

The tax deductibility of e-toll expenses in respect of salaried individuals

by

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DECLARATION

I, Jacobus Louis Botha, hereby declare that:

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30 April 2014

Table of Contents

SUMMARY	IV
CHAPTER 1: INTRODUCTION	1
1. BACKGROUND	1
2. PROBLEM STATEMENT	4
3. RESEARCH QUESTIONS	4
4. SIGNIFICANCE OF THE RESEARCH.....	5
5. RESEARCH METHODOLOGY	5
6. LIMITATIONS.....	6
7. OVERVIEW OF CHAPTERS.....	7
CHAPTER 2: SECTION 11(A) OF THE INCOME TAX ACT AND THE “PRODUCTION OF INCOME” REQUIREMENT WITHIN THE CONTEXT OF E-TOLLING	8
1. INTRODUCTION	8
2. THE “PRODUCTION OF INCOME” REQUIREMENT.....	12
3. THE PRODUCTION OF INCOME REQUIREMENT APPLIED IN THE CONTEXT OF E-TOLLING	16
4. CONCLUSION	18
CHAPTER 3: SECTION 23(B) OF THE INCOME TAX ACT - THE PROHIBITION ON THE DEDUCTION OF DOMESTIC OR PRIVATE EXPENSES AND HOW IT PROHIBITS THE DEDUCTION OF E-TOLL COMMUTING EXPENSES	19
1. INTRODUCTION	19
2. THE PROHIBITION ON THE DEDUCTION OF COMMUTING EXPENSES AS APPLIED BY OUR COURTS	20
2.1. <i>Commissioner for Inland Revenue v De Villiers</i>	20
2.2. <i>The application of the prohibition by our courts before and after the decision in De Villiers</i>	20
3. THE HISTORY OF SECTION 23(B) RELATING TO THE DEDUCTIBILITY OF HOME OFFICE EXPENSES.....	23
4. CONCLUSION	24
CHAPTER 4: SECTION 23(M) OF THE INCOME TAX ACT AND WHETHER IT RATIONALLY DIFFERENTIATES BETWEEN SALARIED INDIVIDUALS AND INDIVIDUALS WHO EARN THEIR INCOME MAINLY FROM COMMISSION	26
1. INTRODUCTION	26
2. THE INFLUENCE OF THE CONSTITUTION ON THE LAW OF TAXATION	27
3. SECTION 9(1) OF THE CONSTITUTION AND THE PRINCIPLE OF HORIZONTAL EQUITY.....	29
4. THE INTERPRETATION OF SECTION 23(M).....	32
5. WHY DOES SECTION 23(M) DIFFERENTIATE?	34
6. IS THE DIFFERENTIATION CREATED BY SECTION 23(M) RATIONAL?	35
6.1. <i>Specific deductions in s 11 and the likelihood of salaried and non-salaried individuals making use of them in the course of their trades</i>	37
6.2. <i>The number of salaried and non-salaried individuals</i>	42
6.3. <i>Will the omission of s 23 increase SARS’s administrative burden?</i>	44
7. CONCLUSION	44
CHAPTER 5: GRANTING A TAX DEDUCTION FOR E-TOLL COMMUTING EXPENSES INCURRED BY SALARIED WORK COMMUTERS IN ORDER TO GAIN PUBLIC ACCEPTANCE	45
1. INTRODUCTION	45
2. THE LACK OF PUBLIC ACCEPTANCE OF E-TOLLING IN GAUTENG	46
3. THE FACTORS THAT INFLUENCE PUBLIC ACCEPTANCE	47

3.1. <i>The perception of the congestion problem</i>	47
3.2. <i>Equity or fairness</i>	49
3.3. <i>Success of public outreach efforts</i>	50
3.4. <i>Use of toll revenues</i>	51
4. HOW CAN THE ISSUE OF PUBLIC ACCEPTANCE BE ADDRESSED BY GRANTING A TAX DEDUCTION FOR E-TOLL COMMUTING EXPENSES IN FAVOUR OF SALARIED WORK COMMUTERS?	52
4.1. <i>It will provide an incentive for users to become registered and especially registered e-tag users and in turn, improve the effectiveness of the current e-toll payment structure.</i> 53	
4.2. <i>The loss in tax revenue suffered by government could be offset by the reduced funding of SANRAL</i>	54
4.3. <i>The possible increase in congestion and decrease in the use of public transport, if any, is likely to be insignificant</i>	58
4.4 <i>It will assist in addressing the issue of equity on various fronts</i>	59
5. CONCLUSION	60
CHAPTER 6: CONCLUSION	61
BIBLIOGRAPHY	68
ANNEXURE A: EXAMPLE OF HOW THE GAUTENG FREEWAY IMPROVEMENT PROJECT TOLL CALCULATOR IS USED TO CALCULATE E-TOLL COMMUTING EXPENSES	75

Summary

This dissertation aims to establish whether individuals who have to incur e-toll expenses in travelling between their home and workplace since the implementation of e-tolling on roads forming part of the Gauteng Freeway Improvement Project (GFIP), referred to as “e-toll commuting expenses”, should be allowed to deduct these expenses for income tax purposes. These individuals are referred to as salaried individuals or salaried work commuters.

The implementation of e-tolling on GFIP roads has led to a situation where salaried work commuters who have to make use of these roads in travelling between their home and workplace will now have to incur this additional e-toll commuting expense without receiving any tax relief.

Although e-toll commuting expenses meet the requirements of the general deduction formula in s 11(a) of the Income Tax Act 58 of 1962 (“ITA”) to qualify as a deduction for income tax purposes, there are other provisions in the ITA which effectively prohibit the deduction of such commuting expenses.

Section 23(b) of the ITA prohibits the deduction of all commuting expenses on the basis that they constitute a domestic or private expense. This was the decision of the Appellate Division in *Commissioner for Inland Revenue v De Villiers*, which is the leading authority on this topic. This was also the decision in a number of court cases decided before and after this judgment was handed down. Section 23(b) has been amended by the Legislature from time to time and although these amendments related to the deductibility of home office expenses and not to the deductibility of commuting expenses, the reason behind these amendments are relevant to the topic of this dissertation.

Furthermore, s 23(m) also effectively prohibits the deduction of such commuting expenses by limiting the number of specific deductions in s 11(a) that are available to salaried individuals. As this limitation does not apply to individuals who work as agents or representatives and who earn their income mainly from commission, the question arises whether the differentiation created by this section is rational and constitutionally

permissible in terms of s 9(1) of the Constitution of the Republic of South Africa, 1996. It is submitted that such differentiation is indeed rational.

Considering the public's vehement opposition to the implementation of e-tolling and in light of the fact that, internationally, public acceptance is one of the factors that affect the success of such a road pricing initiative, it is argued that a tax deduction should be granted to salaried work commuters for all e-toll commuting expenses incurred by them. It is submitted that such a deduction will improve public acceptance by addressing some of the equity and socio-economic concerns caused by e-tolling and improve compliance with the e-tolling payment provisions without leading to a significant increase in congestion on GFIP roads. Although this will reduce government's revenue from income tax, the reduced government funding required by SANRAL can offset such loss in revenue due to increased public compliance with the e-tolling payment provisions.

Finally, it is submitted that a tax deduction for e-toll commuting expenses should only be granted to salaried work commuters who are also registered users in terms of the E-Road Regulations in Government Gazette 36911. Such a deduction provision should also require salaried work commuters to keep records of when they incurred these deductions. It is also argued that the amount that ought to be allowed as a deduction should be determined by having regard to the social and economic impact of the provisions of the ITA on salaried work commuters and so as to alleviate their tax burden without eroding the existing tax base.

Chapter 1: Introduction

1. Background

In 2008, the South African National Roads Agency Limited (“SANRAL”) declared certain Gauteng roads as toll roads in terms of s 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act (“SANRAL Act”¹).² Subsequently, the Gauteng Freeway Improvement Project (“GFIP”) was launched on 24 June 2008 with the promise of contributing “substantially to easing the daily lives of hundreds of thousands of motorists and passengers who currently spend many precious hours stuck in traffic.”³ The project was based on the concept of open road tolling, which comprises electronic tolling (e-tolling) and the obligatory use of transponders (e-tags) in all vehicles.⁴

The declaration “gave rise to unprecedented public and political debate.”⁵ The implementation of e-tolling on Gauteng freeways was suspended after an interim interdict pending the finalisation of a review application was granted in *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd*⁶ pursuant to an application brought by the Organisation for Urban Tolling Alliance (“OUTA”). The Minister of Transport subsequently withdrew the proclaimed tariffs payable to use these roads.⁷ However, the high court order was overturned in *National Treasury v OUTA*,⁸ paving the way for SANRAL to implement e-tolling on GFIP roads. OUTA’s review application of e-tolling on GFIP roads was dismissed by the North Gauteng High

¹ Act 7 of 1998.

² *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC), par [6] (“*National Treasury v OUTA*”).

³ “The Gauteng Freeway Improvement Project”, September 2008, 8.

⁴ *Ibid.*

⁵ *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* (90/2013) [2013] ZASCA 148 (9 October 2013) (“*OUTA v SANRAL (no 3)*”), par [2].

⁶ (17141/12) [2012] ZAGPPHC 63 (28 April 2012), 17 (“*OUTA v SANRAL (no 1)*”), 30.

⁷ South Africa (2012) Gauteng Freeway Improvement Project, toll roads: Publication of the tariffs for the different categories of road users and classes of motor vehicles: Withdrawal. (General Notice No. 451, 2012) *Government Gazette*, 35402:3, 31 May 2012.

⁸ Par [74].

Court⁹ and its appeal to the Supreme Court of Appeal was also unsuccessful, although it overturned the costs order awarded against OUTA in the high court.¹⁰ E-tolling finally went “live” on GFIP roads on 3 December 2013, amidst great opposition from various quarters of society.¹¹ In March 2014, the Democratic Alliance unsuccessfully challenged the constitutionality of the Transport Laws and Related Matters Amendment Act 3 of 2013, which was passed to facilitate e-tolling.¹²

There is, however, another issue that relates to income tax law: how are toll fees to be treated for purposes of calculating the taxable income of especially salaried individuals who use GFIP toll roads to travel to and from their workplace? This matter, which is the subject of this dissertation, has a number of aspects and it is not limited to an interpretation and application of the Income Tax Act (“ITA”).¹³

In *National Treasury v OUTA* the Constitutional Court held that “99% of the burden of tolling will be borne by more affluent road users who make up the first and second quintile of income earners in Gauteng and that public transport users will be exempt from paying tolls.¹⁴ *The harm these users will experience will therefore not be of a*

⁹ *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* (17141/2012) [2012] ZAGPPHC 323 (13 December 2012) (“*OUTA v SANRAL (no 2)*”).

¹⁰ *OUTA v SANRAL (no 3)*, paras [43]-[45].

¹¹ Tubbs B, “E-tolls: the Grinch that stole Christmas”, 21 November 2013. Available at http://www.itweb.co.za/index.php?option=com_content&view=article&id=69204 (accessed on 6 February 2014).

¹² *Democratic Alliance v The President of South Africa* (18392/13) [2014] ZAWCHC 31 (13 March 2014), par [1]-[2] (“*Democratic Alliance*”). An application similar to this one was brought by the Tolhek Aksiegroep in the North Gauteng High Court on 2 December 2013, but was dismissed as it was not considered urgent – see paras [111][e] and [111][i] of the *Democratic Alliance* decision.

¹³ Act 58 of 1962, as amended. “Taxable income” is defined as the aggregate of the amount remaining after deducting from the income of any person all the amounts allowed under Part I of Chapter II to be deducted from or set off against such income; and all amounts to be included or deemed to be included in the taxable income of any person in terms of the ITA – ITA, s 1.

¹⁴ “Qualifying public transport vehicles” are exempted from the payment of tolls on the GFIP – South Africa (2013) South African National Roads Agency Limited and National Roads Act (7/1998): Tariffs for different categories of road users and classes of motor vehicles: Gauteng Freeway improvement project, toll roads: For public comments (General Notice No. 1006, 2013) *Government Gazette*, 36912:20, 9 October 2013 (“GG 36912”).

*pressing or acute kind.*¹⁵ Although this statement might be correct, SANRAL commissioned an economic analysis of the GFIP the findings of which were published in 2010, which found that work commuters were potentially vulnerable to e-tolling as they have little choice in making this journey.¹⁶ To finance the construction and future maintenance of roads forming part of the GFIP, the “user pay” principle was applied.¹⁷ This means that persons using one of these roads have to pay a specified amount every time they pass under a toll plaza as the result of a so-called e-transaction.¹⁸ They will incur this additional toll expense in travelling with their personal vehicles¹⁹ between their home and place of employment, which will be referred to as an “e-toll commuting expense”,²⁰ to use roads that they previously used at no additional cost, without receiving any tax relief. This is because of ss 23(b) and 23(m) of the ITA. Section 23(b) prohibits the deduction of “domestic or private expenses” from a person’s income²¹ for

¹⁵ *National Treasury v OUTA*, par [62].

¹⁶ Standish *et al* (2010) *An Economic Analysis of the Gauteng Freeway Improvement Scheme*, 69 & 74 (“GFIP Economic Analysis”).

¹⁷ *National Treasury v OUTA*, par [5].

¹⁸ *OUTA v SANRAL (no 1)*, 17. The latest promulgated E-Road Regulations refer to this as an “e-toll transaction” and defines it as “the recording of the passage of a motor vehicle under a gantry and the simultaneous recording of the liability of the user of that motor vehicle to pay toll for the use of that motor vehicle on the road on which the gantry is situated” - South Africa (2013) South African National Roads Agency Limited and National Roads Act (7/1998): E-Road Regulations (General Notice No. 739) *Government Gazette*, 36911:6, 9 October 2013 (“E-Road Regulations”).

¹⁹ In this dissertation “personal vehicles” should be understood as referring to any vehicle used, not necessarily owned, by a salaried work commuter in travelling to work which is not provided to him by his employer and that does not constitute public transport. Compare Belgian tax legislation, which distinguishes between commuting expenses incurred through the use of a personal vehicle and through other means - Haulotte *et al* (2013) *Tax Survey Research and Information Department of the Federal Public Service Finance of Belgium*. Available at http://financien.belgium.be/nl/binaries/FiscaalMemento2013_EN_tcm306-223399.pdf (accessed on 29 April 2014) (“Haulotte *et al*”).

²⁰ Expenses incurred in travelling between one’s place of residence and place of employment are sometimes referred to as commuting expenses – Hirte & Tscharaktschiew (2011), 1. This term will be employed throughout this dissertation. E-toll commuting expenses do not include any e-toll expenses incurred in making other private journeys for example from one’s home to a shopping centre to do grocery shopping.

²¹ “Income” is defined as the amount remaining of the gross income of any person for any year or period of assessment after deducting therefrom any amounts exempt from normal tax under Part I of Chapter II – ITA, s 1.

the calculation of his²² taxable income²³ whereas s 23(m) states that an individual may only deduct certain expenses relating to his employment from his income for tax purposes, even though employment is also regarded as a “trade”.²⁴ Work commuters affected by these provisions will be referred to as “salaried work commuters” or “salaried individuals”.

2. Problem statement

The question discussed in this dissertation is whether government should consider amending the ITA to enable salaried work commuters to deduct e-toll commuting expenses from their income for income tax purposes.

3. Research questions

In addressing the problem statement, the following questions arise:

1. Would salaried work commuters be allowed to deduct e-toll commuting expenses from their taxable income in terms of s 11(a) of the ITA, but for ss 23(b) and 23(m)?
2. Why does s 23(b) prohibit the deduction of commuting expenses?
3. Why does s 23(m) limit the number of deductions available to salaried individuals, but not to those persons who earn their income on a commission basis and is this differentiation between the two classes of persons constitutionally permissible?
4. How can the granting of a tax deduction in favour of salaried work commuters for e-toll commuting expenses improve public acceptance of e-tolling on the GFIP, including some of the socio-economic consequences thereof?

²² As the ITA makes use of the male form of the pronoun, it will also be used in this dissertation. Where the pronouns “him” or “his” are used, it should be understood that reference is made to “her” as well.

²³ Although s 8(1) of the ITA also states that any expenses incurred in travelling between a person’s place of residence and place of employment are deemed not to have been expended for business purposes and are therefore not deductible for income tax purposes, it deals with the situation where employees receive a travel allowance from their employers and as such it will not be discussed in this dissertation.

²⁴ ITA, s 1.

5. If such a tax deduction were to be introduced, should the deduction apply to all salaried work commuters and how much of the e-toll commuting expense should be allowed as a deduction?

4. Significance of the research

Toll roads in South Africa are not a new phenomenon. The GFIP is an urban toll road scheme,²⁵ as opposed to other toll roads, which are all instances of "rural" or "long haul" tolling where motorists are stopped at toll plazas to pay for using the road.²⁶ Furthermore "the sections earmarked for tolling, constitute the main arteries for the movement of motor vehicles in and around the two major cities of South Africa that constitute the economic and administrative heartland of the country."²⁷ The implementation of the e-toll system on Gauteng freeways has the effect of imposing an additional expense on motorists, especially on salaried work commuters living in Gauteng, who previously used the same roads to travel to and from work on a daily basis free of charge.²⁸ Coupled with the socio-economic conditions prevailing in South Africa and the public opposition to e-tolling, this research aims to investigate whether tax law, through the tax deduction proffered, can be utilised by government to address social and socio-economic concerns, such as those caused by e-tolling. It is hoped that this dissertation will lead to more research being conducted regarding the deductibility of commuting expenses, including e-toll commuting expenses, for income tax purposes.

