TAX FAIRNESS: THE TEST APPLICABLE TO THE *CONTRA FISCUM* RULE

by

Theuns Jooste

29032972

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Supervisor: Professor H. Du Preez

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ABSTRACT

A SYSTEMATISED REVIEW OF THE LITERTUARE RELATED TO TAX FAIRNESS: THE TEST APPLICABLE TO THE *CONTRA FISCUM* RULE

By

Name and Surname: Theuns Jooste
Supervisor: Professor H. Du Preez
Department: Department Of Taxation
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BACKGROUND:

The *contra fiscum* rule is a presumption that statute law is not unjust, inequitable or unreasonable and applies to the interpretation of fiscal legislation. It seeks to prevent undue hardship on the part of a taxpayer where the provisions of a taxing statute are not clear. Courts have invoked the *contra fiscum* rule when there existed an ambiguity in a particular taxing provision and where there existed two reasonably possible interpretations. The consideration of 'ambiguity' *vis-a-vis* 'two reasonably possible interpretations' implies the use of two different tests when considering the *contra fiscum* rule.

MAIN PURPOSE OF STUDY:

The purpose of the study is to establish if there exists any support for the application of two different tests when invoking the *contra fiscum* rule by having regard to case law and academic works. Part of the purpose of this study is to establish whether the use of different tests might lead to different results and what the resulting impact might be on a taxpayer.

METHOD:

A systematised review of existing case law and academic papers on the topic of the *contra fiscum* rule was considered in seeking to ascertain whether courts have invoked both tests when dealing with taxation legislation specifically. The method of applying the two different tests were then specifically considered against the backdrop of the facts and judgment of the Supreme Court of Appeal in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018 where the minority considered the test of 'ambigiuty', in order to establish whether a different judgment might have followed.

FINDINGS:

Authority in the form of case law and academic articles exists, which is premised on the use of the tests of both 'ambiguous' and 'two reasonably possible interpretations' when applying the *contra fiscum* rule.

CONCLUSIONS:

Having applied the latter test to the minority judgment in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, it was concluded that a different result might have followed, being one that favoured the taxpayer.

Keywords: Contra fiscum, Fairness, ambigious, case law

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CHAPTER 1 - INTRODUCTION

1.1 BACKGROUND

Historically, Courts followed a restrictive or literal approach to the interpretation of taxation laws (Du Plessis, 2011, p. 334). Authority for this approach can be found in Commissioner for Inland Revenue v George Forest Timber Co Ltd, 1924, p. 531 in referring to Partington v The Attorney General, 1869 where the Court held that *"If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute"*.

The above *dicta* in Partington v The Attorney General, 1869 followed the strict or literal manner of interpretation, which necessitates interpretation, absent of ambiguity, by having regard only to the grammatical construction of a statute, regardless of the inconvenient or unjust result that may follow, which is derived from English law. This approach has been criticised by Dison SC, 1976, p. 161 whom is of the view that the rules of interpretation in South Africa are common-law rules and it is for this reason that he warned against applying the English rules of interpretation to taxing statues in South Africa, as no South African court has the jurisdiction to substitute its own common-law principles for that of another country (Trust Bank van Afrika v Eksteen, 1964, p. 402).

The result according to Dison SC, 1976, p. 161 is that the English rules of interpretation that all legislation, albeit taxing or not, necessitate the exact same approach, is not similar to the approach in South Africa. To illustrate the difference in approach to interpretation followed by English and South African courts, Dison SC, 1976, p. 162 looks at the case of CIR v Delfos, 1933 which, *inter alia,* dealt with the presumption against the double taxation principle applicable in South Africa. Such principle does not find application in English law as the following of the strict or literal approach to interpretation allows for the imposition of double taxation if the plain meaning of a statute provides therefore, as can be found in R v Canadian Eagle Oil Co Ltd, 1946, p. 139 where Viscount Simon LC said that "*In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There*

is no equity about a tax. There is no presumption as to a tax". Dison SC, 1976, p. 183 argues that the recognition of the presumption against double taxation principle in South African law is in effect an expression of the equitable principles of interpretation known as the *contra fiscum* rule.

To best describe what the *contra fiscum* rule is, reference should be made to Steyn, 1974 where he says that: "*Bepalings wat laste oplê. Hier kom veral belastingwette in aanmerking. By die uitleg van sulke wette geld die reël dat die uitleg wat teen die fiscus gaan, gevolg moet word ("Interpretatio contra fiscum adhibenda"), of soos dit uitgedruk word in Hollandsche Consultatien, 3(2), b.685, n 12: hy wat by twyfel teen die fiscus uitspraak gee, gee nie `n slegte uitspraak nie ("non male judicat, qui in dubio contra Fiscum judicat"). Die beswaarde onderdaan moet altyd die voordeel van die twyfel geniet. As sy geval nie binne die duidelike bepalings van die wet staan nie, gaan hy vry uit". "…As daar onsekerheid omtrent die bedoeling bestaan, moet die hier bedoelde vermoede ten gevolg hê dat die betrokke belasting nie gehef word nie".*

It will be noted that Steyn, 1974 specifically refers to *"Bepalings wat laste oplê. Hier kom veral belastingwette in aanmerking",* thereby attributing the *contra fiscum* rule to taxation legislation only.

The Appellate division in Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975 when departing from the restrictive approach to interpretation of legislation concluded that "*Apart from the rule that in the case of ambiguity a fiscal provision should be construed contra fiscum which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of ambiguity, be construed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation*". (Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975, p. 727).

Even though the Court in Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975 deviated from the restrictive approach and considered the *contra fiscum* rule, it went further to state that in effect the *contra fiscum* rule was similar to the common law *maxim* that applies to all legislation that imposes a burden on a subject and

which *maxim* was not limited to taxation laws. This approach; however, is contrary to that stated by Steyn, 1974.

In two very recent judgments by the Supreme Court of Appeal in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018 and (Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020 the approach regarding the consideration of 'ambiguity' in applying the *contra fiscum* rule was confirmed, subject to a further qualification in Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020 which will be dealt with in more detail hereunder.

Du Plessis, 2011, p. 333 furthermore confirms that the *contra fiscum* rule and the common law *maxim* serve as tertiary assumptions of the intention of the legislature dealing with issues regarding interpretation. In the Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, p. 490 matter it was argued that the *contra fiscum* rule should be invoked from the outset, and not only when the interpretation of a taxation statute falls victim to an '*irresoluble ambiguity'*, which is contrary to that stated by Du Plessis, 2011

The main issue for consideration regarding the *contra fiscum* rule can be found in certain Appellate division judgments which had regard to whether certain provisions where '*reasonably capable of two interpretations*' and not whether they admitted of '*ambiguity*' (Hulett & Sons Ltd v Resident Magistrate, Lower Tugela, 1912 ; Israelsohn v CIR, 1952 ; Sekretaris Van Binnelandse Inkomste v Raubenheimer, 1969 ; NST Ferrochrome (Pty) Ltd v Commissioner, Inland Revenue, 2000)

The aim of this paper is not to consider the departure from the restrictive approach to interpretation of legislation but to investigate the two different considerations regarding the *contra fiscum* rule being the presence of '*ambiguity*' on the one hand and whether a taxing provision '*is reasonably capable of two interpretations*' with the specific aim of establishing whether these 'tests' will lead to different interpretational results on the other hand.

1.2 RATIONALE FOR THE STUDY

The *contra fiscum* rule has its origin in the presumption that legislation is not unjust, unreasonable or inequitable and is paramount to protect individual hardship that may be imposed by legislation to which process individuals have no say or input (Du Plessis, 2011,

p. 334). The *contra fiscum* rule, applied, may save a taxpayer from extreme hardships insofar as payment of tax liability goes which the fiscus may not be entitled to. On the contrary, and which is considered in this paper, is whether the failure to apply the contra *fiscum* rule correctly may lead to a result which still causes undue hardships on the subject.

1.3 RESEARCH QUESTION AND OBJECTIVES

The research question is to identify whether the use of different tests in applying the *contra fiscum* rule might lead to different results. As the *contra fiscum* rule seeks to prevent undue hardship on the part of a taxpayer when issues arise regarding the interpretation of taxation laws, it becomes imperative to consider the test that should be invoked, as this might lead to the a tax liability on the part of the taxpayer which ought not to have been imposed.

The objectives guiding this study are:

- To assess the extent to which South African courts apply different tests when considering the *contra fiscum* rule;
- To assess whether there exists academic support for the existence of the different tests regarding the *contra fiscum* rule; and
- To establish whether the two different tests might lead to different results.

1.4 RESEARCH DESIGN AND METHODOLOGY

In this study, a qualitative and doctrinal research methodology is used incorporating a systematised literature review.

A literature review involves the examination of existing literature on a specific study and accepts that material included consist of some degree of permanence which has been subject to peer-review (Grant & Booth, 2009). A literature review methodology characterises a method of identifying relevant literature for possible inclusion in the study. Grant & Booth, 2009, p. 97 argue that there exist certain strengths and weaknesses in the literature review process. The most prominent strength being a process of consolidation

and avoidance of duplication of research; however, the study being subject to bias and falling victim to omissions of relevant materials is a conceived weakness.

A systematised literature review is a more focused and rigorous method of analysing literature on a specified subject. (Cronin, Ryan, Coughlan., 2008)

A doctrinal research methodology seeks to identify and address a problem which has not been addressed before in an attempt to make an original contribution (Kilbourn, 2006).

The present study seeks to consider the approach followed by courts in South Africa when dealing with the *contra fiscum* rule in order to identify the problem that surrounds the application of test of the *contra fiscum* rule.

