be prima facie unconstitutional, the onus would then fall on the revenue authorities to justify its application in terms of the limitation of rights clause in section 36 of the Constitution. However, such justification would probably have to rely on arguments similar to those raised in S v Mbatha: S v Prinsloo (supra), namely that there is proof of a high level of tax evasion in South Africa and that the deeming provision assists and is necessary for combating the rising levels of tax evasion. Furthermore, without the proper collection of taxes, the government would not be able to further its aims of socially uplifting the citizens of the country and there would be a negative effect on the quality of life of South Africans.

As indicated in S v Mbatha: S v Prinsloo (supra), these arguments were thrown out because there was no inherent mechanism in the provision to protect the innocent. Although additional tax imposed in terms of section 76(1)(b) of the Act is imposed administratively, the very fact that it is imposed presupposes a notion of guilt on the taxpayer’s part. Is it reasonable and justifiable that an administratively imposed penalty can potentially far exceed any penalty imposed by the judiciary for similar offences stipulated in section 104(1) of the Act? In addition, it is submitted that it would be virtually impossible for the revenue authorities to demonstrate that its objective of collecting taxes could not reasonably have been achieved by other means less damaging to constitutionally entrenched rights. The facts of ITC 1778 (supra) brilliantly illustrate this point. What would have happened had the taxpayer not been able to secure the corroborative evidence of his witness who resided overseas?

It is time for the taxpayer to challenge the constitutionality of the deeming provision of section 76(5) when appealing against additional tax imposed by the Commissioner in terms of section 76(1)(b) of the Act. Although the Special Court is obliged in such an appeal to use its “own, original discretion” in weighing up the factors which should be taken into account when imposing any additional tax in terms of section 76(1) of the Act (Da Costa v CIR (supra)), the judiciary is obliged to apply the section 76(5) deeming provision even if it leads to a potential miscarriage of justice. Unfortunately, to date, the judiciary has not of its own accord seen fit to question the constitutionality of section 76(5) of the Act. It is submitted that the judiciary even tends to compound the problem by linking section 76(5) of the Act to the general onus provision of section 82 thereof.

It was not specifically mentioned in ITC 1758 (supra), but perhaps the court was subconsciously aware of the unfair burden a taxpayer bears in resisting additional tax imposed by the Commissioner, in coming to the conclusion that an automatic imposition of a 200% penalty was not generally imposed in practice. Relying on the authority of Da Costa v CIR (supra), the court held that even the automatic imposition of a 100% penalty
by the revenue authorities was not in accordance with the requirements of section 76(1).
There were extenuating circumstances present in the case and, in addition, there was even a
reasonable doubt as to whether there was a clear intention on the taxpayer’s part to evade
tax. The court remitted the 100% penalty initially imposed by the Commissioner to 50%.

This clearly illustrates the point of Langa J in S v Mbatha: S v Prinsloo (supra) that in
penalty situations (and as discussed earlier, the judiciary regard the imposition of additional
tax as “in essence” a penalty), a deeming provision, even if there is an appeal to a court of
law, does not provide an inherent mechanism to protect the innocent or even the potentially
innocent. The imposition of administrative penalties should be such that even where a
taxpayer has committed an offence, that his or her constitutional rights are protected and
that he or she is treated fairly. It is submitted that where an ostensible presumption of
dishonesty is embodied in legislation, it heightens the conflict between the revenue
authorities and the taxpayer to unacceptable limits. It also offends the basic purpose and
spirit of the Constitution and the violation of his or her rights cannot be justified in terms of
the section 36 limitation of rights clause in the Constitution.

8.3 Constitutionality of the general reverse onus provision imposed
in terms of section 82 of the Act

The Katz Commission held that there are clear grounds for justifying the general reverse
onus provision of section 82 of the Act in terms of the limitation of rights clause of section
33 of the Interim Constitution (now section 36 of the Constitution). The reasons advanced
for this opinion (at 77-78) were that they would necessitate a drastic departure from current
procedure and would also impose a heavy burden on Inland Revenue in the preparation and
litigation of tax disputes. Accordingly, the Commission regarded the section 82 reverse
onus provision as constitutional and did not recommend any amendment to it.