5. Research methodology

An interpretive, analytical and argumentative approach will be adopted in this dissertation. In answering the questions mentioned, the relevant provisions in the ITA will be interpreted and analysed, although reference will also be made to other

²⁵ *OUTA v SANRAL (no 1)*, 17.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ In *OUTA v SANRAL (no 1)*, the court mentioned the effect the imposition of the toll fees would have on four individuals who are members of OUTA and who have no other choice but to use these roads – pages 12-14 of the judgment. The Quadpara Association of South Africa, which protects and promotes the rights and interests of people with disabilities and people with mobility impairment, also indicated that the effect of the payment of tolls on their members would be devastating – pages 15-16 of the judgment.

legislation where applicable. Based on the interpretation and analysis of the provisions in question, an argumentative approach will be adopted to address whether the ITA should be amended and how it can be amended to address the issues of public acceptance and some of the socio-economic consequences arising from the implementation of e-tolling on the GFIP.

6. Limitations

Unlike the litigation proceedings mentioned under the heading entitled Background, the purpose of this dissertation is not to question the legality of implementing e-tolling on GFIP roads or other roads in future. The discussion will be limited to how the ITA affects especially salaried work commuters, who were able to use GFIP roads free of charge in travelling to work prior to the implementation of e-tolling, but who will now have to incur e-toll commuting expenses on this journey and why government should consider amending the ITA so that they are allowed to deduct this expense. Although s 23(b) of the ITA prohibits the deduction of all commuting expenses incurred between one's home and workplace as they constitute "domestic or private expenses",²⁹ the deduction proffered in this dissertation only applies to e-toll commuting expenses. This is because they create an additional expense for salaried work commuters who use their personal vehicles in travelling to work. It will not be argued that expenses incurred when using "long haul" or "rural" toll roads³⁰ when travelling to work should be deducted.³¹ Although e-tolling might be rolled out in other provinces in future,³²

²⁹ *Commissioner for Inland Revenue v De Villiers* 1962 (1) SA 581 (A). It dealt with the provision as it appeared in s 12(b) of the Income Tax Act 31 of 1941.

³⁰ *OUTA v SANRAL (no 1)*, 13.

³¹ An urban toll road network, such as the GFIP, causes certain salaried work commuters who have to use the network to travel between their home and place of employment, to incur a daily e-toll commuting expense, which is not tax deductible. Costs incurred on a "long haul" toll road in conducting business will usually arise in a slightly different manner; for example, a cattle farmer who has to incur expenses in transporting cattle from his farm in Bela-Bela in the Limpopo Province to an auction in Brandfort where they will be put up for sale, will be allowed to deduct all his travelling expenses, including toll road expenses from his taxable income. The same would apply to an out-of-town attorney, who lives in Polokwane and has to travel to Johannesburg to represent a client in a matter in the South Gauteng High Court. However, if the same attorney was living in Pretoria, working at a law firm in Johannesburg and travelled to the South Gauteng High Court to represent his client, he would not be able to deduct any of his travel expenses, except those incurred in travelling between his place of employment and the South Gauteng High Court.

³² Jooste B, *Cape Argus*, "ANC urges council to learn from Gauteng on toll road plans", 9 December 2011; Mgaga T, *Witness*, "No plans for shunned e-toll in KZN", 22 February 2011; Staff reporters, *Daily News*, "No e-toll plans for KZN...yet", 8 February 2011.

reference will be made mainly to the GFIP urban toll road network, as it is the first of its kind in South Africa.³³ The privacy concerns caused by the use of technology in e-tolling will also not be addressed.³⁴

7. Overview of chapters

In chapter 2, s 11(a) of the ITA will be discussed and in particular the “production of income” requirement, within the context of salaried work commuters who incur e-toll commuting expenses on a daily basis when using GFIP roads. Chapter 3 will deal with s 23(b), in particular the way it has been applied by our courts to prohibit the deduction of commuting expenses and how it has been amended by the Legislature over a period of time. In chapter 4, the focus will fall on whether s 23(m) of the ITA rationally differentiates in terms of s 9(1) of the Constitution between salaried individuals and individuals who earn their income mainly from commission. Chapter 5 will deal with how the issue of public acceptance of electronic tolling projects has arisen internationally, the factors that influence public acceptance, and whether the lack of public acceptance, including the problem of equity in the case of e-tolling on GFIP roads can be addressed through granting a tax deduction for e-toll commuting expenses to salaried work commuters. In chapter 6, the conditions that would apply to such a deduction will be set out if it is found that government should consider granting the deduction in question.

³³ *OUTA v SANRAL (no 1)*, 17.

³⁴ Hommes and Holmner (2013), 198 *et seq.*

Chapter 2: Section 11(a) of the Income Tax Act and the “production of income” requirement within the context of e-tolling

1. Introduction

An individual who carries on a trade may deduct from his income any amount that qualifies as a deduction in terms of the so-called general deduction formula.³⁵ This formula consists of two legs. First, s 11(a), known as the positive test, states that any expenditure or loss may be deducted if it is incurred in the production of income, provided that such expenditure or loss is not of a capital nature.³⁶ The second leg of the test is s 23(g), known as the negative test,³⁷ which stipulates that an amount may only be deducted to the extent that it was “laid out or expended for the purposes of trade.” Only the positive component of this test will be considered.³⁸ The purpose of this chapter is to examine whether e-toll commuting expenses would be deductible in terms of s 11(a), but for the provisions of ss 23(b) and 23(m) of the ITA, as explained in chapter 1.

The focus will fall mainly on the “production of income” requirement, as it is the only provision in s 11(a) that would prohibit a person from deducting e-toll commuting expenses, from his taxable income. E-toll commuting expenses meet all the other requirements of s 11(a) of the ITA: Firstly, the definition of “trade”³⁹ includes employment and therefore any e-toll commuting expenses incurred will meet this requirement. Secondly, monies paid towards the use of GFIP roads will constitute

³⁵ De Koker & Williams (2013), par 10.19. Section 11(a) sets out six requirements that have to be met for an amount to qualify as a deduction.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ The negative component of the general deduction formula, is not relevant to this discussion as this dissertation only argues for the deduction of e-toll work commuting expenses and not for the deduction of all e-toll expenses on GFIP roads. As employment is included in the definition of “trade”, e-toll commuting expenses can be considered to be “laid out or expended for the purposes of trade” within the context of s 11(a), unlike other e-toll expenses.

³⁹ “Trade” is defined in s 1 of the ITA as including every profession, trade, business, **employment**, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act, 1978 (Act No. 57 of 1978), or any design as defined in the Designs Act, 1993 (Act No. 195 of 1993), or any trade mark as defined in the Trade Marks Act, 1993 (Act No. 194 of 1993), or any copyright as defined in the Copyright Act, 1978 (Act No. 98 of 1978), or any other property which is of a similar nature.

expenditure as it entails “the action of spending funds.”⁴⁰ Thirdly, according to *Edgars Stores Ltd v Commissioner for Inland Revenue*,⁴¹ the expenditure will be “actually incurred” if the taxpayer has “incurred an unconditional legal obligation during the year of assessment in question” even if the taxpayer has not discharged the debt in the same year.⁴² This means that e-toll commuting expenses will be deductible in the year in which they are incurred unless the terms of use allow the user to pay a reduced amount if certain conditions are met, but which can only be met in the following year of assessment. This could happen if an alternate user⁴³ makes use of one of the grace period discounts or one of the discounts after the grace period available to him where the e-toll transaction is incurred in one year of assessment, but the grace period expires in the next year of assessment.⁴⁴

GG 36912 distinguishes between alternate users, registered e-tag users, non-registered e-tag users and registered VLN users. If one considers paragraph 5.16 read with the wording in Table 6 of GG 36912, it appears that an alternate user who is registered with SANRAL and has an e-tag, but does not meet the criteria to be a registered e-tag user at the time of the e-toll transaction, will only pay the amount payable by registered e-tag users, set out in Column 3 of Table 1, if he pays within the grace period. Similarly, a user who is identified by VLN⁴⁵ at the time of the e-toll transaction, but does not meet the criteria to be a registered VLN user at the time, will

⁴⁰ *Commissioner, South African Revenue Service v Labat Africa Ltd* 2013 (2) SA 33 (SCA), par [12]. The court explained that the ordinary meaning of the word “expenditure” also refers to the action of disbursement, consumption or within the context of the ITA the disbursement of assets other than money with a monetary value. See also *Joffe & Co (Pty) Ltd v Commissioner for Inland Revenue* 1946 AD 157 for a detailed discussion of the meaning of “expenditure and losses”.

⁴¹ 1988 (3) SA 876 (A), 889 (“*Edgars Stores*”).

⁴² *Edgars Stores*, 888; *Nasionale Pers Bpk v Kommisaris van Binnelandse Inkomste* 1986 (3) SA 549 (A), 564A.

⁴³ An alternate user is defined as a user who is not a registered e-tag user, a registered VLN user, a day-pass user for the e-road used or a non-registered e-tag user – E-Road Regulations, 5.

⁴⁴ The grace period is defined as “seven days from the date and time that an e-toll transaction occurs” – GG 36912, 4.

⁴⁵ VLN is defined in the E-Road Regulations as “the motor Vehicle Licence Number allocated to a motor vehicle under s 4(3) of the National Road Traffic Act or under the legislation of the country in which the motor vehicle was registered.” Section 4(3) of the National Road Traffic Act 93 of 1996 states that a motor vehicle must be registered and licensed in accordance with the Act before it may be used on a public road.

only pay the amount payable by registered VLN users, set out in Column 5 of Table 1, if he pays within 7 days of the date and time that the e-toll transaction occurred.⁴⁶ Lastly, an alternate user who uses the GFIP toll road for the first time and fails to pay within the grace period, but registers with SANRAL as an e-tag or VLN user and pays the invoice referred to in paragraph 5.19, within 30 days of the invoice date, is entitled to an additional discount so that after all the discounts have been applied, he pays the amount equal to the Standard Tariff shown in Column 2 of Table 1.⁴⁷

To illustrate how the “actually incurred” principle, as interpreted in *Edgars Stores*, applies in this context an example will be used. A salaried work commuter (say) Mr Dlamini, incurs six e-toll transactions on 28 February 2014, the first at 07:00 and the last at 17:50, to none of which the time-of-day discount applies.⁴⁸ He travels to work from his home in Centurion to his place of employment in Sandton and back. In doing so he enters the GFIP toll road at the John Vorster interchange on the N1 and exits the GFIP toll road at the Rivonia interchange, which is also on the N1 and passes under the Pikoko, Flamingo, Sunbird, Tarentaal, Ihobe and Ivusi gantries in this order in driving to his place of employment and in reverse order, when travelling back home.⁴⁹ The cost for each e-toll transaction as well as the total cost of the journey, depending on what kind of user he is, is set out in Table 1 below.

⁴⁶ The frequent user and time-of-day discounts apply to alternate users who pay for an e-toll transaction within the grace period, subject to complying with the requirements of the frequent user discounts as contemplated in paragraphs 5.9 to 5.14 and the requirements of the time-of-day discount as contemplated in paragraphs 5.5 to 5.8, respectively – see GG 36912, paras 5.18.1 and 5.18.2.

⁴⁷ GG 36912, par 5.20.

⁴⁸ The time-of-day discounts for class A2 and other vehicles are set out in Table 4 of GG 36912.

⁴⁹ To establish which toll gantries he would pass under, the Gauteng Freeway Improvement Project Toll Calculator, as found on SANRAL’s website, was used. Available at <http://tollcalc.sanral.co.za/etoll/> (accessed on 15 January 2014) (“Toll Calculator”) – see Annexure A to this dissertation.

Table 1: Cost of Mr Dlamini's journey depending on his road user status (all amounts are in Rand):⁵⁰

Gantries passed under	Standard tariff	Registered e-tag user tariff	Non-registered e-tag user tariff	Registered VLN user tariff	Alternate user tariff
Pikoko	5.63	2.91	5.63	5.63	16.89
Flamingo	5.34	2.76	5.34	5.34	16.02
Sunbird	6.50	3.36	6.50	6.50	19.50
Tarentaal	4.99	2.58	4.99	4.99	14.97
Ihobe	6.50	3.36	6.50	6.50	19.50
Ivusi	5.34	2.76	5.34	5.34	16.02
Total (one way)	34.30	17.73	34.30	34.30	102.90
Total (return trip)	68.6	35.48	68.6	68.6	205.8
Total	68.6	35.48	68.6	68.6	205.8

When each e-toll transaction occurs, Mr Dlamini becomes due for at least the total amount of R68.60 based on the standard tariff for each e-toll transaction, before any discounts are taken into account.⁵¹ In terms of the “actually incurred” principle as interpreted in *Edgars Stores*, this will be the amount deductible in the 2014 year of assessment before any discounts are taken into account. If in terms of par 5.16, read with table 6 in GG 36912, Mr Dlamini was registered with SANRAL and had an e-tag, but did not meet the requirements to be a registered e-tag user when he incurred the transactions on 28 February and pays for all the e-toll transactions before 07:00 on 7 March 2014,⁵² he will only have to pay the reduced amount of R35.48 on 7 March 2014. This means that his original liability is reduced by R33.12 (R68.6 - R35.48). However, as payment of the reduced amount was conditional upon his compliance with the requirements to be a registered e-tag user within seven days of the original transaction occurring, he can only deduct R35.48 in the 2014 year of assessment. If he

⁵⁰ The information in this table is based on the information set out in Table 1: Tariffs for motor vehicle class: Class A2 as it appears in GG 36912.

⁵¹ This also seems to be the way in which SANRAL will calculate the amount due to it. This conclusion was reached after entering all the information in the example into the Toll Calculator and going through steps 1 to 4 – see Annexure A to this dissertation.

⁵² Obviously, the grace periods for the e-toll transactions incurred later than 07:00 on the morning of 28 February expire later than 07:00 on the morning of 7 March 2014, but as in all likelihood he will pay for all the e-toll transactions at once, this assumption has been made.

does not meet the requirements to be a registered e-tag user on 7 March 2014, he can deduct the additional amount of R33.12 in the 2015 year of assessment.

If he was identified by means of VLN, but did not meet the requirements to be a registered VLN user when the e-toll transactions occurred, and pays before 07:00 on 7 March 2014, it will not affect his tax liability for the 2015 year of assessment as the total amount payable by a registered VLN user is the same as the amount payable based on the standard tariff. If Mr Dlamini was an alternate user on 28 February, but registers with SANRAL as an e-tag or VLN user and pays the invoice amount of R205.80 before 28 March 2014, he will be entitled to an additional discount, which will mean he will only pay the total amount of R68.60, based on the Standard Tariff. This provision will therefore also not affect his tax liability for the 2015 year of assessment.

Lastly, e-toll commuting expenses are not capital in nature, as they pertain to an individual's income producing activities, i.e. that of producing income by means of employment, which is listed as a trade in the ITA.

2. The “production of income” requirement

The leading authority on this issue is *Port Elizabeth Electric Tramway Company Ltd v Commissioner for Inland Revenue (“PE Tramway”)*.⁵³ The appellant carried on business as a tramway company. One of its drivers lost control of its tram-cars, causing an accident in which the driver suffered fatal injuries.⁵⁴ A court having ruled that the company had to pay compensation to the deceased's widow in terms of the Workmen's Compensation Act, the company sought to deduct the amount of compensation as well as legal expenses it incurred in those court proceedings for income tax purposes.⁵⁵

The court stated that two questions have to be answered to determine whether an expense was incurred in the production of income: Firstly, it must be determined “whether the act, to which the expenditure is attached, is performed in the production of

⁵³ 1936 CPD 241.

⁵⁴ *PE Tramway*, 242-243.

⁵⁵ *PE Tramway*, 243.

income” and secondly “whether the expenditure is linked to it closely enough.”⁵⁶ In addition, the court held that although it might appear that only acts “*necessary* to earn the income and expenditure *necessarily* attendant upon such acts” may be deducted it is not the case as “businesses are conducted by different persons in different ways”.⁵⁷ The purpose of the act that creates the expenditure must be considered.⁵⁸ This means that “all expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are *bona fide* incurred for the more efficient performance of such operation provided they are so closely connected with it that they may be regarded as part of the cost of performing it.”⁵⁹ On the facts the court held that as the employment of drivers is necessary in carrying on the business of the tramway company, and the employment of drivers carries with it as a necessary consequence a potential liability to pay compensation if such drivers are injured in the course of their employment,⁶⁰ the compensation paid to the widow was deductible.⁶¹

These principles have been applied in a number of cases. In *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* (“*Genn & Co*”)⁶² the court stated that expenditure is closely enough connected to the income-producing act if it would be “proper, natural or reasonable to regard the expenses as part of the cost of performing the operation.”⁶³ Whether the connection is close enough for such expenses to be “naturally, properly or reasonably” regarded as part of the income-producing operations depends on the circumstances of each case.⁶⁴ One must also look at the purpose of the expenditure and “to what it actually effects” to determine whether the expenditure and the income-

⁵⁶ *PE Tramway*, 245.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *PE Tramway*, 246.

⁶⁰ *PE Tramway*, 247.

⁶¹ *PE Tramway*, 248.

⁶² 1955 (3) SA 293 (A).

⁶³ *Genn & Co*, 299C.

⁶⁴ *Ibid.*

earning operations are linked closely enough.⁶⁵

More recently, in *Commissioner, South African Revenue Service v Scribante Construction (Pty) Ltd*⁶⁶ the Supreme Court of Appeal applied these principles by finding that interest incurred by a construction company in loaning money from its shareholders⁶⁷ was incurred in the production of income as having these funds at its disposal enabled the company to increase “its competitiveness and, temporarily, its income in the form of interest which it retained.”⁶⁸ This indicated a sufficiently close link between the procurement of the loans and the company’s income-earning operations. Although the company could have operated without these funds (loans), they allowed the company to perform its operations more efficiently, which meant the expense was still deductible in terms of the decision in *PE Tramway*.⁶⁹

The principles laid down in *Genn & Co* have also been applied to hold that the discounting of promissory notes for the purposes of creating cash flow and conducting one’s business⁷⁰ was an expense incurred in the production of income.⁷¹ Furthermore, it has been held that amounts expended by a South African subsidiary company in order to retain its subsidiary status with regard to its American parent company⁷² were deductible as there was a sufficiently close link between the amounts expended in meeting its social responsibility obligations and its income-earning operations.⁷³

In *Sub-Nigel Ltd v Commissioner for Inland Revenue*⁷⁴ the court held that insurance premiums paid by a company to protect itself against losses it would suffer in the event

⁶⁵ *Genn & Co*, 299F-G.

