Some Thoughts on the Interpretation of Tax Treaties in South Africa

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1 Introduction

South Africa is a party to approximately 70 bilateral treaties for the prevention of double taxation on different types of income.1 Most of South Africa’s treaties are based in some way on the Model Tax Convention drafted by the Organisation for Economic Co-operation and Development (OECD MTC). The OECD MTC is by far the most influential of the model tax conventions and is used widely, not only by OECD members, but also by non-OECD members (such as South Africa). It is important to note, though, that the OECD MTC is not an international treaty that is binding on its members.2 As a model tax convention, it is used by countries as a basis from which to negotiate tax treaties.3 Thus, although an actual treaty between two countries (eg, South Africa and another country) may not be worded exactly like the OECD MTC, many of the terms used in the actual treaty may adopt the wording of the model or contain its wording with some adjustments. The OECD MTC is updated every two to three years,4 and is accompanied by commentary drafted by the OECD.5

In a number of fairly recent decisions, the South African courts have been called upon to apply some of the tax treaties entered into by South Africa with a view to establishing a taxpayer’s liability to tax in South Africa. The purpose of this article is to examine some of these decisions and to glean some thoughts on the approach taken by South African courts to the interpretation of tax treaties entered into by South Africa. In order to achieve this, the status of tax treaties in South Africa will be discussed and recent decisions regarding such status will be considered. Some general comments

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3 Ibid.
4 David A Ward et al The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries of the OECD Model (2005) at 7–8. The latest update was adopted by the OECD Council in July 2010.
regarding the interpretation of tax treaties will follow and provide the required background for a discussion of the South African decisions on the interpretation of treaties.

2 Status of Tax Treaties in South African Law

Any tax treaty has a dual nature: first, it is an international agreement entered into between two states (i.e., a bilateral agreement) and, second, it becomes part of domestic law. This second aspect of a tax treaty’s nature will be relevant to this part of the research. There are different procedures by which double tax treaties form part of domestic law in each state. In some states, the treaty automatically becomes part of domestic law when it takes effect. In other states, the treaty becomes part of domestic law upon parliamentary approval, whilst in still others, legislation is needed to make the treaty part of domestic law. In some countries, once the treaty becomes part of the domestic law, it has no status higher than any other law. If there is a conflict between the provisions of a tax treaty and the domestic income tax legislation, the question that arises is how the conflict should be resolved. In countries where a treaty has a status higher than domestic legislation, a conflict is resolved by the treaty’s higher status.

The Constitution of the Republic of South Africa, 1996 (‘the Constitution’), provides that 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. Furthermore, any international agreement becomes law in the Republic when it is enacted into law by national legislation. In other words, in order to be bound on an international level, South Africa requires parliamentary approval for a double taxation agreement. Thereafter,

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6 Baker op cit note 2 in par E.02.
7 Idem in par F.01.
8 Idem in par F.03.
9 Section 231(2) of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).
and in order for it to form part of South African domestic law, enactment by national legislation is required.\(^{11}\)

There are three methods available to Parliament by which a treaty may be incorporated in domestic law. One of these is an enabling Act of Parliament which gives the executive the power to domesticate the treaty by means of proclamation or notice in the *Government Gazette*.\(^{12}\) The Income Tax Act (the Act) provides that the National Executive may enter into double taxation agreements with other countries.\(^{13}\) It further provides that once Parliament has approved the relevant agreement, the agreement must be published in the *Gazette*, whereupon the agreement shall have effect as if enacted in the Act.\(^{14}\) The Act therefore constitutes the national legislation, required by the Constitution, by which the double tax agreement becomes part of domestic law.

Once a treaty has been domesticated via legislation, ordinary domestic statutory obligations are created.\(^{15}\) The minority judgment in *Glenister v President of the Republic of South Africa* stated the position more emphatically and suggested what would happen when a conflict arises:

> ‘It is implicit, if not explicit, from the scheme of s 231 that an international agreement that becomes law in our country enjoys the same status as any other legislation. This is so because it is enacted into law by national legislation, and can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates its intent that the enacting legislation should have such status. . . . The amicus therefore properly accepted that, upon incorporation under s 231(4), an international agreement assumes the status of ordinary legislation in our law. In addition, the amicus also accepted, quite properly, that, if there is a conflict between an international agreement that has been incorporated into our law and another piece of legislation, that conflict must be resolved by the application of the principles relating to statutory interpretation and superseding of legislation.’\(^{16}\)

In a footnote, the minority suggested that subsequent legislation which conflicts with the legislation domesticking the international agreement would supersede the domesticking legislation (in the absence of a provision in the domesticating legislation that it would prevail over subsequent legislation).

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\(^{11}\) Hattingh ‘Elimination of International Double Taxation’ op cit note 10 in par 36.14 is of the view that enactment by national legislation is not required. He reasons as follows: South Africa’s double taxation treaties must be approved by Parliament in terms of s 231(2) of the Constitution, a double taxation treaty not being an agreement of a technical, administrative or executive nature or an agreement which does not require either ratification or accession (as envisaged in s 231(3) of the Constitution). Yet South Africa’s double taxation treaties are self-executing and therefore do not require national legislation in order to become law in South Africa. The purpose of s 108 is to empower the tax administration to carry out treaty obligations in the context of the powers granted under the Act. Section 108 of the Act is not proper enacting legislation. Hattingh’s argument is based on the fact that, unlike the United Kingdom, South Africa does not pass separate legislation for each treaty that it concludes.


\(^{13}\) Section 108(1).

\(^{14}\) Section 108(2).

\(^{15}\) Per Moseneke DCJ and Cameron J, delivering the majority judgment in *Glenister v President of the Republic of South Africa* supra note 12 in par 181.

