

Hanged by a comma, groping in the dark and holy cows – fingerprinting the judicial aids used in the interpretation of fiscal statutes

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ABSTRACT

This article describes and analyses, from a practical point of view, the process followed when interpreting a statute under the ‘purposive’ approach, an approach that has been given constitutional recognition in South Africa. The research fingerprinted and identified the various aids, both internal and external, that the judiciary may use to seek the ‘purpose’ underlying the statute, taking into account the constraints of the Constitution. The discussion and conclusion indicate that many of these aids, even aids that were previously prohibited under the ‘strict and literal’ approach to the interpretation of statutes, may now be used by the judiciary to avoid any ‘groping in the dark’ when attempting to find the ‘purpose’ underlying a statute.

Many of the interpretational presumptions analysed in this article originate from centuries ago and are based on equity and fairness. They have all been given an elevated status by either being incorporated directly into the provisions of the Constitution of the Republic of South Africa Act (Act No. 108 of 1996) (as a fundamental right in the Bill of Rights) or indirectly as part of the constitutional recognition of the common law.

Key words: Constitution, interpretation of statutes, interpretational aids and presumptions, purposive approach, strict and literal approach, taxpayers’ rights

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Introduction

It has been said that Sir Roger Casement, the Irish patriot, was “hanged by a comma” (Webb 2004; Clark 2007: 61). In his dream to pursue an Ireland free from the yoke of British rule, he met and collaborated with the government of Germany, which was then at war with Britain. They promised the Irish guns and ammunition to support the proposed Irish Easter Rising against the British in 1916. When Sir Roger returned to Ireland, he was arrested on charges of treason, sabotage and espionage.

He was transported to England and prosecuted under the Treason Act (Act of 1351), an Act written in Norman French and unpunctuated. It had been interpreted for centuries as only applying to treasonable deeds carried out on English soil, not on foreign soil. The court, in its deliberations, called for an examination of the original parchment on which the Treason Act had been written. According to Webb (2004), a faint mark was found on the parchment, which could have been a comma or merely a dirty mark. The judges decreed that the mark found was a comma, which enabled them to determine that the Treason Act also applied to treasonable deeds carried on outside England. Sir Roger was convicted of treason and hanged in 1916.

The British government had been determined during the course of the trial to discredit the honour and reputation of Sir Roger by leaking information on Sir Roger’s alleged homosexuality (Tilzey 2011). Thus, they were ecstatic about his conviction for treason. Assuming, however, that political interference played no part in the conviction, the importance of the comma in Sir Roger’s trial illustrates only one of the problems encountered by the judiciary in interpreting statutes.

The judiciary, both in England and South Africa, until relatively recently generally used the ‘strict and literal’ approach to the interpretation of statutes, especially in fiscal matters, to overcome interpretational problems. It did not matter that such approach led to unfairness or even hardship (*New Union Goldfields Limited v CIR* (17 SATC 1)).

In England, the judiciary, with Lord Denning leading the way, moved away from the ‘strict and literal’ approach to a ‘purposive’ approach whereby the purpose underlying the statute was sought. In *Davis v Johnson* ([1978] 1 All ER 841), Lord Denning used the Hansard Parliamentary Debates Reports (the ‘Hansard Reports’), the use of which was previously denied to the judiciary, as an aid to assist the court in finding the intention of Parliament and the purpose behind a provision. He rejected the notion that judges should “grope about in the dark for the meaning of an Act without switching on the light” (851).

The House of Lords, in *Pepper (Inspector of Taxes) v Hart* ([1993] 1 All ER 42), also used the ‘purposive’ approach to the interpretation of a fiscal statute and confirmed that it is permissible to use the Hansard Reports as an aid to statutory interpretation.

The judgement, in effect, brought down the curtain on the 'strict and literal' approach to interpreting fiscal statutes in England and ushered in the 'purposive' approach. The question that now arises is whether the 'purposive' approach to interpreting statutes is also followed in South Africa.

The South African judiciary, in interpreting statutes, have always recognised that the courts should give effect to the 'intention of Parliament'. However, unless the 'strict and literal' reading of the statute led to an absurdity, the judiciary looked no further – such literal reading, they argued, represented what Parliament intended (*Glen Anil Development Corporation Ltd v SIR* (37 SATC 319)).

Whether the 'strict and literal' approach to interpreting a fiscal statute is still valid today in South Africa was analysed in a previous article (Goldswain 2008: 107–121). The conclusion reached was that the adoption of the Constitution of the Republic of South Africa (Act No. 108 of 1996) (hereafter the 'Constitution') was a catalyst for an immediate and enforced change from the 'strict and literal' approach to a 'purposive' approach that incorporates the principles and values underpinning the Constitution. Section 39(2) of the Constitution, as interpreted by several Constitutional Court decisions – (*S v Makwanyane and Another* (1995 (3) SA 391 (CC) at 403–404); *Du Plessis and Others v De Klerk and Another* (1996 (5) BCLR 658(CC) at 722; *C:SARS v Airworld CC and Another* (70 SATC 48); *Metropolitan Life Ltd v C:SARS* (70 SATC 162)) – lends irrefutable support for this conclusion. In addition, several eminent South African jurists (Du Plessis & De Ville 1993: 63; Davis 1994: 103; Botha 2005: 9–10) endorse this conclusion. This change in approach now applies equally to fiscal legislation (*ITC 1646* (61 SATC 37)). Deviation from such an approach, without compelling reasons being advanced, could constitute grounds for an appeal to the Constitutional Court. It can also mean that precedent-creating decisions of the past can now be challenged in the appropriate circumstances (Goldswain 2008: 107–121).

These conclusions are encapsulated in *ITC 1384* (46 SATC 95 at 106), where it was stated by Steyn J that fiscal statutes:

... have to be construed subject to the presumption of a fair, just and reasonable lawgiver's intention and in consequence with the 'new approach' to interpretation of fiscal statutes, in terms whereof such measures are neither to be subjected to eviscerating formalism or strictness nor to be treated with fawning respect as 'Holy Cows'.

It is interesting to note that these words were written some ten years prior to the advent of the new constitutional order in South Africa. The new approach referred to by Steyn J is the 'purposive' approach to interpreting legislation.

