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**Potential double tax treaty override of South African exit
taxation law – how do tax treaties allocate the right to tax
unrealized gains?**

by

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HARN60 Master Thesis

Master's Program in European and International Tax Law

2014/2015

28 May 2015

Spring semester 2015

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Abstract

“Traditionally regarded as Africa’s biggest economy, with an estimated 2013 GDP of USD 370 billion, South Africa has a relatively wide treaty network, having concluded tax treaties with 73 countries (as of July 2014), 52 of which are outside Africa.”¹

South African income tax legislation makes provision for the levying of exit taxes or charges when individuals emigrate from or companies cease to be residents² or become headquarter companies, or when controlled foreign companies (CFC) cease to be CFCs otherwise than by way of becoming residents.

As indicated by the title the discourse followed in this paper entails the analysis of treaties to ascertain the connecting factors employed by the OECD Model treaty giving rise to signatories levying exit taxes. Furthermore, using decided cases, the DTTs entered into by South Africa with other countries in the international community are scrutinised to assess whether they are at threat of being circumvented by domestic tax provisions on exit taxation in South Africa.

¹ An excerpt drawn as a direct quote from Albertus Marais’ journal article *“The Risk for Tax Treaty Override in Africa – A Comparative Legal Analysis”* IBFD, published in November 2014.

² Subject to the legislative criteria for determining the residence status of corporate entities.

Preface

What started out as a rare and well-timed opportunity to join the Transfer Pricing team of a leading international audit firm in South Africa has culminated in my journey to acquire extensive knowledge in tax law, international tax law in particular, leading to studies in Sweden.

Acknowledgements and gratitude must first be given to the Swedish government, its agency the Swedish Institute (SI) and the kind people of Sweden whose contributions to the fiscus made it all possible. Further the government of South Africa and its Department of International Relations and Cooperation (DIRCO) must also be acknowledged for its contribution to my journey leading to Sweden.

Thirdly, due acknowledgement must be given to the professors of the master's degree program in European and International Tax Law at the Department of Business Law, Prof. Cécile Brokelind and Prof. Oskar Henkow, the doctoral students and support staff for their imparting of knowledge and support during the study period. As a final acknowledgement the camaraderie among fellow students on the program and the unwavering love and support of my family and friends in South Africa must be heralded.

Abbreviation list

Approx.	Approximately
CFC	Controlled Foreign Company
CGT	Capital Gains Tax
DTC	Double Tax Convention
DTT	Double Tax Treaty
EEA	European Economic Area
EC	European Community
ECJ	European Court of Justice
EU	European Union
HO	Head Office
ITA	Income Tax Act, No. 58 of 1962
MC	Migrating Company
MS	Member State
p.	page
par.	paragraph
PE	Permanent Establishment
POEM	Place of Effective Management
SA	South Africa
SARB	South African Reserve Bank
SARS	South African Revenue Service
SCA	Supreme Court of Appeals
UN	United Nations
ZAR	South African Rand

1. Introduction

1.1 Statement of problem

Exit taxation presents itself in instances where an individual or a company migrates from one state to another, thereby moving their assets from the jurisdiction of the old state to the new one. In a situation where a migrating company moves its registered office or place of effective management (POEM) to another state exit taxation is usually imposed by the state the company's registered office or POEM used to be based in in an effort aimed to preserve such state's fiscal sovereignty by taxing unrealised capital gains and hidden reserves of the migrating company.³ When this happens there exists a likelihood that the unrealised capital gains can be subjected to double taxation when it taxed in both the previous and the new residence state, or perhaps even double non-taxation when it escapes taxation in both states.⁴ The rights to impose this tax on the unrealised portion of the individual or company's capital gains is allocated through domestic legislation and double tax treaties.

This paper and its research is undertaken by a South African author, who, bearing an interest in the legislative and court precedent developments of recent years in this area in South African tax law, would like to conduct research and analysis of the current position faced by individuals and companies in South Africa contemplating on emigrating or transferring business operations from South Africa. With this in mind, an investigation is conducted into how states defend themselves against double non-taxation while fulfilling commitments under the DTTs regarding the avoidance of double taxation.

Initially a brief overview of the history of South Africa's legal rules regarding the imposing of exit taxes will be provided. The inspiration to delve into this area of research came from a prominent headline-grabbing case of a wealthy individual, who when emigrating from South Africa had the expatriation of his assets blocked, and upon release were imposed a ZAR 250 million (approximately €19 million) exit tax levy.⁵ Mark Shuttleworth, the said wealthy individual, had emigrated from South Africa to the Isle of Man, a British Crown dependency and low-tax jurisdiction in 2001. Even though he was charged the levy in terms of South African exchange control regulations imposed by the South African Reserve Bank, his case still finds relevance for this paper as it amounted to exit taxation, imposed the only way the SA

³ Zernova, Daria (2011) *"Exit taxes on companies in the context of the EU internal market"* Intertax Vol 39, issue 10, Kluwer Law, p471.

⁴ *Ibid*, p484.

⁵ <http://mg.co.za/article/2014-10-01-billionaire-wins-landmark-case-against-sa-reserve-bank> accessed on 4 April 2015.

government could in the absence of empowering exit tax law provisions at the time.⁶ The most prominent and definite case involving the application of domestic tax legislation to have come out of South Africa is that of *Tradehold Limited*⁷ in which the Commissioner for SARS appealed a decision of the Tax Court in Cape Town, wherein the Respondent (Tradehold) had successfully appealed against an additional assessment raised by SARS based on a taxable capital gain which arose from a deemed disposal by Tradehold of its shares in Tradegro Holdings Limited in terms of para 12(1) of the Eighth Schedule to the Income Tax Act 58 of 1962.⁸

These two court decisions left an indelible mark on South African taxation as they definitely indicated the period during which the start of exit taxation would ensue, even though not supported by robust law, and the position where it would eventually be provided for in legislation. The sections hereunder will attempt to trace and detail the steps followed by the South African legislature during both periods.

1.2 Aim

This research paper hopes to achieve a two-pronged goals: firstly, it aims to investigate how taxation rights on unrealised gains are allocated in terms of tax treaties and domestic law in South Africa as well as in international trade regions whom the South African tax authority and legislature looks up to for guidance in drafting its tax laws and establishing related doctrine; secondly, through an analysis of South African DTTs that have been the subject of court decisions this research hopes to determine whether there is treaty override when the authority in South Africa imposes exit taxes on deemed disposals or unrealised capital gains.

These two goals will be researched and set out in more detail in the preceding paragraphs, taking guidance from EU and South African sources of law. Thereafter certain conclusions will be reached in this regard, taking into account all the relevant developments and strides achieved in international taxation.

