Some aspects of estate duty on deceased estates in the Republic of South Africa - with special reference to the problems and effects of double taxation occuring in relation to the German Erbschaftsteuergesetz (Inheritance Tax Act)

by

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This work is dedicated to my parents

Friedhelm Wilhelm

and

Marlis Brigitte
Beckmann

without whose encouragement,
assistance and support this
work would not have been possible.

Declaration

I the undersigned hereby declare that the work contained in this research dissertation is my own original work and has not previously in its entirety or in part been submitted at any university for a degree.

.....

(Nicolai Beckmann)

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I

Some aspects of estate duty on deceased estates in the Republic of South Africa - with special reference to the problems and effects of double taxation occurring in relation to the German Erbschaftsteuergesetz (Inheritance Tax Act)

Preface and brief summary of the focus of this work

`In this world nothing can be said to be certain, except death and taxes´.[1)]

If one agreed with this statement, made by Benjamin Franklin one year prior to his death, one could come to the ultimate conclusion that there has to be a special certainty about capital transfer taxes, estate duties, inheritance taxes or other death duties levied on deceased estates.
There seems to be no reason whatsoever to doubt the final truth of the first part of Franklin`s statement.
But is it also right to assume that there is a certainty about taxes or, what is more, to draw the conclusion that there could be a special certainty about the different types of taxes connected with the death of an individual ?
On the one hand it seems to be true. There are only a few countries throughout the world levying very limited or no taxes at all, and if one forgets about a few tax havens[2)], like the Caymen Islands for example, one is also inclined to agree with the latter part of Franklin`s statement - there seems to be certainty about the levying of taxes.
But, on the other hand, is the amount of taxes, especially the amount of capital transfer taxes, estate duties, inheritance taxes or other death duties levied on a persons death, always that certain ?

The avoidance of double taxation has been an objective of most of the world`s nations since the negotiation of the first Income Tax Convention in the middle of the nineteenth century.[3)] The development of most of the world`s countries into modern industrial nations, with trade links all over the world, gradually demonstrated the problems which can arise if one country levies taxes without considering the levying of an equal or similar tax in another country.
Today the negative consequences of double taxation on the movement of goods, services and capital are widely understood by modern states enacting tax systems for their citizens.[4)]
Especially where the biggest `tax source´ is concerned - income tax[5)] - most of the mo-

1) ***Benjamin Franklin*** in a letter to ***Jean Baptiste LeRoy,*** one year before his death.
2) The main tax havens of the world are specificly examined in the works of, ***A. S. Ginsberg,*** International Tax Havens, p. 3, p. 55 *et seqq.* / ***B. Spitz,*** International Tax Planning, p. 82 *et seqq.* / ***do,*** Tax Haven Enzyclopaedia / ***do,*** in: The Taxpayer 19 (1970), p. 63 *et seqq.*, p. 87 *et seqq.*, p. 107 *et seqq.*, p. 125 *et seqq.*, p. 153 *et seqq.*, p. 207 *et seqq.*, p. 227 *et seqq.*
3) See also, ***A. S. Ginsberg,*** International Tax Havens, p. 11.
4) *Cf.*, ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, chap. 27, para. 1624.
5) In 1991 the Republic of South Africa had a total tax revenue of R 69 290 (million) which consisted to 52,6% = R 36 454 (million) of income tax revenue and to 0,12% = R 82 (million)

dern industrial nations have entered into bilateral double taxation agreements with their potential foreign trade partner-countries to prevent the more unpleasant effects of double taxation[6].

But it is certainly not sufficient just to avoid double taxation where it seems to have the biggest impact - in the area of current taxes like taxes on income.
For many years the international double taxation of estates and inheritances has hardly been a subject of burning interest. There have been only a few tax specialists, scholars, administrators and practitioners who have realized the serious problems which can result from the imposition of capital transfer taxes, death taxes, estate duties or inheritance taxes at full rate by two or more jurisdictions.[7]
Although capital transfer taxes, estate duties, inheritance taxes and other death duties, in contrast to the income tax, are only levied on certain occassions, a simultaneous levying of those taxes by two tax systems of different countries is likely to strain the private property and assests of their citizens (to be precise of their taxpayers) as well as perhaps

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of estate duty revenue. Source: ***R.S.A. Central Statistical Service,*** Bulletin of Statistics, Vol. 26, No. 3 (September 1992), Chapter 11.1.2., Central government, Exchequer receipts, Tax revenue. Similar figures can be found in the revised revenue figures for 1992/93 and in the budgeted collections for 1993/94 - recently published in the (1993) Income Tax Reporter, p. 85. In

6) In October 1992 the government of the ***Republic of South-Africa,*** for example, had concluded the following double taxation agreements on the sector of the Income Tax:
   a. Agreements that are comprehensive in character and extend to a number of different types of income: ***Bophuthatswana,*** 1977, ***Botswana,*** 1978, ***Ciskei,*** 1982, ***Gambia, Grenada, Nicaragua, Mauritius, Seychelles, Sierra Leone,*** 1946, 1954, 1961, ***Israel,*** 1979, ***Lesotho,*** 1959, ***Malawi,*** 1971, ***Namibia,*** 1959, 1969, ***the Netherlands,*** 1971, ***Swaziland,*** 1973, ***Sweden,*** 1955, ***Switzerland,*** 1967, ***Tanzania,*** 1960, ***Transkei,*** 1977, ***the Federal Republic of Germany,*** 1973, ***the United Kingdom,*** 1962, 1969, ***Uganda,*** 1960, ***the United States of America,*** 1987, ***Venda,*** 1979, ***Zimbabwe,*** 1965 and ***Zambia,*** 1956, 1960.
   b. Agreements restricted to a special type of income, namely that derived from shipping and aircraft business: ***Belgium,*** 1957, ***Brazil,*** 1972, ***Denmark,*** 1951, ***Finland,*** 1952, ***France,*** 1955, ***Greece,*** 1965, ***Ireland,*** 1960, ***Italy,*** 1953, ***Japan,*** 1968, ***Norway,*** 1951, ***Portugal,*** 1957, ***Republic of China,*** 1980 and ***Spain,*** 1974.
   See, ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, chap. 27, para. 1624 - 1673 and Section D / ***C. Divaris / M. Stein,*** Silke on South African Income Tax, Vol. 2, chap. 24, p. 24-3 and Appendix Double Taxation Agreements.

   At the same time the ***Federal Republic of Germany*** had entered double taxation agreements, on the sector of the Income Tax and Corporate Income Tax, with the following countries (this excludes double taxation agreements restricted to a special type of income): ***Argentinia,*** 1978, ***Australia,*** 1972, ***Austria,*** 1954, ***Bangladesh,*** 1991, ***Belgium,*** 1967, ***Brasil,*** 1975, ***Bulgaria,*** 1987, ***Canada,*** 1981, ***China,*** 1985, ***Republic of Corea,*** 1976, ***Côte d'Ivoire,*** 1979, ***Cuwait,*** 1987, ***Cyprus,*** 1974, ***Czechoslovakia,*** 1980, ***Denmark,*** 1962, ***Ecuador,*** 1982, ***Egypt,*** 1987, ***Finland,*** 1979, ***France,*** 1959, 1969, 1989, ***Greece,*** 1966, ***Iceland,*** 1971, ***India,*** 1959, 1984, 1986 (redrafted), ***Indonesia,*** 1990, ***Iran,*** 1968, ***Ireland,*** 1962, ***Israel,*** 1962, 1977, ***Italy,*** 1925, ***Jamaica,*** 1974, ***Japan,*** 1966, 1979, 1983, ***Kenia,*** 1977, ***Hungary,*** 1977, ***Liberia,*** 1970, ***Luxemburg,*** 1958, 1973, ***Malaysia,*** 1977, ***Malta,*** 1974, ***Morocco,*** 1972, ***Mauritius,*** 1978, ***the Netherlands,*** 1959, 1980, ***New Zealand,*** 1978, ***Norway,*** 1958, ***Pakistan,*** 1958, 1963, 1970, ***the Philipines,*** 1983, ***Poland,*** 1972, 1979, ***Portugal,*** 1980, ***Rumania,*** 1973, ***Singapore,*** 1972, ***the Republic of South-Africa,*** 1973, ***Spain,*** 1966, ***Sri Lanka,*** 1979, ***Sweden,*** 1959, ***Switzerland,*** 1971, 1978, 1989, ***Thailand,*** 1967, ***Trinidad and Tobago,*** 1973, ***Tunesia,*** 1975, ***Turkey,*** 1985, ***the USSR,*** 1981, ***Urugay,*** 1987, ***the United Kingdom,*** 1964, 1970, ***the United States of America*** 1989, ***Yugoslavia*** 1987, ***Zambia,*** 1973, and ***Zimbabwe,*** 1988. The double taxation agreements with: ***Chile, Costa Rica, Mexico*** and ***Venezuela*** were being renegotiated at that time. The double taxation agreements with: ***Austria, Egypt, Ireland, the Netherlands, Pakistan, Sweden*** and ***Switzerland*** either are or were being revised and the exchange of the instruments of ratification are still to be made.
   See, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 242.

7) See, ***W. D. Goodman,*** International Double Taxation, p. iii.

the development of the economic or trade relations between the countries involved.
Despite the consequences of international double taxation on deceased estates, which can be as detrimental as double taxation on income tax, most countries throughout the world seem to have neglected the problem.
If double taxation agreements on income tax were to be the rule - double taxation agreements on the taxation of deceased estates most certainly would have to be the exception to the rule.[8)]
Even the Republic of South-Africa and the Federal Republic of Germany, two advanced industrial nations on the brink of the 21st century, have until today not entered a bilateral double taxation agreement on the taxation of deceased estates.
Therefore a further question, to focus the question already posed, may be allowed. Is the amount of estate duty and inheritance tax on deceased estates, levied simultaneously by the different tax systems of the Republic of South-Africa and the Federal Republic of Germany, sufficiently certain, that a bilateral agreement on the estate duty on deceased estates is unnecessary ?

The aim of the following LL. M. dissertation on `Some aspects of estate duty on deceased estates in the Republic of South-Africa - with special reference to the problems and effects of double taxation occurring in relation to the German Erbschaftsteuergesetz (ErbStG[9)] - Inheritance Tax Act)´ is a close examination of the above mentioned `gap´ in the bilateral agreements between the Republic of South-Africa and the Federal Republic of Germany.
In order to find out, either if there really is a `gap´ or if the `burden´ of double taxation is already avoided by unilateral relief, the dissertation focuses on the main aspects and provisions of the South-African Tax Law dealing with estate duty on deceased estates

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8) If one compares the tight net of double taxation agreements, concluded by the ***Republic of South-Africa*** and the ***Federal Republic of Germany,*** on the sector of the Income Tax (p. II, fn. 4), with the number of double taxation agreements entered into, on the sector of double death duties, the result seems rather bleak.
Until today the ***Republic of South-Africa*** has entered five bilateral agreements on double death duties with other countries - namely: ***Lesotho,*** 1944, ***Sweden,*** 1961, ***the United Kingdom,*** 1978, ***the United States of America,*** 1947, 1952 and ***Zimbabwe,*** 1933.
See, ***D. Meyerowitz,*** Meyerowitz on Administration of Estates..., chap. 31, para. 31.2, 31.8, 31.14, 31.26, 31.34 and appendices A-152, A-157, A-162, A-173, A-181.
The ***Federal Republic of Germany,*** has entered double taxation agreements on double death duties with the following nations: ***Greece,*** 1912, 1953, ***Austria,*** 1955, ***Sweden,*** 1935, 1951, 1990, 1993, ***Switzerland,*** 1980 and ***the United States of America,*** 1982, 1986.
See, ***Ebenroth,*** Erbrecht, p. 998 *et seqq.* and fn. 3, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 103 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 27 *et seqq.*

9) ***Erbschaft- und Schenkungsteuergesetz*** (Inheritance and Donations Tax Act) in the revised form, as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany on the 17th of April 1974 (BGBl. I 1974, p. 933 *seqq.*), as amended by the Acts of the 14th of December 1976 (BGBl. I 1976, p. 3341 *seqq.*), of the 18th of August 1980 (BGBl. I 1980, p. 1537 *seqq.*), of the 22nd of December 1983 (BGBl. I, 1983, p. 1583 *seqq.*), of the 19th of December 1985 (BGBl. I 1985, p. 2436 *seqq.*), of the 25th of June 1990 (BGBl. II 1990, p. 518 *seqq.*), of the 23rd of September 1990 in relation with the Unification Treaty FRG / former GDR (BGBl. II 1990, p. 885 *seqq.*, p. 985 *seqq.*) and the Amendment Acts of the 13th of December 1990 (BGBl. I 1990, p. 2775 *seqq.*), the 25th of February 1992 (BGBl. I, p. 297 *seqq.)* and the 9th of November 1992 (BGBl. I, p. 1853 *seqq.*). Please notice that the ***Erbschaft-und Schenkungsteuergestez*** in the following will be referred to by the abbreviation ***ErbStG.***

and the unilateral provisions of the South-African `International Tax Law´ for cases in which more than one jurisdiction is involved in the taxation of such estates.
For this purpose an analysis and discussion of the South-African Law of estate duty and the South-African `International Tax Law´ is necessary.
Reference to the related rules and provisions of the common law, such as the Law of Succession, the Law of Trusts, the Law of Donations and the Conflict of Laws, will be made where necessary.
The analysis of the South-African Law will be followed by an introduction to the German ErbStG (Inheritance Tax Act) and its provisions for unilateral relief from international double taxation on deceased estates.

