How Have the Courts Decided What *De Minimis* is in Tax Law?

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Abstract

This article analyses how South African courts have decided the applicability of the *de minimis non curat lex* maxim and, more broadly, considered the *de minimis* concept in tax law. A doctrinal research methodology is employed with the focus on an analysis of predominantly reported judicial decisions. The applicability of the maxim is found to be decisive in only one tax case: the *Diageo SA (Pty) Ltd v Commissioner for the South African Revenue Service* case of 5 July 2023. Consequently, this study thus also reviews judicial precedent in respect of the applicability of the maxim in other areas of the law with consideration of the relevance to tax law. Further, several tax cases that refer to the broader *de minimis* concept or to trivial or trifling matters are examined. As there is no one definitive test to determine the applicability of the maxim, the courts have used several factors to guide their determination. Through inductive reasoning, the following conclusions are drawn. (i) In respect of statutory interpretation: First, the primary factor in the determination of the applicability of the maxim is the purpose of the provision. This is aptly demonstrated in the *Diageo* judgment. Secondly, where the statute sets a clear, objectively verifiable limit or amount, there is essentially no room for the application of the maxim in interpreting the statute. Where, however, no such verifiable basis is provided, a purposive interpretation is paramount – which may in fact require the application of the maxim. (ii) The use of the *de minimis* concept in tax law appears to depend on whether the matter is one of principle (substance) or practicality (administrability). In the former case, the amount (the factor of *extent* or *value*) is irrelevant whereas in the latter, the *de minimis* concept has been applied.

Keywords

De minimis non curat lex; trivial; trifling; tax law; judicial discretion; interpretation of statutes.

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1 Introduction

De minimis non curat lex: the law does not regard trifles. The use of this well-known legal maxim (hereafter "the *de minimis* maxim" or "the maxim") in South African case law can be traced as far back as 1861[1] and appears in various areas of the law. The application of the maxim in South African law was last comprehensively discussed in the academic literature by Labuschagne (1973) in *De Minimis Non Curat Lex.*[2] More recently, but confined to the field of criminal law, its applicability was discussed by Hoctor (2019) in "Assessing the *De Minimis Non Curat Lex* Defence in South African Criminal Law".[3] Although Labuschagne explores the use of the maxim in various areas of the law,[4] the area of tax law is not mentioned. Perhaps this is because, despite the maxim being referred to in tax cases from as early as 1931,[5] there does not appear to be a tax case that turned on the applicability of the maxim until 2023, when the case *Diageo SA (Pty) Ltd v Commissioner for the South African Revenue Service*[6] was decided in the High Court.

A legal maxim is an established principle or proposition of law.[7] The legal maxim *de minimis non curat lex* has also been referred to as a doctrine,[8]

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1 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 125.

2 Labuschagne 1973 *Acta Juridica* 295-302.

3 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 119-150.

4 Such as the law of delict, patent law, insolvency law and contract law.

5 See e.g. *Ochberg v Commissioner for Inland Revenue* 1931 AD 215 (hereafter the *Ochberg* case).

6 *Diageo SA (Pty) Ltd v Commissioner of the South African Revenue Services* 2023 JDR 2422 (GP) (hereafter the *Diageo* case).

7 Oxford English Dictionary 2022 https://www.oed.com/ defines a maxim in law as "a proposition (ostensibly) expressing a general rule of law, or of equity", whereas the glossary of legal terms in Du Plessis *et al Introduction to Law* states that maxims are "broad statements of principle of which the truth and/or reasonableness appears self-evident."

8 See e.g. the *Diageo* case para 47.

principle,[9] rule,[10] or legal notion.[11] Related to but distinct from the maxim is the Latin term *de minimis*, with its etymon *de minimis non curat lex*.[12] The term, which can be used as an adjective, an adverb or a noun, is defined as describing something that is insignificant, negligible, unimportant or "unworthy of attention".[13] In tax law, the term – which is broader than the maxim (i.e. the rule or principle) – is used far more frequently than the maxim. In this article we refer to the use of the term as "the *de minimis* concept" or "the concept" to prevent confusion with the maxim.[14]

The question that this article aims to address is: how have the courts decided the applicability of the *de minimis* maxim in the context of tax law? As the courts have only very rarely decided this question in tax cases[15] the research question is extended to include how the courts have considered the broader *de minimis* concept in the context of tax law. Understanding how the judiciary has applied the *de minimis* maxim and concept in tax cases can provide a useful foundation for answering further questions (beyond the scope of this study) about *de minimis* tax matters, such as how these matters are dealt with in tax legislation and tax administration.

The applicability of the maxim has, however, been more frequently considered by the judiciary in other areas of South African law, predominantly in criminal law.[16] Given the limited judicial authority on the use of the maxim in tax law, this study also examines how the judicial precedent in respect of the applicability of the maxim in other areas of the law could be applied to tax law.

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9 See, e.g. the *Diageo* case paras 57, 61, 63 and 64; the *Ochberg* case 229; *Delange v Costa* 1989 2 All SA 267 (A) 270; *S v Visagie* 2009 2 SACR 70 (W) 77 (discussed in para 3.1 in the main text); *Benoni Town Council v Meyer* 1961 3 All SA 294 (W) 305 (discussed in para 3.2 in the main text).

10 See, e.g. *S v Kgogong* 1980 3 SA 600 (A) 604; *S v Nedzamba* 1993 1 SACR 673 (V) (hereafter the *Nedzamba* case) 677; and *S v Visagie* 2009 2 SACR 70 (W) 87, *Director of Public Prosecutions v Klue* 2003 1 All SA 306 (E) 310 (discussed in para 3.1 in the main text); *AA Mutual Insurance Association Ltd v Sibothobotho* 1981 4 SA 593 (A) 603 (discussed in para 3.2 in the main text). Also Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 120 fn 12; Burchell and Milton 1980 *Annu Surv SA L* 389, where it is referred to as "the *de minimis* rule".

11 *Income Tax Case 1838* 2009 72 SATC 6 para 3.

12 Oxford English Dictionary 2022 https://www.oed.com/.

13 Oxford English Dictionary 2022 https://www.oed.com/; Merriam-Webster date unknown https://www.merriam-webster.com/.

14 The confusion that exists between the rule/maxim and the term is pointed out in Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 125. Confusion is also caused by the fact that *de minimis* is sometimes used by the courts and in the literature as short for *de minimis non curat lex*, and thus not just when the concept is meant. For example, in *S v Kgogong* 1980 3 SA 600 (A), a case which clearly dealt with the application of the *de minimis non curat lex* maxim, the court does not once use the full maxim, but refers to it throughout the case only as the "*de minimis* rule".

15 See para 4.2 in the main text.

16 *Diageo* case para 56.

This study employs a doctrinal legal research methodology with descriptive and theory-building objectives. Answering the research questions requires an analysis of judicial decisions. Through inductive reasoning, general principles are inferred from the analysis. The population of cases considered in this study are those contained in the following databases:[17] SAFLII,[18] Lexis Library (LexisNexis South Africa)[19] and Juta Law Online Publications (Jutastat e-publications).[20] It is incumbent upon us to draw attention to a methodological limitation of this study. Legal databases of judgments consist mostly of reported judgments of the higher courts.[21] Not all judicial decisions in South Africa are reported (or, in the context of magistrate courts' decisions, even typed). As the focus of this study is on that which the courts consider *de minimis* or trivial, using academic legal databases that contain mostly reported judgments results in an inherent selection bias. This notwithstanding, a study of what the judiciary has determined are the most relevant cases is still a worthwhile endeavour that may produce valuable findings.

