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THE IMPACT OF COMPETITION LAW REMEDIES ON THE TAXATION PROCESS IN SOUTH AFRICA

A research paper submitted in partial fulfilment of the requirements for the LLM Degree in Mercantile Law, University of Pretoria, South Africa

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Dedication

This paper is dedicated with admiration to my mother, **Isabel Sibongile Mhango**, who has been my rock of support throughout my life tirelessly supporting and encouraging me in everything I do. Constantly reminding me to put God first in everything I do. My father **Sir Bazuka Micheal Kalwefu Mhango, senior counsel**, my mirror of inspiration to achieve the best I can for myself, through focused dedication.

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“Do not go where the path may lead, go instead where there is no path and leave a trail” (Ralph Waldo Emerson)

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Declaration

I, **MUYEYKA BAZUKA MHANGO**, declare that this dissertation is my original work. It has not been submitted before to any other university or institution. Where works of other people are used, references have been provided. I hereby present this work in partial fulfilment for the award of the LLM degree in Mercantile Law.

Signed

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Muyeyeka Bazuka Mhango

31 October 2012

Pretoria,

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Abbreviations and Acronyms

AC	Appeal Court Reports
AD	Appellate Division
CAC	Competition Appeal Court
CC	Constitutional Court
CR	Complaint
DOJ	Department of Justice
ECR	European Court Reports
EU	European Union
FTC	Federal Trade Commission
F.d	Federal Reporter
HL	House of Lords
IR	Interim Relief
IRC	Internal Revenue Code
KB	Kings Bench Law Report
NGP	New Growth Path
OECD	Organisation for Economic Co-operation and Development
Rev.Rul	Revenue Ruling
SA	South African law Report
SATC	South African Tax Case Report
SARS	South African Revenue Services
SA ITA	South African Income Tax Act
SCA	Supreme Court of Appeal
T.C Memo	Tax Court Memorandum Decision
TC	Tax Case Law Report
UK	United Kingdom
USA	United States of America
U.S	United States Supreme Court Report
U.S.C	United States Code
WLR	Weekly Law Report

SUMMARY

Combating the effects of the global recession that hampered the economies of various nations has been endeavoured by many governments since 2008. The South African government's stand to do this shows that it is possible to return the economy back to its glory days, however, the duration of this process of overturning the same is unknown. The government has raised policies and programs, one of which being the New Growth Path (NGP) to combat these effect. This programme, *inter alia*, calls for increased government expenditure to facilitate job creation through infrastructure development.

It is trite economic principles that government expenditure has to be balanced with its revenue collection, otherwise it might lead to budget deficit. Prolonged budget deficit, naturally, is not ideal for a nation's economy as the same increases government borrowing, results in higher taxes, and affects inflation. While government revenue is mostly financed through taxes, studies show that increasing taxes is also to the detriment for the economy. Therefore, there is a need for disenable policy stand to be taken in respect of the government's programme, as well as the generation of revenue to support the same. In this regard, one of the ways being advanced by this research in respect of a better combating the recession is to utilise economic legislations enacted in the country. Amongst other economic legislations in South Africa this paper discusses Income Tax Act (SA ITA) (which regulate the persons to pay income taxes) and Competition Act (which regulate fair competition).

The focus of this dissertation revolves around the impact competition law remedies have on the income taxation process. The aim of the research is to analyse the possible loopholes in the current legislation that might hamper a government revenue generation to support its new growth path. This was met through an extensive study of relevant literature in competition and income tax laws in South Africa and also comparative analysis with relevant laws of the United States of America (USA).

The main conclusion drawn from this research is that there is an impact of the current competition law remedies on the income taxation process. This research promotes and argues for a change in approach, through government enactment of clear and certain laws both in the field of competition law and tax law. This change would assist government in raising revenue more effectively and achieve it economic growth path and, in turn, combat the global economic crisis that affected the economy.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

One of the main objectives of a state is to satisfy the needs and to protect the interest of all its citizens, thereby promoting their welfare in the broad sense. The achievement of this objective can be better described as economic development of a nation¹. However, with the global economic crisis (recession) in 2008, many countries have seen a decline in their economies and the approach to make a 'u-turn' of this situation is at the heart of the economic policy of every government at the moment.

South Africa, amongst other countries, has experienced the effects of this global crisis through a huge number of job losses². The Government's commitment to improve the public welfare at large, and thereby enhancing economic growth through curtailing these experiences, has been through the vision embodied by the introduction of a program called the New Growth Path³ (NGP). The NGP's main focus is to use economic policies that are in line with the goal of creating of five million jobs by 2020. This focus is to rebuild the productive sectors of the economy; to use the major investment commitments in the private sector and the public enterprises to support a NGP and connect policy, resources, institutions and partnerships into a coherent package⁴.

One of the proposed ways of achieving the NGP is for government to invest heavily into infrastructure. This entails government increasing its expenditure to create employment. For government to expend more it is required that it should have a mechanism of generating income. One of the main sources of a government income is through taxes. Tax may be defined as a compulsory levy imposed by government and the money raised should be used either for public purposes or, if the purpose of the tax is not to raise money, it should encourage social

¹ Collins English Dictionary & Thesaurus, 4th Edition (2011), defines economy as a system of interrelationship of money, industry and employment in a country.

² The New Growth Path: The Framework. See www.info.gov.za/view/DownloadFileAction?id=135748 accessed 14/09/2011.

³ This program was introduced at a public level by President Jacob Zuma in his state of nation address in parliament in February 2011. See www.info.gov.za.

⁴ Comments in the State of Nation Address debate, National Assembly, by Minister of Economic Development Ebrahim Patel. See www.info.gov.za/speech/DynamicAction?pageid=461&sid=16545&tid=28906 accessed 14/09/2011.

justice within the community⁵. Therefore, there is a need for the government to raise more income to balance its expenditure for the implementation of this program⁶.

In response to the recession, South Africa has pursued an accommodative fiscal stance; while revenue has fallen government has and will maintain a real increase in expenditure⁷. This spending growth was largely financed by increased revenue associated with economic expansion and improved tax compliance and administration⁸.

One of the options available to balance the revenue collection and expenditure is to increase taxes. Study has shown, however, that the increase of taxes has a negative effect on economic growth⁹ and will, therefore, not be good for the achievement of the government's goal. The NGP also proposed to provide tax breaks and reliefs and it is submitted that this may have a huge impact on the economy in the long run, if not balanced with other tax collective measures to meet the government expenditure¹⁰.

With this stand for increased expenditure, there is a logical need to balance what a government can raise and what the government has to spend for a better fulfillment of the NGP. To this end, there is a call of an extraordinary national effort from all role-players, not only just to identify the barriers to progress, or just to propose solutions, but also to work together, over the long term¹¹. This invitation is for rendering assistance to find the best combination of revenue

⁵ See Whitehouse, C. (2001): *Revenue Law Principles and Practice* (19th Edition) Tolley Lexisnexis.

⁶ The primary objective of taxation is, and always has been, to raise money for government expenditure. See Whitehouse, C. (n5 above).

⁷ The 2012 budget increased the government's expenditure to a record high of one trillion rand (See budget speech of Minister Gordon, P. available at <http://www.parliament.gov.za/content/speech>).

⁸ Revenue has now decreased relative to GDP, and the budget deficit has widened. Medium Term Budget Policy Statement speech 2011, 25 October 2011. See www.parliament.gov.za/content/speech~3.pdf

⁹ Romer, C.D. & Romer, D.H, *The Macroeconomic Effects of Tax Changes: Estimates Based on a New Measure of Fiscal Shocks* available at www.elsa.berkeley.edu/~cromer/RomerDraft307.pdf accessed on 21/10/2011.

¹⁰ Study has proved that reduction of tax is good for the economy. This increases the consumer surplus and hence help them to meet their daily needs (See Palacios, M. & Harischandra, K. *The impact of taxes on economic behaviour- High taxes decrease growth and investment* available at <http://pirate.shu.edu/~rotthoku/Prague/ImpactofTaxesonEconomicbehavior.pdf> accessed on 20/10/2011). However, this purpose cannot be favoured and is not conducive in the economic period the world is currently facing (See Gauti B. Eggertsson *Can a Tax Cut Deepen the Recession?* available at <http://www.newyorkfed.org/research/economists/eggertsson/ContractionaryTaxes.pdf> accessed 20/10/2011).

¹¹ Gordhan, P. (n8 above).

measures, borrowing and spending plans, that is consistent with economic growth, sustainability and broad-based development and social progress¹².

There are several other establishments that have as their core objective to enhance economic growth, amongst others, competition and tax laws.

1.1.1 Competition Law

The commencement of the Competition Act¹³ was welcomed by both the public and private sector of the community in South Africa. This Act brought about the codification of many separate legislations and brought South Africa in line with the international community. The Competition Act was enacted with the aim, amongst others, to promote the efficiency, adaptability and development of the economy¹⁴. In the preamble of the Competition Act, it is declared that the better implementation of it would lead to a state where all South Africans will be provided with equal opportunity to participate fairly in the national economy.

Study has shown that there is a positive relationship between the effective enforcement of competition law and economic growth¹⁵. The effect of competition law on economic growth depends on the law enforcement efficiency of the government. Without an efficient enforcement scheme, a stronger competition law cannot on its own support productive growth, but might slow down the potential path of growth¹⁶. To this end, the Competition Act provides for several enforcement remedies¹⁷ open to the competition authorities to clamp down contraventions that are seen to deter or hinder competition, and, in turn advance the development of the national economy.

¹² Gordhan, P.(n8 above).

¹³ The Competition Act No. 89 of 1998 came into effect on the 1st of September 1999. Before this Act competition law was regulated by the Maintenance and Promotion of Competition Act 96 of 1979.

¹⁴ Section 2(a) of the Competition Act.

¹⁵ Tay-Cheng, Ma *The Effect of Competition Law Enforcement on Economic Growth*, Journal of Competition Law & Economics, 7(2), 301-334

¹⁶ See the discussion of objectives of remedies in Chapter two.

¹⁷ Section 58(1)(a) of the Competition Act provides for the remedies (Chapter two).

The enforcement of competition law is no easy and straightforward mission, and hence the agencies must undergo a process of learning by doing before they can enforce the law effectively.¹⁸

1.1.2 Income Taxation

Income taxation provides one of the ways for government to raise money to fund its several programs¹⁹. This has an effect in helping economic growth of the country if the collection of the revenue is effective, as the government will have money to implement its policies. Assessment of income tax of a person involves an element of deduction²⁰. Logically, the more deductions are allowed, the less the tax collectable is. Therefore, the law needs to provide specifically which deductions may be allowed.

This research deals with the legal relationship between competition and tax law, in particular, income tax²¹. The relationship between the two has not been given proper attention corresponding to their practical and theoretical importance. The theoretical and practical clarification of competition and tax laws relations presently finds itself in an 'embryonic stage'²².

Even though an immediate consideration shows no common points of coordination between competition and tax laws, a more thorough analysis will show a common core in extricable

¹⁸ Tay-Cheng, Ma (n15 above) concludes that there is a positive relationship between the effective enforcement of competition law and productivity growth. The enforcement of competition law provides only the preconditions for intense competition but not the intense competition itself. The success or failure of the law depends on the competition culture that is shaped by the country's socioeconomic ideology and institutional framework.

¹⁹ Discussed in chapter three.

²⁰ This is done in accordance to the relevant provisions of the law (n19 above).

²¹ The Income Tax Act 58 of 1962 (SA ITA) regulates the assessment of Income Taxes in South Africa.

²² For instance it has been shown that tax does not generate the sort of attention given by independent empirical academic research and this neglect has amongst others resulted in a lack of knowledge of '*potentially important peculiarities of individual countries*'. See Cobham A: *Taxation Policy and Development* available at http://www.taxjustice.net/cms/upload/pdf/OCGG_-_Alex_Cobham_-_Taxation_Policy_and_Development.pdf accessed 8/03/2012. This is also confirmed by the World Bank's study of its own performance in this area during the 1990s that showed that "*The major limitation of Bank operations in the area of tax ...pertains to the inadequate institutional framework for knowledge accumulation...Unlike several other areas of operation, theoretical underpinnings for efficient and effective tax and customs administration are still rudimentary.*" See Barborne, L.A, et al (1999): *Reforming tax systems: The World Bank record in the 1990s*. World Bank Working Paper Series 2237.

connection despite differing content and function of the law that governs each field²³. Competition and tax law interaction may take several forms; notably, both are intended to enhance economic growth in a country. However, it is admitted²⁴, no general consensus on the potential interactions exists. The aim of development of the economy will essentially entail that these several legislation be consistent with one another²⁵, thereby not raising doubt on the impact of one on the other.

On a critical analysis of the two areas, it appears that the remedies for the enforcement of competition law may have an impact on income tax assessment and may, therefore, decrease the income generation for the state. This impact could be experienced from an increase or creation of tax avoidance schemes²⁶ that may reduce the tax that is collected.

The research, therefore, intends to determine this impact and assess how best the interrelation of competition and tax laws could be effectively enforced to the achievement of a better coherent system of revenue generation for the state and better development of the economy.

1.2 PROBLEM STATEMENT

For a better development of a national economy, any legislation to achieve that goal must be consistent with other legislation for the same purpose. Any legislation or statute cannot be viewed in isolation if its objective is to bring about a national development in economy²⁷. This research intends to demonstrate that the current structure of the Competition Act have an impact on the taxation process in South Africa. The question to be addressed is whether the

²³ It is not hereby stated that neither competition law nor tax law, on themselves, are of limited importance. On the contrary, both areas of the law represent the single most important examples of existing difficulties. The research presents a somewhat broader view on the subject than the traditional focus on individual areas on themselves.

²⁴ At the time of this research no literature that specifically address this relationship could be allocated.

²⁵ Heilbroner R.L.(1975): *The Making of Economic Society* 5th ed (Prentice-Hall 1975) at 161 the following is stated: *'In economic circles, there is a continuing debate between "monetarist" and "fiscal" views; the first is emphasizing the importance of monetary controls, the second giving priority to tax and budgetary policy. Nonetheless, a large measure of agreements exists as to the usefulness of the main control mechanism. The debate is largely about which mechanisms are the most effective'*.

²⁶ Tax avoidance involves the taxpayer's organisation of his affairs in a legal manner and such a way that he has little or no taxable income. This is done by utilising loopholes in the tax laws and exploiting them within legal parameters. See Stiglingh M, et al (2012) *Silke: South African Income Tax* Lexisnexis Durban.

²⁷ See Heilbroner, R.L. (n25 above) p 161.

current competition law remedies have an impact on the assessment of income taxation in South Africa.

The ancillary question is whether the current competition laws fall short of or may present loopholes to achieve the main object it was enacted to achieve, as read with other fiscal legislation with the same objective on the different field or level. There is a need to develop or amend the same in line with the international world and not to create any doubt in its enforcement.

From the comparative study to be undertaken, this paper will also have to address the question of how the South African competition and tax laws could be framed to conform to other jurisdictions that have developed the relevant areas of study.

1.3 RESEARCH OBJECTIVES

The objective of this contribution is to bring about an interest in interdisciplinary legal coordination and to clarify the fundamental relationship between the two fields of competition law and tax law.

The overall objective of the proposed research is to examine and propose reasonable recommendations that South Africa should consider to make its competition law more deterrent and/or to seal any loopholes that can be utilised by role-players to attain the national economic development in South Africa, to be in line with income tax legislation.

The specific objectives of the research are to:

- (a) Critically analyse the structure of the current Competition Act with regard to its enforcement remedies.
- (b) Critically analyse the Income Tax Act with regard to allowable deductions for the assessment of income tax and how the same may be affected by the Competition Act as it currently stands.

- (c) Discuss the interaction and/or the impact the competition law remedies may have on the taxation process and attempt to find a best way to forge a better competition law that will also enhance the government's goal for economic growth, regard being had to the lessons from other jurisdictions.

1.4 RESEARCH HYPOTHESIS

The research is premised on the assumption that the current Competition Act is not adequate to ensure efficient and effective enforcement of other legislation in South Africa. The Competition Act plays a role in the economic development of the country. There is a need to align the enforcement mechanism of this Act with fiscal legislation so that there would be an effective development of the economy in this country and hence better achievement of the NGP. The assumption is that if the enforcement of the Competition Act were to lead to certain conduct being criminalised this would provide certainty in the enforcement of income tax legislation²⁸ and hence, develop the economy by enabling the government to collect revenue effectively and address its vision of the NGP without engaging in other mechanisms that might lead to further hampering of the economy²⁹.

