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TAX STORIES: SECONDARY SOURCE OF TAX CASES

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FACULTY OF LAW

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CHAPTER ONE

1 INTRODUCTION

1.1 BACKGROUND

Historically the teaching and learning of law is based on numerous substantive or doctrinal law and such approach has rendered practical and socio-economic aspects of the law insignificant.¹ This approach is the core cause of the problem students have, especially those from accounting background when they have to read and understand tax cases.² Tax Stories are a mechanism to counter this problem. Tax Stories are narrative of seminal tax cases that created precedent in our tax system and established foundational principles of tax law.³ The narration includes a broader enlighten on the litigants and their history, political and social setting upon which the case arose and judges who presided in these cases.⁴

Judgments of these cases, like most other judgments, are lengthy and constructed with complex critical choice of legal jargon and words. Tax Stories give more detailed circumstances and background concerning the judgement in simpler and more reader friendly way. Stack correctly concludes that: “They paint a detailed and multi-coloured picture of the lives and times of the people and organisations involved in dispute with Revenue Authorities”.⁵

¹ Ndebele, C. & Ndlovu, L. 2013. Using feedback from students to remedy a pedagogy of historically disadvantaged: a case study of law teaching. *Anthropologist*, 15(1):1-11 at 4.

² Stack, E.M. 2015. The “tax stories”. *Southern African Business Review Special Edition Tax Stories*, i-x at iv.

³ Stack, *supra* note 2, at i.

⁴ Stack, *supra* note 2, at i.

⁵ Stack, *supra* note 2, at x.

1.2 RATIONALE FOR THE STUDY

The concept of Tax Stories is still young in academia, especially in South Africa. It was originally inspired by Caron in his research titled *Tax Archaeology*.⁶ In his introduction Caron⁷ seeks to respond to a call by Simpson⁸ to free canonical cases “from the overburden of legal dogmatic ... by relating them to evidence, which have to be sought outside the law library, to make sense of them as events in history and incidents in evolution of law”.

Teaching of tax, like many other law courses is ahistorical.⁹ Oberst observes that this lead to students having a preconceived idea that tax law lacks coherent concepts and policies hence approach tax courses with trepidation.¹⁰ Caron discloses that even the best-known teacher of tax, Eustice¹¹ have complained that the subject is becoming virtually unteachable due to its growing complexity.¹² This remains a problem as it is apparent that students are yearning for a more practical approach to what they are taught.¹³

In an attempt to make tax law more teachable, legal academics have considered several ways to approach the teaching of tax. Oberst argues that tax teachers should employ an active approach that requires students to struggle directly with legislation and regulations.¹⁴ In contrast Livingston argues that a skills approach that examine tax issues from multiple perspective should be employed.¹⁵ Shurtz, on the other hand, argues that law professors ought to apply critical methods of teaching tax, exploring how issues of race, class gender and other non-traditional categories of

⁶ Caron, P.L. 2009. *Tax Archaeology*. [Online] Available from: <http://ssrn.com/abstract=1484698> [Accessed: 2015-06-27].

⁷ Caron, *supra* note 6, at 1.

⁸ Simpson, A. W. 1995. Leading cases in common law. *Oxford*, 12.

⁹ Mehrotra, A.K. 2005. Teaching tax stories. *Journal of Legal Education*, 55(1/2):116-125 at 118. See also Avi-Yonah, R.S. 2003. Tax stories and tax histories: is there a role for history in shaping tax law? *Michigan Law Review*, 101(6):2227-2237 at 2227.

¹⁰ Oberst, M.A. 1996. Teaching tax law: developing analytical skills. *Journal of Legal Education*, 46:79-93 at 80.

¹¹ James S. Eustice was a Professor Emeritus of Taxation at NYU Law School and taught tax courses for more than five decades.

¹² Caron, P.L. 1994. Tax Myopia. *Virginia Tax Review*, 13:517-590 at 522.

¹³ Ndebele & Ndlovu, *supra* note 1, at 8.

¹⁴ Oberst, *supra* note 10, at 80.

¹⁵ Livingston, M.A. 1998. Reinventing tax scholarship: lawyers, economist, and the role of the legal academy. *Cornell Law Review*, 83:365-454 at 431.

analysis intersect with tax law.¹⁶ However, the most innovative approach to teaching tax law seeks the dual goal of engaging students and highlighting the importance of tax for a well-rounded education.¹⁷

Tax Stories contribute in advancing these teaching of tax law methodologies despite their differences. This contribution is significant in the United States of America as there are over five Law Stories books published and edited by expert in respective fields of law.¹⁸ In South Africa there is currently one Tax Stories series edited by Stack.¹⁹

Reviewers of Tax Stories have identified loopholes and gaps in them. Avi-Yonah identifies the gaps to be that there are too lengthy in discussing current doctrine compared to the historical background of the case, stories are too long, other important cases are not included as the focus is on cases decided by the highest courts and that the order of the cases is not chronological.²⁰ Mehrotra identifies the gaps to be that the writers are less narrative in Tax Stories, writers follow a linear order in all Tax Stories and also put too much emphasis on tax law autonomy and disregard the broader political, social and economic circumstances in relation to the story.²¹

1.3 RESEARCH PROBLEM STATEMENT

To encourage students to read is a challenge as reading is no longer a favourite of many young people.²² This is a real-life problem. Tax Stories are also a real-life approach to address this problem. The current South African Tax Stories series is less narrative, focuses on law autonomy leaving out concepts of politics, social and economic circumstance and each story is quite lengthy. There is no nexus between the historical background and the impact cases had in history. The choice of cases is

¹⁶ Shurtz, N.E. 1998. Critical tax theory: still not taken seriously. *North Carolina Law Review*, 76:1837-1888 at 1841.

¹⁷ Mehrotra, *supra* note 9, at 117.

¹⁸ Caron, P.L. 2002-2003. Back to the future: Teaching law through stories. *University of Cincinnati Law Review*, 71:405-420 at 407. See also Avi-Yonah, *supra* note 9, at 2228.

¹⁹ This series is available on Southern African Business Review Special Edition Tax Stories 2015.

²⁰ Avi-Yonah, *supra* note 9, at 2228-2233.

²¹ Mehrotra, *supra* note 9, at 122-124.

²² Stack, *supra* note 2, at x.

also questionable as some cases are relatively old and their principles are no longer law.²³ There is no Constitutional Court case in the series, this is a missed opportunity as no observation is made on the impact of the Constitution on tax law, as a historical event.

The research problem lies in filling these gaps in Tax Stories. This is important as Tax Stories forms part of secondary source of tax law pedagogy. The research problem underpinning this study is developing a narrative and brief Tax Story, rich in history with clear interlink of politics and economics in tax law whilst providing credible secondary source for tax teaching.

1.4 RESEARCH HYPOTHESIS

A well narrated Tax Story is a credible secondary source of tax teaching that enable legal and non-legal student to understand relationship between fiscal legislation interpretation with political and socio-economic circumstance of the time. The understanding of the principle the case set will be achieved without engaging on a lengthy complex court judgement.

1.5 RESEARCH OBJECTIVES

1.5.1 Primary research objective

The main objective of the research is providing and developing a credible secondary source of teaching tax through a Tax Story which reflect on the historical background of a seminal tax case and show political, social and economic influence into tax law in a narrative form which is easy to read and understand.

²³ For an example the story of “*CIR v Niko*: a question of economic reality” in which the court applied the strict legal approach to the interpretation of legislation without taking into account justice, equity and fairness. This approach does not accord with the principles of the Constitution of the Republic of South Africa, 1996.

1.5.2 Secondary research objectives

The main research objective of this study is supported by the following secondary research objectives:

- To review the current Tax Stories series to establish gaps.
- To formulate research design and methodology strategy suitable for development of a Tax Story.
- To research on historical, political and economic concepts concerning the tax case.
- To write a Tax Story that meets the main objective of the study.
- To conclude the study and make recommendations for future development of Tax Stories.

1.6 RESEARCH DESIGN AND METHODOLOGY

1.6.1 Research design

The study is designed within interpretive research paradigm.²⁴ It adopts a critical analysis of a tax case. It further analyses the historical background of the case with the aim of contextualising the discussed case. The study will use the judgment of a tax case as the source of data.²⁵ Other sources are history and politics books which explains historical and political events that forms part of history in context of the analysed tax case. The reasoning behind the study is to show the link between tax law, political, social and economic aspects.

1.6.2 Research methodology

The study adopts the doctrinal research methodology. It focuses on reading and conducting intensive scholarly analysis as a systematic process of synthesising a judicial decision.²⁶ The study also adopts methodologies in historical research as it discuss historical background.²⁷ Such methodology is described by Leedy and Ormrod as a rational explanation of events and making inferences on effects they

²⁴ Revees, T.C. & Hedberg, J.G. 2003. *Interactive learning system evaluation*. Englewood Cliffs, New Jersey: Educational Technology Publication at 23.

²⁵ The court judgments are available from law reports and online cases databases.

²⁶ McKerchar, M. 2008. Philosophical paradigms, inquiry strategies and knowledge claims: applying the principles of research design and conduct to taxation. *eJournal of Tax Research*, 6(1):5-22 at 18-19.

²⁷ Stack, *supra* note 2, at vi.

had on individuals and society.²⁸ The study will be purely based on documentary data that will be critically analysed to produce a creditable reader-friendly secondary source of the tax case. The best end results of the research will depend on the creativity and insight of the researcher.²⁹

1.7 EXPOSITION

The main outcomes of the present study will be presented in the format of a mini-dissertation. The structure of the mini-dissertation is explained and summarised below.

Chapter 1: Introduction

Chapter one provides an introduction and background of Tax Stories and also sets out the rationale for the study, and states the research problem, the research question and the research objectives. The research design and methodology are briefly summarised and the chapter finally provide an overview of the chapter structure of the mini-dissertation.

Chapter 2: Theoretical constructs

Chapter two identifies and defines the theoretical constructs that are relevant to the primary and secondary objectives of the study. This chapter analyses the difficulty in understanding tax cases, the causes of such difficulty and the effect caused by this difficulty. The chapter further investigates the impact Tax Stories have in the teaching of tax law.