Object and scope of article

The interpretation of a fiscal statute is the basis on which the revenue authorities can assess and collect taxes, and correspondingly the foundation on which a taxpayer's rights are built. A haphazard, inconsistent, discriminatory and unfair interpretation of a fiscal statute leads to chaos for both the revenue authorities and the taxpayer.

Much has been written on the general concept or theory of the 'purposive' approach to the interpretation of statutes, but little on how the concept can be translated into practice in a fiscal environment. Even the major recognised textbook on taxation in South Africa, *Silke on South African Income Tax* (De Koker & Williams 2010: par 25.1D), quoted with approval in numerous tax cases (for example in *Glen Anil Development Corporation Ltd v SIR (supra)*), does not give much practical guidance in this regard. One of the other recognised textbooks on taxation in South Africa, *Income Tax in South Africa* (Urquhart 2010: par 2.1), also gives little recognition to the 'purposive' approach other than to observe that there is a trend towards the 'purposive' approach.

The object of this article, by reviewing the available relevant literature, is an attempt to fill this void by analysing the process of interpretation and fingerprinting aids that are useful in interpreting fiscal statutes using the 'purposive' approach, taking into account the constraints of the Constitution. It is hoped that the analysis and discussion of the process and the aids that may be considered in the interpretation of fiscal statutes will enable those who are involved in the tax field to interpret statutes in a similar fashion to the judiciary and thus predict the way in which a court would interpret the statute in the future, or probably more importantly, whether there is any basis for challenging the interpretation of statutes as determined previously by the judiciary.

Aspects considered to be beyond the scope of this article include aids that are discussed in sufficient detail in a well-recognised South African taxation textbook such as *Silke on South African Income Tax* (De Koker & Williams 2010) and many of the interpretational presumptions that are now embodied, either directly or indirectly, in the Constitution.

Research method

The research method adopted comprised a literature review and an analysis of the relevant provisions of the Income Tax Act, the Constitution and the reported decisions of the various courts together with published articles and textbooks that relate directly to the objective.

As far as the local court decisions are concerned, a comprehensive search was done on the LexisNexis Electronic Library (2010), and the appropriate decisions concerning the interpretation of statutes were selected for analysis.

The interaction between language and legal skills in interpreting statutes

Language, rather than law skills, was often resorted to in resolving the interpretation of a specific provision of a statute when the ‘strict and literal’ approach was used. Theoretically, it could be argued that the ‘strict and literal’ approach allows even the layperson who has competent language skills to interpret a provision. Thus, the presumption that ‘everyone is presumed to know the law’ was appropriate under that approach. Unfortunately, in practice, the interpretation of a statute is not so simple. A combination of language and legal skills is necessary to arrive at a logical, sensible and equitable interpretation irrespective of which approach is adopted, whether it is the ‘strict and literal’ or the ‘purposive’ approach.

Often the words used in a statute are inadequate to describe what was intended by the legislature. This can lead to ambiguity, confusion and consequently, uncertainty. In *Geldenhuys v CIR* (14 SATC 419), the court had to decide on the meaning of the words “received by” as used in the definition of “gross income” in section 1 of the Income Tax Act. The court did not use the everyday grammatical and dictionary meaning in deciding on its scope as the definition was obviously far too wide for what was intended by the legislature. For example, the receipt of a *bona fide* loan would have been taxable in the hands of the borrower and amounts ‘received by’ an agent on behalf of a principal would have been taxed in the hands of the agent if the ordinary grammatical meaning of the word ‘receipt’ had been applied in its interpretation.

Similarly, the meaning of the words ‘accrued to’, also used in the definition of ‘gross income’, led to uncertainty for decades. Even after the Cape Supreme Court in *WH Lategan v CIR* (2 SATC 16) had determined its meaning as being ‘entitled to’, the Appellate Division questioned whether the meaning should not rather be ‘due and payable’ (*CIR v Delfos* (6 SATC 92)). The matter was only finally settled some 64 years later by the Appellate Division in *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* (52 SATC 9) when the *Lategan* principle was confirmed.

In these two cases, a combination of language and legal skills was used. Language skills were necessary to establish the ordinary grammatical meanings of the words, and legal skills were required to arrive at a sensible, restrictive answer as to their meaning.

The lack of foresight and poor draftsmanship resulting in errors or omissions in a statute require both language and legal skills for their interpretation. For example, in *Shell's Annandale Farm (Pty) Ltd v C:SARS* (62 SATC 97), the taxpayer's land had been 'expropriated' by the State, and value-added tax was claimed by the Commissioner on the compensation received by the taxpayer. 'Expropriation' was not specified as a supply or deemed supply in terms of the Value-Added Tax Act (Act No. 89 of 1991) (hereafter the 'Value-Added Tax Act'). The court, in applying the common law *contra fiscum* and *cassus omissis* presumptions, held that some act was required for there to be a 'supply', and as the 'expropriation' did not involve any act on the part of the person whose property had been expropriated, no 'supply' for VAT purposes had taken place. The omission of the word 'expropriation' was fatal for the case of the Commissioner. The Value-Added Tax Act was later amended to specifically include 'expropriation' as a deemed supply (section 8(21)). The approach in this case appeared to be more a skill of language – merely ignoring the omitted word – but it also needed a vast knowledge of legal skills relating to, *inter alia*, the *contra fiscum* and *cassus omissus* presumptions, to arrive at, it is submitted, the correct decision.

Is there a difference between the 'intention of Parliament' and the 'purpose' of a statute?

The 'strict and literal' approach to the interpretation of fiscal statutes was advocated and used by the South African judiciary prior to the change in the constitutional order in 1994. However, in a case where absurdity arose, the judiciary resorted to establishing the 'true intention of Parliament' (*Farrar's Estate v CIR* (1926 TPD 501) rather than merely looking at the strict and grammatical meaning of the words used. This was done with the assistance of judicially recognised aids, including using certain centuries-old common law presumptions. The question is whether merely seeking the 'intention of Parliament' can be equated to the 'purpose' underlying the statute, or whether something else is required. The 'supremacy' question and the dictates of the Constitution also need to be analysed in order to arrive at a conclusion in this regard.