1.5 SCOPE

It is admitted that the subject area under consideration is very extensive. Therefore, a limited but refined scope is proposed³⁰ in this research. The relationship between competition law and tax law will mostly be dealt with in terms of an effective framework that would be of beneficial interest to South Africa as a country. The dissertation assumes that South Africa does not provide an effective relationship between the two fields of study and will, therefore go into a detailed discussion to find the possible interaction for a better and co-ordinated development of the national economy.

²⁸ Furthermore, criminalising these remedies could also deter future infringements of the Competition Act and enhance the success of its implementation.

²⁹ For example increasing borrowing by the government and raising of taxes.

³⁰ The research will mostly deal with the competition law remedies and income tax deductions, as provided by relevant legislations and makes a comparative study with the USA law on the same areas.

To this end, the research will also deal, in nutshell, with the possible arguments that can be raised for the proposed change in approach for the current legislation³¹.

1.6 SIGNIFICANCE OF THE RESEARCH

The government has started implementing the NGP program that will involve huge expenditure. There is, therefore, a need for generation of income to fuel this expenditure. The income generation and expenditure will have to be balanced to ensure that economic growth is sustained otherwise there might be a prolonged budget deficit³². Economic study on budget deficit shows that a prolonged budget deficit has a bad impact on the economy of a country as a whole³³.

The proposed interrelation and coherent enforcement of competition and tax laws would make the achievement of better income generation workable. This could be done by the amendment of the competition and tax laws³⁴ to be consistent.

Even if the proposed framework were not to be adopted *in toto*, this research would prove a valuable addition and increase the knowledge of effective and efficient interrelationship between the two areas of law. It is also hoped that this research can prove to be the basis for further research in these fields.

1.7 RESEARCH METHODOLOGY

While there is a lot of literature available on individual areas under study herein, there is, admittedly, little literature, if any³⁵, in regard to the interface of the two areas of law. However

³¹ The principles of tax avoidance and double jeopardy (discussed in chapter four).

³² Budget deficit is the different between government's expenditure and government's revenue collections (see Morh, P, Fouries, L and Associates (2008): *Economics for South African Students* 4th Ed Van Schaik Publishers page 354-53).

³³ It has an effect, amongst others, on inflation (Morh.P, Fouries. L and Associates {n32 above}). See also Laubach T (2003): *New Evidence on the Interest Rate Effects of Budget Deficits and Debt* available <http://www.federalreserve.gov/pubs/feds/2003/200312/200312pap.pdf> accesses 04/12/2011.

³⁴ The SA ITA in this case.

³⁵ See n24 above.

the research will utilise the requisite law (legislation and case law) that are available to create a logical nexus between the two fields.

The research will conduct a critical analysis of the present Competition and Income Tax legislation (both from a legal and practical perspective) and also critically engage with the literature in order to develop a robust framework of competition and income tax laws for South Africa³⁶.

1.8 CHAPTER OVERVIEW

Chapter one introduces the paper by laying the background, the problem to be addressed, the objectives, the significance of the study, how the study was conducted and outlines the presentation of the knowledge.

Chapter two discusses models of legal frameworks regulating competition law in South Africa. This chapter will introduce substantive issues of Competition law remedies and discuss the objectives of competition law remedies. The chapter also analyses the legal framework regulating competition law remedies in USA.

Chapter three covers models of legal framework regulating income taxation in South Africa. This chapter will introduce substantive issues of income taxation, the objectives of taxation, the principles of interpretation of fiscal legislation, legal framework on deductions when assessing income tax by discussing the legal provisions pertaining to income tax law. This chapter also addresses the legal framework regulating income taxation deductions in United States of America.

Chapter four provides the overall recommendations and conclusion of the study. This chapter revisits the problem statement to see whether the same has been answered by the investigation. In conclusion the interface of competition and tax laws is drawn and the impact of

³⁶ This will also involve a little narrative comparative analysis of legislation in the USA, which has a most intensive history of competition laws. The choice of the country of comparative jurisdiction is based on the fact that the USA's antitrust laws is one of the oldest in the world, the same dated back to at least 1890, when the congress passed the first federal law prohibiting monopolies and other restraints of trade in the Sherman Act (See Rees, M. (2011): *Cartel Enforcements Worldwide* CMP Publishing Ltd at 1035).

competition law remedies on income taxation is also assessed. The chapter further makes recommendations and proposes future areas of research.

CHAPTER TWO

THE REMEDIES UNDER THE COMPETITION LAWS

2.1 INTRODUCTION

Competition law outlaws certain conduct that is regarded as harmful to competition as a whole but the way of enforcing the contravention is different in most states³⁷. Competition law provides for a range of enforcement actions and remedies that are available to the competition authorities and parties that have suffered damages as a result of infringement of the Competition rules³⁸.

The threat of enforcement action and associated sanctions for violation of competition rules increase the expected cost of anti-competitive behaviour to businesses and individuals, and hence make anti-competitive behaviour less attractive³⁹. This may encourage business more widely to comply with competition law and set up formal or informal procedures to ensure compliance and minimise the risk of being subjected to competition investigation⁴⁰.

The authorities can regulate the public enforcement of the competition act through the following actions and remedies⁴¹:

- (a) The imposition of administrative penalties⁴²;
- (b) Criminal sanctions⁴³;
- (c) Positive measures or orders⁴⁴;

³⁷ Most of the provisions in different states prohibit almost similar conduct. This will be shown in the brief discussion in this chapter of the different jurisdictions. The jurisdictions in this research are South Africa and USA (n36 above).

³⁸ The enforcement remedies regulated by the authorities are referred as public enforcement remedies and those enforced by a party that suffers damages are referred as private enforcement remedies.

³⁹ Office of Fair Trading final report (December 2011), *The Impact of Competition Interventions on Compliance and Deterrence*. Available on <http://www.oft.gov.uk> accessed on 13/02/2012.

⁴⁰ Office of Fair Trading final report (n39 above).

⁴¹ The authorities are not limited to a single remedy in an action but can employ or seek several remedies in one action for the contravention of any section in the Competition act. See *The Competition Commission/ South African Airways (Pty) Ltd (SAA) Case 18/CR/Mar01*, available on <http://www.comptrib.co.za>

⁴² Administrative penalties serve as punishment for infringing the Competition act. Its purpose is to deter future would-be transgressors, or indeed, repeated transgressions. See Neuhoff, M. et al (2006) *A Practical Guide to the South African Competition Act* 288.

⁴³ A criminal sanction is a retributive type of punishment for certain unlawful conduct. The type of punishment is normally quite severe since this type of unlawful conduct is regarded as morally reprehensible and therefore deserving of society's disdain. See Neuhoff, M. (n42 above) 294.

⁴⁴ Positive measures are specific performance orders. The infringing party could be ordered to change its structure by selling certain assets or refrain from certain practices. See Neuhoff, M. (n42 above) 296.

- (d) Interdicts⁴⁵;
- (e) Consent orders and informal settlements⁴⁶; and
- (f) Declarators⁴⁷.

The party that has suffered damages as a consequence of another party infringing the competition act can enforce his rights through the following actions and remedies:

- (a) Interim relief⁴⁸;
- (b) Declarators⁴⁹; and
- (c) Damages⁵⁰.

There is no consistency in different regimes or jurisdictions on the enforcement of competition laws⁵¹. In certain regimes, a weak competition law tradition exists and enforcement is either non-existent or limited whereas in other regimes building an effective enforcement culture is an extremely important goal, which is taken very seriously. This chapter analyses the objectives of remedies generally available in competition law, the specific remedies⁵² provided for under the South African Competition Act, makes

⁴⁵ An interdict is an order in which a firm is ordered to do something (mandatory interdict) or ordered not to do something (prohibitory interdict). See Neuhoff, M. (n42 above) 301.

⁴⁶ Consent orders are settlement agreements between an infringing party and the Competition commission for an infringement of the Competition act and thereafter confirmed by the Competition Tribunal. Agreements reached by the infringing party and the commission but not confirmed by the tribunal are referred as informal settlement agreements. See Neuhoff, M. (n42 above) 303.

⁴⁷ A declarator is an interest or right that is sought to be judicially declared. See Neuhoff, M. (n42 above) 308.

⁴⁸ Interim relief is ordered in order to prevent serious or irreparable harm to the applicant. See Neuhoff M (n42 above) 338-339. In *National Association of Pharmaceutical Wholesalers and Others/Glaxo Wellcome (Pty) Ltd and Others* Case 68/IR/Jul01 available on <http://www.comptrib.co.za>, the tribunal articulated the following test, “*In order to establish serious or irreparable damage the evidence must demonstrate that, on the face of it, absent a granting of interim relief, the ability of the ability of the applicants to remain as viable competitors within the market is ‘serious’ or ‘irreparably’ threatened*”.

⁴⁹ This is a finding by the Competition Tribunal that the historical conduct of a firm constituted a prohibited practice. This finding is important to enable parties that have been prejudiced by a prohibited conduct to pursue a damages claim. See also n48 above.

⁵⁰ These are compensation in monetary terms for a wrong committed by another that causes loss and intended to put the claimant in a position he was in before such wrong (See *Verfeld v South African Citrus Farms Ltd* 1930 AD 452, 454 per Stratford JA). It should be noted that there are different kinds of damages that are awarded in different jurisdictions. This will be discussed more in chapter two.

⁵¹ This research will be restricted to the USA (see n36 above). It should, however, be noted that the South African Courts are cautious on the use of comparative law. See *Federal Morgul Aftermarket Southern Africa (Pty) v Competition Commission* 33/CAC/Sep03 available at <http://www.comptrib.co.za> 5 – 9.

⁵² The focus on the public enforcement will be on administrative penalties and focus on private enforcement will be on awarding of damages.

a comparative analysis of remedies employed in other jurisdictions⁵³ and finally makes conclusions regarding the remedies in South African competition law.

2.2 OBJECTIVE OF COMPETITION LAW REMEDIES

2.2.1 Introduction

Remedies can be used either to improve the negative effects of a contravention, or to deter further contravention of the Competition laws⁵⁴. Davies and Lyons⁵⁵ define remedies as interventions that are designed to avoid the anti-competitive effects of an infringement, while not impeding its anticipated efficiency gains⁵⁶. Remedies may, therefore, be far more difficult to implement and this will require substantial insight by the relevant competition authorities⁵⁷. The effectiveness of a remedy in competition cases will ultimately depend on whether it achieves the pre-contravention level of competition in the market, eradicating any harm the infringement might otherwise have caused consumers and competition in that market⁵⁸.

It is, however, more complex to design an appropriate and effective remedy for contravention of the Competition law⁵⁹. Competition remedies need to stop the conflicting conduct, prevent its recurrence, and restore competition⁶⁰.

2.2.2 Objectives

⁵³ See n36 above.

⁵⁴ Binge L and van Eeden J *Remedy Design and Application in South Africa* the fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa 2010.

⁵⁵ Davies, S. and Lyons, B. (2007): *Mergers and Merger Remedies in the EU*. European Commission. Edward Elgar Publishing Limited: Massachusettes.

⁵⁶ This definition does not include sanction as in fines and damages (Hellström P et al *Remedies in European Antitrust Law* 76 *Antitrust law Journal* (2009) at pag 44-45, argues that sanctions are not remedies in a strict sense as they intended to punish). In this research, however, the term remedy is used broadly to encompass both remedy as defined by Davies, S. and Lyons, B. (n55 above) and sanctions.

⁵⁷ The appropriate starting point for sound remedy design is the effect of the infringement at hand (see Hellström P et al {n56 above} at 63).

⁵⁸ See U.S Department of Justice (2011) : *Antitrust Division Policy Guide to Merger Remedies* available at <http://www.justice.gov/atr/public/guidelines/272350.pdf> page 21-23.

⁵⁹ The fundamental problem is that there is no agreement on the appropriate objective (s) for every contravention

⁶⁰ Barnett, T O (2008): *Section 2 Remedies: A Necessary Challenge, in 2007* at page 551 *Fordham Competition L. Inst.*

Some of the objectives of competition law remedies are the following:

- (a) Putting a stop to abusive conduct. However, simply achieving this objective alone does not constitute a sufficient remedy. There needs to be a particular mechanism put in place to prevent the defendant from repeating the same or similar conduct⁶¹.
- (b) Another crucial objective is the restoration of the level of competition that would have existed in the absence of the violation. This provides prospective relief to consumers that are left exposed to the ongoing harm from lost competition⁶² and may involve actions to disadvantage the offender⁶³.
- (c) Deterrence⁶⁴ is another important objective⁶⁵, which ensures not only that the infringing person or entity becomes less likely to repeat the violation, but also that other persons or entities are less likely to engage in prohibited conduct⁶⁶. Unlike other objectives, this objective views punishment as a method of maximizing utility, to be employed only when the disutility of imposition is less than the utility to society secured by its deterrent effect.

2.2.3 Discussion of objectives

The deterrence theory views the decision to engage in improper behaviour as a function of the probability of being detected and successfully prosecuted and the magnitude of the penalty that is imposed. In his classic analysis of criminal enforcement, Gray Becker, emphasized the savings in enforcement costs that arise if one increases the penalty and reduces the probability of detection so as to keep the expected penalty constant⁶⁷.

⁶¹ See Barnett, TO (n60 above) at 551; see also Binge L and van Eeden J (n54 above).

⁶² See Binge L and van Eeden J (n54 above).

⁶³ See Barnett, TO (n60 above).

⁶⁴ This finds its roots in the classic utilitarian argument that suffering is a pain that should be avoided and that, as a result, punishment, itself a form of suffering could not be justified unless a specific social benefit or utility can be derived from its imposition. See Binge L and van Eeden J (n54 above).

⁶⁵ This research will dwell much on this objective amongst the other objectives.

⁶⁶ This is one objective that is applied for most contravention, e.g in UK one the day of when the UK Competition Act 1998 was introduced before parliament, in October 1997, Margaret Beckett, the then Secretary of State for Trade and industry, described it as, "...providing a strong deterrent against cartels and abuses of market power ...Stiff penalties for firms which breach the prohibition will reduce anti-competitive behaviour in the economy" (see Dept. of Trade and Industry press release, 'Competition Bill to Benefit Consumers and Business', P/67/662, 16 Oct 1997). Yet, over-deterrence can also become a problem. If firms are concerned about the likelihood of being found guilty, they may exercise too much self-restraint and avoid certain behaviour that might have been pro-competitive.

⁶⁷ Becker G (1968): *An economic Theory of Crime and Punishment*.

There is general consensus in the literature that remedies should be *proportionate* to the violation⁶⁸. The scope and form of a proportional remedy does not exceed what is necessary to achieve the objectives of the law. Proportionality in the strict sense requires that the seriousness of the intervention and the gravity of the reasons justifying it are in adequate proportion to each other⁶⁹. The remedy should also be suitable in each circumstance bearing in mind its required purpose that it intends to accomplish. The remedy so intended has to also adhere to the *necessity principle*. The necessity principle indicates that the measure is permissible only if no less restrictive suitable measure is available to achieve the objective⁷⁰.

Proportional remedies focus on harm and not on immorality and hence they do not attempt to introduce more competition in the market than would have existed before the violation⁷¹. In some jurisdictions, including the EU, competition statutes expressly require remedies to be proportionate to the violation committed⁷².

2.2.4 Views of designing effective remedies

Competition law studies⁷³ have provided suggestions for designing remedies that are effective to combat contraventions of the law. Ideally, competition authorities should define their remedial objectives and devise sound strategies for achieving them before taking any enforcement action in a matter. Having sufficient evidence to prove liability for contravention does not imply that a successful remedy is designed and implemented⁷⁴. Furthermore, designing a remedy that is theoretically perfect will do little good if it is highly impractical⁷⁵. For an effective remedy to be in place, the competition authority needs to have a thorough understanding of the industrial developments, and this includes the impact of the market as a whole and also the fulfillment of the objectives of the competition law, for

⁶⁸ Proportionality suggests that the level of sanctions imposed should be related to the harm caused, taking into account not only the illegal profit raised but also the costs imposed on others as a result of the illegal activity. See *The Impact of Competition Intervention on Compliance and Deterrence* (n39 above).

⁶⁹ See Hellström, P. et al (n56 above) at 49.

⁷⁰ See Sullivan, E.T. (2003): *Antitrust Remedies in the US and EU: Advancing a Standard of Proportionality*. University of Minnesota law School.

⁷¹ See Bange, L. and van Eeden (n54 above).

⁷² OECD Observer (2008): *Remedies and Sanctions for Abuse of Market Dominance*. Policy Brief: December 2008.