\(^{16}\) Idem in pars 100–1.
However, since the matter was not before the Court, it explicitly chose not to express a firm view on the matter.\(^\text{17}\)

The conclusion that may be drawn from the above is that, according to both judgments in *Glenister*, a treaty, once it is domesticated via legislation, has the same status as other legislation. In the case of tax treaties, this would imply that a double tax treaty which is domesticated via s 108 of the Act enjoys status no higher than that of any other provision of the Act.\(^\text{18}\)

In *A M Moolla Group Ltd and Others v Commissioner, South African Revenue Service and Others*\(^\text{19}\) the Supreme Court of Appeal had to interpret a provision in a trade treaty between South Africa and Malawi for the reduction of certain customs duties. The Court relied on the provisions of the Customs and Excise Act,\(^\text{20}\) which provides for the domestication of certain treaties, to conclude that the relevant treaty formed part of that act. The Court’s interpretation of the provisions of the treaty was based entirely on the fact that the treaty formed part of the Customs and Excise Act. The Court held that if there were to be an apparent conflict between general provisions of the Customs and Excise 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, and on the facts the Court found 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 *Moolla* judgment appears to conflict with the minority judgment in *Glenister* in so far as the *Moolla* case suggests that the provisions of the Customs and Excise Act prevail over a treaty which forms part of the Act, whilst the minority judgment in *Glenister* clearly indicates that the normal principles of statutory interpretation must be followed to resolve the conflict.

The status of tax treaties was recently pronounced on in *Commissioner, South African Revenue Service v Van Kets*.\(^\text{21}\) In this case the Australian Tax Office (ATO) requested SARS to provide certain information in terms of the double tax agreement between South Africa and Australia. The information related to an Australian resident, Saville, and his links with a non-resident company known as RLCF. The relevant information was held by Van Kets, and SARS attempted to use ss 74A and 74B of the Act to obtain information regarding Saville and RLCF from Van Kets. These sections enable SARS, ‘for the purposes of the administration of the Act in relation to any taxpayer’, to

\(^{17}\) Idem in footnote 88.

\(^{18}\) Brincker op cit note 10 in par 12.2; Olivier & Honiball op cit note 1 at 303; *Commissioner, South African Revenue Service v Van Kets* supra note 12 in par 25. For a contrary view, see Hattingh ‘Elimination of International Double Taxation’ op cit note 10 in par 36.14, who argues that ‘the Constitution places South Africa’s commitments under international tax treaties, once approved by Parliament, at a level superior to ordinary parliamentary legislation (such as the Income Tax Act)’.

\(^{20}\) Sections 1 (definition of ‘the Act’) and 49(1)(a) of the Customs and Excise Act 91 of 1964.

procure information from such taxpayer or any other person. Van Kets argued that since neither Saville nor RLCF were ‘taxpayers’, as defined, SARS could not rely on the relevant sections in the Act to obtain the information from him. A ‘taxpayer’ is defined, inter alia, as any person chargeable with any tax under the Act.\(^{22}\) Since Van Kets was not chargeable with tax, but merely held information, he could not be regarded as a taxpayer. SARS argued that these sections of the Act were the means by which it invoked the power to obtain information requested by foreign revenue authorities in terms of double tax agreements. If Van Kets’s argument were to succeed, SARS argued, it would not have any legislative mechanism to obtain the information, available in South Africa, which it was obliged to provide to the foreign tax authorities, unless the information related to a ‘taxpayer’.

Article 25 of the South Africa-Australia double tax agreement provides, inter alia, as follows:

‘(1) The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic law concerning taxes referred to in Article 2, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.’

It continues:

‘(3) In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

\((a)\) to carry out administrative measures at variance with the law and administrative practice of that or of the other Contracting State;

\((b)\) to supply information which is not obtainable by the competent authority under the law or in the normal course of the administration of that or of the other Contracting State;’

The Court cited s 108 of the Act and referred to the dates and Gazettes by which the relevant treaty came into force and was amended, respectively. The Court further referred to ss 231(2) to (4) of the Constitution and the majority judgment in Glenister, concluding that ‘[t]he effect of s 108 is thus to ensure that domestic statutory obligations are created’. Moreover, the Court found, on the basis of these sections in the Constitution and the guidance of the Constitutional Court in Glenister, that the Act was an enabling act, giving the executive the power to bring a treaty into effect in South African law by means of a notice in the Government Gazette.\(^{23}\) After referring to a textbook,\(^{24}\) the Court found that the provisions of a double tax agreement rank at least equally with domestic law, including the Act, and that the provisions of these two documents should, therefore, be ‘reconciled and read as one coherent whole’.\(^{25}\) The relevant double tax agreement had to be interpreted as part of the Act and, consequently, ss 74A and 74B had to be interpreted so as to be compatible with the double tax agreement. The word ‘taxpayer’ should therefore include those taxpayers who fall within the scope of the

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\(^{22}\) Section 1 of the Income Tax Act.

\(^{23}\) Commissioner, South African Revenue Service v Van Kets supra note 12 in par 18.

\(^{24}\) Olivier & Honiball op cit note 1 at 305.

\(^{25}\) Commissioner, South African Revenue Service v Van Kets supra note 12 in par 22.
double tax agreement. Since an Australian resident, such as Saville, would fall within the scope of the double tax agreement, he would also be regarded as a taxpayer, making s 74 applicable to Van Ketz as ‘any other person’ who would be obliged to furnish information regarding a taxpayer, Saville.

It was argued before the Court that art 25 of the double tax agreement expressly provides that South Africa is not obliged to carry out administrative measures at variance with South African law or supply information which is not obtainable under South African law. In terms of this argument, SARS’s powers are limited by ss 74A and 74B, read with the definition of ‘taxpayer’, to information relating to a taxpayer, as defined. Hence SARS could not provide the information requested by the ATO in terms of the double tax agreement, as SARS was unable to use ss 74A and 74B to procure the information. It seems that the Court did not directly address this point, save to state that such an argument would cause an inconsistency to the extent that SARS would not be able to comply with the ATO’s request. The Court then relied on the fact that the double tax agreement forms part of the Act and that the ‘compatible’ interpretation, set forth above, should be followed.

The Court therefore did not so much interpret the double tax treaty as choose to expand the meaning of the term ‘taxpayer’ in the Act, because of an article in the double tax agreement. In effect, the Court altered the meaning ascribed to a term in terms of the definition section. There is a long line of cases in South African law that deals with the departure from a defined term when interpreting legislation. Pertinent in tax matters is Commissioner for Inland Revenue v Simpson,26 in which Watermeyer CJ stated that

1‘it seems to me that effect should be given to the rule laid down by Halsbury, Laws of England, in para. 591 of Vol. 31 (Hailsham ed.), viz.:

A definition section does not necessarily apply in all the possible contexts in which a word may be found in the statute. If a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning.’

