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Tax legislation and the right to equality: Does section 23(m) of the Income Tax Act 58 of 1962 rationally differentiate between salaried individuals and individuals who earn their income mainly from commission?

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Abstract

The authors speculate how a court should deal with a tax matter that implicates the right to equality. Section 23(m) of the Income Tax Act 58 of 1962 squarely raises an equality dispute — in the context of rational/irrational differentiation, not fair/unfair discrimination. The aim of this article is to evaluate if section 23(m) rationally differentiates between salaried and non-salaried individuals — if the differentiation created by section 23(m) is constitutionally permissible. First, the authors discuss the influence of the Constitution of the Republic of South Africa, 1996 on tax legislation with reference to selected cases where provisions in tax legislation came under constitutional scrutiny. Secondly, the operation of section 9 of the Constitution is explained. Thereafter, the authors interpret section 23(m) in considering whether the differentiation therein falls foul of

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section 9 of the Constitution. Having regard to those deductions which are not available to a salaried individual in terms of section 23(m) and to the number of individuals who are listed by SARS as salaried and non-salaried individuals in SARS's statistics from 2015 to 2018, the conclusion is reached that the differentiation between salaried and non-salaried individuals appears to be rational as it might lead to a significant increase in the administrative burden of SARS and of the salaried individuals in question.

I Introduction

As set out in more detail below, provisions in South African tax legislation have come under constitutional scrutiny in a number of cases. In *First National Bank v Commissioner for South African Revenue Service*,¹ the property clause was considered. *Metcash Trading Ltd v Commissioner for South African Revenue Service* implicated the right to access to courts. *Gaertner v Minister of Finance* dealt with the right to privacy. In *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service & another*,² the court considered the property clause and the requirement that all legislation must be consistent with the rule of law.³ More recently, in *Barnard Labuschagne Inc v South African Revenue Service & another*,⁴ the potential infringement of the right to access to courts was considered.⁵

In this article, we speculate how a court should deal with a tax matter that involves section 9 of the Constitution — the right to equality. South Africa's National Treasury, which is responsible for administering the

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annual tax legislative cycle and for preparing the policy documents setting out the rationale behind the inclusion or removal of a provision in tax legislation, has at least implicitly acknowledged that tax legislation should not differentiate between taxpayers.⁶ We have identified section 23(m) of the ITA as a tax provision that squarely raises an equality dispute — in the context of rational/irrational differentiation, not fair/unfair discrimination.⁷ The aim of this article is to evaluate if section 23(m) of the ITA rationally differentiates between salaried and non-salaried individuals; put differently, if the differentiation created by section 23(m) is constitutionally permissible.¹⁰

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

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

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any contributions to a pension or retirement annuity fund as may be deducted from the income of that person in terms of section 11F;

any allowance or expense which may be deducted from the income of that person in terms of section 11(c), (e), (i) or (j);

(iiA) any deduction which is allowable under section 11(nA) or (nB); and

(iii) any deduction which is allowable under section 11(a) or (d) in respect of any rent of, cost of repairs of or expenses in connection with any dwelling house or domestic premises, to the extent that the deduction is not prohibited under paragraph (b)'.

Section 23(m) effectively prohibits the deduction of expenses incurred in the production of income from employment or in the holding of an office, with certain exceptions.¹¹ Section 23(m) prohibits the deduction of certain private expenses, such as commuting expenses, even if section 23(b) were not to apply as the expense of travelling between one's work and home constitutes a deduction related to a person's employment or the holding of his office.¹²

Section 23(m) differentiates between persons who receive remuneration in respect of their employment or the holding of their office and between individuals who work as an agent or representative whose remuneration is normally derived mainly in the form of commissions based on his or her sales or the turnover attributable to him or her' because it permits the section 11 deductions to the first class of individuals but not to the latter. It does not affect an individual's right to deduct expenses falling outside section 11 of the ITA, as the provision only applies to expenditure, losses and allowances 'contemplated in' section 11.¹³ For ease of reference, the former class will be referred to as 'salaried individuals' and the latter as 'non-salaried individuals' throughout this article.

We will first discuss the influence of the Constitution on tax legislation with reference to selected cases where provisions in tax legislation came under constitutional scrutiny. Secondly, the operation of section 9 of the Constitution will be explained. Thereafter, we will deal with the interpretation of section 23(m) in considering whether the differentiation therein falls foul of section 9 of the Constitution.

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II The influence of the constitution on the law of taxation

In *First National Bank v Commissioner for South African Revenue Service*,¹⁴ the Constitutional Court stated that 'even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country — a legitimate governmental objective of undisputed high priority — are not immune to the discipline of the Constitution and must conform to its normative standards'.

Virtually every provision in the ITA, *prima facie*, infringes on a person's fundamental rights as enshrined in the Bill of Rights.¹⁵ According to Goldswain,¹⁶ a number of provisions in the ITA would have unjustifiably infringed on a person's fundamental rights were it not for section 36 of the Constitution, which ensures that no fundamental right is absolute and that all rights are subject to limitation. For example, it has been argued that the mere imposition of tax could constitute an infringement of the right to property in section 25 of the Constitution.¹⁷ Tax audits, investigations and search and seizure provisions could be in violation of the rights to privacy and human dignity in sections 14 and 10 respectively. Answering written enquiries or attending a judicial inquiry and being compelled to answer questions could infringe on the right not to incriminate oneself in terms of section 35(3)(j). The right to equality in section 9 clashes with sections that provide, for example, that taxpayers over the age of 65 are entitled to a larger medical deduction or tax rebate than those under the age of 65.¹⁸

Provisions in our tax legislation have come under constitutional scrutiny in several instances.

