

**Consistency as a desirable and achievable objective in the
proposed rewrite of the South African Income Tax Act, 1962
(Act No. 58 of 1962)**

MINI-DISSERTATION

BY

Jeanne Abbie Viljoen
(Student number 71341189)

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Supervisor: Prof. Riël CD Franzsen

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CERTIFICATE OF ORIGINALITY

I hereby certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that this thesis and the work reported herein was composed by and originated entirely from me. Information delivered from the published and unpublished work of others has been acknowledged in the text and references are given in the list of references.

Jeanne Abbie Viljoen

A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.

Ralph Waldo Emerson: *Self-Reliance*, 1841

Everything that can be put into words can be put clearly.

Wittgenstein: *Tractatus Logicus-Philosophicus* (translated) DF Pears and BF McGuinness,
1961 Routledge & Kegan Paul London 51

They [lawyers] dwell upon words until they become mere precisians in the use of them. They would rather be accurate than be clear. They would sooner be long than short. They seek to avoid two meanings, and end – on occasions – by having no meaning.

Lord Denning: Romanes lecture at Oxford, 1959, 'From Precedent to Precedent'

You've got to be mindful of the consequences of the words.

George W Bush, 2005, quoted in Poole, Steven, *UnspeakTM*, Little, Brown, London, 2006

CONTENTS

Chapter 1

INTRODUCTION	1
1.1 Background	1
1.2 Purpose	4
1.3 Literature review	4
1.4 Scope	4
1.5 Methodology	4
1.6 Summary of chapters	5

Chapter 2

THEORETICAL FOUNDATIONS	7
2.1 OUTLINING SOME RELEVANT CONCEPTS	7
2.1.1 The reading process	7
2.1.2 Complexity	9
2.1.3 Legal interpretation	11
2.1.4 Plain language	14
2.1.5 Consistency	17
2.1.6 Taxes	19
2.1.7 Income tax	24
2.2 DISCUSSION OF CONCEPTS	26
2.2.1 Efficiency in drafting	26
2.2.2 Why is consistency desirable?	27
2.2.3 Can consistency be achieved?	28

Chapter 3

WRITING UNDERSTANDABLE TAX LAWS	31
3.1 The drafter of tax legislation	31
3.2 The reader of tax legislation	33
3.3 Drafting tools	35
3.3.1 Definitions	35
3.3.2 Illustrations, diagrams and examples	37
3.3.3 Structure	37

3.3.4 Paragraphing or tabulation	39
3.3.5 Gender neutrality	39
3.3.6 Tagging or labelling	42
3.3.7 Plain language tools	43

Chapter 4

COMPARATIVE STUDY OF SOME REWRITES 44

4.1 Australia	44
4.2 The United Kingdom	46
4.3 Other jurisdictions	49
4.4 Comparisons and conclusions	51

Chapter 5

WRITING AN ITA THAT CAN BE UNDERSTOOD 52

5.1 The legal framework for a rewrite of the ITA	54
5.1.1 The Constitution	54
5.1.2 The ITA	57
5.2 Who reads and who drafts tax legislation in South Africa?	58
5.2.1 The reader of tax legislation in South Africa	58
5.2.2 The role of the drafter in South Africa	60
5.3 Should a rewrite of the ITA be undertaken?	62
5.4 How should the ITA be rewritten?	63
5.5 The way forward	64
5.5.1 Process outline	66
5.5.2 Consistency in the rewrite of the ITA	68
5.5.3 Use of electronic tools to achieve consistency	68
5.5.4 Examples of redrafting	69

Chapter 6

CONCLUSION 76

CASES 78

BIBLIOGRAPHY 79

Chapter 1

INTRODUCTION

1.1 Background

The plain language movement gathered force in the early 1990s but calls for plain language were heard long before. The Constitution of the State of Indiana required in 1865 that “Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms.”¹ In the United States of America the demand for plain language in legal documents was driven by the consumer movement.² Legal documents such as contracts create rights and obligations for those who sign them. It is therefore essential that the signing parties are able to read and understand the document.³ Legislation is a specific kind of legal document. The members of a legislature, who agree to the rights and obligations contained in a piece of legislation, do so as representatives of the people. It therefore goes without saying that it is important for the members of the legislature to be able to read and understand the legislation that they pass.⁴ In many countries there is also a growing realisation that citizens who are subject to rights and obligations should be able to access the legislation in which these are contained.⁵

Since the 1990s tax legislation in a number of English-language jurisdictions has been the subject of a rewrite process. The extent of the rewrite and the degree of success has varied significantly from one country to the other. Common themes were the desire to simplify the legislation and to make it more understandable and accessible. These goals were to be attained by using plain language, that is ordinary words ordered into short, simple sentences and set out in a clear, user-friendly format that aids the reader to find relevant information.⁶

¹ Quoted in Bekink B and Botha C “Aspects of Legislative Drafting: Some South African Realities (or Plain Language is Not Always Plain Sailing)” *Statute Law Review* 28(1) 34-67 40.

² Viljoen F “The plain language experience in the USA” in Viljoen F and Nienaber A (eds) *Plain Legal Language for a New Democracy* 2001 Protea Book House Pretoria 46.

³ Butt P and Castle R *Modern Legal Drafting: A Guide to Using Clearer Language* 2006 Cambridge University Press Cambridge 115.

⁴ Xanthaki H “On Transferability of Legislative Solutions: The Functionality Test” in Stefanou C and Xanthaki H (eds) *Drafting Legislation: A Modern Approach* 2008 Ashgate Aldershot Hampshire 13.

⁵ Viljoen F and Nienaber A “Introduction” in Viljoen 29.

⁶ For the use of plain language, see 2.1.4 and for a short history of some rewrites, see Chapter 4.

In South Africa a rewrite of the Income Tax Act (Act 58 of 1962) (the ITA in this document) was mooted in 1997. Although research has been undertaken in this regard, little visible progress has been made to date. Practical considerations may now provide renewed impetus to this project: The Tax Administration Bill (the TAB in this document) is due to be introduced in Parliament during 2011; a new dividends tax is due to soon replace the current system of secondary tax on companies (STC); and numerous changes to the ITA have been occasioned by new provisions in the Companies Act, 2008 (Act No. 71 of 2008), which came into operation in May 2011. The TAB has been designed to “incorporate into one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts.”⁷ This implies that these generic administrative provisions, dealing with matters like objections and appeal processes, must be deleted from the ITA. It is calculated that these provisions constitute a quarter of the existing provisions of the ITA. They are mainly concentrated in Chapters I and III, but are also spread throughout the Act amongst the taxing provisions. Their repeal can only aggravate the existing problems around non-sequential numbering of sections, subsections and paragraphs in the ITA.⁸

One might well ask why one of the cardinal pieces of South African legislation⁹ has not been the subject of a thorough review since the advent of a new democratic dispensation in South Africa. The Constitution of the Republic of South Africa, 1996 (the Constitution in this document) has clear implications for the rights of citizens (and taxpayers) in their dealings with government. Although ignorance of the law does not remove liability to comply with it, the rule of law places an obligation on government to make the law intelligible and accessible to those who have to comply with it.¹⁰

One of the reasons for a lack of urgency in this review might be that in fact taxpayers have only limited exposure to the ITA. Most taxpayers interact with the South African Revenue Service (SARS), which is the revenue administration agency.¹¹

⁷ Notes on the draft TAB released for comment on 30 October 2009 accessed on 15 November 2010 at <http://www.sars.gov.za>.

⁸ At present, section 11E is followed by sections 11sex, 12B, 12C, 12D, 12DA and 12E, in that order.

⁹ 5.9 million individuals and over 1.8 million companies were registered for income tax in 2010: National Treasury and SARS *2010 Tax Statistics* 6.

¹⁰ Lord Simon of Glaisdale “The Renton Report - Ten Years On”, Text of address given at Statute Law Society Annual Conference on 12 October 1985 accessed at <http://slr.oxfordjournals.org/content/6/1/133.extract> on 10 March 2011.

¹¹ For a discussion of taxpayer interaction with SARS see 5.2.1.

Another possible reason is that the language of the ITA is surprisingly modern, given that it was written in 1962.¹² Not many instances of the type of expressions so offensive to the plain language movement, for example “hereinafter mentioned”¹³ and “null, void and of no further effect”¹⁴, are to be found.

Many complaints about the ITA are concerned with the large number of annual amendments, many of which come into operation on different dates. This substantially increases the complexity of the document. Sometimes time constraints lead to overhasty drafting. This in turn leads to technical corrections in subsequent years. Sometimes these corrections are effected to provisions that have not yet come into operation.¹⁵ Technical complexity of implementation is therefore added to complexity of substance, which is often enough dictated by the complexity of the targeted circumstances, especially in anti-avoidance measures.¹⁶

In these circumstances one would have to ask whether simplifying the language or making the layout of the Act more user friendly would not merely constitute superficial changes that do not have any effective impact on the readability and accessibility of the Act.¹⁷ In a country like South Africa, with limited resources, one cannot proceed to spend taxpayers’ money on the basis that the end product would look nicer.¹⁸

What this dissertation aims to demonstrate is that consistency in the language and structure of a rewritten Income Tax Act is a desirable and achievable goal that will indeed constitute a simplification of the material and will thereby facilitate reading and comprehension. This should in turn lead to lower compliance and enforcement costs for taxpayers and SARS respectively¹⁹, which would justify the initial expense of the rewrite.

¹² A contributing factor may well have been that at the time Bills had to be introduced in Parliament in both the official languages of the time. The knowledge that the text had to be translated in a short time might well have encouraged the drafters to draft plainly.

¹³ Inns of Court School of Law Institute of Law City University London *Drafting* 2003 OUP Oxford 19.

¹⁴ *Plain English Manual* accessed on 10 March 2010 at www.opc.gov.au/about/docs/pem.pdf 39.

¹⁵ Section 146 of Act 7 of 2010 amends section 12 of Act 17 of 2009 to add a further qualification to the effective date (1 January 2008) by limiting the operation of that provision to controlled foreign companies that submit tax returns to SARS after 1 September 2009.

¹⁶ See 2.1.2.

¹⁷ Caldwell H “Can legislation rank as literature?” in Stefanou 256.

¹⁸ For a discussion of the restrictions in the Public Finance Management Act (Act 1 of 1999), see 5.3.

¹⁹ Xanthaki in Stefanou 11.

1.2 Purpose

The intention of this dissertation is not to fill a knowledge gap in the field of drafting tax legislation. The aim is rather to bring concepts from a variety of fields together. These concepts are then applied to formulate a specific desirable and achievable goal to guide and facilitate the process of the rewrite of the ITA.

1.3 Literature review

A multidisciplinary approach was followed to conduct a literature survey. Resources were used from psycholinguistics as to the comprehension of the written word; from politics and economics as to a constitutional framework within which taxation takes place; from taxation as to the nature of tax and income tax; from law and legal interpretation as to the need for clarity and precision in legislation (and the art of drafting legislation with this in mind); and from comparative law as to the experience of rewriting tax legislation in different jurisdictions.

1.4 Scope

The constraints of time and a word limitation and the vastness of the field meant that the scope of the dissertation had to be clearly defined. On the one hand the context in which income tax is imposed and the ITA is applied in South Africa had to be briefly outlined. On the other only those aspects that are relevant to establishing the desirability and achievability of greater consistency in the redrafting of the ITA within this context were examined. These included ways of promoting reading comprehension and intelligibility by use of specific drafting techniques like plain language and the application of these techniques to the rewrite of similar tax legislation elsewhere in the world.

1.5 Methodology

The methodology employed is mainly a conceptual review of the literature on reading comprehension and drafting, as well as the context within which tax legislation is written in South Africa. A brief comparison is done on the objectives of and processes employed in recent rewrites of tax legislation in Australia and the United Kingdom, with brief reference to the drafting of tax legislation in some other jurisdictions. The lessons to be learnt from these experiences are evaluated in a South African context and against the backdrop of the theoretical argument that consistency is

desirable and that, other than simplification, it is achievable. A logically deductive argument is used to posit that if consistency - by limiting the number of elements to be processed - facilitates reading comprehension, then consistency in language, structure and content should also facilitate a wider comprehension of a complex text like the ITA. This concept of consistency being applied consistently is brought to bear on a proposed process for the rewrite of the ITA.

1.6 Summary of chapters

After the scene has been set in this Chapter, some apposite concepts like reading comprehension, complexity in legislative texts, legal interpretation and plain language are outlined in Chapter 2. These concepts are considered in the context of writing legislation in a way that facilitates the reading process, putting to best use strategies used by a reader, in order to enhance comprehension. The concepts of taxation, governments' right to tax and of income tax are also briefly discussed. (The scope of the dissertation allows only a glance at these subjects, but drafting of income tax legislation has to be situated in the broader context of income, taxation and government.) The outlined concepts are then discussed with a view to establishing that consistency is a desirable outcome and that at the very least an improvement in consistency can be achieved in the rewrite of the ITA.

In Chapter 3, some drafting tools and techniques are discussed and the vexing question of the reader for whom the legislative text is drafted is considered. The location and role of the drafter is also discussed. Layout, format and structure are examined in the context of consistency: as tools to achieve and enhance consistency and also as elements to be subjected to a rigorous application of consistency.

Chapter 4 forms an overview of the rewrites of tax legislation undertaken in Australia and the United Kingdom, together with a glance at some aspects of drafting tax legislation in other jurisdictions like Canada, the United States of America and China. Although the circumstances, objectives and outcomes in each country differ, valuable lessons of how to go about things can be learnt from the practical experience in these countries. Specific attention is paid to the process of drafting: the interaction between research, policy making, drafting and review. A conclusion is drawn that a pragmatic and incremental approach should be followed in South Africa. A desirable objective that serves as guiding principle throughout the process, such as consistency, can be achieved.

Chapter 5 formulates a way forward for the rewrite of the ITA. The project is first situated in its country-specific context: the Constitution, the role of the State Law Advisers in the drafting process, taxpayer interaction with SARS and the ITA and the implications for establishing the likely reader of tax legislation. Arguments against a rewrite are raised, as well as compelling reasons for undertaking it. These are important as they help to shape the objectives of the project, but also the pitfalls to be guarded against. The outcome of the project is uncertain. To paraphrase Bekink and Botha: Plain language and plain drafting are necessities in post-1994 South Africa, but they cannot guarantee bringing the legislative ship to its predestined harbour. Although the Constitution may serve as a compass to indicate a general direction there are many obstacles that could wreck this hazardous enterprise.²⁰

In an effort to provide for sustainability, the process is broken down into four main phases, each of which has a completed Income Tax Bill as its product. A process map is compiled for each phase, listing the main steps to be taken. The idea is to structure the phases and the steps in such a way that each step forms a building block for the overall structure. At the same time each step has to be self-sufficient. If for some reason (lack of resources or change of policy) the project is abandoned the completed steps and Bills remain viable. The guiding principle here is how to achieve consistency in language, structure and content.

Chapter 6 concludes this dissertation. A project that entails even a small change to a crucial legislative text like the ITA is indeed a perilous enterprise and should not be undertaken lightly. However, the changes to the ITA occasioned by, amongst other things, the TAB have made some form of restructuring inevitable. Drafting is an interactive and iterative process and rewriting the ITA will require several iterations and some mitigation measures to limit unforeseen consequences. Consistency as a desirable outcome provides the necessary focus in each phase and can be achieved in incremental steps. In this way, there is a good chance that the ITA will become more accessible and that its readers will be able to understand and act on what they read.

²⁰ Bekink 34.

Chapter 2

THEORETICAL FOUNDATIONS

This chapter introduces some concepts that are essential to the discussion of achieving consistency in the rewrite of the ITA. The theoretical ground is laid for viewing consistency as a desirable outcome. The question as to whether this outcome is achievable is raised here and will be further examined in Chapter 5.

2.1 OUTLINING SOME RELEVANT CONCEPTS

2.1.1 The reading process

Some of the meanings for the word “read” in the Oxford Dictionary are “look at and understand the meaning of written or printed matter by interpreting its characters or symbols”; “discover information by reading” and even “understand or interpret the nature or significance of”.²¹

Reading is a complex cognitive process that consists of a set of component skills. The main skills and knowledge areas have been identified as automatic recognition skills; evaluation skills; metacognitive knowledge; and knowledge of vocabulary and syntax, of formal discourse structure (formal schemata) and of content (content schemata). Automatic word identification skills are seen as “critical to fluent reading”.²² Word recognition is considered to be automatic when the reader is unaware of the recognition process, does not control it and therefore uses little of the brain's processing capacity. Fluency in reading also requires syntactic knowledge and a large recognition vocabulary (between 10 000 and 100 000 word families).²³ Recognising the organisational structure (formal schema) of a text improves the reader's comprehension and recall of the text. Certain organising patterns, like cause-effect, comparison-contrast or problem-solution, are specifically helpful to second language readers.²⁴ Content schemata or prior knowledge related to the content of a text aids comprehension. (A tax practitioner reading a new provision in the ITA is more likely to

²¹ Waite M (ed) *Oxford Dictionary and Thesaurus* 2007 Oxford University Press Oxford 853.

²² Grabe W “Current Developments in Second Language Reading Research” *TESOL Quarterly* 25 (3) Autumn 1991 379.

²³ Grabe 380.

²⁴ According to the census of 2001, only 8,2% of South Africans use English at home. <http://www.statssa.gov.za/census01/html/keyresults> accessed on 10 December 2010.

understand it than a layperson who has no knowledge of income tax.) Readers also require skills to evaluate what they have read and to relate it to other information.²⁵

The psycholinguistic model of reading proposed reading as a selective process, in which readers use prior knowledge to make predictions about the content of a text and then sample the text to confirm their predictions.²⁶ More recent studies have proved that bottom-up processing plays an important role in fluency.²⁷ The bottom-up process emphasises textual decoding (lower-level automatic word identification) while the top-down process emphasises the prior knowledge of and interpretation by the reader (higher-level comprehension). The interactive approach can be seen to emphasise the role played by the reader in interpreting the text (combining prior knowledge with information obtained from the text) or alternatively to emphasise the simultaneous interaction of component cognitive skills in the reading process.²⁸ Studies of eye movement during reading indicate that readers read most words (80 per cent) and do not predict and sample texts as postulated in the psycholinguistic model of reading. Visual analysis by good readers is precise and very rapid, while using limited processing capacity.²⁹ Because of the perceived importance of automatic word recognition in fluent reading, strategies to improve automaticity, like reading the same text repeatedly, have been devised.³⁰ Fluent (and therefore rapid) reading is important for comprehension, as a rapid flow of information allows the reader to make the necessary connections and inferences.³¹

Helen Caldwell³² did a study of the vocabulary used in legislation in the UK. The number of words contained in all the legislation enacted in the UK between 1980 and 2005 came to a total of 16 834. If these are reduced to word families (where verbs and nouns of the same family are counted as only one word) this total is estimated to be reduced by at least a third (roughly 10 000 word families). Compared to the vocabulary of Shakespeare and the active vocabulary of an average educated person in the UK (20 000 word families) the number of word families employed in

²⁵ Grabe 381, 390.

²⁶ Grabe 377.

²⁷ Grabe 385.

²⁸ Grabe 383.

²⁹ Grabe 385.

³⁰ Grabe 391.

³¹ Grabe 378.

³² Caldwell in Stefanou 247.

legislation is “fairly impoverished”.³³ This means that the reader of legislation repeatedly comes across the same words and stock phrases, which should improve automatic recognition of these words and phrases and should therefore lead to greater fluency and comprehension. Consistent word use as an aid to automatic word recognition and therefore to fluent reading and comprehension will be discussed in 2.1.5. The notion of consistent format and layout in the ITA as a formal schema to facilitate the reading process will likewise be examined.