In dealing with the same topic, the Supreme Court of Appeal in Hoban v Absa Bank Ltd t/a United Bank and Others27 quoted with approval a passage from Canca v Mount Frere Municipality28 in which it was stated:

‘The principle which emerges is that the statutory definition should prevail unless it appears that the Legislature intended otherwise and, in deciding whether the Legislature so intended, the Court has generally asked itself whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply.’

The Supreme Court of Appeal in Hoban further explained that ‘context’ should not be limited to parts of a legislative provision which immediately precede and follow the specific passage under examination, but includes the entire enactment in which the words appear, and in its widest sense also enactments in pari materia and the situation or ‘mischief’ sought to be remedied. Furthermore, the Court held that the legislative intention must

26 1949 (4) SA 678 (A) at 692.
27 1999 (2) SA 1036 (SCA) at 1044.
28 1984 (2) SA 830 (Tk).
be ascertained when analysing the context. 29 The test accepted in Hoban has been approved in other judgments of the Supreme Court of Appeal, 30 as well as by the Constitutional Court. 31

It seems that the Van Kets Court did not apply the test laid down in the above-mentioned cases when it decided to expand the meaning of the word ‘taxpayer’ to include those who fall within the scope of the double tax agreement. It is submitted that the Court’s finding that the double tax agreement forms part of the Act and ranks equally to all the other provisions of the act is correct in the light of Glenister and the provisions of the Constitution. Bearing in mind the point made about the meaning of context in Hoban, it is fair to assume that the relevant double tax agreement forms part of the context when interpreting the definition of ‘taxpayer’. The purpose of the relevant sections of the Act and the articles of the double tax agreement would also have to be ascertained to paint the full picture of the context. One would then have to ask whether the application of the definition of ‘taxpayer’ would result in an injustice or incongruity or absurdity, given this context.

Applying this analysis, the purpose of the relevant provisions will now be examined. The purpose of inserting a provision such as art 25 into a double tax agreement is set out by the OECD as follows:

In the first place it appears to be desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the Convention are to be applied. Moreover in view of the increasing internationalisation of economic relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the Convention. 32

The Van Kets Court did refer to the purpose of art 25 by way of an example, but not to the OECD MTC or its commentary.

Croome and Olivier describe the purposes of ss 74A and 74B as ensuring that each taxpayer pays the correct amount of tax, 33 that SARS may verify information contained in a tax return, 34 and to broaden the tax base. 35

The context within which the meaning of the definition of ‘taxpayer’ is to be evaluated is therefore the whole of the Act, which includes the relevant, equally ranking, double tax agreement and the purpose of the relevant provisions as set out above. Articles 25(3)(a) and (b) of the double tax agreement, which provide that South Africa is not obliged to act contrary to the Act, limit South Africa’s obligations in terms of the double tax agreement. This limitation forms part of the context and should inform the interpretation of the definition of ‘taxpayer’. It is therefore submitted that applying the

29 Hoban v Absa Bank Ltd t/a United Bank supra note 27 at 1044.
30 ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd 1999 (3) SA 924 (SCA); Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA).
31 Walele v City of Cape Town and Others 2008 (6) SA 129 (CC); Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others 2010 (2) SA 181 (CC).
32 Paragraph 1 of the Commentary on art 26 of the OECD MTC.
33 Beric J Croome & Lynette Olivier Tax Administration (2010) at 110.
34 Idem at 111.
35 Idem at 118.
defined meaning to the term ‘taxpayer’ would not result in an injustice or incongruity or absurdity. Consequently, it is submitted that the Court was not justified in extending the meaning of the term ‘taxpayer’ as it did in the case.

It is furthermore submitted that the Court should have considered the provisions of s 233 of the Constitution. That section obliges the Court to prefer any reasonable interpretation of the word ‘taxpayer’ and ss 74A and 74B that is consistent with the relevant tax treaty, as a source of international law, over any alternative interpretation that is inconsistent with such treaty. Articles 25(3)(a) and (b) themselves state that South Africa’s obligations under the treaty are limited to what is allowed under the Act, namely, arts 74A and 74B read with the definition of ‘taxpayer’. South Africa’s obligations in terms of art 25(1) of the double tax agreement are therefore limited to what is allowable in terms of the Act. Interpreting the term ‘taxpayer’ in accordance with its defined meaning would therefore have been consistent with the relevant treaty, as is required by s 233 of the Constitution.

In the recent case of Commissioner for the South African Revenue Service v Tradehold Ltd36 the Court again had the opportunity to pronounce on the status of double taxation treaties in South Africa. The Court referred to s 108 of the Act, calling it ‘enabling legislation’, and then held that ‘[o]nce brought into operation a double tax agreement has the effect of law’.37 The Court described the ‘legal effect’ of a double taxation treaty by quoting a passage from Downing, which also stated that a treaty has effect as if enacted in the Act.38

By referring to s 108 as ‘enabling legislation’ the Court, arguably, confirmed the argument set forth above, namely, that the Act, more specifically s 108, serves as the national legislation which is required to domesticate the international agreement entered into by the national executive.39 The Court, however, did not address this point directly, which is a pity, given the divergence of views regarding the process required for domestication of double taxation treaties.

Regarding the Court’s statement that ‘a double tax agreement has the effect of law’, it is noticeable that the Court did not specifically state how the double taxation treaty ranks – whether higher, equally, or lower – in relation to other domestic legislation. The Court did refer to a passage in Downing in which it was stated that the treaty has effect as if enacted in the Act, giving the impression that the Court views the treaty as part of the Act. It is interesting to note that the Court did not refer to the Glenister case, in which the majority held specifically that ordinary domestic statutory obligations are created when a treaty is domesticated. But it went on to state:

37 Idem in par 16.
38 Ibid.
39 As is required by s 231(4) of the Constitution.
‘Double tax agreements effectively allocate taxing rights between the contracting states where broadly similar taxes are involved in both countries. They achieve the objective of s 108, generally, by stating in which contracting state taxes of a particular kind may be levied or that such taxes shall be taxable only in a particular contracting state or, in some cases, by stating that a particular contracting state may not impose the tax in specified circumstances. A double tax agreement thus modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.’