Consideration will also be given to case law where the Courts failed to apply the *contra fiscum* rule under circumstances when it should have been applied in order to identify the underlying cause for such failure. In considering the relevant case law, consideration was also given to the views of various academics and practitioners on the subject. A pragmatic philosophical stance to the literature is utilised to assess and interpret the various views taken by the authors as well that of the Courts.

1.5 SUMMARY OF CHAPTERS

- Chapter 1 is aimed to provide the reader with a brief background regarding the *contra fiscum* rule in order to understand what contentions exist regarding the test around the invocation of the rule and to demonstrate why further investigation is necessary. The object of the research is also set out in this chapter in order to properly understand the impact and result that different tests regarding the rule may have on the tax payer.

- Chapter 2 deals with the methodology followed in gathering, collating and utilising the information gathered.

- Chapter 3 deals specifically with the various sources supporting and illustrating the different tests regarding the invocation of the *contra fiscum* rule and concludes with

the question of different outcomes dependant on the particular test that is invoked when applying the *contra fiscum* rule.

- Chapter 4 will focus on the findings made during the research and will set out the limitation of the study. The main aim of this chapter is to reach a conclusion based on the research and to recommend further areas of study.

CHAPTER 2: RESEARCH DESIGN AND METHODOLOGY

2.1 INTRODUCTION

Research entails the collection, analysis and interpretation of information to better understand a specific subject (Leedy & Omrod, 2015).

Before any research work is conducted, it is important to acquaint oneself with the different methodologies available to identify the specific methodology applicable to the relevant research being conducted and in turn to formulate the research design of the study (Hart, 1998).

In this chapter, an overview is provided on the different research methodologies and research design elements of the study. An explanation is further provided on the method used to obtain and assess the relevant resources. As the study is mainly concerned with the evolution and applicability of the *contra fiscum* rule in South Africa, most sources cited consist of case law and therefore, the study utilises a systematic and doctrinal review of the available literature on *contra fiscum*. Research is conducted by including keywords in the relevant databases. Annotations of the case law obtained are also used in order to assess the extent to which courts refer, apply and/or deviate from previous decisions. Annotations are further used as a vital tool to obtain the most recent decisions to track the most recent developments.

2.2 RESEARCH DESIGN

2.2.1 Philosophical stance

There exists broadly four different types of philosophical perspectives being positivism, realism, interpretivism and pragmatism.

Positivism or quantitative research, also referred to as the scientific method or logical positivism, is premised on research which is objective and independent, concluding that results are reliable and capable of replication (Bacon-Shone, 2016, p. 13 ; Pather & Remenyi, 2005). Techniques used in a positivistic approach include the quantification of

the subject matter and assessing its qualities using a numerical value-based method (Pather & Remenyi, 2005).

Realism is premised on the notion that nature, be it forces, objects, ideas or social structures, exist independent from human existence and that reliable knowledge can be gained by research (Pather & Remenyi, 2005).

Interpretivism, on the other hand, acknowledges the inherent bias or lack of absolute objectivity in the research and proposes the implementation of certain procedures to identify and control such bias (Pather & Remenyi, 2005). Interpretivism is not reliant upon numerical data or statistical analysis (Pather & Remenyi, 2005).

A pragmatic philosophical approach is used in this study, as the question of the applicability and development of the *contra fiscum* rule in South Africa is most relevant to tax practitioners and the judiciary when advising clients or making findings on the interpretation tax legislation which may be vague.

2.2.2 Nature of the study

A study can either be explanatory, descriptive or predictive.

A descriptive study uses observations of different situations as a form of collecting data. (Walliman, 2011) (Bacon-Shone, 2016, p. 17). Its primary focus is to establish and predict what will happen given the presence of similar circumstances or conditions (Walliman, 2011).

An explanatory study seeks to answer the questions as to why a particular phenomenon is observed in an attempt to identify the link between cause and effect. This form of study mainly uses quantitative data in the form of statistical data (Bacon-Shone, 2016, p. 17).

A predictive study seeks to create a model that can be used to identify possible future outcomes (Bacon-Shone, 2016, p. 17).

The nature of this study is descriptive. It seeks to establish a pattern between the authorities followed by a particular Court when dealing with the interpretation of taxation

legislation and the outcome of the judgment. Ultimately, it seeks to establish whether a particular approach followed by a Court would lead to a particular result. Once that has been established, the causal link between the test applied by a Court and the outcome of the judgment should become clear.

2.2.3 Reasoning methods

There exist three reasoning methods. The first being inductive reasoning, the second being deductive reasoning, and the third being a combination of inductive and deductive reasoning.

Deductive reasoning dictates a method of reasoning that accepts both the premise and the conclusion of a study. The research objective of the study should first be identified whereafter the definitions and assumptions applicable should be clarified. The researcher should then create a logical structure based on the definitions and assumptions to reach the research objective. This method of reasoning is used to move from a general premise to one which is more specific, as the logical structure used to reach the objective consists of the definitions and assumptions generally applicable (Zalaghi & Khazei, 2016, p. 24).

Inductive reasoning are the inverse of deductive reasoning. It implies the formulation of a general theory based on the observation of specific cases. It therefore moves from the specific to the general by generalizing findings observed in specific case studies (Zalaghi & Khazei, 2016, p. 24).

A third method called abductive reasoning exists, which incorporates both inductive and deductive reasoning. The method entails the use of inductive reasoning to formulate a general theory and to then test the general theory by using deductive reasoning.

This study uses an inductive method of reasoning, as specific case studies in the form of case law and existing literature on the application of the *contra fiscum* rule in the South African legal framework are used in order to formulate a general theory.

2.2.4 Time horizon

The time horizon elements of a study can either be longitudinal or cross-sectional.

Longitudinal studies are studies that consider various observations taken over an extended period, which is then analysed to identify the manner of change of the subject matter (Ployhart & Vanderberg, 2010).

A cross-sectional time horizon study is focused on information gathering on a specific time or for a short period and provides the reader with findings associated for that specific time. Even though cross-sectional time horizon studies are less time consuming than longitudinal time horizon studies, it is difficult to make causal inferences from the study's findings (Levin, 2006, p. 24 ; Ployhart & Vanderberg, 2010, p. 96).

This work follows a cross-sectional design in order to establish the scope of the *contra fiscum* rule and the test applicable in considering the rule at a specific time.

2.2.5 Unit of analysis

The development of a specific theory usually assumes a certain unit of analysis. The unit of analysis of a study represents the subjects that are being studied. Broadly, two different units of analysis exist, being on the individual level or the organisational level; however, a study can consist of any other unit of analysis under the specific broad category and is case specific (Hasan & Banna, 2010).

The unit of analysis on the organisational level is focused on studying the collective, for example a firm, organisation or government department, whereas the unit of studying on the individual level is focused on the individual being the scientist, the judge or the employee.

The unit of analysis of this study is on the individual level, as the question of the test applicable to the *contra fiscum* rule depends on the approach adopted by the court dealing with the interpretation of fiscal legislation.

2.2.6 Types of data

Data can take the form of being either quantitative or qualitative in nature, the first being numerical and directly measurable data, and the latter non-numerical recordable data. A study may utilise both qualitative and quantitative data (Bacon-Shone, 2016, p. 43).

One of the characteristics of quantitative data is its tendency to generalise by virtue of its use of primarily statistical probabilities, whilst qualitative data is more concerned with context and therefore findings tend to be more specific (Bacon-Shone, 2016, p. 43).

Qualitative data is used in this study, as its primary focus is on academic literature and case law.

2.2.7 Sources of data

Data gathered can either be from a primary or secondary source.

Primary data represents newly gathered information, whilst the use of secondary data represents data that were previously gathered. As data collection is not always repeatable and may be expensive to gather, the use of secondary data may present a vital tool for certain types of studies (Bacon-Shone, 2016, p. 42)

Only secondary sources of data are used in this study, as the main focus of analysis is existing publications by academics, practitioners, as well as reported judgments of the South African Courts.

2.3. RESEARCH METHODOLOGY

Methodology is a guide to the path followed in conducting the research and can be represented by various different methods of collecting and analysing data (Hart, 1998) in order to reach a specific conclusion (Walliman, 2011).

2.3.1. Methodological classification

The methodological classification of a study can either be qualitative or quantitative; however, some methodologies may be a mix between qualitative and quantitative.

A quantitative research methodology can be described as a methodology that seeks to answer a research problem by testing theories consisting of variables premised mainly on empirical research or numbers. Its analysis involves a statistical procedure which aims to establish the truth of a predictive generalisation (Sogunro, 2002, p. 3).

Qualitative research necessitates the extensive collection of data in the form of verbal or subjective analysis stretching over an extensive period (Sogunro, 2002, p. 4).

This study follows a qualitative methodology when considering case law over a certain period. It takes the views and opinions expressed by academics into consideration to establish whether different tests had been used by the courts over the years in approaching the *contra fiscum* rule to ultimately establish whether further research should be undertaken on the specific topic.

2.3.2. Systematised review of the literature

To 'review literature' can be described as the identification and analysis of information on more than one occasion. Gathering of information and filtering that which is relevant and discarding that which is of a lesser quality are common characteristics of a systematic review (Grant & Booth, 2009, p. 92).

Grant & Booth, 2009, p. 95 identify fourteen main review types being critical, literature, mapping, meta-analysis, meta-synthesis, mixed studies, overview, qualitative, rapid, scoping, state-of the art, systematic, systematised and umbrella reviews.

