IS THE RECEIPT OR ACCRUAL OF A CAPITAL NATURE OR INCOME? A CRITIQUE

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DECLARATION

I ,EVERSON ROUND SAMUKANGE, do hereby declare that this, my dissertation, is my original work. The sources that I relied upon and used in the discussion were all properly acknowledged.

This Dissertation is submitted in partial fulfilment of the requirements of the Master of Laws Degree in Commercial Law (LMCO) in the Faculty of Law at the University of Zimbabwe. The dissertation has never been submitted before for any degree or examination at the University of Zimbabwe

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ABSTRACT

In Zimbabwe, the concept of income as distinguished from capital is a field that still has scope for scholarly work and research. Unlike South Africa and the United Kingdom, Zimbabwe has the Income Tax Act and the Capital Gain Tax Act both of which relate to gains in income and capital respectively. The Income Tax Act defines gross income and says that which is of a capital nature is excluded from assessable income tax.The Act does not define that which is of a capital nature. The body of knowledge that exists on this subject matter derives largely from case law. In the Republic of South Africa and the United Kingdom, both countries tax capital gains under the provisions of the income tax. There is no separate legislation outside the Income tax legislation dealing with capital gains in both countries.

There is a general consensus that the income-capital distinction in relation to receipts or accruals in the taxpayers' hands remains unsettled. There is no single fashioned indicia that applies universally in all instances to demarcate the two concepts. Where there is debate, recourse has not been to look at legislation but at case law which has developed various tests in an attempt to speak definitively on the distinction. This research explores the capital-income distinction in relation to receipts and accruals in the tax payers' hands in the Zimbabwean context and seeks to add to the existing body of knowledge on the subject matter.

CHAPTER 1:INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

What constitutes income as distinct from what may be referred to as capital in respect of amounts that are received or that accrue to the taxpayer remains largely elusive. There has been, over the years a clear and defined attempt at delineating the two, income and capital, with a view to get rid of uncertainty in the tax collection system. This has been so in most jurisdictions. Such certainty of what constitutes income as opposed to that which is of a capital nature aids indelibly in achieving an efficient tax collection system and largely helps both the taxpayer and the tax collector in discharging their obligations effectively and without unnecessary contestation. Out of the realisation of the need to have the line drawn between the two concepts of capital and income, the courts have developed various tests in order to assist to determine what may be income and what may be regarded as capital in relation to any amount in the taxpayers' hands.

One would have thought that the confusion that remains hovering on these concepts in tax law would be settled via legislative intervention. Our Income tax law does not define that which may be of a capital nature as opposed to income exhaustively. What it does, is to give a general guideline and then shifts the onus and places it on the taxpayer to prove whether the amount received or accrued to a taxpayer is taxable or it is of a capital nature.

Section 8 of the Income Tax Act defines gross income in the following terms;

> "gross income" means the total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment from a source within or deemed to be within Zimbabwe **excluding any amount** **(not being an amount included in "gross income" by virtue of any of the following paragraphs of this definition)** so received or accrued which is proved by the taxpayer to be of a capital nature …

It is very clear that the onus to prove whether an amount is income or is of a capital nature is placed on the taxpayer. In a way, the Legislature accepts that there is no universally agreed definition of the terms of income as distinct from capital in income tax law hence casting the onus on the taxpayer to prove. An efficient tax system would require that what is income be easily ascertainable and what is capital also be easily defined. In Zimbabwe and across several other jurisdictions, there is an acceptance that what may be income in the hands of one person may be capital in the hands of another. This effectively accepts the nebulous nature of income vis a vis amounts that are of a capital nature. It cannot be over emphasised that our income tax law in Zimbabwe has left the subject matter open. It can also not be seriously debated that if one were to advert to Adam Smith's revered Canons of Taxation, the distinction on what amounts to capital or income in relation to what would have been received or accrued to a taxpayer is important. Adam Smith speaks to the principles of certainty, equity, convenience and efficiency in any tax system.

Arguably, these principles placed side by side with what obtains on the subject matter of this discourse leaves a lot to be desired.

Against the foregoing background, this study seeks to pay particular regard to that which is income as distinct to that which is of a capital nature. A clear attempt will be made to juxtapose the understanding on these concepts vis a vis the canons of taxation by Adam Smith. The legal framework of the Zimbabwean tax system shall be visited and suggestions made. The intention is to further research and determine whether there can be a preferred guideline on what constitutes income as opposed to that which is of a capital nature so as to add to the body of knowledge over the subject matter. It has to be accepted that the courts in Zimbabwe and across the border, have developed separate tests in an attempt to provide guidance on the nature of an amount received by or accrued to a tax payer on whether it is income or it is capital. A comparative analysis with recommendations will have to be made in the result.

1.2 <u>STATEMENT OF THE PROBLEM</u>

The problem is the absence of a clearcut distinction between that which can be regarded as income and that which can be taken as capital in respect of an amount received by or accrued to the tax payer. This creates uncertainty and undoubted inconvenience in tax law. Is this a product of an interpretation exercise? From the dearth of case authorities, it can be deduced that what may be capital in one man's hands can be stock in trade (income) to another.

It is undesirable to have a scenario where at every turn, the court is called upon to determine whether given the set of facts before it, an amount received or accrued to the taxpayer is income or it is of a capital nature. This completely removes certainty in tax jurisprudence. Is what we have on this subject matter all there is? Can there be a clearly defined formula or the waters remains as murky as ever? The problem assumes ascending importance if regard is had to the provisions of our Income Tax Law in Zimbabwe. It is clear that it does not aid the situation. Our law deliberately (*it may be because of this realisatio*n) casts the burden to prove whether an amount is income or capital on the tax payer. The legislature itself indirectly accepts that it is not in a position to tell that which is income and that which is capital. This ought not to be so. The thrust therefore, of this research is to critique the concepts of income *vis-a-vis* capital in respect of amounts received or accrued to the tax payer and an attempt will made to enhance the understanding on this subject matter in the Zimbabwean context.

1.3 <u>RESEARCH QUESTIONS</u>

(1) What is the importance of the distinction between an amount received or accrued to the tax payer being income or being of a capital nature?

(2) Is it possible to have a clear cut distinction in respect of the concepts in (1)

above?

(3) What is the Zimbabwean approach on that which is income as distinct from that which is of a capital nature?

(4) Is it an interpretation exercise that has seen the distinction remaining elusive?

(5) What is the importance of the distinction *viz-a-viz* Adam Smith's Canons of Taxation?

1.4 METHODOLOGY

This discourse is essentially based on a desktop research. Desktop Research speaks to the overview and study of primary and secondary literature. There shall be documentary review in order to gain better understanding of the distinction between income and capital in tax law and in the process exploit its scope and remit with a view of finding ways of definitively resolving associated challenges on the elusive nature of the subject matter. In essence, there shall be reliance on already existing data. Case authorities, textbooks, web searches and various online platforms will be relied upon in the process. Tax legislation will also be reviewed and principally, the methods of research to be adopted will be descriptive critical analysis and comparative analysis.

For any income to be called income, it must have been received or accrued to the tax payer in a tax year from a source within or deemed to be within Zimbabwe.

The descriptive critical analysis will look at the legal framework on the subject matter and what it currently provides and the short comings thereto. A critique of the law as it stands will be made identifying the gaps and where there is room to improve.

Comparative Analysis will look at our jurisprudence and a comparative survey will be made on South African and the United Kingdom jurisprudence on the distinction between that which is income and that which is of a capital nature on amounts received or accrued to the taxpayer. An analysis will be carried out of the approaches that are taken in the said jurisdictions and it is hoped that Zimbabwe may benefit from the aforementioned countries and possibly enhance its own jurisprudence on the subject matter.

1.5 LITERATURE REVIEW

A tax is a tax because it has the force of law. A law has to exist to enable the levying of a tax on the citizens by the government of any country. That this is the position pertaining to tax was spoken to by **Hyatali CJ** in **Attorney General of Trinidad**

&Tobago v Ramesh Dipraj Kumar Mootoo[1] where his Lordship exhorted that the power to tax is founded on necessity and is inherent in any sovereign state. His Lordship postulates that no constitutional government can exist without it. It is from this premise that tax law has developed over the years. The question in the present discourse however, rests on the distinction between income and capital in relation to accruals or receipts in the taxpayers' hands. According to **Urquhart**[2] although "eminent counsel, distinguished judges" had over several years attempted to interpret the phrase, "the subject is still as murky as ever." This is how he positions the debate on that which is income as opposed to that which is of a capital nature in respect of amounts received or accrued to the taxpayer. **R.C Williams** postulates that although the two concepts of income and capital are mutually exclusive, it is however possible for a single amount to be partly income and partly capital. This position is in sync with the position that any amount accruing or received by the taxpayer will have to take one of two forms. It is either the amount is income or capital. There is no middle of the road sort of scenario.

According to **Croome, Oguttu, Muller, Legwaila, Kolitz, Williams and Low in their book Tax Law: An Introduction,** the issue whether the proceeds constitute a receipt or accrual of an income or capital nature is especially problematic because the mere realisation of a profit by the taxpayer does not cause the proceeds to be classified as revenue in nature. They further posit that the taxpayer is entitled to dispose a capital asset to his or best advantage. This position seems steeped in the field of capital gains, which in South Africa, is levied under income tax and in terms of the income tax legislation. In the said book, the learned authors then proceed to list accruals or receipts that can be regarded as being of an income nature and these includes compensation received for services rendered or to be rendered, any amount received or accrued on account of employment of capital, proceeds emanating from the disposal and sale of stock in trade, and damages that may speak to loss in revenue. The Learned authors proceed to then list again, accruals and receipts of what they consider to be of a capital nature and these include an inheritance, a donation, gambling, or betting profits, an amount received or accrued out of a restraint of trade on the taxpayer, proceeds arising from the disposal or realisation of an investment and damages that relate to loss of capital. The absence of a universally agreed definition of the concepts of capital and income has effectively led scholarly work coming up with is then perceived to be helpful guidelines.

L Olivier, in the article **Capital versus Revenue:Some Guidance, 2012 De Jure,** takes the position that the intention of the taxpayer plays a key role in the exercise of distinguishing whether an amount is capital or income and the taxpayers' *ipse dixit* is never conclusive. The proposition is that to determine whether the taxpayers' intention has changed, the tax collector or the court, whatever the case maybe, ought to ask the question whether on the totality of the facts and circumstances of a particular case the taxpayer has crossed the Rubicon. What

[1] (1976) 28 WIR 304, at page 326

[2] **Capital v Revenue:** *Some light in the darkness?" **1979 Acta Juridica 299***

emerges from the available literature, texts and various articles as amplified by development of the distinction through case law is that there is no single formula to delineate the two. It is always an exercise that has to be carried out in the face of the particular facts before the tax collector.

The definition given in the Income Tax Act of Zimbabwe is limited to gross income for purposes of assessable and taxable income and it excludes that which is of a capital nature. The Act does not define what it is that can be termed 'of a capital nature'. **Tapera and Majachani in their Book: Unpacking Tax law ands Practice in Zimbabwe, 2016 Ed** propounds that the question whether a particular receipt or accrual is of a capital or income nature depends on an examination of the circumstances of each particular case. The question is not one with a ready answer in every particular case. There is no indication in the Act of what it is that can be regarded as being of a capital nature. The deeming provisions in the Act seeks to delineate income as distinct from capital. What the Act does, in principle, is to clearly provide that any accrual or receipt in the taxpayers' hands is either income or capital. There is no half way house in the sense of being neither income nor capital. An amount has to take one form or the other.

The position in South Africa, in relation to income tax is that income assumes, by law, the non-capital character. **De Koker and Williams; Silke on SA Income Tax,** opine that the definition and development of the concept of income in South Africa has, in essence, been characterised as 'non-capital' and effectively implying that income has no distinctive attributes of its own.

In the United Kingdom, the Judiciary developed various features that ought to be exhibited by an amount for it to be called income. **Holmes K, The Concept of Income: A Multidisciplinary Analysis(IBFD Publications 2000),** says that income ought to have the following features viz; an incoming, convertibility into cash, a periodic flow, the reward of employment or vocation or the produce of property, a realisation, separation from source, a profit making purpose or motive and application of the ordinary meaning of income. Just like South Africa, there is no separate legislation for Capital gains as it obtains in Zimbabwe, the United Kingdom places gains of a capital nature that are liable to tax under income tax. A capital gain within the taxable range is income liable to tax.

