Monthly Notebook 2011

MONTHLY NOTEBOOK

From 94 TSH 2011 to 105 TSH 2011

This is a free publication devoted to unearthing what is going on in the SA tax field. If it isn’t here, it never happened.

This is perhaps the only newsletter in the world with its own *stylebook* (also free), by Costa Divaris & Duncan McAllister (2015 ed).

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All past issues from 2012 to date. All cases listed in the Monthly Listing from 2006 to date. Visit our [website](#).

All past entries in the Monthly Notebook from 2007 to date. All words & phrases from 2009 to date.
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Official extortion by SARS

The taxpayer has lodged an objection and advanced ample reasons why it believes the SARS claims made upon it to be contrary to the provisions of the Income Tax and Value-Added Tax Acts. Along comes a ‘final demand’ threatening, within forty-eight hours to apply for a judgment under s 91(1)(b) of the Income Tax Act as well as ‘[f]urther legal actions’ should the judgment not result in payment.

This demand is made by the SARS ‘Enforcement Centre’, which clearly neither knows its law nor reads this newsletter.

After all, the facts invite an application of the decision by Spilg j, in Mokoena Albert Sepataka v CSARS case no 05/20445 South Gauteng High Court, Johannesburg (90 TSH 2010; 93 TSH 2010).

In the face of an objection, such a judgment cannot be obtained, and would be a nullity.

Is any restaurant in the land tax-compliant?

Esme Langley (PwC Paarl) writes:

When our clerks are working out of town and they purchase a meal, we are entitled to claim the VAT. However, the majority of the take-away places issue a only pro-forma invoice, which states that VAT is included. If payment of these pro-forma invoices can be proven, may we claim the VAT? These are not big amounts that I am talking about—they are all under R1 000, but VAT on all these small amounts makes a difference at the end of the day.

You bet, especially for the restaurateurs. I have never, ever been given a valid tax invoice by a restaurant, anywhere in South Africa. Clearly, they all manipulate both their VAT and income tax liability, and the customer gets a provisional document so as to make the manipulation easier. The result is that any input tax deduction is prohibited.

But, as, famously, I once warned SARS at its Woodmead office, be careful about complaining. Many restaurants are protected by the Mob.

More on nonresident independent contractors & PAYE

Dan Foster (KPMG Services (Pty) Ltd) writes:

I was very pleased to see your discussion about discrimination against nonresident contractors in the latest newsletter [93 TSH 2010]. This has been a vexed issue for some time for many clients, as you can imagine.

I have also tried to push the ‘anti-discrimination’ clause in DTAs, but in the end have come to the conclusion that discrimination against nonresidents in terms of tax treatment may be barred under a treaty but not discrimination in terms of a tax-withholding (presumably, since tax withheld can be refunded if there is ultimately no tax liability). There are numerous examples of nonresidents suffering ‘discrimination’ in terms of a tax-withholding, for example, under ss 35, 35A and 47A–K. Nonresident withholding taxes on passive and even active income are common in many countries, and do not appear to fall foul of DTA nondiscrimination clauses.

Ultimately, a nonresident contractor can file a return and claim his business expenses and pay tax on his taxable income at the same rate as a resident. The only difference is that he has already had PAYE deducted from his gross pay (whereas the resident gets to pay provisional tax later).

‘Discrimination’ under a treaty does not include cash-flow disadvantages, it is submitted. That’s my two-cents’-worth, anyway.

Keep up the good work!

Nice point. I say again: this is not my field. But if withholdings are OK, you have to be sure that PAYE is a withholding tax. On account of s 89bis(1) of the Income Tax Act, read with para 28 of the Fourth Schedule to the act, I am not so sure. Under what I usually describe as the ‘duality’ of PAYE (and the provisional tax), it is both an independent impost and an advance payment:

89bis. (1) Payments by way of employees’ tax and provisional tax shall be made in accordance with the provisions of the Fourth Schedule and shall be made at such place as may be notified by the Commissioner, and any such payments which relate to a taxpayer shall, for the purposes of this Act and subject to the provisions of paragraph 28 of the said Schedule, be deemed to have been made in respect of his liability for taxes as defined in [s 89bis(3)], whether or not such liability has been ascertained or determined at the date of any payment.
Supremely Anal Retentive Swine

This elaboration upon an occasional scatological remark of mine, courtesy of Shaun Lyle (Lyle & Associates), who, in response to ‘Die, tax practitioner, die!’ in 92 TSH 2010, says that it is ‘so refreshing to read a newsletter that isn’t SARS arse-kissing’. He continues in similar vein:

Let’s face it SARS would be in shit street if it weren’t for stressed tax practitioners doing all the work for those arrogant bustards.

As for the idiots who wrote the e@syFile system, if they spent less time publically patting themselves on the back and focused on using their own software, then maybe, just maybe, we would have something more user-friendly and less of a pain in the arse. Clearly the programmer has never had to capture info en masse into this system.

I have a list of issues that I have put to SARS, with nothing more than a ‘we acknowledge your concerns and will address them’ or some such bullshit in return. I even put my list to the accounting institutes and had confirmations from fellow practitioners. Needless to say, most institutes have their heads buried so far up the Commissioner’s bum they don’t hear anything.

Scary, scary, indeed.

Extracting a house from a company or trust—the fiasco continues

Regular correspondent Anville van Wyk (Van Wyk Fouchee Inc) writes:

I have just worked through the ‘Draft guide to the disposal of a residence from a company or a trust’ dealing with the new para 51A [of the Eighth Schedule to the Income Tax Act; 91 TSH 2010]. What astonishes me is that the person who has drafted this document also seems to be unable to interpret the legislation. On p 20 the following is stated:

What is contemplated—the disposal or the person referred to in para 51A(1)(b) and (c)? It would seem that what is contemplated is a disposal of a qualifying residence….

Lower down in the paragraph:

It would seem that this is a reference….

Do you have any idea how these people go about drafting legislation and these guides? Is the person who drafts the legislation locked up so that nobody else can come to him or her? Can the person doing the drafting guide not have access to the drafter of the legislation?

As a matter of interest, it would seem that a person who resides in a residence held by a close corporation or trust—the fiasco continues

maybe, just maybe, we would have something more user-friendly and less of a pain in the arse. Clearly the programmer has never had to capture info en masse into this system.

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Scary, scary, indeed.

6—An irreverent newsletter designed to keep you up to date—
VAT: imports & payment

I always like to praise SA’s clearing and forwarding agents, since, on the whole, I believe that they carry out complicated duties singularly well, especially in complying with our highly complex customs and VAT laws, and in handling what are often vast sums of money. SARS ought to remunerate them for all that they do. At the same time, their clients cannot forget that both they and their agents are ‘importers’ for fiscal purposes, and if anything goes wrong, both parties might suffer, grievously.

In a country becoming increasingly anti-business and anti-productivity it might be invidious to single out the entirely unnecessary VAT requirement that VAT be paid on imports, usually by the clearing and forwarding agents, and then almost immediately be claimed back again, almost exclusively by their clients. But, you have to admit, it is a ridiculous clog on the economy.

The provision permitting the deduction of VAT on imports by the client can be very confusing, even to those familiar with the VAT system. It is s 16(3)(a)-(iii), and it reads like this:

(iii) [VAT] charged in terms of section 7(1)(b) in respect of goods imported into the Republic by the vendor and invoiced or paid, whichever is the earlier, during that tax period;

Invoiced or paid? By whom? SARS does not invoice anyone, and the client-importer is certainly not going to invoice itself for the VAT on an importation.

Municipal councillors & institutionalized tax fraud

In the last issue (93 TSH 2011) the Monthly Listing included what is certainly the most egregious instance of tax fraud by the legislature I have ever recorded (see also 77 TSH 2009; 77 TSH 2009).

In the bad old days, pre-1994, municipal councillors might have been a bunch of self-seeking scoundrels but the towns they ran they ran pretty well, and at meagre rates of pay, usually for only a modest ‘allowance’, which they struggled heroically and persistently to increase. Yes, they enjoyed their little perks, fiscal and otherwise, but it was all small-time stuff. Just how much things have changed is recorded by GN 1196 GG 33867 of 10 December 2010.

Altogether illegally, this notice purports to extend to councillors the same crooked benefit enjoyed by the president, deputy president, ministers, deputy ministers, premiers, MECs and MPLs. Thanks to the Remuneration of Public Office Bearers Act, these worthies have R120 000 of their pensionable basic salaries deemed to be the amount to which s 8(1)(d) of the Income Tax Act applies.

In the days when we still had political constituencies, s 8(1)(d) provided for what were called ‘constituency allowances’. The idea was that, since the holding of political office obliged the holder to expend moneys out of (usually) his own pocket, qualifying outlays should effectively be made deductible by the exclusion from the tax base of the amount of a dedicated allowance paid to them and actually spent on qualifying purposes.

What the Remuneration of Public Office Bearers Act does is recycle an approach that used to be applied to travelling allowances paid to political office-bearers. It relieves the state from the need actually to pay a dedicated amount as an allowance, as is very strictly required in the victim’s sector of the economy, and as confirmed by the case law.

What is especially cheeky about this adaptation is that it has been applied to an allowance that is required to be expended upon its intended purposes in order to enjoy its privileged tax treatment, unlike travelling allowances, which even today are privileged, although far less so than before, regardless of actual disbursement upon travelling.

The ANC, which I ordinarily find hard to distinguish from the Nationalists of yore, save for far
How to screw your fellow-shareholder—Not!

Some attorneys confuse their roles with those of comedians, and can manage to be uproariously funny.

This dispute is between the shareholders of a company in dissolution, and so continues to address the question first approached in two parts in 92 TSH 2010—how do I screw my fellow shareholder? This is of the class of question ‘How do I cut off my right arm?’, the answer to which is ‘Carefully’.

Apropos of nothing, this country bumpkin lawyer (and in law, as I often like to say, the countryside is frighteningly close) sends his client’s adversary a claim under s 129 of the National Credit Act, including a claim for interest.

Statute law is a funny thing, in that it first has to be found to apply before it may be used to shove away the common law like a turd on a lawn. For example, s 129 requires the existence of a ‘consumer’, a ‘credit agreement’ and a ‘credit provider’.

If this newsletter has been about anything, it has been about definitions. But it is also about the consistent failure of everyone, but especially attorneys, ever to consult the actual law. My definition of an attorney is of someone who will derive the content of a piece of legislation from first principles, rather than read the bugger. (My definition of an accountant also works: a accountant is someone who fails to read the next paragraph.)

The first hurdle you face when trying to squeeze an ordinary commercial contretemps into the NCA is the definition of the noun ‘credit’:

‘[Credit],’ when used as a noun, means—
(a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or
(b) a promise to advance or pay money to or at the direction of another person;

‘Credit’ is thus something that arises under a perfected agreement (92 TSH 2010). If a dispute is under way, both the common and the tax law usually abide the patrimonial (property) outcome, that is, the establishment of a valid claim by one party against the other.

But say you allege perfection, along with the failure of the other party to perform under the terms (as opposed to the conditions) of an agreement. You then run your finger down the list of alternative characteristics of a ‘consumer’ and a ‘credit provider’. The only place your finger may possibly alight is here:

(c) the party to whom credit is granted under a credit facility;
(d) the party who extends credit under a credit facility;

And what is a ‘credit facility’? Why, it is an agreement (perfected, remember) meeting all the criteria of s 8(3) of the NCA.

Oops! The draftsperson of the NCA never studied computer programming, and ends up defining things in terms of themselves. Nevertheless, you know what he or she means, and you continue to read s 8(3).

Double oops! Section 8(3) is all about an undertaking to supply goods or services or pay amounts. No matter, you say. What is a commercial arrangement between shareholders parting ways other than a patrimonial commitment to transfer property (goods) from the one to the other? Hey presto! All commercial disputes can thus be shoehorned into the NCA!

Not so fast! In the first place, s 4(1)(a)(i) doesn’t allow the act to be applied to a credit agreement with a juristic person with assets or an annual turnover of R1 m or more. Section 4(2)(b) excludes a string of transactions deemed not to be at arm’s length. Section 4(5) excludes sales of goods or services for full payment by cheque or similar instrument that is subsequently refused.

Discouraged yet? If not, go back to s 8(3). Its component parts are joined by ‘and’ s, meaning that a ‘credit facility’ must meet all of the stipulated requirements, just as you expect even your socks to be returned by your laundry. Nothing wishy-washy about that.

In short, there must be an agreed supply, the agreed provision of credit and the agreed imposition of a charge, fee or interest.

Still baying at the moon? Well, go to s 40, which requires the registration of ‘credit providers’. Section 40(4) makes a ‘credit agreement’ entered into by an unregistered ‘credit provider’ unlawful and
void, to the extent provided in s 89.

Not had enough yet? Then try s 93(1), which requires the credit provider to deliver a document recording the credit agreement to the consumer.

So, says this comedian attorney, my client is going to take you to court under an act whose every provision my client has violated.

Way to go, bozo!

VAT: the role of performance in a ‘supply’

The general time-of-supply rule—to which there are important exceptions—is set out in s 9(1) of the Value-Added Tax Act, which reads like this:

(1) For the purposes of this Act a supply of goods or services shall, except as otherwise provided in this Act, be deemed to take place at the time an invoice is issued by the supplier or the recipient in respect of that supply or the time any payment of consideration is received by the supplier in respect of that supply, whichever time is earlier.

Clearly, before you can time a supply under this rule, there must in the first place be a ‘supply’ in existence. After all, an invoice or even a payment cannot establish a liability to account for output tax under s 7(1)(a), the act’s principal charging provision. The targeted underlying transaction must obviously be a ‘supply’ as defined in s 1:

‘[S]upply’ includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of ‘supply’ shall be construed accordingly;

Natural & deemed times of supply

It follows that a transaction will have not one time but two times of supply, its natural, common-law time of supply and its artificial, deemed time of supply, although the two times need not necessarily differ.

It also follows that it is impossible to determine a deemed time of a supply unless you have already established a natural time of time of supply; otherwise there can be no transaction to time.

Natural times of supply may be found only in the definition of a ‘supply’, which, after reading it one or two thousand times, I now see is ambiguous. Does it rely, across the board on performance

‘[S]upply’ includes performance in terms of a sale, rental agreement, instalment credit agreement and [in terms of] all other forms of supply,.... or does it add to performance-determined transactions all other transactions falling under the ordinary meaning of the word supply

‘[S]upply’ includes performance in terms of a sale, rental agreement, instalment credit agreement and [includes] all other forms of supply...?

One thing is for sure: the word includes actually means means, whichever reading you choose to go for. (If performance is necessary across the board, the term ‘supply’ cannot bear its ordinary meaning, and, if it is not, the ordinary meaning is already encompassed by the words all other forms of supply.) From then on, things are murky.

The Explanatory Memorandum on the Value-Added Tax Bill, 1991, which introduced VAT to South Africa provides no clue to a proper reading of the definition. Next, I checked the New Zealand and United Kingdom legislation, only to find that when we define the term ‘supply’ we are on a frolic of our own.

Then, remembering that the definition was changed (in fact, in 1999; could it really have been so long ago?) as a result of a case, I made what turned out to be a difficult search for the string “value-added tax act” in South African Tax Cases Reports published by LexisNexis, on the basis that very few VAT cases have ever been reported.

It ain’t MacDonald’s farm

The case is Shell’s Annandale Farm (Pty) Ltd v CSARS 2002 (3) SA 111, 62 SATC 97, and the judge Davis J.

SARS raised the point, in limine (a case within a case, on a specific legal point), whether a taxpayer could anticipate an assessment by approaching the court for a declaratory order. In an impressive review of the relevant case law, Davis J dismissed the objection raised by SARS. (Note to self: This is an excellent place to start a search on the role of declaratory orders in taxation, a topic over which I positively salivate.)

The substantive issue was whether, under the definition of a ‘supply’ as it then stood, an expropriation could amount to a supply. And Davis J found that it could not.

How to read the definition of a ‘supply’

And here the trail runs cold, as I suddenly realize why our definition of a ‘supply’ was so little regarded upon the introduction of VAT, and why it differs so radically from its New Zealand origins. The idiot draftsman overreacted to the opportunity offered by Shell’s Annandale Farm to amend the definition and—possibly disastrously, possibly innocuously—introduced the concept of performance into the equation.

The good news is that the ambiguity of the replacement definition is resolved by the history of its amendment. This is how it used to read:

‘[S]upply’ includes all other forms of supply, irrespective of where the supply is effected, and any derivative of ‘supply’ shall be construed accordingly;

In this version, once again, the word includes
means means (the inclusion of the word other is idiotic and was not a feature of the original New Zealand template), and the term ‘supply’ clearly bears its ordinary meaning (the action of supplying, or condition of being supplied).

Yet, by reading the definition within the context of the entire act, Davis J concluded that only its active, as opposed to its passive ordinary dictionary meaning applied.

And, clearly, on the historical record, performance relates solely to a ‘sale, rental agreement, instalment credit agreement’.

Thus the proper reading of the definition goes as follows:

‘[S]upply’ includes performance in terms of a sale, rental agreement, instalment credit agreement and [includes] all other forms of supply…;

The 1999 amendment
Did The Explanatory Memorandum on the Revenue Laws Amendment Bill, 1999 cast any light of this seemingly injurious injection of performance into the ‘supply’ equation? Hell, no! The sad sack who made the relevant entry described the amendment as being ‘merely of a textual nature’ (onetime SARS code for ‘We made a boobook but don’t want anyone to notice’; on my reading of the act, I believe that sars ought to have won Shell’s Annandale Farm, and its boobook was its failure to win it, not its inability to apply the New Zealand template). And no mention was made in the explanatory memorandum whatsoever of Shell’s Annandale Farm. (Aha! The smoking gun.)

The role of performance
So it is without assistance from any official source that I continue the struggle to understand what is a ‘supply’—just about the most fundamental concept of the entire VAT law—within the context of performance.

The terms ‘sale’, ‘rental agreement’ and ‘instalment agreement’ are all defined in s 1. Performance under these transactions constitutes a ‘supply’. Both on the basis of the actual wording of the definition (‘all other forms of supply’) and the principle expressio unius est exclusio alterius (the express mention of one thing excludes all others), I am going to guess that, without performance, these transactions cannot give rise to a supply. In other words, a ‘sale’, for example, cannot be judged to have taken place under the ordinary meaning of the word supply, whether in its active or passive sense. Performance is essential.

My next guess follows on the first, and asserts that performance is used here not to identify solely transactions dependent upon performance, under which performance constitutes a form of suspensive condition clogging perfection of a contract (82 TSH 2010) but performance generally, under all transactions constituting sales, rental agreements and instalment credit agreements; that is, performance under a contract.

My third guess relies upon the second, and asserts that, on that ground and in the context, only performance by the supplier is to be considered, not performance by the recipient, even in a transaction dependent upon reciprocal performance.

My final guess is that what is required is not any performance under these contracts but performance in full—so-called complete performance. Otherwise the definition would have been written differently. (On the problems that the idiot drafts-person has over the years created by devaluing the numerical determiner any into a pidgin article—’a’, ‘an’, ‘the’—see 79 TSH 2009; 88 TSH 2010.)

Superficially considered, there is no need to investigate the role of performance in the timing of rental agreements and instalment credit agreements, since s 8(3)(a) and (c) spell out exactly when a time of supply occurs. Both definitions relate to agreements, whose mere conclusion or perfection clearly does not trigger a time of supply. A rental agreement is timed, rather, by payments (ordinarily a mere term of an agreement) due or received, whichever are earlier. An instalment credit agreement is timed by the earlier of delivery and the receipt of payment.

What role, then, does performance play in relation to such transactions? You cannot simply ignore the content of legislation, and the only possible conclusion is that payments or delivery notwithstanding, if the supplier does not perform under a rental agreement or instalment credit agreement, there can be no supply. For example, if a landlord fails to make the premises available, there can be no ‘supply’ to the tenant.

What is left is a ‘sale’:

‘[S]ale’ means an agreement of purchase and sale and includes any transaction or act whereby or in consequence of which ownership of goods passes or is to pass from one person to another;

Again, the mere perfection of an agreement of purchase and sale cannot on its own constitute a supply. Nor will the issue of an ‘invoice’ or the receipt of a ‘consideration’. Performance by the supplier is the sine qua non for a supply to be constituted. After all, this is the purely active part of the definition of a ‘supply’; only its second part (‘and all other forms of supply’) encompasses both active and passive ordinary meanings of the word supply.

So where’s the beef?
Careful readers of this newsletter will have gathered that the exegesis of the fiscal role of performance is one of the long-term aims of this newsletter, but it is a labour I am approaching very gingerly, on account of the deep well of personal ignorance from which I am compelled to work. But in the current context the issue is not whether performance has patrimonial (property) effects; it is simply:

☐ What does performance mean in the context of the definition of a ‘supply’?
☐ What are the effects of its causal, perhaps even careless 1999 inclusion in the definition?

According to Black’s (sv ‘performance, n), the word means:

The successful completion of a contractual duty, usu
resulting in the performer's release from any past or future liability...

On the assumptions made here, I am prepared to go with this definition. In fact, it reinforces what I have already suggested—what is necessary is complete performance by the supplier.

And here a few stabs at possible effects:

- Under s 9(1), if delivery is a term of a sale, any invoice issued or payment received before delivery is meaningless from a VAT point of view and incapable of either rendering the supplier accountable for output tax or the recipient entitled to an input tax deduction.
- Transactions of sale, rental agreements and instalment credit agreements between 'connected persons' are unaffected since s 9(2)(a) is not (I notice for the first time) a deemed time-of-supply provision but a deemed-supply provision.
- Performance-dependent transactions, such as rental agreements, cannot be dealt with under s 9(3)(a) before their essential conditionality is recognized. As periodic performance by the supplier is completed, a separate natural time of supply arises, and is artificially timed by payment, due or received.

And now the live rail: what happens with the sale of fixed property?

I am not yet ready to cross swords with combative colleagues and correspondents on this issue but I will point out something odd. At the very least, both payment and registration in the Deeds Office will constitute terms of any fixed property transaction. Complete performance will require both to have been effected.

How the hell, then, is s9(3)(d) meant to work? The deemed time of supply it stipulates is the earlier of registration and payment!

Impossible, I say, since no 'supply' will have arisen until both terms are fulfilled.

And it is possible that others, with a greater understanding of performance under contract law, might find similar examples of deemed timing rules seemingly rendered unconstitutional by the extraordinary, almost frivolous 1999 amendment of the definition of a 'supply'.

94 TSH 2011—January

Learning the law with your PC: Charitable trusts

This story starts in ancient Roman times, but you can read all about that for yourself in Marks v Estate Gluckman 1946 AD 289 if, like me, you happen to have over the decades kept a stash of bound, old Appellate Division case reports without ever consulting them save a couple of times in your youth and again now, in this lonely, isolated instance. Trust me. Once you get used to it, turning the pages of a—whatchamacallit?—book really isn't so difficult.

Causing all the trouble in Gluckman, a case of very considerable authority, to this day, was a testamentary trust, which—how should I put this?—book really isn't so difficult.

It was pointed out in Crewe, said the truly learned Tindall JA,

according to our law the dominium may be vested in trustees while the ultimate destination of the property or of interest in the property is left in abeyance to be determined by the course of future events.

On that basis, he said:

I shall therefore, call this disposition a trust.

Observe, you foul, unwashed and charlatanic academics, what a real student of the law immediately does when confronted with an arrangement purporting to be a trust, in this instance, a so-called ordinary testamentary trust: he checks its validity as such, looking for

- a divestiture ('disposition'), actually from the executor's control (executors don't own, not in any capacity),
- in favour of the trustees, who as a consequence own the property (it 'vests' in them), although only in a fiduciary capacity, and
- ensures that there are either identifiable beneficiaries or a legitimate object ('ultimate destination of the property').

Crewe on testamentary trusts

I was so excited by this hugely prestigious vindication of my own, unfauling practice that I decided to
look over Crewe once again, although this time more conventionally, in the electronic LexisNexis South African Tax Cases Reports, where the pages don’t yellow with age. The principal judgment was delivered by none less than Watermeyer CJ, and, to jog your memory should you, too, once have read the case, the trust involved held shares in the venerable East London Daily Dispatch.

Even then—during, good grief, World War II—pesky academics were confusing themselves and all about them with the English law on trusts, and trying to say that a trust is a, is a..., is a...er, is je ne sais quoi; in fact, just about anything that might pop into their addled, fluff-ball brains.

Do you blame me for going, rather, with no fewer than two (Two! Count ’em!) Chief Justices? Here is how in Crewe Watermeyer CJ brusquely dismissed all this self-celebrating academic crap:

There is, however, no reason why the problem presented in our law should not be solved by the application of the principles of our law of contract. See the remarks of Innes CJ, in the case of Estate Kemp v McDonald (1915 AD at p 499).

The subtle additional significance of this passage will, I know, be lost unless I point out that here is an eminent jurist looking to our contract law not simply in relation to trusts in general but to a testamentary trust, which is famously sui generis (one of a kind), on account of arising unilaterally rather than under a contract. (The contract surely comes into being when the trustees accept office from the executor.)

Trusts ad pias causas

Back in Gluckman, Tindall JA continued by noting that the trust was for educational purposes, and found that these were of a public character. It consequently deserved to be treated as a trust ad pias causas, or, to fast-forward over the centuries, a trust ‘for charitable purposes’.

The principle underlying that treatment is that dispositions for charitable purposes must be upheld as far as legitimately possible...this is the policy of our law.

Can you see why I prefer not to consult so-called textbooks but to look up the law for myself? Although at the time presiding over inferior courts, famous judges have endorsed this dictum, for example, Corbett J (père; as he then was), a great man, lawyer and judge, in Ex parte Blum: In re Estate Kalson 1964 (2) SA 643 (C):

Our law—like English Law—adopts a benevolent attitude towards bequests or gifts for charitable purposes, or ad pias causas (see Marks v Estate Gluckman, 1946 AD 289).

The scope of such a charitable trust was laid out by Broome JP in Ex parte Thomson 1959 (4) SA 528 (N):

... In Marks v Estate Gluckman, 1946 AD 289 at p 311, Tindall JA, preferred the expression ‘for charitable purposes’ to the expression ‘ad pias causas’. Whichever expression is used, it would seem to include religious, charitable and educational purposes and other purposes for the public benefit.

What has perhaps come from English law

I embarked upon this search on charitable trusts through our case law in the hope of finding authority for two concepts, only to discover that neither of them enjoys any, since they have not as yet migrated from English law, at least not in the sense of being unequivocally accepted by one of our superior courts.

The first concept—the acceptable scope of a charitable trust—was touched upon in Gluckman, by way of a quotation from Income Tax Commissioners v Pemsel 1891 AC 531:

‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

The second concept—the full set of so-called object trusts—was touched upon in Standard Bank of South Africa Ltd, NO v Betts Brown and Others 1958 (3) SA 713 (N) by way of a quotation from Re Shaw 1957 (1) AER 758 referring to...

...the rule in English law that ‘one cannot have a trust, other than a charitable trust, for the benefit, not of individuals but of objects’.

Object trusts

The definition of a ‘trust’ in s 1 of the Trust Property Control Act allows for eight different types of trust: ordinary inter vivos; ordinary testamentary; inter vivos bewind; testamentary bewind; ordinary inter vivos object; ordinary testamentary object; inter vivos object bewind; and testamentary object bewind.

Object trusts are those identified as being qualifying arrangements for the achievement of the object stated in the trust instrument.

The definition of a ‘trust’ in this act sprang from our common law and constitutes the rock-bottom minimum essentialia of a trust. (These represent, as economists like to say, the necessary although not sufficient requirements to be satisfied by an actual, operational trust under our law.) We thus allow object trusts but the accepted view is that, as under English law, they must be of a charitable nature; that is, they must be charitable trusts.

‘Charitable trusts’ in real life

The few purported charitable trusts I have come across in real life have challenged my confidence in being able properly to test their validity:

O Some of them include noncharitable purposes, a possibility touched upon in the case law you will find if you search for the strings ‘ad pias causas’ and ‘charitable trusts’. There really isn’t much to go on. In future, I shall try to understand the underlying principle, if any.

O The majority are vague about the causes targeted by their objects. From now on the question I shall be asking is: Is the bloody thing of a
public character? In fact, I bet that a search for the string "public character" would pay dividends in this context.

And a few have had me rolling on the floor laughing, having been drawn by cretins with no idea that there are limits to the concept of a charitable trust (poverty, education, religion or beneficial to the community).

And I am intrigued by press accounts of the supposed charitable trusts of our political lords and masters. In such an irredeemably corrupt country, with a taxation authority so much lacking in forensic skills, and with politically powerful people enjoying such miasmic impunity, it is difficult to believe that such trusts hew to the principles set out here.
An irreverent newsletter designed to keep you up to date—
Vintage stuff, no doubt
Malcolm McIntyre writes to say:
I hope that I am one of the silent five (or more) who enjoy (relish) each issue of TSH, reading and imbibing the scholarly articles. The quality is like red wine.
May you and your team be spared for many more editions.

State regulation of pharmacies
Kallie van der Merwe found he simply had to respond to my remarks about the fixing of a single exit price for medicines until the end of the year (94 TSH 2011):
Usually you are way over my head, I have to admit, but in this slaan jy die spyker op sy kop. En in die midden!
How the endemic annihilation of hundreds (if not thousands) of pharmacies countrywide in recent years serves the poor with better access to medication beats me. I have it on reliable information that at least one pharmacy conglomeration excludes various, more affordable potions, freely available over the smaller man’s counter, from their lines. The specter of vested interests rears its head.... Astounding stuff, indeed.

Waylaid by SARS’s incompetence
A subscriber, who wishes henceforth to be known simply as ‘Vic from Cape Town’, writes:
First, regarding cockups. Every time I complete an EMP 201 for a client, the electronic form asks me for my initials, date of birth and position. This despite the fact that my full name and ID number are on each form.
Why can’t the non-changeable info also stay on from month to month? I did ask Anton Krynauw of Interfile but he said SARS have other crap to deal with at the moment. Seems like things are worse since lots of the IT work has gone in-house, together with most of the Interfile staff.
Secondly, I agree with your contributor on e@syFile [94 TSH 2011]. It’s most non-user-friendly, and to download the new version, I had to get Mr Krynauw to help me. Note to SARS: not all accountants are IT geeks.
Lastly, I wish SARS would realize that, apart from some accountants helping their clients dodge tax, most of us help them stay on the straight and narrow. SARS rarely does personal, VAT or PAYE audits on SBCs, so we do it for them.

Untaken leave—a hoary problem
Joretha Pretorius (RMS Auditors) has this problem:
A client of mine would like to deduct the leave day due to his employees at the end of the financial year as an expense for income tax purposes. This will be the leave days not taken by them as at 28 February. Is this allowed? If so, why? And if not, then why not?
This is an ancient matter, which is not to say that many people understand it.
Leave comes in two flavours—statutory and contractual. By strict law, employees aren’t allowed to fail to take their statutory leave; nor may they cash it in. So there really isn’t any liability to pay statutory leave. When the time comes, the employee will cease working temporarily and be paid leave pay.
Each working day might generate an increment in entitlement to days of leave, but it doesn’t add a cent to the employer’s liabilities. To accrue for as-yet-untaken statutory leave is like accruing for next month’s or year’s salaries.
Unfortunately, the people who write the laws don’t know much law themselves, and the way they chose to stop employers who, on the advice mainly of their auditors, were claiming untaken statutory leave as an expense, was to enact s 23E of the Income Tax Act, which forbids provisions for leave pay.

SARS File 13, always obliged to assist
John de Jager (DTTS) says that, many years ago, he telephoned SARS on a tax query, and the girl in the particular division said:
They probably send the info to ‘miscellaneous’ on the 4th floor.
He asked her to whom he should speak? Hold
How do you survive without a tax database?

Whenever anyone sets me a tax problem, I search for and open up relevant legislation and official documents, usually on multiple screens, to find both context and detail. Watching me do this the other day was an attorney I have known and respected for ages. ‘From where do you get all this information?’, he asked.

My mental response was astonishment. First, how does he advise his clients, without such access? Secondly, how could he possibly be unaware of the existence of the Tax Shock, Horror Database, made available monthly on DVD at the risible price of R161 each, inclusive of VAT? It includes all the material listed each month in this newsletter, save for indicated items, usually those protected by copyright, and subject to a delay for press clippings, which involve extra processing.

Come on, South African business professionals! Are you scared of information?

SARS demands payment within a week

Regular correspondent Juanita Roman (MD Accountants & Auditors) says:

We have been having a problem with assessments issued by SARS from the end of January to date. All assessments issued before 31 January 2011 reflect the (first) due date as 1 March 2011, and second date as 31 March 2011, but returns assessed from 31 January 2011 onwards reflect the first and second dates seven days later, that is, 7 February 2011, and demanding payment of the 2010 assessed taxes by this date.

Please advise where in the Income Tax Act this has been specified.

Nothing upsets me more than a state breaking its own laws, especially when the hooligans at SARS are involved. There is no new law authorizing this thuggish brigandry. SARS is simply trying to get the boodle in by its year-end, the end of March (it reports on a receipts basis). I believe that, constitutionally, if not contractually, after allowing thirty days interest free for perhaps a century, SARS cannot arbitrarily change the period allowed.

Now watch how it treats supposed defaults under this temporary aberration. What’s the bet that it has not changed its computer programs, and the supposed demands are mere fluff, altogether dislinked from proper sanctions?

On the other hand, after an interval of some months, it might come forward and announce that the wrong dates were inserted as a result of a computer glitch. It has practiced this deception before (79 TSH 2009).

Why you can’t ask the idiot draftsperson what the law means

I knew I had it somewhere but couldn’t think of a search-word that would retrieve it. Eventually, I came across it by chance, only to find that it was represented twice in my personal database, once in this very newsletter (67 TSH 2008).

Here is this little, much-prized gem from (as I’ve said before) a book I read at an impressionable age and still possess, Maxwell on Interpretation of Statutes 11 ed (1962) Sweet & Maxwell Ltd:

Lord Halsbury states, however, that he has, on more than one occasion, said that the worst person to construe a statute is the person who is responsible for its drafting, for he is much disposed to confuse what he intended to do with the effect of the language which in fact he has employed.

Since I was too lazy to get up and find the physical Maxwell—even though it is not a metre away—and recover the citation, I simply Googled a few words from this quote and was, in a blink of an eye, rewarded with the actual page of the very book. I swear it looks familiar, although I won’t go so far as to say that I remember it well.

This famous passage comes from Hilder v Dexter [1902] AC 474, 477.

The Road Accident Fund—maverick tax exemptions

I always thought that fiscal matters are supposed to be dealt with exclusively in fiscal legislation. I have this memory—could it be false?—that the first Minister of Finance of this new era was very strict on the issue. What hope, though, to confirm this fancy, much less find legislative support for it?
At any rate, if this be the rule, there are certainly exceptions to it. Here, for the record, is such an exception, from the Road Accident Fund Act:

**Exemption from taxation**

16. (1)(a) The Fund, its assets, property, income and its operation and transactions shall be exempt from all taxation, or the Fund shall be refunded all taxation paid by it, as the case may be.

(b) The Fund shall be exempt from—

(i) all customs, excise and stamp duties; and

(ii) liability for payment, withholding or collecting of any tax or duty.

(2) Goods which have been acquired or imported free from customs or excise duty by the Fund shall not be sold, hired out or otherwise disposed of unless authority has been obtained in advance and any necessary duties and taxes paid.

(3) Notwithstanding subsection (1), the Fund shall not claim exemption from taxes which are no more than charges for public utility services.