It is not intended to impose or create `new ideas´ in regard to the South-African Law of estate duty on deceased estates and the South-African `International Tax Law´ or the related Laws of Succession, Trusts and Donations.
What is intended is to research the South-African Law of estate duty on deceased estates and to analyse this law and its proceedings.
It is further intended to provide an introduction to the German ErbStG and the German International Tax Law.
The relevant South-African Law and the German Tax Law are compared where necessary.
Finally the interaction between and the conflict of the South-African Law of estate duty on deceased estates and the German ErbStG will be examined. Special emphasis will be placed throughout on the provisions of the two different tax systems, which allow unilateral relief from `double death taxation´.

In order to achieve a concise and precise examination of the above mentioned problems this study is divided into four main parts.

The first part is a general introduction to the main problem to be examined. It also embodies an explanatory section for the technical terms employed in the pages that follow (e.g. the term `South-African International Tax Law´). The conclusion of the first part provides a short introduction to the historical background of estate duty in general and a special historical summary of the development of the estate duty in Republic of South-Africa and the development of the ErbStG in the Federal Republic of Germany.

The second part consists of an examination of the South-African Law of estate duty and the South-African International Tax Law in relation to the aspects mentioned above.
Thirdly there is an introduction to the German ErbStG.
The fourth and final part is a theoretical discussion of the unilateral relief regulations provided by the two tax systems that were the subject of the previous examinations and leads towards the conclusion of this thesis. In conclusion the estate duty and ErbStG provisions are going to be evaluated and critized where necessary.

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Abbreviations

ab init.	*(ab initio)*	from the beginning
AC		English Law Reports, Appeal Cases
AD		Reports of the Appellate Division of the Supreme Court of South Africa
ad loc.	*(ad locem)*	at the place
aF	*(alte Fassung)*	old version (in contrast to amended or revised version)
a. h. l.	*(ad hunc locum)*	at this place
All ER		All England Law Reports
AO	*(Abgabenordnung)*	German Fiscal Law Code
AStG	*(Außensteuergesetz)*	German Foreign Tax Relations Act / German Law to Prevent International Fiscal Evasion
BB	*(Betriebs-Berater)*	German Company and Tax Law Journal
Bd.	*(Band)*	Volume
BFH	*(Bundesfinanzhof)*	German Federal Fiscal Court / Supreme Tax Court
BFHE	*(Sammlung der Entscheidungen des Bundesfinanzhofs)*	Reports of the German Federal Fiscal Court / Supreme Tax Court
BFH NV	*(Sammlung amtlich nicht veröffentlichter Entscheidungen des Bundesfinanzhofs)*	Reports of the German Federal Fiscal Court / Supreme Tax Court
BGB	*(Bürgerliches Gesetzbuch)*	German Civil Law Codification
BGB - Gesellschaft (GbR)		Partnership under the German Civil Law Code / Civil Law Association
BGBl. I	*(Bundesgesetzblatt, Teil I)*	German Federal Law Gazette, Part I
BGBl. II	*(Bundesgesetzblatt, Teil II)*	German Federal Law Gazette, Part II
BVerfG	*(Bundesverfassungsgericht)*	German Federal Constitutional Court
BewG	*(Bewertungsgesetz)*	German Valuation Law
BStBl. I	*(Bundessteuerblatt, Teil I)*	German Federal Tax Gazette, Part I
BStBl. II	*(Bundessteuerblatt, Teil II)*	German Federal Tax Gazette, Part II
BStBl. III	*(Bundessteuerblatt, Teil III)*	German Federal Tax Gazette, Part III
chap.		chapter
CIR		Commissioner of Inland Revenue
Cod. Iust.		Codex Iustinianus

Abbreviations

DB	*(Der Betrieb)*	German Company and Tax Law Journal
DIHT	*(Deutscher Industrie- und Handelstag)*	Federation of German Chambers of Industry and Commerce
DStR	*(Deutsches Steuerrecht)*	German Tax Law Journal
DTA		Double Taxation Agreement
DVR	*(Deutsche Verkehrsteuer-Rundschau)*	German Tax Law Journal
do	*(ditto)*	the same
EDA		Estate Duty Act 45 of 1955
EFG	*(Entscheidungen der Finanzgerichte)*	Reports of the German Fiscal Courts / Tax Courts
EGBGB	*(Einführungsgesetz zum Bürgerlichen Gesetzbuch)*	Introductory Law of the German Civil Law Codification
ErbStDV	*(Erbschaftsteuerdurchführungsverordnung)*	Regulations for the Implementation of the ErbStG
ErbStG	*(Erbschaftsteuergesetz)*	German Ineritance Tax Act
EStG	*(Einkommensteuergesetz)*	German Income Tax Act
et seq	*(sequens)*	and the following
et seqq	*(sequentes, sequentia)*	and those follwing
ex p	*(ex parte)*	one side only
FG	*(Finanzgericht)*	Fiscal Court / Tax Court
FGO	*(Finanzgerichtsordnung)*	German Tax Court Code / Rules of Procedure of the Tax Courts
FinArch	*(Finanzarchiv)*	German Tax Law Journal
FinMin BW	*(Finanzministerium Baden-Württemberg)*	Ministry of Finance of the German Province Baden-Württemberg
GbR (Gesellschaft Bürgerlichen Rechts)		Partnership under the German Civil Law Code / Civil Law Association
GG	*(Bonner Grundgesetz von 1949)*	German Constitution of 1949
GmbH	*(Gesellschaft mit beschränkter Haftung)*	German Company with a Limited Liability / Private Limited Company
GmbH & Co. KG		Limited Partnership [KG] with a Private Limited Company as a general [personally liable] Partner and the Shareholders of the GmbH as Limited Partners
GmbHG	*(GmbH - Gesetz)*	GmbH Law Codification
GrEStG	*(Grunderwerbsteuergesetz)*	German Transfer Tax Act
HGB	*(Handelsgesetzbuch)*	Commercial Law Code
Hrsg	*(Herausgeber)*	editor

Abbreviations

ibid. or ib	*(ibidem)*	in the same place
i. e	*(id est)*	that is to say
i. q	*(idem quod)*	the same as
inf	*(infra)*	below
in init	*(in initio)*	in the beginning
in loc. cit	*(in loco citato)*	in the place cited
int. al	*(inter alia)*	amongst other things
IRC		Inland Revenue Commissioners
IWB	*(Internationale Wirtschaftschaftsbriefe)*	Tax Law Collection (loose-leaf)
Jura	*(Juristische Ausbildung)*	German Law Journal
KG	*(Kommanditgesellschaft)*	Limited Partnership
KStG	*(Körperschaftsteuergesetz)*	Corporation Income Tax Act
LAWSA		W A Joubert, The Law of South Africa
lit	*(literal)*	refers to sub-paragraphs under South African and German Law
loc. cit	*(loco citato)*	at the place cited
MB		Modern Business Law / Moderne Besigheidsreg
nF	*(neue Fassung)*	revised or amended version (in contrast to old version)
NJW	*(Neue Juristische Wochenschrift)*	German Law Journal
NPD		Reports of the Natal Provincial Division of the Supreme Court of South Africa
OEEC		Organization for European Economic Cooperation
OECD		Organization for Economic Cooperation and Development
oHG	*(offene Handelsgesellschaft)*	General Partnership
op. cit	*(opere citato)*	the work quoted

Abbreviations

resp.	respective(ly)
RFH ... *(Reichsfinanzhof)*	Fiscal Court of the Reich
RFHE ... *(Sammlung der Entscheidungen des Reichsfinanzhofs)*	Reports of the Fiscal Court of the German Reich
RGBl. ... *(Reichsgesetzblatt)*	Law Gazette of the German Reich
RGBl. I ... *(Reichsgesetzblatt, Teil I)*	Law Gazette of the German Reich, Part I
RGBl. II ... *(Reichsgesetzblatt, Teil II)*	Law Gazette of the German Reich, Part II
RIW ... *(Recht der Internationalen Wirtschaft)*	German Law Journal
SA (A)	South African Law Reports / Reports of the Cases decided in the Appellate Division of the Supreme Court of South Africa
SA (AD)	South African Law Reports / Reports of the Cases decided in the Appellate Division of the Supreme Court of South Africa
SA (C)	South African Law Reports / Reports of the Cases decided in the Cape Provincial Division of the Supreme Court of South Africa
SATJ	South African Tax Journal
scil. ... *(scilicet)*	namely
sec.	section
seq. ... *(sequens)*	the following
seqq. ... *(sequentes, sequentia)*	those follwing
SIR	Secretary for Inland Revenue
StuW ... *(Steuer und Wirtschaft)*	German Tax Journal
u. s. ... *(ut supra)*	as above
UVR ... *(Umsatz- und Verkehrsteuer Rundschau)*	German Tax Journal
v.	versus
vid. ... *(vide)*	see
viz. ... *(videlicet)*	namely
v. s. ... *(vide supra)*	see above
VStG ... *(Vermögensteuergesetz)*	German Wealth Tax Act
VVDStRL ... *(Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer)*	German Public Law Journal
v. v. ... *(vice versa)*	conversely

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A. General Introduction

I. Introduction to the focus of this research

`Thus we sailed up the straits, wailing in terror, for on the one side we had Scylla, and on the other the awesome Charybdis sucked down the salt water in her dreadful way.´[1]
[....]
`My men turned pale with terror; and now, while all eyes were on Charybdis as the quarter from which we looked for disaster, Scylla snatched out of my ship the six strongest and ablest men. I saw their arms and legs dangling high in the air above my head. "Odysseus" they called out to me in their anguish.´[2]

Although this dissertation on `Some aspects of estate duty on deceased estates in the Republic of South-Africa - with special reference to the problems and effects of double taxation occurring in relation to the German ErbStG´ is certainly not meant to be a classical-play delivered by the South-African Treasury as `Charybdis´, the German Treasury as `Scylla´, the tax specialist or practitioner as `Odysseus´ and the taxpayer as `his men´, the poetic, eloquent and colourful verses of Homer`s `Odyssey´ may serve as a metaphorical introduction to the problems which can arise from the levying of double death duties on deceased estates by two different tax systems at the same time.

Today estate and tax planning are generally referred to as `the arrangement, management, securement and disposition of a person`s estate, so that he, his family and other beneficiaries may enjoy and continue to enjoy the maximum from his estate and his assets during his lifetime and after his death, no matter, when death occurs´.[3] Consequently the only guarantee, for the potential bequeather, that his descendants can also enjoy and benefit from his `hard earned´ life-time`s work, is the early anticipation of his death and the amount of estate duty payable to the South-African Treasury at the time of his death.
Accordingly tax specialists and practitioners recommend that the South-African taxpayer should use all the tools, given to him during his life-time in order to minimise the tax burden levied on his future deceased estate.[4]
For this reason the modern South-African literature on estate planning focuses on and discusses such complex matters as the will, donations, trusts, limited interests, companies,

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1) ***Homer,*** Odyssey, Book 12, translated by ***E. V. Rieu,*** `The Odyssey´, p. 186, lines 234 to 237.
2) ***Homer,*** *in loc. cit.*, p. 186, lines 243 to 250.
3) Definition by, ***D. Meyerowitz,*** in: The Taxpayer 14 (1965), p. 1 *et seqq.* (at p. 1) / following this definition, ***G. A. Urquhart,*** S.A. Company Law Journal, Estate Planning Seminar 1983, p. 1 *et seqq.* (at p. 1) / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chapter 1, para. 102 / *cf.* similar, ***W. Abrie,*** Estates - Planning and Administration, p. 2 / ***J. H. Jordaan,*** Estate & Financial Planning, p. 1 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 220.
Please note that the use of the masculine personal pronoun in this work is not meant to exclude women.
4) The fact that the taxpayer in South-Africa is entitled to arrange his affairs within the ambit of the law to limit his tax liability results mainly from the *dicta* in the famous case ***CIR v. Estate Kohler,*** 1953 (2) SA p. 548 *et seqq* (at p. 591 *et seq.*), where ***Centlivres C.J.*** quoted the so called `Westminster doctrine´ embodied in ***IRC v. Duke of Westminster,*** 1936 AC p. 1 *seqq* (at p. 19 *et seq.*) per ***Lord Tomlin,*** where it was held, that:
` *Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.´*

partnerships, options, investments, the use of preference shares or life insurances.[5] But on considering all the above mentioned estate planning tools another aspect of growing importance in modern estate planning is often neglected - that is the exclusion of the possibility of double death duties being levied on deceased estates.[6]

'[...]; and now, while all eyes were on Charybdis (the South-African Treasury) as the quarter from which we looked for desaster, Scylla (the German Treasury) snatched out of my ship the six strongest and ablest men'.

The economic involvement of South-African citizens in foreign countries has grown in proportion to the development of the Republic of South-Africa into a modern industrial nation. A few decades ago the number of South-African citizens living abroad or owning foreign property was very small, but today it is not unusual for South-African citizens to travel overseas or earn a living in different countries all over the world. On living in these countries, like the Federal Republic of Germany for example, they might even establish family relationships (e.g. marry a German citizen) or perhaps own or part-own property and assests located in these foreign countries as well as in the Republic of South-Africa.

As mentioned above[7], the Republic of South-Africa has not yet entered into a double taxation agreement on death duties with the Federal Republic of Germany.