1.3 Outline

This paper is structured into four main sections. The first of these sections explores and discusses what ‘exit taxation’ is as a concept found in international taxation. This section takes a broad overview discussion of what exit taxation entails. Thereafter it branches into aspects of exit taxation that

⁶ *Ibid.*

⁷ Case number 132/2011 *Commissioner for the South African Revenue Service vs Tradehold Ltd*, judgment delivered on 8 May 2012.

⁸ *Ibid.*

merit discussion under their own independent paragraphs, the first of which is the potential treaty override in exit taxation situations. The second subparagraph of the definition of exit taxation involves the discussion of the interaction of exit taxation with fundamental freedoms (EU law). Lastly the definition of exit taxation section is rounded off with a discussion of EU law or the latest development at EU law that could impact exit taxation in the EU community. The aim with providing the discussion sought to hereunder is to cast a glimpse into both historical and future trends within the field of exit taxation.

The second section of this paper explores the South African domestic law and applicable DTTs that find application in the determination of exit taxation situations. In this section we will explore the various forms that exit taxation exists in in South Africa, thereafter as a sub-section we investigate what effects the legislative amendments relating to exit taxation has had materially in the allocation of taxing rights. This is done in order to demonstrate the relationship between domestic law and DTT provisions in how they allocate exit taxing rights to signatory states or third states.

The third main section of the paper provides an analysis of the guidance provided by the OECD Model Convention on the allocation of rights to different jurisdictions that are signatories to a DTT modelled thereon for the taxation of unrealised gains. This section will consist of two main sub-headings, namely Article 4 and Article 13, which are believed to cast a better light on how to resolve this allocation of taxing rights scenario. In so providing this analysis the aim is to demonstrate the overarching ideal provisions that most states should contain in their DTTs.

The fourth and last section of this paper will be a discussion of the case law that provides guidance in the interpretation of the principles involved in deciding exit taxation matters. This section will be divided into two broad sub-sections, one discussing ECJ or EU court decisions, and the other discussing South Africa specific case, of which there are two in existence at the moment. Under each sub-section the discussion of the cases will be further split into individual and corporate tax cases involving exit tax.

1.4 Delimitation and Scope

Although the use of exit taxation mechanisms has many legal consequences, the research conducted in this paper will be limited to mainly the treaty override legal issues that ensue when exit taxes are levied on private individuals and companies. This then means that the EU case law relied upon, analysed and discussed in this paper, will be that which has treaty override implications and/or exit taxation as the issues that the Court/s had to decide on. Further, as this paper also has aims to bring exit taxation issues to the fore from a South African perspective, the exit taxation case law emanating from

this country as well as its domestic legislation and DTT providing for it are discussed.

The focus of this paper is mainly on individual exit tax consequences in South Africa, the corporate exit tax consequences discussed herein are mainly for clarification and context building purposes.

1.5 Outline Method and material

The legal research conducted into this paper follows both an internal and external perspective, to a certain degree. This approach is described by Douma as:

“[a] study of the law as it ought to be and the ways in which the desired legal reality can be achieved in a legal way.”⁹

As provided by Article 38 of the Statute of the ICJ the sources of law consulted, analysed and documented in this paper are international conventions (tax treaties), principles of law, judicial decisions and the writings of scholars.¹⁰ It is trite to mention that while in EU law judicial decisions are considered to be a subsidiary source of law in South African law, which follows a combination of Roman-Dutch and English common law, court precedents are considered to be a primary source of law.

Soft law sources have also been cited herein in the form of the OECD Commentary to the Model Convention.

⁹ Douma, Sjouard (2014) *“Legal Research in International and EU Tax Law”* Kluwer, p17.

¹⁰ *Ibid*, p20.

2. What is exit taxation?

Exit taxes have been broadly defined as referring to the tax consequences that arise upon ceasing to be a resident of a certain tax jurisdiction.¹¹ They are charged in order to secure taxation in respect of unrealised income accrual or tax deferral that would possibly escape taxation in the accrual jurisdiction when a taxpayer leaves such a jurisdiction.¹² In the EU the imposition of these taxes is considered to be justified in order to ensure territorial and temporal fiscal coherence.¹³ It is a generally accepted basis for establishing jurisdiction that a country has a right to tax income derived from sources within it.¹⁴ Against popular belief, the main purpose of DTTs is not to prevent double taxation as this is circumvented with unilateral exemption or credits.¹⁵ According to Avi-Yonah¹⁶ the main goal of DTTs is to implement the benefits principle by shifting the tax on passive income from the source to the residence country, while allowing the source country to tax active income if it is attributable to a PE in it. A situation where all exit taxes are abolished, with the exit MS only being entitled to tax income sourced in its territory, could lead to significant tax base erosion in high-tax jurisdictions and profit shifting to low-tax jurisdictions.¹⁷

In the preceding paragraphs of this section of the paper we will explore what fundamental principles of EU law are affected by or have interaction with exit taxation situations. An explanation of the different categories of unrealised accruals that a source state may want to impose exit tax on will also be provided. Finally an analysis and comparison will be drawn between the imposition of exit taxation in the EU and third states.

The three main categories of unrealised accruals that may have exit tax consequences in the source state are set out first, ahead of other sections to be set out hereunder. The first category is one that includes unrealised capital gains, fiscal reserves, goodwill and other value increases not yet taxed among the assets and liabilities of an undertaking leaving the country (seat transfer), and unrealised gains in respect of single assets moved abroad.¹⁸ The second category has unrealised capital gains in shareholdings in closely held companies (especially where such companies are non-resident) or in other movable assets of individuals leaving the country. The third and last category

¹¹ <http://www.thesait.org.za/news/112537/SARS-Overreacts-After-SCA-Decision-On-Exit-Taxes.htm> accessed on 7 April 2015.

¹² Terra, B. & Wattel, P. (2012) “*European Tax Law*” 6th ed, Wolters Kluwer, p 955.

¹³ *Ibid.*

¹⁴ Avi-Yonah, Reuven S. (2015) “*Advanced Introduction to International Tax Law*” Edward Elgar Publishing, p8.

¹⁵ *Ibid* p46.

¹⁶ *Ibid.*

¹⁷ Zernova, D. (2011) *supra* p493.