If only I knew how to make the distinction required by s 16(3)!

95 TSH 2011—February

**Words & phrases—‘their children’**

A husband and wife are beneficiaries under a trust, as are ‘their children’. Would the husband’s child from another relationship be included?

Here is what was said in *Manjra v Desai and Another 1968 (2) SA 249 (N)*:

In that context the word ‘their’, although used as a possessive adjective, does not necessarily connote collective possession. (See *The Oxford English Dictionary*, sv ‘their’: ‘The boys know their Greek syntax’). Examples readily spring to mind of the use of the word ‘their’ to convey the idea that each of the several persons to whom the pronoun refers is intended. Thus, an intimation by a headmaster that boys may invite their parents to attend a school function would readily be understood to mean that each of the boys at the school may invite his parents. The Courts have not infrequently construed the words ‘their estate’ in a joint will to refer to the estate of each of the testators; the words ‘their children’ in a will or trust deed may mean, depending upon the context, the children born of the union of the testators or donors or may mean their respective children. As Lord Halsbury LC, observed in *White and Another v Tyndall and Others*, 13 AC 263 at p 270, 

‘…it is hardly accurate to say that the word “their” is an ambiguous word. Its grammatical force is of course like that of other pronouns and its application must be ascertained from the context’.

95 TSH 2011—February

**VAT & PAYE on fringe benefits—an utter disconnect**

It’s always a pleasure to hear from Rob Cooper (Softline VIP), who is at the coalface in the application of our ridiculously complex payroll laws. I expected something extraordinary, and I wasn’t disappointed. Even better, I have come to know his little trick of laying sly traps for the unwary, so I treated his enquiry with care.

This time he drew attention to the changes in the law as from 1 March 2011 affecting the fringe-benefits value of a company car, and the interaction of the VAT calculation that must go hand in hand with its PAYE valuation.

In the first place, to find the law regulating the VAT valuation of a company car is a mission. If, like me, you want to go back to the underlying legislation before trying to find a solution to a problem, you have to remember that, despite s 10(13) of the Value-Added Tax Act, which calls for the Minister of Finance’s input to be gazetted, what he actually did was issue regulations.

Well, I didn’t remember, and, after searching fruitlessly among Gazette notices over the years, had to go to the latest VAT 404 to get the proper reference—to a regulation, namely GN R 2835 of 22 November 1991.

Next, the regulations include their own definition of the term ‘determined value’, that is, of a company car. Needless to say, it has been left unamended since 1991. For example, it still excludes VAT.

The upshot is that, as the law stands, you have to make two calculations of determined value, one for VAT and the other for PAYE. The other difference between the two regimes lies in their treatment of maintenance paid for by the employee.

Thus a complete disconnect exists between the VAT and the tax law. How has it arisen? Well, as I often like to say, essentially because the people amending the law do not know the law, and cannot be bothered to learn it. This is not a joke. It is the observable truth.

What was also depressing was to see how extremely complex and detailed the latest valuation provisions in para 7(8) of the Seventh Schedule to the Income Tax Act have become. As initially conceived, fringe-benefits taxation was meant to simplify payrolls.

I’ll let Rob have the last word:

It is a very messy situation, which I shall point out to SARS and await their response. If I get one, I will let you know. The current status is obviously that no one knows what the correct calculation is, and every employer will be doing what they think best.
**VAT: going, going, going concerns**

Not many tax students will have realized that there are no fewer than three ‘going-concern’ concessions in the Value-Added Tax Act. What interests me is the question whether the idiot draftsperson consciously created their differences or simply bumbled along—as usual.

<table>
<thead>
<tr>
<th>Section 8(25)</th>
<th>Section 11(1)(e)</th>
<th>Section 11(1)(p)(i) &amp; (2)</th>
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<tbody>
<tr>
<td>Corporate reorganization non-supply</td>
<td>Zero-rating on disposal</td>
<td>Inter-branch/division/enterprise zero-rating</td>
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<tr>
<td>where any goods or services are supplied by a vendor to another vendor,</td>
<td>the supply is to a registered vendor</td>
<td>(i) the supply of an enterprise or part of an enterprise as a going concern, by a vendor to that vendor’s branch or division, which branch or division is separately registered in terms of section 50 (2):</td>
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<td>(ii) the supply of an enterprise, branch or division, as contemplated in section 50 (2), as a going concern to a separately registered enterprise of that vendor:</td>
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(i) that supply is of an enterprise or part of an enterprise which is capable of separate operation, | of an enterprise or of a part of an enterprise which is capable of separate operation, | (aa) that enterprise or part is capable of separate operation; and |

These provisions are essentially identical.

where the supplier and recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern; or | where the supplier and the recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern: | [See two blocks above.] |

‘Going concern’ status is a matter of mere declaration (67 TSH 2008; 88 TSH 2010; 90 TSH 2010). | ‘Going concern’ status is a matter of mere declaration (67 TSH 2008; 88 TSH 2010; 90 TSH 2010). | ‘Going concern’ status is a matter of fact. |

(aa) such supplier and such recipient have, at the time of the conclusion of the agreement for the disposal of the enterprise or part, as the case may be, agreed in writing that such enterprise or part, as the case may be, will be an income-earning activity on the date of transfer thereof; and | | (bb) will be an income-earning activity on the date of transfer thereof; and |

‘Income-earning’ status is a matter of no concern. | ‘Income-earning’ status is a matter of mere declaration. | ‘Income-earning’ status is a matter of fact. |

(bb) the assets which are necessary for carrying on such enterprise or part, as the case may be, are disposed of by such supplier to such recipient; and | | |

The asset-package is of no concern. | This provision is unique. | The asset-package is of no concern. |

(cc) in respect of supplies on or after 1 January 2000, such supplier and such recipient have at the time of the conclusion of the agreement for | | (cc) a tax invoice issued in accordance with section 20 in relation to that supply is inclusive of tax at the rate of zero per cent; or |
<table>
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<th>the disposal of such enterprise or part, as the case may be, agreed in writing that the consideration agreed upon for that supply is inclusive of tax at the rate of zero per cent;</th>
</tr>
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<tbody>
<tr>
<td>There is no need for objective certainty between the parties.</td>
<td>Objective certainty between the parties is what the going-concern zero-rating is all about. If only SARS knew it!</td>
</tr>
<tr>
<td>There is no need for objective certainty between the parties.</td>
<td></td>
</tr>
<tr>
<td>(ii) the enterprise or part, as the case may be, disposed of as a going concern has been carried on in, on or in relation to goods or services applied mainly for purposes of such enterprise or part, as the case may be, and partly for other purposes, such goods or services shall, where disposed of to such recipient, for the purposes of this paragraph be deemed to form part of such enterprise or part, as the case may be, notwithstanding the provisions of paragraph (v) of the proviso to the definition of &quot;enterprise&quot; in section 1.</td>
<td>(ii) where the enterprise or part, as the case may be, disposed of as a going concern has been carried on in, on or in relation to goods or services applied mainly for purposes of such enterprise or part, as the case may be, and partly for other purposes, such goods or services shall, where disposed of to such recipient, for the purposes of this paragraph and section 18A be deemed to form part of such enterprise or part, as the case may be, notwithstanding the provisions of paragraph (v) of the proviso to the definition of &quot;enterprise&quot; in section 1; or</td>
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<tr>
<td>What happened to the reference to s 18A?</td>
<td>Shum mishtake here.</td>
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95 TSH 2011—February

**At least the Poms scam their own government, too**

Foreign nationals like to present themselves here as working for their offshore, sole-trader companies, sometimes with disastrous consequences for their—Yes!—employers (91 TSH 2010).

Perhaps in response to that story, a regular correspondent has sent me, without comment, a report of a UK matter involving a UK resident allegedly working for his own UK company as service-providing contractor engaged by a client.

Here is the citation: *MBF Design Services Ltd v Revenue & Customs* [2011] UKFTT 35 (TC) (05 January 2011).

Our laws on this issue are obviously different from those of the UK yet share some surprisingly strong similarities, at least in the fiscal department.

In its judgment, the tax tribunal haulers on and on about the facts and the law, to my mind showing again and again that this aircraft designer worked for Airbus UK Ltd rather than his one-man company, yet, equally repeatedly, concluding that he wasn’t its employee.

Good grief! The man had no other source of income, over a yonkish period, suffered supervision, clocked in on factory hours, at the factory, and was appointed under contracts that were, in parts, shall I say ‘interesting’. Nevertheless, in a process sounding suspiciously like our cop-out ‘dominant impression test’ (‘overall impression’), the tribunal found for a ‘contract of services’ (rather than employment).

95 TSH 2011—February

**Onus/burden of proof: the cases SARS doesn’t want you to read**

Perhaps you were lucky enough to study the tax law at a postgraduate course run by someone who understood the importance of the early case law on the topic—and encouraged you actually to read some of the famous decisions.

If so, (a) unless you are lying, it’s a bloody miracle, and (b) you will instantly recognize these citations: *Ochberg v CIR* 1931 AD 215, 5 SATC 93 and *CIR v Butcher Bros (Pty) Ltd* 1945 AD 301, 13 SATC 21.

Multi-millionaire counsel helping banks to defraud the fiscus by way of marketing tax products have over the years heaped much abuse upon these decisions but my present focus is on the
seemingly simple subject of onus. Certainly, poorly trained SARS staffers are encouraged to believe it to be a simple matter: the onus for everything, they claim, lies on you, the taxpayer, citing s 82 of the Income Tax Act, which reads like this:

**82.** The burden of proof that any amount is—
(a) exempt from or not liable to any tax chargeable under this Act; or
(b) subject to any deduction, abatement or set-off in terms of this Act; or
(c) to be disregarded or excluded in terms of the Eighth Schedule,
shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, or that such amount must be disregarded or excluded, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.

Even after the damage wreaked by the as-yet unpunished fiscal vandals who created our CGT, the Income Tax Act pivots mainly on derived amounts, which are processed in various ways so as to identify, precisely, the tax base. That is why the subject-matter of s 82 is an amount, and, unusually in ordinarily arse-about-face tax legislation, it is mentioned upfront, in the opening line of s 82.

What follows is a short list of reliefs—s 82(a), (b) and (c).

Finally, you are told that, if you think your are entitled to one of these reliefs, it is up to you to prove it.

I could end this piece right here, since there really is nothing more to say about the taxpayer’s onus. It is blindingly obvious that no onus rests upon the taxpayer to prove or disprove the existence of an amount. To whom, then, does that task fall? The adage ‘He who alleges must prove’ provides the solution, and it is SARS that carries the burden of proof.

Unless you have personally witnessed the evils perpetrated by SARS officials abusing this principle, you will have no conception how constitutionally central it is to the tax law. If it did not hold, SARS could assess you for a taxable income of, say, R16 m, get a piece of paper stamped by a friendly clerk (at times in the very employ of SARS itself!), and then proceed to sequestrate your estate.

In this context, I always tell the true and terrifying tale of a couple savaged in this manner by SARS, and how it took me three weeks to have their furniture returned by the Sherriff.

There is no need, however, to take my word on this issue. Here is what Roos JA said about it in Ochberg, citing a predecessor provision to s 82:

The other question of general application to the whole matter is the interpretation of sec 57 of Act 40 of 1925 which lays down that the burden of ‘proof that any amount is exempt from or not liable to the tax chargeable under this Act or is subject to any deduction, abatement, or set-off in terms of this Act shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off’. It is contended by the appellant that the words ‘tax chargeable’ mean ‘income tax’ and that the onus is only placed upon the taxpayer after the Commissioner has proved that the amount is ‘income liable to income tax’.

The answer to this contention is that it would make the section meaningless and useless. The section means that an amount received by the taxpayer, on which an assessment has been made by the Commissioner, is taxable unless the taxpayer shows that it is not income.

Several judgments were delivered in this case but the court was unanimous on the issue of onus.

And here is what Feetham JA said about it in Butcher, citing the same predecessor provision to s 82:

The assessment in dispute, made by the Commissioner under sec 7(1)(a), can only be allowed to stand if some ‘amount’ accrued to or was received by the company in the tax year ended 30th June, 1935, by virtue of its rights under the building clauses in the lease, and it is essential for the Commissioner, in order to support his assessment, to show that some ‘amount’ has accrued to or been received by the company by virtue of such rights (vide Ochberg v Commissioner for Inland Revenue…

Just how deeply these cases are buried in the SARS consciousness was revealed in ITC 1545 (1992) 54 SATC 464:

At the inception of the hearing in the present proceedings Mr Meyerowitz, who appeared for the appellants, submitted in limine that to the extent that the taxpayer’s liability for any tax may have been dependent upon an amount having accrued to or been received by him, the onus of proving such receipt or accrual was on the Commissioner and had to be discharged on a balance of probabilities, and that it was only thereafter that the taxpayer became burdened with the onus of proving the assessment to be incorrect in terms of s 82… This contention was disputed by Miss Vosloo on behalf of the Commissioner. She submitted that upon a proper construction of the section, the appellants bore the onus of showing that the amounts in question had not accrued to or been received by the taxpayer.

Scott J, President of the court, analyzed the difference between s 82 and its predecessor provisions, coming to the conclusion that Butcher still prevailed.

Finally, a more widely known story about onus. Several years ago a keen SARS staffer noticed that interest payments by banks seemingly far outstripped interest receipts by taxpayers. Some crap software was then cobbled together to break the raw data down to the level of individual taxpayers but without any authentication, validation or control procedures whatsoever. Additional assessments were then generated in their thousands and dispatched. All over the country, hospitals were swamped with retired investors suffering heart attacks after receiving these entirely illegal assessments, backed, as usual, with the standard, extortionate SARS threats and claims for immediate payment.
payment. What protects you and me from these state-sponsored gangsters is the Constitution, our judges and a knowledge of the law.

95 TSH 2011—February

An employer’s vicarious liability (& tax)

First off, why my interest in this topic? There’s a hint in 86 TSH 2010: it goes to an employer’s right to claim an income tax deduction for the costs occasioned by his employee’s delict or crime.

For example, I am driving on my employer’s business. As a result of a cunningly placed camera and entirely unsupervised, unconconstitutionally installed road furniture and markings, I am fined for ‘speeding’. (It’s actually a form of direct taxation or extortion.) According to the vicarious liability rules, I am liable but so is my employer. My employer created the risk of causing harm by commanding me to venture upon the public roads and so should be liable when the harm occurs.

Is my employer denied a deduction under s 23(e) of the Income Tax Act? Hell no! It has suffered no ‘fine’ but has discharged a liability imposed by common law.

Can it then actually claim a deduction? Alas No, at least not in the example I have given, since the state is unlikely to raise a claim for a traffic fine against my employer, and thus bring about an incurrals for the employer, and I am unaware of any common-law indemnity against an employee’s own delict or wrongful act or crime.

Contractually, the parties can deal with possible delictual claims as suits (as directors are so commonly indemnified), but an agreement to shield an employee from his wrongful act would, I am sure, be unenforceable and thus constitute what I would these days call a ‘patrimonial nullity’, since a deduction demands a preceding incurrals, resulting in property for one party (a patrimonial claim against the other) and a liability for the other.

What about VAT? VAT is concerned not with incurrals but ‘supplies’, and any costs incurred personally by an employee in a matter involving his employer’s vicarious liability would involve supplies made to the employee, not the employer, even if the employer is made to pay. For the employer to claim any VAT involved as input tax would itself be a crime; a very serious one (perpetrated every day in analogous circumstances by vendors across the land, and now outrageously mandated by SARS for employers of SAICA members—94 TSH 2011).

The vicarious liability rule

I am thrilled with the success of my ‘learning the law with your PC’ series, which exploits the public and commercial databases with which we are so abundantly blessed, and the astonishing utility even of simple search algorithms. But its limitations were brought home by Nugent JA’s (majority) judgment in Minister of Safety and Security v F (592/09) [2011] ZASCA 3 (22 February 2011) (see the Monthly Listing).

In 86 TSH 2010, I fingered K v Minister of Safety and Security 2005 (6) SA 419 (CC), also involving rape by policemen, as the leading case on vicarious liability. And, indeed, Nugent JA’s judgment opens with a reference to that case.

More leading cases

Yet the case he is most concerned with is Minister of Law and Order v Ngobo 1992 (4) SA 822 (A), ‘with reference to two cases that it [the court in Ngobo] described as “lodestars in this firmament”’. 

Mkize v Martens [1914 AD 382] and Estate Van der Byl v Swanepoel [1927 AD 141]’. He refers also to Feldman (Pty) Ltd v Mall 1945 AD 733.

None of these cases is mentioned in my earlier piece, understandably in relation to the lodestars and Feldman, which are represented only and by chance in a physical database in my possession. But my PC approach altogether missed Ngobo.

Ngobo found part of the reasoning in Minister of Police v Rabie 1986 (1) SA 117 (A) to be wrong (the reason for a rule is not the same thing as the rule). Yet the Constitutional Court in K adopted the two-stage enquiry laid down in Rabie (state of employee’s mind; sufficient link between employee’s acts and employer’s business). Nugent JA seems to me to be saying that K wasn’t really a vicarious liability but a state-liability case.

Nevertheless, in K the Constitutional Court made an express finding of vicarious liability, on the basis of a policeman’s personal liability for duties he omits to fulfil. By inference from that case, the state was not vicariously liable for the personal delictual acts of a policeman (while not performing official duties). If the Constitutional Court in K could in such circumstances find that the state would not be vicariously liable, then, a fortiori, Nugent JA would so find.

A raping policeman can hardly be said to be engaged in the affairs of his employer. Even following Ngobo, how could anyone say he was ‘engaged in his master’s affairs’? And an application of Feldman would reveal the errant policeman as going about his own rather than his employer’s affairs. All of the factors said to be relevant in the case before Nugent JA were present, ‘in accentuated form’, also in K, yet the Constitutional Court found on the basis of duty.

A policeman between shifts displayed none of the ‘characteristics of employment’: while on standby or call, he had to be called back on duty to be on duty.

Cause for dissatisfaction

So lawyerly a judgment and such obeisance to the stare decisis principle deserve respect. Why then, do I emphasize more with the minority’s judgment, even though it relies upon the notion that the policeman concerned put himself back on duty? Is it simply a prejudice against the many mavericks in the force, which was crying out to be purged sev—
eral decades ago, from deep within the days of the Nats? The state's failure to undertake such a purge, nay, its deliberate inclusion within police ranks of known and suspected criminals, render it liable, although not under the vicarious liability rules.
I expose criminal fraud & extortion at SARS—especially in March

In my opinion SARS is an even worse organization under the present Commissioner than under the last—something I would never have believed possible, if I had not seen plenty of evidence with my own eyes.

Take the most innocent-seeming incident first, already the subject-matter of ADR proceedings, at which I represented the taxpayer, from which SARS withdrew after only fifteen minutes.

The provisional taxpayer has been represented by the same, reputable firm of auditors for years. The taxpayer’s bookkeeper, who has never handled it tax affairs (!), gets a call from SARS, claiming that a second provisional tax return for a past year was not submitted. The bookkeeper files a copy of the nil return by eFiling. Obviously, there is no cheque attached, so SARS issues an assessment for almost R200 000 in sanctions.

It turns out that the supposedly missing return was a valid nil return, submitted together with almost a thousand other such nil returns by the auditors, who were able to prove the systemic integrity of their provisional tax procedures. Not one of the other returns was reported as ‘missing’ by SARS.

My guess? A SARS official seeking ‘production’ picked what he thought was a soft target, making two serious errors. 1. I am on retainer to the audit firm, and I don’t take shit from anyone. 2. The sanctions amounted to too big a sum for the victimized parties to lie down and die.

Now, over to the other extreme, also within my personal experience. The taxpayer is someone I’ve known for years, who has become very prominent in the financial services industry. He goes to buy a car, only to be told that SARS has a judgment against him. We go together to Megawatt Park, where I try to explain to a SARS official who knows no law whatsoever—against my forty years of experience as a dedicated student of the law—that he cannot obtain a judgment for PAYE allegedly outstanding without an assessment. No, no, he avers, PAYE is a self-assessment tax, and the law says the Commissioner ‘may’ issue an assessment, and he needn’t do so. Nevertheless, he and his colleague agree to have the judgment rescinded, by the following Friday—a promise that he later denies, effectively calling me and my client liars, despite not demurring immediately when, straight after our meeting, I thanked him by email for his promise. In writing (!), he demanded payment—of the R28 000 sanctions involved—before he would rescind the judgment.

Unsurprisingly, the facts are very similar. A SARS official phoned the taxpayer’s bookkeeper, claiming that PAYE returns for 2004 and 2005 were outstanding! (How likely is that, when PAYE has to be reconciled each year, especially in those years, when tax certificates were still effectively monetized?) Inco- cently, she delivers copies of the returns, all bearing contemporaneous date-stamps showing their original receipt by SARS.

Naturally, there was no cheque attached, so this official, without any debt due to the state being in existence, without the benefit of any assessment, and without warning the taxpayer in any way, illegally invokes s 91(1)(b) of the Income Tax Act by having the clerk of the court stamp a still-secret ‘statement’ of some kind so as to effect what amounts to a judgment.

In my view, such an action is extortionate, and no different from a mobster threatening to bash up a restaurant with a baseball bat if the proprietor does not pay the protection money demanded.

As I tell these tales around the country, I hear that it has become very common for SARS officials to ask for old returns supposedly not received and then to raise sanctions, on the basis that these are submitted without any payment. The SARS putative computer systems are, I am sure, set up so as automatically to produce such a result.

Especially in Durban, I hear, taxpayers have all the deductions they have claimed over the past five years disallowed, and treble-tax sanctions raised, on the basis of tax evasion! The latest tale I heard was from an accountant with a client with a massive assessed loss. SARS raised an assessment ignoring the loss and claiming payment, within one day (!), of a couple of million rands.

eFiling by SARS isn’t delivery!

The act that I keep begging SARS to read is the Electronic Communications and Transactions Act. Unless the parties otherwise agree, the delivery rule contained in s 23 provides that:

Time and place of communications dispatch and receipt

23. A data message—

(a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;

(b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

The amazing point that came up at one of our recent seminars is that a posting on a practitioner's or taxpayer's account by SARS on its eFiling system does not amount to delivery to that practitioner or taxpayer. All such messages remain on the SARS information system!

In the absence of an agreement between the parties (and some piece of sociopathic eFiling trash published by SARS or its undisclosed agents does not amount to an agreement), there can be no effective delivery by SARS under s 106 of the Income Tax Act.

Dear SARS bigwigs

Every time we apply for a VAT registration, the people we deal with at SARS come up with new rules for proof of bank details. In the past, an original bank statement was always accepted. Suddenly, the other day, this was insufficient, and a letter from the bank or a cancelled cheque was required. Considering the fact that cheques are going the way of the dinosaur, this pretty much leaves vendors with having to get a letter out of their banks. Banks aren't always happy to comply, and instead will print out a bank statement and stamp it. Such a statement has also been turned down by your staff recently. The latest I have had was that a client obtained the necessary letter from the bank but SARS did not accept it because the bank did not stamp it.

- Get real.
- Decide what you accept and stick to it.
- Train your staff.
- Notify the poor tax practitioners like myself as to what your decision is. Please do this in writing so that we can take it along to the branch office when we intend to apply for a VAT registration and prove to the person we're dealing with that the document we have is actually acceptable (on the assumption that you'll probably just ignore my third point—I have seen no evidence in the last ten years to suggest that you train your staff at all, so I doubt my meagre plea will get you to do so now).

Yours sincerely

Carl Nielsen

For once, there's a sequel. Carl writes again:

Interestingly, my email elicited a response. I wasn't really expecting that. I was called by someone from the SSMO as well as by Willie Viljoen, both of whom expressed some interest in listening to my problems. However, they wanted me to tell them things that go wrong on an on-going basis. I explained that VAT registrations are not something that come up every day, so it is difficult to identify trends, except to say that I don't remember when last I attempted a VAT registration that went through first time. The problem is that each time we try to learn what the requirements are so that next time we can tailor our application accordingly, only to be told that the very issues that were important last time are now no longer important, and that it is something else we have now got wrong. I made the semi-tongue-in-cheek suggestion that my new fee for handling VAT registrations will be 'whatever the client is willing to pay + R1'.

Words & phrases: ‘a’ v ‘any’ & the VDP

As I have said again and again, while ‘a’ is an article within the set ‘a’, ‘an’ and ‘the’, ‘any’ is a quantifying determiner, which the idiot fiscal draftsperson thinks is an article. The result is that when the sad sap wants to use ‘any’ properly he has to signal his intention by resorting to undiomatic contortions (79 TSH 2009—’any one’; 88 TSH 2010—’any single’).

I am nevertheless unready to claim credit for a miraculous purity in the usage of articles in the income tax Voluntary Disclosure Programme. The joke (well, I find it funny) is that most readers of the relevant law are unable to grasp the considerable purity of that; at least not immediately.

Here is the issue: The VDP is about ‘defaults’ (actually, highly qualified defaults, but I am not going down that road today). Must you disclose all your defaults or may you choose which to disclose?

Typically, SARS, in its copious writings on the VDP, fudges the issue, hoping that you will think that a clean breast of all fiscal sins is required, without actually telling you that in so many words.

The proper use of articles is central to clear writing, since it answers the Les Miserablian question—Who am I?—by which I mean the way in which a particular writer keeps track of the person, thing, subject or object he is writing about. Is a new target being introduced, or have we already been introduced? Only when you come across a writer clueless about this issue will you fully understand what I mean, and one day I shall publish some hilarious examples to prove my point, safe from any danger of hurting the feelings of the culprit concerned, on the sure footing that bad writers never read.

Since this is an evidence-based newsletter, I leave you to judge the issue from these excerpts from the tax VDP. They comprise every reference to a default:

the default in respect of which the person wishes to apply for voluntary disclosure relief
Notwithstanding the provisions of subsection (4)—

is s 15(5):

fixing!) That's a fairly respectable rate of tax. Here 'guideline prices' represented a form of price-

agricultural product. (Until now I thought that Section 15 governs the imposition of levies, which

incorporates measures':

away from any aspect of the law, even if—Nay!

The Winter Cereals Trust—what the hell is it?

96 TSH 2011—March

I see that, in 81 TSH 2009, my first attempt to un-
derstand this term, in relation to the precursor to para 51A of the Eighth Schedule to the Income Tax

Act, the benighted provision dealing with the ex-

What is also demonstrated here is the power of what I call a statistical approach to the interpreta-

tion of statutes and contracts. In this instance, the total population of usages is perfectly consistent, in

that a single default is envisaged, and anyone dis-

agreeing with me will be unable to substantiate his position, since, in matters of interpretation, no con-

cessions are made to mere feelings or insupporta-

ble theories.

While it is true that the Interpretation Act says

that, if the context allows, the singular shall include

the plural form, its application merely means that

you are free to disclose more than one default. It

cannot possibly be applied so as to mean that you

must disclose all your defaults.

To argue otherwise is to confuse definitions with

substantive law.

96 TSH 2011—March

An interest in a residence’—as you were

Take the Marketing of Agricultural Products Act,

which I regard as a major piece of fiscal legislation

but most readers probably believe is of interest

only to farmers and so are perhaps annoyed when

I include in the Monthly Listing Gazette notices

issued under its aegis. It works by means of 'statu-

tory measures':

Implementation of statutory measures

14. The Minister [responsible for agriculture] may from
time to time, by notice in the Gazette, entrust to any juristic person or body of persons, institution or the Department [of agriculture in the national government] the implementation, administration and enforcement of one or more statutory measures in respect of any agricultural product or class thereof.

Section 15 governs the imposition of levies, which

may not exceed 5% of the ‘guideline price’ of an agricultural product. (Until now I thought that ‘guideline prices’ represented a form of price-fixing!) That’s a fairly respectable rate of tax. Here is s 15(5):

(5) Notwithstanding the provisions of subsection (4)—
(a) any levies collected, administered or kept by any person or body under this Act shall not form part of the assets of that person or body, and any levies remaining in the possession of or under the control of any person or body after the period for which such levies were approved, shall be utilized in a manner determined by the Minister; and

(b) all levies shall in a manner and to the extent satisfactory to the Auditor General be accounted for separately from any other funds or assets under the control or in possession of such person or body and be audited on an annual basis by the Auditor-General.

Can trusts qualify?

Could a trust be used as a vehicle for the receipt and disbursement of a levy raised under a statutory measure?

A trust cannot be a ‘juristic person’ (77 TSH 2009). It is not the department of agriculture, for-

estry and fisheries. Can it be a ‘body of persons’ or an ‘institution’? Black’s includes no entry on ‘body of persons’ (which I am sure would never include the trustees of a valid trust) but says that an ‘institution’ is an established organization, especially if it is of a public character. Yet how might a newly cre-

ated trust qualify as an established organization?

In my view, s 14 cannot be validly used to channel a statutory levy to a valid trust.

Some agricultural history

So far so good. Now for my story. In the bad old
days we had the Wheat Board. During the halcyon

times when the ANC was taking (classical liberal)
advice from Harvard University, wheat boards and a

whole lot of interventions in the agricultural sector were swept away. (You would be astonished if you enjoyed only a small insight into how slyly old con-
control mechanisms were converted into new. It’s not for nothing that they say: ‘n Boer maak ‘n plan.’ To take over from the Wheat Board, there appeared two ‘Winter Cereal’ trusts. These were later consolidated into a single ‘Winter Cereal Trust’, whose deed, commendably, you may download off the Worldwide Web.

At some stage an unnamed founder existed but was soon usurped by the trustees, who, through a series of amendments, affected not only the amalgamation of the initial two trusts but rewrote the entire deed of what now is pleased to call itself the ‘Winter Cereal Trust’.

Do the trustees have letters of authority under the Trust Property Control Act? I don’t know, but the trust does have a registration number that looks like it was issued by the Master. Even so, I say that he erred, for the reason that the Winter Cereal trust isn’t a trust at all.

Nor does the trust feature in the schedules to the Public Finance Management Act as any form of statutory body, in or out of government. Nevertheless, the minister of agriculture, forestry and fisheries has authorized it, in GN R 727 of 20 August 2010 (89 TSH 2010), directly to receive a levy from farmers and agricultural players.

Reading the regulation and reading the supposed trust deed, I say that, in law, the trustees, acting as a body of persons, have been appointed the agent of the minister’s department. They do not act as principals, and the validity or otherwise of the trust is irrelevant to the operation of the Marketing of Agricultural Products Act as mediated by them. If I am right, there is no s 14 problem.

Some points about the entity calling itself the Winter Cereals Trust:

- In its creation, one old trust was clearly terminated. Even if the current trust were valid, the complete substitution of the deed of its precursor trust (the second old trust) might have resulted in the termination of that trust through novation. But if the current trust is invalid, its precursor trust was certainly terminated. Therefore, if there are chargeable events (93 TSH 2010) took place that might have had fiscal consequences.

- If it is a valid trust, it is a so-called object trust. As such, under our law it would be required to be a charitable trust, on the ground of being devoted to purposes for the public benefit (94 TSH 2011).

- Its beneficiaries are said to be those active in research into, the collection of information about and the broadening of market access of wheat cereal and the administration of the Wheat Forum. Yet an object trust doesn’t require beneficiaries, something that the draftsperson of the deed perhaps didn’t know. As I read this beneficiaries clause, I see it as representing part of the statement of the object of the trust, and the imprecision with which the supposed beneficiaries are identified does not of itself threaten the validity of the trust.

- Its chairperson has a casting vote! This is not a feature you would expect to see in a valid trust.

- It appears to consider itself exempt from tax under s 10(1)(c)(N) of the Income Tax Act. This is in fact a partial exemption for a PBO. Alas, I cannot see how, even if it were valid, it might qualify as a PBO, although it might have been registered as such by SARS, in which event a complex situation arises, not presently relevant. To me, it appears to be disqualified on several counts, some trivial and rectifiable and others significant and fatal. Nevertheless, on my view of its true nature, it might not face any liability to taxation.

- The unnamed donor of yore plays a part in its constitution yet, even if he lives, is not a party to its rewritten deed! What better evidence do you need of novelty? Yet novelty from one trust to what? With whom are the trustees contracting? I say that they have commandeered the trust property of the two old trusts and are purporting to contract with that property! It’s a legal nonsense!

If this is a trust, then I am Farouk of Egypt, returned to earth thinner (well, somewhat) and poorer (unreservedly). In my view, the trustees are acting as agents for the state under the Marketing of Agricultural Products Act. That is why there is no infringement of the provisions of that act, and why the tax status of the trust is unimportant.

In any event, a trust ought not to be a recipient of levies under the Marketing of Agricultural Products Act, since, as already suggested, an institution cannot, before its creation and successful operation, be an established organization. Moreover, there are too many problems besetting the identification of a valid charitable trust for a trust to serve as a reliable delivery vehicle for state purposes.

The minister and the Treasury should get rid of all such trusts and substitute them with s 21 companies (93 TSH 2010), which have the advantage of being, unquestionably, juristic persons and under far more detailed statutory supervision than trusts.

**What is the nature of levy payments?**

If I am right in concluding that the trust is not a trust at all but that the trustees, headed by their chairperson, act as a body of persons as an agent for the department, the monies they disburse come directly from the department, even if, physically, they are paid directly to the trustees.

What is the nature of such payments? They are not ‘government grants’ as defined in s 1 of the Income Tax Act, since they do not flow from a programme or scheme envisaged by s 10(1)(y), an exemption which, as I point out in every issue, has yet to be brought into effect.

They might be payments for services rendered, but then the department, via the trustees, would have to enter into service contracts with recipients. In any event, they would form part of a recipient’s ‘gross income’, since they cannot possibly be of a capital nature.

They could be ‘grants’ as defined in s 1 of the Value-Added Tax Act. If so, s 8(5A) and s 11(2)(f) would be engaged and a deemed zero-rated supply by the recipient to the department would spring
An employer’s vicarious liability & fault

Ponnang JA in CSARS v TFN Diamond Cutting Works (Pty) Ltd SCA Case no 070/04:

In Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd 2001 (1) SA 1214 (SCA), Howie JA stated (paras 7 and 8):

Vicarious liability is imposed on innocent employers by a rule of delictual law. The rule in its most simple form is that the liability arises when an employee commits a delict within the course of such employee’s employment. The foundational formulation of the rule is to be found in Mtike v Martens 1914 AD 382 at 390. The dictum in question goes on to warn that an act done solely for the employee’s own interests and purposes, and outside the employee’s authority, is not done in the course of employment even if done during such employment. Uncertainty created by later judicial pronouncements as to the content and ambit of the rule was removed by the decision in Minister of Law and Order v Ngobo 1992 (4) SA 822 (A). [95 TSH 2011]

The reason for the rule is often stated to be public policy. See, for example, Salmond and Heuston on the Law of Torts 19 ed at 457. And an underlying reason for that policy has been held in Feldman (Pty) Ltd v Mall 1945 AD 733, in a passage at 741, to be the consideration that because an employer’s work is done ‘by the hand’ of an employee, the employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee’s improper or negligent conduct ‘in carrying on his work’.

The question is always as Howie JA put it (para 10), ‘were the acts in the case under consideration in fact authorized; were they in fact performed in the course of the employee’s employment?’

How does a debt due to the state arise under the Income Tax Act?

As I like to say to poorly trained SARS officials, while I don’t know where they live, I, thanks be, live in what is supposed to be a constitutional democracy. Before I may be mulcted in tax by SARS, it is necessary that I incur a debt due to the state. Just how do I do that?

The answer seemingly lies in s 91(1)(a) of the Income Tax Act:

**Recovery of tax**

91. (1)(a) Any tax or any interest payable in terms of section 89(2) or 89quat shall, when such tax or interest becomes due or is payable, be deemed to be a debt due to the State and shall be payable to the Commissioner in the manner and at the place prescribed.