It may be argued that the Court, when it stated that a double taxation treaty applies in preference to domestic law, referred to domestic law existing at the time when the treaty came into effect. However, in the very next paragraph, the Court acknowledged that ‘double tax agreements are intended to encompass not only existing taxes, but also taxes which may come into existence at later dates (see Art 2(2)).’ The Court was, therefore, very much aware of the influence of subsequent legislation on existing treaties. It is submitted that the Court effectively stated that a double taxation treaty will always apply in preference to domestic law in the case of conflict. The Court did not refer to the Glenister, Van Kets or AM Moolla decisions in making this point.

In examining the South African case law regarding the conflict between the relevant act and double taxation treaties in South Africa, it 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 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

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40 Commissioner for the South African Revenue Service v Tradehold Ltd op cit note 36 in par 17.
41 Idem in par 18.
42 Academic writers hold different views regarding the possibility of so-called ‘treaty override’. Hattingh is of the view that any attempt to override South Africa’s obligations in terms of a double taxation treaty by means of subsequent legislation will be unconstitutional (‘Elimination of International Double Taxation’ op cit note 10 in par 36.14). Brincker suggests that since a double taxation treaty is not incorporated into domestic legislation by means of specific adoption, the treaty may override the national legislation except to the extent that the national legislation specifically provides otherwise (op cit note 10 in par 12.7.1). Olivier and Honiball also indicate that domestic legislation may, in some circumstances, override a double taxation treaty (op cit note 1 at 317).
Glenister minority’s view to the extent that the Court in Van Kets found the provisions of a double taxation treaty to rank at least equally 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”.

It is submitted that the preferred view is that of the minority in Glenister. Thus it is suggested that a double taxation treaty and the Act domesticating the treaty rank equally and that, in the case of conflict between the provisions of a double taxation treaty and the Act, the normal principles of statutory interpretation should be followed to resolve the conflict. It is submitted that these principles would include the following:

- A reference to s 233 of the Constitution which compels a court to prefer any reasonable interpretation of the Act that is consistent with international law over any alternative interpretation that is inconsistent with international law. In other words, the Act should be interpreted in a way that is consistent with South Africa’s double tax treaties, being a source of international law, unless this interpretation is unreasonable. Therefore, a court will be compelled to interpret the Act in such a way that taxation is limited in accordance with a treaty, unless this interpretation is unreasonable. It is argued below that South African courts have thus far not hesitated in allowing the provisions of a tax treaty to prevail over the existing provisions of the Act (Moolla being an exception), and that such an approach accords with the Constitution.

In interpreting subsequent legislation which conflicts with an existing treaty, a Court would have to pay particular attention to the requirement of reasonableness.

- The maxim lex posterior priori derogat, a rule specifically referred to in the relevant footnote of the Glenister case, although completely obiter. This rule has been described as follows:

  ‘A statutory provision clearly inconsistent and irreconcilable with its preceding, hierarchically equal or subordinate counterparts in pari materia revokes them to the extent of such inconsistency and irreconcilability.’

  The rule is, however, qualified in a number of respects, one of which is that subsequent legislation dealing in general terms with a matter will not prevail over more specific prior legislation (generalia specialibus non derogant).

  If this rule were to be applied, it would be possible for subsequent provisions of the Act to override provisions of a treaty. However, a treaty

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43 Olivier & Honiball op cit note 1 at 315.
44 Dugard op cit note 12 at 27.
45 Supra note 19.
47 Ibid.
entered into after the enactment of a relevant provision in the Act would not be caught by such a rule.

• The presumption that legislation does not violate international law.

Although the view of the minority in Glenister is preferred, it is acknowledged that South African courts will probably follow Tradehold in relation to double tax treaties, since it was a unanimous judgment by the Supreme Court of Appeal.

3 Interpretation of Tax Treaties: General Comments

As stated above, any tax treaty has a dual nature, namely, that of an international agreement and a part of domestic law. As an international agreement, it is subject to the rules of interpretation of other treaties – in other words, public international law – but as domestic law, it is subject to the rules applicable to domestic legislation. Under public international law, the treaty is to be given an autonomous meaning (that is, the meaning of the treaty, irrespective of the domestic law of the relevant states). In terms of public international law, the Vienna Convention on the Law of Treaties (Vienna Convention) contains rules regarding the interpretation of treaties. Even though South Africa has not ratified this Convention, most authors agree that South Africa is, generally speaking, bound by its provisions, as it merely codifies customary international law. However, in Harksen v President of the Republic of South Africa, the Constitutional Court stated that the extent to which the Vienna Convention reflects customary international law is by no means settled. Yet the Court assumed that a particular provision of the Vienna Convention did reflect customary international law and therefore formed part of South African law.

The point of departure, when considering the Vienna Convention, is art 26,
which states that treaties are binding upon the parties to it and must be performed by them in good faith. Articles 31 and 32 of the Vienna Convention then provide as follows:

‘Article 31
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.

‘Article 32
Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.’

