Cross border tax assistance as a framework for revenue mechanism

A mini thesis submitted in partial fulfilment of the requirements for Masters of Law degree (LLM)

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ABSTRACT

A national tax authority i.e., SARS has a wide range of powers at its disposal to collect taxes that are not paid or on time or in their full amount within the borders of South Africa. The issue arises when a taxpayer leaves their jurisdiction without settling the tax debt or has no asset within the jurisdiction that may serve to recover the tax debt. Tax authorities across the globe have thus come up with measures to ensure effective collection of taxes in response to the possibility that taxpayers may avoid paying their tax debts. The initial step is therefore to request for assistance from a foreign tax authority to collect the taxes due. The process of cross-border tax assistance is a significant and necessary one in ensuring the recovery of tax debts from a foreign government. As means of addressing the threat, South Africa introduced section 93 of the Income Tax Act which was later repealed by section 185 of the Tax Administration Act in the assistance of recovering of tax debts from a foreign government. This provision is however subject to the fact that there ought to be an international tax agreement concluded between South Africa and the foreign government. Recent cases show cooperation and assistance between SARS and foreign tax authorities in the enforcement of outstanding taxes and indicates an increase in international effort s to prevent efforts of taxpayers avoiding paying their taxes.

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GLOSSARY OF KEYWORDS, EXPRESSION AND TERMS

The following keywords, expressions and terms are used in this mini thesis:

Cross-border transactions

Foreign tax authority

International Tax Agreement

Revenue Rule

South African Revenue Service

Tax Administration Act

Tax assistance

Tax Treaty

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ABBREVIATIONS AND ACRONYMS

ATO	Australian Tax Office
DTA	Double Taxation Agreement
GIT	Glencoe Investment Trust
HMRC	Her Majesty's Revenue and Customs
PAJA	Promotion of Administration Justice Act
SARS	South African Revenue Services
SCA	Supreme Court of Appeal
TAA	Tax Administration Act

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CHAPTER 1

BACKGROUND TO THE STUDY

1.1 INTRODUCTION

Taxation is an important tool to provide for the financing of public expenditure. It primarily generates revenue for the benefit of society in execution of governmental obligations. It is fundamental to strengthening the viable functioning of the government and the social contract between persons and society.[1] Tax debts minimises the revenue collected from taxation and this results in governments not being fully able to achieve their obligations.[2] As a result, there has been a growing need in the international sphere for tax cooperation to tackle tax debts among other things. This has been an initiative of the G20, and the communiqué at the G20 Leaders' Summit in September 2013,[3] stated 'we call upon on all countries to join the Multilateral Convention on Mutual Administrative Assistance in Tax Matter (hereinafter "the Convention")'. One of the primary aims of the Convention is to help governments enforce their tax laws. It offers the necessary tools for cooperation in tax matters and enhancing tax collection abilities across international borders.[4]

South Africa is among the 144 jurisdictions that are currently participating in the Convention.[5] This means that the South African Revenue Services (hereinafter 'SARS') on request with a foreign country can ask for assistance in recovering tax debts due by a South African taxpayer living in a foreign country provided that South Africa has concluded an international tax agreement with that particular country. Similarly, tax authorities of a foreign country can ask for assistance from SARS in the collection of tax debt due to those countries on condition that

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[1] IMF, OECD & UN et al *Supporting the Development of More Effective Tax Systems* (2011) 8.
[2] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 5.
[3] OECD 'Convention on Mutual Administrative Assistance in Tax Matter' *OECD* 2021 available at http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (accessed 31 March 2022).
[4] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 21.
[5] OECD 'Convention on Mutual Administrative Assistance in Tax Matter' *OECD* 2021 available at http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (accessed 31 March 2022).

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they have concluded an international agreement.[6] The request can only be made by the competent authority of that foreign country and not by the public (taxpayers). SARS can thus request for assistance as well as provide assistance with the collection of tax debt.

Section 93 of the Income Tax Act,[7] which was later repealed and replaced by section 185 of the Tax Administration Act (hereinafter 'TAA'),[8] governs the rendering of assistance by SARS for the recovering of tax debt on behalf of a foreign government. Croome and Olivier[9] also contended that SARS cannot exercise its TAA powers granted by section 185 given that a bilateral or multilateral agreement exists between South Africa and the foreign jurisdiction.

The rendering and requesting of assistance in recovering a tax debt is a fairly new concept in South Africa. This is because of a common law rule, the Revenue Rule, that judicial authority of one country could not enforce the revenue laws of another country.[10] The Revenue Rule stems from English law and traces back to the 1700s.[11] It is founded on the principle that the power to tax is a manifestation of a state's sovereignty.[12] 'No country ever takes notice of the revenue laws of another.'[13] By virtue of the Revenue Rule, an enforcement of taxation in another country would impinge the sovereignty of the foreign country. The rule was first recognised by South African courts in *Commissioner of Taxes Federation of Rhodesia v McFarland*.[14] South Africa could thus not entertain a claim by a foreign country for taxes due to it nor could it enforce a foreign judgement for such taxes.

The coming into operation of section 93 of the Income Tax Act made it easier for South Africa to slightly deviate from the Revenue Rule by now allowing SARS to render assistance to foreign taxing authority with the collection of tax debts due to a foreign country in respect of assets in South Africa and vice versa, provided that the request was received in terms of a bilateral or multilateral agreement.

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[6] Croome B 'SARS can recover taxes from offshore assets' *SAIT* 11 September 2012 available at https://www.thesait.org.za/news/102408/SARS-can-recover-taxes-from-offshore-assets-.htm (accessed 27 March 2022).

[7] 58 of 1962.

[8] 28 of 2011.

[9] Croome BJ & Olivier L *Tax Administration* 2ed (2015) 124-125.

[10] Croome B 'SARS can recover taxes from offshore assets' *SAIT* 11 September 2012 available at https://www.thesait.org.za/news/102408/SARS-can-recover-taxes-from-offshore-assets-.htm (accessed 27 March 2022).

[11] Millikan B 'The Revenue Rule: A common law Doctrine for the Twenty-First Century' (2016) 16 *Duke Journal of Comparative & International Law* 80.

[12] Jeffrey RJ *The Impact of State Sovereignty on Global Trade and International Taxation* 1999 26.

[13] *Holman v Johnson* (1775) 1 Cowp 341.

[14] 1965 (1) SA 389 (W).

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There are three circumstances that might determine whether SARS is able to grant assistance or receive assistance to foreign taxing authority with the collection of taxes due: 1) The Revenue Rule, 2) the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, where the country seeking assistance is a participant of the Convention and does not have a bilateral or multilateral agreement that makes provision for reciprocal assistance with collection of tax with South Africa and 3) The provisions of a bilateral agreement entered into between South Africa and other country requesting assistance.[15]

Due to the urge for tax cooperation internationally, the *Ben Nevis (Holdings) Ltd & Another v Her Majesty's Revenue and Customs (*hereinafter '*Ben Nevis*')[16] case and *Krok v Commissioner for the South African Revenue Services* (hereinafter '*Krok*')[17] case indicates that other foreign tax authorities will be encouraged to seek assistance from SARS.

1.2 LEGAL PROBLEM

As aforementioned, tax debts have a negative impact on the governments. It reduces the government's revenue thus making it difficult for a government to achieve its economic and social obligations, and the equity of a tax system is undermined. Therefore, in order to avoid tax debts, government including South Africa have taken the initiative to conclude tax treaties in order to mitigate the issue of tax debts.

Certain academics consider tax treaties to only be applicable to substantive provisions as opposed to procedural or administrative provisions.[18] It follows that the general principles that govern public international law should apply to a tax treaty. Some other academics are of the view that although a tax treaty is governed by public international law, a tax treaty constitutes domestic law that stands supreme at domestic level which has an effect on the rights and obligations of taxpayers.[19] In a South African context, a tax treaty ought to be subordinate to the Constitution of the Republic of South Africa (hereinafter 'the Constitution'),[20] by virtue of section 2 of the Constitution. Section 2 of the Constitution provides that the Constitution is

[15]Croome B 'SARS can recover taxes from offshore assets' *SAIT* 11 September 2012 available at https://www.thesait.org.za/news/1DE02408/SARS-can-recover-taxes-from-offshore-assets-.htm (accessed 27 March 2022).
[16] [2013] EWCA Civ 578.
[17] 2015 (6) 317 (SCA).
[18] De Koker A & Brinker E *Silke on International Tax* (2010) para 1.3.
[19] De Koker A & Brinker E *Silke on International Tax* (2010) para 1.3.
[20] Constitution of the Republic of South Africa, 1996.

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itself the supreme law of South Africa.[21] Therefore, international tax agreements must be in line and consistent with the Constitution. In circumstances where they are found to be inconsistent with it, the common law Revenue Rule will prevail. As the Revenue Rule has not yet been revoked, the provisions under the TAA that enables SARS to render assistance for the collection of tax debt may be affected.

Conflict between the provisions of an international tax agreement and domestic legislation may arise and this might affect SARS in the collection of tax debts. In *AM Moolla Group Ltd v Commissioner for the South African Revenue Services*[22] the court held that, where there is a conflict between a treaty and a domestic legislation, the domestic legislation must prevail.[23] This then poses the question on the development of SARS's in rendering services to foreign countries for the purpose of tax collection and whether the Revenue Rule is still applicable, taking the TAA provisions and South Africa's international agreement, both bilateral and multilateral agreements into considerations.

1.3 RESEARCH QUESTION

The primary question that this mini thesis seeks to answer is in the effectiveness of SARS's powers to render assistance to a foreign country in the collection of tax debts and whether the Revenue Rule is applicable and relevant. The secondary question that this mini thesis seeks to answer is in the case of conflicts between an international tax agreements and domestic law, whether the international tax agreement will trump the domestic law or will the domestic law trump the tax agreement as this may result in South Africa being able to render assistance in the collection of tax debts or not in terms of the Revenue Rule.

1.4 METHODOLOGY

[21] Section 2 of the Constitution reads: 'This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'
[22] [2003] JOL 10840 (SCA).
[23] [2003] JOL 10840 (SCA) para 15.

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This mini thesis will be conducted by way of desktop research that consists of referencing primary sources and secondary sources. These will consist of legislation, case law, journal articles, textbooks, the Constitution, internet sources, and treaty agreements.

1.5 CHAPTER OUTLINE

This study will compromise of the following chapters herein below:

1.5.1 Chapter 2

This chapter will discuss the Revenue Rule from its existence in the United Kingdom and being incorporated in South Africa. This chapter will thus determine whether it is still applicable to South African law.

1.5.2 Chapter 3

This chapter will provide for an overview of international tax agreements, both bilateral and multilateral. It will discuss the term international law, the nature and objectives of tax treaties.

1.5.3 Chapter 4

This chapter will analyse a provision in the TAA that grants SARS the powers to render assistance or request for rendering of assistance for purposes of collecting tax debts. It will discuss the concept of source and resident.

1.5.4 Chapter 5

This chapter will discuss the two cases that dealt with the rendering and the request for assistance for purposes of tax debt collection, namely the *Ben Nevis* case and the *Krok* case.

1.5.5 Chapter 6

This chapter will conclude the mini-thesis and provide for recommendations.

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CHAPTER 2
THE REVENUE RULE

2.1 INTRODUCTION

Governments who seek to collect tax liabilities outside their borders often face a significant obstacle in the form of the Revenue Rule, which is summarised by Lord Mansfield in *Holman v Johnson,*[24] as 'no country ever takes notice of the revenue laws of another'. The Revenue Rule, a common law doctrine with origins in the 18th century,[25] generally allows courts to decline entertaining or enforcing foreign tax judgements or foreign revenue law.[26] However, with the increase of cross-border tax evasion in the late 20th century, countries discovered it to be mutually beneficial to include provisions in their bilateral tax treaties allowing each treaty partner to assert specific domestic claims in the other country's courts. This chapter will discuss the history of the Revenue Rule from its existence in the United Kingdom and being incorporated in South Africa, with the purpose of establishing whether it is still relevant in South Africa.