Well, a SARS official might riposte, that’s that. You owe, you pays.

Not so fast! That is not how statute law is meant to be interpreted. Before s 91(1)(a) can apply, a tax or interest must be payable under either s 89(2) or s 89quat. Since s 89quat deals entirely separately with PAYE, provisional tax, and interest on these unusual, Fourth Schedule taxes, I focus here solely on s 89(2).

As defined in s 1, a ‘tax’ is what you expect it to be but, astonishingly, includes an administrative penalty imposed under s 75B. Additional tax under s 76 would be included, but other penalties have been forgotten. These are imposed under s 35A(9)(b) (10%; withholding tax on nonresident sellers of immovable property); s 80S(1) (R1 m; reportable arrangements); and s 101(8) (R25 a day; appointment of public officer). Except for the s 80A penalty, these penalties are awaiting deletion and replacement by administrative penalties. Offences involving criminal proceedings are excluded, even if involving what in the headings to various sections (ss 75 and 84) are referred to as penalties.

Thus no machinery exists for the collection of the s 80S(1) penalty. It follows that, well, I don’t know what follows. You can hardly say that the payment and collection of such a purely statutory concept as a pecuniary penalty is a common-law issue. My guess is that the very introduction of the system of administrative penalties shows up the unconstitutionality of the s 80S penalty, and, should you fall liable to it, I advise you not to pay!

Back to s 89(2) taxes and interest. What are they?

(2) If the taxpayer fails to pay any tax in full within the period for payment notified by the Commissioner in the notice of assessment or within the period for payment prescribed by this Act, as the case may be, interest shall, unless the Commissioner having regard to the circumstances of the case grants an extension of such period and otherwise directs, be paid by the taxpayer at the prescribed rate on the outstanding balance of such tax in respect of each completed month (reckoned from the date for payment specified in the notice of assessment or the date on which the tax has been...
come payable in terms of this Act, as the case may be) during which any portion of the tax has remained unpaid.

Section 89(2) appears to be all about interest, and that is how it would have been presented to you if you ever studied taxation. Certainly, and thanks to s 91(1)(a), the interest charge it raises constitutes a debt to the state.

Yet the greater significance of s 89(2) lies in its identification of the tax due and payable constituting a debt to the state:

☐ Tax that is the subject-matter of an ‘assessment’ showing a period for payment.
☐ Tax due to be paid within a period fixed otherwise than by assessment.

Which taxes (lying outside of the Fourth Schedule) are these? This turns out to be a surprisingly difficult question, owing to the steady addition of taxes to an act that used to be focused solely on ‘normal tax’ (the so-called income tax, and the tax on taxable allowances, movements in trading-stock balances and taxable capital gains). To answer it, you have to undertake some interpretation.

Normal tax
You have to submit an annual return for assessment (s 66). If you don’t, the Commissioner’s remedy is to make an estimated assessment (s 78).

Assessable and chargeable amounts left out must be dealt with by the Commissioner by way of additional assessments (s 79(1)(a) and (b)). Qualifying discrepancies must be dealt with by the Commissioner by way of reduced assessments (s 79A). Irregular assessments must be withdrawn by the Commissioner (s 79B).

A reading of the entire act might be necessary to prove it, but normal tax becomes a debt to the state by way of an assessment, and in no other way.

Additional tax
The first additional tax appears in s 12G(12). The next in s 12I(15). These represent sanctions for the abuse of special allowances. No mention is made of assessments.

I notice for the very first time that at least someone believes the donations tax imposed by s 54 to be subject to additional tax under s 76 (s 61(h)).

Yet I just cannot see how such a substantial sanction might be imposed in such an offhand manner, especially when substitution under the mutatis mutandis formula used yields no intelligible result. And at least one SARS official believes that the STC is subject to additional tax, owing to his misreading of s 64B(11), whose introduction he promoted, or so rumour has it. Everyone else believes him to be wrong on this issue. On both counts, what you face is drafting by gesture (thinking of Die Burger’s Wonderman of yore, I prefer the Afrikaans, by gebaar), while the imposition of a tax requires rigorous and precise detail.

The infamous treble tax is in fact additional tax imposed under s 76. The only hint so far that an assessment is involved in its recovery is to be found in s 76(2)(c).

Another such hint relating to all additional taxes lies in s 83(13)(b), part of the appeals procedure.

Other taxes
The so-called lifting tax imposed by s 33 is, one way or another, mediated by assessments.

The withholding tax on royalties imposed by s 35 is recoverable from the person supposed to make a withholding under s 91 (s 35(2)(e)). No mention is made of an assessment.

The withholding tax on payments to nonresident sellers of immovable property imposed by s 35A becomes the personal liability of a person failing to deduct it (s 35A(7)). No mention is made of an assessment.

The tax on foreign entertainers and sportspersons imposed by s 47B is the subject-matter of a return (s 47F). That would presumably lead to an assessment. A resident failing to make the withholding required (by s 47D) becomes personally liable (s 47G). No mention is made of an assessment.

The turnover tax imposed by s 48A is extremely sketchily presented. I am prepared to guess that it is mediated by returns and assessments.

The donations tax imposed by s 54 is a self-assessment tax subject to the Commissioner’s power to assess either the donor or donee (s 60(5)).

The secondary tax on companies (STC) levied by s 64B is also a self-assessment tax subject to the Commissioner’s power to estimate any unpaid amount by way of assessment (s 64B(8)).

Look Ma! No assessment!
So how does the Commissioner collect additional taxes and the self-assessment taxes? They cannot simply become payable and immediately collectable, as SARS officials will assert, since, as I never tire of telling them, that would be like being fired from your job without receiving three written warnings. How is it that they understand—and only too well—due process in labour matters but believe a taxpayer to have no rights to such process?

Here is the answer:

Additional assessments
79. (1) If at any time the Commissioner is satisfied—

(c) that, as respects any tax which is chargeable and has become payable under this Act otherwise than under an assessment, such tax has not been paid in respect of any amount upon which such tax is chargeable or an amount is owing in respect of such tax,

he shall raise an assessment or assessments in respect of the said amount or amounts:—

A SARS official seeking to collect money from you for normal tax, additional tax or any one of the other taxes mentioned here without benefit of an assessment, to which you are entitled to object and appeal, is in my view guilty of fraud and extortion, and so is his or her boss, the Commissioner.
Learning law with your PC: the *in duplum* rule

This one is especially easy. All you have to do is read the judgment of Shongwe JA in *Margo and Another v Gardner and Another; Gardner and Another v Margo and Another* 2010 (6) SA 385 (SCA). It happens to be the first SCA decision to respond to a search for the string “in duplum” in the *South African Case Reports* published by Jutus, from 1977 to date:

> It is trite that the *in duplum* rule forms part of South African law. It is also axiomatic that the *in duplum* rule prevents unpaid interest from accruing further once it reaches the unpaid capital amount. However, it must be borne in mind that a creditor is not prevented by the rule from collecting more than double the unpaid capital amount in interest, provided that he at no time allows the unpaid arrear interest to reach the unpaid capital amount. On the facts of this appeal this court is not asked to review the order of the SCA, but to give effect to it as it stands. The order of the SCA is unequivocal and does not provide for any interest ceiling. Therefore the amounts claimed in the second writ are all due and owing by Gardner to Margo on the strength of the SCA judgment. The purpose or basis of the *in duplum* rule is to protect borrowers from exploitation by lenders who permit interest to accumulate, but essentially also to encourage plaintiffs to issue summons and claim payment of the debt speedily. Delays inherent in litigation cannot be laid at the door of litigants and it would be unfair to penalize a creditor with the application of the *in duplum* rule while proceedings are pending.

Delayed performance is performance, nevertheless

*Nkengana v Schnettler* (65/09) [2010] ZASC 64 (7 May 2010) (87 TSH 2010) was about performance under a property deal, with lots of loose ends bedevilling the facts. But performance is a critical issue in taxation, since it can determine the timing of a chargeable event (82 TSH 2010).

Griesel AJA, who delivered the unanimous decision of the court, said (footnote removed) said:

> It is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, so far as it is possible, performance of that other party’s obligations in terms of the contract. Accordingly it was not disputed on behalf of the respondent that, for so long as the original deed of sale remains uncanceled (as in this instance), it remains open to the appellants—even at this late stage—to claim specific performance of the original agreement while tendering performance of their reciprocal obligations.

The $64 000 question is: will the outstanding reciprocal performances delay the patrimonial event and thus accrual/inciparual?

‘Exporter’: does a defined noun define the corresponding verb?

Nugent & Lewis JA in *Standard General Insurance Company Limited v Commissioner for Customs and Excise Case* no 622/02 (I have omitted the footnotes):

> … In other words, argues Standard General, although the noun (‘exporter’) is defined, the definition does not extend to the use of the verb.

In support of that contention it was submitted that if the drafter of the legislation had intended to refer to an ‘exporter’ as it is defined in the Act that word would have been used in place of the phrase ‘person who exports’. Moreover, it was pointed out that when defining the noun the drafter of the legislation did not expressly extend its meaning to the use of the verb, as is often done in legislation. For example, when the definition of the word ‘manufacture’ was later inserted in the Act it expressly provided that the noun would bear a corresponding meaning.

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

In our view the drafter of s 18A (which was inserted when the definition of ‘exporter’ already existed) might just as well have held the view that because a ‘person who exports’ is the linguistic equivalent of an ‘exporter’ the former phrase would suffice. Naturally the noun might have been used instead but we do not think that a contrary intention was necessarily signified by the choice of words that have an equivalent meaning.

We also think it would be remarkable—simply from a consideration of the intelligibility of language—if the drafter of the definition of the noun were to have intended the verb to be used with a different connotation. It is true that when a noun is defined in legislation the drafter often expressly attributes a corresponding
Rather than attempting to draw inferences as to the drafter’s intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation. As pointed out by Nienaber JA in De Beers Marine…, when dealing with the meaning of ‘export’ for the purpose of s 20(4)—which draws a distinction between export and home consumption—the word must ‘take its colour, like a chameleon, from its setting and surrounds in the Act’.

While the word ‘exporter’ as it is used in subsections (2) and (3) is clearly a reference to the ‘person who exports’ in subsection (1), in our view the person who is referred to in subsection (1) is, by equivalence of language, an exporter, and that word is in turn defined. That construction seems to fit more readily with the apparent purpose and operation of the Act than a construction that gives a narrow meaning to the phrase.

The object of the Act (in so far as it relates to import duties) is to ensure that duty is collected on goods that are imported into this country and its provisions are mainly directed towards that end. It is not surprising that liability for the payment of duty should be imposed upon more than one person, or upon one person in more than one capacity, for the Commissioner cannot be expected to know who has what interest in goods that are landed.

There are various provisions in the Act in which liability for the payment of duty is imposed at different times on a variety of people who might have some interest in the goods and s 44A(c) provides an appropriate example. When goods are imported and delivered by a carrier to a customs warehouse duty becomes payable by, amongst others, the ‘importer’ of the goods, defined to include a person who owns the goods, a person who carries the risk in the goods, a person who represents that or acts as if he is the importer or owner of the goods, a person who actually brings the goods into the Republic, a person who is beneficially interested in the goods, and a person who acts on behalf of any of the aforementioned persons. Just as different people might become liable for the payment of duty so one person might incur liability in different capacities. Furthermore the agent of any such person might become liable not only because he is an importer as defined but also by virtue of the liability imposed on agents generally by s 99(2). Duplication of payment is avoided by s 44A which absolves each of the various persons from liability upon payment of the duty by one of them.

Where the net has been cast that widely upon the importation of goods (to include all those who might have an interest in the import) we would expect the net to be cast equally widely (to include all those who might have some interest in the export) when the goods are removed for export before the duty has been paid, rather than that liability would be limited to only a single person—and possibly his agent. For an agent becomes liable in terms of s 99(2) only if he is the agent, or represents himself to be the agent, of a principal who is himself liable for the payment of duty. It cannot be assumed that a clearing agent will necessarily be appointed by, or represent himself to have been appointed by, the person who is in truth the exporter as narrowly defined (the person who actually exports the goods, whoever that person might be). It can also not be assumed that only one person will undertake the process of exporting from beginning to end. It is unlikely that the legislature would have intended that goods should be permitted to leave the warehouse for export (with the inherent potential that the goods might never have been liable to customs duties and costs) but that the liability for duty would devolve only upon one undefined person. We do not think the legislature could have intended the Commissioner to seek out the true exporter in order to collect the duty from that person, and perhaps from his agent (but only if the agent has been appointed by, or has represented that he has been appointed by, that person).

In our view the legislature must have intended liability to fall upon all the persons who might have an interest in the export (those defined in the definition of an ‘exporter’) just as it imposed liability on all those who have an interest in the import and that a ‘person who exports’ was intended to bear that meaning.

Terms v conditions

In Southern Era Resources Ltd v Farndell No 2010 (4) SA 200 (SCA) 927 (27 November 2009), Mpati P said (footnotes removed):

It is not uncommon to find, in an agreement of purchase and sale, a heading or subheading that reads ‘Conditions of Sale’. What follows such headings are, usually, not true conditions which suspend the operation of the agreement, but enforceable terms of the contract, or both. As was said in R v Katz, the word ‘condition’, in relation to a contract, ‘is sometimes used in a wide sense as meaning a provision of the contract, ie an accepted stipulation’, such as includes ‘ordinary arrangements as to time and manner of delivery and of payment of the purchase price’. In the case of a true condition, however, whether suspensive or resolutive, the operation of the whole contract, or part thereof, and its consequences, depends upon an uncertain future event. In other words, the operation of the obligations flowing from the contract is suspended pending the happening, or failure, of the uncertain future event. Fulfilment of a suspensive condition results in the contract being enforceable. And, normally, if the condition fails and the parties have not agreed otherwise, the contract is rendered void.

The difference between a term of a contract (contractual obligation) and a condition is best described by...
Holmes JA as follows:

(A) contractual obligation can be enforced, but no action will lie to compel the performance of a condition.
32—An irreverent newsletter designed to keep you up to date—
Extortion an everyday event at SARS

This is a ‘Final letter of demand’ addressed to a provisional taxpayer by S L Bassadien ‘Collector’ of the ‘Enforcement department’ of the ‘Compliance Centre’ of the SARS Doringkloof branch.

It claims that an amount of provisional tax is due and that it must be paid within five days, on pain of further proceedings, including the ‘appointment of agent by attaching your bank account’. It closes in this friendly manner:

Kindly take note that if there’s no payment or contact within 05 days a garnish order [sic] will be sent out for the full amount.

It is therefore in your best interest to contact us within 05 days to come to some arrangements

I know and represent this taxpayer. How I wish SARS had carried out its threats! The fact is that SARS has raised no assessment in this matter.

The new VAT form

Regular contributor Carl Nielsen (Dulverton Financial Services) writes:

I think this email conversation might be worth distilling into an entry in the Monthly Notebook. As you have mentioned before, all evidence points to the fact that SARS takes systems live well before they are ready for it. Here is confirmation in black and white (digitally speaking) that SARS is quite happy to introduce a semi-functional system while testing is still on-going. The mind boggles!

Hi Eugene

These awful new VAT forms: when I try to open in Flash I just get a blank page except for some of the static information at the bottom of the page below the line. A problem on your side or mine? I have tried with two different computers, so I suspect the issue is your side.

Carl

Good day Carl,

Thank you for contacting SARS Third Tier Support.

Please advice [sic] if your return is still shows blank on your side. Can you please email us your login name, VAT number and a screen shot of how your VAT return is showing.

Should you require further assistance, do not hesitate to contact the SARS contact centre on 080 000 7277.

Kind regards,

Yolanda Shole—SARS Support
SARS eFiling/e@syFile Support Team

Dear Yolanda

I think I have pinpointed the problem. Using Mozilla Firefox, I get the same issue whether on an Ubuntu system or Windows. I have attached screenshots. Opening the Flash version in Internet Explorer, it works fine. This appears to leave me with the choice of opening the form in Adobe Reader using Firefox or in Flash using Internet Explorer, neither of which option thrills me. It would be highly appreciated if you would work on the software to make it cross-platform capable. At the same time, porting the EMP 201 return to the Flash platform would also be appreciated: Adobe Reader is just so slow.

Carl

Good day Carl,

Thank you for contacting SARS Third Tier Support.

SARS is aware of this problem where the clients returns are blank on some browsers. In the meantime please work on the browser that will allow you to submit your returns successfully. They are still doing a lot of testing in ensuring that the form is convenient and accessible for everyone. Hopefully in the near future the form will open in flash player as well.

Should you require further assistance, do not hesitate to contact the SARS contact centre on 080 000 7277.

Kind regards,

Yolanda Shole—SARS Support
SARS eFiling/e@syFile Support Team

Table of statutory thresholds

<table>
<thead>
<tr>
<th>Date</th>
<th>Source</th>
<th>Legislation</th>
<th>Effective</th>
<th>Threshold</th>
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<td>19981030</td>
<td>GN R 1411 GG 19435</td>
<td>s 46(2)(c)(i), (ii) &amp; (iii) of the Magistrates’ Courts Act</td>
<td>R100 000</td>
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<td>20040312</td>
<td>GN R 313 GG 26113</td>
<td>ss 15 &amp; 16 of the Small Claims Court Act</td>
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<td>GN 713 GG 28893</td>
<td>s 7(1)(b) of the National Credit Act</td>
<td>20060601</td>
<td>lower R15 000</td>
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</table>
Does para 80(2) free nonresident trust beneficiaries from the CGT?

I don’t relish reopening this silly subject (79 TSH 2009; 86 TSH 2010) but the article in the March issue of Business Law & Tax Report (96 TSH 2011) didn’t get up only my nose.

But first, here (Ho, hum) is how para 80(2) of the Eighth Schedule to the Income Tax Act (CGT) reads:

(2) …where a capital gain is determined in respect of the disposal of an asset by a trust in a year of assessment during which a trust beneficiary…who is a resident has a vested interest or acquires a vested interest…in that capital gain but not in the asset, the disposal of which gave rise to the capital gain, the whole or the portion of the capital gain so vested—

(a) must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust; and

(b) must be taken into account for the purpose of calculating the aggregate capital gain or aggregate capital loss of the beneficiary in whom the gain vests.

‘Aha!’ say the lawyers. ‘No mention of nonresidents. Hmm. They must be free from CGT on such distributions!’ I enjoyed the experience at least twice at our seminars of hearing brilliant persons present immediately and instinctively destroying this puerile argument by citing the CGT charging provision, s 26A of the Act.

While you ponder upon that, I’ll report the reaction of Duncan McAllister (SARS), who like me, perhaps despair of ever eradicating this shallow and erroneous analysis of the law:

Nothing new in the article, but many thanks for letting me have a copy. The argument that the conduit-pipe principle still applies cannot be correct because the common law was varied when a trust was brought within the definition of a ‘person’. There is also a principle of interpretation that Parliament is regarded as being aware of the common law. If it was so aware, why did it choose to refer only to a beneficiary who is a resident in para 80? The reason is that Parliament was aware that it had varied the common law by amending the definition of a ‘person’, and that the only way in which a capital gain could be disregarded in a trust would be if there was a specific attribution rule.

I’ve been trying to find out if this principle of interpretation has been applied in SA but no luck so far. I found this on the web:

Presumption that Parliament follows Legal principles and Common law-P

The legislature is presumed to be competent and to have knowledge of all the legislation and case law in existence at the time a statute is enacted. [The Queen v Inhabitants of Watford (1846) 9 QB 626 115 ER 1413, at p 1417 (per Lord Denman CJ). This presumption was expressed as follows by Driedger on the Construction of Statutes supra at pp 156–57: Driedger’s View on Presumption

The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge of which judicial notice may be taken as well as anything contained in briefs or reports tabled with legislation. The legislature is presumed to have a mastery of existing law, both common law and statute law, as well as the case law interpreting statutes. It is also presumed to have knowledge of practical affairs.

Logically, the substance of what the legislature is presumed to know must be knowledge that was available to it at the time the legislation was enacted…. [2747-3174 Québec Inc v Quebec (Régie des permis d’alcool) [1996] 3 SCR 919].

I also came across this passage in a US court case:

fluor Corporation and Affiliates v The United States
The South African Jazz Foundation—what the hell is it?

My personal view of the introduction into South Africa of an official lottery is that it was a plan conceived by that dreadful little man who was polokwane to gain control (probably with racist overtones) of civil-society structures. Like all his plans, it was never properly executed but it has nevertheless had an arbitrarily destructive effect, characteristic of governmental initiatives. Research will perhaps one day show that NGOs were better served by simple charity than by the lottery.

In the mean time the public is left to muse over who receives and who is starved of funds.

In the press the South African Jazz Foundation is said to be a so-called s 21 company but also an events organizer. More to the point, it is a recipient of funds from the National Lottery. My interest piqued, I thought I would scratch about the web to see what would emerge.

The Sunday Times of 24 April 2011 reported that the Foundation received R3,7 m from the National Lottery Distribution Trust Fund to stage a concert at the Coca-Cola Dome in March (see the Monthly Listing). In 2008, it further reported, the National Lottery Board (NLB) had accused the Foundation of being an ‘events-management company’:

In 2007 the NLB gave the Jazz Foundation a grant of R15 million. But in its annual report a year later it stated that the organization ‘was indeed an events-management company’ despite it being registered as a Section 21, non-profit company.

On 22 July 2009 the DA published a question it raised in Parliament, which yielded this table:

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<td>#3820</td>
<td>R2,000,00 paid in full</td>
<td>0</td>
</tr>
<tr>
<td>#13232</td>
<td>R1,050,00 paid in full</td>
<td>0</td>
</tr>
<tr>
<td>#13244</td>
<td>R710,000,00 paid in full</td>
<td>0</td>
</tr>
<tr>
<td>#16894</td>
<td>R2,250,000,00 paid in full</td>
<td>0</td>
</tr>
<tr>
<td>#21626</td>
<td>Only R113,000 paid out</td>
<td>The balance of R3.75 million is being withheld by the NLB on the basis that the project has already been completed</td>
</tr>
</tbody>
</table>

On 19 July 2007 IOL reported that the Foundation won an urgent Pretoria High court order forcing the NLB to pay it the balance of R3.75 m under an agreement to sponsor a national jazz festival. The Foundation’s CEO is quoted as describing the Foundation as ‘non-profit organization’.

The Mail & Guardian on 25 September 1998 reported that the Foundation published the first issue of a by-subscription-only magazine, Jazz Heritage, but I can find no evidence of anything beyond a promised third issue (on 26 May 1999).

In a posting dated 8 February 2011 in the Etraffic Directory, the Foundation includes this statement in its advert promoting the sale of tickets to its concert:

The Jazz Foundation of South Africa is a section 21 company that is aimed directly at promoting and preserving the legacy of South African music.

Yet nowhere on its official website does the Foundation reveal that it is a company, much less a s 21 company, which the old Companies Act calls an ‘association not for gain’ (ANFG).

See Melvil, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 US 353, 382 n 66, 102 SCt 1825, 1841 n 66, 72 Led 2d 182 (1982); Lorillard v Pons, 434 US 35—An irreverent newsletter designed to keep you up to date—

575, 589, 98 SCt 866, 875, 55 LEd 2d 40 (1978); Kelly v United States, 826 F 2d 1049, 1052 (Fed Cir 1987).
Learning the law with your PC: ‘premises’ (& independent contractors)

The word *premises* is used only thirty-one times in the latest version of the Income Tax Act. It is defined only once, in s 74, solely for the purposes of ss 74 to 75, and thirteen of these thirty-one hits are one arguing for a wider meaning to succeed.

Suggest, making it extraordinarily difficult for any-

dering its physical subject-matter, and, I would show that it derives from that part of a title deed showing that it is accounted for by this usage:

‘[P]remises’ include any building, premises, aircraft, vehicle, vessel or place;

What this weirdly presented definition means is that the term ‘premises’ for this purpose bears its ordinary meaning (‘premises’ means…premises) but is extended so as also to include a building, an aircraft and a vehicle, vessel or place. Clearly, aircraft, vessels and a place would never ordinarily be considered to be premises; hence their specific inclusion in these provisions having to do with searches for information by SARS. On the other hand, a building would appear to represent a pre-

eominent example of ‘premises’; its specific inclusion indicates that a building not constituting premises is intended. For example, a maize silo might in ordinary language be accepted as a building but hardly ever as premises. Under the definition, it would nevertheless be searchable.

In all its eighteen other usages, the word premises must bear its ordinary meaning.

What does my favourite dictionary, *Black’s*, say about the word premises?

1. Land and buildings a piece of land and the build-

ing on it 2. Part or all of a building a building or part

What does *Black’s*, the world’s finest legal dictionary, say?

3. A house or building, along with its grounds <smoking is not allowed on these premises>

*Black’s* includes a historical note on the word, showing that it derives from that part of a title deed denoting its physical subject-matter, and, I would suggest, making it extraordinarily difficult for any-

one arguing for a wider meaning to succeed.

What about the case law? At first sight, my usual trick of searching *Jutastat* to find relevant case law appears hopeless, since the word premises appears thousands of times. But the string “meaning of premises” amazingly quickly yielded this gem, which simply has to be the leading modern case on the issue, represented by the judgment of Murray J in *Boyers v Standsfield Ratcliffe & Co Ltd* 1951 (3) SA 299 (T):

There are a number of considerations which have led me to the conclusion that the judgment of the Court a quo is correct, and that a vacant stand or erf does not fall within the meaning of ‘premises’ so as to give the lessee thereof the protection of [the Rents] Act 33 of 1942 (as amended).

In the first place there is the general proposition, for which authority is to be found in numerous cases cited by Craies on *Statutes* (4 ed p 151), *Maxwell* (9 ed p 57), *Halisham* (Vol 31, para 596), that language is generally to be given its natural meaning and words are to be construed in their popular sense. In the present case the popular meaning of the word ‘premises’ appears to connote the existence of buildings or struc-
tures, and neither by reason of any express definition nor (in my view) by reason of any implication of legisla-
tive policy is any meaning other than the popular one required.

In the second place, if regard be had to the aim and scope of the legislation, as evidenced by its history, it is noteworthy that the control of business premises came into existence considerably later than the control of dwellings…. But it seems that there is substance in the respondent Company’s contention that the amendment in 1946 of Act 33 of 1942 indicates that the Legislature was concerned not with a new type of property (viz entirely vacant land, as compared with built upon land), but with spreading the net so as to in-
clude the same type of property, viz a building with any appurtenant land when put to a new user, viz for busi-

ness as opposed to residential purposes.

Why am I interested in the word? Because I have discovered that the construction industry is scared of it in the context of the definition of a ‘personal service provider’ in para 1 of the Fourth Schedule to the Income Tax Act (PAYE)

(b) where those duties must be performed mainly at

and of the term ‘remuneration’ in the same place (first proviso):

Provided that for the purposes of this paragraph a person shall not be deemed to carry on a trade inde-
dependently as aforesaid if the services are required to be performed mainly at the premises of the person by whom such amount is paid or payable or of the person to whom such services were or are to be rendered…. The ‘premises of the client’ are clearly its business premises, that is, the building, standing on a piece of land, in which it conducts its operations. So, too, are the premises of those paying remuneration or enjoying services. Not in a million years could a construction site comprise ‘premises’ for the pur-

poses of these two provisions.

In any event, a construction site is neither owned nor hired by a contractor, and so could never be its premises. If premises they be (an unlikely possibil-
ity), they are the premises of the owner or tenant of the land.
Labour-only subcontractors: Tock, tock! These Romans are crazy

I always, I hope, hesitate before ascribing human behaviour to stupidity but sometimes, alas, there is no alternative. Remember LOSCs? They were extensively covered in 27 TSH 2005, 30 TSH 2005 and 92 TSH 2010. I can never forget them, because of my enduring astonishment at SARS’s reaction to my statement of fact that its second directive on the subject (they refused to let me see the first), issued under the aegis of BIFSA, was illegal. After about a year of sullen silence, they attempted some damage-control, in the form of a third directive, which, sadly, was misunderstood by BIFSA.

Now this cheeky bugger, with a great memory, Greg Beykirch, sends me a string of emails, which, he claims, contradicts what I said in a previous issue:

Subject: BIFSA directive Jan 2005 (5).doc
Mr Naicker
Attached please find the directive as discussed.

If you have any further questions you are welcome to contact Mr Niel Nel at (012) 422 4274.

regards
Gerna Gresse
Quality Assurance Manager
Enforcement and Compliance Risk
SARS Head Office

Hi Gerna
Will it be in order if we use this directive, is it still running?
Please confirm.
Thank you,
Regards,
Liz

Elizabeth
As far as I know yes.
Niel
Your comments
Gerna Gresse
Audit Liaison [sic]
SARS Head Office

Hi Gerna
This directive is still applicable—it has not been withdrawn. These directives are managed by the Legal & Policy Division.

Regards,
Niel Nel
SARS Head Office: Operational Service Escalations & Support

Greg sent me a copy of the ruling in question, effective as from 1 March 2005. It is certainly the third directive, although couched in slightly different terms from the copy I saw in 2005.

The first thing to note about it is that the PAYE law to which it refers has been dramatically changed, especially in its inclusion of independent contractors within the ranks of PAYE employees. In fact, if you read the item elsewhere in this issue on the word ‘premises’, you will learn that a LOSC today simply cannot be a PAYE employee.

As for its validity today, what more can I do but repeat what I said in 92 TSH 2010?

The third ruling (also unconstitutional), of 18 March 2005, silently reflected some of my input, to which it referred as ‘concerns’ about its applicability and the ‘circumstances in which [PAYE] must be deducted from payments made to Labour-Only Subcontractors’. If you read it very carefully, you would have understood that you were allegedly authorized to deduct PAYE at a rate of 6% from an unincorporated LOSC at the rate of 6% if he or she was caught up in the PAYE system.

What happened next was nothing short of cataclysmic, the repeal or downgrading by s 76I of the Income Tax Act of written statements issued by the Commissioner up to 30 September 2006.

Interpretation Note 36 represents the Commissioner’s exercise of his power under s 76I to say which of his earlier writings are binding and which not. As I read it, it throws no lifeline to the three LOSC rulings (the first of which is still a national secret).

So, puleeze, if you are dealing with a LOSC, be sure, as I have previously warned, not to place yourself in breach of contract by deducting PAYE when the law prohibits it. And never, ever think that a 6% rate of PAYE deduction is ever the correct rate. Even without the withdrawal of all past rulings, the 6% rate was illegal under the PAYE law.

Perhaps I also have to repeat what I said about the unconstitutionality of these directives in 27 TSH 2005:

More importantly, the rate of 6% is not fixed by law.

The further implication is that it has been set by the Commissioner under his power to determine the manner in which the PAYE tax tables are to be applied. But—Oops!—he may exercise that power only in the tables themselves, that is, in Guideline for Employers, SARS’s excellent annual publication. Okay, then, he must be acting under his power to issue directives under four other provisions of the law. But—double Oops!—the first of these must be issued to a particular employer; the second must involve a particular employee; the third may be issued only to private companies for tax purposes saddled with a PAYE burden on account of their directors; and the last one allows not for directives but estimated assessments of PAYE raised upon non-compliant employers.

Although SARS does not specifically say so, its approach must be that it has entered into an arrangement under the first of these four provisions, concluded not with a particular employer but with a class of employers represented by an agent acting on their behalf, that is, BIFSA. To this supposition the technical riposte is: Oh yeah? Prove it!

Just as a taxpayer alleging an agent-principal rela-
tionship as an explanation for its fiscal actions is required to prove it, SARS is equally subject to the challenge.

It probably cannot meet this, since it seems highly unlikely that BIFSA is in law the agent of (part of) all builders, especially not in such a sensitive and critical matter as their compliance with the tax laws. Each builder-member therefore individually has to agree to constituting the agency arrangement, and it is well known that many builders have been spitting snakes since news of this initiative started breaking last year and so could not even have been consulted.

97 TSH 2011—April

Words & phrases—‘subject to’

Nicholas AJA in Sentra-Oes Kôöperatief Bpk v CIR 1995 (3) SA 197 (A):

The question then is whether the effect of s 28(2)(c) is to confine the deduction available to a short-term insurer to ‘expenditure’ and to exclude a loss. In this connection the opening words of ss (2) of s 28, ‘[s]ubject to the provisions of this Act’, are important. They are to be contrasted with the opening words of ss (1), ‘[n]otwithstanding anything to the contrary contained in this Act’. In the majority judgment in S v C Marwane 1982 (3) SA 717 (A) at 747H–748B, Miller JA explained that the purpose of the phrase ‘subject to’ when used in a legislative provision, is

‘... to establish what is dominant and what subordinate or subservient; that to which a provision is “subject”, is dominant—in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be “subject” to the other specified one. As Megarry J observed in C and J Clark v Inland Revenue Commissioners [1973] 2 All ER 513 at 520:

“In my judgment, the phrase ‘subject to’ is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.”

‘But when the intention is that that which is now being enacted shall prevail over other laws or provisions which may be in conflict with it, it is almost invariably prefaced by a phrase such as “notwithstanding any contrary provision...” or words to similar effect....’

The effect of the words “[s]ubject to the provisions of this Act” is therefore that, if there is a conflict, inconsistency or incompatibility between them, the gene deduction formula contained in s 11(a) prevails over the specific provision in s 28(2)(c). And no reason suggests itself why the Legislature should have wished to exclude the application to a short-term insurer of the deduction formula which in terms of s 11(a) is applicable to any person carrying on any trade within the Republic.

The wording of s 28 of the Income Tax Act has subsequently been substantially changed but the principle of interpretation stands.

97 TSH 2011—April

VAT: tax invoices & second-hand goods, especially when exported

How fortunate you are if you do not have to contend with the very few but very obscure provisions of the Value-Added Tax dealing with ‘second-hand goods’, which are essentially defined in s 1 as ‘goods which were previously owned and used’ and sectional title units swapped for rights under a share block scheme.

Famously, ‘second-hand goods’ exclude all mining rights—essentially because the government has stolen these, in one of the greatest takings in economic history, an act for which I still hope it will be severely punished by our or foreign courts. Also excluded are animals and targeted gold coins.

Both ‘full’ and ‘abridged’ tax invoices are required by s 20(4)(e) and (5)(d) respectively to indicate ‘where applicable, that the goods are second-hand goods’. These simply cannot be second-hand goods on which so-called notional input tax is claimed, since such goods are not allowed to be the subject matter of a ‘taxable supply’ (definition of the term ‘input tax’ in s 1), and a tax invoice would hardly be used for a nontaxable supply! How, then, would second-hand goods get on to a vendor’s tax invoice in the first place?

Unlike ‘input tax’, whose definition is relational and stuffed, madly, with substantive (rather than definitional) provisions, second-hand goods are objectively identifiable. In the main, they are goods that are neither new nor unused. They must have been acquired by the invoicing vendor for onward supply in its enterprise and must therefore be accounted for under s 7(1)(a)—the principal charging provision of the act, which, extraordinarily, allows for both standard-rated and zero-rated outward supplies.

Why would SARS need to know when a taxable supply of second-hand goods is being made? I had to use a crib-sheet to find the answer, in the form of the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2004, where the entry for...
clause 104 includes this paragraph:

The purpose of this amendment is to increase the requirements with regard to the description of the goods sold. It is important to know when goods are second-hand goods, especially when the goods are exported as the zero rate of VAT cannot be applied.