The substantive part of this article commences with an analysis of the meaning and purpose of the *de minimis non curat lex* maxim in part 2. Part 3 discusses the applicability of the maxim in areas of South African law other than tax law – firstly in criminal law and then in private law. Part 4 is the core of the article. It analyses when and how the courts have referred to and considered the applicability of the *de minimis* maxim and concept in tax cases. Part 5 summarises the findings and concludes the article.

2 Meaning and purpose of *de minimis non curat lex*

De minimis non curat lex has been defined as "[t]he law does not concern itself about trifles",[22] or with trivialities.[23] It has been stated that "[t]he maxim signifies 'that mere trifles and technicalities must yield to practical common sense and substantial justice'".[24] Although the maxim refers to "the law" not concerning itself about trifles, it is in fact rather mainly the courts that do not take notice of trivial matters and thereby, for example, acquit an accused

17 As at 13 June 2024.

18 SAFLII 2024 http://www.saflii.org.

19 This database includes the following collections of cases: South African Tax Cases Reports and Judgments Online (which includes some unreported judgments).

20 This database includes the following collections of cases: Supplementary Tax Cases and Juta's Unreported Judgments (which contains some unreported judgments from the higher courts).

21 And the judgments of the tax court (which is not a High Court). See para 4.1 in the main text for a discussion on the tax court.

22 Claassen and Claassen *Claassen's Dictionary of Legal Words*.

23 Du Toit *Pharos Bilingual Police Dictionary*.

24 Nemerofsky 2001 *Gonz L Rev* 323 citing *Goulding v Ferrell* 117 NW 1046 (Minn 1908) 1046 as also cited in the *Diageo* case para 56.

where the offence is trivial.[25] This is stated by Hoctor as "these trifles are not regarded by the court as being a worthy basis for a decision"[26] and thus it can be said that courts, in exercising their judicial discretion, do not regard trifles. The interaction between "the law" and "the courts" has also been explained as "the law does not concern itself with a fact or thing that is so insignificant that a court may overlook it."[27] As the courts should not be concerned with trivialities, the maxim has also been described as "*de minimis non curat lex (vel praetor)*", meaning "the law does not concern itself with trifles (nor does a judicial officer)."[28]

In South African criminal law the *de minimis* maxim is a defence that is applied judicially.[29] For example, in the case of the theft of a paperclip or "assault by drawing a cap over the eyes of the wearer",[30] the accused's conduct remains unlawful, even if trivial.[31] However, as it would be unreasonable to convict and punish the accused for such insignificant conduct, "the court does not regard, heed or take account of the unlawful conduct."[32] The outcome is then an acquittal of the accused,[33] as a result of the exercise of a judicial discretion.[34] The maxim is thus not a defence which excludes unlawfulness, but rather a decision by the court to allow the conduct to go unpunished.

While the meaning of the maxim may be clear, why should the law not concern itself with trifles? What is the justification for this maxim? By acquitting the accused for unlawful but trivial conduct, the constitutional norms of reasonableness and proportionality are served.[35] The judicial discretion to apply the maxim is thus "entirely consistent with the role of the courts in a constitutional democracy with a justiciable Bill of Rights."[36] The maxim has also been rationalised as ensuring that judicial resources are

25 *S v Kgogong* 1980 3 SA 600 (A) 603.
26 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 120-121 with reference to Nemerofsky 2001 *Gonz L Rev* 316.
27 *Diageo* case para 56.
28 *S v Visagie* 2009 2 SACR 70 (W) para 15.
29 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 129.
30 Hoctor "Criminal Law" 70.
31 *Nedzamba* case 675.
32 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 123.
33 Burchell *Principles of Criminal Law* 246.
34 Hoctor *Snyman's Criminal Law* 121.
35 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 122 describes the "rule of reason" as being associated with reasonableness; and Hoctor *Snyman's Criminal Law* 122 argues that the exercise of the discretion "is consistent with the constitutional imperative of proportionality and in particular the right not to be deprived of freedom arbitrarily or without just cause."
36 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 142. At 122 Hoctor highlights the significance of the *de minimis* rule where, for example, the initiation of the criminal process against a person has the potential to unjustifiably limit the rights of the individual – such as in respect of a trivial matter.

used efficiently.[37] If a court's time is taken up by trivial matters, it will not be able to timeously deal with other matters more worthy of the court's time. The judge in *S v Bester*[38] illustrates this point aptly in a criminal law context.[39] This sentiment has also been expressed in a private law context in *Delange v Costa,*[40] where the court states that if all that was required for a successful action for damages for *iniuria* was the utterance of words towards another "which offend such person's subjective sensitivities", then it could lead to the courts being "inundated with a multiplicity of trivial actions by hypersensitive persons."[41] It avoids a position where a (social) cost-benefit analysis does not make sense, and the maxim is therefore applied for purposes of practicality.[42] In essence, the application of the maxim thus enables a better administration of justice.[43]

It has also been said that the maxim can function "as an interpretive tool to inject reason into technical rules of law and to round-off the sharp corners of our legal structure."[44] In this regard Veech and Moon describe the maxim as a "rule of reason".[45] The Constitutional Court has recently supported this in a majority judgment stating that "the principle that the law does not concern itself with trivialities [with reference to *de minimis non curat lex*] can play a role in the interpretation of statutes."[46]

Before analysing the judicial authority regarding the use of the *de minimis* maxim and concept in tax law in part 4, in the following part we first discuss the judicial precedent in respect of the applicability of the maxim in other areas of the law and consider how this could be applied to tax law.

3 Applicability of the maxim in other areas of law

Whilst it is not the aim of this study to undertake a comprehensive analysis of the applicability of the maxim in all areas of South African law, some of the areas are briefly addressed here for the purposes of providing context for the further analysis in respect of South African tax law. Firstly, the area of criminal law is considered. Parallels can be drawn between criminal law and tax law as they are both fields of public law. Secondly, some examples of civil cases dealing with areas of private law are provided. The applicability

37 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 137.
38 *S v Bester* 1971 4 SA 28 (T) (hereafter the *Bester* case).
39 *Bester* case 29.
40 *Delange v Costa* 1989 2 All SA 267 (A) (hereafter the *Delange* case).
41 *Delange* case 271.
42 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 137.
43 *S v Kgogong* 1980 3 SA 600 (A) 603. This is also referred to as "practical legal policy" in Hoctor *Snyman's Criminal Law* 121.
44 Veech and Moon 1947 *Mich L Rev* 543-544.
45 Veech and Moon 1947 *Mich L Rev* 542.
46 *Independent Community Pharmacy Association v Clicks Group Ltd* 2023 JDR 1121 (CC) para 286 (hereafter the *Clicks* case).

of the maxim in a civil context may prove useful since most tax cases are civil cases.