Over the years, the courts have developed various tests in order to render guidance on determining the nature of an amount received or accrued to a tax payer on whether it is income or it is of a capital. One of the tests developed by the courts is the Profit making scheme test. This primarily seeks to ask the questions whether the taxpayer objectively conducted the business and whether it was the objective of the taxpayer to conduct a business and make a profit as a result. This was the test applied by the majority in the famous **CIR V PICK-N-PAY EMPLOYEE SHARE PURCHASE TRUST 54 SATC 271.**
The other test derives from the old celebrated case of **CIR V Visser** which amplified the Fruit and tree test. The understanding under this test is that the tree represents

capital and the fruit, income. **Maritz J** in the **Visser case** gave the analogy of law books. He said law books in the hands of a lawyer are a capital asset and in the hands of a bookseller they are stock in trade(income). Admittedly, the tests are not meant to fit in every situation but merely serves to provide, at least, a starting point and some guidelines. The other test developed is called the fixed versus floating capital test. Under the auspices of this test, the reasoning is that an amount received or that accrues to the taxpayer directly from the disposal of a capital asset ought to be regarded as capital and not income. There can not be any argument around this reasoning. It is important to point out that it is not the straightforward matters that result in the debate. It is the portion of the borderline and complicated cases that concerns the differing views on the subject matter.

What is clear is that the literature available on the subject matter of this discourse is not settled on what can be definitively called income as opposed to that which is of a capital nature. To some, any form of property that is capable of possessing a money value, whether corporeal or incorporeal may be taken as income. There is also an acceptance that there is no 'half way house' on the subject matter. It is either an amount is income or capital at any given time.

A critique of this field is necessary to establish whether what we have is a product of interpretation or it is because capital as distinct from income in tax law is incapable of being definitively delineated. It is also important to look at the literature to establish whether one cannot make recommendations that may make the task easier to both the tax payer, and the tax collector and in the result aid to certainty as propounded by Smith.

CHAPTER SYNOPSIS

1.6 CHAPTER ONE: INTRODUCTION AND BACKGROUND

This chapter will introduce the research topic and give a background surrounding the subject matter. It will also identify the problems associated with the absence of a settled distinction between that which is capital and that which is income in respect of amounts received or accrued to the taxpayer. Briefly, Adam Smiths' canons of taxation will be introduced and how they relate to the subject matter and the desirability of having a clear cut distinction in the field of study. Chapter 1 will also give the statement of the problem, the research questions, the research methodology and the literature review.

1.7 CHAPTER 2: OUTLINE OF THE INCOME TAX LAW OF ZIMBABWE

This chapter will set out the income tax law of Zimbabwe. It will outline how the law as presently coined relates to the distinction between income and that which is of a capital nature in respect of amounts received or accrued to a taxpayer at any given time. A brief look at the capital gains tax law will also be made with a view to give the contextual premise upon which the discourse is found and to also highlight the difference between a capital gain as envisaged by the Capital Gains Tax Act compared to the conception under the Income Tax Act. The writer will also relate to Adam Smiths' canons of taxation vis a vis the law as it obtains currently. Case authorities on the subject matter will also be visited and analysed and the obtaining weaknesses of the framework as it stands will also be proffered.

1.8 CHAPTER 3: COMPARATIVE ANALYSIS FROM SOUTH AFRICA AND UNITED KINGDOM

The essence of this chapter is to give a comparative analysis of Zimbabwes' income tax law system to that of South Africa and the United Kingdom. A look at the income tax law systems of these jurisdictions will be analysed critically. It has to be pointed out that both South Africa and Zimbabwe are Roman Dutch Jurisdictions but the conceptualisation of income in relation capital gains is not the same. South Africa income tax system in relation to a capital gain tallies with that of the United Kingdom.

1.9 CHAPTER 4: THE DEBATE ON INCOME VIS A VIS CAPITAL

This chapter will focus on the various approaches to what constitutes income as opposed to that which is of a capital nature in tax law. The debate will be introduced and positioned. The various tests developed by the courts on the subject matter will be discussed and a critique on them rendered. The various views from different scholars will also be reviewed.

1.10 CHAPTER 5: RECOMMENDATIONS ON THE DEBATE AND CONCLUSION

This chapter gives a summary of what has been traversed in the foregoing chapters and also outline what the writer considers to be the necessary practical recommendations that may be made to the Zimbabwean income tax law system. Recommendations will also be made on the various tests developed over the years on what constitutes income as opposed to that which is of a capital nature in respect of amounts received or accrued to the taxpayer.

CHAPTER TWO:OUTLINE OF THE INCOME TAX SYSTEM OF ZIMBABWE

2.1 INTRODUCTION

In Zimbabwe, the tax system derives from the Constitution. Section 298 of the Constitution provides that no taxes may be levied except under the specific authority of the Constitution or an Act of Parliament[3]. The Constitution also makes a clear attempt, though indirectly, at recognising the principles of taxation[4] as espoused by Adam Smith in his Book, The Wealth of Nations[5]. The law as it currently obtains gives an indication of what constitutes income. Admittedly, the attempt has not helped in ensuring that, with certainty, the citizenry can competently and without difficulty, define what constitutes income.In fact, the citizenry is expected to prove that the amount in its hands is of a capital nature and is therefore not subject to income tax. There has been, over the years a clear effort by the Courts to assist in defining income. The subject of what is income remains as controversial as it has been over the years. Before dealing with the subject matter under scrutiny, it is important to relate to the principles of a good tax system as espoused by Adam Smith.

2.2 PRINCIPLES OF TAXATION

The accepted position in law is that a tax is a tax because it is made compulsory by the legislature. This is the starting point. From this premise, Adam Smith outlined and founded the basic principles of taxation which have stood the test of time and have been applied to most, if not all, tax systems. The proposition is that these principles exist in a good tax system. The canons as propounded by Smith are equity, certainty, convenience and efficiency. The cannons of taxation are discussed in turn.

2.2.1 THE CANON OF EQUITY

The equity principle demands that tax payers ought to contribute towards the States' revenue on the basis of their ability to pay. It is proposed that a good taxation system ensures justice. Naturally, with this understanding, taxpayers with more resources must pay more in taxes.The principle is founded on the notion that the burden of taxation must be shared or distributed equitably in any society and regard ought always to be given to the ability of the taxpayer. In short, there must be proportionality in the manner in which taxpayers pay taxes to government as viewed from the perspective of their income, consumption or wealth. The Constitution speaks to the tax burden being shared equally[6].

A functional and good tax system must therefore contain progressive tax rates anchored on the tax payers' ability to pay and sacrifice. Richer persons in society are expected to pay more in taxes which would be proportionate to their means and this should directly apply in relation to those on the other end in society.

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[3] See Section 298(2) of the Constitution of Zimbabwe

[4] See Sections 298(1)(b)(i), (d) and (e) of the Constitution

[5] The Wealth of Nations, (1776)

[6] See Section 298(1)(b)(i) of the Constitution

The ability to pay principle has two aspects attaching to it. The first one is that of horizontal equity, that is those who are equal in ability to pay, and positioned similarly in society ought to be treated equally. The proposition under horizontal equity is that those with same income should be taxed the same and no one should be discriminated against. The second one is that of vertical equity which denotes that those with different abilities to pay should be treated in a manner that is alive to this fact. They cannot be taxed the same way with the ones richer than them. The level of income is different and a good tax system should ensure that there is both vertical and horizontal equity.

2.2.2 THE CANON OF CERTAINTY

The cannon of certainty requires that the taxpayer be clear on what it is that is the subject of taxation. The taxpayer cannot be expected to guess or to just wake up with a staggering tax bill! There must not be arbitrariness in tax. The taxpayer ought to know his tax obligations in advance and the tax law should ensure that this is so. The time for payment, that is the year of assessment or tax period should be known by the taxpayer, the manner of payment and the quantity to be paid should not be a subject of debate. It ought to be clear to the taxpayer and enable him/ her to embark on tax planning. In Zimbabwe and in most jurisdictions, the approach has been to interpret tax legislation in favour of the taxpayer where there is doubt. This is the *contra fiscum rule*[7]. This common law principle provides that should a taxing statutory provision reveal ambiguity, the ambiguous provision must be interpreted in a manner that favours the taxpayer[8].

There is no presumption as to tax and one has to look at the legislation fairly and if the taxpayer does not fall within the language used then he must benefit[9]. In the **Cape Brandy Syndicate case** the court held thus;

> In a taxing case one has to look merely at what is clearly said. There is no room for any intendments. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in common, nothing is to be implied. One can only look fairly at the language used.

In **M. M. W. Private Limited v Zimbabwe Revenue Authority**[10] **MR Justice Ndou AJ at page 8 opined thus;**

> I will however, not lose sight of the fact that this is a fiscal case which has a different regime of statutory construction. In the case of Loewenstein v COT 1956(4)SA 766(FS) at 772B MURRAY CJ quoted Lord Cairns in Partington v AG 21 LT p375 as follows:

[7] See M. M. W (Private) Ltd v Zimra HH31/22 and MBCA Bank Private Limited v Zimbabwe Revenue Authority SC140/21
[8] See Endeavour Foundations and Another v Commissioner of Taxes 1995(1)ZLR339(SC) and more recently Delta Beverages V Zimbabwe Revenue Authority HH129/15
[9] Cape Brandy Syndicate v IRC [1921]1 KB 64
[10] n 7 above

> I am not at all sure that in a case of this kind-a fiscal case-form is not amply sufficient, because as I understand the principles of all fiscal legislation it is this: if the 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 statutes.

The *contra fiscum rule* does, in fact, ensure that the tax payer is not burdened by a tax bill where the law is not clear that the obligation to pay tax exists in the statute.It is a good intervention in the context of the principle of certainty. Attaining certainty in taxation is imperative[11] and indispensable if it is to be useful to both the taxpayer and the tax collector. Smith speaks of the importance of certainty in taxation in the following manner;

> The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid ought all to be clear and plain to the contributor and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax gatherer, who can either aggravate the tax upon any obnoxious contributor or extort, by the terror of such aggravation, some or prerequisite to himself"[12]

Certainty, in tax law, is primary. While the taxpayer is able to ascertain his tax liability from their income with ease, the tax collector is also able to plan on how much in taxes to expect at any point in time. It is important for budgeting at the national level. It enables the government to know or at least estimate how much funds it will have through taxation. This is why it is important, in any tax regime, to definitively deal with all tax questions definitively. The principle of certainty assumes ascending importance if one looks at the subject matter of this discourse. The distinction of what it is that constitutes income as opposed to that which is capital cannot be overemphasised. It enables the tax man to know beforehand that which he can collect from the taxpayer. On both the tax payer and the tax collector it enables ease of planning before the tax amount falls due.

The expectation under this head is that there is certainty to those falling within the tax band, certainty as to liability in any given period of assessment and then certainty of that which the government collects in any tax period. The absence of a clear distinction on income and capital in relation to accruals or receipts in the taxpayers' hands is an indictment on this principle.

2.2.3 THE CANON OF CONVENIENCE

[11] See CVS V COT 1988(2)ZLR27(HC)

[12] A. Smith, 'An inquiry into the Nature and causes of the Wealth of Nations, 1904, available at http://www.econlib.org/library/Smith/smWN21.html

Convenience[13], as a principle, requires that the tax ought to be collected by the tax collector in the most effortless way on the part of the taxpayer. The process of tax payment and tax collection should be convenient to the contributor. Taxes should be levied in the same period that income is earned and in the most expedient way. Taxes ought to be collected in cash as opposed to being in kind. This inquiry would arise where the taxpayer has assets but is not liquid. Under this understanding, the taxpayer would be expecting to be given time to pay the tax should he not have the funds in hand when the tax is said to be due.

Adam Smith conceived of a tax system in which; every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state[14]. The manner in which the taxes are collected has a direct relation with the compliance rate from the taxpayers. It is important therefore to make the process of taxation as convenient as it possibly can, in the interests of both the taxpayer and the tax collector.

It is important to have a convenient tax system for instance if a tax is deducted at source from the Salaries Services Bureau, in the Zimbabwean context, which applies to civil servants. The civil servant(tax payer) only gets the net amount due to him and government would have deducted that which is due to it by law.

2.2.4 THE CANON OF EFFICIENCY AND COST EFFECTIVENESS

In terms of the efficiency principle, the collection of taxes must be commensurate with the expenses incurred in the process. The revenue yield ought to be proportionate to what is spend in the collection process. This principle finds expression Constitutionally. The Constitution in Section 298(1)(d) provides in the following terms;

"(1) The following principles must guide all aspects of public finance in Zimbabwe-

(d) public funds must be expended transparently, prudently, economically and effectively."

The above provision was clearly founded on the idea that public funds, which are a product largely, of taxation, be spent sparingly and without waste in the process of tax collection. The tax man employs public resources in the process of collecting tax In fact, in the Zimbabwean context, the provisions of the Public Finance Management Act[15] admonishes the fruitless and wasteful expenditure of public resources and also under Section 44 of the Act, all public entities are obligated to efficiently discharge obligations including those relating to tax collection. Extravagancy and wastefulness in tax collection is inimical to a functional and good

[13] See also Section 298(1)(d) of the Constitution

[14] A. Smith, 'An inquiry into the Nature and causes of the Wealth of Nations, 1904, available at http://www.econlib.org/library/Smith/smWN21.html

[15] Chapter 22:19

tax system. It is therefore not countenanced under this principle. Essentially, efficiency, as a principle, touches on the process of tax collection in that it should not adversely affect the allocation and use of resources in the economy and should obviously not cost more than the taxes collected themselves.