2.1.2 Complexity

The Oxford Dictionary describes the word “complex” as “consisting of many different and connected parts” and “difficult to understand; complicated”.³⁴ Complexity in legislative texts is caused by a variety of factors. Caldwell states that legislation formulates rules and that the interrelationship between these rules causes complexity.³⁵ Deborah Paul states that legislative complexity is caused by the necessity to reconcile the aim of equitable tax liabilities and the requirements of tax administration and compliance. A second contributing factor is a desire to provide certainty. Where the law is unclear, taxpayers demand guidance and this usually takes the form of authorities (interpretation notes or rulings). New authorities clarify the law but add to the complexity of the text (and also add to the volume of material to be consulted).³⁶

Butt and Castle raise the issue of the use of precedent as a cause for the complexity of modern legal documents. Legal drafting is not taught as a course at universities and lawyers learn to draft on the job. The safest way to proceed is by copying from previous examples. Books of model forms have been published since the 16th century and in many cases these models have simply been copied over the years, mistakes and all. Of course the language is no longer appropriate in the 21st century, neither is the formulation tailored to a specific meaning. This leads to the use of archaic expressions and catch-all phrases such as “null and void”.³⁷

³³ Caldwell in Stefanou 249.

³⁴ Waite 195.

³⁵ Caldwell in Stefanou 251, 256.

³⁶ Paul DL “The Sources of Tax Complexity: How much simplicity can fundamental tax reform achieve?” *North Carolina Law Review* 76 1997 155.

³⁷ Butt 13.

Greater complexity is an unintended consequence of gender-neutral drafting. (Adding “or she” or “or her” to a masculine pronoun makes the sentence longer and more difficult to read.)³⁸ Techniques like tagging and labelling bring in new elements that cause additional complexity in language use, although they might provide greater clarity.³⁹

Summaries, signposts and mind-mapping (used in the Australian rewrite)⁴⁰ and signposts and overviews (used in the Tax Law Rewrite Project in the United Kingdom)⁴¹ also add to the number of elements to be taken into account when reading (therefore to the complexity of the text).

A broad formulation of principles is the simplest way of drafting.⁴² However, broad formulations do not provide certainty for specific cases. Comprehensiveness is a means of attempting to provide certainty. The disadvantage to the taxpayer and all other readers of tax legislation is the inevitable increase in complexity in the fabric of the law.⁴³

Simple rules provide certainty (in the form of rough justice) but do not make adequate provision for differences in circumstances. Making the rules more equitable leads to greater complexity. More complex rules are more difficult to understand, which is another form of unfairness. Therefore both simplicity and complexity give rise to some inequity.⁴⁴

Another reason for complexity in tax legislation is the need for anti-avoidance rules. When taxpayers make use of loopholes in existing legislation, the legislation must be “tightened up” to prevent the avoidance. As in the case of providing greater certainty for the taxpayer, anti-avoidance rules usually take the form of more detailed descriptions, which in turn lead to greater complexity.⁴⁵

³⁸ Greenberg D “The Techniques of Gender-neutral Drafting” in Stefanou 73.

³⁹ Greenberg in Stefanou 74, 75.

⁴⁰ Nienaber A “Plain language in Australia: An overview” in Viljoen 34.

⁴¹ Rogers H “Drafting Legislation at the Tax Law Rewrite Project” in Stefanou 82.

⁴² *Plain English Manual* 6.

⁴³ Laws S, “Drawing the Line” in Stefanou 30.

⁴⁴ Morse G and Williams D *Davies: Principles of Tax Law* 2000 Sweet & Maxwell London 7.

⁴⁵ Laws in Stefanou 32.

In Australia one of the stated aims of the rewrite of the tax legislation was to structure provisions in such a way that the reader's short-term memory capacity should not be exceeded.⁴⁶ This points to a need for simplicity in substance, as the existence of a large number of elements to be taken into consideration (i.e. complexity) stretches the reader's short-term memory capacity and therefore processing capacity.⁴⁷

2.1.3 Legal interpretation

The verb "interpret" is defined to mean, amongst other things, "to explain the meaning of something" or to "decide that something has a particular meaning and to understand it in this way" and "interpretation" is "the particular way in which something is understood or explained".⁴⁸ Legal or statutory interpretation can therefore be seen as the particular meaning that the courts accord to a statute and the way in which that statute is understood and explained by the courts of a particular jurisdiction.⁴⁹ In a South African context, Lourens du Plessis⁵⁰ refers to a shared belief amongst the judiciary "that statutes are bearers of meaning" and that the meaning should be retrieved "in accordance with prescribed rules or procedures". The "theories of interpretation" in common law are in fact methods of interpretation without being theories in the sense of providing explanations or justifications for their use.⁵¹ He discusses literalism, intentionalism, purposivism, judicial activism, objectivism and the linguistic turn in this regard. Literalism (or the *ipsissima verba* approach) relies on the concept of "clear and unambiguous language" employed by the legislature to denote its intention. The ordinary meaning of the words prevails unless they lead to an absurdity or inconsistency.⁵² Intentionalism views the aim of interpretation as ascertaining the intention of the legislature and then giving effect to the ideas signified by the language employed.⁵³ Purposivism aims to identify the purpose of legislation, by means of the "mischief rule", amongst other things.

⁴⁶ Nienaber in Viljoen 34.

⁴⁷ See 2.2.2.

⁴⁸ Hornby AS *Oxford Advanced Learner's Dictionary of Current English* 2005 Oxford University Press Oxford 781, 782.

⁴⁹ Interpretation of tax laws by the courts is seen as one of the legal limitations on a government's power to tax. Vanistendael F "Legal Framework for Taxation" in Thuronyi V (ed) *Tax Law Design and Drafting* 1998 IMF 15.

⁵⁰ Du Plessis L *Re-Interpretation of Statutes* 2002 Butterworths Durban 101.

⁵¹ Du Plessis 93.

⁵² Du Plessis 93-94.

⁵³ Du Plessis 94-95.

The defect in existing legislation, which the provision in question seeks to address, must be remedied. If the language of the provision departs from the purpose that is sought, the purpose overrides the language. The historical context and the context of the whole document may be brought to bear to determine the purpose of a particular piece of legislation.⁵⁴ The theory of judicial activism emphasises the “creative role” to be played by judges in interpreting and applying legislation.⁵⁵ According to the objectivist approach, the legislature's role is limited to the formulation and passage of legislation. Making the law concrete, by applying it in concrete situations, is the task of the courts. In this regard, the aspect of time is included. Interpretations of the past must be brought into and applied in the present.⁵⁶ The linguistic turn questions the existence of generally applicable rules to be applied in specific circumstances. Because language is not completely clear and unambiguous, a statute can only be interpreted in context (and context includes the purpose of a provision). Because the meaning of language is not obvious, more than one interpretation is possible.⁵⁷

A literal interpretation of legislation requires that every eventuality be spelled out: otherwise taxpayers and judges could argue that an eventuality that is not mentioned specifically is not covered by the legislation. This may happen despite the legislator's clear intention to encompass all eventualities of a certain kind, even those not mentioned.⁵⁸ One of the techniques employed to promote a less literalist and more purposive interpretation of legislation is the use of a purpose clause.⁵⁹

Purposive legal interpretation requires that the reader establishes the intention of the lawmaker in order to give effect to this intention. The use of a purpose clause to this end is debated in the Renton Report.⁶⁰ The objective is to state the purpose of a provision in general terms before entering into the specifics of its implementation. This should have the advantage of communicating the legislator's intent clearly. By its very general nature, however, a purpose clause may contradict the

⁵⁴ Du Plessis 96-97.

⁵⁵ Du Plessis 97.

⁵⁶ Du Plessis 98-99.

⁵⁷ Du Plessis 99-100.

⁵⁸ Laws in Stefanou 30.

⁵⁹ Laws in Stefanou 30.

⁶⁰ *The Preparation of Legislation: Report of a Committee appointed by the Lord President of the Council* (1975) Cmnd 6053 referred to by Caldwell in Stefanou 256.

more specific provisions that follow on it and may therefore cause confusion, or be outright misleading. This can happen if the purpose clause, for example, states that the purpose is to levy tax on income derived by a taxpayer and subsequent sections (or subsections) place a limit on the part of the taxpayer's income that is liable to tax, by providing for exemptions and deductions. If these limitations are not referred to in the purpose clause, the two sets of provisions contradict each other. Although a purpose clause may be useful in conveying the legislator's intent, it must therefore be used with circumspection.⁶¹

More problematic is the concept of "retrieving the meaning" of a legislative text from the language used. Du Plessis argues that meaning is not to be "found" in a text and then "retrieved" but that meaning is "attributed" or "decided on" in an interactive process.⁶² This accords more closely with the definition of "interpret" quoted at the beginning of this section.

De Ville refers to a number of writers, for example Francis J Mootz III, Peter C Schank and Eagleton,⁶³ who do not agree with the traditional view that language is an objective tool used to communicate the writer's thoughts. On the traditional view thoughts precede their expression in words. If the meaning is not clear from the words themselves, it can be found by ascertaining the writer's intention. According to postmodern thinking, however, the writer thinks in and through language because language is pre-existing and thought takes place in the confines of the world of language. Furthermore, the writer of a text does not determine its meaning. Meaning is derived from "an interaction between the text and the interpreter (situated within a community of interpreters)".⁶⁴ The meanings of words are social and cultural constructs. As societies and cultures change with time, so do meanings.⁶⁵

The interpreter is always situated in a specific context that is connected to the past but not determined by it. The past cannot be reconstructed. Neither can the writer or the interpreter place himself or herself in the future, to write or interpret for a situation that does not yet exist. The effect of this is that the interpreter cannot step into the shoes of the writer to objectively ascertain the

⁶¹ The House of Lords Select Committee on the Constitution found in October 2004 that a purpose clause should not form part of a Bill: Caldwell in Stefanou 256.

⁶² Du Plessis xv.

⁶³ De Ville JR *Constitutional and Statutory Interpretation* 2000 Interdoc Consultants Cape Town 8-10.

⁶⁴ De Ville 11.

⁶⁵ De Ville 8,9.

original meaning of the text. Because there is no “correct” meaning of a specific text, no method is able to determine the correct meaning.⁶⁶ As the language employed by the writer is not neutral or innocent, so the interpreter is not objective or disinterested. Interpretation of a text is in part determined by the practical application that is sought within a specific (interpreter's) context.⁶⁷

Legal interpretation and drafting may be seen as two sides of the same coin.⁶⁸ A drafter who is aware of interpretation rules is better equipped to draft in a way that will enable interpretation along the lines of the drafter's intention. Butt and Castle conclude that a drafter rarely drafts “in a defensive style”,⁶⁹ with the rules of interpretation in mind, and that reliance on the courts to interpret legislation instead of the text speaking for itself would be an abdication of responsibility.⁷⁰ Nonetheless, the style of legal interpretation prevalent in a country of necessity has an effect on the drafting style employed. The extreme complexity of the income tax laws in Australia was in part attributed to the “strict and literal” style of interpretation employed by the courts in that country until the 1980s.⁷¹

Although the “ordinary meaning of words” is not always “clear and unambiguous”,⁷² the golden rule - the ordinary meaning of words, unless specifically required and indicated otherwise, and consistency in the use of terminology - provides some guidelines for drafters. From a drafter's point of view this can be summed up as: use ordinary words in their ordinary meaning; never change the language unless a different meaning is intended; and always change the language when a different meaning is intended.⁷³

2.1.4 Plain language

⁶⁶ De Ville 7, 16.

⁶⁷ De Ville 7,8.

⁶⁸ “Statutory drafting and interpretation are two constituent parts of an exercise in communication.” McLeod I *Legal Method* 2005 Palgrave Macmillan Basingstoke 223.

⁶⁹ Butt 39.

⁷⁰ Butt 48.

⁷¹ Ault HJ and Arnold BJ (eds) *Comparative Income Taxation: A Structural Analysis* 2004 Kluwer Law International The Hague 10.

⁷² *Savage v Commissioner for Inland Revenue* 1951 4 SA 400 (A) 410F-G per Schreiner JA, in Du Plessis 199.

⁷³ Butt 61.

Plain language is one of the tools advocated to achieve a simplification of tax legislation. One might well ask: What is plain language? Plain language is “language which conveys its meaning to the reader clearly, simply and directly”.⁷⁴ But plain language is not restricted to language, it also deals with content, format and layout: the overall design of the document; the way sentences and paragraphs are structured and numbered; and formatting elements such as typesize, justification and white space.⁷⁵

In the 1960s and 1970s the plain language movement was largely driven by consumer rights movements in the United States of America, the United Kingdom, Australia and Canada and non-English-speaking countries such as Sweden and Mexico.⁷⁶ In the United States of America a Document Design Center for public documents was formed in 1978 and in the 1990s the Veterans Benefit Administration (VBA) started reader-focused writing. On 30 September 1993 President Clinton signed Executive Order 12866, calling for regulations that are simple and easy to understand, thereby minimising uncertainty and litigation. In 1998 a memorandum on plain language stipulated the use of ordinary words, short sentences, the active voice and “you” and other pronouns.⁷⁷ The Plain Writing Act of 2010 (signed into law by President Obama on 13 October 2010) stipulates that plain language must be used by executive agencies in official documents such as letters, publications or forms (but not regulations).⁷⁸ In the United Kingdom the National Consumer Council worked with the Plain English Campaign (started in 1979) and with Clarity (an international organisation of lawyers with the aim of using language that is “both certain in meaning and easily understandable”) to produce *Plain Words for Consumers* and *Plain English for Lawyers*.⁷⁹ In post-1994 South Africa plain language was seen as one of the tools in a process of democratisation.⁸⁰

A number of jurisdictions compiled specifications as to what constituted writing in plain English. In Canada Elmer Driedger authored *A Manual of Instructions for Legislative and Legal Writing* that

⁷⁴ Inns of Court: 1.

⁷⁵ Butt 96, 113.

⁷⁶ Butt 78.

⁷⁷ Viljoen in Viljoen 45-47, 49.

⁷⁸ Choi Wooje “Plain Writing Act of 2010 signed into law” *IBFD North America* 21 October 2010; Center for Plain Language accessed on 21 October 2010 at <http://centerforplainlanguage.org/plain-writing-laws/plain-writing-act-2010>.

⁷⁹ Butt 79, 82, 86.

⁸⁰ Omar D “Plain language, the law and the right to information” in Viljoen 58.

was published by the Department of Justice in 1982. In the 1990s the Plain Language Institute of Vancouver published an *Editorial and Design Stylebook* and the Plain Language Centre of the Canadian Legal Information Centre produced *Plain Language Resource Materials*.⁸¹ The Law Reform Commission of Victoria (Australia) published *Plain English and the Law* in 1987.⁸² A summary of the recommendations contained in it appears in the *Practice Manual for Legislative Drafting* of the South African State Law Advisers:

1. The organisation (layout) of the text should be clear; important items should be placed first, then qualifiers and details; sections that belong together should be grouped together and arranged in a logical order to form a coherent whole; a clear table of contents, headings schedules, footnotes and indexes should be used.
2. The text should be written in short sentences, using the active voice and avoiding unnecessary detail and cross references.
3. Gender-neutral language should be used: by adding “or she” or “or her” when appropriate; by repeating the noun (e.g. the tenant may renew the tenant’s lease); or by simply using “the” without specifying possession (e.g. the tenant may renew the lease).
4. The relative pronouns “that” and “whose” should be used, as they can be used in personal and non-personal cases.⁸³

A common feature of these publications is that they contained lists of archaic and unnecessary words and expressions, to be avoided completely or to be replaced by more modern equivalents.⁸⁴

The optimism of the plain language movement of the 1990s has been tempered somewhat by the practice of drafting in subsequent years. Judicial criticism of provisions drafted in plain language cannot be blamed solely on the conservatism of lawyers. Because there are no familiar formulations to hide behind, ideas have to be expressed clearly.⁸⁵ This requires clarity of thought and insight. (The use of the active voice instead of the passive implies that the drafter is aware of exactly who is to perform the action.) Simplicity and precision have to be weighed up against each other,

⁸¹ Butt 107-108.

⁸² Butt 95.

⁸³ State Law Advisers (comp) *Practice Manual for Legislative Drafting* 2001 166-169.

⁸⁴ See *Plain English Manual* 38-40.

⁸⁵ Butt 118.

especially in tax legislation, which is read by a variety of users, especially professional tax advisers.⁸⁶

Despite initial expectations that plain language would cut through the thicket of redundant word usage and convoluted phrases, plain English might require the use of more words than the concise style of some traditional drafting.⁸⁷ The experience of the Tax Law Rewrite Project (TLRP) in the United Kingdom, as well as the attempt to rewrite tax legislation in plain language made in Australia point to this conclusion.⁸⁸ In both these cases, the result was a disproportionate increase in the volume of the legislation. The Social Security Act of Australia was redrafted to make it more accessible to non-lawyers but the result was a document of 1471 pages that cannot be “mastered” without the help of a lawyer. Butt and Castle are of the opinion that the drafters did not “master the intricacies of their own creation”.⁸⁹

2.1.5 Consistency

Despite Ralph Waldo Emerson’s famous criticism of “foolish consistency”,⁹⁰ the Oxford Dictionary indicates it as an approving term to be used when someone behaves or something happens in the same way over a period of time, or when the different parts of, for example, an argument all agree with each other.⁹¹ In this dissertation, in the context of rewriting the ITA, consistency may be used to refer to the use of exactly the same words to convey the same meaning, and also to a similarity of format that enables the different parts of the ITA to work together and to agree. It may even be extended to policy which is applied in the same way for a period of time and across different parts of the tax legislation.

In the early days of typesetting letters and characters had to be physically assembled into lines of type that were eventually made up into page segments. Type had to be proofed very carefully as it was relatively easy to make a mistake. This was a time-consuming process and ways were sought to

⁸⁶ *Plain English Manual* 12.

⁸⁷ Inns of Court 15.

⁸⁸ See chapter 4.

⁸⁹ Butt 115.

⁹⁰ “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.” Ralph Waldo Emerson *Self-Reliance* 1841.

⁹¹ Hornby 310.

speed it up. One was to use blocks of type pre-assembled into standard words and phrases. Pieces of text could also be cast into solid thin metal plates (clichés) to be used on multiple printing presses at the same time or repeatedly at varying intervals. Because the copy had been thoroughly proofread at the start of the process, there was no need to check it every time it was reused.⁹²

Using defined terms and other expressions in exactly the same format has the same advantage for the modern drafter as using stereotypes had for old-style printers. It saves time and limits errors. Errors of whatever kind compromise the clarity and precision of a document⁹³ and the plain language drafter should avoid them by all means possible.⁹⁴ However, an over-emphasis on consistency can lead to what Butt and Castle describe as the “tyranny” of the precedent books.⁹⁵

The main advantage of consistency to a reader is that it facilitates reading and comprehension.⁹⁶ One of the phrases used very frequently in the ITA relates to the difference between the time when an amount may accrue to a taxpayer and when the taxpayer actually receives the amount. This eventuality is covered by the phrases “is received by or accrues to” or “received or accrued”, depending on the context. Consistency should come to the aid of any reader of legislation. If the phrases are used correctly and consistently, they become a standard part of the information (i.e. the content schema).⁹⁷ In cases where only accrual is meant and receipt is not included, a reader that is fairly familiar with the text should immediately make a mental note of the difference. (A normal reaction would be to interrupt the reading process to ask what the difference is and why this text has been stated differently.) In this way consistency (or intentional non-consistency) helps to highlight substantive aspects that are worthy of note.

As stated in the outline of the reading process, repetition of the same words and phrases aids automaticity and therefore fluency in reading. Fluency is an important aspect of reading comprehension, as speed allows the reader to hold meaningful pieces of information in the mind

⁹² <http://www.museumofprinting.org> last accessed on 10 December 2010.