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FNB v CSARS held that certain provisions of the Customs and Excise Act¹⁹ were unconstitutional in that they unjustifiably infringed on the property rights in section 25(1) of the Constitution.²⁰ The court held that although FNB neither used, enjoyed or possessed the vehicles at the time the Commissioner detained and threatened to sell them, FNB remained the rightful owner and a sale in this context would have constituted a deprivation of property. The appellant successfully argued that section 114 of the Customs and Excise Act infringed on section 25 of the Constitution as it entitled the state to detain and sell goods belonging to persons who did not owe a debt to the state.

In *Metcash Trading Ltd v Commissioner for South African Revenue Service*, the Constitutional Court held that the 'pay now, argue later' principle, as found in sections 36(1), 40(2)(a) and 40(5) of the Value-Added Tax Act at the time,²² did not infringe on an individual's right to access the courts in section 34 of the Constitution. The 'pay now, argue later' rule obliges a taxpayer to pay the due tax before the taxpayer is afforded the opportunity to access the court to dispute the tax, but pursuant to the implementation of the Tax Administration Act,²³ the position has changed.²⁴

Gaertner v Minister of Finance held that sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the Customs and Excise Act, which permitted South African Revenue Service (SARS) officials to conduct, *inter alia*, warrantless searches albeit under certain circumstances,²⁶ constituted an unjustifiable violation of the section 14 constitutional right to privacy.²⁷ Section 4 of the Customs and Excise Act was held to be overbroad as it does not explicitly identify the premises that can be searched without a warrant, neither

declaration of invalidity for six months allowing Parliament time to remedy this constitutional breach.

The decisions in these cases are prime examples of where tax law provisions were measured against the Constitution. The aim of this article is to predict how an equality dispute should be resolved in a tax law context. Below we explain how section 9(1) of the Constitution operates before we apply section 23(m) of the ITA against these equality principles.

III Section 9(1) of the constitution and the principle of horizontal equity

In *Harksen v Lane NO & others* the Constitutional Court set out the approach to be followed when a legislative provision is alleged to be in conflict with section 9²⁹ of the Constitution.³⁰

The first question to be asked is whether the provision differentiates 'between people or categories of people' and if it does, whether the differentiation bears 'a rational connection to a legitimate government purpose'.³¹ If it does not bear a rational connection or has an illegitimate government purpose,³² then there is a violation of section 9(1), but even if it does bear a rational connection, it might nevertheless amount to discrimination.³³ The second question to be asked is whether the differentiation amounts to unfair discrimination.³⁴ This requires a two-stage analysis.³⁵ The first question is whether the differentiation constitutes discrimination.³⁶ If the differentiation is on a specified ground, then discrimination will have been established.³⁷ If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.³⁸ If the differentiation amounts to discrimination, the question is whether it amounts to unfair

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discrimination.³⁹ If it is found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, there is no violation of section 9(3).⁴⁰ If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.⁴¹

As the differentiation in section 23(m) of the ITA does not take place on a prohibited ground,⁴² section 9(3) is not relevant to this discussion and the focus will be on how section 9(1) has been interpreted and applied. There will be discrimination on an unspecified ground if the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. It is submitted that a person's status as a salaried individual is not a ground that falls into this category of unspecified grounds.

Prinsloo v Van der Linde,⁴³ one of the earlier cases heard by the Constitutional Court, focused on differentiation in terms of section 9(1). The court explained that it is impossible to govern a country and regulate the affairs of its citizens extensively without differentiating between them.⁴⁴ Such differentiation can be referred to as 'mere differentiation'⁴⁵ and will be permissible in terms of section 9(1) if it is rational, meaning that there must be a rational connection between the differentiation and a legitimate government purpose.⁴⁶ The rationality principle in the context of section 9(1) has been applied in a number of cases.⁴⁷ This approach was endorsed in *Jooste*,⁴⁸ where the court added

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that if the differentiation in question was irrational, it could still be justified in terms of the limitations clause.⁴⁹ Differentiation will be irrational if it is 'arbitrary' or 'manifests naked preferences'.⁵⁰ Case law does not set out the requirements for a governmental purpose to be legitimate, but merely determines it on a case-by-case basis. For example, in *Jooste* the purpose of the Compensation of Occupational Injuries and Diseases Act⁵¹ to regulate compensation for disablement of employees caused in the course of their employment comprehensively (and in the process depriving them of a common-law action) was found to be a 'legitimate purpose'.⁵² In *Prinsloo* it was held that the presumption of negligence on the part of a landowner living outside a fire control area where a fire starts on his land and causes damage to land belonging to others was linked to the state's 'strong interest in preventing veld, forest and mountain fires' which was the purpose of the Forest Act.⁵³