It is submitted that the two arguments advanced by the Commission regarding the
constitutionality of section 82 of the Act are somewhat thin. In Metcash Trading Ltd v
C:SARS (63 SATC 13), in finding that the provision dealing with the pay-now-argue-later
principle (section 36 of the Value-Added Tax Act 89 of 1991) was constitutional, the court
mentioned the arguments put forward by the revenue authorities to justify the application of
the section 36 limitation of rights clause. The court argued that the tax morality of
taxpayers is low and vendors take advantage of the fact that the revenue authorities lack
properly trained staff and even have difficulty employing trained accountants. Fortunately,
it appears as if the court did not take these arguments into account in finding that the
section 36 limitation of rights clause was reasonable and justifiable in an open and
democratic society. It found that the pay-now-argue-later principle was constitutional on
other grounds.

According to Swart (1996:455-456), a lack of trained revenue staff is not sufficient
justification under any circumstances to curtail taxpayers’ fundamental rights. In a similar
vein, it can be argued that the mere fact that a “heavy burden” would be placed upon the
revenue authorities in the preparation and litigation of tax disputes is no proper justification
for the general burden of proof to be on the taxpayer.

A more fruitful line of reasoning is that it is generally accepted that the principle
underlying the general reverse onus is based on the notion that the circumstances and facts
of the issue at hand are peculiarly within the taxpayer’s knowledge and not within the
revenue authorities’ knowledge (N Ltd v COT (24 SATC 657 at 658)). This may have been true in the past, but the sophisticated computer and analytical tools now at the disposal of the revenue authorities and the type of electronic information which can be demanded from third parties by them, could potentially result in the revenue authorities having even a greater knowledge of a taxpayer’s affairs than the taxpayer himself or herself has.

Perhaps the most compelling reason for the constitutionality and thus the continued application of the section 82 reverse onus provision, is that several Western countries, including Canada, whose Charter is the basic framework on which the South Africa’s Constitution is based, use the reverse onus for general assessing issues arising between the taxpayer and the revenue authorities (Johnson v MNR (48 DTC 1182 (SCC)) without such reverse onus being regarded as unconstitutional.

It is submitted that, in the appropriate circumstances, a taxpayer may well attempt to challenge the constitutionality of the section 82 reverse onus provision sometime in the future. There are many instances in practice where the application of the general reverse onus provision could lead to a taxpayer’s economic ruin merely as a result of him or her being unable to discharge the burden of proof because acceptable evidence is not available owing to the circumstances in which a taxpayer finds himself or herself. ITC 1758 (supra), which is discussed in detail above, is an excellent example of a situation in which there could potentially be a miscarriage of justice. The question that can be posed is: How the economic ruin of a potentially innocent South African taxpayer can be justified in an open and democratic society?

9 Conclusion and recommendations

There is a well-known saying that the only thing easier to skin than a banana is the taxpayer (anonymous). Statutorily, a taxpayer is placed in an inferior position in relation to the revenue authorities when a reverse onus provision, presumption or even a deeming section of the Act is applied. This is especially true in penalty and additional tax situations.

It is clear that the State has a problem with the constitutionality of section 104(2) of the Act. It is submitted that when the reverse onus presumption is applied to section 104(1)(a) and (c) of the Act, it is regarded as judicial and penal in nature and thus violates the right of an accused to a fair trial generally (section 35(3) of the Constitution) and the specific right to be presumed innocent (section 35(3)(h) of the Constitution), based on the decision of the Constitutional Court in S v Mbatha: S v Prinsloo (supra). There seems little prospect of the State being able to successfully argue that the section 104(2) presumption is justifiable and reasonable in an open and democratic society as demanded by the section 36 limitation of rights clause in the Constitution. In spite of the fact that the Katz Commission Report concluded some 15 years ago that the reverse onus as provided for in terms of section 104(2) is unconstitutional, taxpayers are still awaiting an appropriate amendment.