2.2 MEANING OF THE REVENUE RULE

In terms of the Revenue Rule 'the courts of one state are precluded, in the absence of a permissive rule to the contrary, from entertaining legal proceedings involving the enforcement of the revenue laws of another state- an attribute of sovereignty'.[27] Furthermore, the Supreme Court of Appeal (hereinafter 'the SCA') in *Krok* explained the rationale underlying the Revenue Rule as follows:

> 'This is so because international comity does not extend to the recognition of tax liabilities imposed by a state on its subjects for its own domestic management and regulation. Thus, a foreign state may not have a claim for taxes

[24] (1775) 1 Cowp 341.
[25] Mallinak B 'The Revenue Rule: A common law doctrine for the twenty-first century' (2006) 16 *Duke Journal of Comparative & International Law* 79.
[26] *Krok and Another v Commissioner for the South African Revenue Service* 2015 (6) SA 317 (SCA) para 26.
[27] *Krok and Another v Commissioner for the South African Revenue Service* 2015 (6) SA 317 (SCA) para 26.

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payable to its fiscus enforced in another state, as this would be tantamount to derogation of the other state's territorial supremacy.'[28]

In other terms, a foreign taxing authority cannot enforce a claim for taxes from that foreign country in South Africa under the Revenue Rule. The Revenue Rule is founded on the idea that imposing taxes is an exercise of sovereignty by a state as provided by in the *Krok* case, and that doing so in another state would be an infringement of that state's sovereignty rights. Sovereignty means having the power to wield authority over every person living in the territory. One could even argue that the authority embodies sovereignty in its purest form.[29] Subsequently, the foundational tenet upon which all international relations are based, sovereign equality constitutes the core of the entire body of international legal standards.[30]

It is against this backdrop that, in accordance with the Revenue Rule, the courts of one country will not entertain the enforcement of the revenue laws of a different country.

2.3 DEVELOPMENT OF THE REVENUE RULE

The earliest reported case referencing the Revenue Rule dates to 1729,[31] and was the case of *Attorney General v Lutwyde*.[32] *Lutwyde* dealt with whether import duties that were sought on tobacco sold in Dumfries, Scotland could be enforced in an English Court. According to the Attorney General, the issue did not rest upon the residence of the parties but upon the nature of the matter for which the bond was given. Lutwyde contented that the English Court did not have jurisdiction in the matter as 'conusance belongs to the Court of Exchequer in Scotland and not to this court'.[33] Lord Chief Baron Pengelly, agreed with the Attorney General's description of the action and held that 'before the union, this court had no jurisdiction of the revenues in Scotland, and therefore the question is, whether the statute is not exclusive of us, since it is giving a further jurisdiction to them who had it exclusive of us before'.[34]

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[28] *Krok and Another v Commissioner for the South African Revenue Service* 2015 (6) SA 317 (SCA) para 26.
[29] Cassese A *International Law* 2ed (2005) 49.
[30] Cassese A *International Law* 2ed (2005) 48.
[31] Mallinak B 'The Revenue Rule: A common law doctrine for the twenty-first century' (2006) 16 *Duke Journal of Comparative & International Law* 80.
[32] (1729), 145 Er 674 (Ex. Ct).
[33] Bunbury *Reports of Cases in the Court of Exchequer, From the Beginning of the Reign of King George the First to the Fourteenth Year of the Reign of King George the Second* 1756 286.
[34] Mallinak B 'The Revenue Rule: A common law doctrine for the twenty-first century' (2006) 16 *Duke Journal of Comparative & International Law* 80.

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Since the obligation was a foreign tax obligation, the English Court was unwilling to enforce a bond that was executed in Scotland, the Scottish duties on tobacco. The court decided that allowing the enforcement of the foreign tax debt in England would extend Scotland Court's jurisdiction into England, because prior to the Act of Union of 1707, Scotland and England were separate sovereignties and the English Court had no jurisdiction over revenues in Scotland.[35]

The rule was subsequently referenced in *Boucher v Lawson*.[36] The plaintiff in *Boucher* sought delivering of a cargo of Portuguese gold from Portugal to the United Kingdom. The defendant resisted this by relying on a Portuguese prohibition on the export of gold. During that period, it was illegal to export gold from Portugal, but Lord Chief Justice Hardwicke concluded that the defendant could not rely on the prohibition of the export of gold from Portugal because the import of gold to England was permitted and that 'the right of an English subject cannot be altered by the general law of any other country'.[37] The term 'revenue' does not appear in the judgement. This is because, the case was not directly concerned with the Revenue Rule. It, however, encouraged the idea that the English Courts would not enforce the laws of a foreign government in England.

Following the demonstration in *Lutwydge* and *Boucher* that the laws of a foreign government would not be enforced in England, it eventually led to the English case of *Holman*. In this case, Johnson bought tea at Dunkirk from Holman, a Frenchman who was aware that Johnson intended to smuggle the tea into England. Johnson then failed to pay and claimed that because Holman was aware of his scheme, the contract payment could thus not be recovered. In rejecting the argument, Lord Mansfield held that 'no country ever takes notice of the revenue laws of another'.[38]

Four years later, Lord Mansfield decided *Planche and Another v Fletche*[39] and firmly entrenched the Revenue Rule in the English legal system. This was affirmed in *Government of India, Ministry of Finance v Taylor and Another.*[40] Taylor served as the liquidator for an English company with operations in India that was being wound up in England. The Indian

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[35] Bunbury *Reports of Cases in the Court of Exchequer, From the Beginning of the Reign of King George the First to the Fourteenth Year of the Reign of King George the Second* 1756 281.
[36] (1734) 95 Eng. Rep. 53.
[37] (1734) 95 Eng. Rep. 53 at 53.
[38] *Holman v Johnson* (1775) 1 Cowp 341.
[39] (1779) 1 Douglas 251, 99 E.R 164.
[40] [1955] A.C 491.

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Government, to which the company was liable for various taxes only recovered a very small portion of the company's remaining assets in India. Proof for the tax owing was submitted to the English liquidators but was rejected by the liquidators based on the Revenue Rule. The Indian Government contested this, claiming that not only did the rule not apply in the context of insolvency, but that the rule itself was not as well established as earlier cases had supposed. Furthermore, they contended that exclusion of foreign law could only be limited to laws which characterised as penal and most of the foreign tax legislation would not attract this characterisation.[41]

The court rejected the argument and so unequivocally affirmed the rule's existence. Viscount Simonds described the rule as a 'strong fortress'[42] which was founded on a 'formidable array of authority'.[43] Simonds cited the findings of the Australian Court in *Sydney Municipal Council v Bull*[44] that:

> 'There is a well-recognised rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not call the taxes of foreign States for the benefit of the sovereignty of those foreign state.'

Although the recovery of a tax debt by a tax authority of a foreign country was not concerned in those Early English cases, they paved the way for a plethora of subsequent tax cases, the history of which was very well outlined in *Government of India*.

After its inception from Britain in 1776, the United States of America also adopted the Revenue Rule as formulated by the English Courts.[45] The Supreme Court of New York first recognised the Revenue Rule in *Ludlow, Brewerton, & Strong v Van Rensselaer,*[46] where Ludlow claimed performance of a promissory note issued in Paris, France.

2.4 REVENUE RULE IN SOUTH AFRICA

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[41] [1955] A.C 491 at 494.
[42] [1955] A.C 491 at 506.
[43] [1955] A.C 491 at 504.
[44] [1909] 1 KB 7, KBD.
[45] Silver BA 'Modernising the Revenue Rule: The Enforcement of Foreign Tax Judgements' (1992) 22 *Georgia Journal of International & Comparative Law* 615.
[46] 1 Johns.94 (1806).

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South African Courts were first called upon to adjudicate in a matter which involved the Revenue Rule in *McFarland*.[47] The court held that 'so far there has been no decision on the matter in South African Courts and it is therefore necessary to examine the basis for the view referred to and to determine whether this accords with our own law'.[48] Interestingly, unlike the early English case where the Revenue Rule was formulated, the *McFarland* case was the first South African case which dealt with the rule and it involved the recovery of taxes by a foreign taxing authority. The case dealt with the recovery of two amounts in terms of an order of the High Court of Southern Rhodesia in favour of the said Commissioner.[49]

The Revenue Rule was thoroughly analysed by the High Court to determine its applicability in the South African legal system, even though no reference to the term was once used. This analysis took a few international cases into account. The court relied on the findings in *Government of India*, that 'enforcement of a claim for taxes is but an extension of sovereign power which imposed the taxes'[50] and held that: 'just as one State cannot send its police force into another State so also it cannot send its tax gathers'.[51] The Revenue Rule, according to the High Court did not distinguish between the direct enforcement of foreign tax laws and the enforcement of an order in respect of foreign taxes already granted by a foreign court.[52] The High Court confirmed the relevance of the Revenue Rule in the South African legal system.

In *Priestley v Clegg,*[53] the High Court was yet again faced with the Revenue Rule, however in the context of an insolvent estate. The *McFarland* case was seen by the court as being the leading case in South Africa regarding the enforcement of foreign tax debt in South Africa.[54]

Although *McFarland* had set the ground in South Africa by accepting and endorsing the Revenue Rule, the SCA, however, for the first time found in *Krok* that the Revenue Rule was inapplicable in cases involving the enforcement of a foreign debt.[55] It should be noted that *Krok* is different to *McFarland* which also dealt with the Revenue Rule. *Krok* was decided post 1994, subsequently, it was decided in terms of section 185 of the TAA which empowers SARS to recover tax on behalf of foreign states in certain circumstances, and it was decided in terms of

[47] 1965 (1) SA 389 (W).
[48] 1965 (1) SA 389 (W) at 391.
[49] 1965 (1) SA 389 (W) at 390.
[50] (1955) 1 ALL E.R. at 299.
[51] 1965 (1) SA 389 (W) at 394.
[52] 1965 (1) SA 389 (W) at 394.
[53] [1985] 4 ALL SA 249 (T).
[54] [1985] 4 ALL SA 249 (T) at 250.
[55] [2015] 4 ALL SA 131 (SCA) para 28.

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the provisions of the international tax agreement between South Africa and Australia to recover foreign tax debt. On the other hand, *McFarland* could not rely on the provisions of an international tax agreement as there were no tax agreements that provided for assistance with collection of foreign tax debt at the time that the case was decided.

In *Krok*, which will be discussed broadly in chapter 5, the taxpayer sought to argue that the rule 'entitled South African taxpayers to arrange their affairs on its assurance that their assets were protected against foreign tax authorities'.[56] The SCA held that prior to the enactment of section 185 of the TAA and the introduction of Article 25A into the double Taxation Agreement (hereinafter 'the DTA') between the South Africa and the Government of Australia- the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 1 July 1999, the Revenue Rule would have prevailed.[57] It further held that the Revenue Rule 'does not constitute an absolute prescription of the recognition of foreign revenue laws and may be abrogated by convention or treaty'.[58]

According to section 231(4) of the Constitution 'any international agreement becomes law in the Republic when it is enacted into law by national legislation'. Accordingly, the International Tax Agreement between South Africa and Australia, together with the subsequent Protocol amending it, were concluded in accordance with section 108 of the Income Tax Act and had been published in the Government Gazette, making them a part of South African domestic law. Thus, the SCA found that this had the effect of altering the common law position by abrogating the Revenue Rule.[59]

The provision of Article 25A of the DTA between South Africa and Australia read with section 185 of the TAA provide for assistance with the collection of a foreign tax debt in terms of an International Tax Agreement led the SCA to dismiss the appeal because they had altered the South African common law position regarding the enforcement of a foreign tax debt by a South African Court. The Revenue Rule could thus not be relied upon.

2.5 CONCLUSION

[56] [2015] 4 ALL SA 131 (SCA) para 28.
[57] [2015] 4 ALL SA 131 (SCA) para 26.
[58] [2015] 4 ALL SA 131 (SCA) para 28.
[59] [2015] 4 ALL SA 131 (SCA) para 28.

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In the modern world, revenue laws ought to be viewed in conjunction with a country's tax legislation. The Revenue Rule can be abrogated in an agreement between a country and another country through a treaty. A specific provision in a treaty that commits a contracting state to assist with the collection of a tax debt from another state may lessen the impact of the Revenue Rule. Therefore, what can be deduced from *Krok* is that, in the absence of section 185 of the TAA and an International Tax Agreement between two foreign countries, the Revenue Rule will prevail.