A systematic review is used in this research and can be described as the systematic gathering, evaluation and formulation of information on a specific topic. One of the main advantages of a systematised review system is that it attempts to incorporate all known knowledge on a specific topic. A perceived weakness of this type of study is that by focusing inherently on effectiveness, it has limited application and fails to assist in answering more complex research questions (Grant & Booth, 2009).

The predicament regarding the inconsistent application of the *contra fiscum* rule in the South African legal framework becomes evident. What should also be taken into

consideration is the binding effect of the *stare decisis* principle, which dictates that courts should stand or abide by cases already decided (Claassen, 2019).

A systematic review of the existing case law and other literature should offer guidance and provide answers as to the views of the majority of judges and academic writers on the application of the *contra fiscum* rule.

2.3.3. Data collection technique

The methodological approach should first be set before the required data collection technique can be identified (Hart, 1998). Data collection can be in the form of surveys, interviews, focus groups, observations, extractions and secondary data sources, although other forms of data collection also exist (Harrell & Bradley, 2009).

In this study, secondary data sources consisting of case law were sourced from Juta and LexisNexis online publications database and academic literature journals were sourced from HeinOnline and EBSCOhost databases.

Case law mentioning the *contra fiscum* rule were used, and even thought it might not have been the primary consideration in the relevant matter, it remains relevant in order to evaluate the stance and views taken by different courts in applying the *contra fiscum* rule.

2.3.3.1 Keywords

Keywords searched in Juta's online law publications, EBSCOhost and HeinOnline included "*contra fiscum*" and "*interpretation of fiscal legislation*". From case law sourced, consideration would then be given to the headnote provided in the judgment to assess the main issues relevant to the specific matter and to identify the relevant paragraphs that dealt with *contra fiscum* or the interpretation of fiscal legislation. Sources were limited to judgments of the Supreme Court of Appeal or the Constitutional Court, as inferior courts were bound to judgments of the superior courts by virtue of the *stare decisis* rule and therefore judgments of the high courts were disregarded.

2.3.3.2 Search criteria

Juta's online law publication database only contains reported judgments since 1947 and therefore reported judgments predating 1947 were obtained from the LexisNexis database, as it contains judgments from 1828.

Apart from reported judgments, textbooks by academics and journals published by two tax practitioners were considered in this review and excluded any other source of publication. This review is limited to literature in the field of law and sources were limited to South Africa.

2.3.3.3 Recording of selected academic articles

This section provides an overview as to the recording of the literature used.

In this work, the citation and bibliography function under the 'Referencing' tab incorporated into the Microsoft Word program was used, which provides for various referencing styles. In this work, the Harvard referencing style was used when citing literature in text and in the bibliography.

Once research was identified as being relevant to the topic at hand, the full citation would be inserted into the 'Manage Sources' sub function, which would then allow the user to keep full detailed records of the literature used throughout the research and writing process.

2.3.4. Quality assessment of the data

This section gives an overview as to the quality of the data used.

The Australian Business Dean Council (ABDC) consists of a panel of experts in the fields of, *inter alia,* taxation with the main aim of assessing the quality of journals. Journals

assessed by the ABDC panel are ranked in the following categories A*; A; B and C in ascending order of quality (Australian Business Deans Council, 2019).

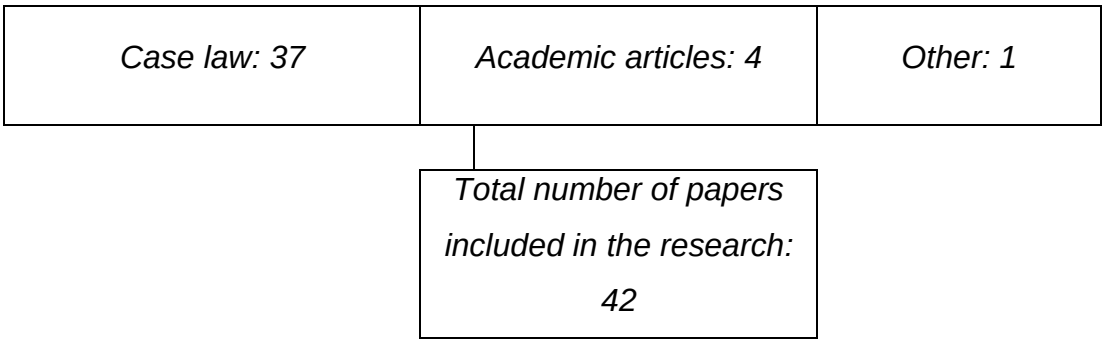
There is no similar review board on legal journals in South Africa, as legal journals are only peer reviewed (Carnelley, 2018). As the articles referred to in this work are of a legal nature, it cannot be categorised in any order of quality.

Furthermore, most data sources in this paper consist of judgments from the Supreme Court of Appeal, which are also not ranked according to quality.

2.3.5 Summarised overview of the data collection and quality assessment

In this section, a summary of the data used in this study is set out. As this paper consists mostly of case law, the quality thereof cannot be measured and assessed. The quality of academic literature referenced in this paper are also not capable of being measured for the reasons set out under Section 2.3.4.

Figure 1: summary of results



2.4 SUMMARY

The current study uses a systematised literature review incorporating aspects of a doctrinal methodology. To establish the tests used by the courts in applying the *contra*

fiscum rule, a systematised review of case law dealing with the interpretation of fiscal legislation is considered to establish inconsistencies when applying the rule.

Further consideration is given to the work of legal academics in order to ascertain if theoretical support exists for the approaches followed by the court when applying the *contra fiscum* rule.

CHAPTER 3: THE *CONTRA FISCUM* RULE

3.1 THE STATUS OF THE RULE AS AT 2020

The *contra fiscum* rule has proven to be somewhat problematic in the South African legal framework. Courts on various occasions ruled on the interpretation of fiscal legislation without having considered the rule, while others have went as far as to completely reject its applicability (Dison SC, 1976 ; CIR V Dundee Coal Co Ltd, 1923; CIR v Janke, 1930 ; CIR v Delfos, 1933).

In 1976, Dison SC, 1976, p. 159 extensively examined the *contra fiscum* rule to establish to what extent it was applied to fiscal legislation in practice, if at all.

In order to understand why the *contra fiscum* rule has been elusive regard must be had to CIR v Delfos, 1933. Delfos was employed by a company known as the South African Iron and Steel Industrial Corporation Limited from, *inter alia,* 1923 to 1929 receiving an annual salary of £3 000 and fees in the amount of £200. The company credited the full salary of Delfos during the years 1923 to 1929 in its books, however, short-paid it to Delfos as a result of the company's weak financial position. During the financial year ending June 1930, the company paid the total salary and fees shortfall of £9 900 to Delfos. The question was then posed whether the whole amount of £9 900 should be considered as forming part of the gross income of Delfos for the tax year ending June 1930 or whether the amount of £9 900 ought to form part of Delfos' taxable income for the previous years of assessment when he became entitled to his salary and when the amounts became due and payable by the South African Iron and Steel Industrial Corporation Limited.

The main issue in the appeal then revolved around the interpretation of the words "*received by*" or "*accrued to*" as they appear in the definition of "*gross income*" defined in Section 1 the Income Tax Act 40 of 1925. The court applied the restrictive approach as stated above when Wessels CJ held the view that a literal approach to the interpretation of the words "*received by*" should be followed, and relied on the English case of Partington v The Attorney General, 1869 stating that "…*as I understand the principal of all fiscal taxation it is this: If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown,*

seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be".
The Appellate division followed the approach laid down in Cape Brandy Syndicate v IRC, 1921 and R v Canadian Eagle Oil Co Ltd, 1946 when having held that "*In a Taxing Act one has to look merely to what is clearly said. There is no equity about the tax. There is no presumption as to the tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used*". The phrase quoted, according to Dison SC, 1976, is indicative of the fact that the Court failed to appreciate the applicability of the *contra fiscum* rule due to the fact that the Court used the literal approach to interpretation, which was specifically rejected in the South African approach to interpretation (Jaga v Dõnges NO, 1950, p. 664 ; Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd, 1962, p. 476) and which approach Dison SC, 1976 concluded did not form part of the South African common law.

Wessels CJ; however, formulated a view that a court, when dealing with a definition such as "*gross-income*" which forms the basis of the Income Tax Act 40 of 1925, may only deviate from the literal approach in exceptional circumstance. Dison SC, 1976, p. 173 is also critical of this view as it attempts to create a hierarchy regarding certain provisions in the Income Tax Act 40 of 1925 for which he concludes no support will be found.

Stratford JA, dissenting from the majority, followed a different approach in the interpretation of the definition of "*gross income*", which was that a qualified meaning should be given to the words "*received by*" in order to only include such income that was received by Delfos for the particular year of assessment. Stratford JA's view was in line with the true purpose of the Income Tax Act, which is to tax a person on his true income received for a particular tax year. This approach to qualify the words "*received by"* may be considered to be in line with the restrictive approach laid down in Partington v The Attorney General, 1869.

The result of Stratford JA's view was that the £9 900 did not form part of his true income received during the tax year ending 1930 and that the unpaid salaries "*accrued to"* Delfos during the preceding tax years as they became due and payable by the company (CIR v Delfos, 1933, p. 262).

Dison SC, 1976, p. 172 regards CIR v Delfos, 1933 as a case rejecting the *contra fiscum,* rule as it was not even considered by the Court.

An interesting point that should be mentioned in the Delfos matter is when Stratford AJ said *"that the words are capable of the construction I give them, I cannot doubt"* which should have led the minority to invoke the *contra fiscum* rule, as this would atomically lead to the conclusion that the statutory provision was 'ambiguous' or 'reasonably capable of two different constructions'.

