

# The “tax stories”

E.M. Stack

*Tax Stories* is a collection of journal articles researched and written by academics at most of the universities in South Africa. The idea behind *Tax Stories* is not an original one, but was inspired by a research paper of Paul L. Caron<sup>1</sup> entitled *Tax Archaeology*, which the author describes as<sup>2</sup> “the result of archaeological digs into ten seminal U.S. Supreme Court federal income tax cases ...”. For the South African academics, writing the present series of stories has involved a fascinating journey into the past – the geographical, historical and legal settings in which landmark cases in South African tax law were decided. The authors “met” interesting characters and the research revealed many of their personal circumstances and idiosyncrasies.

Each of the seminal cases reported on in the present series of *Tax Stories* established a lasting tax principle. It is in describing the context in which the cases arose and the companies and characters involved, however, that the readers’ interest in a particular case is stimulated and the richness of the “tapestry” of taxation becomes apparent. In a sense, too, the judgments may also have been influenced by the circumstances in which the cases arose. In the words of Wessels, CJ:<sup>3</sup>

[T]he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men but ... particular individuals situated in the particular circumstances in which they were.

These “particular circumstances” are described in the stories.

## The context of Tax Stories

The *Tax Stories* journey spans a period of time that includes the early 1900s, just before the First World War, the era of the “Great Depression”, the Second World War and the period shortly thereafter, and the late 1900s and early 2000s, prior to and after the “birth” of the new South Africa. One of the most momentous events

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Prof. E.M. Stack is in the Department of Accounting, Rhodes University. E-mail: e.stack@ru.ac.za.

1 P.L. Caron. 2009. *Tax Archaeology*. [Online] Available: <http://ssm.com/abstract+1484698> (accessed 14 November 2014).

2 *Supra* at 1.

3 *Bitcon v Rosenberg* 1936 AD 380, at 396.

in South Africa, the advent of the Constitution of the Republic of South Africa in 1996, gave cause for the authors of certain *Tax Stories* to criticise some of the earlier judicial decisions. Had certain of these early cases, in which the strict literal approach to the interpretation of statutes was applied, been decided after the advent of the Constitution, the result could well have been completely different. In certain instances, the period in which the events occurred will certainly have influenced the transactions or the outcome of the cases discussed in this series.

The gold fever that struck the Witwatersrand goldfields in the latter part of the 1800s, for example, was certainly the reason why John Pyott travelled there to seek his fortune, and the realisation that the rough circumstances were no place for a woman would have been the reason for his return to set up his biscuit-making business in Port Elizabeth. The advent of the First World War would have driven up the cost of tin used for making the biscuit tins and caused the company to charge the substantial deposits on the tins that gave rise to that tax dispute regarding whether these deposits were “received” for tax purposes. J. Niko’s expanding business in the shipping industry in Durban during the Great Depression would have made others in the industry take note of his success and be willing to invest in shares in his newly formed company. The formation of this company gave rise to the dispute about the value to be placed on the trading stock transferred to the new company and ultimately the decision that lock-stock-and-barrel sales of a business as a going concern would in future not necessarily be treated as being of a capital nature.

The Second World War, or its impending outbreak, would certainly have influenced the directors of *Unilever Ltd* to enter into the transactions to move assets out of Europe and into South Africa, giving rise to the tax dispute relating to the source of the interest paid on the loan secured by the assets. The war was also the reason for Sam Cohen’s extended visit to New York to obtain stock for his South African business and the Commissioner for Inland Revenue’s claim that he continued to be resident in South Africa. In a much later period, the depressed economy in the Vanderbijlpark area in the 1990s would have provided the opportunity for Marietje Prinsloo to offer “financial relief” to the residents through her “Ponzi” scheme and its inevitable collapse that ended in the Supreme Court of Appeal case in which it was held that the proceeds of the scheme were to be included in “gross income”.

The *Tax Stories* journey<sup>4</sup> allows readers to travel with Isaac Ochberg to Eastern Europe to rescue his orphans, or to accompany John Pyott on his journey to the goldfields of the former Transvaal. Readers can sit in the electric tramcar driven by Piet Jacobs, a driver employed by the Port Elizabeth Electric Tramway Company,

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<sup>4</sup> Refer to the *Tax Stories* included in the series.

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travelling down the steep Russell Road in Port Elizabeth, only to watch in horror as he loses control at the bottom of the hill and crashes into the Masonic hotel and a jeweller’s store next door. Readers can join the directors of Unilever Limited in the boardroom and debate how to get the company’s assets out of Holland and Europe ahead of the impending German hostilities, or accompany Sam Cohen to New York during wartime to buy stock for his growing *OK Bazaars* business. Or readers can visit Port Sunlight in England, where William Hesketh Lever established his soap factory and model housing for his employees.