⁶⁶ 2002 (4) SA 835 (SCA) (“*Scribante Construction*”).

⁶⁷ *Scribante Construction*, par [2].

⁶⁸ *Scribante Construction*, par [10].

⁶⁹ *Ibid.*

⁷⁰ *Commissioner for South African Revenue Service v Creative Productions (Pty) Ltd* [1999] 2 All SA 14 (N), 16 (“*Creative Productions*”).

⁷¹ *Creative Productions*, 21.

⁷² *Warner Lambert SA (Pty) Ltd v Commissioner, South African Revenue Service* 2003 (5) SA 344 (SCA), paras [1]-[5] & [15] (“*Warner Lambert*”).

⁷³ *Warner Lambert*, paras [16], [18] & [20].

⁷⁴ 1948 (4) SA 580 (A) (“*Sub-Nigel*”).

that fire caused its mining operations to come to a standstill,⁷⁵ were deductible as they were paid for the purpose of producing income even though no income “actually resulted” from these payments.⁷⁶ With regard to the production of income requirement, the court stated that the question is not whether “a particular item of expenditure produced any part of the income”, but “whether that item of expenditure was incurred for the purpose of earning income.”⁷⁷ Therefore, expenditure need not be “causally related” to the income generated by the business to be deductible.⁷⁸

This principle was also illustrated in *ITC 1842*,⁷⁹ where the court had to decide whether or not audit fees incurred by a company, which earns its income mainly through dividends and interest, were deductible.⁸⁰ The court held that the auditing of financial records is an expense that is “necessarily attached” to the performance of the company’s income-earning operations and even though no revenue is directly attributable thereto, the expense was still incurred for the purpose of producing income.⁸¹ Expenses incidentally incurred in conducting the business of a company are incurred in the production of income.⁸² However, the mere fact that a taxpayer is required by law to incur certain expenses does not mean that they were incurred to produce income.⁸³

In *ITC 1847*⁸⁴ the court held that it is not for it to say, with the benefit of hindsight, that expenditure should be disallowed because it was excessive or not strictly necessary. “If

⁷⁵ *Sub-Nigel*, 587-588.

⁷⁶ *Ibid.*

⁷⁷ *Sub-Nigel*, 592.

⁷⁸ *Commissioner for Inland Revenue v Drakensburg Garden Hotel (Pty) Ltd* 1960 (2) SA 475, 479H-480A.

⁷⁹ 72 SATC 118 (“*ITC 1842*”).

⁸⁰ *ITC 1842*, par [2] & [8].

⁸¹ *ITC 1842*, par [15].

⁸² *Sentra–Oes Koöperatief Bpk v Commissioner for Inland Revenue* 1995 (3) SA 197 (A), 209D-210B.

⁸³ *ITC 1842*, par [13].

⁸⁴ 73 SATC 126 (“*ITC 1847*”).

the purpose of the expenditure was to produce income, in the course of trade, and the expenditure was not of a capital nature, then that is sufficient.”⁸⁵

All the cases mentioned provide practical examples of when an expense will be regarded as having been incurred in the production of income. In the next section the abovementioned principles will be applied to illustrate how e-toll commuting expenses incurred when using GFIP toll roads, meet the “production of income” requirement.

3. The production of income requirement applied in the context of e-tolling

In terms of the test laid down in *PE Tramway*, the first question to be answered is whether the act of driving to one’s place of employment and back home, through which a salaried work commuter will incur e-toll commuting expenses if he makes use of GFIP roads, is performed in the production of income, and, secondly, whether incurring e-toll commuting expenses is closely enough related to the act of driving to one’s place of employment.

As it is necessary for a salaried work commuter to travel from his place of residence to his place of employment (if he does not work from home) to conduct his trade it can be said that the act of driving to work and back to his place of residence is performed in the production of income. E-toll commuting expenses are incidentally incurred when a taxpayer makes use of GFIP roads in travelling between his place of employment and his place of residence and therefore it can be said that they are closely enough related to the act of employment, through which a salaried work commuter earns income.

Furthermore, the expense is incurred to travel to the place of employment where he conducts his trade and therefore it is incurred to produce income. A person who is employed by someone to work at specific premises must travel to those premises to conduct his trade and hence e-toll commuting expenses are attributable to being employed. Without travelling to work and actually being at the premises a salaried individual cannot conduct his trade. However, in line with the principle laid down in *ITC 1842*, it is not suggested that e-toll expenses should be deductible because one is required by law to pay the expense when using GFIP roads.

⁸⁵ *ITC 1847*, par [22].

As stated in *PE Tramway* and *ITC 1847*, excessive expenses are deductible as long as they are incurred *bona fide* in the production of income, bearing in mind that different businesses conduct their businesses in different ways. Thus a salaried work commuter is not obliged to make minimal use of GFIP roads in travelling between the place of employment and his place of residence by using alternative roads, but can only deduct e-toll commuting expenses to the extent to which they are incurred in travelling to and from work. In a practical sense this would mean that the commuter could only deduct e-toll commuting expenses incurred in travelling the shortest available route using the GFIP network. In line with *PE Tramway* and *Scribante Construction*, the commuter is entitled to make use of GFIP roads in travelling to work instead of using alternative routes as it will save time and increase the efficiency with which he can travel to work and conduct his trade. For example, if the shortest available route to the place of employment using the GFIP network entails that he passes under two toll gantries as opposed to three if he has to first drop a child off at school before going to work, he will only be allowed to deduct the e-toll commuting expense that would have been incurred if he passed under only two toll gantries.

To illustrate how the expense (and concomitant tax deduction) will be calculated, the example of Mr Dlamini will again be used. It will be assumed that he is a salaried work commuter, registered e-tag user and that he drives a light motor vehicle (Class A2). The route that he travels to work is the shortest route available when using the GFIP network. He will repeat this journey when he returns home at the end of the workday. It will also be assumed that he has a “normal” workday i.e. that he works from 09:00-17:00 from Monday to Friday. Based on this assumption, travel on GFIP roads will most probably take place between 06:00 and 10:00 in the morning and before 18:00, which will mean that virtually none of the e-toll transactions incurred will qualify for the time-of-day discount.⁸⁶

Based on this information, his total daily e-toll commuting expense is calculated as R35.48.⁸⁷ Assuming that he works 20 days in any given month his monthly e-toll

⁸⁶ Any e-toll transaction incurred “after 06:00 up to and including 10:00” and “after 14:00 up to and including 18:00” on a weekday, will not be discounted. Any e-toll transaction incurred “after 18:00 up to and including 23:00” will qualify for a 10% discount based on the Standard Tariff payable for the relevant e-toll transaction - see Table 4: Time-of-day discounts in GG 36912.

⁸⁷ See Annexure A at the end of the dissertation for a step-by-step explanation of how the Toll Calculator is used to calculate Mr Dlamini’s e-toll commuting expense.

account will amount to R709.60 ($R35.48 \times 20$) excluding any discounts. As a registered e-tag user he qualifies for the frequent user discount, which means his monthly e-toll commuting expenses are capped at R450. Therefore his e-toll commuting expense, which he can deduct, amounts to R5400 ($R450 \times 12$) in a year of assessment.

4. Conclusion

This chapter explained how e-toll commuting expenses meet the requirements of the general deduction formula in s 11(a) of the ITA. It illustrated how the “actually incurred” principle could affect the deductibility of e-toll commuting expenses within a specific year of assessment. More importantly, it indicated that e-toll commuting expenses meet the “production of income” requirement.

Chapter 3: Section 23(b) of the Income Tax Act - the prohibition on the deduction of domestic or private expenses and how it prohibits the deduction of e-toll commuting expenses

1. Introduction

Section 23(b) of the ITA provides:

No deductions shall in any case be made in respect of the following matters, namely –

(b) domestic or private expenses, including the rent of or cost of repairs of or expenses in connection with any premises not occupied for the purposes of trade or of any dwelling-house or domestic premises except in respect of such part as may be occupied for the purposes of trade: Provided that-

(a) such part shall not be deemed to have been occupied for the purposes of trade, unless such part is specifically equipped for purposes of the taxpayer's trade and regularly and exclusively used for such purposes; and

(b) no deduction shall in any event be granted where the taxpayer's trade constitutes any employment or office unless –

(i) his income from such employment or office is derived mainly from commission or other variable payments which are based on the taxpayer's work performance and his duties are mainly performed otherwise than in an office which is provided to him by his employer; or

(ii) his duties are mainly performed in such part.

The s 23(b) prohibition is an extension or application of s 23(a), which prohibits the deduction of costs "incurred in the maintenance of any taxpayer, his family or establishment."⁸⁸ Domestic expenses relate to the house, home or family of the person incurring them.⁸⁹

In this chapter the application of the prohibition on the deduction of commuting expenses by our courts will first be considered. Then, the manner in which s 23(b) has been amended from time to time and the possible reasoning behind these amendments will be investigated. Although the amendments to s 23(b) related to home office expenses and had nothing to do with the possible deduction of (e-toll) commuting expenses, the reasoning behind the

⁸⁸ Davis *et al* (2013), 23(b)-1.

⁸⁹ De Koker & Williams (2013), par 7.10.

amendments remain relevant, as this section is the basis for the prohibition on the deduction of commuting expenses.

2. The prohibition on the deduction of commuting expenses as applied by our courts

2.1. Commissioner for Inland Revenue v De Villiers⁹⁰

The leading authority regarding the deductibility of commuting expenses is the decision of the Appellate Division in *De Villiers*. The question was whether the taxpayer, who was a practising advocate in Pretoria and a partner in farming operations located in the then Orange Free State,⁹¹ could deduct the expenses he incurred in traveling from Pretoria to their farm and back.⁹² It was argued that the management and control of the business was conducted in Pretoria and that as such, the business was being carried on in two places, on the farm itself and in Pretoria.⁹³ The court held that the expenses were not deductible as the decision to conduct part of the farming business in Pretoria was made for “domestic or private reasons” and consequently that the expenses incurred in traveling between Pretoria and the farm were for domestic or private purposes and thus not deductible.⁹⁴ The same, the court said, would apply to any expenses incurred in traveling between any taxpayer’s place of residence and place of employment.⁹⁵

2.2. The application of the prohibition by our courts before and after the decision in *De Villiers*

The result in *De Villiers* was not something unexpected. As far back as 1929, it was held that “when a man travels from his office to his house and from his house to his office he is on private business, business with which the Commissioner is not

⁹⁰ 1962 (1) SA 581 (A) (“*De Villiers*”).

⁹¹ *De Villiers*, 584D-E.

⁹² *De Villiers*, 585B.

⁹³ *De Villiers*, 584E-G.

⁹⁴ *De Villiers*, 586G-H.

⁹⁵ *De Villiers*, 587A.

concerned” and that such expenditure “cannot figure as a deduction on revenue account.”⁹⁶ In *ITC 415* the taxpayer lived on his farm but he was also a director of several companies and derived his income mainly from directors’ fees for which he had to visit various towns to attend directors’ meetings.⁹⁷ The court held that the traveling expenses were not incurred in the production of income but were of a domestic or private nature as his decision to reside on the farm where he conducted farming operations was “for his own convenience.”⁹⁸

Where a taxpayer incurred travelling (and subsistence) expenses in travelling to another town, which was not his ordinary place of business or residence to conduct university examinations, the court held that “the place where the examinations were held was the appellant’s place of business for the purposes of this item of income”⁹⁹ and that these expenses were incurred “before and after the discharge of the appellant’s functions as examiner and not during the discharge of these duties”¹⁰⁰ and consequently disallowed the expenses as a deduction.¹⁰¹ Similarly, a minister who lived in a certain town where he performed services as the minister of the congregation was not permitted to deduct the expenses incurred in travelling to another town where he also performed services at another congregation.¹⁰²

In *ITC 978*, a taxpayer who was employed by an airways company and had to have a car to travel to his place of work, especially in emergencies, was not permitted to deduct these travelling expenses even though there was no public transport that he could use to get from his home to the airport.¹⁰³ “He has to get there” (to the airport) “and sometimes quickly, and he has to get there not always at regular times . . . but while he is getting there he is not in the performance of his duties.”¹⁰⁴ In another

⁹⁶ *ITC 146* (1929) 4 SATC 278 (U), 279.

⁹⁷ *ITC 415* (1938) 10 SATC 258 (U), 258 (“*ITC 415*”).

⁹⁸ *ITC 415*, 260.

⁹⁹ *ITC 507* (1941) 12 SATC 167 (U), 167 (“*ITC 507*”).

¹⁰⁰ *ITC 507*, 169.

¹⁰¹ *Ibid.*

¹⁰² *ITC 1163* (1971) 33 SATC 205 (C), 206.

¹⁰³ *ITC 978* (1962) 25 SATC 43 (F), 44.

¹⁰⁴ *Ibid.*

matter, the Commissioner of Taxes allowed only 25% of the expenses incurred by a specialist surgeon in travelling by car from his home to his consulting rooms, to one or more hospitals near his consulting rooms and sometimes to private houses, as a deduction.¹⁰⁵ The appellant argued that at least 90% of the expenses should be deductible as they were incurred in the production of income,¹⁰⁶ but the court confirmed the Commissioner's decision, as the expenses were a result of the appellant's election "to live at a particular place, some distance from his work."¹⁰⁷ Similarly, it was held in *ITC 1065* that a surgeon's travelling expenses in travelling from his home to the hospital where he fulfilled his main duties were not deductible.¹⁰⁸ However, his travelling expenses incurred in travelling between the hospital and two other places he worked at were allowed as a deduction.¹⁰⁹ Even in the case where an individual had to pay someone to drive him to and from work because his physical disabilities made it impossible for him to do so, the expense was disallowed as a deduction as the expense pertains "to the private life of the appellant" and "not to his life as a trader."¹¹⁰ A lecturer, who resided in Brakpan and worked in Johannesburg,¹¹¹ was not allowed to deduct the travelling expenses incurred when he had to use his car to travel to other locations where he lectured as a freelance lecturer.¹¹² A pharmacist who worked in Ladybrand and had to travel to Johannesburg on occasion to conduct business there¹¹³ was also disallowed from deducting his travelling expenses.¹¹⁴

Currently, s 8(1)(b)(i) and paragraphs 7(4) and (7) of the Seventh Schedule to the ITA treat the travel of an employee, the holder of an office or a taxpayer in certain other positions between his place of residence and his place of employment or business as

¹⁰⁵ *ITC 1015* (1963) 25 SATC 328 (F), 332 ("*ITC 1015*").

¹⁰⁶ *ITC 1015*, 332-333.

¹⁰⁷ *Ibid.*

¹⁰⁸ *ITC 1065* (1964) 27 SATC 111 (T), 113.

¹⁰⁹ *Ibid.*

¹¹⁰ *ITC 1132* (1969) 31 SATC 155 (R), 160.

¹¹¹ *ITC 1410* (1985) 48 SATC 32 (T), 33 ("*ITC 1410*").

¹¹² *ITC 1410*, 34-35.

¹¹³ *Golby v Secretary for Inland Revenue* 1969 (2) SA 377 (A), 379A & 379F-G ("*Golby*").

¹¹⁴ *Golby*, 382B-383C.

domestic or private travelling.¹¹⁵

3. The history of section 23(b) relating to the deductibility of home office expenses

Until 1991, s 23(b) effectively allowed an individual to deduct the rent or cost of repairs or expenses in respect of the part of any dwelling house or domestic premises occupied for the purposes of trade.¹¹⁶ This was confirmed in *Kommissaris van Binnelandse Inkomste v Van der Walt*.¹¹⁷ The taxpayer was a university lecturer and the question was whether expenses relating to, *inter alia*, his home study were deductible.¹¹⁸ With reference to the judgment in *PE Tramway*, the court held that these expenses were deductible as he could prove that the expenses were incurred for the more efficient performance of his duties as a lecturer.¹¹⁹

The first amendment to s 23(b) introduced proviso (a)¹²⁰ as it appears in the current version of the ITA.¹²¹ After this amendment, expenses incurred in respect of part of a dwelling house or domestic premises occupied for the purposes of trade only qualify as a deduction if that part is specifically equipped for purposes of the taxpayer's trade and if it is regularly and exclusively used for that purpose.¹²² The reason for this amendment appears to have been the difficulty of establishing whether any premises are used for the purposes of trade and the various disputes in this regard, especially with regard to expenses relating to the maintenance of a study at home.¹²³

¹¹⁵ De Koker & Williams (2013), 7.50.

¹¹⁶ This exception, which provided for the apportionment of certain expenses, had formed part of income tax law since 1914 - s 15(2)(b) of the Income Tax Act 28 of 1914; s 21(2)(c) of the Income Tax Act 41 of 1917; s 13(c) of the Income Tax Act 40 of 1925; s 12(b) of the Income Tax Act 31 of 1941 – see Swart (1995), 653.

¹¹⁷ 1986 (4) SA 303 (T) ("*Van der Walt*").

¹¹⁸ *Van der Walt*, 305E-H.

¹¹⁹ *Van der Walt*, 309E-F. See also Swart (1995), 653.

¹²⁰ Section 23 of the Income Tax Act 129 of 1991.

¹²¹ See Swart (1995) and s 23 of Act 129 of 1991. "...Provided that - (a) such part shall not be deemed to have been occupied for the purposes of trade, unless such part is specifically equipped for purposes of the taxpayer's trade and regularly and exclusively used for such purposes."

¹²² Swart (1995), 654.

¹²³ Explanatory Memorandum on the Income Tax Bill, 1991, 16 – see Swart (1995), 654.