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CHAPTER 3

INTERNATIONAL TAX AGREEMENT: AN OVERVIEW

3.1 INTRODUCTION

Cross-border tax assistance in the recovery of taxes, like all forms of international cooperation in tax matters, must be based on an international legal agreement that is in force between the requesting and the requested state.[60] The existence of an international tax agreement serves as the foundation for all legislative provisions allowing such assistance. The existence of an international tax agreement with specific provisions for reciprocal assistance with tax debt collection between South Africa and the foreign government requesting assistance is a criterion for SARS to provide or request any assistance with the collection of a tax debt.

3.2 NATURE OF INTERNATIONAL TAX LAW

The term 'international tax' often gets misinterpreted. Arnold points out that the term 'international tax' is a misnomer.[61] The term generally refers to international aspects of the domestic tax laws of a country. The treaties of a country are perhaps the most apparent international aspect of a country's domestic tax system.[62] In its traditional context, it refers to the interface between the fiscal laws of a given jurisdiction and those of other countries.[63]

Therefore, in cases where cross-border investment occurs, where funds are transferred across countries, or where taxpayers of varying fiscal jurisdiction conduct economic transactions, it is the interplay of respective tax laws that dictate the fiscal implications for all parties concerned.[64] Within this framework, a thorough comprehension of a country's tax laws is fundamental to understanding international tax law. Moreover, familiarity with foreign taxation laws is indispensable when considering how they relate to one another.[65]

[60] OECD 'Global Forum on Transparency and Exchange of Information for Tax Purposes' available at https://www.oecd.org/tax/trnsparency/documents/cross-border-assistance-recovery-of-tax-claims-african-countries.pdf (accessed 07 January 2023).
[61] Arnold BJ & McIntyre JM *International Tax Primer* 2ed (2002) 2.
[62] Croome BJ, Oguttu AW & Muller E et al *Tax Law: an Introduction* 2013 513.
[63] De Koker A & Brinker E Silke *on International Tax* 2010 ch 1.1.
[64] De Koker A & Brinker E *Silke on International Tax* 2010 ch 1.1.
[65] De Koker A & Brinker E *Silke on International Tax* 2010 ch 1.1.

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International tax law differs from international law in some respects yet remains anchored in its fundamental principles. While international law is defined as consisting of 'certain rules of conduct within modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement',[66] the language of international tax law is different. Its language uses terms like 'source' and 'residence' jurisdiction, which differ from 'nationality' and 'territoriality'. It adopts a determination of nationality with reference to a definition of 'residence', a concept far broader than what it is often understood under international law.[67]

3.3 OVERVIEW OF A TREATY

Many countries around the world have a vast treaty network with their trading partners and the number of tax treaties has exponentially increased over the past ten years.[68] There are reportedly more than 3500 tax treaties in place across the world.[69]

In specific terms, tax treaties are agreements between sovereign states and, more specifically, are instruments of public international law.[70] Article 2 of the Vienna Convention on the Law of Treaties (hereinafter 'Vienna Convention)[71] defines a treaty as '… an international agreement concluded between States in written form and by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' A treaty is often referred to as an 'agreement' or 'convention'. As indicated by Article 2, the name used is not of importance, and thus the terms will be used interchangeably.

Centred by the number of parties involved, tax treaties can be classified into bilateral and multilateral treaty. A bilateral treaty means that two states have entered into the treaty and where more than two contracting states have entered into a treaty, it is referred to as a multilateral treaty.[72]

[66] Hall WE *A Treaties on International Law* 8ed (1924) 1.
[67] De Koker A & Brinker E *Silke on International Tax* 2010 ch 1.1.
[68] Arnold BJ & McIntyre JM *International Tax Primer* 2ed (2002) 3.
[69] OECD/G20 *Addressing the Tax Challenges of the Digital Economy, Action 1-2015 Final Report* 2015 94.
[70] De Koker A & Brinker E *Silke on International Tax* 2010 ch 1.3.
[71] Vienna Convention on the Law of Treaties 1969.
[72] Olivier L & Honiball M *International Tax, A South African Perspective* 5ed (2011) 290.

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3.4 ASSISTANCE IN THE COLLECTION OF TAXES THROUGH BILATERAL AGREEMENT

The need for assistance in collecting taxes globally became significant when the OECD issued its 1998 Report entitled 'Harmful Tax Competition: An Emerging Global Issue'[73] in which it recommended that in order to counter the harmful tax practices of tax-haven and preferential tax regimes, countries should consider undertaking coordinated tax-enforcement programmes targeting taxpayers who benefit from practices that constitute harmful tax competition. Due to its concerns that there would be increased tax evasion if one country would not enforce the revenue claims of another, the OECD recommended in its Report that:

> 'Countries be encouraged to review the current rules applying to the enforcement of tax claims of other countries and that the Committee on Fiscal Affairs pursue its work in this area with a view to drafting provisions that could be included in tax conventions for that purpose.'[74]

Subsequent to this recommendation, in 2003, the OECD Council approved the inclusion of Article 27 which deals with the assistance in tax collection in the 2003 update of OECD Model Convection. A similar Article 27 was also included in the United Nations Model Double Taxation Convention. In the context of a double tax treaty, Article 27 of the OECD Model Tax Convention is one of the mechanisms governments can adopt to ensure assistance in the collection of taxes.

Article 27(1) of the OECD Model Tax Convention provides that 'contracting states shall lend assistance to each other in the collection of revenue claims'. This assistance is not restricted by Article 1 of the OECD Model Tax Convention, which states that the treaty applies only to residents of the contracting states. According to Article 27(1) assistance must be provided in terms of a revenue claim owed to a contacting state by any person, whether resident of a contracting state. Article 27(2) of the OECD Model Tax Convention defines 'revenue claim' to mean an amount owed in respect of taxes of every kind and description imposed on behalf of the contracting states, or of their political subdivisions or local authorities, as long taxation is not contrary to the Convention or any other instrument to which the contracting states are parties. Article 27(3) sets out the conditions under which a request for assistance in the

[73] OECD *Harmful Tax Competition: An Emerging Global Issue* (1998).
[74] OECD 'Manual on the Implementation of Assistance in Tax Collection' available at https://www.oecd.org/ctp/exchange-of-tax-information/39261429.pdf (accessed 28 May 2023).

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collection of taxes is not to be made. It provides that 'a revenue claim of a contracting state shall be accepted for collection in the other state if it is enforceable under the laws of that former state and the person owing the amount has no administrative or judicial rights to prevent such collection'. That revenue claim shall be collected by the other government according to the provisions of its laws that apply to the enforcement and collection of its own taxes.[75]

Article 27's inclusion in the OECD Model Tax Convention has increased willingness of countries in assistance in tax collection (in treaty context), provided certain conditions are met.[76]

By signing bilateral tax treaties that include Article 27 provisions, South Africa can ensure that it is assisted in the collection of taxes.[77] Most of South Africa's tax treaties that were signed prior to 2003 when Article 27 was adopted into the OECD Model Tax Convention do not contain Article 27. South Africa is currently in the process of negotiating some of these old treaties, which could result in the inclusion of an article on assistance in the collection of taxes.[78] For instance, it has signed Protocols to a few of its old treaties to include Article 27. Examples are Article 25A of the Protocol between South Africa and Australia double tax treaty and Article 28 of the Protocol between South Africa and Netherlands double tax treaty. Likewise, the same applies to the United Kingdom. Apart from these countries, no other Protocol pertaining to Article 27 has been signed with other developed countries, but South Africa had concluded agreements containing an article on assistance in collection of taxes with African countries such as Algeria, Botswana, Ghana, Lesotho, Mozambique, Namibia, Swaziland and Uganda.[79]

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3.5 ASSISTANCE IN THE COLLECTION OF TAXES THROUGH MULTILATERAL AGREEMENT

[75] Oguttu AW *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 645.
[76] OECD 'Manual on the Implementation of Assistance in Tax Collection' available at https://www.oecd.org/ctp/exchange-of-tax-information/39261429.pdf (accessed 28 May 2023).
[77] Oguttu AW *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 651.
[78] Oguttu AW *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 651.
[79] Croome B & Brink J 'Reciprocal Assistance in the Collection of Taxes' *ENSafrica* 04 July 2012 available at https://www.mondaq.com/southafrica/tax-authorities/185074/reciprocal-assistance-in-the-collection-of-taxes (accessed 17 May 2023).

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A Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAA Convention) was developed in 1988 by the OECD and the Council of Europe,[80] which was initially only open to members of the OECD and the Council of Europe. However, with the international pressure to increase transnational tax administrative cooperation, in 2011, the G20 called for action 'to make it easier for developing countries to secure the benefits of the new cooperation tax environment'.[81] As a result, the OECD and the Council of Europe developed a Protocol in 2011 that amended the MAA Convention thereby opening it up to developing countries. In South Arica the MAA Convention was adopted on 21 February 2014 when it was published in the *Government Gazette*.

The MAA Convention is a multilateral agreement and binds only the states that are party to the convention, or which have assented to it.[82] Although South Africa is not a member of the OECD, it has assented to the MAA Convention, which then means that it is legally binding in South Africa and on South Africa. Section 231 of the Constitution does not distinguish between multilateral and bilateral treaties, and it is submitted that they have the same legal status, provided that the multilateral treaty was properly executed and adopted in terms of section 231 of the Constitution.

Articles 11 to 16 of the MAA Convention provide provisions for the lending of assistance by one government to another in the collection of tax debt. The provisions relating to the assistance in the collection of taxes in the MAA Convention are largely in line with Article 27 of the OECD Model Tax Convention.

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3.6 OBJECTIVES OF A TREATY

The main objective of a treaty is to facilitate cross-border trade by eliminating tax impediments to cross-border flow.[83] Thus, the most important objective of a tax treaty as reflected in the preamble of most treaties, often reads 'the avoidance of double taxation of the prevention of

[80] OECD 'Convention on Mutual Administrative Assistance in Tax Matters' available at https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (accessed 28 May 2023).
[81] OECD 'Convention on Mutual Administrative Assistance in Tax Matters' available at https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (accessed 28 May 2023).
[82] Cassese A *International Law* 2ed (2005) 171.
[83] Arnold BJ & McIntyre JM *International Tax Primer* 2ed (2002) 105.

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fiscal evasion'.[84] An example of this is the DTA between South Africa and Malaysia.[85] Nevertheless, treaties generally offer more than merely the relief of double taxation. Generally other objectives of a tax treaty include:

- the provision of certainty as to a taxpayer's tax affairs
- the reduction of withholding taxes
- the allocation of taxing jurisdiction between the contracting states
- the prevention of tax evasion by cooperation between administrations through *inter alia* the exchange of information
- the collection of taxes through the exchange of information
- the collection of taxes due to the other contracting state through mutual assistance and
- the collection of taxes with the assistance of the other contracting state etc.[86]

According to Olivier and Honiball, the objectives of a tax treaty depend on whether the question is asked from the perspective of a taxpayer or from the perspective of one of the contracting states.[87] The objectives between the two contracting states would be to determine whether the particular state has the right to ask for assistance in the collection of a tax debt.

Section 108 of the Income Tax Act provides:

> '(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.'

[84] Olivier L & Honiball M *International Tax, A South African Perspective* 5ed (2011) 268.
[85] The preamble to the treaty between South Africa and Malaysia published in the Government Gazette 29021 Notice 68 (13 July 2006) reads: 'Agreement between the government of the Republic of South Africa and the government of Malaysia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes and income.'.
[86] Olivier L & Honiball M *International Tax, A South African Perspective* 5ed (2011) 278.
[87] Olivier L & Honiball M *International Tax, A South African Perspective* 5ed (2011) 276.

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From the above provision, it can be deduced that in the South African context, the government through the national executive can enter into an agreement with the government of another country for the reciprocal assistance for the collection of tax debts. Subsequently, the collection ought to be done in terms of the laws of South Africa and another country. Therefore, an agreement entered into in terms of section 108 must comply with the laws of the Republic in order for its provisions governing reciprocal assistance with the collection of taxes to be valid.

3.7 TREATIES IN THE CONTEXT OF SOUTH AFRICAN DOMESTIC LAWS

South African laws are subject to the provisions of the Constitution. Section 2 of the Constitution provides that the Constitution is the supreme law of the country. Since a treaty is classified as an international agreement, it ought to be applied in accordance with and in the context of section 231 of the Constitution. In terms of 231, all international agreements, i.e., including tax treaties must be adopted in accordance with certain formalities to be incorporated as part of South African law. Section 231(2) of the Constitution read in conjunction with section 231(4) of the Constitution sets out the requirements for an international agreement to bind South Africa. Section 231 (4) provides that an international agreement becomes law in the Republic when it is enacted into law by national legislation.