The absence of a clear cut formula on the capital and income distinction in relation to receipts and accruals may undermine this principle if in the process of tax collection, the tax collector will have to end up in court to have an adjudication on whether the amount accruing to or received by the taxpayer is taxable. These are the considerations that take precedence in an efficient tax system. In fact, it ought to be understood that tax collection is an administrative function and must therefore be discharged in compliance with the principles of honesty, transparency and cost effectiveness. No point is served to spend more in seeking to collect a lesser tax that is due to government. If this happens, then the inference is that the tax system is not good and functional.

There is a general acceptance that no single infallible test exists in settling the question whether a receipt or accrual is income or capital. However, whether receipt or accrual is capital or income is sometimes obvious yet there are also difficult cases. It is these difficult cases that may render Adam Smiths' canons of taxation, sometimes of little or no relevance at all. That there must be clarity as to the concepts of income and capital in relation to accruals or receipts to the taxpayer is critically important. In fact, the whole tax system rests on the presence of an easily discernible and definite conceptualisation of the assessable income.

2.3 AN AMOUNT OF AN INCOME NATURE

In the Zimbabwean context, the concept of what may be regarded as income is defined by legislation[16]. The Act broadly defines income and it is clear that what is income includes non cash amounts. For instance, the right of use or occupation of land or buildings[17], the right of use of plant and machinery, the right of use of any patent and several other non-monetary items[18]. Under the definition of income, the inclusion of non-cash items as constituting assessable amounts of income seems to suggest the use of the convertibility test[19]. If the item can be converted to money then it is assessable income. Deducing from the statutory definition, the position is that everything that is not of a capital nature is income. This ought also to include the items that are deemed by the Act as income regardless of whether they are of a capital nature. The Act defines gross income. In relating to the aspect of definition of income, **Jordan CJ** had the following to say in **Scott v C of T**[20] **thus;**

The word income is not a term of art, and what forms of receipts are

[16] Section 8 of the Income Tax Act of Zimbabwe
[17] Section 8(1)(d) of the Act
[18] See Section 8(1) of the Act
[19] See Tenant v Smith [1892]AC 150
[20] (NSW)(1935) 35 SR(NSW) 215

comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to treated as income must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income, or that special rules are to be applied for arriving at the taxable amount of such receipts

R.C Williams[21] holds the view that an item does not become income unless it is money or it is capable of being converted to money. Generally, individuals and businesses would regard income as the amount or value they receive or that accrues to them or that is deemed to accrue from the employment of their labour and/or products. An individual's gross income may equal the total earnings from wages and salaries, return on investment and sale of property and other receipts and/or accruals. What concerns income tax law is that which is regarded as taxable income. This may be regarded as the amount received by or accruing to or deemed to have accrued to the tax payer in any particular year of tax assessment.

According to **Lee Burns and Richard Krever**[22]**,** income tax is concerned with the measurement of the net economic gain of a tax payer in a fixed period for the purpose of collecting a portion of the gain as tax. It has been suggested that a gain may be income from a business or an individual, if it arose from a transaction that was entered into or concluded by the tax payer with a business or profit making desire. Such a gain is set to arise from an adventure or concern in the nature of trade[23]. The general understanding of income is broad but excludes that which is utilised to realise the gain that may be called income.

Various items may be regarded as income and includes, but are not limited to, the following;

(i) Cash in lieu of leave.
(ii) Proceeds received or accruing from the ordinary carrying out of a business.
(iii) Whatever amount received or accruing from a trade or professional practice.

It has been settled, however, that a gift and or donation is not income[24]. Money received as a loan is also not income[25]. In the case of **Wilkins v Rogerson**[26], a company gifted its employee a tailor made suit with a value of fifteen pounds for the Christmas holidays. The tailor was advised to direct the invoice to the company, the employer. The Court found that the benefit of the free suit was a product of his employment and was therefore assessable income received by the employee. The

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[21] See Williams R.C, Income Tax and Capital Gains Tax in S.A.Law and Practice, 3rd Edition, Butterworths (2001)
[22] Tax Law Design and Drafting (volume 2; International Monetary Fund: 1998; Victor Thuronyi, ed.)
[23] See Martin v Lowry (1927) AC 312, Rutledge v CIR 1929 14 TC 490
[24] Moore v Griffiths (Inspector of Taxes) 1972 (3) ALL ER 399
[25] See CIR v Genn & Co (Pty) Ltd 1955 3 SA 293
[26] See [1961] CH 133

value was the realisable value to the recipient of the suit, the employee, being an amount capable of being recouped should the employee resale the suit. This is the convertibility test. This clearly presents a contrary view to the position taken in **Smith v Tenant** in that the amount that would afford the employee the opportunity to stay in a similar house , the rent, could competently be converted to money. The court could have found the 'benefit' of free accommodation which accrued by virtue of employment as taxable income in the hands of the employee. What the variance in the findings discussed in this discourse simply demonstrates, is the elusive nature of what it is that constitutes income. The legislative definition impliedly accepts the difficulty in clearly demarcating the extent and reach of income.

2.4 THAT WHICH IS OF A CAPITAL NATURE

The Income Tax legislation, as alluded to above, defines gross income. It, however, calls everything that is not income, capital. The law then proceeds to cast the burden to prove that the receipt or accrual is of a capital nature on the tax payer[27]. In this determination, various considerations come into the fray for instance the intention of the tax payer with the asset in his hands. Speaking to a similar position on the definition of income given by the legislature by our law, in South Africa, in the case of **COT V Booyens' Estates Ltd**[28]**, Wessels J** had the following to say;

> Although the Act does not define capital it does define income, and as the latter is definitely related to the former, we must presume, that the Legislature assumed that the ordinary economic meaning is to be attached to the word capital.

This position simply translates to defining the term capital ordinarily. It would have been ideal for the legislature to attempt a definition of the term capital. It did not define the term capital and placed the obligation to prove the 'undefined capital' on the taxpayer. The Wessels Js' approach was followed in the case of **Smith v SIR**[29], where **STEYN CJ** opined thus;

> In the absence of any indications to the contrary- and I have found none-the word 'capital' has to be given its ordinary meaning. Broadly speaking and for present purposes, it may be said to connote money and every form of property used or capable of being used in the production of income or wealth. Such a commercial or business sense is the sense in which one expects it to be used in the context here in question, and it is to capital in that sense that, for purposes of S11(2)(b) bis at any rate, expenditure is to be related in order to determine whether or it is expenditure of a capital nature.

The definitions proffered above demonstrate that capital is simply that which is used to produce income. That which produces income is not the subject of taxation according to our law. It would include such items as buildings, plant and machinery, factories and such other assets that do not have a short life span. The caveat to this understanding is that the asset remains of a capital nature to the extent that the taxpayer does not decide to convert it to stock in trade and carry on the business of

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[27] See Section 8 of the Income Tax Act

[28] 1918 AD 576

[29] 1968 (2) SA 480 (A) , 30 SATC 35

selling such asset recurrently.

The distinction between capital and income in relation to receipts or accruals in the taxpayers' hands is dealt with in the case of CIR V Visser[30]. His Lordship Maritz J likened it the tree. He developed the tree and fruit analogy. The court propounds that income is what capital produces or is something in the nature of interest or fruit as opposed to principal or tree. The court, however, accepts that the application of the analogy presents in, some instances, difficulty in its application.

Ultimately, the question of what constitutes capital as distinct from income assumes the nature and form of a legal question whose settlement turns on the facts and the legislative provisions. It ought to be pointed out at the outset that the role of the judiciary in this entire discourse cannot be over emphasised. The Judges shape the form and content of the understanding of the concepts of income and capital.

2.5 A RECEIPT OR AN ACCRUAL?

For any determination to be made on whether an amount is taxable, it ought first to be either received by or accrued to or in favour of a person or deemed to have been received by or accrued to in favour of a person in any tax year. There cannot be a discussion on income without there being a receipt or accrual by the tax payer.

There is little debate on what 'received by' means in income tax jurisprudence. The tax payer ought to receive for themselves for such receipt to attract tax. If the tax payer receives any sum in any capacity other than in his/her own right and on his/her own behalf, the amount received is not taxable. In **Gelden v CIR[31],** the court found that the tax payer did not receive the proceeds of the sale of the sheep in her capacity as a tax payer. She had received the proceeds in her capacity as a representative of the heirs of the Estate and the beneficiaries thereto and therefore, that which she had received did not form part of her income. The receipt was not subject to tax.

What has been the subject of some debate is the meaning of accrued to or deemed to have accrued to a tax payer in any year of assessment. The leading authority on this subject matter is the judgment in **Lategan v CIR**[32]. This case related to a wine farmer who had sold the wine he had produced in May 1920, for the sum of Five Thousand Nine Hundred and Twenty Four British Pounds. Three Thousand Five Hundred British Pounds of this amount was received by the tax payer by 30 June 1920 (*close of the year of assessment*).The tax payer was a member of a wine farmer's co-operative formed to control and regulate the sale of wine by its members. The Constitution of the Co-operative had a clause permitting certain retentions and contribution money to be deducted from that which was due and

[30] 8 SATC 271, 1937 TPD 77
[31] 1974(3)SA 256
[32] 1926 CPD 203

payable to or received by its members. The retentions and contribution seems were used partly for administration costs and partly for creation of reserves in which the tax payer became entitled to receive shares.

The Commissioner for Inland Revenue regarded the whole amount of Five Thousand Nine Hundred and Twenty Four British Pounds as the tax payer's gross income and disallowed the deduction of both retention and contribution sums. On appeal, **Watermeyer J** had this to say;

> In my opinion the words in the Act "has accrued to or in favour of any person" merely meant "to which he has become entitled." So far as a debt was concerned which was payable in the future and not in the year of assessment …….. but he had acquired a right to claim payment of the debt in future. This right had vested in him, had accrued to him in the year of assessment and it was a valuable right which he could turn into money if he wished to do so. According to what had been stated above the value of this right must, in his Lordship's opinion, be included in the taxpayer's gross income for taxation purposes...

This is now known as the Lategan Principle and our income tax legislation is largely fashioned along the principle. The Lategan Principle was tested in **CIR v People's Stores (Walvis Bay) (Pty) Ltd**[33]**.** The position adopted in this case was that an amount is taken to have accrued to the tax payer when he becomes unconditionally entitled to it[34]. The Margo report,[35] of the **Commission of Inquiry into the Tax Structure of the Republic of South Africa** (The Margo Report) analyses the accrual principle in the following terms;

> …the test of entitlement is clearly inappropriate as it determines when the assets exists in a business… where a tax payer has become entitled to a right in terms of which an amount payable in the future year of assessment, due allowance should be made in the valuation thereof for the futurity of that right beyond twelve months.

The Margo report and the various other authorities[36] confirm the position in Lategan. Deeming provisions seek to place an amount that is deemed to have accrued (even if it has not) within the tax band. The law has various provisions that speak to deeming that income has accrued[37]. What is important, however, is that there is an understanding of what an accrual is for purposes of determining whether the amount that has accrued or deemed to have accrued is taxable. It has been suggested by R.C Williams[38] that it is possible of a single amount to be partly income and partly capital. Williams suggest that a gift made to the taxpayer out of affection or a banknote picked on the street is surely not income or capital. This proposition is

[33] 1990 (2) SA 353 (A)
[34] See also Hersovs' Estate v CIR 18 SATC 20, per Centlivres CJ
[35] Cecil Margo, 1986
[36] See also CIR v Delfos 6 SATC 92
[37] See also Section 8, Section 10(1) to (7) and Section 12 1(a) to (d) of the Income Tax Act of Zimbabwe
[38] In his book at page 112

contrary to the 'no half way house approach'[39] that is opined in both the legislation[40] and decided cases[41]. Our income tax law proceeds from the premise that an amount received or that has accrued to the taxpayer is either income or capital. The amount must, by law, fit into one of the two classifications.

2.6 THE INCOME TAX LAW OF ZIMBABWE

Income Tax is governed by the Income Tax Act (Chapter 23:06). It is the complete code on income tax in Zimbabwe that is, it covers both individuals and corporates. The Act has three broad provisions which ought to be understood by any person interested in income tax in Zimbabwe. These provisions are those that apply to all tax payers, then those that apply to the individual tax payer and then the provisions that apply to corporates. The Act, compulsorily, in Section 6 legislates income Tax and that it shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund[42]. For income tax to attach or to be levied, there must be income. The Act defines gross income as;

> The total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment from a source within or deemed to be within Zimbabwe excluding any amount(not being an amount included in "gross income" by virtue of any of the following paragraphs of this definition) so received or accrued which is proved by the taxpayer to be of a capital nature and, without derogation from the generality of the foregoing, includes…[43]

The conception of income tax has to be understood from the gross income definition as a starting point. The next step is to then determine whether the taxpayer has allowable deductions in terms of the Act and only after the allowable deductions are ascertainable is one able to come up with taxable income. Section 15 of the Income Tax Act extensively deals with allowable deductions. The deductions are categorised into viz, those that are specific in the sense that the Act identifies them by name. The second category of deductions are those that are general and will have to be ascertained in any given year of assessment of the taxable income. The understanding on general deductions is that they ought to be deducted if it can be established that the taxpayer incurred the expenses in the course of production of income. The deduction formula becomes intrinsically important to the determination of general deductions. The formula takes into account the following heads;

(i) That the taxpayer is carrying on a business

[39] see Crowe v CIR 1930 AD 122, 4 SATC 133 at 136

[40] See Section 8 of the Income Tax Act of Zimbabwe

[41] Pyott Ltd v CIR 13 SATC 121(A)

[42] The Section provides that there shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund an **income tax** in respect of the taxable income, as defined in this Part, received by or accrued to or in favour of any person during the year of assessment end ending the 31st of March 1968 and each succeeding year of assessment thereafter.