According to Swart, the judgment in *Van der Walt* and the 1991 amendment to s 23(b) resulted in a further amendment to s 23(b) during 1993.¹²⁴ A taxpayer whose trade constitutes any employment or office in terms of this proviso is not entitled to any deduction under s 23(b) unless the taxpayer's income from such employment or office consists mainly of commission or other variable payments based on the taxpayer's work performance, and the taxpayer's duties are not performed mainly in an office provided by the employer.¹²⁵ Whereas in *Van der Walt* the *bona fide* incurring of a home office expense for the more efficient performance of the taxpayer's duties was sufficient, this was no longer the case after the 1993 amendment.¹²⁶ The stated reason for this amendment was that many people claimed expenses in respect of studies not used regularly and exclusively for their trade, but used only occasionally.¹²⁷ Measures to prevent such misuse placed a considerable administrative burden on the Commissioner.¹²⁸ The allowance of such expenditure on a large scale also led to a loss of revenue, which had to be recovered by means of increases in tax rates or by some other means.¹²⁹ Swart concludes that mainly administrative reasons underlie the amendments effected to s 23(b) during 1991 and 1993.¹³⁰

4. Conclusion

In this chapter, the history of s 23(b) of the ITA was examined with reference to case law and to the amendments that have been made to this section over time. It was shown how our courts have consistently disallowed an individual's commuting expenses as a deduction for income tax purposes as it is considered a private

¹²⁴ Proviso (b) to s 23(b) as added by s 18(1)(a) of the Income Tax Act 113 of 1993 – see Swart (1995), 654.

¹²⁵ Swart (1995), 654.

¹²⁶ Swart (1995), 655. See for example the decision in *Special Board Decision No 143* (Germiston Special Board) where it was held that the appellant, a high school teacher, could not deduct the expenses related to her home study even though they were incurred *bona fide* in the furtherance of her employment as a school teacher as she did not perform her duties mainly (more than 50%) in her home study – see paragraphs 3-5 and 7-8 of the judgment.

¹²⁷ Swart (1995), 655.

¹²⁸ *Ibid.*

¹²⁹ Explanatory Memorandum on the Income Tax Bill, 1993, 36 – see Swart (1995), 655.

¹³⁰ Swart (1995), 655.

expense. Whereas s 23(b) also previously permitted the deduction of home office expenses if they were incurred for the more efficient performance of one's duties, a loss in revenue and the administrative burden it placed on the revenue authorities to prevent its misuse were the most likely reasons for more stringent conditions being imposed to claim this deduction. A tax deduction for e-toll commuting expenses in favour of salaried work commuters would require an exception to s 23(b). Accordingly, the underlying reasons for the amendments regarding the deductibility of home office expenses in s 23(b) are important, as they would have a bearing in determining to whom any deduction should apply and its extent.

Chapter 4: Section 23(m) of the Income Tax Act and whether it rationally differentiates between salaried individuals and individuals who earn their income mainly from commission

1. Introduction

Section 23(m) of the ITA states that the following deductions are prohibited:

Subject to paragraph (k), any expenditure, loss or allowance, contemplated in section 11, which relates to any employment of, or office held by, any person (other than an agent or representative whose remuneration is normally derived mainly in the form of commissions based on his or her sales or the turnover attributable to him or her) in respect of which he or she derives any remuneration, as defined in paragraph 1 of the Fourth Schedule, other than –

- (i) any contributions to a pension or retirement annuity fund as may be deducted from the income of that person in terms of section 11(k) or (n);
- (ii) any allowance or expense which may be deducted from the income of that person in terms of section 11(c), (e), (i) or (j).

Section 23(m) effectively prohibits the deduction of expenses incurred in the production of income from employment or in the holding of an office, with certain exceptions.¹³¹

Section 23(m) prohibits the deduction of e-toll commuting expenses even if s 23(b) were not to apply as the expense of travelling between one's work and home constitutes a deduction related to a person's employment or the holding of his office.¹³²

The purpose of this chapter is to determine whether the differentiation created by s 23(m) is constitutionally permissible. If it is unconstitutional, it will remove one of the existing hurdles to the effective prohibition of the deduction of e-toll commuting expenses.

Section 23(m) differentiates between persons who receive remuneration in respect of their employment or the holding of their office and between individuals who work as an "agent or representative whose remuneration is normally derived mainly in the form of commissions based on his or her sales or the turnover attributable to him or her" because it permits the s 11 deductions to the first class of individuals but not to the latter. It does not affect an individual's right to deduct expenses falling outside s 11 of the ITA, as the provision only applies to expenditure, losses and allowances

¹³¹ De Koker & Williams (2013), par 10.19.

¹³² De Koker & Williams (2013), par 7.45.

“contemplated in” s 11.¹³³ For ease of reference, the former class will be referred to as “salaried individuals” and the latter as “non-salaried individuals” throughout this chapter. The argument will focus mainly on the constitutionality of s 23(m), in the light of s 9 of the Constitution of the Republic of South Africa, 1996 (“Constitution”).

First, the influence of the Constitution on tax legislation will be discussed with reference to selected cases where provisions in tax legislation came under constitutional scrutiny. Second, the operation of s 9 of the Constitution will be explained. Thereafter, the interpretation of s 23(m) will be dealt with and whether the differentiation therein falls foul of s 9 of the Constitution.

2. The influence of the Constitution on the law of taxation

In *First National Bank v Commissioner for South African Revenue Service*¹³⁴ the Constitutional Court stated that “even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country - a legitimate governmental objective of undisputed high priority - are not immune to the discipline of the Constitution and must conform to its normative standards.”

Virtually every provision in the ITA, *prima facie*, infringes on a person’s fundamental rights as enshrined in the Bill of Rights.¹³⁵ According to Goldswain,¹³⁶ a number of provisions in the ITA would have unjustifiably infringed on a person’s fundamental rights were it not for s 36 of the Constitution, which ensures that no fundamental right is absolute and that all rights are subject to limitation. For example, the mere imposition of tax could constitute an infringement of the right to property in s 25 of the Constitution.¹³⁷ Tax audits, investigations and search and seizure provisions could be in violation of the rights to privacy and human dignity in ss 14 and 10 respectively.

¹³³ *Ibid.* These include medical expenses and medical scheme contributions (s 18) and donations made to public benefit organisations (s 18A).

¹³⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner for South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768, par [31] (“*FNB v CSARS*”).

¹³⁵ Goldswain (2008), 118.

¹³⁶ *Ibid.*

¹³⁷ See in this regard Croome (2008) who states in his LLD thesis at page 37 that although the imposition of tax is, in principle, a justifiable deprivation of a taxpayer’s property, unreasonable taxing measures or tax provisions with an ulterior motive will not withstand constitutional muster.

Answering written enquiries or attending a judicial inquiry and being compelled to answer questions, could infringe on the right not to incriminate oneself in terms of s 35(3)(j). The right to equality in s 9 clashes with sections that provide, for example, that taxpayers over the age of 65 are entitled to a larger medical deduction or tax rebate than those under the age of 65.¹³⁸

Provisions in our tax legislation have come under constitutional scrutiny in a number of instances. *FNB v CSARS* held that certain provisions of the Customs and Excise Act were unconstitutional in that they unjustifiably infringed on the property rights in s 25 of the Constitution.¹³⁹ In *Metcash Trading Ltd v Commissioner for South African Revenue Service*,¹⁴⁰ the same court held that the “pay now, argue later” principle, as found in ss 36(1), 40(2)(a) and 40(5) of the Value-Added Tax Act,¹⁴¹ did not infringe on an individual’s right to access the courts in s 34 of the Constitution. *Gaertner v Minister of Finance*,¹⁴² held that ss 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the Customs and Excise Act, which permitted South African Revenue Service (“SARS”) officials to conduct, *inter alia*, warrantless searches albeit under certain circumstances,¹⁴³ constituted an unjustifiable violation of the right to privacy.¹⁴⁴

Provisions in SA tax legislation have not yet been attacked relying on s 9 of the Constitution, the equality clause. However, the recent decision of the French Constitutional court handed down at the end of 2013, in which it approved the imposition of a 75% wealth tax on certain high income earners,¹⁴⁵ took place after the same court held in 2012 that a previous version of this proposal was unconstitutional as it violated the principle of taxpayer equality and that households with the same total

¹³⁸ Goldswain (2008), 118.

¹³⁹ The appellant successfully argued that s 114 of the Customs and Excise Act 91 of 1964 infringed on s 25 of the Constitution as it entitled the state to detain and sell goods belonging to persons who did not owe a debt to the state – see paras [113] and [133].

¹⁴⁰ 2002 (4) SA 768 (CC), par [67].

¹⁴¹ Act 89 of 1991.

¹⁴² (CCT 56/13) [2013] ZACC 38 (14 November 2013) (“*Gaertner*”).

¹⁴³ *Gaertner*, par [37].

¹⁴⁴ *Gaertner*, par [35]-[74].

¹⁴⁵ Ruitenber R, “France’s Hollande gets court approval for 75% millionaire tax”, 29 December 2013. Available at <http://www.bloomberg.com/news/2013-12-29/france-s-hollande-gets-court-approval-for-75-millionaire-tax.html> (accessed 28 April 2014).

revenue could end up paying different rates.¹⁴⁶

3. Section 9(1) of the Constitution and the principle of horizontal equity

Section 9(1) of the Constitution states that everyone is equal before the law and that everyone deserves equal protection of the law and s 9(2) states that discrimination may not take place on one of the listed grounds in which case the discrimination will be unfair. In *Harksen v Lane*¹⁴⁷ the court set out the approach to be followed when a legislative provision is alleged to be in conflict with s 9¹⁴⁸ of the Constitution.¹⁴⁹

The first question to be asked is whether the provision differentiates “between people or categories of people” and if it does, whether the differentiation bears “a rational connection to a legitimate government purpose?”¹⁵⁰ If it does not bear a rational connection or has an illegitimate government purpose,¹⁵¹ then there is a violation of s 9(1), but even if it does bear a rational connection, it might nevertheless amount to discrimination.¹⁵² The second question to be asked is whether the differentiation amounts to unfair discrimination.¹⁵³ This requires a two-stage analysis.¹⁵⁴ The first question is whether the differentiation constitutes discrimination?¹⁵⁵ If the differentiation is on a specified ground, then discrimination will have been established.¹⁵⁶ If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or

¹⁴⁶ *Ibid.* After the court’s judgment in 2012, a new version of the provision was drawn up in line with the principles laid down by the court.

¹⁴⁷ 1998 (1) SA 300 (CC) (“*Harksen*”).

¹⁴⁸ The *Harksen* decision was based on s 8 of the Interim Constitution which is virtually identical to s 9 of the 1996 Constitution.

¹⁴⁹ *Harksen*, par [54].

¹⁵⁰ *Ibid.*

¹⁵¹ *Harksen*, par [56].

¹⁵² *Harksen*, par [54].

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

to affect them adversely in a comparably serious manner.¹⁵⁷ If the differentiation amounts to discrimination, the question is whether it amounts to unfair discrimination?¹⁵⁸ If it is found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, there is no violation of s 9(2).¹⁵⁹ If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.¹⁶⁰

As the differentiation in s 23(m) of the ITA does not take place on a prohibited ground,¹⁶¹ s 9(2) is not relevant to this discussion and the focus will be on how s 9(1) has been interpreted and applied. *Prinsloo v Van der Linde* (“*Prinsloo*”),¹⁶² one of the earlier cases heard by the Constitutional Court, focused on differentiation in terms of s 9(1). The court explained that it is impossible to govern a country and regulate the affairs of its citizens extensively without differentiating between them.¹⁶³ Such differentiation can be referred to as “mere differentiation”¹⁶⁴ and will be permissible in terms of s 9(1) if it is rational, meaning that there must be a rational connection between the differentiation and a legitimate government purpose.¹⁶⁵ The rationality principle in the context of s 9(1) has been applied in a number of cases.¹⁶⁶ This

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ There will be discrimination on an unspecified ground if the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner – *Harksen*, par [47]. It is submitted that a person's status as a salaried individual is not a ground that falls in this category of unspecified grounds.

¹⁶² 1997 (3) SA 1012 (CC).

¹⁶³ *Prinsloo*, par [24].

¹⁶⁴ *Prinsloo*, par [25].

¹⁶⁵ *Prinsloo*, paras [25] and [26].

¹⁶⁶ *Geldenhuis v National Director of Public Prosecution* 2009 (2) SA 310 (CC), par [29]; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC), par [11]; *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC), par [48]; *Ernst & Young v Beinash* 1999 (1) SA 1114 (W), 1142F-I; *City*

approach was endorsed in *Jooste*,¹⁶⁷ where the court added that if the differentiation in question was irrational, it could still be justified in terms of the limitations clause.¹⁶⁸ Differentiation will be irrational if it is “arbitrary” or “manifests naked preferences”.¹⁶⁹ Case law does not set out the requirements for a governmental purpose to be legitimate, but merely determines it on a case-by-case basis. For example, in *Jooste* the purpose of the Compensation of Occupational Injuries and Diseases Act¹⁷⁰ to regulate compensation for disablement of employees caused in the course of their employment comprehensively (and in the process depriving them from instituting a common law action) was found to be a “legitimate purpose”.¹⁷¹ In *Prinsloo* it was held that the presumption of negligence on the part of a landowner living outside a fire control area where a fire starts on his land and causes damage to land belonging to others was linked to the state’s “strong interest in preventing veld, forest and mountain fires” which was the purpose of the Forest Act.¹⁷²

In *Prinsloo*,¹⁷³ *Jooste*¹⁷⁴ and *Weare*¹⁷⁵ it was stated that the question of a rational connection does not depend on whether the governmental objective could have been achieved in a better or more effective way. *Weare*, for example, held that the differentiation between juristic persons and partnerships, whereby individuals who hold a licence can carry on the business of bookmaking in partnership and juristic persons cannot,¹⁷⁶ was rationally connected to the legitimate government purpose of regulating

of *Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733 (C), 743A-B; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), par [27]; *Mhlekwa v Head of Western Tembuland Authority* 2001 (1) SA 574 (Tk), 620J-621A; *Weare v Ndebele* 2009 (1) SA 600 (CC), par [46] (“*Weare*”).

¹⁶⁷ *Jooste*, par [12].

¹⁶⁸ *Ibid.*

¹⁶⁹ *Jooste*, par [17]; *Prinsloo*, par [25].

¹⁷⁰ Act 130 of 1993.

¹⁷¹ *Jooste*, par [17].

¹⁷² Act 122 of 1984; *Prinsloo*, par [39].

¹⁷³ Par [35] and [36].

¹⁷⁴ Par [17].

¹⁷⁵ Par [46].

¹⁷⁶ *Weare*, par [61].

gambling,¹⁷⁷ *inter alia*, because one of the reasons for the provision was that it was easier to hold individual licence-holders accountable than juristic persons, whose shareholders and management are difficult to hold personally liable.¹⁷⁸

The right to equality does not mean that individuals will always be entitled to equal treatment.¹⁷⁹ Within the context of tax law, the principle of horizontal equity entails that taxpayers in the same financial position, i.e. where they have an equal ability to pay, must pay the same amount of income tax.¹⁸⁰ Swart explains that the principle of horizontal equity reflects the basic values of the Constitution regarding equality and fairness.¹⁸¹ It is submitted that this principle is an application of the rationality requirement within the context of tax legislation. Within the context of income tax law, horizontal equity would require that principles of income tax law, such as the general deduction formula, should in principle be applied consistently to taxpayers to ensure, as far as possible, that taxpayers in the same financial position pay the same amount of tax.¹⁸² Provisions that depart from the general principles of income tax law and thereby also from the principle of horizontal equity, for example, in order to encourage or discourage specific economic activities, would in principle be in breach of s 9(1).¹⁸³

4. The interpretation of section 23(m)

Our courts have not interpreted s 23(m) since it came into effect on 1 March 2002. As explained in the introduction of this chapter, the only contentious aspect of s 23(m) is the differentiation it creates between salaried individuals and non-salaried individuals. In the course of discussing this provision reliance will be placed mainly on what is stated in SARS Interpretation Note 13.¹⁸⁴

¹⁷⁷ *Weare*, par [66].

¹⁷⁸ *Weare*, par [63].

¹⁷⁹ *Prinsloo*, par [32].

¹⁸⁰ Swart (1995), 647; Domenico (2006), 119.

¹⁸¹ Swart (1995), 647.

¹⁸² Swart (1995), 648.

¹⁸³ *Ibid.*

¹⁸⁴ SARS Interpretation Note 13, Income Tax Act 58 of 1962 Section 23(m) *Deductions: Limitation of Deductions for Employees and Office Holders* (Issue 3) 15 March 2011 ("IN 13"). Although our courts have accepted that SARS will not always consider themselves bound by what is stated in their Interpretation Notes (see ITC 1675 62 SATC 219, 228-229), this position

In terms of IN 13, the term “employment” in s 23(m) should be afforded its narrower meaning of an employer-employee (master-servant) relationship and does not include an independent contractor.¹⁸⁵ The holding of an office generally flows from an appointment (such as the President, cabinet ministers, judges and directors of companies) whereas the holding of employment flows from a contract and is something in the nature of a post.¹⁸⁶ Section 23(m) applies to these individuals if they receive remuneration as defined in the Fourth Schedule to the ITA. For purposes of this discussion the detailed definition of remuneration is not relevant. The real issue is the reason for which payment is received and the nature of the payment received i.e. whether it is paid on a commission basis or not.