3.1 Criminal law

The point of departure for criminalising conduct is the harm principle. The state is justified in criminalising conduct that causes harm or creates an unacceptable risk of harm to others.[47] It is a question of degree, however, whether and if so when such conduct warrants criminal prosecution, conviction and sanction. In cases where seriousness is an element of the crime (such as for *crimen iniuria*) the courts are tasked with deciding what is serious. In other cases where it is not, the *de minimis* rule can serve as a "mediating maxim for the application of the harm principle."[48]

Hoctor provides a comprehensive overview of the South African case law dealing with the *de minimis* rule in criminal cases.[49] He references ample cases where the courts have exercised their judicial discretion in applying the *de minimis* rule to acquit the accused when the court regarded the violation of the law to be trivial. What is clear is that there is no one definitive test that can be applied to determine triviality.[50] In *S v Dimuri*[51] Gillespie J states that the determination requires the judicial officer to make a "value judgment"[52] or a "policy decision to be exercised according to all the relevant circumstances of the case."[53] The exercise of this discretion is analogous to the courts' determination of the seriousness of an insult, such as that it would constitute *crimen iniuria*.

Several (cumulative) factors identified in the literature[54] have been used by the courts to guide their determination of the applicability of the *de minimis* maxim. These include (as further elaborated upon below): (i) the *extent* (of the harm caused), also referred to as the value[55] or the size and type of

47 Ashworth and Horder *Principles of Criminal Law* 28.

48 Feinberg *Harm to Others* 188, 216.

49 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence".

50 See *S v Seweya* 2004 1 SACR 387 (T) (hereafter the *Seweya* case) para 18 stating that "no definitive rule can be formulated to distinguish between trivial cases meriting criminal censure and trivial ones that can be excluded on the principle *de minimis non curat lex.*"

51 *S v Dimuri* 1999 1 SACR 79 (ZH) (hereafter the *Dimuri* case), where the offence in question was kidnapping.

52 *Dimuri* case 89B, *Seweya* case and *S v Visagie* 2009 2 SACR 70 (W), which cites Gillespie J in the *Dimuri* case.

53 *Dimuri* case 89D.

54 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 132-141; Veech and Moon 1947 *Mich L Rev* 544-560; Inesi 2006 *Berkeley Tech LJ* 951-956; and Ruedin 2008 *EHRLR* 87-92.

55 Veech and Moon 1947 *Mich L Rev* 558, Ruedin 2008 *EHRLR* 87 and Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 139 all refer to "value". Veech and Moon at 559, however, rightly note that value is an "indefinite term". In addition, Ruedin at 87 points out that value "can be expressed in terms of money, distance,

harm caused,[56] (ii) *intent*,[57] (iii) *practicality,* referring to the administration of justice and (iv) the *purpose*[58] (*ratio legis*) of the provision (in other words, the harm or mischief the rule in question is designed to prevent).[59]

Further, it is worth recalling that crime falls within the sphere of public law as opposed to that of private law and is directed against a public interest rather than a private interest. It is the state that prosecutes the alleged perpetrator of a crime, irrespective of the views of a private individual.[60] Accordingly, the public interest will thus necessarily always be a factor requiring consideration in criminal cases – whether implicit or explicit.[61] This is aptly quoted in *S v Dimuri*,[62] with reference to Burchell and Hunt, and as also subsequently cited in *S v Visagie*, as follows:

> It is true that crime affects the interests of the community as a whole and not merely the individual complainant. But if the harm done is of a very trifling nature the community is not really affected and would not be prejudiced if the accused were acquitted.[63]

In theft cases, the *extent* of the harm caused, expressed as the value of the item stolen, has guided the courts' determination. In the Appellate Division case *S v Kgogong*[64] Trollip JA held that the piece of paper taken by the appellant containing notes that "had served their purpose"[65] "was of no value or merely of very trivial value or interest."[66] The court held that the magistrate had thus erred in not applying the *de minimis* rule. Trollip JA concludes:

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weight, time etc., but, in principle, it is not possible to express what a trifle is in absolute terms."

56 Inesi 2006 *Berkeley Tech LJ* 951.

57 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 137-139. In assault cases, for example, this factor has frequently been employed as justifying the application of the maxim in the presence of provocation. See e.g. *S v Visagie* 2009 2 SACR 70 (W), where the *de minimis* rule was applied to quash the conviction. Ruedin 2008 *EHRLR*, however, notes that this factor has been used both to justify and to exclude the application of the *de minimis* maxim.

58 Veech and Moon 1947 *Mich L Rev* 545 regard this as "probably the most important of the factors."

59 Inesi 2006 *Berkeley Tech LJ* 958.

60 Hoctor "Criminal Law" 3.

61 In *S v Visagie* 2009 2 SACR 70 (W) para 15 EM Du Toit AJ adds the following to Gillespie J's sentence from the *Dimuri* case 89D "obviously including the perceived interests of the community as a whole", making it explicit that the public interest must also be considered.

62 *Dimuri* case 89C.

63 *S v Visagie* 2009 2 SACR 70 (W) para 14.

64 *S v Kgogong* 1980 3 SA 600 (A) (hereafter the *Kgogong* case).

65 *Kgogong* case 604.

66 *Kgogong* case 604.

> Hence, in my view, where the offence alleged is a simple theft of an article of trivial or no value, the accused should not be prosecuted therefor, but if he is, he should generally be acquitted.[67]

By contrast in *S v Nedzamba,* where theft was also the offence in question, the *de minimis* rule was not applied. Liebenberg J held that:

> [n]ot only the value of the article but also the purpose of the thief in stealing it, the effect the deed has on the interests of the community and all the circumstances under which the deed was committed should be taken into account.[68]

In this case the accused had stolen two blank cheque forms from the complainant's cheque book. He subsequently made out one of the cheques to cash and cashed it at the bank. He was charged with one count of theft and one count of fraud.[69] Despite the negligible value of the blank cheque forms, the court did not consider it appropriate to apply the *de minimis* rule to the theft charge since the blank cheque forms were stolen with the *intent* to commit fraud and thereafter used for this purpose.[70]

In *S v Visagie*,[71] where the applicability of the *de minimis* rule to the crime of assault was considered, *intent* and *practicality* factored into the court's decision to apply the maxim and overturn the conviction.[72] The facts of the case involved an altercation between the appellant and the complainant. It resulted in the appellant's pushing the complainant, who consequently tripped over a piece of equipment, fell, and broke his wrist. As regards *intent*, the court held that the complainant's conduct was "provocative and aggressive."[73] As regards *practicality*, EM Du Toit AJ paraphrases Trollip JA in *S v Kgogong*:

> [I]t would in all the circumstances of the case better serve the administration of justice in our busy courts, while at the same time not adversely affect the interests of the community as a whole, if the courts were not to be concerned with this trivial and childish confrontation…[74]

In determining whether to apply the *de minimis* maxim, the *purpose* of the criminal law provision, although also a relevant factor for common law crimes, is most evidently considered by the courts in respect of statutory offences.

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67 *Kgogong* case 603-604.
68 *Nedzamba* case 676.
69 *Nedzamba* case 673.
70 *Nedzamba* case 676.
71 *S v Visagie* 2009 2 SACR 70 (W) (hereafter the *Visagie* case).
72 *Visagie* case para 37.
73 *Visagie* case para 34.
74 *Visagie* case para 36.

