The purposive approach to the interpretation of fiscal legislation – the winds of change

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Abstract
This study examines the way in which our judiciary approach the interpretation of fiscal legislation. It traces the roots of the historical approach (the strict and literal approach), its shortcomings and the modifications to such an approach when it leads to an absurdity. It then analyses whether the advent of the Constitution (Constitution of the Republic of South Africa Act 108 of 1996) has been a catalyst for a change from the strict and literal approach. The conclusion reached is that the Constitution has been a catalyst for a change in approach – to a purposive approach. One of the results of the change in approach means that the taxpayer now has a realistic opportunity to question and even have unjust and unfair interpretation decisions of the past reversed in the appropriate circumstances.

Key words
Constitution
Interpretation of legislation/statutes
Purposive approach
Taxpayers’ rights

1 Introduction
According to legend, Abraham Lincoln was once asked: “How many legs does a dog have if you call a tail a leg?” The natural answer, of course, is “five”, to which Abe allegedly replied: “No, the answer is four, because no matter how many times you call a tail a leg it remains a tail” (Feinstein 1998: 1).

Our judiciary faces a similar quandary on a daily basis when interpreting legislation. Interpretation, 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.

Many questions arise about the approach that the judiciary used or should use to interpret fiscal legislation. Some of the important questions that arise in this context are:

- Is the approach to the interpretation of fiscal legislation the same as legislation in general?
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- Is a strict and literal interpretation or a more flexible approach, possibly the purposive approach, followed?
- Has the Constitution (Constitution of the Republic of South Africa Act 108 of 1996, hereinafter referred to as the “Constitution”), which is more than a decade old, influenced the way in which legislation (including fiscal legislation), is now being interpreted?
- If so, what is the general impact of the change in direction?

2 Objective and scope of study

The objective of this study is an attempt to answer the questions posed above. This necessitates a basic analysis of case law relating to the interpretation of fiscal legislation from a historical perspective and then examining the impact that the Constitution has had on or should have on such interpretation.

It is considered to be beyond the scope of this study to discuss, in an exhaustive or detailed manner, the intricacies and difficulties in interpreting fiscal legislation. For example, there will be no discussion on the common law presumptions and aids to the interpretation of legislation, other than a brief discussion of the contra fiscum rule of interpretation, unless they impact on the objective of this study. Neither will the Interpretation of Statutes Act 3 of 1957 be discussed since it does not specify the general approach (the strict as opposed to the purposive approach) which should be followed when interpreting legislation.

The ambit of the rights of both the revenue authorities and the taxpayers arising from the judicial interpretation of the Bill of Rights clauses in the Constitution read together with the relevant fiscal legislation, are also not dealt with in detail. Some of the rights thus arising are recorded as an area for further research.

3 Research method

The research method adopted consists of a literature review of the relevant provisions of the Constitution, the Income Tax Act 58 of 1962 and the common law together with court decisions and published articles and textbooks relating directly to the objective.

A comprehensive search was conducted on the Butterworths Electronic Library (LexisNexis Butterworths 2008) and the appropriate cases relating to the object of this study were selected.

4 Historical basis of interpreting tax legislation - the strict and literal rule

4.1 Preview

In the English case of Cape Brandy Syndicate v IRC, (1921(1) KB 64), Rowlatt J indicated (at page 71) 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.”
The Appellate Division in *CIR v Simpson* (16 SATC 268) and *CIR v Frankel*, (16 SATC 251) quoted this *dictum* with approval and for some time after, the strict and literal rule was used as the guiding principle for the interpretation of fiscal legislation by the judiciary.