The application of the deeming provision of section 76(5) of the Act means that the Commissioner may theoretically impose additional tax in terms of section 76(1)(b) of the Act on a taxpayer merely because he or she was unable, in the first instance, to discharge the general onus of proof as required by section 82 of the Act (ITC 1725 (supra), ITC 1758 (supra) and ITC 1489 (supra)). Section 76(1)(b) of the Act is quasi-judicial in nature and it is therefore submitted that the imposition of additional tax must be subject to the same standards of scrutiny as any other judicially imposed sanction. Only in this way will the
right to just administrative action be regarded as lawful, reasonable and procedurally fair. It is further submitted that the deeming provision of section 76(5) of the Act, linked as it is to section 82 of the Act by the judiciary, is also not justifiable or reasonable in an open and democratic society as required by the section 36 limitation of rights clause in the Constitution, especially if the following questions are posed:

- Is there any inherent mechanism in the provision, other than an appeal to the Special Court against the Commissioner’s decision to impose additional tax, to protect a potentially “innocent” taxpayer? Even the Special Court is obliged to apply the deeming provision (unless it should declare it unconstitutional) that limits the protection which such court can offer to a potentially “innocent” taxpayer.

- Is it reasonable and justifiable that a subordinate SARS official lacking judicial training can impose an administrative penalty where such penalty imposed theoretically can far exceed any penalty imposed by a properly trained judicial officer for a similar offence?

- Would the revenue authorities be able to demonstrate that its objective in collecting taxes could not reasonably have been achieved by other means less Draconian than imposing an administrative penalty in circumstances where the taxpayer may have committed no offence other than not being able to satisfy the general reverse onus placed upon him or her in terms of section 82 of the Act but still being able to give a satisfactory explanation for the increase, for example, in his or her net worth?

Taking into account all the concerns raised above, it is submitted that an appropriate amendment to section 76(5) of the Act would not have much practical impact on the administration of the Act. The Commissioner would still be able to impose additional tax in cases where it is warranted with a lawful, reasonable and procedurally fair process being followed. However, it could have a major impact in those cases where the taxpayer has given a reasonable and satisfactory answer. The explanation given by the taxpayer may not be sufficient to discharge the reverse onus of proof for the purposes of section 82 of the Act, but may be sufficient to rebut the Commissioner’s argument (if the onus is upon the Commissioner instead of the taxpayer) that additional tax should be imposed merely because the taxpayer was unable to discharge the onus for the purposes of section 82 read together with section 76(5) of the Act. The decision in *ITC 1758* (*supra*) regarding the Angolan refugee, who fled to South Africa during the Angolan conflict, is apposite. Although the additional tax imposed was reduced to 50% (from the 100% imposed originally by the revenue authorities) by the Special Court, it is submitted that no additional tax would have been imposed but for the deeming provision of section 76(5) of the Act, read together with section 82 of the Act. It is a pity that the legal team representing the taxpayer in that case did not challenge and pursue the constitutionality of section 76(5) of the Act.

Regulations were recently issued (December 2008) under section 75B of the Act (Government Notice 1404) prescribing the administrative penalty that should be imposed for certain noncompliance taxation offences committed as described in paragraph 4 of those regulations. The specified noncompliance offences in terms of the regulations, however, exclude alleged omissions or incorrect statements in a person’s return whether they were innocently or even fraudulently omitted or made. Section 76(1) of the Act (the so-called “triple tax provision”) still applies to these types of offences. Although it is considered to be beyond the scope of this article, it is submitted that the South African legislators should put a brake on any possible exercise of arbitrary power by SARS staff in these
circumstances, and even limit the administrative penalty that may be imposed in terms of section 76(1) of the Act to a substantially lower amount than the 200% penalty, which may theoretically be imposed. Perhaps a good starting point would be in the region of 20%. Further research in this area is required to determine an acceptable international level for administratively imposed penalties in such circumstances. In order to punish the errant taxpayer in cases which warrant further punishment (greater than 20%), SARS should be forced to take the taxdefaulters to court and charge them with common law or statutory tax fraud, with the onus being on the State instead of the taxpayer to prove beyond a reasonable doubt that the taxpayer has committed an offence with the necessary intention.