In a more recent judgment by the Supreme Court of Appeal in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, the *contra fiscum* rule again proved to be elusive as the majority giving judgement on the interpretation of specific tariff headings, as they appear in the Customs and Excise Act 91 of 1964, conceded that both the interpretation advanced on behalf of the Commissioner as well as the taxpayer were reasonable (Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, p. 6). However, no mention nor consideration was given to the *contra fiscum* rule and consequently the Court dismissed the interpretation advanced by the taxpayer by having regard only to what interpretation was most 'businesslike', which consideration is consonant with the general principles regarding interpretation of documents, including legislation as restated in Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012, which has become the *locus classicus* on interpretation. It might be prudent at this stage to consider the failure by the Court in Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012 to draw a distinction between fiscal legislation and other legislation, which might solely be attributed to the fact that the Court did not consider the presumptions applicable to the interpretation of statutes, which serves as source of assumptions aimed at assisting the Court when uncertainty exists as to the true intention of the legislature, and from which presumptions both the *contra fiscum* rule and the common law maxim find its origins (Du Plessis, 2011, p. 334)

Be that as it may, it was for the minority in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, p. 18 to raise the question of the applicability of the *contra fiscum* rule which, it held would "*absent unambiguous language…be decisive in favour of the taxpayer in cases of doubt*".

A case that followed on Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018 was that of Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020 in which the legal representatives were

specifically requested by the Supreme Court of Appeal to deal with the application of the *contra fiscum* rule.

The Court concluded that the *contra fiscum* rule in fact still applied in South Africa, authority for which can be found in the words *"Counsel for Telkom submitted that the contra fiscum rule should be applied at the outset, as part of the interpretive technique to be utilised in establishing the meaning of words contained in a fiscal statue. I, however, agree with the submission by counsel for the Commissioner, that the rule should only be invoked after an interpretational analysis results in an 'irresoluble ambiguity' as to the meaning of the particular provision in the fiscal statute"* (Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, p. 490). The Supreme Court of Appeal concluded that "*As there is no ambiguity in the interpretation of the section, the contra fiscum rule is not applicable*" (Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, p. 497).

The approach in Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020 is somewhat consonant with that in Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975, p. 727 where the Appellate division did mention the *contra fiscum* rule; however, found that the wording of the particular section was clear and therefore did not invoke it.

The step-by-step enquiry, which seeks to first ascertain if the wording of a particular provision is clear, and if not, then only to invoke the *contra fiscum* rule is according to Dison SC, 1976, p. 177 incorrect, whom submits that the applicability of the *contra fiscum* rule cannot be ignored by merely reaching the conclusion that the wording of the statute is clear. Dison SC, 1976, p. 177 specifically states that the correct approach to the *contra fiscum* rule is that a court ought to establish first *"whether a taxing statute is reasonably capable of more than one interpretation"*, and if so, the interpretation that favours the taxpayer should be followed.

What becomes clear from the above is that it has been authoritatively stated that the *contra fiscum* rule does apply in South Africa; however, it seems that certain issues remain regarding its application.

To complicate matters further it should be considered that the use of the words '*irresoluble ambiguity'* stated in Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, p. 490, might impose a test higher than that associated with existing case law dealing with the *contra fiscum* rule, which might raise issues of its own.

This paper will not deal with the question whether the approach to the application of the *contra fiscum* rule should occur on a step-by-step analysis as stated in Commission for Inland Revenue v Delfos , 1933 and Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020 but rather to consider the tests of *'ambiguity'* or whether a particular fiscal provision is '*reasonably capable of two different interpretations'* and whether such different tests might lead to different outcomes.

3.2 THE TEST OF THE *CONTRA FISCUM* RULE

3.2.1 Introduction

In Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975, p. 727, the Appellate division of South Africa found that;

"Apart from the rule in the case of ambiguity a fiscal provision should be construed contra-fiscum (Estate Reynolds & Others v CIR, 1937) *which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of an ambiguity, be constructed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation. Indeed I do not think that the rule as stated in the* (Cape Brandy Syndicate v IRC, 1921) *supra, is any different from that applicable in the interpretation of all legislation. However that may be, it is clear from the remarks of Wessels CJ in Delfos case, supra, that even in the interpretation of fiscal legislation the true intention of the Legislature is of paramount importance, and, I should say decisive".*

The Court in Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975 found that fiscal legislation, like all other legislation, should be construed in favour of the subject only when ambiguity was present in the interpretation of a statutory

provision. This approach seems to indicate that the test applicable to fiscal legislation and all other legislation is synonymous.

The common law *maxim* referred to by the Appellate division is known as *semper in dubiis benigniora praeferenda sunt ("in cases of doubt the most beneficial interpretation is to be preferred"* (Moosa, 2018, p. 5).

Consequently, the Appellate division came to the conclusion that the *contra fiscum* rule and the common law maxim necessitate the same test, ergo the presence of ambiguity, when dealing with interpretational issues regarding statutes that impose burdens on a subject.

It follows then that when dealing with the interpretation of fiscal statutes or other statutes that impose a burden on a subject, regardless which approach a Court adopts, be it the test laid down in the common law *maxim* or the *contra fiscum* rule as described by Steyn, 1974, the result ought to be the same as the enquire will always be one as to 'ambiguity'.

Du Plessis, 2011, p. 334 states that "*historically a restrictive approach to legislation gave rise to the interpretation contra fiscum when dealing with taxing statutes"* and that "*the interpretation that favours the taxpayer should be used only when the language used in a statute is ambiguous*", that it to say when unambiguous language is absent. The test then is to ascertain whether a particular provision is ambiguous, and if so, to interpret the provisions against the fiscus. This method of interpretation is applicable to onerous provisions imposing burdens which is premised on the presumption that statute law is just, equitable and reasonable (Du Plessis, 2011, p. 334).

On the other hand and as a different form of the presumption that statute law is not unjust, inequitable or unreasonable, Du Plessis, 2011, p. 334 refers to the common law *maxim* of *semper in dubiis benigniora praeferenda sunt* ("*in cases of doubt the most beneficial interpretation is to be preferred*") which "*falls to be invoked when a provision is reasonably capable of more than one meaning*".

Du Plessis, 2011 does not mention that the *maxim* is applicable to the interpretation of fiscal legislation; however, states that it can sustain other applications of the presumption that statute law is just, equitable and reasonable and has also been invoked as a relatively independent canon of construction (Du Plessis, 2011, p. 334).

According to Du Plessis, 2011 the *maxim* approach has on occasions even been invoked when *"there existed something less than ambiguity in the relevant statute, for instance vagueness, obscurity or elasticity of language"*. (Du Plessis, 2011, p. 338).

Du Plessis, 2011 seems to indicate that there exists a difference between the common law *maxim* and the *contra fiscum* rule which, is contrary to the judgment in Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975.

It must also be borne in mind that even though interpretation *contra fiscum* is referred to as a rule, it however does not constitute a rule of law but are considered a rule of approach Dison SC, 1976. It is for this reason Dison SC, 1976, p. 168 states that it is not important as to how interpretation *contra fiscum* is classified as it is only the result thereof that matters.

This research examines whether there exists any support in theory or in practice for the existence of two different tests being *'ambiguity'* and *'two reasonably possible interpretations'* regarding the interpretation of fiscal legislation, and if so, whether it may lead to different results.

3.2.2 Ambiguity: in theory

As already stated above, Du Plessis, 2011, p. 334 and Steyn, 1974 are of the view that the *contra fiscum* rule falls to be invoked when a taxing statute is '*ambiguous'*.

It is necessary to requote Steyn, 1974 where he says that: "*Bepalings wat laste oplê. Hier kom veral belastingwette in aanmerking. By die uitleg van sulke wette geld die reël dat die uitleg wat teen die fiscus gaan, gevolg moet word ("Interpretatio contra fiscum adhibenda"), of soos dit uitgedruk word in Hollandsche Consultatien, 3(2), b.685, n 12: hy wat by twyfel teen die fiscus uitspraak gee, gee nie `n slegte uitspraak nie ("non male judicat, qui in dubio contra Fiscum judicat"). Die beswaarde onderdaan moet altyd die voordeel van die twyfel geniet. As sy geval nie binne die duidelike bepalings van die wet staan nie, gaan hy vry uit". "…As daar onsekerheid omtrent die bedoeling bestaan, moet die hier bedoelde vermoede ten gevolg hê dat die betrokke belasting nie gehef word nie".*

Dison SC, 1976, p. 159 relies on the above as authority for the proper approach to the *contra fiscum* rule and rephrases his understanding of what is stated by Steyn, 1974 as "*The rule falls to be applied whenever a provision in a taxing statute is reasonably capable of two different interpretations*", even though the use of the words "*voordeel van die twyfel*" and "*sy geval nie binne die duidelike bepalings van die wet staan nie*" as stated by Steyn, 1974 all seem to point to the consideration of ambiguity.

It should; however, also be considered that Dison SC, 1976, in his paper, did not specifically deal with the applicable tests regarding the *contra fiscum* rule, but dealt more with the existence of the *contra fiscum* rule in the South Africa legal context.

3.2.3 Ambiguity: in practice

This chapter will focus on case law where the Court approached the *contra fiscum* rule by adopting the test of ambiguity.

In Hulett & Sons Ltd v Resident Magistrate, Lower Tugela, 1912 the Appellate division considered Section 107 of the Natal Act 25 of 1891 that required that certain labour agreements had to be signed in the presence of a Magistrate. Section 107 made provision for a standard form to be completed, which would then serve as the required certificate. The form of certificate furthermore provided that parties both sign in the presence of a magistrate who must then attest that according to its judgment, the parties understand the contents of their agreement, which then require the relevant Magistrate's signature.