¹⁸ *Ibid.*

is the real value of pension or annuity capital for which contributions have been deducted in the past and of which the investment return has not been taxed in anticipation of the expected taxation of the future benefits once the policy starts paying.¹⁹

The principle of proportionality features very strongly in exit tax scenarios in the EU, as such member states have to guard against imposing these taxes in a disproportionate manner where such action is not required to secure tax base gains, while balancing that with taking proportionate measures to ensure tax base integrity.²⁰ The most important fundamental principle of EU law identified as being affected by the imposition of exit taxation is the freedom of establishment.²¹ Helminen writes that it would depend on the details of the national exit tax provision, whether it can be accepted under EU law or not.²²

Possible exit tax charge regimes for individuals are immediate exit taxes, re-entry charges and extended tax liabilities.²³ Immediate exit taxes, with the sub-categories of general or limited, are levied on the appreciated value of the taxpayer's properties immediately before emigration.²⁴ How this unfolds in practice is that under a general exit tax regime, all of the assets of a taxpayer are deemed to be alienated, whereas, under a limited exit tax regime, only specific assets, such as substantial shareholdings, are deemed to be alienated before the individual's emigration.

The South African tax system recognises all three categories of unrealised accruals leading to taxation. It has, however, only been very recently that legislation has been enacted in the country's income tax laws to give practical effect to these intents.

2.1 Potential treaty override in exit taxation situations

For countries making use of the OECD Model Convention as their basis for concluding tax treaties the main connection between tax treaties and internal law is via Article 3(2).²⁵ In essence this article provides that signatories to bi- and multi-lateral tax treaties shall assign meanings to undefined terms in the treaty that are on par with the meanings assigned to the same terms under domestic law at the time the treaty came into effect. *Avery Jones*²⁶ further states that where a state effects a change to the definition of a type of income

¹⁹ *Ibid* p 956.

²⁰ *Ibid* at p 955.

²¹ Helminen, M. (2013) "EU Tax Law – Direct Taxation" IBFD at par 2.2.1.

²² *Ibid*.

²³ Chand, V (2013) "Exit Charges for Migrating Individuals and Companies: Comparative and Tax Treaty Analysis" Bulletin for International Taxation, at par 2.

²⁴ *Ibid* at par 2.1.1.

²⁵ Maisto, G (2006) "Tax Treaties and Domestic Law" IBFD Publications (editor). Avery Jones, J.F. "The Interaction between Tax Treaty Provisions and Domestic Law" p 123.

²⁶ *Ibid* p 133.

in order to affect non-residents adversely it should not apply to the treaty, and that this change may only apply to the treaty where it is effected in order to improve the definition in so far as it affects residents and non-residents equally.

EU law does not concern itself too much with the criteria used for the allocation of taxing rights between signatory states to a tax treaty.²⁷ The signatory states are given a wide choice as to which OECD Model Convention connecting factors they employ. Importantly, EU law does not dictate that the states apply identical tax scales, that they ensure that the income is always taxed at the lowest level of taxation between the two states involved, nor that they guarantee that the relocation of a taxpayer always passes off without tax implications for such taxpayer. The only requirement imposed by EU law is that equal treatment be meted out to non-residents' and foreign-source income within the scope of the area of taxation.²⁸

At ECJ level the Court held that it is not tasked with adjudicating matters on the interaction of domestic law with tax treaty law if no contravention of EU law is detected in that matter.²⁹ In a different matter³⁰ heard before it the ECJ also held that it does not consider tax treaty overrides incompatible with EU law, so long as cross-border investments are not taxed less favourably than comparable domestic investments ultimately under such a treaty.³¹

In Section 3.1 *infra* the relationship between the provisions of the tax treaties concluded by South Africa (which, as stated before, are based on the OECD Model Convention) and the amendments brought into the domestic tax legislation to give effect to levying exit tax is analysed in more detail.

2.2 Interaction of exit taxation with fundamental freedoms

Even though they're not unreasonable from a fiscal coherence point of view, the imposing of exit taxes poses an obstacle to the exercise of the fundamental right to free movement as they're levied on an unrealised asset of the emigrant taxpayer.³² The case law has shown a distinction between the emigration of legal entities and that of natural persons.³³ The possible fundamental freedoms affected in either situation will be discussed in further detail in Section 5 *infra* through the case law that uncovered the compliance or contravention therewith.

²⁷ Terra (2012) *supra* at p 951.

²⁸ *Ibid.*

²⁹ Case C-128/08 *Damseaux v Belgian State*, ECR 2009 I-06823 par [19].

³⁰ Case C-298/05 *Columbus Container Service*, ECR 2007 I-10451.

³¹ Terra (2012) *supra* at p 953.

³² *Ibid* at p 956.

³³ *Ibid* at p 957.

2.3 Example of EU exit taxation rules applied from EU law, treaties and/or domestic law

The rules espoused by different EU MSs, detailed hereunder, find application in various exit taxation situations.

The first example involves the migration of a company from one MS to another.³⁴ If a company transfers its seat from Luxembourg to Italy, it retains its legal identity in Luxembourg, while Italy follows the substantive law of Luxembourg and recognises the legal personality of the MC. The tie-breaker rule in the DTT between these two MS resolves dual-residence conflict in favour of Italy, and to balance things out Luxembourg considers the MC liquidated and taxes its unrealised capital gains.

The second scenario involves the migration of a company from a MS to a third country. For instance, in the situation where a company established in France moves its corporate seat to a third state, the transfer of corporate seat to the third state will trigger off taxation of latent capital gains in France even though an intra-EU corporate seat transfer would be not be viewed as a cessation of activity for tax purposes.

Thirdly there could be an intra-enterprise transfer of assets, an example of which could be a company incorporated in the Netherlands acting in the capacity of HO could transfer all its profit-generating assets attributable to its German PE to its Belgian PE. Under German law, the transfer of assets of a PE situated in its territory is deemed a disposal for tax purposes. In order to prevent tax base erosion, Germany will tax the value of the hidden reserves of such assets, which will include the current value plus future profits that could be derived through the PE if the respective assets remained connected with it.

The rules applied in the three instances detailed above have fundamental freedom/s' implications. In the first scenario, the intra-EU migration of a company, the exit tax rule applied potentially affects the freedom of establishment of MC.³⁵ The second scenario, being the transfer of corporate seat of MC to a third state, is covered by the principle of free movement of capital and enjoys no further protection under EU fundamental rights doctrine.³⁶ In the third and last situation, where a HO situation in one MS transfers its assets from one PE to another PE situated in a different MS, the freedom of establishment finds application.³⁷

³⁴ Zernova, D. (2011) *supra* p478.

³⁵ *Ibid*, p479.

³⁶ Zernova, D. (2011) *supra* p479.

³⁷ *Ibid*, p480.

In this section a broad overview of the development of exit taxation in the international context has been provided. The preceding section aims to provide a discussion on the development of exit taxation in South Africa and illustrating its effects.