Chapter 3: Research design and methodology

Chapter three provides a detailed description of the research design and methodologies used in Tax Stories. This chapter commences with the research orientation, presents detailed information about source of primary data, how it will be critical analysed in developing a Tax Story.

²⁸ Leedy, P.D. & Ormrod, J.E. 2005. *Practical research: planning and design*. Upper Saddle River, NJ: Pearson at 172.

²⁹ McKerchar, *supra* note 26, at 13.

Chapter 4: Development of a Tax Story

Chapter four develops a Tax Story based on the judgement of *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2001 (1) SA 1109 (CC). The developed Tax Story discusses both the High Court and the Constitutional Court judgment. It further discusses the political, economic and historical events in which the case arose. The developed Tax Story is designed to fill the gaps identified in chapter one.

Chapter 5: Conclusion

Chapter five brings the study to its conclusion. The chapter summarises the study and conclusions from the other chapters, explains the contributions and limitations of the present study and also makes recommendation for future research.



CHAPTER TWO

2 THEORETICAL CONSTRUCTS

2.1 INTRODUCTION

The objective of this chapter is to explain the theory behind the introduction of Tax Stories. To achieve this objective this chapter will discuss the challenges that academics have identified in legal education and more specifically in teaching tax law. The chapter will then provide an overview discussion on proposed solutions to address the identified challenges in legal education. In greater details, the chapter will discuss what Tax Stories are and why they are important and relevant in addressing the challenges legal education have. This chapter will then conclude by discussing the benefit of Tax Stories to scholars, academics and students.

2.2 THEORETICAL CONSTRUCTS

The fact that tax law is frequently encountered in other fields of study raises problems in teaching tax law.¹ The multidisciplinary of tax law have encouraged institutions to adopt the approach of not only using lawyers to teach it, but also accountants and economist.² This shows a greater need for tax cases to not only be left to be understood by lawyers, but also by other role players in the commercial world. The introduction of Tax Stories in legal education assist both legal and non-legal professionals, who deal with tax, in understanding tax cases.³

Fuller states that the objective of legal education is not mere knowledge of law but something more durable, more versatile and muscular.⁴ Tax Stories brings the 'something more durable, more versatile and muscular' to tax cases as they take us through the journey of discussing social, factual and legal background of the case

¹ Lowndes, C.L.B. 1960-1961. Problems in teaching tax law: tax law encountered in other fields of law. *Journal of Legal Education*, 13:481-485 at 481 and at 485.

² Sharp, A. and Datt, K. 2010. Proposals for assessment in tax teaching. *Journal of the Australasian Tax Teachers Association*, 5:46-65 at 55.

³ Stack, E.M. 2015. The "tax stories". *Southern African Business Review Special Edition Tax Stories*, i-x at iii.

⁴ Fuller L.L. 1950-1951. On teaching law. *Stanford Law Review*, 3:35-47 at 35.



and explore immediate impact and the role that the case continue to play in our current tax law.⁵ This ‘outside of the judgement discussion’ is important as litigants are human beings in a social space with problems before they are reported cases.⁶

A transaction can take place in different forms, but when considering one form of transaction over the other, there have to be serious considerations of tax and its implications.⁷ The disregard of tax consideration and understanding of tax implications for a particular transaction may prove to be disastrous.⁸ The development of credible, reader-friendly and fun to read Tax Stories will assist both legal and non-legal professionals in understanding tax implications of a particular transaction. Through Tax Stories a layman can have a greater understanding of tax principles and implications without consulting a tax specialist who is costly and it improves access to information.

It is a fact that lawyers are chief architects of our legal, political and economic order.⁹ However, the judgements are lengthy and constructed with complex critical choice of legal jargon only understandable to lawyers.¹⁰ This puts greater emphasis on the idea that the writer of a Tax Story must be creative enough to conflate social, political and economic setting in the story without conflicting the issues of law concerned. Achieving this will be fulfilling the dream of Simpson to free canonical cases from overburden of legal dogmatic.¹¹ This approach to learning tax also improves the ability of students to apply tax principles into real-world situations which is an important aspect.¹²

It is equally important to state that Tax Stories do not create hypothetical facts in order to present a colourful story. The inclusion of historical, political and social setting in which the case arose and description of characters involved put emphasis on the *obiter dictum* by Chief Justice Wessels. Wessels CJ states that the trial judge

⁵ Caron, P.L. 2002-2003. Back to the future: Teaching law through stories. *University of Cincinnati Law Review*, 71:405-420 at 408.

⁶ Kerper, J. 1998. Creative problem solving vs. the case method: A marvelous adventure in which Winnie-the-Poor meets Mrs. Palsgraf. *California Western Law Review*, 34:351-374 at 353.

⁷ Lowndes, *supra* note 1, at 483.

⁸ Lowndes, *supra* note 1, at 483.

⁹ Fuller, *supra* note 4, at 37.

¹⁰ Stack, *supra* note 3, at iii list one of the objectives of Tax Stories as to “explain the facts of each case and the decision in simple language to assist non-legal scholars to interpret cases”.

¹¹ Simpson, A. W. 1995. Leading cases in common law. *Oxford*, 12.

¹² Sharp and Datt, *supra* note 2, at 48.



will be concerned by particular individuals situated in the particular circumstances in which they were when dealing with litigants and not concern with what is or is not probable when dealing with them.¹³ The ‘particular circumstances’ that Wessels CJ refers to are described in Tax Stories.¹⁴ The importance of their description is that they influenced the circumstances in which the case arose or the outcomes of the case.¹⁵

It is common that most teachers of law concentrate on current doctrine during their classroom learning and teaching.¹⁶ However, most of law teaching is still based on cases, which are by definition historical artifacts which arose at a specific time and place and reflect historical context.¹⁷ The objective of Tax Stories is to remedy the lack of historical data in law teaching.¹⁸ The lesson learned from history in legal education is that it shows how the law was developed to arrive to the current doctrine and it also provides normative rationale to interrogate the current doctrine.¹⁹ The introduction of Tax Stories is also an attempt to provide the reader with more in-depth information that would normally not be obtained during classroom discussions in the course.²⁰

Avi-Yonah correctly points out that one of the best way to understand current doctrine is to understand the previous law, the loopholes it had which resulted to the enactment of the new law.²¹ This shows the importance of history in law teaching.

Central to taxation is politics as taxation is about the relation between the state and its citizens.²² The political decisions of the state do affect the taxation as it have direct influence on how citizens are taxed and influences the behaviour of citizens towards

¹³ *Bitcon v Rosenberg* 1936 AD 380 at 396.

¹⁴ Stack, *supra* note 3, at i.

¹⁵ Stack, *supra* note 3, at ii.

¹⁶ Avi-Yonah, R.S. 2003. Tax stories and tax histories: is there a role for history in shaping tax law? *Michigan Law Review*, 101(6):2227-2237 at 2227

¹⁷ Weaver, R.L. 1991. Langdell’s Legacy: Living with the case method. *Villanova Law Review*, 36:517-596 at 543. See also Avi-Yonah, *supra* note 16, at 2227. See also Caron, *supra* note 5, at 406.

¹⁸ Avi-Yonah, *supra* note 16, at 2227.

¹⁹ Avi-Yonah, *supra* note 16, at 2237.

²⁰ Caron, *supra* note 5, at 406. See also Avi-Yonah, *supra* note 16, at 2228.

²¹ Avi-Yonah, *supra* note 16, at 2234.

²² Jones, C.C. 1998. Mapping tax narrative. *Tulane Law Review*, 73:653-697 at 657. See also Avi-Yonah, *supra* note 16, at 2235.

avoiding and evading tax. A recent South African political event in South Africa and the influence it had on taxation illustrates this view.

The President of the Republic of South Africa fired the then Minister of Finance, Nhlanhla Nene, on the 9th of December 2015 and replaced him with Minister Des Van Rooyen. The country's debt servicing cost was estimated to have arisen between R1.5 billion and R2 billion due to this cabinet reshuffle.²³ The President replaced Minister Des Van Rooyen with Minister Pravin Gordhan due to the markets' reaction. In an attempt to stabilise the economy Minister Gordhan announced in his 2017 Budget Speech that the tax rate for high income earners with R1,5 million or more taxable income will increase to forty five percent for 2018 tax year.²⁴ This brought about a huge public outcry.²⁵ This proves, as Avi-Yonah states, that to pretend that tax exist purely separately would be being ignorant of reality.²⁶

It is common cause that there already exists other supplementary text to assist students in courses like tax.²⁷ Supplementary text includes outlines, explanatory notes and collection readings amongst others. However, Tax Stories are case method in legal education with modern interest in narrative and storytelling coupled with new technological tools.²⁸ Tax Stories are important as case method is a predominant method of teaching and learning in law schools.²⁹

As a form of the case method, Tax Stories gives an in-depth analysis of cases which produces more lasting value to students to process new information and solve new problems.³⁰ Caron correctly points out that it is not a good method of teaching to

²³ Zuma's blunder on Nene costs SA billions – when will taxpayers call enough? [Online] Available from: <http://www.fin24.com/BizNews/zumas-blunder-on-nene-costs-sa-billions-when-will-taxpayers-call-enough-20151213> [Accessed: 2017-04-12].

²⁴ Minister of Finance Budget Speech 2017 [Online] Available from: <http://www.treasury.gov.za/documents/national%20budget/2017/> [Accessed: 2017-04-12]. The tax rate for this income bracket was forty one percent for 2017 tax year. Rate of tax for individuals [Online] Available from: <http://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Rates%20of%20Tax%20for%20Individuals.aspx> [Accessed: 2017-04-12].

²⁵ Taxpayers hit with highest marginal rate since '94 [Online] Available from: <http://www.fin24.com/Budget/taxpayers-hit-with-highest-marginal-rate-since-94-20170222> [Accessed: 2017-04-12].

²⁶ Avi-Yonah, *supra* note 16, at 2235.