Schedule 2, item 11 of the Stamp Duties and Fees Act 30 of 1911 imposed a certain taxation on every '*certificate'* by any person in a public or official capacity of '*any act or thing having been done or performed*', or of any document or copy of any document. Item 3 of the same schedule; however, exempted certain agreements from stamp duty, being *'agreements for the hire of any domestic servant, labourer, or seaman'.*

In this particular matter, the appellant appeared before the Magistrate in order to conclude a labour agreement. The Magistrate, acting on instruction of the receiver of revenue, refused to sign the labour agreement and consequently refused to certify same in terms of Section 107 until the necessary stamp duty had been paid. Based on the Magistrate's refusal, the appellant applied for an order compelling or directing the Magistrate to execute

and sign the necessary labour agreements.

The main issue in the appeal was whether the attestation by the magistrate amounted to a '*certificate*' within the meaning of schedule 2, item 11, and therefore attracted the necessary stamp duties. It was conceded on behalf of the Magistrate that the declaration confirming that the parties signed in its presence and that they understood the contents of their agreement, did not amount to a *'certificate'* within the meaning of schedule 2, item 11, but amounted to more than the mere attestation of the signatures of the contracting parties, as in the case of a witness.

The court was also of the view that it was not clear from the provisions of the Stamp Duties Act 30 of 1911 that the attestation by the Magistrate qualified as a '*certificate*' within the meaning of schedule 2, item 11 and therefore it could not be the intention of the legislature to have imposed stamp duty in such cases.

The court concluded that as the certificate was required in terms of Section 107 in order for the agreement between the contracting parties to be valid, the certificate formed an inseparable part of the exempted agreement and therefore was not subject to stamp duties as it ought to be specifically exempted.

Innes ACJ further stated that; "*The question is not free from doubt; but in a taxing statute the proper course is, in cases of doubtful construction, to give the benefit of the doubt to the person sought to be charged*". Innes ACJ continued to state that "*It is upon this point that I feel constrained to differ from the conclusion of the majority of the Provincial Division*" (Hulett & Sons Ltd v Resident Magistrate, Lower Tugela, 1912, p. 764).

Laurence J in concurring with Innes ACJ held that "*when the Crown seeks to impose a burden on the subject, the express sanction of the Legislature, framed in unambiguous terms, requires to be proved; where the language is not free from ambiguity, and the intention, reading the relevant provisions as a whole, seems at least doubtful, the Crown is not entitled to succeed"*. The appeal accordingly succeeded. (Hulett & Sons Ltd v Resident Magistrate, Lower Tugela, 1912, p. 768)

The use of the words "*in cases of doubtful construction*" by Innes ACJ and the approach of Laurence J seem to emphasise that the enquiry is one into whether the relevant act is

'ambiguous'.

In Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975, the court was tasked with the interpretation of Section 103(2) of the Income Tax Act 58 of 1962, which contained the statutory anti-avoidance measures. The relevant section read that "*whenever the secretary is satisfied that any agreement or any change in the shareholding in the company as a direct or indirect result of which income has been received by or has accrued to that company during any year of assessment, has at any time before or after the commencement of the income tax act, been entered into or effected by any person solely or mainly for the purpose of utilising any assessed loss or any balance of assessed loss incurred by the company, in order to avoid liability on the part of that company or any other person for the payment of any tax, duty or levy on income, or to reduce the amount thereof, the set of any such assessed loss or balance of assessed loss against any such income shall be disallowed*".

The facts in this matter are briefly the following: The appellant ("Glen Anil Developments Limited") was a wholly owned subsidiary of Trico Holdings ("Trico"), which was in turn a wholly owned subsidiary of USM of which two shares in USM were hold by a company known as Charter Shipping Corporation Limited ("Charter"). The appellant had an assess loss in the tax year ending 30 June 1966 of R622 947 and a deficit on profit and loss account for undistributed profit tax of R664 166

On 16 March 1966, a certain Dr Rubenstein purchased, *inter alia*, two of the shares held in Charter on behalf of his three major children, were not active parties in the negotiations or the conclusion of the agreement.

The written agreement furthermore provided that the share capital in USM would be increased from R2 to R3 in order to put all the children of Dr Rubenstein on equal footing. The written agreement furthermore provided that Dr Rubenstein would become a director of USM. The assessed loss was incurred at a time when the appellant carried on the business of a distributing company. After the agreement on 16 March 1966, Dr Rubenstein, being a town developer, utilised the appellant for such business purposes. During the year of assessment ending 30 June 1966, the appellant derived an income of R222 895.00, which the appellant then sought to set off against the assessed loss incurred prior to 1965. The secretary refused such set-off on its interpretation of Section Income Tax Act 58 of 1962.

On behalf of the Appellant it was contended that Section 103(2) of the Income Tax Act 58 of 1962, when referring to "*as a direct or indirect result of which income has been received or accrued to that company*" referred to the company in which there has been a change in the shareholding, which could only be applicable to Charter and not the appellant company and consequently Section 103(2) did not apply. The court then considered the predecessor to Section 103(2) being Section 90(1)(b) of the 1941 Income Tax Act. The material difference being contained in the words "*Income has been received or has accrued…to any company*".

That the income which the appellant received from his township development business during 1966 had been received or accrued by it as a direct or indirect result of the agreement of 10 March 1966 was common cause between the parties.

The substitution of the words "*that company*" for the words "*any company*", as it was contended by counsel on behalf of the Appellant, indicated a different application as that contained in Section 103(2) Income Tax Act 58 of 1962. The court then referred to the matter of Cape Brandy Syndicate v IRC, 1921 ; Commissioner For Inland Revenue v Simpson, 1949) and to Commissioner for Inland Revenue v George Forest Timber Co Ltd, 1924 which followed the literal interpretation and provided that: "*If a person sought to be taxed, comes within the letter of the law he must be taxed. However great the hardship may appear to the judicial mind to be. On the other hand if the crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute but he can simply adhere to the words of the statute*." This approach, which will be remembered, has its origins in English law which Dison SC, 1976 expressly stated does not find application in the South African approach to interpretation.

However, the Court went on to state that "*Apart from the rule that in the case of ambiguity a fiscal provision should be construed contra fiscum* (Estate Reynolds & Others v CIR, 1937) *which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of ambiguity, be construed in favour of the subject*".

The above *dictum* seems to indicate that the approach to fiscal legislation, in cases of doubt, being legislation imposing burdens, should not be differentiated with other legislation, in this

case the common law *maxim*. It is clear that the court was aware of the *contra fiscum* rule; however, it was of the view that it only fell to be invoked when an ambiguity existed, which is contrary to the approach followed in, *inter alia,* Hulett & Sons Ltd v Resident Magistrate, Lower Tugela, 1912 ; Estate Reynolds & Others v CIR, 1937 ; Sekretaris Van Binnelandse Inkomste v Raubenheimer, 1969.

It is interesting to note that the Court's conclusion that there is no difference between the *contra fiscum* rule and the common law *maxim*, by implication, found that the test of 'ambiguity' applied both to the *contra fiscum* rule and the common law *maxim,* which is contrary to the views stated by Du Plessis, 2011.

It must be mentioned that the Court proceeded further to state that the *contra fiscum* rule does not apply to every provision in a taxing statute with specific reference to the anti-avoidance measures contained in Section 103(2) Income Tax Act 58 of 1962 and which formed the premise of the appeal before the Court, but rather that the section be interpreted "*in such a way that will advance the remedy provided by the section and supress the mischief against which the section is directed.*" This approach is also not accepted by Dison SC, 1976, p. 179 as the correct approach, as he is of the view that the *contra fiscum* rules apply to all provisions of a fiscal statute including the anti-avoidance measures, support of which can also be found in CIR V Dundee Coal Co Ltd, 1923 ; CIR v King, 1947

The court then found in favour of the secretary for Inland Revenue insofar as the *contra fiscum* rule did not apply to the anti-avoidance measures contained in Section 103(2) of the Income Tax Act 58 of 1962.

Another matter evidencing the test of *'ambiguity*' is that of Secretary for Inland Revenue v Kirsch, 1978 in which the Court had to consider whether a gain of R12 400.00 resulting from allotment of 5 000 shares in a South African company should have been included in the taxpayers taxable income under the provisions of Section 8A of the Income Tax Act 58 of 1962. Section 8A of the Income Tax Act 58 of 1962 provided that "*there shall be included in the taxpayers income any gain made by the tax payer, by the exercise, cession or release during such year of any right to acquire any marketable security, if such a right was obtained by the tax payer as a director or former director of any company or in respect of services rendered or to be rendered by him as an employee to an employer"*.

The respondent opposed the contention that the allotment of the shares should form part of his taxable income on the basis that Section 8A of the Income Tax Act 58 of 1962 only applied to share option schemes and because the respondent obtained the shares by way of purchase and not by way of an option. It was therefore contended that Section 8A did not apply. The Court, based on the argument on behalf of the Respondent, considered the differences between an option on the one hand and a simple offer on the other. Furthermore, it was contended by the Respondent that in taxing laws a "*right*" always refers to an enforceable right and because a simple offer is revocable, it did not amount to a right.

The court then stated that there is no "*mystique about tax law*" and that ordinarily legal terms and concepts of interpretation of statutes falls to be applied.