3. South African domestic law

Historically South Africa operated under a dual currency method, using both the Commercial Rand (used in reality internally for daily business transactions) and the Financial Rand (a virtual currency form) which was abolished in early 1983, only to be re-introduced in September 1985.³⁸ Up until its final abolition in March 1995 the Financial Rand allowed foreign investors to bring in currency to South Africa at the lower rate permitted by this Financial Rand. The effect of this Financial Rand system was that it acted as a shock absorber for foreign investors, with the aim of increasing interest in South Africa as a foreign investment destination. Prior to the introduction of CGT interest paid or accruing to South African non-residents were exempt from income tax.³⁹ Upon emigrating from South Africa, special and more restrictive rules of taxation were imposed, for instance, the interest exemption would be made effective only in the case where the emigrant had spent more than 183 days out of South Africa in the financial cycle under assessment.⁴⁰

A major ‘brain drain’ trend emerged in the mid to late 1990s in South Africa after the dismantling of the oppressive Apartheid government regime.⁴¹ This involved a number of highly specialised South African citizens and residents emigrating from the country, in particular from the white minority race. Under the Apartheid government system the people from this socio-economic level and higher formed the majority of people who earned sufficiently high employment and business income to afford to make investment in real estate property and intangible property.

The legislature introduced the CGT into South African tax law on the 1 April 2001.⁴² This introduction of CGT would lead to exit tax consequences on legal and natural persons alike in South Africa. Various alternative legislative provisions find application in situations where a resident person other than a company ceases to be a ‘resident’, or a company ceases to be a resident or becomes a headquarter company, or a CFC ceases to be a CFC otherwise than by way of becoming a resident.⁴³ Section 9H of the ITA, a general anti-avoidance provision, characterizes the cessation of residence as triggering a deemed disposal of assets (except for certain excluded assets) an event which gives rise to prima facie ‘exit tax’ consequences. How this works out practically is that the person or company who or which ceases to be a resident

³⁸ Cronje, W (1995) “*South African Tax Legislation Affecting Foreign Investors*” Intertax, p 246.

³⁹ *Ibid* p 247.

⁴⁰ *Ibid*.

⁴¹ Wa Kabwe-Segatti, A (2008) “*Migration in post-apartheid South Africa: Challenges and questions to policy-makers*” Agence Française de Développement, p177.

⁴² Cronje, W (2000) “*South Africa: Tax News*” Intertax, p 480.

⁴³ De Kocker (2014) “*Silke on South African Income Tax*” LexisNexis, at par 14.2.

is deemed to have disposed of his or its assets at market value and to have reacquired them immediately thereafter at the same value.⁴⁴ Thus normal (income) tax or CGT becomes payable as if such person had disposed of all his or its assets at their market value on that day.

The developments starting with the introduction of the dual currency introduced in the early 1980s are an indication that the SA Treasury was preparing itself for SA being a player in the international sphere. It was a kind of acknowledgement by the SA government that the country represented a viable market area for international investment, and also the SA government's way of making SA more attractive as an investment option. A big transition in government occurred in 1994 when SA held its first official democratic elections and ushered a new government of national unity. Six years from this date the SA legislature would adopt CGT law provisions, evidently illustrating certain trends that were observed by the legislature, treasury and the national tax authority from a political, social and economic perspective. The introduction of CGT would have implications for individual persons and companies, which are analysed and discussed in the preceding sub-sections.

3.1 Individual exit tax law position

The deeming provision of Section 9H, in sub-section 2, provides that in the case of persons other than legal persons changing residence then three things are deemed to have occurred, namely: that the person disposed of their assets on the day before they ceased to be residents, the year of assessment ended on the day before the person ceased to be a resident, and the day on which such person changes residence is the start of the following year of assessment for the person.⁴⁵ The consequence therefore of this treatment is that income tax or CGT becomes payable as if the person had disposed of all their assets on their market value on the day of emigration.⁴⁶

The taxation of individual persons by the South African government is based on residence.⁴⁷ Individual persons resident⁴⁸ in SA are taxed on their

⁴⁴ De Kocker (2014) *ibid*.

⁴⁵ Section 9H(2) of the Income Tax Act 58 of 1962.

⁴⁶ Silke *ibid*, par 14.2

⁴⁷ Badenhorst, M (2015) "*Individual Taxation South Africa*", IBFD, with updates up to and including 28 February 2015, p23.

⁴⁸ The term 'residence', in SA law, means that an individual –

- is ordinarily resident in South Africa; or
- if not ordinarily resident, is physically present in South Africa for a period or periods of at least 91 days on average in a particular tax year, and a period exceeding 91 days in aggregate during each of the preceding five years, as well as for a period or periods exceeding more than 915 days on average during those preceding 5 tax years.

worldwide income, including capital gains from the disposals and deemed disposals of capital goods. The deeming provision (Section 9H) has been described above in the introductory paragraphs of this chapter. When this tax is computed the taxpayer is treated as having disposed of their assets (subject to certain exclusions) for an amount equal to the market value of the assets on the day before ceasing to be a South African resident and to have immediately reacquired the same assets at a cost equal to the same market value.⁴⁹

The exit tax regime in SA works in tandem with the country's foreign exchange controls.⁵⁰ Certain consequences ensue when an individual emigrates, an event marked by such individual's departure and cessation of residence in the Common Monetary Area⁵¹ to take up residence in another country. An individual traveling alone is permitted to expatriate up to ZAR 4 million worth of assets, and a family may expatriate up to double of that amount.⁵² It makes sense that the government linked the exit tax levy to exchange control regulations otherwise it would be difficult to keep track of the flow of money in and out of the borders of South Africa.

A circular was released by the Minister of Finance in February 2003 that a 10% levy imposed on removal of funds from SA, calculated on the amount sought to be expatriated.⁵³ The Minister announced that anyone leaving the country would be allowed to take with them a maximum amount of ZAR 750,000.00 and that taking any amount in excess thereof would need authorisation from the Exchange Control Department of SARB. Where this authorisation was granted, the authorisation would be conditional on the emigrant paying a 10% levy on such extra amount that would exceed ZAR 750,000.00.

The enforcement of exchange control measures on emigrating individual persons often involves the seizure or confiscation of currency found in their possession at points of exit from SA where they have not obtained the prior consent of the SARB to leave with such currency from SA.⁵⁴ The SARB is also empowered to go beyond just seizing the currency found in the possession of the person, in certain instances the SARS is also empowered to effect the attachment of immovable property for the satisfaction of claims

⁴⁹ Daya, Lavina "Revised exit charge upon ceasing to be a resident in South Africa" tax ENSight, ENS tax publications, <https://www.ensafrica.com/news/Revised-exit-charge-upon-ceasing-to-be-a-resident-in-South-Africa?Id=892&STitle=tax%20ENSight> accessed on 21 May 2015.