The strict interpretation approach tended, in general, to favour the *fiscus* because equity and fairness played no part in such an approach. However, in isolated cases, such an interpretation could lead to a favourable result for the taxpayer. For example, in *CIR v Lunnon* (1 SATC 7), admittedly an old decision, the court adopted, to the advantage of the taxpayer, what Professor Williams (1998:285) describes as a blinkered view of the nature of income. He submits that the court failed to apply the economic principle or concept that any reward for services rendered is inherently revenue in nature, irrespective of whether there is a legal obligation to pay. In that case, the taxpayer resigned his directorship of a company when the company relocated from Pretoria to Johannesburg. All fees due to him were paid and he had no further claim on the company. The shareholders sometime later resolved that the company pay the former director a gratuity in recognition of his valuable services on the Board in previous years when the directors’ fees were not commensurate with the work involved and as a *solatium* for the loss of his seat on the Board on transference of the head office to Johannesburg. In the provincial division, the court held that the company was under no legal obligation to make the payment. It was a voluntary, non-recurring payment, not in the nature of a salary, stipend or wage. It was not paid in lieu of arrear salary or fees, as the director’s fees due for the whole period of office had been paid. The taxpayer had no claim on the company except, perhaps, one of gratitude. The court was of the opinion that where a director of a company, after his retirement, received a monetary gift for past services, as a tribute for such services, the company not being under any legal or even moral obligation to make it, such a gift was a receipt or accrual of a capital nature and not taxable as income. On appeal to the Appellate Division, it was confirmed that the amount received was a donation and as such a benefit of a capital nature and therefore not taxable as income.

It is submitted that Williams’s view is correct. The court failed to recognise the link between the payment made and the services rendered. As a result of the taxpayer’s victory, para (c) of the definition of “gross income” was amended to include “any voluntary award, received or accrued in services rendered or to be rendered”.

Such victories by the taxpayer, however, were more likely to arise when the matter before the court related to tax planning and the application of anti-tax avoidance legislation. The principle that the taxpayer is entitled to arrange his affairs in a manner whereby he would pay the least amount of tax, stemmed from the notion of strict interpretation (*Partington v The Attorney General*, 21 CT 370).

These original decisions tended to create the impression that fiscal legislation should be interpreted differently to other legislation – strictly as opposed to attempting to establish the true intention or purpose of the legislature.

It took some 20 years after the *Simpson* and *Frankel* cases before the Appellate Division in the form of Botha JA in *Glen Anil Development Corporation Ltd v SIR* (37 SATC 319), rejected the notion that fiscal legislation should be interpreted differently to other legislation. He stated (at page 334) that the decisive and overriding principle to be used when interpreting fiscal legislation is no different from that applicable in the interpretation of all legislation. In all cases of interpretation, the true intention of the legislature is of paramount importance.
Coetzee J in *SIR v Kirsch*, (40 SATC 95) reiterated this approach when he remarked that there is no particular mystique about tax law. In order to determine the intention of the legislature, one must look fairly at the language used.

It is submitted that the strict and literal rule of interpretation was incorrectly perceived by the judiciary as a mechanism to protect a taxpayer from poorly drafted, unclear, uncertain and arbitrary provisions (*Partington (supra)*). However, to illustrate the strict and literal rule of interpretation giving rise to patently unfair results, the case of *Ochberg v CIR* (5 SATC 93), is apposite. The decision by the then highest court in the land, the Appellate Division, has perplexed and confounded tax commentators, academics and students of tax law ever since.

The decision is an interesting exercise in judicial logic, leading, it is submitted, to an illogical and unfair result. The taxpayer was considered by the court, for the purposes of the judgement, to be the sole beneficial shareholder of a certain company. He rendered services to the company in consideration for which the company allocated him additional shares. After the allocation of the additional shares, he remained the company’s sole shareholder. Looking at the transaction from a purely objective, accounting, economic and business point of view, the additional shares that he received had a value, but the total value of his shares, including the additional shares allocated to him, remained the same. That is, the value of his original shares had decreased correspondingly with the increase in the value of the additional shares issued to him. His economic wealth had not increased at all. He argued that he had received no financial benefit for the services for which he had ostensibly been paid in the form of shares.

The majority of the court, however, was unmoved by the taxpayer’s argument and held that the value of the shares received must be determined objectively and be taxed accordingly. De Villiers CJ, with whom the majority of the court agreed, argued that the shares were issued for services rendered. It should not make any difference if the shares were issued to an outsider or to a person who was the sole shareholder. He concluded his argument as follows (at page 99):

“*How could what is after all a purely fortuitous circumstance affect the legal position so as to convert what is received by an outsider as income into capital when received by him.*”

Stratford JA and Wessels JA, in their separate minority judgements, succinctly explained the illogical result arising from applying the logic used by the Chief Justice. Stratford JA was of the opinion that the shares issued to the taxpayer brought no added wealth to him. To tax him would be manifestly unjust. He concluded (at page 118):

“*I can find nothing in the Income Tax Act which compels us to designate as income something which every principle of reason and commonsense tells us is nothing of the kind.*”

In a similar vein, but perhaps more powerfully, Wessels JA argued that the principle underlying the Income Tax Act is that a taxpayer pays his tax not out of his capital but out of his incomings. If it was assumed that Ochberg possessed nothing besides his interest in the company, then if he was liable to pay income tax on the face value of the shares issued, a transaction that did not increase his estate, he would be obliged to realise his capital in order to pay his income tax. He concluded (at page 113): “This seems to me contrary to the whole tenor of the Act.”