In *Prinsloo*, *Jooste*,⁵⁵ and *Weare* it was stated that the question of a rational connection does not depend on whether the governmental objective could have been achieved in a better or more effective way. *Weare*, for example, held that the differentiation between juristic persons and partnerships, whereby individuals who hold a licence can carry on the business of bookmaking in partnership and juristic persons cannot,⁵⁷ was rationally connected to the legitimate government purpose of regulating gambling,⁵⁸ *inter alia*, because one of the reasons for the provision was that it was easier to hold individual licence-holders accountable than juristic persons, whose shareholders and management are difficult to hold personally liable.⁵⁹

This section 9(1) right to equality is not absolute, meaning there is no absolute standard which can be laid down to determine rationality.⁶⁰ The principle of horizontal equity in tax law may assist in concretising rationality in the context of tax legislation. The principle of horizontal equity entails that taxpayers in the same financial position, i.e. where

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they have an equal ability to pay, must pay the same amount of income tax.⁶¹ Swart explains that the principle of horizontal equity reflects the basic values of the Constitution regarding equality and fairness.⁶² It is submitted that this principle is an application of the rationality requirement within the context of tax legislation. Within the context of income tax law, horizontal equity would require that principles of income tax law, such as the general deduction formula, should in principle be applied consistently to taxpayers to ensure, as far as possible, that taxpayers in the same financial position pay the same amount of tax.⁶³ Provisions that depart from the general principles of income tax law and thereby also from the principle of horizontal equity, for example, in order to encourage or discourage specific economic activities, would in principle be in breach of section 9(1).⁶⁴

IV The interpretation of section 23(m)

Our courts have not interpreted section 23(m) since it came into effect on 1 March 2002. As explained in the introduction to this article, the only contentious aspect of section 23(m) is the differentiation it creates between salaried individuals and non-salaried individuals. In the course of discussing this provision, we rely mainly on what is stated in SARS Interpretation Note 13.⁶⁵ In *Marshall & others NNO v Commissioner for the South African Revenue Service*,⁶⁶ the Constitutional Court essentially stated that courts should not rely on SARS interpretation notes to interpret tax legislation. Although the contents of IN 13 are therefore not binding law, the note still reflects how SARS will likely apply section 23(m) and is likely what would apply in practice, until a court is called upon to interpret section 23(m).

In terms of IN 13, the term 'employment' in section 23(m) should be afforded its narrower meaning of an employer–employee (master–servant) relationship and does not include an independent contractor.⁶⁷ In terms of the same note, the holding of an office generally flows from

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an appointment (such as the President, cabinet ministers, judges and directors of companies) whereas the holding of employment flows from a contract and is something in the nature of a post.⁶⁸ Section 23(m) applies to these individuals if they receive remuneration as defined in the Fourth Schedule to the ITA. For purposes of this discussion the detailed definition of remuneration is not relevant. The real issue is the reason for which payment is received and the nature of the payment received — whether or not it is paid on a commission basis.

An agent is defined in IN 13 as 'a person authorised or delegated to transact business for another', whereas a representative is defined as someone 'who represents another or others'.⁶⁹ 'Commission' is defined as 'a percentage of sales or turnover of the person on behalf of whom the agent or representative is acting'.⁷⁰ Furthermore, the remuneration received by an agent or representative is not necessarily as defined in the Fourth Schedule, but merely a general reference to a reward or pay received in return for services rendered or work done.⁷¹ The term 'mainly' is interpreted to mean more than 50 per cent of the taxpayer's gross remuneration and as such the total income of the taxpayer (including 100 per cent of all allowances) must be compared to his or her commission income.⁷² Where the commission constitutes more than 50 per cent of the gross remuneration, the limitation in section 23(m) will not apply to such an agent or representative and he or she will still be allowed to make other deductions under section 11.⁷³

SARS Binding Private Ruling 008⁷⁴ provides an example of where payment received will constitute 'commissions based on his or her sales or the turnover attributable to him or her'. The applicant received his remuneration in the form of a basic fixed monthly salary, certain allowances and a further variable payment (referred to as 'commission' in the contract of employment), which the applicant would earn in

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relation to the services he renders as a sales consultant.⁷⁵ SARS ruled that the variable payments made by the company to the applicant for services rendered as a sales consultant constitute 'commissions based on his or her sales or the turnover attributable to him or her' in terms of section 23(m).⁷⁶

BPR 008 refers to the commission that the appellant in question would receive as a 'variable payment'. The ruling was granted with reference to the applicant's duties as a sales consultant, which might indicate that it is not essential for a person to receive his income in his capacity as an agent or representative, but rather that the payment he receives must be of a variable nature.⁷⁷ We return to the relevance of variable payments in the sections below.

V Why does section 23(m) differentiate?

Section 23(m) was introduced in section 21(1)(b) of the Taxation Laws Amendment Act⁷⁸ and came into effect on 1 March 2002. According to the 2002 Budget Review,⁷⁹ 'normal salaried employees have very few expenses that relate to the production of their employment income as it is usual practice for employers to provide the necessary facilities. Where such expenses are claimed the quantification of the expenses and the split between non-deductible personal use and deductible business use result in significant administrative burdens for both SARS and the taxpayers concerned'.⁸⁰ Despite the justifications offered here (taxpayers incur few expenses in the production of their income and the administrative burden), Klue *et al* question the constitutionality of section 23(m).