⁵⁰ http://en.wikipedia.org/wiki/Expatriation_tax accessed on 21 May 2015.

⁵¹ The Common Monetary Area includes South Africa, Namibia, Swaziland, and Lesotho.

⁵² http://en.wikipedia.org/wiki/Expatriation_tax *ibid*.

⁵³ Matlala, David (2013) "The Law Reports" DE REBUS, p248.

⁵⁴ *Andrew Lionel Phillips v South African Reserve Bank & Others* (221/11) [2012] ZASCA 38 (delivered on 29 March 2012), at par [1].

related to exchange control contraventions.⁵⁵ For practical purposes certain institutions are qualified in terms of exchange control regulations to act as authorised dealers in remitting funds abroad on behalf or account of individuals who have emigrated.⁵⁶ It could therefore only be through these authorised dealers that individuals could lodge requests for authorisation to expatriate their monies beyond the borders of South Africa upon emigration.⁵⁷

Not all is lost however, there is some consolation in the fact that a relief measure is provided to South African resident individuals against double taxation in the form of an ordinary foreign tax credit.⁵⁸ A further buffer against the effects of CGT triggered exit taxation for individual persons is the annual exclusion, limited to ZAR 16,000.00 (approx. EUR 1,200.00) in a particular tax year with the possibility to increase it to ZAR 120,000.00 (approx. EUR 9,000.00) in cases where the taxed individual died during the tax year.⁵⁹ These relief measures mean that an individual emigrating to a country where they are subjected to taxation on the same income assessed in South African as being liable to levying of exit tax by given a foreign tax credit in respect of that income in South African as well as receiving some protection through the annual exclusion amount.

3.2 Corporate or business exit tax law position

It was only when the SCA pronounced its judgment in the *Tradehold Ltd* case, which will be discussed in greater detail in the next chapter of this paper, that legislative amendment was brought about giving legal power to the national tax authority to impose exit taxes. Immediately after the SCA delivered its judgment on the 8 May 2012, the SARS issued its press release slamming the judgement as being contrary to the legislature's intention; shortly thereafter on 5 July 2012 legislative amendments were proposed that overhauled and extended the laws relating to exit taxes.

Two criteria are used to determine the residence status of companies in South Africa, the first is whether it is incorporated, established or formed in South Africa, and secondly if it has its POEM in South Africa.⁶⁰ As with individual taxpayers, South African resident companies are taxed on worldwide capital

⁵⁵ *South African Reserve Bank v Torwood Properties (Pty) Ltd* (626/94) [1996] ZASCA 104; 1997 (2) SA 169 (SCA); [1996] 4 All SA 494 (A); (delivered on 25 September 1996).

⁵⁶ *Pratt v First Rand Bank* (416/07) [2008] ZASCA 92 (delivered on 12 SEPTEMBER 2008), [5] and [7].

⁵⁷ *Shuttleworth v South African Reserve Bank and Others* (30709/2010) [2013] ZAGPPHC 200; [2013] 3 All SA 625 (GNP) (delivered on 18 July 2013), [4].

⁵⁸ Section 6 *quat* of the ITA.

⁵⁹ SARS: *GUIDE ON THE RESIDENCE BASIS OF TAXATION FOR INDIVIDUALS 2008/09* LAPD-IT-G02 External Guide, published in May 2009.

⁶⁰ Badenhorst, Mark (2014) "South Africa Corporate Taxation" IBFD, September 2014, p 7.

gains from the disposal or deemed disposal of capital assets.⁶¹ The legislation governing taxation, namely the ITA, in South Africa provides for certain instances in which persons including companies are deemed to have disposed of their assets, thereby attracting CGT. For corporate exit tax purposes these instances comprise when a company ceases to be a resident or becomes a headquarter company, or a controlled foreign company (CFC) ceases to be a CFC otherwise than by way of becoming a resident.⁶²

A major difference between the individual and corporate exit tax regimes is that for individuals exit tax is triggered off by the individual emigrating from South Africa, thus losing their residence, whereas with companies it is in fact the acquisition of a residence status in South Africa that leads them to facing exit tax charges.

3.3 DTTs signed by the South African government

In order to prevent double taxation the South African government is empowered to enter into DTTs with other countries upholding this objective. Section 108 of the ITA provides:

“108. Prevention of or relief from, double taxation

(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.”

As of July 2014 South Africa had concluded 73 DTTs with various countries from around the world, 54 out of those being out of the African continent.⁶³ As with other African countries, increased trade between South Africa and the international community has been the main driver behind this large number of DTTs being entered into by South Africa. Marais⁶⁴ holds the view that South Africa has never enacted legislation that can be viewed as treaty override and instead has taken positive to resolving treaty abuse by renegotiating treaties seen as eroding the tax base, and has resisted the temptation to oppose them unilaterally through legislation.

⁶¹ *Ibid*, p14.

⁶² De Kocker (2014) “*Silke on South African Income Tax*” LexisNexis, at par 24.26.

⁶³ Marais, Albertus (2014) “*The Risk for Tax Treaty Override in Africa – A Comparative Legal Analysis*”, Bulletin for International Taxation, IBFD, November 2014, p 607.

⁶⁴ *Ibid*, p 608.

As mentioned in the introductory paragraphs of this section South Africa emerged from its non-democratic oppressive government regime in the mid 1990s and from decades of economic sanctions to become a key trade area on the African continent. This therefore created a need for legislation to be effected taking into account this new position and South Africa's future prospects, thus Section 108 (international agreements signing empowerment provision) and Section 9H (deemed disposal of assets) were promulgated. Even with little experience in the field of concluding international agreements it appears that South Africa has respected the terms of agreements expressed in the articles of the DTTs by not averting them through the use of domestic legislation. Next we will delve a bit deeper into the concept of treaty override taken from a universal perspective.

4. How does the OECD Model Convention address the allocation of taxation rights to unrealized gains?

The majority of DTTs concluded by South Africa are based on the OECD Model Convention, with a very few being drafted based on the UN Model Convention.⁶⁵ In Section 2.1 of this paper it was stated that countries which base their DTTs on the OECD Model Convention are given a wide choice as to which connecting factors to make use of when concluding the DTTs, therefore a discussion of the provisions of the OECD Model Convention in this regard becomes necessary.