Readers can share the distress of the citizens of Vanderbijl Park, South of Johannesburg, who lost all their savings to Marietjie Prinsloo’s “Ponzi” scheme, or witness the struggle of entrepreneurs in Durban and Cape Town to weather the financial storm of the Great Depression. A hair-raising drive to the Kruger National Park with Mr Justice Oliver Deneys Schreiner at the wheel is another experience readers can share. But a visit to the winelands of the Cape with Willem Hendrik Lategan or a sailing trip around the world in Peter Clark Kuttell’s yacht might prove to be a more pleasant experience. Readers could even be silent witnesses at the *Lever Brothers* hearing, and meet the hypothetical “practical man” who caused so much debate.

## Objectives of the stories

In her review of Paul L. Caron’s *Tax Archaeology*, Kim Brooks<sup>5</sup> elegantly articulated a common complaint about legal education that “the case method strips real-life disputes of their complexity, excitement, social and economic contexts and of the many perspectives from which they can fairly be observed.” In providing these perspectives for the South African cases discussed, the objectives of each of the articles in the present series of *Tax Stories* are to

- explain the facts of each case and the decision in simple language to assist non-legal scholars to interpret these cases;
- relieve the tedium of reading the often dry case reports and to assist with the problems often experienced in applying the principles established in these cases in practical situations;
- demonstrate the continuing relevance of the principles established in the cases, or to critique the decisions; and
- “bring the cases to life” by incorporating into their analysis and interpretation the historical and situational perspectives of the cases and by providing a glimpse

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<sup>5</sup> K. Brooks. 2004. *Tax Stories: An In-Depth Look at Ten Leading Federal Income Tax Cases* 28 Queen’s L.J. 705.

into the characters and companies involved in the conflicts with the Revenue Authorities.

The main purpose of the *Tax Stories*, however, is to make available a pedagogical resource for tax educators and scholars and therefore make a contribution to existing literature on taxation in South Africa.

### The pedagogical contribution

The pedagogical contribution of the *Tax Stories* can be described in terms of their impact on how students of taxation approach their learning. It is submitted that the approach to learning is at the heart of the problem that students, and particularly students from an accounting background, experience with reading and understanding tax cases. There are undoubtedly a number of educational theories that could be used to explain the approach to learning, but only the theories of John Biggs<sup>6</sup> will be referred to in this brief introduction.

In a diagram illustrating student orientation to learning, the teaching method and the level of engagement, John Biggs<sup>7</sup> uses as points on the vertical axis the levels of student engagement, ranging from the lowest to the highest levels: “memorising, note-taking, describing, explaining, relating, applying and theorising”. The analysis and interpretation of case law in tax requires all the levels of engagement, and not merely memorising, note-taking and describing. On the horizontal axis, Biggs presents a continuum of the student activity required – ranging from passive learning to active learning – and links this continuum to the teaching method used. Examples he cites to illustrate the teaching methods that prompt the particular level of student activity are a standard lecture at the passive learning end of the range and problem-based learning at the active learning end of the range. Students of taxation are typically required to apply tax principles to practical situations, thus problem-based learning, but it is argued that more is required. In a standard lecture on a particular tax case, lecturers would normally concentrate on the facts of the case and the decision, prompting a passive learning approach by students. By describing the context and characters involved and how these may have impacted on the facts of the case and/or the decision of the judges, and by lending background colour to the case, the aim of the *Tax Stories* is to awaken the interest of the students and equip them

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6 J. Biggs. 1999. *What the Student Does: Teaching for Enhanced Learning* Higher. Education Research & Development, vol. 18, no. 1; J. Biggs. 1999. *Teaching for Quality Learning at University*. Society for Research into Higher Education. United Kingdom: Open University Press.

7 J. Biggs. 1999. *What the Student Does: Teaching for Enhanced Learning* at 59.

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to engage in learning at the highest cognitive levels – explaining, relating, applying and theorising.

In his other work, John Biggs<sup>8</sup> uses the concepts of “surface” and “deep” approaches to learning in relation to ways in which teaching can be improved. He explains<sup>9</sup> that the surface approach reflects an “intention to get the task out of the way”, with low cognitive-level activities when higher-level activities are needed for the task. The deep approach,<sup>10</sup> however, arises from the student’s desire to engage meaningfully with the task, using the most appropriate cognitive activities. These students would therefore focus on the underlying meaning – the main ideas, themes, principles or successful applications – trying to learn the details but making sure that they understand. They will have positive feelings about the task – interest, a sense of importance, challenge, even of exhilaration. Biggs goes on to explain<sup>11</sup> that the factors that encourage students to adopt a “deep” approach to learning are not independent of teaching and “[e]ncouraging the need-to-know, instilling curiosity [and] building on students’ prior knowledge are all things that teachers can attempt to do”. The *Tax Stories* are the embodiment of this teaching philosophy.