I thought as much. You have never heard of such a rule, and expect me to search for it somewhere in the act. And search I do. Even though I know it ought to be somewhere in s 11, I cannot find it. A search on the key words 'second-hand goods' and 'zero' prove to be fruitless. In the end, I have to rifle through various SARS documents and, eventually, the 1998 Gazette notice on the export incentive scheme to find the provisions that follow:

**VATA s 11(1), proviso**

Provided that paragraphs (a), (b), (c), (d) and (i) of this subsection shall not apply in respect of any supply of goods by a vendor if in respect of such goods input tax contemplated in paragraph (b) of the definition of 'input tax' in section 1 has been deducted in terms of section 16(3) by that vendor or any other person where that vendor and that other person are connected persons.

**In clear:** The targeted goods-related zero-ratings do not apply if you or your connected person claimed notional input tax on the second-hand goods you are exporting or effectively exporting. Instead, you must standard-rate the supply... well, sort of. Were you actually to add 14%, your offshore customer will have a screaming fit.

**VATA s 10(12)**

(12) Where any supply of goods is a supply which would, but for the proviso to section 11(1), be charged with tax at the rate of zero per cent, the consideration in money for that supply shall be deemed to be an amount equal to the purchase price of those goods to the supplier:

**In clear:** Remember the second-hand goods you just exported? Forget what you actually sold them for and pretend that you sold them at cost. In other words, please account for output tax on what you paid for them. In other, other words, please disgorge the notional input tax you claimed when you bought the things.

**VATA s 10(12), first proviso**

Provided that in any case where the deduction of input tax referred to in that proviso has been made by any other person (where that supplier and that other person are connected persons), the consideration in money for that supply shall be deemed to be an amount equal to the greater of the purchase price of those goods to that supplier and the purchase price of those goods to that other person:

**In clear:** When it was your connected person who claimed the notional input tax, pretend you sold the second-hand goods at the higher of their cost to you and the cost to your connected person. (I wonder how you are meant to have acquired them from your good old CP.)

**VATA s 10(12), second proviso**

Provided further that for the purposes of this subsection, the purchase price of any goods shall not be reduced by any amount of input tax deducted under section 16(3) by the supplier or, as the case may be, any other person where the supplier and that other person are connected persons.

**In clear:** It’s bloody price control! You are not allowed to reduce the price to your customer by the notional input tax that either you or your CP claimed. No. That can’t be right. What it actually means (I think) is that the ‘purchase price’ referred to in the opening words of s 10(12) means the purchase price before the notional input tax deduction claimed either by you or your CP. In other words, this is not a proviso but a definition.

When self-important arseholes with a mediocre education get to write the law, trying to ape the effete drafting manners of their pompous, unchallenged professors, who couldn't possibly get a job in the real world, this is the kind of crap you end up with.

What it amounts to is this: To avoid confusion, you had better make a separate invoice for exported second-hand goods. I would have recommended that you steer clear of a ‘tax invoice’ for this purpose, but the law seems to insist upon one.

What no one has thought of, however, is how, in a tax invoice covering exported second-hand goods, you are meant to show the value of the supply, the amount of tax charged and the consideration for the supply; or

The ‘consideration’ for a supply is the payment expected for it. The ‘value’ of a supply is the consideration for it, less the tax included. Although this type of export cannot be zero-rated, no tax is included in the consideration, with the result that the value and consideration are equal, while the tax charged is, er, nil, as opposed, of course, to zero.

So much for your customer. For you, as long as no CP was involved, the consideration in money is deemed to be your cost, before the notional input tax deduction. As far as I can tell, the use here of this strange term is meant to instruct you whether to issue a full or an abridged tax invoice, although the difference is almost meaningless for exports.

But you would rely upon its use also as a reason not to reveal to your customer what was your cost. (You are required to reveal the ‘consideration’ on the tax invoice; not the ‘consideration in money’.)

All that is left for you is to devise a VAT accounting system that reports this particular outgoing supply not at its invoiced value but at its cost—in Box 11 on the (old) VAT 201 form. Good luck!
An irreverent newsletter designed to keep you up to date—
VAT & PAYE on car benefits—the disconnect continues

Rob Cooper (Softline VIP) reports that

the SARS VAT people are still chewing over the outdated 1991 VAT regulation prescribing the calculation of VAT on the company car fringe benefit (95 TSH 2011).

This is GN R 2835 of 22 November 1991, which includes a definition of the term ‘determined value’, that is, of a company car. Unamended since 1991, it differs from the current PAYE definition of the same term (para 7 of the Seventh Schedule to the Income Tax Act) by excluding VAT and by treating maintenance expenses paid for by an employee differently.

The upshot is that, as the law stands, you have to make two calculations of determined value, one for VAT and the other for PAYE.

A not-very-deep secret of the property industry

Annetjie Fermor (Propjet Management) asks:

Can you please help with this question? We are purchasing properties from a seller but paying the purchase price to a firm of attorneys. From whom should we get the VAT invoice? The attorneys are saying that they don’t issue VAT invoices, since we are not buying the properties from them.

As far as I know, especially the very biggest players in the property industry have always refused to supply tax invoices when selling fixed property, for reasons unknown to me but at enormous risk for buyers that are vendors. So perhaps you are enjoying the usual runaround.

It is a criminal offence (s 58(1) of the Value-Added Tax Act) for a registered vendor to fail to supply a tax invoice to a recipient, as is required by s 20(1).

It is unlikely that the attorneys are acting as agents for the seller as far as concerns the sale (as opposed to the collection of the proceeds). If they are, s 54(1) authorizes them to issue a tax invoice, in their own name.

The proper course is to sue the sellers for damages should they refuse to comply with the law, since it is highly unlikely that you will find anyone prepared to prosecute a statutory crime when no member of the elite is involved, on either side.

Bank details—a massive risk

Regular correspondent Carl Nielsen (Dulverton Financial Services) sent me a copy of a letter written to Willie Viljoen (SARS). This is an edited version:

I must bring to your attention what I think is a massive potential risk that SARS has caused.

A week or two ago, I got a letter (via SAIPA, I think) from SARS with the subject REQUEST FOR CHANGE OF BANK DETAILS. This undated letter addresses the issue of fraud attendant upon the changing of bank details and hence is to do with the bank details relevant when refunds are paid: in other words, the bank details that are held in SARS’s core systems—outside of eFiling.

It states that changes to bank details will be effected through four channels; actually an error, in that the fourth bullet point is actually just the second line of the third point. Thus only three channels actually exist.

The first channel is ‘in person at any SARS branch’. Fair enough, and the rest of the letter goes on to explain what is needed in order to use this channel.

The second is via ‘SARS eFiling (if registered as an eFiler)’. I made enquiries about this one and initially was sent a response telling me how to update banking details on eFiling. These are the details that eFiling uses when making payments to SARS. But it is not true that updating these impacts upon the bank details on SARS’s core systems. Further clarification did highlight that the person responding had misunderstood my question and thought that I was asking about eFiling only. Nevertheless, I believe that there is a strong risk of taxpayers’ updating their bank details on their eFiling profiles and assuming that this has affected the details stored by SARS and used for VAT refunds.

The third channel supposedly opens ‘when submitting an Individual Income Tax Return (IT 12), Return of Income: Companies and Close Corporations (IT 14) and (Employer Declaration) EMP 501 return/reconciliation’. I know that SARS’s core system is updated on the basis of bank details submitted on an IT 12. I also know that it definitely is not affected by bank details entered on an IT 14—the system completely ignores those bank details. I don’t know about the EMP 501 but what would be the point? There are to my knowledge never any refunds relating to EMP 501 returns.

Kind regards,
Carl Nielsen
In this particular matter the medical aid pays only
This is the first time in thirty-five years in practice that I
First, the very inappropriately named e@syFile has
Does anyone else have the same issues?
Shirley Renwick writes:
Getting advice from SARS can drive you to breaking the law
Shirley Renwick writes:
Does anyone else have the same issues?
First, the very inappropriately named e@syFile has
The next day I try again and find that there is a new
I phone SARS, and two officials kindly came to my
I phone SARS, and two officials kindly came to my
Since installing this version I have tried to connect
The other problem she experienced was confusion between ID numbers and tax reference numbers:
I then asked the same SARS official what I should do
I think these issues need to be addressed. Clearly, the e@syFile versions are not adequately prepared and tested. I spoke to a payroll company which was involved in Beta testing, and they said that they had advised SARS of a number of issues and were ignored. SARS officials have also said that they have frequently requested either training on the technical support side of the programme or that a representative from eFiling be available at each office—to no avail. Apparently SARS officials have to call the eFiling call centre as well—they don’t have their own line to eFiling!
There is only one person from eFiling dealing with tax practitioners issues countrywide—so he is not prepared to assist more than eight clients per day. This is what I was told by SARS employees, off the record.
I then asked the same SARS official what I should do about those employees on my client’s payroll that have no ID numbers. This client is a farmer. There are probably hundreds of thousands of people in the rural areas without ID numbers, and who also find it too onerous to obtain ID numbers. The only answer he could give me was that everyone had to have a tax reference number, and they could not get a reference number without
an ID. Does this mean that anyone without an ID document is unemployable? Surely this is unconstitutional. The SARS official also refused to give me the name of anyone to assist me in what to do about the 2011 payroll, which has some employees with no ID number, simply saying that nobody could help me, since the rules were that everyone has to have a tax reference number.

So how do I advise my client? Remove the employees from the payroll before submission? Illegally allocate the wages paid to another expense account?

More and more, these bizarre regulations are forcing us to become criminals!

The problem lies not with any regulations—in fact, appropriate regulations are in short supply, and what are bizarre are the SARS units that go off for extended periods on frolics of their own. And I have repeatedly referred to the sociopathic nature of anything emerging from eFiling and e@syFile.

We need to uncover who or what is behind these initiatives, how they won the tender, if ever there was a tender, and from whence comes their utter contempt not merely for the Constitution but for ordinary commercial practice in the development of major computer systems and programs.

Strangely, the lack of leadership at SARS started a long time ago, enduring over the reign even of the last Commissioner, who made a jolly good show of looking like a leader.

98 TSH 2011—May

‘Gross income’: reading the law, in sets

You have possibly read the definition of the term ‘gross income’ in s 1 of the Income Tax Act a hundred times—yet, have you?

‘Gross income’, in relation to any year or period of assessment, means—

(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely—

If you ever underwent any formal study of taxation, you would have been told that the famous special inclusions—paragraphs (a) to (n)—in ‘gross income’ following this opening statement are meant specifically to bring within the scope of the definition receipts and accruals of a capital nature, despite the general exclusion of such receipts and accruals. In other words, for ‘residents’, the opening words encompass the full set of worldwide noncapital receipts and accruals, while the special inclusions comprise a list of sets of receipts and accruals of a capital nature.

What tosh. The truth is that the opening statements does not by any measure constitute the full set of noncapital receipts and accruals, for the reason that several of the special inclusions clearly comprise further such sets. And one of the instinctive rules of sets is that you do not include within—that is, add on to—a set items it already includes. It follows that, without benefit of cross-references or ‘subject to’ clauses, what is specifically included after the opening statement must have been omitted from that statement to begin with.

For some of the famed special inclusions, then, the word including actually means excluding the following items, which are to be specifically included:

Most conspicuously omitted are receipts and accruals having their origin in services rendered, ostensibly a separate set catered for by para (c) of the definition:

(c) any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered, or any amount (other than an amount referred to in section 8(1)) received or accrued in respect of or by virtue of any employment or the holding of any office:

I don’t know about you but I was never taught that the additional, para (c) set of receipts or accruals springing from services rendered in fact breaks down into two separate sets, one covering the services of independent contractors,

any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered,

and the other covering what in our tax treaties is referred to as ‘dependent personal services’, that is, employment (in the labour-law sense) and the holding of an office:

or any amount (other than an amount referred to in section 8(1)) received or accrued in respect of or by virtue of any employment or the holding of any office:

The exclusion from the second services set of s 8(1) amounts, that is, of allowances, tells you what ten or more years of study of s 8(1) itself will not conclusively reveal—that s 8(1) applies solely within the context of dependent personal services. After all, instinctively, you cannot exclude from a set items that it does not already include.

The far bigger picture is that the opening statement of what is ‘gross income’ not only excludes service-related receipts or accruals but all allow-
ances, which, to the extent that they are taxable are in fact included in ‘taxable income’ (not gross income) by s 8(1).

It also excludes fringe benefits. The first proviso (it is not really a proviso) to para (c) at first sight comes across as an exclusion from both services-related sets of receipts of accruals (that is, both dependent and independent personal services):

Provided that—
(i) the provisions of this paragraph shall not apply in respect of any benefit or advantage in respect of which the provisions of paragraph (i) apply;

But when you read para (i) and, indeed, the Seventh Schedule to the act, you are compelled to acknowledge that it, too, applies only within the context of dependent personal services:

(i) the cash equivalent, as determined under the provisions of the Seventh Schedule, of the value during the year of assessment of any benefit or advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said Schedule…;

At least at some stage in the past the remaining service-related inclusions in ‘gross income’, such as a payment for the unexpired portion of an employment contract or a restraint, were considered to be or possibly were of a capital nature and so were specifically included.

As far as noncapital receipts or accruals are concerned, then, the definition of the term ‘gross income’ ought to have been drafted in the following form (I grasp the opportunity to fix a few other problems):

DEMOTIC DRAFTING s 1 sv ‘gross income’
‘Gross income’ means the total amount, in cash or otherwise, derived by a resident during the year of assessment or the total amount, in cash or otherwise, derived by a nonresident from a source within or deemed to be within the Republic during the year of assessment, excluding, first, such an amount so derived by reason of services rendered or to be rendered of an independent nature or dependent personal services rendered or to be rendered and the taxable portion of a fringe benefit as determined under the Seventh Schedule, which are specifically included in this definition, excluding, secondly, the taxable portion of an allowance determined under s 8(1) and so specifically included in taxable income, and excluding, thirdly, receipts or accruals of a capital nature not specifically included in this definition, and including…;

One advantage my version enjoys over the original is that it makes it clear that, for nonresidents, the source principle applies throughout the definition of the term ‘gross income’. That, I am sure, is the officially desired outcome.

98 TSH 2011—May

How tax debts due to the state arise—II (PAYE)

In 96 TSH 2011, I showed, beyond contention, that all the taxes imposed by the Income Tax Act, apart from the ‘Fourth Schedule’ taxes—PAYE and provisional tax, imposed under the Fourth Schedule to the act—are either directly or, via, s 79, indirectly required to be the subject-matter of assessments before they stand to qualify as debts due to the state recoverable by SARS under s 91:

Recovery of tax
91. (1)(a) Any tax or any interest payable in terms of section 89(2) or 89qual shall, when such tax or interest becomes due or is payable, be deemed to be a debt due to the State and shall be payable to the Commissioner in the manner and at the place prescribed.

The ‘taxes’ so covered comprise normal tax under s 5, additional tax under s 12G(12) and s 12L(15), the liftings tax under s 33, the withholding tax on royalties under s 35, the withholding tax on foreign-owned property under s 35A, the tax on foreign entertainers and sportsman under s 47B, the turnover tax under s 48A, the donations tax under s 54, the secondary tax on companies under s 64B, additional tax under s 76, and administrative penalties imposed under s 75B.

Some of these are so-called self-assessment taxes, under which you effectively volunteer payments. (In truth, all tax is voluntary. As a percentage of GDP, tax collections in the USA remain unchanged over decades, no matter how much the law changes. Check it out for yourself.) Even so, those sad, untrained saps at SARS cannot get a penny extra from you without raising an assessment.

Although I can hardly contain my impatience to reveal the earth-shattering consequences of this state of affairs, which will tweak the nose of every constitution-busting tax official in the land, whether abusive, arrogant high-up or abusive, defamatory handlanger, as well as some arse-kissing private-sector types, I must first finish with the Income Tax Act and then go on to the other principal taxing statutes, such as the Value-Added Tax Act.

Thus it is the turn now of the Fourth Schedule taxes, first PAYE. Stand by for some stuff you never learnt at university.

Fourth Schedule taxes are not your ordinary self-assessment taxes, thanks to what I call their duality, in that, at first, they appear to be independently payable, regardless of actual liability for normal tax. Only at the moment of assessment do they become advance payments against actual liability (under para 28 of the Fourth Schedule):

Payments of employees’ tax and provisional tax and interest on overdue payments of such taxes 89bis. (1) Payments by way of employees’ tax and provisional tax shall be made in accordance with the provisions of the Fourth Schedule…, and any such payments which relate to a taxpayer shall, for the pur-
poses of this Act and subject to the provisions of para-
graph 28 of the said Schedule, be deemed to have
been made in respect of his liability for taxes as de-

defined in subsection (3), whether or not such liability has
been ascertained or determined at the date of any
payment.

What is awkward is the fact that, although a provi-
sional taxpayer makes his own payments, a PAYE
employee’s payments are made by his employer.
The wording of s 88bis(1) caters adequately for this
awkwardness (‘payments which relate to a taxpay-
er’).

Far more serious is the fact that, while the
provisional tax is about payments, PAYE is mostly
about deductions. (I have not yet fully resolved this
issue to my own satisfaction.)

Independent liability for PAYE deductions is estab-
lished by para 2(1) of the Fourth Schedule:

Employers to Deduct Tax
2. (1) Every—
(a) employer who is a resident; or
(b) representative employer in the case of any em-
ployer who is not a resident,
...who pays or becomes liable to pay any amount by
way of remuneration to any employee shall...deduct or
withhold from that amount...by way of employees’ tax
an amount...in respect of the liability for normal tax of
that employee...and shall pay the amount so deducted
or withheld to the Commissioner within seven days af-

ter the end of the month during which the amount was
deducted or withheld....

This independent liability is so real that it consti-
tutes a debt due to the state, although a conditional
one (see the words in bold type below), which is
crystallized at the point at which the PAYE system
switches from deductions to payments:

4. Any amount required to be deducted or withheld in
terms of paragraph 2 shall be a debt due to the State
and the employer concerned shall save as otherwise
provided be absolutely liable for the due payment
thereof to the Commissioner.

As in all self-assessment systems, provision has to
be made for an employer who fails to adhere to the
requirements of para 2(1). The procedure to be
followed (due process) starts with para 5(2):

(2) Where the employer has failed to deduct or with-
hold employees’ tax in terms of paragraph 2 and the
Commissioner is satisfied that the failure was not due
to an intent to postpone payment of the tax or to evade
the employer’s obligations under this Schedule, the
Commissioner may, if he is satisfied that there is a
reasonable prospect of ultimately recovering the tax
from the employee, absolve the employer from his lia-
bility under sub-paragraph (1) of this paragraph.

SARS cannot simply ignore such a provision. The
first thing required is the exercise by the Commis-
sioner of his discretionary power to ascertain the
employer’s intention in allegedly failing to make the
required deduction. Next, he must establish the
creditworthiness of the employee concerned. He is
obliged to apply his mind in this manner and on
these two enquiries. Should these yield positive
results, in the sense that (a) the employer was not
evading tax, and (b) the employee is good for (or
even has paid) the tax allegedly not withheld, the
Commissioner is obliged to absolve the employer
from his liability to have made deductions.

Thus para 5(2) proves that there is no absolute
liability under the PAYE system on the defaulting
employer’s part, since there is a condition to be
tested, namely, the outcome of the application by
the Commissioner of his mind to these enquiries.

This condition is of a resolutive character: the
employer, say, factually did not deduct (and there-
fore did not pay); the employer became personally
liable under para 4 to pay; but his liability will be
expunged if the Commissioner’s enquiries produce a
positive result.

Having commenced in para 5(2), the procedure
to be followed (due process) when an employer
fails to adhere to the self-assessment requirements
of para 2(1) and has not been absolved of liability
culminates in para 12(1):

12. (1) Where any employer who is required to deduct
or withhold employees’ tax in terms of paragraph 2—
(c) has failed to deduct or withhold employees’ tax; or
(d) has failed to pay over any amount of employees’
tax deducted or withheld,

and such employer has not been absolved from his or
her liabilities in terms of the provisions of this Sched-
ule, the Commissioner may make a reasonable esti-
mate of the amount of employees’ tax which is required
to be deducted or withheld and issue to the employer a
notice of assessment for the unpaid amount.

This first re-emphasizes the importance of the
employer’s right to benefit from due process in the
matter of the Commissioner’s power to condone a
nondeduction, under para 5(2). Then it requires the
Commissioner (a) to make an estimate of the
amount involved and (b) issue a notice of assess-
ment. A notice of assessment is effectively an ‘as-
essment’ as defined in s 1.

If you know absolutely nothing about statutory
law, you might argue that, owing to its use of the
word may, para 12(1) is not binding upon the
Commissioner, yet the world’s most famous legal
dictionary, Black’s, points out that in dozens of
cases the word ‘may’ has been found to mean shall
or must, but its primary legal meaning is is permitt-
ted to, which is what it means here.

For example, in Vacation Exchanges Interna-
tional (Pty) Ltd v CSARS (case no A 253-2008) the
court said that the word may in para 3(2) of the
Seventh Schedule (fringe benefits) meant that SARS
could recover any shortfall of tax only from the em-
ployee, and not from the employer.

Better still, if may allows the Commissioner ca-
priciously to choose whether or not to obey the law,
what would you make of provisions such as pa-
ra 6(2A) of the Fourth Schedule?

(2A) If an employer fails to pay an amount of employ-
ees’ tax with intent to evade that employer’s or any
employee’s obligations under this Act, the employer
may be liable to pay a penalty not exceeding an
amount equal to twice the amount of employees’ tax which that employer so failed to pay.

Would you say the defaulting employer has a choice whether to be mulcted in a penalty?

What para 12(1) supports is the rule emerging again and again from a reading of the act as a whole:

SARS cannot demand a penny from you without first raising an assessment, against which you may object and appeal.

96 TSH 2011—May

### Who needs Parliament when we have the Treasury?

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<td>s 108 ‘section 79 of Act 31 of 2005’</td>
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</table>

These are the differences between the Taxation Laws Amendment Bill, 2010, as passed by that quaint institution, Parliament, and the Taxation Laws Amendment Act, as amended by the gangsters at the Na-
The shaded rows contain the more significant changes.

Whoever is responsible has committed an illegal act, of *lèse majesté*. Worse still, he or she is incredibly petty to want to make such piffling changes in the first place.
An irreverent newsletter designed to keep you up to date—
ADR reaches its nadir?

Against my better judgment, after at first pointedly refusing the option to follow alternative dispute procedures, I relented, partly because I failed to appreciate, until too late, that the matter would otherwise have gone before a tax board (which need not be a costly exercise) rather than the tax court, & partly because my most recent experience of ADR (96 TSH 2011) was so surprisingly rational.

What I encountered was nothing less than shocking. No one present from SARS had read my letter of objection, there was an outright refusal to discuss any point of law, and the SARS officials thought that ownership of shares is established by registration at Cipro.

VAT refunds & bank details

Regular correspondent Carl Nielsen (Dulverton Financial Services) writes:

I have had an interesting lesson in bank practice which others might learn from. One of my clients, a trust, was due a fat refund on VAT, having purchased a property in a vatable transaction. SARS paid out the refund, but my client did not receive the funds. After making enquiries, we discovered that some time ago a change in bank details for the trust was not communicated to SARS, who had therefore effected payment to what we thought was a defunct bank account.

Enter Standard Bank, which had cunningly re-used the bank account number, so some other lucky fish had found himself suddenly come into money. Unfortunately, it had taken some time for us to realize the error, so, by the time we notified the bank, said fish had spent a portion of the funds.

(As an aside, I found this interesting. One would think that either the funds would land in the account of someone who says ‘Hmm, these aren’t mine, better not spend them because someone is going to come looking’ or of someone who says ‘Whoohoo, Bank Error In Your Favour’, and cleans the account out.)

Anyway Standard Bank was able to secure the unspent portion (it seems that my poor client is on the line for the unrecovered balance) and return it to SARS.

Here’s where the fun and games with SARS starts, because trying to convince them to change your bank details practically requires a polygraph. We hand-delivered what we thought was the necessary documentation to the SARS branch, which accepted it, only for their back office to return it demanding that we also submit municipal accounts as proof of addresses. I should like to find the person who originally thought up this idea of using municipal bills for proving addresses and hang, draw and quarter them! (An exercise in complete futility. I have an oversea client who owns five properties in SA and can therefore ‘prove’ his address five times over, if you like, and still be talking codswallop.) Anyway, a phone call to the right people at SARS, and all we now need to do is hand deliver the documents (sigh!) and they’ll make it all happen, pronto.

South Africa: I call the top

I once called a top of the US stock market. At the time I was a keen follower of American economic news, and, intuitively, I could see nothing ahead but the abyss. I shared the insight, by email, with only one person, who ignored it, to her cost.

Right now I have the same understanding but about an entire nation and without any intention of informing any immediate or even medium-term response.

Economies can change direction at light-speed, but I have lived through this one before, under the Nationalists, and I know how it ends—or, rather, how it drags on, ever downward. At least, under them we could look forward to the revolution; yet what a sorry disappointment that has turned out to be.

And how indistinguishable is today’s bunch of fascists from yesterday’s! Better dressed, indubitably. Not a grey shoe in sight. More corrupt, infinitely. No treasure trove, no matter how sacred, is left untapped. And, Yes, Yes, no need to state the obvious, more melanin-enriched. But otherwise, multi-coloured peas in a pod. The same all-consuming lust for power. The same disdain for both the economy and the common good. The Nats even celebrated the equivalent of a Mr Malema, except that their Julius wanted to nationalize all property (except his own house, of course, and, perhaps, the houses of his academic colleagues), and not just the mines. And the ANC will eventually fail for the same reason that the Nats failed—an ever-narrower, serial redefinition of the chosen few—but, probably, without the grace note of a Mr De Klerk.

Today South Africa can look forward comfortably to at least twenty-five years of steady decline. Add another thirty years if the Zimbabwe option is selected. After all, Mr Mugabe has demonstrated that, provided a government is ruthless enough and the population docile enough, even a poor, small coun-
try can sustain a sufficiently compact elite through the decades.
Any one of a thousand possibilities could and certainly will prove me wrong; it’s just that, right now and right out to the horizon, there is not a bright sail in sight. The daily dose of crazed interventions, fiscal giveaways, murder of opportunity, envy of the productive, and hate of freedom are all too familiar. So are a pusillanimous, arse-licking business community, a sclerotic, rigged and corrupt economy, crumbling infrastructure, poisonous physical environment and deadly (save for criminals) police force. With the end of a wasted commodities boom, missed despite its epochal proportions, we even have the comfort of returning to parlous financial times, complete with an unsustainable set of national accounts. And—How could I forget?—chaunvinism and racism are once again official policies.

There are things to celebrate. Some of our business people and businesses are great. We have a few great public figures, although we might disagree about who they are. We have a smattering of great scientists and medical and other professionals. The DA is demonstrably great. Our judiciary and our Roman-Dutch legal system are great, although very, very remote. We have exported hundreds of thousands of our children, many of whom, I am sure, are great. On the other hand, apart from a few giants, our academe is a desert, and our religious institutions invisible, save when politicking. As for the national psyche, I would not dare attempt to sum it up during such tumultuous times of political demagogy and (Yes, I agree with the ANC on this score) relative deprivation.

The thing to watch is the external cost of borrowing. Right now, owing to a concatenation of effects, it’s not bad. Nor will it soar overnight. But our gradual decline will be reciprocated by its gradual ascen.-cent. The coming mega-destruction of wealth by our inept, corrupt parastatals in the name of restoring the infrastructure, will help the process a lot. So will the madmen who periodically call for devaluation (for which read ‘inflation’ and, when superloonies enjoy a platform, ‘hyperinflation’).

The good news is that, some four generations from now, South Africans, or whatever they might be calling themselves by then, will inherit a rich underground patrimony, untouched—apart from a few scattered, tired old holes—by human hand.

We should wish them well as we acknowledge that re-access to the world community, some good American advice and a helluva lot of luck gave us the last real uptick most of us are ever likely to see.

South Africa, you’ve never had it so good! Too bad that the best is past.

99 TSH 2011—June

Shared access—don’t do dat!

Regular correspondent Rogerio Russo (Du Toit Littleton) experienced this little exchange with SARS. It is unedited:

To: SARS eFiling Support
Subject: Re: SARS eFiling—Shared Access Granted
Dear Support,
Please advise the meaning of shared access.
Rogerio M B Russo

Dear Rogerio Russo
Thank you for contacting SARS Efilng Assist.
It basically means that you now have access with some-one else to one and the same profile, but this determines what you can and do on that profile.
Please further read on the centricity on the attachment as that will explain further how it is done and please do bare in mind that once a shared access is done it cannot be reversed.
The case number attached to this email is 51744204.
Please do not hesitate to contact us on 0800 00 7277(SARS) for further assistance.
Regards
Sarsefiling Support Team
Bernidette Hughes

To: eFilingAssist7
Subject: RE: SARS eFiling—Shared Access Granted
Dear Bernidette,
On what grounds to you grant access to my clients to someone else without my consent?
This in my view is a major breach of confidentiality. I’m not happy about this at all. I want it stopped immediately.
Rogerio M B Russo

99 TSH 2011—June

How tax debts due to the state arise—III (provisional tax)

The hypothesis being tested in this mini-series is that, before any tax imposed by the Income Tax Act stands to qualify as a debt due to the state recoverable by SARS under s 91, it is required, either directly or, via, s 79, indirectly, to be the subject-matter of an assessment.

The last such tax to be considered is that other Fourth Schedule tax, the provisional tax, yet another self-assessment tax, which turns out, possibly, to be anomalous, although not in any way threatening the hypothesis.

Long tradition, established by 95 TSH 2011 and 96 TSH 2011, demands that I start by reproducing the provision that dare not be read in isolation:

Recovery of tax
91. (1)(a) Any tax or any interest payable in terms of section 89(2) or 89quat shall, when such tax or interest becomes due or is payable, be deemed to be a debt due to the State and shall be payable to the Commis-
Like the only other Fourth Schedule tax, PAYE, the provisional tax differs from ordinary self-assessment taxes by reason of its duality, in that, at first, it appears to be independently payable, regardless of actual liability for normal tax. Only at the moment of assessment does it become an advance payment against actual liability (under para 28 of the Fourth Schedule):

Payments of employees’ tax and provisional tax and interest on overdue payments of such taxes 89bis. (1) Payments by way of employees’ tax and provisional tax shall be made in accordance with the provisions of the Fourth Schedule..., and any such payments which relate to a taxpayer shall, for the purposes of this Act and subject to the provisions of paragraph 28 of the said Schedule, be deemed to have been made in respect of his liability for taxes as defined in subsection (3), whether or not such liability has been ascertained or determined at the date of any payment.

What is this if it is not an outright prescription, situated in the main body of the act, compelling you to make your provisional tax payments as specified by the Fourth Schedule, regardless whether, at the time, you have or rationally expect no liability for normal tax at all?

Nor can there be any doubt but that this prescriptive theme is picked up in the Schedule itself, even though the substantive provision and the delegated or subsidiary detail are festooned with the psychotic handshaking that the Treasury’s young, aspirant telecommunications technicians believe is essential to modern drafting:

17. (1) Every provisional taxpayer shall in the manner provided in this Part make payments (called provisional tax) to the Commissioner in respect of his liability for normal tax in respect of every year of assessment. (3) Where for the purpose of determining any amount of provisional tax required to be paid by any provisional taxpayer in respect of any year of assessment the liability of such taxpayer for normal tax is required to be estimated in respect of such year, such liability shall be deemed to be the amount of normal tax which, calculated at the relevant rate referred to in subparagraph (4), would be payable by the provisional taxpayer in respect of the amount of taxable income estimated by such taxpayer in terms of paragraph 19(1) during the period prescribed by this Schedule for the payment of the said amount of provisional tax....

There now arises a point I don’t think I have ever seriously considered before. Does machinery exist for SARS to collect provisional tax payments due but not made? After all, the taxpayer is still going to be assessed for the year, and his real liability for normal tax, unassuaged by mandatory advance payments, will be a debt due to the state under s 91, which SARS can collect to its heart’s content, together with interest.

I am not talking about the savage provisional tax sanctions, undoubtedly unconstitutional, which are dealt with in the accompanying table, but actual payments calculable as being due (in itself sometimes a controversial issue) but not paid at all before assessment, which renders all such payments moot.

And now I really notice for the first time this curious provision, para 31 of the Fourth Schedule:

Recovery of Employees’ Tax, Provisional Tax, Penalty, Additional Tax and Interest

31. Any amount of employees’ tax, provisional tax, penalty imposed under this Act in respect of non-compliance with this Schedule or additional tax payable in terms of this Schedule, and any amount of interest payable in terms of section eighty-nine bis of this Act shall when it becomes due or is payable be a debt due to the State and may be recovered by the Commissioner in the manner prescribed in section ninety-one for the recovery of tax and interest due or payable under this Act.

There are so many substantive and constitutional problems with this para 31, including both its apparent duplication of the gravamen of s 91 and the impossibility of its being able to invoke s 91 from the depths of subsidiary legislation, that I am happy to declare it a dead letter. Certainly, it could never support the contention that SARS can compel payment before final assessment.

The answer to the conundrum has to lie in s 91(1)(a) itself, which contains a specific reference to the provision devoted to showering consequences upon a nonpayment of provisional tax payments—s 89quat. It sets out the circumstances in which such a nonpayment or even a late payment will or will not attract an interest charge. And it deals as well, in a broadly similar way, with overpayments. The intention is clear; to respond to nonpayments and underpayments with an interest charge—not the collection of the payments themselves.

But even if I am wrong on both of these last two points, and SARS can demand provisional tax payments, it would still be bound to do so via an assessment, thanks to s 79:

Additional assessments

79. (1) If at any time the Commissioner is satisfied—
(c) that, as respects any tax which is chargeable and has become payable under this Act otherwise than under an assessment, such tax has not been paid in respect of any amount upon which such tax is chargeable or an amount is owing in respect of such tax, he shall raise an assessment or assessments in respect of the said amount or amounts....

But if the failure to make payment was accompanied by a failure to submit an estimate, in my opinion SARS would be compelled first to make its own estimate under para 19(2).

What is left is an issue that, right now, I would rather leave alone: is interest payable for any reason under the act the subject-matter of an assessment or does it just run, like mora interest, except that it is a debt due to the state?

The only straw in the wind I can find is s 89ter(2):
(2) The total amount owing by the taxpayer after the deduction of the relevant payments or other credits in respect of any taxes as defined in subsection (3) and of interest in respect of such taxes payable by the taxpayer in terms of section 89(2) or 89quat shall for the purposes of any proceedings for recovery (including proceedings under section 91) be deemed to be a debt due to the State, and in any such proceedings the Commissioner shall not be required to furnish particulars of the amount claimed: Provided that the Commissioner shall at the request of the taxpayer furnish the taxpayer with copies of any notices of assessments relating to the taxpayer as the taxpayer may require.

The implication of the *faux* proviso is that even interest ought to be the subject-matter of an assessment, but that cannot be right. Perhaps an assessment is required to identify the provision under which SARS believes interest to be payable, thus putting the taxpayer on notice, and it then runs once the assessment becomes final.