IN 13 indicates that section 23(m) was introduced to limit the deductions that employees and office holders can claim against their employment income.⁸² It further states

amended slightly. In 2005, it was amended by section 28(1)(b) of the Revenue Laws Amendment Act⁸⁴ that amended subparagraph (iii), but which was subsequently repealed in terms of the Taxation Laws Amendment Act.⁸⁵ In terms of section 28(1)(c) of Act 31 of 2005, subparagraph (iv) of section 23(m) was added. In 2008, subparagraph (iiA) was inserted by section 37(1)(c) of the Revenue Laws Amendment Act⁸⁶ and was subsequently amended by the 2013 Taxation Laws Amendment Act.⁸⁷ Although the number of deductible expenses available to salaried employees has therefore increased, a number of specific deductions listed in section 11 are not available to salaried individuals. These deductions will be discussed in the remainder of this article below. The question arises whether this situation is tenable considering section 9 of the Constitution.

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

As mentioned above, it appears that the differentiation was created as salaried individuals incur few expenses in the production of their income and because of the heavy administrative burden posed on SARS and individual taxpayers prior to the introduction of section 23(m). If the constitutionality of this provision were to come before our courts, SARS would most likely be able to provide more detailed reasons for this differentiation but at this stage the reasons cited in the 2002 Budget Review are all that is available. Before considering whether the differentiation is rational, the question is whether the purpose of the differentiation is legitimate.

The statement in the 2002 Budget Review that the number of deductions available to a salaried individual was reduced as so few of such an individual's expenses are incurred in the production of income does not constitute a legitimate government purpose in itself and should merely be seen as a reason for the introduction of section 23(m). Although Klue *et al* state that it could just as well be argued that this is a

good reason for these few expenses to be deducted,⁸⁸ this is not the underlying purpose behind section 23(m). This reason is related to the actual governmental purpose of this section, which is to reduce the administrative burden placed on SARS and on individual taxpayers. In terms of the South African Revenue Service Act,⁸⁹ one of the functions of SARS is to 'secure the efficient and effective, and widest possible, enforcement of', *inter alia*, the ITA.⁹⁰ Similarly, individuals bear an administrative burden in that they have to keep supporting documentation for a period of five years from submission of a tax return.⁹¹ It is submitted that the alleviation of the administrative burden on SARS and salaried individuals falls within the ambit of this provision and as such it constitutes a legitimate government purpose. The question is whether the differentiation between salaried and non-salaried individuals is rationally connected to the government purpose of alleviating the administrative burden on SARS and on salaried individuals.

Klue *et al*, state that it is not clear why this burden should create more difficulty than claims for section 11(a) and other deductions by other classes of taxpayer.⁹² Bearing in mind that differentiation need only be rational and need not provide the most efficient or best way of achieving the government purpose it seeks to achieve,⁹³ it is submitted that to determine the true nature of the possible increase in the administrative burden, were it not for section 23(m), two matters must be addressed. First, one has to ascertain the number of specific deductions listed in section 11 which an individual taxpayer could possibly incur in the production of their income and, secondly, one must determine the number of salaried individuals (those whose section 11 deductions are limited because of section 23(m)) *vis-à-vis* the number of non-salaried individuals. The 2002 Budget Review gives no indication of the number of individuals that would be (or were) affected by this amendment. However, the statistics issued by SARS shed some light on this topic. One of the statistics issued by SARS on an annual basis is the number of individuals who earned their income from a specific source, which will be used to answer this question.

First, the specific deductions in section 11 that salaried and non-salaried individuals can deduct in terms of section 23(m) will be listed

and thereafter the number of individuals earning their income from salary or on a commission basis will be set out.

(a) Specific deductions in section 11 and the likelihood of salaried and non-salaried individuals making use of them in the course of their trades

In Table 1 below, the section 11 deductions that are available to salaried and non-salaried individuals in terms of the limitation in section 23(m) will be set out. 'Yes' indicates that an individual is permitted to make the deduction if the requirements of the subsection are met, whereas 'No' indicates that an individual is not permitted to make the deduction whatsoever. 'N/A' indicates that the deduction is not applicable as it would be impossible for a taxpayer to incur the deduction in his or her capacity as a salaried or non-salaried individual.