Additionally, section 108 of the Income Tax Act sets out the domestic procedures for the recognition of tax treaties into South African law. According to section 108 (2) of the Income Tax Act, when Parliament has approved the international agreement as required by section 231 of the Constitution, the arrangements of the agreement shall be notified by publication in the Government Gazette. Olivier and Honiball opine that, once a treaty has been proclaimed in the Government Gazette, the provisions of a tax treaty will have the same effect as domestic law in South Africa.[88] Du Plessis supports this view that after parliamentary approval, and for a treaty to form part of South African law, it needs to be enacted into law by national legislation.[89]

A treaty will become law in South Africa when it is enacted into law by national legislation. It was held in *Glenister v President of the Republic of South Africa*[90] that:

[88] Olivier L & Honiball M *International Tax, A South African Perspective* 5ed (2011) 303.
[89] Du Plessis I *A South African Perspective On Some Critical Issues Regarding the OECD Model Tax Convention On Income and Capital, With Special Emphasis On Its Application To Trusts* (unpublished PhD thesis, Stellenbosch University, 2014) 119.
[90] 2011 (3) SA 347 (CC).

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> 'An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane and failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards the other signatory state. An international agreement that has been ratified by Parliament under section 231(2) however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.'[91]

For an agreement entered in terms of section 108 of the Income Tax Act to be valid, the provisions in that agreement governing reciprocal assistance with the collection of taxes ought to comply with the laws of South Africa.

However, in the event of a conflict between the Act and a treaty, one has to determine whether the provisions of an agreement will override the provisions of the domestic laws. If one turns to South African court judgement for guidance it seems that there are at least four different views.[92]

In *AM Moola Group Ltd & Others v Commissioner for the South African Revenue Service & Others*[93] the Supreme Court of Appeal (hereinafter 'the SCA') ruled that when deciding a conflict between certain provisions of the Customs and Excise Duty Act[94] and the International Trade Agreement concluded by South Africa and Malawi, the Act must prevail.[95]

In *Commissioner for the South African Revenue Service v Tradehold Ltd* [96] which dealt with Schedule 8 of the Income Tax Act, the SCA held that a treaty modifies the domestic law and must prevail over the domestic law.[97] Academics have expressed their views on the *Tradehold* case and interpretation of treaties.

Classen poses the question of whether a treaty must take preference and its provisions and be given effect over domestic tax law.[98] Classen favours a balanced approach that takes into

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[91] 2011 (3) SA 347 (CC) para 92.

[92] Du Plessis I *A South African Perspective On Some Critical Issues Regarding the OECD Model Tax Convention On Income and Capital, With Special Emphasis On Its Application To Trusts* (unpublished PhD thesis, Stellenbosch University, 2014) 118.

[93] [2003] JOL 10840 (SCA).

[94] 91 of 1964.

[95] [2003] JOL 10840 (SCA) para 15.

[96] [2012] JOL 28890 (SCA).

[97] [2012] JOL 28890 (SCA) para 17.

[98] Classen LG 'The exit tax consequences of the migration of companies from South Africa: Commissioner for the *South African Revenue Service v Tradehold Ltd*' (2013) 25 *South African Mercantile Law Journal* 397.

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account international norms and national policies with South Africa's constitutional framework.[99] She emphasises how crucial it is to harmonise treaty interpretation with both domestic law and international law.

Du Plessis acknowledges that it has not yet been settled whether a treaty will prevail over the provisions of a domestic tax law in the event of any ambiguity or conflict.[100] He, however, supports the view expressed by the minority judgement in *Glenister*, that a tax treaty and a domestic law rank equally. Additionally, should conflict arise, it ought to be settled by the application of statutory interpretations and superseding legislation.[101] Although, Du Plessis prefers this view by the minority judgement in *Glenister*, he acknowledges that the view in *Tradehold* will possibly be preferred in future in South Africa.[102]

In *Glenister* the minority held that in the case of conflict between a treaty and domestic law 'the conflict must be resolved by the application of the principles of statutory interpretation and superseding of legislation'.[103]

The court in *Secretary for Inland Revenue v Downing*[104] was called upon to interpret a provision in a tax treaty between South Africa and Switzerland. Corbett JA held that in South Africa, a treaty is regarded as though it is enacted in domestic legislation and forms part of domestic law.[105] It can thus be submitted that there is no clear view from the Constitutional Court and the SCA regarding conflicts between international treaties and South African domestic laws.

3.8 CONCLUSION

South Africa's ability to lend or receive assistance to a foreign country in the recovery of a tax debt is dependent on the existence of an international tax agreement that makes for such provision. The agreement ought to be applied in accordance with and within the context of

[99] Classen LG 'The exit tax consequences of the migration of companies from South Africa: Commissioner for the *South African Revenue Service v Tradehold Ltd*' (2013) 25 *South African Mercantile Law Journal* 398.
[100] Du Plessis I 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) 24 *South African Mercantile Law Journal* 51.
[101] Du Plessis I 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) 24 *South African Mercantile Law Journal* 41
[102] Du Plessis I 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) 24 *South African Mercantile Law Journal* 41
[103] 2011 (3) SA 347 (CC) para 101.
[104] 1975 (4) SA 518 (A).
[105] 1975 (4) SA 518 (A) at 523A.

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section 231 of the Constitution. Section 231 provides that in order for a tax treaty to be applied as part of South African law, it must be adopted in accordance with certain formalities of the Income Tax Act. Section 108(2) of the Income Tax Act sets out the domestic procedures for the recognition of tax treaties into our law. As a result of section 108(2), a treaty will have the same standing as other domestic law provisions once it is enacted. Enactment through national legislation is the only way for a treaty to be incorporated into the domestic laws of South Africa. It can thus be submitted that there is a relationship between a treaty and the domestic laws of a country.

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CHAPTER 4

SECTION 185: ASSISTING FOREIGN GOVERNMENTS

4.1 INTRODUCTION

As aforementioned, a new global standard of cooperation in tax matters has emerged. From a tax administrative perspective in South Africa, the TAA will play an important role.[106] With effect from 1 October 2012, the TAA became law,[107] in the midst of a dire economic situation, ailing financial resources and growing public frustrations over the governments' failure to provide a better quality of life for South Africans.[108] This is an effort of enhancing SARS's tax detection and collection capabilities. Moreover, it indicates Parliament's commitment to honour South Africa's international obligations in the fight against this scourge internationally and to prevent the mischief of tax minimisation.[109] The provisions of the TAA are to be carried out in full provided they pass constitutional muster.

4.2 ANALYSIS OF SECTION 185

The purpose of the TAA as set out in the long title of the statute is 'to provide for the effective and efficient collection of tax; to provide for the alignment of the administrative provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the external practically possible; to determine the powers and duties of the South African Revenue Services and officials… .'

The TAA has strengthened SARS's arsenal powers by conferring authority on it, to provide assistance to foreign governments in accordance with an international tax treaty.[110] In order to give statutory support to measures relating to international assistance in the collection of taxes, South Africa enacted provisions in Chapter 11 Part E and F of the TAA that deal with assisting

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[106] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 21.
[107] Government Gazette 35491 of 4 July 2012.
[108] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 21.
[109] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 21.
[110] Section 185 of the TAA.

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foreign governments to recover taxes. Section 185 of the TAA which repealed section 93 of the Income Tax Act, supports the global initiative to enhance tax transparency and cooperation among countries.

Section 185 of the TAA reads as follows:

> 185. Tax recovery on behalf of foreign governments. —(1) If SARS has, in accordance with an international tax agreement, received—
>
> *(a)* a request for conservancy of an amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation or concealment of assets by the person, a senior SARS official may authorise an application for a preservation order under section 163 as if the amount were a tax payable by the person under a tax Act; or
>
> *(b)* a request for the collection from a person of an amount alleged to be due by the person under the tax laws of the other country, a senior SARS official may, by notice, call upon the person to state, within a period specified in the notice, whether or not the person admits liability for the amount or for a lesser amount.
>
> (2) A request described in subsection (1) must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating—
>
> (*a*) the amount of the tax due;
>
> (*b*) whether the liability for the amount is disputed in terms of the laws of the other country;
>
> (*c*) if the liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and
>
> (*d*) whether there is a risk of dissipation or concealment of assets by the person.
>
> (3) In any proceedings, a certificate referred to in subsection (2) is—
>
> (*a*) conclusive proof of the existence of the liability alleged; and
>
> (*b*) prima facie proof of the other statements contained therein.

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(4) If, in response to the notice issued under subsection (1) (*b*), the person—

(*a*) admits liability;

(*b*) fails to respond to the notice; or

(*c*) denies liability but a senior SARS official, based on the statements in the certificate described in subsection (2) or, if necessary, after consultation with the competent authority of the other country, is satisfied that—

(i) the liability for the amount is not disputed in terms of the laws of the other country;

(ii) although the liability for the amount is disputed in terms of the laws of the other country, such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; or

(iii) there is a risk of dissipation or concealment of assets by the person, the official may, by notice, require the person to pay the amount for which the person has admitted liability, or the amount specified, on a date specified, for transmission to the competent authority in the other country.

(5) If the person fails to comply with the notice under subsection (4), SARS may recover the amount in the certificate for transmission to the foreign authority as if it were a tax payable by the person under a tax Act.

(6) No steps taken in assistance in collection by any other country under an international tax agreement for the collection of an amount alleged to be due by a person under a tax Act, including a judgment given against a person in the other country for the amount in pursuance of the agreement, may affect the person's right to have the liability for the amount determined in the Republic in accordance with the relevant law.

The first requirement under section 185 is that there must be an agreement between South Africa and the foreign tax authority seeking to enforce the recovery of the foreign tax debt. Moreover, section 185 (1) provides that '… a senior SARS official may authorise an application for a preservation order under section 163 as if the amount were a tax payable by the person under a tax Act'. The use of the word 'may', according to Botha, is directory as

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compared to words such as 'shall' which are peremptory, with the former entailing level of discretion.[111] As there are few cases pertaining to section 185, our courts have not yet interpreted the meaning of 'may' in the context of section 185(1) of the TAA. The meaning of the term has however been considered by the Appellate Division in the context of the Patents Act[112] in *Amalgamated Packaging Industries Ltd v Hutt and Another*.[113] The Appellate Division had to determine whether the word 'may' bestowed on the Registrar of Patents a discretion to post-date a patent application or whether the Registrar was obliged to do so.[114]

In interpreting the term, the Appellate Division applied a literal approach taking the legislature's intention into consideration.[115] The Appellate Division held that the inclusion of the word 'may' by the legislature, when the word 'shall' could have been used instead, indicated that the legislature intended to give a level of discretion on the Registrar of Patents when considering the backdating of a patent application.[116] Therefore, the word 'may' as used in section 185(1) bestowed on a senior SARS official a measure of discretion to authorise an application for a preservation order.

Therefore, a senior SARS official has the option to request a preservation order under section 163 where a request for such order was received and there is a risk of dissipation or concealment of assets.

Prior to the enactment of the TAA, SARS had to apply for a preservation under the common law, as the Income Tax Act did not have a mechanism for the Commissioner to apply for a preservation under the fiscal statutes to ensure the preservation of assets where there was a concern that a taxpayer may dissipate or conceal assets and frustrates SARS's efforts to recover the tax.[117] Section 163 of the TAA now provides statutory grounds in which SARS may obtain a preservation order from the High Court to prevent the dissipation of assets. It is important to note that a preservation is not regarded as a tax collection stop, rather it is used to safeguard assets that might be recovered at a later stage.[118]

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[111] Botha C *Statutory Interpretation: An Introduction for Students* 3ed (2003) 135.
[112] 37 of 1952.
[113] 1975 (4) SA (A) 943.
[114] 1975 (4) SA 943 (A) 950.
[115] Goldswain GK 'Winds of Change' (2009) 23 *Tax Planning* 18.
[116] 1975 (4) SA 943 (A) 950.
[117] Croome BJ 'Preservation Order Assists SARS In Action' available at https://www.bericcroome.com/searc/label/preservation%20order (accessed 04 April 2023).
[118] *Commissioner for the South African Revenue Service v Africa Cash & Carry (Pty) Ltd and Others* 77 SATC 242 para 16.