The OECD Model Convention provides for the allocation of taxation rights to either the residence or the source state under two articles, namely, Article 4 (the tie-breaker rules pertaining “residence”) and Article 13 (capital gains). These two provisions and others that may find relevance are discussed in the section detailed hereunder.

4.1 Article 4 – Residence

The definition of residence is provided for under Article 4 of the OECD MC, as follows:

1. *For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.*
2. *Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:*
 - a) *he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);*
 - b) *if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;*

⁶⁵ Eskinazi, Ray (2005) “*IFA Cahiers Report, South Africa*” IFA Volume 1, 2005, p 592.

- c) *if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;*
- d) *if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.*

3. *Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.*

According to the Commentary⁶⁶ on the OECD MC the purpose of Article 4 is to resolve cases where there is double residence. With regards to the fiscal classification of persons as a resident, states are required to rely on their domestic laws as the DTTs do not concern themselves with the conditions attaching to this classification. It is the norm for DTTs drafted in accordance with the OECD MC to contain Article 4(3) which allocates unlimited taxing rights to the MS where the company has its place of effective management.⁶⁷ Therefore, the exit MS may tax only that income of the MC, which is sourced in the MS.

South Africa has closely followed and applied this approach to determining the residence status of individual and legal persons in South African. As a result, the cases decided in its courts have religiously applied the criteria for determining the residence status of persons and also as a determining factor in cases involving exit taxation.

4.2 Article 13 – Capital gains

This article provides guidance on how capital gains are treated in DTTs following this model.

It provides:

1. *Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.*
2. *Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.*

⁶⁶ With updates up to and including 2014.

⁶⁷ Zernova, D. (2011) *supra* p472.

3. *Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.*
4. *Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.*
5. *Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident.*

The Commentary to this article of the OECD MC provides that it is left to the domestic law of each Contracting State to decide whether capital gains should be taxed and, if they are taxable, how they are to be taxed. This is due to the fact that countries apply varying rules to the levying of CGT and some countries do not even provide for this regime. Since unrealized capital gains are often related to exit taxes it is important to analyse Article 13 in order to judge whether immediate exit taxes are restricted by the DTC or not.⁶⁸ It is noteworthy to mention that Article 13 only applies in situations where there is an effective gain from the alienation of the property. By the same token then it can be ascertained that, as long as no alienation takes place, the levying of an exit tax will not arise and Article 13(5) will not be applicable.⁶⁹

For purposes of determining the allocation of taxing rights in exit taxation situations Article 13 of the OECD MC finds more relevance, to a lesser extent Article 4 can also be looked up in order to clarify residence conflicts, which are also closely linked to exit taxation.

5. Analysis of case law interpreting exit taxation

⁶⁸ de Man, Fernando and Tiiu, Albin (2011) “*Contradicting views of exit taxation under OECD MC and TFEU - are exit taxes still allowed in Europe?*” Intertax Vol 39, Issue 12, p617.

⁶⁹ *Id* and paragraph 5 of the Commentary on Article 13, Commentary to the OECD MC.

This section is divided into two main sub-headings, with each providing a detailed analysis of case law stemming from the two areas of interest that have been detailed throughout the undertaking of the research into this paper. The first sub-heading discusses the major decisions of exit taxation matters emanating from the EU region, where the ECJ naturally is the highest court of appeals. Under this sections individual and corporate taxation cases are detailed under their separate respective headings.

Thereafter the two known cases from South African courts are discussed. Even though there are just two cases at the moment they are also discussed under distinct headings, being individual and corporate tax cases.

5.1 The ECJ and/or other court interpretation

The ECJ has, before it, heard a few cases of exit taxation and how taxation rights are to be allocated between signatory member states. These cases will be discussed below in their respective sections, separated according to whether the subject of the exit tax imposed was an individual or a company.

5.1.1 Case law addressing individual exit taxation

*5.1.1.1 de Lasteyrie du Saillant*⁷⁰

Facts and legal issue

Mr de Lasteyrie, a French resident, emigrated to Belgium. Upon emigration, he became subject to individual income tax on the unrealized gains of a substantial shareholding he held in a French company.⁷¹

The exit tax was assessed at a rate of 26% on the difference between the fair market value of the shares at the date of emigration and their acquisition price. A deferral of the payment of the exit tax could be obtained subject to the appointment of a fiscal representative in France and the provision of adequate security or guarantee.⁷² If deferral was granted, French capital gains tax was only payable when the shares were effectively sold or otherwise transferred or cancelled.⁷³ The tax paid abroad was creditable against the tax payable in France, if the tax represented an individual income tax on capital gains. The tax claim was cancelled if either the relevant person still held the shares after

⁷⁰ Case C-9/02 *de Laysterie du Saillant*, ECR 2004 I-02409.

⁷¹ C-9/02 *de Lasteyrie du Saillant*, *ibid*, [12].

⁷² *Ibid*, [3].

⁷³ *Ibid*, [15].

a period of five years or the taxpayer became resident for tax purposes in France again (whichever occurred first).⁷⁴

The issue was whether such treatment was compatible with the freedom of establishment.

Judgment

The Court held that the French domestic tax law provision for imposing exit tax on unrealized capital gains is contrary to the freedom of establishment provided for in Article 52 of the EC Treaty.⁷⁵ Further the Court stated that its finding is supported by the fact that the tax system at issue in the main proceedings allows exoneration in respect of all taxation to which increases in value, where realised, have been subject in the country to which the taxpayer transferred his tax residence. Such taxation might have the consequence that realised increases in value, including the part of them acquired during the taxpayer's stay in France, are entirely taxed in that country.⁷⁶

5.1.1.2 *Case C-470/04, N*⁷⁷

Facts and legal issue

In 1997, N emigrated from the Netherlands to the United Kingdom⁷⁸. On his emigration, N owned 100% of the shares in three limited liability companies established under Netherlands law, in respect of which actual management and control had been exercised in the Netherlands Antilles since 1997. In respect of 1997, N received a tax assessment on income from a deemed disposal of his substantial shareholdings. The tax liability was deferred on his provision of security in the form of pledging shares in one of the companies. Following the judgment in [C-9/02 Lasteyrie du Saillant](#), the Netherlands Ministry of Finance announced that security could no longer be required. Accordingly, on 7 June 2004, N was notified by the tax authorities that the pledge could be regarded as released.

The issues can be summed up as:

- (i) the freedom of establishment or the right of EU citizens to move and reside freely within the EU applied;
- (ii) the freedom of establishment should be interpreted as precluding Member States from taxing increases in value on the transfer of a taxpayer's residence outside their tax jurisdiction;

⁷⁴ *Ibid*, [3].