[43] See Section 8 of the Income Tax Act (Chap 23:06)

(ii) In the process of carrying on business the taxpayer incurs expenditure or loss

(iii) Such loss or expenditure is incurred in the production of income

(iv) The expenditure or loss ought not to be of a capital nature.

An expenditure is any use of money or property by the taxpayer to pay for or in consideration for a service or asset required in the course of carrying on business. A loss is a relative concept but the courts have limited a loss to be an expenditure that is related to a third party in circumstances that are not required in the course of business. For instance, where a taxpayer pays damages to a third party for liability arising in the course of trade[44]. Arguments have been made that the use of the word loss could actually be superfluous but the courts are unwilling to have regard to this word[45]. Understanding how the deduction formula for general expenditure is important in income tax law.

A careful consideration of Section 8 of the Income Tax Act yields the undeniable fact that it is not a definition at all. It has been generally accepted that Section 8 of the Income Tax Act above is essentially shaped by case law[46]. To place a meaning on what is income one has to look elsewhere. The Courts have given definitions on what is income and in doing so, income has been distinguished from capital. It is generally accepted that income is that which is produced by capital[47]. There is sometimes a fine line between capital employed to produce income and income itself.

In Section 2 of the Income Tax Act, an 'amount' is defined as money or any other property corporeal or incorporeal having an ascertainable money value[48].It is important to have a clear comprehension of what an amount is as it forms the basis upon which any accrual or receipt is considered income or capital. Our law proceeds from the premise that an amount is anything that can be converted to money in the sense of having an 'ascertainable money value'. The word 'received by' means that which is paid to the taxpayer in his own right and for his own benefit. The words 'accrued to' simply translates to that which the taxpayer is entitled to or that which becomes due and payable to the taxpayer at any given time or in future. A deemed source is governed by Section 12 of the Income Tax Act and income may be deemed to be from a source within Zimbabwe even if the true source is not Zimbabwe

There is a clear exclusion of amounts proved by the taxpayer to be of a capital

[44] See Geoff and Company v CIR 1946 AD 157

[45] See Stone v CIR 1974(3)SA 584

[46] See Lategan v CIR 1926 AD 203

[47] See **CIR V VISSER 1937 TPD77 where at page 81 Maritz J found** that " income is what capital produces or is something in the nature of interest or fruit as opposed to principal or tree. This economic distinction is a useful guide in matters of income tax but its application is very often a matter of great difficulty for what is principal or tree in the hands of one may be interest or fruit in the hands of another"

[48] See also Commissioner for South Africa Revenue Service v Brumeria Renaissance Pty Ltd 69 SATC 205

nature under the definition of gross income. The burden to prove that it is capital lays on the taxpayer. Section 8 of the Act includes trading stock under gross income[49] and this also applies to annuities which may be by gift or legacy or arising from disposal of an asset or in the form of a pension[50].

Under the auspices of Section 8 of the Act, the question of the source of that which is income is important. It appears to also play a role in the definition of income. It is said that income must be connected to the taxing authority or the system. There must be a relationship between the taxpayer and the tax system. Generally there are two connecting factors which are source of the income that is not concerned about the identity of the taxpayer but where is the income made and identity of the taxpayer, that is the taxpayer is either a citizen or a resident.

Section 8 of the Income Tax Act and the various provisions under it read together with Section 2 of the same Act is central to this discourse. It defines gross income. The Act defines what is an amount and clearly speaks to the amount being ascertainable in value. This provision arguably legislates the convertibility test dealt with elsewhere in this discussion. The Act gives an indication of what is capital. It provides the various deeming provisions of what it is that can be taken as the assessable income and therefore subject to tax. The Act lists the various items, some, on the face of it, of a capital nature but subjects them to tax. Importantly, the definition Section, in very clear terms, imposes the obligation on the tax payer to prove that the accrual or receipt in his hand is of a capital nature and therefore not taxable.

Exemptions are dealt with under Section 14 of the Act as read together with the 3rd Schedule[51]. Section 15 of the Act then deals with allowable deductions and expenditure or losses to the extent to which they are incurred for the purpose of trade or production of income (in essence that which can be regarded as revenue is allowable) is deductible except to the extent to which they are capital in nature[52]. Section 16 of the Act then deals with prohibited deductions which includes entertainment, thin capitalisation, domestic or private expenditure, expenses recoverable under insurance, expenses incurred in production of exempt income or in production of income deemed to be from a source within Zimbabwe and several other such expenses.

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[49] See Section 8(1)(h) of the Act

[50] See Section 8(1)(a) of the Act

[51] Where companies, non profit making organisations, dividends from local companies, income from which residents tax on interest is to be withheld, receipt or accrual from the sale of traditional beer and other receipts and accruals are dealt with.

[52] See Section 15 of the Act. And consider the approach taken in **D Bank Ltd v Zimbabwe Revenue Authority HH135/15** where at page 10 his **Lordship Kudya J**(as he then was) found thus; "I am satisfied that applying practical business and sound accounting principles emanating from International Financial Reporting Standards that informed the treatment of software as an amortised intangible asset in the financial accounts of the appellant for three consecutive years all expenditure attaching to computer software was of a capital nature"

Capital allowances are dealt with under Section 15(2)(c) of the Act as read with the 4th Schedule and includes costs of the asset, depreciation and also takes into account the purpose and type of the asset. Under this provision, Commercial buildings are looked at from the date of construction, its purpose and farm improvements, staff housing, tobacco barns but all these have a restriction on the cost. Capital allowance recoupments are also dealt with under Section 8(1)(j) of the Act.

Leases are also dealt with under the auspices of Section 8(1)(d) of the Act. A lease premium or rentals is gross income in the hands of the lessor and therefore taxable. Under Section 15(2)(d) of the Act, where the leased asset is used for the sole purpose of trade the premium is a business expense in the hands of the lessee over the period of the lease or 10years whichever is shorter. Hire purchases and credit sales are dealt with under Sections 17 and 18 of the Act. For purposes of tax, the sale price is deemed to accrue on the date of signing the agreement. Effectively this means that the income is taxable even though it is not yet received and this is subject to Sections 17 and 18 of the Act.

Our law has always been alive to the distinction between capital and income in respect of receipts and accruals in the taxpayers' hands. Just like most jurisdictions, the law has been the subject of various tests and propositions in a bid to afford a meaningful distinction that comports with the views from other jurisdictions. . In **'C' Limited v Commissioner**[53]**, Quenet J** held that the anticipation of the directors of the company that the company would derive a profit from a transaction is not sufficient reason for holding that this a scheme of profit making if it is established that their prime object is to acquire an investment. One would need to contrast this decision with the finding per **Macdonald J in 'E' Company Ltd v The Commissioner of Taxes**[54] where his Lordship found that the Appellant company bought the land cheaply with the intention of disposing profitably at a later date. **Quenet J** in the **C Limited cas**e, supra had reasoned that;

> I venture to think, however, that when land is bought, whether for investment or for trading purposes, the buyers' expectation always is that the land will appreciate in value. The Respondents' counsel submitted that the intention to erect a building was alternative to an intention to sell. That may be true in so far as the contention was meant to apply to the surplus; as I have indicated, there was evidence to suggest that the Appellant explored the possibility of erecting a building and leasing it either to the Federal Government or to the Shelf Company; but as regards the land to be an investment and to develop it when conditions were favourable[55].

Both Judgments relate to the intention of the taxpayer but reach a different conclusion on whether the amount is taxable or not. Recently, a question for determination that arose was whether waived school fees is an advantage or benefit

[53] 1961 R& N 309
[54] 1958 RLR 723
[55] at page 310

in terms of Section 8(1)(f) of the Income Tax Act and could be regarded as income[56]. In dealing with the subject, **Mr Justice Kudya** found that the right to education at concessionary rates constituted incorporeal property enjoyed by children at these schools and that the waived amount is an amount equal to the value of an advantage or benefit in respect of employment and falls into the definition of amount as defined in Section 2 of the Act[57]. It was therefore income and His Lordship relied on the Lategan case and found as follows;

> It appears that at the time the Lategan case (supra) was decided "amount" was limited to money and was extended by dint of judicial interpretation to include the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which had a money value. The rewards earned by his work or wits or employment of his capital accrued to him in the form of cash or some kind of property or in the form of rights[58]

The debate and absence of a universal formula on what it is that constitutes income has been with us for a long time[59].The judiciary continues to play a critical role in developing the jurisprudence around the subject matter. Any interpretation exercise of any law, unless there is no statutory provision dealing with it, starts with a careful consideration of the statute itself and then case law as a corollary of Statute law.

2.6.1 CAPITAL GAINS TAX

This is governed by the Capital Gains Tax Act[60]. Capital gains is levied on a gain realised from the disposal of a specified asset in terms of Section 6 of the same Act. Specified assets includes immovable property, any marketable security, any right or title to property whether corporeal or incorporeal that is registered or required to be registered or required to be registered with all the Acts listed under Section 2 of the Act.

The Act was promulgated on the 1st of August 1981. It changed the regime in respect of the specified assets. A gain, by virtue of this Act, that is of a capital nature is liable to capital gains and not income tax. Gross capital amount is defined as the total amount received by or accrued to or in favour of a person in any year of assessment from a source within Zimbabwe from the sale on or after the 1st of August 1981, of specified assets excluding any amount so received or accrued which is proved by the taxpayer to constitute gross income. This Act did not, just like the Income Tax Act, decisively deal with the distinction between that which is of a capital nature and therefore a capital gain, as distinct specifically with that which

[56] See AS Schools &Others v Commissioner General Zimbabwe Revenue Authority 2016 ZLR (1) 58

[57] See also Standard Chartered Bank(Zimbabwe) Ltd v Zimbabwe Revenue Authority 2009(2) ZLR 251(S) at 255

[58] at page 69

[59] See ITC 1336(1981), 43 SATC 114 (Z) per Squires J

[60] Chapter 23:01

is of an income nature. This is different to the income tax regime that obtains in the Republic of South Africa and in the United Kingdom. Both jurisdictions levy capital gains under their income tax legislation.

2.7 CONCLUSION

Overall, the income tax regime in Zimbabwe is as set out in the Act and as amplified in case authorities. There is no definitive answer to the question on the exact distinction between income and capital in relation to an accrual or receipt particularly in respect of borderline cases. The ordinary and straightforward cases pose little to no problems at all. In fact, it is the borderline cases that concern the jurisprudence in income tax law. In these cases, the starting point seems to largely borrow and derive from the decided cases for instance the position in **Commissioner for Inland Revenue v Visser**[61] where the fruit and tree analogy is developed[62]. In the same case, it was suggested that income may be described as the product of a man's wits or energy[63]. There is a growing trend towards ascertaining the intention of the taxpayer when he/she is holding the amount that has accrued or that he/she has received in any period of tax assessment. This is the exercise that appears to have applied from the Rhodesian case authorities to date even though it is arguable that the process of determining intention of the taxpayer itself is not and has not been straightforward.

[61] 1937 TPD 77
[62] See also Willoughbys' Consolidated Company Limited v Commissioner of Taxes 1958 RLR 870
[63] n 61 above at page 81

CHAPTER 3:COMPARATIVE ANALYSIS FROM SOUTH AFRICA AND UNITED KINGDOM

3.1 INTRODUCTION

This chapter seeks to give a comparative analysis of the income tax regimes of South Africa and the United Kingdom as juxtaposed with the Zimbabwean income tax as outlined in Chapter 2 above. There can be no debate that tax law, across the world, is largely a product of legislation. There is also no serious argument that can be made on the view that the income and capital distinction debate has been with us for a long time. What has happened over the years is the development of the law through case law in aiding the understanding on the subject. Admittedly, the intervention of the courts seems not to have resolved the question. The distinction is circumstantial and subject, of course, to the views of those mandated to make a determination at any given time.These, would be, in the first instance, the taxman and in the second instance the Judges that may then be called to decide the dispute. In this Chapter, an outline of the Income Tax law of South Africa shall be briefly given followed by that of the United Kingdom. Particular emphasis shall be given on the general approach in both jurisdictions on the distinction between those receipts or accruals that may be of a capital nature as distinct to those that are of an income nature. The fact of the debate around the distinction between income and capital will be laid bare as understood in both jurisdictions.