An agent is defined in IN 13 as “a person authorised or delegated to transact business for another”, whereas a representative is defined as someone “who represents another or others.”¹⁸⁷ “Commission” is defined as “a percentage of sales or turnover of the person on behalf of whom the agent or representative is acting.”¹⁸⁸ Furthermore, the remuneration received by an agent or representative is not necessarily as defined in the Fourth Schedule, but merely a general reference to a reward or pay received in return for services rendered or work done.¹⁸⁹ The term “mainly” is interpreted to mean more than 50% of the taxpayer’s gross remuneration and as such the total income of the taxpayer (including 100% of all allowances) must be compared to his or her commission income.¹⁹⁰ Where the commission constitutes more than 50% of the gross

has most probably changed since the commencement of the Tax Administration Act 28 of 2011 (“TAA”). Section 5(1) of the TAA defines a practice generally prevailing as “a practice set out in an official publication regarding the application or interpretation of a tax Act” and in terms of s 5(2) may only be withdrawn under specific circumstances. This means that what is stated in an Interpretation Note will carry much more weight than in the past and will be binding on SARS in court proceedings unless the circumstances mentioned in s 5(2) are present.

¹⁸⁵ IN 13, 3.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.* See also the matter of *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk* 1966 (4) SA 434 (A) at 445D where the court held that the Afrikaans word “hoofsaaklik”, which is translated to English as “mainly”, meant *more than 50% (my emphasis)*, within the context of s 51(f) of the Income Tax Act 31 of 1941.

remuneration, the limitation in s 23(m) will not apply to such an agent or representative and he will still be allowed to make other deductions under s 11.¹⁹¹

SARS Binding Private Ruling 008¹⁹² provides an example of where payment received will constitute “commissions based on his or her sales or the turnover attributable to him or her.” The applicant received his remuneration in the form of a basic fixed monthly salary, certain allowances and a further variable payment (referred to as “commission” in the contract of employment), which the applicant would earn in relation to the services he renders as a sales consultant.¹⁹³ SARS ruled that the variable payments made by the company to the applicant for services rendered as a sales consultant constitute “commissions based on his or her sales or the turnover attributable to him or her” in terms of s 23(m).¹⁹⁴

BPR 008 refers to the commission that the appellant in question would receive as a “variable payment”. The ruling was granted with reference to the applicant’s duties as a sales consultant, which might indicate that it is not essential for a person to receive his income in his capacity as an agent or representative, but rather that the payment he receives must be of a variable nature.¹⁹⁵

5. Why does section 23(m) differentiate?

Section 23(m) was introduced in s 21(1)(b) of Act 30 of 2002 and came into effect on 1 March 2002. According to the 2002 Budget Review¹⁹⁶ “normal salaried employees have very few expenses that relate to the production of their employment income as it is usual practice for employers to provide the necessary facilities. Where such expenses are claimed the quantification of the expenses and the split between non-deductible personal use and deductible business use result in significant administrative

¹⁹¹ IN 13, 3.

¹⁹² SARS Binding private ruling 008: BPR 008 Income Tax Act 58 of 1962 Section 23(m), *Certain variable payments made to a marketing executive and the application of section 23(m)* 6 March 2008 (“BPR 008”).

¹⁹³ BPR 008, 2.

¹⁹⁴ BPR 008, 3.

¹⁹⁵ See De Koker & Williams (2013), par 10.19.

¹⁹⁶ National Treasury, Republic of South Africa *Budget Review 2002* (20 February 2002) (“2002 Budget Review”).

burdens for both SARS and the taxpayers concerned.”¹⁹⁷

Klue *et al*¹⁹⁸ question the constitutionality of s 23(m). They argue that there were two reasons for the introduction of this “draconian restriction”: The first is that such taxpayers incur few expenses in the production of their income and the second is the administrative burden imposed on SARS and individual taxpayers were it not for the introduction of s 23(m).

IN 13 indicates that s 23(m) was introduced to limit the deductions that employees and office holders can claim against their employment income.¹⁹⁹ It further states that the provision has been updated since then to “expand the deductions that employees and office holders may claim.”²⁰⁰ Subsequent to its introduction in 2002, it has been amended twice. In 2005, it was amended by s 28(1)(b) of Act 31 of 2005 which amended subparagraph (iii) to its current form, by s 28(1)(c) of Act 31 of 2005 which added subparagraph (iv) and in 2008 subparagraph (iiA) was inserted by virtue of s 37(1)(c) of Act 60 of 2008.²⁰¹ Although the number of deductible expenses available to salaried employees has therefore increased, a number of specific deductions listed in s 11 are not available to salaried individuals. The question arises whether this situation is tenable in light of s 9 of the Constitution.

6. Is the differentiation created by section 23(m) rational?

As mentioned under the previous heading, it appears that the differentiation was created as salaried individuals incur few expenses in the production of their income and because of the heavy administrative burden posed on SARS and individual taxpayers prior to the introduction of s 23(m). If the constitutionality of this provision

¹⁹⁷ 2002 Budget Review, 83 and at 223 of Annexure C: Summary of Tax Proposals to the 2002 Budget Review. This measure would raise additional revenue of R85 million – 2002 Budget Review, 83.

¹⁹⁸ Klue *et al* (2013), par 3.10.

¹⁹⁹ IN 13, 1.

²⁰⁰ IN 13, 1.

²⁰¹ This amendment provides that, if certain amounts were received by or accrued to an employee and were included in the employees’ taxable income, where any portion of that amount is refunded by the employee to the employer, the refunded amount will be allowed as a deduction against the employee’s taxable income. The same principle applies to restraint of trade payments that were previously included in taxable income and were subsequently refunded by the employee – see IN 13, 1.

were to come before our courts SARS would most likely be able to provide more detailed reasons behind the reason for this differentiation but at this stage the reasons cited in the 2002 Budget Review are all that is available. Before considering whether the differentiation is rational, the question is whether the purpose of the differentiation is legitimate.

The statement in the 2002 Budget Review that the number of deductions available to a salaried individual was reduced as so few of such an individual's expenses are incurred in the production of income does not constitute a legitimate government purpose in itself and should merely be seen as a reason for the introduction of s 23(m). Although Klue *et al* state that it could just as well be argued that this is a good reason for these few expenses to be deducted,²⁰² this is not the underlying purpose behind s 23(m). This reason is related to the actual governmental purpose of this section, which is to reduce the administrative burden placed on SARS and on individual taxpayers. In terms of the South African Revenue Service Act ("SARS Act"),²⁰³ one of the functions of SARS is to "secure the efficient and effective, and widest possible, enforcement of", *inter alia*, the ITA.²⁰⁴ Similarly, individuals bear an administrative burden in that they have to keep supporting documentation for a period of 5 years from submission of a tax return.²⁰⁵ It is submitted that the alleviation of the administrative burden on SARS and salaried individuals falls within the ambit of this provision and as such it constitutes a legitimate government purpose. The question is whether the differentiation between salaried and non-salaried individuals is rationally connected to the government purpose of alleviating the administrative burden on SARS and on salaried individuals.

Klue *et al*, state that it is not clear why this burden should create more difficulty than claims for s 11(a) and other deductions by other classes of taxpayer.²⁰⁶ Bearing in mind that differentiation need only be rational and need not provide the most efficient or best way of achieving the government purpose it seeks to achieve,²⁰⁷ it is submitted that in

²⁰² Klue *et al* (2013), par 3.10.

²⁰³ Act 34 of 1997.

²⁰⁴ SARS Act, s 4(a)(i) read with Schedule 1.

²⁰⁵ TAA, s 29(3)(a).

²⁰⁶ Klue *et al* (2013), par 3.10.

²⁰⁷ See *Prinsloo* at par [36], *Jooste* at par [17] and *Weare* at par [46].

order to determine the true nature of the possible increase in the administrative burden, were it not for s 23(m), two matters must be addressed. First, one has to ascertain the number of specific deductions listed in s 11 which an individual taxpayer could possibly incur in the production of their income and secondly, one must determine the number of salaried individuals, i.e., whose s 11 deductions are limited because of s 23(m), *vis-à-vis* the number of non-salaried individuals. The 2002 Budget Review gives no indication of the number of individuals that would be (or were) affected by this amendment. However, the statistics issued by SARS shed some light on this topic. One of the statistics issued by SARS on an annual basis is the number of individuals who earned their income from a specific source, which will be used to answer this question.

First, the specific deductions in s 11, which salaried and non-salaried individuals can deduct in terms of s 23(m), will be listed and thereafter the number of individuals earning their income from salary or on a commission basis will be set out.

6.1. Specific deductions in s 11 and the likelihood of salaried and non-salaried individuals making use of them in the course of their trades

In Table 2 below, the s 11 deductions that are available to salaried and non-salaried individuals in terms of the limitation in s 23(m) will be set out.²⁰⁸ “Yes” indicates that an individual is permitted to make the deduction if the requirements of the subsection are met, whereas “No” indicates that an individual is not permitted to make the deduction whatsoever. “N/A” indicates that the deduction is not applicable as it would be impossible for a taxpayer to incur the deduction in his capacity as a salaried or non-salaried individual.

Table 2: Section 11(a) deductions available to salaried and non-salaried individuals

Subsection in s 11 of ITA	Salaried individuals	Non-salaried individuals
(c) - Legal expenses	Yes	Yes

²⁰⁸ Amendments to ss 11 and 23(m) that were not in effect at the time of submission of this dissertation were not taken into account. These include amendments to ss 11(k)(ii)(dd), 11(l), 11(n) and 23(m)(i), (iiA) and (iii) which will all come into effect on 1 March 2015. Sections 11(a) and (b) are not included in the table as the former provision contains the general deduction formula that was discussed in chapter two and as the latter section has been repealed.

(cA) - Restraint of trade payments ²⁰⁹	N/A	N/A
(d) – Repairs to property occupied for the purposes of trade	No	Yes
(e) - Capital allowances or consideration in the nature of a lease premium	Yes	Yes
(f) – Deduction of a lease premium	No	Yes
(g) – Allowance in respect of leasehold improvements	No	Yes
(gA) – Capital allowance in respect of expenditure incurred in designing or to obtain payment of patent	No	Yes
(gB) – Expenditure incurred in the grant or restoration of any patent	No	Yes
(gC) – Capital allowance on patents, designs, copyright	No	Yes
(gD) – Expense incurred in acquiring government licence ²¹⁰	N/A	N/A
(h) – Allowance on lease premiums and leasehold improvements	No	Yes
(hB) – Allowance on amount paid to someone in terms of the Mineral and Petroleum Resources	N/A	N/A

²⁰⁹ Section 11(cA) allows the deduction of amounts paid to a person as a restraint of trade payment, in the course of carrying on one's trade. It is unlikely that a salaried individual or a person deriving his income mainly from commission will make such a payment in the course of carrying on their trade.

²¹⁰ This deduction is only applicable if the taxpayer's trade constitutes the provision of telecommunication services, the exploration, production or distribution of petroleum or the provision of gambling facilities.

Development Act 28 of 2002 ²¹¹		
(i) – Bad debts	Yes	Yes
(j) – Doubtful debts	Yes	Yes
(k) – Pension fund contribution	Yes	Yes
(l) – Pension fund, provident fund, benefit fund contribution by employer ²¹²	N/A	N/A
(lA) – Qualifying equity share granted by employer to employee ²¹³	N/A	N/A
(m) – Annuities to former employees or partners and their dependants ²¹⁴	N/A	N/A
(n) – Contributions to a retirement annuity fund ²¹⁵	Yes	Yes
(nA) – Refunding of voluntary awards received	Yes	Yes
(nB) – Refunding of restraint of trade payments received	Yes	Yes
(o) – Loss on disposal of depreciable assets	No	Yes
(s) – Distribution of	N/A	N/A

²¹¹ It is unlikely that someone will incur the expense in his capacity as a natural person. The expense has to be incurred in the production of income, which means that even if a farmer incurs the expense in remunerating a community or natural person, he will not be entitled to this deduction, as it is most probably not related to his farming trade.

²¹² This provision only applies to employers.

²¹³ Only employers can grant qualifying equity shares.

²¹⁴ This provision will most likely only apply to employers.

²¹⁵ From 1 March 2015, s 23(m) will no longer allow for a pension fund deduction to individuals in terms of s 11(n) – see s 56 (1)(a) of Act 31 of 2013.

property shares by a company ²¹⁶		
(w) – Key-person life policy premium ²¹⁷	N/A	N/A
(x) – Any other deductions incurred in Part I of Chapter II of the ITA	No	Yes

In total, there are nine deductions applicable to natural persons that salaried individuals may not deduct if incurred in the production of income but that may be deducted by non-salaried individuals if incurred in the production of income. It falls outside the scope of this dissertation to discuss the purpose of each of these provisions and the reason for their inclusion in s 11 in detail. However, as each of these provisions are related to certain trade(s), what will be considered is whether salaried individuals are likely to be remunerated from these trades in the course of their employment or holding of an office and whether non-salaried individuals are likely to earn commission as agents or representatives in any of these trades.

Section 11(d), which allows the deduction of repairs to property occupied for the purposes of trade, is related to s 23(b), but in terms of s 11(d), individuals under certain circumstances would be allowed to deduct expenses incurred on property that they let to others as part of their trade.²¹⁸ It is unlikely that a salaried individual will ever incur such an expense in the production of his income, unless he makes use of a home office of which the related expenses are deductible by satisfying the requirements of s 23(b). However, as s 23(b) also requires that a person may only deduct home office expenses if he is remunerated mainly in the form of commission income or variable payments, it would appear as though situations might arise where the concomitant s 11(d) deduction could be incurred by agents or representatives in the course of their trade. Section 11(f) deals with expenses incurred in letting property in the form of a lease premium, but as Davis *et al* explain, an allowance deduction such as this is

²¹⁶ This provision only applies to companies.

²¹⁷ This provision will most likely only apply to employers.

²¹⁸ See De Koker & Williams (2013), par 8.100 and *ITC 643 (1947) 15 SATC 243*.

usually spread over a number of years.²¹⁹ It is unlikely that salaried or non-salaried individual taxpayers will incur a lease premium expense in the course of their trade.²²⁰

Section 11(g) deals with the deductibility of expenditure incurred on improvements, which has been included in the recipient's gross income under paragraph (h) of the gross income definition.²²¹ Paragraph (h) of the gross income definition relates to income received by a lessor in that a right accrues to him whereby the lessee has to make improvements to the land or buildings of the lessor. Section 11(h) is related to s 11(g): it entitles lessors to deduct an allowance on part of the amount received in terms of a lease premium or leasehold improvement agreement as mentioned in paragraphs (g) and (h) of the "gross income" definition in s 1. It is unlikely that a non-salaried individual will incur s 11(g) or (h) expenses in the course of his employment, but at the same time it is unclear how or why an agent or representative would incur such an expense in the course of his trade as he is merely acting on behalf of someone and won't receive the income in question in his personal capacity.

Sections 11(gA), (gB) and (gC) all relate to trade that involves the use or development of intellectual property.²²² The income derived from owning intellectual property tends to be paid in the form of royalties, which constitutes a variable payment and is unlikely to be paid in the form of a salary, but at the same time an agent or representative will probably not earn income in the form of royalties as his income is generated through sales which entitle him to a certain amount of commission income. The s 11(o) deduction may be made if a loss is suffered on a depreciable asset when it is disposed of, such as any asset on which a s 11(e) allowance is allowed. It is not clear why salaried individuals are not entitled to this deduction whereas they are allowed to deduct a capital allowance on certain assets in terms of s 11(e).

Section 11(x) is a general provision and states that a taxpayer may deduct any amounts, which in terms of any other provision in Part I of Chapter II of the ITA (sections 5 to 37O) may be deducted from the income of the taxpayer. In

²¹⁹ Davis *et al* (2013), 11(f)-3.

²²⁰ For an application of s 11(f), see *Commissioner for South African Revenue Service v BP South Africa (Pty) Ltd* 68 SATC 229.

²²¹ Davis *et al* (2013), 11(g)-2.

²²² De Koker & Williams (2013), par 8.100.

*Armgold/Harmony Freegold Joint Venture (Pty) Ltd v Commissioner for the South African Revenue Service*²²³ the court stated, within the context of the deduction on mining capital expenditure (in terms of ss 15(a) and 36, which can only be deducted by mining operators), that s 11(x) allows the deductions of certain mining capital expenditure as a “class privilege”, despite the provisions of s 11(a). *Sekretaris van Binnelandse Inkomste v Die Olifantsrivierse Ko-operatiewe Wynkelders Bpk*²²⁴ held that the purpose of s 11(x) is to permit the deductions contained in the special provisions in Part I of Chapter II of the ITA to be made against the income of a particular trade and not to confine the word ‘income’ where it appears in these special sections in every instance to the income derived from a particular trade.²²⁵ Read together, these judgments seem to suggest that the purpose of s 11(x) is to allow for the creation of further specific deductions falling outside of s 11, which would not necessarily be subject to the requirements in s 11(a), such as the capital expenditure deduction available to certain mining operations. It is very unlikely that a salaried or non-salaried individual will incur any of these trade-specific deductions in the production of income.

6.2. The number of salaried and non-salaried individuals

In this section, statistics regarding the numbers that relate to individuals who are listed as earning “Income (Salaries and wages, remuneration)” and those who are listed as earning “Commission” will be set out.²²⁶ These statistics were compiled using the source codes for each type of income. Statistics relating to the 2010 to 2012 years of assessment are taken into account as certain source codes were consolidated in the

²²³ 2013 (1) SA 353 (SCA), par [7] (“*Armgold*”).

²²⁴ 1976 (3) SA 261 (A), 266D.

²²⁵ De Koker & Williams (2013) at par 8.1 interpret this judgment to mean that in the absence in one of these provisions (in Part I of Chapter II of the ITA) of any implication that the deduction it permits is to be made only from the income derived from a particular trade, the deduction may be made against ‘income’ as defined in s 1 that is, including income derived otherwise than from the carrying on of a ‘trade’ as defined in s 1. The reasoning of the authors is unclear and it is submitted that the decision in *Armgold* best explains the application of s 11(x) in relation to s 11(a).

²²⁶ 2013 Tax Statistics, A joint publication between National Treasury and the South African Revenue Service 21 October 2013. Available at <http://www.treasury.gov.za/publications/tax%20statistics/2013/TStats%202013%20WEB.pdf> (accessed on 30 March 2014) (“2013 Tax Stats”).

