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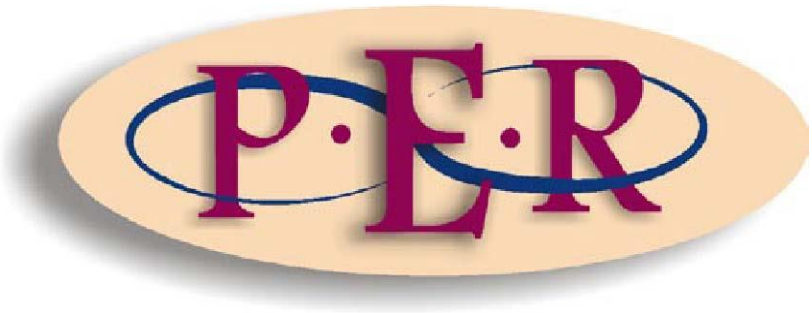

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THE INCORPORATION OF DOUBLE TAXATION AGREEMENTS INTO SOUTH AFRICAN DOMESTIC LAW

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1 Introduction

There are different opinions as to the process whereby double taxation agreements (DTAs) are incorporated into South African law. This contribution aims to discuss some of the existing opinions and to offer a further perspective on the matter.

It is important to determine the method of incorporation of DTAs, as this may influence, *inter alia*, the persons entitled to rely on the DTA, the timing of such reliance and also whether domestic legislation promulgated subsequently to the DTA and which conflicts with the DTA, will apply in preference to the DTA (a so-called treaty override).[1] Thus, examining the process of the incorporation of DTAs into South African law involves an investigation into the status of DTAs in terms of South African law.

At the heart of the debate lies the interpretation of two provisions, namely section 231 of the *Constitution of the Republic of South Africa*[2] (the *Constitution*) and section 108 of the *Income Tax Act*[3] and the interaction between the two.

Section 231 of the *Constitution* reads as follows:

> (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic

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1 Hattingh "Elimination of International Double Taxation" para 36.14.

2 *Constitution of the Republic of South Africa,* 1996.

3 *Income Tax Act* 58 of 1962.

> without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 108 of the *Income Tax Act* provides that:

> (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.
> (2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the *Gazette* and the arrangements so notified shall thereupon have effect as if enacted in this Act.

In practice, DTAs entered into by South Africa are not regarded as agreements "of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession".[4] This practice seems to be correct, since the provisions of s 108(2) of the *Income Tax Act*, which envisages parliamentary approval, indicate that DTAs are not of the kind referred to in section 231(3) of the *Constitution*. Most authors therefore agree that South Africa is bound, on an international level, after a DTA has been approved by both houses of Parliament.[5]

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4 Section 231(3) of the *Constitution*; Olivier and Honiball *International Tax* 295; Hattingh "Elimination of International Double Taxation" para 36.14.

5 Section 231(2) of the *Constitution*; Du Plessis *South African Perspective on Some Critical Issues* 112; Du Plessis 2012 *SA Merc LJ* 32; Hattingh "Elimination of International Double Taxation" para 36.14.

2 Are DTAs self-executing or not?

The real debate centres on the question of whether a further step is required in order for the DTA to become part of South African domestic law. In terms of the *Constitution*,[6] an international agreement (of which a DTA is an example) will become part of South African law only when it is enacted into law by national legislation. Thus, a second legislative step is required for the DTA to become part of domestic law.[7] However, the same section of the *Constitution* also deals with self-executing provisions of an international agreement. It provides that these provisions need not go through the second step (legislative enactment), but are law in South Africa once they have been approved by both houses of Parliament, unless the self-executing provision is inconsistent with the *Constitution* or an act of Parliament.[8]

One view holds that South Africa's DTAs are self-executing and therefore become law on approval of the DTA by Parliament in terms of section 231(2) of the *Constitution*. This view is based, *inter alia*, (a) on the opinion that self-executing provisions are, like their American counterparts, provisions that, standing alone, would be enforceable in court. It is then argued that the distributive provisions in DTAs are self-executing in this sense; (b) the point that South Africa's DTAs are not each enacted though separate legislation. In terms of this view, section 108(2) of the *Income Tax Act* cannot be regarded as proper enacting legislation, since the purpose of this provision is merely "of an administrative nature aimed to empower the tax administration to carry out treaty obligations in the context of the powers granted under the Income Tax Act".[9] According to this view, a DTA is not inconsistent with the *Income Tax Act* and therefore the second step of legislative enactment is not required. In this regard, it is acknowledged that DTAs by their nature conflict with the provisions of the *Income Tax Act*, but that they may also be consistent with the *Income Tax Act* in the sense