In *Director of Public Prosecutions v Klue*[75] the Director of Public Prosecutions appealed against the magistrate's acquittal of the accused on the grounds that the magistrate erred in finding the maxim applicable.[76] The issue that this case turned on was whether or not exceeding the statutory limit of alcohol concentration in a driver's blood of 0.05% (i.e., 0.05 grams per hundred millilitres of blood)[77] by 0.02g/100 ml – in other words, having a blood alcohol concentration of 0.07% – was an insignificant or trivial transgression. The magistrate had ruled that it was. Kroon J, writing the judgment for the high court, categorically disagreed with the magistrate in this regard.[78]

In his judgment Kroon J, notwithstanding citing the relevant parts of the *Kgogong* case, clearly distinguished between the application of the maxim where a statutory offence is concerned as opposed to a common law offence.[79] He *inter alia* cited Ackermann J[80] in *S v Magidson:*[81]

> The maxim is also applicable to statutory offences but the approach in such cases is somewhat different. The enquiry there is directed to the intention of the Legislature and whether such intention is a manifestly severe one.[82]

Kroon J clearly stresses the importance of considering the *purpose* of the legislation:

> [W]here the application of the maxim is to be considered in regard to a statutory offence, the aims and objectives of the legislation are important considerations. There is no room for an application of the maxim if it would be contrary to the clear intention of the legislature, even in respect of relatively non-serious contraventions.[83]

Kroon J proceeds with an assessment of the *purpose* of section 65 of the *National Road Traffic Act* and states that these provisions "are aimed at combating the carnage on our roads."[84] He points out that by introducing these stringent rules designed to ensure safer public roads, the public interest has been served.[85]

He is instructive as to how the courts should interpret a statutory limit:

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75 *Director of Public Prosecutions v Klue* 2003 1 All SA 306 (E) (hereafter the *Klue* case).
76 *Klue* case para 5.
77 Section 65(2)(a) of the *National Road Traffic Act* 93 of 1996 (hereafter the *National Road Traffic Act*).
78 *Klue* case para 13.
79 *Klue* case para 13.
80 *Klue* case para 13.
81 *S v Magidson* 1984 3 SA 825 (T) (hereafter the *Magidson* case).
82 *Magidson* case 832H.
83 *Klue* case para 13.
84 *Klue* case para 13.
85 *Klue* case para 13.

> [W]here the legislation has determined a statutory limit, there is no room for the application of the *de minimis* rule where the limit is exceeded. In a sense, the legislature has already determined what would be regarded as negligible, and it is not for the Courts to raise that limit. To hold otherwise…would not only introduce uncertainty, but would indeed also ignore the clear wording of the Act and permit the courts to usurp the function of the legislature.[86]

Kroon J held that the magistrate was "clearly wrong"[87] in applying the *de minimis* rule and in acquitting the respondent. The appeal was upheld.

The various factors discussed above played a role in the determination of the applicability of the *de minimis* maxim in criminal cases – whether in respect of common law or statutory offences. Where statutory offences are concerned, the *purpose* of the legislation is the vital factor. Where a clear statutory limit has been set, the legislature has determined the level, and thus the discretion of the courts is limited. As the source of tax law is almost exclusively legislation (statutory law), judicial authority in respect of tax law usually deals with issues of statutory interpretation. Accordingly, we can expect that the *purpose* of the legislation would be the predominant factor in determining the applicability of the *de minimis* maxim in tax cases.

3.2 Private law

Despite the diversity of areas of private law in which the *de minimis* maxim has been applied, only a few examples of these are provided here with a few brief observations.

In the law of delict[88] it has been held that the *actio iniuriarum* has a number of elements that must be satisfied for a successful action for damages, "subject to the principle *de minimis non curat lex*".[89] A court would accordingly be able to dismiss a claim for damages for trivial matters. In contrast to the prevailing position in criminal law that trivial conduct remains criminally unlawful, in the law of delict "trivial infringements should not be considered wrongful".[90]

In *Pharma Valu Sunnyside BK v Pretorius*,[91] for example, it was held that a delictual claim for defamation should be refused on the basis of *de minimis non curat lex.*[92] It was held that the respondent, who, when leaving a pharmacy, was stopped by a security guard and accused of stealing from

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86 *Klue* case para 13.
87 *Klue* case para 11.
88 See a discussion of "deliktereg" in Labuschagne 1973 *Acta Juridica* 301-302.
89 *Delange* case 270.
90 Mukheibir *et al Law of Delict* 1.14.3.
91 *Pharma Valu Sunnyside BK v Pretorius* 2010 JDR 1037 (GNP) (hereafter the *Pharma* case).
92 *Pharma* case para 30.

the pharmacy (which in fact he did not do), overreacted and was easily offended.[93] With reference to *R v Walton*[94] the court agreed that:

> [i]n the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity.[95]

The *de minimis* maxim has also been applied by the court in a civil case – in the context of an interdict pertaining to a water servitude. In *Benoni Town Council v Meyer*[96] the town council applied for an interdict against the owner of land to prohibit the owner from continuing to fill up a *vlei* (a swamp or a natural basin) as that would create a danger of flooding to the adjacent public road controlled by the town council. The court held that the reclamation of the *vlei* would create a danger of infringement of the plaintiff's rights. However, the judgment continues, "not every danger of infringement will entitle a plaintiff to relief" as the *de minimis* maxim can be applied in appropriate circumstances.[97] The court proceeded to evaluate whether the danger of infringement of the town council's rights was negligible or not. Acknowledging that "[i]t would be difficult to formulate a definition of *minimum* that would be valid for all circumstances",[98] the court considered the following factors relevant to the evaluation: "the *extent*, duration and frequency of the expected infringement"[99] (own emphasis). The court held that the danger of infringement of rights, although the occurrence of floods would be rare, was not negligible and granted the interdict against the further reclamation of the *vlei*.[100] In respect of the reclamation that had already occurred (which was found to be "a negligible infringement of the plaintiff's rights"), the owner was not ordered to restore the *vlei* due to the *de minimis non curat lex* maxim.[101]

Another area of law where the maxim has been applied is insurance law. In *AA Mutual Insurance Association Ltd v Sibothobotho,*[102] for example, the Appellate Division applied the maxim in the interpretation of a provision of the (now repealed) *Compulsory Motor Vehicle Insurance Act* 56 of 1972.[103] The insurer sought to avoid liability on the grounds that the plaintiff (claimant) was "being conveyed in or upon the insured vehicle".[104] The court

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93 *Pharma* case para 30.
94 *R v Walton* 1958 3 SA 693 (SR) (hereafter the *Walton* case).
95 *Walton* case para 30.
96 *Benoni Town Council v Meyer* 1961 3 All SA 294 (W) (hereafter the *Benoni Town Council* case).
97 *Benoni Town Council* case 303.
98 *Benoni Town Council* case 303.
99 *Benoni Town Council* case 303.
100 *Benoni Town Council* case 303.
101 *Benoni Town Council* case 305.
102 *AA Mutual Insurance Association Ltd v Sibothobotho* 1981 4 SA 593 (A) (hereafter the *AA Mutual Insurance* case).
103 *AA Mutual Insurance* case 603.
104 *AA Mutual Insurance* case 598.

considered that the purpose of the legislation was "to give the greatest possible protection to third parties [claimants]."[105]

The court concluded as follows:

> Looking at the whole incident in broad perspective it seems to me that, whatever may be said about the driver's intentions and the passenger's intentions, this is a case in which the *de minimis non curat lex* rule can appropriately be applied. A man sits or stands on the front of a motor vehicle performing a simple mechanical operation. The vehicle jerks forward three or four times. He has been moved, perhaps five paces, but to say that he has been conveyed as a passenger for this distance is to strain the language of the Motor Vehicle Insurance Act.[106]

Accordingly, the maxim was applied in the interpretation of legislation and it was emphasised by the court that a "broad perspective", including a consideration of the *purpose* of the legislation, required this.[107]

4 Applicability of the *de minimis* maxim and concept in tax law

It has been argued that the maxim as a "rule of reason … may be applied in all courts and to all types of issues."[108] There is thus in principle no reason why it cannot apply to tax law. Due to the limited number of tax cases that referenced the maxim itself, a wider search was performed to also consider relevant cases where the term "*de minimis*" or the words "trifling" or "trivial" were referred to (what we refer to in this article as the *de minimis* concept). In this part we analyse judicial decisions that have applied or referred to the *de minimis* maxim or concept in South African tax law.