⁷⁵ ECR 2004 I-02409, para. [69].

⁷⁶ *Ibid* para. [68].

⁷⁷ Case C-470/04 *N. v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, ECR 2006 I-07409.

⁷⁸ *Ibid*, [11].

(iii) the release of the guarantee amounted to a retrospective lifting of all obstacles, whether the form of the document on the basis of which the guarantee was released has any impact on that assessment and whether compensation is due in reparation of any damage that might thus have arisen.⁷⁹

Judgment

The Court held that the answer to the first two questions must therefore be that a Community national, such as the applicant in the main proceedings, who has been living in one MS since the transfer of his residence and who holds all the shares of companies established in another MS, may rely on Article 43 EC.⁸⁰

To answer question three and five, which it had felt was better to consider together, the Court stated that Article 43 EC precludes a MS from establishing a system for taxing increases in value in the case of a taxpayer's transferring his residence outside that MS, such as the system in the current case which makes the granting of deferment of the payment of that tax conditional on the provision of guarantees and does not take full account of reductions in value capable of arising after the transfer of residence by the person concerned and which were not taken into account by the host MS.⁸¹

The answer to the fourth question that an obstacle arising from a requirement that a guarantee be constituted cannot be raised with retroactive effect merely by releasing that guarantee.⁸²

5.1.2 Case law addressing corporate exit taxation

5.1.2.1 Case C-371/10, *National Grid Indus*⁸³

Facts and legal issue

National Grid Indus a incorporated under Netherlands law had, until 15 December 2000, its POEM in the Netherlands. Since 10 June 1996, National Grid Indus had a claim of GBP 33,113,000 against National Grid Company plc., a company established in the United Kingdom. An unrealized exchange rate gain was generated on that claim. On 15 December 2000, National Grid Indus transferred its POEM to the United Kingdom. The foreign exchange gain at that time was NLG22,128,160.

As a result of the application of the UK-Netherlands treaty, National Grid Indus yielded no taxable profits in the Netherlands. The law of the Netherlands operated to tax all unrealized capital gains at the time of the

⁷⁹ *Ibid*, [19].

⁸⁰ ECR 2006 I-07409, para. [30]

⁸¹ ECR 2006 I-07409, para. [55].

⁸² *Id* para. [67].

⁸³ Case C-371/10 *National Grid Indus*, ECR 2011 I-12273.

transfer of the company's place of management. No deferral was possible. National Grid Indus was therefore taxed on, inter alia, the foreign exchange gain.

The issues to be decided by the Court can be abridged as follows:

- (i) whether a company incorporated under the laws of a MS which is subject to an exit tax following the transfer of its place of effective management to another Member state may rely on the EU freedom of establishment;
- (ii) whether an exit tax is incompatible with the EU freedom of establishment, if it is applied in the circumstances of (i) above, and without deferment of payment until the time of realization of capital gains, and also does not take into consideration subsequent decreases in value for the calculation of gains relating to business assets which were transferred to the other MS; and
- (iii) whether it is relevant that the exit tax in question relates to a (currency) profit which accrued under the tax jurisdiction of the Netherlands, whereas that profit cannot be reflected under the tax system of the host MS.

Judgment

Where a MS imposed an exit tax upon the transfer of the place of effective management of that company to another MS, and that transfer did not affect its status of being a company of the first MS, the said company can rely on Article 49 of the TFEU, namely the freedom of establishment, against the second MS.⁸⁴ Having said that, the Court held that this freedom however does not prevent the legislation of a MS from applying amount of tax on unrealized capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its POEM to another MS, ceases to obtain profits taxable in the former MS.⁸⁵

From the decisions of the ECJ discussed above we have gathered that the freedom of establishment is an important fundamental freedom that needs to be upheld by EU MSs when enacting exit taxation legislative provisions for individual and legal persons alike. Further, when enforcing such legislative provisions the national authorities of the MSs may not fix the amount of the exit levy to be paid on a deferral basis without taking into account the future value of the asset to which this levy attaches.

5.2 The SA court cases on exit taxation

⁸⁴ *Ibid*, [32].

⁸⁵ *Ibid*, [64].

5.2.1 Case law addressing individual exit taxation

*Shuttleworth v South African Reserve Bank and Others*⁸⁶

Facts and legal issue

The Applicant, Mr Shuttleworth, had emigrated from South Africa to the British Isles, a Protectorate of England in 2001 and sought to expatriate his wealth, at the time a sum of about ZAR 4 billion (approx. EUR 280 million).⁸⁷ He was informed by the South African government that he could only be allowed to expatriate these funds in four blocs. When the Applicant sought the authorisation to expatriate the fourth and final bloc, an amount of ZAR 2,504,748,935.00 (approx. EUR 192 million) the SARB informed him that it would impose a 10% levy thereon, amounting to ZAR 250,474,893.50 in 2009. The Applicant paid this amount over to the SARB in protest and thereafter instituted legal proceedings to recover it.⁸⁸

The SCA, as the final court of appeals in matters of a non-constitutional nature, had to decide on the following main issues

- firstly, on whether the decision to impose a 10% levy on the Applicant was a lawful decision.
- secondly, whether the system of exchange control was constitutionally compliant.
- thirdly, whether the SARB and the other Respondents were obliged to repay the Applicant the 10% levy amount and interest.⁸⁹

The secondary legal issues the Court had to decide on involved finding an appropriate remedy for the unconstitutionality of Section 9 of the Exchange Control legislation and its Regulations⁹⁰ as well as reviewing whether the ‘closed door policy’ of the SARB was procedurally fair.⁹¹ The judgment in so far as it relates to these two issues is not discussed as they represent issues that are relevant more for internal purposes of the SARB and do not hold a lot of relevance to the results sought to be achieved for the discussion flowing in this paper.

Judgment

The Court upheld the Applicant’s appeal on the first and second legal issues stating that a participative law making process had not been followed properly by the legislature in imposing the 10% exit charge and that also the officials at SARB failed to apply their discretion in a constitutional matter when

⁸⁶ Case No. 30709/2010 [2013] ZAGPPHC 200; [2013] 3 All SA 625 (GNP) (delivered on 18 July 2013).

⁸⁷ *Ibid*, [2].

⁸⁸ *Ibid*, [1] and [3].

⁸⁹ *Ibid*, [11].

⁹⁰ Falling mainly under the Currency and Exchange Act No. 9 of 1933.