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In cases where SARS seeks to rely on section 163 to assist a foreign tax authority with a preservation order, it must be certain that the preservation order is necessary for the collection of the foreign tax debt. *Krok* was the first South African case in which a foreign tax authority requested SARS to assist with an application for a preservation order in respect of a foreign tax debt under section 185.

Section 185(2) of the TAA outlines the form that the request for conservancy of collection of tax ought to occur. If the request does not meet the requirements set out, SARS is thus required to reject it and may not render the assistance sought. In the event that SARS decides to entertain such a request for assistance and the request did not meet the requirements of section 185(2), it will be open to judicial review under section 6 of the Promotion of Administrative Justice Act (hereinafter 'PAJA')[119] since it contravenes section 185(2).

Section 185(3) provides that a certificate issued by the competent authority of the other state in respect of the tax due must be treated as a conclusive proof of the existence of the liability alleged and *prima facie* proof of the other statements contained therein. This does not imply that the tax liability in question is not open to challenges in court in the relevant foreign country, but it does effectively preclude the possibility of doing so in a South African court. This means that the taxpayer in question cannot raise a defence that the tax debt is not due to the foreign taxing authority.

Section 185(4) requires the senior SARS official to consider the content of the certificate envisioned in section 185(2) and the discussions with the foreign taxing authority when determining whether to request the person in question to make payment in respect of the alleged liability.

Section 185(5) provides that, where a person fails to comply with the notice issued under section 185(4), SARS may recover the amount in the certificate for transmission to the foreign authority as if it were a tax payable by the person under a South African Tax Act.[120]

4.3 RESIDENCE AND SOURCE JURISDICTION: OVERVIEW

[119] 3 of 2000.
[120] The collection of taxes is governed by sections 169 – 176 of the TAA.

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One of the significant questions that one asks when deciding whether income is taxable in a particular country is whether a connection or *nexus* exists between the income and the country.[121] The necessary connecting factor, as laid down under the domestic law of different countries, is either the person who received the income is connected to the particular country or the activities that give rise to the income are connected to the country.[122] These factors are referred to as 'residence jurisdiction' and 'source jurisdiction' and are closely connected to principle of sovereignty, in other words, the principle that a state has sole jurisdiction over its own territory or subject. [123]

4.4 JURISDICTION TO TAX IN SOUTH AFRICA

Section 1 of the Income Tax Act sets out the definition of 'gross income' which is the starting point for determining a person's taxable income.[124] The person sought to be taxed must qualify as a 'person' who falls within the definition and meaning as defined in the Income Tax Act. The definition of 'persons' is defined in section 1 of the Income Tax Act. 'Persons' for the purpose of income tax includes the estate of a deceased person, insolvent estate, a portfolio. South African courts[125] have interpreted this to also include companies, close cooperations and other juristic persons within the meaning of the term 'person' as defined also in the Interpretation Act.[126]. In terms of the definition set out in section 1 of the Income Tax Act:

> 'Gross income, in relation to any year or period of assessment, means-
>
> i)in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
>
> ii)in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within or deemed to be within the Republic during such year or period of assessment, excluding receipts or accrual of a capital nature.'

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[121] Olivier L & Honiball M *International Tax: A South African Perspective* 5ed (2011) 9.
[122] Olivier L & Honiball M *International Tax: A South African Perspective* 5ed (2011) 9.
[123] Olivier L & Honiball M *International Tax: A South African Perspective* 5ed (2011) 10.
[124] Croome BJ, Oguttu AW, Muller E et al *Tax Law: An Introduction* 2ed (2019) 20.
[125] *Friedman NNO v Commissioner for Inland Revenue*: *In Re Phillip Frame Will Trust v Commissioner for Inland Revenue* 1991 (2) SA 340 (WLD).
[126] 33 of 1957.

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The definition of gross income in the Income Tax Act, is divided into a definition that applies to a resident income taxpayer and to non-resident income taxpayer.[127] Under a residence basis of taxation, residents are subjected to income tax in South Africa on their worldwide income. They are liable to pay income tax in South Africa on income that is earned domestically as well as any income earned outside the borders of South Africa. This implies that receipts and accruals of South African residents from their international transactions are taxable in South Africa, but subject to double tax treaty provisions.[128] In terms of a source base taxation, country's right to tax depends on whether the activities that generated the income took place within its tax borders.[129] South Africa has a hybrid income tax system that is mainly residence based and to a lesser extent source based.[130]

4.5 GENERAL INTRODUCTION OF A RESIDENCE-BASED SYSTEM

The application of any international tax agreement concluded between South Africa and another contracting government is of specific consequence in the context of residency.[131] In terms of a residence basis of taxation, the nexus between the country and the income is the person who receives the income or to whom it has accrued. This system of taxation is also currently adopted by Belgium, Canada, Germany, Italy, South Africa and the United Kingdom.[132]

However, from a domestic law perspective, not many countries possess the administrative capacity to extend their tax net to such a degree.[133] Consequently, a 'residence-minus' approach is adopted. This means that although taxpayers are subject to tax on their worldwide income certain categories of income accruing to a resident outside South Africa will not be subject to South African tax.

The justification for a residence basis of taxation lies on the notion that a resident enjoys the protection of the state. The resident should contribute to the income tax system of the country

[127] Section 1 of the Income Tax Act.
[128] Oguttu AW *International Tax Law: Offshore Tax Avoidance in South Africa* 2015 72.
[129] Oguttu AW *International Tax Law: Offshore Tax Avoidance in South Africa* 2015 71.
[130] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 191.
[131] Tax Consulting *Expatriate Tax: South African Citizens Working Abroad and Foreigners in South Africa* 2ed (2011).
[132] Olivier L & Honiball M *International Tax: A South African Perspective* 5ed (2011) 19.
[133] Olivier L & Honiball M *International Tax: A South African Perspective* 5ed (2011) 19.

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in which he/she resides, even if the income is earned outside the country.[134] Residents are aware that they have the protection of their government at their disposal whenever they are outside their country of resident and can return to the country of their residence after their wonderings The justification 'for taxing non-residents on their source income is less clear'.[135]

The residence system ensures that neutral treatment exists for residents who invest domestically and residents who invest abroad.

4.6 RESIDENCE IN SOUTH AFRICAN LAW CONTEXT

The TAA does not have a definition of the term 'resident'. The definition can be found in the Income Tax Act. 'Resident' as defined in section 1(1) of the Income Tax Act provides that any taxpayer (natural persons or juristic) who qualifies as a resident is liable to be taxed in South Africa on the taxpayer's worldwide income earned during a particular year of assessment when the person is resident. The definition of 'resident' in the Income Tax Act sets out two tests, any one of which can be used to determine if in a particular year a natural person qualifies as resident for income tax. First, consideration is given to whether the natural person is ordinarily in South Africa. If the answer is in the affirmative, then the natural person qualifies as resident for income tax purposes. Secondly, if the answer is in the negative, there is a second enquiry that may render a natural person to be resident in South Africa, namely, the physical presence test.

The physical presence test is premised on the number of days that a natural person is physically present in South Africa. It applies only to a natural person who was not at any stage during a relevant tax year of assessment ordinarily resident in South Africa. The definition of resident in section 1(a)(ii) of the Income Tax Act refers to a natural person who is not ordinarily resident in South Africa for a period or periods exceeding:

- 91 days exceeding in aggregate during the year of assessment under consideration;
- 91 days in aggregate during each of the five years of assessment preceding the year of assessment under consideration; and

[134] Olivier L & Honiball M *International Tax: A South African Perspective* 5ed (2011) 19.
[135] Olivier L & Honiball M *International Tax: A South African Perspective* 5ed (2011) 19.

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- 915 days in aggregate during the five proceeding years of assessment.

A natural person who meets the three above mentioned requirements is said to be a resident in South Africa for tax purposes for a relevant year of assessment.

4.6.1 Ordinary resident

The Income Tax Act does not define ordinary resident and our courts have interpreted the term in order to determine its meaning.

In *Levene v Inland Revenue Commissioners*[136] the court held that the term 'connotes residence in a place with some degree of continuity, apart from accidental or temporary absences'.[137] In *Cohen v Commissioners for Inland Revenue*[138] the court proposed an *obiter dictum* that a person's ordinary resident would be 'the country to which he would naturally as a matter of fact return from his wonderings, as contrasted with other lands it might be called his usual or principal residence and would be described more aptly than other countries as his real home'.[139] In *Commissioner for Inland Revenue v Kuttel*[140] Goldstone JA adopted this approach and acknowledged that, despite the fact that Kuttel continued business operations in South Africa and maintained his mode of life in the United States of America is an indication that the United States of America was his principal residence.[141]

It is noteworthy that the ordinary resident test under the definition of resident applies regardless of how many days a person spends in South Africa for a particular tax year. In other words, physical presence has no bearing on it. It is, otherwise, a state of mind. A person who is ordinarily resident in South Africa in terms of the principles set out in *Cohen* and confirmed in *Kuttel* is a resident as defined, even though he may not be in South Africa for the required number of days.[142] In terms of SARS interpretation Note 3, there are two requirements that needs to be present in order for a person to be ordinarily resident in South Africa:

- an intention of becoming ordinarily resident in a country, and
- steps indicative of this intention

[136] 1928 AC 217.
[137] 1928 AC 217.
[138] 1946 AD 174, 13 SATC 362
[139] 1946 AD 174, 13 SATC 362 at 371.
[140] 1992 (3) SA 242 (A).
[141] 1992 (3) SA 242 (A) para 22.
[142] Huxham K & Haupt P *Notes on South African Income Tax* 2007 25.

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4.6.2 Persons other than natural persons

Residence in so far as it applies to persons other than natural persons, one refers to juristic persons such as trusts, insolvent estate, companies etc. In terms of the definition of resident in the section 1 of the Income Tax Act, it stipulates that, any such person, will be regarded as resident of the Republic, if it is incorporated in South Africa, established, or formed in South Africa or has its place of effective management in South Africa.

One of the factors provided in the definition of the term resident as it applies to juristic entities is that in addition to stating that a juristic person can be resident in South Africa if it is incorporated, established here, then too it can be said to be resident in South Africa for a particular year of assessment where South Africa is its place of effective management.

4.6.3 Incorporated, established or formed in the Republic

According to section 13 of the Companies Act,[143] a company comes into existence when the founder of the company files a Memorandum of Incorporation, with the Companies and Intellectual Property Commission. The company will only be said to be a South African resident and liable to tax in South Africa on its worldwide income if all the registration requirements as set out in section 14 of the Companies Act have been complied with.

4.6.4 Place of Effective Management

The Income Tax Act does not define the term 'place of effective management' nor is there any case law that provides clear guidance on the interpretation of the term. It is, however, familiar in tax treaties as a 'tie-breaker' criterion used in determining the tax residence of an entity when it is a dual resident.[144]

The term 'place of effective management' seems to have been introduced in South Africa in response to the 1997 Katz Commission Report[145] which recommended the change of South Africa's tax system from a source-based system to a residence-base system. The report provided that:

[143] 71 of 2008.
[144] Oguttu AW *International Tax Law: Offshore Tax Avoidance in South Africa* 2015 77.
[145] Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa Fifth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (1997).

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> ‘The current definition of domestic company is a company incorporated in South Africa or a company “managed and controlled” in South Africa. The main criticism of this definition is that it has proven to be subject to relatively simple, formalistic manipulation. This concept is also out of line with the commonly used, and much more substantial, tax treaty expression of “effective management”. The Commission recommends that the concept of effective management as referred to in Article 4(3) of the OECD Model Tax Convention be used consistently to designate the tax residence of a person other than a natural person. This may perhaps be best achieved through an appropriate definition in section 1 of the Income Tax Act. Again, the change will have the benefit of employing international and, therefore, commonly understood terminology.’[146]

In an endeavour to provide clarity to the meaning of ‘place of effective management’ SARS issued Interpretation Note 6 of 2002. SARS draws a distinction between the place where:

- central management and control are carried out by the board of directors;
- executive directors or senior management execute and implement policy and strategic decisions made by the board of directors, and where they make and implement day-to-day operational management and business activities; or
- the day-to-day business activities are carried out or conducted.[147]

In 2010, the High Court in *Oceanic Trust Co Ltd NO v Commissioner for the South African Revenue Service*[148] provided some clarity on the concept ‘place of effective management’ as it is used in the Income Tax Act. The court held that a corporation’s place of effective management for income tax purposes is the place where key management and commercial decisions that are necessary for the conduct of a person’s business are ‘in substance made’. The court reached this decision by applying the United Kingdom’s decision in the *Commissioner for Her Majesty’s Revenue and Customs v Smallwood and Another*.[149]

[146] Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa Fifth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (1997) ‘basing the South African Income Tax System on the Source or Residence principle options and recommendations’ para 6.1.2.1
[147] SARS ‘Discussion Paper on Interpretation Note 6 Place of Effective Management’ 30 October 2011 3.
[148] (2012) 74 SATC 127 (WCC).
[149] [2010] EWCA Civ 778.