In effect, both minority judges used a subjective test for valuing something received in a form other than cash, namely, what the value was to that individual taxpayer in those
circumstances. The aspect of the receipt being capital in nature was not properly canvassed by the majority decision but referred to by the minority judgements.

The saving grace for the majority decision (and the taxpayer) was that the objective valuation was determined as the nominal value of the shares rather than 50 percent of the company’s total value. The manner in which this so-called “objective valuation” was done, namely, using the nominal value of the shares rather than 50 percent of the company’s value, leads one to conclude that, far from being an objective valuation, the actual valuation was somewhat closer to a subjective valuation. This case will be referred to again in section 5.3 below, when dealing with proposed guidelines on applying the purposive approach to interpreting legislation.

4.2 How the courts overcame the difficulty of adhering to the strict and literal rule when the application of such rule led to absurdity

The strict rule of interpretation requires that the ordinary grammatical meaning of words must be applied (Cape Brandy Syndicate v IRC [1921] 1 KB 64; R Koster & Son (Pty) Ltd & Another, 47 SATC 24). Schreiner JA in Savage v CIR (18 SATC 1 at page 9), pointed out, however, that although the principle is clear, the problem is one of application. He endorsed the words of De Villiers JA in Shaler v The Master and Another (1936 AD 136 at page 143), where it was stated:

“Moreover, as has often been remarked by eminent judges, it is dangerous to speculate as to the intention of the legislature and what seems an absurdity to one man does not seem absurd to another.”

Applying the ordinary grammatical and literal meaning to words is referred to also as the primary rule of interpretation. However, the primary rule may be departed from if the ordinary grammatical language gives rise to a glaring absurdity. In such a case, the court is justified in departing from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true “intention of the legislature” (Venter v R, 1907 TS 910; M v COT, 21 SATC 16; Farrar’s Estate v CIR, 1926 TPD 501).

Looking beyond the ordinary, grammatical meaning of a word to establish the “intention of the legislature” in interpreting legislation (but only when the wording creates an absurdity), overlaps, to a limited degree, with the purposive approach to the interpretation of fiscal legislation. In brief, the purposive approach seeks to ascertain the intention of Parliament by reading an Act as a whole and placing in context the ends sought to be achieved (the objective) and the relationship between the individual provisions of the Act (the scheme). If the words used are clear and unambiguous and in harmony with the intention of Parliament, objective and scheme of the Act, then the ordinary and grammatical meaning of the words is used. If the words used are obscure or ambiguous, then the meaning that best accords with the intention of Parliament, the object and scheme of the Act but one that the words are reasonably capable of bearing, is to be given to them (Miers & Page 1990:177).

Putting aside the purposive approach for the moment and returning to the primary rule of interpretation, the judiciary have indicated that when using such a rule of interpretation, the ordinary, grammatical wording is decisive about the legislature’s intention – there is no necessity to look any further. However, owing to the very nature of language, and more specifically, the translation of legislation from Afrikaans to English or vice versa, the
meanings of words in legislation are often not entirely clear and the legislature’s intention is not manifest. For example, in *Geldenhuys v CIR* (14 SATC 419 at page 430), the court had to decide on the meaning of the words “received by” as used in the definition of “gross income” of section 1 of the Income Tax Act. Fortunately, the meaning attributed by the court to the words “received by” bore little relationship to its ordinary grammatical meaning. If the court had not restricted its meaning to “received by the taxpayer on his own behalf and for his own benefit”, it would have led to absurd results – for example, loans would have been taxable and amounts received by an agent on a principal’s behalf would have been taxable in the hands of the agent. Unlike the judges in the *Ochberg* case, the judges in the *Geldenhuys* case did not fall for the fundamentally flawed arguments put forward by the revenue authorities to tax a receipt that was not in the nature of income.