Before the relevant cases are analysed a basic understanding of the tax dispute resolution structures, with specific reference to the different bodies and their decisions or judgments, is required. This leads to a possible explanation of why there are so few tax cases dealing with *de minimis* matters and provides the context necessary for the analysis of the tax cases.

4.1 Tax dispute resolution structures

Chapter 9 of the *Tax Administration Act* 28 of 2011 (hereafter the *TAA*) deals with dispute resolution. A taxpayer may, in terms of section 104 of the *TAA*, object to an assessment and to certain decisions of the South African Revenue Service (hereafter SARS).[109] If SARS disallows an objection, a

105 *AA Mutual Insurance* case 602.
106 *AA Mutual Insurance* case 603.
107 *AA Mutual Insurance* case 603.
108 Veech and Moon 1947 *Mich L Rev* 542 (footnotes omitted).
109 Section 104 of the *Tax Administration Act* 28 of 2011 (the *TAA*).

taxpayer may appeal to the tax board or the tax court.[110] The tax board hears an appeal in the first instance if the tax in dispute does not exceed ZAR 1 million and if a senior SARS official and the taxpayer so agree.[111] If these requirements are not met, the tax court hears the appeal after the objection was disallowed. Furthermore, the tax court also hears appeals (*de novo*) where either party is dissatisfied by the decision of the tax board.[112]

The tax court is not a court of law which sets precedent,[113] but rather "a creature of statute" established and functioning as directed by the *TAA*.[114] It is, however, a court of record,[115] meaning that "its proceedings are recorded and if an appeal proceeds to a higher court, that court will receive a record of the tax court's proceedings."[116] The president of the tax court is a judge or an acting judge of the High Court, who hears the appeal together with an accountant and a representative of the commercial community.[117] The tax court's judgments must be published for general information in anonymised form,[118] but the judgments do not set precedent as they only resolve the issue between SARS and the taxpayer.[119] Where a party is dissatisfied by a decision of the tax court, a right of further appeal to a full bench of the High Court and the Supreme Court of Appeal is also provided for in the *TAA*.[120]

Civil tax cases are, therefore, not heard in magistrate courts.[121] The tax board is where one would typically expect disputes of a trivial nature to be heard due to the monetary limit determining the board's jurisdiction. These decisions are, however, not available for analysis since a decision of the tax board is only required to be submitted to SARS and the appellant

110 Section 107(1) of the *TAA.*

111 Section 109(1) of the *TAA*, read together with GN 1196 in GG 39490 of 17 December 2015: Notice fixing the amount of the threshold for the amount of tax in dispute for purposes of an appeal to the Tax Board.

112 Section 115 of the *TAA.*

113 *Poulter v Commissioner for the South African Revenue Service* 2024 2 All SA 876 (WCC) paras 28 and 52. Also see *Ochberg* case 218.

114 *Nesongozwi v Commissioner for the South African Revenue Service* 2022 JDR 3077 (SCA) para 10.

115 Section 116(2) of the *TAA*.

116 Croome and Olivier *Tax Administration* 326.

117 Section 118(1) of the *TAA.*

118 Section 132 of the *TAA.*

119 Arendse, Williams and Klue *Silke on Tax Administration* s 5.12.

120 Section 133(2) of the *TAA.* Although not provided for in the *TAA*, an appeal to the Constitutional Court is also possible in terms of s 167 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

121 The resolution of a tax dispute by way, for example, of a judicial review in terms of the *Promotion of Administrative Justice Act* 3 of 2000 is excluded from the scope of this article.

taxpayer.[122] As stated by SARS, "[t]he sittings of the Tax Board are not public and the Board's decisions are not published by SARS."[123]

The intention of the legislature in developing this dispute resolution structure whereby the tax board (previously, the special board) hears appeals prior to an appeal to the tax court (previously, the special court) was considered in *ITC 1670.*[124] The special court held that:

> [i]t is therefore clear that the Legislature intended that trivial cases not occupy the time of the Special Court, but are rather dealt with quickly and more cheaply elsewhere[125] (own translation).

This could explain why there are so few tax cases where the applicability of the *de minimis* maxim is considered (as further discussed in para 4.2 below). The time and cost of litigation is another factor that may result in taxpayers accepting SARS's assessments and decisions and paying the tax in dispute rather than litigating. As both SARS and taxpayers would guard against resolving trivial disputes litigiously, such disputes would therefore likely be resolved during the objection, tax board or alternative dispute resolution[126] stages.

4.2 Tax cases

The only tax case identified where the outcome of the case turned on the applicability of the *de minimis non curat lex* maxim was the very recent *Diageo* case. Interestingly, the judgment by Van der Schyff J does not cite as authority any other tax case in which the *de minimis* maxim was referred to. This supports our finding that there has been no prior South African tax case where the applicability of the *de minimis* maxim formed part of the court's *ratio decidendi*. Further, only one criminal tax case in which the applicability of the *de minimis* maxim was referred to (as one of the grounds of the appeal) was identified.[127] As the court only briefly responded to this ground by stating that "the increases would not have been trivial"[128] (referring to the increases in income over several years, resulting in increased tax and penalties) without any further discussion, this case is not analysed further.

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122 Section 114(3) of the *TAA.*

123 SARS 2023 https://www.sars.gov.za/legal-counsel/dispute-resolution-judgments/dispute-resolution-process/.

124 *Income Tax Case 1670* 1998 62 SATC 34 (G).

125 *Income Tax Case 1670* 1998 62 SATC 34 (G) 37 (translation of "Dit is dus duidelik dat die Wetgewer beoog het dat nietige sake nie die tyd van die Spesiale Hof in beslag neem nie, maar elders vinnig en goedkoper afgehandel word").

126 Section 107(5) of the *TAA*.

127 *R v Stone* 1959 1 SA 125 (SR) (hereafter *R v Stone*).

128 *R v Stone* 131.

In the *Diageo* case the High Court on appeal had to consider "the applicability of the maxim *de minimis non curat lex* in excise tariff classification."[129] It had to be determined by the court whether the vanilla in a liqueur (made with wine spirits), added for flavouring and with an alcohol content of 0.6%,[130] disqualified the product from being classified under a certain tariff subheading which was subject to a lower excise duty. The tariff subheading with the reduced rate applies to liqueurs and cordials with an alcoholic concentration "exceeding 15 percent by vol. but not exceeding 23 percent vol"[131] referring to the alcohol content of the final product. Further, Additional Note 4[132] states that this tariff subheading:

> [s]hall only apply to liqueurs, cordials and other spirituous beverages containing the following:
>
> (a) … or
>
> (b) wine spirits to which other non-alcoholic ingredients have been added.