6 Section 231(4) of the *Constitution*.

7 See the minority judgement of Ncgobo CJ in *Glenister v President of the RSA* 2011 3 SA 347 (CC) para 92.

8 The question of whether a DTA "is inconsistent with the Constitution or an act of Parliament" (s 231(4) of the *Constitution*) is not addressed here. The focus of this paragraph falls on the question of whether a DTA can be regarded as self-executing or not.

9 Hattingh "Elimination of International Double Taxation" para 36.14.

that section 108 specifically envisages the conclusion of DTAs and that DTAs are therefore consistent with the aim of that section.[10]

Another view holds that South Africa's DTAs are not self-executing and should therefore be enacted into law by national legislation. As regards the meaning of a self-executing provision, it is accepted that this concept is controversial. Some authors argue that the incorporation of the concept of the self-executing provision in the *Constitution* is unfortunate and argue that, since there are no self-executing provisions *per se* in international agreements, the reference to self-executing provisions can be ignored.[11] If one supports this argument, the conclusion necessarily entails that a DTA cannot be self-executing. One of the counter-arguments is, of course, that a concept used in the *Constitution* cannot simply be ignored and that a meaning should be attached to it in the context of South African law.[12]

South African courts have also considered self-executing provisions in treaties, but these judicial decisions have grappled with the concept.[13] Only one case, *Goodwin v The Director-General, Department of Justice and Constitutional Development*, has pronounced on the meaning of the concept of a self-executing provision, where the court, seemingly *obiter*, quoted with approval from an American textbook, as follows:

> A treaty can be described as self-executing if its provisions are automatically, without any formal or specific act of incorporation by state authorities, part of the law of the land and enforceable by municipal courts.[14]

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10 Hattingh "Elimination of International Double Taxation" para 36.14.

11 Scholtz 2004 *SAYIL* 216.

12 Dugard *International Law* 59.

13 See, eg *President of the RSA v Quagliani, and Two Similar Cases* 2009 2 SA 466 CC; *Quagliani v President of the RSA; Van Rooyen and Brown v The President of the RSA* (T) unreported case number 959/04 of 18 April 2008; *Goodwin v The Director-General, Department of Justice and Constitutional Development* (T) unreported case number 21142/08 of 23 June 2008; and *Claassen v Minister of Justice and Development* 2010 6 SA 399 WCC.

14 *Goodwin v The Director-General, Department of Justice and Constitutional Development* (T) unreported case number 21142/08 of 23 June 2008 para 37. The court in *Quagliani v President of the RSA; Van Rooyen and Brown v President of the RSA* (T) unreported case number 959/04 of 18 April 2008 never explicitly described the meaning of a self-executing provision (Ferreira and Scholtz 2009 *CILSA* 269). In *President of the RSA v Quagliani, and Two Similar Cases* 2009 2 SA 466 CC the Constitutional Court specifically found it unnecessary to consider whether the agreement in question was self-executing. According to Botha the judgement therefore does not deal with the notion of self-executing provisions (Botha 2009 *SAYIL* 264). However, Ferreira and Scholtz are of the view that the court, by implication, found the agreement to be self-executing (Ferreira and Scholtz 2009 *CILSA* 271).

Dugard states that a treaty will be self-executing "only if the language of the treaty so indicates and existing municipal law, either common law, or statute, is adequate in the sense that it fails to place any obstacle in the way of treaty application".[15] Ferreira and Scholtz prefer Dugard's approach, because it proposes that domestic law, and not the treaty, should be the starting point of the enquiry. They suggest that a South African court should first establish the extent to which domestic law permits the application of the provisions of the treaty and only subsequently decide whether the specific treaty should be declared to be self-executing.[16] The position in the United States of America (which is the source of the above definition) differs from that in South Africa because in the United States of America all treaties are self-executing by nature. However, in exceptional circumstances, provisions in American treaties require enactment in legislation. Whether or not these circumstances arise is determined by domestic legislation.[17] South Africa, on the other hand, clearly requires enactment into domestic law (the second step, described above) for a treaty to become binding on subjects of the state. The treaty itself can therefore not determine its self-executing status, since it is domestic law that determines its enforceability by subjects of the state.[18]