⁷³ OECD Competition Committee (2006): *Remedies and Sanctions in Abuse of Dominance Cases*. OECD Competition law and Policy.

⁷⁴ See Bange L and van Eeden J (n54 above).

⁷⁵ Hovenkamp H (2005) *The Antitrust Enterprise: Principle and Execution* Harvard University Press page 45.

example in rapid changing industries, regard need to be had how new technologies will affect market performance⁷⁶.

The designing of effective remedies will also, therefore, entail the practicability of implementing each remedy and this has to involve determining not only easiness or complication of enforcing each remedy, but also estimating the cost implication of enforcement⁷⁷. This leads to having an optimal remedy desired for all players for better enforcement of the laws⁷⁸. The economic analysis of optimal legal sanctions is built upon the foundational insight that penalties or remedies should be sufficient to induce offenders to internalise the full social cost of their crimes⁷⁹.

Regardless of the particular remedy chosen, there has to be a realistic and useful framework in place for implementation and hence applying the best objective that the remedy intended to achieve⁸⁰, thereby determining what the possible side-effects of each of the contemplated remedies will be as the remedy may also be detrimental to research and development in general if companies come to believe that their most valuable innovations will have to be shared with competitors⁸¹. The status assigned to each remedy also has an impact on other areas of the law⁸², for example the advantage the wrongdoer would benefit from his contravention⁸³. Other jurisdictions view any infringement of competition rules to be criminal, for example in the USA⁸⁴, where the competition laws leaves no room for an infringing party to claim any deduction when assessing his income tax for that year⁸⁵.

To this end competition law needs to provide effective remedies for the compliance with the law that would in the end achieve the overall objective of the legislation in question.

2.3 SPECIFIC REMEDIES UNDER THE SOUTH AFRICAN COMPETITION ACT

⁷⁶ See Bange L and van Eeden J (n54 above).

⁷⁷ Hovenkamp H (n75 above) pag45.

⁷⁸ Hovenkamp H (n75 above) pag45-46.

⁷⁹ See Landes, W.M. (1983) *Optimal Sanctions for Antitrust Violations*.

⁸⁰ See *Antitrust Division Policy Guide to Merger Remedies* (n58 above).

⁸¹ The defendant's record of compliance with competition law should be taken into account when designing the remedy: if there is a pattern of misconduct the sanction should be stronger. The defendant's history of compliance may also influence the selection of the type of remedy.

⁸² The other field of law that is being considered in this research is income tax law.

⁸³ Note the maxim against benefiting from own wrong that is enforced around the world, including South Africa, might be applicable in this instance.

⁸⁴ Discussed in paragraph 2.4 below.

⁸⁵ This impact is addressed in chapter four.

In South Africa competition law is regulated in terms of the Competition Act⁸⁶. The main prohibitions in the Competition Act relate to restrictive horizontal practices⁸⁷, restrictive vertical practices⁸⁸ and abuse of a dominant position⁸⁹. To combat these prohibitions, chapter 6 of the Competition Act provide several enforcement mechanisms⁹⁰.

This section will only deal with two of the remedies or sanctions that are provided in the Competition Act, namely administrative penalties or fines and damages⁹¹.

2.3.1 Penalties or Fines

Section 59 of the Competition act regulates the imposition of fines in regard to contraventions of certain provisions of the act. This section provides;-

“(1) The Competition Tribunal may impose an administrative penalty only-

- (a) for a prohibited practice in terms of section 4 (1) (b), 5(2) Or 8 (a), (b) or (d);
- (b) for a prohibited practice in terms of section 4 (1) (a), 5 (1), 8 (c) or 9 (1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice;

⁸⁶ See n13 above. The Competition Act follows Competition law approaches and standards as found in the competition laws of EU and Canada, to mention two. For detailed analysis see Dabbah MM & Hawk BE *Anti-cartel Enforcement Worldwide* (2009).

⁸⁷ Section 4 of the Competition Act prohibits practices between competitors that fix prices, divide markets, collude in tendering and that have an effect to substantially prevent or lessen competition in a market. For more discussion on this section see Neuhoff, M. (n42 above) Chap. 3.

⁸⁸ Section 5 of the Competition Act prohibits practices between parties in a supply chain to set minimum resale price maintenance and any practice that has an effect to substantially prevent or lessen competition in a market. For more discussion on this section see Neuhoff, M. (n42 above) chap. 4.

⁸⁹ Sections 8 and 9 Competition Act stipulates the conduct that a dominant firm may not engage, these include price discrimination, excessive pricing, refusal to access to an essential facility, exclusionary behaviour, inducing a supplier/customer, refusal to supply, predatory pricing, tying and any other conduct by a dominant firm that has an effect to substantially prevent or lessen competition in a market. Section 7 thereof sets out the legal requirements for when a firm will be considered to be dominant for the purposes of the application of the provisions of the Competition Act. For a detailed discussion on these sections see Neuhoff, M. (n42 above) Chap. 5 and 6.

⁹⁰ It is important to note that section 65(1) of the Competition Act provides that “*nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition appeal Court declares that provision to be void*”. This section gives the two authorities the power to make decisions in terms of the Act.

⁹¹ These have a direct effect on the fulfillment of the deterrence objective of the remedies that may be imposed to enforce competition law.

(c) for contravention of, or failure to comply with, an interim or final order of the Competition Tribunal or the Competition Appeal Court; or

(d) if the parties to a merger have-

- (i) failed to give notice of the merger as required by Chapter 3;
- (ii) proceeded to implement the merger in contravention of a decision by the Competition Commission or Competition Tribunal to prohibit that merger;
- (iii) proceed to implement the merger in a manner contrary to a condition of approval of the merger imposed by the Competition Commission in terms of section 13 or 14, or the Competition Tribunal in terms of section 16; or

proceeded to implement the merger without the approval of Competition Commission or the Competition Tribunal, as required by this Act.”

When determining this penalty, the Competition Tribunal has a wide discretion⁹², with the only constraint in that the amount may not exceed 10% of the firm’s annual turnover, including exports from South Africa, during the firm’s preceding financial year⁹³, and secondly, the Competition Tribunal is enjoined to consider a variety of factors, which include⁹⁴:

- a) the nature, duration, gravity and extent of the contravention⁹⁵;
- b) any loss or damage suffered as a result of the contravention⁹⁶;
- c) the behaviour of the respondent⁹⁷;
- d) the market circumstances in which the contravention took place⁹⁸;
- e) the level of profit derived from the contravention⁹⁹;

⁹² Neuhoff, M. (n42 above) 290.

⁹³ Section 59(2) of the Competition Act.

⁹⁴ Section 59 (3) of the Competition Act and see also SAA case (n41 above).

⁹⁵ *“This factor is given the most weight, firstly because it deals with three separate issues (nature, duration and extent) and thus as a matter of quantity it is the most wide ranging of factors. Secondly, it needs to be weighted heavily enough to provide for a meaningful distinction between various types of contraventions”* Competition Tribunal in SAA case (n41 above).

⁹⁶ *“Here we would look at loss or damage to competitors and/or consumers as a result of the prohibited practice. This receives a lower weighing as the competitors/ consumers can recoup this loss through a claim for civil damages”*, Competition Tribunal in SAA Case (n41 above).

⁹⁷ *“This deals with the behaviour of the respondent firm in relation to the market, i.e, consumers and competitors, as opposed to the regulators. This factor must be weighed sufficiently high to serve as both an aggravating factor for respondent whose behaviour in the market justifies, but on the other hand, is there to provide mitigating to those who attempt to redress the adverse effects of their conduct”* Competition Tribunal in the SAA Case (n41 above).

⁹⁸ *“Here we deal with what the nature and dynamics of the market are at the time of the contravention. We examine here the type of market, its structure and history. We look at how materially the conduct impacted or could have impacted on the market structure”* Competition Tribunal in the SAA Case (n41 above).

- f) the degree to which the respondent has co-operated with the competition authorities¹⁰⁰; and
- g) whether the respondent has previously been found in contravention of the Competition Act¹⁰¹.

In *Competition Commission/Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others*¹⁰² it was held that the percentage turnover to be considered for the penalty should be calculated only from the infringing line of business and not the total turnover of the respondent¹⁰³.

The Competition Tribunal has imposed a number of fines based on these guidelines¹⁰⁴. The fines imposed have severe financial implications as it results in huge amounts of money to be paid to the National Revenue Fund referred to in Section 213 of the Constitution of South Africa¹⁰⁵ and this may have an impact on other fields of law¹⁰⁶.

2.3.2 Damages

Securement of damages in South Africa for Competition law is regulated by chapter 5 of the Competition Act. These damages can be secured through a consent order¹⁰⁷ issued by the competition authorities or private civil action for damages can be instituted.

⁹⁹ "Here what we are dealing with is made quite specific. Nevertheless evidence of the level of profit derived as a result of the contravention is difficult to prove in practice and for this reason the factor, while not unimportant, is not given a high weighting", Competition Tribunal in SAA Case (n41 above).

¹⁰⁰ "This factor is given a high weighting because of the importance we attach to co-operation with the regulators. Those who co-operate should be able to score well in mitigation of the penalty whilst those who have not, should be penalized", Competition Tribunal in SAA Case (n41 above).

¹⁰¹ "This factor needs a high weighting as a repeat offence is very serious and needs to be adequately deterred", Competition Tribunal in SAA Case (n41 above).

¹⁰² Case 08/CR/Mar01 available at <http://www.comptrib.co.za> accessed on the 21-01-2012.

¹⁰³ See also *Harmony Gold Mining Company Ltd and another v Mittal Steel South Africa Ltd and another* [2007] 2 CPLR271 (CT) that followed this approach in fining the sum of R691.8 million.

¹⁰⁴ For more exposition of the guidelines see Sunderland P & Kemp K (2008) *Competition law of South Africa* Lexisnexis Durban para 12-9 to 12-17.

¹⁰⁵ The Constitution of the Republic of South Africa, 1996. Examples of fines include in SAA case (n41 above) a fine of R45 Million was imposed for abuse of dominance position, in *Competition Commission/Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others* (n102 above) a fine of R3 Million rand was imposed for engaging in resale price maintenance and in 2012 a fine of R449 Million was impose *Competition Commission/Telkom SA LTD 11/CR/Feb04* available at <http://www.comptrib.co.za> accessed on the 21-06-2012.

¹⁰⁶ This paper argues that the impact might be felt in the income taxation process.

¹⁰⁷ Section 49D and 58(1)(b) of the Competition Act regulate the powers of the competition authorities to enter into consent agreements and make consent orders.

Section 65 regulates, *inter alia*, the exclusion of persons who have been awarded damages in consent order from pursuing civil damages¹⁰⁸; the procedural requirements for the commencing a damages action¹⁰⁹; the status of an a certificate issued by the Competition Tribunal or the Competition Appeal Court¹¹⁰; when a person's right to claim damages arising out of a prohibited practice comes into existence¹¹¹.

When the damages are sought within an action being dealt with by the Competition authorities damages maybe awarded in same action. This is determined by a consent order in terms of which the complainant consents to the award of damages to be made therein¹¹².

A party's right to institute a civil action for damages suffered as a result of prohibited conduct comes into existence on the date of the Competition Tribunal's determination. If a party decides to institute a civil action to claim damages the party would have to attach a notice¹¹³ from the chairperson of the Competition Tribunals or the Judge President of the Competition Appeal Court certifying that the conduct constituting the basis of the action has been found to be a prohibited practice under the Competition Act¹¹⁴. The notice must also include the date of the Tribunal's or Court's finding and also the section(s) of the Competition Act in terms of which the Tribunal or Court made its finding¹¹⁵. This cause of action bears the principles of delict¹¹⁶ in that there have to be, among others, a nexus between the loss suffered and the anti-competitive conduct. The damages that may be awarded may vary in regard to the proved element of damages.¹¹⁷

2.3.3 Status of the Remedies in South African Competition Act

¹⁰⁸ Section 65(6)(a) of the Competition Act. This is consistent with our common law which does not permit a party to recover what would amount to double damages. See Neuhoff, M. (n42 above) 344.

¹⁰⁹ Section 65(6)(b) of the Competition Act.

¹¹⁰ Section 65(8) of the Competition Act.

¹¹¹ Section 65(9) of the Competition Act.

¹¹² The reason for this requirement is that the award of damages in a consent order precludes a complainant from commencing an action in a civil court for damages. See Neuhoff, M. (n42 above) 304.

¹¹³ Section 65(7) of the Competition Act provided, "A certificate referred in Section 65(6) (b) is conclusive proof of its contents and is binding on a civil court"

¹¹⁴ Section 65(2) of the Competition Act provides that civil court should not commence with its proceedings until the matter has been conclusively determined by the Competition Tribunal or the Competition Appeal Court.

¹¹⁵ See Neuhoff, M (n42 above) 344-345.

¹¹⁶ The requirements of a successful claim in delict actions include: Conduct, wrongfulness, fault, causation and damages. For more discussion on these elements/ requirements see J Neethling et al *The Law of Delict* (2006) Chap. 2 – 6.

¹¹⁷ South African law does not provide for punitive damages.

The Competition Act, in its current format, does not criminalise¹¹⁸ prohibited practices or any contravention in respect of mergers¹¹⁹. Although there are some criminal sanctions provided in chapter 7¹²⁰ of the Act, these do not relate to prohibited practices but essentially to hindering the enforcement and administration of the Act¹²¹.

Constitutional arguments have been raised that when imposing an administrative penalty under section 59(1) of the Competition Act, the Tribunal is imposing a criminal penalty and that, accordingly, the civil standard of proof provided by the Act¹²² is inappropriate and the Tribunal has no power to impose such penalty. This has been based on the contention that the administrative penalty under this section is not different to a criminal penalty imposed by a criminal court. While this argument has not yet been substantively considered by the Tribunal or the Competition Appeal Court, the case of *Federal-Mogul Aftermarket Southern Africa v Competition and Minister of Trade and Industry*¹²³ seems to provide a number of reasons as to why the administrative penalty is civil, instead of criminal in nature¹²⁴.

The Competition Appeal Court in the *Federal-Mogul* case¹²⁵ held that a respondent faced with an administrative penalty under Section 59 of the Act is not an “accused person” and therefore not entitled to the protection by section 35(3) of the Constitution of the Republic of South Africa¹²⁶. In particular, a

¹¹⁸ This may stem from the findings of the fact that the Maintenance and Promotion of Competition Act 98 of 1979 with its amendments failed on substantive as well as logical grounds, amongst other grounds was that the criminal law failed to provide adequate sanctions for conduct that was condemned in terms of the procedures set out in the Act. See the *Proposed Guidelines for Competition Policy* on 27 November 1997 published by the Department of Trade and Industry.

¹¹⁹ This has been one of the critics of the enforcement mechanism of the Competition Act. See the debate on the Competition Amendment Bill available at <http://www.parliament.gov.za> accessed on 5/01/2012.

¹²⁰ Sections 69, 70 to 75 and 77 of the Competition Act.

¹²¹ This may have resulted from the Competition Bill published in May 1998 by the Department of Trade and Industry. In its explanatory memorandum to the Bill it outlined, amongst others, that infringement of competition legislation will not be subject to criminal sanctions.

¹²² Section 68 of the Competition Act provides that contraventions of the Competition Act need only be proved on the balance of probabilities, save for section 49C proceedings and criminal proceedings.

¹²³ See n51 above.

¹²⁴ *Federal-Mogul Aftermarket* case (n51 above) paragraph 37-38. The earlier *obiter dicta* by the Appeal Court to the effect that proceedings under the act are “a hybrid between criminal and civil proceedings” was made somewhat fleeting in a different context and provides no significant support for an alternative view.

¹²⁵ See n51 above.

¹²⁶ The Constitution of the Republic of South Africa 1996.

respondent who is liable to a penalty under section 59(1) is not accused of any criminal activity and the determination of its liability cannot result in a conviction being recorded¹²⁷.

However, the Competition Amendment Act¹²⁸ that is not yet in effect¹²⁹ attempts to change this position. The amendment will in essence make contravention of certain provisions of the act criminal in nature. The new section 73A will make it an offence for a director of a firm, or a person having management authority within the firm, to cause the firm to engage in (or knowingly acquiesce in the firm engaging in) a prohibited practice in terms of section 4 (1) (b)¹³⁰. An individual who commits such an offence will be liable to a fine of up to five hundred thousand Rand (R 500, 000) and/or imprisonment of up to ten (10) years.

There is, of course, some criticism against this amendment contending that it is unconstitutional. The criticism seems, however, to dwell mainly on the reverse onus that would be created by section 73A(5)¹³¹ and not the whole rationale¹³² that brought about by this amendment, of which this research advocates for¹³³. Suffice to say, if this amendment is brought into operation it will only criminalise one aspect of the prohibitions¹³⁴ provided in the Competition Act.