⁹³ Inns of Court 18.

⁹⁴ Consistent language use also facilitates translation - an aspect that is important in a South African context - and increases the viability of electronic translation. The exact same phrase can be replaced by an equivalent through a simple ‘Find and replace’ function. Variants are more difficult to find.

⁹⁵ See 2.1.2.

⁹⁶ “A uniform style can help communicate the message by enabling the reader to concentrate on the important part of the message without being distracted by mere stylistic differences.” *House Legislative Counsel’s Manual on Drafting Style* 1995 Office of the Legislative Counsel: US House of Representatives 9.

⁹⁷ Grabe 381.

(and short-term memory) and to make connections between them. This is essential when dealing with complex texts that consist of many layers of meaning.⁹⁸

Consistency of format may be viewed slightly differently but it has the same effect. Repetition of the same format familiarises the reader with the shape of the text, for example heading, general statement and details in subsequent subsections. This formal schema facilitates the predictive aspect that is crucial in a reader's search for information in a text and forms part of the top-down processing of information.⁹⁹

Consistency is a golden rule of legal interpretation¹⁰⁰: use of the same language denotes an intention to convey the same meaning. This gives the drafter of legislation a clear indication: use the same language when the same meaning is intended and change the language if a different meaning is intended.¹⁰¹

Consistency in this dissertation is seen not only as an essential tool for drafting clearly but also as a means of facilitating and simplifying the process by which a reader reads the ITA and processes the relevant information contained in it.

2.1.6 Taxes

The concept "tax" is notoriously difficult to define.¹⁰² The Oxford Dictionary defines it as "money that you have to pay to the government so that it can pay for public services."¹⁰³ The dictionary also lists duty, custom, tariff, levy and excise as words used for money to be paid to government. Economically any compulsory transfer of resources to the government can be seen as a tax,

⁹⁸ See 2.1.1.

⁹⁹ Grabe 377.

¹⁰⁰ See 2.1.3.

¹⁰¹ Butt 62.

¹⁰² Thuronyi V *Comparative Tax Law* 2003 Kluwer Law International The Hague 45.

¹⁰³ Hornby 1516.

including inflation costs.¹⁰⁴ However, from a legal perspective, Victor Thuronyi does not see inflation as a tax because there is no payment by a taxpayer to government.¹⁰⁵

Taxes are generally the main source of income for government. Other sources are borrowing, printing of money and selling of assets. The primary aim of government is to use the money raised by means of taxes to finance government expenditure. The bulk of government expenditure goes to providing public services. These are services that the private sector cannot provide (such as defence) and services that are considered to be best provided by government to all citizens (such as education and health services). However, taxes are also raised for other reasons, e.g. wealth distribution, to control the economy and to modify people's behaviour.¹⁰⁶ Specific taxes on selected products, called excises,¹⁰⁷ are imposed to curb people's use of alcohol and tobacco, while environmental levies are an attempt to make consumers pay the full price (not just the market price) for the use of non-degradable substances like plastic bags or of fuel for cars.¹⁰⁸

The basic legal framework for modern fiscal systems requires that a tax may only be levied in terms of lawfully enacted legislation, that the tax must be impartial and that the revenue must be used for "lawful public purposes". Under the rule of law these requirements are enforced by the courts.¹⁰⁹ Philosophically the government's right to tax derives from the realisation that government is needed to prevent anarchy (the Hobbesian theory). In accordance with a social contract between government and citizens, citizens pay taxes to enable government to provide an ordered society for the benefit of the citizens.¹¹⁰ Government has a revenue-maximising tendency, while citizens operate behind a veil of ignorance.¹¹¹ (They do not at any given time know when and to what extent they will individually benefit from government services.) Because electoral procedures like majority rule do not provide adequate protection to citizens, constitutional limits to government's

¹⁰⁴ Steenekamp T "Chapter 9 Introduction to taxation and tax equity" in Black Calitz Steenekamp *Public Economics* 2008 Oxford University Press SA Cape Town 116.

¹⁰⁵ Thuronyi 2003 45.

¹⁰⁶ Morse 4-5.

¹⁰⁷ Cnossen S "Role and Rationale of Excise Taxation" in Cnossen S (ed) *Excise Tax Policy and Administration in Southern African Countries* University of South Africa Pretoria 1.

¹⁰⁸ Morse 5.

¹⁰⁹ Vanistendael in Thuronyi 1998 15.

¹¹⁰ Brennan G and Buchanan JM *The Power to Tax: Analytical foundations of a fiscal constitution* 1980 Cambridge University Press Cambridge 4-9.

¹¹¹ Black P "Chapter 6 Public Choice Theory" in Black 77, 69.

power are needed.¹¹² These take the form of rules that govern government conduct and accounting procedures, and specify the services to be provided by government, the structure of the government and the type of laws to be enacted.¹¹³

The characteristics of a good tax system were formulated in 1776 by Adam Smith¹¹⁴. These requirements of equity, certainty, convenience and efficiency are called the four canons of taxation. A further requirement is that taxes should be neutral. They should not impact on economic behaviour, thereby hindering the free flow of market forces.¹¹⁵

As a result of globalisation in the late twentieth century, countries have to remain within the norms of international taxation in order to become or remain competitive. This has implications for national tax policy, as free trade zones, tax holidays and advantageous depreciation regimes may be employed to attract investments. Regional cooperation entails that countries must abide by the common rules of regional bodies.¹¹⁶

There is a general perception that taxes should be fair. The poor are not subject to income tax on compassionate grounds and necessities of life are not taxed. This has the benefit to employers of being able to keep wages low.¹¹⁷ Fairness is measured in terms of the ability-to-pay concept and the benefit principle. Persons in equal circumstances (with the same ability to pay) should be subjected to an equal amount of tax. This constitutes horizontal equity.¹¹⁸ Vertical equity requires that persons in different circumstances be subject to an appropriately different amount of tax. This is much more difficult to apply as it raises the question of what is appropriately different. Progressive tax rates on income are seen as a way of providing vertical equity.¹¹⁹ Those who are able to pay should do so,

¹¹² In the previous dispensation in South Africa, the courts did not have the right to strike down legislation enacted by Parliament. The tax system is now subject to the Constitution and tax legislation is subject to judicial review. Croome BJ *Taxpayers rights in South Africa* 2010 Juta Cape Town 4.

¹¹³ Brennan 9.

¹¹⁴ Smith A *An Inquiry into the Nature and Causes of the Wealth of Nations* 1776 Book V Chapter II referred to by Croome 3.

¹¹⁵ Morse 6.

¹¹⁶ Morse 10.

¹¹⁷ Sabine BEV *A Short History of Taxation* 1980 Butterworths London 114.

¹¹⁸ Steenekamp in Black 122.

¹¹⁹ Steenekamp in Black 123.

while others (young, elderly, destitute) receive government services that they cannot afford themselves.

The benefit principle requires that taxpayers be taxed proportionately to the benefits they receive from government. Expenditure is thereby matched by revenue. However, government often provides non-excludable public goods (such as policing) and it is not always possible or appropriate to apportion use of these goods because of the redistributive objectives of government.¹²⁰ The benefit principle is most often applied in the context of user charges, where it is possible to determine who benefits from a particular service, such as toll roads.¹²¹

Some forms of income are excluded from the tax base because they are non-cash and these exclusions have an effect on the equity of a tax system.¹²² Morse and Williams use the example of two people who have the same amount of money: one buys a house and lives in it. There are no tax implications for him. The other person applies the money to buy shares and uses the dividends he receives to pay his rent. If the income on dividends is taxed, the two are not in the same tax position, although both have acted lawfully and in an economically sound way.¹²³

The freedom from arbitrary taxation was contained in the Magna Carta of 1215 and the Petition of Rights of 1628. Both these documents guarantee that taxes are raised only by the lawful representatives of taxpayers in Parliament, thereby providing some certainty to the taxpayers.¹²⁴ Certainty is the second of Adam Smith's canons. In order to plan for tax obligations, a taxpayer must know how much tax is going to be due. Therefore the rules that determine tax liability should be capable of being understood. The simpler the rules, the more easily they are understood, therefore the more certainty for a taxpayer. But simple rules often afford "rough justice" because they ignore differences between taxpayer circumstances. An effort to make the rules fairer, more tailored to specific circumstances, inevitably detracts from their simplicity. The harder the rules are to understand (and enforce) the less certain they are. The search for equity therefore detracts from certainty.¹²⁵

¹²⁰ Steenekamp in Black 121.

¹²¹ Steenekamp in Black 116.

¹²² Steenekamp T "Chapter 11 Income taxation" in Black 157.

¹²³ Morse 6-7.

¹²⁴ Vanistendael in Thuronyi 1998 18.

¹²⁵ Morse 7.

The third canon is that of convenience.¹²⁶ Tax should be extracted as painlessly as possible, thereby reducing complaints. Indirect taxes such as excises and value-added tax are seen as more convenient, because they are invisible. This reduces tax resistance.¹²⁷ Withholding of tax from salaries (by means of a pay-as-you-earn system) reduces the inconvenience of income tax, as the salary earner never actually receives the full amount of salary and therefore does not need to pay the tax to the revenue service (because the employer does it on the employees' behalf). In this case the person responsible for withholding the tax (employer) bears a sizeable compliance cost, while the cost to the tax administration is low (because enforcement is simplified).¹²⁸

Keeping the cost of a tax to the minimum is the fourth of Adam Smith's canons. Efficiency of tax legislation can be seen as the relation between the costs and the benefits of a particular piece of legislation.¹²⁹ In order to measure the efficiency of a tax, the cost of administration and enforcement, as well as that of compliance, must be taken into account. The rate of tax has an effect on the efficiency of a tax because it influences taxpayer behaviour. If the average rate of tax is high, this serves as an incentive for taxpayers to work harder, so that they have enough money left after tax. If a taxpayer is subject to a high marginal rate of tax, it serves as a disincentive to work harder: the person simply pays more tax and receives no benefit from a higher income. This leads to tax avoidance and tax evasion.¹³⁰ Tax avoidance is seen as one of the reasons for complexity in tax legislation, which in turn leads to higher enforcement and compliance costs.¹³¹

In addition to the requirements discussed the Katz Commission lists the following precepts for a good tax structure: simplicity, cost-effectiveness, flexibility, stability, distributional effectiveness and a fair balance of direct and indirect taxes.¹³²

¹²⁶ Morse 5.

¹²⁷ Steenekamp T "Chapter 13 Taxes on goods and services" in Black 199.

¹²⁸ Steenekamp "Chapter 10 Tax efficiency and tax reform" in Black 143.

¹²⁹ Posner, R, 'Cost Benefit Analysis: definition, justification and comments on conference papers' 29 (2000) *The Journal of Legal Studies* 1153-1177 referred to by Xanthaki in Stefanou 7.

¹³⁰ Morse 9.

¹³¹ Laws in Stefanou 30.

¹³² Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa 18 November 1994 at 1.5.4(a), referring to the Report of the Margo Commission on the same topic 1987.

2.1.7 Income tax

In order to examine the question of what constitutes income (that which is to be taxed under an income tax) we need to look at the history of income taxes, especially in the United Kingdom. Income taxes were traditionally used to raise revenue for wars. They were therefore periodic taxes, raised after the consent of Parliament had been obtained. The practice of the monarch having to convene a Parliament in order to raise money for wars was a major factor in the development of the British parliamentary system. The Bill of Rights (1688) stipulated that no tax could be charged without the consent of Parliament.¹³³ In 1842 an income tax was introduced in the United Kingdom and it is still in place with modifications.¹³⁴

Three concepts of income can be distinguished: source, trust or accretions. According to the first, income is that which flows from a (regular) source like employment. Windfalls, gifts and capital gains are therefore excluded from this concept of income. The trust concept distinguishes between income (or revenue) and capital. This flows from the trust law principle that gains from the sale of assets should be reinvested in the trust and not paid out as income. This was intended to safeguard the assets of the trust for remaining beneficiaries. Both these conceptions exclude capital gains from income, but for different reasons. The difference appears in the treatment of business income. On the “source” view income and capital gains from business are treated the same, whereas the “trust” view would exclude capital gains from business income.¹³⁵

The United Kingdom presently has a system that combines source and trust concepts. The United States of America and Japan use the concept of accretion. Any accession to wealth that has been realised and that falls under the taxpayer’s control is counted as income. In the United States of America sale of land and property has long been a source of great wealth and regular income to real estate brokers, whereas the sale of land occurred rarely in European countries. This reinforced the differing views of land as a saleable commodity (source of income) and land as capital essential to the production of income in these two parts of the world.¹³⁶

¹³³ Ault 115.

¹³⁴ Morse 22.

¹³⁵ Thuronyi 2003 236-239.

¹³⁶ Thuronyi 2003 236.

Income may be defined globally or in terms of schedules. According to the global definition, income from different sources is not treated differently. In a schedular system, different types of income are set out in schedules and may be treated differently, according to the schedule into which they fall. If an amount does not fall into any of the types listed in the schedules, it is not taxed as income. There has been a general move towards a global system in most countries, but at the same time schedular elements have been retained or brought in subsequently in the form of exemptions or limitations on the treatment of losses in different categories of income. Capital gains are also taxed under a special regime.¹³⁷

In a global system the starting point is the gross income of a person: all amounts received by that person. Certain amounts are exempt from income tax. They have to be subtracted from gross income in order to arrive at income. Income of public organisations, religious institutions, charitable organisations or educational institutions are generally exempt, as are welfare payments and scholarships. Some amounts are exempted to avoid double taxation, usually in terms of a treaty between two jurisdictions or in terms of international convention. Some amounts are exempted for political or administrative reasons. Windfall gains are often exempt because of practical considerations and because they are not seen as being linked to economic activity.¹³⁸

Once the income of the taxpayer has been determined, expenses incurred in the production of income are allowed to be deducted from income. These deductions may include capital allowances and depreciations. Sometimes donations to charitable organisations and contributions to retirement funds may also be deducted. The taxable income of the taxpayer is determined by subtracting all deductions allowed from income.¹³⁹

Once the tax rate has been applied to taxable income, the tax payable is determined by subtracting tax offsets. These may apply because of tax already withheld (as in a PAYE system) or for social or economic reasons.¹⁴⁰

¹³⁷ Thuronyi 2003 233, 242.

¹³⁸ Burns L and Krever R "Individual Income Tax" in Thuronyi 1998 504-505.

¹³⁹ Burns 505, 502.

¹⁴⁰ Burns 501.

2.2 DISCUSSION OF CONCEPTS

2.2.1 Efficiency in drafting

Efficiency is one of the canons of tax law.¹⁴¹ According to Xanthaki efficiency is a “desired value” but in the hierarchy of legislative drafting she places efficiency below effectiveness. Effectiveness is seen as the relationship between the purpose of legislation and its effect, that is, to what extent the drafted product achieves its aim.¹⁴² Efficacy is seen as the extent to which the policy aims are achieved. The effectiveness of legislation contributes to the efficacy of the policy. In evaluating the effectiveness of legislation, Seidman and Seidman emphasise the skill of the drafter.¹⁴³ Efficiency is placed on the same level as three other objectives pursued by a drafter: clarity, precision and (un)ambiguity. Plain language, simplicity and gender neutrality are placed on a lower level, to be employed in an effort to attain the higher order objectives of efficiency and effectiveness in drafting, which in turn serve efficacy.¹⁴⁴ Improved effectiveness is linked to improved implementation and compliance.¹⁴⁵

Having established the desirability of effectiveness in drafting, one might argue that drafting aims and tools that contribute to effectiveness are also desirable. But the relationship between efficiency, clarity, precision and unambiguity is somewhat complex. Although vagueness or generality is sometimes intended in legislation, ambiguity (uncertain or inexact meaning) is not. Excessive attempts at precision (exactness of expression or detail) can lead to overdrafting, a criticism often levelled at common law drafters. In an effort to be exhaustive the drafter may in fact create unintended loopholes. If legislation is clear, it is intelligible and unambiguous, that is it is easy to understand and conveys its message clearly to all its readers.¹⁴⁶ Clarity, precision and consistency provide certainty. They also provide intelligibility, essential in a democracy where ordinary citizens

¹⁴¹ Morse 5.

¹⁴² Xanthaki in Stefanou 6.

¹⁴³ “Effective policy finds its expression not in the statements of a policymaker, but in the product of the legislative drafter.” Seidman A and Seidman RB “Between Policy and Implementation: Legislative Drafting for Development” in Stefanou 318.

¹⁴⁴ Xanthaki in Stefanou 17.

¹⁴⁵ Xanthaki in Stefanou 6.

¹⁴⁶ Xanthaki in Stefanou 10.

and law enforcement agents must understand the laws. Inaccessible law bears a high cost: enforcement, application and interpretation become difficult and time and money is wasted.¹⁴⁷

Although clarity, precision, unambiguity and efficiency (and therefore effectiveness and efficacy of the law) are desirable objectives in drafting, maintaining the right balance between them is a daunting task.¹⁴⁸ A discussion of rewrites of tax laws in other jurisdictions¹⁴⁹ indicates that simplification proved to be an elusive goal. The requirements of precision have led to excessive volumes of texts. Although simplicity may be the aim, the volume creates the need for overviews and signposts (a different form of cross referencing) that adds an additional layer of complexity.¹⁵⁰ Complexity adds to compliance costs, which are in turn a burden on the economy.¹⁵¹ This has led to Lord Howe's statement that "lower quantity is at least as important as higher quality".¹⁵²

2.2.2 Why is consistency desirable?

This paper aims to demonstrate that consistency is an appropriate objective in the rewrite of the ITA, because it is desirable while also being achievable. It is desirable because (with clarity and precision) it helps to achieve certainty and intelligibility (as seen above). It is usually seen as one of the tools used in plain language, although of course its use predates the plain language movement. Consistent and correct use of terminology and definitions is one of the guidelines for plain language provided by the Inns of Court School of Law.¹⁵³ Consistency is also a crucial element in legal interpretation. Consistent use of the exact same phrase or defined term indicates that the same meaning is intended and that any departure from the standard phrase or term indicates a different meaning.¹⁵⁴

¹⁴⁷ Xanthaki in Stefanou 11.

¹⁴⁸ The style of drafting may be related to the kind of legislation: criminal and tax laws require a greater degree of precision than laws that state general principles (such as a Constitution or a Human Rights Act). The definitions section of a piece of legislation may also require more precision than a section that states the tasks of a governing body. In cases where simplicity militates against certainty, the Renton Report advises that precision should prevail over simplicity in order to provide certainty. Xanthaki in Stefanou 11.

¹⁴⁹ See Chapter 4.

¹⁵⁰ Rogers in Stefanou 82.

¹⁵¹ Steenekamp in Black 142.

¹⁵² Aberavon Lord Howe "Simplicity and Stability: The Politics of Tax Policy" *British Tax Review* 2001 2 114.

¹⁵³ Inns of Court 18.

¹⁵⁴ See 2.1.3.

Reading consists of automatic and cognitive processing aspects and cognitive processing power is limited by the reader's short-term memory capacity.¹⁵⁵ If more elements in the reading process are dealt with automatically, more processing capacity is freed up to form cognitive links between elements contained in the text. These cognitive links enable the reader not only to understand the words and the sentences of the text, but also to comprehend the meaning that the writer is attempting to convey. One of the elements leading to greater automaticity and the maximising of processing capacity is consistency in language, layout and content. For example, the consistent use of defined expressions such as "taxable income" leads to frequent repetition of the same words and phrases, which enhances fluency in reading, which in turn leads to better comprehension. The processing power of the human brain is limited (by amongst other things the amount of information the person can hold in short-term memory). Therefore, in order to maximise the processing power, extraneous information should be limited. The less capacity is needed for the process of finding information and reading it, the more processing capacity is available to digest the information and to extract the relevant meaning from it. Consistency helps to limit the information involved in the digesting process as the brain does not need to pay attention to already familiar concepts. These fade into the background, so to speak, as they become part of the known schema.