⁹¹ *Shuttleworth vs South African Reserve Bank and Others ibid*, [11].

processing and making a decision on the Applicant's request for authorisation to expatriate his wealth.⁹²

The Court did not provide a firm decision regarding legal issue number 3, namely the repayment of the 10% levy back to the Applicant but provided some positive encouragement to him to proceed with a civil claim to recover the amount he paid.⁹³

5.2.2 Case law addressing corporate exit taxation

*Tradehold Ltd*⁹⁴

Facts and legal issue

The Commissioner for SARS appealed the decision of the Cape Town High Court, which in itself was an appeal against an additional assessment raised by the Commissioner based on a taxable capital gain which arose from a deemed disposal by Tradehold Limited of its shares in its subsidiary, Tradegro Holdings Limited, in terms of para 12(1) of the Eighth Schedule to the ITA.⁹⁵ Tradehold's only relevant asset was its 100 per cent shareholding in Tradegro Holdings which, in turn, owned 100 per cent of the shares in Tradegro Limited, with this company owning 65% of the shares in UK-based company, Brown & Jackson plc.⁹⁶

In 2002 by decision of the Board of Directors in Luxembourg it was decided to hold of Tradehold's meetings in Luxembourg, the effect of which Tradehold's POEM was transferred to Luxembourg although it retained its South African residence.⁹⁷

The legal issues before the SCA were

- to decide on whether Tradehold ceased to be a resident on the 26 February 2003, the day it effectively moved its POEM to Luxembourg.
- to decide whether a deemed disposal espoused in par 12 of the Eighth Schedule of the ITA amounts to an 'alienation'.

It is really interesting to see that this landmark decision involved the Court deciding on the two connecting factors promoted by the OECD Model Convention for charging exit taxes. The Commissioner for SARS argued that it was entitled to impose the exit tax on Tradehold as all the requirements for its cessation or residence were met when it transferred its POEM to

⁹² *Ibid*, [56] and [79].

⁹³ *Ibid*, [169].

⁹⁴ *Commissioner for the South African Revenue Service v Tradehold Ltd* Case No. 132/11 [2012] ZASCA 61 (delivered on 8 MAY 2012).

⁹⁵ *Ibid*, [1].

⁹⁶ *Ibid*, [2].

⁹⁷ *Ibid*, [3].

Luxembourg.⁹⁸ The Commissioner further held the view that a deemed disposal of an asset under par 12 of the Eight Schedule of the ITA does not amount to an ‘alienation’ as contemplated in Article 13 of the OECD Model Convention and the DTT entered into between South Africa and Luxembourg.⁹⁹

Judgment

The SCA confirmed the supremacy of the ranking of DTTs in South African law by stating that once they are signed they have the effect of law in South Africa as if directly enacted into the ITA.¹⁰⁰ Further the Court held that DTTs allocate taxing rights between the signatory states and that in situations of conflict they take precedence over domestic law.¹⁰¹

The Court dismissed the Commissioner’s appeal, essentially holding that what the SARS had attempted to do in re-assessing Tradehold had amounted to an attempted treaty override. The Court applied a wide meaning to the term ‘alienation’ stating that a deemed disposal falls within the ambit of that meaning and upholding the decision taken by the Cape Town Tax Court that the South Africa-Luxembourg DTT articles applied, thereby granting taxing rights to Luxembourg.¹⁰²

⁹⁸ *Ibid*, [8].

⁹⁹ *Ibid*, [11].

¹⁰⁰ *Ibid*, [16].

¹⁰¹ *Ibid*, [17].

¹⁰² *Ibid*, [26].

6. Recommendations and findings

The research conducted into this paper had the goal of establishing concrete answers to the questions presented in the form of the questions used as heading of the two sub-sections of this section.

6.1 Does South African exit taxation laws amount to treaty override?

The short answer to this question is a resounding ‘no’. In terms of the empowering provisions contained in Section 9H, Section 108 and par 12 of the Eighth Schedule to the ITA South Africa has enacted laws that provide for the effective assessment and collection of exit taxes, empower South Africa to conclude DTTs respectively. No legislative provisions have been enacted giving powers to circumvent the articles of DTTs concluded by South Africa, and further through the domestic law court precedents we have seen that the South African courts have been very consistent and highly efficient in applying the law and ensuring that South Africa is on par with other international countries in avoiding treaty override.

6.2 Considering how the South African exit taxation laws have been formulated do they result in the situation where the SARS loses its rights to tax unrealised gains on deemed disposal of assets?

A different way to formulate the question in the heading of this sub-section would be to ask whether the current exit taxation legislation in South Africa results in the undesirable situation where taxpayers escape taxation in both South Africa and the country of immigration.

No domestic court case has been decided yet in a situation where a person (be it an individual or a company) managed to escape tax liability in instances where they emigrated from South Africa or where they amended or transferred the registration status and POEM from South Africa. Relying on the strict legislative provisions provided by the South African legislature and the fact that South Africa follows the OECD Model Convention the author is of the view that is a situation that is least likely to occur.

7. Conclusion

This paper has provided a meaning of tax law in terms of legislation, double tax treaties and models they are drawn on and also from case law. It seems to be universally accepted that in the case of individual persons exit tax charges ensue when these individuals emigrate from their countries of residence and where they owned certain assets whose worth or value (current and future) might escape taxation should the country the individuals are emigrating from not impose exit taxes thereon. The situation becomes slightly more complicated in the case of companies as there are two determiners of residence for them, namely incorporation or registration and the place of effective management. The author notes that South Africa employs these criteria too when assessing the residence of persons for purposes of assessing their exit tax liability.

Thereafter a brief history of the development of exit taxation in the EU has been detailed. The categories of capital gains giving rise to exit taxation is provided, also at a high level. The readers' attention is also drawn early on to the all-important issue of the treaty override, one of the main aims of assessment of this paper. To round off the second section of this paper the DTTs concluded by South Africa are given a mention.

In the third section a deep exploration of South African domestic tax laws providing for exit taxation and for concluding international agreements to prevent double taxation is set out. In separate sub-sections an analysis is provided of the law as it applies in individual taxation and in corporate taxation scenarios.

Finally the all key decisions of the ECJ and South African courts are analysed and discussed. The goal behind doing this is to make a comparison by reflecting the position at international law and pairing it up with where South Africa finds itself at the moment in the sub-field of exit taxation.

Recommendations or findings are then provided as to where the legal institutions in South Africa stand, namely the legislature, courts and national tax authority. At the onset the author was unsure of how well-developed the South exit tax regime was, and it has greatly pleased the author to discover through the research conducted towards this paper that South Africa isn't lagging far behind the international community. It would even be fair to conclude that, through the decision in *Tradehold Ltd*, South Africa is one of the key players in developing exit taxation in the world.

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