The recently decided case of *Welch’s Estate v C:SARS* (66 SATC 303) is also instructive in this regard. The word “donation” was thought to be comprehensively defined in section 55 of the Income Tax Act. The revenue authorities were of the opinion that a payment made in terms of a court-sanctioned divorce order to a trust for the maintenance of an ex-wife and a minor child, fell within the ambit of the definition. However, the Appellate Division thought otherwise and narrowed the meaning of “donation” as defined, by including the essential elements of “pure liberality” or “disinterested benevolence” as demanded by the common law, in its interpretation. In so doing, the court found that payments made in terms of a divorce order could never be regarded as a donation. This is a classical purposive approach to the interpretation of statutes.

4.3 Establishing the “intention of the legislature”

When there has been uncertainty, ambiguity or absurdity in the language used in legislation, the courts have tended to seek the “intention of the legislature” and the primary rule of interpretation has been departed from. The objective of the “intention of the legislature” rule is to canvass the legislature’s policy in enacting the provision and interpreting it in a manner so as not to defeat the policy (*Glen Anil Development Corporation Ltd v SIR* (37 SATC 319)). This may mean, in appropriate circumstances, giving an expansive meaning, and in other cases, a restrictive meaning to a word or phrase, depending on the policy of the legislature in enacting the legislation. In *CIR v Kuttel* (54 SATC 298), for example, a restrictive meaning was given to the words “ordinary resident” by the Appellate Division on the basis that the policy of the legislature was to extend the interest exemption concessions to those persons not ordinarily resident in the Republic so as to encourage them to invest in the country. The court held that there was no reason to extend the meaning of “ordinary resident” so as to defeat the policy which would have been the case should an expansive meaning have been applied.

However, an extended meaning was given to the phrase “in the process of manufacture” in *SIR v Safranmark (Pty) Ltd* (43 SATC 235). In that case, the court had to determine whether the preparation and cooking of “Kentucky Fried Chicken” pieces was a “process of manufacture” for the purposes of the enhanced capital allowances for plant and machinery used in such process as provided for in terms of section 12 (now section 12C) of the Income Tax Act. The majority of the court concluded that the preparation and cooking of raw chicken pieces was a “process of manufacture”. They used an extensive interpretation of the phrase “process of manufacture” and second-guessed the intention of the legislature as being to provide tax incentives on capital plant and equipment purchased in any case which vaguely resembled a manufacturing process.
Corbett JA, in his minority judgement, used a “strict” or formalistic approach to his interpretation of the phrase “in the process of manufacture”. He failed to take cognisance of the legislature’s supposed intention and looked merely at the wording in the section. He apparently found it difficult to reconcile his mind to the fact that the conversion of a piece of raw chicken into a piece of cooked chicken, constituted a “process of manufacture”.

The point of this short discussion of the Kuttel and Safranmark cases is to illustrate the subtle shift over a long period by the judiciary from the strict rule of interpretation (as applied in the Ochberg (supra) and Lunnon (supra) cases) to attempting to establish the “intention of the legislature”, even in cases where the words appeared clear and unambiguous. The Appellate Division in New Union Goldfields Limited v CIR (17 SATC 1) in 1950 had already held that when the meaning of a word was not clear, the court was entitled, in seeking to ascertain the intention of the legislature, to consider the nature and apparent purpose of the tax. Although they did not directly refer to this approach as a purposive approach to the interpretation of legislation, such an approach is akin to the purposive approach.

5 The Constitution – a catalyst for change

5.1 The difference between the Westminster system of government and the new constitutional dispensation - the supremacy question

The State of the Union Act 69 of 1934, promulgated by the South African Union Parliament in 1934, confirmed the independent status of the Union. In view of South Africa’s historical connections with Britain for more than a century, it was not surprising that the Union adopted the Westminster system of parliamentary supremacy or sovereignty. The Westminster system and all its institutions remained intact until the Interim Constitution (Republic of South Africa Constitution Act 200 of 1993, hereinafter referred to as the “Interim Constitution”) was promulgated on 27 April 1994.

Parliamentary supremacy is generally taken to mean that neither the courts nor any other body have the power to review and strike down oppressive or ultra vires legislation enacted by Parliament. What Parliament enacted was the law and it did not matter that such legislation violated or infringed a person’s common law rights or any other rights.