²⁷ Caron, *supra* note 5, at 405.

²⁸ Caron, *supra* note 5, at 405.

²⁹ Kerper, *supra* note 6, at 351.

³⁰ Blasi, G.L. 1995. What lawyers know: Lawyering expertise, cognitive science, and the function of theory. *Journal of Legal Education*, 45:313-397 at 339.



rush through to signature cases but it is important to unpack with reasons why central cases are important to deepen understanding of law.³¹ To further enhance the study of seminal cases Tax Stories provide additional raw material to deepen understanding.³²

As Tax Stories set forth social, factual and legal background of the cases, this results in cases making sense as events in history and incidents in the evolution of law.³³ It is through Tax Stories that we bring the ghost of the past that haunted the law.³⁴ Tax Stories also reveal the human drama behind development of law.³⁵ It is this dynamic role of Tax Stories that led to Jones coming to a conclusion that stories sourced from case law are real tax.³⁶ The existence of Tax Stories benefits students with doctrinal and institutional artifacts stories uncover in general textbooks of law.³⁷

De Vito states that stories have power.³⁸ Their power is centred on their ability to be extremely persuasive.³⁹ This is evident from finding that stories have proved to be nine per cent better⁴⁰ for first year students than exposition⁴¹ at improving student learning.⁴² The reason for this is that if the material is put in a recognisable structure like stories, it results in people learning better and absorbing more.⁴³ As law schools have pressure to teach more content and more quickly,⁴⁴ there is a great need to

³¹ Caron, *supra* note 5, at 407.

³² Caron, *supra* note 5, at 407.

³³ Simpson, *supra* note 11, at 12.

³⁴ Douglas, P. 2000. Introduction to Legal Archaeology Symposium. *Utah Law Review*, 183-184 at 184.

³⁵ Douglas, *supra* note 34, at 184.

³⁶ Jones, *supra* note 22, at 659.

³⁷ Caron, *supra* note 5, at 420.

³⁸ De Vito, S. 2013-2014. The power of stories and images in law school teaching. *Washburn Law Journal*, 53:51-70 at 51. See also Tyler, J.O. and Mullen, F. 2011. Telling tales in school: Storytelling for self-reflection and pedagogical improvement in clinical legal education. *Clinical Law Review*, 18:283-337 at 283.

³⁹ Haven, K. 2007. Story proof: the science behind the startling power of story. *Greenwood Publishing Group*, at 7-9.

⁴⁰ Determination of percent "better" or "outperforming" relative to another supplementation method was made by calculating how much each supplementation method improved learning as compared to no supplementation, then dividing that amount for the better supplementation method by the amount for the weaker supplementation method.

⁴¹ Exposition is a writing which describes or depicts a concept but is not character-driven.

⁴² De Vito, *supra* note 38, at 52.

⁴³ De Vito, *supra* note 38, at 53.

⁴⁴ Fleischmann, I. 2013. *January courses at UB Law School Develop real-world skills*. [Online] Available from: <http://www.buffalo.edu/news/releases/2013.html> [Accessed: 2017-05-25].

provide supplementary law material that helps students learn better.⁴⁵ Tax Stories are ideal supplementary law material available to be utilised in achieving the objectives of effective teaching and learning.

In deepening understanding of cases through stories students are provided with new and unseen perspective of law.⁴⁶ An empirical study conducted at Columbus School of Law of the Catholic University of America supports this view.⁴⁷ An increased retention of doctrinal material has been achieved through stories.⁴⁸ Learning can be improved if teaching is modelled to respond positively in the way memory works.⁴⁹ Disregarding how memory works in teaching and learning can hamper the objectives of teaching and learning.⁵⁰ Stories are effective and important as they respond positive to how memory works hence Tax Stories are of great importance in legal education.⁵¹

2.3 CONCLUSION

In conclusion, the development of Tax Stories is a not a well-established study in South African legal education. The discussion advanced in this chapter demonstrates the benefits of developing Tax Stories for South African legal education. The advantages of Tax Stories can benefit law professor, law student and non-legal commerce activist such as economist and accountants. The tax education and awareness⁵² on tax and tax implication is achieved through Tax Stories, in a cost-effective manner. The other benefit of Tax Stories is their contribution to existing

⁴⁵ De Vito, *supra* note 38, at 53.

⁴⁶ Love, J.C. 1998. The value of narrative in legal scholarship and teaching. *Journal of Gender Race and Justice*, 2:87-97 at 97. See also Caron, *supra* note 5, at 419.

⁴⁷ Tyler and Mullen, *supra* note 38, at 285-301. The study was conducted to determine whether student storytelling could improve learning in clinical setting. The study conclusion was that understanding become clearer or deeper by crafting and telling the story.

⁴⁸ Blaustone, B. 1992. Teaching evidence: Storytelling in the classroom. *American University Law Review*, 41:453-484 at 454.

⁴⁹ Willingham, D.T. 2009. Why don't students like school?: A cognitive scientist answers questions about hoe the mind works and what it means for the classroom. *Wiley*, at 54-63.

⁵⁰ Willingham, *supra* note 49, at 56.

⁵¹ De Vito, *supra* note 38, at 58 explains in six points how memory works. These are clinical proved process of how the brain functions.

⁵² Lowndes, *supra* note 1, at 483 discussed the advantage of teaching tax law distributively mentioning awareness of tax in other fields of study as an important one.



literature of taxation as they make available pedagogical resources to tax educators and scholars.⁵³

⁵³ Stack, *supra* note 3, at iv.



CHAPTER THREE

3 RESEARCH DESIGN AND METHODOLOGY

3.1 INTRODUCTION

The aim of this chapter is to discuss the research design and research methodologies employed in the development of Tax Stories. This chapter will first define the research design and outline research design of this study. Thereafter, the chapter will discuss the paradigm the study of Tax Stories falls under. This chapter will further define and discuss methodologies used in the study of developing Tax Stories. Reasons will be advanced as to why such methodologies are relevant and important in the study of developing Tax Stories. This chapter will conclude with an overview discussion on research design and research methodologies in relation to Tax Stories and how their use contributes towards the objective of this study.

3.2 RESEARCH DESIGN

Research design entails all the steps involved in the process to achieve the research objectives.¹ Research design guides the researcher on the research framework and research methodologies to be employed.² Babbie and Mouton describe research design as a plan or blueprint of conducting research.³ In essence research design is a building plan of the study as it set out the kind of the study to be conducted.⁴ Research design's main function is to enable the researcher to take appropriate research decision which yield to desired research result.⁵ Research design is an overall detailed plan of the study conducted.⁶

¹ Vosloo, J.J. 2014. *A sport management programme for educator training in accordance with the diverse needs of South African schools*. Unpublished doctoral thesis. Mafikeng: North-West University at 316.

² Vosloo, supra note 1, at 316.

³ Babbie, E. and Mouton, J. 2008. *The practice of social research*. Cape Town: Oxford University Press at 74.

⁴ Steyn, T. 2016. *Taxation research, Meeting 3, Research design and methodology*. Lecture to the TAX 804 on 2016-03-12 at 5.

⁵ Mouton, J. 1996. *Understanding social research*. Pretoria: Van Schaik at 107.

⁶ Welman, C., Kruger, F. and Mitchell, B. 2009. *Research methodology*. Cape Town: Oxford University Press at 46.



Tax Stories are legal interpretative research which falls under the qualitative research method. Tax Stories seek to explain and understand judicial decisions in perspective of political, social and economic setting the case arose.⁷ Bevir and Kedar define interpretative methodology as a methodology that seeks to observe human action as meaningful and historical contingent.⁸ Tax Stories treat seminal cases as meaningful and historical events that shaped our tax law hence they observe and interpret these events. The methodology of interpretative paradigm gives meaning-making practice of human actors at the centre of the defined study.⁹ Interpretative research shows how meaning-making human practice can be tailored to give observable outcomes, it achieves this through analysing those meaning-making practice.¹⁰

McKerchar states that based on subjective interpretation of the researcher, interpretative research provides understanding of social reality.¹¹ Denscombe also observes that interpretivist researcher is likely to not be nice, neat and complete but rather messy and open-ended.¹² This observation sits well with Tax Stories as their structure, organisation and best-end result depends on the creativity of the researcher.¹³ There is no authority or formula on how Tax Stories are told however the researcher should guard against misrepresenting the facts and the law.¹⁴ Glicken observes that in qualitative research, such as Tax Stories, inductive reasoning is

⁷ Stack, E.M. 2015. The “tax stories”. *Southern African Business Review Special Edition Tax Stories*, i-x at vi. See also McKerchar, M. 2008. Philosophical paradigms, inquiry strategies and knowledge claims: applying the principles of research design and conduct to taxation. *eJournal of Tax Research*, 6(1):5-22 at 17.

⁸ Bevir, M. and Kedar, A. 2008. Concept formation in political science: an anti-naturalist critique of qualitative methodology. *Perspective on Politics*, 6(3):503-517 at 511.

⁹ Institute of Public & International Affairs, The University of Utah. Not dated. *What is interpretive research?* [Online] Available from: <http://www.ipia.utah.edu/imps/html/research.html> [Accessed: 2017-06-02].

¹⁰ Institute of Public & International Affairs, The University of Utah, *supra* note 9.

¹¹ McKerchar, *supra* note 7, at 7.

¹² Denscombe, M. 2002. *Ground rules for good research: a ten-point guide for social researchers*. Buckingham: Open University Press at 21-22.

¹³ McKerchar, *supra* note 7, at 13.