The court ultimately concluded in stating that it found no reason as to the intention of the legislature to limit the concept of a "*right*" to options and thereby limiting the application of Section 8A of the Income Tax Act 58 of 1962 to options.

As far as the *contra fiscum* rule goes, the Court held that there flowed no *'ambiguity'* as to the meaning of Section 8A and therefore no need to invoke the *contra fiscum* rule.

Even though the Court was of the view that the *contra fiscum* rule did not apply, it is evident that it considered whether Section 8A of the Income Tax Act 58 of 1962 was ambiguous.

In Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, Daikin Air Conditioning imported air conditioning products, which consisted of indoor and outdoor split system units.

Indoor split system units are typically installed in or under ceilings, and outdoor split system machines are mounted outside on the floor, ground or roof of a building. The commissioner for the South African Revenue Service sought to impose customs duty in terms of Section 47(1) of the Customs and Excise Act 91 of 1964 on the importation of certain air-conditioning machines. Section 47(1) of the Customs and Excise Act 91 of 1964 provides for the charging provision on goods as described in Part 1 of Schedule 1.

Chapter 84.15 to Part 1 of Schedule 1 provides that Customs Duty be imposed *on "air-conditioning machines, comprising a motor driven fan and elements for changing the*

temperature and humidity, including those machines in which the humidity cannot be separately regulated". Under Chapter 8415.10, the types of air-conditioning machines as described above are further split into "*windows or wall types, self-contained or split system*".

On behalf of the Commissioner it was contended that the products fell within the category of air-conditioning machines usually used in buildings, comprising a motor driven fan and elements for changing the temperature, being compressor operated and having a cooling capacity not exceeding 8.8Kw. It was thus contended that it fell under sub-heading 8415.10.10 and it therefore should be subject to customs duty as provided for in that schedule. Daikin Air Conditioning contended that the goods fell short of "*windows or wall types, self-contained or split system*" as set out in chapter 8415.10 and by consequence fell outside the scope of chapter 8415.10.10, as the air-conditioning products should be classified under chapter 8415.90.90 as "*other*" (Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, p. 5)".

The main question then lay in the interpretation of the words '*window or wall types, self-contained or "split-system*". The majority; however, then sought guidance in the Brussels notes, which are explanatory notes issued by the World Customs Organisation to which South Africa is a signatory country. These notes are aimed at assisting interpretation of the different chapters and tariff subheadings provided under Schedule 1.

The majority found that the Brussels notes decisively favoured the interpretation advanced by the Commissioner and that that interpretation was the most "*commercially sensible construction*" which is in line with the business-like and commercial sensibility principles stated in Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012. The construction advanced by Daikin Air Conditioning was accordingly rejected as the court found that such interpretation would render "*unbusinesslike*" results. (Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, p. 7).

The majority did not consider the applicability of the *contra fiscum* rule. What is of relevance is that the minority by way of reference to the article by Dison SC, 1976, p. 159 considers the *contra fiscum* rule which it held is premised on the idea that when dealing with fiscal legislation, a tax can only be imposed on a subject if the words used in a taxing act clearly provides evidence of such an intention on the part of the legislature. The minority's approach was that "*In the instance of the contra fiscum rule, absent unambiguous language, the rule*

will be decisive in favour of the taxpayer in cases of doubt". (Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, p. 13) What is clear from the minority judgment is that the approach followed was to ascertain whether the words used in the Schedule and tariff subheadings admit of any doubt or ambiguity which the minority ultimately found not to be the case (Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, p. 14).

In Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, Telkom, during the period of 2007 to 2009, acquired all the ordinary shares in an entity known as Multi-Links Telecommunications Ltd, being a resident entity of Nigeria. Telkom advanced various shareholder loans to Multi-Links Telecommunications to make the business commercially viable. At the end of October 2011, an amount outstanding on the shareholder loans advanced by Telkom to Multi-Links Telecommunications stood in excess of USD 500 million. The investment proved to be disastrous for Telkom, whom then decided to sell all of its equity shares to a third party known as HIP Oils Topco Ltd. Part of the sale was for the shareholder loans to be advanced to Multi-Links Telecommunications, which Telkom sold to HIP Oils Topco Ltd for a total consideration of USD 100.

In its financial statement for the year ending 2013, Telkom included a foreign exchange gain to the total value of R247 million resulting from the realisation of the shareholder loans; however, in its income tax returns for the 2012 year of assessment, Telkom claimed a deduction in the amount of R3.9 billion resulting from a foreign exchange loss in terms of Section 24I of the Income Tax Act 58 of 1962, which resulted in Telkom incurring a tax loss of R106 billion. The result was that Telkom was entitled to a tax refund on provisional taxes paid in the amount of R822 million, which deduction the Commissioner refused.

The dispute on appeal to the Supreme Court revolved around the interpretation of Section 24I of the Income Tax Act 58 of 1962, which deals with foreign exchange gains and losses.

What has to be noted in particular is that the court requested the legal representatives of the parties to file additional heads of argument dealing specifically with the question as to the applicability of the *contra fiscum* rule as considered by the minority judgement in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018 (Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, p. 485). It will be recalled that the minority stated that the *contra fiscum* rule

fell to be invoke when the words used in a statute were ambiguous (Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018, p. 13).

The Court then, insofar as the *contra fiscum* rule is concerned, found that "*I, however, agree with the submission by counsel for the Commissioner, that the rule should only be invoked after an interpretational analysis results in an 'irresoluble' ambiguity as to the meaning of the particular provision in the fiscal statute*"

A further point of contention might be mentioned where the representatives of Telkom further relied on Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012 when they contended that Section 24I of the Income Tax Act 58 of 1962 had to be interpreted to reflect the foreign exchange loss, as this was concomitant with the approach advanced in Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012, p. 603 when the court held that a "s*ensible meaning is to be preferred than to one that leads to insensible or unbusinesslike results"*.

In effect, Telkom contended that the commercial reality was that Telkom suffered a massive commercial loss when it sold the equity loans to the third party and that it ought not to have incurred a tax payment liability on losses suffered as a contrary approach would lead to an insensible application of the Income Tax Act 58 of 1962. It should again be mentioned that the Supreme Court of Appeal in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018 dismissed the appeal solely on contention that the construction professed by Daikin led to '*unbusinesslike*' results.

However, in Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, p. 496, the court held that "*accordingly, the submission by Telkom, that its interpretation of section 24I of the Act, that resulted in a foreign exchange loss of R3 961 295 256, reflected the commercial reality of the transaction, whereas the interpretation advanced by the Commissioner, that resulted in a foreign exchange gain of R267 421 739, did not, and was not sensible or businesslike, falls to be rejected. The meanings of the relevant portions of the section, interpreted in context, are clear. As correctly pointed out by the Commissioner, Telkom loses sight of the fact that the section is not intended to deal with the tax consequences of commercial losses".*

It would seem that the Court only had regard to the interpretation of Section 24I of Income Tax Act 58 of 1962 and not to the '*businesslike*' results and sensibility of the construction advanced by Telkom. This approach followed by the Court, it would seem, also goes against the object of an Income Tax Act as stated by Stratford JA in CIR v Delfos, 1933, p. 263 that "*the fundamental idea of an income tax Act, which is to tax a man's true income for the year in question*".

Even though Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020 might raise new issues on the interpretation of fiscal legislation, it is evident that the main consideration before invoking the *contra fiscum* rule was to consider the presence of *'ambiguity'*

3.2.4 Two reasonably possible interpretations: In theory

Dercksen, 1989 in his LLD dissertation on the interpretation of taxation laws quotes the following from Voet; "*Laws introducing taxes receive in every case a strict interpretation. So far is this so that they ought not to be extended to things like those which are included in the list of things liable to tax. The reason is that, just as a releasing from burdens is regarded with favour, so on the other hand laying of burdens on things is considered objectionable; and is understood not to go wrong if he has readily given an opinion against the Treasury on doubtful questions. Especially is this so since it was in the power of the Treasury to state and to describe more clearly in respect of what things the tax had to be paid*".

Based on his understanding of what is stated by Voet above, Dercksen, 1989 comes to the conclusion that the *contra fiscum* rule is applicable and falls to be invoked "*waar dit redelikerwys moontlik is om twee betekenisse aan `n wet te gee*".

The relevant test according to Dison SC, 1976, p. 164 has already been described above and is included under this subheading for the fact that he supports the notion that the *contra fiscum* rule falls to be invoked when a provision is '*reasonably capable of two different interpretations*'.

The common law *maxim* stated by Du Plessis, 2011, p. 334 is also mentioned under this heading insofar as it has been invoked as an independent canon of construction, and to the

extent that it has been held to be applicable to the *contra fiscum* rule in Glen Anil Development Corporation Ltd v Secretary For Inland Revenue Services, 1975.

3.2.5 Two reasonably possible interpretations: In practice

In Israelsohn v CIR, 1952, Centlivres CJ had to consider whether the commissioner correctly assessed an amount of tax, which included penalties provided for in Section 65 of the Income Tax Act 31 of 1941, on the income of the wife of a husband whom failed to include such income of his wife in his income tax returns.

The husband and wife were married out of community of property and the marital power was excluded. Section 85(3) of the Income Tax Act 31 of 1941 provided that; "*Any 'tax' due and payable by any person married without community of property and not separated from his wife under a judicial order or written agreement may be recovered from the assets of his wife in so far as the tax is payable 'in respect of' the income of his wife deemed to be his under the provisions of sub section (2) of section 9".*

The commissioner then sought to recover income tax from the wife of a husband whose estate was consequently sequestrated. One of the questions on appeal was whether the word '*tax*' as stated in Section 85(3) included the additional amounts payable as penalties under Section 65 by the wife for the husband's failure to include her income in his income tax assessment (Israelsohn v CIR, 1952, p. 538).