2.2.3 Can consistency be achieved?

Consistency can be brought to bear on different aspects of a legislative text: the language, the layout of sections, the overall structure of the Act in parts and chapters and on the policy that informs the drafting.¹⁵⁶ In Chapter 5 a process outline based on these aspects is proposed for the rewrite of the ITA, with a consolidation of the present ITA as the first step on the path. Although work on different phases may overlap, the focus would be on achieving consistency in one aspect at a time. This limits the work to quantities suited to limited resources. The process is designed to produce a new Income Tax Bill at the end of each phase, thereby providing for sustainability.¹⁵⁷

¹⁵⁵ The plain language rule of writing short sentences is based on the concept of limiting the information contained in a sentence to that which can be contained in an individual's short-term memory. Nienaber in Viljoen 34.

¹⁵⁶ See 3.3.3.

¹⁵⁷ See 5.5.1.

Consistency in language is an important element in drafting: legal interpretation requires it¹⁵⁸ and plain language recommends it as a tool for simplification and intelligibility.¹⁵⁹ It is not a new concept and drafters do not need special training in it. At the same time, it provides a clear focus for the work to be done. Measurable and achievable outcomes can be based on it: Compilation of a style guide will help to lay bare the existing inconsistencies and can serve as a tool for consultation and transparency. Consistent application of language agreed on is achievable electronically (although care will have to be taken not to commit any foolish consistencies).¹⁶⁰

Consistency in format is recognised as an important element in drafting. The Practice Manual provides clear guidance on the internal format of sections and the overall layout in chapters and parts.¹⁶¹ Simply renumbering the sections sequentially would greatly simplify matters for readers, and this is a perfectly achievable task. Greater consistency in the internal structuring of sections can be achieved: the style guide could provide a limited number of models from which the drafter selects the most appropriate, depending on the length and complexity of the intended provision. This is once again standard practice for drafters, as it simplifies their task. Consistency would simply provide a specific focus to that part of the process.¹⁶²

Restructuring the ITA, which at the moment spans more than 400 printed pages, is not a simple task. Plain language precepts enjoin one to group provisions dealing with the same thing together.¹⁶³ This is useful as a guiding principle but the implementation in practice is difficult to conceive. An analysis would have to be made of the provisions in the main Act and the schedules in order to determine which deal with similar matters. A decision will have to be made as to whether, for example, the donations tax should form part of the income tax legislation, as it does at the moment.¹⁶⁴ Should the individual income tax be separated from the corporate tax and, if so, how?¹⁶⁵ Consistency could be a useful tool in the analysing process.

¹⁵⁸ See 2.1.3.

¹⁵⁹ See 2.1.4.

¹⁶⁰ See 5.5.3.

¹⁶¹ State Law Advisers 36-41.

¹⁶² See 5.5.1.

¹⁶³ State Law Advisers 166.

¹⁶⁴ Part V of Chapter II of the ITA.

¹⁶⁵ Burns 499-500. See 3.3.3.

Because consistency is such a desirable outcome an improvement in consistency will already constitute a big step forward. Even if practicalities and human fallibility prevent the achievement of complete consistency, with determined effort and focus greater consistency can be achieved.

Chapter 3

WRITING UNDERSTANDABLE TAX LAWS

In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment.

There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.¹⁶⁶

A realisation of the need for intelligibility specifically in tax legislation has long been felt.¹⁶⁷

However, tax legislation drafted in a technological age reflects the complexity of real life.¹⁶⁸ Tax legislation also has to provide certainty and is cited as one of the cases where precision may have to trump simplicity.¹⁶⁹ In embarking on a rewrite of tax legislation one would have to ask the question: How can one write tax legislation providing certainty in such a way that it is understandable? In order to explore that question one has to look at who drafts tax legislation, who reads tax laws and how they are drafted.

3.1 The drafter of tax legislation

While Crabbe emphasises the legal aspect of legislation he also refers to its communicative aspect.¹⁷⁰ Pearce and Geddes are of the view that the “... inherent uncertainties associated with the use of language ...” imply that legislative drafters “... face real difficulties of communication.”¹⁷¹ They ascribe these difficulties partly to the size and the attitude of the audience of legislation. Unlike normal written communication, legislation dealing with complex matters is addressed at a large unknown audience, some of whom may not be reading in good faith. In addition, the drafter cannot be seen as the author of the legislation. Ultimate responsibility for the legislation (and therefore final decisions about its content) may lie with the legislature, the member of the executive

¹⁶⁶ *J Rowlatt Cape Brandy Syndicate v IRC* 1921 1KB 64 71 12TC 358, 366 quoted in Blann BEJ *Principles of South African Income Tax* 1955 Butterworth Durban 1.

¹⁶⁷ “The imposition of a tax must be effected by plain words.” *Brunton v Stamp Duties Comrs* 1913 AC 747, 760 quoted in Blann 2.

¹⁶⁸ Elliott quotes Elmer Driedger’s remark that legislation is complicated “because life is complicated”. Elliott D *Tools for Simplifying Complex Legislation* 1996 Tax Drafting Conference Auckland accessed on 10 December 2010 at <http://www.davidelliott.ca/papers/simplifying.doc> 1.

¹⁶⁹ Xanthaki in Stefanou 11.

¹⁷⁰ “An Act of Parliament expresses legal relationships. It is also a form of communication.” Crabbe VCRAC *Legislative Drafting* Vol I Cavendish London 27.

¹⁷¹ Pearce DC and Geddes RS *Statutory Interpretation in Australia* 2001 Butterworths Australia 2.

responsible for its introduction, the instructing officers in the relevant department or lobby groups.¹⁷² The drafter forms the link between policy and implementation and must transform policy into law in such a way that it can be implemented.¹⁷³ The quality of legislation therefore depends on the quality of the underlying policy and the quality of the drafting. A third element is how well it works in practice.¹⁷⁴

An important distinction between drafters is whether they are located in a common law or civil law country. Common law jurisdictions often have a separate drafting office along the lines of the Office of Parliamentary Counsel in the United Kingdom.¹⁷⁵ In civil law countries drafting is decentralised and is often undertaken by a committee consisting of civil servants and academics (and sometimes parliamentarians). Civil law drafters produce travaux préparatoires (legislative history) to accompany the legislation.¹⁷⁶ These often contain lengthy and detailed socio-legal explanations of the legislature's intent and of the reasons for the legislative solution chosen. In common law jurisdictions explanatory memoranda have been replaced by explanatory notes. These are written by the drafters and are sometimes only one-page summaries of the broad intention of the legislation.¹⁷⁷

Another important distinction between drafters is whether they work in a large or small jurisdiction. Although the view was held that drafters should not be involved in policy making, this has proved to be largely impracticable.¹⁷⁸ In the process of turning substantive policy into legislation the drafter may raise additional policy matters. An argument can therefore be made for bringing the drafter into the policy formulation process at an early stage before the details of implementation (the "operative face" of the policy)¹⁷⁹ have been finalised.¹⁸⁰ In large jurisdictions drafters have the opportunity to specialise: they do not need to concern themselves with policy making or implementation. In

¹⁷² Pearce 2.

¹⁷³ Seidman in Stefanou 317.

¹⁷⁴ Crabbe 17.

¹⁷⁵ This office was established in 1869 and in recent years almost all legislative drafting has been done by it. Crabbe 10.

¹⁷⁶ Vanistendael in Thuronyi 1998 34. Also called Introductory Reports: Stefanou C "Drafters, Drafting and the Policy Process in Stefanou 327.

¹⁷⁷ Stefanou in Stefanou 326.

¹⁷⁸ Stefanou in Stefanou 321.

¹⁷⁹ Seidman in Stefanou 317.

¹⁸⁰ Crabbe 17.

smaller jurisdictions the role of the drafter extends well beyond simply drafting according to precise instructions.¹⁸¹

3.2 The reader of tax legislation

In 1996 David Elliott advocated what was at the time a new approach to drafting legislation: if the drafter focused on the likely reader of the legislation and tried to answer his or her questions, the text would become user-friendly and more accessible. He also suggested a number of innovative tools to be used: flow diagrams, illustrations and examples. The use of algorithms would enable the drafter to compose the text in such a way that the reader would only be required to read the text applicable to his or her situation.¹⁸² This focus on the likely reader led to the use of the second person in the rewritten Australian tax laws. The taxpayer as the intended reader is addressed directly: e.g. “You must pay income tax for each year ending on 30 June.”¹⁸³

However, determining the likely reader of legislation is not an easy task. Stephen Laws identifies the immediate readers of proposed legislation (Members of Parliament who deliberate on a Bill and individuals and organisations monitoring the parliamentary process) and the ultimate readers (the judges who have to construe the meaning when there is reason to dispute it, as in a court case, once the Bill has become an Act). In the middle ground there are members of the administration who have to implement the legislation, the members of the public who have to abide by it and lawyers (and, in the case of tax laws, tax advisers) who advise clients on compliance (and sometimes concompliance).¹⁸⁴ Addressing any of these groups directly is not appropriate as it could lead to confusion amongst members of the other groups.¹⁸⁵

The rules of legal interpretation provide a drafter of legislation with a number of guidelines for drafting and the drafter can attempt to write from the point of view of a judge as the end user. Butt and Castle do not favour this approach because judges only come into play if there is a conflict as to

¹⁸¹ Stefanou in Stefanou 323.

¹⁸² Elliott 1996 1-4, 8, 9-10.

¹⁸³ Ault 9.

¹⁸⁴ Laws in Stefanou 24-25.

¹⁸⁵ Greenberg in Stefanou 74.

the meaning of the legislative text. They state that drafters do not draft defensively, with failure in mind.¹⁸⁶

Given the large number of potential readers from a variety of positions it would be extremely difficult to identify a likely reader of tax legislation. In fact, the target of the Australian legislation was changed to “the suburban tax practitioner” early in the process.¹⁸⁷ The importance of the mind shift advocated by Elliott lies more in its focus on readers than on targeting a particular reader. This is a move towards emphasising the communicative aspect of legislation and not just expressing the legal relationships correctly.¹⁸⁸ What all readers (therefore also readers of tax legislation) have in common is that they read a text and that they use strategies to try to comprehend not only the words and sentences of the text but also their practical import.¹⁸⁹ Understanding the component skills involved in the reading process should enable a drafter to write tax legislation in a way that maximises the benefit a reader derives from the strategies employed during the reading process.¹⁹⁰ The advantage of this approach, over that of writing for an unknown likely reader, is simply that all readers read.

A reader of legislation is hardly ever a reader in the sense of someone who reads the text from the beginning to the end trying to follow the thread of the writer’s intent. Most readers slot in at a certain point, expecting (predicting) to find the information they are looking for and only read as much as they think necessary.¹⁹¹ Elliott refers to what Richard Saul Wurman calls the black hole of “information anxiety” into which readers fall when they do not find the knowledge they are looking for in the information to hand.¹⁹² He therefore proposes to tailor the organisation of the document to a reader’s needs, amongst other things by using likely questions as headings to the parts or sections where the answers are to be found.¹⁹³

¹⁸⁶ Butt 39.

¹⁸⁷ Coleman C and McKerchar M “The Chicken or the Egg? A Historical Review of the Influence of Tax Administration on the Development of Income Tax Law in Australia” in Tiley J *Studies in the History of Tax Law* 2004 Hart Publishing Oxford and Portland Oregon 306.

¹⁸⁸ See 3.1 for Crabbe’s statement: Crabbe 27.

¹⁸⁹ Grabe 383.

¹⁹⁰ See 2.1.5.

¹⁹¹ Grabe 377. See predictive aspect of reading in 2.1.1.

¹⁹² Elliott D *Legal Drafting: Language and the Law* 1990 Canadian Institute for the Administration of Justice Ottawa accessed on 10 December 2010 at <http://www.davidelliott.ca> 1.

¹⁹³ Elliott 1996 3.

Many of the people who read tax legislation do so for the sake of compliance (their own or their clients') or enforcement (tax authority officials). Compliance and enforcement costs are a burden on the economy.¹⁹⁴ Tax legislation applies to a large number of people and transactions every day. Understandability of tax legislation lowers compliance and enforcement costs and thereby reduces the burden on the economy.¹⁹⁵

3.3 Drafting tools

According to Daniel Greenberg legislative drafters are technical artists that must find the “best tool for the job”.¹⁹⁶ Some of these tools and techniques are reviewed below.

3.3.1 Definitions

Definitions can be an extremely useful tool to achieve consistency in legislative texts. Once a word or expression has been defined in a text, that word or expression must be used whenever that meaning is intended. Any use of a synonym or somewhat modified form (insurance policy as opposed to policy of insurance) may give rise to the supposition that a different meaning was intended.¹⁹⁷ From a reader's perspective, the same defined words or expressions used repeatedly form a pattern that provides an interpretative context for the specific section being read. Because so much hangs on definitions, the drafter of the text must take great care to formulate these very precisely.¹⁹⁸

Exhaustive definitions

Exhaustive definitions (also called exact definitions) are formulated using the word “means”. The scope of the meaning is delimited and often limited to specific manifestations of the term: If “grain” is defined to mean wheat, barley or rye, then rice or maize is not considered a grain for the purposes

¹⁹⁴ Steenekamp in Black 142.

¹⁹⁵ Thuronyi 1998 73.

¹⁹⁶ Greenberg in Stefanou 76.

¹⁹⁷ See 2.1.3.

¹⁹⁸ Xanthaki in Stefanou 11.

of this piece of legislation.¹⁹⁹ In the ITA the term “benefit fund” is defined as meaning a friendly society or a medical scheme. Pension funds or other types of funds cannot be understood to be included because the definition is exactly limited to those two instances.²⁰⁰

Definitions by example

These definitions are not exhaustive and are formulated using phrases such as “includes” or “shall include”. If “grain” is defined to include wheat, barley and rye, then rice or maize may also be considered a grain.²⁰¹ To demonstrate that the definition is not exhaustive, phrases such as “or any other cause” or “or any other goods” may be added. The definition of “gross income” in the ITA uses the phrase “including, without in any way limiting the scope of this definition”.²⁰² Sometimes the inclusion is specific: In the ITA a “child” includes an adopted child. The potential limiting of the meaning of child to a natural child is specifically expanded to include adopted children, for the sake of clarity.²⁰³

The definition of “gross income” in the ITA is a definition by example, although it starts off with the word “means”. It defines “gross income” as the total amount received by or accrued to persons during a year of assessment. It then proceeds to exclude capital receipts or accruals and to include amounts received or accrued in various ways. The problem is that the list of the various ways in which such amounts can be received or accrue stretches over four typeset pages. It looks uncomfortably like an exhaustive list, despite the disclaimer that the examples should not in any way limit the scope of the definition.²⁰⁴

Definitions that apply broadly within a jurisdiction are often defined in an Interpretation Act. This can be a useful tool to establish a national legislative context and guidelines to interpretation.²⁰⁵ Unfortunately the South African Interpretation Act (Act of 1957), has not been rewritten since the Constitution came into effect, although it has been amended.

¹⁹⁹ Rosenbaum KL *Legislative Drafting Guide: A Practitioner's View* FAO Legal Papers Online 64 February 2007 accessed on 15 March 2011 at <http://www.fao.org/legal/prs-ol/years/2007/list07.htm>. 27.

²⁰⁰ Definition of “benefit fund” in section 1 of ITA.

²⁰¹ Rosenbaum 27.

²⁰² Definition of “gross income” in section of ITA.

²⁰³ Definition of “child” in section 1 of ITA.

²⁰⁴ Definition of “gross income” in section 1 of ITA.

²⁰⁵ Thuronyi 1998 85.

3.3.2 Illustrations, diagrams and examples

Graphics have been recommended to illustrate complex ideas or procedures. The Australian Plain English Manual cites the use of a picture, flowcharts and an outline in legislation. It also recommends the use of examples to illustrate the meaning of a provision.²⁰⁶ Purpose statements, headings in the form of questions, notes, boxed information and flowcharts were used in a draft of the Municipal Government Act for Alberta. However, many of these innovations were not implemented.²⁰⁷

3.3.3 Structure

For the sake of readability and for ease of finding information it is important to provide a logical structure that guides the reader.²⁰⁸

As stated in the discussion of plain language²⁰⁹ there is a consensus that grouping together sections that deal with the same subject matter facilitates the reader's task. The way in which the matter is grouped (for example in a time sequence) can help to reveal the relationships between the different aspects dealt with.²¹⁰ Grouping can also help to reduce the need for cross references: if the same matters appear in the same chapter or part there is less need to refer to other chapters and parts.²¹¹ The content of a Bill should be logically broken up into parts, chapters and sections that are clearly indicated in a table of contents.²¹² The use of clear headings as topic specifiers for these structural elements enables the reader to create a mental picture of all the provisions and the way that they relate to each other. This facilitates understanding of the details contained in specific provisions.²¹³

²⁰⁶ *Plain English Manual* 32.

²⁰⁷ Butt 108.

²⁰⁸ Thuronyi 1998 79.

²⁰⁹ See 2.1.4.

²¹⁰ *Plain English Manual* 24.

²¹¹ State Law Advisers 164.

²¹² State Law Advisers 166.

²¹³ *Plain English Manual* 24.

If provisions that deal with similar matters are formatted in the same way this helps to reveal the similarities and highlight the specific differences.²¹⁴

Burns and Krever raise the issue of whether personal income tax and corporate tax should be contained in the same piece of legislation or whether they should be treated separately. There are three possibilities of dealing with this:

1. a complete separation without any cross references in the rules for calculating the tax base;
2. a separation where the rules for calculating the tax base contained in the individual income tax law also apply to the corporate tax; and
3. a combination of both regimes contained in one law where the rules for one are cross referenced to the other.

A further variation on this could be where similar rules appear together and those rules that are specific to each appear separately. Burns and Krever caution against having separate rules, on the one hand because it causes vast duplication and on the other because of the risk of having divergent rules. This may happen if the rules for one are updated but the others are not. They also advise having a similar tax base and tax rates for companies and individuals to simplify the administration of the taxes and to prevent tax savings that exploit the difference between individual and corporate income.²¹⁵ During the rewrite in the UK, it was decided to split the personal income and corporation taxes into two separate Bills. Despite the increased volume due to duplication, the gain in clarity was considered worthwhile.²¹⁶

Consistency to provide a coherent structure to income tax legislation is vital. The key to this is a clear charging provision. This provision must set out the person liable for the tax, the tax period, the tax base and the rate of the tax.²¹⁷ If these basic concepts are set out clearly in the charging provision, consistency of terminology in the rest of the Act will be facilitated. This will in turn provide “a coherent structure for the substantive provisions of the legislation”.²¹⁸ If the charging provision is placed at the beginning of the Act, it provides a framework for the treatment of the

²¹⁴ See 2.1.5.

²¹⁵ Burns in Thuronyi 1998 499-500.

²¹⁶ Rogers in Stefanou 80.

²¹⁷ For a discussion of the base of an income tax see 2.1.7.

²¹⁸ Burns in Thuronyi 1998 501.

basic concepts throughout the text. Without a coherent structure the application of the law is confused and the legislation may even be unworkable.²¹⁹

A logical structure for an income tax Act would progress from gross income via exemptions to income; from income via deductions to taxable income; and from taxable income via tax offsets to the tax payable. The detail of rates (that are subject to change) and administration (the when, how and where of collection and recovery) would follow once the principles of imposition have been established.²²⁰

3.3.4 Paragraphing or tabulation

Paragraphing is useful because it helps the drafter to analyse the relationship between the different elements to be contained in a sentence and it graphically indicates the structure of a sentence to the reader. It also helps to avoid needless repetition and syntactic ambiguity.²²¹ Thuronyi provides the following example:

“The property income derived–

- (a) from a foreign source; or
 - (b) from the disposal of an investment or asset generating foreign-source income
- by an expatriate taxpayer is exempt from income tax.”²²²

It is quite clear that income derived from both (a) and (b) is exempt.