Section 2 of the Constitution which replaced a similarly worded section of the Interim Constitution, provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

Section 8(1) of the Constitution further provides that the “Bill of Rights binds the legislature, the executive, the judiciary and all organs of state”, whilst section 7(2) states that the “state must respect, protect, promote and fulfil the rights in the Bill of Rights”. The courts are formally vested with the power to test the constitutional validity of any government or parliamentary action, including any legislation passed by that body (section 165). However, in terms of section 167(5), only the Constitutional Court may make a final decision on whether an Act of Parliament is constitutional. It must confirm any order of
invalidity made by any other court before that order has validity. The concept of parliamentary sovereignty has given way to constitutional supremacy.

The Bill of Rights imposes a positive obligation or duty on the state to protect, promote and fulfil the rights in the Bill of Rights – it is not merely a negative mechanism that can be used to protect its subjects against the abuse of power by the government and its organs of state (Devenish 1999:9). The Constitutional Court held in its judgement when certifying the Constitution, that in a constitutional state, “no-one exercises power or authority outside the Constitution” (In re Certification of the Constitution of the RSA, 1996 10 BCLR 1253 (CC) par 194). The watchdog and protector of these rights is the judiciary.

5.2 Application of constitutional principles to the interpretation of fiscal legislation

The role of taxation has changed over the centuries – from the mere collection of taxes to support a sovereign ruler and his or her courtiers in earlier times to the collection of taxes for achieving social, economic and other objectives in a modern democracy. Fiscal legislation, in modern times, has always had a purpose and this is particularly so in South Africa at present, where there is a need to uplift the previously oppressed and disadvantaged population. It therefore makes sense when interpreting legislation, to establish the purpose behind the enactment of the legislation. With the Constitution in place, strict interpretation of fiscal legislation has had to give way to a more equitable approach in line with the principles of the Constitution (Silke 1995:136).

Doubt has been cast on whether the strict and literal interpretation rule was ever part of the South African common law even before the adoption of the Constitution. Devenish (1991:375) states the following:

“The eminent and erudite Roman-Dutch scholars De Groot and Johannes Voet, who advocated a purposive methodology against the background of a natural law jurisprudential system, in effect used a teleological methodology of interpretation.”

Since the advent of the Constitution, the arguments against the continued application of the strict and literal rule have gained momentum. Many commentators, including the judiciary, have suggested that a purposive approach should be followed which will promote the democratic values enshrined in the new Constitution (Davis 1994:103; Du Plessis & De Ville 1993:199 & 356). In fact, in Du Plessis and Others v De Klerk and Another (1996(5) BCLR 658(CC) at page 722), it was said that constitutional interpretation is concerned with the recognition and application of constitutional issues and not with the literal meaning of legislation. Prior to that judgement, Froneman J in Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others (1994(3) BCLR 80 (SE) at page 87), remarked that the concept of the “intention of the legislature” does not apply in a system of judicial review based on the supremacy of the Constitution because the Constitution and not Parliament, is sovereign. As such, constitutional interpretation is not concerned with a search to find the literal meaning of legislation but with the recognition and application of constitutional values.

Section 39(1) of the Constitution gives specific instructions on how to interpret the Bill of Rights. Section 39(2) deals with the interpretation of any other legislation. Both the interpretation of the Bill of Rights specifically and other sections of the Constitution in general (including fiscal legislation by implication) must promote the values that underlie
an open and democratic society based on human dignity, equality and freedom. In addition, the courts are given the power in terms of section 39(2) of the Constitution to develop the common and customary law to promote the spirit, purport and objectives of the Bill of Rights. No legislation, common law or customary law may, however, be recognised to the extent that it is inconsistent with the provisions of the Bill of Rights (section 39(3)).

In effect, in interpreting legislation, the judiciary are obliged to promote, inter alia, the protection of the liberty of a person, their property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. Unfairness, inequality and unreasonableness are no longer tolerated, in theory at least, in either legislation or the conduct of public officials.