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The term 'resident' of the Income Tax Act was amended[150] to include an exception to the effect that:

> 'Any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the government of the Republic of South Africa and that other country of the avoidance of double taxation would not be a resident.'

Therefore, the application of the residence basis of taxation in South Africa is subject to the various double tax agreements that has signed with other states. In determining whether a person is a resident of a country, tax treaties provide a separate set of rules.

4.7 SOURCE

Tax will be imposed on residents on their worldwide income and on non-residents on income that is sourced in South Africa.[151] This is done to ensure that South African residents collectively contribute to the fiscus and that non-residents who utilise South African resources to generate income do so through contributing proportionately to the development and maintenance of those resources to the amount of their income that is sourced in South Africa.[152]

4.7.1 Gross income with respect to non-resident

There are two reasons that make the source basis of taxation relevant. First, persons who are not resident in South Africa are only subject to tax in South Africa on income that is sourced in South Africa. [153] The definition of gross income in section 1 of the Income Tax Act, which distinguishes between the basis of taxation applied to residents and that applied to non-residents, specifies that for non-residents, 'gross income in relation to a year or period of assessment is the total amount in cash or otherwise, received by or accrued to in favour of such non-resident from a source within or deemed within the Republic'. Secondly, the source basis of taxation is relevant with regards to its application in the double tax treaties that South Africa has entered into with other states.[154] DTA's make reference to the concept of permanent

[150] As amended by section 33(1) of the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003.
[151] Croome BJ, Oguttu AW, Muller E et al *Tax Law: an Introduction* 2ed (2019) 20.
[152] Croome BJ, Oguttu AW, Muller E et al *Tax Law: an Introduction* 2ed (2019) 20.
[153] Croome BJ, Oguttu AW, Muller E et al *Tax Law: an Introduction* 2ed (2019) 43.
[154] Croome BJ, Oguttu AW, Muller E et al *Tax Law: an Introduction* 2ed (2019) 43.

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establishment in order to resolve conflicts concerning the identification of the identification of the source of income.

For South African income tax purposes, the definition of 'permanent establishment' is set out in section 1 of the Income Tax Act, with reference to the definition of the concept in Article 5 of the OECD Model Convention, in terms of which a permanent establishment is defined as a 'fixed place of business through which the business of an enterprise is wholly or partly carried on'. In terms of Article 5(2) of the OECD Model Convention, this would include a place of management, a branch, a factory, a workshop and a mine, an oil or gas well, or quarry or any place of extraction of natural resource.

In *Transvaal Associated Hide and Skin Merchants v Collector of Income Tax Botswana*,[155] a South African company purchased hides from abattoirs in Botswana and processed them at a shed in Botswana in preparation for sale which was executed at the head office in Pretoria[156]. The court held that the company's occupation of a shed at an annual rental was permanent and not temporary and that it had created a permanent establishment in Botswana.[157]

In *AB LLC and BD Holdings LLC v Commissioner of the South African Revenue Service*,[158] the court had to determine whether AB LLC and BD Holdings LLC had created a permanent establishment in South Africa, and as a result thereof, were liable to tax in South Africa. The Tax Court held that a permanent establishment had been created since the company had provided consulting services in South Africa through its employees for a period exceeding 183 days.[159] According to the Tax Court, the boardroom where the services were performed constituted a fixed place of business and therefore a permanent establishment. In light of this, the income earned by the company that was attributable to permanent establishment was taxable in South Africa. [160]

The concept of permanent establishment is significant because it allows the country in which the permanent establishment is situated (the source country) the right to tax the permanent

[155] 29 SATC 97.
[156] 29 SATC 97 at 100.
[157] 29 SATC 97 at 115.
[158] [2015] ZATC 2.
[159] [2015] ZATC 2 para 40.
[160] [2015] ZATC 2 para 49.

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establishment's income notwithstanding the fact that the permanent establishment has no separate legal existence.[161]

4.7.2 The meaning of 'source'

For years of assessment commencing on 1 January 2012, the Taxation Laws Amendment Act[162] changed the rules regarding the determination of the source of income. The term 'source' is not defined in our domestic laws, and it is thus left to the courts to decide the meaning of the source of income. The definition of source has been determined in light of common law, which entails deducting the meaning of source from case law.[163] In *Rhodesia Metals Ltd (In Liquidation) v Commissioner of Taxes*,[164] the SCA held that 'source' means, not a legal concept but rather something which the practical man would regard as the real source of income and that the ascertaining of the actual source is a practical, hard matter of fact. The principle that was established in *Rhodesia* can be found in the ruling from the judgement of Watermeyer CJ:

> 'The source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income and that this originating cause is the work which the taxpayer does not earn them, the *quid pro qou* which gives in return for which he receives them. The work which he does may be a business which he carries on, on an enterprise which he undertakes, or an in activity in which he engages, and it may take the form of personal exertion, mental or physical, or it may take the form of employment of capital either by using it to earn income or by letting its use to someone else.'[165]

Lever Bros established the test to determine the source of income. First, what is the originating cause for the income that is sought to be taxed? Secondly, where did the originating cause take place.[166] These principles were also affirmed in *Boyde v Commissioner for Inland Revenue,*[167] where it was established that in determining source one has to determine the originating cause and then locate the originating cause.

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[161] Skaar AA *Permanent Establishment: Erosion of a Tax Treaty Principle* 1999 1.
[162] 24 of 2011.
[163] Croome BJ, Oguttu AW, Muller E et al *Tax Law: an Introduction* 2ed (2019) 45.
[164] 1938 AD 282.
[165] *Commissioner for Inland Revenue v Lever Brothers& Unilever Ltd* 1946 AD 441.
[166] 1946 AD 441 at 449.
[167] 1951 (3) SA 525 (A).

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4.8 CONCLUSION

This chapter provides an analysis of section 185 of the TAA which grants SARS the power to render assistance with the collection of foreign tax debt. The most important factor that can be deduced from the provision is that there must be an international tax agreement between South Africa and the contracting state. Section 185 is a reflection of South Africa's commitment to international tax cooperation. It enables SARS to collaborate with foreign tax authorities, facilitating a more efficient and coordinated approach to addressing challenges relating to cross-border taxation.

The application of any international tax agreement concluded between South Africa and another contracting government is of specific consequence in the context of residency. South Africa has a hybrid tax system which is mainly residence based. Most countries that cater for taxation in income does so on the basis of residence. They have what is called a resident-based tax regime. The essence is premised on the idea that a natural or juristic person who is resident in a particular country should contribute to the income tax system of that country so that every person earning an income from participating in an economic environment must contribute to that country's development. Gross income of a non-resident may be taxed in South Africa provided that the income was sourced in South Africa. Non-residents do not escape income tax in South Africa, they will only do so if the non-residents do not earn any income sourced from South Africa in any tax year. It is for this reason that in South Africa for purpose of income tax system we have a hybrid tax system.

South Africa has transformed in line with international best practice in which source was not the basis for income taxation but rather resident of taxation. Since South Africa has moved towards a global community where it would play an important role in the marketplace, it was thus important for South Africa to align its income tax system with of its trading parties and that of countries where South African citizens are likely to do business. Retaining a hybrid tax system is an appropriate mechanism to ensure that the tax net of South Africa is kept as broad as reasonably possible. A resident-based income tax system could result in some citizens or businesses escaping the income tax net in South Africa whilst still operating in South Africa.

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CHAPTER 5

ANALYSIS OF *BEN NEVIS* AND *KROK*

5.1 INTRODUCTION

There are few internationally reported cases pertaining to the rendering of assistance in the collection of taxes. These cases are *Ben Nevis a*nd *Krok* will be discussed broadly in this chapter. In *Ben Nevis*, South Africa called upon a foreign tax authority (the United Kingdom) to render assistance with the collection of tax debt in terms of the international tax agreement between South Africa and the United Kingdom. Furthermore, in *Krok*, SARS was called upon to render assistance with the collection of a tax debt. *Krok* illustrates the effectiveness of collaboration and cooperation among tax authorities in ensuring the successful collection of taxes.

5.2 *BEN NEVIS*

5.2.1 Facts

According to the facts of the case, Ben Nevis (Holdings) limited (hereinafter 'Ben Nevis') is a company incorporated in accordance with the laws of the British Virgin Island (hereinafter 'BVI'). The company was owed and controlled by David King- a South African resident. The sole registered shareholder (HSBCT) held shares as a trustee for the Glencoe Investment Trust (hereinafter 'GIT'), which is an offshore discretionary trust established in accordance with the laws Guernsey for a class of beneficiaries that include Mr King, his wife, and children. Following the determination of a tax appeal in October 2020, Ben Nevis was found liable for taxes amounting to R2.6 billion for the 1998 to 2000 years of assessment to SARS. SARS also claimed that during the subsistence of their investigation of Ben Nevis, assets amounting to £7.8 million were transferred to Metlika Trading Limited, a company that is also incorporated in the British Virgin Island.

SARS relied on Article 25A of the Protocol amending the DTA between the United Kingdom and South Africa, that came into force on October 2011, which deals with mutual assistance in the collection of taxes and sought assistance of Her Majesty's Revenue and Customs

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(hereinafter ‘HMRC’) to collect Ben Nevis’s outstanding debt. HMRC accordingly assisted SARS in transferring Ben Nevis’s assets.

Pursuant to this, Ben Nevis took action in the United Kingdom on the grounds that HMRC had no legal right to enforce its South African tax liability since it related to a period before the DTA between the United Kingdom and South Africa came into force, which was in 2002.[168] Additionally, Ben Nevis argued that Article 27 of the DTA, which governs the entry into force of the DTA , has the effect of precluding the retrospective application of the provision relating to mutual assistance in the collection of taxes which relate to periods prior to January 2003.[169] Essentially, Ben Nevis’s argument was that these provisions of the DTA between the UK and South Africa did not apply in respect of tax debt accrued before 2002. The United Kingdom Court of Appeal thus had to consider Ben Nevis and Metlika Trading Ltd.’s appeal against the High Court’s dismissal of their application to strike out HMRC’s claim.

Two questions concerning international tax law arose in this case. The interpretation and application of the Protocol and the abrogation of the Revenue Rule.

5.2.2 Interpretation of the Protocol

It should be noted that initially, the DTA contained provisions for the mutual exchange of information and not for mutual assistance in the recovery of tax debts.[170] Subsequently, Article 27 of the DTA which deals with Entry into Force, provided that the DTA had effect in respect of South African taxes arising on or post January 2003. The DTA was later amended by way of a Protocol on 8 November 2010 and came into force on 13 October 2011. The Protocol signed between the United Kingdom and South Africa inserted a new provision, Article 25A, providing for mutual assistance in the recovery of tax debts.

According to Article VI of the Protocol in respect to requests for assistance in recovery of taxes, the Protocol has effect for requests made after the date of entry into force of the Protocol. Article VI of the Protocol provides:

> ‘Each of the contracting States shall notify to each other, through the diplomatic channel, the completion of the procedures required by its law for the bringing into force of this Protocol. This Protocol shall enter into force on the date of the

[168] [2013] EWCA Civ 578 para 13.
[169] [2013] EWCA Civ 578 para 13.
[170] [2013] EWCA Civ 578 para 7.

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later of these notifications and shall thereupon have effect in both contracting States:

(a) In relation to Article II of this Protocol, in respect of amounts paid or credited on or after the date of the introduction in South Africa of the system of taxation at shareholder level of dividends declared;
(b) In relation to the information referred to in Article III of this Protocol, in respect of such information that is requested or exchanged on or after the date of entry into force of this Protocol;
(c) In relation to the revenue claims referred to in Article IV of this Protocol, in respect of requests for assistance made on or after the date of entry into force of this Protocol.'