The commissioner contended that the word '*tax*' included the additional amounts payable as penalties and relied on Section 65(3), which specifically described the additional amount as a '*tax*', and on the definition of '*tax*' in Section 1 which was defined as; "*meaning any levy on tax leviable under the Act".*

Centlivres CJ concluded that from a reading of the word *'tax'* as used in Section 85(3) of the Income Tax Act 31 of 1941, it did include the additional amounts payable as penalties' however, that such penalties did not befall the wife as it was not as a result of her failure to include the amounts in his income tax assessments and therefore she ought not to be penalised (Israelsohn v CIR, 1952, p. 540). This was premised on the fact that '*a tax cannot be said to be imposed in respect of a particular subject matter unless it has a direct*

relationship to that matter' as held by Innes CJ in Commissioner of Inland Revenue v Crown Mines Ltd 1923 Ad , 1923.

Centlivres CJ concluded that there was no direct relationship between the appellant's own income and the amount payable by way of additional tax, and if there was any relationship such was indirect and related to the husband's failure to include same in his income tax return.

This prompted Centlivres CJ to formulate the view that the words '*in respect'* as provided for in Section 85(3) of the Income Tax Act 31 of 1941 where of *"wide import and not capable of any precise definition".*

As a result, Centlivres CJ held that *"Consequently it seems to me that section 85(3) is reasonably capable of two constructions. That being so, that construction should be placed on the section which imposes the smaller burden on the taxpayer"*.

In delivering judgment, Centlivres CJ refers to Borchers, N.O v Rhodesia Chrome & Asbestos Co. Ltd, 1930, p. 119 where Stratford, J.A, in referring to a taxing statute, said that: "*In a case of doubt a court of law would have to construe such an Ordinance against the larger imposition"* and to Lord Tankerton in Inland Revenue Commissioners v Ross & Coulter and Others, 1948 (1) *"In dealing with a taxing section he said that if it is 'reasonably capable of two alternatively meanings', the courts will prefer the meaning more favourable to the subject".*

Even though the Court in Israelsohn v CIR, 1952 never specifically mentioned the *contra fiscum* rule, it would seem that the court applied the rule when it concluded that the relevant statutory provision was *'reasonably capable of two constructions'*.

In Sekretaris Van Binnelandse Inkomste v Raubenheimer, 1969, the taxpayer received a substantial amount of his income from farming with cattle. Consequently, it was necessary for the taxpayer to maintain and preserve his grazing lands.

As a result and on the direction of the then Department of Agriculture, the taxpayer undertook to remove vast amounts of invasive weeds on his farm by way of a controlled fire. The controlled fire became uncontrollable and jumped to the farms of two of his neighbours

resulting in them suffering damage. Action was instituted against the taxpayer who then settled same by way of payment of two settlement amounts.

The taxpayer contended that the amounts payable as settlement towards the claims of his neighbours did not form part of his taxable income under the provisions of, *inter alia,* paragraph (c) of Section 11 of the Income Tax Act 59 of 1962, which allowed as a deduction from a taxpayer's gross income "*enige onkoste, behalwe die van n kapitale aard, werklik deur die belastingpligtige gedurende die jaar van aanslag aangegaan 'ten opsigte van' enige geskil of regsgeding wat onstaan in die loop of uit hoofde van die gewone verrigtinge deur hom onderneem by die beoefening van sy bedryf".*

The Court embarked on the question to consider whether the words "*enige onkoste…ten opsigte van enige geskil of regsgeding*" included the settlement amounts of the claims in the legal dispute. On behalf of the Commissioner it was contended that a narrow interpretation should be given to the words '*ten opsigte van',* as it should be interpreted to only include the legal costs directly associated with the legal dispute and not to include the compensation amount paid to settle the legal dispute.

The taxpayer contended for a wide interpretation to include the settlement amounts as a deductible expense under Section 11(c) of the Income Tax Act 59 of 1962.

The court then found that "*Uit hieride gewysdes blyk dit afdoende, meen ek, dat 'ten opsigte van' onderworpe aan `n samehang, vatbaar is vir n wyere betekenis is as die wat weergegee word deur n onmiddelike of direkte verhouding*" (Sekretaris Van Binnelandse Inkomste v Raubenheimer, 1969, p. 320).

This led to the conclusion that "*Dit wil my bygevolg voorkom dat, hoewel die voorskrif in para (c) vatbaar is vir n engere betekenis, n wyere nie uitgesluit kan word nie. Dit is gemenesaak dat by meer as een moontlike betekenis, die uitleg teen die fiscus moet gaan*" (Sekretaris Van Binnelandse Inkomste v Raubenheimer, 1969, p. 322).

It is evident that the court did not consider whether the words of the section were ambiguous but merely whether the interpretation advanced on behalf of the taxpayer was a reasonable one, which approach is in line with the test laid down in the common law *maxim*, resulting in the Court finding in favour of the interpretation advanced by the taxpayer.

In Estate Reynolds & Others v CIR, 1937, Sir F U Reynolds ceded the sum of £120 000.00 and certain life insurance policies to a trust established by him. From the trust deed the trustees had to pay the monthly premiums in relation to the life insurance policies from the proceeds in the trust. Upon the death of Sir Reynolds the commissioner for Inland Revenue instituted an action against, *inter alia,* the executors of the estate on the question of whether the estate was liable for estate duty on the proceeds of the life insurance policies.

Sections 2 and 3 of the Death Duties Act 29 of 1922 levied estate duty on the dutiable amount of the estate of a deceased person and furthermore provided that the estate of such person consists of all the property of that person that passes on his death, and all properties which, in accordance with Section 3, are deemed to pass on his death.

The deeming provision as contained in Section 3(4) of the Death Duties Act 29 of 1922 dealt specifically with policies of insurance and provided that such property shall include *"any amount due and receivable under any policy of insurance effected by such person upon his own life when the policy has been wholly kept up by him; or a part of that amount in proportion of the aggregate of the premiums paid by him when the policy has been partly kept up by him*".

Section 23(b) of the Death Duties Act 29 of 1922 provided that estate duty would be chargeable on property deemed to pass on death of the deceased, and the person liable to pay such duty would be the person on whose behalf such money has been received. The court *a quo* held the view that the policies were wholly kept up by the deceased and consequently estate duty was payable in terms of Section 3(4)(a) on the proceeds. In coming to its conclusion, the court *a quo* referred to the case of Lord Advocate v Scotts Trustees 1918 in concluding that the premiums were indirectly paid by the deceased, whom mandated the trustees to effect such payments.

The main question revolved around the interpretation of Section 3(4)(a) of the Death Duties Act 29 of 1922 insofar as it should be accepted that the deceased paid the premiums, where in fact, the premiums were paid by the trustees acting on the mandate of the deceased, which premiums were also paid out of the trust.

On behalf of the Appellant it was argued that the trust estate did not belong to the deceased

and therefore the premiums that were paid out of the trust were not paid from the property of the deceased as the property vested in the trustees.

On behalf of the commissioner it was argued that the words "*any amount due and receivable under any policy*" indicate that the section covers any proceeds of any policy of the deceased on his own life, whether such proceeds are due to the estate of the deceased or in cessionary and consequently, the proceeds from the insurance policies fell within the ambit of the relevant section and therefore are subject to estate duty.

Stratford ACJ concluded that the trust is paid on the mandate of the deceased and therefore the argument advanced by the appellant related to the manner of payment and not to the question as to who the payer was. The court found that the interpretation given on behalf of the appellant was under the circumstances not reasonable and therefore dismissed the appeal.

The court then dealt with the cross-appeal where it was contended on behalf of the commissioner of Inland Revenue that succession duty was payable under the provisions of Section 10 of the Death Duties Act 29 of 1922, which provided that "*a succession shall be deemed to have accrued whenever any person has become entitled to any property or interest in any property by virtue of any disposition made by any predecessor who has died on/or after 1 July 1922, whereby any such property or any interest in such property passes on the death of such predecessor"*.

The question then arose as to the time when the property and interest in the property pass from the predecessor to the successors, was it on the death of the predecessor in 1930 and therefore after the date specified in Section 10 of the Death Duties Act 29 of 1922 or in terms of the trust deed in 1918 and consequently before the date specified in Section 10 of the Death Duties Act 29 of 1922.

The court a quo confirmed that the bare *dominium* of the property passed in terms of the trust deed in 1918 and therefore Section 10 of the Death Duties Act did not apply. On behalf of the commissioner for Inland Revenue, it was argued that the interest in the property may pass under the provisions of Section 10 of the Death Duties Act, even though it does not pass from the predecessor himself.

The court then formed the view that the disposition took place in terms of the trust deed and accordingly, the date of disposition was in 1918. The court took this view in considering that property cannot go into limbo after a disposition is made and only vest in the new owner after the death of the predecessor. Therefore the property passes to the successors on the date of the disposition.

This view is also supported by the fact that the predecessor in terms of the trust deed specifically stated that he dispossessed himself of all the interest in his property. This reasoning was confirmed by Carlyle AJ in the court a quo.

On behalf of the Commissioner for Inland Revenue services it was further argued that the *"enjoyment"* of the property passed on the death of the deceased only and not in terms of the deed, which was in line with the reasoning in Adamson v Attorney General, 1933 as to the test of the time when the property passed or was deemed to have passed.

The argument was rejected by the court a quo as Section 1 of the Death Duties Act 29 of 1922 referred to the time of becoming "*entitled*" to the interest in the property, and not the enjoyment. Accordingly, the court had to consider whether the title in the property of the beneficiaries was transferred due to the death or the deed.