If one assumes that the reference to self-executing provisions in the *Constitution* cannot be ignored, those provisions require interpretation in order to determine whether a DTA can be regarded as self-executing. Only the definition cited in *Goodwin* (quoted above) has been approved (*obiter)* by a South African court and it is submitted that this definition must therefore be used as the basis for attaching a meaning to the concept. However, as indicated above, the first inquiry should be whether domestic law allows for the application of the provisions of the treaty. The provisions of the treaty itself are only considered thereafter. Applying this interpretation to DTAs, one therefore has to determine whether domestic law, that is, the *Income Tax Act* (and

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15 Dugard *International Law* 57.

16 Ferreira and Scholtz 2009 *CILSA* 269. Also see Swanepoel 2013 http://www.litnet.co.za/Article/aantekening-die-plek-en-gesag-van-internasionale-reg-in-die-suid-afrikaanse-plaaslike-reg- 71, who argues that if domestic law permits the application of the provisions of the treaty, it follows reasonably easily that the treaty should be regarded as self-executing.

17 Scholtz 2004 *SAYIL* 211.

18 Section 231(4) of the *Constitution*; Ferreira and Scholtz 2009 *CILSA* 270.

not the relevant DTA), allows for the application of the provisions of the DTA. At least two reasons may be advanced why the *Income Tax Act* does not allow for the application of the DTA without a further legislative act. First, section 108(2) of the *Income Tax Act* requires that notification by publication in the Government Gazette takes place and only once this has happened, will the DTA become part of the *Income Tax Act*. The *Income Tax Act* therefore places an obstacle (to use Dugard's words), namely, publication in the Government Gazette, in the way of the application of a DTA. Second, the very nature of a DTA is that it conflicts with the *Income Tax Act*. The *Income Tax Act* imposes a liability to income tax and, if applicable, the DTA may provide relief from that liability. The DTA cannot, therefore, apply automatically. A further legislative step is needed to indicate the relationship between the DTA and the *Income Tax Act*. Section 108(2) of the *Income Tax Act* fulfils this function by stating that the DTA, when published in the Government Gazette, shall have effect as if enacted in the Act.

3 Section 108(2) of the *Income Tax Act*

As was argued above, if a DTA is not self-executing, it can only become part of domestic law if it is enacted into law by national legislation.[19]

According to Dugard there are three methods by which treaties can be transformed into domestic law. First, the provisions of a treaty may be set out in an Act of Parliament. Second, the treaty may be included in an Act as a schedule thereto, or third, "an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the *Government Gazette*".[20] In the case of DTAs, the first two methods mentioned by Dugard are not followed. It is submitted, however, that the third method is used through section 108(2) of the *Income Tax Act*. This sub-section, which provides that the DTA shall be notified by publication in the Government Gazette and the DTA shall thereupon have effect as if enacted in the *Income Tax Act*, enables the DTA to be

19 Section 231(4) of the *Constitution*.

20 Dugard *International Law* 55 cited with approval in the minority judgement of Ngcobo CJ in *Glenister v President of the RSA* 2011 3 SA 347 (CC) para 55. See also *Commissioner for the South African Revenue Service v Van Kets* 2012 3 SA 399 (WCC) para 18.

incorporated into South African domestic law by means of publication in the Government Gazette.

Some support for this argument may be found in a number of recent decisions that touched on the matter. In *Commissioner for the South African Revenue Service v Van Kets* the Western Cape High Court considered the DTA between South Africa and Australia. It was held that

> ... the [Income Tax Act] has chosen one of the three principal methods to transform treaties into municipal law; in this case an enabling Act of Parliament which gives the executive the power to bring a treaty into effect in municipal law by means of a proclamation or notice in the Government Gazette.[21]

In *Commissioner for the South African Revenue Service v Tradehold Ltd*, the Supreme Court of Appeal, in examining the DTA between South Africa and Luxembourg, referred to section 108 of the *Income Tax Act*, calling it "enabling legislation".[22] Although the court did not address the point directly, it was arguably confirmed that section 108 serves as the national legislation that is required to domesticate the DTA entered into by the national executive and approved by Parliament.[23]