2010 tax year making it difficult to compare them with the 2009 statistics.²²⁷ Only a certain percentage of taxpayers who were liable to pay tax were assessed as some of the outstanding assessments were only finalised in later years. This is why the percentage of individual taxpayers assessed in 2010 and 2011 is higher than the percentage for 2012 (86.9% assessed).²²⁸

Table 3: Number of salaried and non-salaried individuals in the 2010-2012 years of assessment²²⁹

Year of assessment	Number of salaried individuals: Individuals who earned "Income (Salaries, wages, remuneration)" (Source code: 3601)	Number of non-salaried individuals: Individuals who earned "Commission" (Source code: 3606)
2012 (86.9% assessed)	4 584 975	278 744
2011 (92.2% assessed)	4 572 337	292 784
2010 (94.6% assessed)	4 305 034	278 980

The 2013 Tax Stats do not indicate whether these statistics reflect the number of individuals who earned their income mainly from either one of these sources. It has been assumed that individuals included in the "Income (Salaries, wages, remuneration)" statistic are all salaried individuals and that individuals included in the

²²⁷ During the 2010 tax year, codes 3603 (Pension income), 3607 (Overtime) and 3610 (Annuity from a retirement annuity fund) were consolidated into source code 3601 – Income (Salaries, wages and remuneration) – 2013 Tax Stats, 39. The consolidated amount for source code 3601 as given by SARS has been used. Pension income, overtime and amounts received as an annuity from a retirement annuity fund all constitute "remuneration" as defined in paragraph 1 of the Fourth Schedule. Although the taxable income received from this source for 2009 is given, the number of individuals who earned income from this source in 2009 is not given.

²²⁸ 2013 Tax Stats, 34.

²²⁹ 2013 Tax Stats, Table A2.2.1. This table include only the relevant information in Table A2.2.1.

“Commission” statistic, are all non-salaried individuals. Based on this assumption, the increased administrative burden is reflected by the number of salaried individuals who would qualify for those nine deductions set out under 6.1, but for s 23(m), if the expense was incurred in the production of income.

6.3. Will the omission of s 23 increase SARS’s administrative burden?

From what is stated under 6.2 and 6.3, it appears that if s 23(m) were not in place, an additional 4,5 million taxpayers would qualify for the nine deductions mentioned. Even though it is unlikely that many of the nine deductions identified under 6.1 above would be incurred by non-salaried as opposed to salaried individuals in the course of their trade, without s 23(m) those nine deductions would be available to 4,5 million salaried individuals, which means that the possibility exists for a significant increase in SARS’s administrative burden. If the number of non-salaried individuals were included in the salaried individuals statistic for each year of assessment, the potential increase in SARS’s administrative burden would be even greater. In light thereof, it is submitted that the differentiation created by s 23(m) is rational.

7. Conclusion

In this chapter, the constitutionality of s 23(m) of the ITA was discussed. This provision differentiates between salaried and non-salaried individuals in that it limits the number of s 11 deductions available to the former category of persons, but not to the latter. Section 23(m) was interpreted mainly in light of what is stated in IN 13. The constitutionality of s 23(m) was tested against s 9(1) of the Constitution. The Constitutional Court has interpreted this section to mean that differentiation between two classes of persons is only permissible if that differentiation is rationally connected to a legitimate government purpose. Having regard to those deductions which are not available to a salaried individual in terms of s 23(m) and to the number of individuals who are listed by SARS as salaried and non-salaried individuals in SARS’s statistics from 2010 to 2012, the conclusion was reached that the differentiation between salaried and non-salaried individuals is rational as it might lead to a significant increase in the administrative burden of SARS and of the salaried individuals in question.

Chapter 5: Granting a tax deduction for e-toll commuting expenses incurred by salaried work commuters in order to gain public acceptance

1. Introduction

In chapters 3 and 4 the provisions that would disallow salaried work commuters from deducting e-toll commuting expenses for income tax purposes were discussed. The purpose of this chapter is to set out the reasons why government should consider granting such a deduction in favour of salaried work commuters, specifically in light of the lack of public acceptance towards e-tolling.

According to a report commissioned by the United States Federal Highway Administration regarding various electronic tolling projects that have been implemented around the world and the factors influencing their success,²³⁰ one of the major obstacles encountered internationally in implementing an urban road pricing initiative, such as e-tolling on the GFIP road network, is that of public acceptance.²³¹ In developing countries such as South Africa, public acceptance has an even greater impact on the success of such a project.²³²

The decision to focus on the factor of public acceptance in the case of the GFIP was made because of the “unprecedented public and political debate”²³³ that arose in the wake of the declaration of these roads as toll roads and as the matter of public acceptance also takes account of the socio-economic impact of the project, which is especially important considering that South Africa is one of the most unequal societies in the world with a Gini coefficient of 0,7.²³⁴ The issue of public acceptance will be discussed with reference to how it has manifested itself in South Africa, how it was addressed in other countries and whether the lack of public acceptance of e-tolling on

²³⁰ AECOM Consult Team (2006) US Department of Transportation, Federal Highway Administration, International Urban Road Pricing Final Report, *Work Order 05-002: Issues and Options for Increasing the Use of Tolling and Pricing to Finance Transportation Improvements* (“US Report”).

²³¹ US Report, 9-10.

²³² Hommes and Holmner, 201.

²³³ *OUTA v SANRAL (no 3)*, par [1].

²³⁴ Mokonyama (2012), 1.

GFIP roads can be addressed through the granting of a tax deduction for e-toll commuting expenses incurred by salaried work commuters. Although salaried work commuters only make up part of the public, they make up that part whose acceptance can be gained directly through granting the tax deduction proffered.

2. The lack of public acceptance of e-tolling in Gauteng

In South Africa, public discontent with e-tolling has been evident prior to²³⁵ and after the actual implementation thereof. Despite SANRAL spending millions of rands on advertising campaigns in which they encouraged the public to purchase e-tags,²³⁶ the announcement that “e-tolling will go live” on 3 December 2013 was met with opposition from various quarters of society.

Civil society movement OUTA, which unsuccessfully attempted to have e-tolling on GFIP roads set aside,²³⁷ urged the public to “reject this ill-conceived policy” and described government’s decision to go ahead with the implementation of the system as one “that has lacked a meaningful public engagement process, one that has lacked transparency, one that has provided society with misleading information, one that is too costly and grossly enriches private offshore companies, and one that the people simply do not trust.”²³⁸ Trade union federation Cosatu called on society not to purchase e-tags to show their disapproval of open road tolling.²³⁹ Political parties such as the Democratic Alliance and Agang also voiced their opposition to the system, while the Democratic Alliance and the Tolhek Aksiegroep, consisting of *inter alia* the Freedom Front Plus Party,²⁴⁰ were both unsuccessful in court.²⁴¹ The QuadPara Association of

²³⁵ Hommes and Holmner (2013), 201.

²³⁶ Tubbs B, “E-tolls: the Grinch that stole Christmas”, 21 November 2013. Available at http://www.itweb.co.za/index.php?option=com_content&view=article&id=69204 (accessed on 6 February 2014).

²³⁷ See *OUTA v SANRAL (no 3)*.

²³⁸ Tubbs B, “E-tolls: the Grinch that stole Christmas”, 21 November 2013. Available at http://www.itweb.co.za/index.php?option=com_content&view=article&id=69204 (accessed on 6 February 2014).

²³⁹ *Ibid.*

²⁴⁰ Media release issued by the Freedom Front Plus, “Nou staan net Tolhekaksiegroep, wat VF Plus insluit, tussen padgebruikers en e-tol in Gauteng”, 13 March 2014. Available at www.vfplus.org.za/media-releases/nou-staan-net-tolhek-aksiegroep-wat-vf-plus-insluit-tussen-padgebruikers-en-e-tol-in-gauteng (accessed on 28 April 2014).

SA, a party to the proceedings in *OUTA v SANRAL (no 1)*, indicated that the disability sector will “vigorously fight” against the system.²⁴² Despite the benefits of the e-tolling system, the existing economic constraints on individuals and their distrust in the political administration mean that the system has a high risk of failure if these issues are not addressed.²⁴³

3. The factors that influence public acceptance

The US Report identifies four factors that influence public acceptance of road pricing initiatives.²⁴⁴

3.1. The perception of the congestion problem

Until the public understands how congestion works and how the proposed urban road pricing scheme will alleviate congestion and reduce travel times, they are unlikely to view paying to drive on a road they currently drive for free as an acceptable solution.²⁴⁵ In London, for instance, the public was more agreeable to the implementation of the London Congestion Charge as it was preceded by years of extreme traffic and gridlock situations and the transition to this system was made easier by the fact that London had an excellent public transport system.²⁴⁶ Similarly, a congestion charge was implemented in Stockholm in 2003 and despite initial resistance thereto, after a trial period of approximately six months, citizens and the media were much more positive about the system when they noticed a 30% to 50% drop in traffic congestion and voted to keep the system in place.²⁴⁷

Many people feel that they are victims of congestion as opposed to the cause

²⁴¹ See the decision in *Democratic Alliance* as mentioned in chapter 1.

²⁴² Tubbs B, “E-tolls: the Grinch that stole Christmas”, 21 November 2013. Available at http://www.itweb.co.za/index.php?option=com_content&view=article&id=69204 (accessed on 6 February 2014).

²⁴³ Hommes and Holmner (2013), 202.

²⁴⁴ US Report, 9-10.

²⁴⁵ US Report, 9.

²⁴⁶ Hommes and Holmner (2013), 195.

²⁴⁷ Hommes and Holmner (2013), 196.

thereof.²⁴⁸ This is true in the context of Gauteng, as individuals do not have many alternative travel options beyond the Gautrain, which has a limited reach (and limited capacity).²⁴⁹ Furthermore the Metrorail train system, one of the primary forms of public transport, is characterised by overcrowding of trains, a lack of security and heavy delays (sometimes even because of operators not arriving for work on time).²⁵⁰ Road-based public transport systems, such as the Bus Rapid Transit system, which has been rolled out in Johannesburg and is projected to be rolled out in Pretoria in 2014, do not cater for GFIP commuters. This much is evident from the GFIP Economic Analysis where it is conceded that Gauteng has “inadequate public transport”,²⁵¹ that within Gauteng’s policy framework “the great majority of road-based public transport relies on routes other than freeways” because of its “primarily accessibility, as opposed to mobility, support function”,²⁵² and that “the primary role of freeways with respect to public transport is to ensure that the routes identified for public transport priority are not congested with traffic that should be using the freeways”.²⁵³ It is fair to say that the government subsidized public transport network still needs development between the areas affected by e-tolling.²⁵⁴

Despite the limited public engagement that took place during the toll declaration process,²⁵⁵ it is noteworthy that none of the comments received related to the issue of congestion.²⁵⁶ Although the increased road capacity created by the GFIP would

²⁴⁸ Eliasson and Lundberg (2002) *Road pricing in urban areas* Swedish National Road Administration and T&E. Available at <http://www.transport-pricing.net/download/swedishreport.pdf> (accessed on 25 February 2014), 46 (“Eliasson and Lundberg”); US Report, 9.

²⁴⁹ Hommes and Holmner (2013), 201.

²⁵⁰ *Ibid.*

²⁵¹ GFIP Economic Analysis, 1.

²⁵² GFIP Economic Analysis, 13.

²⁵³ *Ibid.*

²⁵⁴ Hommes and Holmner (2013), 201.

²⁵⁵ Mokonyama (2012), 6.

²⁵⁶ Public comments received during the toll declaration process in 2007 questioned the necessity of tolling, the impact on the economy, the impact on secondary roads due to traffic diversions and general sentiments that tolling of existing urban roads is unacceptable – Mokonyama (2012), 6.

alleviate congestion and reduce the travel times of road users,²⁵⁷ there is little evidence that Gauteng commuters experienced the congestion problem as being so severe that they were willing to pay toll fees to fund the road expansion which would address this matter.

3.2. Equity or fairness

Road pricing is often perceived to only benefit the wealthy, or the people who can most afford to pay the charge without changing their travel patterns. Everyone else will usually have to adjust their current travel to a less optimal mode, destination, route, or time. The costs associated with the (road) pricing schemes are readily apparent to users, but the benefits are often not.²⁵⁸ Despite the fact that users of public road transport are unlikely to feel the effects of e-tolling as public transport vehicles are exempt from paying e-tolls,²⁵⁹ less affluent salaried work commuters will be affected more than their wealthier counterparts.

The GFIP Economic Analysis found that amongst work commuters who were making use of Gauteng freeways, e-toll expenses would make up a greater percentage of the disposable income of less affluent individuals as compared to more affluent road users, albeit that it was based on a higher per/km charge than the rate of 30c/km currently in place.²⁶⁰ In addition, those who only have to make limited use of tolled roads will incur a lower expense than those who have to travel a greater distance on the tolled roads.²⁶¹ This will also apply to salaried work commuters who travel great distances between their homes and their place of employment and who need to make use of GFIP roads in travelling to work. Although social equity arguments can be made from the perspective of the poor and wealthy,²⁶² it is fair to say that e-tolling on the GFIP will affect especially the less affluent “middle class” individuals whose disposable income is

²⁵⁷ GFIP Economic Analysis, 42.

²⁵⁸ US Report, 9.

²⁵⁹ This applies to qualifying public transport vehicles – GG 36912, 20.

²⁶⁰ GFIP Economic Analysis, 75. This was based on a cost of 71.5c/km, adjusted for the electronic tag discount of 20% and the frequent user discount as set out in Table 24 of the GFIP Economic Analysis - pages 73 and 74. The frequent user discount used here differs from the one that is currently being implemented.

²⁶¹ US Report, 9.

²⁶² Eliasson and Lundberg (2002), 26-27.

less than their wealthier counterparts.²⁶³

Work commuters are likely to be the group of people who would be most vulnerable to e-tolling as they have little choice in making the journey.²⁶⁴ This is highlighted by the fact that the alternative public transport options available are very limited, as explained under heading 3.1 above. Considering that South Africa is one of the most unequal societies in the world, with a Gini coefficient of zero point seven (0.7),²⁶⁵ the perception is likely to remain that the project will benefit the wealthy more than the poor as they can afford to pay to use these roads and therefore don't need to alter their travel patterns. In comparison to individuals who also live in the Gauteng area and who do not need to make use of GFIP roads in travelling to work, these GFIP salaried work commuters are clearly at a financial disadvantage.

3.3. Success of public outreach efforts

If the public does not understand how an urban road pricing initiative will work or does not understand its benefits, they focus on the increased costs of the toll or user fee.²⁶⁶ As is evidenced by the opposition to e-tolling set out above, public outreach efforts of SANRAL were not successful. Although support for road pricing projects did increase in other parts of the world after road pricing commenced, there are cases where support declined after the initial increase in support.²⁶⁷ The successful implementation of the London Congestion Charge was largely attributable to the stellar work done by the mayor of London at the time, Ken Livingstone, who involved the public during the entire process and gained sufficient popular support to implement the system without much resistance.²⁶⁸ In the case of e-tolling on the GFIP road network it might be too early to say, but the public opposition prior to it finally being implemented in December

²⁶³ The GFIP Economic Analysis found that amongst persons who used their personal vehicles in travelling to work on GFIP roads that the lower a person's disposable income, the higher the percentage would be that e-toll expenses made up of their disposable income – page 74-75.

²⁶⁴ GFIP Economic Analysis, 74.

²⁶⁵ Mokonyama (2012), 1.

²⁶⁶ US Report, 9.

²⁶⁷ Eliasson and Lundberg (2002), 45-46. This occurred in Oslo where road pricing was introduced in 1990 and where opposition thereto initially decreased, but subsequently increased in 2000 and 2001.

²⁶⁸ Hommes and Holmner (2013), 195-196.

2013, has not declined significantly as is evidenced by the number of protest actions and court cases that have taken place.

3.4. Use of toll revenues

The public typically wants to know how the road pricing revenues will be used and how this use will benefit them.²⁶⁹ Such public knowledge could lead to an increase in public support.²⁷⁰ In terms of the SANRAL Act, SANRAL “must keep separate accounts of all monies received as toll or otherwise in connection with toll roads and of the interest earned on the investment of those monies.”²⁷¹ These monies may only be used to meet expenditure related to toll roads.²⁷² SANRAL's 2012 Annual Report²⁷³ explains that the non-toll and toll operations are run as two separate entities, which includes the financing thereof. The non-toll operations are not allowed to borrow money for any part of the operations and are also not allowed to budget for a cash deficit. Thus non-toll operations are totally reliant on government allocations.²⁷⁴ The toll operation finances itself and may not be subsidised by the non-toll operations.²⁷⁵ Although toll revenues collected by SANRAL are therefore “ring-fenced”, it is unlikely that the public is aware of this.

Another problem is the public's perception of corruption within the state and by extension its agencies such as SANRAL. The Supreme Court of Appeal stated, albeit in the context of a criminal law matter, that “there is a very loud outcry from all corners of society against corruption” and that some have even gone “as far as stating that corruption is rendering the State dysfunctional”.²⁷⁶ It was recently held that “corruption

²⁶⁹ US Report, 10.

²⁷⁰ Eliasson and Lundberg (2002), 44.

²⁷¹ SANRAL Act, s 34(3).

²⁷² SANRAL Act, s 34(3)(a) to (c).

²⁷³ South African National Road Agency Limited 2012 Annual Report. Available at http://sanral.ensight-cdn.com/content/Annual_Report-Sanral2012~1.pdf (accessed on 28 February 2014) (“2012 AR”).

²⁷⁴ 2012 AR, 107.