The 'supremacy' question

When the 'strict and literal' or purely grammatical approach to the interpretation of fiscal statutes results in an absurdity, the presumption is that Parliament never intended the absurd result. The judiciary then have to resort to other means to

establish what they term the 'true intention of Parliament'. To assist the judiciary, they may call upon certain internal and external aids, including common law presumptions, in their quest to find the 'intention of Parliament' (*Venter v R* (1907 TS 910); *M v COT* (21 SATC 16); *Farrar's Estate v CIR* (*supra*)). Seeking the 'intention of Parliament' originated from the concept that Parliament was 'supreme' or 'sovereign' and that whatever it decreed in a statute could not be challenged even if it led to inequitable, unfair and unjust results. In fact, it was this very principle of 'supremacy' that permitted the abuses and violations of human rights, including the rights of taxpayers, under the Apartheid regime prior to the adoption of the Constitution of the Republic of South Africa (Act No. 200 of 1993), generally referred to as the Interim Constitution, in 1994.

With the advent of the new constitutional order in South Africa in 1994, the 'supremacy' of Parliament has been replaced by the 'supremacy' of the Constitution. Section 2 of the Constitution provides that:

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

Thus, although Parliament legislates, all legislation is subject to the purport and spirit of the Constitution, which is 'supreme'.

Dictates of the Constitution in the interpretation of statutes

Section 39(1) of the Constitution gives specific instructions on how to interpret the Bill of Rights, namely the interpretation must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) deals with the interpretation of any other legislation and, since the sub-section does not specifically exclude fiscal legislation, it implies that fiscal legislation must be interpreted in the same way as any other legislation (*ITC 1646* (*supra*)), namely the interpretation must promote the spirit, purport and objectives of the Bill of Rights. The judiciary and academia, as already discussed, have interpreted section 39(2) of the Constitution as compelling the judiciary to follow an approach similar to the so-called 'purposive' approach to interpreting statutes but with a South African flavour – the incorporation of the principles and values underpinning the Constitution.

Additionally, the courts are given the power in terms of section 39(2) of the Constitution to develop the common and customary law so as to promote the spirit, purport and objectives of the Bill of Rights. No statute, common law or customary law may, however, be recognised to the extent that they are inconsistent with the provisions of the Bill of Rights (section 39(3) of the Constitution).

Fingerprinting the judicial aids used in the interpretation of fiscal statutes

In effect, in interpreting legislation, the judiciary are obliged to promote, *inter alia*, the protection of the liberty of a person, his or her property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. Unfairness, unreasonableness and arbitrary actions by public officials are no longer tolerated, not even in fiscal matters (Goldswain 2008: 115).

'Intention of Parliament' v 'purpose' of statute

If the Constitution is 'supreme', does one still need to seek the 'intention of Parliament' in order to find the 'purpose' of a statute, or are the two terms synonymous?

Driegler (in Miers & Page 1990: 177) has suggested a three-stepped technique for interpreting statutes under the 'purposive' approach:

- Ascertain the intention of Parliament, the object of the Act and its scheme.
- Read the individual provisions in their grammatical and ordinary sense, and if such meaning is clear and unambiguous and is in accordance with the intention, object and scheme of the Act, that is the end.
- If the grammatical meaning of the words is obscure or ambiguous, then a reasonable meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act is to be given them.

In short, Driegler's approach is to ascertain the 'intention of Parliament' and harmonise it with the 'object' and 'scheme' of the statute. Thus, the 'purposive' approach of Driegler goes noticeably further than merely seeking the 'intention of Parliament'. Driegler's approach, however, assumes that Parliament is 'supreme'. Does this mean that the approach should be different where the Constitution is 'supreme'?

In *Minister of Land Affairs v Slamdien* (1999(4) BCLR 413 (LCCC)), seeking the 'intention of Parliament' is not specifically mentioned as a necessary technique under the 'purposive' approach. A synopsis of the approach as set out by the court follows (422):

- (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
- (ii) have regard to the context of the provision in the sense of its historical origins;
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values, which underlie it;
- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- (v) have regard to the precise wording of the provision; and

- (vi) where a constitutional right is concerned ... adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection, which the right confers.

These guidelines offered by the court were derived mainly from the judgement of Chaskalson P in *S v Makwanyane and Another* (*supra*) and approved in *S v Zuma and Others* (1995 (2) SA 642 (CC) at 651). The guidelines emphasise the history of the provision, its broad objects, the constitutional values that underlie it and its interrelationship with other provisions of the statute whilst not violating the precise wording of the provision. This approach, if carefully analysed, is similar to the Driegler approach. Establishing the broad objects of a statute cannot be done, it is submitted, without also seeking 'the intention of Parliament'. It is Parliament, after all, that legislates. However, the Driegler approach is expanded to take account of the statute's historical context as well as any constitutionally affected rights. Neither the Driegler nor the *Slamdien* approach provides for violence to be done to the precise wording of a statute unless the words used do not convey the 'purpose' underlying the statute. Thus, in the *Shell's Annandale Farm* (*supra*) case, the judiciary refused to include the 'expropriation' of the property in the definition of 'supply' for the purposes of imposing value-added tax on the property so 'expropriated'. Doing so would have done violence to the words and language used in the provision.

Thus, seeking the 'intention of Parliament' is only one step in the process of establishing the 'purpose' underlying a statute. It does not end there.

The purpose of this paragraph has been to analyse the process of interpretation under the 'purposive' approach. The analysis of the process sets the scene for the practical application of the process by fingerprinting and identifying the aids that are useful in interpreting fiscal statutes using the 'purposive' approach, taking into account the constraints of the Constitution.

Fingerprinting, identifying and discussing the usefulness of internal and external aids used by the South African judiciary to assist in interpreting statutes

As already discussed, in applying the 'strict and literal' approach to the interpretation of statutes, the courts departed from the 'strict and literal' meaning of the words if such meaning led to an absurdity. They then invoked the use of judicially acceptable internal and external aids, including the centuries-old common law presumptions, many of them written in Latin, to find the 'intention of Parliament' and thus interpret the provision.

Fingerprinting the judicial aids used in the interpretation of fiscal statutes

The remainder of this paragraph will endeavour to fingerprint the aids, both internal and external, used by the judiciary prior to 1994 in the process of interpretation. The usefulness or otherwise of these aids will be discussed by examining their practical application as they pertain to the 'purposive' approach to the interpretation of statutes.