3.2 SOUTH AFRICAS' INCOME TAX SYSTEM

3.2.1 DEFINITION

South African Income Tax Law is governed by the Income Tax Act, 1962 (Act No. 58/1962). The Act provides for a series of steps to be followed to determine a tax payer's "taxable income" for any year of assessment or period of assessment. Income tax is the main source of government funding and it is levied on companies, trusts and natural persons. Taxation of income from employment is governed by Sections 8(1), 8A, 8B, 8C and the Fourth and Seventh Schedule of the Act. Capital Gains tax is not a separate tax and falls squarely under the income tax regime as set out in the Eighth Schedule to the Income Tax Act. Capital gains tax is due when the taxpayer disposes an asset on or after 1st October 2001 and realises proceeds that exceed its base cost. It is essentially income realised from the disposal of capital assets. The capital gain is arrived at via deduction of the base cost of the asset from the proceeds realised on disposal . The definition of asset is similar to that which is given to specified asset in terms of the Zimbabwe Capital Gains Tax Act[64].

Gross income is defined in the Act as follows;

> 'Gross income' in relation to any year or period of assessment means, in the case of any person , the total amount, in cash or otherwise, received by or accrued to or in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not)so received or accrued as are described hereunder, namely-;…[65]

The Act refers to that which is of a capital nature and proceeds to outline the same, subject of course to the fact that the list is not exhaustive. The National Treasury[66] noted that according to the Commissioner, one in five cases litigated by South Africa Revenue Authority (SARS) involves the capital versus income distinction and that certain submissions to South African Revenue Services indicate that the available distinction availed by case law is vague and creates uncertainty to the taxpayer as well as needless litigation.

The starting point is that there is an acceptance that there is no halfway house in respect of that which is capital and that which is income in relation to any amount received by or accrued to the taxpayer. There can be no situation where the amount received or that which would have accrued or deemed to have accrued is neither income nor capital[67]. At any point in time, the amount received or accruing to the taxpayer is either income or capital. This may have contributed to the legislation in South Africa which is, just like in Zimbabwe, casting the onus on the tax payer to establish whether an amount is income or capital.

3.2.2 INCOME OR CAPITAL

The jurisprudence surrounding the distinction between income and capital seems anchored on the very old case of **Eisner v Macombe**[68] where **Pitney J** likened capital to the tree or land and income to the fruit or the crop[69]**.** This position was then

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[64] n. 60 above

[65] See Section 1(xi) of the Income Tax Act of South Africa

[66] (Capital Gains Tax In South Africa)**Briefing by the National Treasury's Tax Policy Chief Directorate** to the Portfolio and Select Committees **on Finance** 24 January 2001.

[67] Pyott Ltd v CIR,supra

[68] (1919) USSC 119; (1919) 252 US 189

[69] He opined thus; "The fundamental relation of capital to income has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop, the former depicted as a reservoir supplied from the spring, the latter as the outlet stream, to be measured by its flow during a period of time"

followed in the famous case of **CIR V Visser**[70]**.** It appears to be an accepted starting point in determining income from capital. This authority suggests that income may be described as the product of a man's wits and energy and it goes further to give the fruit and tree analogy in the following terms;

> …..although a man's education, his energy, his personality or his eloquence may have a potential value, such education etc only becomes a factor in the economic or income tax sense when it acquires a real value. His education becomes of real value when it puts it to use for example by adopting a profession. His profession may then be likened to a tree and his earnings from his profession to the fruit of the tree[71].

The fruit and tree analogy in the income and capital distinction debate has been one of the many tests developed over the years. In **Commissioner of Taxes v Boysen**[72]**, Wessels J** opined that, as a general rule, income was revenue derived from capital productively employed. With respect, all the various propositions proffered by the courts in South Africa have not decisively spoken to the distinction on whether an amount is a capital or income receipt or accrual infallibly.[73]

Recently, the debate took an interesting turn in the case of **South African Revenue Services v Founders Hill Pty Limited**[74]. Founders Hill was created by AECI, the holding company, to serve as a realisation company for the purposes of realising the excess land which AECI sought to sell. AECI then sold the land to Founders Hill, which subsequently developed and sold the land itself. Initially, the sale by Founders Hill was not taxed. The Commissioner for the South African Revenue Services subsequently issued revised assessment claims for the profits made on the sale of the land. It was determined that the sale attracted income tax liability.

The tax court held that the profit earned on the sale of the land by Founders Hill was of a capital nature. The Commissioner appealed to the Supreme Court of Appeal. The Supreme Court overturned the tax court judgment. The Supreme Court of Appeal then found that the land sold by the tax payer could not be regarded as being of a capital nature. The reasoning appears to be under pinned by the fact that the land transformed from a capital asset in the hands of AECI to stock in trade in the hands of Founders Hill. This reasoning brings to mind the supposition in **CIR v Visser, supra** where the court speaks of law books in the hands of a lawyer being a capital asset but in the hands of a Book Seller being stock in trade. However, what creates the room for debate is the fact that the land was owned as a capital asset by AECI. The intention to trade in the land, instead of the realisation of the proceeds from this asset as a capital asset, is arguably a signpost in the income and capital receipt or accrual debate.

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[70] n 61 above

[71] n 61 above at page 81 per Maritz J

[72] 1918 AD at page 582

[73] See Commissioner for South African Revenue Services (CSARS) v Founders Hill (Pty) Ltd 2011 (5) SA 112 SCA

[74] n 73 above, 73 SATC 183

There has been a suggestion that to definitively deal with the distinction between a capital or income receipt or accrual, there has to be a determination on whether there has been a change of intention by the asset holder and if so, whether such change of intention crosses the Rubicon. **Lewis JA** [75] in **Founders Hill** had this to say;

> It is only if the property was acquired at the outset as a capital asset that a second question arises-the question that was considered by the court below-which is whether it thereafter "crossed the Rubicon by commencing to engage in the business of trading in the property.

In the circumstances, one may say that South African law, just like Zimbabwean law, is caught up in the web of lack of clarity in respect of the distinction between capital and income in relation to an amount received or accruing to the taxpayer. The approach taken in Founders Hill is arguably debatable if regard is had to the fact that the disposal of the asset(land) was more of a return on investment to the owners. The land may not have been held for speculative purposes[76].

3.3 THE UNITED KINGDOM INCOME TAX SYSTEM

3.3.1 DEFINITION

The income tax law in the United Kingdom is governed by the Income Tax Act (2007). Income tax is charged under various heads and it is unlike the Zimbabwean system. Under the Act, income tax is categorised as employment income, pension income, social security income, trading income, property income, savings and investment income and miscellaneous income. A capital gain falls under income as it is realised upon the disposal of an asset and is considered as part of personal income to the taxpayer who makes the gain. Income tax is an annual tax[77] It being an annual tax, it is assessed yearly and therefore payable for the tax year. Most people in the United Kingdom get personal allowances tax free income depending on them qualifying for such allowances. Such an allowance is the amount one can have before they are liable to pay tax. The primary forms of taxable income in the United Kingdom are earnings from employment, income from self-employment and non-incorporated business allowances availed to job seekers, pensions to retirees, property income, bank and building society interests and dividends on shares.

It has been said that, that which is realised from most means tested social security benefits are not liable to income tax. Income tax is also not payable on employer or employee pension contributions up a certain limit. Before April 2000, married couples were also entitled to a married couples' allowance which was not taxable.

[75] See also CIR V Wyner 2004 (4) (SA) 311 (SCA)

[76] Compare Founders Hill case with 'E' Company Limited v the Commissioner of Taxes 1958 RLR 723

[77] Section 4 of Chapter 1 of the Act

Taxable income in the United Kingdom is subject to different tax rates depending upon the tax band within which the supposed income falls. The Act does not lay out the distinction between a receipt or accrual being of a capital or income nature. It however, categorises what it calls income into various classes as stated herein above. This is not to suggest that the question of the distinction between capital and income receipts or accruals is settled in this jurisdiction.

3.3.2 INCOME OR CAPITAL

The subject matter under discussion is not settled in the United Kingdom. The position is similar to other jurisdictions like Zimbabwe and South Africa. The courts have played an indelible role in assisting on the distinction. The effort by the courts have not been without its limitations. In **Tennant v Smith (Surveyor of Taxes)**[78]**,** the tax payer was an agent to the Bank of Scotland and had a right to stay in a bank owned house but could not sublet it. If he seized employment, he had to vacate the premises immediately. The issue that came up for determination by the Surveyor of Taxes was whether or not the rental value of the bank owned house in which the tax payer resided was income. The court held that an amount is not income if the tax payer is unable to turn it into money (Ability to convert the benefit into money). The reasoning in this case being that the tax payer could not convert the right to company accommodation into income. This has its own problems if regard is had to the fact that it is arguable that the house benefit may not be converted to money but it, in fact, had a monetary value. This monetary value could be considered for purposes of tax. For instance, the taxpayer, if he was without the company accommodation how much would he have spent to secure similar accommodation or how much people in the house as he was ,were paying as rent?.

The United Kingdom also developed the concept that a donation cannot possibly be income and so is a gift. In **Moore v Griffiths (Inspector of Taxes)**[79] it was held that whatever the conceptualisation may be, a gift cannot be taken as income even if it was convertible to money. The question of whether the amount realised is income or capital remains open. What has been regarded as the useful starting point on the debate is what was said by **Viscount Haldane** in **John Smith and Son v Moore**[80] **at page 282,** referring to the work of the famous economist , Adam Smith;

> My Lords, it is not necessary to draw an exact line between fixed and circulating capital. Since Adam Smith drew the distinction in the second book of his 'Wealth of Nations', which appears in the chapter on the division of stock, a distinction which has since become classical, economists have never been able to define more precisely what the line of demarcation is. Adam Smith described fixed capital as what the owner turns to profitably keeping it in his own possession, circulating capital as what he makes profit of by parting with it and letting it change masters.

[78] 1892 ac 150 (HL)
[79] 1972 93) ALL ER 399
[80] 12 TC 266

It has been accepted that there is no universal criteria that can be employed in delineating capital from income[81]. Quite often, it is always a matter of the particular circumstances surrounding a given case. Generally, there is little debate that perpetual payments are unlikely to be capital[82], that the debate between capital and income may be answered by the effect of the expenditure and not its purpose[83] and that if it is not part of the individual or company concerned to trade in the asset then the expenditure is more likely to be capital.[84]

Expenditure that is not once and for all may nevertheless be capital and that an outgoing does not cease to be of a capital nature because it is payable by instalments[85]. Sometimes, there is a very thin line between the payment of a capital sum by instalments and revenue payments for the use of an asset. What the case authorities from the United Kingdom does is to demonstrate that the debate is live[86]. **Holmes K, The Concept of Income: A Multidisciplinary Analysis(IBFD Publications 2000**), propounds that income ought to have the following features viz; an incoming, convertibility into cash, a periodic flow, the reward of employment or vocation or the produce of property, a realisation, separation from source, a profit making purpose or motive and application of the ordinary meaning of income

3.4 CONCLUSION

It ought to be accepted that the positions in South Africa and in the United Kingdom in relation to the distinction between that which is of a capital nature and that which is of an income nature is largely the same. There is a general consensus in both jurisdictions that for the income tax cases that come up for determination anchored on the distinction of capital and income in respect of accruals and or receipts in the tax payers hands there is no single formula that fits all circumstances. The tax regime for both jurisdictions is also the same in relation to having capital gains falling under income tax law and the fact that the gain from the disposal of a capital asset is income. The approach in every case is on a case by case basis and the distinction is determined by taking into account all the facts that surround the particular case. Credit, however, ought to be given to both jurisdictions, the Republic of South Africa and the United Kingdom in developing some useful guidelines towards the subject matter. That the debate remains unsettled is apparent in both jurisdictions.

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[81] Strick v Regent Oil Co Ltd [1965] 43 TC 1

[82] See CIR V Mallaby-Deely and Another [1938]23 TC 15

[83] Atherton v British Insulated and Helsby Cables Ltd[1925] 10 TC 155

[84] The Glenboig Union Fireclay Co ltd v CIR[1922]12 TC 427

[85] See CIR V Adam [1928] 14 TC 34

[86] See also the recent case in Fowler v Commissioner for her Majesty's Revenue and Customs [2020] UKSC22

CHAPTER FOUR:THE DEBATE ON INCOME *VERSUS* CAPITAL

4.1 INTRODUCTION

In Zimbabwe, the onus to establish whether an amount is income or capital is cast on the tax payer. This appears so in both South Africa and the United Kingdom. The tax payer ought to prove that the receipt or accrual is of a capital nature for it not to be taxable in any year of assessment. There are various tests that have been developed by the courts that speak to understanding the dichotomy between that which is of a capital nature and that which is of an income nature.