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5) The above mentioned and furthermore tools are explicitly mentioned in the publications of, ***W. Irwin,*** Insurance and Tax, Vol. 2, No. 1 (1987), p. 15 / ***G. A. Urquhart,*** S.A. Company Law Journal, Estate Planning Seminar 1983, at p. 2 *et seq.* In order to get a brief introduction to the complex problems related with the more commonly known tools, like wills, trusts, donations and limited interests, see the recent publictions of: ***D. Meyerowitz / P. Meyerowitz / D. Davis,*** in: The Taxpayer 37 (1988), p. 224 *seqq.* / ***M. Stein,*** (1988) 3 Tax Planning, p. 75, 76 / ***G. A. Urquhart,*** *loc. cit.*, p. 25 *et seqq.* and ***W. Abrie,*** Estates - Planning and Administration, p. 32 *seqq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., Chap. 3, 4, 5 (wills).
W. Irwin, Insurance and Tax, Vol. 3, No. 3 (1988), p. 11 *et seqq* / ***P. Simkins,*** 2 SATJ 1986, p. 105 *seqq* (at p. 109 *et seqq*) / ***M. Stein,*** (1985) 1 Tax Planning, p. 91, 92 / ***do,*** (1986) 2 Tax Planning, p. 59 *et seqq* / ***do,*** (1987) 2 Tax Planning, p. 91, 92 / ***do,*** (1987) 2 Tax Planning, p. 130, 131 / ***do,*** (1987) 3 Tax Planning, p. 21, 22 / ***do,*** (1987) 3 Tax Planning, p. 43, 44 and ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6, para. 695 *et seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 66 *et seq.*, p. 299 *seq.*, p. 327 *et seqq.* (donations).
D. Clegg, (1987) 3 Tax Planning, pp. 23, 24 / ***do,*** (1992) 6 Tax Planning, p. 41, 42 / ***D. Davis,*** S.A. Company Law Journal, Estate Planning Seminar 1983, p. 35 *et seqq.* / ***R. Eskinazi,*** Insurance and Tax, Vol. 3, No. 1 (1988), p. 11 *seqq.* / ***R. Eskinazi,*** Insurance and Tax, Vol. 3, No. 2 (1988), p. 16 *seqq.* / ***R. Jooste,*** (1987) 3 Tax Planning, p. 17, 18 / ***R. Jooste,*** (1991) 5 Tax Planning, p. 111 *et seqq.* / ***J. Silke,*** (1991) 30 Income Tax Reporter, p. 99 *et seqq.* / ***I. Wilson,*** (1992) 6 Tax Planning, p. 17 seqq. / ***B. Wunsh,*** 1 SATJ 1985, p. 44 *et seqq.* / ***B. Wunsh,*** 2 SATJ 1987, p. 26 *seqq.* and ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 7, para. 701 *et seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 108 *et seqq.* / ***J. H. Jordaan,*** Estate & Financial Planning, p. 125 *et seqq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., Chap. 23 (trusts).
A. Davey, Insurance and Tax, Vol. 1, No. 2, p. 29 *et seqq.* / ***R. Jooste,*** (1988) 27 Income Tax Reporter, p. 5 *et seqq.* (at p. 9 *seqq.*) / ***M. Stein,*** (1986) 1 Tax Planning, p. 139 / ***do,*** (1987) 3 Tax Planning, p. 69 *et seqq.* and ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6, para. 6145 *seqq,* chap. 13, para. 1310 *seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 294, 304, 307, 308, 317 *et seqq.* and 330 / ***J. H. Jordaan,*** Estate & Financial Planning, p. 170 *et seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 29 *seqq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., Chap. 24 (limited interests).

6) Even the well renowned works on estate duty and estate planning by ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., Chap. 27, para. 27.10 *et seqq.,* chap. 30, para 30.8 and chap. 31, para. 31.1 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 326, 388, chap. 17, para. 1701 *et seqq,* are giving only a brief introduction towards the problems of double death duties levied on deceased estates.

7) *Vide supra,* Preface and brief summary of the focus of this work, p. III, and *ibid,* fn. 8.

As a result of this, there are no bilateral regulations dealing with cases where the property and assets of South-African citizens, who are also economically involved in the Federal Republic of Germany, are, at the time of their death`s, subject to the South-African estate duty on deceased estates as well as the German ErbStG.
Likewise a German taxpayer can *vice versa* be affected in the same or in a similar way, if he is economically involved in the Republic of South-Africa.

But although there is a possibility that the property and assets of a South-African taxpayer can be the object of the South-African estate duty and the German ErbStG at the same time, it would be wrong to assume that the tax burden imposed on the deceased estate by the South-African Treasury and the German Treasury simply cumulates.
It was shown earlier that double taxation agreements on the taxation of deceased estates entered into by the Republic of South-Africa and the Federal Republic of Germany are the exception rather than the rule if compared with other double taxation agreements concluded by these countries.[8)]
And yet the problems arising out of this `gap´ seem not to be insoluble. The tax legislators in both countries have foreseen the possibilty of double death taxation occuring from this lack of bilateral agreements, and the South-African and German tax systems provide certain remedies in order to protect their taxpayers from paying double death duties.
One of the [most important of the several] remedies against international double [death][9)] taxation is what is generally referred to as `unilateral relief´, meaning the relief granted outside any commitment contained in bilateral international agreements.[10)]
In the South-African Estate Duty Act 45 of 1955 unilateral relief from international double death duties is mainly provided under sec. 16 (c) of the Act and to a certain degree unilateral relief is also granted under sec. 3 (2) (c)-(h).[11)] A similar unilateral relief is granted by the German tax system under sec. 21 of the ErbStG.

And so the metaphor of Scylla and Charybdis, used in the beginning of this introduction, seems to fade away.

But does a system like this really work ? Is the double death taxation problem really avoided by regulations granting a `basic´ unilateral relief ?
In one way it seems to be possible. Unilateral relief regulations are especially designed to provide relief for a taxpayer who has to `carry the burden´ of two tax systems imposing a death tax on his property and assests.
And if one compares the unilateral regulations provided by the South-African tax system and the German tax system there seems to be a quiet consent between them, as far as the fundamental question of the general prevention of double death duties is concerned. The South-African as well as the German tax legislator have provided regulations stating roughly that any death duty paid to any other state in respect of any property situate outside the legislating country shall be deducted from any duty payable under the death duty statute of the legislating country.[12)]

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8) *Vide supra,* Preface and brief summary of the focus of this work, p. III.
9) The remarks in brackets were inserted in the sentence by the writer of this work.
10) Similar, ***D. Meyerowitz / E. Spiro,*** in: Meyerowitz and Spiro on Income Tax, chap. 27, para. 1625 (relating to the provision of unilateral relief on the Income Tax sector).
11) But compare also the provisions in sec. 4 (e) and (f) of the Estate Duty Act 45 of 1955.
12) *Vide,* sec. 16 (c) Estate Duty Act 45 of 1955, sec. 21 (1), sec. 21 (2) ErbStG.

But despite these unilateral regulations, a complete elimination of double death taxation without a bilateral agreement seems to be an impossible task.
Even though both tax systems provide `basic´ unilateral relief regulations, these regulations can be said to be similar but by no means identical.
This results mainly from the fact that the system of unilateral relief granted by the South-African and the German tax legislators are not synchronized.
Therefore the `basic´ systematic attitude and the definitions of such important terms as `resident´, `ordinarily resident´, `customary place of abode´, `foreign property´ or `property situate outside or inside the country´ differ in the South-African and German statutes concerned with death duty. Consequently several loopholes and pitfalls are left as `traps´ for the taxpayer.
If one has a close look at these loopholes and pitfalls one could even draw the conclusion that, although a `basic´ unilateral relief on international double death taxation is granted by the South-African Estate Duty Act 45 of 1955 and the German ErbStG, these rules are only designed to cope with international double death duties up to a certain degree and in some cases they might not even apply.

In order to find out if there is any substance in this assumption, it is proposed to focus especially on an analysis and discussion of the South-African Law of estate duty, South-African `International Tax Law´ and the related Laws.
In addition an analysis and discussion of the German ErbStG and the German International Tax Law will be necessary.
Although the crucial points connected with the problems concerned will be identified, it is beyond the scope of the present work to discuss all the special problems, related to the complex matters mentioned hereafter, *in extenso*.[13] The purpose of this work is to stimulate the reader to a further examination of the variety of problems occuring where two jurisdictions tax the property and assets of a taxpayer at the time of his death.
In addition the aim is to draw attention to the long-abandoned subject of the international double taxation of estates and inheritances, and to highlight an aspect of growing importance in modern estate planning, too often left out of consideration.

Finally, it is intended to provide the necessary information to enable the reader to decide whether the taxation of South-African / German deceased estates is a troublesome or whether a safe way can be found past the `Scylla´ of the German Treasury and the `Charybdis´ of the South-African *fiscus* to a certain amount of death duty payable to each of them.

13) Please note that if a certain problem is not dealt with *in extenso*, the writer will try to give useful hints for the interested reader to find further literary sources, dealing with the problems concerned.

II. The use of terms

II.1. The definition of 'International Tax Law'

Throughout the preface and in the introduction, the terms 'International Tax Law', 'South-African International Tax Law' and 'German International Tax Law' are used. Because the use of these terms can be found in the German and in other countries' tax terminologies, but not in the South African, it could be ambiguous and partly misleading if these terms were used without definition.

II.1.1. 'International Tax Law'

A lot of different branches of the law deal with 'International Law' and it must therefore be asked how the adjective 'international' is defined when the expression 'International Tax Law' is used.
Basically the use of the term 'international' could give rise to the impression that 'International Tax Law' is merely concerned with multinational or bilateral tax treaties, entered into by different tax systems in order to determine an equivalent use of certain rules of taxation, recognized by the countries that have concluded these treaties or are signatories to them.
Secondly the adjective 'international' is often related to debates about the application of certain rules and rights deriving from 'Public International Law'. But in that context the term 'international' refers mainly to the mere origin of those rules and rights of the 'Public International Law'.[14]
Although both of these aspects build a part of the term 'International Tax Law' neither the first nor the second description of the adjective 'international' is able to explain the use of this word in the term 'International Tax Law' to its full extent.

The term 'International Tax Law', as it is used in general, characterizes the branch of the law that deals with international tax cases (*i.e.* tax cases, involving another country or other countries). The sources of 'International Tax Law' are either national regulations or international double taxation agreements.[15]

As mentioned above the need for relief from international double death taxation has not attracted the conclusion of many bilateral agreements, either by the Republic of South-Africa or by the Federal Republic of Germany.[16] Therefore the 'basic' relief from double (death) taxation in South-Africa is achieved mainly by the (national) unilateral regulations of sec. 16 (c) and to a certain extent by sec. 3 (2) (c)-(h) of the Estate Duty Act 45 of 1955 (EDA)[17]. The German ErbStG provides a (national) unilateral relief, chiefly under sec. 21 of the ErbStG.

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14) See the works of, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 1 *et seq.* / ***R. S. Martha,*** The Jurisdiction to Tax in International Law, p. 46 *et seqq.* / ***C. van Raad,*** Nondiscrimination in International Tax Law, p. 19 *et seqq.* / ***Vogel,*** Der räumliche Anwendungsbereich..., p. 168 *et seq.*

15) *Cf.,* ***Arendt,*** StuW 1959, p. 382 *et seqq.* / ***Boochs,*** DVR 1987, p. 178 *et seqq.* / ***Ebenroth,*** Erbrecht, p. 997 *et seq.* / ***Fischer,*** BB 1984, p. 1033 *et seqq.* / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 1 *et seq.* (at p.2).

16) *Vide supra,* Preface and brief summary of the focus of this work, p. III, and *ibid,* fn. 8.

17) Please notice that the ***Estate Duty Act 45 of 1955*** in the following will be referred to by the abbreviation ***EDA*** or simply the ***Act.***

As a result of this the term `International Tax Law´ reflects mostly national tax regulations when used in the context of South-African estate duty on deceased estates and the German ErbStG.
At first it seems to be a paradox that `International Tax Law´ should be represented just (or to be precise, mainly) by `national´ tax regulations. But the adjective `international´ can also be used in the different branches of the national law to show that specific regulations of these branches deal with international issues.[18]
And `International Tax Law´ is not merely represented by unilateral regulations in these countries, but in accordance with the definition given above - `International Tax Law´, in relation to the South-African estate duty and the German ErbStG, embodies also the few bilateral agreements on death duties concluded by Republic of South-Africa and Federal Republic of Germany[19].

II.1.2. `German International Tax Law´

As the term `International Tax Law´ finds its meaning in the wide definition of all the regulations granting unilateral or bilateral relief from double taxation provided by tax systems throughout the world, the prefix `German´ narrows this term to the German tax legislation. The `German International Tax Law´ is designed to identify the personal (persönliche) and the factual (sachliche) tax liability (Steuerpflicht) of taxpayers with personal relations or economic contacts in foreign countries.
On the aspect of the ErbStG, the `German International Tax Law´ is furthermore intended to give tax specialists, practitioners and taxpayers a tool to control if and to what extend the German ErbStG applies, and to assess the tax liability in cases where property and economic involvement indicates a relation to a foreign country or another foreign element (Auslandsberührung). In the context of the ErbStG a foreign element is introduced to the assessment of death duties as soon as the bequeather (Erblasser) or the heir (Erbe) is a foreigner or one of them has his place of residence (Wohnsitz) in a foreign country. In addition, a foreign element is introduced when the subject matter of an aquisition by inheritance (Erwerbsgegenstand), for example real estate or a company, is located in a foreign country.[20]
The sources of the `German International Tax Law´ on the aspect of death duties are the national regulations of the ErbStG, the Außensteuergesetz (AStG[21] - Foreign Tax Relations Act, designed mainly to prevent international fiscal evasion) and the few double death taxation agreements entered into by the Federal Republic of Germany.

