1. In the *Winckler v Minister of Correctional Services*[1] the Judge found that the only legitimate expectation, in a matter dealing with parole policy, was the legitimate expectation to be fairly considered in accordance with <u>whatever policy happened to exist and be in place at the time.</u> If the principle in this case had to be applied to these set of facts it could be argued that the only legitimate expectation the taxpayer had was that the methodology used would be fairly considered and applied in accordance with whatever policy happened to be in place. If the Revenue authority can accordingly show that other means of determination and methodologies do in fact exist outside the interpretation note, they could argue that they were at liberty to apply their discretion in accordance with whatever policy/methodology they deem to be fair at that time. This view is supported and the position is consistent with the primary contention against the doctrine of legitimate expectation in administrative law, which is that it clashes with the aim of securing administrative freedom of discretion.[2]

2. A second point of contention that one could possibly take in this case, was whether in fact an expectation has been created. Whether an expectation has been created is a question of fact, having regard to the circumstances of the case. The expectation must be legitimate in an objective sense meaning that the question is not whether an expectation exists in the mind of the litigant, but whether, viewed objectively, such expectation is in a legal sense legitimate.[3] This "test" was applied in *National Director of Public Prosecution v Phillips*

   i) Was there a reasonable expectation that was;
   ii) **<u>Induced</u>** by the decision made based on;
   iii) a **clear, unambiguous representation;** and
   iv) that was competent and lawful for the decisionmaker to make.

   Having regard to the above test one must look at the past conduct of the Revenue Services. So one must look at the past conduct and patterns of the Revenue authorities. If the Revenue authorities applied other methods and used other means and policies, and they used, for example, from time to time other interpretation notes, it could be argued that a reasonable expectation has not been induced and that the Revenue authority's merely exercising their discretion and at no point did SARS unequivocally release a media statement advising in clear, unambiguous terms that this interpretation note must and will always be used. The application

[1] 2001 (2) SA 747 (C)
[2] Daphne Barrak–erez *the doctrine of legitimate expectation and the distinction between the reliance and expectation interests,* European public law, volume 11 (issue 4) 2005
[3] President of RSA v SARFU 2000 (1) SA (1) CC par. 219

of the interpretation note is an option and many (or even just some) other methodologies have been used before.

3. In some cases the knowledge of a practice (for example the application of a interpretation note) may actually prevent the formation of a legitimate expectation. If it is a well-known practice that more than one methodology is used, other than the methodology contained in this particular interpretation note, then no legitimate expectation to use the particular interpretation note exists. See *Maqungo v Government of the Republic of Transkei* 1995 (1) SA 412 (TkA).

4. There has been authority to suggest that only procedural legitimate expectation should exist[4] that this approach has been expressly rejected and disapproved in the *Traub* case[5]. The Revenue authority accordingly does not necessarily reject the notion that both substantive and procedural benefits exist in the legitimate expectation doctrine, but argues in this particular instance that the reliance on this doctrine in respect of an interpretation note, which is not even law, undermines the basic requirement of legality where it has the effect of tethering the future exercise of discretion.

5. In *R v Inland Revenue Commissioners, Ex-pare Unilever*[6] the court had to consider a longstanding practice of allowing tax relief to be claimed years of trading loss had been incurred. In this particular case, the court enforced the legitimate expectation doctrine that a late claim would be granted, **however**, they did so on the basis that it was irrational or unreasonable for the Revenue authorities not to grant the claim. In this particular case the application of a methodology outside that which is based on the interpretation note, can not be said to be irrational and unreasonable if other methodologies and application exist and have been applied. There is no component of unreasonable and irrationality in this particular instance in not having applied that interpretation note and as a result based on this case, the legitimate expectation did not exist. This approach and principle was also applied in *R v Secretary of State for the Home Department, Ex-parte Hargreaves*[7].

[4] *Mokoena v Administrator Transvaal* 1988 (4) SA 912 (W)
[5] 1989 (4) SA 731 (A)
[6] (1996) STC 681
[7] (1997) 1 All ER 397 (CA)

6. (If we rely on this argument the argument in # above should be ignored). The appellant's argument that a substantive legitimate expectation exists and that a decision should be made in its favour with a particular methodology applied, is erred. In *Durban Adventures Ltd v Premier, Kwa-zulu Natal(2)*[8] a legitimate expectation at best affords an applicant a right to be heard and the use of the doctrine to create a substantive right is not permissible in South African law. In this particular case, the Applicants are given a right to be heard by way of these proceedings in the Tax Court and by way of the objection and appeal procedures that have been made available. To curtail and circumvent this procedural fairness is opportunistic and premature. No legitimate expectation accordingly exists.

7. A legitimate expectation is in fact a *spes* or hope, but in order for the *spes* to become an enforceable right, the expectation must be legitimate in the sense that it must be made concrete.[9] In this context, our courts have made it clear that a legitimate expectation will only arise if an express promise has been given by an authorative body or if a *regular* practice has been adopted. In the circumstances of this case, the Appellant has failed to show or provide evidence of a regular practice as regards the application of the interpretation note. No evidence is before this court in this regard and it cannot simply be assumed that the interpretation note is applied in isolation to any other possible methodologies used.

[8] 2001 (1) SA 389 (N)
[9] Burns Administrative Law 254