The *Plain English Manual* warns against overdoing paragraphing, which leads to the sentence being “shredded” unnecessarily. If a section is broken into subsections, rather than using paragraphing, common words may have to be repeated, thereby making the sentences longer. However, they argue that the sentences will be easier to understand.²²³

3.3.5 Gender neutrality

²¹⁹ Burns in Thuronyi 1998 501.

²²⁰ Burns in Thuronyi 1998 500.

²²¹ State Law Advisers 175.

²²² Thuronyi V “Drafting Tax Legislation” in Thuronyi 1998 78.

²²³ *Plain English Manual* 26.

According to Greenberg, gender-neutral language is required of the drafter and that is what must be delivered, even if the price to be paid is “a slight loss of simplicity and elegance”. The drafter’s task is to reduce this loss to the minimum possible.²²⁴ Greenberg provides a number of ways in which to avoid gender-specific language: by repetition, omission, reorganisation or tagging. The first option is to avoid the use of pronouns by repeating the noun.²²⁵ This is not elegant, but it provides the greatest degree of certainty.²²⁶

The second technique is to avoid all unnecessary phrases like taxes due “from him” that refer to gender. Although the omission of an individual phrase like this may not appear to have much effect, deleting it throughout the Act would make a substantial difference to the length of the legislation, at the same time making the language gender neutral. Omission of the personal pronoun may also lead to simplification. The sentence “If a person is aggrieved by a decision of the Referee of Snurkle-Boggling he may appeal against it to the High Court.” can become “A person may appeal to the High Court against a decision of the Referee of Snurkle-Boggling.” The inference is that a person who is not aggrieved would not appeal.²²⁷

A third technique to achieve gender-neutral language is to reorganise sentences in order to avoid the use of “he” or “his”. Traditional drafting and plain language precepts advocate use of the active voice for the sake of clarity as to who the doer should be. (“The Minister must issue a notice” rather than “A notice must be issued”.) Thornton states that the “passive form either omits, or reduces the emphasis on, the person performing the action ...”.²²⁸ However, use of the passive voice may be preferable when it enables gender-neutral language (“where the director is satisfied ...” rather than “where the director satisfies herself ...”) and in cases where a number of people must undertake an action (“the document must be signed by a director, the company secretary, a manager or any other authorised employee”).²²⁹ In some cases the doer is immaterial, as in the example provided by Greenberg: “A notice given to the Chief Snurkle-Boggler on a Tuesday must be given on pink paper

²²⁴ Greenberg in Stefanou 76.

²²⁵ Sir Alison Russell: “A draftsman should never be afraid of repeating a word as often as may be necessary in order to avoid ambiguity.” quoted by Greenberg in Stefanou 68.

²²⁶ Elegance in legislative drafting is in any case somewhat constrained by the requirements of consistency, see 2.1.5.

²²⁷ Greenberg in Stefanou 69.

²²⁸ Thornton GC *Legislative Drafting* 1996 Butterworth London 60.

²²⁹ Scottish Government *Plain Language and Legislation* Chapter 4 accessed at www.scotland.gov.uk/Publications/2006/0217093804/4 on 8 December 2010 3.

and by pigeon post.” The emphasis here is on the requirements of the notice, not on the person giving notice. In this case gender neutrality is achieved by use of the passive voice without losing precision.²³⁰

The text may be divided into shorter sentences. This will of itself entail repetition of the subject nouns and will to some extent disguise the inelegant repetition necessary to avoid the use of pronouns. However, this increases the length of the text and may interrupt the flow of subordinate clauses that aids comprehension.²³¹

One can also use the relative pronoun “who” as in the example of “A person who drives on the pavement commits an offence” rather than “A person commits an offence if he drives on the pavement”.²³² The Practice Manual recommends the use of “that” as it applies to personal and non-personal nouns.²³³

If the plural form of nouns is used, the personal pronoun becomes “they” and “their”. Greenberg mentions the use of “they” as if the word acquires an honorary singular status, while retaining its plural verb form. It is doubtful whether this will become acceptable in legislative writing. Even when speaking in the vernacular, people usually only use “they” when they have lost track of the subject of a rambling sentence. Using the plural form creates problems in interpretation despite the indication that the plural may include the singular.²³⁴

Use of the masculine pronouns “he” and “his” is in fact inappropriate for reasons other than their gender-specificity. The words are often used to refer to “a person” mentioned earlier in a proposition. Persons can, however, also be bodies of persons incorporated or unincorporated, not only natural persons. When the rule of thumb is applied and “or she” or “or her” is added, the inappropriateness of the original shorthand use of “he” or “his” is highlighted. To correct this situation, one would have to replace a phrase like “he has taken all reasonable steps” with “he, she, it or they has or have taken all reasonable steps”.²³⁵

²³⁰ Greenberg in Stefanou 70.

²³¹ Greenberg in Stefanou 71.

²³² Greenberg in Stefanou 71.

²³³ State Law Advisers 169.

²³⁴ Greenberg in Sefanou: 72-73.

²³⁵ Greenberg in Stefanou 73.

In section 1 of the ITA a “person” is defined to include an insolvent estate, the estate of a deceased person, any trust and any portfolio of a collective investment scheme in securities. When the male pronoun is used (frequently) in the context of a taxpayer and an employer, this usage not only implies indirectly that taxpayers and employers are not female, it also implies that they are male, and therefore natural, persons.²³⁶

3.3.6 Tagging or labelling

Tags or labels can be used to refer to, for instance, classes of people. Tags can take the form of letters (Person A must pay B amount to C) or whole words such “vendor” for a property-investment partnership.²³⁷ Descriptive labels were used in the Tax Law Rewrite Project in the United Kingdom. Instead of writing “the relevant amount” or “the relevant period” the terms “relievable amount” and “holding period” were used.²³⁸

Greenberg states that labels can “lend a useful flavour” but warns against a flavour that is not neutral.²³⁹ Steven Poole warns against the danger of using evaluative-descriptive terms as labels. Because they are not neutral, these terms contain an unspoken argument. Because the argument is unspoken, it can be used to smuggle in political opinion without the normal need to justify the opinion in public debate. In this way contrary opinion is simply erased.²⁴⁰ In a tax context, the often used phrase “relieving the tax burden” contains an unspoken argument that tax is a burden. It is therefore a heavy load that is difficult to carry or a duty or responsibility “that causes worry, difficulty or hard work”.²⁴¹ Relieving this burden seems the natural, morally right thing to do. When the terminology is changed to “reducing someone’s financial contribution to society” the unspoken moral righteousness is removed.²⁴² There is therefore a real danger in replacing a gender bias with politically charged labels. This clearly is not the domain of the legislative drafter, nor could it be the intention of gender-neutral drafting.

²³⁶ Definition of “person” in section 1 of the ITA.

²³⁷ Greenberg in Stefanou 75.

²³⁸ Rogers in Stefanou 82.

²³⁹ Greenberg in Stefanou 75.

²⁴⁰ Poole S *Unspeak*TM 2006 Little Brown London 3.

²⁴¹ Hornby 190.

²⁴² Poole 2.

3.3.7 Plain language tools

The Inns of Court School of Law provides a number of guidelines to be followed in the quest for effective drafting in plain language. These can be summarised as follows:

1. Each paragraph should contain a single idea, expressed accurately
2. Complex ideas and long sentences should be broken up into subparagraphs
3. A paragraph can be broken into more than one sentence
4. Terminology and definitions should be used correctly and consistently
5. Archaic language should be avoided
6. Unnecessary references (e.g., “said” taxpayer) should be avoided
7. Grammar, syntax and punctuation should be correct (otherwise clarity and precision are lost)
8. The draft text should be read out loud: any problems in this process probably indicate a problem in formulation.²⁴³

The next chapter provides some insight into how the issues raised in this chapter played out in the rewrites undertaken in a few jurisdictions.

²⁴³ Inns of Court 15.

Chapter 4

COMPARATIVE STUDY OF SOME REWRITES

The plain language movement, and its drive for accessible legislation, has had a major effect in some countries. One of the outcomes has been a rewrite of the tax legislation in some of the English-speaking countries of the world. Before proceeding to a discussion of the proposed rewrite of the ITA in South Africa, a brief look is provided at rewrites undertaken in other jurisdictions. Although copying laws or models from other jurisdictions may not be helpful, lessons can be learnt from studying their processes and outcomes.²⁴⁴

4.1 Australia

A federal income tax was introduced in Australia in 1915 (during World War I) in conjunction with a land tax. In the 1920s a Royal Commission investigated issues of equity, efficiency and simplicity and this gave rise to a new Tax Act in 1922. This was followed in 1936 by the Income Tax Assessment Act (ITAA).²⁴⁵ Capital became more mobile in the 1960s and this led to greater tax avoidance. In the late 1960s and 1970s the High Court followed the Duke of Westminster approach that a taxpayer could choose to arrange his or her affairs in such a way that they attracted the least tax. Government introduced various detailed measures to specifically counter the avoidance.²⁴⁶ In the 1980s the tax base was broadened and rates were cut. New measures to tax capital gains, fringe benefits and company dividends were introduced and taxation of the foreign source income of residents was overhauled.²⁴⁷ The Mathews Committee found that the tax system was complex, cumbersome, confusing and costly to administer and comply with. Asset stripping and other avoidance was so widespread that salary and wage earners (who were trapped in the tax system) carried an unfair tax burden. Public opinion began to turn against tax avoidance.²⁴⁸

²⁴⁴ Seidman A, Seidman RB and Payne J (eds) *Legislative Drafting for Market Reform: Some lessons from China* 1997 Macmillan London 9.

²⁴⁵ Ault 3.

²⁴⁶ Coleman in Tiley 295, 298.

²⁴⁷ Ault 4.

²⁴⁸ Coleman in Tiley 300-301.

The income tax is important in terms of revenue raised. Even though a Goods and Services Tax was introduced on 1 July 2001, the federal income tax raised 58% of all taxes in 2000-2001.²⁴⁹

However, the volume and complexity of the enabling legislation became a problem. By the early 1990s the ITAA of 1936 had grown from 126 pages to 6000 pages.²⁵⁰ The effect of this can be seen in the number of taxpayers who needed the help of an agent to submit their returns: 72 per cent of all personal taxpayers.²⁵¹ The causes for the increase in volume and complexity may be found in the tax reforms instituted, widespread avoidance necessitating detailed legislation to close loopholes and the fact that all provisions are contained in the legislation itself (and not in regulations).²⁵²

In 1993 government announced a rewrite of the ITAA 1936. The Tax Law Improvement Project (TLIP) would redraft the legislation in plain English and would cast it in a user friendly form, with the use of diagrams, flow charts, illustrations, signposts and lists. At the outset the intention was to write for the taxpayer in the street. To this end, the second person form is used and the taxpayer is addressed directly: “You must pay income tax for each year ending on 30 June”.²⁵³ The taxpayer in the street as likely reader of the new tax legislation was, however, abandoned early on in the process. The legislation is now directed at “the suburban tax practitioner”.²⁵⁴ One-third of the ITAA 1936 was rewritten and the ITAA 1997 replaced those parts of the ITAA 1936.²⁵⁵ However, the TLIP’s brief was to rewrite the existing law without changing the meaning or the policy underlying it. When a major tax reform programme got underway in 1998, the decision was made to abandon the project because its results were “cosmetic” and did not address the “underlying causes of complexity”.²⁵⁶ The Board of Taxation created in 2000 suggested (in 2002) a new process to take legislation from original concept to final legislation taking account of policy, administration and drafting in an “iterative and interactive” way (rather than the previous linear approach). In accordance with this process, staff members from the Australian Tax Office (ATO) - responsible for administration - were seconded to Treasury - responsible for tax policy formulation. Drafting is still

²⁴⁹ Ault 5.

²⁵⁰ Ault 8.

²⁵¹ Coleman in Tiley 306.

²⁵² Ault 8.

²⁵³ Ault 9.

²⁵⁴ Coleman in Tiley 306.

²⁵⁵ The ITAAs of 1936 and 1997 together cover 8000 pages and contain 6 million words. Ault 9.

²⁵⁶ Ault 9.

exclusively done by the Office of Parliamentary Counsel (OPC), based on a brief from Treasury.²⁵⁷ Arnold is of the opinion that the OPC is the reason why tax legislation is badly written. He advocates making use of drafters within Treasury who can write clearly and concisely and who know the subject matter in question. In this way, the drafting process should impose discipline on the formulation of tax policy.²⁵⁸

4.2 The United Kingdom

An income tax was first raised in the United Kingdom in 1798 and, apart from an interruption between 1816 and 1842, it has been in place ever since. In 1803 a schedular system was introduced: income tax is levied on the property, profits or gains stated in the schedules attached to the Act. Different rates may apply to amounts listed in different schedules. A difference is also made in the treatment of income and capital, partly because of the precepts of trust law.²⁵⁹ The income tax is an annual tax that must be reinstated every year, and is not suited to taxing capital gains. A separate capital gains tax was therefore introduced in 1965. The corporation tax was consolidated with the income tax in the Income and Corporation Taxes Act (the ICTAA) of 1988, while capital gains were dealt with in the Taxation of Chargeable Gains Act of 1992. Both these acts were successively amended by the annual Finance Acts.²⁶⁰

The ICTAA 1988 contained overlapping calculation rules and provisions that applied to both personal and corporation taxes but were only expressed in terms of income tax. Furthermore amendments effected by the annual Finance Acts were contained in free-standing provisions. This made the structure of the ICTAA very complex.²⁶¹ Criticism of the tax legislation rose to a crescendo in 1993, and in 1995 a project to rewrite the direct tax legislation was announced: the tax law simplification project.²⁶² The initial aim was soon abandoned and replaced by a more achievable one: “to rewrite primary direct tax legislation to make it clearer and easier to use, without changing the law”. The name was accordingly changed to Tax Law Rewrite Project

²⁵⁷ Ault 9.

²⁵⁸ Arnold B “Australian Tax Rewrite” *Revenue Law Journal* 19 1 2009 Article 1 1.

²⁵⁹ See 2.1.7.

²⁶⁰ Ault 115-117.

²⁶¹ Rogers in Stefanou 80.

²⁶² Morse 47.

(TLRP).²⁶³ The project team consists of 30 full-time members: officials of HM Revenue and Customs, experienced tax professionals from the private sector and drafters from the OPC. Oversight is provided by a steering committee consisting of MPs and members representing the judiciary and legal, accounting, consumer and business interests. Support is provided by a consultative committee consisting of members from the legal, tax and accounting professions.²⁶⁴ The project entails analysing existing legislation, together with relevant case law, repealing obsolete provisions, reordering and rationalising existing provisions and rewriting the substance, while preventing inadvertent changes to the existing regime. Minor changes may be made to bring the legislation in line with established practice or to enhance consistency of the language. These changes are identified and set out clearly in the Explanatory Notes accompanying the rewritten texts. The consultative committee examines the minor changes in order to prevent adverse effects on taxpayers. (Substantive changes are effected by means of the annual Finance Bills and are subject to the usual parliamentary scrutiny.)²⁶⁵

The rewritten parts of the legislation are subject to an intensive review and consultation process. Batches of draft provisions are published on the TLRP website, accompanied by an explanation of the present legislation, the rewrite team's approach and reasons for the proposed minor changes. Comments from interested parties must be submitted within 12 weeks. The draft provisions are reviewed in light of the comments received and are then published in the form of a draft Bill. Persons wishing to comment are again afforded 12 weeks to submit comments. The draft Bill is then reviewed in light of the comments received and prepared for introduction in Parliament. Additional consultation with specialised groups (like the life insurance sector) may take place.²⁶⁶ The consultative process forms a contrast to the "rush and secrecy" of the annual Finance Bills.²⁶⁷ Once introduced in Parliament the products of the TLRP benefit from a special expedited process, similar to that for consolidation Bills. This is due to the intensive consultation process prior to introduction and to the fact that the rewrite does not effect substantive changes to existing law. The Joint Committee of both Houses of Parliament verifies that this is the case.²⁶⁸

²⁶³ Rogers in Stefanou 77.

²⁶⁴ Rogers in Stefanou 77-78.

²⁶⁵ Rogers in Stefanou 77.

²⁶⁶ Rogers in Stefanou 78.

²⁶⁷ Morse 48.

²⁶⁸ Rogers in Stefanou 78.

A key feature of the effort to make the legislation clearer and easier to understand is the high-level restructuring that was undertaken. A logical order is created to tell the story of how a person's tax liability is to be calculated and similar rules are grouped together. The income tax and corporation taxes (consolidated in the 1988 ICTAA) were separated for the sake of clarity although it meant that many provisions had to be duplicated. On the basis that earnings and pensions were relevant to most people, the Income Tax (Earnings and Pensions) Act of 2003 was the first legislation produced by the TLRP. The Income Tax (Trading and Other Income) Act (ITTOIA) followed in 2005. The rules on rates, tax calculation, relief for losses and administration of withholding taxes were dealt with in the Income Tax Act of 2007. The corporation tax is due to be dealt with in two separate pieces of legislation. The process of grouping similar aspects together was continued in the structure of the Acts themselves: Part 2 of ITTOIA deals with rules to calculate trade profits and Chapter 4 of this Part deals with rules restricting deductions in the calculation of trade profits.²⁶⁹

Although there is a realisation that the complexity of the substance may mean that “users may still take some time to understand how it works”, the drafting style of the TLRP is determined by the quest for clarity.²⁷⁰ Modern language is used, avoiding archaic formulations like “the aforesaid” and “hereinbefore mentioned”. Long sections - caused by many additions over time – are broken into four or five parts, expressed in shorter sentences. Paragraphing is used within subsections. Formulas are used to replace or supplement long explanations in words because tax professionals find the formulas easier to understand. Method statements are used to set out the steps involved and the order in which tax calculations are to be done. Consistent use of a single term is seen to improve understandability and is therefore preferred, even if it entails a slight change in the law. Descriptive labels such as “the relievable amount” are used instead of generic terms such as “the relevant amount”.²⁷¹

The result of the restructuring and the teasing out of individual propositions from the densely-drafted existing provisions is an increase in volume: the three tax Acts mentioned before contain 2500 sections. It is not possible to have an overview of such a vast quantity of information. Signposts and overviews are provided in text. These add to the volume of the text, but are welcomed by readers as guides to navigating their way through the number and volume of tax laws. Because signposts are non-operative provisions, Rogers warns against the danger that these

²⁶⁹ Rogers in Stefanou 80.

²⁷⁰ Rogers in Stefanou 80.

²⁷¹ Rogers in Stefanou 81.

provisions might not be consistently updated when amendments to the substantive provisions are effected.²⁷² Devices to provide guidance might in such a case not only become a source of additional complexity but also of confusion.

4.3 Other jurisdictions

Although rewrites as such have not been undertaken in the jurisdictions below, significant changes in their tax laws have taken place and as such they serve as examples from which prospective rewrite projects can learn valuable lessons.