II.1.3. `South-African International Tax Law´

Although comparable or equivalent terms to `International Tax Law´ or `German Interna-

18) *Cf.*, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 1.
19) *Vide supra,* Preface and brief summary of the focus of this work, p. III, and *ibid,* fn. 8.
20) See, ***Ebenroth,*** Erbrecht, p. 997 and 998 / ***Meincke,*** ErbStG - commentary, sec. 21, para. 1 *et seqq.* and sec. 2, para. 1 and para. 14.
21) ***Gesetz über die Besteuerung bei Auslandsbeziehungen (Außensteuergesetz),*** (Foreign Tax Relations Act) as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany on the 8th of September 1972 (BGBl. I, p. 1713 *et seqq.*) as lastly amended by Unification Treaty FRG / former GDR (BGBl. II, 1990, p. 889 *seqq.*, p. 985 *seqq.*) and the Taxation Amendment Act of the 25th of February 1992 (BGBl. I, p. 297 *seqq.*).
Please notice that the ***Außensteuergesetz*** in the following will be referred to by the abbreviation ***AStG.*** The relevant sections of the AStG for the German ErbStG and the `German International Tax Law´ on death duties are sec. 4 and sec. 2 of the AStG.

tional Tax Law' are *expressis verbis* not provided by the South-African Tax Law terminology - it is unavoidable that something like 'International Tax Law' or 'South-African International Tax Law' is also in existence when one compares the content of the South-African estate duty regulations and the double taxation agreements with the contents of the foreign terminology.

It was shown above that sec. 16 (c) and sec. 3 (2) (c)-(h) of the EDA together with the double death taxation agreements concluded by the Republic of South Africa provide the same basic criteria for qualification as 'International Tax Law' or 'South-African International Tax Law' as well as for example the German ErbStG.

In addition to that the EDA also gives tax specialists, practitioners and taxpayers a tool to comprehend whether and to what extent the South-African EDA applies, and to assess the death duty which is levied on an estate when a taxpayer owns property situate outside the Republic (sec. 16 (c) EDA) or is 'not ordinarily resident' (sec. 3 (2) (c)-(h) EDA) in the Republic at the time of his death.[22]

Because of all the shown similarities with the foreign (*viz.,* the German) tax law terminology providing the terms 'International Tax Law' or 'German International Tax Law' for the above described criteria, it may be permissible, to introduce the terms 'International Tax Law' and 'South-African International Tax Law' analogously to the foreign use of these terms - to use them as a short reference to the above mentioned considerations.

The tax law regulations referred to in this context are the EDA regulations granting unilateral relief[23] or the bilateral agreements, entered into by the Republic, providing relief from international double death taxation[24].

II.2. 'Double Taxation'

Another term of tax law terminology used throughout the preface and in the introduction is the term 'double taxation'.

'Double taxation' does not appear to be capable of precise definition, even though it has been in use for many years.[25] Apparently the meaning of the term 'double taxation' is widely regarded as self-evident.[26] But on examination a lot of different combinations concerned with the possibility of levying multiple taxes can be found and the terminology differs from case to case.

The scale of the different usages of the term 'double taxation' varies and finds its climax in the distinction between double taxation in a narrow sense (Doppelbesteuerung im engern Sinn), in a wider sense (weiteren Sinn), in the widest sense (im weitesten Sinn), formal (formale) and material or substantive (materielle) double taxation, subjective (subjektive) and objective (objektive) double taxation, genuine (echte) and not genuine (unechte) double taxation, technical (technische), legal (rechtliche), economic (wirtschaftliche), horizontal (horizontale), vertical (vertikale) double taxation and so on.[27]

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22) See also the provisions in sec. 4 (e) and (f) of the EDA.

23) *Viz.,* sec. 16 (c) and sec. 3 (2) (c)-(h) of the EDA.

24) *Vide supra,* Preface and brief summary of the focus of this work, p. III, fn. 8.

25) This is the conclusion drawn by ***W. D. Goodman,*** International Double Taxation of Estates..., p. 3 *et seqq.,* where he thoroughly examines the term 'double taxation' and its contents. This statement is culminated in the German tax law literature by the statement: 'It is unimportant for the use of double taxation agreements, how the term double taxation has to be defined.' See, ***Vogel,*** Doppelbesteuerungsabkommen, Introduction, para. 4.

26) *Cf.,* ***W. D. Goodman,*** International Double Taxation of Estates..., p. 3.

27) See for the scale of the different interpretations of the term 'double taxation', ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 9 / *Cf.* ***Tipke / Lang,*** Steuerrecht, p. 145 *et seq.*

But the three major or paramount varieties of double taxation can be expressed as economic, domestic and international double taxation.[28]

II.2.1. Economic 'Double Taxation'

Economic tax terminology interprets the term 'Double Taxation' as an indicator for the position, where the same object of taxation (Steuerobjekt) is subject to a tax at more than one level. The most important example arises where company profits are first subject of a tax in the hands of the company and then, upon distribution, are taxed once again in the hands of the shareholder. According to economic tax terminology, this statement of affairs would be interpreted as a case of 'double taxation'.[29]
But since the taxpayers in this case are different *legal personae* and the quality of income changes upon distribution, 'economic double taxation' is, strictly speaking, not an example of 'double taxation' as it is used in tax law terminology[30] or hereafter.

II.2.2. Domestic 'Double Taxation'

Because of the above critizism of the economic approach to double taxation, tax law terminology uses this interpretation neither in theory nor in practice.[31]
Tax law terminology differentiates mainly between domestic double taxation (Doppelbelastung) and international double taxation (Doppelbesteuerung).[32]
Domestic double taxation occurs where one and the same tax legislator imposes a tax twice in respect of the same taxable event (wirtschaftlichen oder steuerbaren Vorgang) and person (Steuersubjekt).[33] But the term domestic double taxation (Doppelbelastung) does not refer to the situation where the tax legislation operates at different levels in a country's constitutional structure (for example, federal [Steuerhoheit des Bundes], provincial [Steuerhoheit der Länder] and municipal [Steuerhoheit der Kommunen] authorities enjoy concurrent or overlapping tax powers).[34]
Nor does it refer to a position where an item is subject to two different types of taxes (e.g. income tax and VAT).[35]
But on the issue of 'Some aspects of estate duty on deceased estates in the Republic of South-Africa - with special reference to the problems and effects of double taxation occuring in relation to the German ErbStG' the double taxation problem is not solely created by one tax legislator. Therefore it is not domestic double taxation (Doppelbelastung), which is meant when the term 'double taxation' is used here.

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28) *Cf.*, ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *et seqq.* (at p. 69) / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 9 *seqq.*.
29) See also, ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *et seqq.* (at p. 72) / With a nearly identical example for the German Tax Law, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 9 *seqq.*.
30) *Cf.*, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 9. / ***A. Passos,*** Tax Treaty Law, p. 77.
31) ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 9 *et seqq.*
32) ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 9 / ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *et seqq.* (at p. 69) / This differentiation is critizised in: ***Tipke / Lang,*** Steuerrecht, p. 145 *et seq.*
33) ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 10 / ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *et seqq.* (at p. 69).
34) For detailed information see, ***Tipke / Lang,*** Steuerrecht, p. 145 *et seq* and ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *et seqq.* (at p. 69) .
35) *Cf.*, ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *et seqq.* (at p. 69).

II.2.3. International 'Double Taxation'

In contrast to domestic double taxation the term international double (or multiple) taxation deals with the conflict (steuerliche Normenkonkurrenz) of tax regulations (provided by two different states or countries and therefore different sovereign tax legislators) on an international basis. The problem of international double taxation arises mainly where tax authorities of different legislating countries impose and levy an identical or similar tax (gleiche oder gleichartige Steuer) on the same taxpayer (Steuersubjekt) in respect of the same taxable event or object (Steuergegenstand) at the same time.[36] In short, international double taxation is the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods.[37]

The causes of the possible liability of a taxpayer to pay double death taxes on South-African / German deceased estates lie mainly in the fact that the various connecting factors between the regulations of the two tax jurisdictions on the one hand and the potential taxpayers on the other hand are not mutually exclusive but concurrent. For this reason the death duties imposed by the Republic of South-Africa and the Federal Republic of Germany can overlap to the disadvantage of the single (death) taxpayer. The occurrence of this effect is rooted chiefly in the diffent systematic concepts and different attitudes towards death duties embodied in the differing death tax legislations of these countries.

While the South-African EDA relates mainly to the 'property' of the deceased and his 'ordinarily residence' at the time of his death, the German ErbStG finds the connecting factors for the levying of death taxes chiefly in the person of the deceased (bequeather) or in the quality of the taxpayer (heir) as a 'resident' or 'ordinarily resident'. But in addition to that the connection of death duty to the location or *situs* of the property that is subject to the aquisition by death, is also a part of the German ErbStG.

Consequently the possibility that the South-African estate duty and the German inheritance tax can concur and overlap is significant, if property of the deceased or the deceased himself was economically or personally involved in the tax systems of both countries at the time of his death. Therefore it is the term 'international double (or multiple) taxation' that is intended, when the term 'double taxation' is used hereafter.

II.3. 'Death duties'

The term 'death duties' or 'death taxes', as it is used here, is intended as a general term and encompasses South-African estate duty on deceased estates and the German inheritance tax, as well as other duties which are levied in respect of the transfer of wealth from a bequeather (deceased) to an heir, if they are not specifically referred to in the text.[38]

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36) ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 10 and in detail, p. 10 *et seqq.*

37) See, ***D. R. Davies,*** Principles of International Double Taxation Relief, p. 1, para 1.01 who is refering to the definition given by the ***OECD,*** Model Double Taxation Convention of Income and on Capital (1977), p. 7, para. 3. Similar, ***A. Passos,*** Tax Treaty Law, p. 77 *et seq.* and ***Tipke / Lang,*** Steuerrecht, p. 145 *et seq.*

38) The term is also used by ***W. D. Goodman,*** International Double Taxation of Estates..., p. 1.

III. A basic characterization of the South-African and the German `death duty legislation´

The imposition of a death duty can be assumed as soon as a tax system taxes the subject matter of the passing (transfer) of property and assets from a deceased to an heir.
In most of the modern tax systems throughout the world the levying of such a tax is achieved by the imposition of a death duty separate from other taxes (*e.g.* income tax).
A different attitude towards the levying of death taxes can only be found in the reports of the `Royal Commission on Taxation´ (Carter-Commission)[39], enquiring into the tax policy and tax structure of Canada in the middle of the 1960`s. In that report the Carter-Commission discussed and recommended the embodiment and the levying of `death taxes´ during the taxpayers lifetime through income tax[40]. But this second possibility of levying a `death duty´ is at present not used.[41]
On examining the characteristics of the South-African and the German death taxes one finds that both tax systems impose a death duty on the transfer of property and assets from a deceased to an heir in the `traditional manner´ - represented by a tax separate from other taxes.[42]
Because there is a strong bond between death duties and the avoidance of death duties by donations, the South-African as well as the German tax legislator has complemented death duty legislation with the introduction of a donations tax.[43]
Up to this point it seems that South-African and German death tax legislation have a lot in common. But the basic common factors that can be found on comparing both death duty systems on the surface, are belied by the differences that can be found beneath.[44]
On examining the different systems of death duties imposed by tax legislations throughout the world a distinction can be made between two major forms or methods of levying death taxes.
In some jurisdictions, the death duties levied take the form of transfer taxes, sometimes

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39) See, ***Report of the Royal Commission on Taxation*** (Carter-Report), Vol. III, chap. 7, 8, 10, 17, Ottawa 1966.

40) ***Report of the Royal Commission on Taxation*** (Carter-Report), *op. cit.*, p. 465 *et seqq.*

41) A death tax following this concept was levied for a short time in the USA, on the basis of the Income Tax Act of 1894. See, ***Oberhauser,*** Handbuch der Finanzwissenschaft, Vol. II, p. 488.

42) In the Republic of South-Africa the death taxes are levied by the ***Estate Duty Act 45 of 1955*** as lastly amended by the Taxation Laws Amendment Act, No 36 of 1991. In the Federal Republic of Germany the death duties are levied by the ***Erbschafts- und Schenkungsteuergesetz of the 17th of April 1974*** as lastly amended by the Taxation Laws Amendment Act of the 25th of February 1992 (BGBl. I, p. 297 *seqq.*) and the Amendment Act of the 9th of November 1992 (BGBl. I, p. 1853).

43) Therefore the German ***Erbschafts- und Schenkungsteuergesetz (ErbStG)*** embodies provisions for inheritance taxation as well, as provisions for donations tax.
In the Republic of South-Africa the donations tax is embodied in the sec. 54 *et seqq.* of the ***Income Tax Act 58 of 1962.*** And although appearing in the Income Tax Act, donations tax has nothing to do with the taxation of incomes, but is a tax on the disposal of capital designed, according to the ministerial budget speech, at the time of its introduction, to prevent taxpayers by the means of donations, reducing the value of their estate for estate duty purposes [...]. ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, chap. 28, para. 1638 / *Cf.,* ***C. Divaris / M. Stein,*** Silke on South African Income Tax, Vol. 2, chap. 23, para. 23-1 / See also the remarks per ***Boshoff A.J.P.,*** in ***Ogus v. SIR*** 1978 (3) SA p. 67 *et seqq.* (at p. 74) / ***do.*** 40 SATC p. 100 *seqq.* (at p. 107). But the remarks about the avoidance of estate duty are no longer valid, per 46 SATC p. 121 *seqq.* (at p. 124).

44) The following is only a short introduction to the basic differences between the South-African and the German death duties. The other differences will be shown up throughout the work.

called franchise taxes or estate taxes / duties (Nachlaßsteuer).[45] Other countries impose a tax on the heir or beneficiary. This form of taxation is frequently referred to as an inheritance tax, succession duty, sometimes as an acquisition duty or accessions tax (Erbanfallsteuer).[46] The two systems do not exclude each other and there are tax legislations which assess liability for the death duty payable by their taxpayers using a combination of both.