2.4 COMPARATIVE JURISDICTIONAL REMEDIES: UNITED STATES OF AMERICA

The USA has extensive pieces of legislation¹³⁵ that were enacted to combat competition law violations. The Sherman Act¹³⁶ outlaws “every contract, combination...or conspiracy in the restraint of trade or

¹²⁷ See *Sappi Fine Paper (Pty) Ltd v Competition Commission 23/CAC/Sep02* par 47.

¹²⁸ Competition Amendment Act 1 of 2009, signed into law in 2009.

¹²⁹ This amendment will be operational on a date yet to be proclaimed by the President.

¹³⁰ This section prohibits certain horizontal restrictive practices e.g. price fixing, market allocations and collusive tendering. For discussion on these practices see Neuhoff, M. (n42 above) chap. 3.

¹³¹ The section 73A(5) of the Act states that, in any such proceedings against a director or manager, ‘a finding by the Tribunal or the Appeal Court (or an acknowledgement by the firm itself in a consent order contemplated in section 49D) that the firm has contravened section 4(1)(b) will constitute prima facie proof of the fact that the firm engaged in such conduct’.

¹³² To further deterrence of contravention of the Competition Act (see the objectives of remedies discussed in paragraph 2.2 above).

¹³³ For detailed discussion on some of the arguments see Smith, A. and Wewege, E. : *The Unconstitutionality of the Competition Amendment Bill* available at

<http://bowman.co.za/eazines/Competition/Newsletter/Competition%20Newsletter> accessed on 05/02/2012.

¹³⁴ Restrictive horizontal practice as provided by section 4(1)(b) of the Competition Act.

¹³⁵ Amongst others The Sherman Act, The Clayton Act, The Robinson-Patman Act, The Hart-Scott-Rodino Act, The Federal Trade Commission Act, and the Antitrust Civil Process Act.

commerce among the several states¹³⁷ and monopolisation, attempted monopolisation, and conspiracy to monopolise¹³⁸. A violation of either section 1 or 2 is a felony¹³⁹, punishable by fine and/or imprisonment¹⁴⁰.

The Clayton Act¹⁴¹ regulates conduct relating to, *inter alia*, tying¹⁴², price discrimination¹⁴³, civil enforcement¹⁴⁴ of antitrust laws, mergers and acquisition¹⁴⁵, premerger notification¹⁴⁶. Reading the Sherman Act and the Clayton Act together, it would be submitted that the conduct regulated by latter are also criminal in nature as the Sherman Act criminalise any contravention of it competition laws. To remedy these prohibitions the USA provides the remedies and sanctions¹⁴⁷ discussed below.

2.4.1 Penalties or Fines

The Sherman Act does not differentiate between civil and criminal violations of the antitrust laws as the Act itself provides that all violations of the antitrust law constitute a felony¹⁴⁸. The imposition of a fine or imprisonment may be done after the finding by the court that an antitrust law has been infringed. The Department of Justice (DOJ), the Federal Trade Commission (FTC) and private litigants may all bring civil

¹³⁶ The Sherman Act 15 U.S.C. was passed in 1890 and is the original antitrust statute in the USA. The key sections of the Act are analogous to Article 81 and 82 of the EC Treaty. See Broder, D.F. (2005): *A Guide to the US Antitrust Law* at 40.

¹³⁷ Section 1 of the Sherman Act.

¹³⁸ Section 2 of the Sherman Act.

¹³⁹ This is specifically provided by the Sherman Act 15 U.S.C §1, 2, and 3.

¹⁴⁰ Fine for a corporation may go as high as \$ 100 million (or more) per violation. Per violation penalties for individuals include fines as high as \$1 million and prison terms of up to 10 years. It is to be noted that The Criminal Fine Improvement Act of 1984, which applies to criminal violations generally, allows courts to impose even higher fines than those prescribed by the Sherman Act-up to double the amount gained by the violator or lost by the victim. See 18 U.S.C. §§ 3621-3624.

¹⁴¹ Passed in 1914. 15 U.S.C

¹⁴² Section 3 of the Clayton Act. Section 1 and 2 of the Sherman Act also provides this in regard to tying of services and other intangibles.

¹⁴³ Section 2 of the Clayton Act was amended by the Robinson-Patman Act 1936 to outlaw price discrimination.

¹⁴⁴ This is provided by Section 4 of the Clayton Act. This research will deal on this remedy of civil enforcement for damages that can be awarded.

¹⁴⁵ Section 7 of the Clayton Act prohibits mergers or acquisitions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly”. This is analogue to the EC Merger Regulation.

¹⁴⁶ For more discussion on this Act see Broder, D.F. (n136 above) chap. 2, 5, 6 and 7.

¹⁴⁷ This section will only analyse the imposing of fines and damages.

¹⁴⁸ See n139 above. See also Dabbah MM and Hawk BE (n86 above) page 1250.

proceedings but only the DOJ may prosecute criminal violations of the antitrust laws¹⁴⁹. The persons found in violation of the antitrust laws face significant fines¹⁵⁰. These fines may be divided into two sets, that is, Corporation fines and Individual fines.

The fine imposed on Corporations found in violation of antitrust laws is derived from the “base fine” which is the greater of:-

- a) the amount in the Sentencing Guidelines table corresponding to the offence level,
- b) the gain to the organisation from the offence, or
- c) 20% of the volume of commerce affected¹⁵¹.

This base fine is then multiplied by minimum and maximum multipliers based on the corporation’s “culpability score”, a value that attempts to qualify the degree of the offender’s guilt or fault, to find the Sentencing Guidelines’ recommended fine¹⁵². In setting the fine, the court considers, amongst other factors;

- a) the need for the sentence to reflect the seriousness of the offence,
- b) promote respect for the law,
- c) provide just punishment,
- d) afford adequate deterrence,
- e) the organisation’s role in the offence, and
- f) any collateral consequences of conviction¹⁵³.

Individuals convicted of antitrust violation may be fined up to \$1 Million and corporations up to \$ 100 million¹⁵⁴. The United States Sentencing Guidelines recommend a fine range of between one and five

¹⁴⁹ The conviction of criminal violation of the antitrust requires all the elements of criminal law, in *United States v United States Gypsum Co* 438 U.S. 422 (1978) the Supreme Court ruled that the government must prove criminal intent to obtain a criminal conviction. At 435 the court stated, “*defendant’s state of mind or intent is an element of criminal antitrust offense which must be established by evidence and inferences drawn there from*”. This conviction may also lead to a term of imprisonment for up to 10 years.

¹⁵⁰ See U.S. Department of Justice, Antitrust Division: *Sherman Act Violations Yielding at Corporate Fine of \$50 Million or more* (May 2008), available at <http://www.usdoj.gov/atr/public/criminal/225540.pdf> accessed on 26/11/2011. This is governed by, to a large extent, by the US Sentencing Commission’s Sentencing Guidelines, which were established to bring uniformity to the sentences imposed by federal courts. However, it should be noted that these are now “effectively advisory” following the Supreme Court holding in *United States v Booker*, 543 U.S. 220 (2005) that mandatory nature of the sentencing Guidelines was incompatible with the Sixth Amendment.

¹⁵¹ See Dabbah MM & Hawk BE (n86 above) 1277.

¹⁵² See Dabbah MM & Hawk BE (n86 above) 1277.

¹⁵³ See Dabbah MM & Hawk BE (n86 above) 1277.

percent of the volume of commerce affected, but not less than \$20, 000¹⁵⁵. In setting the fine the court takes into account the following factors;-

- a) the extent of the defendant's participation in the offence,
- b) the defendant's role in the conspiracy,
- c) prior history of violation, and
- d) the degree to which the defendant personally profited from the offence¹⁵⁶.

In addition to these high fines that may be imposed, the infringing party must also pay interest on any fine of more than \$2,500 that is not paid in full before the fifteenth day after the judgment¹⁵⁷.

2.4.2 Damages

Private actions in the field of competition law are considered to be an integral part of the USA competition law enforcement and they have been consistently encouraged by USA competition authorities and courts¹⁵⁸.

Damages actions are possible by virtue of section 4¹⁵⁹ of the Clayton Act. This action incorporates the treble-damages remedy: plaintiffs are able to bring actions against the offending firm and obtain three times their actual damages and also recover their court fees¹⁶⁰. Section 4A of the Act extends the right to sue for single damages to the USA government when bringing civil action for damages¹⁶¹.

¹⁵⁴ This was effected in 2004 by the Antitrust Criminal Penalty Enhancement and Reform Act.

¹⁵⁵ See the United States Sentencing Guidelines available at <http://www.ussc.gov/guidelin.htm>.

¹⁵⁶ See the United States Sentencing Guidelines (n155 above) §8C2.5.

¹⁵⁷ See 18 U.S.C. §3612 (f).

¹⁵⁸ Dabbah MM (2010) *International and Comparative Competition Law* at 256-257. The reliance on private actions in the US competition law as both an independent strand of competition enforcement and supplementary tool to public enforcement has on the whole been considered as a positive development carrying considerable advantages, whether in terms of relieving the burden on the Antitrust Division in particular or providing those who suffer competition harm with an avenue to seek compensation or offering redress to a wrong.

¹⁵⁹ Section 4 of the Clayton Act gives private parties who have suffered loss due to a competition law infringement the power to launch such actions in federal courts.

¹⁶⁰ A major goal behind the section 4 enforcement mechanism was to enhance and supplement the whole enforcement within US competition law regime and offer victims of competition infringements a proper tool to seek redress. See Dabbah MM (n158 above) 258.

¹⁶¹ See n159 above.

To be successful with this action of damages the plaintiff has to show both that the competition law violation was the material cause of harm¹⁶² and that it suffered ‘antitrust injury’. The courts hold that antitrust injury is an injury of-which the competition laws were intended to prevent and that ‘flow from that which makes the defendant’s acts unlawful’¹⁶³.

The claimant may use ‘follow on’ or ‘piggy-back’ actions based on convictions or civil verdicts obtained by government enforcers¹⁶⁴. The claimant is entitled to use the conviction as *prima facie* evidence that the defendant took part in the illegal scheme and thus has only to prove that he suffered damages from the scheme¹⁶⁵.

2.4.3 The Status of the Remedies in United States of America

The USA competition law enforcement remedies have, in essence, a standing of criminal violation¹⁶⁶. This is so irrespective of whether the remedy sought in that particular action is in the form of civil enforcement¹⁶⁷.

This jurisdiction provides most attraction for private parties to institute civil actions for treble damages¹⁶⁸ and the criminalisation of any violation of competition rules seems would discourage persons from contravening the competition laws because of possible imprisonment sentences that may be imposed¹⁶⁹. The employment of heavy punishment for persons contravening competition law in the USA can be said to be a better deterrent to any further violation of the law¹⁷⁰ and it is submitted that

¹⁶² See *Blue Tree Hotels Inv., Ltd v Starwood Hotels & Resorts Worldwide, Inc.* 369 F.3d 212, 220 (2d Cir. 2004).

¹⁶³ See *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 487 (1977).

¹⁶⁴ See Rees M (2011) *Cartel Enforcement Worldwide* CMP Publishing 1066-7.

¹⁶⁵ Section 5 of the Clayton Act allows an antitrust civil plaintiff to use a prior judgment in a government action as *prima facie* evidence against the defendant. See also *Hanover Shoe, Inc. v United Shoe Mach. Corp.*, 392 U.S. 481, 484 (1968) (giving *prima facie* effect to prior judgment in government civil monopolisation).

¹⁶⁶ Although in practice only clear and intentional violations involving activities that are ‘hardcore cartel activity such as price-fixing, bid-rigging and market-allocation agreements’ are investigated and prosecuted. See *Status Report: A Summary Overview of the Antitrust Division’s Criminal Enforcement Programme* (February 1, 2004), available at <http://www.usdoj.gov/atr> accessed on 4/01/2012.

¹⁶⁷ The Sherman Act states that all violations of the antitrust laws are criminal violation.

¹⁶⁸ Treble damages infer awarding three times the damages that have been proved.

¹⁶⁹ See Baker, D. I. *The Use of Criminal law Remedies to Deter and Punish Cartels and Bid-Rigging* 69 *Geo.Wash.L.Rev.*693 (2000-2001).

¹⁷⁰ See Griffin, J.M. (2001) *Criminal Cartels Status Reports, Remarks at the 49th Annual Conference of the American Bar Association Meeting of the Committee on Criminal Procedure and Enforcement* available at <http://www.usdoj.gov/atr/public/speeches/8063.htm>.

this jurisdiction therefore provides a good enforcement model to be observed by other developing jurisdictions.

2.5 CONCLUDING REMARKS

From the exposition of the remedies for infringements of South Africa and USA competition law as discussed, it is submitted that the USA has a very effective system in place to deter either continued violation or other potential violators to infringe the competition laws.

The nature of the damages that are awarded in South African law seem not to attract claimants to pursue claims in their private capacity as South African law does not allow the awarding of punitive or exemplary damages or treble damages. Serious judicial doubts have been expressed concerning the awarding of punitive damages in delictual claims. In *Innes v Visser*¹⁷¹ Greenberg J referred to the punitive element in damages as an “incongruity (which) is no doubt a relic of the law as it existed when the clear distinction of modern law, at any rate in England and South Africa, between civil and criminal relief was unknown”. It is assumed that the aim of discouraging “*evil and high-handed conduct*” is foreign to the basic purpose of the law of delict¹⁷².

Therefore under the current legislation, it is submitted, there is no possibility that damages, for contravention of competition rules, will be awarded on a higher scale to attract more private enforcement.

The awarding of treble damages by the USA courts has contributed much to increased private enforcement and this has had the effect of increasing the deterrence of parties infringing the competition rules.

¹⁷¹ 1936 WLD 44 at 45

¹⁷² Professor Van der Walt, the main proponent of academic criticism of the principle of awarding damages. See Van de Walt *Delict: Principles and Cases* (1979) at 5-7. He continues, “... The policy of awarding punitive damages unduly enriches the plaintiff who is entitled only to compensation for loss suffered. This policy has the added disadvantage of putting a wrongdoer in jeopardy of being punished twice- in the civil proceedings and in the criminal proceedings which could follow or which have preceded the civil action.”

It is submitted that South Africa should adopt a better approach to conform to the international world: the Competition Amendment Act, although not yet in operational, that introduce¹⁷³ criminal sanctions to cartel practices can be seen as a good starting point to increase deterrence of parties to infringe the Competition law as surveys confirm that criminal penalties, especially imprisonment, are the penalties of greatest concern to business people¹⁷⁴.

¹⁷³ Once the amendment is in operation.

¹⁷⁴ See UK Office of Fair Trading, *The Deterrence Effect of Competition Enforcement by the OFT* (November 2007). Available at www.oft.gov.uk accessed 20/01/2012.

CHAPTER THREE

THE TAXATION OF INCOME

3.1 INTRODUCTION

Taxation can be described as a compulsory monetary-based contribution payable by the public as a whole or a substantial sector thereof to the government of a state or country¹⁷⁵. Although the primary purpose of taxation is to defray government expenditure¹⁷⁶, it can also serve as an instrument to attain socio-economic and political objectives¹⁷⁷.

Taxes are levied in terms of specific legal rules that are enacted through legislation and it is a requirement that the legislation that imposes the burden of tax must be certain¹⁷⁸. In South Africa, and of course other jurisdictions, the common taxes that are levied includes Income tax¹⁷⁹, Capital gains tax¹⁸⁰, Value-Added tax¹⁸¹, Donation tax¹⁸², and Estate tax¹⁸³, to mention a few¹⁸⁴.

Income tax being one of the taxes that are imposed on a person¹⁸⁵ is assessed using specified legal norms and/or statutes that are in operation. A comparative study between South Africa and the USA indicates that there are some similarities on the assessment of income tax. Income¹⁸⁶ taxes are levied on the taxable income¹⁸⁷ of a person for a specific year of

¹⁷⁵ Muller, E. 'Framework for Wealth Transfer Taxation in South Africa' LLD Thesis, University of Pretoria 2010. See also Whitehouse, C. (n5 above) page 5 that conforms to this definition.

¹⁷⁶ Whitehouse, C. (see n5 above) page 6.

¹⁷⁷ Objectives of taxation are discussed below.

¹⁷⁸ This implies that the law imposing an obligation on a person to pay taxes should be certain and simple to assess and collect. See the principles of interpretation of fiscal legislation below.

¹⁷⁹ In South Africa this is levied in terms of the SA ITA (n21 above), as amended.