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Decision under para 20(2) is an ‘assessment’ (s 1) |
| para (20A)(1)              | 20% Additional tax for late estimate | para 20A(2)—investigate circumstances | para 20A(3) | s 79(1)—additional tax is a ‘tax’ (s 1) 
Decision under para 20(2) is an ‘assessment’ (s 1) |
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Decision under para 27(2) is an ‘assessment’ (s 1) |

99 *TSH* 2011—June

Sole trader, farmer—RIP

I had a bad turn the other day when I mistakenly gained the impression that SARS was digging up old trenches traversed in a long-forgotten war about deceased sole-traders with trading stock on their hands at the moment of death, and deceased farmers similarly embarrassed by livestock and produce. The issue is whether, at such a moment, the following recoupment, or similar, arises:

ITA s 22(8)

(b) If during any year of assessment—

(ii) taxpayer has disposed of trading stock, other than in the ordinary course of his trade, for a consideration less than the market value thereof;

and the cost price of such trading stock has been taken into account in the determination of the taxable income of the taxpayer for any year of assessment, the taxpayer shall be deemed to have recovered or recouped—

(B) where such trading stock has been applied... in a manner contemplated in paragraph (b),... an amount equal to the market value of such trading stock;

and such amount shall be included in the income of the taxpayer for the year of assessment during which such trading stock was so applied...:

The farming provision, in para 11 of the First Schedule to the Income Tax Act, achieves more or less the same end.

What really scared me, to tell the truth, was whether I could remember how I used to defeat SARS when, in the old days, it attempted to apply the recoupment *post mortem*, especially when a search of my correspondence archives yielded only enigmatic hints—and the shocking realization that, even as recently as 2001, I had actually corresponded with the National Treasury’s Keith Engel. Ah! The follies of even far-advanced youth!

No matter. Today I apply patrimonial (property) and statistical methods to uncover the meaning both of contracts and statutes.

Under the common law there is no disposal of any asset by the deceased upon death. In fact, the patrimonial consequences are unique, in that, although control over the deceased’s assets passes to the executor, ownership does not pass. In other words, ownership lies either in some sort of suspended state or (my preference) remains with the deceased. I have already described (93 *TSH* 2010)
what happens next, with the beneficiaries, whether under the will or intestate, first acquiring non-patrimonial, personal, conditional rights against the executor and then, if all goes well, actual patrimonial rights and, ultimately, objects.

Thus, on my view of the common-law position, the deceased’s trading stock is disposed of when ownership passes to the beneficiaries of the estate. But it cannot possibly be disposed of by the taxpayer, since he is no more. Therefore the provision cannot possibly apply.

But what do the words disposed of really mean? They appear about twenty-three times in s 22, and only twice is the defined term ‘disposal’ (s 1) used, in s 22(8)(iv) and (8)(d).

Can you interpret the words disposed of, a verb, by reference to the defined term ‘disposal’, a noun?

On a historical basis, to do so would be extraordinary. Both provisions using the defined term ‘disposal’ were introduced when or shortly after the CGT came into being, and, consequently, they were certainly used in the defined sense. But the addition of two usages of a newly defined noun within the context of twenty-three established usages of an undefined verb should not lightly be taken to signify the transmogrification of the meaning of the verb, and especially not if no pressing need to do so is apparent. Had the intention been to extend a corresponding meaning to disposed of, either s 22(8) would have been rewritten into nounal form or the definition of the term ‘disposal’ would have been expanded so as to accommodate the verbal form.

Then look how laboriously and at what great length did Nugent & Lewis JJA in Standard General Insurance Company Limited v Commissioner for Customs and Excise Case no 622/02 (96 TSH 2011) come to the conclusion that the defined noun ‘exporter’ defined the corresponding verb, export. The implication is that this is not an exercise routinely to be embarked upon.

Finally, acknowledge that the compound verb ‘held and not disposed of’ in s 22 is highly significant and not easily understood. This appeared in 90 TSH 2010:

The provision that most concerns me is s 22, that dealing with year-end trading stock, which conjures with the hugely significant concept ‘held and not disposed of’. This clearly allows for a meaning for the word ‘held’ other than owns. After all, how can I both hold and dispose of unless the word ‘hold’ in this particular context means have in my possession but not necessarily own?

Making matters infinitely worse is the very much more modern s 23F, on the acquisition and disposal of trading stock, which conjures with the even more radical concept of a taxpayer’s incurring expenditure for the acquisition of trading stock which was neither disposed of by him during such year nor held by him at the end of such year.

At the same time, I cannot for a moment suggest that trading stock I acquire on consignment or under a floor plan (motor industry) is my ‘trading stock’. It simply isn’t!

While I take some time out to ponder this issue, I shall assume that the trading stock provisions are indeed concerned with possession—but only of property at least at some stage owned by the taxpayer.

To me, then, in s 22 the words disposed of mean to make a patrimonial transfer into the ownership of another, and nothing more or less.

In any event, how I used to defeat SARS on this issue was to look first to the ‘year of assessment’ as defined in s 1. That, in the context, translates into a period of assessment. And that period ends at the moment just before death (ss 22(6) and 66(13)(a)). At that moment the deceased still holds and has not disposed of anything.

The upshot is that, upon a taxpayer’s death, a deemed disposal of trading stock takes place under the CGT but not the income tax system.

99 TSH 2011—June

The Business Trust—what the hell is it?

Please don’t for a minute think that I deliberately set out to create a ‘What the hell is it?’ series (the Jazz Foundation, 96 TSH 2011; the Winter Cereals Trust, 97 TSH 2011). It’s just that tax problems cannot be solved in a constitutional vacuum, and I just happen, in a sort of Delphic manner, to have stumbled across a string of ‘Know thyself’ issues, although in none of these was I the one imbibing the oracular fumes.

Find ‘Business Trust’ on the internet and prepare yourself for a shock—a ‘trust’ with partners and—By golly! I predicted it in 81 TSH 2009—directors!

The corporate partners include some of SA’s most prestigious companies. Even I admire some of them. But then the government is also said to be a partner, which is perhaps why the Nirvana predicted by the Business Trust has not quite materialized by, er, 2011. Still, there remain a few months in hand, certainly ample time even to create 500 000 jobs, according to some even senior clowns.

The directors are all either famous persons, some deservedly so, or ministers or deputy ministers. What connects them, I dare say, is that they all know that the word director is not reserved to the corporate world (81 TSH 2009); not even under the new Companies Act.

Seemingly no longer accessible on the Trust’s website is its 2008 annual report, which mentions all manner of funds, programmes, partnerships, initiatives and even at least one company, but whether a ‘Pty’, ‘Lt’ or ‘Association incorporated under s 21’ (ANFG) I cannot say. There are co-chairmen, prestigious auditors (Count ’em! Two!),
an audit committee, a finance committee, a big business working group, trust administrators, asset managers and a complement of management and staff. But nary a word about what, constitutionally, the Business Trust might be when it's at home.

The current financial statements are available for inspection but, alas, not on the Trust's website. While the 2008 financials show the trust receiving 'grants' from the government and making 'payments to projects', a 2003 progress report I managed to find shows grants both received and disbursed. This also, uniquely, refers to a trust deed and trustees. And it shows allocations to 'associates' identified as two s 18A (deductible donations) educational trusts and Jobco.

Although I initially came across some of Jobco's history, this currently appears to have been removed from the Trust's website. One thing I did find somewhere and temporarily keep was a template for donations to 'Jobco (operating as Business Trust)'.

So I search for the string "jobco" on the Trust's website and come up with—would you believe it?—part of a disclaimer identifying 'Jobco' as an association incorporated under s 21 of the Companies Act, registration number 1999/013443/08 'operating as "Business Trust"'. The complete disclaimer itself is inaccessible.

Searching the web at large, I find an individual who believes he works for 'Jobco-Business Trust'. Whether it acts as agent or principal, the beneficiary's identified as two s 18A (deductible donations) educational trusts and Jobco.

To sum up so far: Knocking about in the backwoods there might or might not still be a purported trust, perhaps valid, perhaps invalid, but irrelevant for present purposes. The Business Trust is in truth a s 21 company, actually called Jobco, which, automatically, under the new Companies Act, became a 'non-profit company' (s 1). That is why it has directors, rather than trustees.

Its website, by failing to identify the company properly, is in breach of both the old and the new Companies Act (s 50(3) and s 32(4), respectively). By failing to reveal its ANFG status, it was in breach of s 49(3) of the old act. Section 11(3)(c)(v) of the new act requires it to reveal its NPC status. Its illustrious directors might want to repair these deficiences, or else face sanctions.

The only tax exemption I can imagine it aspiring to is under s 10(1)(cN) of the Income Tax Act, which requires it to qualify as a PBO. To my surprise, SARS no longer publishes a list of approved PBOs, possibly because so many qualifiers actually failed. As a director of Jobco, I would respect my personal suspicion that Mr Mbeki personally penned the Ninth Schedule to the Income Tax Act, and check the company's qualification very, very carefully, especially since Jobco has a finger in so many pies.

Whether it actually has partners or merely subscribes to the jargon favoured by the ANC and its pucker-lipped suitors, is neither here nor there.

Cash-flow issues
And now, at last, cash flow issues:

- I cannot imagine why it is registered as a vendor. What might be its 'enterprise', I wonder?
- The grants it receives from the state cannot be exempt under s 10(1)(y) of the Income Tax Act, because the necessary Gazette notices remain unpublished (98 TSH 2011). But perhaps it acts merely as an agent for the state.
- If it receives grants beneficially, they would be zero-rated under s 8(5A) and s 11(2)(t) of the Value-Added Tax Act.
- The grants it pays out, for example, under the aegis of the Shared Growth Challenge Fund, cannot be exempt under s 10(1)(y), whether it acts as principal or agent.
- Whether it acts as agent or principal, the beneficiaries of its grants or disbursements receive them, I believe, on revenue account. In other words, the income tax applies.
The whole issue turns on what is meant by the words ‘carrying on business’, in this context. I do not think any useful purpose is served by examining meanings placed on these words in decided cases, where the words were not used in the same context.

Here, I think the statement of Kuper J in ITC 883 23 SATC 328 at p 330, which was approved by the learned President in the Court below, provides a useful starting-point as, in this case, the words were used in a similar context.

Kuper J said:

…the words ‘carrying on business’ must be defined in accordance with the intention of the Act gathered from its scope and provisions. That unless there is something in the Act to the contrary the usual commercial meaning must be given to the words.

It is also clear, in my view, that the phrase ‘carrying on business’ as used in the section was a phrase of limitation. It was not intended that the exemption should fall away if the taxpayer derived any income from any source within the Union.

It is quite impossible to define precisely this ‘commercial’ meaning so as to have a yard-stick with which to measure any particular activities. The sensible approach, I think, is to look at the activities concerned as a whole, and then to ask the question: Are these the sort of activities which, in commercial life, would be regarded as ‘carrying on business’? The principal features of the activities which might be examined in order to determine this are their nature, their scope and magnitude, their object (whether to make a profit or not), the continuity of the activities concerned, if the acquisition of property is involved, the intention with which the property was acquired. This list of features does not purport to be exhaustive, nor are any one of these features necessarily decisive, nor is it possible to generalise and state which feature should carry most weight in determining the problem. Each case must depend on its own particular circumstances.

If a large property in a business area is purchased and this valuable property at the time contains only a small retail store, but the purchaser continued after purchase to operate the small store as a store, he could obviously be carrying on the business of the retail store, even if the acquisition and running of the store was quite an incidental purpose for the purchase of the property, the dominant purpose of which purchase was to invest in property and reap a capital appreciation. Take another case where a similar property was purchased for a similar purpose if the property merely contained one building which was let for a small rental, the continued leasing of this building could never be said to constitute ‘the carrying on business’ even though the profit from the lease in the one case might be approximately the same as the profit from the store in the other. Take yet another case, if the object of the purchase was to build a series of residential flats on the property and then turn the capital invested to account by the leasing of all these flats to different tenants, then as soon as the first of these flats was built and leased, the purchaser might be said to have commenced the ‘carrying on of the business’ of leasing flats to the public. In these examples given and in the vast majority of cases, there will be very little difficulty in deciding whether particular activities do or do not constitute ‘carrying on business’. The occasional case will arise, however, where the decision will be an extremely difficult one to make; and unfortunately these are the cases that come before the Courts. The present case is an example.
Small business corporations—don’t be wrongly disqualified

The concept of pre-populated tax returns is bound to fail, to the extent that it will rely upon unvalidated third-party information. Reliance upon third-party information is official policy, although, as far as I am aware, not a word has been said about validation.

Databases are maintained for different reasons and subject to wildly different standards of integrity. There is no reason whatsoever why the data in one database will be suitable for inclusion in another database, especially not for legal purposes, such as taxation.

There is really no need for me to lecture SARS on this topic, since it has effectively conducted a case study in the field when, several years ago, one of its officials had the bright idea to compare the databases of interest paid to individuals by banks with the database of interest-earnings reported by individuals in their income tax returns. On the basis of the raw, aggregate totals, there appeared, it seems, to be a huge discrepancy, and thus massive evasion.

The next step led to disaster, in that the untested third-party data were relied upon as a direct route to the raising of assessments, mainly upon widows, orphans and the retired. I remember that a very large number of assessments had to be recalled, although not before reports circulated in the press of heart attacks and even deaths, allegedly brought about by the usual, draconian threats accompanying the exorbitant assessments. (As I always say, rather owe money to the Mob than to SARS, since research shows that, unlike SARS, the Mob has a sense of humour.)

In recent years, I have reason to suspect, SARS has targeted another group of taxpayers, those operating small businesses corporations (SBCs), on the basis of the most unreliable, most corrupt and most sinister database in the land—that of Cipro (now CIPC). What it appears to have done is to compare the SARS database of taxpayers owning SBCs with the Cipro database of individuals registered as owning companies and close corporations. Those taxpayers thus shown to own shares in or to be a member of an SBC as well as being registered at Cipro as a shareholder in or member of any other company or close corporation found their SBCs being reassessed as ordinary ‘companies’. My further suspicion is that the great majority of those targeted simply gave up, accepting reassessment.

Yet some interesting points of law arise that could offer succour to victims of this inherently flawed initiative.

In order for a company to qualify as a ‘small business corporation’, during each year of assessment it must, under s 12E(4)(a)(ii) of the Income Tax Act, be able to declare that none of the shareholders... holds any shares or has any interest in the equity of any other company as defined in section 1....

As I have previously shown (90 TSH 2010), throughout the Income Tax Act, the word holds means, at best, owns, and, at worst, enjoys a patrimonial right to or in property. Disqualification therefore arises out of a patrimonial interest enjoyed by any one of the shareholders at any time during a year of assessment in any other ‘company’ as defined in s 1.

In s 12E(4)(a)(ii) two types of patrimonial rights or objects are clearly contemplated, namely, any shares and any interest. Equally clearly, these are neither merely shares in any other company nor merely an interest in any other company, since the quoted words cannot be read in this manner. How the disqualification is meant to be read, since there is no alternative, is that it will be triggered if a shareholder of the target company is found to hold shares in the equity of any other company, or to have an interest in the equity of any other company.

There is no reason in law or even under the tenets of colloquial language why such shares are required to be held, while such an interest is required to be had. Both terms require beneficial ownership, in the sense of possession by lawful title. In patrimonial terms, the shares are or interest is required to vest in the shareholder.

Nor may it be argued that an interest, as opposed to a share, has been included solely to cater for close corporations. The definition of a ‘company’ includes several entities, such as associations, that do not have shareholders holding shares but members having interests. It follows that disqualification depends upon ownership or possession of shares in ‘companies’ having shares and of an interest in ‘companies’ not having shares.

Another possible reason for the distinction made between shares and an interest is that it is possible in law to have an interest in shares without enjoyment of full ownership in them, for example, in the form of a usufructuary interest or a some form of derivative.

An interest is reliably defined as an advantage or profit, especially of a financial nature, and as a legal share in something or a claim to or right in property. A possible definition of the term equity in this context is that it constitutes an ownership-interest in property, especially in a business.

But two different terms used deliberately in close conjunction to each other cannot be given the same or even a similar meaning, merely, of ownership, that is, of a vesting in the shareholder. The term equity is used, rather, in the sense of a homeowner’s equity in his house, being its net value to...
Chapter III, thus incorporated into the VAT law, no-rulings issued by SARS several years ago but not—on the widespread reliance of taxpayers upon the Commissioner. (The history behind its introduction is to make the rulings provided for binding upon the Commissioner, the reason being that the intention of the Part states that rulings are binding upon taxpayers, the reason that the Commissioner is the party bound.)

It follows that a shareholder’s membership of, say, an association not for gain registered under the Parties Act, 1962, for implementation and operation of the Act.


Any procedures and guidelines issued by the Commissioner in terms of section 76S of the Income Tax Act, 1962, for implementation and operation of the advance tax ruling system apply mutatis mutandis for purposes of this Act.

The wording of s 76J reinforces the point here being made, since s 76H deals solely with the binding effect of rulings upon the Commissioner.

(1) For purposes of section 76H, an advance tax ruling applies to a person only if all of the following conditions have been satisfied—

In any event, rulings apply only to the postulated facts upon which they are based (see, for example, s 76K).

If any further proof were required that rulings cannot override the law, save in the taxpayer’s fa-
vour, and then only until the law is interpreted by the courts, it is s 76L(1):

76L. (1) Notwithstanding any provision to the contrary contained in this Act, an advance tax ruling ceases to be effective upon the occurrence of any of the following circumstances—

(b) if a court overturns or modifies an interpretation of the Act on which the advance tax ruling is based, the advance tax ruling will cease to be effective from the date of judgment unless—

(i) the decision is under appeal;

(ii) the decision is fact-specific and the general interpretation upon which the advance tax ruling was based was unaffected; or

(iii) the reference to the interpretation upon which the advance tax ruling was based was obiter dicta.

The clear conclusion to be drawn is that binding general rulings bind SARS alone, and have no effect upon either the tax law or the general population of taxpayers.

I have enjoyed the advantage recently of closely studying the advance tax rulings section of the Tax Administration Bill, 2011, and can report that it makes such a conclusion even more obvious.

Under contract law

But even if the point being made here were wrong, it would be impossible to assert that a binding general ruling can have an effect upon commercial contracts, outside of the need to issue a tax invoice or a credit or debit note.

For example, if the parties to a contract have agreed upon a means of payment involving the immediate deduction by the recipient of the amount due by the supplier by way of an unconditional discount from the pre-discount price invoiced by the supplier (and so, incidentally, reflecting the true ‘consideration’ for the supply), the supplier cannot, on the basis of a binding general ruling, claim a variation of the contract. All that the VAT law (and, to the extent that it is applicable to the facts and is correct in law, a binding general ruling) can do is compel the supplier to issue a credit note and prevent the recipient from issuing a tax invoice.

It has always been necessary to distinguish between various forms of price-reduction, which, in law, are properly the subject-matter of a credit note issued by the supplier, and the rendering of services by the recipient of goods supplied, which are properly the subject-matter of a tax invoice issued by the recipient of the goods, in its capacity as supplier of the service.

sgr 06 in no way changes this understanding of the law.

Suppliers sending their customers solemn form-letters asserting, for example, that sgr 06 compels them first to issue a credit note before allowing any remission of the pre-discount price are simply making unilateral attempts to alter existing contracts disguised as adherence to a legal necessity, which, in my view, they deliberately misunderstand.

Perhaps, though, I am being uncharacteristically generous, and, in reality, either they or their advisers are simply numbskulls.

When does ‘source’ signify for residents?

The famous Lever Bros case showed that the fiscal concept of source in the context of taxation comprises two elements—the identification of the originating cause of an income-stream, and then the location, somewhere in the world, of that originating cause. Under our worldwide system of taxation the source of receipts and accruals (including the proceeds arising from the disposal of assets) is supposed to be irrelevant for ‘residents’. It is only nonresidents whose income tax base is limited to their ‘gross income’ from a source in the ‘Republic’.

Nevertheless, there was a hiccup when we switched to the worldwide system, in that we continued to apply a deemed-source formula to pensions earned wholly or partly abroad even by residents, so as to establish what part, if any, is taxable here. By extension, the same formula was applied to lump-sum benefits from retirement funds. In 83 TSH 2010 I showed what the National Treasury has done to that extension, although not so thoroughly as to rule out all hope for its survival.

Source signifies also in the application of s 6quat of the Income Tax Act, the unilateral relief offered against foreign taxation. For foreign-sourced income-streams, you get a rebate; for locally sourced income-streams, you get a mere deduction.
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Tshwane masters the VAT system

Johan le Roux (JCB Inc) has sent me a statement from the City of Tshwane reflecting VAT on finance charges.

Finance charges are, at least in provincial and national circles, regarded as being a consideration for an exempt supply and thus free of VAT.

The really weird thing is that the percentage rate of VAT applied by the City is much less than 14%.

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Retentions & VAT—don’t account (invoice) too soon

Rodney Carpenter (Carpenter & Co) writes:

My client has a VAT problem on retentions on engineering contracts. The 10% retention is withheld by his clients for twelve months in terms of the contract. VAT is paid on 100% of the contract when the invoice is made out, but the retention is only received twelve months later. Is there a legal way that the payment of the VAT on the retention can be delayed until it is due, twelve months later?

Such retentions are usually the subject of some form of conditionality, such as clearance by a QS or an architect or engineer. Conditionality of this type delays any patrimonial (property) consequences and thus usually delays chargeable events under the various tax laws.

The first opportunity for such a delay under the VAT law is encountered under the definition of a ‘supply’:

'supply' includes performance in terms of a sale, rental agreement, instalment credit agreement...;

As far as a retention is concerned, if it is associated with the type of conditionality I have in mind, there is no performance and therefore no ‘supply’ until the conditionality is resolved—as long as the underlying transaction is a ‘sale’, ‘rental agreement’ or ‘instalment credit agreement’ (94 TSH 2011).

But the question posed probably involves a ‘service’, rather than a ‘sale’, a ‘rental agreement’ or an ‘instalment credit agreement’. While performance is not a component of the definition of a ‘service’, it is effectively allowed for in the time-of-supply rules.

Thus the rules in s 9(3)(b)(ii) relating to goods or services supplied directly in the construction, repair, improvement, erection, manufacture, assembly or alteration of goods override the general time-of-supply rule (earlier of invoice and payment of consideration), and, in the ordinary course, depending upon the nature of the work and the contract, there ought not to be VAT payable upfront on a retention payment.

But you have to read the law carefully. Here is the deemed time of supply triggered by all s 9(3) supplies:

those goods or services shall be deemed to be successively supplied, and each such successive supply shall be deemed to take place whenever any payment in respect of any supply becomes due, is received, or any invoice relating only to that payment is issued, whichever is the earliest;

A retention will become due when the conditionality driving it is resolved, and that moment will establish the deemed time of supply—unless, that is, you have foolishly issued a retention-invoice at some earlier time.

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PAYE: prior-year awards

Recently, I promised some seminar attendees that I would ask Rob Cooper (VIP Payroll) how the PAYE system is currently handling bonuses awarded, incurred and accrued in one year but paid only in the following year. Here is what Rob has to say:

A short & a long answer

The short answer is that the current tax certificate does provide for the reporting of bonuses in Year 2 that accrued in Year 1 but paid only in the following year. Here is what Rob has to say:

The ‘Transaction Year’, defined as being ‘the tax year during which the employer deducted and paid [transacted] employees’ tax in respect of remuneration paid or payable to an employee. This could include employees’ tax on remuneration which accrued during a previous tax year.’ This would always be the current tax year (2012), since the tax records being processed in the payroll would all be ‘transacted’ (using the EMP 201 system) in the current tax year.

2. The ‘Year of Assessment’, defined as being ‘the tax year in which the remuneration paid or payable to an employee accrued’. Normally the ‘Year of Assessment’ would also be 2012, since by far the majority of employment income accrues in the year in which it is paid (transacted). The exceptions are normally backdated salary increases, and bonuses.
Assuming Year 1 = 2011 and Year 2 = 2012: When a bonus that accrued in Year 1 is processed in the payroll during the course of Year 2, the payroll reports the bonus on a tax certificate at the end of Year 2, with the Transaction Year = 2012 (which allows the reconciliation of total taxes withheld to total taxes paid to SARS to painlessly include the tax on the bonus), and the Year of Assessment = 2011. Receiving a 2012 certificate with a 2011 year of assessment, triggers SARS to re-open the assessment of the employee who received the bonus.

—Rob Cooper

Shelf-companies & SBCs: Oops!

Regular correspondent Carl Nielsen (Dulverton Financial Services) writes:

I read with interest your detailed analysis of the s 12E(4)(a)(ii) definition of a small business corporation (SBC).

As an aside, what the hell is the definition doing there anyway? Recently, I was hunting it down, and was forced to do a search after failing to find it in s 1, where it surely belongs! [The reason is that, in some of history’s worst drafting ever, the definition is not a definition at all but substantive law. For a laugh, see the Supplement to 40 TSH 2006.—Ed]

I was interested to divine from your writing that you are under the impression Cipro has a register of shareholders. As far as I am aware, for companies, all they have is a register of directors. So any attempt by SARS to track down naughty SBC-claimers by using of Cipro’s databases, would be limited to close corporations.

As another aside, why the lawmakers decided on such a cack-handed anti-avoidance provision I cannot fathom. There are many legitimate reasons to own membership in more than one close corporation, or shares in more than one company, having nothing to do with any attempt to circumvent the ‘S’ part of being an SBC. Surely some sort of system of adding together revenues of entities joined by common owners to decide if they qualify as being ‘small’ would have been more sensible.

Anyway, the issue I wanted to focus on was the fairly recent addition to the exclusions to this whole issue of ownership of multiple entities ostensibly introduced to cater for shelf-companies. The technicality was that, upon the purchase of a shelf company, that entity would be excluded from enjoying SBC status until its second fiscal year, owing to the fact that, from its incorporation to its purchase, it was held by someone who is an owner of a ream of dormant entities.

Under the old legislation: Mr A buys Shelfco CC, which was registered with Mr B as sole member. Mr B is a member of hundreds of shelf CCs. For the first fiscal year, Shelfco CC is not able to qualify as an SBC, since Mr B was a member of more than one SBC.

Under the new legislation: It was intended to allow Mr A to treat Shelfco CC as an SBC. But, the way they have done it, Mr B is a member, almost definitely, of WeSellShelfCos CC, his trading company. Because WeSellShelfCos CC trades, all other entities that Mr B owns are not able to claim SBC status. So Mr A still has to wait until the next fiscal year.

Or am I missing a trick somewhere?

—Carl Nielsen

You have to be right

Here is the text of the amended exclusion:

(ii) none of the shareholders or members at any time during the year of assessment of the company, close corporation or co-operative holds any shares or has any interest in the equity of any other company as defined in section 1, other than—

(hh) any company, close corporation or co-operative if the company, close corporation or co-operative—

(A) has not during any year of assessment carried on any trade; and

(B) has not during any year of assessment owned assets, the total market value of which exceeds R5 000; or

In the first year of Mr A’s ownership, Mr B’s previous ownership in the same year appears to disqualify the shelf-company from exclusion.—Ed

The travails of collecting a VAT refund

Reader Mike Dyke writes:

Another SARS practice has appeared. For two of the organizations with which I am involved the submission of a VAT return resulting in a refund. In both instances, a request for documents supporting the return followed. In the first instance the amount involved was only R538, and was occasioned by the purchase of stock for contracts that would be completed only in six to eight weeks’ time. In the second, the request was received within two hours of the eFiling of the return. I don’t believe anyone at SARS works so quickly; there must be an automatic trigger somewhere in their system.

The first matter didn’t end there. I filed a letter with attached documents, only to be advised that tax as required a vat audit to be carried out.

Further documents were requested, and, because of the volume involved, I delivered copies of dormant entities.
personally to SARS Alberton. On the Friday following I received a phone call from the official concerned, who said that she had not received the documents I had promised to deliver that Monday (only seven days after the notice; not pushing the twenty-one days allowed under the ‘request’). I told her that I had delivered them to SARS on Wednesday, delivery having been delayed by the disruptions taking place in the area as a result of industrial action. She asked me where I had delivered them to, and I told her that it was to the SARS Alberton office. Oh no, she said, I am at the Alberton Campus (which, I must admit, I was unaware of), and I must collect them and deliver them to her at the Campus.

I pointed out that SARS’s procedures permit the delivery of documents to any SARS office, and that this was specifically stated in the request. I said that I was sure the Alberton office would transfer the documents to her (they’re about 2 km away), and suggested she contact them to confirm that they would. She told me (and this was when I lost my cool—most unusual for me) that she had no contact with the Alberton office and was allowed only to call the sars Call Centre). I suggested that she did that and ask to speak to Mark Kingon. ‘Who’s he?’, she asked.

She then said she would contact the taxpayer directly and request the bookkeeper to deliver the documents. I said that I would instruct the bookkeeper to refuse any such request and would file a formal complaint against her failure to accept documents that had been filed in accordance with sars procedures. It seems that SARS has reached a new low of staff incompetence.

While I awaited the outcome with interest, it happened again. I submitted a VAT return (for my own business) on 3 August at about 09h00. At 11h02 I received the attached notice! [See the next item.]

It was quite clear from the return that the only unusual thing (which resulted in a refund) was the VAT related to bad debts written off. This is a separation item on the return, so should not have required VAT related to bad debts written off. This is a separation item on the return, so should not have required any further information other than, perhaps, the details of the debtors. So it’s quite clear that the issue of the notice is triggered by a programme that identifies ‘abnormalities’.

The same thing happened with another client, for more or less the same reason.

Just to add to the confusion, I had the same request for another client, due a refund (of about R500). The notice is issued by SARS Alberton, so I delivered about 100 documents to sars Alberton.

The person handling the review came back to me and said they couldn’t find the documents. They should have been delivered to SARS Alberton Campus, not to the SARS Alberton office. The sars Alberton Campus, according to the lady who spoke to me, is not in Alberton, but in New Redruth.

Strangely enough, the SARS Alberton office is also in New Redruth—you can confirm that by its address, Newquay St—all the streets in New Redruth are named after towns in Cornwall. Even stranger, the ‘Alberton Campus’ is not listed on the SARS website. The only reference gives a call centre number, with no physical location (which I have subsequently found out through a friend).

I also pointed out that (as you will see from their notice), documents can be delivered to any SARS office. I normally eFile them but there were just too many documents. I have refused to provide them with further copies unless they are prepared to pay me for doing so, (including mileage and standing in a queue for at least an hour to lodge them), since the loss of the documents is their internal problem which they must solve.

Life is very frustrating at the moment—my prime mission at the moment is studying the new Companies Act. I am almost losing my mind over the standard of the English (including substantive errors, not just stylistic). The drafters should be made to attend your Legal Drafting Master Class, which is one of the most enjoyable things I’ve done in recent years.

Finally, and a little hard to believe—of the three cases I have mentioned, the VAT refunds due were paid yesterday, even though I have not yet submitted all the documents requested. The only one that is still outstanding is the R538 due, where I did submit all the documents but they lost them. I am staring to think that it’s a waste of time trying to apply logic to our friends.—Mike Dyke

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Yes, it’s another SARS VAT refund scam

Then a listed company sends me a SARS eFiling auto-generated letter (Review of VAT 201 declaration) in response to a VAT 201 return submitted two hours earlier.

It requests information because ‘variances have been detected in this submission’ but fails to state what the variances are (because nobody actually applied any brainpower), which makes it very difficult to respond, since you have to guess.

The request most probably arises because the company has a refund due (as it does more often than not, owing to the nature of its business). Extremely frustrating.

Here is an extract from the SARS form itself, including its outright fabrications:

Thank you for submitting your VAT 201 declaration for the 201106 tax period.

Please note that your VAT 201 declaration has been identified for review as part of the VAT assessment verification process, due to the fact that variances have been detected in this submission. Please carefully review your VAT 201 declaration against your relevant supporting documents, correct any errors and submit a request for correction.

Alternatively, you are required to provide the output...
The Tax Administration Bill—a gross violation of human rights

Eric Milner wrote to his MP, expressing his serious concerns ‘about the gross violation of human rights as contained in the Tax Administration Bill that is currently before Parliament’, only to discover ‘that they have not read the bill except for the pay-now-argue-later section. What hope do we have that any of the other MPs will read the bill?’ Here is his response:

Some examples of draconian powers
I would like, however, to point out that there are many, many constitutional concerns besides the pay-now-argue-later rule. Just some examples:

Section 186 of the bill provides that a court can order that the passport of a taxpayer be confiscated, the taxpayer can be prevented from leaving the country, and the taxpayer can be ordered to cease trading simply on the basis of the beliefs of a senior official. Clearly, this is in violation of s 21 of the Constitution, as well as of s 22. We are reintroducing the worst sins of the Apartheid government without, it seems, political parties raising much resistance.

Section 180 of the bill provides for personal liability for negligence. Frankly, this is nonsense. Many, many businessmen are doing their best to survive, and are not experts on taxation (in fact, I would venture to state that very few entrepreneurs have any idea how tax works). Accordingly, any businessman who runs into financial difficulty will risk being found to be negligent without having any intention to defraud SARS. The whole purpose of limited liability is to provide businessmen the opportunity to take risks without putting the entire well-being of their families at risk. For some strange reason, government appears to believe that entrepreneurs will be the driving force behind job creation while the government does everything in its power to impose draconian laws and burdens on entrepreneurs.

As for the pay-now-argue later rule (section 164), I cannot put the matter better than the Law Society has. Essentially, the Law Society has pointed out that the very employee who will be deciding a judge or presiding officer decide if tax is post-poned, not a SARS official, whose bonus may depend upon the outcome of the decision. Furthermore, please note that Justice Kriegler in the Metcash Trading Limited case specifically held that the decision does not apply to income tax but only VAT. SARS has purposely misinterpreted this ruling, in my opinion with male fides.

Section 161 of the bill provides that SARS may require a deposit for future taxes. This is ridiculous. Clearly, the remedy available to SARS is to prosecute anybody who commits an offence. It really should not be open to SARS to require security for future taxes. This provision then goes on to allow SARS to collect the security as if it were a tax. We thus have the ridiculous possibility of SARS’s putting a company or an individual into liquidation for a tax debt for tax that is not due as yet. It also has the effect of punishing a person who has committed an offence for the rest of this person’s life. Someone who has committed an offence will never be able to open a business in future, despite having served his or her sentence. Stalin no doubt, would be very proud of the laws proposed by SARS.

Riding roughshod over rights
These are just a sample of the draconian powers that SARS seeks to give itself. There are many provisions that ride roughshod over the rights of taxpayers. Parliament simply should not allow civil servants to exercise the kind of power sought by SARS. That is why we have a legal system and courts. If SARS is putting forward the argument that it should be allowed to bypass the courts, owing to the inefficiencies of the courts, what does this say about the chances of the ordinary man to obtain redress and justice from the courts? Why should the government give itself powers and remedies that are not available to the ordinary man?

Furthermore special tax courts are available to SARS, and access to these courts (including delays) is entirely within the control of SARS. There is, therefore, no reason to provide SARS the power to bypass the courts when SARS is the very cause of the delays in the legal system. Rather, Parliament should seek to expand the roll of these courts. Let a judge or presiding officer decide if tax is postponed, not a SARS official, whose bonus may depend upon the outcome of the decision. —Eric Milner

Drafting the Tax Administration Bill: what went wrong?

There is a mad desire among officials, enflamed no doubt by the lobbyists and consultants who feed off the officials and their legislative excreta, to rewrite everything. But do the skills exist, even at the very fundamental level of the principles of legal drafting (to say nothing of legal, especially constitutional
Some of these rules looked, I imagine, like this:

- Cross-references from one section to another must be named in the modern style. For example, s 42(6) refers to 'section 104(2)'.
- Cross-references within a section must be named in the old colonial style. For example, s 42(6) refers to 'subsection (5)', indicating s 42(5). These last two rules are never broken. (At least two such cross-references are wrong; see s 187(6) and its purported cross-reference to itself, and the cross-reference in s 244(3) to a nonexistent s 244(4).)
- Cross-references must take the form ‘as referred to in’, ‘described in’, or ‘assigned in’. This rule is broken with the forms ‘as defined in’, and, perhaps as used by the second crew, ‘as contemplated in’. The formulations as referred to in, assigned in and described in are perhaps the only neologisms spawned by this legislative exercise. (It’s cute how the idiot draftsperson thinks that, in each bout of legislative excretion, a few new ways of saying the same thing will (a) make all the difference and (b) endure past the first round of inevitable amendment.)
- Cross-references must be used sparingly. The rate at which this rule is broken tends to increase as the bill progresses through its sections. There are at the very least 350 cross-references, and a probable total of about 450. The result is that it is impossible to read the bill sequentially. (See the first table following.)