## The “pillars” of income tax in South Africa

Taxation law in South Africa is a closely interwoven tapestry of legislation and case law. South African tax law is not codified into legislation, and the courts are frequently called upon to interpret legislation. Judges therefore play a pivotal role in the development of tax law. The two pillars of income tax are the definition of “gross income”<sup>12</sup> and what is commonly referred to as “the general deduction formula”.<sup>13</sup> Most of the terms included in the definition of “gross income” and the general deduction formula are not defined in the legislation, and the courts have, from the earliest history of tax in South Africa, provided an interpretation of terms such as “received by and accrued to or in favour of” a taxpayer, the “residence” status of a taxpayer, the valuation of “an amount”, the capital or revenue nature of an amount received or accrued or expended and the meaning of the terms “actually incurred” and “in the production of the income”. Certain of these seminal cases that

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8 J. Biggs. 1999. *Teaching for Quality Learning at University*. Society for Research into Higher Education. United Kingdom: Open University Press, at 13.

9 *Supra* at 14.

10 *Supra* at 16.

11 *Supra* at 17.

12 S 1 of the Income Tax Act, 58 of 1962.

13 Comprising the preamble to s 11, s 11(a) and s 23(g) of the Income Tax Act, 58 of 1962.

have created precedent and established the foundational principles of tax law are discussed in this first series of *Tax Stories*.

In the past, the courts have applied a strict legal approach to the interpretation of legislation which, as described in the *Niko*<sup>14</sup> story, does not take into account justice, equity and fairness as it follows the letter of the law strictly,<sup>15</sup> looking "at what is clearly said. There is no room for intendment. There is no equity about a tax."<sup>16</sup> There has been a shift to the purposive approach, and in the new approach, the purpose underlying the statute is sought.<sup>17</sup> This means not merely seeking the "intention of Parliament" but also considering the history of the provision, its broad objectives, the constitutional values underlying it and its interrelationship with other provisions. In more modern times, it can be questioned whether certain of the cases described in the *Tax Stories* may have been decided differently, had this new interpretative approach been applied. This question is also addressed in certain of the *Tax Stories* and, in other stories, the decisions are criticised in terms of the purposive approach.

## Research methodology

The same research methodology is applied in all the *Tax Stories* and can be described as falling within the interpretive paradigm, as they seek to understand and explain. Certain of the *Tax Stories* also incorporate aspects of the critical paradigm, as they subject the decisions arrived at in the cases to examination using a critical lens. As with most legal interpretive research, the stories adopt a *doctrinal* research methodology. This methodology, as described by McKerchar,<sup>18</sup> provides a systematic exposition of the rules governing a particular legal category, analyses the relationships between the rules, explains areas of difficulty and is based purely on documentary data. Because the methodology adopted in the *Tax Stories* also integrates the discourse of historical research, the *Tax Stories* also apply the methodologies of this branch of research. Leedy and Ormrod<sup>19</sup> describe historical research as follows:

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14 "CIR v Niko: a question of economic reality", referred to as "the Niko story".

15 Goldswain, G.K. "The Purposive Approach to the Interpretation of Fiscal Legislation: The Winds of Change". 2008. *Meditari*. Vol. 16(2) at 119.

16 *Cape Brandy Syndicate v IRC* 1921 (1) KB 64 at 71.

17 Goldswain, G.K. "Hanged by a Comma, Groping in the Dark and Holy Cows: Fingerprinting the Judicial Aids used in the Interpretation of Fiscal Statutes". 2012. *Meditari*. Vol. 16(3) at 31.

18 McKerchar, M. *Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation*. eJournal of tax Research. P.5 – 22. [Online]. Available: [http://www.asb.unsw.edu.au/research/publications/ejournaloftaxresearch/Documents/paper1\\_v6n1.pdf](http://www.asb.unsw.edu.au/research/publications/ejournaloftaxresearch/Documents/paper1_v6n1.pdf) (accessed 10 May 2014).

19 Leedy, P.D. and Ormrod, J.E. 2001. *Practical Research: Planning and Design*. Upper Saddle River, New Jersey: Merrill Prentice Hall at 172.

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Looking at a string of seemingly random events, the historical researcher develops a rational explanation of the sequence and causes of the events and makes inferences about the effects that the events had on individuals and the society in which they lived.