The purposive approach to the interpretation of legislation that was favoured by the Roman-Dutch writers included the principle of equity, a principle embodied in natural law. The contra fiscum presumption is merely an expression of that concept in the same way that the presumption against double taxation expresses the same notion. Even Corbett JA, well known for his strict and formalistic approach to the interpretation of fiscal legislation, could not resist the concept of equity when he remarked (CIR v Nemojin (Pty) Ltd (45 SATC 241 at page 267)):

“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 the point of view of the fiscus.”

In Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others (1990(1) SA 925(A) at page 943), a judgement delivered in 1990, Smallberger JA stated that “the notion of what is known as a ‘purposive construction’ in not entirely alien to our law”. Unfortunately, Smallberger JA preferred to follow the literal interpretation principle as being entrenched in our law and stated “I do not seek to challenge it”. He was of the opinion that it was only in cases of ambiguity that there was room for a purposive approach.

The judge in ITC 1584 (57 SATC 63), a judgement given in 1994, abandoned Smallberger’s approach in favour of a more equitable approach in line with the constitutional principles underpinning the then Interim Constitution. In that case, an ex-spouse agreed, in terms of a divorce settlement made an order of court, to pay his ex-wife alimony and provide for the maintenance of his minor children during his lifetime as well as after his demise. A testamentary trust was established as a result of his subsequent death. It provided for a monthly amount to be paid to his ex-wife for the maintenance of his minor children in accordance with the divorce settlement order. The Commissioner included such amounts received for the maintenance of the minor children in the ex-wife’s taxable income, proclaiming that such monthly maintenance payments constituted an annuity.

Objection was made to the amounts being included in the ex-wife’s taxable income. The main basis of the objection was that the exemption in terms of section 10(1)(u) of the Income Tax Act, granting exemption for amounts paid to a former spouse or children for their maintenance in terms of an order of divorce, was applicable. The question before the court therefore was whether the section 10(1)(u) exemption was applicable when paid from a deceased estate rather than from a living person.

The provision, on the face of it, appeared clear and unambiguous – it made no specific mention of alimony and maintenance amounts paid by deceased estates as qualifying for the
exemption. In addition, the Commissioner had previously won his case some years before, based on this very same argument, in *ITC 1119* (30 SATC 159), when Kotze J applied a strict and literal interpretation to section 10(1)(u).

Seligson AJ, however, refused to follow the strict interpretation of section 10(1)(u) as was done in *ITC 1119*. In arriving at his decision, he did not refer to the Interim Constitution but rather agreed with the observation of Centlivres JA in *CIR v Simpson* (16 SATC 268), that the *Cape Brandy Syndicate* rule (*supra*) should be qualified when something needs to be “implied by necessity”. He stated the following (at page 70):

“Clearly, to interpret the relevant exemption as applicable when maintenance is paid by a former spouse, but not by such spouse’s deceased estate, would create a glaring anomaly with inequitable results . . . the effect of such a construction would be to erode the amount available for the maintenance of the minor children in need of support in a case such as the present. It could bear harshly on the custodian parent as well.”

He concluded (also at page 70) that to differentiate between the maintenance paid to an ex-spouse by the deceased estate of the ex-husband or by the ex-husband himself, appeared to be “absurd and irrational” and “could never have been intended by the legislature when it enacted the exemption in section 10(1)(u)”. He applied a so-called “judicial amendment” to section 10(1)(u) and rejected the decision in *ITC 1119* as “incorrect and ought not to be followed”. In practice, if not in words, he was following a purposive approach.

Although it is considered to be beyond the scope of this study to discuss the *contra fiscum* rule of interpretation in detail, the application thereof in the context of constitutional interpretation is instructive. In *Shell’s Annandale Farm (Pty) Ltd v CIR* (62 SATC 97), a Cape Provincial Division decision handed down in 1999, the court appeared to extend the *contra fiscum* presumption to cases not only where there is an ambiguity in the wording but also where there is an ambiguity about the intention of the legislature, even if there was no obvious ambiguity in the wording. Although not specifically stated as such, the court was giving effect to the principles underpinning the Constitution. The court had to decide whether an “expropriation” of property amounted to a “supply” as defined in section 1 of the Value-Added Tax Act. The court, applying the *contra fiscum* presumption, concluded that the interpretations of “supply” as put forward by the opposing parties, were both plausible and therefore the court had to apply the interpretation most favourable to the taxpayer. The court then went on to remark that the solution for the aggrieved revenue authorities was to amend the definition of supply to ensure that the proceeds from an expropriation were brought unambiguously within the scope of the definition. It was not long after the judgement was handed down that the revenue authorities effected the suggested legislative amendment.