The death taxes which take the form of transfer taxes or estate duties generally levy a death duty based on the deceased`s total property, less exemptions. The assessment of this kind of death tax normally excludes the question how many heirs participate in the inheritance or how the heirs were related to the deceased.

In contrast to this, death duties payable in the form of inheritance taxes or succession duties are levied as a tax on the person (heir) who has aquired property or assets due to an inheritance or bequest. This type of death tax is generally based on the inherited amount received by the beneficiary and on his (family) relationship to the bequeather.[47]

In its origin death duties on deceased estates were introduced by tax legislators mainly for fiscal reasons. A methodic, systematic or dogmatic justification given by the legislators for the imposition of those taxes can therefore be seen mainly as a supplement delivered with or after the introduction of the death tax.[48] But since the first introduction of death duties in the Cape Province in 1864[49] or since the introduction of the first uniform death duty regulation in Germany in 1906[50] a whole variety of reasons of all shades, either in favour of or against the created death tax, were enlisted by tax specialists concerned with this matter.

But only a few of all the `pros and cons´ that were or are brought forward seem to be designed to survive a critical approach to their arguing.[51]

In order to expose the basic methodic, systematic and dogmatic attitudes of the different tax systems towards the death duties imposed by them, the discusion that follows will focus on the main justifications for the imposition of the South-African estate duty and the German inheritance tax. Some of these aspects may concur or be similar, but in order to show the different approaches of the South-African and the German tax legislator the exposition will be twofold.

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45) ***W. D. Goodman,*** International Double Taxation of Estates..., p. 1 *et seq.* / ***Oberhauser,*** Handbuch der Finanzwissenschaft, Vol. II, p. 490.

46) See, ***W. D. Goodman,*** *op. cit.*, p. 1 *et seq.* / ***Oberhauser,*** *op. cit.*, p. 491.

47) ***W. D. Goodman,*** *op. cit.*, p. 2 / ***Oberhauser,*** *op. cit.*, p. 491 *et seq.*

48) *Cf.* ***Oberhauser,*** *op. cit.*, p. 490.

49) For a short historic background see, ***J. N. Swart,*** The Planning and Administration of Estates, p. 220 / ***D. Meyerowitz,*** in: The Taxpayer 3 (1954), p. 84 / *vide infra,* part A. IV.3., p. 16 of this work / The Province of the Cape of Good Hope introduced the first Succession Duty Act in 1864. Natal followed in 1905 and the Transval constituted the first Estate Duty Act in 1899. In the Orange River Colony the Succession Duty was embodied as Chapter LXVIII of the Law Book.

50) See, ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 19 *et seq.* / ***Oberhauser,*** *op. cit.*, p. 495.

51) *Cf.*, ***Oberhauser,*** *op. cit.*, p. 490 / The arguing about the discontinuation or the retention of death duties (estate duty) embodies a whole variety of arguments which cannot all be reproduced in this work. The main arguments are exposed in the works of ***J. N. Swart,*** *op. cit.*, p. 220 *et seq.* / First Report of the Commission of Enquiry into Fiscal and Monetary Policy in South-Africa ***(Franzsen Commission I),*** p. 58, para. 279 *et seqq.* / Second Report of the Commission of Enquiry into Fiscal and Monetary Policy in South-Africa ***(Franzsen Commission II),*** p. 89 *seq.*, para. 359 *et seqq.* / Report of the Commission of Enquiry into the Tax Structure of South-Africa ***(Margo Commission),*** p. 311 *seq.*, para. 20.4 *et seqq.*

III.1. A basic characterization of the South-African estate duty on deceased estates

The estate duty levied in the Republic of South-Africa is codified in the Estate Duty Act 45 of 1955 (EDA); and the assessment of the payable death duty is based on the deceased's total property, less exemptions.[52] South-African estate duty is levied at a flat rate of 15%[53] and the liability for the payment of the estate duty rests normally[54] with the executor of the deceased estate.[55] The estate duty payable affects the distributable balance of a deceased estate and is therefore required to be reflected in the liquidation and distribution account of an estate as an estate liability.[56] The question how many heirs participate in the inheritance or how the heirs were related to the deceased is generally of no importance for the calculation of the South-African estate duty.[57]

Bearing these facts in mind and comparing them to other death duty systems, one can classify the South-African estate duty on deceased estates as a death tax which is significantly related and similar to the Anglo-American[58] death tax systems (Nachlaßsteuersysteme).

South-African estate duty (Nachlaßsteuer) on deceased estates is imposed by the legislator to give the tax system a balance and finish in that the [estate duty] system is based on a source that is not utilized or affected by the ordinary income tax or indirect taxes (*e.g.* VAT).[59] For this reason estate duty can be seen as a tool to tax capital gains which were not subjected to income tax, or to tax wealth which is not the result of an (taxable) effort.[60] In short - South-African estate duty is partly meant to control the 'paid' and to recover the 'unpaid' taxes of the taxpayer at the time of his death.[61]

Furthermore the South-African estate duty is characterized as a supplementary tax concerned with the redistribution of wealth and the equitable spread of the tax burden.[62] To reach this goal the EDA provides tools to redistribute large assets and to counteract the concentration of property.[63]

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52) To be exact: The dutiable amount is calculated by bringing into account all such property as, in term of the EDA, forms part of the deceased estate, and the values determined according to the regulations of the EDA, and by deducting therefrom: firstly all such amounts as are allowed as deductions in terms of the EDA (the difference being the net value of the estate), and secondly, by deducting from this net value the abatement allowed by the EDA. *Cf.,* ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates..., chap. 27, para. 27.3 and 27.1.

53) Compare, ***First Schedule*** (Rate of Estate Duty) of the EDA.

54) *Vide,* sec. 11 (a) (ii) of the EDA. The exception from the rule is embodied in sec. 11 (a) (i) of the EDA. Compare also sec. 11 (b), 12, 13 and 25 of the EDA.

55) See, ***Meyerowitz,*** in: Meyerowitz on the Administration of Estates..., chap. 30, para. 30.14. / For concise information about the general rule and the exceptions to the rule see also, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10.

56) *Cf.,* ***Meyerowitz,*** in: Meyerowitz on the Administration of Estates..., chap. 15, para. 15.79.

57) The fixed deductions for surviving spouses and children - one of the few provisions regarding the family relation under the old EDA (former sec. 4A EDA), was substituted by sec. 11 (1) of the Taxation Laws Amandment Act 87 of 1988. *Cf.,* ***M. Stein / L. Mitchell / J. Silke,*** in: (1991) 30 Income Tax Reporter, p. 245 and (1992) 31 Income Tax Reporter, p. 7 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para 394.

58) See, ***Ferid / Firsching,*** Internationales Erbrecht, Vol. III, Großbritannien (Great Britain), sec. H, para. 258 *et seqq.* and Vol. VI, USA (United States of America), sec. H, para. 296 *seqq.*

59) *Cf.,* ***J. N. Swart,*** *op. cit.,* p. 221 / ***Franzsen Commission II,*** *op. cit.,* p. 89 *seq.,* para. 360 / ***Margo Commission,*** *op. cit.,* p. 311, para. 20.6

60) See also, ***J. N. Swart,*** *op. cit.,* p. 221 / ***Franzsen Commission II,*** *op. cit.,* p. 89 *et seq.,* para. 360 *seqq.* / ***Margo Commission,*** *op. cit.,* p. 311, para. 20.6

61) See especially, ***Margo Commission,*** *op. cit.,* p. 311, para. 20.6 (h).

62) This fact is also especially mentioned in ***Margo Commission,*** *op. cit.,* p. 311, para. 20.8, 20.9, 20.10, 20.11.

63) ***Margo Commission,*** *op. cit.,* p. 311, para. 20.6 (b).

III.2. A basic characterization of the German inheritance tax (ErbStG)

The inheritance tax levied in the Federal Republic of Germany is codified in the Erbschaft- und Schenkungsteuergesetz of 1974 (ErbStG). In contrast to South-African estate duty on deceased estates (Nachlaßsteuer) the German ErbStG levies inheritance taxes directly on an heir[64] who has aquired any property or assets due to an inheritance or bequest (Erbanfallsteuer).[65] On calculating the dutiable amount of death taxes the German inheritance tax considers the (family) relationship between the deceased and the heir and in addition to that the value of the inheritance. The rate of taxation depends mainly on family relationship - the closer the family relationship between the deceased and the heir - the less the rate of inheritance tax.[66]

Therefore the German ErbStG can be characterized as an inheritance tax or succession duty (Erbanfallsteuer) similar to other Continental inheritance taxes codified for example in the Dutch or Austrian death duty systems.[67] But the German ErbStG also shows up certain similarities to the Japanese inheritance tax.[68]

The German inheritance tax system (Erbanfallsteuer) is mainly influenced by the idea that a person who benefits from the deceased`s death should be subject to personal taxation in respect of this benefit.[69] The central term in the justification of the imposition of the German ErbStG is the financial capacity (finanzielle Leistungsfähigkeit) of the heir. Like the income of a person, the acquisition of property due to an inheritance is regarded as an advancement of the heir`s financial capacity and is therefore taxable.[70]

Another justification for the German inheritance tax is the distributive goal of the ErbStG, which is also based on the financial capacity. Whereas the different rates of taxation in the German Income Tax Act (depending on the income) are theoretically designed to achieve an equal distribution of the net income, the different rates of taxation in the inheritance tax act (depending on the family relationship between deceased and heir; and the value of the inheritance) follow the ideal of an equal distribution of property and assets.[71]

Finally the ErbStG is designed to give all taxpayers (heirs) the opportunity of an `equal start´ (Gleichheit der Startchancen) - after the inheritance tax is deducted from the acquired inheritance. For this reason the German inheritance tax legislator introduced increasing rates of taxation connected to the increasing value of inheritances.[72]

III.3. Summary

Although there are certain similarities between the South-African and the German death

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64) *Vide,* sec. 20 ErbStG. *Cf.,* ***Meincke,*** ErbStG - commentary, sec. 20, para. 3 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25, 175.

65) *Cf.,* ***W. D. Goodman,*** *op. cit.,* p. 2 / ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 26, 30, 41 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 7 / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 15 (2.3.1.) / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25, 32 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, p. 178, para. 1.1.

66) ***Pohlmann,*** Erbschaft- und Schenkungsteuer, p. 13. *Cf.,* the tax brackets in sec. 15 ErbStG.

67) Compare, ***Ferid / Firsching,*** Internationales Erbrecht, Vol. IV, Österreich' (Austria), sec. L, para. 160 *et seqq.* and Vol. IV, Niederlande (Netherlands), sec. Texte E, p. 133 *et seqq.*

68) See, ***Ferid / Firsching,*** Internationales Erbrecht, Vol. III, Japan (Japan), sec. L, para. 236.

69) *Cf.,* ***Oberhauser,*** *op. cit.,* p. 491 *et seqq.* / ***W. D. Goodman,*** *op. cit.,* p. 2.

70) ***Oberhauser,*** *op. cit.,* p. 491 *et seqq..*

71) See also, ***Oberhauser,*** *op. cit.,* p. 493 *seq.*

72) *Cf.,* ***Oberhauser,*** *op. cit.,* p. 494 / For the different rates of taxation under the German ErbStG see, sec. 19 in relation with sec. 15 of the ErbStG.

duty systems (*viz.*, the levying of death taxes as separate duties from other taxes and the combination of death duties and donations taxes), the differences in the basic attitudes towards the levying of these taxes prevail. Whereas the South-African death duties are levied by a system of estate duty on deceased estates, focusing mainly on the property of a deceased (Nachlaßbesteuerung), the German system is dominated by the idea of levying inheritance taxes directly on the heir who has aquired property or assets due to an inheritance or bequest (Erbanfallsteuer).

IV. The historic background of the characterized South-African and German `death duty legislation´

Estate duty, inheritance taxes or death duties in general have an interesting history. Among certain other taxes death taxes can be said to be one of the oldest tax remedies imposed by `fiscal legislators´ throughout the centuries to participate in the passing of property and assets from a deceased (deceased) to an heir.
Duties similar to the modern estate duties and inheritance taxes can be found in the ancient Sumerian and Egyptian tax systems, as well as in the Hellenistic period in ancient Greece.[73]

IV.1. Death duties and the Roman Empire

Compared to any other ancient tax system the levying of death duties found its first thorough elaboration[74] and reached its highest peak in the Roman Empire.
In the first centuries A.D. the main source of revenue in the Roman Empire was the land tax levied in the Roman Provinces.[75] But Roman citizens living on land situated in Italy had been exempt from this tax since the wars at the beginning of the first century B.C.[76]
Because there was a substantial lack of money in his budget and he could not tax Roman citizens with a land tax, the emperor *Augustus* introduced an `inheritance tax´ payable by those citizens.[77]
The economic scale of this tax was, compared to the economic scale of today`s estate duty and inheritance tax revenue[78], a major one. The inheritance tax revenue of the Ro-

73) See, ***Oberhauser,*** *op. cit.*, p. 495.

74) Evidence for the elaborateness of the Roman inheritance duty system and its `close rela- tion to modern death duty systems´ is given in the fact that the Roman Death Duty Codification, the *`lex vicesimaria´*, allowed the deduction of certain death-bed and funeral expenses from the inheritance tax payable by the heirs. This is the essence of a fragment in the ***Corpus Iuris Civilis,*** D. 11, 7, 37, 1 (This fragment deals with the problem of funeral expenses - a problem which still can be found in our times, compare ***The Taxpayer*** 19 (1970), p. 238). See, ***von Schanz,*** FinArch 1900, p. 1 *et seqq.* (at p. 28) / ***do.,*** FinArch 1901, p. 553 *et seqq.* Today the South-African EDA provides a similar provision in sec. 4 (a) of the Act. In the German ErbStG the death-bed and funeral expenses are deductible under sec. 10 (5) (No.3) ErbStG.