This chapter seeks to analyse and critique the various tests that have been developed over the years in seeking to come up with an easily discernible distinction between income and capital in relation to amounts received by or accruing to the tax payer. Authorities both in Zimbabwe dating back to Rhodesia and the Republic of South Africa as well as the United Kingdom will be visited. There is no universal consensus on the number of tests that have been developed. The tests are many and include the fruit and tree test, the profit making scheme test, the fixed versus floating capital test, the convertibility test and several others. The running theme through the authorities seems to be the suggestion that each case ultimately turns on the given set of facts and circumstances.

4.2 WHAT IS THE DEBATE ON THE CAPITAL AND INCOME DISTINCTION?

It has to be accepted that our income tax law as it stands distinguishes income from capital receipts and accruals in the tax payers' hands in terms of Section 8 of the Income Tax Act. The envisaged distinction per the legislative provisions is, however, limited to the definition of gross income and then the exclusion of the receipts or accruals that are of a capital nature. Capital nature is not defined in the Act and guidance in this regard will have to be extracted from decided authorities.

It may be correct to suggest that the idea of casting the onus on the taxpayer[87] to prove that which is of a capital nature in any year of assessment is founded on the implied acceptance that the distinction of income from capital does not admit to a precise delimitation. The legislature, in a further attempt to ensure that there is some direction on the distinction, inserted deeming provisions that speak to what is then included in the assessable income tax band. The law as it stands speaks to an amount in the taxpayers' hands taking one of two forms. It is either income or capital.

The debate around the subject matter of the distinction between income and capital in relation to receipts or accruals in the hands of the taxpayer was beautifully captured in **Rand Mines (Mining & Services) Ltd v CIR**[88] where the Court aptly says;

> An abiding problem has been to identify and then synthesise into a reasonably accurate and universally applicable yardstick the factors which are indicative of each of the two classes of expenditure. No such yardstick has yet been fashioned and the attempt has come to be regarded as futile and has been abandoned. Instead the

[87] See Section 8 of the Income Tax Act of Zimbabwe
[88] (1997) 1 ALL SA 279(A), 59 SATC 85 at 92

> courts have identified useful indicia to which regard may be had, emphasising that they are no more than that and that in each case close attention must be given to its particular facts. In C**ommissioner of Taxes v Nchanga Consolidated Copper Mines Ltd** the judge warned against the notion that any of the indicia identified by the court, taken singly, will always lead to the right conclusion.

This honest conceptualisation of the absence of a universally applicable yardstick founds this discussion. An attempt will therefore be made to look at the various tests developed by the courts of the land and from outside our jurisdiction on the subject matter of the distinction between income and capital in relation to accruals and receipts in the hands of the taxpayer. It must be pointed out that the cases from jurisdictions like the Republic of South Africa are of a persuasive nature and are not binding on the law in Zimbabwe. In this context, it must be admitted however that, in most instances and because we are both Roman Dutch Jurisdictions, we heavily rely on how concepts have been defined and dealt with in South Africa and then borrow such understanding and develop our own understanding from that premise. The various tests that have been developed over the years through decided cases on the subject of the distinction between income and capital of an amount in the taxpayers' hands for purposes of income tax payable shall be explained and analysed below

4.3 THE FRUIT AND TREE ANALOGY

According to this test, the tree is the taxpayers' income earning structure or asset which subsists permanently and the fruit is what the income earning structure or asset periodically produces. The understanding is that the disposal of the income earning structure, unless it becomes the core business of the taxpayer, remains the receipt or accrual of a capital nature. It would therefore not be taxable. However, that which the income earning structure or asset produces accrues or is received as income and is therefore the subject of tax. In short, this test suggests that the tree represents capital, and the fruit represents income. This test derives from the old case of **Eisner v Macomber**[89] **where Pitney J** captured the conception of the ultimate result of this test in the following terms thus;

> The fundamental relation of capital to income has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop, the former depicted as a reservoir supplied from spring, the latter as the outlet stream, to be measured by its flow during a period of time[90]

The above conception, in 1919, was envisaged as assisting in drawing the line between capital and income. It was then followed and developed in the famous case of **CIR V Visser**[91]**.** In this case, it was held that;

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[89] n 68 above

[90] ibid

[91] n 61 above

> 'Income' is what 'capital' produces, or is something in the nature of interest or fruit as opposed to principal or tree. This economic distinction is a useful guide in matters of income tax, but its application is very often a matter of great difficulty, for what is principal or tree in the hands of one man may be interest or fruit in the hands of another. Law books in the hands of a lawyer are a capital asset; in the hands of a bookseller they are a trade asset.

Without a doubt, the above proposition accepts the inherent challenges that attach to the tree and fruit analogy in drawing the line between that which is of a capital nature and that which is income in respect of accruals or receipts to the taxpayer. It is not every case where it is simple to delineate the tree from the fruit. The common example is the fact of law books in the hands of a lawyer and then the same law books in the hands of a bookseller[92]as envisaged in the above citation. This debate has been met with the suggestion that it is the intention of the taxpayer that determines whether a receipt is taxable as income or not. Effectively, this means, subject to the intention of the taxpayer, an originally perceived capital asset can transform into an income asset and therefore becomes taxable[93].This is problematic. At what point can the transformation amount to a complete change from an asset of a capital nature to an asset of an income nature and therefore taxable?.

Invariably, a capital expenditure in an asset that may be sold at a later date, at a profit, has been perceived as speculation and therefore the accrual or receipt at that point amounts to income and is therefore taxable[94]. In **CIR V George Forest Timber Company Limited[95] Innes CJ** opined in his conception of the fruit and tree analogy as follows;

> … Money spent in creating or acquiring an income producing concern must be capital expenditure. It is invested to yield further profit, and while the outlay does not recur the income does. There is a great difference between money spent in working it. The one is capital expenditure, the other is not. The reason is plain, in the one case it is spent to enable the concern to yield profits in the future, in the other it is spent in working the concern for the present production of profit[96]

In the above context, the income producing concern is the tree and what it produces, with the potential of continuous recurrence, is the income (the fruit). In the context of deductions, a case in point is **BP Southern Africa (Pty) Ltd v CSARS**[97]. A payment for the right to operate under a certain name was held to be of a capital nature by the lower court. The Appeal Court was of a contrary view and found that the amount was not of a capital nature as it was more closely linked to the tax payer

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[92] as suggested in CIR V Visser, n 61 above

[93] Compare Founders Hill case vis a vis Berea West Estates Pty Limited v CIR, 38 SATC 43 (1976(2) SA 614)

[94] E Company Ltd v The Commissioner of Taxes 1958 RLR 723

[95] 1924 AD 516

[96] n64 above at page 525

[97] 69 SATC 79

income earning activities (the fruit) than it was to the income and earning structure (the tree).

Under the fruit and tree analogy, in some instances, the person who owns the income producing structure is not taxed, while in others the taxpayer may be taxed. The metaphor, for this reason, has been the subject of sharp criticism[98] and could be one of the reasons why the courts do not restrict themselves to one test in any particular situation. The test to be adopted in any situation, whether rightly or wrongly, is dependant on the set facts before the court.

4.4 PROFIT MAKING SCHEME

The understanding under this test is that the taxpayer has embarked on a profit making scheme in respect of the receipt or accrual at any given point. If the view is that the receipt or accrual is a mere enhancement of value from the asset, and the gain made is not that which accrues or is received out of a scheme to make profit, then the amount is not taxable. The thrust under this test is whether the tax payer objectively conducted a business and that the objective of the tax payer is indeed to conduct the business. If the inquiry from the foregoing is in the affirmative, the amount cannot possibly be of a capital nature. It has to be income.

The test was developed in the old case of **Californian Copper Syndicate v Inland Revenue**[99] where **Lord Jusice Clerk** accepts that the line is difficult to draw but each case ought to be considered on its own facts. The simple facts in this case where that the Appellant was formed for the purpose of acquiring certain mineral fields and the company was left with inadequate share capital to fund the working on the minerals. Two years later, the company sold the mineral fields at a huge profit, though the sale was as envisaged by the company's articles of association, the purchase price was paid via fully paid up shares of another company. The shares were not converted into cash. The court found that the profits arising out of the sale and resale of mineral fields even if not in cash form was assessable to income tax.

Lord Clerk reasoned that enhanced values obtained from realisation or conversion of securities may be so assessable to income where the act is not limited to mere realisation or change of investment but it amounts to carrying on or carrying out of a business. The realisation of the gain out of the disposal of the asset ought, under this test, to be a product of proper trading[100]

Closer home, the profit making scheme test came up for consideration and application in **CIR v Pick-n-Pay Employee Share Purchase Trust**[101].The trust

[98] In **Berkey v Third Ave Ry. Co. 244.NY.84,94,155 N.E,61 (1926)** Justice Cardozo admonished the use of metaphors and exhorted thus; "Metaphors in law ought to be narrowly interpreted, for starting as devices to liberate thought, they end often by enslaving it"

[99] (1904)4 SLR 41-691

[100] per Lord Trainer, in n68 above

[101] 54 SATC 271

Respondent was formed to provide shares to company employees. The trust acquired shares at the market value and on-sold them, on a continuous basis, to the employees. Although the trust had no intention of making a profit, it however, made a profit. The question that the court had to determine was whether the realised profit was of a capital nature and therefore, not taxable. It was held by the majority that the profits were of a capital nature and therefore not taxable. The minority was of the firm view that the test that ought to be applied in determining the nature of an amount should be an objective one. Put differently, the minority were of the view that it should be decided whether, on any given facts, whether a business was carried on and whether the amount was received in the ordinary course of business and if it can objectively be found that this is so, then that amount was not of a capital nature and therefore taxable. The majority relied on **Natal Estates Ltd v SIR**[102] and the minority on **Overseas Trust Corporation v CIR**[103]**.** The majority decision is premised on the understanding that the Trust was not objectively in the business of selling shares and therefore the amount received or accruing realised could not be assessable to income tax. The minority decision is premised on the understanding that the mere realisation of a capital asset at the optimal price possible in the market does transform an investment into a trade or the business of earning profits.

In the case of **E Company Ltd v The Commissioner of Taxes**[104]**,** Appellant company bought nine farms in Southern Rhodesia adjoining each other. Some fourteen years later, Appellant took transfer and consolidated the farms into one block for transfer purposes and it became owner of one single block of land measuring about twenty eighty thousand two hundred and seventeen (28 217) morgen in extent. In 1951, a decision to subdivide the block into smaller farms was then made and eleven (11) farms were realised. All the farms were subsequently sold between 1953 and 1954. A surplus of nineteen thousand five hundred and nineteen (§19 519) was received by the Appellant. The tax collector perceived this surplus assessable to income and therefore included it in the tax year of assessment. Appellant contended that this accrual was of a capital nature. It was held that the surplus was taxable and Appellant had failed to establish that the land it held was held for investment purposes and that its resale was simply the realisation of fixed capital at an enhanced value. **At page 731, McDonald J** had this to say;

> The conclusion I reach on this case, as a whole, is that the Appellant Company bought land cheaply with the intention of disposing of it profitably at a later date and pending profitable resale to obtain such income from it as could be obtained without the investment of funds in development.

Effectively, the court found that the Appellant had failed to establish that the land had been held for investment purposes and that its resale was simply the realisation of fixed capital at an enhanced value or best possible price that the market could

[102] 37 SATC 193

[103] 2 SATC 71

[104] 1958 RLR 723

offer as at that date. The 'profit' realised from the sale of the land was taken as assessable income on account of the finding that the land had been held for speculative purposes. Speculation for over half a century! Arguably though, the court did not look at the passage of time and the undeniable natural appreciation of the value of the land as a fixed capital asset. It can be said that the Appellant could not be taken to have been in the business of selling land. The value of the land in 1896 could not be expected to remain the same some sixty (60) years later[105]. It gained value. It cannot be said that the land was being held with the intention of disposing it off at a profit let alone being held for speculation purposes for such a long period of time. Can it be said that the profit realised after sixty years was designedly sought? This debate demonstrates the unfortunate result of the absence of a fashioned formula in distinguishing income from capital in respect of accruals or receipts in the hands of the taxpayer.

Ultimately, what emerges from this test is its inadequacy in definitively proffering a clear cut approach to the capital-income distinction in relation to receipts or accruals to the taxpayer. The test is difficult, with respect, to comprehend. How does a court formulate the view that a property sold after sixty (60) years in the E Company, supra, could have been held speculatively? This merely shows that the test is incomplete on its own and cannot be universally applied.

4.5 FIXED VERSUS FLOATING CAPITAL TEST

This test is premised on the fact that where an amount is received or accrues from the disposal of fixed capital, it must be taken to be of a capital nature. An amount received or accrued from the disposal of floating capital is income. It has been said that fixed capital is any investment in real or physical asset that may be used in the production of goods or services for sale. Fixed capital would include plant, equipment, factories and so on. These assets are not consumed or diminished during the actual production process but can continuously be employed for the production of income. The fixed capital assets depreciate in value over long periods of time. Floating capital (sometimes called circulating capital) is that which is consumed at each operation of production and reappears transformed into new products[106]. This would include raw materials employed in the production of goods.