I find it impossible to stop any conventionally trained lawyer from abusively relying upon the crutch of cross-references, which are a sign of ignorance of the rules of interpretation, the need for a definition to be supplied, imagined learning or aping one’s better’s without understanding why they are better.

The principal rule of interpretation is that, in order to understand a provision, you read the entire act (or contract). Then, to understand a part of a chapter or provision, you read the entire chapter or provision. In a passage on, say, snakes, the reader does not expect an interruption dealing with, say, power drills, and will assume that you are continuing to talk about the subject you have delineated (snakes) until you move on to some other subject (power drills).

Tell me, for example, what the cross-reference achieves in this passage, taken from s 3:

(i) give effect to the obligation of the Republic to provide assistance under an arrangement made with the government of any other country by an agreement entered into in accordance with a tax Act.

(2) If SARS has, in accordance with any arrangement referred to in subsection(2)(i) made with the government of any other country,

What is being cross-referred to is an arrangement made with the government of any other country by an agreement entered into in accordance with a tax Act.
All of these words could have been repeated in s 3(3); a compound pronoun could have been used, as in ‘such an arrangement’, without any risk of confusion; or, to make my other point, a definition could have been created to signify all of those words, for example, ‘international tax arrangement’.

As it happens, the proper solution to the problem was to have created a definition, since this type of arrangement is referred to again in ss 151(e), 185(1) and 185(6).

The putative supervisor should have spotted that need.

<table>
<thead>
<tr>
<th>Provision</th>
<th>Internal (to same section)</th>
<th>External (to different section)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>9</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>14</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>67</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>68</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>69</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>70</td>
<td>16</td>
<td>1</td>
</tr>
<tr>
<td>71</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>72</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>162</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>163</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>164</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>165</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>166</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>167</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>251</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>252</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>253</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>254</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>255</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>256</td>
<td></td>
<td>4</td>
</tr>
</tbody>
</table>

The putative second crew became increasingly reckless with cross-references as it presumably rushed to complete the work, until it ended up drafting the abomination illustrated in the following diagram.

Does this diagram illustrate legal drafting or public vomiting? I particularly like the references to information, which are identified either by a reference to s 71(1), which cross-refers to s 71(2), or by references directly to s 71(2). Yet again, the evidence seems strong that at least two drafting crews were involved.
Drafting by vomiting

Disclosure in criminal, public safety or environmental matters

(1) If so ordered by a judge referred to in subsection(3) or (4), a senior SARS official must disclose the information described in subsection(2) to—

(a) the National Commissioner of the South African Police Service, referred to in section 6(1) of the South African Police Service Act, 1995 (Act no 68 of 1995); or
(b) the National Director of Public Prosecutions, referred to in section 5(2)(a) of the National Prosecuting Authority Act, 1998 (Act no 32 of 1998).

(2) Subsection (1) applies to information which may reveal evidence—

(a) that an offence (other than a tax offence) has been or may be committed in respect of which a court may impose a sentence of imprisonment exceeding five years;
(b) that may be relevant to the investigation or prosecution of an offence referred to in subparagraph (a);
(c) of an imminent and serious public safety or environmental risk.

(3) A senior SARS official may, if of the opinion that—

(a) SARS has information referred to in subsection(2);
(b) the information will likely be critical to the prosecution of the offence or avoidance of the risk; and
(c) the disclosure of the information would not seriously impair a civil or criminal tax investigation,

make an application ex parte to a judge in chambers for an order authorizing SARS to disclose the information under subsection (1).

(4) The National Commissioner of the South African Police Service, the National Director of Public Prosecutions or a person acting under their respective direction and control, if—

(a) carrying out an investigation relating to an offence or a public safety or environmental risk referred to in subsection (2); and
(b) of the opinion that SARS may have information that is relevant to that investigation,

may make an ex parte application to a judge in chambers for an order requiring SARS to disclose the information referred to in subsection (2), which application requires prior notice to SARS of at least 10 business days unless the judge, based on urgency, allows a shorter period.

Subject to

A draftsperson who for whatever reason chooses to ignore or is ignorant of the principal rule of interpretation will also be prone to excessive use of the subject to form of cross-reference.

In C and J Clark v Inland Revenue Commissioners [1973] 2 All ER 513 at 520 Megarry J said:

In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.

The table that follows tests some of the bill's subject-to provisions against this standard.

Very few of these usages mark collisions requiring resolution by a dominant/subordinate identifier. The rest demonstrate a form of mindless showing-off—to the peanut gallery.

<table>
<thead>
<tr>
<th>Putative subject subsection (subordinate)</th>
<th>Putative master subsection (dominant)</th>
<th>Clash?</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 9(1)(b)</td>
<td>this Act</td>
<td>Que?</td>
<td>I have no idea what this formulation means.</td>
</tr>
<tr>
<td>s 16(1)</td>
<td>s 18(4)</td>
<td>None</td>
<td>Ombud’s mandate ostensibly made subordinate to requester’s exhaustion of available complaints resolution mechanisms. Nutty.</td>
</tr>
<tr>
<td>s 56(4)</td>
<td>s 57(2)</td>
<td>None</td>
<td>Section 57(2) is relevant to s 57(1) only. Unintelligible.</td>
</tr>
<tr>
<td>s 61(2)</td>
<td>s 63</td>
<td>Yes</td>
<td>Section 61(2) requires a warrant; s 63(1) (not s 63) does not.</td>
</tr>
<tr>
<td>s 61(8)</td>
<td>s 66</td>
<td>Yes</td>
<td>Section 61(8) makes SARS not liable; s 66 makes it liable.</td>
</tr>
<tr>
<td>s 68(2)</td>
<td>this Chapter (6—confidentiality)</td>
<td>Que?</td>
<td>Well, of course. But what about the other provisions of the Chapter not similarly subordinated? Are they stand-alone provisions, divorced from the Chapter?</td>
</tr>
<tr>
<td>s 69(1)</td>
<td>this Chapter (6—confidentiality)</td>
<td>Que?</td>
<td>Ditto.</td>
</tr>
<tr>
<td>s 69(2)(c)</td>
<td>s 69(3) &amp; (4)</td>
<td>None</td>
<td>Rules for approaching the High Court. Formulation 'subject to' does nothing.</td>
</tr>
</tbody>
</table>
Definitions

The huge number of cross-references in the bill already presages bad news on this score. But, first, the putative rule:

- All global definitions (those applying across the entire bill) must be listed in s 1, and all local definitions (those applying exclusively to chapters of the bill) must be listed in the first section of each chapter.

In the first place, the list of global definitions is a fake, since about eleven of the supposedly defined terms in s 1 have meanings ‘assigned’ to them elsewhere in the bill, while about another eight have meanings ‘referred to’ elsewhere. Thus about 30% of the global definitions are mere place-keepers; in truth, mere indicators of the real locations of the actual definitions, all of which are listed in the accompanying table. Several of these place-keeper definitions do not work as definitions at all, for the reasons suggested in the table but mostly because they are hopelessly entangled with substantive law.

Such entanglements are, to me, a failsafe sign of weak drafting skills yet de rigueur at all the big law and accounting firms and, doubtless, throughoutacademe.

<table>
<thead>
<tr>
<th>Place-keeper definition, s 1</th>
<th>Link</th>
<th>Actual location</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>additional assessment</td>
<td>referred to</td>
<td>92</td>
<td>Two assessments are referred to in s 92. No formal definition supplied.</td>
</tr>
<tr>
<td>administration of a tax Act</td>
<td>assigned</td>
<td>3</td>
<td>The actual definition lies in s 3(2). Section 3(1) contains a duty, and s 3(3) a power.</td>
</tr>
<tr>
<td>effective date</td>
<td>assigned</td>
<td>187(4) &amp; (5)</td>
<td>Section 187(4) proclaims an identity, and s 187(5) is irrelevant (see the main text).</td>
</tr>
<tr>
<td>jeopardy assessment</td>
<td>referred to</td>
<td>94</td>
<td>A jeopardy assessment is dealt with only in s 94(1). No formal definition is given.</td>
</tr>
<tr>
<td>original assessment</td>
<td>referred to</td>
<td>91</td>
<td>Only s 91(1), (2) and (3) deal with an original assessment.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
<td>Note</td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>------------</td>
<td>----------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>practice generally prevailing</td>
<td>assigned</td>
<td>The actual definition lies in s 5(1). The remainder of s 5 comprises substantive law.</td>
<td></td>
</tr>
<tr>
<td>prescribed rate</td>
<td>assigned</td>
<td>Yes, an actual definition lies in s 189(3).</td>
<td></td>
</tr>
<tr>
<td>presiding officer</td>
<td>person</td>
<td>Very unclear. Read s 50(1), (2), s 51(3) and s 111.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>before whom</td>
<td></td>
<td></td>
</tr>
<tr>
<td>public officer</td>
<td>referred to</td>
<td>The person to be called a ‘public officer’ is identified in s 246(2), which comprises substantive law. No formal definition is given.</td>
<td></td>
</tr>
<tr>
<td>reduced assessment</td>
<td>referred to</td>
<td>A reduced assessment is dealt with in s 93(1), which is a substantive provision. No formal definition is given.</td>
<td></td>
</tr>
<tr>
<td>reportable arrangement</td>
<td>assigned</td>
<td>The actual definition lies in s 35(1) and (3). Section 35(2) is a substantive provision.</td>
<td></td>
</tr>
<tr>
<td>representative taxpayer</td>
<td>assigned</td>
<td>The actual definition lies in s 153(1). The remainder of s 153 comprises substantive law.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes, an actual definition lies here. Understand it if you dare.</td>
<td></td>
</tr>
<tr>
<td>responsible third party</td>
<td>assigned</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SARS confidential information</td>
<td>assigned</td>
<td>The actual definition lies in s 68(1). The remainder of s 68 comprises substantive law.</td>
<td></td>
</tr>
<tr>
<td>senior SARS official</td>
<td>referred to</td>
<td>This is a substantive provision. No formal definition is given.</td>
<td></td>
</tr>
<tr>
<td>tax board</td>
<td>established</td>
<td>Establishment is under s 108(1)(a). The remainder of s 108 comprises substantive law.</td>
<td></td>
</tr>
<tr>
<td>tax court</td>
<td>established</td>
<td>Establishment is under s 116(1). The remainder of s 108 comprises substantive law.</td>
<td></td>
</tr>
<tr>
<td>Tax Ombud</td>
<td>appointed</td>
<td>Appointment is under the opening words of s 14(1). The remainder of s 14 comprises substantive law.</td>
<td></td>
</tr>
<tr>
<td>taxpayer</td>
<td>assigned</td>
<td>Yes, an actual definition lies here.</td>
<td></td>
</tr>
<tr>
<td>taxpayer information</td>
<td>assigned</td>
<td>Yes, an actual definition lies here.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>withholding agent</td>
<td>assigned</td>
<td>Yes, an actual definition lies here.</td>
<td></td>
</tr>
</tbody>
</table>

Next, lists of local definitions are to be found at the beginning of Chapters 7, 9, 10, 14, 15, 16 and 18, but Chapter 9 has a second set of definitions, in Part F, as does Chapter 16, in Part B, while Chapter 4 has its definitions in Part B. Pity the poor ordinary reader! Some local definitions will never be found, even by an extraordinary reader:

- Chapter 10’s local definitions apply also to Chapter 11. These ought to have been global definitions located in s 1.
- Similarly, the definitions of Part B of Chapter 4 apply also to s 212. Ditto.
- The definition of an ‘excluded “arrangement” ’ is altogether hidden in s 36(1), without benefit of any place-keeper, anywhere.

Problematical definitions
In the bill’s Chapters, defined terms bear their defined meaning only ‘unless the context indicates otherwise’, and only if they are embraced by single quotation marks. But, surely, a defined term shown so embraced could not possibly bear anything but its defined meaning, no matter what the context? Why use the quotation marks, by which you deliberately invoke the defined meaning, if not to indicate the defined meaning? It’s a nutty conceit.

And then, inevitably, quotation marks will be forgotten. For example, s 34, the list of local definitions for Part B of Chapter 4, neglects to embrace within single quotation marks defined terms included in other defined terms. So what meaning do these terms bear? The same thing occurs in the definition of an ‘applicant’ in s 14; yet not with the definition of an ‘application’ in the very same section. (Two crews treading on each other’s toes?) (No one with even an elementary understanding of computer programming would have made such mistakes, and no one lacking such an understanding ought to be allowed to draft.) Abandoned (by the second crew, perhaps?) only in s 75—with its simultaneous definition both of
‘class member’ and ‘class members’—and nowhere else, is an otherwise unfailing reliance upon the number-rule of s 6 of the Interpretation Act

While the term ‘binding effect’, locally defined in s 75, is required to be deduced from s 82, the pseudo term non-binding effect is effectively given a definition in s 88.

I shall have to think of a prize to offer the first person to understand the definition of the global term ‘effective date’:

*effective date* has the meaning assigned in section 187(4) and (5);

(4) The effective date in relation to an additional assessment or reduced assessment is the effective date in relation to the tax payable under the original assessment.

(5) If a senior SARS official is satisfied that interest payable by a taxpayer under subsection (1) is payable as a result of circumstances beyond the taxpayer’s control, the official may, unless prohibited by a tax Act, direct that so much of the interest as is attributable to the circumstances is not payable by the taxpayer.

Even if the reference in the definition to s 187(5) is simply mistaken, where is the definition in s 187(4), unless it means that ‘effective date’ is effective date?

The crucial definition of a ‘tax Act’ cross-refers to s 4 of the ‘SARS Act’, where no act whatsoever is specifically mentioned. You have to infer that some subset of the national legislation listed in Schedule 1 is intended.

Conflict of laws
Contrary to its hugely flattering self-description in its accompanying Memorandum, the bill simplifies and consolidates nothing but adds a further piece of legislation to be consulted on a tax issue to the existing eighteen such pieces identified as ‘tax Acts’. (Nor does it apply to the Customs and Excise Act, which is not a ‘tax Act’.)

According to s 4(2) and (3), if another tax Act covers an administrative matter on which the bill is silent or if there is an inconsistency, on any matter, the other act prevails.

With definitions, you are required to integrate the preamble to the global definitional clause

1. In this Act, unless the context indicates otherwise, a term which is assigned a meaning in another tax Act has the meaning so assigned, and the following terms have the following meaning:

and the typical definitional clause to be found in Chapters of the bill

101. In this Chapter, unless the context indicates otherwise, the following terms, if in single quotation marks, have the following meanings:

with this subsection inserted by Schedule 1 to the bill (there is no Schedule 2) into the definitional clauses of nine tax Acts:

(2) Unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Tax Administration Act bears that meaning for purposes of this Act.

Before attempting the exercise, why not illicit some help from the Memorandum?

Terms used in the TAB which are defined in the tax Acts retain their defined meaning in the TAB, unless the context in which they are used in the TAB indicates otherwise, or if they are specifically defined in the TAB. Terms defined in the TAB apply to tax Acts unless the context in the tax Act indicates otherwise, or if they are specifically defined in the relevant tax Act.

Put aside the always troubling and entirely unnecessary contextual override (*unless the context indicates otherwise*). Are these the rules?

- A term defined in a tax Act bears its meaning defined there if used in the TAB.
- A term defined in the TAB bears its meaning defined there if used in the tax Act.
- A term defined in the TAB bears its meaning defined there if used in a tax Act.

But what about the distinction between global and local definitions? My guess is that the first and third of these rules apply only to global definitions.

And what about possible conflicts? My guess is that a global definition in a tax Act will not override a global definition in the TAB, and vice versa.

Conclusion
For reasons that escape me, the local fiscal environment is inimical to the bestowal of any honour upon fundamental principles of legal drafting.

Yet the rules are simple, and almost all of them have been explained in back issues of this newsletter.
South Africa: time to shrug?

Occasional correspondent Dale Irvine sent in this quotation from Ayn Rand in *Atlas Shrugged*:

> Money is the barometer of a society’s virtue. When you see that trading is done, not by consent, but by compulsion—when you see that in order to produce, you need to obtain permission from men who produce nothing—when you see that money is flowing to those who deal, not in goods, but in favors—when you see that men get richer by graft and by pull than by work, and your laws don’t protect you against them, but protect them against you—when you see corruption being rewarded and honesty becoming a self-sacrifice—you may know that your society is doomed.

SARS goes paperless

Lindy Landman reports that the SARS Practitioner’s Unit in Durban is given *one ream of paper a month* for use by all members of the unit. You cannot get more than a few pages from them unless you bring in your own paper. We now take our own paper to all appointments, in case should we want anything printed.

Should you wish to have any printing done on a SARS letterhead, such as a clearance certificate, you are not allowed more than one copy for being in good standing and only five copies for tenders. Otherwise there is someone (from the SARS office?) selling backstreet SARS letterheads for R500 a page, to cover the shortfall.

The environmental levy on CO² emissions & VAT

Regular correspondent Rogerio Russo recently took delivery of his new BMW, only to discover that the dealer added a VAT charge to the environmental levy on CO² emissions payable under s 54A of the Customs and Excise Act. Can taxes be charged on taxes, he asks?

The levy is imposed upon targeted imported goods and goods manufactured in SA. The person liable for the levy is, very clearly, the ‘importer’ or, if you read the entire act while crossing your fingers behind your back, the manufacturer. The dealer will ordinarily be buying as a principal from the importer or manufacturer, presumably at a price covering all costs, including customs duties, excise duty and environmental levies payable by the importer or manufacturer.

These duties and levies are costs imposed upon the importer or manufacturer and presumably passed on to the dealer. Ordinarily, a dealer doesn’t break out his supplier’s costs under the Customs and Excise Act and add VAT to them. He simply pays a VAT-inclusive price to his supplier, and then accounts for VAT on the total consideration payable by his customer (including the dealer-markup), and is compelled to disclose its VAT component in one or other of the permitted methods.

If, at that stage, he chooses to go all historical on his customer, showing a—at that stage—mythical CO² emissions levy, he is simply trying to show that the high price of the car isn’t entirely his fault.

As for taxes on taxes, s 13(2) of the Value-Added Tax Act specifically values imported goods entered for home consumption under the Customs and Excise Act at their customs duty value plus the duty levied, plus a 10% surcharge. And s 7(3) does something similar for excise duty and the environmental levy, for example, when goods are bought in but are then removed from bond. The buyer has to pay the duty or levy as well as VAT on the duty or levy.

Arrogant, careless arseholes who couldn’t audit a CD

A doctor is warned by SARS of an impending income tax, VAT and PAYE audit covering four years of assessment, having been identified by the SARS ‘Risk Engine for an integrated audit’ (is it solar powered, I wonder?). He is to be sent a notice of audit letter within a week.

In the mean time, he is asked to answer the questions in an attached spreadsheet…prepopulated with the personal details of one of his colleagues!
Spaces deleted between words at random in MS Word

Long-time contributor Duncan McAllister (SARS) writes:

I have found a strange phenomenon with MS Word lately. I use Word 2007 at the office and Word 2010 at home. When I save a document at home and open it at the office spaces are removed between words at random. It is a real pain, since I have to recheck the entire document from scratch in order to reinsert the spaces. After a Google search I discovered that the problem lies with Word 2007, which was corrected by a patch subsequently incorporated into Office 2007 Service Pack 2. For details of the problem and links to the patch and Service Pack 2 click here.

Some surprises hidden away in the Schedule to TAB

The Tax Administration Bill, 2011, I am sorry to say, is a huge disappointment, not least for the decision taken to list the deletions and amendments necessary for its introduction to the ‘tax Acts’ other than taken to list the deletions and amendments necessary for its introduction to the ‘tax Acts’ other than itself (a daft definition, if you ask me) in the eighty-page Schedule 1 to the Bill (there being no Schedule 2), in the narrow, third column of an entirely unnecessary, tri-columnar table, for which there is no explanatory memorandum.

Thank goodness, the instruction had clearly gone out to make no amendments to existing law other than those absolutely essential for the introduction of a Tax Administration Act. Thus it is possible, albeit with a great deal of effort (which I have expended), to map the old law on to the new and thus see through all the lies about this development.

‘Administration’—as it is no doubt now meant to be understood, that is, widely—has not moved over to a new act but has been parted, like the Red Sea of old, with some remaining in the tax Acts other than the Tax Administration Act, and the remainder in the tax Act that will be the Tax Administration Act, subject to the rule that what is in the tax Acts overpowers what is in the tax Act. (If you are not following, understand, at least, that your days as a tax practitioner are over.) Thus in future you will never handle an administrative matter without consulting simultaneously at least two and sometimes even three acts, as well as the expected replacement regulations governing the resolution of disputes.

Just in case you are inclined to disbelieve me and listen, rather, to those great, unwashed commentators who have yet to read this legislation, while penalties are to be found both in what will be the Tax Administration Act and in the other tax Acts, your defences against their imposition will sometimes lie in either source and sometimes in both sources of law—depending, always, on how myriad, pending deletions and commencements are handled by the loony tunes who run the tax circus.

In fact, very little stuff has moved over to what will be the Tax Administration Act, which comprises, essentially, vast swathes of new law, all in oppression of the taxpayer and the realization of the wildest wet dreams that SARS has ever entertained in the dark of the night.

Nevertheless, and probably because more than a single crew worked on this project, the Schedule (I cannot bring myself to call it ‘Schedule 1’) altogether improperly includes substantive changes to the tax law—changes that ought, rather, to have been included either in the current or the next annual amending acts.

In the circumstances, these changes are extremely difficult to find. I list here the more obvious examples I can spot while paging through the 228 pages of the notes for our latest seminar on the Schedule to the bill (notes or an equivalent that state ought to have provided):

- Corporate vendors will for the first time be required to notify SARS of changes to the majority ownership of a company.
- Public officers, representative vendors and representative employers will no longer be required to be residents or residents of the Republic but will have to reside in the Republic. The meaning of this word and the significance of the substitution are at the moment unclear to me.
- The date of a conventional assessment will be the date of its issue. It is uncertain whether the idiot draftsperson intended to engage the common law or the language of the SARS gym.
- For the first time (in my opinion), taxes such as the liftings tax, the withholding tax on royalties, donations tax and the STC will be subject to (swinging) penalties.
- An ‘assessment’ will include tallies to be taken into account in future years of assessment, such as farming development expenditure.
- As a result of what must have been a drafting error, several taxes and penalties will no longer be specifically prohibited as normal tax deductions.
- Donations tax will no longer be payable within three months. Instead, it will be payable on the same basis as the STC.
- Mature directors of private companies will no longer be excluded from exemption from the provisional tax.
- The period between assessments driving the establishment of the ‘basic amount’ for provisional tax purposes will be shortened from sixty days.
There is no provision whatsoever in the Income Tax Act for the issue of tax clearance certificates. They were first heard of on 16 September 2001, in connection with what was then the R750 000 offshore investment allowance for taxpayers in good standing. The

**Words & phrases: ‘habitatio’**

A form of property is a *habitatio*. What follows is an extract from the judgment of Van Rooyen AJ in *Kidson and Another v Jimspeed Enterprises CC and Others* 2009 (5) SA 246 (GNP) (footnotes removed):

[6] *Habitatio* has since time immemorial been recognized as one of the personal servitudes, in addition to usufruct and use. In *Galant v Mahonga* Sampson J summed up the position well:

‘I have already held that her right amounted to *habitatio*. At one time in Roman law it was doubtful whether *habitatio* was a distinct servitude; but Justinian (*Inst* 2.5.2–5) decided to allow it to be classed among personal servitudes, although it seemed to the jurists to stand as a right by itself. See also D 7.8.10, C 3.33. The Roman-Dutch authorities accepted this law. Grotius *Introduction* (2.44.8) treats *habitatio* under usus, and recognizes the right to let. Van der Linden, *Institutes* (1.11.6) includes it under personal servitudes, and there never has, I think, been a doubt that it is so regarded in our law to-day. A personal servitude differs from a real servitude because it is attached to a person and not to a dominant tenement; but the right comprises a part of dominion and is for that reason a *ius in rem* which founds an *action rei vindicatio*. The plaintiff, therefore, can sue in this action for the recovery of her right against any owner of the land subject to the right.

.... *Now habitatio* is treated in the authorities as akin to use, and use was restricted to bare enjoyment, and to what is necessary to enable the free use to be enjoyed. Justinian (*Inst* 2.5.2.) extended to *habitatio* the right to receive a guest in the house (I presume temporarily) and allowed the owner of the servitude to reside in the house with his wife and children, and such persons as might be in his employ, and by a decision allowed the power to let the right of inhabiting to others. *Voet ad Pand* (7.8) does not throw any light on the extent of the right in regard to the question at issue in this case, and indeed the general trend of the Roman-Dutch writers is to leave the matter where Justinian placed it.’

[7] Personal servitudes have been classified, since Roman times, with praedial servitudes, as limited real rights. In spite of the personal servitude’s connection to a particular person (it cannot be transferred or inherited) it is for all other purposes a real right and, as such, legally recognized property which is protected as an asset by private-law remedies. All real rights have a *res* as object. A *res* is of a tangible nature and does not amount to a mere airspace. Air or space can, accordingly, never qualify as an object of a *ius in rem*. Even in the sectional title legislation the ownership of one of the sections is described with reference to at least the middle of the walls, roof and floor between the sections.

[8] The object of the right to *habitatio* (right of free residence) is the land which is subject to the limited real right of *habitatio*. That is why it is registered against the title deed of the land with cadastral precision as to which part of the land is subject to the *habitatio*.... The object of the limited *ius in rem* is accordingly not the air which is encircled by the ‘four’ walls of the farmstead, but the land on which it is located. That is why the rented room in *Kain v Khan* is not in itself the *res*, since it is part of the building and, superficies *solo cedit*. The entitlements of the holder of the right of *habitatio* may, however, in that case be defined with reference to the particular room as part of the building attached to the land as object of the real right.

[9] When the person who has the right of *habitatio* abandons the right, it lapses. As a personal servitude it also lapses on the death of the holder of the *habitatio*. Before that the holder of the right may, of course, reach an agreement with the owner of the burdened property to abandon his limited real right and to accept as a *quid pro quo* some compensation for this waiving of his limited real right. This does not amount to a ‘transfer’ of the limited real right to the owner, but will have the consequence that the erstwhile burden encompassed in the limited real right falls away and the entitlements of the owner of the then unburdened ownership will automatically return to the original unburdened position, thanks to the elasticity of the real right of ownership.

**Tax clearance certificates**

This is what I said in 85 *TSH* 2010:

*Thanks to two incorrect cross-references, I failed until very recently to understand what the definition of the ‘effective date’ in the Tax Administration Bill means. When you get around to it, you are in for a very nasty surprise, since, as I read the definition, interest will run on the capital amount of tax, penalties and interest, calculated daily and compounded monthly, and, in some important instances, will start running even far in the past.*

*Only reproductive language can accurately express what SARS intends to do to taxpayers with this legislation.*

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*An irreverent newsletter designed to keep you up to date—*
tax clearance application form, FIA 001, gives no indication of the authority under which it is issued.

A search of the SARB’s Exchange Control Manual reveals that it is purely an excon construct, and thus just as vague and dubiously constitutional as anything else done under the Currency and Exchanges Act, the exchange control regulations and the orders and rules under the exchange control regulations.

From that modest start, SARS has developed tax clearance certificates into a major brake on economic growth and a marvelous boost to its malevolent, mindless powers.

The new Tax Administration Bill, 2011 includes a section on applications for and the issue of tax clearance certificates, including requirements governing both their issue and content.

What other statutory requirements touch on such certificates?
In our entire statute book there are only two references to them.

Section 27(1) of the Cross-border Road Transport Act reads in part as follows:

**Freight transport**
27. (1) The Regulatory Committee must take the fol-

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**On the constitutionality of TAB**

When illustrious names such as Gilbert Marcus SC and Steven Budlender grace an opinion, even one commissioned and paid for by SARS, you cannot but have high expectations. Alas, the reality, dated 11 August 2011 and freely circulating, although not to be included in my *Tax Shock, Horror Database*, is a huge disappointment.

The authors give the entire bill their constitutional blessing, yet address only three issues:

☐ Warrantless search and seizure.
☐ The pay-now-argue-later principle.
☐ Personal liability of third parties.

The first issue is a straw man, since warrantless searches are allowed under a wide range of laws.

The second is ignorant, in that, for the umpteenth time, Metcash has been cited although not read. In fact, even the actual proposed provision has not been properly read. Can you spot the error?

**Payment of tax pending objection or appeal**
164. (1) Unless a senior SARS official otherwise directs in terms of subsection (3)—
(a) the obligation to pay tax chargeable under a tax Act; and
(b) the right of SARS to receive and recover tax chargeable under a tax Act, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

Clue: When is a tax chargeable?

The third issue includes some perhaps unwise elements but is accepted as not straying into unconstitutionality.

Allow me to list some issues, whether constitutional or not, that scare me witless, leaving out the largely fraudulent attempts of the bill to confuse SARS with the police:

☐ Ought Parliament not to have considered, on a cost-benefit basis, the potentially explosive issue of third-party returns?
☐ Is it really wise, in our dangerous and suspicious environment, for SARS officials to pitch up, unannounced, looking for hidden trades, and what will be the benefit?
☐ Does the bill seriously mean to change the rules for administrative review, and exclude the option of a notice of motion?
☐ Are we expected to believe that SARS has lost its most significant onus, of proving an amount or a supply?
☐ Can we trust SARS fairly to demand security or a preservation order for taxes not yet due or immediate payment of an assessment?
☐ Is it wise to make personal liability dependent upon mere negligence?
☐ Will a court really limit a right to travel abroad, call for the surrender of a passport, withdraw a business licence or demand the cessation of trade over a tax debt?
☐ How will the definition of ‘relevant material’ gel with the right against self-incrimination?
Provisional tax: when will an 8% increase equal 16%?

Occasional contributor Eric Milner writes:

Thanks to para 19 of the Fourth Schedule to the Income Tax Act, every provisional taxpayer must submit an estimate of his or her total taxable income at prescribed intervals of six months and to pay a proportionate amount of tax on each estimate. Unless the Commissioner agrees to accept a lesser amount, the estimate of total taxable income may not be less than the basic amount. As defined, the ‘basic amount’ essentially provides that the last assessment (for the latest preceding year of assessment) is to be used, less various amounts, such as a capital gains, seen as unusual items.

This is the law as it was applied for many years. In 2009 the law was amended to provide that if an estimate...must be made in respect of a period that ends more than one year after the end of the latest preceding year of assessment in relation to such estimate, the basic amount...shall be increased by an amount equal to eight per cent per annum of that amount, from the end of such year to the end of the year of assessment in respect of which the estimate is made.

The outcome is that someone who was not assessed for the 2011 tax year and was required to submit a first provisional return by 31 August had 16% (8% for 2011, and 8% for 2012) added to the basic amount. To make life easier, SARS performed the calculation for you on the return.

For anybody who believes in conspiracy theories, this is where the story gets interesting. The ‘preceding year of assessment’ is defined as the preceding the year of assessment in respect of which the estimate is made; and in respect of which a notice of assessment relevant to the estimate has been issued by the Commissioner not less than 60 days before the date on which the estimate is submitted to the Commissioner.

In order to avoid the 16% increase in the basic amount, the taxpayer had to be assessed by SARS by 1 July. Yet tax returns were released by SARS only on 1 July, making it impossible to be assessed by 1 July and thus guaranteeing SARS a 16% increase in provisional tax collections.

Perhaps the delay was occasioned by the need for employers to submit IRP 5 certificates and for these certificates to be loaded on to eFiling.

Such an explanation would suffice for individual taxpayers but what about companies and trusts? In early March it was possible to submit tax returns for the 2011 tax year for companies. Yet this functionality was removed, and, as with individuals, tax returns for companies and trusts became available only on 1 July.

The question to be asked is: Was 1 July chosen by SARS for the release of the 2011 tax returns with the intention of maximizing tax collections, or am I being too cynical?—Eric Milner

[Hidden in the Schedule to the Tax Administration Bill, 2011 is a fix for para 19, making an 8% increase nothing more than that.—Ed]
An irreverent newsletter designed to keep you up to date—
Coming soon to a SARS office near you

Subscriber Greg Beykirch writes:

Thanks again for your great newsletter.

A SARS issue: if I want to change my bank details for income tax purposes I'm told to visit a SARS office, the reason being all the fraud that takes place. What if I live 500 kilometers from the nearest tax office, I'm poor, and I'm due a refund of, say, R1 000. There are not SARS offices in every dorp in the country.

Do I just write the amount off? Can I claim travelling as a direct refund from SARS or at least a deduction against my taxable income?

It seems like a standard SARS response to any query: 'Go to your nearest SARS office.'

Is SARS really as out of touch with reality as all that?

Should I talk about parking at SARS's offices? No, they obviously think all taxpayers have transporter machines where you are uploaded into a radioactive, computerized machine and are sent on your way at a push of a button.

Helping young people

SIR—Following the piece I wrote in your newspaper earlier this week (continue to ignore the young and poor at our peril, August 29), several people have asked what needs to be done to improve the circumstances of young people in SA. The following practical interventions might do some good:

- Sell public schools to private investors.
- Fund public schooling through a voucher system that allows parents to choose where to send their children.
- Declare teaching an essential service and curtail trade union activity in the profession.
- Provide 100% bursaries to any person who wishes to study teaching on condition that they spend a number of years in the public schools system.
- Ensure that qualifying school-leavers are able to access tertiary education.
- Insert a right-to-work clause in both the Labour Relations Act and the Basic Conditions of Employment Act and repeal minimum wage legislation.
- Repeal the Employment Equity Act and the Broad-Based Black Economic Empowerment Act.
- Abandon the horizontal application of bargaining council agreements
- Sell state enterprises to private-sector investors.
- Devolve greater legislative powers on both taxation and labour regulation to the provincial legislatures to allow these to compete with each other for investment.
- Liberalize immigration law.
- Abandon cadre deployment.
- Reinroduce a corruption-busting unit like the Scorpions with extensive prosecutorial, investigative resources.
- Introduce legislation that no person convicted of a crime may serve in public office or in the public service.
- Prevent political party officials, civil servants or their immediate families from doing business with the state.
- Introduce legislation that police station commanders and public hospital CEOs are elected during local polls by the communities they serve in.
- Introduce a 100% constituency-based electoral system for national elections.

Frans Cronje
Deputy CEO, Unit for Risk Analysis, South African Institute of Race Relations

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Essentialia—universal partnerships

Moosa JA in Ponelat v Schrepfer (802/10) [2011] ZASCA 167 (see the Monthly Listing):

The essentials of a universal partnership were succinctly summarized in the passages of the judgment of the trial court quoted hereunder:

"The essentials of a special contract of partnership were confirmed in the case of Pezzuto v Dreyer 1992 (3) SA 379 (A) at 390, as follows:

"Our courts have accepted Pothier’s formulation of such essentials as a correct statement of the law…. The three essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit…. A fourth requirement mentioned by Pothier is that the contract should be a legitimate one."