This is indeed what the *Tax Stories* attempt to do. Leedy and Ormrod also describe<sup>20</sup> the difference between historical narrative and historical research as the latter being not the accumulation of facts, but rather their interpretation. In a sense, therefore, the historical research methodology is also adopted in the *Tax Stories*. Unlike true historical research, however, the stories use only data in the form of documents and do not, in view of the fact that all the events have occurred in the distant and fairly distant past, include interviews with persons involved in these events.

The particular research method applied in each of the *Tax Stories* can also be described as a case study which, according to Babbie and Mouton,<sup>21</sup> involves an intensive investigation of a single unit (in the present case a court decision), involving multiple variables and from multiple perspectives and generating explanations about a case using “thick” descriptions.

The data used in the *Tax Stories* are purely documentary records that are all in the public domain. No ethical considerations therefore apply in respect of the use of these documents. Although certain of the authors met with and spoke personally to family members and descendants of the characters involved in certain of the cases (relatives of *Peter Clark Kuttel* who was involved in one tax story<sup>22</sup> and descendants of *Willem Hendrik Lategan* who was involved in another<sup>23</sup>), these interviews were not included in the stories.

## The organisations and the characters involved

Many of the products manufactured by the companies involved in the *Tax Cases* can still be found in our homes – including Pyott’s biscuits, Sunlight soap and Hulett’s sugar. OK Bazaars stores are to be seen in almost every town in South Africa. The Port Elizabeth Electric Tramway building is presently undergoing restoration in Port Elizabeth and is situated close to where the accident occurred that gave rise to the *PE Electric Tramways*<sup>24</sup> case, and Unilever, a global company, screens television advertisements in South Africa every day. At least one of the cases made headline news at the time – the *MP Finance CC*<sup>25</sup> case. Tax history is alive and well!

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20 *Supra*.

21 Babbie, E. & Mouton, J. 2009. *The Practice of Social Research*. Cape Town: Oxford University Press Southern Africa.

22 *CIR v Kuttel* 1992 (3) SA 242 (A), 54 SATC 298.

23 *W H Lategan v CIR* 1926 CPD 203, 2 SATC 16.

24 *Port Elizabeth Electric Tramway Co Ltd v CIR* 1936 CPD 241, 8 SATC 13.

25 *MP Finance Group CC (In Liquidation) v C:SARS* 2007 SCA, 69 SATC 141.

Many of the characters involved in the cases were colourful, some famous and others infamous. Among the colourful characters described in the *Tax Stories* is Isaac Ochberg, a litigious gentleman originally from the Ukraine, who was even involved posthumously, through his lawyers, in litigation to try to exclude his wife from his estate, but who was also a compassionate benefactor and a hero. A documentary film – *Ochberg's Orphans* – was produced in the United Kingdom and recounted his rescue of Jewish orphans in Eastern Europe and their resettlement in South Africa. Another famous character described in a *Tax Story* was William Hesketh Lever, who from a humble beginning working in his father's grocery store, went on to found the mighty Unilever empire. He was an innovator and an entrepreneur – among his “firsts” was the introduction of pension and medical benefits for his employees, paid holidays, reasonable wages and employee housing.

Some of the less famous characters described in a *Tax Story* were businessmen such as J. Niko, who like Isaac Ochberg, managed to prosper even during the years of the Great Depression. Another well-known *Tax Story* character was Sam Cohen (a violinist) who, together with his partner, Michael Miller (a hairdresser), opened the first OK Bazaars store in Johannesburg in June 1927.<sup>26</sup> Willem Hendrik Lategan is another businessman described a *Tax Story* whose ancestors were among the founders of the Cape wine industry. His dispute arose as a result of the sale of wine to KWV (Ko-Operatieve Wijnbouwers Verenigingen van Zuid Afrika Beperkt), which was formed by a group of wine farmers in 1918 and in 1990 transformed itself from a regulator of the industry into one of the major wine exporters in South Africa.<sup>27</sup> Piet Jacobs was the tram driver whose tram crashed at the bottom of Russell Road, Port Elizabeth and whose resulting injury was the reason for the tax dispute regarding the payment of compensation and the related legal costs, described in another *Tax Story*. The infamous character in one *Tax Story* was Marietjie Prinsloo, who ran a multi-million rand “Ponzi” scheme that impoverished many of the residents of Vanderbijlpark.

Some of the judges, too, have their moment in a number of *Tax Stories*. Some were handsome, like Chief Justice Watermeyer, while others were voted as being least likely to win the “handsomeness award”, like Acting Judge of Appeal Davis.<sup>28</sup> Davis AJA was extremely irascible and was reputed to have attacked a man with his umbrella, who was sitting in his reserved seat at a rugby match, while Judge of

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26 The Heritage Portal. [online] Available: <http://www.heritageportal.co.za/article/ill-break-ok-bazaars> (accessed 14 February 2015).