The general trend amongst courts in various countries is to apply the rules of public international law to interpret tax treaties and not the normal rules for the interpretation of domestic legislation.55 Article 31(1) of the Vienna Convention specifically refers to the ordinary meaning of a term. In this regard, the ordinary meaning has been described as

‘the meaning that naturally flows from a reading of the text considering its object and purpose and taking into account the common intention of the parties. This refers to the way that a specific term would be understood in that particular context’.56

As stated in the relevant articles of the Vienna Convention, courts may also use extrinsic aids to interpret a double tax treaty, one of which is the OECD commentaries to the OECD MTC.57 Although there are several categories of material mentioned in arts 31 and 32 of the Vienna Convention in which the commentaries may be classed in order to provide a basis for their use in the interpretation of a double tax treaty, the commentaries do not fit neatly into any of these categories. Furthermore, academic writers disagree on the category in which the commentaries should be placed.58

55 Baker op cit note 2 in par E.02; Brincker op cit note 10 in par 12.8.1. Arnold argues that tax treaties should not be interpreted differently from domestic legislation. He provides a number of reasons usually given for the differences in interpretation, but argues that these differences, although real, do not justify different interpretational approaches (op cit note 56 at 9–12).
57 Baker op cit note 2 in par E.09.
58 Idem in par E.12. According to Baker, the possible categories are as follows:
Despite this uncertainty, the courts in many countries use the OECD commentaries in interpreting treaties, but the exact basis on which they do so is unclear and seldom explicitly stated by the courts. The OECD itself certainly intended that the commentaries should be used in the interpretation of double tax agreements. The OECD commentaries are not considered binding rules of international law. Thus, although neither the OECD MTC nor its commentaries are legally binding on the courts, the latter often place significant weight on the commentaries, although the basis on which this is done is not always clear.

A further point of uncertainty regarding the use of the commentaries is the version of the commentaries to be used. If a treaty was concluded in a given year and the OECD subsequently changed the commentary, which commentaries are to be used when a dispute arises? The OECD’s view is that existing treaties should be interpreted in the spirit of the revised commentaries, as far as possible. The OECD concedes that if the revised articles or commentaries differ in substance from those used in previously concluded treaties, the revised commentaries are irrelevant. Nor is the OECD’s view that the latest version of the commentaries should be used shared by all.

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‘Article 31(1): material establishing the ordinary meaning to be given to terms of the treaty; Article 31(2): as part of the context of the treaty, an agreement made between all the parties in connection with the conclusion of the treaty, or an instrument made by one or more parties and accepted by the other parties; Article 31(3): a subsequent agreement or subsequent practice regarding the interpretation of the treaty; Article 31(4): material establishing a special meaning to be given to terms in the treaty; Article 32: as a supplementary means of interpretation, including the preparatory work of the treaty.’


61 OECD op cit note 59 in par 29, although the OECD does not consider the commentaries as binding. The OECD has also made a non-binding recommendation that the OECD members follow the commentaries (Ward op cit note 5 at 99; Frank Engelen ‘Some Observations on the Legal Status of the Commentaries on the OECD Model’ (2006) March Bulletin for International Taxation 105 at 105).

62 Ward et al op cit note 4 at 52. A contrary view is held by Engelen (op cit note 61 at 106–9). Some authors have described the commentaries as ‘soft law’ (eg, Klaus Vogel et al Klaus Vogel on Double Taxation Conventions 3 ed (1997) at 45), although Ward et al are of the opinion that “attaching the description “soft law” to the commentaries does not give the commentaries any status or position in international law that they would not have had in the absence such a descriptive and somewhat ambiguous label” (op cit note 4 at 38).

63 OECD op cit note 59 in pars 33–5.

64 Baker op cit note 2 in par E.13; Vogel et al op cit note 62 at 46. For an overview of the approaches followed by courts in a number of countries as well as the views of academic authors, see Ward et al op cit note 4 at 95–110.
4 The Interpretation of Tax Treaties: South Africa

4.1 The Constitution

The Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.65 Thus customary international law forms part of South Africa’s domestic law and can be trumped only by an Act of Parliament or the Constitution. A South African court may take judicial notice of customary international law, which, in practice, would mean the consideration of judicial decisions, both foreign and South African, and international law treatises.66 A court would consider these sources to ascertain whether a particular rule is accepted as a rule of customary international law. As stated above, the Vienna Convention is considered to be a codification of customary international law and therefore forms part of South African law.67 On the view that the OECD MTC and its commentaries are not international law, however, these will not form part of South African domestic law.68

Furthermore, the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.69 On the basis that the OECD MTC and its commentaries are not international law, South African courts will not be obliged to interpret the Act in a way that is consistent with the OECD MTC and its commentaries.

4.2 South African Case Law

In the next paragraphs, South African case law on the interpretation of treaties will be discussed with a view to drawing a conclusion regarding South Africa’s approach to treaty interpretation. Reference will first be made to cases in which non-tax treaties were interpreted and then selected cases in which tax treaties were interpreted will be discussed.

In Mzeku and Others v Volkswagen SA (Pty) Ltd and Others70 the Labour Appeal Court was requested to find that certain employees had a right to strike based on the relevant provisions of ILO Convention 87 on Freedom of Association and the Right to Organise and ILO Convention 98 on the Right to Organise and Collective Bargaining. It was submitted that these conventions formed part of South African law based on ss 231 and 233 of the Constitution. It is submitted that the Court made no finding regarding the basis on which the

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65 Section 232 of the Constitution. Generally speaking, the pre-1996 constitutional position will not be discussed. Treaties entered into by South Africa prior to the Constitution are regarded as binding on the country in terms of s 231(5) of the Constitution.
66 Dugard op cit note 12 at 56.
67 Section 232 of the Constitution.
68 For a contrary view, see Olivier & Honiball op cit note 1 at 312, who argue that the commentary on the OECD MTC probably forms part of South Africa’s customary international law.
69 Section 233 of the Constitution.
70 2001 (4) SA 1009 (LAC).
relevant ILO Conventions formed part of South African law, but from the judgment it seems as though the Court assumed that it was bound to these conventions. In interpreting the conventions, the Court relied on an ILO report by the Committee of Experts on the Application of Conventions and Recommendations International Labour Conference, unfortunately, again, without providing a basis for its reliance.\(^{71}\)

In *Seton CO v Silveroak Industries Ltd*\(^{72}\) the Court had to interpret the Recognition and Enforcement of Foreign Arbitral Awards Act,\(^{73}\) which was promulgated because South Africa was a party to the ‘New York Convention’. The Court, basing its finding on s 233 of the Constitution, held that the decisions of other countries, which also incorporated the provisions of the convention into their national legislation, had persuasive authority.