¹⁸⁰ In South Africa this is levied in terms of section 26A as read with eighth schedule of the SA ITA (n21 above).

¹⁸¹ In South Africa this is levied in terms of the Value Added Tax Act 89 of 1991.

¹⁸² In South Africa this tax is levied in terms of sections 54 to 64 of the SA ITA (n21 above).

¹⁸³ In South Africa this is levied in terms of the Estate Duty Act 45 of 1955.

¹⁸⁴ This research will dwell on the Income tax as levied in terms of the SA ITA (n21 above).

¹⁸⁵ Person here infers both natural person and jurist person. Section 2 of the Interpretation Act 33 of 1957 includes in the definition of a person "any body of persons corporate or unincorporated".

¹⁸⁶ Income has been defined in *Eisner v Macomber* 252 U.S. 189, 207 (1920) as "...the gain derived from capital and from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets".

¹⁸⁷ This is also known as the tax base. This is the amount by which tax rates are multiplied to compute the tax payable. For a detailed discussion see Popkin, W.D. *Fundamentals of Federal Income Tax Law* (1994) chapter 1

assessment¹⁸⁸. The determination¹⁸⁹ of a person's income tax depends on that person's gross income¹⁹⁰. In summary, to determine the tax payable by a person, the person's gross income for the year is deducted by allowable deductions¹⁹¹ in terms of the specific legislation provisions. The end result is the taxable income on which the tax rate is multiplied to get tax payable by that person.

For the purpose of this research emphasis will be on the deductions that are allowed and those that are prohibited in terms of relevant legislation. If the allowable deductions are increased, the total tax payable by the taxpayer will reduce and vice versa. If the tax payable is low, the total revenue to be collected by the authorities will also be lower. Government may therefore fail to fulfill its goals¹⁹² if it cannot, at least collect what it intends to spend¹⁹³.

This chapter analyses the objectives of taxation, the principles of interpretation of fiscal legislation, then discusses income tax deductions under South African tax legislation, and undertakes a comparative analysis of the United States income tax deduction provisions.

3.2 THE OBJECTIVES OF INCOME TAX

¹⁸⁸ The year of assessment means 'a year or other period in respect of which any tax or duty is leviable under the SA ITA is chargeable (section 1 of the SA ITA).

¹⁸⁹ Depending on the jurisdiction under consideration which could have minor differences.

¹⁹⁰ Section 1 of the SA ITA defines 'gross income' as, "**Gross income**, in relation to any year or period of assessment means-

- (i) *in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident;*
- (ii) *In the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic,*

during such year or period of assessment, excluding receipts or accruals of a capital nature...". For a detailed discussion on the South African concept of gross income see De Kober, A. and Williams, R.C (2010): *Silke on South African Income Tax*. In the United States gross income is defined as, "*all income from whatever source derived...*" (26 U.S.C. § 61). Under this definition, unless there is an exception in the law, the U.S government considers all income taxable. However this definition, as that in South Africa, has several specific inclusions and exclusions. For a detailed discussion on these, see Whittenburg, G.E. and Altus-Buller, M. (2011): *Income Tax Fundamentals*. Chapter 2.

¹⁹¹ This may include exemptions.

¹⁹² See the objectives of taxation below.

¹⁹³ This may lead to a budget deficit. Economic study has proved that a prolonged budget deficit is not favourable for economic growth of a country. For detailed discussion on the effects of budget deficit see Doménech R et al (1997): *The effects of Budget Deficits on National Savings in the OECD* available at <http://iei.un.es/rdomenec/saving.pdf> accesses 30/08/2012.

Several theories¹⁹⁴ have been raised to support the imposition of tax on persons. Amongst others this paper discusses two of the objectives and/or goals of taxation, each one having a high significance in the attempt to improve the citizen's welfare, that is, a fiscal tool to provide for the financing of government expenditures¹⁹⁵ and non-fiscal purposes that seek to accomplish numerous socio-economic or political objectives¹⁹⁶. In fulfilling both these goals, the government in essence raises fund to support the economic growth of a nation.

3.2.1 Fiscal Tool for Financing Expenditure: The primary purpose of taxation is to raise revenue for government expenditure. Although the government can raise revenue by borrowing, by printing money, and by selling things, in practice, it is unavoidable that taxation should meet most of the government's fiscal requirements¹⁹⁷. Attitudes to taxation depend to some extent on the views of taxpayer as to the merits of the items of government expenditure¹⁹⁸. There are three separate calls on the public purse that can be identified which the government must meet by collecting tax revenue¹⁹⁹:

- a) The short-term requirement to address immediate problems of human development:-This imperative stems from a basic needs conception of poverty, which the private enterprise cannot provide, including, the provision of food security, emergency medical treatment, defence and law and order²⁰⁰. It also pays for services that it is thought are better provided on universal basis, such as social security benefits, and education²⁰¹.

¹⁹⁴ For a detailed discussion these theories see Muller, E. (2010) 42-54 (n175 above) and also Friedland, J.B. (2010) *Integration of Corporate and Individual Income Taxes: An Equity Justification* unpublished LLM thesis, University of Witwatersrand.

¹⁹⁵ Although this is the chief objective of taxation, it has been argued that the main aim of taxation 'is to reduce private consumption and private investment so that the government can provide social goods and merit goods and subsidise the poor without causing inflation or balance of payments difficulties..' (See Allan, C.A. (1971): *The Theory of taxation* Penguin at 23).

¹⁹⁶ Enger, A.G. (2008) *Taxation for non-fiscal purposes* available at http://www.nsf.net/seminare/stockholm08/norsk_jur_national.doc accesses on 12/03/2012.

¹⁹⁷ Morse, G. and Williams, D. (2004) *Davies: Principles of Tax Law* 5th Edition. London, Sweet & Maxwell at 4.

¹⁹⁸ This is in line with the benefit principle of taxation that calls for tax burdens to be distributed in the same proportions as the benefits derived from government expenditure(See Rice, S.J. *introduction to Taxation*)p 1-15

¹⁹⁹ See Cobham, A. (n20 above) page 4.

²⁰⁰ See Cobham, A (n20 above) page 4.

²⁰¹ Morse, G. and Williams, D. (n197 above)

- b) The immediate need for investment to address less pressing but equally important human development issues:- This encompasses a more complex approach to poverty, including education and preventative medicine and to simultaneously improve economic potential²⁰².
- c) The creation and/or long-term maintenance of the institutions and governance structures needed as guarantors of quality life and prospects for its further improvement

3.2.2 Non-Fiscal Taxation: The principle of social economic welfare forms the basis of this goal. It focuses on the general good that government has to provide for its people. This includes aspect for such as, the redistribution of wealth and income, representation and re-pricing economic alternatives.

- a) Redistribution²⁰³ is valuable to the extent that it can allow a given society to achieve human development gains by lifting its poorest members out of poverty²⁰⁴. Where a society has wealth sufficient to meet the revenue goal, inequality may form the obstacle to widespread human development²⁰⁵. In terms of redistribution of resources, this can be used to mitigate political tension, in view of the fact that the wide disparity of wealth in developing countries in particular has been a definite cause of racial and ethnic tension²⁰⁶.

Immediate gains from direct quality of life enhancement are complemented by longer-term benefits through the effective increase in the society's development potential. Changes in taxation can and do affect economy, but control is also exercised by adjusting the money supply and credit²⁰⁷. Tax has the effect of removing income or wealth from the private sector and these diverted resources are then relocated in the form of goods, services and benefits to recipients designated by the government²⁰⁸. The diverted income diminishes the aggregate expenditure²⁰⁹ of the government.

²⁰² See Cobham, A. (n20 above) page 4.

²⁰³ This has become increasingly accepted as the objective of taxation in a democratic society. See Rakowski (1996) Tax law Rev 438.

²⁰⁴ See Cobham, A. (n20 above) page 5.

²⁰⁵ See Cobham, A. (n20 above) page 5.

²⁰⁶ Rudnick and Gordon in Thuronyied Vol 1 (1996) 297.

²⁰⁷ Morse, G. and Williams, D.(n197 above) page 5.

²⁰⁸ Williams, R.C. (2001) *Income Tax and Capital Gains Tax in South Africa- Law and Practice* at 2.

²⁰⁹ By varying the surplus or deficit on current account a government can influence the rise and fall of economic growth, inflation and unemployment (Williams, R.C.(n208 above) 2).

- b) Representation relates directly to the claim ‘no taxation without representation’. The connection between representation and taxation stem from fact that citizens feel they have a lower stake in governance and policy outcomes when they are excluded from government as community purchase of a public good. That is, low tax burdens in resource-rich countries can not only lead to less discipline in government, but also the undermining of the likelihood of good policy outcomes and wide spread exclusion²¹⁰.
- c) Re-pricing economic alternatives²¹¹ is a government’s main tool by which to influence the behaviour of their individual and corporate citizens and addressing this objective can deliver substantial benefits²¹². This can be seen from, for example, the imposition of customs duties on certain imports to protect the countries products that are similar to those being imported²¹³. These so-called ‘sin taxes’, levied on products such as alcohol and tobacco, were implemented to discourage people from consuming these products²¹⁴. This objective conforms to the deterrence goal of taxation.

Although literature indicate that ‘sin taxes’ are applicable to products such as alcohol and tobacco, there is a trend in certain jurisdictions to tax illegal or criminal activities or proceeds thereof²¹⁵ if the activity constitute a ‘trade’²¹⁶ as a way to deter persons from being involved in those kind of activities²¹⁷.

²¹⁰ See Cobham, A. (n20 above) page 5.

²¹¹ This research uses the objective of fiscal collection and this objective to form the nexus basis between competition and tax laws.

²¹² See Cobham, A. (n20 above) page 5.

²¹³ See Enger, A.G. (n196 above).

²¹⁴ Smith (1776) book v ch ii art iv, available at <http://www.adamsmith.org> accessed on 9/02/ 2012, mentions that “[i]t has for some time past been the policy of Great Britain to discourage the consumption of spirituous liquors, on account of their supposed tendency to ruin the health and to corrupt the morals of the common people”.

²¹⁵ In the USA case of *United States v Sullivan* 274 U.S 259 (1927) Justice Holmes for the unanimous Court stated, at 263, “We see no reason...why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay”. In *James v. United States*, 366 U.S 213 (1961) it was further stated, at 219, “When the taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, ‘he received income..., even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent’ ”.

²¹⁶ Trade is defined below.

²¹⁷ Williams RC (n208 above) at 337.

Whilst it is clear from the foregoing discussion that the fiscal objective is of vast importance in the economic growth of a nation, taxes imposed for non-fiscal purposes, in particular the re-pricing economic alternative objective, should play an important role in this development. This objective discourages or deters the taxpayer in engaging in unlawful activities, though the law gives no express indications that these are to be abandoned as it does when it criminalises them²¹⁸. Conversely the fines payable for some offences may, because of the depreciation of money, become so small that they are 'cheerfully paid'. They are then perhaps felt to be 'mere taxes', and 'offences' are frequent, precisely because in these circumstances the sense is lost that the rule is, like the bulk of the criminal law, meant to be taken seriously as a standard of behaviour²¹⁹. However, if this objective is effectively implemented, it is submitted that, it would lead to further deterrence of the offender by not only paying the fine but also being taxed and/or be refused a deduction of that fine on the unlawful activity infringement.

3.3 PRINCIPLES OF INTERPRETATION OF FISCAL LEGISLATION

Fiscal legislation is complex and detailed²²⁰. However, as any other legislation the fiscal legislation has to conform to Constitutional imperatives²²¹. Flowing from these complexities in such legislation the courts have generally adopted two approaches as guide on interpretation of fiscal legislation, namely, a strict approach and a purposive approach.

3.3.1 Strict Approach: The strict approach of interpretation is based on the assumption that tax legislation should be interpreted literally, regardless of the consequences²²². The 'letter of the law' has to be strictly adhered to where tax laws are concerned and this precludes using any presumption or assumption in the interpretation of tax laws²²³.

²¹⁸ Hart, H.L.A. (1975): *The Concept of Law* Oxford press.

²¹⁹ See Whitehouse, C. (n5 above) page 6.

²²⁰ In part this is inevitable since tax legislation should be certain, i.e, taxpayers should know whether they are or are not subject to tax or duty on a particular transaction.

²²¹ In South Africa, for instance section 2 of the Constitutional of the Republic of South Africa, 1996, specifically declare the supremacy of the Constitution above any other law.

²²² *CIR v George Forest Timber Co Ltd* 1924 AD 516, the court stressed the 'letter of the law' in interpreting tax legislation.

²²³ *CIR v Simpson* 1949 4 SA 678 (A).

This infers that the court must interpret the statute as it stands and cannot remedy or cure a *casus omissus*²²⁴ by supplying missing words. In the famous passage by Rowlatt J in the United Kingdom case of *Cape Brandy Syndicate v IRC*²²⁵, it was stated in this regard that;

“...[I]t is urged...that in a taxing Act clear words are necessary in order to tax subjects. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that the words are to be unduly restricted against the Crown, or that there is to be discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for 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...”

In South Africa, the leading authority on statutory interpretation stresses that the deviation from the literal interpretation of a statute is justified only where the intention of the legislation can be ascertained beyond doubt from other sources²²⁶. It would, therefore, logically be required that those other sources have to be legally binding as well. If no other legally binding sources can be found, there cannot be a need to try to ascertain the intention apart from strictly interpreting that relevant statute²²⁷.

3.3.2 Purposive Approach: This approach stresses the true intention of the legislature in the interpretation of fiscal legislation as of paramount importance²²⁸. In *Blue Circle Cement Ltd v CIR*²²⁹, the Appellate Division applied this approach of interpretation to determine whether a certain deduction was permissible within the framework of the SA ITA.

If there is doubt about the meaning of a provision or that provision might have two possible meanings, the *contra fiscum* interpretation is applicable. The *contra fiscum* is a common-law rule that provides that in the case of ambiguity, statutory provisions which impose burdens

²²⁴ A matter or contingency not catered for in the Act.

²²⁵ *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, at 71, 12 TC 358.

²²⁶ *Glen Anil Development Corp Ltd v CIR* 1975 (4) SA 715 (A) at 727.

²²⁷ In *Elf Enterprise Caledonia Ltd v IRC* [1994] STC785, 68 TC 328, for example, the court held that Inland Revenue Press Releases could not be used as an aid to statutory interpretation.

²²⁸ *Glen Anil Development Corporation Ltd v SIR* 38 SATC 319 at 334.

²²⁹ *Blue Circle Cement Ltd v CIR* 1984 2 SA 764 (A)

must be interpreted strictly, giving preference to the least onerous interpretation²³⁰. Where a provision of the tax Act is reasonably capable of two constructions, the court will adopt the interpretation that imposes the smaller burden on the taxpayer²³¹. This *contra fiscum* interpretation can only be invoked in cases of reasonable doubt, that is, in the absence of clear and unambiguous language in the legislation²³². This can be identified as one of the recognised loopholes that can be used against the State, if its fiscal legislation is not clear.

From the foregoing discussions of the approaches utilised by the courts, if the person sought to be taxed comes within the letter of the law or the intention of the legislature, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the state, seeking to recover the tax, cannot bring the subject within the letter of the law or not within the intention of the legislature, the subject is free, even if, ostensibly, it may appear that tax should be leviable. In other words, if there is to be an equitable construction, certainly such a construction is not admissible in a taxing statute, where words of the statute are clearly not in favour of it²³³.

The intention of the legislation must be derived from the words of the Act itself²³⁴. This entails that the law itself has to be certain. The marginal notes to the Act, parliamentary debates, minister's statements as to the meaning of the Act and memoranda purporting to explain the Act cannot be used to ascertain the meaning of the Act²³⁵.

The South African Revenue Services (SARS) publishes Practice Notes and Interpretation Notes which set out its interpretation of various provisions. These Practice Notes and Interpretation Notes are, however, simply guidelines to SARS employees and taxpayers regarding how SARS

²³⁰ This implies that when construing a provision in a legislation that imposes a burden upon the subject (e.g Tax), in the case of an ambiguity, the provision must be construed in favour of the subject. See *Dibowits v CIR* 1952 (1) SA 55 (A) at 61.

²³¹ *Dibowits* case (n230 above).

²³² See Stingling, M. (n26 above) page 11.

²³³ *Partington v The Attorney General* (1869) 21 LT 370 (HL) at 375.

²³⁴ *IRC v Hinchy* [1960] AC 748 at 766.