Additional Note 4 was introduced to support the labour-intensive wine industry. The purpose of the lower excise rate was so that the more expensive wine spirits (derived from the distillation of wine) could be competitively used as a substitute for C-spirits (derived from other sources such as sugar cane) in the manufacture of spirituous beverages.[133]

The taxpayer argued for a "purposive interpretative approach"[134] and contended that since the alcohol content of the vanilla flavouring is "so minutely small", the *de minimis* maxim applies.[135] Therefore, the taxpayer argued that the alcohol content of the vanilla flavouring, which was described by the taxpayer as "nugatory and insignificant", should not be taken into account in the classification process.[136]

The Commissioner for the SARS (hereafter the Commissioner), on the other hand, contends with reference to Additional Note 4(b) that "non-alcoholic" means 0% alcohol and "since the vanilla extract contains 0.6% alcohol, that is the end of the matter."[137] The Commissioner also argued that if the taxpayer's *de minimis* argument were to be upheld, the loss suffered by SARS would be "no trivial loss and not *de minimis*"[138] and that the duty at

129 *Diageo* case para 5.
130 *Diageo* case para 8.
131 *Customs and Excise Act* 91 of 1964, Schedule 1, Part 2, Section A.
132 *Customs and Excise Act* 91 of 1964, Schedule 1, Part 1, Chapter 22, Additional Note 4.
133 *Diageo* case paras 23 and 49.
134 *Diageo* case para 25.
135 *Diageo* case para 5.
136 *Diageo* case para 28.
137 *Diageo* case para 30.
138 *Diageo* case para 42.

stake "amounts to millions of Rands annually".[139] The Commissioner therefore focussed on the factor of *extent* (in the parlance of the factors used in part 3) – both as regards the amount of alcohol and of the tax at stake.

The Commissioner further made use of an analogy to section 65 of the *National Road Traffic Act* to argue that the *de minimis* maxim cannot apply and that "'non-alcoholic ingredient' means an ingredient with 0% ABV [alcohol by volume]".[140] Section 65(2) of the said Act prohibits driving on a public road where the driver's blood alcohol concentration is "not less than 0.05 gram per 100 millilitres".[141] In the *Klue* case the court ruled that the *de minimis* maxim cannot be applied in interpreting the aforementioned provision.[142] The Commissioner contends:

> [w]hen the question arises whether section 65 has been breached, the test is simple. If the test result is 0.049 g/100 ml, it has not been breached. If it is 0.05 g/100 ml it has been breached.[143]

The court *a quo* determined that the case turned on whether the vanilla flavouring constituted a "non-alcoholic ingredient" for the purposes of Additional Note 4(b).[144] The judge performed an analysis of the ordinary meaning of the words "ingredient", "alcoholic" and "non-alcoholic". He determined the ordinary meaning of "non-alcoholic" to be "0% vol"[145] and concluded that "[w]hat is relevant is the presence of alcohol".[146] The court *a quo* agreed with the Commissioner's interpretation and dismissed the appeal.

The full court, however, found issue with the court *a quo's* judgment by stating:

> [i]nterpreting Additional Note 4(b) without considering the context within which it operates…is a misdirection by the court a quo, in law as far as statutory interpretation is concerned…[147]

In her judgment, Van der Schyff J (with Munzhelele J and Millar J concurring) structured her discussion under the following three headings: "Statutory Interpretation", "Purpose of the Customs and Excise Act 91 of 1964", and "*De minimis non curat lex*".

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139 *Diageo* case para 42.
140 *Diageo* case para 70.
141 *National Road Traffic Act* 93 of 1996 s 65(2).
142 See para 3.1 in the main text, where this case is discussed.
143 *Diageo* case para 39.
144 *Diageo Proprietary Limited v the Commissioner for the South African Revenue Services* (unreported) case number 93168/2019 of 17 March 2021 (hereafter *Diageo court a quo* case) para 3.
145 *Diageo court a quo* case para 44.
146 *Diageo court a quo* case para 61.
147 *Diageo* case para 7.

In respect of the discussion on statutory interpretation, she cited several prominent cases that stress the importance of having regard to context[148] thus requiring a purposive approach to interpretation. While acknowledging that the starting point of statutory interpretation "is the language of the provision itself"[149] she also referred to the recent judgment from the Supreme Court of Appeal in *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd*[150] and stated:

> [t]he court held that there is no straightforward attribution of a dictionary meaning of a word as the word's ordinary meaning to construe a statute.[151]

She concluded her discussion on statutory interpretation:

> In my view, the Commissioner erred in holding the view that meaning had to be attributed to the phrase 'non-alcoholic' and the word 'ingredient'. Diageo correctly identified the issue at hand, not as the attribution of meaning to two loose-standing words or phrases, but as holistically interpreting Additional Note 4(b) having regard to its purpose within the broader customs and excise regulatory regime. It is also in this context, that Diageo's reliance on the *de minimis* doctrine must be considered.[152]

As regards Van der Schyff J's comments on the purpose of the *Customs and Excise Act* 91 of 1964, she agreed with the taxpayer's view that the purpose of Additional Note 4(b) is to prevent a manufacturer from adding cheaper C-spirits to the more expensive wine spirits to increase the alcohol content of the beverage and still benefit from the lower rate.[153]

In the above context, she evaluated the amount (or *extent)* of the alcohol in the vanilla flavouring not in terms of absolute value but in terms of its contribution to the alcohol content of the final product and concluded that:

> [a]n ingredient can only be regarded as an alcoholic ingredient if it significantly contributes to the ABV of the final product.[154]

Under the heading "*De minimis non curat lex"*, the judgment discussed some of the case law dealing with the *de minimis* maxim including two criminal cases (*R v Maguire*[155] and the *Visagie* case) and two civil cases (the *Benoni Town Council* and *AA Mutual Insurance* cases). The inference

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148 Including *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC); *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC); and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter the *Natal Joint Municipal Pension Fund* case).

149 *Diageo* case para 45.

150 *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd* 2023 JDR 1900 (SCA).

151 *Diageo* case para 44.

152 *Diageo* case para 47.

153 *Diageo* case para 50.

154 *Diageo* case para 51.

155 *R v Maguire* 1969 4 SA 191 (RA).

made from the analysis of the said case law was that "the question as to whether the principle applies depends solely on the factual matrix of each case."[156] The court, however, proceeded to make the determination of the applicability of the *de minimis* maxim by evaluating the specific facts in light of the *purpose* of the legislation.[157]

In response to the Commissioner's contention regarding the potential loss of revenue to the fiscus, the judge contended:

> By promulgating tariff subheading 2208.70.21, National Treasury weighed up the benefit of promoting the local wine and soft fruit industries…against the loss of excise duty…and concluded that the benefit outweighs the loss.[158]

The court disagreed with SARS's argument that the *de minimis* principle is not applicable as the excise duty lost is not trivial. The court's view was that the volume and quantity of exports of the product was irrelevant to the determination of the product's tariff subheading classification.[159]

Van der Schyff J found the Commissioner's analogy with section 65 of the *National Road Traffic Act* to be misplaced and held:

> [i]n Additional Note 4(b), the term 'non-alcoholic' is not defined. Meaning must be attributed to the term 'non-alcoholic' through the process of interpretation…[160]

She concluded that the position in respect of the meaning of "non-alcoholic ingredient" is different from section 65 of the *National Road Traffic Act* as "no verifiable basis is provided for determining the meaning"[161] of such an ingredient.