¹⁴ Tax Stories in South African Business Review Special Edition can be used as a benchmark, however the different authors used unique approach in narrating their stories. It is also observed from the series that they are aspects which are important for every case like facts, issues in dispute, judgment and reasons for judgment which must be addressed in the Tax Story.

required and more creative and indirect means of collecting data and evidence should be employed.¹⁵

Research methodology is defined by Leedy and Ormrod as a general approach in carrying out research project.¹⁶ Tax Stories adopt methodologies of doctrinal research, historical research and case study.¹⁷ This study employs strategies from the three methods to develop a Tax Story. Employing these strategies, the case will be interpreted in narration incorporating the social, political and economic setting in order to achieve the objectives of the research as stated in chapter one.¹⁸

3.3 DOCTRINAL RESEARCH

Pearce, Campbell and Harding describe doctrinal research as traditional or 'black letter law' research.¹⁹ They further describe it as a systematic process of identifying, analysing, organising and synthesising statutes, judicial decisions and commentary.²⁰ Doctrinal research is focused on conducting intensive scholarly analysis and reading²¹ which involves analysis and manipulation of theoretical concepts.²² Formulation of legal doctrines through analysis of legal rules found in statutes and cases is at the heart of doctrinal legal research.²³ The purpose of the in-depth analysis used in doctrinal legal research is to deliberate on important aspects and have informed opinions.²⁴

In a doctrinal legal research, rules are placed in a logical and coherent structure, relationship between the rules is described and the ambiguities within the rules are

¹⁵ Glicken, M.D. 2003. *Social science: a simple guide*. Boston: Pearson Education at Chapter 6. See also Hutchinson, T. and Duncan, N. 2012. Defining and describing what we do: doctrinal legal research. *Deakin Law Review*, 17(1):83-119 at 105.

¹⁶ Leedy, P.D. and Ormrod, J.E. 2010. *Practical research planning and design*. Upper Saddle River, New Jersey: Person Education at 12.

¹⁷ Stack, *supra* note 7, at vi - vii.

¹⁸ The objectives of the study are discussed under 1.5 in chapter one.

¹⁹ Pearce, D., Campbell, E. and Harding, D. 1987. Australian law schools: a discipline assessment for the Commonwealth tertiary education commission. Canberra: *Australian Government Publishing Services* at 309.

²⁰ Pearce, Campbell and Harding, *supra* note 19, at 309. See also Hutchinson and Duncan, *supra* note 15 at 84.

²¹ McKerchar, *supra* note 7, at 19.

²² Chynoweth, P. 2008. Legal research. In Knight, A. and Ruddock, L. (eds.) *Advanced research methods in built environment*. Chichester, West Sussex, UK: Wiley-Blackwell at 29.

²³ Chynoweth, *supra* note 22, at 29. See also Hutchinson and Duncan, *supra* note 15 at 85.

²⁴ Chynoweth, *supra* note 22, at 32.

clarified.²⁵ The process of clarifying ambiguity in legal rules is made easy when legal rules are viewed in their proper historical or social context.²⁶ Doctrinal research focuses on the discovery and development of legal doctrine for publication in textbooks and journal articles.²⁷

Hutchinson and Duncan state that the doctrinal research is centred in analysing and reading of primary sources of legal doctrines.²⁸ McKerchar, on the other hand, has observed that there is a strong willingness in doctrinal researchers to not only be confined to the operation of the law but also understand philosophical, moral, economic and political assumptions underlying the research.²⁹ The researcher of Tax Stories should have this willingness observed by McKerchar. The process of synthesising the law in doctrinal research is a subjective process which requires extensive knowledge, specialised set of skills, detailed judgment, accuracy and depth thought.³⁰

Considering the above discussion, there is no doubt that the study of Tax Stories adopts the doctrinal research methodology. Tax Stories synthesise judicial decisions through their in-depth analysis of the case. The process involves intensive analysis and reading of the case to identify important facts and legal principles. The process also enfolds intensive analysis of political, economic and social setting of the time. Further, Tax Stories analyse the legal arguments of the parties involved, analyse the decision of the court and the reasons for the judgment. This process is indeed black letter law research.

3.4 HISTORICAL RESEARCH

Hutchison describe historical research as a search for truth considering the view and perspective of every actor and their role in the event through examination of conceivable data.³¹ Historical research is also defined as a systematic collection and

²⁵ Hutchinson and Duncan, *supra* note 15 at 101. See also Chynoweth, *supra* note 22, at 36.

²⁶ Chynoweth, *supra* note 22, at 30.

²⁷ Chynoweth, *supra* note 22, at 30.

²⁸ Hutchinson and Duncan, *supra* note 15, at 113.

²⁹ McKerchar, *supra* note 7, at 31.

³⁰ Hutchinson and Duncan, *supra* note 15, at 116.

³¹ Hutchinson, T. 2010. *Research and writing in law*. Australia: Thompson Reuters at 36.

evaluation of data to describe, explain and understand actions or events that occurred sometime in the past.³² Shams defines historical research as a process of critical inquiry into past events in order to produce an accurate description and interpretation of events.³³

Hacker defines historical research as developing an understanding of the past through examination and interpretation of evidence.³⁴ The evidence that is examined and interpreted can be in form of text, recorded data, pictures, maps and so on.³⁵ Tax Stories are confined to text evidence only. Tax Stories, to an extent, adopts historical research as they examine political, social and economic setting in relation to the case discussed. Tax Stories examine the characters and their role in the case as an event that had an impact in history.

Leedy and Ormord describe historical research as looking at random events and develop a rational explanation on the causes of these events and also draw inference on the effects on these events on individuals and society.³⁶ Tax Stories consider random events (political, social and economic circumstances) and develop a rational explanation of their influence on the case and discuss the impact and legacy the case had on our tax law. Tax Stories use only documented data and do not go to the extent of interviewing characters as a true historical research would do.³⁷

3.5 CASE STUDY METHOD

The case study research method is widely recognised in studies where an in-depth explanation of social behaviour is sought.³⁸ The case study method allows for exploration and understanding of complex issues through detailed contextual

³² The University of New Mexico. *Historical research*. [Online] Available from: www.unm.edu/~marley/methppt/fall06/day12.ppt [Downloaded: 2017-06-05] at 2.

³³ Shams, J.A. 2013. *Historical research*. [Online] Available from: <https://www.slideshare.net/MadamJahan/historical-research-17259546> [Accessed: 2017-06-05].

³⁴ Hacker, D. *Research and documentation online*. [Online] Available from: <http://www.dianahacker.com/resdoc/history.html> [Accessed :2017-06-05].

³⁵ Hacker, *supra* note 34.

³⁶ Leedy, and Ormrod, *supra* note 16, at 172.

³⁷ Stack, *supra* note 7, at vii.

³⁸ McKerchar, *supra* note 7, at 14. See also Zainal, Z. 2007. Case study as research method. *Jurnal Kemanusiaan* bil 9:1-6 at 1.

analysis of limited number of events and their relationship.³⁹ The case study method also closely examine data within a specific context.⁴⁰ Yin define the case study research method as an inquiry that investigates an event within real-life context using multiply sources of evidence.⁴¹

Babbie and Mouton describe the case study method as using multiple variables from multiple perspective to generate explanation about the single unit being intensively investigated.⁴² In the context of Tax Stories a 'single unit' is the judicial decision. Creswell observes that case study is bound by time and activity and hence the researcher's detailed information collection should be within the ambit of that boundary.⁴³

From the above it is clear that Tax Stories adopt the case study research method as they require the researcher to engage in an in-depth exploration and understanding of political, social and economic setting in relation to the facts and the decision of the tax case. The political, social and economic setting is limited to the tax year in which the tax dispute arose.

3.6 CONCLUSION

In conclusion, it is clear from the above discussion that Tax Stories are developed from the integration of three research methodologies being doctrinal research method, historical research method and the case study research method. All three research methodologies are tailored to fit within the interpretative research design.

The three research methodologies have important contribution in achieving both the primary and secondary objectives of Tax Stories. The doctrinal research

³⁹ Zainal, *supra* note 38, at 2.

⁴⁰ Zainal, *supra* note 38, at 1.

⁴¹ Yin, R.K. 1984. *Case study research: design and methods*. Beverly Hills, California: Sage Publication at 23.

⁴² Babbie and Mouton, *supra* note 3, at 156.

⁴³ Creswell, J. 2003. *Research design. Qualitative, quantitative and mixed methods approaches*, London: Sage Publication at 15.



methodology contributes by analysing legal rules found in statutes and case law.⁴⁴ The historical research method plays the role of explaining the events that occurred in the past.⁴⁵ The role of the case study method is to investigate events within real-life context using multiply sources of evidence.⁴⁶

The characteristics of the three research methodologies are important for the development of a Tax Story. The combination of these three methodologies in producing a Tax Story produces a credible secondary source of the tax case which is well researched in law and history. Further, this combination makes the reader understand the law and history as events that changed our life.

⁴⁴ Chynoweth, *supra* note 22, at 29. See also Hutchinson and Duncan, *supra* note 15, at 85.

⁴⁵ The University of New Mexico. *Historical research*. [Online] Available from: www.unm.edu/~marley/methppt/fall06/day12.ppt [Downloaded: 2017-06-05] at 2.

⁴⁶ Yin, *supra* note 41, at 23.



CHAPTER FOUR

4 THE STORY OF THE ‘PAY NOW, ARGUE LATER’ PRINCIPLE

4.1 INTRODUCTION

This chapter develops a Tax Story based on the judgment by Kriegler J in the matter of *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another (Metcash case)*.¹ The rationale behind choosing this case is that it a seminal tax case in post-democratic South Africa. This case was decided by the highest court in the land being the Constitutional Court and the principles entailed on it are authority. This also means that the lessons learned from the case have passed constitutional muster. Further to that, this case confirmed a tax principle which deviate from the general commercial litigation practice, the principle well known as ‘argue now, pay later’ principle. The confirmation of this principle is an event that had an impact on our tax administration.

The Tax Story will be developed employing the three methodologies and strategies discussed in chapter three.² In the Tax Story the facts of the case, issues in dispute, both decisions of the High Court and the Constitutional Court and reasons for the judgments will be narrated. The narration will be in perspective of the political, social and economic setting during the period the case arose.

The benchmark set by Tax Stories in the South African Business Review Special Edition Tax Stories 2015 will be closely observed. The narration of the story will be in the spirit to achieve the objectives of this study as set out in chapter one.³ The researcher will use creativity to ensure that the story remains factually and legally accurate and remains simple to understand. In doing so the researcher will achieve the objective of producing a credible secondary source of the *Metcash* case.