Table 1: Section 11(a) deductions available to salaried and non-salaried individuals

Subsection in s 11 of ITA	Salaried individuals	Non-salaried individuals
(c) Legal expenses	Yes	Yes
(cA) Restraint of trade payments ⁹⁴	N/A	N/A
(d) Repairs to property occupied for the purposes of trade	No, unless certain requirements are met	Yes
(e) Capital allowances or consideration in the nature of a lease premium	Yes	Yes
(f) Deduction of a lease premium	No	Yes
(g) Allowance in respect of leasehold improvements	No	Yes
(gA) Capital allowance in respect of expenditure incurred in designing or to obtain payment of patent	No	Yes
(gB) Expenditure incurred in the grant or restoration of any patent	No	Yes
(gC) Allowance in respect of expense incurred to acquire certain intellectual property	No	Yes

Subsection in s 11 of ITA	Salaried individuals	Non-salaried individuals
(gD) Expense incurred in acquiring government licence ⁹⁵	N/A	N/A
(h) Allowance on lease premiums and leasehold improvements	No	Yes
(hB) Allowance on amount paid to someone in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ⁹⁶	N/A	N/A
(i) Bad debts	Yes	Yes
(j) Doubtful debts provision for non-bank taxpayers	Yes	Yes
(jA) Doubtful debts provision for bank taxpayers	N/A	N/A

11F (previously 11(k) and (n)) Pension fund contribution and retirement annuity fund contributions	Yes	Yes
(l) Pension fund, provident fund, benefit fund contribution by employer ⁹⁷	N/A	N/A
(lA) Qualifying equity share granted by employer to employee ²³	N/A	N/A
(m) Annuities to former employees or partners and their dependants ⁹⁹	N/A	N/A
(nA) Refunding of voluntary awards received	Yes	Yes
(nB) Refunding of restraint of trade payments received	Yes	Yes
(o) Loss on disposal of depreciable assets	No	Yes

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Subsection in s 11 of ITA	Salaried individuals	Non-salaried individuals
(w) Key-person life policy premium ¹⁰⁰	N/A	N/A
(x) Any other deductions incurred in Part I of Chapter II of the ITA	No	Yes

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

Section 11(d), which allows the deduction of repairs to property occupied for the purposes of trade, is related to section 23(b), but in terms of section 11(d), individuals under certain circumstances would be allowed to deduct expenses incurred on property that they let to others as part of their trade. ¹⁰¹ It is unlikely that a salaried individual will ever incur such an expense in the production of his or her income, unless he or she makes use of a home office for which the related expenses are deductible by satisfying the requirements of section 23(b). However, as section 23(b) also requires that a person may only deduct home office expenses if he or she is remunerated mainly in the form of commission income or variable payments, it would appear as though situations might arise where the concomitant section 11(d) deduction could be incurred by agents or representatives in the course of their trade. Section 11(f) deals with expenses incurred in letting property in the form of a lease premium, but as Davis *et al* explain, an allowance deduction such as this is usually spread over a number of years. ¹⁰² It is unlikely that salaried or non-salaried individual taxpayers will incur a lease premium expense in the course of their trade. ¹⁰³

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Section 11(g) deals with the deductibility of expenditure incurred on improvements, which has been included in the recipient's gross income under paragraph (h) of the gross income definition. ¹⁰⁴ Paragraph (h) of the gross income definition relates to income received by a lessor in that a right accrues to him or her whereby the lessee has to make improvements to the land or buildings of the lessor. Section 11(h) is related to section 11(g): it entitles lessors to deduct an allowance on part of the amount received in terms of a lease premium or leasehold improvement agreement as mentioned in paragraphs (g) and (h) of the 'gross income' definition in section 1. It is unlikely that a non-salaried individual will incur section 11(g) or (h) expenses in the course of his other employment, but at the same time it is unclear how or why an agent or representative would incur such an expense in the course of his or her trade as he or she is merely acting on behalf of someone and will not receive the income in question in his or her personal capacity.

Sections 11(gA), (gB) and (gC) all relate to trade that involves the use or development of intellectual property. ¹⁰⁵ The income derived from owning intellectual property tends to be paid in the form of royalties, which constitutes a variable payment and is unlikely to be paid in the form of a salary, but at the same time an agent or representative will probably not earn income in the form of royalties as his or her income is generated through sales which entitle him or her to a certain amount of commission income. The section 11(o) deduction may be made if a loss is suffered on a depreciable asset when it is disposed of, such as any asset on which a section 11(e) allowance is allowed. It is not clear why salaried individuals are not entitled to this deduction whereas they are allowed to deduct a capital allowance on certain assets in terms of section 11(e).

Section 11(x) is a general provision and states that a taxpayer may deduct any amounts which in terms of any other provision in Part I of Chapter II of the ITA (sections 5–370) may be deducted from the income of the taxpayer. In *Armstrong/Harmony Freegold Joint Venture (Pty) Ltd v Commissioner for the South African Revenue Service*, ¹⁰⁶ the court stated, within the context of the deduction on mining capital expenditure (in terms of sections 15(a) and 36, which can be deducted only by mining operators), that section 11(x) allows the deductions of certain mining capital expenditure as a 'class privilege', despite the provisions of section 11(a). *Sekretaris van Binnelandse Inkomste v Die Olifantsrivierse*

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Ko-operatiewe Wynkelders Bpk held that the purpose of section 11(x) is to permit the deductions contained in the special provisions in Part I of Chapter II of the ITA to be made against the income of a particular trade and not to confine the word 'income' where it appears in these special sections in every instance to the income derived from a particular trade. ¹⁰⁸ Read together, these judgments seem to suggest that the purpose of section 11(x) is to allow for the creation of further specific deductions falling outside of section 11, which would not necessarily be subject to the requirements in section 11(a), such as the capital expenditure deduction available to certain mining operations. It is very unlikely that a salaried or non-salaried individual will incur any of these trade-specific deductions in the production of income.