²⁷⁵ *Ibid.*

²⁷⁶ *S v Mahlangu* 2011 (2) SACR 164 (SCA), par [26].

has become cancerous” in our democracy.²⁷⁷ South Africa has a history of corruption in technology based road systems, such as the National Traffic Information System (e-Natis), which keeps information about *inter alia*, driver’s licences,²⁷⁸ as well as growing public dissatisfaction with government service delivery.²⁷⁹ Lack of transparency has been a hallmark of the e-toll project.²⁸⁰ For instance, SANRAL initially refused to disclose details of the Electronic Toll Collection Joint Venture stating that the information requested by OUTA was intellectual property that belonged to third-party organisations.²⁸¹ The largest shareholder in the e-tolling consortium is a company headquartered in Austria, who reported in the 2010/11 financial year that its road solutions projects segment, under which e-tolling falls, grew 247% year-on-year with its CEO stating that this was largely attributable to the implementation of e-toll collection systems in SA and Poland.²⁸² Therefore, even though the SANRAL Act mandates the “ring-fencing” of monies received as toll, the public is justified in thinking that the money will largely be benefitting offshore companies as opposed to being used to improve the current toll road network.

4. How can the issue of public acceptance be addressed by granting a tax deduction for e-toll commuting expenses in favour of salaried work commuters?

The US Report lists a number of key strategies that are necessary for the success of a road pricing initiative.²⁸³ To address the equity and privacy concerns that the public might have regarding such a project, it suggests, *inter alia*, that other vehicle taxes be reduced.²⁸⁴ As stated in chapter 1, the proposal put forward in this dissertation is different as it relates to income tax relief.

The tax deduction of commuting expenses is not a new concept. Commuting expenses are allowed as an income tax deduction for individuals in a number of European

²⁷⁷ *Bosasa Operations (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ), par [38].

²⁷⁸ *Hommel et al* (2012), 71 & 72.

²⁷⁹ *Hommel and Holmner* (2013), 201.

²⁸⁰ *Naidoo* (2013), 108.

²⁸¹ *Ibid.* See also *OUTA v SANRAL (no 1)*, 22.

²⁸² *Naidoo* (2013), 108.

²⁸³ US Report, 15.

²⁸⁴ US Report, 19.

countries such as Belgium, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Norway and Switzerland.²⁸⁵ In Japan, commuting expenses are also deductible as they are considered to be employment-related.²⁸⁶ In Belgium for example, individuals are entitled to a deduction of 0.15€/km for commuting expenses incurred in travelling to work when using a “personal vehicle”, based on the fact that it is regarded as an expense that is incurred “with a view to acquiring or preserving taxable income”,²⁸⁷ which is different from the South African position as set out in chapter 3. It will not be argued that the South African position should be brought in line with the position in Belgium or other European countries mentioned. The argument is merely that government should consider allowing the deduction of e-tolling expenses for work commuters as it would improve public acceptance of e-tolling on GFIP freeways, and would increase the likelihood of the project being a success. Considering that the “user pay” principle applies in respect of all toll roads managed by SANRAL, it is crucial that this e-tolling project garners the necessary support as it is possible that e-tolling will be rolled out in other areas of the country where a freeway is located between two major cities, for example Durban and Pietermaritzburg. In the next section, it will be explained how the granting of such a tax deduction will assist in improving public acceptance of e-tolling in Gauteng, with reference to some of the factors mentioned in the previous section of this chapter.

4.1. It will provide an incentive for users to become registered and especially registered e-tag users and in turn, improve the effectiveness of the current e-toll payment structure

Between the first announcement of the toll tariffs in February 2011 and 2013, toll tariffs were reduced twice by government and along with that, a number of discounts were introduced which are available to registered e-tag users.²⁸⁸ These include frequent user discounts, time of day discounts and monthly toll caps. The e-toll payment regime has been structured in such a way as to incentivise individuals to purchase e-tags and

²⁸⁵ Hirte & Tscharktschiew (2011), 1.

²⁸⁶ Domenico (2006), 119.

²⁸⁷ Haulotte *et al* (2013), 37.

²⁸⁸ GG 36912, 19.

become registered e-tag users as this will reduce their e-toll expenses.²⁸⁹

Even though the benefits of becoming a registered e-tag user are apparent, the fact remains that salaried work commuters now have to pay to use a road that they previously used for free and that research has shown they are reluctant to do.²⁹⁰ Despite the fact that their travel time might be reduced by the road expansion,²⁹¹ it was noted in the GFIP Economic Analysis that commuters do not always value time savings as much as those implementing the tolling system would like.²⁹² Lastly, it must be kept in mind that the benefits of road pricing schemes are often not as apparent to the public as the cost thereof.²⁹³ The granting of a tax deduction for e-tolling expenses will address these concerns as individuals will receive a direct monetary benefit in the form of tax relief at the end of the year of assessment, but as will be argued in chapter 6, the deduction should only be available to registered users.²⁹⁴ This will encourage salaried work commuters to become registered users as it will not only decrease their e-toll commuting expenses, but will now be taken into account to reduce their income tax liability for an expense which they largely cannot choose to avoid.²⁹⁵

4.2. The loss in tax revenue suffered by government could be offset by the reduced funding of SANRAL

The maintenance of non-toll roads, which constitute the majority of the South African road network,²⁹⁶ is completely reliant on government allocations for funding.²⁹⁷ In the

²⁸⁹ GG 36912, 20.

²⁹⁰ US Report, 9.

²⁹¹ GFIP Economic Analysis, 42.

²⁹² GFIP Economic Analysis, 34.

²⁹³ US Report, 9.

²⁹⁴ Registered users are defined as registered e-tag users or registered VLN users – E-Road Regulations, 6.

²⁹⁵ GFIP Economic Analysis, 74.

²⁹⁶ Toll roads constitute approximately 15.8% of the national road network, with non-toll roads making up the remainder - South African National Road Agency Limited *2013 Annual Report*. Available at http://sanral.ensight-cdn.com/content/SANRAL_Annual-Report12_LRES.pdf (accessed on 14 April 2014), 32 (“2013 AR”).

²⁹⁷ 2012 AR, 12.

2011/2012 financial year, this was to the tune of R8 billion.²⁹⁸ According to SANRAL, the toll operation finances itself.²⁹⁹ Although the tolling approach relieves government of the burden of direct funding,³⁰⁰ this is only partly true as s 34(1) of the SANRAL Act lists twelve financing options of which the levies raised on the sale of fuel,³⁰¹ tolls raised on toll roads³⁰² and monies appropriated by Parliament³⁰³ are being used to finance the GFIP.³⁰⁴ Furthermore, the SANRAL Act states that SANRAL may not be placed in liquidation “except if authorised by an Act of Parliament adopted specifically for that purpose”,³⁰⁵ which means that government is likely to cover any funding shortfall that SANRAL experiences. For example, after the e-tag rate was reduced to a rate of approximately 30c/km in 2012, SANRAL was given a “once-off grant” of R5.75 billion “to ensure its borrowing level is sustainable.”³⁰⁶ In addition, National Treasury requested Cabinet to grant a “special appropriation of a further R1.9 billion in the form of a subordinated loan” to ensure that SANRAL is able to meet its obligations.³⁰⁷ Although the “extraordinary grant of R5.75 billion” granted in March 2012 was sufficient to enable SANRAL to meet all its obligations in the 2012/2013 financial year,³⁰⁸ the effect of s 10 of the SANRAL Act is that government will keep funding SANRAL with taxpayers’ money, to ensure that SANRAL remains liquid if SANRAL does not garner sufficient funding to finance its operations through e-tolling or through other financing means such as the bond sale held in April 2014.³⁰⁹ As SANRAL is dependent on commuters paying for each e-toll transaction they incur, taxpayers’ money will be

²⁹⁸ 2012 AR, 102.

²⁹⁹ 2012 AR, 107.

³⁰⁰ GFIP Economic Analysis, ii.

³⁰¹ SANRAL Act, s 34(1)(b).

³⁰² SANRAL Act, s 34(1)(g).

³⁰³ SANRAL Act, s 34(1)(k).

³⁰⁴ *OUTA v SANRAL (no 3)*, par [7].

³⁰⁵ SANRAL Act, s 10.

³⁰⁶ 2012 AR, 105. See also *National Treasury v OUTA*, par [60].

³⁰⁷ 2012 AR, 106.

³⁰⁸ 2013 AR, 118.

³⁰⁹ Paton C, “E-toll debacle fails to slow demand for SANRAL bond” 22 April 2014. Available at - <http://www.bdlive.co.za/business/transport/2014/04/22/e-toll-debacle-fails-to-slow-demand-for-sanral-bond> (accessed on 24 April 2014). The government insures these bonds.

utilised to fund SANRAL directly through e-tolling and indirectly through government funding, with taxpayers' money collected by SARS.

The granting of a tax deduction for e-toll expenses will therefore result in the amount of government funds available for allocation to SANRAL and to other government functionaries being reduced, but at the same time it could result in greater support for the e-tolling system and greater compliance therewith. This should result in a boost to SANRAL's revenue from e-tolling on the GFIP. It will also likely lead to a decrease in SANRAL's collection and debt-enforcement expenses. SANRAL has conceded that collection costs would exceed the cost of the first phase of the GFIP within 20 years from the initial implementation on Gauteng's roads, based on a public non-compliance rate of 60%.³¹⁰ The High Court seemed to agree with OUTA's argument that a non-compliance rate of 60% was not "unduly high."³¹¹

The question then arises whether the loss in revenue suffered by government will be offset by the increased revenue from e-tolling due to a decline in the non-compliance rate. Although it was projected in 2012 that approximately 70 000 road users would not comply with e-tolling within a week after its implementation,³¹² the nature of the e-tolling payment structure makes it difficult to ascertain the exact amount that would be lost by SANRAL assuming that this projection is correct. However, it will be set out in Table 4 below how the granting of a deduction will lead to government losing only a percentage of the amount paid in e-toll commuting expenses and not the whole amount paid by a salaried work commuter.

To illustrate this, the example of two fictitious taxpayers will be used, who fall in different income brackets based on the tax rates for the 2014 year of assessment, but who both incur an annual e-toll commuting expense of R5400, which is the maximum

³¹⁰ *OUTA v SANRAL (no 1)*, 22. In none of the subsequent decisions in the North Gauteng High Court, Constitutional Court or Supreme Court of Appeal was any information given to the contrary. Finance Minister Pravin Gordhan recently stated in answer to a parliamentary question, that more than R6 million was spent in legal fees in court cases involving e-tolling – "Defending e-tolls cost taxpayers R6m", 24 February 2014. Available at <http://www.fin24.com/Economy/Defending-e-tolls-cost-taxpayers-R6m-20140224> (accessed on 3 March 2014).

³¹¹ This seems to be in light of the fact that SANRAL has "no means of identifying the 'user or driver' who declines to pay e-toll voluntarily" – see *OUTA v SANRAL (no 1)*, 23. The court refers to this as a "relatively modest non-compliance percentage" – page 24 of the judgment.

³¹² *OUTA v SANRAL (no 1)*, 24.

expense that can be incurred if someone is a registered e-tag user of a class A2 vehicle.³¹³ Taxpayer A falls in the lowest income tax bracket, i.e. he earns between R0 and R165000 and taxpayer B falls in the highest income tax bracket i.e. he earns upwards of R638600. It is also assumed that both are younger than 65 meaning they are only entitled to the primary rebate.

Table 4: Taxable income calculation (all amounts are in Rand)

	Taxpayer A	Taxpayer A: with e-toll commuting expenses deduction	Taxpayer B	Taxpayer B: with e-toll commuting expenses deduction
Gross income	(120 000)	(120 000)	(900 000)	(900 000)
Minus: Exempt income	(0)	(0)	(R25000)	(R25 000)
Income	R120 000	R120 000	R875 000	R875 000
Minus: General and specific deductions (excl e-toll deduction)	(30 000)	(30 000)	(100 000)	(100 000)
E-toll deduction	(-)	R5400	(-)	R5400
Taxable income	R90 000	R84600	R775 000	R769600
Income tax payable before primary rebate	$90\ 000 \times 18\% =$ 16200	$84600 \times 18\% =$ 15228	$185205 + [(775' - 638600) \times 40\%]$ 239765	$185205 + [(769600 - 638600) \times 40\%]$ R237 605
Minus: Primary rebate	(12080)	(12080)	(12080)	(12080)
Income tax payable to SARS	4120	3148	227685	225525

³¹³ It is assumed that these taxpayers will drive Class A2 vehicles as government anticipates that 82,7% of commuters will use this kind of vehicle on the GFIP toll roads – GG 36912, 16.

Loss of revenue to government due to e-toll deduction	$4120 - 3148 = 972$	$227685 - 225525 = 2160$
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Upon closer inspection one will note that for taxpayer A, the amount of R972 constituting government's loss in revenue is equal to 18% of the e-toll commuting expenses deduction of R5400: $R5400 \times 18\% = R972$. Similarly, in the case of taxpayer B, the amount of R2160 is equal to 40% of R5400: $R5400 \times 40\% = R2160$.

If the assertion made in GG 36912 is true that "based on actual measurements, it is anticipated that 82,7% of road users (Class A2) will pay a maximum of R100 per month if they are registered as e-tag users",³¹⁴ the deductible amounts in the above table will be at least 75% less for the individuals in question.³¹⁵ Although one may then argue that the deduction will be negligible it is submitted that even a small deduction will improve public acceptance, as it is the principle of granting a tax deduction that is at stake. Government and SARS would probably be able to calculate the loss in revenue that it would suffer, if any, should such a deduction be granted. Although research undertaken for the government of the United Kingdom suggested that a general income tax concession can be very costly to the state, this was found in the context of countries where the commuting expenses deduction is based on the distance travelled,³¹⁶ which is different from the deduction suggested in this dissertation which would only apply to e-toll commuting expenses incurred.

4.3. The possible increase in congestion and decrease in the use of public transport, if any, is likely to be insignificant

One of the goals of tolling is usually to reduce congestion as set out under heading 3.1 above. The granting of a tax deduction might have the opposite effect.

The problems regarding the inadequacy of public transport in Gauteng, including the

³¹⁴ GG 36912, 16.

³¹⁵ There is no indication in GG 36912 how this amount was calculated and unfortunately it is not comparable to the findings of the survey done in the GFIP Economic Analysis as the figures therein are based on a different per km rate and on a different discount structure.

³¹⁶ Potter *et al* (2006), 235.

limited reach of the Gautrain, are highlighted under heading 3.1 above. In light thereof, it is unlikely that the granting of a tax deduction for e-toll expenses will lead to users of public transport and especially existing Gautrain users from reverting back to the use of their personal vehicles instead of the Gautrain in travelling to work, causing an increase in road traffic. This is firstly because the proposed tax deduction will be limited to e-toll commuting expenses and will not extend to fuel expenses as well. The high fuel price, the extent to which it has increased in the last number of years and the fact that it is likely to increase in coming years, adds to this argument. The risk of trip lengthening and increased car commuting, which was the result of a general tax concession granted in certain European countries,³¹⁷ is therefore unlikely to ensue. Furthermore, current forms of road based public transport in Gauteng rely on routes other than freeways,³¹⁸ which means that such public transport users are unlikely to now make use of their personal vehicles, if they have access to one, on the freeway on a daily basis. It is fair to say that if the tax deduction does bring about an increase in road traffic on GFIP toll roads, it is likely to be insignificant.

4.4 It will assist in addressing the issue of equity on various fronts

As explained under heading 3.2 above, all work commuters who make use of GFIP roads in travelling to work are at a financial disadvantage as opposed to any other Gauteng work commuter who uses his personal vehicle in travelling to work, but who needn't make use of GFIP roads in doing so. This is as work commuters using GFIP roads in travelling to work do not have a choice, but have to make use of these roads.

E-tolling also creates a situation whereby less affluent "middle class" work commuters aren't able to absorb this additional cost as easily as their wealthier counterparts due to the former group having a smaller disposable income.³¹⁹ The granting of a tax deduction for e-toll expenses in favour of work commuters will address this inequality. Although an income tax deduction might have the effect of rewarding long distance

³¹⁷ *Ibid.*

³¹⁸ GFIP Economic Analysis, 13.

³¹⁹ The GFIP Economic Analysis found that amongst persons who used their personal vehicles in travelling to work on GFIP roads that the lower a person's disposable income, the higher the percentage would be that e-toll expenses made up of their disposable income – page 74-75.

commuters,³²⁰ the nature of the deduction proposed in this dissertation is different from the position in countries such as Belgium and Germany³²¹ where a deduction is allowed based on the distance travelled to work. As the deduction will only apply to e-toll commuting and not to fuel expenses, a road user would effectively make a loss if he were to undertake a longer journey in making use of the GFIP toll road to qualify for the deduction, as he would also incur increased fuel expenses that will remain tax non-deductible.

Although it is true that higher income users will benefit more in the sense that their deduction will be greater,³²² this is merely a consequence of these users falling in a higher tax bracket and remains in line with the principle of horizontal equity as discussed in chapter 4.

5. Conclusion

In this chapter the issues affecting public acceptance of a road pricing initiative, such as e-tolling on the GFIP, were discussed. It was found that within the context of the GFIP toll roads, commuters did not perceive congestion as a major problem, that work commuters making use of GFIP roads are likely to be financially vulnerable to the implementation of the system, that public outreach efforts seem to have been largely unsuccessful in garnering support for the project and that the public does not believe that the funds will be used to benefit them. It was argued that the granting of a tax deduction to salaried work commuters who are registered users would address this issue in that it would incentivise road users to purchase e-tags and increase compliance while also reducing the financial burden on government in funding SANRAL. Furthermore, it was stated that the deduction is unlikely to have a significant effect on congestion and importantly that it would address some of the equity and socio-economic concerns created by the implementation of e-tolling in Gauteng.

³²⁰ Hirte & Tscharaktschiew (2011), 9. This was within the context of a German city, but it is submitted that the same principle will apply in the context of Gauteng and the GFIP as well.

³²¹ Potter *et al* (2006), 226.

³²² Hirte & Tscharaktschiew (2011), 1.

Chapter 6: Conclusion

The opposition to e-tolling and the negative financial consequences thereof on individuals, especially work commuters, have been highlighted in this dissertation. Because of ss 23(b) and (m) of the ITA, salaried work commuters are not allowed to deduct e-toll commuting expenses from their taxable income, even though they could previously make use of these roads free of charge in travelling between their home and place of employment.