The Protocol came into force by the Double Taxation Relief and International Tax Enforcement (South Africa) Order 2011.[171] Ben Nevis argued that the Protocol was subject to the provisions of the DTA which it amended. Therefore, any request for assistance relating to a tax arising between 1998 and 2002 was not covered by the DTA because it only had effect in relation to taxes arising after January 2003.

5.2.3 Interpretation of treaties

Although treaty provisions are incorporated into domestic law, there is a body of case law which has built up over the years concerning their interpretation. As a treaty is an international agreement it ought to be construed in accordance with international interpretation rules, particularly those contained in the Vienna Convention. Since the Vienna Convention is a codification of international customary law, this rule arguably holds true for all treaties and not only for countries who signed the Convention. In order for something to be regarded as a customary rule of international law, it needs to meet certain requirements. In this regard Dugard states the following:

> 'Since international law is not foreign law, courts may take judicial notice of it as if it were part of South Africa's common law. In practice, this means that courts turn to judicial decisions of international tribunals and domestic courts, both South Africa and foreign to international law treaties for guidance as to whether or not a particular rule is acceptable as a rule of customary international

[171] [2013] EWCA Civ 578 para 12.

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law on the grounds that it meets the twin application of *usus* and *opinion juris*.'[172]

The application of this rule will be considered in the specific context of treaties. Our Constitution also does not only make it clear that customary international law is a source of law in South Africa unless it is consistent with the Constitution or an Act of Parliament[173] but also that in interpreting legislation, a court must prefer interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law as per section 233 of the Constitution.

Courts will draw on the principle embodied in Article 31(1) of the Vienna Convention. Article 31(1) requires the ordinary meaning of the words to be interpreted in the context, that a 'treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose'. Additionally, in terms of Article 31(2) of the Vienna Convention, where appropriate courts may also look at agreements relating to the treaty which were made between all parties in connection with conclusion of the treaty. It is clear from this provision that any Protocols to a treaty is considered.

HMRC and SARS had argued that the rules of interpretation as set out in Article 31 and Article 32 of the Vienna Convention did not apply to either the United Kingdom-South Africa DTA or the Protocol on grounds that South Africa is not a party to the convention. The Court of Appeal rejected this contention and held that the rules of interpretation set out in Article 31 and 32 of the Vienna Convention are rules of customary international law and therefore binding on all states regardless of whether or not they are parties to that convention.[174]

5.2.4 Revenue Rule

In the High Court, HMCR and SARS had contended that the Revenue Rule had been abrogated by the treaty provisions. Consequently, it was argued that it could no longer be said that there is a public policy that prevents SARS as the competent authority from collecting tax debts due

[172] Dugard J *International Law: A South African Perspective* 3ed (2005) 52.
[173] Section 232 of the Constitution reads: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.
[174] [2013] EWCA Civ 578 para 17.

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to it and from taking enforcement action directly in the United Kingdom.[175] This argument was however rejected by the United Kingdom High Court.

The public policy objection remains contrary to all concepts of independent sovereignties when it comes to a foreign tax authority enforcing tax debts.[176] On appeal, this question was not addressed. Any enforcement action must therefore be undertaken in accordance with the reciprocal assistance provisions of the treaty.

Ben Nevis reasserts the primacy of the Vienna Convention in interpreting tax treaties and provides a systematic application of those rules.

5.2.5 Court of Appeal Judgement

The United Kingdom Court of Appeal held that Article 27 of the DTA did not limit the temporal application of the Protocol and Article 25A.[177] Furthermore, Article 25A of the Protocol read free of Article 27 was found to apply to requests for assistance in the enforcement of tax liabilities arising before the Protocol came into force.[178] The Court of Appeal referred to Article 28 of the Vienna Convention which forbids retrospectivity of treaties unless a contrary intention appears from such a treaty, but found that this was not a peremptory norm of international law. Ultimately, the intention of the parties would be the deciding factor in the retrospective application.[179] Consequently, the Court of Appeal held that there was no unfairness in its application of Article 25A of the Protocol which permitted cross-border collection of tax debts, although the debts related to years of assessment commencing before 2002 DTA came into force. Therefore, the application of Article 25A would apply to all enforcement requests made on or after the date on which the Protocol entered into force.

Yet, another argument made by Ben Nevis was that section 173 of the United Kingdom Finance Act (hereinafter 'Finance Act')[180] which gave the government power to give effect to arrangements relating to international tax enforcement, did not apply retrospectively to allow for enforcement of the DTA.[181] Ben Nevis submitted the implementation of Article 25A creates

[175] *Commissioner for Her Majesty's Revenue and Customs and Commissioners for the South African Revenue Service v Ben Nevis (Holdings) Ltd* [2012] EWHC 1807 (ch) para 51.
[176] *Commissioner for Her Majesty's Revenue and Customs and Commissioners for the South African Revenue Service v Ben Nevis (Holdings) Ltd* [2012] EWHC 1807 (ch) para 53.
[177] [2013] EWCA Civ 578 para 14.
[178] [2013] EWCA Civ 578 para 43.
[179] [2013] EWCA Civ 578 para 43.
[180] United Kingdom Finance Act, 2006.
[181] [2013] EWCA Civ 578 para 45.

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a new cause of action in respect of tax debts when previously no such cause of action existed and the abolition of an absolute defence that the taxpayer would otherwise have had. It is accepted that there is a presumption that legislation is not intended to have retrospective effect unless there are express words to the contrary. The Court of Appeal cited Justice Ward in the case *Hager v Osborne*[182] where it was held that:

> 'Changes relating to the past are objectionable only if they alter the legal nature of past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened and bases new legal consequences upon it.'[183]

The Court of Appeal held that the Revenue Rule forbidding collection of taxes assessed by a foreign tax authority was amended in the Finance Act to allow for cross-border tax enforcement. The change allowed for collection of foreign taxes arising before the amendment came into force. The Revenue Rule impeding the enforcement had been a matter for the states involved and it did not create a legitimate expectation for the taxpayer that it would not be abrogated in the future.[184]

5.3 ***KROK***

5.3.1 Facts

This case concern a dispute between Mr Hugh Krok and SARS over the interpretation and application of South Africa's international tax agreement. Mr Krok a South African resident held interest in various offshore trusts and companies. The argument centred around the taxation of income derived from the offshore entities. Whilst Mr Krok argued that the income should not be taxable, SARS contended that the income should be subject to tax in South Africa.

Mr Krok was a South African resident, thus subject to SARS's authority until he emigrated to Australia in 2002. He lived there for six years before deciding to relocate to the United Kingdom. Upon leaving South Africa, he was required under the South African exchange control regime to place certain assets under the control of a registered foreign exchange dealer.

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[182] [1992] Fam. 94.
[183] [1992] Fam. 94 at 99.
[184] Greene M 'Enforcing foreign tax debts: How far can you go?' (2013) 24 *International Tax Review* 27.

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The Australian Tax Office (hereinafter 'ATO') charged Mr Krok with tax for the number of years when he was resident in Australia on the grounds that he remained the legal and beneficial owner of assets in the blocked accounts. In 2012, the ATO requested assistance from SARS in the collection of taxes in an amount exceeding AS$25 million that arose during Mr Krok's period of residency in Australia from 2002 to 2008.

In response to the request from its Australian counterparts, SARS assisted in the collection of tax by obtaining a preservation order against Krok's assets in South Africa in terms of section 163 read together with section 185 of the TAA. SARS did this in order to prevent Krok from dissipating the assets that were subject to the order. This then provided security for payment of the Australian tax debt.

5.3.2 Issues

The main issue in this case concerned the temporal aspect of tax treaty provisions that enabled South Africa and Australian tax authorities to mutually assist each other in cross-border collection of tax debts. The form of reciprocal assistance in this regard was a request for an asset preservation order sought by SARS on behalf of ATO in relation to assessed Australian tax on Mr Krok.

In addition to this immediate issue, the judgement is noteworthy for three aspects.[185] First, it is the SCA's affirmation that the Vienna Convention provides binding norms for treaty interpretation in South Africa. Secondly, the court clarified that the nature of the Revenue Rule as a doctrine of law that is not primarily aimed to protect taxpayers. Lastly, the intersection of private international law and tax law is shown by the SCA's reasons for rejecting a claim by a third party who asserts beneficial ownership in locally situated assets that formed the subject of a preservation order.[186]

5.3.3 The Protocol

It should be noted that Australia and South Africa concluded a double tax convention in 1999 (Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion) which did not contain provision for assistance in the cross-border collection of taxes. The agreement

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[185] Hatting J 'Commentary: Krok and Another v Commissioner for the South African Revenue Service' (2015) 18 *International Tax Law Reports* 44.
[186] Hatting J 'Commentary: Krok and Another v Commissioner for the South African Revenue Service' (2015) 18 *International Tax Law Reports* 44.

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was subsequently amended by way of a Protocol. A Protocol was signed and entered into force in November 2008 inserting a new Article 25A providing for cross-border assistance. This agreement and Protocol were entered into by South Africa in accordance with section 108(2) of the Income Tax Act read with section 231(4) of the Constitution.

Article 25A provides that SARS and the ATO shall assist each other in the collection of taxes. During the time of this Protocol, South Africa did not have specific provisions for acts of conservancy to ensure that assets potentially subject to tax collection were not dissipated. Such provisions were introduced by the TAA and became effective from October 2012.

5.3.4 The tax treaty dispute

As indicated above, the tax treaty concluded by South Africa and Australia did not contain provisions that catered for cross-border assistance in the collection of taxes. The treaty was however, amended by a Protocol in 2008. The new provisions of the amended treaty which dealt with cross-border assistance were silent in respect to their temporal application, and specifically whether they applied to tax debts that had arisen prior to the signature of the Protocol in 2008.[187] It was unclear, however, whether the same temporal cut-off date applied to all amendments inserted into the 1999 tax treaty in 2008 because the Protocol itself contained a provision that governed the Protocol's coming into effect (from 1 July 2009 in regard to Australian taxes).

The SCA essentially took the approach that the wording of the provisions of the tax treaty that permitted cross-border assistance was unrestricted as to the year in which the taxes arose; the revenue claims in respect of which assistance could be requested merely referred to 'taxes of every kind and description' as per Article 2(4)(a) read with Article 25A of the 1999 tax treaty as amended in 2008.[188] Thus this provided the 'wildest latitude' for the cross-border mutual assistance clause.[189] According to the SCA, the wording in the Protocol that dealt with the coming into effect of the Protocol itself did not 'purport to form part' of the tax treaty.[190] In

[187] Hatting J 'Commentary: Krok and Another v Commissioner for the South African Revenue Service' (2015) 18 *International Tax Law Reports* 44.
[188] 2015 (6) SA 317 (SCA) para 36.
[189] 2015 (6) SA 317 (SCA) para 34.
[190] 2015 (6) SA 317 (SCA) para 35.

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other terms, this means that the provisions of the tax treaty governing cross-border assistance did not essentially include the effective date clause of the Protocol.[191]

This led to the SCA's conclusion that tax claims arising in respect of years prior to 2008 could form the subject of a request for assistance in collection lodged after 2008. In reaching this conclusion, the SCA upheld the decision of the High Court, and approved the reasoning of the United Kingdom Court of Appeal which dealt with a similar scenario in the case of *Ben Nevis.*

5.3.5 Revenue Rule

The SCA's perspective on the nature of the Revenue Rule is also a noteworthy aspect of the judgement. A broader discussion on the Revenue Rule may be found in chapter two of this paper. The SCA's perspective on the nature of the Revenue Rule has ramifications for taxpayers that perhaps has not been appreciated until this judgement.

Mr Krok contended that the Revenue Rule 'entitled South African taxpayers to arrange their affairs on its assurance that their assets were protected against foreign tax authorities'.[192] Additionally, Mr Krok contended that the Protocol was not retroactive in effect and could thus not apply to taxes which arose in the period from 2002 to 2008 to which the common law revenue applied.[193] The High Court rejected Mr Krok's argument and he therefore appealed the decision on the basis that the conflicts of the Revenue Rule applicable in customary international law, precluded SARS from assisting the ATO in the manner that it did so that the Court a quo was wrong in granting the preservation order.[194]

In order to determine whether the Revenue Rule had this effect, the SCA had to engage with the rule's nature. In this regard, the SCA cited *Taylor*, in which several theories were developed to justify the existence of the rule. As previously mentioned, in terms of the Revenue Rule, which forms part of South African law 'courts of one state are precluded in the absence of a permissive rule to the contrary, from entertaining legal proceedings involving the enforcement of the revenue laws of another state- an attribute of sovereignty'.