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[105] See the decision in **Stott v CIR 3 SATC 253** where **Wessels JA at page 262 held thus;** "If you are dealing with a company one of whose objects is to buy and sell land, then the company might well be considered to be doing the business of selling and buying land even though it carries out only a single transaction:but when an individual like a surveyor who is not professedly carrying on the occupation of a landjobber buys and sells one or more plots of land, he cannot be said *prima facie* to be doing the business of a landjobber. Before it can be said that an individual is carrying on a business there must be some proof of continuity"

[106] See Blacks law Dictionary , 2nd Edition

The distinction between floating and fixed capital is set out in **CIR v George Forest Timber Co Ltd**[107] where the following was said;

> Capital, it should be remembered, may be either fixed or floating. I take the substantial difference to be that floating capital is consumed or disappears in the very process of production, while fixed capital does not; though it produces fresh wealth, it remains intact. The distinction is relative, for even fixed capital, such as machinery, gradually wears away and needs to be renewed. But as pointed out by **Mason J in Stephan v CIR (1919 WLD at 5**) the two phrases have an ascertained meaning in accountancy as well as in economics. Ordinary merchandise in the hands of a trader would be floating capital. Its use involves its disappearance; and the money obtained for it is received as part of the ordinary revenue of the business. It could never have been intended that money received by a merchant in the course, and as the result of his trading, should not form part of his gross income[108].

This test is also employed in determining when a receipt or accrual of any amount by the taxpayer is income or capital. The problem, which is apparent, is that both fixed capital and floating capital depreciate. It is only the rate of depreciation that distinguishes them. The floating vs fixed capital test was termed the fourth test **in Willoughby's Consolidated Co. Ltd v Commissioner of Taxes**[109] where **Young J at page 872** had this to say;

> The fourth test is whether the asset was part of the fixed or circulating capital of the tax payer. I think it must be accepted on the evidence that it was the Appellant's intention to keep this asset in the business indefinitely, and while the intention to hold the asset as in investment lasted, it cannot, I think, be said that the rights in question formed part of the Appellant's floating capital. But once the decision to sell was taken did these rights not change their character?...

Just like the above tests, this test is also not conclusive and not universal. In **CIR vs Goodrick**[110] **at page 15 Vanden Heever J** had this to say;

> In judging therefore, whether accrual and receipts where of a capital nature or not, the question is what was the function of the asset which the receipt or accrual represents. With as much truth as there is in the dictum invoked by the Special Court one could say that if this function was productive, the receipt is prima facie of a capital nature. If not productive then it is income. Intention is one but only one, element in the problem; other surrounding circumstances, must be taken into consideration too.

Affirming the above position by Van den Heever J, *Mr Justice Young J in* **Willoughby's Consolidated Co. Ltd v Commissioner of Taxes** supra raps it up in the following terms;

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[107] 1 SATC 20 23-24 /1924 AD 516

[108] *see also SBI v Aveling 40 SATC 1 17*

[109] 1958 RLR 870

[110] 1942 OPD 1

"It is no doubt useful to look at the problem from this point of view, but it is after all only but one circumstance, and all the circumstances must be viewed together".

The various tests that have been related to above accept that they do not provide, with certainty, a formula that is applicable in every instance to deal with the question of the distinction between capital and income in respect of receipts or accruals in the hands of the tax payer. All the facts surrounding any given case will have to be looked at. A holistic approach to the dispute before a court, is what will determine how the distinction is drawn. There is no universal approach to the subject matter.

4.6 WITHER THE TESTS?

The test are many. Their usefulness is dependant on a particular set of facts that come up for determination[111]. It appears and it ought to be accepted that from the foregoing discourse there is no single test that can be said to be determinative of what income is as distinct from capital in relation to accruals and/or receipts in the taxpayers' hands

This is because in **Willoughbys' Consolidated Company, supra** and several other authorities, there is an acceptance that no single test can be looked at alone and give a direct answer. **Young J**[112] in that case identified several tests and puts them into four categories and these are they; if the realisation relates to the main framework of the taxpayers business, it would be a capital accrual, if the transaction was carried out by the taxpayer in its capacity as trader or property owner, if the former then it is income and the latter capital nature, whether the accrual or receipt is recurrent and if it is, the accrual or receipt is income and lastly whether the asset was part of fixed or floating capital as envisaged elsewhere above.

That there is difficulty in coming up with the best test is settled. In the case of **The Federal Coke Company Pty Ltd v Federal Commissioner of Taxation**[113]**. Justice Brennan,** in speaking to the effect of character of the transaction being the determinant on the distinction had this to say;

> When a recipient of moneys provides consideration for the payment, the consideration will ordinarily supply the touchstone for ascertaining whether the receipt is on revenue account or not. The character of the asset which is sold for a price or the character of a cause of action discharged by a payment will ordinarily determine, unless it be a sham transaction, the character of the receipt of the price or payment. The consideration establishes the matter in respect of which the moneys are received. The character of the receipt may then be determined by the character in the recipients' hands, of the matter in respect of which the moneys are received.

[111] See Allied Mills Industries Pty Ltd V FC of Taxation 89 ATC 4365, 4369
[112] at page 872
[113] [1977] FCA 3, 77 ATC 4255

In **Pick 'n Pay Employee Share Purchase Trust at page 52** the Court put it in the following words;

> There are a variety of tests for determining whether or not a particular receipt is one of a revenue or capital nature. They are laid down as guidelines only - there being no single infallible test of invariable application. In this respect, I agree with the following remarks of Friedman J in ITC 1450 (at 76) "But when all is said and done, whatever guideline one chooses to follow, one should not be led to a result in one's classification of a receipt as income or capital which is, as I have had occasion previously to remark, **contrary to sound commercial and good sense.**

Effectively, the approach in the Pick n Pay case is to accept the problem presented by the subject matter. After this acceptance, proceed to suggest that the distinction should be guided by what renders 'sound commercial and good sense'. Apart from this concept of sound commercial and good sense being an additional test developed to deal with the distinction of capital and income in relation to receipts or accruals in the hands of the taxpayer, the suggestion, with utmost respect, does not take the difficulty around the subject, any inch closer to definitive resolution. What is that which can be can be called 'sound commercial and good sense'? It is as nebulous as the distinction itself and this may further complicate the understanding around the subject matter. In **Tuck v CIR**[114] **Corbett JA** in accepting the difficulty around the distinction held as follows;

> It seems to me that most problems of characterisation (of income and capital) and the valuation of each element could appropriately be dealt with by applying the simple test indicated by Watermeyer CJ in the passage quoted from his judgment in Lever Brothers case….. viz by asking what work, if any, did the taxpayer do in order to earn the receipt in question, what was the quid pro quo which he gave for the receipt?

Corbett JA summarises the inception of the distinction based on the decision in Lever Brothers to mean the exchange for work done to be income and the value given to earn the receipt or the quid pro quo given by the taxpayer. More recently, Mr Justice Kudya J (as he then was) had occasion to relate to the subject In **D Bank Ltd Versus Zimbabwe Revenue Authority**[115]**.** His Lordship, in this case ,identified three (3) tests which he says applied in relation to the nature of an expenditure as to whether it is capital or revenue. His Lordship lists them as follows;

(i) The test of enduring benefit.
(ii) The test of ownership.
(iii) The profit making apparatus test.

The issue for determination before His Lordship was whether the costs on computer software acquired by Appellant was a revenue expense which was allowable as a

[114] 1988(3) SA 819(A)
[115] HH 135/15

deduction in terms of the Income Tax Act or that it constituted an expense of a capital nature and therefore not allowable as a deduction. His Lordship relied on **Amway India Enterprises v Dy CIT**[116]. **At page 9 of the judgment** His Lordship had this to say;

> In India, expenditure is treated as capital expenditure either when it results in the acquisition of ownership of a capital asset[ownership test] or when it results in the accrual of an advantage of an enduring nature to the user in the capital field [the enduring and functional test]. Accrual of benefit in the capital field was defined in para [44] to mean a benefit that forms part of the profit-making apparatus of the taxpayer's business.

In this case, His Lordship held that a software expenditure was of a capital nature. This decision is sound in the general deductions formula related to elsewhere in this discussion.

In the face of the various tests and the wide spectrum of jurisprudence arising from decided cases, can it be said they are useful? The answer lies in the acceptance that the distinction between capital and income in respect of accruals or receipts in income tax law is elusive. It is this acceptance that may lead one to argue that the tests are an unnecessary classification exercise. One must, however admit that these tests at least provide a good starting point as there are various decisions, correctly rendered on account of the tests. A court will have, subjectively, to decide which test is most applicable in a particular situation and this more often than not, results in decisions that further contribute to the complexity and difficulty around the subject matter. The absence of a universal formula on the distinction undermines the canon of certainty as postulated by Adam Smith. It sets the scene for a regime that does not enable the taxpayer to plan effectively in respect of his/her tax obligations.

4.7 THE ROLE OF INTENTION OF THE TAXPAYER IN THE INCOME-CAPITAL DISTINCTION

There is a growing consensus that, ultimately, in determining whether an amount is income or capital in the hands of the taxpayer is dependant on his/her intention. Intention has been defined as purpose, formulated design; a resolve to do or forbear a particular act; aim; determination[117]. Silke[118]postulates that the intention of the taxpayer is the most significant test employed by the courts in deciding with what intention did the tax payer acquire and hold the asset. The enquiry by the court to establish intention, will, without debate, be broad. The question of intention in most cases is evidentiary. In **Elandsheuwel Farming(Edms) Bpk v SBI**[119] in his

116 (2008) 111 ITD 112

117 See Black's Law Dictionary, 2nd Edition.

118 Silke on Income Tax Vol. 1, Chapter 3

119 1978(1) SA 101 (AD)

dissenting judgment dealing with the role of intention in the distinction debate, **Corbett JA** commented thus;

> While the normal type of profit making scheme, relating to the acquisition and subsequent sale of an asset, contemplates a continuing and unchanging purpose from acquisition to sale, the courts have recognised the possibility of an intervening change of purpose or intention. Thus, an asset may have been acquired with the intention of reselling it at a profit but thereafter the owners' intention may change and he may decide to hold it as an income producing capital asset or investment. If, while this latter purpose persists, the asset is realised, this change of intention would be a strong indication that it was a capital realisation and that the proceeds would be non-taxable….
> Conversely, an asset originally acquired to be held as an income producing investment may by reason of a subsequent change of purpose or intention on the part of the owner become the subject matter of a profit making scheme so that the proceeds of and ultimate realisation constitute gross income……

In **Natal Estates Limited v SIR[120], Holmes JA at page 202G-203A** stated thus;

> Important considerations include, inter alia, the intention of the owner, both at the time of buying the land and when selling it (for his intention may have changed in the interim); the objects of the owner, if a company; the activities of the owner in relation to his land up to the time of deciding to sell it in whole or in part; the light which such activities throw on the owner's ipse dixit as to intention; where the owner sub-divides the land, the planning, extent, duration, nature, degree, organisation and marketing operations of the enterprise; and the relationship of all this to the ordinary commercial concept of carrying on a business or embarking on a scheme for profit. Those considerations are not individually decisive and the list is not exhaustive.

In this case, the taxpayer disposed land it held for many years as a capital asset. The taxpayer entered into the profit making business of township development and marketing of the land. The Appellate Division held that the company had changed its intention to that of selling the land for a profit and as a business. The Court accordingly determined that the proceeds from the sale of the land was assessable income and liable to tax. The understanding of the court in this case is that the Appellant had crossed the Rubicon and engaged in business in respect of the land and that the land was now its stock in trade.

The case of **Willoughby's Consolidated Co. Ltd v Commissioner of Taxes** which has been discussed above is also apposite. Land acquired in 1896 was disposed in 1954 some sixty (60) years later. A profit was realised. The argument however, is whether the decision to sell in 1954 amounted to a change in the intention of the company in respect of the investment in the land. It cannot be argued that an investment is an investment if no benefit is recognised out of it. The issue that should have exercised the mind of the court is whether the land in 1954 had transformed into the company's stock in trade. It had not. The disposal of the land

[120] 37 SATC 193, 1975(4) SA 177(A)

was simply a return on the investment. This way, the proposition is that there is a thin line between a return on investment and an asset being treated as a stock in trade on disposal. In **John Bell and Co (Pty) Ltd v SIR**[121]**,** it was held at (202-203) that:

> the mere change of intention to dispose of an asset hitherto held as a capital asset does not per se subject the resultant profit to tax. Something more is required in order to metamorphose the character of the asset and to render its proceeds gross income. For example, the taxpayer must already be trading in the same or similar kinds of asset and he then and there starts some trade or business or embarks on some scheme for selling such assets for profit, and, in either case, the asset in question is used as his stock in trade.