In the Adamson case, Lord Wright reasoned the property could pass contingently, being at risk of failure to survive a predecessor.

With regards to this aspect, the court then held the view that the words "*property passing on death"* were not sufficient to attract estate duty as the decision had to be made on the precise words used in the act.

The court then furthermore concluded that "*when we are dealing with a taxing statute and the decision favours the tax payer, we are bound to invoke the rule interpretation contra fiscum*" and accordingly, the court held that Section 10 did not apply and succession duty was not payable.

From the above, it becomes evident that even though the appellate division held a certain view as to the interpretation, which was contrary to the interpretation followed by Lord Wright in Adamson, the court was bound to invoke the *contra fiscum* rule and to interpret the

relevant Act in favour of the taxpayer as there existed two reasonably different interpretations.

In NST Ferrochrome (Pty) Ltd v Commissioner, Inland Revenue, 2000, where an alternative argument advanced on behalf of the appellant was that subparagraphs (d)(iv) of the definition of '*connected person'* in Section 1 of the Income Tax Act 58 of 1962, "*was at least reasonably capable of the construction which the appellant sought to place upon it*".

The Supreme Court of Appeal then held the following regarding the *contra fiscum* rule: "*Where there is doubt as to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction* (NST Ferrochrome (Pty) Ltd v Commissioner, Inland Revenue, 2000, p. 1048).

In CIR V Dundee Coal Co Ltd, 1923, the Appellate division had to interpret Section 38(d) of the Income Tax Act of 1917 which stated that *"in the case of any company carrying on mining operations, any undistributed profits which are reinvested in the business of the company and rank as capital expenditure for the redemption allowance provided by Section 23 shall not be deemed to be a dividend distributed".*

The relevant company issued debentures in the sum of £83 705.00 for the period 1909 to 1911, which debentures where to be used as capital expenditure as defined in Section 23(5) of the Income Tax Act 41 of 1917.

In 1917, the Company paid £21 410.00 towards the holders of the debentures in order to redeem same. The full bench of the Natal Provincial Division was of the view that the payment of the sum of £21 410.00 did not constitute the distribution of a dividend and was therefore exempted from taxation.

The full bench formulated its view having regard to the effect of the relevant provision as interpreted by the Appellant. The full bench concluded that the provision of Section 23(5) of the Income Tax Act of 1917 provided a special exemption to mining companies which, according to the interpretation advanced by the appellant, would not place the mining company in any better position than that of a commercial company as it would trigger a tax

liability once the profits are redeemed in order to settle a capital liability incurred in any year prior to assessment.

The minority adopted the interpretation advanced on behalf of the taxpayer, which was in line as the interpretation adopted by the full bench; however, the majority of the Appellate division adopted the interpretation advanced on behalf of the commissioner.

CIR V Dundee Coal Co Ltd, 1923 is regarded as a case disregarding the application of the *contra fiscum* on the bases that the majority of the Appellate Division did not consider whether the other views advanced by the full bench and Juta JA, where reasonably possible (Dison SC, 1976, p. 165).

3.2.6 Different tests, different outcomes

To illustrate this point, regard must be had to the judgment in Rex v Milne and Erleigh, 1951 where Centlivres CJ, giving judgment on behalf of the full bench, was tasked with interpreting the provisions of Section 15(2)(b) of the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914, being a penal statute, which provided that "*any person who incites, instigates, commands or procures any other person to commit any crime….shall be guilty of an offence*".

Even though it was not a matter dealing with the interpretation of fiscal statutes, the rule relating to the interpretation of penal statutes and fiscal statutes are precisely the same (Dison SC, 1976, p. 164).

The issue in short was where one person incites another to commit a crime, and the latter then commits same without the knowledge that his actions are tantamount to being criminal, the question turned on whether the former might be guilty under the provisions of Section 15(2)(b) Riotous Assemblies and Criminal Law Amendment Act 27 of 1914 .

In order for Section 15(2)(b) Riotous Assemblies and Criminal Law Amendment Act 27 of 1914 to be applicable, there should first have been present the act of incitement and the result of the incitee having committed a crime, before the inciter may be guilty of an offence under Section 15(2)(b). It was therefore imperative that the incitee himself had to commit a crime before his actions could be attributed to the inciter. The court formulated the view that

Section 15(2)(b) could not apply insofar as the incitee did not have the necessary *mens rea* to commit a crime, which is to have knowledge that the particular Act constitutes a crime, regardless of whether the inciter had the required knowledge.

The reasoning followed by Centlivres CJ was that even though the inciter had a guilty mind, it could not have been the intention of the legislature to punish a person with a guilty mind where the incitee had not committed a crime. Centlivres CJ's view was supported by Patteson J and Parke J in Rex v Welham (Rex v Milne and Erleigh, 1951, p. 798).

However, the court *a quo,* as per Lucas J, held a different view as to the interpretation of Section 15(2)(b). Of importance is the fact that the only reason given by Lucas J in support of judgment was that it was supported by the Dutch version of the particular Act (Rex v Milne and Erleigh, 1951, p. 822).

Centlivres CJ was then bound to conclude that the provision was capable of being interpreted in two different ways, even though Centlivres CJ did not agree with the interpretation by the court *a quo*. It might be argued that the particular provision could not have been ambiguous according to Centlivres CJ, given the fact that his construction was supported by Patteson J and Parke J and that the construction given by the court *a quo* was not substantiated by any reasons nor authority. However, on the question whether the particular provision was reasonably capable of more than one interpretation, Centlivres CJ was bound to follow the interpretation that was least arduous having regard not whether he thought the provision was ambiguous but rather that there was another reasonable interpretation.

Applying the above *maxim* to Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018 one would be reminded that the majority in that case concluded that '*two reasonably possible interpretations might be given'*, being that the words '*self-contained'* and '*split-system'* may be qualified to the preceding words and relate only to '*window or wall types'* as was contended by Daikin Air Conditioning, or that the words '*window or wall types'* might be limited to '*self-contained'* air condition units and that the words '*split-system'* might stand on its own, as contended by the Commissioner.

It must be emphasised that the majority concluded that the interpretation advanced by Daiken Air Conditioning was reasonably possible.

What is of importance is that the minority had the advantage of reading the views expressed by the majority and in particular the view that both constructions advanced by the commissioner and taxpayer were reasonably possible. Further, the minority was mindful of the applicability of the *contra fiscum* rule; however, on the test of ambiguity, the minority found against Daikin Air Conditioning.

It must be considered whether the result would have been different had the minority, as in the case of Rex v Milne and Erleigh, 1951, bound itself to the fact that the majority found that both interpretations were reasonably possible and therefore were bound to invoke the interpretation that favoured the taxpayer.

3.3 CONCLUSION

Having regard to what is stated above, it becomes evident that authority exists to support the test of ambiguity and the common law *maxim* when dealing with fiscal statutes. While we have moved towards a different general approach to interpretation of legislation as stated in Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012, doubt cannot exist as to the applicability of the *contra fiscum* rule; however, as to the test applicable to invoke the *contra fiscum* rule, it would seem that certain issues still remain unresolved.

4. CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

Chapter 4 will set out the summary of findings and conclusions made, having done the systematised review of the literature used. Possible limitations to the summary and findings will then be considered to highlight any shortcomings and issues for further consideration. This chapter will conclude by considering future research on the topic.

4.2 Summary of findings and conclusion

The research question for this study is to identify whether the use of different tests in applying the *contra fiscum* rule might lead to different results. The objectives guiding this study are:

- To assess the extent to which South African courts apply different tests when considering the *contra fiscum* rule;
- To assess whether there exists academic support for the existence of the different tests regarding the *contra fiscum* rule; and
- To establish whether the two different tests might lead to different results.

After conducting the systematised literature review, it became evident that certain courts use the test of '*ambiguity*' and other courts use the test contained in the common law *maxim* of '*two reasonably possible interpretations'*.

Considering the work of Du Plessis, 2011, it becomes evident that these two tests do not necessarily correlate, with the common law *maxim* being invoked in, *inter alia*, instances where there are less than ambiguity, being vagueness.

In the pursuit of answering the research question, it then becomes evident that the most recent Supreme Court of Appeal judgment in Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020 went further than to consider whether the particular statute was ambigious but whether such ambiguity was irresolvable.

In considering how the different tests were applied in practice, it was also found that different results might follow depending on the test that a particular court invokes, as was demonstrated having regard to the minority judgment in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018.

4.3 Limitations

This study include South African case law and academic articles dealing with the interpretation of fiscal legislation and is therefore limited in this sense that decisions by courts in foreign jurisdiction on this aspect are not included.

4.4 Future research

Considering the summary of findings, it is recommended that future research should focus on providing clarity as to whether the *contra fiscum* rule should only be invoked when the intention of the legislature is not clear, the result being that the provision is ambiguous or capable of two reasonably possible interpretations, or whether the *contra fiscum* rule should be invoked from the outset to immediately enquire whether a particular provision is ambiguous or reasonably capable of two interpretations.

Apart from the above, further research should seek to establish the applicable test to the *contra fiscum* rule.

4.5 Concluding remarks

Even though the existence of the *contra fiscum* rule has conclusively been upheld by both the minority in Commissioner of the South African Revenue Service v Daikin Air Conditioning South Africa (Pty) Ltd, 2018 and the majority in Telkom SA SOC Ltd v Commissioner for the South African Revenue Service, 2020, it seems that there still exists a substantial degree of controversy regarding its application.

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