In the 1990s, China underwent a fundamental change from a state-controlled economy to a socialist market economy.²⁷³ Government rejected the so-called big bang approach but instead followed the approach that a legal structure and institutions should be put in place to provide certainty and stability to local and foreign investors and to avoid extremes of income that would undermine their socialist principles and lead to social unrest. Besides the contract and property law required to provide certainty to investors, banks and a securities market were required to ensure capital mobility. The education system had to provide a suitably qualified workforce, an agricultural extension service was needed to assist farmers in growing and changing production needs and a budget law was required to ensure provision of government services and fiscal responsibility. To meet all these needs, 22 new laws had to be drafted in a relatively short time. A five-year project was financed by the UNDP to draft the laws with the help of international legal specialists and to build capacity among Chinese drafters. The aim was to leave behind not only well qualified drafters but also drafters well suited to specific Chinese requirements.²⁷⁴

Comparisons from foreign legislation had limited usefulness and the drafters had to gain the knowledge to promote profound societal changes by means of legislation. These drafters were largely responsible for the substance as well as the form of the law, compiling research reports containing the necessary theoretical background at the same time as the legislation. Drafting was done by lawyers and, e.g., professional engineers or social scientists employed by the relevant department.²⁷⁵

²⁷² Rogers in Stefanou 83.

²⁷³ Seidman 1997 viii.

²⁷⁴ Seidman 1997 2-3.

²⁷⁵ Seidman 1997 6, 7, 9.

The project was successful in the sense that it achieved the goal of drafting the required legislation within the very limited timeframes and the drafters were an essential part of the process, although not the only players.²⁷⁶

An income tax was instituted in Canada in 1917 and a major overhaul of this tax took place in 1972, after the report of the Carter Commission in 1966. Subsequent tax reforms in the late 1980s were less significant. Taxation takes place on a largely schedular basis.²⁷⁷

Before 1972 the legislation was worded in a broad, general style: the transfer pricing rule simple stated that the price charged between the parties in question should “reasonable in the circumstances”.²⁷⁸ After the tax reforms of 1972 there was a clear change in the drafting style: detailed technical rules were added and are changed on an ongoing basis. The purpose of these rules is to limit the interpretative role of the Canadian courts. The complexity of the legislation is the result of an attempt to provide certainty but tax professionals complain about the complexity. The new style of drafting has resulted in an expansion of the volume of the Income Tax Act: In 2003 it was nearly 2000 pages long. Although the Act is amended regularly and there are periodic consolidations of Canadian statutes, the Income Tax Act is not included because of the high cost of printing a renumbered Act.²⁷⁹

A tax on the income of individuals was instituted in the United States of America in 1864. After its repeal in 1872 a new Act on the income of individuals and corporations was instituted in 1895. An amendment of the Constitution was required to have this Act ratified in 1913.²⁸⁰ The 1913 Act comprised 16 pages, in 2004 the Act comprised about 6000 pages, without counting the case law, rulings and other authorities to be consulted with regard to the Income Tax.²⁸¹ Some reasons for this increase in volume are political and the fact that legislation is not only aimed at countering tax avoidance but also attempts to prevent it from occurring.²⁸²

²⁷⁶ Seidman 1997 5.

²⁷⁷ Ault 23, 25.

²⁷⁸ Ault 27.

²⁷⁹ Ault 28.

²⁸⁰ Ault 137.

²⁸¹ Paul 157.

²⁸² Ault 147.

4.4 Comparisons and conclusions

Drafting and rewriting tax legislation is a complex process within other government processes and does not lend itself well to quantifiable comparisons but some useful conclusions can be drawn from the experience in other jurisdictions.

The initial goal of the rewrite in the United Kingdom was to simplify the tax legislation. The obvious question is: Is simplicity possible without policy changes? The TLRP has in fact proved that even rewriting the tax laws is not possible without some minor policy changes. Complexity often arises from the substance of a provision, not only the language in which it is expressed. The rewrites in Australia and the United Kingdom have proved that the style of writing can greatly increase the volume of a piece of legislation, without any changes in policy. Some innovative techniques employed to make the text more user-friendly, such as signposting, illustrations and labelling also added to the volume and the complexity of the text, even though the substance may have stayed the same.

The Canadian experience shows that style is influenced by the circumstances for which the legislation is drafted. If the goal is to counter abuse in the tax system and there is a political desire not to give the courts opportunity to interpret, the style becomes detailed and explicit and the volume grows. Writing every provision with a reader in bad faith in mind leads to ever more detail (as in the United States of America).

The Chinese experience teaches us that given the necessary political will, and therefore resources, legislation that is appropriate to a specific country can be drafted in a relatively short time. It also shows that involvement of drafters in a research and policy formulation team can be beneficial. Moreover, it proved that, as Brian Arnold alleges, a drafter does not have to be a lawyer: what is required is a person who understands the substance and who can write clearly.²⁸³

²⁸³ Arnold 1.

Chapter 5

WRITING A SOUTH AFRICAN ITA THAT CAN BE UNDERSTOOD

The Constitution has changed the ‘context’ of all legal thought and decision-making in South Africa.²⁸⁴

As seen in previous chapters, the plain language movement of the 1990s insisted that legislation should be written in a language and style that made it understandable to all citizens. Efforts to express tax legislation in simple accessible language were undertaken in the United Kingdom, Australia and other jurisdictions. The rewrite of the South African ITA is proposed against this international background, but also within a specific domestic context.

After the advent of democracy for all in 1994, a new Constitution for South Africa was adopted in 1996. International expertise was brought in to help draft this founding and aspirational document, the language and style of which was to serve as a model for drafting the new laws required for a new South Africa. However, there was recognition early on that the Constitution as a founding document dealt in principles that could be described in broad language. Drafting of tax laws in such broad terms could lead to ambiguity and therefore uncertainty.²⁸⁵

The income tax impacts on a large number of taxpayers: 5,9 million individuals and 1,8 million companies were registered for personal income tax (PIT) and corporate income tax (CIT) in 2010. Together with value-added tax, these taxes account for 80 per cent of the revenue raised in the national sphere.²⁸⁶ As part of a tax reform initiative a separate institution called the South African Revenue Service (SARS) was created in 1997 in terms of the SARS Act 34 of 1997. This agency is responsible for administering tax legislation and for collection of taxes. As the name indicates, emphasis is placed on the service aspect. One of the ways in which revenue collection is optimised is by promoting voluntary compliance with tax laws. Numerous information guides are published, dealing with matters ranging from interest rates on outstanding taxes to the import of secondhand vehicles into Botswana. Advertising campaigns publicise due dates for submission of returns. E-filing, a system for taxpayers to submit their returns electronically, is the latest in the steps that are

²⁸⁴ Cameron J 1996 6BCLR 836 W 863. Quoted in Bekink 61.

²⁸⁵ Van der Westhuizen J “Plain language in the drafting of the 1996 Constitution” in Viljoen 64-67.

²⁸⁶ National Treasury and SARS 2010 *Tax Statistics* 6.

designed to facilitate matters for taxpayers while reducing the costs of administration and enforcement.²⁸⁷

In the Budget Review of 1997 the rewrite of the ITA was mooted but visible progress with this project has been slow. The reasons for this lie outside the scope of this research paper but it is likely that the magnitude of the task proved daunting in a country where a skills shortage is a daily reality. The introduction of the Tax Administration Bill (called the TAB) in Parliament has now changed the landscape of the ITA. The TAB draws general administration procedures for all South African tax legislation into one piece of legislation, thereby eliminating the duplication of these provisions in each of the separate tax Acts. It is estimated that, once the Tax Administration Act comes into effect, the volume of the ITA will be reduced by 25 per cent²⁸⁸.

Numerous complaints about the ITA are received and there is a perception that the Act is unreadable and inaccessible. Unfortunately, it is not clear whether the ITA is difficult to read because of the language used or because of the complexity of the subject matter and the policy embodied in it. In the United Kingdom a project that set out to simplify tax laws was converted into a project to rewrite these laws in modern, plain English without changing the underlying policy.²⁸⁹ In a country like South Africa, with more limited resources, a language rewrite might also seem like a more manageable project than simplifying the laws. However, the results in the United Kingdom and Australia are not suitable for the local context. Rewording the old laws - replete with archaic duplications like “null and void” and unnecessary formulations like “hereinafter” and “the aforesaid” - has resulted in an increase in volume of monumental proportions.²⁹⁰ A very small minority of South Africans have English as their first language.²⁹¹ The illiteracy rate is high and there are large disparities in education. The use of plain language is seen as a way of providing information about rights and obligations that will empower people.²⁹² Increasing the volume of

²⁸⁷ SARS website last accessed at www.sars.gov.za on 15 January 2011.

²⁸⁸ Notes on the draft TAB released for comment on 30 October 2009 accessed on 15 November 2010 at <http://www.sars.gov.za>.

²⁸⁹ See 4.2.

²⁹⁰ In Australia the ITAA of 1936 and the partly rewritten ITAA of 1997 together cover 8000 pages and contain 6 million words. Ault 9. In the United Kingdom the three income tax Acts rewritten to date contain 2500 sections. Rogers in Stefanou 83. See 4.1 and 4.2.

²⁹¹ In the 2001 census 8,2% of the population indicated that they speak English at home. www.statssa.gov.za/census01/html/keyresults accessed on 10 December 2010.

²⁹² Van der Westhuizen in Viljoen 64.

words to be read is, however, not helpful in these circumstances, as the sheer size of the document creates complexity and provides another barrier to accessibility.²⁹³

Before asking the question whether, in these circumstances, the ITA should be rewritten the proposed rewrite of the ITA is placed in its country-specific context. Thereafter a possible way forward for the rewrite is proposed, based on the knowledge contained in the previous chapters.

5.1 The legal framework for a rewrite of the ITA

5.1.1 The Constitution

As seen in the discussion of taxation,²⁹⁴ a government's power to tax is limited by the social contract between the government and the citizens of the country. In South Africa this contract is embodied in the Constitution. The Constitution is a “profoundly transformative document”²⁹⁵ that was intended to form a “constitutional document by the people for the people”.²⁹⁶ In its aim to constitute a break with the past it is also an aspirational document. In an effort to make this founding text accessible to all citizens, it was drafted in plain language and translated into all eleven official languages.²⁹⁷ Simple, everyday words were combined into short sentences. Obligations were clearly identified by the use of the active voice and the mandatory word “must”. The text speaks broadly (inclusively) and in the present tense – for example: “Everyone has the right to life”.²⁹⁸ Only essential definitions are included and those are placed towards the end of the document.²⁹⁹ Cross references are limited and are simplified because subdivision is limited to paragraphs. The overall structure of the text is set out in a table of contents and a preamble sets out the purpose of the document. Foundational issues are treated first and general provisions are placed towards the end, while secondary information is detailed in schedules.³⁰⁰

²⁹³ See 2.2.1 for Lord Howe of Aberavon’s statement that a reduction in quantity is as important as an improvement in quality. Howe 2.

²⁹⁴ See 2.1.6.

²⁹⁵ Bekink 35.

²⁹⁶ Bekink 41.

²⁹⁷ Bekink 41.

²⁹⁸ Section 11.

²⁹⁹ Section 239.

³⁰⁰ Bekink 41-42.

The aim of the drafters of the Constitution was that it should also serve as a model for plain language drafting in other legislation³⁰¹ and the principles of plain language are discussed and advocated in the Practice Manual compiled by the Office of the Chief State Law Adviser.³⁰² One therefore has to ask: Why is plain language drafting still not plain sailing?³⁰³ One of the answers would probably be that drafting legislation is not simply a question of language. Legislation must always be placed in the legal framework of the specific country. There is a presumption that the legislator (and therefore the drafter) knows all the laws of the country. However, the existence of old-order legislation (and its interaction with the Constitution and with post-Constitutional legislation) complicates matters for drafters. Old-order legislation consists of legislation from different dispensations (1806-1910, 1910-1961, 1961-1986 and 1986-1994) and from different legislatures (national, provincial, independent and self-governing territories and municipalities). These statutes are still in operation unless repealed. Some have been repealed, some have been partially repealed and others still apply. If the enabling Act is repealed, regulations issued in terms of that Act are also repealed. The abolition of the homelands and the division into nine provinces (instead of four) changed the geography of the country. Furthermore, local government institutions and the boundaries of municipalities have changed. This creates opportunities for overlapping jurisdictions and conflicting legislation.³⁰⁴

South African law has three sources: legislation, common law derived from the Roman Dutch base law and customary law. Legislation can specifically override common law and customary law but common law presumptions are still used for legal interpretation.³⁰⁵ Primary legislation may be enacted in the national,³⁰⁶ provincial³⁰⁷ or local³⁰⁸ sphere. Delegated legislation may take the form of proclamations and regulations issued in terms of a statute by the President, a Minister, a Premier, a member of a provincial executive or a statutory body.³⁰⁹ Customary law includes customary

³⁰¹ Van der Westhuizen in Viljoen 64.

³⁰² State Law Advisers 166.

³⁰³ See title of article by Bekink and Botha.

³⁰⁴ Bekink 42, 43-44.

³⁰⁵ Bekink 52.

³⁰⁶ Sections 43(a) and 44 of the Constitution.

³⁰⁷ Sections 43(b) and 104 of the Constitution.

³⁰⁸ Section 156 of the Constitution.

³⁰⁹ Bekink 46-47.

international law³¹⁰ and a reasonable interpretation that conforms to international law is to be preferred over a reasonable interpretation that does not take account of international law.³¹¹

International agreements must be approved by Parliament, unless the provisions are of a “technical, administrative or executive nature”. Legislation enacted in terms of an international agreement becomes part of South African law, but some agreements are self-executing and do not require national legislation. International agreements entered into before 1994 remain binding.³¹²

Law from all three sources mentioned is subject to the supreme Constitution and must be interpreted in terms of the norms and values contained in it. Given South Africa's history before 1994, the Constitution aims to enable “... a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance.” The goal is “a society based on democratic values, social justice and fundamental human rights”. These rights are contained in the Bill of Rights and legal interpretation must take place “through the prism” of the Bill of Rights.³¹³

When drafting legislation in South Africa a drafter always has to keep the founding values of democracy, human dignity, equality and freedom in mind. Not only the substance of drafting is important but also the language in which it is couched. If legislation is not clear to all those people who need to understand it, they cannot enforce their rights. If the legislation is accessible only to some there can be no equality before the law. Plain language therefore becomes one of the ways in which the accessibility of legislation can be improved.³¹⁴

In a multicultural and multilingual country language is an extremely sensitive issue. Translation of legislation into at least one other official language (besides English) is mandatory.³¹⁵ But translation in a multicultural society is fraught with problems. Precise and clear communication can only occur if sender and receiver attach the same meaning to equivalent words and phrases. Ambiguity of language can lead to confusion in the implementation of legislation. In order to avoid this, terms

³¹⁰ Section 232 of the Constitution.

³¹¹ Section 233 of the Constitution.

³¹² Section 231 of the Constitution.

³¹³ Langa J 2001 1 SA 545 CC para 21. Quoted in Bekink 61.

³¹⁴ Bekink 56-58.

³¹⁵ Section 6 of the Constitution requires that government must use at least two official languages in its communications with the public.

and concepts used in legislation must be standardised. However, the need for sensitivity on the part of the drafter remains: a term like “traditional health practitioner” has a very different connotation from the vernacular and pejorative term “witch doctor”.³¹⁶

In this context, plain language does not guarantee plain sailing for a legislative drafter. Illiteracy, which affects about 30 per cent of the adult population, still presents an enormous stumbling block to effective legislative communication and therefore to compliance. However, consistency in style and approach can go a long way to enable effective communication in the plainest language possible.³¹⁷

The Constitution provides a framework not only for the substance of legislation but also for the procedure to be followed for its enactment. Sections 74 to 77 deal with different parliamentary procedures for Bills dealing with different functional areas.³¹⁸ Public consultation is an important part of the process of lawmaking.³¹⁹ In some cases where the Constitutional Court held that the public had not been sufficiently consulted, the resultant legislation was declared invalid.³²⁰

5.1.2 The ITA

The present ITA was written in 1962 and has been the subject of amendment Acts once or twice a year since then. Income tax was first imposed throughout the Union in 1914 (Act 28 of 1914). The Mining Taxation Act (Act 6 of 1910) consolidated the taxation laws relating to mining and the Income Tax Act of 1917 (Act 41 of 1917) consolidated the legislation on the taxation of income and mining. Act 40 of 1925 was the next consolidation Act and it repealed all previous legislation. Act 31 of 1941 was the next consolidation Act and it introduced taxes on non-resident shareholders and undistributed profits. The 1941 consolidation formed the basis for Act 58 of 1962 (the present ITA). Act 58 of 1962 was also a consolidation, incorporating all the legislation relating to the taxation of income and donations. The rates of tax were set out in a Schedule and these varied according to income and marital status. The Act contained a number of policy changes: employers had to provide

³¹⁶ Bekink 55.

³¹⁷ Bekink 63, 66.

³¹⁸ Section 77 describes money Bills as Bills that appropriate money or impose taxes.

³¹⁹ Sections 59 and 72 require Parliament to facilitate public involvement and to conduct their proceedings in an open manner.

³²⁰ *Matatiele Municipality v The President of the Republic of South Africa* 2006 5 BCLR 622.

specific information about employee remuneration for PAYE purposes; provision was made for payments of maintenance in the case of separation or divorce and for payments to employees who temporarily rendered services outside South Africa; interest and dividends received from building societies and banks were deemed to be sourced in South Africa, regardless of the place where the loans or deposits were made; and there was an exemption for non-retirement fund lump sum benefits under R4000.³²¹

The base of the tax set out in the ITA is income and not profits. Income is calculated by deducting exempt amounts from gross income. Taxable income is calculated by deducting deductions and set-offs from income. Receipts and accruals of a capital nature are excluded unless specifically included in the definition of “gross income”.³²²

A major reform took place in 2001 when the base was changed from territoriality to residence. Residents are chargeable to tax on their worldwide income, whereas non-residents are taxed on income generated in South Africa, subject to agreements for the avoidance of double taxation concluded with some countries.³²³ In the same year a tax on capital gains was introduced.³²⁴

5.2 Who reads and who drafts tax legislation in South Africa?

The questions asked in Chapter 3 are echoed here in a country-specific context: Who drafts tax legislation, for whom and how?

5.2.1 The reader of tax legislation in South Africa

Victor Thuronyi states that the only material consulted by the majority of taxpayers may be instructions issued by the tax authority on how to fill out tax forms. Although these instructions may not have any legal status they have practical significance.³²⁵ The SARS website has a range of information guides and other tools to guide taxpayers through the process of complying with their

³²¹ Isaacs I Fielding WD Lazar L and Wells MJ *Law and Practice of South African Income Tax* 1963 Butterworths Durban 3-6.

³²² Isaacs 7-8.

³²³ *2010 Tax Statistics* 6.

³²⁴ Section 26A and the Eighth Schedule of the ITA.

³²⁵ Thuronyi in Thuronyi 1998 87.

tax obligations.³²⁶ However, citizens and taxpayers have varying degrees of involvement with the tax administration system and with tax legislation. It is not simply a question, in Driedger's idiom³²⁷, of switching the television set on or off or changing the channels.

A car would be a better metaphor in this case. Some people never use a car: they walk, ride a bicycle or take a train (people who do not pay taxes). Some people take a bus or mini-bus taxi but they take no responsibility for the fuel, maintenance or licensing of the vehicle (employees whose income is subject to withholding, such as the PAYE system). Some car owners see fuel and maintenance costs and licence fees as a necessary evil and simply pay them without wasting time and effort (people who pay taxes without paying too much attention to them). They never consult the Owner's Manual (ITA). If they need assistance they consult a service provider (SARS or a tax adviser). Some people take good care of their cars. They read the Owner's Manual (ITA) carefully and always stay within the specifications laid out in it. They expect the car to perform accordingly. These are honest taxpayers who invest time and money into having the system work efficiently and who know their rights.