"The essentialia of the partnership set out above applies equally to a universal partnership….. The contract of partnership may not necessarily be ex-
press. It could be tacit or implied from the facts, provided they admit of no other conclusion than that the parties intended to create a partnership…. Our courts have recognized that a universal partnership, also known as domestic partnership, can come into existence between spouses and co-habitees where they agree to pool their resources….‘

A universal partnership in which the ‘parties agree to put in common all their property, both present and futu-

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Improvements not owned by taxpayer (s 12N)

Michael Stein’s Briefing in the last issue attracted this enquiry from a reader:

I read your interesting article in the 102 TSH 2011 dealing with the new s 12N. Although good in principle, I have experienced that in practice s 12N is a disaster for most, if not all, government property transactions, since most of these are based on a type of ‘lease and leaseback’ structure, whereby the property is developed or refurbished and then let back to Government. Although all the criteria under s 12N(1) would be met, s 12N(3) kicks you out, since it does not allow the taxpayer (unless in a group context) to grant the use to any other person (that is, sublet or lease and leaseback).

Since s 12N is now the sole deduction section for these transactions, one cannot default back to the old s 11(g), where it dealt with government land. This means that no deduction is available to a taxpayer for leasehold improvements to government land. Do you perhaps have any thoughts on the type of mischief Treasury is trying to stop?

Michael sent the enquiry to Keith Engel (National Treasury), who replied thusly:

The main concern in s 11(g) and s 12N is the use of the sale-leaseback mechanism as a means of exporting tax base (the exempt government entity letting the bank receive interest income reduced by depreciation). This concern evidently came from some 1980s trans-

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Leasehold improvements: fraud most foul by national tenant(s)

For my sins, I have had to read many a lease dealing with improvements. It is extremely rare to come across improvements that the tenant is obliged to effect, on account of the adverse fiscal conse-
quences of such an arrangement—save under the recently introduced s 12N of the Income Tax Act.

In the private sector, then, noncompulsory improve-
ments will be the order of the day. A very common arrangement is for landlord and tenant to share the cost of the improvements, although not necessarily equally. Also common is a tendency for the landlord to establish the tenant as agent to effect the improvements. Since buildings are usually very valuable things, such agreements tend to be elaborate, so as to control the tenant’s dealings with the landlord’s property and prevent abuse.

So when, recently, I came across a short lease of this nature, involving, moreover, a recently erected building, presumably not requiring much improve-
ment, my youthful forensic instincts were aroused from their long slumber.

It got worse. The improvements clause consisted in a couple of lines, calling upon the landlord to shell out several millions, and the tenant to effect improvements, with no elaboration whatsoever. The work was allegedly to be done by the tenant, acting as agent, and was to be evidenced, curiously, by two documents—a small bill for architects’ fees, and another, large bill for the cost of construction. To me, the lease agreement, at least in its
treatment of the alleged improvements, looked like a sham.

Then I saw the bills actually presented, and my blood ran cold. They were one-liners.

By the most amazing coincidence, not more than a week later I learnt that the tenant involved regularly enters into agreements encompassing improvements, seemingly on exactly the same terms.

What is going on here? In all probability, no improvements whatsoever are effected, or improvements to a value less than the sum the landlord agrees to pay.

In truth, the landlord is being extorted to pay an upfront rental rebate, which the landlord dare not deduct for income tax purposes, since both the agreement and the bills describe the expenditure as being for improvements. It would amount to a most serious crime in such circumstances to claim a deduction under s 11(a) (I am thinking Prevention of Organized Crime Act here).

What about the tenant? No way is it declaring the rental rebate for what it is. I imagine—and this is pure speculation—that it simply credits the amount paid by the landlord against its own construction or leasehold improvements accounts, thus burying the accrual where it will never be found.

My bad—SARS has gazetted electronic requirements

I can’t remember how many times I have begged SARS to read the Electronic Communications and Transactions Act, a fascinating piece of legislation with complex constitutional implications deserving much closer study than I, alas, have afforded it.

In the present context, the critical provision is s 28:

Requirements may be specified

(1) In any case where a public body performs any of the functions referred to in section 27, such body may specify by notice in the Gazette—

(a) the manner and format in which the data messages must be filed, created, retained or issued;

(b) in cases where the data message has to be signed, the type of electronic signature required;

(c) the manner and format in which such electronic signature must be attached to, incorporated in or otherwise associated with the data message;

(d) the identity of or criteria that must be met by any authentication service provider used by the person filing the data message or that such authentication service provider must be a preferred authentication service provider;

(e) the appropriate control processes and procedures to ensure adequate integrity, security and confidentiality of data messages or payments; and

(f) any other requirements for data messages or payments.

In case you are interested:

‘public body’ means—

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when—

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a power or performing a function in terms of any legislation;

Imagine my surprise recently, when going through regulations to the Income Tax Act listed by Jutastat, I came across GN R 1454 of 8 October 2003. It describes itself, more or less, as regulations issued under s 66(7B) of the Income Tax Act prescribing procedures for submitting returns in electronic format & requirements for electronic signatures. My humiliation was completed by the discovery that the regulations have been sitting in my TSH Database for years.

What, then, of the Value-Added Tax Act? Hell and damnation! It, too, has been adorned with equivalent regulations, GN R 312 of 12 March 2004. And (Ouch!) it, too, is included in the Database. These are regulations issued under s 28(7) of the Value-Added Tax Act prescribing procedures for submitting returns in electronic format & requirements for electronic signatures.

And yet…. And yet. These regulations were drawn to constitute eFiling, make no mention of the Electronic Communications and Transactions Act, and perhaps do not satisfy all of its requirements.

That is perhaps a topic for another day, except for electronic signatures, which, I freely admit, baffle me.

The Electronic Communications and Transactions Act defines the beast in the following way:

‘electronic signature’ means data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature;

The regulations appear to be at cross-purposes with this definition:

Electronic signature

4. (1) When an electronic return submitted by means of the e-filing service is received on the e-filing website, the electronic signature of the taxpayer or tax practitioner is electronically attached to that return.

(2) An electronic signature of a taxpayer or tax practitioner as contemplated in regulation 4(1) consists of the user-ID of that taxpayer or tax practitioner together with the date and time that the return was received on the e-filing website.

(3) An electronic signature attached to a return as contemplated in regulation 4(1), is deemed to have been attached to that return by the person who submitted that return by way of the e-filing service.

Perhaps I have been right all along. SARS does still
need to read the Electronic Communications and Transactions Act.

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TAB: request for relevant material

Seminar attendee Tarryn Atkinson (First Rand Banking Group) poses a question under clause 46 of the Tax Administration Bill, which bears the heading ‘Request for relevant material’:

Is this provision to allow SARS to request information where necessary for audit/dispute purposes or can they use this upfront to request information that they currently can’t request under s 74A?

From her further remarks, I gather that SARS inclines to the view that clause 46 effects some portentous change.

Section 74A of the Income Tax Act is repealed by the Tax Administration Bill. Clause 46 of the Bill is therefore likely to constitute a replacement of s 74A. Closer examination reveals that this conclusion is correct, although only in relation to the individual taxpayer.

Furnishing of information, documents or things by any person

74A. The Commissioner or any officer may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing) documents or things as the Commissioner or such officer may require.

Request for relevant material

46. (1) SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires.

The wording is practically identical. The implication must be that no substantive change is intended.

(2) A senior SARS official may request relevant material in terms of [s 46(1)] in respect of taxpayers in an objectively identifiable class of taxpayers.

This relates to third-party returns (see also s 26).

(3) A request by SARS for relevant material from another person is limited to the records maintained or that should reasonably be maintained by the person.

If anything, this is a limitation on SARS’s powers as compared with the current position. Alternatively, it is meaningless froth.

(4) A person receiving from SARS a request for relevant material under this section [s 46] must comply with the requirements of the request, and must submit the relevant material to SARS at the place and within the time specified in the request.

This obligation is surely implied under the current law.

(5) SARS may extend the period within which the relevant material must be submitted on good cause shown.

An unnecessary but a nice-to-have repetition of what, I imagine, is already in the Promotion of Administrative Justice Act (PAJA).

(6) Relevant material required by SARS under this section [s46] must be referred to in the request with reasonable specificity.

If anything, this is a limitation on SARS’s powers as compared with the current position. But it is probably a common-law requirement in any event, and possibly also covered by PAJA.

(7) A senior SARS official may direct that relevant material be provided under oath or solemn declaration.

Ok, this is new.

(8) A senior SARS official may request relevant material that a person has available for purposes of revenue estimation.

Once again, this has to do with third-party returns, in relation to which I have very grave concerns.

The conclusion speaks for itself: Clause 46 gives SARS no greater substantive powers over an individual taxpayer than did s 74A. If anything, it limits its previous powers or, better, clarifies how administrative justice plays its role.

In relation to third-party returns, which were already catered for by s 74A, there seems to be a widening of powers, since s 74A was probably limited to information about a particular taxpayer (line fishing), while s 46 permits (if it is constitutional) net fishing.

Section 74A and its associated provisions required very careful reading, and, for once, even SARS did read these carefully. It was meant to enable a desk audit. Clause 46 is much stronger on the issue of third-party returns.

So my answer to the question is No, in relation to the individual taxpayer, and Yes, in relation to third parties (if this aspect of the clause is constitutional; I am worried about procedural issues).

I agree that s 74A was previously limited to an audit. In relation to third parties, clause 46 no longer is (if third-party returns are procedurally constitutional).
The latest SARS provisional tax scam

When you read the wonderful things the Commissioner says about the incredible performance of his organization (see the Monthly Listing) and you are a fiscally dumb business bigwig, all puckered up from servicing the ANC government, you might tend to be impressed. You also won’t be reading this newsletter and so will continue to make a fool of yourself.

Back in the real world, we ordinary serfs see SARS as the Evil Empire, and for good reason.

Picture this. A very large organization, itself responsible for an appreciable portion of national collections, and meticulously honest, indulges the bad habit of claiming VAT refunds. For me, such a practice should lead to the instant dismissal of the company official responsible, unless the taxpayer is an exporter or similar.

Within two hours of the electronic submission of the claim via the usual VAT 201 monthly declaration, they receive a form letter alleging to be a ‘review of VAT 201 declaration’—a patent falsehood.

The next lie is the claim that the declaration has been ‘identified’ for review due to the fact that variances have been detected in this submission.

Put aside the challenge of assigning a meaning to the word variances. SARS has no earthly means of judging the validity of a VAT return, certainly not at this level of refinement, and especially not since, several years ago, the validating software it initially acquired from abroad had to be junked, probably on account of being DOS-based. The only feasible explanation other than fraudulent misrepresentation is that the current month’s return is not numerically identical to last month’s.

On this hollow pretext, the vendor is instructed thusly:

Please carefully review your VAT 201 declaration against your relevant supporting documents, correct any errors and submit a request for correction.

In other words, with no evidence whatsoever, SARS is accusing the vendor of submitting an incorrect return, a criminal offence. No wonder I hope to continue my studies in the law of defamation.

How can I be sure that SARS is so far lying through its teeth? Because the very next sentence poses an alternative explanation for the review!

Alternatively, you are required to provide the output tax schedule, input tax schedule, all documents relating to capital expenditure claimed (if applicable) and other transactional records that would explain the reason for variance and specific proof of output tax declared and/or input tax deducted which resulted in the variances, for example, substantial increase in exports, commencement of exports, purchase of inventory, change in use adjustment, increase in bad debts, etc.

I would certainly call for the resignation of a financial director who responded in kind to this ‘review’. How can you possibly respond to alternative accusations/requests? Perhaps what SARS intends is to receive in return—in every instance of a claim for a refund—either a ‘request for correction’ or the impossible mountain of information distilled in the return. Imagine an organization with, say, a R1 billion monthly turnover actually submitting what SARS requests!

What SARS is actually saying is that VAT 201 is null and void for a tax period in which a refund is claimed, and all the supporting information has to be physically supplied.

What has at least emerged so far is the meaning SARS ascribes to the word variances. It refers to a vendor’s claim for a refund, as opposed to a payment in favour of SARS. Merely by reporting a refund-position, then, the vendor is defamed/saddled with an impossible evidentiary burden.

Nor does it help that SARS is utterly self-contradictory in its demand for transactional records and proof of output tax declared and input tax deducted:

Note: Not all supporting documents for output tax declared and/or input tax deducted are required for this tax period but only those as indicated above.

A set excluding itself amounts to fresh air, and how would you submit that in the compulsory A4 format?

Please note that you have 21 days from the date of this letter to comply, to enable us to complete the review. Failure to comply with this request may result in assessment being issued.

On what evidence? This is an extortionate threat designed solely to avoid having to pay the vendor interest on the refund claimed, while the vendor’s cash remains in the SARS coffers.

Should the vendor not respond within twenty-one days, a follow-up letter is issued, replete with what SARS would call an escalated threat:

Failure to produce the documents or provide the information without just cause may constitute a criminal offence.

When the vendor, thus prodded, confirms—Surprise! Surprise!—that the VAT 201 agrees with its records and that VAT refund claims are a routine feature of a cyclical business, SARS comes back with specific requests for information, namely, in the instance I am describing, ‘an input/output reconciliation schedule that clearly ties to the VAT 201 return submitted’, a list of capex and the five largest capex invoices.

(I consider myself to be especially thoughtful about the theory of accounting and reporting for VAT yet cannot imagine what such a reconciliation...
Finally, once these more precise requests have been satisfied, along comes a letter declaring the review to be completed, and the refund is paid, without a cent of interest.

In my view, the whole process is fraudulent.

Words & phrases: what is a mineral?

A ‘useful test of what is a mineral in the ordinary and popular sense of the word’ was formulated by Fletcher Moulton LJ in Great Western Railway Co v Carpalla United China Clay Co Ltd [1909] 1 Ch 218 at 231:

If I were rash enough to venture a definition of ‘mineral’ I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which makes it occupy so much of the earth’s crust. I should not think that what in engineering cases is usually known as ‘contractor’s muck’ is a mineral. To dig out ballast and crushed stone and earth, a mere mixture of heterogeneous portions of the earth’s crust, for the purpose of making embankments, where the material goes from one position in the earth’s crust to another without modification or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt the things that you are handling were originally within the earth’s crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth’s crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral. Limestone may vary from a poor quality that is only worth burning into lime up to the very finest Carrara marble, but all those gradations have a value in use, either for building, or statutory, or for the manufacture of lime. Ironstone for the purpose of obtaining the iron, slate for its numerous uses, to which I need not refer—all these things seem to me to be properly called minerals, because from their properties they have a value in use.’

Cited by Farlam AJA (as he then was) in Minister of Land Affairs v Rand Mines Ltd 1998 (4) SA 303 (SCA).

‘Plus valet quod agitur’—substance over form

In Zandberg v van Zyl 1910 AD 302, Innes JA said:

Now as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies plus valet quod agitur quam simulante concipiitur [greater value is attached to what is done than to what appears to be done]. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.

In the same case Solomon JA said:

Prima facie, however, we must assume that the nature of a transaction is such as it purports to be, and the onus is on him, who asserts that it is something different, to prove that fact.’

Quotation taken from the judgment of Ramsbottom J in Dalrymple, Frank and Feinstein v Friedman and Another (2) 1954 (4) SA 649 (W).
Here is the official explanation:

The two documents...were moved on the website to the correct category under ‘All Publications’ as part of a routine clean-up exercise. We have mistakenly ticked the ‘send notifications’ check box, creating the impression that there were changes to the documents where in fact they were only reorganized in the database. Please accept our apologies for this oversight.

SARS web team

Out of SITe, out of mind?

Reader Steven van Zyl writes:

A very large percentage of clients’ pre-populated tax returns does not reflect their SITE contributions. Even though the amount is reflected on the original IRP 5, it does not always show in the tax return.

In the tax industry, we will discover the omission by a simple calculation or just by comparing the IRP 5 with the tax return. I am wondering how many SARS employees will go to the same trouble when they assist taxpayers going to the SARS offices.

My estimate is that there will be a large number of taxpayers out there who will pay the R540 tax bill they are going to receive because they ignorantly believe that, since SARS assisted them, the outcome must be correct.

SARS refuses to do calculations, so the poor taxpayer is not even aware what is coming. Even taxpayers who registered themselves for eFiling will not know what to look out for.

The danger is that, because this is an electronic process, one would assume that SARS should get it right. But it seems not. Then again, maybe it is a way for SARS to balance its books!

Tax practice? I’d rather be fishing

Vic from Cape Town says that he feels ‘moved to write again’, about three issues.

1. I have a vendor who pays in a few thousand rands every two months. It has dropped in the recession (surprise, surprise). Two periods ago SARS wanted a breakdown of his input VAT. It’s fairly simple, and I sent them a few lines explaining it, also mentioning the economic downturn affecting his turnover.

This last period they were at it again but now they wanted a sales breakdown. Since he keeps manual records, I said they were welcome to come inspect his tax invoices—many small ones. Then they said just send us his COS invoices (99% of input VAT).

Next, I receive a call, just as I was going to submit these, and a new chap says they want sales and COS. I tell him to send an auditor, since I don’t get paid extra for this work, being on a retainer, and my client isn’t going to do it either. I say stuff SARS. No longer do I go out of my way to help them (for free).

2. All of a sudden I have been receiving a lot of VAT statement of accounts. These are all nil, and relate to clients who no longer exist (and are therefore not VAT-registered) or, in two instances, were never registered for VAT at all.

3. I am getting admin penalty statements of account for matters in which the penalties have been paid but some crazy amount reflects under ‘30 days’, even though the amount due is shown as being Nil further up. The call centre confirms nothing is due.

Buying a debt for R1

Having recently gained some insight into how SARS reads s 24J of the Income Tax Act, which provides for day-by-day interest, I can tackle an issue that cropped up during one of our recent seminars.

I buy the shares and loan accounts in a distressed company for, say, R100 for the shares and R1 m, to the company.

First question: does s 24J apply? First answer: No, since there is no ‘maturity’ date.

Second question: when will I pay tax? Second answer: only when I realize the R1 asset, whether in whole or in part; that is, receive payments from the company on account of the loan.

Third question: will I pay CGT or income tax? Third answer: it depends upon the facts.

My colleague Julian Ware has a slightly different slant on this question. What if, he asks, s 24J is applied as soon as it is possible to apply it, that is, in the year or years of actual maturity?

It has been suggested that this very matter is addressed in the Taxation Laws Amendment Bill, 2011, which proposes a fresh category of instrument—a ‘demand instrument’. Pro tem, I disagree.
Citroën go home!

Michael Stein writes:

An interesting advert for Citroën cars on the radio and on www.citroen.co.za saying that the seller will bear the VAT on the sale (which, of course, a seller always has to do) but implying that it is giving the buyer a discount. I wonder how it gels with s 65 of the Value-Added Tax Act, especially s 65(iv)?

The provision referred to reads as follows:

(iv) a vendor may not state or imply that any form of trade, cash or any other form of discount or refund is in lieu of the tax chargeable in terms of section 7(1)(a).

Is there a sanction? I’ll say. Section 58(e) visits upon a contravention of s 65 and conviction a fine or imprisonment for a period not exceeding twenty-four months. Each violation would constitute a separate offence.

As if these violations were an insufficient insult to our laws, in the Saturday Star of 12 November 2011 there appeared a full-page ad declaring:

No VAT to pay, own yours today.

In very tiny type this statement appears:

*On the original recommended retail price including VAT and CO² tax. *E&OE.*

Yet nowhere can I find any statement bearing an asterisk. This press advert is also in violation of the other provisions of s 65 regulating how prices are to be displayed, inclusive or exclusive of VAT.

I am sure that if I went to France I would be expected to obey its laws. Didn’t the arseholes responsible for this ‘no VAT’ campaign wonder why no one else had thought of it before?

PAIA manuals: who will put an end to this madness?

The utterly insane and perfectly useless Promotion of Access to Information Act, in s 51, required ‘private bodies’ to compile altogether senseless manuals within six months after the commencement of the section.

GN 1243 GG 25410 of 29 August 2003 exempted all private bodies other than companies not being ‘private companies’ under s 20 of the Companies Act, 1973 from compiling the manual for a period of two years from 1 September 2003 to 31 August 2005.

Then GN 865 GG 27988 of 31 August 2005 extended that exemption for the four months from 1 September 2005 to 31 December 2005.

More significantly, it introduced a fresh exemption, to run from 1 January 2006 to 31 December 2011, for all private bodies, excluding:

- Companies not being private companies as contemplated in s 20 of the Companies Act, 1973.
- Private companies as there contemplated operating within any of the sectors listed in Column 1 of the Schedule to the notice and having fifty or more employees in their employment or a total annual turnover equal to or more than the applicable amount mentioned in Column 2 of the Schedule.

Here is the definition of a ‘private body’ in s 1:

‘private body’ means—

(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;

(b) a partnership which carries or has carried on any trade, business or profession; or

(c) any former or existing juristic person, but excludes a public body;

I was recently asked whether a trust is included, probably on account of two possible grounds:

- A trustee is often a natural person (although often not, according to supposed beneficiaries).
- For purposes of some statutes, a trust is a juristic person. But not under the common law (77 TSH 2009).

But that’s not the point. As part of the ANC’s vision of a perfect society, unless a fresh exemption appears pretty soon, a few million people in business are going to be in breach of the law, since they sure as hell are not going to waste time on a dumb manual.

Attorneys’ & advocates’ contingency fees—Part I

A few weeks ago, I was unaware of the Contingency Fees Act, which applies exclusively to a ‘legal practitioner’, defined in s 1 (note well) as an attorney or an advocate.

This state of blissful ignorance, I believe, makes...
me superbly qualified to comment on the meaning of its s 2(2), currently prominent in the news:

(2) Any fees referred to in subsection (1)(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the ‘success fee’), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

What do you think it means?

I have warned repeatedly in these pages of the legal principle of interpretation that the persons you should never consult about the meaning of a statute are those responsible for drafting it. Nevertheless, decades of being baffled by arcane tax legislation has taught me the educational value of any crib-sheet to hand, whether by the grace of providence or the said perps. In this instance, it is the Memorandum on the Objects of the Contingency Fees Act about contingency fees but, as its title confirms, its specific purpose is to address this particular issue comprehensively. Surely it would confirm, its specific purpose is to address this particular issue comprehensively. Surely it would displace the putative common law—by codifying it.

Next comes a shocker. According to the Memorandum:

There are common law prohibitions on contingency fees agreements between legal practitioners and their clients. Case law has also expressed some doubt regarding the validity of contingency fees agreements.

The main purpose of the act, then, is to override the common law, at least according to the Memorandum. Say that it errs, and there used to be room under the common law for contingency fees. What would be the effect of the act? Read the leading case on the confluence of statute and common law:

It is clear from the authorities that in our law, as in English law, the presumption that a statute alters the common law as little as possible is to be relied on only in the case of ambiguity in the statute and even then it may have to compete with other secondary canons of construction.

Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (In Liquidation) 1981 (1) SA 171 (A).

Not only is there no ambiguity in the Contingency Fees Act about contingency fees but, as its title confirms, its specific purpose is to address this particular issue comprehensively. Surely it would displace the putative common law—by codifying it.

Next comes a shocker. According to the Memorandum:

To avert the danger of the entire proceeds of successful litigation being swallowed up by ‘attorneys’ and counsel’s fees, it is provided in clause 2 that the total of the uplift fees payable to both an attorney and an advocate (if one is employed) be limited to 25 per cent of the proceeds of the litigation, excluding costs.

Payable to both an attorney and an advocate? Can this be, when the actual words of the statute read:

the total of any such success fee payable by the client to the legal practitioner?

Forget the gender and number clause, s 6, of the Interpretation Act. What the Memorandum is doing here is called substitution, very often a useful tool of interpretation but hugely controversial in this context. By substituting for the term ‘legal practitioner’ the exact content of its definition, it has ended up with:

the total of any such success fee payable by the client to an attorney or an advocate!

But it has cheated, by ignoring the article ‘the’ preceding the reference to ‘legal practitioner’. Articles prompt the Les Miserablian question ‘Who am I?’ (96 TSH 2011), and the answer in this instance is the legal practitioner concerned.

Not in a million years would anyone understand that sole performer to constitute a duet! On this issue, then, the Memorandum is very probably wrong. Much, much stronger language would surely have been required to establish a maximum fee for both the attorney and the advocate.

As a lawyer would say, albeit for a much higher fee, I am fortified in coming to this conclusion by the standard contingency fees agreement set out in the regulations to the act, which clearly sees an advocate’s fees as being additional to those of the attorney.

But if both attorney and advocate were to charge on a contingency basis, the law perhaps ought to read as the Memorandum interprets it.

At first sight, amendments to s 2(2) made in the Portfolio Amendments to Contingency Fees Bill [s 33–97] (Monthly Listing) gave me hope of throwing some light on the intended meaning of the provision but proved disappointing, being designed more to improve its language than alter its import.

In any event, it is evident from the excerpt from the Memorandum I have reproduced that Parliament was led to believe that the maximum success fee was the smaller product of the following equations:

- Double the normal fee.
- 25% of the total amount awarded, excluding costs.

Make no mistake, that is how s 2(2) appears to read. But, in Part II (below), citing the relevant case law, I challenge this view, claiming, at the very least that s 2(2) is poorly drafted. I would go so far as to say that even the idiot fiscal draftsperson would have made a better fist of it.
Home, sweet home: transfer duty, donations tax & CGT fraud

We all like to moan about corruption in the public sector, and I'll be the first to say that, since 1992, it has become endemic and probably irreversible. But what about taxpayers who take a chance?

Consider what I think is the silly idea of selling the bare dominium in your private home to your trust while retaining the usufruct. The idea is to 'save transfer duty' when you, the usufructuary, die and the trust accedes to the full enjoyment of the property, 'free of transfer duty'.

Plans that depend upon your death to reach pay-out don't strike me as being particularly exciting. Moreover, as long as you are younger than sixty, seventy or even older, your creditors (and spouse) will retain their interest in your usufructuary rights.

But who keeps a house over a full lifetime? When it is time to sell, try and explain to the buyer why there are two sellers, not one, and explain to the beneficiaries of the trust why they are being mulcted in so much CGT.

In any event, why do you want your house in a trust in the first place? So that the Treasury can devise yet another tortuous opportunity for you to get it out again? Or so that the beneficiaries of the trust may one day hold sway over you, the now penniless founder?

Face it. The reason why you enter into such a transaction—and form a trust to carry it out—is because some professional sold you on the idea. Don't get me wrong. I have no problem with professionals earning a living. Caveat emptor.

But there's a twist. What about the mortgage loan on the property? With good reason, banks hate to lend to trusts, and do you really think you can easily raise a loan on a usufructuary right?

As part of the difficult task of refinancing the property in the trust, the usufructuary is, it seems, advised to grant the trust (the bare-dominium holder) a waiver, allowing the mortgagor full access to the full value of the property in the event of default. Again, what the hell, I am broadminded. There's nothing intrinsically wrong with such an arrangement. Per ardua ad astra.

But it would affect the value of the bare dominium, wouldn't it? Let's say you valued the bare dominium on the basis laid down in the Estate Duty Act. Although the Transfer Duty Act does not specifically sanction such a valuation method, the SARS Transfer Duty Handbook (2007) certainly does. What about the value of or added by the waiver?

Should the waiver be provided to the trust free of charge, you would certainly be embroiled in an artificially priced, related-party transaction. You would certainly be liable to donations tax and CGT. And you would almost certainly be liable to be found guilty of committing fraud. Merda!

Murder, a kombi on the roof, a golf-cart crash & a steep Camps Bay hill

At long last I can report the outcome of my enforced visit to proceedings of the Western Cape High Court recorded in 88 TSH 2010, brought about by litigators of my acquaintance, who, tired of my constant praise of our judges, wanted me to see what really happens in court. (As if, no naïf, I don't already know, from both personal and vicarious experience over the years!)

But why the inordinate delay? I might as well tell you the whole of this extraordinary tale.

The matter—a delictual claim—was first heard by the late Patrick Maqubela AJ, who, I am told, was a natural gentleman, who handled the proceedings with charm and fairness. His lurid murder, allegedly by his wife, and the resulting sensational press reports occasioned by her ongoing trial have cast a pall over whatever honour might have been his due as a man and a lawyer.

In the present matter, at least, he arrived unerringly at the (as you will see) correct decision: the accident under review was caused solely by the negligence of the driver of a kombi minibus, and his employer was vicariously liable for his delict (fault).

The kombi had been parked on a steep hill in Camps Bay, Cape Town. The claimant climbed in; after a short while the kombi rolled backwards—on to the roof of a house. Whose house? In an amazing—some would say, provident—coincidence, it crashed, upside down, on to none other than the employer's high-end house! The claimant was seriously injured.

Inexplicably, the Supreme Court of Appeal granted the driver and employer leave to appeal Maqubela AJ's finding. Thus the matter returned to the Western Cape High Court, before Desai J, Zondi J and Steyn J, unfolding in the unedifying manner I have tried to describe in 88 TSH 2010, more than adequately justifying the dark picture of judicial proceedings that had been painted for me.

In an atmosphere of near-chaos, the court seemed unprepared, and thus unable to grasp the applicable principle of law or the difference between an employee and an independent contractor.

Things looked grim for the claimant. And grew worse. Month after month, the court failed to deliver its judgment. More than one compliant was lodged through proper channels, only to be met with complete silence. (You have to understand the context: it might be the fairest Cape, and it might be blessed with Helen Zille, but its judges have in the past been swept by a tornado of controversy.)
very hard to forget when things go awry.)

But then the highly admired Traverso D.P. intervened, promised a judgment by a particular date, apologized when there was an overshoot on that date, and then—in a no doubt unrelated incident—was struck down by an acting judge wielding a golf cart.

And then out pops the judgment of the court, delivered by Desai J, fully vindicating my faith in our judges and our Roman-Dutch legal system.

The legal principle applicable to the facts? Res ipsa loquitur—the thing speaks for itself. This maxim signifies a rebuttable presumption of negligence. The kombi undoubtedly rolled backwards. The inescapable inference is that it was not in gear, and the handbrake, if applied, must have slipped. (Any trained driver would have engaged the handbrake, put the vehicle in gear, and turned its front wheel towards the curb. This easily ascertainable fact was, to my personal chagrin, not in evidence.)

While the onus of proof of negligence rested upon the claimant, the fact that the kombi rolled backwards gave rise to a prima facie inference of negligence, which had not been rebutted before Maqubela AJ.

What, then, was the true status of the driver? It was argued, on the strength of the dominant impression test, that he was an independent subcontractor, and not an employee. The traditional test, said Desai J, is the control test. An employee worked under the control of another who told him or her what to do and ‘how’ and ‘when’ to do so.

I just love the way he finessed the distinction:

This [the control test] is no longer an indispensable requirement for the existence of a contract of service. It remains, however, an important indicator of the nature of the contract between the parties.

The evidence—including even the T-shirt worn by the driver—clearly indicated that he was an employee.

(The great thing separating a contractor from an employee is that, while an independent contractor contracts for an outcome, an employee makes his or her work-potential available. It is essential, just as Desai J did here, to ask not whether someone is an independent contractor but whether he or she is an employee. Only if the answer is in the negative can he or she be an independent contractor.)

The driver was negligent on the job. Since he was found to be an employee, his employer was vicariously liable (86 TSH 2010, 95 TSH 2011 and 96 TSH 2011) for his negligence.

2 Productions and Another v M B Klugman (A605/09) [2011] ZAWCHC (4 November 2011), I understand that permission is being sought to appeal.

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Attorneys’ & advocates’ contingency fees—Part II

According to the ‘Memorandum on the Objects of the Contingency Fees Bill, 2007’, Parliament was lead to believe that the maximum success fee under the Contingency Fees Act was the smaller product of the following equations:

- Double the normal fee.
- 25% of the total amount awarded, excluding costs.

In fact, you can read a lengthy obiter dictum to this very effect, given by Morrison AJ in Thulo v Road Accident Fund 2011 (5) SA 446 (GSJ) (15 March 2011). Unfortunately, I cannot find a public-access version of the judgment for inclusion in the TSH Database. (Full disclosure: I have interacted professionally with Les Morrison.)

This is an angry judgment, or, better, polemic, which even I know will flow off the back of the RAFF—and will not be read by many other judges, perhaps the majority of whom, I am very sorry to say, regularly allow the RAFF and its representatives to wreak havoc with wretched people’s lives.

In his obiter dictum, Morrison AJ first set out to dispel the fictitious notion sometimes bandied about by practitioners of a ‘common-law contingency fee’, previously prohibited by our law. See Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA) (2004 (9) BCLR 930).

In the tax field what I call faux provisos—mere affectations or conceits deployed by the idiot draftsperson to embellish the meager fruits of his labours—are abundant. But, in the second leg of his discussion, Morrison AJ takes them all seriously.

The true function of a proviso is to qualify the principal matter to which it stands as a proviso—as to which see, for example, Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 79F–J and the cases there cited. In other words, a proviso taketh away, but it does not giveth. If there is a principal matter (in this case the right to charge a success fee calculated at double—100% more than—the normal fee) it is not the function of a proviso to increase or enlarge that which it follows, it is to reduce, qualify and limit that which goes before it in the text.

Alas, he here goes too far. Hira, if you bother to look it up, dealt with ‘an excepting or qualifying proviso’, that is, a particular kind of proviso. My beloved Black’s is far more catholic (as are most sources), identifying a proviso in drafting as a provision that begins with the words Provided that and supplies a condition, exception, or addition.

To me, a faux proviso is of the type that merely adds something to a provision and so is indistinguishable from any other term of the law. Another such proviso is one that qualifies not what precedes or follows it but is entirely self-referential; that is, it is, again, merely yet another provision, and, if
it limits anything, it limits its own content.

Thus it is neither necessary nor wise to regard as a true proviso just any form of words identifying itself as a *proviso*.

To me, a proviso in its pure form is a *conditional* or *excepting* stipulation. If s 2(2) includes a real proviso, the only conditionality to be found is

in the case of claims sounding in money.

Expressed as an algorithm, the proviso might properly be read as follows:

**IF CLAIMS SOUND IN MONEY/LIMIT → 25% LIMIT**

**IF CLAIMS SOUND NOT IN MONEY/LIMIT → DOUBLING LIMIT**

In any event, Morrison AJ himself describes the wording of s 2 as being ‘potentially ambiguous’. Moreover, in the tax field, at least, when we want to limit an amount to the smaller of two magnitudes, we say so, expressly (while both ignorantly and historically inconsistently using or instead of and as the field-limiting conjunction).

Even on his terms, both the doubling and the 25% limits of s 2(2) serve as limitations upon the empowering s 2(1), which overrides the common-law prohibition against contingency fees. As limitations, they may be seen as mere—and equal—terms of s 2(1), rather than a term of s 2(2) (doubling limit) and its limitation (25% limit).

Nor can you beg the question simply by declaring, as did Morrison AJ, that:

Bodily-injury claims [levied] against the Road Accident Fund invariably contain claims sounding in money.

The act is there to serve nearly all types of claims under nearly all branches of the law. (Excluded are criminal and family-law proceedings.)

Then there is the purposive argument. The attorney goes on risk, on a no-result, no-pay basis. At least with a claim ‘sounding in money’ what measures the result more exquisitely than the damages won by the client? Limit the fee to a maximum of double the normal fee, however, and you have lost the outcome-based incentive, reverting to the diligent piling-up of hours.

Nevertheless, whatever might be the correct interpretation, as a matter of policy, I would cheerfully subscribe to Morrison AJ’s summation:

The way the law works...is that the client is assured of being paid at least 75% of the money amount obtained by successful litigation.

If only the statute had said just that!