²³⁵ However, the court may properly have regard to the history of the provision of the Act and the form in which it appeared in the earlier Acts. See *CIR v Simpson* 1949 (4) SA 678 (A).

will administer the various laws. These Notes by SARS do not have the force of law and hence are not binding²³⁶.

3.4 INCOME TAXATION IN SOUTH AFRICA

Section 5 (1) of the Income Tax Act²³⁷ (SA ITA) establishes the liability of a taxpayer for income tax²³⁸. This tax is imposed upon persons, irrespective of whether they are natural persons, companies, close corporations or other taxable entities.

There are many steps in the computation of taxable income of a taxpayer and the starting point is the determination of taxpayer's gross income²³⁹. After the gross income of a taxpayer has been determined the next step is to determine the taxpayer's income. Income means gross income minus exempt income²⁴⁰. After income is determined the next step is to determine the taxpayer's taxable income. Taxable Income is the aggregate of the amount remaining after deducting from the income of a person all the amounts allowed to be deducted²⁴¹ or set-off²⁴² against such income under part I of Chapter II of the Act. If such deductions and set-offs exceed the income, the result is a loss which, subject to certain rules, can be carried forward and set-off against the income of the following year. From this 'taxable income'²⁴³ a rate is multiplied thereto to determine the tax payable by the taxpayer²⁴⁴.

3.4.1 Deductions under the South African Income Tax Act

²³⁶Stiglingh, M (n26 above) 13. See also *ITC (1993) 56 SATC 175* at 186 where Zulman J stated, "Departmental practice is not necessarily, of course, an indication of what the law means... Plainly the procedure and the practice laid down by the Commissioner in that regard, is, if nothing else, commercial wisdom and good sense"

²³⁷ See n21 above.

²³⁸Section 5(1) of SA ITA provides that, "(1) Subject to the provisions of the Fourth Schedule there shall be paid annually for the benefit of the National Revenue Fund, an income tax (in this Act referred to as the normal tax) in respect of the taxable income received by or accrued to or in favour of..."

²³⁹ See n190 above.

²⁴⁰ The categories of income which are exempt from normal tax are listed in sections 10 and 10A SA ITA. For a detailed discussion see De Koker, A. and Williams, R.C. (n190 above) Chapter 6.

²⁴¹ The allowable deductions are set out in sections 11-20 read with section 23.

²⁴² For example, the setting off of the balance of a loss incurred in a previous year; section 20.

²⁴³ It should be noted that section 26A of the SA ITA includes in the taxable income of a person for a year of assessment the taxable capital gains of that person for that year of assessment, as determined in terms of the Eighth Schedule of the Act. This research does not deal with this aspect of income tax, however for a detailed discussion of this aspect see De Koker, A. and Williams, R.C. (n190 above) Chapter 24.

²⁴⁴ For a natural person a progressive rate is applied while for a juristic person the flat rate is applied thereto.

The final step in the determination of taxable income is to deduct from the 'Income' as defined in section 1 of the Act all the amounts allowed to be deducted²⁴⁵. Sections 11 to 19, which are positive sections relating to deductions, enumerate a list of the items that may be deducted from income. Section 23, which is the negative section in deductions, sets out a list of items that may not be deducted from income.

3.4.1.1 General Deduction Formula

Most deductions²⁴⁶ in the computation of taxable income are derived from the so-called general deduction formula²⁴⁷. This formula incorporates the positive aspect of section 11²⁴⁸ and the negative aspects of section 23²⁴⁹. These two sections read together, in essence, provide that expenditure²⁵⁰ and losses²⁵¹ actually incurred²⁵² during the year of assessment²⁵³ in the

²⁴⁵ The main sections in the SA ITA dealing with deductions are sections 11 to 19 and section 23.

²⁴⁶ This is set as a general provision formula applicable to any amount sought to be deducted by taxpayer that is not specifically provided for in the legislation and may include the deduction of damages paid by the taxpayer.

²⁴⁷ In terms of *Port Elizabeth Electric Tramway Company Ltd v CIR* 1936 CPD 241, 8 SATC 13 at 16, this general formula requires that sections 11(a) and 23(g) must be read together when one considers whether an amount may be deducted.

²⁴⁸ Section 11(a) provides for the deduction of " *expenditure and losses actually incurred in the production of income, provided such expenditure and losses are not of a capital nature*"

²⁴⁹ Section 23(g) provides that, " *no deductions shall in any case be made in respect of the following matters, namely...(g) any moneys, claimed as deduction from income derived from trade, to the extent to which such moneys were not laid out or expended for the purposes of trade*".

²⁵⁰ The word 'expenditure' is not restricted to an outlay of cash but includes outlays of amounts in a form other than cash (see *Caltex Oil (SA) Ltd v SIR* 1975 665 (A), 37 SATC 1).

²⁵¹ The word 'loss' has not been defined by the courts but it has been held that in the context of a provision almost identical to s 11(a), it is not clear whether it meant anything different from 'expenditure' (*Joffe & Co (Pty) Ltd v CIR* 1946 AD 157, 13 SATC 354 at 360, Watermeyer CJ stated, that, " *in relation to trading operations the word is sometimes used to signify a deprivation suffered by the loser, usually an involuntary deprivation, whereas expenditure usually means a voluntary payment of money*"). In the *Port Elizabeth Case* (n241 above) at 15 the court considered that in the context of the word appeared ' *to mean losses of floating capital employed in the trade which produces the income*'.

²⁵² The use of the words 'actually incurred' rather than 'necessarily incurred' widens the field of deductible expenditure. The word 'incurred' does not merely mean 'paid', but connotes 'the undertaking of an obligation to pay or the actual incurring of liability (see *Ackermans Ltd v C: SARS* 2010 (1) SA (SCA), 73 SATC 1). In *ITC 1587* (1994) 57 SATC 97 at 103 it was held that the expression 'expenditure actually incurred' does not mean expenditure actually paid during the year of assessment, but means all expenditure in respect of which the taxpayer has incurred an 'unconditional legal obligation' during the year of assessment, whether or not that liability has been discharged during that year. See also *Caltex Oil (SA)* case at 12 (n244 above). For a detailed discussion on "actually incurred" see De Koker A and Williams RC (n190 above) §7.5.

²⁵³ See n188 above.

production of the income²⁵⁴, and not being of a capital nature, may be deducted if either in part or in full laid out or expended for the purposes of trade.

No deductions may be claimed in terms of this formula²⁵⁵ if the taxpayer is not engaged in the carrying on of a 'trade'²⁵⁶. It has been construed that the term 'trade' as defined²⁵⁷ has a very wide interpretation²⁵⁸ and the definition is not necessarily exhaustive²⁵⁹. Therefore whether a taxpayer is carrying on a 'trade' is an inference from the facts and that inference is a matter of law²⁶⁰. The activities of the taxpayer concerned need to be examined as a whole in order to establish whether he is in fact carrying on a 'trade'²⁶¹ but continuity and profit motives of the taxpayer are good, although not conclusive, pointers or indicators of carrying on of a trade²⁶².

The phrase 'in the production of income' has been subject to much judicial scrutiny. The expenditure must be incurred in order to produce income for the taxpayer but there is no need to demonstrate that the taxpayer's income is as the result of the expenditure in question²⁶³.

In *Port Elizabeth Electric* case²⁶⁴, the leading decision on the interpretation of this phrase, Watermeyer AJP stated,

²⁵⁴ See the discussion below.

²⁵⁵ And the whole of section 11 of SA ITA. This commences as follows: "For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from income of such person so derived..." The only exception to this is section 11(x) which permits the deduction of otherwise than from the carrying on of a trade. See *SBI v Die Olifantsrivierse Ko-operatiewe WynkeldersBpk* 38 SATC 79 at 84-5.

²⁵⁶ The term 'trade' includes "every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or grant of permission to use any patent as defined in the Patent Act [57 of 1978], or any design as defined in the Designs Act [195 of 1993], or any trade mark as defined by the Trade Marks Act [194 of 1993], or any copyright as defined by the Copyright Act [98 of 1978], or any other property which is of a similar nature" (section 1 of the SA ITA).

²⁵⁷ See n256 above.

²⁵⁸ *Burgess v CIR* 55 SATC 185 at 196.

²⁵⁹ *Burgess* case (n258 above) at 197.

²⁶⁰ *CIR v Stott* 3 SATC 253 at 258.

²⁶¹ *Estate G v COT* (1964 SR).

²⁶² See *ITC 1385* (1984) 46 SATC 111 at 114-5 and *De Beers Holdings (Pty) Ltd v CIR* 47 SATC 229 at 260.

²⁶³ *KBI v Van der Walt* 1986 (4) SA 303 (A) at 309G.

²⁶⁴ *Port Elizabeth* case (n247 above) SATC 16-18. This case involved the deductibility of damages arising from an accident involving a tram, Watermeyer AJP regarded the act of entailing the expenditure to be, not the apparently negligent driving on the part of the tram driver, which caused the accident, but the employment of tram drivers. It was stated at SATC 18, "In the present case the employment of drivers is necessary in the carrying on of the business of the tramway company and the employment of the drivers with it as a necessary consequence a potential liability to pay compensation if such drivers are injured in the course of their employment".

“...the purpose of the act entailing expenditure must be looked to. If it is performed for the purpose of earning income, then the expenditure attendant upon it is deductible...Here, in my opinion, all expenses attached to the performance of business operation bona fide performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attach to it by chance or are bona fide incurred for more efficient performance of such operation provided they so closely connected with it that they may be regarded as part of the cost of performing it”.

The *ratio decidendi*²⁶⁵ of the *Port Elizabeth* case²⁶⁶ is thus that the deductibility in terms of the general formula depends on the fulfillment of two requirements²⁶⁷, one subjective requirement²⁶⁸ and the other objective requirement²⁶⁹. Both these requirements involve questions of fact to be determined in relation to each case²⁷⁰. It is not important whether the expenditure in question is neither necessary nor extravagant nor whether the particular item of expenditure produced any part of the income: what the court is concerned ‘with is whether that item of expenditure was incurred for the purpose of earning income’²⁷¹. Therefore expenditure which is incurred with the intention by the taxpayer to make an ultimate profit and where the expenditure in question is incurred for the reasons of commercial expediency or the direct facilitation of the taxpayer’s trade is deductible²⁷².

Apart from the general deduction formula, other deductions are allowed in terms of specific provisions²⁷³ of the SA ITA and other provisions of section 23 of the SA ITA specifically prohibit certain deductions²⁷⁴.

²⁶⁵ The ratio decidendi of a case is the reason or ground for the decision of a court and becomes a principle of law that may have to be applied in future cases in which the facts are similar, depending on the authority of the court that gave the decision.

²⁶⁶ See n247 above.

²⁶⁷ Williams, R.C. (n208 above) at 285.

²⁶⁸ The bona fide purpose of the taxpayer in the performing the act to which the expenditure relates or whether the act to which the expenditure was attached was performed in the production of income.

²⁶⁹ The closeness of the link between that act and the expenditure in question.

²⁷⁰ *CIR v Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 298-9.

²⁷¹ *Sub-Nigel Ltd v CIR* 1948 (4) SA 580 (A), 15 SATC 381 at 394.

²⁷² *CIR v Sunnyside Centre (Pty) Ltd* (1998) 56 SATC 319 (Appellate Division) at 326.

²⁷³ Amongst others, deductions for qualifying expenditures incurred before the commencement of trade is carried on; deduction of annuities to former employees or partners and their dependents (s 11(m); bad debts (s11(i); doubtful debts (s11(j); finance charges (s11(bB); donations to public benefit organizations and qualifying

The damages or compensation paid by the taxpayer is not specifically provided for in the SA ITA and if the taxpayer seeks to deduct this expenditure, the general deduction formula is to be employed²⁷⁵. If it is shown by the taxpayer that the two requirements envisaged by the *Port Elizabeth* case are met, there can be no doubt that the taxpayer would succeed in claiming this deduction²⁷⁶.

3.4.1.2 Specific Prohibited Deductions

The specific prohibition of deduction of expenditure in respect of unlawful activities requires special discussion. Section 23(o) provides:-

“any expenditure incurred—

- (i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 ([Act No. 12 of 2004](#)); or
- (ii) which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic or in any other country if that activity would be unlawful had it been carried out in the Republic;”

Unlawful activity in this provision includes activities referred to in the Act that deals with the prevention and combating of corrupt activities²⁷⁷. SARS interpretation Note 54 tends to define unlawful activities to include any unlawful activity provided by any law²⁷⁸ but that is inconsistent

beneficiaries (s18A); fund contributions by employers (s11(l)); future expenditure on contracts (s24C); leave pay (s23E); legal costs (s11(c)); life insurance premiums (s11(w)); repairs (s11(d)); shares issued by the employer (s11(lA)); restraint of trade payments (s11(cA)); repayment of employee benefits (s11(nA) and 11(nB)); issue of venture capital company shares (s12J). For a detailed discussion on these deductions see Stiglingh, M (n26 above) chapt.8.

²⁷⁴ Amongst others, private maintenance expenditure (s23(a)); domestic or private expenditure (s23(b)); recoverable expenditure (s23(c)); interest, penalties and taxes in terms of a fiscal legislation (s23(d)); provisions and reserves (s23(e)); expenditure incurred to produce exempt income (s23(f)); non-trade expenditure (s23(g)); notional interest (s23(h)); expenditure incurred by labour brokers, personal service companies and personal service trusts (s23(k)); expenditure relating to employment or office (s23(m)); government grants (s23(n)); and unlawful activities (s23(o)). For a detailed discussion on these specific deduction see Stiglingh, M. (n26 above) chapt.7. For the purpose of this research only section 23 (o) will be discussed further.

²⁷⁵ See Stiglingh, M. (n26 above) at 152.

²⁷⁶ See *ITC 49* (1926) where the taxpayer, a trader of petrol lamps, was allowed to deduct damages paid when one of the lamps exploded and caused injuries to the purchaser.

²⁷⁷ Stiglingh, M. (n26 above) at 149.

²⁷⁸ SARS quotes various authorities regarding various terms. It describes a fine as ‘ a financial penalty imposed for crime committed’ and quotes Matthews J who in *Rex v Laughton* 1930 NPD 47 at 53 described penalty as, “penalty

with the principles of fiscal legislation and there is no case law to support that interpretation²⁷⁹. Using the interpretation given by SARS would mean even damages or compensation paid by the taxpayer would not be deductible as an expense²⁸⁰ as it constitutes a violation of civil law²⁸¹. Therefore this purported interpretation is untenable under the principles of fiscal legislation both in fact and/or law²⁸².

It is trite that fines or penalties for criminal conduct in the carrying of business operations cannot be regarded as constituting expenditure incurred in the production of income and may therefore not be deducted²⁸³. To allow the same would frustrate the legislative intent and allow a punishment imposed to be diminished or lightened²⁸⁴ and partly on the notion that criminal penalties are not imposed on the taxpayer *qua* trader, but as a personal punishment²⁸⁵.

3.4.2 How Deductions are treated in South Africa

In South Africa, therefore, it can be concluded that when any deduction in the determination of taxable income is sought, regard should be had to the general formula, for expenses not specifically provided for, and the specific inclusions and prohibitions, for those expenses that are provided for. If the expense satisfies the two requirements as set forward in the *Port Elizabeth* case, the amount expended will be allowed as a deduction. Legal authority infers that only criminal penalties or fines may not be deductible in any case as this is against public policy consideration and of course section 23(o) of SA ITA. The law is not certain as to whether any other penalties, not of criminal nature, may also be deductible. The interpretation provided by

when used in a statute- though it may not import a punishment for a criminal offence- does at least imply some form of sanction declared or operating by order of a court of law". And Black's Law Dictionary, SARS states, defines 'unlawful act' as "conduct that is not authorised by law; a violation or criminal law."

²⁷⁹The law itself is not certain what unlawful activity includes. See interpretation of fiscal legislation above.

²⁸⁰This is contrary to the decision in *Port Elizabeth* (n241 above), in which it was held that if the two requirements are met, the damages or compensation should be deductible.

²⁸¹In this instance the law of delict.

²⁸²In *Ernst v CIR* 1954 (1) SA 318 (A), 19 SATC 1 it was clearly determined by the Appellate Division that, the interpretation by SARS of any provision of the Act will not influence the courts to place a construction upon that provision that the language of the section will not allow.

²⁸³See *ITC 1490* (1990) 53 SATC 108 at 114.

²⁸⁴n283 above at 114.

²⁸⁵Williams, R.C. (n208 above) at 337.