Some car owners are companies that own more than one car. Services and changes of tyres are monitored carefully: balancing safety considerations against costs. A dedicated person with good technical knowledge of cars oversees servicing of the engines, sometimes negotiating with the mechanics at the service centre to obtain a good deal. This person is a tax adviser who knows the tax laws and can obtain favourable conditions for clients. Some car owners feel that they do not want to spend real money on maintenance: they take the car to a back-yard mechanic who fits unauthorised spare parts and tyres that might be stolen. These are taxpayers who engage unscrupulous tax advisers to minimise their tax burden at all costs. Some of these advisers do not even know the law very well. Some do, but read it in a peculiar way.

With such a variety of potential readers for a variety of purposes So, while the premise that tax laws are read by ordinary citizens and should be readily accessible to all may be somewhat unrealistic, regarding taxpayers as users who do not need to know how the thing works is not appropriate either. The right to be informed is a democratic right and should be exercised to empower people.³²⁸ Moreover, South Africa is a democracy with aspirations of being a participatory democracy. In such

³²⁶ Accessible at www.sars.gov.za.

³²⁷ Driedger's view that tax legislation can no more be simple and accessible than the workings of a television set can, quoted by Elliott 1996 1.

³²⁸ Omar in Viljoen 58. (Consumers also have rights to some information about television sets.)

a system it is not appropriate to have legislation – especially tax legislation that has an effect on the majority of the people – that is inaccessible to taxpayers and citizens.³²⁹ A middle ground has to be found where tax laws are written as simply and clearly as possible, without sacrificing the detail necessary to provide certainty.

The proverbial man and woman in the South African street are unlikely to consult the ITA in order to determine how much tax they should pay. They are far more likely to consult a SARS publication directed at the category of taxpayers to which they belong or simply the tax tables and thresholds, also to be found on the SARS website. This means that the readers of the rewritten ITA are more likely to be found in one of the other categories of readers identified by Stephen Laws: Members of Parliament, members of parliamentary monitoring groups (e.g. Parliamentary Monitoring Group in South Africa), concerned citizens, tax advisers, members of the tax administration (SARS) and members of the judiciary.³³⁰ This would preclude the use of the second person and some of the drafting techniques advocated by David Elliott, as they would not be appropriate in these circumstances. This would also imply that, although language use should be as simple as possible, a certain measure of sophistication as to language, formatting and layout would be acceptable and would not be seen as a barrier to accessibility.

5.2.2 The role of the drafter in South Africa

Although the common law is one of the sources of law in South Africa, the country's drafting institutions follow the civil law model with some modifications.³³¹ Drafting is decentralised: it usually takes place in the relevant government department (with or without input from academics). Once the drafting is completed, the department submits the draft Bill to the Office of the Chief State Law Adviser (OCSLA) for scrutiny. The primary task of the responsible State Law Adviser is to ensure that the draft Bill accords with the Constitution and is not in conflict with other laws.³³² The language (or "formulation") is also scrutinised to ensure that the object of the Bill is achieved and that the proposed legislation reflects government policy. Furthermore the State Law Adviser must

³²⁹ Omar in Viljoen 56.

³³⁰ Laws in Stefanou 24-25.

³³¹ See the location of drafters in 3.1.

³³² In some common law countries this would be the responsibility of the parliamentary counsel tasked with drafting the Bill. Crabbe 7.

provide an opinion as to the procedure to be followed by Parliament in considering the Bill.³³³

Different procedures for different categories of Bills are prescribed in the Constitution: section 74 deals with amendments to the Constitution, section 75 deals with ordinary matters at a national level, section 76 provides for instances where national and provincial competencies overlap and section 77 deals with money Bills (Appropriation Bills or Bills that impose a tax obligation).³³⁴

This opinion is contained in the Memorandum of Objects that accompanies, and is integral to, all Bills except money Bills.³³⁵ The memorandum must set out the object of the Bill, the existing legal position, the reasons for change and the intended outcomes. It also indicates the financial implications of the proposed change and the persons and institutions consulted in the process of deciding on a specific policy.³³⁶ Although not as extensive as the travaux préparatoires (legislative history)³³⁷ of civil law jurisdictions, the Memorandum of Objects is usually more substantive than the two-to-three-page summaries contained in the explanatory notes of common law countries.³³⁸ Although not stipulated by Parliament and not an integral part of the Bill, an Explanatory Memorandum accompanies the annual legislation amending tax laws. This document sets out the rationale for change and makes use of examples, illustrations and diagrams of actual situations. It is consulted widely by tax practitioners and other interested parties and is available as part of the public record on National Treasury and SARS websites.³³⁹

The experience in the Australian and United Kingdom rewrites provides some useful comparisons in this case. Arnold concludes that the problems with the “old” tax legislation in Australia remain in the rewritten legislation because the drafting is still done by the same people, i.e. from the Office of Parliamentary Counsel. Reference is also made to an effort to streamline the legislating process from tax policy formulation to drafting to Parliamentary scrutiny.³⁴⁰ In the United Kingdom the process of the TLRP received widespread approval, because of its transparency and ample

³³³ State Law Advisers 9-10.

³³⁴ Sections 74, 75, 76 and 77 of Constitution.

³³⁵ In accordance with National Assembly Rule 243.

³³⁶ State Law Advisers 12-13.

³³⁷ Vanistendael in Thuronyi 1998 34. Also called Introductory Reports, which include the intent of the legislature (sometimes in socio-legal detail) and an explanation of the solution proposed. Stefanou in Stefanou 327.

³³⁸ Stefanou in Stefanou 327.

³³⁹ www.treasury.gov.za or www.sars.gov.za.

³⁴⁰ Arnold 1-2.

opportunities for consultation. The Committee Report on Tax Simplification recommends following a similar process for the annual Finance Bills that effect amendments to existing tax legislation. It is clear that process is important in drafting. In South Africa there is an existing and effective process for annual amendment Bills. Policy formulation and drafting takes place within National Treasury after ample consultation with and consensus from SARS on matters affecting the administration.³⁴¹ Taxpayers and other stakeholders have regular opportunities to make inputs into both policy and drafting issues. Once the drafting has been completed, the Bills are scrutinised by the OCSLA before being sent to Parliament. Because the rewrite would require resources beyond the present capacity of National Treasury, additional policy formulation and drafting resources will be required. However, the existing process (with its transparency and consultation) may be adopted and amplified as a guideline for the rewrite process and it should not be necessary to devise a completely new process.

5.3 Should a rewrite of the ITA be undertaken?

Devoting resources to a project of which the success is doubtful is not responsible in terms of governance. Sections 38(c)(ii) and 45(c) of the Public Finance Management Act (Act 1 of 1999) prohibit, amongst other things, “fruitless and wasteful expenditure” by officials of a government department. This is expenditure that was “made in vain” and could have been avoided by proper care.³⁴² As a developing country South Africa must provide basic services for many of its citizens and this is clearly an expenditure priority. However, an efficient tax system should clearly also be a priority, as the tax system provides the means to raise the money needed for government expenditure.³⁴³ Although an efficient tax system that facilitates compliance is not a guaranteed way of attracting domestic or foreign investment, an inefficient tax system with high compliance costs is almost certain to prove a deterrent to such investment. Any improvement in the way taxpayers interact with SARS (brought about by the Tax Administration Bill) or in taxpayer comprehension of their income tax obligations (brought about by a rewritten Income Tax Act) should have a positive effect on tax efficiency³⁴⁴ and should indirectly facilitate economic development.

³⁴¹ National Treasury and SARS 2008 *Tax Statistics* 3.

³⁴² Definition of “fruitless and wasteful expenditure” in section 1 of PFMA.

³⁴³ Steenekamp in Black 15.

³⁴⁴ Xanthaki in Stefanou 8-9.

A compelling argument against a rewrite is that a solid body of case law has been built up over the years and that this will all be destabilised or even become useless. This situation will create uncertainty for taxpayers and SARS alike and can only raise compliance costs on both sides of the fence. Although this is not an argument to be discarded lightly, one would do well to bear in mind that case law and precedent embody principles.³⁴⁵ If a rewrite is undertaken responsibly, these principles will remain valid. Even though the substance of what used to be expressed in section 8(4) may subsequently be set out in, for example, section 5(1) the import should be the same. A judge's pronouncement on a certain case under the "old" provision should be relevant to a similar case under the "new" provision. Guidance would have to be provided to facilitate finding specific provisions in the rewritten Act but this problem can be mitigated by an equivalence table as well as a well-organised layout and table of contents for the new Act. During the transition a table indicating the old reference and the new location should help to guide and reassure readers familiar with existing section numbers.

Mention has been made of the aspect that any change to the ITA is a potential cause of uncertainty for taxpayers, advisers and the SARS. The TAB is due to cause large-scale changes to the ITA: placing standardised administrative procedures in one piece of legislation entails removal of a large number of sections to avoid duplication, changes to definitions to ensure that the meaning apply across all tax Acts and consequentially a large number of changes to cross-references.³⁴⁶ Given the practical considerations of changes in the legislative environment of the ITA (brought about by the TAB and the Companies Act (Act 71 of 2008)), tax reform in the form of the introduction of the dividends tax and the vast number of amendments to the ITA over the past 49 years, a new codification of the present ITA is essential. Taxpayers and all other interested parties simply need to know what is contained in the Act and what is not, as well as which parts of it are in operation and which are not. This seems to be a minimum requirement for certainty under the Constitution and the common law.³⁴⁷

5.4 How should the ITA be rewritten?

The most obvious effect of the TAB on the ITA is the removal of a large number of sections. (Most of the provisions of Chapter III will be repealed once the TAB becomes an Act of Parliament and

³⁴⁵ Blann 3.

³⁴⁶ Contained in paragraphs 23 to 106 of Schedule 1 to the TAB.

³⁴⁷ Glaisdale 1.

goes into effect.) This will aggravate the present problems around non-sequential numbering and is likely to highlight the need for a consolidated version of the ITA. Renumbering would entail an examination of the location of provisions in the ITA, leading to a measure of restructuring. The present ITA follows a logical pattern of charging provision, rebates, exemptions and deductions, with details in the Schedules, but this structure has been obscured by additions and deletions over the course of time. (The extensive use of substantive definitions and the fact that all exemptions have to be fitted into a structure determined by the opening words of section 10(1) are glaring problems.) Restructuring would inevitably raise the question as to whether individual and corporate income tax should be dealt with in the same piece of legislation.³⁴⁸ This leads to the question whether the donations tax and the capital gains tax (at present contained in the ITA) should be separated out in freestanding Acts, as are the transfer duty, estate duty and securities transfer tax. If the decision is made to go the separate route, the dividends tax (due to come into operation soon) would logically also be removed and dealt with in separate legislation. Even if corporate and individual income tax are retained in one piece of legislation the result would be a substantially reduced ITA, which could be seen as a simplification in itself.

As seen in the previous paragraphs, a consideration of desired form and structure leads to conceptual issues as to what forms part of an income tax. It is to be expected that consideration of language aspects will also lead to conceptual considerations (seeing that concepts have to be embodied in language and language helps to determine the meaning of a concept). In the United Kingdom's TLRP the language of the legislation was treated separately from substance in an effort "to make progress possible".³⁴⁹ In South Africa, with modest resources, having a modest goal that can be achieved within a reasonable timeframe seems reasonable. However, the criticism of the results achieved by the TLRP (i.e. that a simple restatement of existing legislation without any attempt at simplification of substance is not sufficient) seems to indicate that this approach would not be entirely suitable to the South African context. The separation of language, form and structure from substance would be difficult to achieve and not necessarily helpful.

5.5 The way forward

This brings us to an important consideration in the proposed rewrite: In order to make optimal use of the limited resources available, the project will have to be carefully managed. In compiling the

³⁴⁸ Burns in Thuronyi 1998 500. See 3.3.4.

³⁴⁹ Rogers in Stefanou 77.

process outline in 5.5.1, some principles from the project management environment were applied. The five basic process groups are identified: initiating, planning, executing, monitoring and controlling, and closing. The processes are described in terms of inputs, tools and techniques, and outputs. Project management requires the identification of a critical path and work breakdown. There is recognition that processes overlap and interact throughout the lifetime of a project in iterative cycles. Planning for the beginning of the project takes place in detail, with more detail being filled in for later phases as the project progresses. This requires continual updating of plans, implementation and response to the results of implementation in the form of updated plans.³⁵⁰

In an interactive process of consultation, formulation and drafting the various tasks and steps will have an influence on each other, therefore the project map is subject to modification as the work progresses. It is, however, essential as a planning tool because it helps to identify specific goals (Bills) and the tools and techniques (consistency) needed to achieve them, while also serving as a progress chart. Measuring progress is essential to the process itself and also serves as a tool for transparency. As seen from the requirements of the PFMA, allocating additional resources to a project should depend on the progress and success of the project up to that point.³⁵¹ Parliament and the general public must be kept informed to obtain and keep their approval and support for the project.

The approach followed in the proposed process outline³⁵² is based on the view that drafting legislation is an interactive and iterative process that does not take place in a linear fashion.³⁵³ It is interactive in the sense that substance, language, form and structure all inform each other. As progress is made, some completed parts have to be revisited and modified to match new aspects brought in by subsequent drafting progress (the iterative component). Although unnecessary duplication should be avoided, repetition provides its own scrutiny and quality checks and can be used to good effect.

Based on this, a pragmatic and incremental approach to the rewrite is proposed. According to the Oxford Dictionary pragmatism is about “solving problems in a practical and sensible way rather

³⁵⁰ Project Management Body of Knowledge (PMBOK) accessed on 13 February 2011 at www.projectsmart.co.uk/pmbok.html.

³⁵¹ See 5.3.

³⁵² See 5.5.1.

³⁵³ See 4.1 for recommendations of 2002 Board of Taxation referred to in Ault 9.

than by having fixed ideas or theories”.³⁵⁴ The immediate problems (and opportunities) are mainly presented by the effects of the TAB and a consolidation of the present ITA seems a pressing requirement leading from this. Certainty requires a statement of what is contained in the Act and what is not.³⁵⁵ Grouping of related provisions and sequential renumbering seems a logical further step. Making language use consistent can reasonably be expected to improve readability and the reader’s comprehension of the substance. These are relatively small and achievable steps and can be undertaken with the help of some moderate additional resources. If these steps are successful and receive a positive response, subsequent larger steps (such as the overall restructuring of the ITA) can be undertaken confidently. It should also be easier to obtain additional resources for the more substantive aspects of the project if the project has proved itself to be viable on a small scale.

The incremental component is provided by the overall plan.³⁵⁶ Although tasks may initially seem unrelated, they all fit into the grand design. As each task is completed, it provides a step for a further task to build upon. Each phase has a complete Bill as its product and each subsequent Bill is based on the previous one. In this way, the completion of each phase will provide an opportunity to assess the continued viability of the overall rewrite project. The work may be continued, paused or stopped completely at that point, depending on success to date, availability of resources and political will. The end product of the previous phase, the completed Bill, should remain valid regardless of this decision. (Although the printing costs of a series of Bills will be high, the gains in transparency by having a series of consultations and scrutinies before and during the Parliamentary process should compensate adequately.)

The process of undertaking a rewrite will have to meet the consultation requirements of the Constitution and will have to be as transparent as possible.³⁵⁷ The process will also have to make specific provision for a parliamentary process that distinguishes between matters to be dealt with in a money Bill³⁵⁸ and other matters³⁵⁹.

5.5.1 Process outline

³⁵⁴ Hornby 1138.

³⁵⁵ See 2.1.6.

³⁵⁶ The process outline in 5.5.1.

³⁵⁷ See 5.1.1

³⁵⁸ Section 77 of the Constitution.

³⁵⁹ Section 75 of the Constitution.

In order to give effect to the incremental approach, the project has to be broken down into identifiable and achievable phases, steps and tasks. The phases are a preparatory phase, consolidation phase, rewrite phase and tax reform phase, with a complete Bill as end product of each phase. Each phase consists of steps and within each step there are tasks. As each step is completed, it must form a building block for subsequent steps. It must, however, also be complete of itself. The sequence of the steps and tasks may not be linear, and they might have to overlap.

STEPS DURING PREPARATORY PHASE

1. Reviewing draft amendments in TAB
2. Incorporating amendments in ITA
3. Compiling a Schedule of provisions not yet in operation
4. Drafting transitional provisions

STEPS DURING CONSOLIDATION PHASE

1. Reviewing results of Preparatory phase
2. Piloting passage of Consolidation Bill through Parliament
3. Initiating Rewrite phase

STEPS DURING REWRITE PHASE

1. Achieving consistency in language (with draft Bill as product)
2. Achieving consistency in internal structure and format (with draft Bill as product)
3. Achieving consistency in overall structure (with draft Bill as product)
4. Piloting passage of Bills through Parliament
4. Initiating Tax reform phase

TASKS DURING TAX REFORM PHASE

- a. Conduct large-scale review of income taxes
- b. Consider policy adjustments necessitated by review
- c. Achieve consensus on policy adjustments necessitated by review
- d. Effect policy adjustments by means of Budget Review process and annual Taxation Laws Amendment Bills
- e. Incorporate adjustments in new ITA
- f. Publish new ITA

The outline provided is not meant as a final blueprint. It is an indication of a way forward: an example of a project map.

5.5.2 Consistency in the rewrite of the ITA

Sections 57 to 67 of the *Practice Manual for Legislative Drafting* provide an indication of the importance accorded to formal matters like numbering, punctuation, grammar, language style and indentation. The conventions set out serve as a style guide and are seen to serve “the practical purpose of facilitating communication”.³⁶⁰ A generally accepted style for all legislation in the same jurisdiction makes it easier for a reader to find particular provisions containing required information.³⁶¹

According to Crabbe consistency is essential to effective communication, especially in the context of legislative drafting.³⁶² It is important to use the same expression in the same text: once the expression “to give notice” has been used, notice should not subsequently be “furnished”, “lodged” or “submitted”, unless there is a logical explanation for the different usage.³⁶³

Consistent language use is particularly important in the South African context. South Africans are in majority not native English speakers or readers. One of the salient differences between first language and second language speakers is the extent of their active reading vocabularies (100 000 as opposed to 10 000 words). Fortunately for these second (and third and fourth) language speakers, the vocabulary of tax legislation is fairly limited and the same set phrases are frequently used and reused. This should facilitate reading and comprehension of tax legislation.³⁶⁴

5.5.3 Use of electronic tools to achieve consistency

Style Guide

Once a list has been compiled of expressions presently employed in the ITA, a decision will have to be made as to whether these expressions are acceptable. If an expression like “For the purposes

³⁶⁰ State Law Advisers 45.

³⁶¹ State Law Advisers 162.

³⁶² Quoted in State Law Advisers 171.

³⁶³ State Law Advisers 180.

³⁶⁴ See 2.1.1.

of ...” is to be retained, all the permutations of this expression that are currently found in the Act (For purposes of, For the purpose of, For purpose of) can be traced electronically and replaced by the selected expression. This can be done by means of a simple Find and Replace function. The advantage of this method is that the expression will therefore be used in exactly the same, consistent format throughout the text.

Subsequent drafters, who have to draft amendments to the Act, will then be able to consult the Style Guide and employ the expressions that have been decided on. If in future a decision is made to use a different expression, that expression can simply be inserted to substitute the previous one by the same Find and Replace function. This not only saves time for the people involved, because they do not need to start redrafting on page 1, it also ensures consistency.

Furthermore, publication of the Style Guide provides a fair measure of transparency. Members of the public and Members of Parliament who have to consider a Bill can rest assured that the work done to the legislation is summarised in the Guide and that no subtle rewording (that constitutes a policy change) has taken place without their knowledge.

Use of electronic tags for, e.g., sections should enable updating references to these sections when changes are made. At the moment this mainly occurs when obsolete sections are repealed, but if consolidations are to be undertaken regularly, renumbering and subsequent updating of references will become a regular feature of the landscape.