(For the benefit of those who love to mumble ci-

...nt and VAT nexus, comprising an incurral and an inward supply—and then, if successful, recovers those disbursements from the other side—a recoupment and an outward supply (under the rubric ‘insurance’).

‘Taxed costs’ will also include an allowance for the hourly fee that the attorney would have charged had he not opted instead for the success fee. That cannot possibly enure for the benefit of the attorney but must be paid to the client.

The way I read it, what Traverso AJP said in *Law Society of sa and Others v Road Accident Fund And Another* 2009 (1) SA 206 (C) confirms the point I am making:

in terms of the Road Accident Fund Act 56 of 1996 (the *RAF Act*). It has become practice for attorneys to undertake *RAF* work on a contingency basis. This is authorized by the Contingency Fees Act 66 of 1997 and given recognition in s 19(d) of the *RAF Act*. Typically, attorneys who undertake *RAF* work on a contingency basis enter into contracts with their clients in which their clients agree that when their claims have been resolved, the *RAF* must pay the compensation into the attorneys’ trust accounts; they are entitled to deduct from the award the fees and disbursements due to them and then pay the balance to their client.

When the *RAF* settles a claim, or is ordered to effect payment of a claim, it is liable for payment of the party and party costs of the successful claimant. Party and party costs typically represent 50% to 70% of the total of the fees and disbursements due to an attorney. A substantial portion of the costs incurred in the running of a case forms part of the attorney and client component of costs, and are not recoverable from the *RAF*. The same applies to disbursements such as fees of experts, which are generally taxed at a rate significantly lower than the actual fees charged. The consequence is that when a claim is finalized and compensation paid by the *RAF* into an attorney’s trust account, part thereof is deducted by the attorney pursuant to his or her agreement with his or her client, and the balance is paid to the client. This system has been employed for decades and is the basis upon which attorneys undertake work of that nature and is the method by which claimants obtain representation in order to enable them to pursue their claims against the *RAF*. 

89—An irreverent newsletter designed to keep you up to date—
tween an association and a 

Turning to associations, they are described in 

On the slimmest of evidence, I believe it to be dan-

'universitas',

104 Van Zyl J against earlier decisions conflating an unincorporated association with a universitas or insisting that a universitas have a constitution.

On the substantive issue of the difference be-

What he had to say (footnotes removed):

'in Roman-Dutch law is a 

A more correct statement of the law is that it may be advisable, but not essential, for a universitas to have a constitution. This conforms with the manner in which all associations are formed. As the law pertaining to associations is based on a combination of Roman-Dutch law and English law, the prevailing view is that an association is formed on the basis of contract.

A universitas, however, is a legal fiction, an aggregation of individuals forming a body of persons. In contrast, an association is formed on the basis of contract. An association is therefore a separate legal entity that has perpetual succession with rights and duties independent from the rights and duties of its members. One of the most important rights of a universitas is the capacity to own property. Being a legal persona, a universitas may sue or be sued in its own name. It derives the characteristics from the common law and it is not necessary for it to be created by or registered in terms of a statute.

By contrast, an unincorporated association refers to an association 'which does not have a legal persona separate from its constituent members'. 'Corporate' has a correspondingly opposite meaning. An unincorporated association is regarded as merely an aggregation or collection (a body) of natural persons. Accordingly, if the term 'unincorporated association' is used, it refers to nothing more than a collection of individuals who... are bound to one another by contract and who act jointly in pursuit of a common purpose. It has no existence on its own. It consequently cannot own property and has no locus standi to sue or be sued in its own name. In legal proceedings by or against the association, every member must as a result be cited as a plaintiff or a defendant, as the case may be.

Accordingly, the feature that a partnership, a firm and an unincorporated association have in common is that they have no legal personality of their own and do not exist apart from the individuals of whom they are composed.

... A more correct statement of the law is that it may be admirable, but not essential, for a universitas to have a constitution. This conforms with the manner in which all associations are formed. As the law pertaining to associations is based on a combination of Roman-Dutch law and English law, the prevailing view is that an association is formed on the basis of contract.

'It will come into being if the individuals who pro-

The primary source for determining the characteristics of the association is therefore its constitution. It provides evidence of the intention of the members who contracted to form the association. What the intention of the founding members was is a factual question and, where the constitution is equivocal, or there is no written constitution, it may be determined with reference to other considerations, such as the nature of the association, its object and its activities. For example, in Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs, the appeal court found that, despite the absence of a written constitution or rules, the respondent association complied with the requisites for a universitas. In arriving at this conclusion Ogilvie Thompson JA had regard to the fact that it acted as a separate entity. This was evidenced by the fact that it had a secretary, kept its funds in a separate banking account, it existed continuously for more than 30 years, the purpose for which it was formed, and the fact that it constantly pursued such purpose....

What then is a body of persons, for example, in fiscal legislation? No different, I say, from an association, and can prove it either by searching through the case reports for the string "body of persons" or, more simply, citing s 1 of the Interpretation Act sv 'person':

'Person' includes—

(a) any divisional council, municipal council, village management board, or like authority;

(b) any company incorporated or registered as such under any law;

(c) any body of persons corporate or unincorporate;

Hold on. Corporate or unincorporate? How does
that gel with Van Zyl’s decision? Black’s agrees that an unincorporated association is not a legal entity. In what sense would it be a ‘person’?
Strange goings-on with VAT ‘suspending’

Regular correspondent Carl Nielsen (Dulverton Financial Services) writes:

Have you had any experience with SARS ‘suspending’ a VAT vendor, on the basis of turnover being below R50 000 without expecting the exit-VAT in terms of a full-on deregistration? I have two examples.

One is a close corporation that owned property and sold most of it. The last little piece was untenanted and so the CC was no longer earning income. SARS ‘suspended’ the VAT registration. When my client purchased the property, the seller was unsure whether to charge VAT or transfer duty. In the end, we went with transfer duty. I'm pretty sure that wasn't right.

The second example is a trust owning an aircraft. Input VAT was claimed on the cost of the aircraft and the cost of upgrading it. At some point SARS ‘suspended’ the trust’s VAT registration. When the trust sold the aircraft, it charged VAT and paid it over, using a VAT return that appeared on eFiling after a number of attempts at SARS to ‘unsuspend’ the trust. When the purchaser went to claim the VAT he had paid, however, SARS was not interested, on the basis that the VAT number on the invoice he used to justify the claim was listed on their systems as suspended!

Attempts to unravel the mess continue. My position is that the Value-Added Tax Act holds no truck with ‘suspending’ an registration. Surely, either you stay registered or you get deregistered and pay the necessary outputs on exit. Or am I wrong?

To be fair, I need to see the version of the act that SARS is using.

The (possibly corrupt) SARS money-making machine

Reader Hugh Knight writes:

Are you aware of the penalty assessments sent by SARS to people below the threshold (and in one case, someone who had died six months earlier)? Some people panicked and paid the penalty, and were told that the only way to get a refund of the penalty is to complete several years’ returns, none of which produced any tax liability.

Carl Nielsen has had similar experiences:

I recently received an assessment for the 2011 year for a close corporation client and was surprised to see penalties for underestimation of provisional tax tacked on to the assessment.

As always, the SARS IT 34 does not give sufficient detail to understand the basis on which SARS has raised these penalties, so I requested further information. They claimed that they were raised because the second-period estimation was too low. The taxpayer’s taxable income is below R1 m, so the penalty was based on the shortfall compared with 90% of actual taxable income, which was less than the basic amount.

I went back to my records of the provisional tax return submitted, since I was very surprised to hear that we had submitted an estimate lower than the basic amount (I advise a client to submit such an estimate only if very sure that the actual income will be lower than the basic amount). I discovered that I had indeed used the basic amount for the estimate—in this instance the 2009 taxable income, bumped up by the ridiculous 16% that statute requires.

I highlighted this fact to SARS, who responded that more than sixty days before we submitted the estimate, we should have used the 2010 taxable income as the estimation. This was significantly higher than in 2009 (even after the 16% increase), hence they charged the penalties.

At this point, I turned to the top tax brain in the land, and you kindly pointed out to me the proviso in para 19(1)(e)(ii) of the Forth Schedule, which states that, notwithstanding an intervening assessment, if the provisional tax return form reflects an amount as the basic amount, the taxpayer is entitled to use that as the basic amount.

When I pointed this out to SARS, they grudgingly responded with ‘the penalty erroneously imposed has now been waived’. I was uncertain as to how ‘erroneous’ this actually was—but my suspicions were confirmed when the exact same scenario arose with a second client. I guess it might not be deliberate, but it would appear that SARS’s computer systems have not been correctly programmed to take into account that important proviso.

In 104 TSH 2011, a correspondent commented on the admin-penalty statements from SARS reflecting balances in the ‘ageing’ but in the transaction list correctly reflecting all penalties as dealt with. A colleague of mine asked a SARS official about this when he was meeting her regarding other issues. Her comment:

They probably hope that people will be confused and will pay the penalties again.

Perhaps I am being a bit too kind when I leave the door open for the possibility that the provisional tax penalties are merely an innocent error.
Undated, unauthenticated junk mail from SARS

In 104 TSH 2011 I recorded my entirely accidental discovery, on, of all places, the individuals’ tax-season page of the SARS website, of an undated corporate notice on ‘New corporate income tax processes and procedures’.

Reader Hugh Knight actually received a copy of this notice, in his capacity as a tax practitioner. (Odd, that. I am also registered as such but never receive any notices. The SARS ‘systems’ are clearly a disgraceful shambles.) He asks: What is the validity of an undated notice?

But he could have gone further. How are we to know whether such a document actually emanates from SARS, and how do we know if even SARS has the authority to issue it?

SARS is a copious but pathetic, disorganized and often unruly and fissiparous communicator. It is hopeless to attempt to advise it, since it simply cannot and will not learn.

So I say, to any other tax administration on the continent that might be listening, take formal steps to identify, serialize, date, and authenticate your communications to taxpayers, giving the specific statutory provision under which they are issued. And make sure that, no matter who might be the specific target of any particular communication, there is a single place where the full set of communications is made available.

Trusts, PAIA manuals & confused (dumb?) attorneys & accountants

Despite the item on this topic in 104 TSH 2011, at least three professionals, of all of them subscribers, have written to me about it. This is an evidence-based newsletter but it is no match for urban legends, which currently maintain — no doubt to the profit of some — that all trusts should have compiled manuals under the Promotion of Access to Information Act by the end of December 2011.

What disturbs me most is the growing awareness that our professional communities are losing the ability simply to look something up. Rumours and ‘expert’ pronouncements are what are relied upon, and, even when the appropriate legislation is seemingly consulted, an inability to interpret it prohibits any real comprehension.

Here is what one professional sent to his clients. I feel bad picking on him, since many others share his beliefs (‘views’ would be too strong), so I am not going to name or even locate him:

According to our information, all trusts must submit manuals.

The PAIA-law’s definition... requires a ‘juristic person’, as part of the definition of a ‘private body’, to submit a manual. There is no further description of a ‘juristic person’. I attach, however, a couple of definitions that I found on the internet, as well as the definition of a ‘juristic person’ as defined in s 1 of the new Companies Act. Although each statute relies upon its own definitions, we have no reason to believe that a trust is not included in the definition of a ‘private body’. We are thus of the opinion that a trust must submit a manual.

Unless our universities are turning out professionals who can better use their noodles, we are lost.

Words & phrases: unincorporated associations & bodies of persons

In 104 TSH 2011 I ended a similarly titled item by claiming that, on the basis of strong evidence, there is no difference between an association and a body of persons. These labels are used interchangeably, both in judgments and statutes.

A far more significant distinction is that between an incorporated association or body of persons, more formally known as a universitas, and an unincorporated association or body of persons. While a universitas is a separate legal entity under the common law, an unincorporated association or body is merely a collection of natural persons bound by contract and pursuing a common purpose.

As I showed in that issue, the distinction is rather brilliantly demonstrated by Van Zyl J in United Workers Front and Others v Premier, Eastern Cape Province 2010 (2) SA 114 (ECCB). The case involved a particular rule under the Uniform Rules of Court allowing an association to sue or be sued in its own name.

This, said Van Zyl J, did not automatically confer locus standi upon an entity otherwise lacking it. In order to enjoy independent legal status, an association would have to be a universitas.

Why, then, have the rule? Purely for procedural convenience. You can cite the association by name, without the hassle of determining its precise nature — corporate or unincorporate — and, if unincorporate, without naming each of its members individually.

And that line of reasoning, I imagine, also explains why the Interpretation Act includes as a ‘person’ any body of persons corporate or unincorporate.
The idea, I imagine, is to make it convenient, should it be considered necessary, for a lawmaker to apostrophize an association or body of persons simply as a ‘person’, without having to define or ascertain its exact status and without risk that the actual legal entities involved, whether a universitas or individual natural persons, might escape being encompassed by a particular law.

105 TSH 2011—December

Court orders single-beneficiary trust!

For a couple of years I have been trying to prise an illustrative trust deed out of the curatorship industry; to no avail (91 TSH 2010). My concern is that single-beneficiary trusts might be the norm, with possibly catastrophic results.

Instead of merely listing previous items in TSH on this issue, allow me to ruminate afresh on the concept of a single-beneficiary trust:

☐ The validity of such a trust is by no means ruled out, whether by statute or common law.

☐ Since there is but one beneficiary, there is an excellent chance that the trust will be a bewind, signifying that the beneficiary owns all of the trust property.

☐ Again, since there is but one beneficiary, such a trust can hardly aspire to constitute what is commonly referred to as a discretionary trust. What, after all, is there to exercise a discretion over? At the very most, the deed might purport to give the trustee the power to delay making a distribution in continuance (as opposed to upon termination).

☐ As long as the sole beneficiary is legally competent, the nudum praeceptum rule (as sole beneficiary, I can lift any clog operating in my favour; 78 TSH 2009) allows him or her—in one way or another, not presently of concern—to exercise ownership over the trust property.

☐ The type of trust I have described does not protect the trust property either from the beneficiary himself or herself or the beneficiary’s creditors, and cannot possibly save any estate duty.

What about a beneficiary lacking legal competence?

A minor will be under the control of his or her guardians, but only until the age of 18 (under s 17 of the Children’s Act) or earlier emancipation. Thereafter, all bets are off. Death before majority or earlier emancipation would also result in an estate accessible to creditors. Yet even guardians could cause havoc, depending upon the deed (it might, for example, constitute a bewind), although I should like to think that they cannot penetrate the nudum praeceptum rule on their charge’s supposed or even actual behalf.

A person under the control of a curator or an administrator (91 TSH 2010) would enjoy far better protection, since, even if the trust were to fail, for example, on account of comprehensive invalidity, the trust property would come under the control of the curator or administrator. This side of such a catastrophe, the nudum praeceptum rule would be inoperative. Creditors (with a valid claim) would get a look-in only upon the death of the legally disad-vantaged person. Sadly, many in this group will be incapable of drawing a valid will (91 TSH 2010) and so will die intestate, sometimes with inequitable consequences.

I have said enough, I hope, to illustrate the dangers of a single-beneficiary trust but, alas, not loudly enough for all to hear. The message needs to be conveyed especially to counsel on both sides of RAF and delictual matters in which large sums might be awarded to injured parties, and from them to presiding judges.

What brought on this effusion was the otherwise exemplary judgment in Saaiman v Road Accident Fund (08/33131) [2011] ZAGPJHC (23 November 2011). The order made by the court, although not couched with the patrimonial care a tax person might desire, amounts, in my view, to a direction that the proceeds arising from the dispute be paid into a trust created for the benefit of the injured party, the plaintiff. Thus property is to pass directly from the defendant, the RAF, to the trust, without ‘bouncing’ first off the plaintiff, with potentially calamitous fiscal consequences.

Oddly, in specifying the provisions to be contained in the trust deed, the court (actually, those who drafted the order for the convenience of the court) failed to mention the purpose of the trust. Given the circumstances, especially the concomitant order that the RAF pay the costs of administering the trust, it may be safely inferred that its purpose is to conserve and apply the proceeds so as best to overcome the consequences for the plaintiff, over his lifetime, of the injuries he sustained. Since a trust without a purpose is invalid, this glaring omission in the order demonstrates, I believe, the depth of ignorance about trusts prevalent in this branch of the law.

But what really caught my eye was the direction that the plaintiff be the sole beneficiary of the trust, and that the trust property pass to his estate upon his death. Whether those involved realize it or not, this amounts to a direction that the trust be constituted as an ordinary trust rather than a bewind. This conclusion is supported by other aspects of the order. The main point, though, is that the trust is directed to be a single-beneficiary trust, without any gift over (no termination or failsafe beneficiary other than the plaintiff) upon the beneficiary’s death.

As a legally competent person (his injuries were not to the brain), this particular beneficiary therefore enjoys protection under the nudum praeceptum rule, yet the order describes his interest in the trust as ‘contingent rights’, which it suspends in the event of
cessation, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the plaintiff.

I am by no way over my head in terms of my understanding of the law yet I cannot help suggesting that no order of court can suspend the fundamental operation of the Insolvency Act. Such an imagined protection from creditors comes, rather, from the fevered brows of the vast majority of plagiarists (I can’t call them, bloody idiots that they are, draftspersons) knocking together trust deeds either in blithe ignorance or a sharp knowledge that creditors are usually even more stupid than they are.

In the item on rights and interests elsewhere in the present issue, I argue that the right of a legally capable major beneficiary from whom a trust deed purports to withhold full enjoyment of property—for example, under an age qualification or some other time clause—in violation of the *nudum praeceptum* rule to demand, at the very least, delivery of the patrimonial object is a vested, not a contingent right (or *spes*, as it is more properly called). In fact, I prefer to argue that such a beneficiary actually owns the patrimonial object itself, and woe betide the trustees.

The question then arises to what extent a court order that does not even concern itself with the purpose of the trust it orders into being is capable of overriding a branch of the common law of whose existence it is clearly oblivious. If I were the plaintiff’s creditor, I would sue the bugger—injured though he might be—and find out.

105 TSH 2011—December

**Spam e-mails & the law**

It is impossible in this country to lay a charge with the police on a statutory crime not involving violence—unless you have sleazy connections or, what amounts to the same thing, are a politician. Nevertheless, it remains interesting to see what our statutes would achieve if only we enjoyed a functioning system of justice.

Here is what the Electronic Communications and Transactions Act says about:

**Unsolicited goods, services or communications**

45. (1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer—

(a) with the option to cancel his or her subscription to the mailing list of that person; and

(b) with the identifying particulars of the source from which that person obtained the consumer’s personal information, on request of the consumer.

(2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication.

(3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

(4) Any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

According to s 42(1), this rule applies only to electronic transactions, an expression used eleven times in the act but left undefined. In the context, I take s 45 to refer to unsolicited commercial communications sent electronically, in the form of a ‘data message’, whether by e-mail, SMS, Tweet, or similar.

The next time I get pissed off with all the unsolicited crud I receive, I am going to follow the course of action suggested by the act:

49. A consumer may lodge a complaint with the National Consumer Commission in respect of any non-compliance with the provisions of this Chapter by a supplier.

At one stage I was caught in the maws of an outfit selling its services to a number of customers. Each product they advertised electronically came with an invitation to unsubscribe, as if each producer were the sender. They didn’t mind sending you dozens, even hundreds, of e-mails. When I invited them to explain to me, for publication, why they thought they were operating within the law, they were rude but desisted from sending me anything else.

The Consumer Protection Act relies to a large extent on the concept of ‘direct marketing’:

‘[D]irect marketing’ means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of—

(a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or

(b) requesting the person to make a donation of any kind for any reason;

‘[E]lectronic communication’ means communication by means of electronic transmission, including by telephone, fax, SMS, wireless computer access, email or any similar technology or device;

Until the pie-in-the-sky hope of registries of preemptive blocks becomes a reality, your main remedy lies in s 11:

**Right to restrict unwanted direct marketing**

(1) The right of every person to privacy includes the right to—

(a) refuse to accept;

(b) require another person to discontinue; or

(c) in the case of an approach other than in person, to pre-emptively block, any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.

(2) To facilitate the realization of each consumer’s right to privacy, and to enable consumers to efficiently protect themselves against the activities contemplated in
subsection (1), a person who has been approached for the purpose of direct marketing may demand during or within a reasonable time after that communication that the person responsible for initiating the communication desist from initiating any further communication.

Section 69 sets out a wide range of means by which a consumer might enforce his or her rights.

What puzzles me is how these pests get your e-mail address or cell number in the first place, until, that is, I receive an e-mail offering me hundreds of thousands, even millions, of e-mail and SMS addresses.

105 TSH 2011—December

Learning law with your PC: rights v interests

In 80 TSH 2009 I reproduced extracts from two judgments of Watermeyer JA.

In Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 175–6 he said:

Unfortunately the word ‘vest’ bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right—that he has all rights of ownership in such right including the right of enjoyment. If the word ‘vested’ were used always in that sense, then to say that a man owned a vested right would mean no more than that a man owned a right. But the word is also used in another sense, to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right. When the word ‘vested’ is used in this sense Austin (Jurisprudence, vol 2, lect 53), points out that in reality a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or a possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right.

In Durban City Council v Association of Building Societies 1942 AD 27 at 33 he said:

The right of a beneficiary in a bewind to the full enjoyment of the bewind’s (trust’s) property, saving only control, which vests in the trustees. A bewind is a curious institution, under which the usual nudum praeceptum rule (78 TSH 2009) is presumably rendered ancillary to the terms of the deed (contract). Another way of saying the same thing is to say that the beneficiary owns the patrimonial (property) object itself, subject to the clog of control.

The right of a beneficiary awaiting a distribution of property made under the deed by the trustees to demand delivery of the patrimonial object.

The right of a legally capable major beneficiary from whom the deed purports to withhold full enjoyment of property—for example, under an age qualification or some other time clause—in violation of the nudum praeceptum rule to demand, at the very least, delivery of the patrimonial object. I prefer to argue that such a beneficiary actually owns the patrimonial object itself, and woe betide the trustees.

The full ownership of the patrimonial object by the ‘beneficiary’ of a ‘trust’ for fiscal purposes that is invalid under the common law or of a valid trust that has terminated or has made some other automatic distribution while the trustees sleep.

By contrast, the spes enjoyed by a discretionary beneficiary of a trust is not property under the common law and so is neither a ‘right’ nor an ‘interest’. That is why the definition of a ‘beneficiary’ in s 1 of the Income Tax Act allows for both a vested and a contingent interest. In fact, this is the only reference to a ‘contingent interest’ in the entire act. Yet there are two references to a ‘contingent right’, without any intention whatsoever being evident to identify a different meaning.

To ‘hold’ means fully to own or to enjoy some lesser form of patrimonial right in or to property (90

97—An irreverent newsletter designed to keep you up to date—
The act includes these phrases: 'holds a right' (thrice); 'holds an interest' (twice); and 'held an interest' (once).

Perhaps the nuttiest usage of the words ‘an interest’ appears in the terms ‘an interest’ and ‘residence’ as defined for purposes of Part VII of the Eighth Schedule, which is misleadingly entitled ‘Primary residence exclusion’ but has in recent years been made to include the CGT relief available upon the transfer of a residence from a company or trust under paras 51 (81 TSH 2009, 82 TSH 2010) and 51A (89 TSH 2010, 90 TSH 2010, 91 TSH 2010; 94 TSH 2011; 96 TSH 2011), a provision to which other related reliefs are linked.

In the first place, rather than giving the loaded and ambiguous words ‘an interest’ a special meaning, the idiot draftsman would have been better advised to work with the concept of a ‘qualifying residence’. The unwary reader will not expect such a commonplace term to be a term of art.

Secondly, these two defined terms are not only used separately but in conjunction—no fewer than eleven times, the most flagrant instances reading ‘an interest in a residence as contemplated in paragraph 51’ and ‘an interest in a residence as contemplated in paragraph 51A’. Would any reader expect that two separate definitions are required to be consulted in order to figure out the cross-reference? On my first encounter with para 51A, I certainly didn’t so expect (96 TSH 2011).

Next, in para 44, while a ‘residence’ is what you resides, the defined term ‘resident’ for the word ‘reside’ (Tax Administration Bill) means any structure, including a boat, caravan or mobile home, which is used as a place of residence by a natural person, together with any appurtenance belonging thereto and enjoyed therewith, you would never guess what ‘an interest’ might be.

First, it is a ‘real or statutory right’, the suggested meaning, the idiot draftsman would have been better advised to work with the concept of a ‘qualifying residence’. The unwary reader will not expect such a commonplace term to be a term of art.

Secondly, these two defined terms are not only used separately but in conjunction—no fewer than eleven times, the most flagrant instances reading ‘an interest in a residence as contemplated in paragraph 51’ and ‘an interest in a residence as contemplated in paragraph 51A’. Would any reader expect that two separate definitions are required to be consulted in order to figure out the cross-reference? On my first encounter with para 51A, I certainly didn’t so expect (96 TSH 2011).

Next, in para 44, while a ‘residence’ is what you might expect it to be,

‘[R]esidence’ means any structure, including a boat, caravan or mobile home, which is used as a place of residence by a natural person, together with any appurtenance belonging thereto and enjoyed therewith, you would never guess what ‘an interest’ might be.

First, it is a ‘real or statutory right’, the suggested definition, madly, that the envisaged statutory rights are not real rights. Secondly, it is a share in a share block company or a share or interest in a similar entity which is not a resident.

This is a real right; why is it separately listed?

Thirdly, it is a right of use or occupation, which is a personal right, the suggestion being that personal rights cannot be real rights.

Excluded is a right under a mortgage bond, which is a real right. Also excluded is a right or interest of whatever nature in a trust or an asset of a trust, other than a right of a lessee who is not a connected person in relation to that trust.

The implication is that ‘rights’ differ from ‘interests’, and the exclusion extends even to a ‘bewind’ in which a beneficiary actually owns a residence! Yet an unconnected tenant of a trust enjoys ‘an interest’.

No one could possibly internalize such a curious array of rights, especially not under the rubric ‘an interest’.

More generally, the impression I get is that the idiot draftsman is largely unfamiliar with the act—far too unfamiliar to be allowed to amend it—and gets his special insights into tricky parts of the common law not from his own knowledge, experience and hard work but from isolated, condensed comments from more experienced reviewers not too keen on the exercise.

Perhaps the young dolts at the Treasury are compelled to seek advice from hardened SARS officials. If so, those officials ought to seek redress under the rubric ‘unfair labour practice’.

105 TSH 2011—December

Words & phrases—‘reside’ (Tax Administration Bill)

Amendments proposed in the Tax Administration Bill, 2011 to the definition of a ‘representative employer’ for PAYE purposes and the VAT identification of persons acting in a representative capacity ditch the defined term ‘resident’ for the word resides, for reasons not given and unknown.

What might the word reside mean?

Barrie No v Ferris and Another 1987 (2) SA 709 (c) dealt with the construction of a will granting a beneficiary the conditional usufruct (not a usus or habitation; see 102 TSH 2011) over a property in the following terms:

I leave and bequeath the usufruct thereof to my friend…. for the rest of his natural life, or for as long as he may elect to reside there.

Baker J said (references removed):

‘Reside’ means that a person has his home at the place mentioned. It is his place of abode, the place where he sleeps after the work of the day is done…. It does not include one’s weekend cottage unless one is residing there…. The essence of the word is the notion of ‘permanent home’.

How did I find such a minor case? It was cited in Kiepersol Poultry Farm (Pty) Ltd v Phasiya 2010 (3) sa 152 (sca), a case about land reform.

How did I find that case? By searching for the string “meaning of reside”, which yields very few hits in The South African Law Reports (1947 to date) (Jutas).

In fact, the only other significant case thus identified is Cleeve v The Minister Of The Interior 1956 (2) sa 223 (t), a case on the concept of ‘domicile’ under the Immigration Act, which relies to an extent on the word resides. Ludorf J said:

Consequently I can look at other examples in other pieces of legislation where the Courts have endeavoured to define the meaning of the word ‘residence’ in the ordinary sense of the word. A number of cases...
have been cited and they all follow much the same reasoning. In Cowie v Pretoria Municipality 1911 TPD 628, Wessels J said:

‘But in ordinary language a person is said to live in a place even though he may be temporarily absent on certain occasions and for certain short periods.’

That dictum was quoted with approval by Centlivres JA in Ex parte Minister of Native Affairs 1941 AD 53 at 59. He also said this:

‘Thirdly it is inherent in the decision of Solomon v Wolff 15 SC 152, that a person cannot be said to reside at a place which he is temporarily visiting.’

Difficulties sometimes arise where a person resides in two places. Also there is the question when there are temporary absences as to where to draw the line. This was considered by the full Bench in Cowie’s case, supra. But these are all questions relating to the facts of a particular case. It may well be that a man absents himself so often or so long from what he claims to be his place of residence that on the facts it is found that he no longer resides there.

On the basis of this admittedly tiny sampling of the law, the questions I want to ask the idiot draftsper-son are:

- In the light of the fact that the courts appear to treat the expressions reside, residence and ordinarily resident as being synonymous, what did you hope to achieve by departing from the defined term ‘resident’?
- Do you really believe that society can afford to spend time on such arcane points of law?
- How do feel about banking your salary cheque?

105 TSH 2011—December

Provisional tax credits: do you always get relief?

In order to avoid sanctions, how do you pay tax otherwise than upon an assessment? The answer you would expect would be by way of PAYE deductions, provisional tax payments and the s 6quat rebate for foreign taxes paid on foreign-sourced income. The real answer is more obscure.

Liability for ‘normal tax’ is established by s 5(1) of the Income Tax Act. Since s 6quat(1) calls for the rebate to be deducted from the normal tax payable, my first suggestion is that no sanction based upon normal tax may be computed without the prior deduction of the s 6quat rebate for which a taxpayer qualifies, whether or not specific provision is made for such relief.

Such specific provision is made in the provisional tax interest regime constituted by s 89quat, since the critical concept of a provisional taxpayer’s ‘credit amount’ is the sum of his provisional tax payments for the year, his so-called topping-up payments, his employer’s PAYE deductions made during the year (in practice, later deductions are also taken into account) and his s 6quat rebate.

By contrast, para 28(1) of the Fourth Schedule, which calls for the set-off of PAYE deductions and provisional tax payments upon assessment, forgets about the s 6quat rebate. On my thesis, and, indeed, in practice, the rebate is in fact taken into account.

Section 89ter, which governs a taxpayer’s account at SARS, essentially, for normal tax, specifically refers to the PAYE deductions and provisional tax payments allowed to be set off under the Fourth Schedule (a clear reference to para 28) and perhaps caters for the s 6quat rebate by way of these words:

and such other details as may be required to establish the total amount owing by the taxpayer from time to time in respect of such taxes.

Thanks to s 89bis, both PAYE and provisional tax represent payments made against liability, again, essentially for normal tax.

Against this background, how well does the provisional tax system cope with these three distinct types of payments of normal tax?

In the first place, I think, it is implied by para 17(3) of the Fourth Schedule that estimates of normal tax liability are made in the light of s 89bis, since, for provisional tax payments required to be paid, the deemed liability is the amount of normal tax which…would be payable by the provisional taxpayer in respect of the amount of taxable income estimated by such taxpayer…during the period prescribed.

Since liability for normal tax is reduced by the s 6quat rebate, it is easy to read into para 17(3) and other provisions allowance for the rebate.

Under para 17(5), the provisional tax tables are made as significant as a limited form of delegated law as their PAYE equivalent. And it is there that the s 6quat rebate is specifically mentioned. The power delegated to the Commissioner under the tables is to prescribe the manner in which such tables shall be applied.

And the tables very clearly allow estimates and topping-up payments to be made under paras 19-(1), 21 and 23A with due allowance for PAYE deductions, provisional tax payments and the s 6quat credit.

It is para 17(7) that allows a provisional taxpayer to use the tables. Does it have the effect of debar-ring a provisional taxpayer not using the tables from taking s 6quat into account? Not under the usual rules of interpretation, and, certainly, not under my thesis. In any event, it is far more likely that the tables may be read as allowing every provisional taxpayer to take s 6quat into account.

Additional taxes—para 20 (underestimate)

Estimates called for by para 19 are of taxable in-come, not liability for normal tax. The same applies
to an estimate made by the Commissioner under para 19(3). Yet liability for normal tax under para 20 must in the first instance be read in the sense of s 89bis, in that it is reduced by both provisional tax and PAYE payments, and, whether under my thesis or the tables, in the sense that it is reduced by the s 6quat.

But additional tax is levied on the difference between normal tax on the estimated taxable income and normal tax on the target estimated taxable income. Normal tax is reduced by the s 6quat rebate but not by PAYE and provisional tax payments. Thus a s 6quat rebate must serve to reduce para 20 additional tax—but not PAYE deductions and provisional tax payments!

Since provisional tax payments actually made would have been based upon the lower estimate actually made, no hardship is likely to arise. But PAYE might well have been paid on some other basis, and to leave it out of the calculation could cause considerable hardship.

Perhaps the calculation is meant to be made on normal tax outstanding after deduction of PAYE, provisional tax payments and the s 6quat rebate. That would produce a much fairer result and might well be accepted by a court.

Alas, this view is not supported by the tables, although they speak here outside the realm of their limited delegated authority. Here is one of the two formulations used:

The additional tax will be imposed on the difference between the normal tax as disclosed for provisional tax purposes and the amount of normal tax on 80% of the actual taxable income.

105 TSH 2011—December

**Government grants & scrapping payments & grants, simpliciter**

In a great many issues, in the ‘Lost & Found’ section, I repeatedly pointed out that s 10(1)(y) of the Income Tax Act, although itself effective, was toothless, as a result of a failure of the Minister of Finance to publish the necessary Gazette notices. This is how the main body of the exemption reads:

(y) any government grant or government scrapping payment received or accrued in terms of any programme or scheme which has been approved in terms of the national annual budget process and has been identified by the Minister by notice in the Gazette with effect from a date specified by the Minister in that notice (including any date that precedes the date of such notice) for purposes of this paragraph, having regard to…;

Then, in 98 TSH 2011, I was able to publish the joyful news that two relevant Gazette notices had appeared:

- GN 365 GG 34233 of 29 April 2011. With effect as from 31 October 2006, grants derived under the taxi recapitalisation programme will be exempt for purposes of s 10(1)(y) of the Income Tax Act & para 64A of the Eighth Schedule to the act (CGT), ‘for the purposes of that schedule’. What is puzzling is why the notice refers simply to a grant rather than a ‘government grant’ or a ‘government scrapping payment’, both of which terms are defined in s 1.
- GN 366 GG 34233 of 29 April 2011: This covers grants derived between October 2004 and September 2008 under the Staple Food Fortification Program (sic) administered under the regulations published in g 24715 of 7 April 2003 under s 15(1) of the Foodstuffs, Cosmetics & Disinfectants Act.

But that’s it. No other ‘government grants’ or ‘government scrapping payments’ are exempted.

How does Interpretation Note 59, of 10 December 2010 deal with this challenging state of affairs? It is entitled ‘Tax implications of the receipt or accrual of government grants and government scrapping payments’. I am glad to report that it acknowledges that, up to the date of its publication, no programme had been approved for the purposes of s 10(1)(y).

In addition, it deals extensively with grants, plain and simple, dished out by a government or public
body for a particular purpose, a topic I have touched on in 96 TSH 2011 (Winter Cereals Trust) and 99 TSH 2011 (Business Trust AKA Jobco NPC), without, I am ashamed to admit, consulting IN 59. (Note to self: There are now too many interpretation notes to rely upon memory to signal their relevance to any particular matter.)

Once again, I am glad to report that IN 59 consists largely in an exemplary, scholarly treatment of the capital or revenue nature of grants simpliciter.