(b) The number of salaried and non-salaried individuals

In this part, statistics regarding the numbers that relate to individuals who are listed as earning 'income (salaries and wages, remuneration)' and those who are listed as earning 'commission' will be set out. ¹⁰⁹ These statistics were compiled using the source codes for each type of income. Statistics relating to the 2015 to 2018 years of assessment are taken into account, being the most recent information available in SARS and National Treasury's annual tax statistics publication. As reflected by the data in 2019 Tax Stats, at the time of its publication, only a certain percentage of taxpayers who were liable to pay tax in each year of assessment were assessed by December 2019.

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Table 2: Number of salaried and non-salaried individuals in the 2015–2018 years of assessment

Year of assessment	Number of salaried individuals: Individuals who earned 'Income (Salaries, wages, remuneration)' (Source code: 3601)	Number of non-salaried individuals: Individuals who earned 'Commission' (Source code: 3606)
2018 (74.9 assessed)	4 087 097	255 334
2017 (85.8 assessed)	4 562 058	280 615
2016 (87.8 assessed)	4 720 558	293 943
2015 (88.6 assessed)	4 905 362	304 856

The 2019 Tax Stats do not indicate whether these statistics reflect the number of individuals who earned their income mainly from either one of these sources. If one assumes that individuals included in the 'income (salaries, wages, remuneration)' statistic are all salaried individuals and that individuals included in the 'commission' statistic are all non-salaried individuals, the increased administrative burden can be reflected by the number of salaried individuals who would qualify for those eight deductions set out under 6.1, but for section 23(m), if the expense was incurred in the production of income. To the extent that certain individuals are included in both the 'income (salaries, wages, remuneration)' statistic and the 'commission' statistic, the increased administrative burden is reflected by the number of salaried individuals who would qualify for those eight deductions set out under 6.1, but for section 23(m), less those salaried individuals who also earn commission and are included in that statistic.

As stated above, these statistics are reflected here to analyse the requirements of 'rationality' and 'legitimate' governmental purpose in the context of section 9(1) of the Constitution.

(c) Will the omission of section 23(m) increase SARS's administrative burden?

From what is stated under 6.2 and 6.3, it appears that if section 23(m) were not in place, between 2015 and 2018, between 4.1 million and

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additional 4.9 million taxpayers could potentially qualify for the eight deductions mentioned. Even though it is unlikely that many of the deductions identified under 6.1 above would be incurred by non-salaried as opposed to salaried individuals in the course of their trade, without section 23(m) those eight deductions would be available to between 4.1 and 4.9 million salaried individuals, which means that the possibility exists for a significant increase in SARS's administrative burden. If the number of non-salaried individuals were included in the salaried individuals' statistic for each year of assessment, the potential increase in SARS's administrative burden would be even greater. In light thereof, the differentiation created by section 23(m) appears to be rational.

VII Conclusion

We discussed the constitutionality of section 23(m) of the ITA in this article. This provision differentiates between salaried and non-salaried individuals in that it limits the number of section 11 deductions available to the former category of persons, but not to the latter. We indicated that, with reference to preparatory legislation, National Treasury has at least implicitly acknowledged that tax legislation should not differentiate between taxpayers in the same or a similar position. Section 23(m) was interpreted mainly in light of what is stated in IN 13, bearing in mind that the contents of IN 13 are not binding. The constitutionality of section 23(m) was tested against section 9(1) of the Constitution. The Constitutional Court has interpreted this section to mean that differentiation between two classes of persons is permissible only if that differentiation is rationally connected to a legitimate government purpose. Having regard to those deductions which are not available to a salaried individual in terms of section 23(m) and to the number of individuals who are listed by SARS as salaried and non-salaried individuals in SARS's statistics from 2015 to 2018, we concluded that the differentiation between salaried and non-salaried individuals appears to be rational as it might lead to a significant increase in the administrative burden of SARS and of the salaried individuals in question.

* BComm (Law) LLB LLM (Pret).

† BA (Law) (Pret).

‡ BComm (Law) LLB LLM LLD (Pret).

1 *First National Bank of SA Ltd t/a Wesbank v Commissioner for South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 31.

2 2002 (4) SA 768 (CC) para 67.

3 (CCT 56/13) 2013 ZACC 38 (14 November 2013).

4 [2017] 4 All SA 175 (GP).

5 The requirement under section 1(c) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

6 2020 ZAWCHC (15 May 2020).

7 Aside from tax matters implicating a right in the Bill of Rights, under the Constitutional Court's broadened jurisdiction, allowing it to hear matters raising an arguable point of law of general public importance, the Constitutional Court has heard at least one matter dealing with the interpretation of a tax provision (*Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service* (CT13/19) [2020] ZACC 16 (21 July 2020)). The judgment does not turn on how tax legislation should be interpreted in light of a provision in the Bill of Rights. However, it makes the interesting point that a provision in income tax legislation, specifically section 24C of the Income Tax Act 58 of 1962 ('ITA'), should not be interpreted to allow a restaurateur that is attached to a franchise to claim the section 24C allowance, compared to a restaurateur that is not attached to a franchise.