Internal aids

Generally, anything contained in a statute because it has been passed by Parliament may be used as an aid to its interpretation. Unlike the Treason Act (Act of 1351), which resulted in Sir Roger Casement being "hanged by a comma", statutes today are punctuated, and account must be taken of such punctuation (*Skipper International v SA Textiles and Allied Workers' Union*, (1989(2) SA 612 (W)).

Preamble, long and short title to a statute and headings of a provision

The preamble to a statute gives an idea of its main object or 'purpose' and should always be borne in mind when interpreting a statute. In *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* (1917 AD 593 at 597), it was stated: "A preamble has been described by an old English Judge as 'a key to open the minds of the makers of the Act and the mischief which they intended to redress.'" The court also held that "where the Court is satisfied that the Legislature must have intended to limit in some way the wide language used, then it is proper to have recourse to the preamble".

It is surprising, therefore, that the majority of the judges in the very same court (Appellate Division) in *Ochberg v CIR* (5 SATC 93) did not apply this fundamental aid when coming to the conclusion that a taxpayer who owned, for all practical purposes, 100 per cent of a company and awarded himself further shares in the company at no cost, had fallen foul of the definition of 'gross income' as contained in section 1 of the Income Tax Act. By applying the 'strict and literal' approach to the interpretation of 'gross income', without reference to the preamble, which, after all, stated that the Act related to the "taxation of incomes...", they failed to recognise that neither the income nor the assets of the taxpayer had increased by the awarding of the shares. Wessels JA, however, in delivering one of the minority judgements, recognised that if the taxpayer were to be taxed on the value of the shares awarded, he would be paying the tax out of his capital. In his opinion (113): "This seems to me contrary to the whole tenor of the Act." His view was based on the preamble to the Income Tax Act read together with the definition of 'gross income' that the objective of the statute was to

tax only income and not capital. Wessels JA's approach was, it is submitted, a classic 'purposive' approach to interpreting statutes. Perhaps his well-reasoned minority judgement lends encouragement to the view of Steyn J in *ITC 1384 (supra)* that a fair, just and reasonable lawgiver's intention should not give way to an obviously incorrect 'holy cow' precedent creating judgement that must be followed at all costs.

Even the long and short titles of a statute can assist in the interpretation of a statute. In *National Director of Public Prosecutions v Seevarayan* (66 SATC 15), the court looked to the short title, the long title as well as the preamble to the Prevention of Organised Crime Act (Act No. 121 of 1998) in order to ascertain the 'purpose' underlying the statutory provisions contained therein. It was held that the statute was directed at the prevention of 'organised crime', and not by the wildest stretch of the imagination could the evasion of personal income tax by a single individual be categorised as 'organised crime'.

In interpreting a fiscal statute under the 'purposive' approach, it is submitted that, as a first port of call, the judiciary should always seek guidance from the preamble and the long and the short titles to a statute. These are indispensable internal aids to the interpretation of a provision.

Definitions in a statute

The definitions contained in the Income Tax Act should normally be adhered to unless the context otherwise indicates. In *Welch's Estate v C:SARS* (66 SATC 303), the definition of 'donation', although appearing to be comprehensively defined in section 55 of the Income Tax Act, was challenged. The question was whether a payment made in terms of a court-sanctioned divorce order to a trust for the maintenance of an ex-wife and a minor child fell within the ambit of the definition of 'donation'. The Appellate Division narrowed the meaning of 'donation' as defined, by including the essential elements of 'pure liberality' or 'disinterested benevolence', as demanded by the common law, in its interpretation. In so doing, the court found that payments made in terms of a divorce order could never be regarded as a donation. This is a classical 'purposive' approach to the interpretation of statutes that includes the principles underlying the Constitution – in this case, fairness and equity.

Differences in English and Afrikaans versions of a statute

A full discussion on using both the English and Afrikaans versions of a statute as an interpretational aid is considered to be beyond the scope of this article, as it is covered in both *Silke on South African Income Tax* (De Koker & Williams 2010) and *Income*

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Tax in South Africa (Urquhart 2010). Its contributory importance as an internal aid, nevertheless, needs to be recognised.

Although the signed language version usually prevails, the unsigned language version may be referred to in construing the meaning of a word (*New Union Goldfields Limited v CIR (supra)*). For example, in *ITC 1548* (55 SATC 26), the court referred to the word used in the unsigned Afrikaans version – ‘boerdery’ – in interpreting the English words ‘farming operations’ and gave it a restrictive meaning, namely, that ‘farming operations’ did not extend to farming activities like shearing sheep or harvesting, undertaken by a third party on behalf of a farmer.

External aids

An external aid is material from another source, which may assist the judiciary in interpreting a statute. The Constitution, being the supreme law of South Africa, is the most important external aid. It ensures fairness and equity in the interpretation of statutes.

An equally important external aid is the use of previously decided cases on the subject. However, a detailed discussion on the use of precedent (the *stare decisis* principle) is considered to be beyond the scope of this article.

Textbooks may and should be consulted for supporting or even alternative views. In the case of fiscal issues, a textbook such as *Silke on South African Income Tax* (De Koker & Williams 2010) is often referred to and quoted in addition to overseas textbooks such *Halsbury's Laws of England* (Macay 1998).

The Hansard Reports and explanatory memoranda

In *More v Minister of Co-operation and Development*, (1986(2) SA 102(A)), the Appellate Division reaffirmed the rule that neither Explanatory Memoranda nor the Hansard Reports could be used as an aid to the interpretation of a particular provision. The Hansard Report is the official report of what was said in Parliament when the statute was debated. The same rule was followed by the English judiciary until Lord Denning, in *Davis v Johnson (supra)*, and the House of Lords, in *Pepper v Hart (supra)*, relaxed the rule and accepted that the Hansard Reports can be referred to in the appropriate circumstances. Lord Denning was not prepared to “grope in the dark” (851) to find the ‘intention of Parliament’ or ‘purpose’ of a provision when such relevant and important material was so readily available.

The Explanatory Memorandum, which accompanies a Bill when it is sent to the public for comment, is perhaps in a slightly different category than the Hansard

Reports. It is primarily a National Treasury document, with inputs from the South African Revenue Service (SARS), indicating their interpretation of the legislation. However, it is not a document that is normally debated or passed by Parliament.