In light of the *purpose* of the relevant provisions to, *inter alia,* incentivise the use of wine spirits rather than cane spirits,[162] the court held that the additional alcohol from the vanilla was negligible (contributing 0.00004% to the ABV of the final product), and insufficient to invoke the application of Additional Note 4(b).[163] The court, therefore, applied the *de minimis* maxim and upheld the appeal.[164]

While the factor of *extent* was considered in the *Diageo* judgment, the *purpose* of the provision was the predominant factor in determining the applicability of the maxim. The *extent* of alcohol content in the vanilla flavouring did not undermine the *purpose* for which the lower excise duty

156 *Diageo* case para 57.
157 *Diageo* case para 60.
158 *Diageo* case para 61.
159 *Diageo* case para 69.
160 *Diageo* case para 70.
161 *Diageo* case para 70.
162 *Diageo* case para 61.
163 *Diageo* case para 60.
164 *Diageo* case para 72.

category was introduced. In adopting a purposive approach to interpreting the provision in question in its broader context, the judgment is congruent with the reasoning in the *AA Mutual Insurance* case.[165]

In *ITC 1939*[166] the Johannesburg Tax Court had to decide a case on the other end of the spectrum of significance, viz. whether a matter was material. While the court, strictly speaking, did not have to consider the triviality of a matter in this case, the case nonetheless provides some valuable insights. The case entailed the interpretation of section 45 of the *Value-Added Tax Act* 89 of 1991 (hereafter the *VAT Act*). Section 45 provides that the Commissioner is liable for interest on delayed refunds. However, where a return is "incomplete or defective in any material respect"[167] the delay, for the purposes of calculating the interest, is determined differently. In this case SARS had paid interest amounting to ZAR 3 570 115.33 (in respect of delayed VAT refunds of ZAR 71 229 183.86) to the taxpayer in terms of section 45 of the *VAT Act*.[168] Thereafter SARS recalled the interest as it transpired during an audit that deemed output tax of ZAR 601.09 in aggregate on a fringe benefit was not declared.

SARS submitted that this non-declaration rendered the VAT returns incomplete as provided for in section 45.[169] SARS's view was that the taxpayer's failure to declare the fringe benefit was non-compliance and, therefore, an error.[170] SARS further argued that an error is material to SARS and that non-compliance with the legislation cannot be condoned, as:

> [t]he Commissioner is tasked with collecting all the taxes due to the fiscus, regardless of how 'immaterial' they may seem to be.[171]

The taxpayer did not appeal against the merits of the output tax finding – after its objection was disallowed – because, given the minimal amount of output tax, it made no sense from an economic viewpoint.[172] However, the taxpayer objected to and appealed against the decision of SARS to recall the interest based on the argument that the amount of ZAR 601.09 did not render the return "incomplete or defective in any material respect", but rather that the quantum of the output tax was "trifling and clearly immaterial."[173] The court interpreted section 45 as follows:

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165 See para 3.2 in the main text, where this case is discussed.
166 *Income Tax Case 1939* 2020 83 SATC 157 (case number VAT 1712) (hereafter *ITC 1939*).
167 *Value-Added Tax Act* 89 of 1991 s 45(1)(i).
168 *ITC 1939* paras 4, 6.
169 *ITC 1939* para 14.
170 *ITC 1939* para 20.
171 *ITC 1939* para 20.
172 *ITC 1939* para 10.
173 *ITC 1939* para 10.

> Section 45 is a pragmatic provision not concerned with principle but with materiality. It recognises the fact that vendors may render returns that are incomplete or defective. If it were a matter of principle then any defective or incomplete return would carry the consequence of SARS not having to pay interest. But, the Legislature, in its wisdom, determined that expedience trumps principle insofar as the payment of interest by SARS is concerned.[174]

The court expressed the size (or *extent*) of the non-declaration as a relative value, being the ratio of the amount of output tax to the total amount of the refund, which was 0.0006%.[175] The court held that this fraction does not satisfy the materiality test that the legislature included in section 45 of the *VAT Act*.[176] As such, the court held that the taxpayer's VAT returns were not "incomplete or defective in any material respect", as contemplated in section 45(1)(i) of the *VAT Act*.[177]

Two useful insights emerge from this case. First, the court distinguished between provisions of principle and provisions of expedience or pragmatism. This distinction offers a paradigm which may be useful in analysing how the courts have determined what is *de minimis* in tax law. Secondly, the Commissioner's contention, at least in this case, that all taxes due to the fiscus are material, was rebutted.

The amount (or *extent*) of tax at stake in a dispute does not necessarily determine whether a dispute is trivial nor does it have a bearing on the applicability of the *de minimis* maxim. In *ITC 489*,[178] for example, the issue entailed the deductibility of transportation expenses by a journalist. The court had to determine whether these expenses were incurred in the production of the appellant's income and were thus deductible. The court clearly regarded this determination as a matter of principle:

> The amount of tax involved is small, but we have to consider small amounts as well as large. However trivial the amount of tax involved, the principle may be of great importance to a great many taxpayers throughout the country.[179]

Similarly, in *ITC 824*[180] the court did not consider that the magnitude (or *extent*) of an amount would lead to a different conclusion. The court had to decide whether a loss could be claimed as a deduction or whether it was a capital loss and thus not allowable as a deduction. In respect of a building held for sale, the loss was the result of the running expenses of the building exceeding the rental income earned. In reaching its conclusion against the taxpayer, the court held as follows:

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174 *ITC 1939* para 25.
175 *ITC 1939* para 19.
176 *ITC 1939* para 26.
177 *ITC 1939* para 28.1.
178 *Income Tax Case 489* 1941 12 SATC 68 (U) (hereafter *ITC 489)*.
179 *ITC 489* 69.
180 *Income Tax Case 824* 1956 21 SATC 79 (T) *(*hereafter *ITC 824)*.

> The loss so incurred was a capital loss expended for the purpose of equipping the ultimate profitmaking undertaking. Mr Nathan [the appellant's counsel] suggested that a distinction could be drawn between the cases herein referred to and the instant case, on the ground that the rentals there derived were trivial whereas they are substantial in this case. In my opinion the difference in the rentals cannot distinguish the principle to be applied in this case from that applied in the other cases.[181]

Accordingly, the quantum of rental income was irrelevant in the determination of the nature of the loss.[182] This case and *ITC 489* – both cases that dealt with matters of principle – illustrate that in respect of matters of principle, the magnitude (or *extent*) of the amount is irrelevant and thus even small amounts are relevant.

By contrast, in *ITC 749*[183] a trivial component of a transaction was disregarded by the court. Under the *Income Tax Act* 31 of 1941 only income derived from a source in South Africa (the Union at the time) or deemed to be in the Union fell in its ambit. Income was deemed to be from a source in the Union if it was received, *inter alia,* for services rendered in the carrying on in the Union of any trade. In this case, auditing and accounting work was performed outside South Africa by a partnership with its main office in Johannesburg. All the work was performed outside the Union, other than some typing and copying work which took place upon return to the Johannesburg office. The court held that the work performed outside the Union was not closely enough linked to the carrying on of the firm's business in the Union for the fees to be deemed to be from a Union source, to which the court added the following reservation:

> so far as there was an ascertainable charge for the copying work done in Johannesburg this would be assessable, unless it is so small that it should be ignored by virtue of the maxim *de minimis lex non curat*.[184]

The court, therefore, acknowledged that income which is "ascertainable" but "so small" can be disregarded. The court here took a pragmatic approach in not requiring apportionment of the income to trivial components.