The SCA explained the rationale underlying the Revenue Rule as follows:

[191] Hatting J 'Commentary: Krok and Another v Commissioner for the South African Revenue Service' (2015) 18 *International Tax Law Reports* 45.
[192] 2015 (6) SA 317 (SCA) para 28.
[193] 2015 (6) SA 317 (SCA) para 18.
[194] 2015 (6) SA 317 (SCA) para 22.

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> 'This is so because international comity does not extend to the recognition of tax liabilities imposed by a state on its subjects for its own domestic management and regulation. Thus, a foreign state may not have a claim for taxes payable to its fiscus enforced in another state, as this would be tantamount to derogation of the other state's territorial supremacy.' [195]

Although the SCA's articulation of the rationale for the Revenue Rule is less persuasive, the court reached a conclusion that Mr Krok's expectations based on the Revenue Rule 'misconceives the nature of the rule which does not exist for the benefit of protection of taxpayers'.[196]

In its analysis, the SCA dismissed Krok's appeal. According to the SCA, the Revenue Rule does not prevent the application of Article 25A to taxes arising before the DTA came into effect. Furthermore, the Revenue Rule did not constitute an absolute proscription of the recognition of foreign revenue laws, rather it was merely concerned with the enforcement of taxes. It could be abrogated by a convention or treaty.[197] Therefore, it was held that once South Africa and Australia decided to enter into an international tax agreement to assist each other in the collection of taxes, the rule ceased to exist.[198]

In short, the appeal was dismissed on the acknowledgement that the Revenue Rule was abrogated by section 163 read with section 185 of the TAA and Article 25A of the DTA between Australia and South Africa. Furthermore, this decision is in line with section 232 of the Constitution.[199]

According to the SCA's decisions on the nature of the Revenue Rule, whenever two countries sign a tax treaty that permits reciprocal assistance in the collection of tax, considerations that justify the rule fall away and are no longer considered when interpreting the relevant tax treaty.[200] This is evident from the SCA's reliance on *Labuschagne v Labuschagne:*

[195] 2015 (6) SA 317 (SCA) para 26.
[196] 2015 (6) SA 317 (SCA) para 29.
[197] 2015 (6) SA 317 (SCA) para 28.
[198] 2015 (6) SA 317 (SCA) para 28.
[199] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 197.
[200] 2015 (6) SA 317 (SCA) para 29.

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Labuschagne v Minister van Justisie[201] which confirmed the existence in South African law of the maxim *cessante rationale legis, cessat ipsa lexi.*[202]

5.3.6 Conflict between private international law and tax law

The last noteworthy aspect of the judgement is the intersection of private international law and tax law. The facts of the case have highlighted the connection between the two. From the facts of the case, initially Mr Krok had divested himself of the beneficial interest in the blocked assets in favour of a British Virgin Island company. The British Virgin Island entity thus intervened in the South African court procedures claiming that it was the beneficial owner of the Mr Krok's assets situated in South Africa that were the subject of the preservation order sought by SARS on behalf of ATO. It further argued that as the beneficial owner, the preservation order could not be confirmed as it owed no tax debt to ATO. In dealing with this matter, the SCA had to consider the private international law aspect of the 2008 transaction. The SCA accepted the notion that the contracts were valid under the law of British Virgin Islands. However, in terms of South African common law, the ownership of assets situated in South Africa ought to be diced under the forum *rei sitae* which is also in accordance with English common law.[203]

South African law prescribes the procedure for transferring immovable property and as regards movable assets, whether tangible or intangible South African common law requires proper delivery of contract goods to a purchase.[204] The SCA held that the British Virgin Island entity had failed to prove obtaining beneficial ownership in the blocked accounts because there was no evidence provided of actual instruments of transfer that comply with South Africa legal requirement.[205]

Tax authorities can address aggressive tax avoidance schemes from this perspective of private international law which has an aspect of cross-border transactions.[206] Surprisingly, this approach has not often been seen much in practice, at least not in South Africa. It can be challenging for tax authorities to make an argument for application of the doctrine in cross-

[201] 1967 (2) SA 575 (A).
[202] 1967 (2) SA 575 (A) at 587.
[203] 2015 (6) SA 317 (SCA) para 42.
[204] 2015 (6) SA 317 (SCA) para 43.
[205] 2015 (6) SA 317 (SCA) para 43.
[206] Hatting J 'Commentary: Krok and Another v Commissioner for the South African Revenue Service' (2015) 18 *International Tax Law Reports* 52.

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border context since it calls for evidence of the acts of the parties who are not within easy reach.[207]

When assets are located within the jurisdiction of the tax authority, and are thus perhaps easier to investigate, the private international aspect of cross-border transaction on the other hand, is often concerned with domestic law.[208] Based on the outcome of *Krok* it is reasonable to assume that SARS will give closer scrutiny to the private international law dimension of cross-border schemes.

5.4 CONCLUSION

Ben Nevis provides a summary of the approach that the United Kingdom Courts will take when interpreting legislative provisions which are routed in DTA provisions and highlights that arguments based on strict literal provisions are likely to encounter difficulties. *Ben Nevis* sets a good example of a united front presented by tax authorities to pin down the taxpayer and ensure successful reciprocal assistance in the collection of taxes. What one learns from *Krok* is that assets held in South Africa are not safe from preservation orders where tax liabilities arise in jurisdiction with tax treaties with South Africa and these kinds of conservancy provisions exists therein since South Africa will comply with the obligations imposed on it by the DTA.

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[207] Hatting J ‘Commentary: Krok and Another v Commissioner for the South African Revenue Service’ (2015) 18 *International Tax Law Reports* 52.
[208] Hatting J ‘Commentary: Krok and Another v Commissioner for the South African Revenue Service’ (2015) 18 *International Tax Law Reports* 52.

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CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 CONCLUSION

One of the objectives of this mini thesis was to provide an analysis of SARS's powers to render assistance to a foreign country in the collection of tax debts and whether the Revenue Rule is still relevant. This chapter will therefore recapitulate the key findings as discussed in the above chapters made in relation to the research questions formulated in chapter 1.

As discussed in chapter 1 of this paper, there are three circumstances that may determine whether SARS is able to grant or receive assistance from a foreign government with the collection of taxes due: (1) the Revenue rule; (2) the Convention; and (3) the provisions of a bilateral agreement entered between South Africa and other taxing authority requesting assistance.

The Revenue Rule is a well-known principle in international tax with origins in the 18th century. Under this rule, a country will not assist in enforcement of the tax claims of another country. This notion stems from the international law principle of sovereignty which provides that a government has exclusive jurisdiction over its own territory and that a foreign government cannot interfere. A specific provision in a tax treaty under which contracting taxing authorities undertake to assist in collection of the other government's taxes may lessen the impact of the Revenue Rule. The SCA found in *Krok* that the Revenue rule does not constitute an absolute prescription of the recognition of foreign revenue laws, international tax treaties can override this rule to some extent, allowing for reciprocal assistance in the collection of taxes between countries.

The reciprocal assistance in the collection of taxes ought to be based on an international legal agreement that is in force between the requesting and the requested government. In South Africa, the government through the national executive can enter into an agreement with the government of another country for the reciprocal assistance for the collection of tax debts. According to section 231 of the Constitution, that international tax agreement must be applied in accordance with the Constitution. In certain circumstances international tax agreements may

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clash with domestic laws of a country i.e., rights of taxpayers. In South Africa, the approach to be followed in such circumstances is still unclear.

Effective international cooperation with respect to assistance in the collection of taxes requires legal instruments to enforce assistance in the collection of taxes due. There are several international legal instruments on the basis of which assistance in the collection of taxes may take place. This can either be through bilateral or multilateral tax agreement.

6.2 RECOMMENDATIONS

Cross-border tax assistance will continue to exist as long as there is still a dire need to address tax debts across the globe. As discussed in chapter 3, cross-border tax assistance in the recovery of taxes ought to be based on an international legal agreement that is in force between the requesting and the requested state. Thus, in South Africa, the existence of an international tax agreement with specific provisions for reciprocal assistance in the collection of taxes due by a taxpayer is a criterion for SARS to provide or request any assistance with the collection of a tax debt.

In the course of the application of section 185, a taxpayer may consider that SARS have infringed a fundamental right applying to the taxpayer or the international tax agreement is not in line with the TAA. According to section 8 of the Constitution, fundamental rights apply to both natural persons and juristic persons. Chapter 4 above provides a distinction between the two. Accordingly, a taxpayer is a beneficiary of fundamental rights if the taxpayer is a natural person or juristic person.[209]

The term 'taxpayer' as mentioned in section 151 of the TAA, encompasses persons who are also located outside of South Africa. Thus, SARS will exercise its TAA powers extraterritorially in respect of taxpayers located outside South Africa. An example of this can be found in *Krok*. However, it is noteworthy that the enforcement of South Africa's tax laws in foreign jurisdictions may raise legal issues. As discussed by Moosa, cross-border enforcement of the TAA raises two important questions: first, whether the TAA permits SARS to exercise, across international borders, the various powers conferred by the TAA and

[209] *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* 2013 (2) SACR 443 (CC) para 30.

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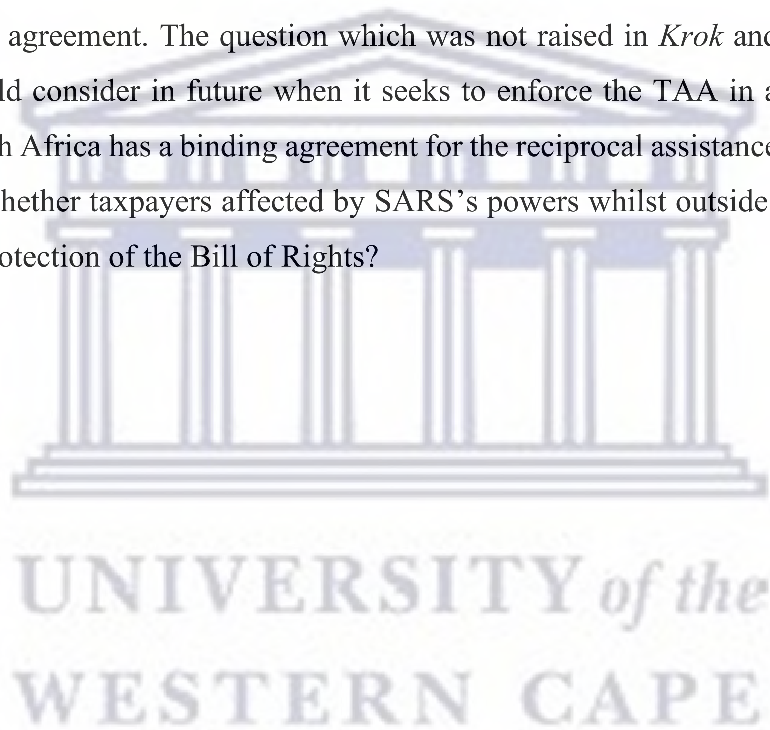
secondly, whether the Bill of Rights applies exterritorialy for the benefit of a taxpayer?[210] For purposes of this paper, these questions will not be answered and answers can be found in Moosa's LLD thesis.

It should however be noted that neither the TAA nor the Bill of Rights expressly state that their provisions apply outside South African borders. According to the international law principle of territoriality and the principle of non-intervention in the reserved domain of domestic jurisdiction, the general norm is that the TAA and SARS's powers of administration are limited to South Africa.[211] Section 185 of the TAA makes provision for SARS to exercise its TAA powers outside South Africa provided that such conduct is approved under the aegis of an international tax agreement. The question which was not raised in *Krok* and which I believe that SARS should consider in future when it seeks to enforce the TAA in a foreign country with whom South Africa has a binding agreement for the reciprocal assistance in the collection of tax debts is whether taxpayers affected by SARS's powers whilst outside South Africa are entitled to the protection of the Bill of Rights?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[210] Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of the Western Cape, 2016) 191.

[211] Jefferey RJ *The Impact of State Sovereignty on Global Trade and International Taxation* 1999 37.

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