

# Interpretation of fiscal legislation

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The judgment of the Supreme Court of Appeal in Commissioner SARS v Bosch (394/2013) [2014] ZASCA 171 (19 November 2014) (Bosch case) dealing with the fiscal consequences of a deferred delivery transaction is not only important in the context of the meaning of simulation, but also with reference to the way in which legislation should be interpreted.



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In the Bosch case the question arose as to the meaning of s8A of the Income Tax Act, No 58 of 1962, which read that there was to be included in a taxpayer's income an amount of any gain made by him by the exercise, cession or release during a year of assessment of any right to acquire a marketable security.

The issue in dispute was whether the right to acquire shares arose when the taxpayer exercised the option to acquire shares or only when the time for payment and delivery of the shares arrived. It was indicated that, as a starting point, the words of the section must be considered in the light of their context, the apparent purpose of the provision and any relevant background material. It was indicated that there may be 'rare' cases where the words in the statute are only capable of bearing a single meaning. However, outside those type of scenarios it was indicated that it is 'pointless' to refer to a statutory provision having a plain meaning. It was indicated that one meaning may strike the reader as syntactically and grammatically more plausible than another. However, as soon as more than one possible meaning is available, the determination of the proper meaning depends as much on context, purpose and background as on dictionary definitions or even 'excessive peering' at the language to be interpreted without sufficient attention to the historical contextual scene.

In the context, reference was made to a right to acquire a marketable security. It did not refer to the acquisition of a marketable security. It was indicated that, if an offer is made to sell a marketable security, in circumstances where the offer is not linked to keep the offer open for a defined period, the offeree has a right to acquire the marketable security for so long as the offer remains open for acceptance.

Apart from the fact that the fiscal legislation was amended subsequently in order to address the apparent anomaly, the court specifically referred to the explanatory memorandum that accompanied the amending legislation that indicated that the previous wording "fail to fully capture all the appreciation associated with the marketable security as ordinary income".

The court also indicated that, in the case of a marginal question of statutory interpretation, "evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation". It was indicated that the conduct of SARS that administered the legislation provides evidence of how reasonable persons in their position would understand and construe the legislation. It is thus a valuable pointer to the correct interpretation of the legislation. Given the fact that the South African Revenue Service (SARS) interpreted the legislation in a specific manner (contrary to the argument that was presented in the Bosch case, the court thus accepted the interpretation contended for by the taxpayer.

The Bosch case is clear authority for the fact that one should not adopt a literal interpretation to legislation as the so-called plain meaning approach is not helpful. The moment more than one meaning is possible, one should look at all the surrounding circumstances, including:

- subsequent legislation and the reason for the subsequent legislation; and
- the way in which SARS has interpreted the legislation previously.

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