There is no definition on what it is that amounts to crossing the Rubicon, that is, transforming the capital asset into stock in trade. In **Founders Hill, supra** the Court speaks to crossing the 'Rubicon' without which the disposal of the asset cannot mutate into income. What may be of particular importance is the caveat placed on crossing the Rubicon. In **Natal Estates Ltd v SIR supra,** the court had this to say;

> From the totality of the facts one has to enquire whether it can be said that the owner had crossed the Rubicon and gone over to a business, or embarked upon a scheme, of selling such land for profit, using the land as his stock-in-trade.

In **Founders Hill, Lewis JA** envisaged the situation where an asset is acquired as a capital asset but it thereafter "crossed the rubicon" as a result of engagement in business by trading in the very asset. All this is helpful. However, the question is whether it is the intention of the taxpayer to turn the asset into stock in trade. The difficulty that arises from deciphering the intention of the tax payer in circumstances where liability is dependant on his perceived intention is obvious.

In the penultimate result, the tax man is interested in establishing what is the intention of the taxpayer in respect of the asset that may be of a capital nature in his hands but is subsequently sold. The tax collector is not worried about the the subjective mind of the taxpayer but his objective mind when he/ she concluded the transaction[122]. This is not an arithmetic exercise. This view is held because in **CIR V Paul**[123] the taxpayer was taxed on the profit earned on the sale of land initially acquired but perceived to be a surplus to his needs. Then there was the conception of carrying on business as earlier discussed in this discourse. The objective mind by the taxpayer that they are running a business to realise a profit is important in coming up with a decision whether the amount in the taxpayers' hands is taxable income. The intention to this extent comes into the fray. However, it ought to be accepted that intention, is a triable factor and would require evidence to prove its existence. In a tax case set up, and in the face of our tax law which casts the burden

[121] 1976 4 SA 177 (A)
[122] see SIR V Trust bank of Africa Ltd 1975(2) SA 652, 37 SATC 87
[123] See 1956(3)SA 335

to prove, if the amount is of a capital nature, on the taxpayer, it may be difficult to clearly decipher intention. For instance, in a situation where land is purchased as a capital asset, say a farm and some stock in the form of domesticated animals are kept and bred on it. Should the business wind up and the farm is subdivided, sold and a surplus is realised, surely the receipt or accrual in this instance is arguably not income. The realisation, on sale of the land, may of course, be the subject of capital gains tax.

4.8 SOME GUIDING PRINCIPLES ON THE DISTINCTION

That there is no universal formula to determine what is income or capital in respect of receipts or accruals to the taxpayer is a position that cannot be seriously questioned. What, however, has been developed over the years are some guidelines that are useful on the distinction in respect of the subject matter. Just like the various tests that have been discussed above, the guidelines are not an end in themselves. They provide a good launching pad for the exercise. In fact, to have some propositions that apply in most situations is in tandem with the Canons of taxation as espoused by Smith.

What I found to be of useful application are the propositions by Professor R W Parsons [124]in his book on income tax. The propositions are not exhaustive but can be useful in the debate. The learned Professor provided about fifteen guidelines and I summarise about eight of them herein below. These are;

i) A mere gift to the taxpayer does not have the character of income
ii) A mere windfall gain to the taxpayer does not have the character of income
iii) A capital gain is a capital gain and not income
iv) A gain, which is one of number derived periodically by the taxpayer assumes the character of income
v) A gain derived from the property held by the taxpayer has the character of income
vi) A gain in the taxpayers' hands which is a reward for services rendered or to be rendered is income
vii) A gain which is realised from an act of carrying on a business or from the carrying out of an isolated enterprise by the taxpayer has the character of income
viii) A gain in the taxpayers' hands which is compensation for an item that would have had the character of income had it been derived or for an item that has the character of a cost of deriving income has itself the character of income.

The above propositions, are not exhaustive. They however, put in simpler terms the conception of what constitutes income as distinct from capital in relation to the receipts or accruals in the taxpayers' hands.

[124] Income Taxation in Australia (1985) from paragraph 2.7

4.9 CONCLUSION

The debate on the distinction between income and capital in relation to receipts or accruals in the hands of the taxpayer remains a live one. However, it is not an uncharted territory. Over the years, the development of the various tests that have been discussed provide a good starting point in relation to what is it that can be looked at when faced with the question .

CHAPTER FIVE:RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

In this chapter, an attempt at summarising the entire write up will be made particularly the theme and arguments in each chapter. This discourse revolved around the distinction between that which is of a capital nature as distinct from that which is income in relation to receipts or accruals in the taxpayers' hands. It has been established that the income tax in Zimbabwe does not admit to a 'halfway house' by providing for either income or capital in the Income Tax Act. It is important to point out that the canons as propounded by Adam Smith would require that the tax law in any jurisdiction be elaborate enough that the tax payer can plan and ascertain his tax obligations without difficulty. It has also been established that the tax regime that we have is such that it is up to the taxpayer to determine that the receipt or accrual in his/ her hands has the character of capital.

5.2 SUMMARY OF FINDINGS

It has been established throughout chapter one to Chapter four that the debate on the concepts of income and capital in relation to receipts or accruals in the tax payers’ hands remains a live one. One can be justified to suggest that whilst various tests have been developed by the courts over the years to deal with the distinction, the ultimate answer to the question, in any situation, is a product of the Judge/judges seized with the matter. Judges play a crucial role in the interpretation exercise which has shaped not only the debate but the content of it as well. It has emerged that the contra fiscum rule has been applied in our jurisdiction on various occasions particularly where there is ambiguity in relation to a tax provision that does not speak in clear terms. The applicability of the contra fiscum rule to the distinction of between income and capital in relation to accruals or receipts has not been developed. This is understandable if one were to look at the fact that whilst income is defined, the burden to prove the ‘undefined capital’ is placed on the taxpayer. The taxpayer can not argue that there is an ambiguity on the capital receipt or accrual when the legislature does not define capital.

The tests developed over the years by the judiciary as demonstrated in the various chapters, without a doubt, provide a good starting point to the debate. They are, admittedly, inadequate to bring closure to the complexity around the subject matter. It is clear that the concept of intention seems to have been accepted as central in delineating an amount in the taxpayers’ hands as either capital or income. The consideration of the intention of the taxpayer in the distinction will then be determined, more often than not, by the evidence before the court seized with the matter. A case in point is the position adopted by **Quenet J** in **C Limited,** supra where his lordship, even though the taxpayer had not, as a matter of fact, placed tangible evidence before him that it had done anything towards developing the land that it had purchased but the supposed intention to develop it when the the conditions became favourable was sufficient to find that the amount realised from the sale of the land was a capital receipt and not income and therefore not subject to income tax. This position can be contrasted, without difficulty, with the decision in **E Company Lt**d, supra where land purchased in 1896 and subsequently sold some sixty years later was found to have been acquired for speculative purposes and therefore what was realised from the disposal was assessable income. Quenet J, in C limited took the better view that, naturally, the purchase of land either for investment or trading purposes is underpinned by the expectation that the land will gain value. This conceptualisation of the distinction seems preferable. This is not only in line, impliedly, with the contra fiscum rule but also upholds the principle of certainty as envisaged by Adam Smith. Whilst much can be said about what the different judges have been saying over the years, it can be said that intention is one of the indicia which is useful in differentiating income receipts or accruals from capital receipts or accruals.

5.3 <u>SUMMARY OF ARGUMENTS FROM CHAPTER ONE TO CHAPTER FOUR</u>

Chapter One gives an introduction of the whole discourse and outlines the proposed content and reach of each chapter up to Chapter Four. It introduces the research questions and conceptualises the statement of the problem and heralds the analysis of the subject matter. The definition or absence of it of the term income is also outlined. It gives the whole structure of the dissertation from the First Chapter to Chapter Five. Chapter one also speaks to the literature review, and a summary of the

Chapter Two, in this discourse, sets out the income tax regime in Zimbabwe as captured in the Income Tax Act. Chapter two also outlines how the Act does not define the term capital. The Act defines gross income and it excludes that which is of a capital nature in the definition. Chapter Two, in detail, deals with the aspect that it is the taxpayer that bears the onus of establishing that the receipt or accrual of any amount in his/her hands is of a capital nature and therefore not subject to income tax. The law, on the distinction between capital and income in respect of receipts and accruals, is also related to from the days in Rhodesia to present day. It is accepted under Chapter two that there is no single formula in Zimbabwe and elsewhere that can be said to have been consistently followed in the field of determining income as distinct from capital in the taxpayers' hands in any particular year of assessment.

Chapter Three of the dissertation offers a comparative analysis of the income tax regimes of the Republic of South Africa and that of the United Kingdom. The discourse around the distinction in both jurisdictions is similar to the one obtaining in Zimbabwe. The British system is different in that there is amalgamation with capital gains tax under income tax unlike in Zimbabwe where the Income Tax Act is the complete embodiment of our income tax law and then there is the Capital Gains Tax Act as a standalone legislation. The United Kingdom system is similar to the law inn South Africa on placing capital gains under income tax. The running theme in both jurisdictions is also that there is no single formula that has been found yet to be the universally applicable in determining that which is income as distinct from capital in the taxpayers' hands. The exercise is largely ascertained by the consideration of the particular facts that concerns the case that would have come up for determination. It must, however, be stressed that the intention of holding the asset by the taxpayer in any year or period of assessment by the taxpayer seems to be rendering some good starting point in every case across these jurisdictions.

Chapter Four discusses the debate on the subject matter of the income and capital distinction. The problem is looked at from the perspective of having been with us for a long time and an attempt at conceptualising the nature of the debate is set out. Following this, an overview of some of the various tests that have been developed over the years in respect of the distinction between income and capital is then given. An analysis of the various approaches, not limited to Zimbabwe, is rendered. What emerges, clearly, from all the tests, is that no single test can be said to offer a distinction that can be said to apply in every instance. The fruit and tree analogy speaks to capital being that which produces income. The profit making scheme is centred on the intention of the taxpayer. Whether the holding of the asset or amount, the taxpayer has the primary intention of making a profit. If the answer is yes, then what is realised from that enterprise is income and therefore the subject of income tax. It can be deduced that the ultimate question revolves around the intention of the taxpayer which, just like all other terms, is not short of controversy in itself. A look at the question of intention is done in respect of almost similar circumstances by the taxpayer where land is purchased and is then sold and what was then realised was treated differently. In one of the cases, the court accepted that land naturally appreciates in value and its purchase is intended to realise more value in the future and in another, the court found that land purchased some more than half a century earlier, was being held for speculative purposes and on its disposal it attracted assessable income.

Various authorities are looked at and the concept of crossing the rubicon as being the determinant of the taxpayers' intention in any given set of facts is also analysed. After all these discussions, it is posited that do we really need the tests as developed over the years. The better view is obviously to find and accept that the tests provide a good starting point in the subject matter of the distinction between income and capital in relation to receipts and income in any year or period of assessment. The Chapter then concludes by making some summation of the views as propounded by Professor Parsons. The propositions are not exhaustive but conceptualises the categorisation of a gain in the taxpayers' hands.

5.4 RECOMMENDATIONS

In a field where the jurisprudence available suggests that the problem has lingered for a very long time, one has to be careful in coming up with any recommendations that are meaningful and helpful. I would consider that the following questions can provide a useful guideline on the subject matter of the distinction between income and capital in relation to accruals and or receipts in the tax payers' hands;
-What is the nature of the asset/ amount in the taxpayers' hands in any given period or year of assessment?
-What is the character of the asset in the taxpayers' hands?
-What is the intention of the taxpayer in holding the asset? Is the asset held for the production of income or to be used as stock in trade at an opportune time in the future?
-How long has the taxpayer held the asset and how does he regard it?
-On disposition of the asset, what form does the transaction take? Is it in the nature of a business in the objective sense? This is to say does the taxpayer objectively set out to carry out business in disposing the asset in his hands
-What evidence does the taxpayer have to support the view that it is capital and not income?

It is important to have some common position on the subject matter of the distinction as it not only helps both the taxpayer and the tax collector, but it also achieves the certainty in law which is a key cog in any legal system. Certainty in law is foundational and is the basis of the s*tare deciss* principle in respect of judicial decisions. The court ought to be careful not to upset positions already taken unless doing so is irresistibly founded on sound principle and beneficially develops the jurisprudence on the subject matter.

5.5 CONCLUSION

The debate on the income and capital distinction in relation to accruals or receipts in the taxpayers' hands in any year of assessment is always a question of fact. The court will have to look at the circumstances of the entire case surrounding the case in question and come up with the decision it considers appropriate. Whilst the canons of taxation by Adam Smith arguably founded the framework within which tax law is developed, the principles are practice shaped by the particular tax system concerned. The canon of certainty remains one of those principles which is difficult to uphold in the field of the income and capital distinction in respect of receipts or accruals in the taxpayers hands. In fact, the whole host of the canons of taxation being certainty, convenience, efficiency and equity are to a fairly large extent difficult to uphold in the face of the absence of a clear formula on determining without difficulty what may be income as distinct from capital. On the whole, however, it can be said that there is sufficient material and tools both the taxpayer and tax collectors' disposal to deal with the distinction between income and capital in relation to receipts and accruals in the taxpayers' hands.

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