A search of the LexisNexis Electronic Library (2010) revealed that neither the Hansard Reports nor the Explanatory Memoranda have been used so far by the South African judiciary to assist them in interpreting a fiscal statute. Nevertheless, it is submitted that the time will come when the Hansard Reports will be found to be a useful aid to assist in the interpretation of a fiscal statute. Perhaps, even the Explanatory Memoranda may be found to be an acceptable aid as it does cast some enlightenment on why the statute is being enacted, but only from the perspective of National Treasury.

Law Commission and Law Reform Reports, Government White Papers and International Conventions

A search of the LexisNexis Electronic Library (2010) revealed that to date, the judiciary have not been inclined to use Law Commission and Reform Reports, Government White Papers or International Conventions in the interpretation of fiscal statutes except where special provision for their use is made within the statute. The Income Tax Act has no such provision. Even the Katz Report (Katz Commission Report 1994), which recommended certain amendments to the Income Tax Act (some of which have been accepted and incorporated in the Income Tax Act), has not been used as an extrinsic aid to the later interpretation of those amendments.

English law also does not accept these materials as aids to the interpretation of statutes (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591(HL)). The argument against the use of Commission Reports, Government White Papers and the like is that the final legislation as passed by Parliament is usually substantially different from that recommended by a Commission.

Nevertheless, it is submitted that the judiciary may be inclined to consult reports, papers and International Conventions, not so much to interpret, for example, the ambit of a fundamental constitutional right as it relates to a taxpayer within a South African context, but rather to elucidate the problem areas associated with such a right and to enrich the arguments for the decision eventually handed down.

The Interpretation of Statutes Act

The Interpretation Act (Act No. 33 of 1957) does not assist in finding the underlying 'purpose' of a provision. Its unambitious and limited aim is to provide, *inter alia*,

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standard definitions of common provisions that permit statutes to be drafted more briefly than otherwise would have been the case.

Dictionaries and other literary sources

Dictionaries are commonly consulted as a guide to the meaning of words or phrases in a statute where there is no help from previously decided cases on the point (*Blue Circle Cement Ltd v CIR*, (46 SATC 1)), but dictionaries are not very useful when attempting to determine the ‘purpose’ of a statute. In *ITC 1619* (59 SATC 309), the taxpayer argued that the word ‘building’, as used in section 11(bA) of the Income Tax Act, includes the land on which a building stands. The taxpayer lost his case, the court holding that the taxpayer had not referred to any dictionary meaning which supported his contention that land falls within the definition of a ‘building’. Furthermore, applying the classical ‘purposive’ approach, the court held that the ordinary meanings of the words will only be departed from where it is found that such meanings were not intended when examined in the context of the section in which the words appear and against the background and purpose of the statute as a whole. The court found that there was no indication that the legislature used the word ‘building’ with the intention that it would also mean the land upon which it was erected.

Statutes or provisions borrowed from another country’s legislation

Several provisions in the Income Tax Act have been borrowed from Australian and English fiscal legislation. Where this has occurred, the judiciary tended to interpret such legislation in the same way as interpreted in the country of origin. The English case of *Atherton v British Insulated and Helsby Cables Ltd* (1926 AC 205), for example, postulated the test for determining whether expenditure is of a capital or revenue nature. The test has been quoted with approval in many South African cases dealing with the same subject matter (*New State Areas Ltd v CIR* (14 SATC 155)).

Taking the historical context of a provision into account formed an integral part of the *Slamdien* (*supra*) approach to the interpretation of a provision under the ‘purposive’ approach. Nevertheless, the original country’s interpretation will not pass muster if it is in conflict with the spirit and purport of the Constitution.

Earlier repealed statutes where the context indicated otherwise

The word ‘income’ is defined in section 1 of the Income Tax Act as meaning ‘gross income less exempt income’. Such definition of ‘income’ should be used whenever it

is found in the Income Tax Act, unless the context indicates otherwise, as happened in *CIR v Simpson* (16 SATC 268). The Appellate Division had to decide whether the word 'income', as used in section 9(2) of the 1941 Income Tax Act (Act No. 31 of 1941), the forerunner to section 7(2) of the present Income Tax Act, was to be given its defined meaning or its ordinary meaning of 'profits or gains'. The court held that the meaning of the word 'income' for the purposes of section 9(2) was not to be found in the definition section of the Act but in the original 1914 Income Tax Act (Act No. 28 of 1914), meaning 'profits or gains'. Finding otherwise would have led to absurd results.

Thus, even under the 'strict and literal' approach but only when an absurdity arose, the judiciary looked at the historical context of a provision to determine its meaning.

Statutes in pari materia

A judge may seek help from statutes that are *in pari materia* – statutes that relate to the same person or thing or to the same class of persons or things. A search of the LexisNexis Electronic Library (2010) revealed that the South African judiciary have not, so far, found a non-fiscal statute to be *in pari materia* with the Income Tax Act. However, since certain provisions of the Value-Added Tax Act are identical to those of the Income Tax Act, for example, the Pay-Now-Argue-Later provisions embodied in section 88 of the Income Tax Act and section 36 of the Value-Added Tax Act, they will probably be found to be *in pari materia*. The provisions are there to achieve the same purpose, namely to collect outstanding taxes expeditiously. Thus the constitutionality of the Pay-Now-Argue-Later provision of the Value-Added Tax Act, as determined in *Metcash Trading Ltd v C:SARS and Another* (63 SATC 13), would probably also hold true for the section 88 Pay-Now-Argue-Later provision in the Income Tax Act.

It is submitted that the fact that the judiciary are not inclined to find statutes other than fiscal statutes *in pari materia* is correct. It fits in with the approach that the judiciary should look to the preamble and long and short titles of a statute to assist in the determination of its 'purpose'. Statutes in other fields of the law do not normally have the same 'purpose' as a fiscal statute. Using non-fiscal legislation as being *in pari materia* with the Income Tax Act could light up the way in a manner that leads to the wrong path being followed.

Interpretational presumptions

Although interpretational presumptions are considered to be external aids to the interpretation of statutes, it is considered appropriate to analyse and discuss them separately.