The latest decision to consider the process of incorporating DTAs into South African law is *Krok v The Commissioner for the South African Revenue Service*.[24] Again, the DTA between South Africa and Australia (as well as a later Protocol entered into between the two states) was in issue. The court stated that the DTA and Protocol were concluded in terms of s 108(2) of the *Income Tax Act* read with s 231(4) of the *Constitution*. The court further stated:

> Thus, they became part of South African law as they were approved by the legislature under these provisions and duly gazetted.[25]

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21 *Commissioner for the South African Revenue Service v Van Kets* 2012 3 SA 399 (WCC) para 18.

22 *Commissioner for the South African Revenue Service v Tradehold Ltd* 2012 3 All SA 15 (SCA) para 15.

23 Du Plessis *South African Perspective on Some Critical Issues* 117; Du Plessis 2012 *SA Merc LJ* 38.

24 *Krok v The Commissioner for the South African Revenue Service* (SCA) unreported case numbers 20230/2014 and 20232/2014 of 15 August 2015.

25 *Krok v The Commissioner for the South African Revenue Service* (SCA) unreported case numbers 20230/2014 and 20232/2014 of 15 August 2015 para 24.

Clearly, the court in *Krok* viewed publication in the Government Gazette as a requirement for the DTA to become "part of South African law". If the agreement had been self-executing, publication in the Government Gazette would have been unneccesary and it would have been part of South African domestic law automatically on approval by Parliament. By implication, the court in *Krok* therefore found that the DTA and Protocol are not self-executing. The only way in which the DTA could then become part of South African domestic law was by enactment into law via national legislation, such as section 108 of the *Income Tax Act*.

4 Treaty override?

Whether or not DTAs are regarded as self-executing, the status of a DTA[26] in relation to the *Income Tax Act* still has to be determined. In other words, once the DTA forms part of South African domestic law, does it rank higher, lower or on a par with the *Income Tax Act*? This question is of particular importance in the case of a conflict between the *Income Tax Act* and the DTA. If provisions are inserted into the *Income Tax Act* after a DTA has been entered into and these provisions of the *Income Tax Act* conflict with South Africa's obligations in terms of the DTA, will the *Income Tax Act* "override" the DTA? Again, there are divergent views on the topic.

One view holds that DTAs take precedence over the *Income Tax Act*. This view is based on the opinion that treaty obligations have the same force as the *Constitution*, that is, they occupy the highest possible level.[27] According to this view, the DTA will, consequently, take precedence over the *Income Tax Act* and a court will apply the DTA in preference to the *Income Tax Act*. However, the Constitutional Court in *Glenister* stated that:

> It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.[28]

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26 Assuming that it has been incorporated into South African domestic law.
27 Hattingh "Elimination of International Double Taxation" para 36.14.
28 *Glenister v President of the RSA* 2011 3 SA 347 (CC) para 181.

In the light of the *Glenister* judgement, the view that DTAs create rights and obligations on a par with the *Constitution* cannot be supported.

In a previous contribution the present author examined South African case law on this point and reached the following conclusion:

> [I]t is submitted that three views may be distinguished:
> - The view expounded in *AM Moolla*, namely, that the treaty forms part of the relevant Act and, in the case of conflict between the general provisions of the relevant Act and particular provisions of the treaty, the Act must prevail. However, the treaty must be construed in such a way as to avoid any conflict between the Act and the terms of the treaty. In *AM Moolla* the Court found, on the facts, that the Act gave content to the expressions used in the treaty, with the result that no conflict arose between the Act and the treaty.
> - The Supreme Court of Appeal in *Tradehold* was of the view that a double taxation treaty modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.
> - In *Glenister* both the minority and the majority judgments indicated that ordinary domestic statutory obligations are created once a treaty is domesticated via legislation. The minority was of the view that if there is a conflict between a domesticated international agreement and other domestic legislation, the conflict must be resolved by the application of the principles of statutory interpretation and superseding legislation. The judgment in *Van Kets* seems to follow the minority judgment in *Glenister* to the extent that the Court in *Van Kets* found the provisions of a double taxation treaty to rank at least on a par with domestic law and that the provisions of the Act and the double taxation treaty should, therefore, be "reconciled and read as one coherent whole".[29]

Although the present author expressed a preference for the view of the minority in *Glenister* and suggested the principles of interpretation that should be followed to resolve the conflict, it was acknowledged that in future courts would probably follow the view in *Tradehold* in relation to DTAs.