In *S v H*\(^{74}\) the Court had to interpret the Hague Convention on the Civil Aspects of International Child Abduction (1980). The Court referred to numerous foreign judgments and also to what it termed ‘Hague Convention jurisprudence in a number of international jurisdictions’.\(^{75}\) The Court furthermore quoted with approval a decision in which the House of Lords held that a purposive construction had to be given to the relevant convention.\(^{76}\) In addition, the Court adopted a test that ‘gives effect to the spirit of the convention’.\(^{77}\)

In *Secretary for Inland Revenue v Downing*,\(^{78}\) the Court was called upon to interpret a provision in the tax treaty between South Africa and Switzerland. The treaty was based on the 1963 OECD MTC, and was domesticated by virtue of s 108(2) of the Act; and therefore it was held by the Court to have effect as though enacted into the Act.\(^{79}\) The Court acknowledged the widespread use of the OECD MTC by stating:

> ‘This model has served as the basis for the veritable network of double taxation conventions existing between this country and other countries and between many other countries *inter se*.\(^{80}\)

The Court also observed that the convention makes liberal use of what has been termed ‘international tax language’.\(^{81}\) The Court a quo in *Downing* clearly referred to a certain passage in the OECD Report as part of its judgment. The Appellate Division quoted, with approval, the relevant part of the Court a quo’s judgment in which it referred to the OECD Report.\(^{82}\) The Katz Commission regarded this part of the Appellate Division’s judgment as

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\(^{71}\) Idem in pars 21–7.

\(^{72}\) 2000 (2) SA 215 (T).

\(^{73}\) Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

\(^{74}\) 2007 (3) SA 330 (C).

\(^{75}\) Idem in par 44.

\(^{76}\) Idem in par 45.

\(^{77}\) Idem in par 49.

\(^{78}\) 1975 (4) SA 518 (A).

\(^{79}\) Idem at 522–3.

\(^{80}\) Idem at 523.

\(^{81}\) Ibid.

\(^{82}\) Idem at 526.
acknowledging the OECD’s Commentary as an ‘important guide in interpreting concepts used in South African double taxation agreements’, a sentiment acknowledged by numerous authors.

Furthermore, the Downing Court preferred to interpret certain words in their ‘natural meaning’, it referred to the intention of the parties to the convention, and it concluded that the article should be read as a whole in order to interpret it.

In *ITC 1473*, the Court had to interpret a clause in the double taxation treaty between South Africa and Germany. Without providing any grounds for doing so, the Court, in order to support its interpretation of the relevant provision, referred to a letter by the German Ministry of Finance to the South African authorities which seems to reflect an agreement between the countries regarding the interpretation of the relevant article.

In *ITC 1503*, the Court had to interpret an article in a treaty between South Africa and another country (its name not being mentioned in the report) for the avoidance of double taxation on income and profits derived from sea or air transport. The Court held that the meaning of the agreement must be determined according to the principles governing the interpretation of contracts in South Africa. The Court held that it was obliged to determine what the language of the document would ordinarily be understood to mean, and considered the fact that the arrangements in the treaty had the effect as though enacted in the Act by virtue of s 108(2) to be irrelevant. The taxpayer and the Commissioner agreed in the statement of facts that they were entitled to refer to the text and commentaries of the 1977 OECD Model agreement without any admissions being made as to the evidentiary value and subject to permission of the Court. The Court relied on the commentaries to the OECD Model in support of its conclusion. No reasons were given for the reference to the commentaries, but it may be explained by the agreement reached between the parties.

In *ITC 1544*, the Court had to decide whether non-resident shareholders’ tax (NRST) imposed by South Africa fell foul of the non-discrimination article in the treaty between South Africa and the Netherlands. NRST was levied on dividends paid, inter alia, to companies which were not South African companies. A South African company paid dividends to its shareholder, a Dutch company, and tried to reclaim the NRST previously paid. The Dutch company argued that NRST discriminated against it on the basis of...
nationality and that such discrimination was prohibited by the non-discrimination clause in the South Africa – Netherlands treaty. The Court found that NRST indeed discriminated against the Dutch company. The relevant treaty was domesticated in terms of s 108(2) of the Act, and the Court held that the effect of that section is

‘[t]o grant statutory relief in certain circumstances where the South African Act imposes a tax, where the provisions of a double-tax Convention grants an immunity or exemption from such tax to persons governed by the Convention. Tax is not payable to the extent to which an immunity or exemption from tax is granted in terms of a binding double tax Convention which has been proclaimed and thus has statutory effect’.

The Court held that in the light of s 108 of the Act, the non-discrimination provision in the treaty ‘governed’ the relevant NRST provisions, and that no NRST was therefore payable by the Dutch company. It is submitted that the Court therefore found that the provisions of a tax treaty had the effect of limiting the tax imposed by a previously enacted section of the Act.

The double taxation agreement between South Africa and the United Kingdom was interpreted in ITC 1735. The Court confirmed that the agreement had effect as though enacted in the Act by reason of s 108(2). When interpreting the term ‘athlete’ in the relevant agreement, the Court attributed the ‘modern ordinary meaning’ to the term and concluded that the parties could not have intended that a more impractical and limited meaning should apply. In determining what the ‘modern ordinary meaning’ is, the Court referred, inter alia, to the work by Vogel.

It will be recalled that in A M Moolla Group Ltd v Commissioner, South African Revenue Service the Court had to interpret an article in a trade treaty between South Africa and Malawi for the reduction of certain customs duties. The Court held that the relevant treaty formed part of the Customs and Excise Act, and based its interpretation of the provisions of the treaty entirely on that finding. Hence, it found that the meaning to be attached to a term used in the treaty was the meaning ascribed to it in the relevant provision of the Customs and Excise Act (and regulations thereto) and not the ordinary meaning of the term. The Court further held that, because the treaty formed part of the Customs and Excise Act and that, hence, the meaning of a term used in the Act was ascribed to the treaty, the interpretation of the treaty provisions must change when the act is changed.