Presumptions have been part of the South African common law for centuries, and many of them that deal with issues of fairness, equity and justice have been elevated to the status of a fundamental right by their inclusion in the Bill of Rights. Even the common law presumptions not elevated to fundamental right status are indirectly part of the Constitution and have to be developed (section 39(2) of the Constitution). As such, the judiciary are obliged to consider these presumptions and apply them, where appropriate, when interpreting a statute.

The ambit of the presumptions now specifically included in the Bill of Rights and certain other common law presumptions, as specified later in this article, are considered to be beyond the scope of this article. Thus, only the presumptions relating to *cassus omissus*, 'reading down', double taxation and language will be analysed.

In the case of *cassus omissus*, words may have to be 'necessarily implied' or 'read in'

Statutory interpretation does not usually extend to 'reading in' words that have been omitted from a statute to rectify or change a statute (*Brownstein v CIR*, 10 SATC 199; *Hippo Holdings Co Ltd v CIR*, 16 SATC 112). Such actions may be regarded as a "naked usurpation of the legislative function under the thin disguise of interpretation" (*per* Lord Simonds, in *Magor and St Mellons Rural District Council v Newport Corporation* ([1951] 2 All ER 839 at 841). However, the Constitution impliedly permits the 'reading in' of words, especially when our fundamental rights are at stake (section 172). The Constitution impliedly provides for far more drastic action – the 'severance' of a provision to maintain its constitutionality (see section 172(1)(a) of the Constitution and *South African National Defence Union v Minister of Defence and Another* (1999 (6) BCLR 615 (CC))).

The judiciary uses the phrase 'necessarily implied' to 'read in' words where there is a case of *cassus omissus*. In *CIR v Peoples Stores (Walvis Bay) (Pty) Ltd (supra)*, the court held there was a 'necessary implication' that an amount, which has been taxed as an accrual or receipt, cannot again be taxed when it is received or accrued, as that would be regarded as double taxation. It may also extend to a provision when it is obviously unfair or inequitable or excludes a common law principle such as the *audi alteram partem* rule (*Metcash Trading Ltd v C :SARS and Another (supra)*).

ITC 1584 (57 SATC 63) is a good example of the ‘necessarily implied’ or ‘reading in’ technique in practice. The case involved the interpretation of section 10(1)(u) of the Income Tax Act, which granted an exemption for amounts paid to a former spouse or children for their maintenance in terms of a divorce order. The question before the court was whether the provision could be extended to the payment of the maintenance from a deceased estate. The Judge, Seligson AJ, refused to follow a ‘strict and literal’ interpretation of section 10(1)(u), which created a “glaring anomaly with inequitable results”, and held that the legislature could never have intended such an “absurd and irrational” result and it “could never have been intended by the legislature when it enacted the exemption in section 10(1)(u)(70)”. He applied a so-called ‘judicial amendment’ to section 10(1)(u).

In the *Shell Annandale Farming* case (*supra*), the court did not permit the ‘reading in’ of the word ‘expropriation’ as a ‘deemed supply’ for the purposes of the Value-added Tax Act. The court was of the opinion that there was no *cassus omissus* in the provision and thus the *contra fiscum* presumption applied.

In both of these latter two cases, the judiciary, in following a ‘purposive’ approach, arrived at a just and equitable decision in favour of the taxpayer, something that was not easily achievable under the ‘strict and literal’ approach to the interpretation of statutes.

Statutes are ‘always speaking’: ‘reading down’ so that technical and commercial innovations and developments are taken into account

The fabric or the *mores* of society, but especially the Constitution, can influence the interpretation of statutes over time. Thus, the judiciary occasionally modify or adapt statutes to keep them constitutional or ‘alive’. This technique is known as ‘reading down’. The court in *Haynes v CIR* (64 SATC 321) used this technique in interpreting the scope and ambit of the ‘search and seizure’ provisions of section 74D of the Income Tax Act.

Applying the presumption that statutes are ‘always speaking’ sits more comfortably with the ‘purposive’ approach to the interpretation of statutes rather than with the ‘strict and literal’ approach.

Presumption against double taxation

There is an important presumption that there is no double deduction available to a taxpayer (*ITC 1766* (66 SATC 125)) unless a provision specifically provides for it or it

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is a practice generally prevailing at the date of assessment (*CIR v Hulett Aluminium (Pty) Ltd* (62 SATC 483)).

Correspondingly, the same amount cannot be taxed twice in the hands of the same person. In *Isaacs v CIR* (16 SATC 258), the court held that the imposition of income tax is fundamentally a tax upon a man's annual profits or gains and should not be taken as imposing tax upon a taxpayer twice in respect of the same profits or gains. Thus, unlike in the *Ochberg (supra)* case, the court, in effect, looked to the objective or 'purpose' of the statute as espoused in the preamble to the then Income Tax Act (Act No. 31 of 1941) in confirming this fundamental principle.

Nevertheless, the same amount may be taxed in the hands of different taxpayers. For example, one taxpayer may not get a deduction for a payment made whilst another taxpayer may have to pay tax on receipt of the same amount (*ITC 554* (13 SATC 211)).

Language presumptions

An informed analysis of words and word patterns was a necessary ingredient in the interpretation of statutes under the 'strict and literal' approach to interpreting statutes. The 'purposive' approach, as explained in the *Slamdien (supra)* case, also does not permit violence to be done to the precise wording of a statute unless the words used do not convey the 'purpose' underlying the statute. Thus, the analysis of language presumptions is just as important under the 'purposive' approach to the interpretation of statutes as it was under the 'strict and literal' approach.

***Ex abundanti cautela* or tautology**

There is a presumption against tautology (unnecessary repetition). Every word is important and none should be regarded as redundant or superfluous (*CIR v Golden Dumps (Pty) Ltd* (55 SATC 198). Where there is tautology, the repetitious words are not amended or altered; they are ignored (*Israelsohn v CIR* (18 SATC 247)).

In line with the presumption against tautology, it is not surprising that very few words in the provisions of the Income Tax Act have been found by the judiciary to be unnecessarily inserted or repetitious. One example can be found in *SBI v Lourens Erasmus (Edms) Bpk* (28 SATC 233), where the court indicated that the word 'solely' as used in the phrase 'solely or mainly' in the Income Tax Act was unnecessarily inserted since it added nothing to the meaning of the word 'mainly' as used in the phrase.