¹ 2001 (1) SA 1109 (CC).

² See 3.2, 3.3 and 3.4 in chapter three.

³ See 1.5 in chapter one.

4.2 THE STORY OF *METCASH* CASE

4.2.1 Introduction

South Africa is a constitutionally democratic country. This means that the Constitution of the Republic of South Africa, 1996 (the Constitution) “is the supreme law of the Republic; law or conduct inconsistent with it is invalid”.⁴ The *Metcash* case bears testimony to the fact that South Africa is a constitutional state. The *Metcash* case demonstrated how the court struck a balance between competing interests being the South African Revenue Service’s (SARS) paramount duty to efficiently and speedily collect and administer tax, on one hand, and taxpayers’ constitutional rights, on the other hand.

The constitutional provision alleged to be contravened in the *Metcash* case is section 34 of the Constitution. The provision provides that “everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where applicable, another independent and impartial tribunal or forum”. In line with this provision, a civil litigation principle exist which provides that an amount subject to litigation is not due and payable until the court pronouncement in a judgment.⁵ Also, the common law rule of judicial practice provides that noting of an appeal automatically suspends the execution of a judgment.⁶

The constitutional right to access to courts is in spirit of open democratic society based on values of human dignity, equality and freedom. In the *Metcash* case the constitutionality of section 36(1), section 40(2)(a) and section 40(5) (impugned provisions) of the Value-Added Tax Act⁷ (VAT Act) was challenged. These provisions empowered the Commissioner for the South African Revenue Service (the Commissioner) to use a summary procedure in effecting a civil judgment for a liquid debt and also collecting a tax debt notwithstanding noting an appeal by a

⁴ Section 2 of the Constitution of the Republic of South Africa, 1996.

⁵ The principle is based on the rational that property subject to litigation cannot be disposed until a competent court pronounces the judgement. If this rule is not abided to, courts would be of no effect. The court rulings and orders would not be practical but simply academic.

⁶ See also section 18 of the Superior Courts Act 10 of 2013.

⁷ 89 of 1991.



vendor.⁸ These powers of the Commissioner constituted what is well known as the ‘pay now, argue later’ principle.

4.2.2 The Story

4.2.2.1 The Characters

Metcash Trading Limited (Metcash) was a wholesaler and distributor of consumer goods and liquor retailer.⁹ During the financial year of April 1999 Metcash had about 162 outlets throughout the country employing about 8 500 employees having a turnover of approximately R6 billion.¹⁰ Metcash was a subsidiary wholly owned by Metro Cash and Carry (Metro) which had a turnover above R28 billion for April 1999 financial year.¹¹ Metcash went out of business in South Africa on July 2012.¹²

The Commissioner is an official capacity created by the South African Revenue Service Act¹³ (SARS Act). The Commissioner is appointed by the President of the Republic in terms of section 6 of SARS Act. During the *Metcash* case, the Commissioner was Mr Pravin Gordhan who later become the Minister of Finance in 2009 and again in 2015. The duties of the Commissioner, amongst others, are to control and give directions to SARS on the administration of tax Acts.¹⁴ These duties include collection of tax due in terms of the tax Acts for the National Revenue Fund. In exercising his duties, the Commissioner is bound by the Constitution.¹⁵

The High Court judgment was written by Snyders J (full name Suretta Snyders). Snyders J was appointed to the bench in 1997 as a Judge of the High Court in Johannesburg after being called to the Johannesburg Bar in 1984 and taking silk in

⁸ *Metcash*, *supra* note 1, at 1.

⁹ Company overview of Metcash Trading Africa (Pty) Ltd. [Online] Available from: <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=22867106> [Accessed: 2017-07-19].

¹⁰ *Metcash*, *supra* note 1, at 2.

¹¹ *Metcash*, *supra* note 1, at 2.

¹² Company overview of Metcash Trading Africa (Pty) Ltd, *supra* note 9.

¹³ 34 of 1997.

¹⁴ Section 3 of the Tax Administration Act 28 of 2011.

¹⁵ Section 8 of the Constitution of the Republic of South Africa, 1996. See also *First National Bank of SA Ltd t/a Wesbank v C: SARS 2002 (7) JTLR 250* at 252 the court held that “no matter how indispensable fiscus statutory provisions were for the economic well-being of the country, they were not immune to the discipline of the Constitution and had to conform with its normative standards”.



1996.¹⁶ She was later appointed as a Justice of the Supreme Court of Appeal in 2008.¹⁷ On her passing in 2014, the Chief Justice of the Republic of South Africa Mogoeng Mogoeng praised her for the fortitude she showed in the myriad challenges that woman judicial officers face as mothers, wives and jurists.¹⁸

The Constitutional Court unanimous judgement was written by Kriegler J (full names Johan Christian Kriegler). Kriegler J is the founding justice of the Constitutional Court, the position he held from 1994 until his retirement in 2003.¹⁹ Kriegler J headed the Independent Electoral Commission (IEC) during the transition period in 1994 which oversaw the first democratic elections of South Africa.²⁰ He was instrumental in establishing the permanent IEC which he chaired until 1999. Kriegler J is the well-established author having co-drafted the Judicial Code of Conduct and authored a book in criminal procedure.²¹ During the apartheid regime Kriegler J was an activist involved in establishing various human rights and public interest advocacy bodies.²²

His involvement includes transformation and training with Black Lawyers Association, chairing Lawyers for Human Rights and founding trustee of the Legal Resource Centre. Kriegler J's legal practice attracted prominent political figures like Eugene Terreblanche, Mangosuthu Buthelezi and Desmond Tutu, which he represented.²³ During his Constitutional Court justice interview Kriegler J described himself not only as a lawyer but also a 'political animal'.²⁴ During the interview, he also echoed a view that the Constitutional Court would have not achieved its ultimate

¹⁶ Office of the Chief Justice. 2014. *Media statement on the passing of Justice Suretta Snyders*. Press statement issued on Tuesday, 02 September 2014. [Online] Available from: http://www.judiciary.org.za/doc/Office-of-the-Chief-Justice_Media-Statement-on-the-passing-of-Justice-Suretta-Snyders.pdf [Accessed: 2017-10-11].

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Judges | Justice Johann Kriegler. [Online] Available from: <http://www.constitutionalcourt.org.za/site/judges/justicejohankriegler/index1.html> [Accessed: 2017-06-14].

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Judges | Interview. Interview with Justice Johann Christian Kriegler, Judge of the Appellate Division, 5 October 1994. [Online] Available from: <http://www.constitutionalcourt.org.za/site/judges/transcripts/johankriegler.html> [Accessed: 2017-06-14].

²⁴ Ibid.

purpose if it was not alert of political realities and seriously consider implications of its decisions in society.²⁵

4.2.2.2 Background of the case.

The dispute between Metcash and the Commissioner began in mid-1996. The Commissioner was not satisfied with VAT return declarations furnished by Metcash for VAT tax periods from July 1996 to June 1997. The Commissioner contended that certain goods were not sold and delivered during these periods and therefore no input tax should be claimed in relation to these transactions. The meetings and correspondence exchanged between the parties yielded to no positive results.

The Commissioner raised an assessment, additional tax, imposed penalties and interest on Metcash account. The Commissioner further informed Metcash that the total tax debt raised on the account was due to be paid on a specific date after disallowing the objection. The correspondence further informed Metcash that failure to make payment will result in the Commissioner taking steps to recover such tax debt due without any further notice to Metcash.

The Commissioner was relying on section 40(2)(a) of the VAT Act for the summary procedure to recover tax debt. This led to Metcash approaching the High Court on an urgent basis to interdict the Commissioner from invoking the summary procedure pending the appeal to Special Income Tax Court (Special Court). Snyders J of the High Court held that the impugned provisions were inconsistent with the fundamental right to access to court afforded to everyone by section 34 of the Constitution and hence invalid. The High Court then referred the order of constitutional invalidity to the Constitutional Court in terms of section 167(5) and 172(2) of the Constitution which provided that an order of constitutional invalidity by a High Court is of no force unless confirmed by the Constitutional Court.

4.2.2.3 Basic overview of VAT system

VAT system is a sophisticated, complex and complicated type of tax.²⁶ VAT is imposed at each step of manufacture and distribution of goods or services that are

²⁵ *Ibid.*

²⁶ *Metcash, supra* note 1, at 11.

supplied in the country in the course of business. It is calculated on the value of each successive step as goods move from hand to hand along the commercial production and distribution chain.²⁷ In terms of section 7 of the VAT Act it is calculated at the rate of 14 per cent on the value of supply concerned.

The VAT Act refers to participants in VAT system who are suppliers as ‘vendors’,²⁸ a term that is interchangeable with the term ‘taxpayer’. The VAT Act requires suppliers who meet the requirements to register with the Commissioner as vendors.²⁹ The VAT vendor determines the VAT liability by deducting VAT paid by the vendor during acquisition of supplies (input tax) from VAT received by the vendor when supplies were sold (output tax).³⁰ If the application of this formula results to a negative value, the vendor is at a refund position whilst if the value is positive, that amount is due to SARS by the vendor.

The VAT Act entrust the vendor with important and crucial duties and responsibilities. The duties important for the present discussion can be summarised as:

- a) Levying and calculating VAT for each supply made;³¹
- b) Keeping proper records for all transactions for almost five years;³²
- c) Correctly calculation of VAT liability for each VAT period;³³ and
- d) Submitting VAT returns timeously and making any payments due to SARS timeously.³⁴

The effect of these duties and responsibilities created by the VAT system is that they involuntarily make the vendor the collector of VAT on behalf of SARS.³⁵

²⁷ *Metcash*, *supra* note 1, at 13.

²⁸ ‘Vendor’ is defined in section 1 of the VAT Act.

²⁹ Section 23 of the VAT Act.

³⁰ Section 16 of the VAT Act.

³¹ Section 7 of the VAT Act.

³² Section 55 of the VAT Act.

³³ Section 16 of the VAT Act.