Other academic contributions have expressed contrasting views. Marais[30] opines that a DTA will prevail (although it is not guaranteed) over domestic law as a result of the domestic interpretation rules. He argues that although treaty override seems

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29 Du Plessis 2012 *SA Merc LJ* 40. Costa and Stack also acknowledge the conflict between the *Tradehold* and *AM Moola* decisions, but fail to mention the third alternative, namely the approach of the Constitutional Court in *Glenister* (Costa and Stack 2014 *JEF* 272).

30 Marais 2014 *BFIT* 608. For this statement Marais relies on *AM Moola Group Ltd v Commissioner for the South African Revenue Service* 65 SATC 414. Yet this case does not support Marais's point, since the court found at para 15 that in the event of a conflict between the relevant act and a provision in the trade treaty (in that case), the relevant act must prevail. Marais makes no mention of *Commissioner for the South African Revenue Service v Tradehold Ltd* 2012 3 All SA 15 (SCA).

extremely unlikely, it should not be entirely discounted and that if a domestic provision is "so pertinent that a conciliatory interpretation is not possible", treaty override can take place.[31] For this view he relies on section 232 of the *Constitution*, which provides that customary international law is law in South Africa unless it is inconsistent with the *Constitution* or an Act of Parliament. Marais does not explain how section 232 of the *Constitution* makes treaty override possible. If Marais meant that a provision of the *Income Tax Act* could override a treaty because customary international law is law in South Africa only to the extent that it is consistent with the *Income Tax Act* (the relevant domestic law), the argument is easily dismissed. Since treaties (such as DTAs) are not customary international law, they cannot be law in South Africa in terms of section 232 of the *Constitution*. But perhaps Marais's argument could be along the following lines (although he does not express it in this way): if one assumes that article 31 of the *Vienna Convention on the Law of Treaties* (the *Vienna Convention*),[32] which deals with the interpretation of treaties, is customary international law and therefore law in South Africa, South Africa's DTAs will have to be interpreted in accordance with that article.[33] Article 31 of the *Vienna Convention* requires states to interpret DTAs in

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31 Marais 2014 *BFIT* 608.

32 *Vienna Convention on the Law of Treaties* (1969). Art 31 reads as follows:
"*General rule of interpretation*
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

33 South Africa is not a party to the *Vienna Convention*. In *Harksen v President of the RSA* 2000 2 SA 825 (CC) the Constitutional Court stated that the extent to which the *Vienna Convention* reflects customary international law is by no means settled. However, in *Glenister v President of the RSA* 2011 3 SA 347 (CC) the Constitutional Court at para 187 and fn 43 relied on a 31(3)(b) of the *Vienna Convention*, adding weight to the view that the *Vienna Convention* forms part of South African law. See Du Plessis *South African Perspective on Some Critical Issues* 98 for a more detailed discussion of the views regarding the status of the *Vienna Convention* in South African law. However, in *Krok v The Commissioner for the South African Revenue Service* (SCA) unreported

such a way that double taxation is avoided.[34] It may be argued that if the *Income Tax Act* imposes tax in a situation where exclusive taxing rights are awarded to the other state with which South Africa has entered into a DTA, the application of the relevant provisions of the *Income Tax Act* may be viewed as a form of double taxation.[35] Marais's argument might then be that this rule of interpretation (which is assumed to be customary international law) may not be applied in such a way, because its application is in conflict with the provisions of domestic legislation (the *Income Tax Act*).

However, article 31 of the *Vienna Convention*, which obliges South Africa to interpret DTAs in a way that avoids double taxation, does not conflict with the provisions of the *Income Tax Act*. DTAs should therefore be interpreted in keeping with article 31 of the *Vienna Convention* (assuming it is customary international law). If the result of such an interpretation is that the *Income Tax Act* imposes tax in conflict with the DTA, it is submitted that the approach of the minority in *Glenister* should, ideally, be used to resolve the conflict, a point to which I shall return.