5.5.4 Examples of redrafting

Some examples and proposals are furnished to provide some practical application of the ideas set forth so far. They are not intended in any way to pre-empt any consultation, policy formulation and drafting process undertaken for the rewrite.

The use of the active voice is generally advocated as it is more explicit. However, sometimes it is unnecessary to specify who is to do something, e.g., “If a taxpayer incurs expenses..., those expenses must be treated ...” is longer and more complicated than “Expenses incurred by a taxpayer ... must be treated ...” without adding any relevant information.³⁶⁵

³⁶⁵ See 3.3.5.

Definitions section

The position of the Definitions section was questioned at the time of the writing of the Constitution and the Labour Relations Act. Placing it as the first section was seen as being not user-friendly, because the first section should be used to state the purpose of the Act. The matter of consistency as an aid to reading comprehension is relevant here. The formal elements of an Act form part of the schema of “Acts”. A reader who has previous experience of reading South African legislation (prior knowledge) expects to find the definitions grouped together in section 1 of the Act (prediction). Any departure from this constitutes an obstacle to reading comprehension unless and until it becomes accepted practice to place the definitions section elsewhere, in which case the new position would become part of the schema of “Acts”. Thornton argues that it is user-friendly to place the Definitions at the beginning because they are then easily found.³⁶⁶

On a practical note the question has to be asked: If the Definitions do not go at the beginning, where can they be placed consistently? If the Definitions section goes at the end, where is the end? The last section is always the Short Title and Commencement section. If there are transitional provisions and other matters relating to commencement times, they are logically placed right before the Short Title and Commencement. But not all Acts have complicated commencements, so the Definitions could be the second or third last provision. Many Acts have Schedules and Appendices at the end. Paging from the back to find the beginning of the definitions section is completely counter-intuitive and does not seem to be particularly user-friendly. If the Definitions serve as a directory to finding the section that mainly deals with that concept, it would make logical sense to place it at the beginning, as an adjunct to the Table of Contents.

Kenneth Rosenbaum³⁶⁷ raises the issue of operative provisions hidden in a definition. His solution is set out below because it serves as a useful example to resolve some of the problems with substantive definitions in the ITA. He first provides a descriptive definition:

“ ‘Liaison officer’ means a person appointed under Section 10 of this Law to coordinate tax assessments with the Finance Ministry”. The appointment of the liaison officer, a reference to the officer’s duties and the location of the liaison office are then dealt with fairly concisely in section 10:

³⁶⁶ State Law Advisers 54.

³⁶⁷ Rosenbaum Part III E6, p. 27.

“Section 10(a) The Minister shall appoint an official of the department as liaison officer to coordinate tax assessments with the Finance Ministry.

(b) The liaison officer shall maintain an office in the Finance Ministry Headquarters.”.

The operative elements are all three grouped together in section 10, while the definition retains a descriptive element and acts as an index or directory. In section 10, it is not necessary to use the cumbersome formulation “liaison officer defined in section x” because all the definitions in this law are grouped together in the Definitions section. Present South African drafting style would permit an even shorter version of the definition:

“gross income” means the amounts contemplated in section x.

In this definition the description is solely confined to the substantive section. This is safer, as any abbreviated description has the potential to mislead, but is probably not in keeping with the plain language objective of being user-friendly. The over-use of the word “contemplated” has led to some resistance against it, but it is a useful way of describing what the legislator had in mind or intended without tying it into a time period: “the Board contemplated in section 10” applies equally whether the Board is still to be established in terms of section 10 or whether it is now ten years later and the Board is running smoothly.

In the context of the ITA, a problematic definition like that of “gross income” could be broken up in a similar way with the definition simply stating:

“gross income” means the amounts received by or accrued to a taxpayer during a year of assessment, as set out in section x.”

Section x would then specify that it deals with the income of residents and with South African income of non-residents; which receipts of a capital nature are excluded; which receipts are to be specifically included; and that if the dates of receipt and accrual are not the same, which one is to be used. Each of these issues can be treated in a separate subsection, i.e. in a sentence on its own, and the subsections can be divided into meaningful paragraphs, grouping similar items. This grouping should greatly facilitate comprehension, in contrast to the present washing list that provides little guidance as to the relations between the various items.

Drafting would be simplified if the drafter is not constrained to fit all these items into a pre-existing structure governed by the opening words, “In this Act, unless the context otherwise indicates–”. Although the comfort of the drafter might not seem an important consideration, it plays into the issue of the ease with which the Act can be amended. The more tightly the present Act is structured, the less it presents possibilities for future amendment. In the case of the Income Tax Act, which is amended on an ongoing annual basis, it is important to have a structure that allows insertions and deletions without destabilising the structure of the pre-existing or remaining provisions. A standard Style Guide would also play into this issue of regular amendments. The present Act is a compendium of personal styles, as each drafter brought his or her personal touch to the language and the structure. This is one of the ways of promoting innovation and improvement and should not be discouraged completely. If the main aim of the text is to be comprehensible, however, consistency in language and structure should override innovation when it comes to amendments.

Examples of restructuring and rewording

One of the most problematic sections in the ITA is the Definitions section. Its structure is awkward because the whole 30 pages form one sentence that starts with “In this Act, unless the context otherwise indicates–”. The definitions themselves then follow the model of “‘year of assessment’ means–” or “‘tax’ includes–”. This definition is often accompanied by a proviso or two to qualify the general provisions, providing exceptions or additional qualifications. Each definition would be much better off in a substantive section on its own, with only a signpost to it in the Definitions section.

Another section with a notoriously difficult structure is section 10. This whole section dealing with exemptions (and describing them in detail) consists of one sentence starting on p. 15: “There shall be exempt from income tax–”. When reading on p. 32 one has to page back to the beginning of the sentence to place the paragraph being read in the context of the sentence.

The following redraft of the beginning of an exemptions section is proposed:

“Certain amounts that constitute gross income to be exempt from tax and not included in taxable income

X. (1) Amounts received by or accrued to the government of the Republic in the national, provincial and local sphere in the ordinary course of performing the duties of government are exempt from income tax.

(2) Amounts received by or accrued to ... are exempt from income tax.”

Likewise a whole new Part in the new ITA could be devoted to Incentives. This could look something like the following:

“Part X

Tax Incentive Programmes

Chapter X

Tax incentives to encourage development

Accelerated depreciation to be allowed in respect of development in urban development zones (UDZs)

X. (1) A taxpayer may deduct from taxable income an amount in respect of expenditure incurred by the taxpayer in respect of a development in a UDZ, if the development meets the requirements set out in section X1.

(2) The amount of the accelerated depreciation to be deducted by a taxpayer in respect of a development in a UDZ must be calculated in the manner set out in section X2.

Requirements for development in UDZ to qualify for accelerated depreciation

X1. (1) The taxpayer claiming an accelerated depreciation in respect of a development must be the owner of the development or must have acquired the development from a developer.

(2) The development must be situated in a UDZ.

(3) The development must take the form of–

(a) the construction of–

(i) a new building; or

(ii) an addition to an existing building; or

(b) the refurbishment of an existing building or a part of a building.

(4) Refurbishment of a building must constitute a substantial improvement to the existing structure and may not take the form of maintenance or repairs.

(5) If only a part of a building is refurbished, the refurbishment must affect more than half the building.

(6) A taxpayer that purchases a development from a developer must obtain from the developer a document setting out and certifying the cost to the developer of that development.

Calculation of accelerated depreciation allowance

X3. (1) The calculation of an accelerated depreciation to be allowed to a taxpayer must be based on the cost of the development—

- (a) to the taxpayer; or
- (b) in the case of a development that is purchased from a developer, to the developer.”

Moving all the substantive and operative elements out of the definitions and into the main body of the legislation will simplify drafting and therefore reading. It will also entail a large-scale restructuring of the Act, as all these substantive provisions will have to be placed somewhere and there is at present no provision for this. Although the move has very clear advantages, it is not a step that should be undertaken lightly.

The style of drafting has a profound influence on the structuring and the wording of a provision. Three examples are provided here of different styles of drafting the same provision. The first is intended to reflect the traditional style employed in the ITA in 1962. The second reflects the more descriptive, narrative style employed in many of the newer provisions, while the third provides an alternative to both of these.

Example 1

x. A deduction shall be allowed to a taxpayer of the amount of expenditure incurred by that taxpayer in order to effect an improvement to a building in a UDZ: Provided that the Commissioner is satisfied that the said expenditure was actually incurred by the taxpayer in the year of assessment in question and that the amount of expenditure is deducted in four equal portions, the first of which taking place in the said year of assessment and the subsequent three instalments in the three years of assessment following such year.

Example 2

x. (1) If a taxpayer incurs expenditure in order to effect an improvement to an existing building in a UDZ, he may deduct the amount of the expenditure actually incurred.

(2) The taxpayer contemplated in subsection (1) must satisfy the Commissioner that the expenditure contemplated in subsection (1) was actually incurred in that year of assessment.

(3) (a) The taxpayer must deduct the amount of the expenditure actually incurred in four equal instalments.

(b) The taxpayer must deduct–

(i) the first of the instalments contemplated in paragraph (a) in the year of assessment contemplated in subsection (2); and

(ii) the following three instalments in the three subsequent years of assessment.

Example 3

x. (1) Expenses paid to improve a building in a UDZ may be deducted from the income of the person that incurred the expenses.

(2) The person must submit to the Commissioner proof of the amount of the expenses incurred.

(3) (a) The amount must be deducted in four equal instalments.

(b) The first instalment must be deducted in the year of assessment during which the expenses were incurred and the subsequent instalments in the following three years of assessment.

The third example aims to retain the clarity of layout in Example 2 with some of the economy of style in Example 1. Simplicity allows the use of “the person” and “the amount” without further qualifications because there can be no confusion with any other person or amount in this provision. The limited use of passive voice (when the subject of the verb is immaterial) avoids the use of a personal pronoun, which is problematic because the person/taxpayer might not be a natural person. When necessary to indicate who must submit the proof, the active voice is used. The specification of “an existing” building is removed because a non-existent building cannot be improved. The structure is simple, but follows a specific path: The opening sentence states the general principle; the person mentioned in (1) must perform the action in (2); the amount mentioned in (2) is echoed in (3); (3)(a) introduces the concept of instalments and (3)(b) deals with the detail of the size and frequency of the instalments.

Chapter 6

CONCLUSION

Tax legislation is complex in substance. Comprehension of complex texts is facilitated by plain language and especially by consistency. If the ITA is to be rewritten in order to be understood more easily, it must be rewritten making the best use of tools that facilitate the reader's comprehension. Consistency is an important aid in this regard. The repetition of the same words and phrases in a text constitute an aid to the reading process and therefore to the reader's comprehension of the text. Consistency in format and structure likewise form elements of familiarity that enable the reader to come to grips with the substance of a text.

Consistency is an important aid to legal interpretation and provides a measure of certainty that a word or phrase will be interpreted in a particular way. Certainty is a crucial aspect of income taxation as it enables responsible planning.

The need to review the language of the present ITA has been perceived since 1997. The impact of other legislation and of tax reform measures has now occasioned major changes to the text and has made the present document structurally incoherent. Furthermore, continual amendments since 1962 have rendered non-commercial access to an authoritative version of the text impossible. The provisions of the ITA have an impact on a large number of people and businesses and should be accessible to those who need or wish to consult it. Some form of rewrite therefore needs to take place.

Resources for a rewrite project are limited and have to be used wisely. The aims of the rewrite therefore have to be chosen not only in terms of what is desirable but also of what can be achieved. A pragmatic and incremental approach is therefore proposed, in which new aims are formulated on the basis of what has already been achieved.

Drafting of legislation is one aspect of a process to embody policy in language that enables the policy to be implemented. Rewriting the ITA can therefore not only be seen as a drafting exercise. Even if no policy review is envisioned, the rewrite must form an interactive and iterative process as much as any other legislative drafting exercise. The process outlined in this document is by necessity a provisional process. It will always be subject to review and revision as the work progresses. The purpose is to indicate a pathway on which consistency in different aspects of the text serves as a focus point, an achievable goal.

Consultation is an important aspect of the outlined process. A Style Guide is proposed as an instrument of consultation and implementation. Once a decision has been reached (e.g. on the use of a formulation or a specific format) the formulation or format can be included in the Guide and implemented in the draft text as consistently as is appropriate.

Humans and drafters are fallible and absolute consistency is not achievable. However, an approach focused on providing the greatest possible measure of consistency can be expected to produce a piece of legislation that is more readable and understandable than the present ITA.

CASES

Brunton v Stamp Duties Comrs 1913 AC

Cameron J 1996 6BCLR 836 W

Langa J 2001 1 SA 545 CC

Matatiele Municipality v The President of the Republic of South Africa 2006 5 BCLR

J Rowlatt *Cape Brandy Syndicate v IRComrs* 1921 1KB 64 71 12TC

Savage v Commissioner for Inland Revenue 1951 4 SA 400 A 410F-G per Schreiner JA

BIBLIOGRAPHY

- Aberavon, Lord Howe, “Simplicity and Stability: The Politics of Tax Policy” *British Tax Review* 2001 2
- Arnold, B, “Australian Tax Rewrite”, *Revenue Law Journal*, Volume 19, Issue 1, 2009, Article 1
- Ault, HJ and Arnold, BJ (eds), *Comparative Income Taxation: A Structural Analysis*, 2004, Kluwer Law International, The Hague
- Bekink, Bernard and Botha, Christo, “Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)” *Statute Law Review* 2007 28(1)
- Black, Calitz, Steenekamp (eds), *Public Economics*, 2008, Oxford University Press Southern Africa, Cape Town
- Blann, BEJ, *Principles of South African Income Tax*, 1955, Butterworth, Durban
- Botha, Henk et al, *Rights and democracy in a transformative constitution*, 2003, SUN Press: Stellenbosch
- Bradfield, Graham and Van der Merwe, Derek (eds), “*Meaning*” in *Legal Interpretation*, 1998, Juta Cape Town
- Brennan, Geoffrey and Buchanan, James M, *The Power to Tax: Analytical foundations of a fiscal constitution*, 1980, Cambridge University Press: Cambridge
- Butt, Peter and Castle, Richard, *Modern Legal Drafting: A Guide to Using Clearer Language*, 2006, Cambridge University Press, Cambridge
- Cnossen, Sijbren, “Role and Rationale of Excise Taxation” in Cnossen, Sijbren (ed), *Excise Tax Policy and Administration in Southern African Countries*, University of South Africa, Pretoria
- Cook, Guy, *Discourse*, 1989, Oxford University Press: Oxford, Ninth Edition
- Crabbe, VCRAC, *Legislative Drafting*, Vol I, Cavendish Publishing Limited, London
- Croome, Beric J, *Taxpayers’ rights in South Africa*, 2010, Juta Cape Town
- Cutts, Martin, *Lucid Law*, 1994, Plain Language Commission (Final report on an independent research project to rewrite and redesign a UK act of parliament)
- De Ville, JR, *Constitutional and Statutory Interpretation*, 2000, Interdoc Consultants, Cape Town
- Du Plessis, Lourens, *Re-Interpretation of Statutes*, 2002, Butterworths, Durban
- Elliott, David, *Legal Drafting: Language and the Law*, 1990, Canadian Institute for the Administration of Justice, Ottawa accessed on 10 December 2010 at <http://www.davidelliott.ca>
- Elliott, David, *Tools for Simplifying Complex Legislation*, 1996, Tax Drafting Conference Auckland accessed on 10 December 2010 at <http://www.davidelliott.ca/papers/simplifying.doc>
- Emerson, Ralph Waldo, *Self-Reliance*, 1841

- Glaisdale, Lord Simon of “The Renton Report - Ten Years On”, Text of address given at Statute Law Society Annual Conference on 12 October 1985 accessed at <http://slr.oxfordjournals.org/content/6/1/133.extract> on 10 March 2011.
- Grabe, William, “Current Developments in Second Language Reading Research”, *TESOL Quarterly*, Vol. 25, No. 3, Autumn 1991
- Hornby, AS, *Oxford Advanced Learner’s Dictionary of Current English*, 2005, Oxford University Press, Oxford
- House Legislative Counsel’s Manual on Drafting Style*, 1995, Office of the Legislative Counsel: US House of Representatives
- Inns of Court School of Law, Institute of Law, City University London, *Drafting*, 2003, OUP, Oxford
- Isaacs, I, Fielding, WD, Lazar, L and Wells, MJ, *Law and Practice of South African Income Tax*, 1963, Butterworths, Durban
- Katz Commission, *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa*, 1994, Government Printer, Pretoria
- Kimble, Joseph, *Lifting the fog of legalese: essays on plain language*, 2006, Carolina Academic Press, Durham
- McLeod, Ian, *Legal Method*, 2005, Palgrave Macmillan, Basingstoke
- Morse, Geoffrey and Williams, David, *Davies: Principles of Tax Law*, 2000, Sweet & Maxwell, London
- National Treasury and SARS, *2008 Tax Statistics*, Government Printer, Pretoria
- National Treasury and SARS, *2010 Tax Statistics*, Government Printer, Pretoria
- Paul, Deborah L “The Sources of Tax Complexity: How much simplicity can fundamental tax reform achieve?” *North Carolina Law Review* 76 1997
- Pearce, DC and Geddes, RS *Statutory Interpretation in Australia*, 2001 Butterworths Australia
- Plain English Campaign, *Language on Trial*, 1996, Robson Books Ltd, London
- Plain English Manual* accessed at www.opc.gov.au/about/docs/pem.pdf on 10 March 2010
- Poole, Steven, *UnspeakTM*, 2006, Little, Brown, London
- Rosenbaum KL *Legislative Drafting Guide: A Practitioner’s View* FAO Legal Papers Online 64 February 2007 accessed on 15 March 2011 at <http://www.fao.org/legal/prs-ol/years/2007/list07.htm>.
- Sabine, BEV, *A Short History of Taxation*, 1980, Butterworths, London
- Scottish Government, The, *Plain Language and Legislation*, Chapter 4 accessed at <http://www.scotland.gov.uk/Publications/2006/0217093804/4> on 8 December 2010

- Seidman, A, Seidman, R and Abeyesekere N, *Legislative Drafting for Democratic Social Change* 2001 Kluwer Law International, The Hague
- Seidman, Ann, Seidman, Robert B and Janice Payne (eds), *Legislative Drafting for Market Reform: Some lessons from China*, 1997, Macmillan Press Ltd: London
- State Law Advisers (comp) *Practice Manual for Legislative Drafting*, 2001
- Stefanou, Constantin and Xanthaki, Helen (eds), *Drafting Legislation: A Modern Approach*, 2008, Ashgate Aldershot, Hampshire
- Thornton, GC, *Legislative drafting*, 1996, Butterworth, London
- Thuronyi, Victor (ed) *Tax Law Design and Drafting* 1998 IMF
- Thuronyi, Victor, *Comparative Tax Law*, 2003, Kluwer Law International, The Hague
- Tiley, John, *Studies in the History of Tax Law*, 2004, Hart Publishing, Oxford and Portland, Oregon
- Viljoen, Frans and Nienaber, Annelize (eds), *Plain Legal Language for a New Democracy*, 2001, Protea Book House, Pretoria
- Waite, M (ed), *Oxford Dictionary and Thesaurus*, 2007, Oxford University Press, Oxford
- Wooje Choi, "Plain Writing Act of 2010 signed into law", *IBFD North America*, 21 October 2010
- <http://www.centerforplainlanguage.org/plain-writing-laws/plain-writing-act-2010> accessed on 21 October 2010
- <http://www.museumofprinting.org> accessed on 10 December 2010
- <http://www.projectsmart.co.uk/pmbok.html> accessed on 13 February 2011
- <http://www.sars.gov.za> accessed on 15 November 2010
- <http://www.statssa.gov.za/census01/html/keyresults> accessed on 10 December 2010