³⁴ Section 28 of the VAT Act.

³⁵ *Metcash*, *supra* note 1, at 17.

Unfortunately, it is not all vendors who perform these duties diligently and trustworthy as required by the VAT Act. Some vendors who are dishonest manipulate the VAT system and abuse the trust bestowed on them in terms of the VAT Act entrust them with. These vendors create bogus invoices and supplies in order to be in a refund position. In that way, they receive money not rightfully due to them from the state coffers.

Contemplating challenges the Commissioner will experience in combating the conduct of the dishonest vendors, the legislature empowered the Commissioner with essential weapons in the VAT Act. One of these weapons is the ability to independently issue an assessment if the Commissioner is not satisfied with the VAT return submitted by the vendor or if there is a failure to submit a VAT return.³⁶ The burden of proof that such issued assessment is incorrect rests with the vendor and not with the Commissioner.³⁷

In order to deter vendors from being involved in sinister conduct and also to punish dishonest vendors, above issuing an independent assessment the Commissioner is further empowered to impose a penalty, charge additional tax and impose interest on the outstanding tax debt.³⁸ The VAT Act further empowered the Commissioner with enforcement mechanisms in case of non-compliance by the vendor. These mechanisms include criminal sanctions and extensive powers of interrogation, entry, search and seizure. However, the *Metcash* case did not deal with any of these powers.

The *Metcash* case dealt with the mechanism aimed at enforcing payment in accordance with the assessment despite noting of an appeal. The challenged mechanism was entailed in section 36(1), section 40(2)(a) and section 40(5) of the VAT Act. Section 36(1) of the VAT Act provided that upon the Commissioner issuing an assessment, the vendor was obliged to pay the assessed tax notwithstanding the noting of an appeal. The principle effected by this provision is known as 'pay now, argue later' principle.

³⁶ Section 31 of the VAT Act.

³⁷ Section 37 of the VAT Act. The section has since been repealed and the applicable provision is section 102 of the Tax Administration Act 28 of 2011.

³⁸ Section 59 and 60 of the VAT Act. The sections have since been repealed and the applicable provisions are section 187 and 222 of the Tax Administration Act 28 of 2011.

Section 40(2)(a) of the VAT Act empowered the Commissioner to file a statement with the clerk or registrar of any competent court which had effect of an executable civil judgment for a liquid debt of the amount specified in the statement. Section 40(5) of the VAT Act placed the correctness of the statement filed in terms of section 40(2)(a) of the VAT Act beyond challenge. The procedure effected by section 40(2)(a) and section 40(5) of the VAT Act is referred to as 'summary procedure'. Metcash contended that these provisions unjustifiably limited taxpayer's right to access to courts as protected by section 34 of the Constitution.

4.2.2.4 The High Court judgment

In considering the impugned provisions, Snyders J of the High Court held that the obligation to pay remains intact and cannot be suspended by a court of law but only the Commissioner.³⁹ This meant, the judge held, that the court of law's powers to provide an aggrieved vendor with interlocutory relief was clearly excluded irrespective of the merits of the case.⁴⁰ The judge held that these powers of the Commissioner remained constitutional challengeable regardless of the fact that such decision can be reviewed.⁴¹ Snyders J then held that impugned provisions were inconsistent with provisions of section 34 of the Constitution as they excluded recourse to courts and the vendor suffers the course of execution outside auspice of judicial process.⁴²

In her judgement Snyders J heavily relied on the Constitutional Court matter of *Chief Lesapo v North West Agricultural Bank and Another*⁴³ (*Lesapo*) in concluding that impugned provisions were constitutional invalid. In the *Lesapo* case the Constitutional Court declared provisions in a Bophuthatswana statute, which permitted the bank to conduct sale in execution against its debtors without recourse to the courts, unconstitutional.⁴⁴ The High Court held that the statutory provisions under

³⁹ *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2000 (3) BCLR 318 (W) at 324.

⁴⁰ *Metcash*, *supra* note 39, at 327.

⁴¹ *Metcash*, *supra* note 39, at 327.

⁴² *Metcash*, *supra* note 39, at 326.

⁴³ 2000 (1) SA 409 (CC).

⁴⁴ *Lesapo*, *supra* note 43, at 34.

scrutiny in *Lesapo* were analogous to impugned provisions in *Metcash* case hence findings in *Lesapo* case were applicable.⁴⁵

Snyders J further held that no reliance could be place on the *Hindry v Nedcor Bank Ltd and Another*⁴⁶ (*Hindry*) case because it concerned different section of different Act under different circumstances.⁴⁷ In the *Hindry* case, a provision allowing the Commissioner a form of summary garnishment of the credit in a taxpayers' bank account was found to be justifiable under section 36 of the Constitution.⁴⁸ Snyders J further held that the pronouncement of constitutionality in *Hindry* was *obiter dicta* and hence had no binding effect on her.⁴⁹ She further held that the judge in *Hindry* had not had the benefit of studying the judgment in *Lesapo* case as it was delivered before the *Lesapo* judgement.⁵⁰

Snyders J also emphasised the finding in the *Lesapo* case where the court held that very powerful considerations would be required for a limitation of the right to access to courts to be reasonable and justifiable.⁵¹ The court further held that numerous other measures to discourage or prevent negative consequences advanced by the Commissioner were available.

These measures include higher penalty, higher interest or furnishing security. The availability of these measures rendered constitutional infringement not reasonable or justifiable.⁵² She further held that the 'pressing consideration of public interest' advanced by the Commissioner were dramatic and extensive as this argument did not show how the amount assessed in this particular case will affect the national budget as the facts advanced were too general.⁵³

⁴⁵ *Metcash*, *supra* note 39, at 325 - 326.

⁴⁶ [1999] JOL 4450 (W).

⁴⁷ *Metcash*, *supra* note 39, at 326.

⁴⁸ *Hindry*, *supra* note 46, at 57. The challenged provision in this case was section 99 of the Income Tax Act 58 of 1962.

⁴⁹ *Metcash*, *supra* note 39, at 329.

⁵⁰ *Metcash*, *supra* note 39, at 329.

⁵¹ *Metcash*, *supra* note 39, at 327. See also *Lesapo*, *supra* note 43, at 22.

⁵² *Metcash*, *supra* note 39, at 329.

⁵³ *Metcash*, *supra* note 39, at 328.

4.2.2.5 The Metcash and Commissioner's arguments

Metcash supported the confirmation of the High Court order of constitutional invalidity at the Constitutional Court. Metcash argued that under the impugned provisions the vendor was effectively compelled to pay assessed tax and can but hope to get money back later.⁵⁴ Metcash further contended that impugned provisions allowed the Commissioner to impose a punishment of criminal conduct without resort to the court in form of a double tax (additional tax).⁵⁵

It was further argued on behalf of Metcash that the impugned provisions were unduly harsh and more invasive of vendors' right than comparable foreign tax statute.⁵⁶ Metcash also argued that the impugned provisions were analogous to the one in the *Lesapo* case as they permitted self-help and ousted the recourse to courts.⁵⁷

Metcash submitted that less invasive ways of protecting national interest in ensuring speedy and dependable receipt of VAT were available.⁵⁸ These ways were suggested to be imposing high penalties, imposing high interest and furnishing security against disputed assessment. On these grounds Metcash argued that limitation by impugned provisions was not justifiable under section 36 of the Constitution and that the submission by the Commissioner that they are justifiable was illusory or inadequate.

On the other hand, the Commissioner opposed the confirmation of the order of Constitutional invalidity by the Constitutional Court. The Commissioner contended that the High Court erred in finding that impugned provisions infringed on section 34 of the Constitution. This contention was based on the argument that despite the 'pay now, argue later' principle, the VAT Act still afforded the vendor sufficient opportunities for hearing on the assessment.⁵⁹ These opportunities were filing an objection against the assessment, requesting the extension for payment time, approaching the court to set aside the decision of the Commissioner if he refuses to grant extension. The avenue to appeal the assessment at the Special Court was also available.

⁵⁴ *Metcash, supra* note 1, at 9.

⁵⁵ *Ibid.*

⁵⁶ *Metcash, supra* note 1, at 10.

⁵⁷ *Metcash, supra* note 1, at 9.

⁵⁸ *Metcash, supra* note 1, at 10.

⁵⁹ *Metcash, supra* note 1, at 8.

The Commissioner also argued that the VAT Department had limited human resource to administer sophisticated VAT system and unscrupulous vendors took advantage of this.⁶⁰ This was supported by the example that the Johannesburg revenue office, the largest in the country, only had 145 people in its audit section of which 40 per cent of them lacked tertiary qualifications and had to audit approximately 120 000 vendors. The Commissioner submitted that this was far below the international norm of 1 auditor to 200 vendors as they sat at 1 auditor to 827 vendors.

To support the proposition that general tax morality in the country was low and that there was high rate of tax evasion and fraud, the Commissioner presented the following statistics:⁶¹

- From 19 816 field audits conducted from March to September 1999 38,52 per cent of cases had irregularities and involved R638,3 million while fraud and evasion cases involved R650 million;
- For the fiscal year of 1996 to 1998 and April to July of 1999 fraud and evasion cases involved R1,45 billion.

Considering these grounds, the Commissioner argued that the impugned provisions should not be declared unconstitutional and invalid. However, in the alternative the Commissioner argued that even if there was an infringement, such limitation to a right in the Bill of Rights was permissible under section 36 of the Constitution. This argument was supported by the submission that a quick, reliable and predictable recovery of VAT was of vital national interest.⁶²

The Commissioner also argued that the principle held in the case of *Hindry* should stand. The principle concerned a fiscal provision which allowed the Commissioner a form of summary garnishment of the credit in a taxpayers' bank account.⁶³ In this

⁶⁰ *Metcash, supra* note 1, at 20.

⁶¹ *Metcash, supra* note 1, at 20.

⁶² *Metcash, supra* note 1, at 8.