27 KWV Holdings Ltd. [online] Available: <http://www.kwv.co.za/our-company/timeline#down> (accessed 14 February 2015).

28 As described in the *Tax Story* – *CIR v Lever Brothers and Unilever Ltd: a practical problem of source*.



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Appeal Schreiner was famous for his reckless driving and for the many funny stories he told about his fellow judges in his voluminous correspondence with his wife.<sup>29</sup>

Watermeyer CJ was one of the judges in five of the tax cases dealt with in the *Tax Stories*, and delivered the judgment in three of these. Schreiner JA was involved in two of the cases, one of which was the *Lever Brothers* case, and Davis AJA was involved in four cases, three being with his “friend” Watermeyer CJ. The judgments of Watermeyer CJ were often quite complex and delivered in meticulous detail. In the words of Schreiner JA:<sup>30</sup>

The work is markedly more thoroughly done than when one sits in the Provincial Division ... [Some] matters are heard ... that one would be ready to dispose of in a rough and ready fashion without much delay, but we go over them with the utmost care and choose the words ... that leave no room for mistake ... The Chief, Billy, is a very wise judge with a big and well-stored brain. He guides our discussions with the artistry of a company chairman.

The *Lever Brothers* story<sup>31</sup> includes a short discussion of the lives of these three judges.

*Law, Life and Laughter*,<sup>32</sup> by Ellison Kahn, is a compendium of stories about the judges of earlier times, counsel appearing before them, interpreters and witnesses. Only a few of the funnier incidents and anecdotes about certain judges involved in the cases dealt with in the *Tax Stories* are repeated here, not with the intent of showing any disrespect or to detract from the contributions to the law made by these learned men but, in the spirit of the *Tax Stories*, to show that even these eminent judges have a human side.

Chief Justice Curlewis, one of the judges in the *Ochberg* case, was described as being “the most charming and genial of men” off the Bench, but on the Bench “[h]e was never wrong, but took all eternity being right.”<sup>33</sup> Mr Justice James Stratford, a judge in the same case, was described as being “eminently practical and he had at his disposal a great fund of common sense. He never strained law against equity”.<sup>34</sup> Mr Justice Leopold Greenberg, a judge in the *Pyott* case, was famous for his wit and his comment for the benefit of counsel in a certain case was: “An affidavit is a recital of facts, not an imaginative literary effort.”<sup>35</sup> Mr Chief Justice Albert van der Sandt Centlivres, one of the judges in the *Niķo* case, was described by Mr Justice Oliver

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29 *Supra*.

30 Kahn, E. 1991. *Law, Life and Laughter: Legal Anecdotes and Portraits*. Cape Town: Juta & Co Ltd, at 336.

31 “*Commissioner for Inland Revenue v Lever Brothers and Unilever Ltd: a practical problem of source*”.

32 Kahn, E. 1991. *Law, Life and Laughter: Legal Anecdotes and Portraits*. Cape Town: Juta & Co Ltd.

33 *Supra* at 33.

34 *Supra* at 259.

35 *Supra* at 71.

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Deneys Schreiner as lacking an ordinary sense of humour. “Wit and quirks of life ... would leave [him] cold, yet he would burst into laughter at a feeble joke ... but his judgments were well-organised, especially where legislation was involved; he would cite all the relevant provisions, so that the judgment was admirably self-sufficient ...”<sup>36</sup>

## Conclusion

In an era where reading is no longer a favourite pastime of many young people, to encourage students to read is a challenge. The *Tax Stories* series aims to persuade tax scholars that tax law can be fun. While all of the stories present a “serious” analysis and interpretation of the facts and decisions in the cases dealt with in the series and attempt to make the logic of the sometimes “dry” reasoning of the judges intellectually accessible, the stories go much further. They paint a detailed and multi-coloured picture of the lives and times of the people and organisations involved in the disputes with the Revenue Authorities. The broader aim of a university education is to create a desire for knowledge and a commitment to lifelong learning. Perhaps the readers of these *Tax Stories* will undertake a similar journey into the historical, social and economic context of the tax cases they are required to study and will enjoy the richness of the experience. If this series of stories sparks the interest of scholars of tax, the *Tax Stories* will have succeeded in their objective.

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<sup>36</sup> Kahn, E. 1991. *Law, Life and Laughter: Legal Anecdotes and Portraits*. Cape Town: Juta & Co Ltd at 25.37.

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