It is submitted that even in cases where the language is clear and unambiguous, the Constitution and subsequent case law supports the view that the purpose of the legislation also needs to be looked at in deciding the ambit and extent of the legislation. In addition, the *contra fiscum* presumption has been and still remains a part of our common law and is not in conflict with the Constitution. In fact, it complements the principles underpinning the Constitution by ensuring an element of equity in the interpretation of fiscal legislation.
5.3 Guidelines on applying the purposive approach to interpreting legislation

It is submitted that the judiciary have accepted that the purposive approach to the interpretation of legislation is the correct one to follow, at least in principle. However, they have not really attempted to give any step-by-step guidelines on how the approach works in practice. Driedger (Miers & Page 1990:177), it is submitted, suggests the following effective three-stepped approach:

- "The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).

- The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament, embodied in the Act, and if they are clear and unambiguous and in harmony with the intention, object and scheme and with the general body of the law, that is the end.

- If the words are apparently obscure or ambiguous, then the meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one which the words are reasonably capable of bearing, is to be given them."

It is further submitted that if this three-stepped methodology is followed, the purposive approach would not be far from the requirements of the Constitution to “promote the spirit, purport and objectives of the Bill of Rights” in the interpretation of legislation.

The minority judgements in the Ochberg (supra) case appeared to follow this three-stepped approach. To value an “amount” received other than in cash, in their opinion, otherwise than subjectively in the circumstances of the taxpayer, would be to go against the very principle that underlies the Income Tax Act, namely, that a person “pays his tax not out of his capital but out of his incomings”.

Unfortunately, in 2007, the Supreme Court of Appeal in C:SARS v Brummeria Renaissance (Pty) Ltd and Others (69 SATC 205), saw fit to confirm the majority decision in Ochberg’s case that the valuation of an “amount” received other than in cash had to be done objectively.

It is considered to be beyond the scope of this study to analyse all the intricacies (or lack thereof) of that decision. However, it is submitted that the victory by the Commissioner was based more on what was not argued before the Supreme Court of Appeal rather than what was argued. For example, the appeal court judges, found that they were precluded from taking argument and analysing whether notional interest calculated on an interest free loan could be regarded as capital in nature as it was not raised at the time the appeal notice was lodged. In addition, the deductibility of expenses in terms of section 11(a) was not argued. Nor was any argument or justification given for how the notional interest amount on the interest free loan was to be calculated. For the purposes of the decision, the court accepted the Commissioner’s view that the right had to be determined by applying the weighted prime overdraft rate for banks to the average amount of the interest-free loans in the taxpayer’s possession in the relevant year of assessment. No account was taken of the fact that the taxpayer (and many taxpayers in the same circumstances) could probably have obtained overdraft rates at less than the prime overdraft rate. Furthermore, the judgement appears to apply only to the factual situation where life rights are granted to a person in return for an interest-free loan (a *quid pro quo*) and not where a parent, for
example, lends his son or daughter money interest free without the child giving any *quid pro quo*.

The so-called “objective valuation” postulated in the *Ochberg* case (partly objective), is a different valuation to the one postulated in the *Brummeria* case (fully objective). The fully objective valuation used by the court in the latter case was not contested or argued by the taxpayer. Thus, there still appears to be room to argue the manner in which the objective valuation is to be done.

Finally, it is submitted that the objective valuation is still subject to the overall tenor of the Income Tax Act, namely, that to be taxable, an amount must fall within the definition of “gross income” as defined. Even if an amount is received in a form other than in cash and it is valued objectively, it must still pass muster on whether the amount is capital or revenue in nature. This is demanded by the purposive approach to interpreting statutes, leads to fairness and is thus in line with the spirit and purport of the Constitution.