⁶³ The relevant section in this case was section 99 of the Income Tax Act 58 of 1962.

case, the court found that this provision was justifiable under section 36 of the Constitution.⁶⁴

4.2.2.6 The Constitutional Court judgment

In his analysis of the High Court judgment and the facts before him, Kriegler J judgment dealt with the following issues which arose from the High Court judgment:⁶⁵

- a) The meaning of section 36(1), section 40(2)(a) and section 40(5) of the VAT Act;
- b) Whether the impugned provisions have the effect ascribed to them by the High Court;
- c) Whether the strictures expressed in the *Lesapo* case are applicable in relation to the impugned provisions;
- d) Whether the impugned provisions infringe the right to access to court as protected by section 34 of the Constitution;
- e) If the impugned provisions did infringe on section 34 of the Constitution, whether such infringement can be saved under section 36 of the Constitution.

Kriegler J approach to the matter was that for the proper analysis of section 36(1) of the VAT Act, the provision had to be read in context of Part V of the VAT Act.⁶⁶ Part V of the VAT Act dealt with objections and appeals. The decisions of the Commissioner are administrative in nature and subject to judicial review in terms of Promotion of Administrative Justice Act (PAJA).⁶⁷

The court held that the VAT Act created a tailor-made mechanism of dealing with complains against Commissioner's administrative decisions. This mechanism involved the process of noting an objection, noting an appeal, further appeal to the Special Court and further appeal to ordinary court of law. However, other avenues of

⁶⁴ *Hindry*, *supra* note 46, at 57.

⁶⁵ *Metcash*, *supra* note 1, at 30.

⁶⁶ *Metcash*, *supra* note 1, at 32.

⁶⁷ 3 of 2000.

relief were still available. It was held that the existence of the tailor-made mechanism did not exclude avenue of judicial review in the ordinary course.⁶⁸

Kriegler J held that section 36(1) of the VAT Act was not concern with an appeal against a judgment. However, the provision was concerned with a specialised procedure of dealing with revision of administrative decisions according to the statute.⁶⁹ Therefore, provision does not prohibit access to courts. The provision simply dealt with non-suspension of payment of assessed tax, levied penalty, levied interest and imposed additional tax charged by the Commissioner.⁷⁰

The suspension of payment was possible at the Commissioner's discretion.⁷¹ The exercising of such discretionary powers by the Commissioner constitute administrative action which is reviewable by a court of law.⁷² The legislature contemplated that there will be circumstances where a suspension should be granted depending on the facts of the case, however the Commissioner's decision remains reviewable under administrative law principles.⁷³

The provision of section 36 of the VAT Act does not expressly preclude an aggrieved vendor to resort to a court of law for whatever other relief that maybe appropriate in the circumstances.⁷⁴ The operation of the provision does not place any impediment in the way of an aggrieved vendor to appeal. However, the appeal process provided for under the VAT Act is heard by an independent and impartial specialist tribunal. Such hearings, at the Special Court are akin to the trial and accords with the rules of natural justice.⁷⁵ Therefore, the court held that the High Court erred in finding that provision excluded powers of the court of law to provide aggrieved vendor with interlocutory relief.⁷⁶ The court concluded that argument that section 36(1) of the

⁶⁸ *Metcash*, *supra* note 1, at 33.

⁶⁹ *Metcash*, *supra* note 1, at 33.

⁷⁰ *Metcash*, *supra* note 1, at 37.

⁷¹ This is based on the wording "unless the Commissioner so directs" used in section 36(1) of the VAT Act.

⁷² *Metcash*, *supra* note 1, at 39.

⁷³ *Metcash*, *supra* note 1, at 40. See also *Johannesburg Stock Exchange and Another v Witwatersrand Nigal Ltd and Another* 1988 (3) SA 132 (A) at 152.

⁷⁴ *Metcash*, *supra* note 1, at 43.

⁷⁵ *Metcash*, *supra* note 1, at 47. The court alluded that the presiding officer is a Judge who sits with an accountant and a representative of business community. Parties have right to legal representation, to adduce expert evidence, to cross examination and hence hearing at the Special Court accords to section 34 of the Constitution.

⁷⁶ *Metcash*, *supra* note 1, at 46.

VAT Act infringed constitutionally protected right to access to court could not be supported.⁷⁷

In a critical analysis of section 40(2)(a) of the Act, the court held that indeed the provision resulted to a normal judicial process not being observed to the latter.⁷⁸ In comparison with the challenged provision in the *Lesapo* case, the court held that the provisions were not analogous. The provision in *Lesapo* case constituted self-help which permitted for courts to be bypassed and gave the Land Bank discretion over conditions of sale.⁷⁹ The *Lesapo* case dealt with a debt that arose contractually which could be executed without following any judicial process.

On the other hand, section 40(2)(a) of the VAT Act did involve the courts as the certified statement had to be filled with the clerk or registrar of the competent court.⁸⁰ The provision simply excluded the pleading process but the execution process of the judgment will accord to the normal execution procedure in terms of the court rules.⁸¹ The provision does not authorise the Commissioner to usurp any judicial duty as was the position in *Lesapo* case.⁸² In essence, the provision of the VAT Act and that in *Lesapo* case are opposite. It is on these grounds that Kriegler J rejected the findings of the court *a quo* and held that the provision was not inconsistent with section 36 of the Constitution.

The last provision to be analysed was section 40(5) of the VAT Act. This provision limited the disputes that could be raised against the certified statement filed in terms of section 40(2)(a) of the VAT Act. This it achieved by prohibiting the vendor from challenging the correctness of such certified statement. The provision did not completely bar an aggrieved vendor from litigation by mere fact that the Commissioner have lodged section 40(2)(a) certificate but 'limits' possible grounds for challenging the lodge section 40(2)(a) certificate.⁸³

⁷⁷ *Metcash, supra* note 1, at 46.

⁷⁸ *Metcash, supra* note 1, at 49. The Commissioner need not to follow ordinary litigation process in a normal case where a creditor seeks to recover a debt.

⁷⁹ *Metcash, supra* note 1, at 50.

⁸⁰ *Metcash, supra* note 1, at 51.

⁸¹ *Metcash, supra* note 1, at 51.

⁸² *Metcash, supra* note 1, at 51.

⁸³ *Metcash, supra* note 1, at 53.

The limitation is narrowly focused to only prohibiting challenging of the correctness of any statement filed by the Commissioner in terms of section 40(2)(a) of the VAT Act. Other aspects of the lodged certificate remain challengeable.⁸⁴ Kriegler J held that such bar was reasonable as a specialised tribunal in the form of Special Court was established to specifically deal with correctness of such lodged statement.⁸⁵

The court then had to determine whether the limitation imposed by section 40(5) of the VAT Act was justifiable in terms of section 36 of the Constitution. The court held that the limitation was limited in its scope, it was temporary and was subject to a judicial review.⁸⁶ The court also looked at three features in its determination.

Firstly, it considered the public interest in obtaining full and speedily settlement of tax debt.⁸⁷ Secondly, it considered that the ‘pay now, argue later’ principle reduced frivolous objections and ensured that fiscus was not prejudice by the delay in finalising the dispute.⁸⁸ Thirdly, it also took into consideration that the fact that the ‘argue now, pay later’ principle was adopted in many open and democratic societies.⁸⁹ The court considered these grounds to arrive to the conclusion that section 40(5) of the VAT limitation was justifiable within meaning of section 36 of the Constitution.⁹⁰

4.2.2.7 Impact of political, social and economic circumstance on the case.

In the build up to the *Metcash* case, Metcash had been struggling with labour issues. Their litigation in the Labour Court involved an employee who was dismissed for misappropriating the stock and the Commissioner for Conciliation, Mediation and Arbitration (CCMA) ordered an award against Metcash.⁹¹ Misappropriation of stock is

⁸⁴ *Metcash*, *supra* note 1, at 54.

⁸⁵ *Metcash*, *supra* note 1, at 55.

⁸⁶ *Metcash*, *supra* note 1, at 60.

⁸⁷ *Metcash*, *supra* note 1, at 60.

⁸⁸ *Metcash*, *supra* note 1, at 60.

⁸⁹ *Metcash*, *supra* note 1, at 61.

⁹⁰ *Metcash*, *supra* note 1, at 62.

⁹¹ *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Another* (1998) 19 ILJ 1516 (LC).

equivalent to theft. Theft is a societal problem, especially on impoverish communities where people resort to criminal conduct for survival.⁹²

During the *Metcash* case, Metcash was also facing tough competition from its competitors in the wholesale industry. This led to protection of trademark litigation against one of its competitors, Rainbow Cash and Carry CC, of which Metcash won.⁹³ It is not healthy for any organisation to be in and out of courts as litigation is expensive.

Metcash was losing substantial amount of money from theft done by its employees. The lengthy litigation that followed after dismissal of the employee implicated in theft was also costly as the matter went from CCMA to Labour Court and referred back to the CCMA. It is clear that Metcash was facing challenges both in courts and in business. These challenges must have motivated the board of directors of Metcash to challenge the constitutionality of 'pay now, argue later' principle. This would help the business avoid cashflow short fall as the amount of R265 934 943.04⁹⁴ would have been retained in the business account if the court held in their favour.

The other societal issue that was before the court was considering the effect of the 'pay now, argue later' principle in a business sense. For a business, the effect of the principle would be placing business on a financial distress while it awaits finalisation of its appeal. This could result in the loss of jobs and business closing down. The court had to consider this effect as it was not ideal for a country having an unemployment rate of 25.4 per cent to lose more jobs.⁹⁵ Keeping more people working contributes positively to the fiscus.⁹⁶ It is unfortunate that this point was not persuasive enough for the court to find in favour of Metcash.

⁹² In *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Another* the employee implicated in theft was a Manager. This shows that the problem is so deep that even people in managerial position could risk losing their jobs due to theft.

⁹³ *Metcash Trading Ltd v Rainbow Cash and Carry CC* 2002 JDR 0100 (T).

⁹⁴ *Metcash*, *supra* note 1, at 3.

⁹⁵ South Africa unemployment: 1994 – 2015. [Online] Available from: <https://businesstech.co.za/news/general/77737/south-africa-unemployment-1994-2015/> [Accessed: 2017-09-21].