In chapter 2, it was explained how e-toll commuting expenses incurred by salaried work commuters would be deductible in terms of s 11(a) of the ITA, but for ss 23(b) and 23(m). Chapter 3 involved a discussion of the history of s 23(b) as applied by our courts, from which it appeared that commuting expenses have always been considered to be of a domestic or private nature and hence a non-deductible expense. The amendments made to this section in 1991 and 1993, although related to the deduction of home office expenses, seemingly took place because of the administrative burden faced by SARS to prevent individuals from abusing the deduction. In chapter 4, it was illustrated that the differentiation between salaried individuals and those who earn their income mainly from commission, in terms of s 23(m), is rational. This is because if all the specific deductions in s 11(a) were made available to salaried individuals it could potentially lead to a significant increase in SARS's administrative burden. Finally, in chapter 5 it was argued that granting a tax deduction for e-toll commuting expenses in favour of salaried work commuters, could increase public acceptance of e-tolling on the GFIP and improve equity between salaried work commuters who have to use toll roads and those who do not without increasing congestion on the GFIP. It was also argued that the deduction could be structured in such a way as to ensure that the anticipated increased compliance with the e-tolling payment provisions and concomitant reduction of government funding required by SANRAL offset the reduction in income tax revenue as a result of the deduction being granted. The suggested form this deduction could take will now be discussed.

Two questions arise in this regard: Firstly, should all salaried work commuters be entitled to this deduction and secondly, how much of their e-toll commuting expenses should salaried work commuters, who qualify for this deduction, be allowed to deduct? GG 36912 distinguishes between alternate users, registered e-tag users, non-registered e-tag users and registered VLN users. It is submitted that the deduction of e-

toll commuting expenses should only be available to salaried work commuters who are also “registered users”, defined as registered e-tag users or registered VLN users,³²³ based on the premise that both these categories of users are registered with SANRAL.³²⁴ This means that it will be easier for SANRAL to ensure that these individuals comply with the e-toll payment provisions. Structuring the deduction in such a way would also enhance the effectiveness and purpose of the existing payment regime as it would encourage users, especially salaried work commuters working in Gauteng, to become registered e-tag users.³²⁵

It is significant that the reason behind the amendments to s 23(b) in 1991 and 1993 and the introduction of s 23(m) into the ITA in 2002 was in both cases to reduce SARS’s administrative burden and in the case of s 23(m), to reduce the administrative burden on salaried individuals as well. Limiting the availability of the deduction to registered users will mitigate any additional administrative burden that the granting of the deduction places on SARS, particularly in the context of its duty of ensuring that salaried work commuters do not claim more than they are entitled to. The frequent user discount, which applies only to registered e-tag users³²⁶ and currently caps their e-toll expenses at R450 per month,³²⁷ will assist SARS in preventing any tax evasion that might occur as it will be impossible for these users to claim more than this legally. This is based on the assumption that the deduction is introduced into the ITA and that the deductible amount is equal to R450 per month or R5400 (R450 x 12) per year, which is currently the monthly cap.³²⁸ Assuming the deduction is set at R450 per month, it is submitted that registered VLN users should only be allowed to deduct e-toll commuting expenses up to a maximum of R450 per month. The differentiation that the deduction creates, firstly between registered users and other users and secondly, between

³²³ E-Road-Regulations, 6.

³²⁴ See the definitions of “registered e-tag user” and “registered VLN user” both of which require that the user “is registered with the Agency for a specific motor vehicle” – E-Road Regulations, 6 & 7.

³²⁵ See GG 36912, 20.

³²⁶ GG 36912, par 5.9.

³²⁷ The Minister of Transport may increase the tariffs on 1 March each year, but the increase may not exceed the Consumer Price Index calculated for the preceding 12 months – GG 36912, par 5.22.

³²⁸ *Ibid.*

registered e-tag and VLN users in that VLN users would not be permitted to deduct any e-toll commuting expenses in excess of R450 per month, is rational as the purpose thereof is to enhance the effectiveness of and compliance with the e-tolling payment structure, which it is submitted constitutes a legitimate government purpose.³²⁹ At the time of submission of this dissertation, an e-tag costs R49.95, but this amount is credited to the e-toll account holder's account once he is registered, which means that an e-tag is effectively free.³³⁰ This further strengthens the argument that the differentiation created is rational as it is affordable for salaried work commuters who make use of their personal vehicles and who have to make use of GFIP toll roads to travel between their home and place of employment, to become registered e-tag users.

Assuming that the deduction is capped at the current amount of R450 per month in terms of the frequent user discount, or at a lower amount, the only remaining problem faced by SARS is how to ensure that salaried work commuters only deduct e-toll commuting expenses as opposed to all e-toll expenses they incur on GFIP roads and thereby minimise the risk of tax evasion. This problem will only arise in the event that a salaried work commuter's monthly e-toll commuting expenses are less than the capped amount in a given month, leaving room for other e-toll expenses to be deducted so as to push the total up to the capped amount. The same would apply if the deduction provided only for an annual cap and not for monthly caps as well.

One of the ways in which this problem can be addressed is by requiring salaried work commuters to keep a record of their e-toll commuting expenses, similar to the manner in which employees who receive a "motor-vehicle allowance" from their employers in terms of s 8(1) of the ITA, must keep logbooks of their business travelling expenses in order to ensure that this part of their travelling allowance is excluded from their taxable income.³³¹ SARS can request a salaried work commuter to submit proof of their monthly e-toll commuting expenses supported by their monthly e-toll account(s) in

³²⁹ See GG 36912, 20.

³³⁰ Media release issued by The South African National Roads Agency Soc Ltd "Convenient e-tags now just a click, call or a step away" 3 June 2013. Available at http://www.nra.co.za/live/content.php?Item_Id=4664 (accessed on 1 April 2014).

³³¹ De Koker & Williams (2013), par 4.2B.

order to prove that they did not claim in excess of what they were allowed to.³³² This would still leave the door open for a salaried work commuter to claim that he passed through a greater number of gantries in travelling between his place of residence and his place of employment than he actually did, so as to unlawfully push up his monthly e-toll commuting expense to the capped amount. It is submitted that a salaried work commuter's information as it appears in his tax return, could be used by SARS to make a determination of the gantries a salaried work commuter is likely to pass under in travelling between his place of work and his place of employment.³³³ The use of the Toll Calculator, referred to in chapter two and Annexure A to this dissertation, will assist SARS in making this determination. The nature of the e-tolling system is such that any user will have to enter the GFIP toll road at a specific intersection and exit it at a specific intersection, which brings the use of the Toll Calculator into play. SARS will be able to determine whether a salaried work commuter did in fact pass under the gantries as alleged in the records submitted, based on the intersections at which the salaried work commuter was most likely to enter and exit in travelling between his place of employment and place of residence, which in turn will be based on the addresses of his place of employment and his place of residence. As this information is already at SARS's disposal in that it has to be supplied to them via individual tax returns,³³⁴ no privacy concerns arise.

The amount at which the deduction should be set can only be partly answered in this dissertation as it depends mostly on information and facts which government, Treasury and SARS are in a far better position to ascertain. In *Gaertner* the Constitutional Court held that because South Africa is a developmental state it could ill afford to lose tax

³³² In terms of s 29(3)(a) of the TAA a taxpayer who has submitted a tax return must keep supporting documentation for a period of 5 years from submission of the tax return and in terms of s 102, the burden of proof rests on the taxpayer to prove that he can claim a deduction, unless the assessment is based on an estimate by SARS.

³³³ When applying to become a taxpayer, a person is required to indicate his own physical address and his employer's business address, meaning SARS will already have this information at its disposal – See Form IT77 *Application for registration as a taxpayer or changing of registered particulars: Individual.* Available at <http://www.sars.gov.za/AllDocs/OpsDocs/SARSTaxForms/IT77%20-%20Application%20for%20Registration%20as%20a%20Taxpayer%20or%20Changing%20of%20Registered%20Particulars%20Individual%20-%20External%20Form.pdf> (accessed on 5 March 2014).

³³⁴ *Ibid.*

revenue, especially due to tax evasion.³³⁵ As mentioned in chapter 3, prior to the amendments to s 23(b) the abuse of the deduction for home office expenses led to government suffering a loss in tax revenue. With regard to s 23(m), the 2002 Budget Review indicates that the introduction of this section would raise additional revenue of R85 million. In addressing and alleviating the plight of salaried work commuters who have no choice but to incur e-toll commuting expenses on a daily basis, the amount should be set at a level where it is anticipated that the reduction in government's income due to granting the deduction is set-off by the reduced funding provided to SANRAL, which in turn would be due to the increased compliance with the e-tolling payment provisions.³³⁶ It was indicated in chapter 5 how government will only lose a percentage of the amount paid by a salaried work commuter in e-tolling expenses, with regard to each salaried work commuter. The statistics regarding the number of individuals in each income group living in Gauteng³³⁷ could be utilised along with the aforementioned calculation to estimate the actual tax loss, if any, that government would suffer if the deduction were granted.

In April 2014, SANRAL recorded a revenue collection rate of 36% on the GFIP,³³⁸ which although better than expected,³³⁹ indicates that the non-compliance rate of 60% as foresaw in 2012 was indeed accurate and not "unduly high".³⁴⁰ This reinforces the notion that public acceptance of e-tolling is still relatively low, that the collection costs could well exceed the cost of the first phase within 20 years of e-tolling first being implemented on the GFIP and that the granting of the suggested tax deduction in favour of salaried work commuters, could indeed have overall advantages for SANRAL, government and the public.

³³⁵ *Gaertner*, par [55].

³³⁶ This should be done so as to avoid what happened in Germany where the income tax deduction for commuting expenses led to government losing €4 billion in tax revenue in 2006 – Hirte & Tscharaktschiew (2011), 1.

³³⁷ 2013 Tax Stats, Figure 2.3 and Table A2.1.3.

³³⁸ Paton C, "E-toll debacle fails to slow demand for SANRAL bond" 22 April 2014. Available at - <http://www.bdlive.co.za/business/transport/2014/04/22/e-toll-debacle-fails-to-slow-demand-for-sanral-bond> (accessed on 24 April 2014).

³³⁹ *Ibid.*

³⁴⁰ *OUTA v SANRAL (no 1)*, 22 & 23.

In the 2013 Budget, the Minister of Finance announced that a tax review would be initiated “to assess our tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability.”³⁴¹ A Tax Review Committee was subsequently set up, which was mandated to “evaluate the South African tax system against internationally accepted tax trends, principles and practices.”³⁴² In conducting its investigation, the committee should take into account the objectives of the South African tax system.³⁴³ Although the main objective of taxation is to raise revenue to finance government expenditure, certain social objectives can be met partially through the implementation of a progressive tax system and through the redistribution of resources.³⁴⁴ One of the nine key aspects that the committee would specifically focus on, is the overall tax base and tax burden on individuals, which would essentially require “an evaluation of the *economic and social impact* of the tax system and whether the current tax structure is able to generate sufficient and sustainable revenues to fund government’s current and future expenditure priorities.”³⁴⁵

At a recent dialogue in January 2014 held between professional services firm Deloitte and Judge Dennis Davis, the Chairman of the Tax Review Committee (known as the Davis Tax Committee), the key issue discussed was the extent to which taxes paid are used for the “benefit of society” in light of, *inter alia*, the “perception of rampant corruption in the public sector”.³⁴⁶ The “widespread and sustained backlash” against the implementation of e-tolls, also prompted the question: “How far are we away from a tax revolt?”³⁴⁷

³⁴¹ Statement issued by the Ministry of Finance, Terms of Reference for the South African Tax Review Committee, 1. Available at <http://www.treasury.gov.za/TaxReviewCommittee/Terms%20of%20Reference.pdf> (accessed on 25 October 2013) (“Tax Review Committee”).

³⁴² Tax Review Committee, 2.

³⁴³ Tax Review Committee, 4.

³⁴⁴ *Ibid.*

³⁴⁵ Tax Review Committee, 3.

³⁴⁶ Press Release issued by Deloitte, “The Davis Tax Committee – where are we at and what lies ahead?”, 15 January 2014. Available at http://www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/Davis_Tax_Committee_progress_report.pdf (accessed on 17 April 2014).

³⁴⁷ *Ibid.*

It might be exaggerated to suggest that a tax revolt could be on the cards in the near future, but it seems that the South African public is justified in questioning whether the taxes they pay are used for the benefit of society and it is crucial that the economic and social impact of the tax system is something which must be taken into account when drafting tax legislation. SANRAL's 2013 Annual Report indicates that it will most likely continue to apply the "user-pay" principle in future, as it is not sustainable to rely "solely on the fiscus to fund the maintenance backlog, the upgrades and improvements to the road network".³⁴⁸

It is submitted that granting a tax deduction to salaried work commuters for e-toll commuting expenses, taking account of the suggested form such a deduction could take, can improve the prospects of success of e-tolling on the GFIP and the possible roll out of e-tolling in other provinces, by increasing public acceptance. The information mentioned in this dissertation regarding the funding of SANRAL by government is insufficient to indicate the exact financial implications of granting such a deduction. However, it is submitted that sufficient arguments have been presented for government to at least investigate whether a deduction for e-toll commuting expenses can be granted to salaried work commuters, at an amount that will alleviate the tax burden on individuals without eroding the existing tax base.

-----24 352 words-----

³⁴⁸ 2013 AR, 15.

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Annexure A: Example of how the Gauteng Freeway Improvement Project Toll Calculator is used to calculate e-toll commuting expenses

The illustration below is a map of Gauteng’s highways. The sections marked in blue constitute those sections forming part of the GFIP network. To calculate the cost of the journey between Mr Dlamini’s place of residence and place of employment, the Toll Calculator can be used.

Step

1 **2** **3** **4**

"I plan to drive;

from - Select a location -
select the interchange where you enter the toll road
(you may also right click on the map)

to - Select a location -
select the interchange where you exit the toll road
(you may also right click on the map)

via
(optional) select one way point on your route
(you may also right click on the map)

& back yes no
(the trip returning from where you started)

via
(optional) select one way point on your route
(you may also right click on the map)
(* compulsory fields)

For information only. The toll tariffs as published on 19 November 2013. Errors and omissions excepted.

next

Google

Gauteng Freeway Improvement Project (GFIP) Toll Calculator

LEGEND
Existing toll road
GFIP Network

Based on the journey undertaken by Mr Dlamini on a daily basis as set out in the introduction of chapter 2, the steps set out in the Toll Calculator will be followed to calculate the e-toll commuting expense. In Step 1, the John Vorster interchange on the N1 is selected, being the one at which Mr Dlamini will enter the toll road, from the “from” dropdown list as found in the top left corner of the page and select the Rivonia interchange on the N1, being the one at which he exits the toll road, from the “to” dropdown list which is just below the “from” dropdown list. As he will be using the same route in travelling to work in the morning and back home in the afternoon the “yes” option next to “& back” as it appears on the left hand side of the page has been selected. After entering this information into the Toll Calculator, the following is

displayed: **Step**

Toll Calculator

1 **2** **3** **4**

"I plan to drive;

from N1, John Vorster
select the interchange where you enter the toll road (you may also right click on the map)

to N1, Rivonia
select the interchange where you exit the toll road (you may also right click on the map)

via
(optional) select one way point on your route (you may also right click on the map)

& back yes no
(the trip returning from where you started)

via
(optional) select one way point on your route (you may also right click on the map) (* compulsory fields)

For information only. The toll tariffs as published on 19 November 2013. Errors and omissions excepted.

next

[website / mobile site](#)

This map outlines the route forming part of the GFIP that Mr Dlamini will travel to and from his place of employment every day. In Step 2, Mr Dlamini will indicate that he drives a light vehicle, that he has an e-tag and that he does not drive a public transport vehicle. This information is then displayed as follows:

Gauteng Freeway Improvement Project (GFIP) Toll Calculator

1 **2** **3** **4**

"I am driving;

motorcycle

light vehicle

small heavy vehicle

large heavy vehicle

Do you have an e-tag ?
 yes no
a TAG qualify you for further discount

Public Transport Vehicle ?
 yes no
Yes if the vehicle is registered as public transport

back **next**

Step 3 will require Mr Dlamini to indicate how many return trips he will undertake in a calendar month. He undertakes 2 “return trip(s)”³⁴⁹ on a daily basis at a time of day during which no time-of-day discount, indicated in the following picture as 0% discount, applies. The information is then displayed as follows:

Gauteng Freeway Improvement Project (GFIP) Toll Calculator

Step

1 2 **3** 4

Would you like to calculate the cost of a single or multiple return trip(s) during a calendar month?

single multiple

Show me the frequent user discount.

How many return trips will take place in each period?

Time Period	Trips	% Discount
Time Period 1 (Weekday Peak)	2	0%
Time Period 2 (Weekday Mid-Day)	0	5%
Time Period 3 (Weekday Off-Peak)	0	10%
Time Period 4 (Weekends)	0	15%
Time Period 5 (Night & Public Holidays)	0	25%

Show me the time periods and time of day discounts.

back next

Once this information has been entered, his daily e-toll commuting expense is calculated and displayed as follows:

³⁴⁹ A return trip would in normal parlance refer to the journey to from one’s place of residence to one’s place of employment and back, but in the context of the Toll Calculator, a return trip should be understood to mean one journey from your place of residence to your place of employment or *vice versa*, ie one journey from point A to destination B. This was discovered after entering the details into the Toll Calculator and finding that the cost of 1 “return trip” was the cost for Mr Dlamini to travel from his home to his place of employment.

Step

1

2

3

4

Results

**total cost
(excl. discount)**

total discount

**total cost
(incl. discount)**

Total toll before discount: R 68.60
min e-tag Discount: R33.12 (48.28 %)

Total toll after discounts: R35.48

Show me the individual gantry tariffs.

Toll Calculator