SARS²⁸⁶ seems to suggest that even non-criminal activities are included merely because they contravene the law. This interpretation, it is submitted, does not have the force of law. Although the Courts have not yet adjudicated on this provision, bearing in mind the principles of interpretation of fiscal legislation, this provision is neither clear nor certain. Any interpretation thereof, following the *contra fiscum* principle, must be interpreted to the benefit of the citizen.

It is, therefore, submitted that damages paid by taxpayer and any fine, other than that of a criminal nature, incurred in the production of income may be deductible when assessing taxable income²⁸⁷.

3.5 COMPARATIVE INCOME TAXATION- UNITED STATES OF AMERICA

The income tax in the USA was authorised by the sixteenth Amendment to the Constitution of the USA²⁸⁸. This Amendment empowered Congress to tax ‘incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration’. The primary source of federal tax law is the Internal Revenue Code²⁸⁹(IRC). The IRC taxes both individuals and corporations. In addition to raising money to run the government’s programs, the income tax is used as a tool of economic and social policies²⁹⁰.

Income tax is imposed by §1 (individuals, estates, and trusts) or §11 (corporations) of the IRC²⁹¹. ‘Gross income’ is also the starting point for calculation of a taxpayer’s tax liability in the USA.

²⁸⁶ Interpretation Note No.54 (published on the 26 February 2010) available at www.sars.gov.za accessed 13/03/2012.

²⁸⁷ This is so when it also comply with the requirements of the general deduction formula.

²⁸⁸ On the 1st March 1913 the sixteenth Amendment to the U.S. constitution was ratified. Before the adoption of this amendment the court’s decision in *Pollock v. Farmer’s Loan & Trust Co.* 157 U.S 429 (1895) had found that the Income Tax law enacted in 1894 was unconstitutional. After its adoption the constitutionality of income tax has not been questioned by the federal courts. See Whittenburg, G.E. and Altus-Buller, M (n190 above) at 1-2. For detailed discussion on the history and purpose of this amendment see CRS Annotated Constitution- Sixteenth Amendment available at www.law.cornell.edu/anncon/search/display.html?terms=income%20tax&url=/a accessed 13/04/2012.

²⁸⁹ Internal Revenue Code, 26 U.S.C.

²⁹⁰ Economic tax provisions are the limited allowance for expensing capital expenditures and the accelerated cost recovery system of depreciation. The charitable contribution deduction is an example of a social tax provision. See Whittenburg, G.E. and Altus-Buller, M. (n190 above) at 1-2.

²⁹¹ These two sections reveal that the schedules of tax rates are progressive or graduated, meaning that as income increases, a taxpayer’s tax liability also increases, but at a greater rate.

The definition also has exclusions that are allowed by law²⁹². The tax on a given amount of taxable income is the amount determined under the appropriate schedule or table, less the amount of any tax credits²⁹³. The taxable income of a corporation, trust, or an estate is the taxpayer's gross income less deductions²⁹⁴. For individuals, the computation of taxable income involves two steps: first, some deductions²⁹⁵ are subtracted from the gross income, yielding a figure called 'adjusted gross income'. The next step is for the taxpayer to subtract the sum of itemized deductions and deductions for personal exemptions from the adjusted gross income to determine 'taxable income'²⁹⁶.

3.5.1 Deductions in United States of American Income Tax

As briefly stated above, computation of income tax involves deductions; the income tax is ostensibly a tax on the net income²⁹⁷. This implies that a taxpayer should be entitled to deduct the money he spent from the money the taxpayer earned before the tax rate is applied to the remainder²⁹⁸. The two main provisions that regulate these deductions are § 162²⁹⁹ and § 212³⁰⁰ of IRC.

The Congress is equipped with the 'power to condition, limit, or deny deductions from gross income in order to arrive at the net income that it chooses to tax'³⁰¹. These limitations on deduction are based on public policy considerations³⁰². The judicial impatience with disallowing a deduction spilled over into the Congress and lead to the amendment of § 162 to incorporate §

²⁹² § 1.61-1(a) of the Treasury Regulations provides, "Gross income means all income from whatever source derived, unless excluded by law...". §§101-140 lists the exclusions and these include gifts, discharge of indebtedness, employee benefits, to mention a few. For a detailed discussion on these exclusions see Miller, J.A. and Maine, J.A. (2007) *The Fundamentals of Federal Taxation* chapters 4, 5 and 6.

²⁹³ 26 U.S.C. §21 through 42

²⁹⁴ 26 U.S.C. § 63. See also Gunn, A. and Ward, L.D. (1988) *Federal Income Taxation* at 20.

²⁹⁵ Deductions listed in §62 referred to as 'above-the-line deductions'.

²⁹⁶ § 63.

²⁹⁷ Tax laws only attempt to tax the net increase in the wealth generated by money making activities.

²⁹⁸ Miller, J.A. & Maine, J.A. (n286 above) at 85.

²⁹⁹ This section addresses 'trade' or 'business deductions'.

³⁰⁰ This section addresses expenses related to investment activities. This research will not deal with this aspect but for a detailed discussion see Miller, J.A. & Maine, J.A. (n292 above) at 92.

³⁰¹ *Helvering v. Ind. L. Ins. Co.*, 292 U.S 371 (1934) at 381.

³⁰² See Scallen, S.B *The Deductibility of Antitrust Treble Damage Payments* 52 Minn. L. Rev.1149 (1967-1968).

162 (c), (f), and (g)³⁰³. These policies are the converse of tax expenditures³⁰⁴ because they increase rather than decrease taxes.

3.5.1.1 General Deduction Formula

Section 162(a) of the Code authorises the deduction of ‘ordinary and necessary expenses’³⁰⁵ paid or incurred during the taxable year in carrying on³⁰⁶ any trade or business³⁰⁷. The phrase ‘ordinary and necessary’ expense is unique to the USA income tax legislation and has been subject to a lot of judicial debate³⁰⁸.

In *Welch v. Helvering*³⁰⁹ it was held that there is a need to determine whether the expense is both necessary and ordinary. What is ordinary and necessary is a question of fact and will depend on the ways of conduct and the prevailing form of speech in the business world. There has to be a proximate relationship between the payment or expenditure made and the trade or business to render the payment as an ordinary and necessary expense of the business³¹⁰.

Amongst others, deductions that are allowed include education expenses, substantiation, reasonable salaries³¹¹, travel expenses³¹².

³⁰³ See Scallen, S.B. (n302 above).

³⁰⁴ Professor Stanley Surrey’s definition of tax expenditures, which was embodied in the Budget Act of 1974, states, “Those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability”.

³⁰⁵ An expense is an expenditure that benefits the current year. It can only be deducted if it helps produce in the current year. See Miller, J.A. & Maine, J.A. (n292 above) at 87.

³⁰⁶ ‘In carrying on’ entails that section 162 permits current deductions only for those costs paid or incurred in connection with active, ongoing business and denies current deductibility for start-up or pre-opening costs incurred prior to the beginning of the actual business operations. See Miller, J.A. & Maine, J.A. (n292 above) at 87. These start-up expenditures can be deducted under section 195 of the Code.

³⁰⁷ For a taxpayer to be carrying trade or business it is required that (a) the taxpayer must be involved in the activity with the continuity and regularity, and (b) the taxpayer’s primary purpose for engaging in the activity must be for income or profit. See *Commissioner v. Groetzinger*, 480 U.S. 23(1987) at 35.

³⁰⁸ It should be noted that the South African provision on deduction in the general formula only requires that the amount should have been ‘actually incurred’.

³⁰⁹ 290 U.S. 111 (1933), the question before the court was whether payments by a taxpayer, who is in business as a commission agent, are allowable deductions in the computation of his income if made to the creditors of a bankrupt corporation in an endeavour to strengthen his own standing and credit.

³¹⁰ *Jenkins v. Commissioner* T.C. Memo 1983-667. In this case it was held that payments made in furtherance of a business and protection of business reputation are ordinary and necessary. The mere fact that they were voluntary does not deprive them of their character as ordinary and necessary business expenditure.

³¹¹ Section 162(a)(1) IRC.

3.5.1.2 Specific Prohibited Deductions

The Internal Revenue Code provides specific prohibited deductions in the computation of income tax. Amongst others, the following are of interest for the scope of this research:

- (a) Section 162 (c) is a catch-all for a variety of illegal payments. Any illegal payment is not deductible, if it would subject the taxpayer to a criminal penalty or loss of license or privilege to engage in business³¹³. The prohibition of deductions in this section only relates to illegal payments that are criminal in nature³¹⁴.

- (b) Section 162 (f) disallows the deduction of fines or similar penalties paid to a government. The Regulations include civil as well as criminal fines in the non-deductible category, but compensatory damages are deductible³¹⁵. However, a distinction has to be made between punitive as opposed to retributive penalties.

In *True v. United States*³¹⁶ the Court disallowed the deduction, distinguishing between deductible compensatory payments to the government and non-deductible/retributive payments, under the Federal Water Pollution Control Act. The payments in this case were non-deductible because the amounts were determined by reference to the size of the payer's business and the effect on the payer continuing business both of which bore no relation to compensating an injured party. The Court also considered the 'gravity of the violation', which could relate to the amount of damages (which is compensatory), but also to the degree of fault (which is punitive).

³¹² Section 162(a)(2).

³¹³ §162(c)(2).

³¹⁴ In *Rev.Rul.74-323*, 1974-2 C.B. 40, a taxpayer had incurred advertising expenses but the advertisement violated the law against sex discrimination. Because there was no criminal penalty or loss of license or privilege to do business for violating the law, the expenses were deductible.

³¹⁵ Treasury Regulations § 1.162-21(b).

³¹⁶ 894 F.2d 1197 (10 th Cir.1990)

(c) Section 162(g) disallows a deduction for two-thirds portion of treble damages, if the taxpayer has been convicted or pleads guilty or *nolo contendere*³¹⁷ in a criminal proceeding. In civil anti-trust cases, a losing defendant must pay three times the actual damages³¹⁸. These damages are limited in the assessment of the income of a taxpayer³¹⁹.

3.5.2 How Deductions are treated in the United States of America

The USA assessment of the deductible expenses, from the foregoing discussion, seems to provide clear and certain taxation principles³²⁰. The law that provides for deductions are clearly stated³²¹ in the IRC and there cannot be any presumptions or assumptions regarding the interpretation of such provisions³²². The letter of the law clearly spells out what may be allowed as deductible and what may not. There is clear authority that, not only criminal penalties, but certain civil penalties may be deductible.

3.6 CONCLUDING REMARKS

The comparative analysis indicates that the USA law on income tax deduction provides a proper and legally certain framework for the purpose of deductions. This is also in line with the principles of interpretation of fiscal legislation.

South Africa law, on this area, is not clear as to what may be deductible or not if there is a penalty of a civil nature involved. This leaves room for taxpayers to use the loopholes in the fiscal legislation³²³. As certainty in tax system improves economic efficiency³²⁴, this uncertain position may lead to government failing to collect revenue that it might need to expend for the achievement of its economic growth path.

³¹⁷ *Nolo Contendere* is Latin for 'I will not contend'. It is plea in criminal cases where the accused neither admits nor deposes a charge.

³¹⁸ Popkin, W.D. (n187 above) 244

³¹⁹ See Chapter four.

³²⁰ This is in line with the interpretation principles of fiscal legislation.

³²¹ This is in conformity with the both approaches of interpretation of fiscal legislation.

³²² This is also supported by case law in the USA.

³²³ Which is of course allowed by the law. e.g utilising the *Contra fiscum* principle and tax avoidance schemes.

³²⁴ Most forms of economic activity are undertaken in the expectation of economic rewards. If the taxes on an activity are unpredictable, the after-tax reward is unpredictable. This risk increases the lessening of the level of activity that may lead to slow economic activity. See Rice, S.J (n198 above) p1-16.

South Africa, therefore, needs to learn from experience of other jurisdictions to make its laws clear and certain for it to effectively achieve the economic goals it has set to accomplish.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1 INTRODUCTION

The preceding chapters introduced the subject matter of study and discussed how competition law remedies and the process of income taxation are being regulated in South Africa. In doing this analysis the paper also sampled the USA³²⁵ as an international jurisdiction. The successes of this international jurisdiction, in respect of both fields of study, have also been highlighted.

This chapter will revisit the problem statement to see whether the objectives of the study have been met. The chapter will also take a brief look at the findings from the preceding chapters. The interface between competition and tax law is drawn and the impact of competition law remedies on the income taxation process in South Africa is also analysed. Lastly, recommendations will be made on how to close loop-holes in the tax law having regard to the success of the existing system and the lessons learnt from the comparative jurisdiction.

4.2 RECAPITULATION OF THE RESEARCH PROBLEM

In Chapter 1, paragraph 1.2 highlighted the main question which was supposed to be dealt with by this paper, namely, whether the competition law remedies under the current Competition Act may have an impact on the assessment of income taxation in South Africa. The ancillary question was whether the current competition laws fall short of, or may present loopholes, to achieve the main object the Competition Act was enacted to achieve, as read with other fiscal legislation with a similar objective even if the other fiscal legislation operate on a different field of the law.

It was the hypothesis of the paper that the provisions in the current Competition Act are not adequate to ensure efficient and effective enforcement of tax legislation in South Africa. The objective of this study was to bring about an interest in interdisciplinary legal coordination and clarify the fundamental relation between competition and tax law³²⁶. The overall objective was to examine and propose, if it was found that one has an impact on the other, reasonable recommendations that South Africa could

³²⁵ See n36 above.

³²⁶ This was based on the idea that these two fields have a nexus in the overall economic development of a nation.

consider to make its competition laws more deterrent and utilising that change to seal any loopholes that might have been utilised by role-players to attain national economic development in South Africa, by aligning competition laws same with income taxation laws. The objective was premised on the basis that both competition laws and taxation laws, being economic legislation, could help the better development of the economy if they are aligned and work in conformity to each other.

4.3 CONCLUDING THE THESIS PROBLEM

4.3.1 The Interface between Competition and Tax Law

The interface between competition and tax laws can be seen from their respective objectives or purposes. Intensive studies on both these fields provide a relationship that cannot be avoided in a country that wishes to advance its economic growth by utilising economic legislations³²⁷.

The analysis in chapter Two and Three on the objectives of both competition and tax law indicate that, both being economic legislations, they provide a nexus that can be linked to a common basis for effective enforcement for purposes of economic development. Further there is an element of deterrence objective that is also common to both fields for conduct that seems reprehensible. This entails that, since both have the similar objectives, one field cannot be implemented without having an impact on the other. The aim of this research was to analyse the possibility of aligning these two fields.

4.3.2 The Impact of Competition Law Remedies on the Income Taxation Process

Chapter Two of this paper discusses the remedies that are imposed for contravention of the Competition Act. As these stand, currently, the remedies are not of a criminal nature at all³²⁸.

³²⁷Economic legislation is legislation that serves the public interest by maximizing society's welfare from an economic perspective. See Macey, J.R. "PROMOTING PUBLIC-REGARDING LEGISLATION THROUGH STATUTORY INTERPRETATION: AN INTEREST GROUP MODEL. COLUMBIA LAW REVIEW VOL. 86 MARCH 1986 NO. 2. Also available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2791&context=fss_papers&sei-redir=1&referer=http%3A%2F%2Fscholar.google.co.za%2Fscholar%3Fq%3Deconomic%2Blegislation%26hl%3Den%26btnG%3DSearch%26as_sdt%3D1%252C5%26as_sdt%3Don#search=%22economic%20legislation%22 accessed on 8/05/2012.

³²⁸ There is, of course, an amendment Act in place that has already been passed but is not in operation yet.

Chapter Three of this paper discusses the deductions that are allowed in terms of the Income Tax Act. In terms of these deductions, the law allows all deductions permissible in terms of the general deduction formula and, of course, prohibits any that are specifically provided for in the Act.

The treatment of Competition law remedies are not specifically dealt with in the Income Tax Act and this leaves room for debate on whether the same may be deductible when assessing income tax of a taxpayer who has been fined an administrative fine or any other penalty by the competition authorities. Under the general deduction formula all that is required for expenditure to be allowed is that the expenditure must have been actually incurred in the production of income during the tax year partly or wholly for the purpose of trade³²⁹.

It is common cause that most of the contraventions of competition laws, for example, price fixing, market division, collusive tendering, are engaged into by the infringers to maximise their profits or generate more income. The way this is done is in the production of income and, therefore, it is submitted that the fines that maybe imposed or damages of which the infringer are liable thereon, would be deductible³³⁰ in the assessment of income taxation, using the general deduction formula.

Apart from the general deduction formula, the only other provision in the SA ITA that has been inferred by authorities to incorporate competition law remedies is section 20(o)(ii). This section, *inter alia*, provides that it shall be prohibited to deduct any expenditure which constitutes a fine charged or penalty as a result of an unlawful activity.