### 6 Further research on the possible effects that the constitutional approach (incorporating the purposive approach) to the interpretation of fiscal legislation has on taxpayers’ rights

No government body interferes more in the private affairs of individuals than the South African Revenue Services. Virtually every section in the Income Tax Act, *prima facie*, interferes with a person’s fundamental rights as embodied in the Bill of Rights. In fact, the very imposition of tax violates the right not to be deprived of one’s property (section 25 of the Constitution). Tax audits, investigations and search and seizure procedures clash with the right to privacy (section 14 of the Constitution) as well as possibly with the right to human dignity (section 10 of the Constitution). Answering written enquiries or attending a judicial inquiry and being compelled to answer questions, could offend against the right to remain silent and not be compelled to give self-incriminating evidence (section 35(3)(j) of the Constitution). The right to equality (section 9 of the Constitution) clashes with sections that provide, for example, that taxpayers over the age of 65 are entitled to a larger medical deduction or tax rebate than those under the age of 65.

However, these rights are not absolute. They are subject to a limitation in terms of section 36 of the Constitution that provides that the rights in the Bill of Rights may be

> “limited 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 . . .”.

This limitation of rights provision is the major obstacle for taxpayers wishing to contest the violation of their constitutional rights.

Since the scope of this article precludes a detailed discussion of the ambit of the rights of both the revenue authorities and taxpayers arising from the interpretation of the Bill of Rights clauses, in particular, and of the Constitution, in general, read together with the Income Tax Act, further research in this field is considered necessary.

Nevertheless, it is submitted that it is clear from the discussions outlined above that one vital right arises because of the shift from a strict and literal interpretation to a purposive approach. The decisions in both the *Lunnon and Ochhberg* cases are examples of the strict
and literal interpretation approach leading to an illogical result that is not in accordance with the tenor and purpose of the Income Tax Act. With the judiciary virtually forced by the Constitution to follow the purposive approach, a realistic opportunity exists for a taxpayer to question and even have unjust interpretation decisions of the past reversed in the appropriate circumstances. This is so even where such decisions have been decided by the highest court in the land and are regarded as binding precedent.

The right to contest and thereby correct palpably incorrect decisions does not automatically lead to uncertainty. On the contrary, it is submitted that it leads to less uncertainty. There is a *novus actus interveniens* or a new intervening factor, namely, the Constitution, which demands fairness and equity in judicial matters. Considering, for example, the economic realities when deciding a case, is a prerequisite for fairness and equality and accords with the spirit and purport of the Constitution.

7 Conclusion

Although it appeared from some of the earlier decided cases that fiscal legislation was to be interpreted differently to other legislation, over the years this notion has been completely dispelled, not only by case law (*Glen Anil Development Corporation Ltd v SIR* (37 SATC 319)) but also by section 39(2) of the Constitution.

An analysis of the decided cases also indicates that over the years, the judiciary have gradually shifted from the so-called “strict” interpretation of fiscal legislation (*Cape Brandy Syndicate v IRC* (1921(1) KB 64); *CIR v Lunnon* (1 SATC 7); *Ochberg v CIR* (5 SATC 93)), to an approach akin to the “purposive” approach (*ITC 1584* (57 SATC 63); and *Shell’s Annandale Farm (Pty) Ltd v CIR* (62 SATC 97)). This shift occurred even before the advent of the Constitution (*CIR v Kuttel* (54 SATC 298); *SIR v Safranmark (Pty) Ltd* (43 SATC 235)) because such an approach was and still is in accordance with our Roman and Roman-Dutch common law heritage (Devenish 1991:375). However, the judiciary were never consistent in their approach. Even as late as 1990, the Appellate Division reverted to the strict and literal approach to interpretation (*Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* (1990(1) SA 925(A))).

The automatic application of the strict or literal approach to the interpretation of fiscal legislation is no longer, in theory, a viable option for the judiciary, especially in cases where inequitable and unjust consequences arise as a result of applying such an approach. However, in practice, the strict rule of interpretation will be used in circumstances where such interpretation is not in conflict with the overall as well as the specific intention or purpose of the legislature. Should the judiciary automatically interpret a provision strictly without even attempting to establish the intention or purpose of the legislature, it is submitted that such an omission would constitute grounds for a constitutional challenge to the decision. In addition, the strict rule of interpretation does not and cannot always take account of justice, equity, harshness or unfairness and is therefore, *prima facie*, now unconstitutional. It has been replaced by the classical purposive approach (as espoused by the Roman-Dutch writers) to the interpretation of legislation which, with little modification, is able to incorporate the essential values underpinning the Constitution.

Equity and fairness in the interpretation of fiscal legislation should never be allowed to make way for administrative or even judicial expediency.
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