The use of the words 'shall', 'may' and 'must', 'all' and 'mainly'

The words 'shall' or 'must' are ordinarily used in the directive sense, whilst the use of the word 'may' is an indication of permissiveness (*Big Ben Soap Industries Ltd v CIR* (16 SATC 22)). The word 'may' implies optional conduct, unless the context and 'purpose' underlying the provision indicate otherwise, as was the case in *CIR v King* (14 SATC 184), where the court held that the word 'may' imposed a duty on the Commissioner to exercise his power in terms of the forerunner to the present section 80A of the Income Tax Act, and thus its meaning in that context was directory.

The word 'all' as used in a statute does not mean 'some'. If it is to mean anything other than its ordinary meaning "that must be done in the clearest possible language" (*R Koster & Son (Pty) Ltd & Another v CIR* (47 SATC 23 at 33)).

In *SBI v Lourens Erasmus (Edms) Bpk (supra)*, the court interpreted the meaning of the word 'mainly' as used in several sections of the Income Tax Act and found it to be a quantitative measure that meant more than 50 per cent. The revenue authorities appear not to deviate from this 'more than 50 per cent' meaning. It is usually an arbitrary determination and may lead to unfair discrimination when used in provisions that could violate a fundamental right. For example, section 23(m) of the Income Tax Act uses the word 'mainly' to determine whether an employee may get a deduction for expenditure which otherwise would have been allowed in terms of section 11(a) of the Income Tax Act, but for the application of section 23(m). A 'strict and literal' interpretation of the word 'mainly' could lead to the absurd result of an employee who earns 50.1 per cent of his remuneration in the form of commission income being able to obtain a deduction for expenditure incurred in earning such income, while an employee who earns only 49.9 per cent of his income in the form of commission income would not be able to obtain the same deduction. Under the 'purposive' approach to the interpretation of statutes, the judiciary could 'read down' and amend the meaning of 'mainly' so as to obtain a constitutionally equitable result. It is considered to be beyond the scope of this article to indicate an acceptable percentage to replace the word 'mainly' as the judiciary would have to determine a constitutionally acceptable percentage, if any, depending on the circumstances.

The use of the eiusdem generis and the noscitur a sociis presumptions in interpretation

The *eiusdem generis* (of the same kind) and *noscitur a sociis* (associated with) doctrines are important presumptions. Verbal patterns in a provision suggest how that provision should be interpreted. The rules provide that the meaning of a word may be inferred from the accompanying words.

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In *Joss v SIR* (41 SATC 206), for example, the court applied the *eiusdem generis* rule in determining that an interest-free loan fell within the ambit of the words ‘donation, settlement or other disposition’. It was held that the words ‘other disposition’ took their meaning from ‘donation’ and ‘settlement’. Although ‘other disposition’ could not be regarded as a ‘donation’ for donations tax purposes, an interest-free loan is regarded as a ‘continuing donation’ and thus falls within the meaning of ‘other disposition’ for the purposes of the now equivalent section 7(3) of the Income Tax Act.

Conclusion on the use of presumptions

Generally, under the ‘strict and literal’ approach to the interpretation of statutes, presumptions, especially the language presumptions, were used to great effect in interpreting statutes. This is also the case under the ‘purposive’ approach provided that the presumptions do not undermine the ‘purpose’ of a statute, taking into account the ‘intention of the legislature’, the history of the provision, its broad objects, the constitutional values that underlie it and its interrelationship with other provisions of the statute (*Slamdien (supra)*).

The presumptions listed in the paragraph below are now incorporated directly in the Constitution or indirectly as part of the common law. Because they are constitutionally entrenched presumptions and must be applied in the interpretation of statutes, they deserve separate analysis and discussion, which, unfortunately, is beyond the scope of this article.

Interpretational presumptions now embodied in the Constitution and further research opportunities

A discussion on the centuries-old common law presumptions that are covered in the Constitution generally and the Bill of Rights in particular, as already mentioned, is considered to be beyond the scope of this article. Being constitutionally enforceable means that great care and consideration must be given to their own interpretation within a fiscal environment. Many taxpayers’ rights have been and will be recognised and developed from the fundamental rights stipulated in the Bill of Rights and are considered a fertile area for further detailed research.

Section 8(3) of the Constitution provides that in order to give effect to a right in the Bill of Rights, the judiciary “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right”. Thus, all common law presumptions listed below are either specifically covered in the Constitution or are embraced indirectly as part of the common law that must be applied and developed.

Specifically incorporated in the Constitution are the presumptions against the:

- invasion of common law rights (section 8);
- construing of statutes that leads to a discriminatory result (section 9);
- abrogation of the protection of legal professional privilege (section 14);
- interference with vested property rights or alienating property without compensation (section 25);
- denial of procedural fairness to persons affected by the exercise of public power (section 33);
- ousting of the jurisdiction or restriction of access to the courts (section 34);
- exclusion of the right to a claim of self-incrimination (section 35); and
- exclusion of the *audi alteram partem* principle (section 35).

Presumptions that fall within the ‘catch all’ provisions of section 8(3) of the Constitution dealing with the common law and not dealt with already in this article include the presumption:

- in favour of the rule of law;
- favouring public policy (see *ITC 1490* (53 SATC 108) where no deduction was allowed for fines. Section 23(o) of the Income Tax Act now prohibits the deduction of fines and bribery or corruption payments);
- *contra fiscum* rule (giving preference to the interpretation that favours the taxpayer where there is ambiguity; see *Shell's Ammandale Farm (Pty) Ltd v C:SARS*, (*supra*));
- *semper in dubiis benigniora preferenda sunt* rule (if two interpretations are possible, one of which leads to hardship while the other does not, the Legislature will be presumed to have intended the latter rather than the former). A serious financial hardship rule is now included in the Tax Administration Act (Act No. 28 of 2011) that was promulgated on 4 July 2012 (but which will only take effect at a future date still to be announced by the President in the *Government Gazette*) in the case where penalties are involved (section 218(2)(f));
- *generalia specialibus non derogant* (in the fiscal context, general provisions do not overrule specific or special provisions. Thus section 80A (the general anti-tax avoidance rule) cannot overrule a specific anti-tax provision such as section 7(3) (*ITC 1558* (55 SATC 231)));
- against *delegatus delegare non potest* (a delegated power by the legislature may not be further delegated). The court in *CIR v Da Costa* (47 SATC 87) considered this presumption but found it unnecessary to decide whether this presumption applies in regard of the imposition of additional tax imposed in terms of section 76 of the Income Tax Act;

- against applying statutes extra-territorially unless there is a double taxation agreement with the country concerned;
- intending to legislate in conformity, and not in conflict, with international law;
- against administering punishment in the absence of fault or *mens rea* (intention);
- against applying statutes retrospectively (section 35 of the Constitution prohibits this where criminal sanctions are involved); and
- that a reverse onus should not be applied in penalty situations (*S v Zuma (supra)*; Goldswain 2009: 1–23).