8 See in this regard the Final Response Document on Taxation Laws Amendment Bill, 2018 and Tax Administration Laws Amendment Bill, 2018, published on 17 January 2019, available at <http://www.treasury.gov.za/legislation/acts/2018/Response%20Document%20on%20the%202018%20LAB-17%20January%202019.pdf>, accessed on 30 September 2020. At page 25, it is noted that during the public consultation process on the draft 2018 Taxation Laws Amendment Bill, one of the comments from the public indicated that the proposed amendment to section 11(j) of the ITA dealing with the provision for doubtful debts applicable to non-bank taxpayers 'should not differentiate between banks and non-bank lenders because these taxpayers use the same accounting standards and may use substantially the same methodologies to determine the doubtful debt provisions'. The comment was 'partially accepted', reflecting that National Treasury at least partially agreed with the observation. National Treasury's acceptance of the principle regarding differentiation is further reflected in the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2018 where it is proposed at page 25 that section 11(j) be amended 'to ensure that non-bank taxpayers also have the ability to obtain a tax deduction for a third category of doubtful debts that is broadly comparable to amounts that are in default for bank under section 11(j)'.

9 In *Pienaar Brothers*, the High Court held that tax legislation which applies retrospectively does not infringe the rule of law, if the tax statute in question is rationally connected to a legitimate purpose. The rationality test adopted in this judgment relates to compliance with the rule of law requirement in section 1(c) of the Constitution and must be distinguished from the rationality test under section 9, which is the subject of this article.

10 From a practical perspective, section 23(m) effectively prohibits salaried individuals from claiming certain deductions that are available to non-salaried individuals. For example, in the case of persons commuting between their place of work and home, especially where the commute requires them to use roads forming part of the Gauteng Freeway Improvement Project and incur an e-toll commuting expense. Furthermore, the effect of section 23(m) is also highlighted by the Covid-19 pandemic, pursuant to which a number of salaried individuals have been forced to work from home more often than prior to the pandemic.

11 De Koker & Williams, *Silke on South African Income Tax* (LexisNexis 2013) para 10.19.

12 *Idem* para 7.45.

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

14 *First National Bank of SA Ltd t/a Wesbank v Commissioner for South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 31.

15 Goldswain, 'The Purposive Approach to the Interpretation of Fiscal Legislation: The Winds of Change' (2008) 16(2) *Meditari Accountancy Research* 118.

16 *Ibid.*

17 Croome, *Taxpayers' Rights in South Africa: An Analysis and Evaluation of the Extent to Which the Powers of the South African Revenue Services Comply with the Constitutional Rights to Property, Privacy, Administrative Justice, Access to Information and Access to Courts* (unpublished LLD thesis, University of Cape Town, 2008) 37 states that although the imposition of tax is, in principle, a justifiable deprivation of a taxpayer's property, unreasonable taxing measures or tax provisions with an ulterior motive will not withstand constitutional muster. In *Pienaar Brothers (Pty) Ltd* para 107, Fabricius J held that 'in my view it cannot be argued that all taxes involve a 'deprivation' of property, in the context of section 25(1). A State cannot exist without taxes. Society receives benefits from them. Taxes are not penalties. Neither can they be, without any qualification, be regarded as unjust deprivation of property use.'

18 Goldswain, (2008) 16(2) *Meditari Accountancy Research* at 118. The same principle would apply to the subsequent amendment providing for an even larger tax rebate for persons over the age of 75.

19 Act 91 of 1964.

20 Paragraphs 113 and 133.

21 2002 (4) SA 768 (CC) para 67.

22 Act 89 of 1991.

23 Act 28 of 2011 ('TAA').

24 Under section 164 of the TAA, which coincided with the repeal of section 36 of the Value-Added Tax Act, a taxpayer can apply for suspension of payment of an amount of tax (including VAT) where the taxpayer disputes or intends to dispute the tax liability. Where an application for suspension has been submitted, SARS can only take steps to enforce payment of the tax once it has informed the taxpayer that the application was rejected and ten business days have passed. If an application for suspension of payment is rejected, a taxpayer can review that decision (see, for example, *Peter v CSARS* (3158/2018) [2019] ZAGPJHC (31 May 2019)).

25 (CCT 56/13) 2013 ZACC 38 (14 November 2013).

26 *Gaertner* para 37.

27 Paragraphs 35-74.

28 1998 (1) SA 300 (CC).

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

30 *Harksen* para 54.

31 *Ibid.*

32 Paragraph 56.

33 Paragraph 54.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 Paragraph 47.

43 1997 (3) SA 1012 (CC).

44 Paragraph 24.

45 Paragraph 25.

46 Paragraphs 25-26.

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

Ad Outpost (Pty) Ltd 2000 (2) SA 733 (C) at 743A-B; Pretoria City Council v Walker 1998 (2) SA 363 (CC) para 27; Mhlekwa v Head of Western Tembuland Authority 2001 (1) SA 574 (Tk) at 620-621; Weare v Ndebele 2009 (1) SA 600 (CC) para 46.