The general reverse onus provision of section 82 of the Act does not offend against the right of an accused to a fair trial (section 35(3) of the Constitution). However, it could offend, prima facie, against the right to just administrative action (section 33 of the Constitution). Nevertheless, it is submitted that the general reverse onus is constitutional in that it is reasonable and justifiable in an open and democratic society for the reasons outlined in paragraph 8.3 above.

This submission must be balanced against Judge Langa’s comment in S v Mabatha: S v Prinsloo (supra) regarding the fact that the State did not demonstrate that the objective of facilitating the conviction of offenders could not reasonably be achieved by other means less damaging to constitutionally entrenched rights, applies equally to the general reverse onus as provided for in terms of section 82 of the Act. The use of sophisticated computer programs, statistical analysis, information demanded from a third party in terms of ancillary legislation and the like, has levelled the playing field. There will come a time when there is no longer any theoretical need, which may have been present in the past, for any reverse onus provisions or presumptions to be retained in the Act.

Bibliography

Acts and regulations and notices
Adjustment of Fines Act 101 of 1991
Arms and Ammunition Act 75 of 1969
Constitution of the Republic of South Africa Act 200 of 1993
Criminal Procedure Act 51 of 1977
Income Tax Act 28 of 1914
Income Tax Act 58 of 1962
Value-Added Tax Act 89 of 1991

Books, articles and other publications


**Case law**

*Bloch v SIR*, 42 SATC 7, 1980 (2) SA 401(C)

*Carlson Investments Share Block (Pty) Ltd v C:SARS*, 63 SATC 295, 2002 (5) BCLR 521 (W)

*CIR v Butcher Bros (Pty) Ltd*, 13 SATC 21, 1945 AD 301

*CIR v Goodrick*, 12 SATC 279, 1942 OPD 1

*CIR v Gribnitz*, 50 SATC 127, 1988 (TPD)

*CIR v McNeil*, 22 SATC 374, 1959 (1) SA 481(A)

*Da Costa v CIR*, 47 SATC 87, 1985 (3) SA 768(A)

*Harksen v Lane NO and Others*, 1997(11) BCLR 1489 (CC)

*Israelshon v CIR*, 18 SATC 247, 1952 (3) SA 529(A)

*ITC 43*, 2 SATC 115

*ITC 91*, 3 SATC 235

*ITC 580*, 14 SATC 103

*ITC 743*, 18 SATC 294

*ITC 980*, 25 SATC 48

*ITC 1489*, 53 SATC 99

*ITC 1576*, 56 SATC 1

*ITC 1682*, 62 SATC 380

*ITC 1707*, 63 SATC 343

*ITC 1725*, 64 SATC 223

*ITC 1758*, 65 SATC 396
ITC 1778, 66 SATC 334
ITC 1825, 70 SATC 68
Johnson v MNR, 48 DTC 1182 (SCC)
KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms) Bpk, 58 SATC 273
Malan v KBI, 43 SATC 1, 1981 (2) SA 91(C)
Metcash Trading Ltd v C:SARS, 63 SATC 13, 2001 (1) BCLR 1 (CC)
Mpande Foodliner CC v C:SARS and Others, 63 SATC 46, 2000 (4) SA 1048 (T)
N Ltd v COT, 24 SATC 657
National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, 2000(1) BCLR 39(CC)
R v Oakes, 1986 26 DLR (4th) 200(SCC)
Reliance Land & Investment BC (Pty) Ltd v CIR, 14 SATC 47, 1946 WLD 171
S v Mbatha: S v Prinsloo, 1996 (3) BCLR 293 (CC)
S v Zuma and Others, 1995 (4) BCLR 401 (CC)
Traco Marketing (Pty) Ltd v Minister of Finance and Others, 58 SATC 195, [1996] 2 All SA 467 (SE)
Van der Walt v S, 52 SATC 186