⁹⁶ If more people are working the tax base expands as such individuals contribute to the fiscus by paying taxes such as income tax and Pay-As-You-Earn and they also become active participants in the economy of the country.

The position of the Commissioner is a political appointment. It is common cause that the Commissioner would always want to perform his duties to the satisfactory of his political principal being the President of the Republic. The *Metcash* case arose during a crucial political period of implementation of economic growth policy politically referred to as '1996 Class Project'.⁹⁷ In order to achieve the political scores, it had to be shown that this policy was indeed progressive.

The Commissioner had an important role to play in achieving this political score. It was so because if high revenue was collected it would serve as proof that indeed the economy was growing under this policy. This political circumstance influenced the eagerness of the Commissioner to have the 'pay now, argue later' principle declared constitutional.

4.2.3 Conclusion

The impugned provisions do not oust the recourse to court of law as contended by *Metcash*. The provisions are a mechanism provided to the Commissioner to be able to collect tax efficiently. The limitation effected by the impugned provisions is temporary and subject to judicial review. The vendor whose rights have been materially and adversely affected by the Commissioner is at liberty to institute action against the Commissioner based on PAJA.

Section 40(5) of the VAT Act does limit aggrieved vendor's access to ordinary court but such limitation is justified under section 36 of the Constitution. It can be concluded that when the court had to conduct a balancing factor between taxpayer's rights protected in the Constitution against the national interest in effective collection of tax by SARS, the later outweighed the former.

4.3 CONCLUSION

The finding by the Constitutional Court that the impugned provisions passed constitutional muster because they did not unreasonable and unjustifiable infringed

⁹⁷ The policy known as '1996 Class Project' is a microeconomic policy framework called the Growth, Employment and Redistribution (GEAR) strategy.



the rights protected by the Constitution brought certainty to SARS. Mr Pravin Gordhan, the then SARS Commissioner, pointed out after the *Metcash* judgment that vigorous enforcement of compliance and payment methods have been a success in acting against individuals who did not pay their fair share of taxes.⁹⁸

The provisions of the VAT Act which were subject of the *Metcash* case have since been repealed. The ‘pay now, argue later’ principle is now governed by section 164 of the Tax Administration Act⁹⁹ (TAA) as from 1 October 2012. The wording used in the TAA is fairly similar to the repealed provision of the VAT Act. This means that the courts will still be bound by *Metcash* judgement unless it can be shown that the judgment is wrong.

However, it can be submitted that the legislature failed to make productive use of the opportunity to draft legislation that would achieve balance between SARS’s duty and a taxpayer’s rights to access to the courts.¹⁰⁰ Despite this failure, taxpayers have been able to successfully interdict SARS from collecting tax pending the review under the TAA provision.¹⁰¹ The effective remedy available to the taxpayer is the one many destitute taxpayers cannot afford, which is costly and time consuming litigation routine.¹⁰²

⁹⁸ SARS wants you to pay tax first and argue later. [Online] Available from: <http://www.sowetanlive.co.za/news/business-news/2011/03/15/sars-wants-you-to-pay-tax-first-and-argue-later> [Accessed: 2017-07-15].

⁹⁹ 28 of 2011.

¹⁰⁰ Keulder, C. 2013. “Pay now, argue later” rule – before and after the Tax Administration Act. *Potchefstroom Electronic Law Journal*, 16(4): 125-158 at 151.

¹⁰¹ Taxpayer victory as “pay now, argue later” principle successfully challenged. [Online] Available from: <https://www.ensafrica.com/news/taxpayer-victory-as-pay-now-argue-later-principle-successfully-challenged?Id=1959&STitle=tax%20newsflash> [Accessed: 2017-07-15].

¹⁰² Chaka, J.B.T. 2015. “Pay now, argue later rule in the South African tax law – a critical analysis”. Unpublished masters dissertation. Pietermaritzburg: University of KwaZulu-Natal at 58.



CHAPTER FIVE

5 CONCLUSION

5.1 INTRODUCTION

This chapter concludes the study on Tax Stories. It will conclude the study by commenting on the Tax Story developed on the study based on its achievements, its shortfalls, objectives of the study and reviews made by academics on Tax Stories as discussed in chapter one. This chapter will also discuss the hurdles incurred during the development of the Tax Story and make recommendations for the future study on Tax Stories in South Africa.

5.2 DEDUCTION

It is stated in chapter two that the study of Tax Stories is not a well-established field of research in South Africa. There is only one series of Tax Stories published in 2015 on Southern African Business Review Special Edition. Due to this limitation, the researcher had to rely on commentary and reviews made by academics in the United States of America as the study is well established there. However, the researcher followed methodology used by South African academics in developing the Tax Story in this study.

The primary objective of the study was to provide and develop a credible secondary source of teaching tax through a Tax Story which reflect on the historical background of a seminal tax case and show how political, social and economic setting influence our tax law in a narrative form which is fun to read and understand.¹ This means that the developed Tax Story would not be authority of law but however be of persuasive value. For the Tax Story to achieve this, the discussion in it must be found on credible legal basis.

¹ See 1.5.1 in chapter one.

Through Tax Stories a sound persuasive legal opinion is presented. The credibility of the legal opinion given through a Tax Story is an important aspect of the Tax Story. In this study, the Tax Story developed incorporated the critique by the researcher and other researchers on the subject matter of the case. This gives the researcher an opportunity to present a sound legal opinion on issues which the researcher is not in agreement with in the judgement. The persuasive value is an important aspect in the development of the law.

The Tax Story developed in this study accurately discussed the facts of the case, issues in dispute on the case and applicable law on the case. The Tax Story further discuss the application of the law to the facts, findings and reasons for findings from both the High Court and the Constitutional Court.² However, this discussion was not done in a traditional case analysis method as relevant issues and factors outside the written judgement were also discussed. These among others include the profile of the judge who wrote the unanimous judgement for the Constitutional Court, historical background of the entity which was a litigant against the Revenue Authority, the socio-economic and political setting in which the case arose. A discussion on how the political, social and economic circumstance influenced the case is also provided. Such comprehensive delivery of knowledge enables the reader to comprehend that tax law does not exist in isolation but a societal concept.

The developed Tax Story is relatively short as it covers only about fifteen pages. The ability to keep a Tax Story short is in line with the objective of the study of confining the important information into a short reader friendly material. The process of selecting which information must be entailed in a Tax Story requires good decision making from the researcher as vast amount of information must be reduced to a fine narrated story containing important information only.

Most Tax Stories discuss the judgment by the highest court which dealt with the case. This is not the case with the Tax Story developed in this study. The developed Tax Story discussed extensively both the High Court and the Constitutional Court judgements. This approach to Tax Story gives the reader the opportunity to understand archaeology behind the tax principle discussed in the case. The

² This method is based on FIRAC method.

understanding of the tax principled discussed is enhanced if the findings and reasons of the lower court are discussed than later the reasons as to why the upper court arrived at a different or the same conclusion, as the case may be.

The developed Tax Story further enables the reader, especially the reader with no legal background to easily understand the case without having to read both the High Court and the Constitutional Court's lengthy legal technical judgments. The developed Tax Story also adopted simply language, refraining from using unnecessary Latin maxims and legal jargon. This enhances the understanding of the Tax Story to the reader. Through the developed Tax Story, the objective of knowledge accessibility in an easily understandable language was achieved.

Tax Stories are based purely on documentary data available. The Tax Stories do not include empirical data that can be obtained through personal interviews or other empirical data collection methods. This posed a challenged to the researcher as there is limited data on Metcash as an entity and the judges involved in the case. The closing down of business by Metcash limited the ability of the researcher to profile the entity and obtain it historical background. Despite this challenge the researcher had to be extra careful not use sources which are not credible, fabricate or mispresent the facts to develop the Tax Story.

This study also shows that Tax Stories are not a purely academic exercise which have no impact in real life. They achieve this by having immense contribution on legal education and teaching. Firstly, Tax Stories enables the reader to understand that tax is a real life phenomenal which co-exist with other factors of social environment. They also promote access to basic information and understanding of highly technical judgement. Tax Stories do not only assist persons in legal fraternity but also assist also persons in other fields of profession which concerns tax, like accountants. Tax Stories are also an asset to lay mans who have interest in understanding tax.

The developed Tax Story was not without short falls. Firstly, the developed Tax Story is not purely a narration as what a normal story would be. There is less narration on the story and more discussion on the issues of law concerned. This is because the narration in the Tax Story is constrained to only factual historical circumstances, the

writer does not have liberty to go beyond that. Therefore, the narration depends on how rich are the factual historical circumstances of the case.

At the heart of the Tax Story is a discussion of tax law, reasoning of the presiding judge and reasons for judgements. These are the crucial aspects of the Tax Story as they concern the law and should be presented accurately hence it a challenge to narrate.

The developed Tax Story also had much emphasis on tax law than the broader political, social and economic conditions in which the case arose. This is because at the heart of the Tax Story the aim is to teach the reader about tax. This might raise a challenge on the researcher's side as the study must not derail from its main purpose whilst on the other hand, the Tax Story must be able to undermine the myth of tax autonomy.

Despite the challenges and short falls, the developed Tax Story had to overcome, the developed Tax Story was the first to discuss a case decided during the democracy era and also the first Tax Story to discuss the case that was decided by the Constitutional Court.

5.3 RECOMMENDATIONS

It is recommended that Stories should not be confined to the field of tax but be developed across all field of law. This will contribute positively in teaching and learning. This will be achieved as students will have better understanding of cases as human evolution events that they can relate to than reading to pass the examination. This will also expand research avenues of Stories in the jurisdiction of South Africa. This will further increase access information across fields of law while promoting the culture of reading.



Stories should also be incorporated into undergraduate law program at the universities as student's projects. This would assist law students in improving their writing skills, creative and critical thinking skills. This would also help law students to not only be confined to the doctrine when analysing a legal problem but also look at other factors which have an impact on the legal problem before them. Developing these skills at this level will assist them to be better prepared for legal practice.



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