In Volkswagen of South Africa (Pty) Ltd v Commissioner for South African Revenue Service the Court had to decide whether Secondary Tax on Companies (‘STC’) levied in terms of s 64B of the Act was a tax on dividends as provided for in art 7 of the double tax agreement between South Africa and Germany and, in the alternative, whether STC was a tax substantially similar to taxes previously charged in South Africa (and explicitly mentioned in the

92 Idem at 463.
93 (2002) 64 SATC 455 (G).
94 Idem at 464.
95 Supra note 19.
96 (2008) 70 SATC 195 (TPD).
particular double tax agreement). The judgment did not refer to the OECD MTC or its commentary. This may be partly explained by the fact that art 7 of the relevant double tax agreement specifically requires the application of the law of the country where the company paying the dividend is resident. Hence, the Court in deciding the first argument was entitled, as it did, to have regard only to South African law.

*Grundlingh v Commissioner for South African Revenue Service* afforded the Court an opportunity of considering the treatment of partnerships under a double taxation treaty. The treatment of partnerships is dealt with in the OECD commentary, and the OECD has also produced a comprehensive report on the matter. Regrettably, though, none of these sources were referred to by the Court, which therefore missed an opportunity, not only to comment on the legal status of the OECD commentaries and other materials, but also to gain assistance from these sources.

The Western Cape High Court recently pronounced on the interpretation of treaties in *Oceanic Trust Co Ltd NO v The Commissioner for the South African Revenue Service*. The applicant, a Mauritian company, was the sole trustee of a trust, known as SIMS, which was established and registered in Mauritius. The Court was called upon, inter alia, to issue a declaratory order to the effect that SIMS was not a ‘resident’ of South Africa and that it had not carried on business through a ‘permanent establishment’ in this country. Not only were the relevant definitions in s 1 of the Act relevant, but also the provisions of the double taxation agreement between South Africa and Mauritius, which included a definition of ‘resident’. It is important to note that although SARS’s reasons for the assessment and the taxpayer’s objection formed part of the papers in the application, the Court was not asked to pronounce on the merits of either. The declaratory relief was aimed at establishing whether SIMS was a ‘taxpayer’, which turned on the questions of whether SIMS was a resident of South Africa or had conducted business through a permanent establishment. Much of the judgment therefore focused on whether the Court had jurisdiction to grant the order prayed for. The Court would only have jurisdiction if it had to decide a question of law and this was determined by whether the facts were fully found and sufficiently clear. In deciding this point in relation to the issue of residence, the Court referred to the United Kingdom decision of *Commissioner for Her Majesty’s Revenue and Customs v Smallwood*, but not to the OECD commentaries on art 4 (dealing with residence). Regarding...

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97 (2009) 72 SATC 1 (FSHC).
98 For example, pars 2–6 of the Commentary on art 1 of the OECD Model Tax Convention and the Application of the OECD Model Tax Convention to Partnerships (1999).
99 Johann Hattingh ‘The Tax Treatment of Partnerships under Model-based Bilateral Tax Treaties: Some Lessons from *Grundlingh v The Commissioner for the South African Revenue Service*’ (2010) 127 SALJ 38 at 45. This contribution also criticises the judgment on other points.
100 Brincker op cit note 10 in par 12.8.8.
the issue of permanent establishment, the Court again did not refer to the OECD commentaries on the relevant article, even though pertinent to the points it considered. In neither of the two issues did the Court refer to any international literature on the meaning of either of the relevant terms. Perhaps the Court’s limited engagement with these issues may be explained if the nature of the relief prayed for is borne in mind; but as the Court does make findings regarding residence and permanent establishment, its cursory consideration of these two important concepts is disappointing.

The most recent case dealing with the interpretation of treaties was that of Commissioner for the South African Revenue Service v Tradehold Ltd.103 Tradehold was incorporated in South Africa and on 2 July 2002 its board, at a meeting in Luxembourg, took a decision that all future meetings of the board of directors would be held in Luxembourg. The Court confirmed that, with that decision, Tradehold’s place of effective management was moved to Luxembourg.104 At the relevant time the definition of ‘resident’105 provided that Tradehold remained a resident of South Africa for domestic tax purposes, because it was incorporated in South Africa. It was only when this definition was amended that Tradehold ceased to be a resident of South Africa in terms of the Act. SARS assessed Tradehold for a deemed disposal of certain assets when Tradehold ceased to be a resident (an ‘exit tax’). Tradehold argued, successfully, that the double taxation treaty between South Africa and Luxembourg prevented South Africa from taxing the relevant gain. Regarding the interpretation of the treaty, the Court held that:

‘The DTA is based upon the Model Tax Convention on Income and on Capital agreed to by the committee on Fiscal Affairs of the Organisation for European Economic Co-operation and Development (OECD), which has served as the basis for similar agreements that exist between many countries. In interpreting its provisions one must therefore not expect to find an exact correlation between the wording in the DTA and that used in the domestic taxing statute. Inevitably, they use wording of a wide nature, intended to encompass the various taxes generally found in the OECD member countries. In addition, because the double tax agreements are intended to encompass not only existing taxes, but also taxes which may come into existence at later dates (see Art 2(2)), and bearing in mind the complex nature of taxation in the various member countries, inevitably the wording in the DTA cannot be expected to match precisely that used in the domestic taxing statute. In SIR v Downing supra Corbett JA remarked at 523C-D:

"The convention makes liberal use of what has been termed ‘international tax language’ (see Ostine (Inspector of Taxes) v Australian Mutual Provident Society, 1960 AC 459 at p 480).”

The Court also adopted the approach of a United Kingdom Court in interpreting a double taxation treaty, namely,

‘that the first step in any interpretive inquiry is to ascertain where in the scheme of the double tax agreement the relevant tax falls, and then to consider whether the tax can be imposed consistently with the obligations undertaken thereunder’.106

In Tradehold the relevant double taxation treaty provided that gains from

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103 Supra note 36.
104 Idem in par 3.
106 Supra note 36 in par 20.
certain alienations could only be taxed in the residence state.\textsuperscript{107} The Court held that the term ‘alienation’ in the relevant treaty ‘must be given a meaning that is congruent with the language of the DTA having regard to its object and purpose’\textsuperscript{108}. It also held that the parties to the double taxation treaty must have been aware of the relevant provisions in the Eighth Schedule to the Act and must have intended the treaty to apply to capital gains of the kind provided for in the Eighth Schedule. It therefore held that a deemed disposal in terms of the Eighth Schedule is an ‘alienation’ for purposes of the double taxation treaty.