Therefore, although Marais's conclusion that treaty override is possible in terms of the *Constitution* is correct,[36] his reason cannot be supported. It is submitted that treaty override is possible because of the provisions of the *Constitution* and the way in which these provisions have been interpreted by the Constitutional Court, namely that ordinary domestic obligations are created when an international agreement is domesticated. It is further submitted that section 108(2) of the *Income Tax Act*, which provides that a gazetted DTA shall have effect as if enacted in the *Income Tax Act*, conforms to the *Constitution* in this regard.

On the other hand, Costa and Stack[37] contend that interpreting South African law as overriding DTAs would be unconstitutional. Yet they do not provide any reason for this

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case numbers 20230/2014 and 20232/2014 of 15 August 2015 para 27, the court stated that aa 31 and 32 of the *Vienna Convention* are customary international law and binding on South Africa.

34 OECD *Tax Treaty Override* 9.

35 Oguttu 2009 *CILSA* 111.

36 In fact, that treaty override is possible was spelt out by Ncobo CJ in his minority judgement in *Glenister v President of the RSA* 2011 3 SA 347 (CC) paras 100-101.

37 Costa and Stack 2014 *JEF* 274.

view. Instead, their arguments are based on an interpretation of section 108 of the *Income Tax Act*. They argue that it would not make sense to interpret section 108 of the *Income Tax Act* in such a way that taxation will not be eliminated in the case of conflict between the provisions of the *Income Tax Act* and a DTA. In their view, section 108 would become meaningless if such an interpretation were to be followed.[38] However, it is submitted that it is not the interpretation of section 108 that is relevant, but rather the interpretation of the relevant section of the *Income Tax Act* that imposes the tax and the provisions of the DTA.[39]

Costa and Stack furthermore argue that a conflict between the provisions of the *Income Tax Act* and those of a DTA results in an ambiguity to which the *contra fiscum* principle should be applied. They also argue that the principle that the same amount should not be taxed twice in the hands of the same person (the rule against "double taxation"), should apply. The result of these arguments is that DTAs should be given precedence over the provisions of the *Income Tax Act*.[40] It is submitted that these arguments cannot be supported. A conflict between the provisions of the *Income Tax Act* and a DTA does not result in an ambiguity (to which the *contra fiscum* principle would apply). Rather, the principles dealing with conflicting provisions should be applied to such a situation.[41] Furthermore, the rule against double taxation is not applicable in these circumstances, as it is not the In*come Tax Act* that imposes tax twice on the same taxpayer. The *Income Tax Act* imposes tax only once. Double taxation results from tax imposed by another state on the same income to which the *Income Tax Act* applies. The DTA provides relief from this double taxation under certain circumstances. Whether this relief is applicable, given the conflicting provisions

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38 Costa and Stack suggest throughout their contribution that the intention of the legislator must be sought when interpreting legislation (and, according to them, a DTA). Numerous court cases have moved away from this approach to a more purposive one. See eg *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA; *Krok v The Commissioner for the South African Revenue Service* (SCA) unreported case numbers 20230/2014 and 20232/2014 of 15 August 2015.

39 As pointed out by Olivier and Honiball the wording of s 108(1) does imply that the aim of DTAs is to prevent double taxation (Olivier and Honiball *International Tax* 305). That the aim of DTAs is to avoid double taxation is, of course, common knowledge and should, as set out above, be taken into account when interpreting DTAs.

40 Costa and Stack 2014 *JEF* 276.

41 See Du Plessis 2012 *SA Merc LJ* 40 for the interpretation principles that will be involved in the case of a conflict between a DTA and the *Income Tax Act*.

of the *Income Tax Act*, is in issue. Consequently, there is no question of double taxation imposed by the *Income Tax Act* under these circumstances.[42]

It is submitted that the status of DTAs in South Africa is determined by the *Constitution*. It is furthermore submitted that the *Constitution* allows for the possibility that South Africa's DTAs may be overridden by subsequent legislation (for example, by amendments to the *Income Tax Act*).[43] Whether an override will take place in a specific case should, it is submitted, be determined by the application of the principles of statutory interpretation which apply in the case of conflict. Although these submissions find support in the minority judgement in *Glenister*, both the *AM Moolla* and the *Tradehold* decisions express contrary views (as set out above). It is hoped that the South African courts will provide clarity on this matter in due course.