Virtually all of these presumptions, whether they are directly or indirectly incorporated in the Constitution, require detailed further research to determine their scope and ambit within a fiscal context. The present author has already researched the theoretical ambit and scope of section 9 of the Constitution as it relates to equality and discrimination in a fiscal context (Goldswain 2011:1–25), but there are still many other fertile areas to research. Hopefully, this article can stimulate further research in some or all of the areas listed in this paragraph.

Conclusion

Figuratively speaking, no-one wants to be hanged for or “by a comma”. This is also true of the taxpayer. He or she does not want to pay more taxes than may legally be imposed and certainly does not want any constitutional right violated. The interpretation of a fiscal statute is the basis on which the revenue authorities can assess and collect taxes and, correspondingly, the foundation on which a taxpayer’s rights are built. A haphazard, inconsistent, discriminatory and unfair interpretation of a fiscal statute leads to chaos for both the revenue authorities and the taxpayer.

One of the two objectives of this article has been to analyse the process used in the interpretation of fiscal statutes. Based on the provisions of the Constitution, which is the ‘supreme’ law of the country, judicially decided cases and the views of prominent academic authors, it is clear that South Africa has transcended from applying the ‘strict and literal’ approach to the interpretation of statutes to the ‘purposive’ approach. This is also true in respect of fiscal statutes. The interpretation must take cognisance of the ‘spirit and purport’ of the Constitution and promote, *inter alia*, the protection of the liberty of a person, his or her property and the enforcement of the principles of human dignity, equality, fairness and transparency by public officials. Thus, where a previous interpretation of a statute now violates a provision of the Constitution, there are no ‘holy cows’ and the judiciary should not be afraid to overturn such a decision.

The judiciary may ‘read in’ in the case of a *cassus omissus* or ‘read down’ and apply the presumption that a statute is ‘always living’ to ensure its constitutionality. In so doing, the judiciary are, in effect, making law – something, which was frowned upon under the ‘strict and literal’ approach, but which sits comfortably with the ‘purposive’ approach.

The ‘strict and literal’ approach appeared, on the surface, to focus primarily on the language skills of the judiciary but, in practice, this was hardly ever true. Although appearing to hide behind the language skills necessary to interpret statutes, the judiciary used their legal skills, in most cases, to arrive at a measured and sensible decision. It is for this reason that very few precedent-creating decisions, even today, can be challenged successfully.

Where an absurdity arose as a result of a ‘strict and literal’ interpretation, the judiciary then sought the ‘intention of Parliament’. It was concluded in the current article that seeking the ‘intention of Parliament’ and finding the ‘purpose’ underlying a statute is not the same concept. Under the ‘purposive’ approach, something more than just finding the ‘intention of Parliament’ is necessary (*Minister of Land Affairs v Slamdien (supra)*). The history of the provision, its broad objects, the constitutional values that underlie it and its interrelationship with other provisions of the statute, whilst not violating the precise wording of the provision, must all be considered.

The other objective of this article has been an attempt to fingerprint the usefulness of aids, taking into account the constitutional constraints that may be used in interpreting fiscal statutes under the ‘purposive’ approach. The research on which this article is based indicated that all the aids, both internal and external, used under the ‘strict and literal’ approach to the interpretation of statutes, are still valid aids under the ‘purposive’ approach. In fact, the use of certain aids, for example, the use of the Hansard Reports, which were prohibited under the ‘strict and literal’ approach, would now seem to be valid aids in the interpretation of a statute.

Generally, anything contained in a statute because it has been passed by Parliament may be used as an aid to the interpretation of the statute. This would include the punctuation, the preamble, the long and short titles of a statute as well as the definitions – unless the context indicates otherwise. Even the unofficial Afrikaans version of a statute can be referred to in establishing the ambit of an English word, and *vice versa*.

The Constitution, together with precedent-setting judicial decisions, is the most important external aid. Textbooks and dictionaries are also often consulted. The Interpretation Act (Act No. 33 of 1957), however, belies its name and is not really a tool that can assist in finding the underlying ‘purpose’ of a provision.

Fingerprinting the judicial aids used in the interpretation of fiscal statutes

Several common law presumptions have been identified that can assist in the interpretation of statutes. For example, there is the presumption that there can be no double taxation. Many other presumptions deal with issues of fairness, equity and justice and have been elevated to the status of a fundamental right by their inclusion in the Bill of Rights. Even those not elevated to a fundamental right are indirectly part of the Constitution and have to be developed. These common law presumptions have been listed, but many of them are not discussed as their scope and ambit within the constitutional context require further research.

Aids, especially presumptions directly embodied in the Constitution, usually build the foundation on which a decision is based. Their use is a vital ingredient in establishing the 'purpose' of a statute. These aids add depth to the analysis of the scope and ambit of a statute.

An aid, whether it is an internal or external aid or even a presumption, is not normally used in isolation. Other aids and presumptions should also be used to reinforce and support the underlying 'purpose' of the provision and thus the interpretation decided upon. Such an approach will usually lead to a logical and fair interpretation of a statute.

The old mantra of the judiciary that there is "no equity about tax" (*CIR v Simpson (supra)* at 285; *New Union Goldfields Limited v CIR (supra)* at 15)) should give way to the refrain that there should be no more 'groping in the dark', and so-called 'holy cow' precedent-setting decisions of the past should not be endorsed if obviously incorrect.

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