4.3 Thoughts regarding the South African Cases

In reaching a conclusion regarding the South African case law on the interpretation of treaties, the following points can be made:

- It seems that in those judgments where a South African court has referred to the OECD MTC and its commentaries\textsuperscript{109} or other international instruments or reports,\textsuperscript{110} it has followed the international trend (referred to above) of being silent on the basis of the reference. In some cases, no mention is made of the OECD model or its commentaries.\textsuperscript{111} South African courts might therefore refer to the OECD materials, but whether this will be done, and if it is done, the basis on which it is done, may not be clear. As argued above, the Constitution does not seem to provide such a basis. Foreign precedent\textsuperscript{112} is often relied on as persuasive authority, and so, too, the work of academic writers,\textsuperscript{113} a practice that accords with the Constitution.
- The courts will apply the provisions of a treaty and thereby limit or extinguish tax liabilities imposed by the Act.\textsuperscript{114} Therefore, to the extent that a treaty is applied to legislation existing at the time that a treaty was entered into, the provisions of the treaty will be given precedence.
- The courts, generally, seem to attribute the natural or ordinary meaning to words used in a treaty. To the extent that the natural or ordinary meaning of words is a reference to an autonomous treaty meaning (and not a meaning as conferred by the domestic law of the relevant states), South African courts appear to follow the international trend of interpreting the

\textsuperscript{107} Art 13(4) of the OECD MTC.
\textsuperscript{108} Supra note 36 in par 23.
\textsuperscript{109} Secretary for Inland Revenue v Downing supra note 78; ITC 1503 supra note 87; Commissioner for the South African Revenue Service v Tradehold Ltd supra note 36.
\textsuperscript{110} Mzeku v Volkswagen SA (Pty) Ltd supra note 70.
\textsuperscript{111} For example: Volkswagen of South Africa (Pty) Ltd v Commissioner for South African Revenue Service supra note 96; Grundlingh v Commissioner for South African Revenue Service supra note 97; ITC 1544 supra note 91; ITC 1735 supra note 93; Oceanic Trust Co Ltd NO v The Commissioner for the South African Revenue Service supra note 101.
\textsuperscript{112} Seton Co v Silveroak Industries Ltd supra note 72; S v H supra note 74; Oceanic Trust Co Ltd NO v The Commissioner for the South African Revenue Service supra note 101; Commissioner for the South African Revenue Service v Tradehold Ltd supra note 36.
\textsuperscript{113} For example, ITC 1735 supra note 93; ITC 1544 supra note 91.
\textsuperscript{114} For example: Secretary for Inland Revenue v Downing supra note 78; ITC 1544 supra note 91; ITC 1503 supra note 87; Commissioner for the South African Revenue Service v Tradehold Ltd supra note 36.
provisions of a treaty in accordance with public international law. This conclusion is supported by the many references in the cases to an interpretation in accordance with the intention of the parties\textsuperscript{115} (ie, the two contracting states). Domestic legislation is interpreted in accordance with the intention of Parliament. A case that stands in sharp contrast to the other cases is \textit{Moolla}.	extsuperscript{116} There the Court attributed the domestic-law meaning to the treaty provision and even stated that the treaty meaning would change as domestic legislation changes, both findings based on fact that the relevant treaty formed part of domestic legislation. No mention was made in \textit{Moolla} of s 233 of the Constitution and the Court’s obligation to interpret the relevant legislation in accordance with international law, provided that it is a reasonable interpretation. Nor was there any reference to any of the cases regarding treaty interpretation. It is submitted that the principles laid down in \textit{Downing} and the other cases cited above – that the ordinary meaning should be attributed to the treaty – are preferable, especially in the light of the Constitution.

5 Conclusion

It is submitted that South Africa is bound to its double taxation treaties on an international level, once a treaty is approved by Parliament. The double taxation treaty becomes part of domestic law, once it is published in the \textit{Government Gazette}. Although the double taxation convention forms part of the Act, it is not yet settled whether the double taxation treaty outranks the other provisions of the Act in a case of conflict. Three views were identified by studying case law: namely, that (a) the Act must prevail (\textit{AM Moolla}), (b) a treaty modifies domestic law and will apply in preference to domestic law in the case of conflict (\textit{Tradehold}) and (c) the legislation and treaty rank equally and any conflict must be resolved by the application of the principles of statutory interpretation and superseding legislation (the minority in \textit{Glenister} and \textit{Van Kets}). Although the view preferred in this research is the last one (that is, (c)), it is acknowledged that view (b) will probably be applied in future in South Africa, as the judgment was one by the Supreme Court of Appeal.

Regarding the interpretation of tax treaties, South Africa is not a party to the Vienna Convention, but it is submitted that the important principles regarding interpretation of treaties contained in articles 31 and 32 of the Vienna Convention are customary international law and, therefore, form part of South African law via s 232 of the Constitution.

The OECD MTC and its commentary are not international law and therefore they do not form part of South African law in terms of the

\textsuperscript{115} Secretary for Inland Revenue v Downing supra note 78; ITC 1503 supra note 87; ITC 1735 supra note 93; Commissioner for the South African Revenue Service v Tradehold Ltd supra note 36.

\textsuperscript{116} A M Moolla Group Ltd v Commissioner, South African Revenue Service supra note 19.
Constitution. Furthermore, the Constitution does not oblige a court to interpret the Act in a way that is consistent with the OECD MTC or its commentary.

The South African courts have not explicitly pronounced on the status of the OECD commentaries. Currently, they seem to refer to the OECD commentaries without providing reasons for doing so. However, the commentaries are not always referred to, even where they may be relevant. If their status were established, such an erratic treatment of them might be avoided. It is submitted that the Supreme Court of Appeal’s latest recognition of the importance of the OECD MTC in the Tradehold case will induce other courts to refer to OECD material, albeit without guidance from this court regarding the grounds for such reference. The interpretation of treaties in accordance with the ordinary or natural meaning of the treaty should be supported, and a deviation from this approach, such as the Mooila decision, should be rejected.