75) See, ***von Savigny,*** Über die römische Steuerverfassung unter den Kaisern, Zeitschrift für geschichtliche Rechtswissenschaft 6 (1828), p. 321 *et seqq.* / ***Meincke,*** StuW 1978, p. 352 *et seqq.* (at p. 353) / ***Mommsen,*** Römisches Staatsrecht, Vol. II.2., p. 947.

76) *Cf.*, ***Kaser,*** Das Römische Privatrecht, Vol. I, para. 53, p. 215

77) ***Cassius Dio,*** Dio`s Roman History, Book 55.24, 9 to 55.26 / ***E. Gibbon,*** The History of the Decline and Fall..., Vol. I, chap. VI, p. 299 *et seq.* / ***Mommsen,*** Römisches Staatsrecht, Vol. II. 2., p. 940.

78) In 1991 the Republic of South-Africa had a total tax revenue of R 69 290 (million), which consisted to 0,12% = R 82 (million) of estate duty revenue. ***Source:*** *Vide supra,* Preface and brief summary of the focus of this work, p. I, fn. 5. Similar figures can be found in the revised revenue figures for 1992/93 and in the budgeted collections for 1993/94 - recently publis-

man Empire was the main financial source of the military budget and the military pensions fund for veterans (*viz.*, the *aerarium militare*[79]).

Bearing these facts in mind *Gibbon*[80] assumed, at the end of the 18th century, that the Roman inheritance tax revenue was of such a scale, that the entire property and assets of Roman citizens flowed through the hands of the Roman Treasury within two or three generations.[81]

Although *Gibbon's* thesis cannot be verified by figures, other authors dealing with the same materia have arrived at similar conclusions and one can therefore at least assume, that the Roman inheritance tax was one of the major revenue sources of the Roman Empire up to the second century A.D.[82]

The regulations of the Roman inheritance tax were codified (approximately in the year six A.D.) in the *'Lex Iulia de vicesima hereditatium'*, with the short name *'lex vicesimaria'*. The original text of the codification was lost in the centuries of the decline and fall of the Roman Empire. But the main characteristics of this tax law codification can still be found in the works of the statesman and historian *Cassius Dio*[83].

According to *Cassius Dio* the Roman inheritance tax was levied only on the inheritances and bequests of Roman citizens. It was levied in cases of testamentary and intestate succession and the tax incorporated the property left to an heir, as well as *donations mortis causa* and legacies.[84] 'Close relatives' and 'very poor persons' were exempt from the tax.[85]

As the name of the codification was *'lex vicesimaria'* (*viz.*, the codification that taxes the twentieth part of the inheritance) the tax was levied at a flat rate of five per cent. Under the emperor *Caracalla* (approximately in the year 210 A.D.) the flat rate was raised to ten per cent.[86] But a few years later the successor to *Caracalla*, the emperor *Macrinus*, reintroduced the old rate of five per cent.[87]

Until today it is unknown when the inheritance tax, embodied in the *'lex vicesimaria'*, was abolished. But a fragment of the *Codex Iustinianus* refering to the *'lex vicesimaria'* indicates that the Roman inheritance tax had ceased to exist at the latest with the law reforms introduced by *Iustinian* in the year 531 A.D.[88]

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hed in the (1993) Income Tax Reporter, p. 85. In 1990 the Federal Republic of Germany had a total tax revenue of DM 549 900 (million), which consisted to 0,55% = DM 302 (million) of inheritance tax revenue. Taken from: **Langenfeld / Gail,** Handbuch der Familienunternehmen, sec. VII, para. 1 (1.1.) / See also, **Meincke,** ErbStG - commentary, Einführung, para. 14.

79) The *aerarium militare* was also created by *Augustus* and financed by the tax revenue of the *'Lex Iulia de vicesima hereditarium'* (the Roman succesion duty), the *centesima rerum venalium* (a tax of one per cent levied on the profits of auctions) and the *vicesima quinta servorum venalium* (a tax of four per cent levied on the sale of slaves). See, **Meincke,** StuW 1978, p. 352 *et seqq.* (at p. 353).

80) ***E. Gibbon,*** The History of the Decline and Fall of the Roman Empire in Eight Volumes, London 1776 (The work of Gibbon quoted in this dissertation is a new imprint of 1903).

81) In this context it has to be mentioned, that the Roman Treasury profited mainly from the fact that the deceaseds often made irrational wills. Examples given by, ***E. Gibbon,*** *op. cit.*, Vol. I, chap. VI, p. 300 *et seq.*

82) Compare, ***Mommsen,*** *op. cit.*, Vol. II. 2., p. 940.

83) ***Cassius Dio,*** Dio's Roman History, (The work of Dio cited in this work is a nine volume edition with an English translation of the originally Greek works by Dio).

84) *Cf.*, ***Cassius Dio,*** *op. cit.*, 55.25, 5 to 55.26 / ***E. Gibbon,*** *op. cit.*, Vol. I, chap. VI, p. 299 *et seq.* / ***Mommsen,*** *op. cit.*, Vol. II. 2., p. 940 *et seq.*

85) ***Cassius Dio,*** *loc. cit.*, 55.25, 6.

86) *Cf.*, ***Cassius Dio,*** *op. cit.*, 78.9, 4 / ***E. Gibbon,*** *op. cit.*, Vol. I, chap. VI, p. 299 *et seq.* / ***Mommsen,*** *op. cit.*, Vol. II. 2., p. 940 *et seq.* / ***Kaser,*** *op. cit.*, Vol. I, para. 164, p. 215, fn. 2.

87) See also, ***Cassius Dio,*** *op. cit.*, 79.12, 2 / ***E. Gibbon,*** *op. cit.*, Vol. I, chap. VI, p. 299 *et seq.* / ***Mommsen,*** *op. cit.*, Vol. II. 2., p. 940 *et seq.* / ***Kaser,*** *op. cit.*, Vol. I, para. 164, p. 215, fn. 2.

88) ***Cod. Iust.,*** 6, 33, 3, [...], quia et vicesima hereditatis a nostra recessit re publica, [...].

IV.2. The 'renaissance' of estate duty in the early modern ages

With the decline and fall of the Roman Empire not only was the codification of the *'lex vicesimaria'* lost, but also the idea of levying an inheritance tax or estate duty on deceased estates.

In the early medieval times the levying of death duties was merely impossible (simply because the majority of people in those times had no relevant property or assets).

The reintroduction of estate and succession duties began at the end of the 14th and in the beginning of the 15th century in the Italian city states. At the end of the 16th century the different Provinces of the Netherlands started to levy estate and succession duties.

Some of the German states and England[89] followed the Dutch example in the 17th century.

But the main 'renaissance' of estate and succession duties was throughout the 18th and the 19th century, when nearly all the European states introduced and imposed these taxes on their taxpayers.[90]

IV.3. The historic background of the South-African estate duty

The introduction of the first succession duty on South-African territory falls within the above-mentioned 'renaissance' of death duties in the 18th and 19th century.

In 1864 the Cape Colony introduced a Succession Duty Act[91] in terms of which legatees and heirs of a deceased estate paid a succession duty on the value of their legacies and inheritances.[92] A few decades later, in 1905, Natal[93] and the Orange Free State[94] followed the example of the Cape Colony and also introduced a Succession Duty Act; whereas the tax legislator of the Transval founded an Estate Duty Act in 1899[95].

The Acts imposed by the Provinces at the end of the last and at the beginning of this century differed in 'shape' and 'size' and show the full spectrum of the various possibilities to levy succession duties or estate duties on deceased estates by using a different assessment basis.[96]

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89) *Cf.,* ***E. Gibbon,*** *op. cit.,* Vol. I, chap. VI, p. 299, fn. 102c *et seq.*

90) See, ***Oberhauser,*** *op. cit.,* p. 495.

91) See, ***Statutes of the Cape of Good Hope 1652-1895,*** Vol. I, 1652-1871, p. 919 *et seqq.,* Act to impose Duties on Succession to Property, ***Act No. 5 of 1864*** / As amended by ***Statutes of the Cape of Good Hope 1652-1895,*** Vol. III, 1894-1905, p. 3433, ***Act No. 4 of 1895*** / As amended by ***Colony of the Cape of Good Hope,*** Acts of Parliament, p. 5432 *seqq.,* Session of 1908, Succession Duty Amendment Act of 1908, ***Act No. 33 of 1908.***

92) *Cf.,* sec. 2 and sec. 3 of the Act to impose Duties on Succession to Property, ***Act No. 5 of 1864*** / ***D. Meyerowitz,*** in: The Taxpayer 3 (1954), p. 84 / ***D. Meyerowitz*** / ***P. Meyerowitz,*** in: The Taxpayer 35 (1986), p. 61 / ***J. N. Swart,*** *op. cit.,* p. 220.

93) ***Colony of Natal,*** Acts of the Parliament of the Colony of Natal, Session of 1905, Act to impose Duties on Succession to Property, ***Act No. 35 of 1905*** / As amended by ***Colony of Natal,*** Acts of the Parliament of the Colony of Natal, Session of 1906, Sucession Duty Amendment Act 1906, ***Act No. 21 of 1906*** / As amended by ***Colony of Natal,*** Acts of the Parliament of the Colony of Natal, Session of 1909, Administration of Estates and Sucession Duty Amendment Act 1909, ***Act No. 16 of 1909.***

94) ***The Statute Law of the Orange River Colony,*** Chapter LXVIII of the Law Book, Succession Duty.

95) ***Statutes of the Transval 1899,*** Act of the Law relating to the Paymant of Duty upon the Estates of Deceased Persons of 1899, ***Act No. 15 of 1899*** / As amended by, ***Statutes of the Transval 1909,*** Act to amend the Law relating to the Paymant of Duty upon the Estates of Deceased Persons of 1909, ***Act No. 28 of 1909.***

96) If one compares sec. 2 and sec. 3 of the ***Cape Colony*** Act to impose Duties on Succession to Property, ***Act No. 5 of 1864,*** sec. 2, 3, 4 and 5 of the ***Natal Colony*** Act to impose Duties on Succession to Property, ***Act No. 35 of 1905*** and sec. 1 of Chapter LXVIII of the ***Orange River***

But these pre-Union Acts were repealed when the Death Duties Act 29 of 1922 was enacted.[97] From 1922, when the Death Duties Act came into operation, estate and succession duty were levied on a parallel basis.[98] In the Death Duties Act estate duty was based on the aggregate of the dutiable estate of the deceased and payable out of the estate, while a succession duty was assessed on the inheritance that each heir received; and therefore the succession duty under that Act was payable by the heirs.[99]

The Death Duties Act 29 of 1922 was repealed in 1955 and replaced by the Estate Duty Act 45 of 1955 (EDA), which, in its amended form, is presently in force.[100]

Right from its commencement the EDA was an Act which was and still is disputed.[101] Throughout the decades of its existence a lot of arguments either in favour of the discontinuation or in favour of the retention[102] of the levying of estate duty have been advanced; and it is mainly for this reason that the discussion about the `pros and cons´ of the levying of estate duty also forms a part of the reports of the two major Government Commissions investigating the tax structure of the Republic of South-Africa.

Whereas the first Commission (Franzsen Commission I and II[103]) investigating the tax structure of the Republic at the end of the 1960`s came to the conclusion that the estate duty in its `present form´ had to be maintained; the second Commission (Margo Commission[104]), delivering its report in the mid 1980`s, recommended the abolition of estate duty and the introduction of a capital transfer tax as a `substitution´ for the old EDA.[105]

In 1988 the Government issued a White Paper on the Margo Report and the Minister of Finance said in his Budget Speech that the reform of the old Estate Duty Act to a new Ca-

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Colony Law Book, with sec. 3, 4, 5 and the Schedule of ***the Transvaal*** Law relating to the Paymant of Duty upon the Estates of Deceased Persons of 1909, ***Act No. 28 of 1909.***

97) Third Schedule of the ***Death Duties Act No. 29 of 1922.*** See also, ***D. Meyerowitz,*** in: The Taxpayer 3 (1954), p. 84 / ***D. Meyerowitz / P. Meyerowitz,*** in: The Taxpayer 35 (1986), p. 61 / ***J. N. Swart,*** *op. cit.*, p. 220.

98) Compare, Chapter I and Chapter II of the ***Death Duties Act No. 29 of 1922.*** *Cf.* ***D. Meyerowitz,*** in: The Taxpayer 3 (1954), p. 84 / ***D. Meyerowitz / P. Meyerowitz,*** in: The Taxpayer 35 (1986), p. 61 / ***J. N. Swart,*** *in loc. cit.*, p. 220.

99) As laid down in Chapter I and Chapter II of the ***Death Duties Act No. 29 of 1922.***

100) See, ***Estate Duty Act No. 45 of 1955,*** Second Schedule. The ***Estate Duty Act No. 45 of 1955,*** was lastly amended by the Taxation Laws Amandment Act No. 87 of 1988 and the Taxation Laws Amandment Act No. 136 of 1991. ***D. Meyerowitz / P. Meyerowitz,*** in: The Taxpayer 35 (1986), p. 61 / ***J. N. Swart,*** *op. cit.*, p. 220.