Also, in *Commissioner of Taxes v Shein*,[185] an appeal case decided in the Federal Supreme Court of Southern Rhodesia, the issue was whether the source of income accruing to the respondent was Bechuanaland or Southern Rhodesia. In dismissing the appeal and deciding in favour of the

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181 *ITC 824* 83.

182 Ruedin 2008 *EHRLR* 87 notes that "[i]n some areas, the value factor may be irrelevant. If a seemingly trifling matter proves to embody a point of substance, the maxim should not apply."

183 *ITC 749* 1952 18 SATC 319 (T) (hereafter *ITC 749*).

184 *ITC 749* 323.

185 *Commissioner of Taxes v Shein* 1958 3 SA 14 (FC) (hereafter the *Shein* case).

taxpayer that the source of the income was from outside Southern Rhodesia and thus not taxable in Southern Rhodesia, the court held as follows:

> When a man is engaged to perform a certain work in a given country but has minor duties, which are purely subsidiary and incidental, that fall to be performed in another country, then I do not think it is a practical approach to suggest that portion of his income has its source in that other country. When he is not paid separately for these extraneous duties, it becomes particularly artificial to try to allot portion of his earnings to them.[186]

Accordingly, as a matter of *practicality* (or in tax parlance, administrability), the fact that some duties regarded as "trivial and incidental"[187] were performed in another country did not require a value to be placed on those services and an apportionment of the income to be made to those (trivial) services.

In *ITC 1092,*[188] a receipt, that the court held to be capital in nature, had a trivial component that, strictly speaking, was income in nature. The court had to decide whether the value of certain business assets received by the appellant taxpayer was of a capital or income nature. The transaction was essentially a barter transaction whereby the appellant took over certain obligations of a company in liquidation in exchange for the business assets. As part of the agreement, and in taking over some debtor accounts, the appellant had agreed to collect some of the other accounts on behalf of the liquidator. The Commissioner had contended that the business assets had been received in respect of services rendered by the appellant to the company in liquidation, which would result in the receipt being income in nature. The court held as follows:

> While in this respect appellant may have rendered a small service to the liquidator I do not consider that this consideration was of any moment in the negotiations. It was a trifling matter which does not, I consider, suffice to alter the essential nature of the transaction as I have found it to be.[189]

Accordingly, this "matter of little importance"[190] did not change the nature of a transaction from capital to income (nor did it require an apportionment of the amount). The court, therefore, disregarded the trivial component of the transaction.

There are other cases that, although making mention of the maxim, "*de minimis*" or other similar terms such as "trifling" or "trivial", do not contribute much to the understanding of how the courts have determined what is *de*

186 *Shein* case 17.
187 *Shein* case 17.
188 *ITC 1092* 1966 28 SATC 228 (R) (hereafter *ITC 1092*).
189 *ITC 1092* 231.
190 *ITC 1092* 230.

minimis in a tax content. These include, for example, the *Ochberg* case, *Commissioner of Taxes v Taxpayer*[191] and *ITC 1838.*[192]

5 Conclusion

In criminal law, determining the applicability of the *de minimis* maxim is a matter of judicial discretion that requires courts to make a value judgement weighing up various considerations. While there is no one definite test for determining the applicability of the *de minimis* maxim, several factors have guided the courts' decisions. This article set out how the factors of *extent*, *intent*, *practicality* and *purpose* played a role in this determination in criminal cases dealing with common law offences (such as in the *Kgogong*, *Nedzamba* and *Visagie* cases). In cases – whether criminal or civil – that turned on statutory interpretation, the *purpose* of the provision was the primary factor in the determination of the applicability of the maxim (as demonstrated by the *Klue* and *AA Mutual Insurance* cases).

Let us now recall the question posed at the outset of this article: how have the courts decided the applicability of the *de minimis* maxim, and more broadly, considered the *de minimis* concept in the context of tax law? While "the 'fact intensive nature of *de minimis* determinations' militates against theoretical development",[193] from our analysis of judicial authority we infer the following:

In the *Diageo* case the predominant factor in determining the applicability of the *de minimis* maxim was the *purpose* of the legislation – as in the *Klue* and *AA Mutual Insurance* cases. More importantly, the court thereby followed the "proper approach to interpretation" set out in the *Natal Joint Municipal Pension Fund* case.[194] In applying the maxim, the *Diageo* case is a cogent example of how the maxim "can play a role in the interpretation of statues" as recently alluded to by the Constitutional Court.[195]

Where the courts are called upon to determine whether the *de minimis* maxim should be applied in the interpretation of a statute, two situations should be distinguished. First, those situations where the statute provides a very clear-cut limit or level expressed as a number and such amount is objectively verifiable – such as a blood alcohol concentration of 0.05g/100ml, as was the case in the *Klue* case. Second, those situations where it is the words or phrases in the statute that require interpretation. With regard to the former, where the text of the provision is unambiguous, almost all judicial discretion in respect of the interpretation of the statute has

191 *Commissioner of Taxes v Taxpayer* 1982 1 BLR 33 (CA).
192 *Income Tax Case 1838* 2009 72 SATC 6 (W).
193 Hoctor "Assessing the *De Minimis Non Curat Lex* Defence" 130 (footnote omitted).
194 *Natal Joint Municipal Pension Fund* case paras 17-26.
195 *Clicks* case para 229.

been removed and there is little leeway for the courts to apply the *de minimis* rule. On the contrary, regarding the latter situations, the words used in the statute should be given meaning within the context and the *purpose* of the statute – which may in fact require the application of the *de minimis* maxim. For example, considering the *purpose* of the legislation in which these words appear, the courts interpreted the words or phrases "conveyed" (the key term in the *AA Mutual Insurance* case) and "non-alcoholic" (in the *Diageo* case) by applying the *de minimis non curat lex* maxim.

The use by the courts of the *de minimis* concept in tax law appears to be influenced by whether the issue at hand is a matter of principle (a substantive matter), or a matter of practicality (administrability). Where matters of principle are concerned – such as the deductibility of an expense as seen in *ITC 489* or determining whether a loss is income or capital in nature such as was the case in *ITC 824* – the courts seem to consider the amount (the factor of *extent* or value) as irrelevant and even small or trivial amounts should be considered. The courts have, however, on several occasions applied the *de minimis* concept in pursuit of *practicality*. For example, in *ITC 1092* the court disregarded the income component of a receipt on account of its triviality and determined the entire receipt to be of a capital nature. In *ITC 749* the court ignored trivial services performed in South Africa in respect of income sourced outside South Africa. Lastly, in the *Shein* case the court did not consider it a "practical approach" to apportion income to a country where the only services performed were trivial and incidental.

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List of Abbreviations

Annu Surv SA L	Annual Survey of South African Law
Berkeley Tech LJ	Berkeley Technology Law Journal
EHRLR	European Human Rights Law Review
Gonz L Rev	Gonzaga Law Review
Mich L Rev	Michigan Law Review
SAFLII	Southern African Legal Information Institute
SARS	South African Revenue Service
TAA	Tax Administration Act 28 of 2011
VAT Act	Value-Added Tax Act 89 of 1991
ZAR	South African Rand