CONSTRUCTION AND INTERPRETATION OF TAX LEGSILATION: THEN AND NOW

by Johan Kotze, Tax Executive at Shepstone & Wyile

The principle relating to the construction and interpretation of fiscal legislation are in general those relating to the construction and interpretation of any statute.

As early as 1926 Judge Stratford held in Farrar's Estate v CIR that '*[the] governing rule on interpretation is to endeavour to ascertain the intention of the law-maker from a study of the provisions of the enactment in question*'.

In regard to tax legislation, Income Tax Acts in particular, the language imposing the tax must receive a strict construction. Judge Rowlett held in Cape Brandy Syndicate v I.R. Comrs that '*…in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'.*

Similar statements have been made in several judgments on tax cases. This in Scott v. Russell (Inspector of Taxes), Lord Simonds said: '*My Lords, there is a maxim in Income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. It is necessary that this maxim should on occasion be reasserted …*'

According to Lord Simon in Withers v. Nethersole an equitable construction of income tax legislation is, in general, not permitted. If the meaning of a taxing provision is reasonably clear, the Courts have no jurisdiction to mitigate any apparent harshness.

Thus the norm was that a taxing Act must be construed with perfect strictness whether or not such construction is against the State or against the person sought to be taxed. If however there is any real ambiguity in a taxing Act, such ambiguity may be resolved in favour of the taxpayer, or, as it is sometimes stated: *contra fiscum.*

Recently in *Natal Joint Municipal Pension Fund v Endumeni Municipality* where Wallis JA said the following with regard to the construction:

'*The trial judge said that the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred to authorities that stress the importance of context in the process of interpretation and concluded that:*

> *"A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules."*

Whilst this summary of the approach to interpretation was buttressed by reference to authority it suffers from an internal tension because it does not indicate what is meant by the "ordinary meaning" of words, whether or not influenced by context, or why, once ascertained, this would coincide with the "true" intention of the draftsman.

…

The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. ….'

It is now accepted law that one can rely on what is said in documents such as Explanatory Memoranda, issued when legislation is enacted, to ascertain the meaning of the relevant legislation. Thus in *Minister of Health v New Clicks SA (Pty) Ltd*, Chaskalson CJ said the following:

'In S v Makwanyane and Another I had occasion to consider whether background material is admissible for the purpose of interpreting the Constitution. I concluded that:

> *"where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution".*

Although it is not entirely clear whether the majority of the Court concurred in this finding, none dissented from it. I have no reason to depart from that finding and, in my view, it is applicable to ascertaining the 'mischief' that a statute is aimed at where that would be relevant to its interpretation. This would be consistent with the decisions of the Appellate Division in Attorney-General, Eastern Cape v Blom and Others and Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd and the cases from other jurisdictions referred to in Makwanyane's case.'

It is important for lawyers to be mindful of the above development in the principles of construction and interpretation of legislation, because words use to draft legislation are imperfect.

For any queries on the above, please contact:

Johan Kotze
Tax Executive – Dispute Resolution
Tax practice area at Shepstone & Wylie
jkotze@wylie.co.za
+11 290 2540