101) Compare, ***D. Meyerowitz / A. S. Silke / E. Spiro,*** in: The Taxpayer 4 (1955), p. 221 *et seqq.* / ***D. Meyerowitz / P. Meyerowitz,*** in: The Taxpayer 34 (1985), p. 172 *et seq.* / ***do.,*** in: The Taxpayer 35 (1986), p. 61 *et seqq.* / ***D. Meyerowitz / P. Meyerowitz / D. M. Davis,*** in: The Taxpayer 37 (1988), p. 57 / ***J. N. Swart,*** *op. cit.*, p. 220 *seqq.* / And the arguments provided by the ***Franzsen Commission I,*** *op. cit.*, p. 58, para. 279 *et seqq.* / ***Franzsen Commission II,*** *op. cit.*, p. 89 *seq.*, para. 359 *et seqq.* / ***Margo Commission,*** *op. cit.*, p. 311 *seq.*, para. 20.4. *et seqq.*

102) For the arguments see, ***Franzsen Commission I,*** *op. cit.*, p. 58, para. 279 *et seqq.* / ***Franzsen Commission II,*** *op. cit.*, p. 89 *seq.*, para. 359 *et seqq.* / ***Margo Commission,*** *op. cit.*, p. 311 *seq.*, para. 20.4 *et seqq.*

103) First Report of the Commission of Enquiry into Fiscal and Monetary Policy in South-Africa ***(Franzsen Commission I),*** November 1968 / Second Report of the Commission of Enquiry into Fiscal and Monetary Policy in South-Africa ***(Franzsen Commission II),*** November 1970.

104) Report of the Commission of Enquiry into the Tax Structure of South-Africa ***(Margo Commission),*** November 1986.

105) See, ***Margo Commission,*** *op. cit.*, p. 319 *et seqq.*, para. 20.50 *et seqq.* / The most important recommandations of the Margo commission towards etate duty can also be found in: ***D. Meyerowitz / P. Meyerowitz / D. M. Davis,*** The Taxpayer 36 (1987), p. 155 *seq.* / ***K. Huxham / P. Haupt / R. Jooste,*** in: (1987) 26 Income Tax Reporter, p. 225 *seqq.*

pital Transfer Tax would be a demanding task.[106]

But although the Margo Commisson made substantial suggestions on how the old Estate Duty Act could be reformed into a new Capital Transfer Tax, the South-African tax legislator until today has not transformed these recommendations into a new 'death duty' codification.[107]

The old EDA and the donations tax provisions, embodied in sec. 54 *et seqq.* of the Income Tax Act, have survived. But they have been simplified, retreated and 'streamlined' for present purposes - granting an 'interim relief' until the new capital transfer tax is introduced by the tax legislator.[108] The main characteristics of the estate duty 'streamlining' in accordance with the Margo Report proposals are the abolition of the old progressive rates of estate duty and the introduction of a new flat rate of estate duty of 15%[109], plus the introduction of a substantial abatement of R 1 million[110], to be deducted from the net value of the estate before the tax liability is assessed.

As a result of this estate duty, is currently charged only on large estates.[111]

The near future of the South-African estate duty system can be characterized as an awaiting of the changes a new capital transfer tax will bring to the taxpayers, tax specialists and practitioners.

IV.4. The historic background of the German ErbStG - inheritance tax

In the previous paragraph it can be seen, that the present South-African estate duty system (Nachlaßsteuersystem) is the result of the development of South-African death taxes since their first introduction as succession or estate duties in the times of the Colonies, through the times of the Union, when death taxes were levied on a parallel system, on to today's levying of a single estate duty under the EDA, which was introduced in 1955.

Like the South-African estate duty system, the evolution of the German death tax into an inheritance tax system (Erbanfallsteuersystem) is mainly the result of the death tax development in German territory since the last century.

Although some of the German states imposed a death duty on their taxpayers as early as the 17th century, the main 'renaissance' of the death taxes on German territory also falls in the times of the 18th and 19th century.

After the foundation of the German Reich in 1871, nearly all the German states levied death duties.[112] The variety of death duties levied by the different states and the double death taxation resulting from the different codifications throughout the Reich were considered burdensome for the sole taxpayer; and although most of the German states levied death taxes in the form of inheritance taxes and based the liability for the payment of the tax

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106) Compare, ***D. Meyerowitz / P. Meyerowitz / D. M. Davis,*** The Taxpayer 37 (1988), p. 120(d) *et seqq.* / ***M. Stein,*** (1988) 3 Tax Planning, p. 140.

107) Compare, ***M. Stein,*** (1988) 3 Tax Planning, p. 140 / Recently a draft legislation dealing with the new capital transfer tax has been drawn up. ***D. Meyerowitz / P. Meyerowitz / D. M. Davis / T. S. Emslie,*** The Taxpayer 42 (1993), p. 48.

108) By the Taxation Laws Amandment Act No. 87 of 1988 / ***M. Stein,*** (1988) 3 Tax Planning, p. 140, 142 / ***D. Meyerowitz / P. Meyerowitz / D. M. Davis,*** The Taxpayer 37 (1988), p. 120(d).

109) See, ***First Schedule*** of the EDA / ***Margo Commission,*** *op. cit.*, p. 319, para. 20.53.

110) See sec. 4A of the EDA, introduced by the Taxation Laws Amandment Act No. 87 of 1988 / Compare, ***M. Stein,*** (1988) 3 Tax Planning, p. 142.

111) *Cf.*, ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 391, para. 287 / ***W. Abrie,*** Estates - Planning and Administration, p. 101.

112) *Cf.*, ***von Schanz,*** FinArch 1900, p. 1 *et seqq.* / ***do.,*** FinArch 1901, p. 553 *seqq.* / ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 19 / ***Meincke,*** ErbStG - commentary, Einführung, para. 9 / ***Oberhauser,*** Handbuch der Finanzwissenschaft, Vol. II, p. 495.

on the family relationship between the deceased and the heir[113], a homogeneous death tax legislation throughout the Reich was prevented by the diverse fiscal interests of the German states and the splintered civil law codifications.[114]

With the introduction of the uniform German civil law codification, 'Bürgerliches Gesetzbuch' (BGB[115]) in the German Reich on the 1st of January 1900, a uniform law of succession was imposed on the citizens living in the different German states. This centralisation of the German civil law codification and of the law of succession was the foundation for the introduction of the uniform Reichserbschaftsteuergesetz of 1906[116] (Inheritance Tax Act of the German Reich).

The Reichserbschaftsteuergesetz of 1906 was closely related to the regulations that were embodied in the Prussian Inheritance Tax Act of 1893/95. Spouses, children and grandchildren were exempt from the inheritance tax levied by the Reichserbschaftsteuergesetz. Depending on the grade of family relation and the amount of the inheritance, the rate of taxation increased from 4% up to a peak rate of 25% of the value of the inheritance or bequest.[117]

During an extensive reform of taxes and finances after the First World War the Reicherbschaftsteuergesetz of 1919[118] was introduced. The old inheritance tax was extended by the introduction of an additional estate duty and surviving spouses, children and grandchildren of a deceased were no longer exempt from the inheritance tax levied by the Reich.[119] The peak rate of taxation was increased up to 70% and had to be paid when the value of an inheritance exeeded the amount of 500 000 M (Mark).

With the imposition of a wealth tax in 1922 the additional estate duty, introduced in 1919, was eliminated from the Reichserbschaftsteuergesetz.[120]

After years of crisis and vast inflation in the German Reich, which saw the passing of more than one Emergency Tax Act, at the beginning of the 1920's, the further development of the German inheritance tax was mainly influenced by the Inheritance Tax Reform of 1925.[121] The reformed Reichserbschaftsteuergesetz of 1925 introduced a rate of taxation progressing from 2% up to a peak tax rate of 60%. Surviving spouses were exempt from the inheritance tax when there were also children left by the deceased.[122] For the evaluation of the property and assets of an inheritance the Reichserbschaftsteuergesetz of 1925 referred to the newly introduced Bewertungsgesetz (BewG - Valuation Law).

The Inheritance Tax Amendment Act of 1934 introduced a better position for the parents and grandparents of the deceased and narrowed the tax exemption for surviving spouses to

113) ***Crezelius,*** *op. cit.*, p. 19 / ***Oberhauser,*** *op. cit.*, p. 495 *et seq.*

114) See also, ***Crezelius,*** *op. cit.*, p. 19 / ***Meincke,*** ErbStG - commentary, Einführung, para. 9.

115) ***Please notice*** that the ***Bürgerliches Gesetzbuch*** in the following will be referred to by the use of the abbreviation ***BGB.***

116) ***Reichserbschaftsteuer- und Schenkungsteuergesetz 1906,*** (Inheritance and Donations Tax Act of the German Reich), as announced officially in the Reichsgesetzblatt (Law Gazette of the German Reich), (RGBl. 1906, p. 654 *et seqq.*) / ***Oberhauser,*** *op. cit.*, p. 495 *et seq.*

117) Compare, ***Crezelius,*** *op. cit.*, p. 19.

118) ***Reichserbschaftsteuer- und Schenkungsteuergesetz 1919,*** (Inheritance and Donations Tax Act of the German Reich), as announced officially in the Reichsgesetzblatt (Law Gazette of the German Reich), (RGBl. 1919, p. 1543 *et seqq.*)/ ***Crezelius,*** *in loc. cit.*, p. 19 / ***Meincke,*** ErbStG - commentary, Einführung, para. 9 / ***Oberhauser,*** *op. cit.*, p. 495.

119) See, ***Oberhauser,*** *op. cit.*, p. 495 *et seq.*.

120) Compare, RGBl. I 1922, p. 695 *seqq.* / ***Meincke,*** ErbStG - commentary, Einführung, para. 9 / ***Oberhauser,*** *op. cit.*, p. 495.

121) See, ***Reichserbschaftsteuer- und Schenkungsteuergesetz 1925,*** (Inheritance and Donations Tax Act of the German Reich), as announced officially in the Reichsgesetzblatt (Law Gazette of the German Reich), (RGBl. 1925, p. 320 *et seqq.*)/ ***Crezelius,*** *in loc. cit.*, p. 19, 20 / ***Meincke,*** ErbStG - commentary, Einführung, para. 9 / ***Oberhauser,*** *op. cit.*, p. 496.

122) ***Crezelius,*** *in loc. cit.*, p. 19, 20.

the cases in which the deceased had children from a marriage with the surviving spouse he or she left behind.[123]

After the Second World War, in the years 1946 and 1948, the German inheritance tax was influenced and increased by the tax legislation of the Controlling Council of the Allied Forces in Germany (Kontrollratsgesetze).[124]

In the newly founded Federal Republic of Germany the first major inheritance tax reform, after the Second World War took place in 1954. With this reform the German ErbStG returned mainly to the *status quo* of 1925/34. But in contrast to the legislation of 1925/34 surviving spouses were no longer exempt from the payment of inheritance taxes and the rates of taxation were renewed and increased. Provisions which found their origin in the Reichserbschaftsteuergesetz of 1925 could still be found in the German ErbStG until 1974.[125]

The main revision of the old Inheritance Tax Act and the introduction of a new German ErbStG in 1974 brought a lot of changes and renewals to the German ErbStG, although the main structure of the old inheritance tax system (Erbanfallsteuer) was retained.[126] The inheritance tax burden levied on large inheritances was increased, while the burden on smaller inheritances was decreased - a contribution to the increasing of prices in Germany at that time.[127]

Today the German ErbStG taxes mainly inheritances, bequests and donations, and the assessment of the amount of taxes under the German Inheritance Tax Act is a complex process.[128]

The ErbStG distinguishes between four main tax brackets (Steuerklassen I bis IV), depending on the family relationship between the deceased (donor) and the heir (donee).[129] The rate of taxation depends on the value of the inheritance (donation) and the above mentioned tax brackets.[130] The four distinguishable tax brackets under the German ErbStG are:

Tax bracket or tax class I (Steuerklasse I). It comprises the deceased`s spouse, children, step-children, and children of pre-deceased children or step-children.[131] The rate of taxation varies from 3% (up to DM 50.000) to 35% (over DM 100 million).[132]

In tax bracket II (Steuerklasse II) the descendants of children listed under Steuerklasse I (other than children of pre-deceased children or step-children) and parents, grandparents and more remote ancestors with respect to acquisitions by reason of death are taxed[133] at rates that vary from 6% (up to DM 50.000) to 50% (more than DM 100 million).[134]

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123) Compare, RGBl. I 1934, p. 1056 *et seqq.*

124) Laws of the Controlling Council of the Allied Forces in Germany, StZBl. 1946, p. 25 *et seqq.*, StZBl. 1948, p. 123 *seqq.* / ***Crezelius,*** *in loc. cit.*, p. 19, 20 / ***Oberhauser,*** *op. cit.*, p. 496.

125) See, ***Meincke,*** ErbStG - commentary, Einführung, para. 9 / ***Oberhauser,*** *op. cit.*, p. 495.

126) ***Crezelius,*** *in loc. cit.*, p. 20 / ***Oberhauser,*** *op. cit.*, p. 496 / For the intentions and the reasons of the legislator to renew the ErbStG, see especially, ***Meincke,*** ErbStG - commentary, Einführung, para. 10, 11, 12.

127) ***Oberhauser,*** *op. cit.*, p. 496.

128) See, sec. 1 and sec. 14 to 19 of the ErbStG / ***Oberhauser,*** *op. cit.*, p. 496, 497.

129) See, sec. 15 of the ErbStG. The German Erbschafts- und Schenkungsteuergesetz embodies provisions for the taxation of inheritances as well, as provisions for the taxation of donations (see sec. 1 (1) and (2) of the ErbStG). Therefore the explanations, given in connection with the problems concerned with the taxation of inheritances under the German ErbStG, can analogous also be applied to the problems connected with the taxation of donations.
Vid. the short introduction to the German ErbStG given by, ***D. M. Davis,*** (1990) 3 Juta`s Foreign Tax Review, p. 80 *et seqq.* (at p. 83).