5 Conclusion

It is important to determine the method by which DTAs are incorporated into South African law. For example, if DTAs are self-executing, taxpayers and the relevant revenue authorities will be able to rely on the relevant DTA as soon as it has been approved by both houses of Parliament and they would not have to wait for its enactment into law by national legislation. It is acknowledged that the meaning of the concept "self-executing provision" is problematic. However, it is submitted that the definition quoted in the *Goodwin* decision should be used as a basis to attach a meaning to the concept at this stage, but that the first enquiry should be whether the *Income Tax Act* allows the application of the DTA. Two reasons were advanced why this is not so. Consequently, DTAs cannot be regarded as self-executing. Rather, DTAs are incorporated into South African law through section 108(2) of the *Income Tax Act*. This sub-section empowers the executive to bring the DTA into effect by publication

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42 As stated above, the purposes of the DTA, namely to avoid double taxation, should be taken into account when interpreting the DTA.

43 Should treaty override take place, South Africa will be in breach of its duties in terms of international law. It has also been observed that the South African government has not enacted legislation intended to override a DTA (Hattingh "Elimination of International Double Taxation" para 36.14). Since the South African *Constitution* does not exclude the possibility of a treaty override, the legislature should consider carefully whether or not to exercise this power (see OECD *Tax Treaty Override* para 17).

in the Government Gazette. Support for this argument may be found in the recent decisions in *Van Kets, Krok* and, arguably, *Tradehold*.

There are different views regarding the status of DTAs in relation to the *Income Tax Act*. The courts have been inconsistent in their treatment of the matter, handing down conflicting decisions. It is submitted that the provisions of the *Constitution* should establish the status of South Africa's DTAs. Hence it is submitted that (a) South Africa's DTAs do not attain a status on the same level as the *Constitution*; (b) treaty override is possible in terms of the provisions of the *Constitution*; and (c) the preferred method of resolving a conflict between a DTA and subsequent provisions of the *Income Tax Act* is to follow the usual principles of statutory interpretation (although this was not the method suggested by the court in *Tradehold*).

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LIST OF ABBREVIATIONS

BFIT	Bulletin for International Taxation
CILSA	Comparative and International Law Journal of Southern Africa
DTA	Double Taxation Agreement
JEF	Journal of Economic and Financial Sciences
OECD	Organisation for Economic Co-operation and Development
SA Merc LJ	South African Mercantile Law Journal
SAYIL	South African Yearbook of International Law

THE INCORPORATION OF DOUBLE TAXATION AGREEMENTS INTO SOUTH AFRICAN DOMESTIC LAW

I du Plessis*

SUMMARY

There are different opinions as to the process whereby double taxation agreements (DTAs) are incorporated into South African law. This contribution aims to discuss some of the existing opinions and to offer a further perspective on the matter. At the heart of the debate lies the interpretation of two provisions, namely section 231 of the *Constitution of the Republic of South Africa* and section 108 of the *Income Tax Act* and the interaction between the two. This contribution argues that South Africa's DTAs are not self-executing (a term referred to in section 231(4) of the *Constitution*) and should therefore be enacted into law by national legislation. It is furthermore argued that section 108(2) of the *Income Tax Act* enables a DTA to be incorporated into South African domestic law, by means of publication in the Government Gazette. An analysis of the case law supports this argument. Whether or not DTAs are regarded as self-executing, the status of a DTA in relation to the *Income Tax Act* still has to be determined. In other words, once the DTA forms part of South African domestic law, does it rank higher, lower or on a par with the *Income Tax Act*? It is submitted that the status of DTAs in South Africa is determined by the *Constitution*. It is furthermore submitted that South Africa's DTAs do not attain a status on the same level as the *Constitution* and that the *Constitution* allows for the possibility that South Africa's DTAs may be overridden by subsequent legislation (for example, by amendments to the *Income Tax Act*). Whether or not an override will take place in a specific case should, it is submitted, be determined by the application of the principles of statutory interpretation which apply in the case of conflict. Although this latter submission finds support in the minority judgement in *Glenister*, both the *AM Moolla* and *Tradehold* decisions express contrary views. The hope is expressed that the South African courts will provide clarity on this matter in due course.

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KEYWORDS: double taxation agreement; income tax; self-executing; taxation; treaty; treaty override.