48 Jooste para 12.

49 Ibid.

50 Jooste para 17; Prinsloo para 25.

51 Act 130 of 1993.

52 Jooste para 17.

53 Act 122 of 1984; Prinsloo para 39.

54 Prinsloo paras 35-36.

55 Jooste para 17.

56 Weare para 46.

57 Paragraph 61.

58 Paragraph 66.

59 Paragraph 63.

60 Prinsloo para 32: The right to equality does not mean that individuals will always be entitled to equal treatment.

61 Swart, 'Horizontal Equity as a Constitutional Norm in Income Tax Law: An Analysis with Specific Reference to Section 23(b) of the Income Tax Act' (1995) 58 THRHR 647; Domenico, 'Employer-Provided Benefits and the Environment: Transit Passes and Parking' (2006) 54(1) Canadian Tax Journal 119.

62 Swart, (1995) 58 THRHR 647.

63 Idem 648.

64 Idem 52.

65 SARS Interpretation Note 13, Income Tax Act 58 of 1962 Section 23(m) Deductions: Limitation of Deductions for Employees and Office Holders (Issue 3) 15 March 2011 (IN 13).

66 2018 (7) BCLR 830 (CC).

67 IN 13 at 3.

68 Ibid.

69 Ibid.

70 Ibid.

71 Ibid.

72 Ibid. See also the matter of *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Eiendoms) Bpk* 1966 (4) SA 434 (A) at 445D where the court held that the Afrikaans word 'hoofsaaklik', which is translated to English as 'mainly', meant more than 50 per cent in the context of section 51(f) of the Income Tax Act 31 of 1941.

73 IN 13 at 3.

74 SARS Binding private ruling 008: BPR 008 Income Tax Act 58 of 1962 Section 23(m), *Certain variable payments made to a marketing executive and the application of section 23(m)* 6 March 2008 (BPR 008). Although a binding private ruling can only be binding on the persons applying for the ruling and not on other taxpayers (see sections 82 and 83 of the TAA), the ruling reflects SARS' interpretation of the provision in question and SARS is likely to apply it in the same way to another taxpayer in the same factual situation.

75 BPR 008 at 2.

76 Idem 3.

77 De Koker & Williams, (LexisNexis 2013) para 10.19.

78 Act 30 of 2002.

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

80 2002 Budget Review at 83 and 223 of Annexure C: Summary of Tax Proposals to the 2002 Budget Review. This measure would raise additional revenue of R85 million.

81 Klue *et al*, *Silke on Tax Administration* (LexisNexis Butterworths 2013) para 3.10.

82 IN 13 at 1.

83 Ibid.

84 Act 31 of 2005.

85 Act 31 of 2013.

86 Act 60 of 2008. IN 13 at 1: this amendment provides that, if certain amounts were received by or accrued to an employee and were included in the employees' taxable income, where any portion of that amount is refunded by the employee to the employer, the refunded amount will be allowed as a deduction against the employee's taxable income. The same principle applies to restraint of trade payments that were previously included in taxable income and were subsequently refunded by the employee.

87 Subparagraph (i) of section 23(m) was also amended in 2017, but this was merely as the deduction previously provided for in section 11(k) was moved to section 11F.

88 Klue *et al*, (LexisNexis 2013) para 3.10.

89 Act 34 of 1997 (SARS Act).

90 Section 4(a)(i) read with schedule 1 of the SARS Act.

91 Section 29(3)(a) of the TAA.

92 Klue *et al*, (LexisNexis 2013) para 3.10.

93 Prinsloo para 36; Jooste para 17; Weare para 46.

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

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

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

97 This provision applies only to employers.

98 Only employers can grant qualifying equity shares.

99 This provision will most likely apply only to employers.

100 This provision will most likely apply only to employers.

101 De Koker & Williams, (LexisNexis 2013) para 8.100; ITC 643 (1947) 15 SATC 243.

102 Davis *et al*, 'Juta's Commentary on Income Tax' (Jutastat 2013) para 11(f)-3.

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

104 Davis *et al*, (Jutastat 2013) para 11(g)-2.

105 De Koker & Williams, (LexisNexis 2013) para 8.100.

106 2013 (1) SA 353 (SCA) para 7.

107 1976 (3) SA 261 (A) 266D.

108 De Koker & Williams, (LexisNexis 2013) para 8.1 interpret this judgment to mean that in the absence in one of these provisions (in Part I of Chapter II of the ITA) of any implication that the deduction it permits is to be made only from the income derived from a particular trade, the deduction may be made against 'income' as defined in section 1, that is, including income derived otherwise than from the carrying on of a 'trade' as defined in section 1. The reasoning of the authors is unclear and it is submitted that the decision in *Armgold/Harmony Freegold Joint Venture (Pty) Ltd v Commissioner for the South African Revenue Service* best explains the application of section 11(x) in relation to section 11(a).

109 2019 Tax Statistics, *A Joint Publication Between National Treasury and the South African Revenue Service* December 2019, available at <https://www.sars.gov.za/AIDocs/Documents/Tax%20Stats/Tax%20Stats%202019/Tax%20Stats%202019%20Full%20doc.pdf>, assessed on 4 September 2020 ('2019 Tax Stats').

110 2019 Tax Stats, Table A2.2.1: Assessed individual taxpayers: Selected sources of income, 2015-2018. This table includes only the relevant information in Table A2.2.1.