The Interpretation Note No 54³³¹ by SARS seeks to provide an inference that the competition fines are also incorporated by section 20(o)(ii) of the SA ITA and hence may not be deductible in assessing income tax. However, this interpretation by SARS has no basis in law³³² and therefore, without any clear legislation or binding court decision, cannot be authority of what it purportedly submits.

The authority on this section seems to suggest that the fines and penalties referred are only those that are attached by criminal sanction³³³. It would be against public policy to allow such fines to be

³²⁹ See paragraph 3.4.1.1 above.

³³⁰ This is in conformity of the requirements as provided by case authority (see chapter 3).

³³¹ See n286 above.

³³² See discussion in paragraph 3.2 above.

³³³ See De Kober, A. and Williams, R.C. (n190 above) at § 7.30.

deductible, therefore any criminal fine or penalty may not be allowed as a deduction when assessing one's income tax.

Although in the *Port Elizabeth*³³⁴ case, it was stated, in passing, that unlawful expenditure that include civil contraventions would not be accommodated by the general deduction formula, it is important to note that the United Kingdom case that was cited to support that proposition involved a criminal contravention³³⁵. This provides a distinction and it is submitted that the *obiter* in the case of *Port Elizabeth case* may not be used as authority for the proposition presented by Interpretation Note 54 of SARS.

In South Africa it has been authoritatively held by the courts that the fines or penalties imposed under the Competition Act are civil in nature and do not provide any criminal sanctions³³⁶. Therefore, this section is not applicable to prohibit the deduction of competition law fines when assessing income tax of a person.

In comparative jurisdictions, notably the USA, the law actually provide that any contravention of anti-trust laws constitute a felony³³⁷ and hence the competition remedies are criminal in nature. Using this alone it is clear that any fines imposed for contravention of competition law would not be entertained as a deduction in assessing income tax as it would be against public policy. Furthermore, the USA legislation specifically provides, in its tax laws, that fines for contravention of competition laws may not be deducted in assessing one's income tax³³⁸. This makes any inference in order to deduct fines imposed for contravention of competition laws impossible.

If the South African legislature could adopt this approach towards treatment of contravention of its competition provisions, this would make the law clear and certain. Further, this adoption would also

³³⁴ *Port Elizabeth case* (n247 above).

³³⁵ In the case of *Commissioner of Inland Revenue v van Glehn and Co., Ltd* [1920] 2 KB 553 the taxpayer sought to deduct a fine imposed for trading with an enemy of the state. This was a criminal offence at the time of imposition of the fine.

³³⁶ See paragraph 2.3.3 above.

³³⁷ See paragraph 2.4.3 above.

³³⁸ See paragraph 3.5 above.

provide a way of, not only to deterring further infringements of the competition laws³³⁹, but would also reduce the loopholes that could be utilised to avoid payment of taxes.

4.3.3 Possible Argument for Adopting a Change in South African Approach to Treatment of Competition Remedies for Taxation Purposes

The foregoing discussion shows that there is a gap to be filled if the economic legislation considered in this research could be effective for the growth of the economy. Amongst others this part discusses the principles of tax avoidance and double jeopardy.

4.3.3.1 Tax Avoidance

The principle of tax avoidance, as opposed to tax evasion, provides arguments that would enhance legislative development in South Africa to adopt a change in the way it views its competition law remedies.

The classic distinction between avoidance and evasion was described in *Bullen v Wisconsin*³⁴⁰ as ‘when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as evasion, what is meant is that it is on the wrong side of the line ...’³⁴¹

Tax evasion refers to illegal activities deliberately undertaken by taxpayer to free himself from a tax burden³⁴². Tax avoidance, on the other hand, denotes a situation in which the taxpayer has arranged his affairs in a perfectly legal manner, with the result that he either reduces his income or has no income on which tax is payable³⁴³.

³³⁹ For example, in the United Kingdom there has been a shift of opinion in the 2000s in terms whereof it was recognised that civil sanctions did not go far enough in the fight against cartels and it was concluded that the threat of criminal conviction for individuals (including the possibility of imprisonment) would be the most effective deterrence against companies entering into cartel arrangements (see The White Paper on amendment of competition law, published by the then UK Department of Trade and Industry 2001: *A World Class Competition Regime* [Cm 5233]). This led to the introduction of statutory criminalisation of cartel conduct in the Enterprises Act 2002.

³⁴⁰ *Bullen v Wisconsin* (1916), 240 US.625.

³⁴¹ *Bullen* case (n340 above) at 630.

³⁴² See Stiglingh, M. (n26 above) page 787.

³⁴³ See Stiglingh, M. (n26 above) page 788.

For a tax avoidance scheme to be utilised, it has to be done within the confines of the law. It is an accepted principle of income taxation that tax is only payable if there is a law that imposes that tax³⁴⁴. If there is no provision regulating that particular aspect, either allowing or prohibiting it, the doctrine of the *nulla poena sine lege* (no punishment without a law) could find application.

The principle of *nulla poena sine lege*³⁴⁵ requires certainty and clear laws³⁴⁶. This maxim is based on the legality principle that is implicitly enshrined in the Constitution of South Africa³⁴⁷.

The principle has been found to be applicable in South Africa as reaffirmed in *S v Dodo*³⁴⁸ when it was stated;

“...the nature and range of any punishment, whether determinate or indeterminate, has to be found in the common or statute law; the principle of legality *nulla poena sine lege* requires this. This principle was in fact endorsed Malgas. Even the exercise of the court’s ‘normative judgment’ [S v Dzukuda and others; S v Tshilo (4) SA 1078] in determining the nature and severity of the sentence within the options permitted by law has to be judicially exercised; it is not unfettered...”

This maxim has been accepted to be applicable not only in criminal law but also to any civil laws³⁴⁹.

Adherence to this principle will mean that since the law on deductions of competition law remedies is not regulated by any law in South Africa the taxpayer may not be punished. The taxpayer will therefore

³⁴⁴See *Cape Brandy syndicate v IRC* [1921]1 KB 64, at 71.

³⁴⁵Dicey’s first conception of the maxim was formulated as follows, “we mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”. (Dicey *Introduction to the study of the Constitution* 8thed (1938)).

³⁴⁶Prof A S Mathews *The Rule of Law- Are-assessment in Fiat Justitia Essays in Memory of Oliver Deneys Schreiner* 1983.

³⁴⁷*Director of Public Prosecutions, Western Cape v Arnold Prins*, (unreported) at page 11-13, case number A134/2008. Available at <http://www.saflii.org.za/cases>. Accessed on 7th June 2012.

³⁴⁸*S v Dodo* 2001 (3) SA 382 (CC).

³⁴⁹For example, in the matter between *Doornpoort Kwik Spar CC v. Franciska Odendaal and others*, case number JR1453/2006 (unreported) the Labour Court sitting in Johannesburg applied this maxim with approval.

be allowed to deduct the penalties paid as allowable deduction since it complies with the general deduction formula³⁵⁰.

Therefore, the argument of tax avoidance would support the taxpayer to utilise the law to his advantage since it is not specifically prohibited. If, however, as proposed by this dissertation, the competition law remedies were criminalised³⁵¹ or the SA ITA is amended to specifically deal with the treatment of these remedies, a taxpayer would not utilise the loophole for his advantage. However, if the contravention of competition laws were criminalised, there would not be a chance of the taxpayer trying to utilise the law to his advantage.

4.3.3.2 Double Jeopardy

The principle of double jeopardy is well recognised in democratic principle and provides that no person can be punished twice for the same infringement of the law³⁵². This research advocates for the criminalisation of the competition law infringements and the question is whether this principle of double jeopardy could find application to make it unlawful, constitutionally, for the implementation of this amendment.

Section 35 (5) (m) of the constitution provides,

“every accused person has a right to a fair trial, which includes the right-

...

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.”

This principle has been argued in attempt to avoid being punished for infringement of other laws such as tax and competition laws. The USA courts have held that a penalty could trigger double jeopardy protection if that penalty was intended for punishment³⁵³. While penalties and fines are normally

³⁵⁰ This also infers that the interpretation Note 54 by SARS is not applicable since it does not have the force of law.

³⁵¹ Through proper amendment.

³⁵² See Ravazzini, T. *Department of Revenue v. Kurth Ranch: The expansion of Double Jeopardy Jurisprudence into Civil Tax Proceedings*, 25 Golden Gate U.L.Rev. (1995) page 337.

³⁵³ *Helvering v. Mitchell* 303 U.S 391 (1938) at 398-405.

characterised for punishment, taxes are distinguishable because they are motivated by revenue-raising rather than punitive purposes³⁵⁴ and hence the double jeopardy cannot be applicable.

In South Africa in the case of *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v the Competition Commissioner and Another*³⁵⁵, the Competition Appeal Court, in respect of the double jeopardy, stated,

“the rights set out in section 35 (3) of the constitution are reserved for those people who have been charged in criminal matters and who are likely to be sentenced to a term of imprisonment. It is the imprisonment aspect, which deprives a charged or accused person, of his liberty, which is sought to be protected by the entrenchment of the rights, set out in section 35 (3). It is the threat of imprisonment which triggers off the rights set out in section 35(3).”

It should be noted that when pronouncing this judgment the status of competition law fines were still of a civil nature. The question to be posed is whether the criminalisation of these competition infringements would limit a taxpayer to include a deduction of, for example fines paid in assessment of his tax by employing the double jeopardy argument.

The answer to this seems to be in the negative. In *ITC 11641*³⁵⁶ it was held that the double jeopardy provision only accrue to an accused person and a taxpayer upon whom tax is levied is not an accused person within the meaning of section 35 as there is no question of him being tried for the offence or of proceedings culminating in a conviction with a concomitant criminal record. The payment of taxes can only be enforced by the employment of the ordinary civil process of execution³⁵⁷.

Furthermore, in the USA it is recognised that any infringement of competition laws constitutes a criminal offence. However, the principle of double jeopardy has not been utilised by taxpayer to deduct the fines paid for infringement of competition law for the assessment of taxes. This is so because the legislation makes it clear that deduction of such fines is prohibited.

³⁵⁴ See Ravazzini, T. (n352 above) page344. See also *Sorenson v. State Department of Revenue* 836 P.2d 29 (Mont. 1992) where the court noted at page 31 that tax had a remedial purpose in addition to promoting retribution and deterrence.

³⁵⁵ See n51 above.

³⁵⁶ *ITC 11641* (unreported) (Tax Court Johannesburg. Judgment given on 4 December 2006) available at <http://www.saflii.org/za/cases>.

³⁵⁷ See section 91 of the Income Tax Act.

It would therefore be argued that the criminalisation of competition law remedies would, if proper enactment is implemented, not be trumped by the constitutional principle of double jeopardy.

4.4 CONCLUSION

The current position of the law in South Africa is, therefore, that there is a discernable impact of competition law remedies on the income taxation process. This impact can lead to government utilising both aspects of the law to better achieve its policy on NGP³⁵⁸. There can be other ways for government to raise money than raising taxes. This could be by limiting certain deductions that would be against public policy considerations.

If the government could amend its legislation for better clarity and certainty this could reduce the incidence of taxpayers avoiding taxes by using deductions of fines that have been imposed by the competition law in determination of that taxpayer income taxes. Furthermore, it is clear that the deterrence effect on contravention of competition laws would also be high for fear of having criminal records.

The way the law is at the moment facilitates taxpayers in utilising the loopholes that are available without contravening any other laws³⁵⁹

The Competition Act has been amended³⁶⁰ to criminalise some contraventions in South Africa, however, this amendment Act is not yet in operational³⁶¹. This can be seen as a step in the right direction to minimise the loop-holes that the impact of the remedies criminalised would have on the income taxation process. However, the delay in this amendment being in operational could still have an effect on the economy as a whole. Some contraventions of competition laws in the Amendment Act have been dealt with. This paper wishes the same to be critically and openly debated and possibly be incorporated into the amendment of the law. The decisions to include or exclude such areas must be well informed, justified and conscious regard being had to the impact that the left aspects would have on the income tax process.

³⁵⁸ See paragraph 1.1 above.

³⁵⁹ Tax avoidance is legal in South Africa.

³⁶⁰ n128 above.

³⁶¹ At the time of this research.

It follows therefore that the competition laws and tax laws must be reviewed as noted in this paper. Furthermore the Competition Amendment Act that is proposed requires further revisiting by the South African government to deal with the loop-holes revealed by this study to avoid unnecessary litigation in the future.

4.5 RECOMMENDATIONS

The legal theory of autopoiesis³⁶², which means a process whereby an organisation produces itself, states that the law should be equated to a living organism that has to produce itself as an amoeba.³⁶³ This entails that the law has to self-produce and adopt through getting concepts from the environment or social set up in which it lives to be a part of system, because if it does not do so it would be obsolete and die.³⁶⁴ This legal theory is seems to be supported by the Constitution³⁶⁵ as evidenced from the constitutional court judgment in *S v Mhlungu*³⁶⁶ when it was stated, referring to the dictum of Lord Wilberforce³⁶⁷, that,

“[the law]... is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid [what Lord Wilberforce called] ‘the austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government”³⁶⁸.

Bearing this in mind, therefore, this paper recommends that the law in South Africa must heed efficient concepts and approaches by other jurisdictions to enable it achieve its own goals.

In view of the investigations made in the preceding chapters, it is submitted that what is required is a new approach for both taxation and competition law- a paradigm in which academics, policymakers and

³⁶² The word Autopoiesis is from greek that literally means “ auto or self-creation”.

³⁶³ D’Amato, A. (2003): *International Law as an Autopoiesis System* 15 November 2003 17 <http://anthonydamato.law.northwestern.edu/auto/PLANCK-1.pdf> (accessed 1 March 2012).

³⁶⁴ D’Amato (n363 above) 35.

³⁶⁵ This is the Supreme law in South Africa (section 2 of the Constitution).

³⁶⁶ *S v Mhlungu* 1995 (3) SA 391 (CC).

³⁶⁷ *Minister of Home Affairs (Bermuda) v. Fisher* [1980] AC 319 (PC) 328-9.

³⁶⁸ *S v Mhlungu* (n366 above) at para 8.

campaigners from all regions must play their roles. This paper recommends for South Africa that borrowing from the tax and competition system from USA could solve some of the legal problems. However, pure legal transplantation of the USA law without adapting it to the peculiar situation in South Africa would not be prudent³⁶⁹.

The proposed amendments would, in turn, assist the government to raise revenue without the need to use other mechanisms, for example, raising taxes to support further the Economic Growth Path that has been implemented by the state to effectively “u-turn” the economy. In order to achieve harmony in the system, the roles of the different expert government bodies must be defined in law to avoid the situation where even persons not contravening the competition laws could be penalised by the raising of taxes to support the government programme of infrastructure development.

This paper, therefore, concludes by recommending that South Africa should change its approach of the competition and tax laws by amending the same to eliminate the impact that the former has on the latter.

4.6 AREAS OF FUTURE RESEARCH

The subject matter of this study is complex without quantitative research and it is not tested whether the proposed amendments could effectively regulate the system. Furthermore this research has only dealt with limited aspects of competition law remedies (fines and damages) and only income tax laws. However, further research is imperative to verify the position on the overall impact competition law remedies may have on the taxation process (Value added Tax, Capital Gain Tax, Transfer Duty Tax, et cetera). This paper seeks to provoke such response and research in South Africa for the benefit of all in both the quantitative study and other areas of the two fields of study explored herein. This may help in the government raise enough revenue to support its NGP programme.

4.7 FINAL CONCLUSION

It has been observed that the competition and tax laws as they currently stand do not specifically provide for the treatment of competition law remedies in assessing income taxes. The current legislation

³⁶⁹ The South African competition laws, for instance incorporates the public interest element that is not the case with other nations e.g the USA.

is not certain on its approach either to prevent abuses of the said impact. Therefore, the legislation is lacking in its role of guiding people to the enforcement of both fields of study in respect of the impact competition law remedies have on the taxation process. The rationale of this conclusion is that unlike the common law that may only come in to govern the parties at the stage of litigation when violations are already committed, statutory laws should be loud, clear, accessible, certain, straight to the point and far reaching in guiding people before engaging into any business transaction and contravene the law.

Furthermore, the law as sought to be implemented by the Competition Amendment Act will not effectively eliminate the impact that the competition law will have on the taxation process. On the other hand, the proposed amendment of laws by this research may lead to the desired state. Therefore, further improvements as recommended by this paper have to be considered before the country is faced with new legislation which might be unsatisfactory.

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