130) Sec. 15 and 19 ErbStG. See, ***Oberhauser,*** *op. cit.*, p. 496, 497.

131) Sec. 15 (1) Steuerklasse I No. 1 to 3 of the ErbStG.

132) Sec. 19 (1) ErbStG (Steuerklasse I).

133) *Vide,* sec. 15 (1) Steuerklasse II No. 1 and 2 of the ErbStG.

134) *Vide,* Sec. 19 (1) ErbStG (Steuerklasse II)

Tax class III (Steuerklasse III) taxes parents, grandparents and more remote ancestors with respect to acquisitions by gift, brothers and sisters and their direct descendants, step-parents, sons-in-law, daughters-in-law, parents-in-law and the divorced spouse[135] at rates between 11% (up to DM 50.000) and 65% (over DM 100 million).[136]

In the last tax bracket - Steuerklasse IV - the German ErbStG taxes all other beneficiaries of aquisitions by reason of death or donation and the receivers of 'earmarked gifts' (Zweckzuwendungen)[137] at variable rates from 20% (up to DM 50.000) up to 70% (more than DM 100 million).[138]

In addition the rate of taxation is also influenced by several tax-free and deductible amounts.[139]

Since 1974 there have been only a few minor changes to the German ErbStG. These changes were mainly imposed in accordance with the changing economic structure of the Federal Republic or the changing financial capacity of its citizens.[140]

With the unification of the Federal Republic of Germany and the German Democratic Republic, in 1990, the Laws of both countries had to be assimilated; and since the 1st of January 1991 the former West German ErbStG is also in force in the new Eastern Provinces of the Federal Republic.[141]

IV.5. Summary

The present South-African estate duty system (Nachlaßsteuersystem) and the present German inheritance tax system (Erbanfallsteuersystem) are mainly the result of the evolution or development of the death tax systems introduced on the territory of both countries during the last century. Throughout the decades the death duty systems of South-Africa and Germany were the object of modifications and alterations added by different tax legislators in order to assimilate or adapt the death tax regulations to the changing financial capacity of the taxpayers, to the changing economic and political situation in their countries and to the changing attitudes towards the levying of death taxes in general. Whereas the German ErbStG was the object of an extensive reform in 1974 and has only seen minor changes since then, the South-African estate duty is presently undergoing a phase of major change and will perhaps be substituted by a capital transfer tax in the near future.[142]

V. Double Death Duty Agreements

Although the Republic of South-Africa and the Federal Republic of Germany have, until today, not entered a bilateral agreement on the taxation of deceased estates, the last part of the general introduction to this work may serve as an exposition of the history and the regulations provided by both death tax legislations, respectively by international [economic] organizations, to conclude double death duty agreements.

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135) See, sec. 15 (1) Steuerklasse III No. 1 and 2 of the ErbStG.
136) Sec. 19 (1) ErbStG (Steuerklasse III).
137) Sec. 15 (1) Steuerklasse IV ErbStG.
138) Sec. 19 (1) ErbStG (Steuerklasse IV).
139) See especially, sec. 10, 12, 13, 14, 16, 17, 18 of the ErbStG and the short introduction given by ***D. M. Davis,*** (1990) 3 Juta's Foreign Tax Review, p. 80 *et seqq.* (at p. 83).
140) *Cf.,* ***Meincke,*** ErbStG - commentary, Einführung, para. 12.
141) See especially, ***Meincke,*** ErbStG - commentary, Einführung, para. 13 and 15.
142) Cf., ***D. Meyerowitz / P. Meyerowitz / D. M. Davis / T. S. Emslie,*** The Taxpayer 42 (1993), p. 48.

As mentioned before[143], the fact that the 'property' of a deceased is chargeable with a death duty in the Republic does not prevent any other state from charging a death tax thereon and vice versa. Consequently the same 'property' may be subject to double death duties.[144]

V.1. The general characterization and function of double [death] taxation agreements

The problem of [international] double [death] taxation was defined above as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods.[145]

In order to prevent taxpayers from paying double taxes in general or double death duties in particular, tax-legislating countries throughout the world embody unilateral relief regulations in their tax acts or enter bilateral double [death] taxation agreements.[146]+[147]

While unilateral relief regulations are generally defined and constituted as domestic or one-sided tax remedies against international double taxation,[148] bilateral double taxation agreements are agreements between states or countries and therefore conventions of Public International (Tax) Law.[149]

Double taxation agreements are especially designed to avoid multiple taxation by influencing and curtailing the domestic tax claims levied in the states that are contracting parties

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143) *Vide supra,* part A. I., p. 2 *et seqq.* and part A. II.2.3., p. 9 of this work.

144) *Cf.,* ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.1.

145) *Ut supra,* part A. II.2.3., p. 9, in accordance with the general definition given by ***D. R. Davies,*** Principles of International Double Taxation Relief, p. 1, para 1.01 / ***A. Passos,*** Tax Treaty Law, p. 77 *et seq.* / ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. 1A, chap. 18, para. 18.17. / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 10 *et seqq.* / ***Tipke / Lang,*** Steuerrecht, p. 145 *et seq.*

146) For a general introduction *vide,* ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. 1A, chap. 18, para. 18.17. / ***C. Divaris / M. Stein,*** Silke on South African Income Tax, Vol. 2, chap. 24 / ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, chap. 27, para 1624 *et seqq.* / ***M. C. van Blerck,*** in: (1988) 1 Juta's Foreign Tax Review, p. 27 *et seqq.* / ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *seqq.* / ***E. Danziger,*** (1989) 2 Juta's Foreign Tax Review, p. 39 / ***O. J. Fernandes,*** (1989) 2 Juta's Foreign Tax Review, p. 60 / ***P. R. N. Arthur,*** (1990) 3 Juta's Foreign Tax Review, p. 48 *et seqq.* / ***C. A. Harris / M. C. van Blerck,*** (1990) 3 Juta's Foreign Tax Review, p. 61 *et seq.* / ***R. N. Eskinazi,*** (1991) 4 Juta's Foreign Tax Review, p. 26 *seqq.* These sources deal mainly with double taxation agreements on income tax. As there are only a few sources dealing with double death taxation agreements the reader can apply a lot of the information given by these sources also on double death taxation agreements. Nevertheless it has to be stressed that income taxes and death duties are of a different nature and that it would be wrong to assume the possibility of an analogous transfer of all the information given by the above mentioned sources - a transfer *mutatis mutandis* is more applicable. For double death duties see, ***W. Abrie,*** Estates - Planning and Administration, p. 314 / ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, chap. 3.4. to 3.7., p. 24 *et seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 165. All the possible problems that can occur in double death duty agreements are thoroughly examined in the 'Model Double Taxation Convention on Estates and Inheritances and on Gifts', Report of the OECD Committee on Fiscal Affairs 1982, OECD, Paris 1983.

147) Or to be more exact - the countries enter ***anti*** - double [death] taxation agreements.

148) See, ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. 1A, chap. 18, para. 18.17.1 / ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, chap. 27, para 1625 *et seqq.* / ***M. C. van Blerck,*** in: (1988) 1 Juta's Foreign Tax Review, p. 27 *et seqq.* / ***B. K. Spitz,*** (1988) 1 Juta's Foreign Tax Review, p. 69 *et seqq* (at p. 70 *seq.*) / ***E. Danziger,*** (1989) 2 Juta's Foreign Tax Review, p. 41. For the death duty provisions granting unilateral relief see, sec. 16 (c), sec. 3 (2) (c)-(h) and also sec. 4 (e) and (f) of the EDA. Respectively sec. 21 of the ErbStG.

149) Compare, ***A. Passos,*** Tax Treaty Law, p. 63.

to a bilateral double tax treaty.[150] To achieve this aim double taxation agreements link up similar or comparable tax claims[151] that were enacted by the tax legislators of the contracting countries and curtail these domestic tax claims in order to grant a relief from double taxation for the taxpayer. This so called `curtailing character´ of double taxation agreements is often reinforced by `assimilating´ and `synchronizing´ main aspects of comparable domestic tax legislations of the entering countries in the double tax treaties.[152]

In today`s bilateral tax treaty practice the curtailment of domestic tax claims (`curtailing character´) is achieved mainly by adopting either the exemption method (Freistellungsmethode) or the credit method (Anrechnungsmethode) or a combination of both methods within the structure and regulations of bilateral double taxation agreements.[153]
A double taxation agreement applies the exemption method (Freistellungsmethode) if the contracting country in which the taxpayer is domiciled binds itself to exempt a certain taxable object or a certain taxable event from domestic taxation (provided that the taxable object or event is or has already been taxed by the other contracting country).[154]
In contrast to the exemption method a double taxation agreement embodies the credit method (Anrechnungsmethode) if the contracting country, in which the taxpayer is domiciled, binds itself to a rebate of a foreign tax (tax credit) from the tax liability calculated according to its law. In these cases the amount of the tax rebate is usually the amount equal to the tax paid in the other contracting state on a taxable object or a taxable event which, in accordance with the double taxation agreement between these states, is levied as an identical tax in the other contracting country.[155]

By analogy to the characterization of double taxation agreements above, double death taxation agreements can generally be defined as tax tools used in Public International (Tax) Law to complete or to amend domestic (internal) death duty regulations in countries that are signatories to bilateral death duty agreements.
On entering a double death taxation agreement the concluding countries bind themselves to a curtailment of their domestic death tax claims in order to grant a relief from the double tax burden imposed on the taxpayer who otherwise would be liable to pay death taxes on the same estate (Nachlaß) or inheritance (Erbanfall) for the same tax period to the treasuries of two (or more) countries.[156] Therefore the conclusion of a mutual death duty

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150) See, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 211 *et seq.* / ***Tipke / Lang,*** Steuerrecht, p. 145 *et seq.* / ***C. van Raad,*** Nondiscrimination in International Tax Law, p. 27 / ***A. Passos,*** Tax Treaty Law, p. 77 *seqq.* / ***E. Danziger,*** (1989) 2 Juta`s Foreign Tax Review, p. 39 *et seqq.*

151) *Scil.,* comparable taxes that are imposed on the same taxpayer by two or more sovereign tax legislators in respect of the same subject matter and for identical tax periods.

152) *Vid.,* ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 212 / ***E. Danziger,*** (1989) 2 Juta`s Foreign Tax Review, p. 39 *et seqq.*

153) *Cf.,* ***A. Passos,*** Tax Treaty Law, p. 233 / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 249 *et seqq.*

154) For the use of the ***exemption method*** on the sector of double death duties compare, Art. 10A and the commentaries to Art. 10A of the `OECD Model Convention on Estates and Inheritances and Gifts´ of 1966, Paris 1967 and Art. 9A and the commentaries to Art. 9A of the `OECD Model Convention on Estates and Inheritances and Gifts´ of 1982, Paris 1983.

155) For the use of the ***credit method*** on the sector of double death duties see, Art. 10B and the commentaries to Art. 10B of the `OECD Model Convention on Estates and Inheritances and Gifts´ of 1966, Paris 1967 and Art. 9B and the commentaries to Art. 9B of the `OECD Model Convention on Estates and Inheritances and Gifts´ of 1982, Paris 1983.

156) *Cf., mutatis mutandis,* ***D. R. Davies,*** Principles of International Double Taxation Relief, p. 1, para 1.01 / ***A. Passos,*** Tax Treaty Law, p. 77 *et seq.* / ***A. P. de Koker / G. A. Urquhart,*** In-

agreement between two countries regularly comprises a specification and a narrowing of the scope of their taxing competences. By concluding restrictive bilateral double death tax regulations, the contracting countries influence and curtail their sovereign right to impose a tax claim, a tax liability or to grant a tax relief to certain taxpayers;[157] and it can be a typical feature of double death duty agreements that contracting countries agree on a partial renounciation of levying the full amount of taxes 'normally' due to their domestic tax legislation in order to grant tax relief for the [otherwise double] taxpayer.[158]

But although double [death] taxation agreements to some extent interfere with the sovereign tax legislating competence and the domestic tax claims of the contracting countries, they never deal with questions related to the creation, foundation or constitution of certain taxes or certain taxable events in these countries.[159]
Double taxation agreements are determined mainly by their above-mentioned curtailing character and it would be contradictory if they were able to create, establish or introduce a tax liability in a country *per se*.[160]
It is therefore always the prerogative of the sovereign tax legislator, situated in the country entering a double taxation agreement, to provide the basic domestic tax law in order to set the preconditions for a tax liability of taxpayers and thereby to lay the foundation for the later occuring possibility or necessity to enter a double taxation agreement.[161]

Consequently double [death] taxation agreements have an 'ambivalent character'. As Public International (Tax) Law treaties they basically 'overshadow' the domestic tax law on an international basis.[162] But at the same time double [death] taxation agreements impose a curtailment on the domestic tax acts that are subjected to the treaties. Therefore double [death] tax treaties are also adopted by the domestic tax regulations that were subjected to the agreement and are accordingly treated as being equal to the other domestic tax law enacted by the countries concluding the treaty.[163]

Finally it has to be added that double [death] taxation agreements are determined not only by the curtailment of tax claims and therefore by the losses or gains of revenue granted to

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come Tax in South Africa, Vol. 1A, chap. 18, para. 18.17. / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 10 *et seqq.* / ***Tipke / Lang,*** Steuerrecht, p. 145 *et seq.* and part A. II.2.2.

157) Similar, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 212. / Compare, sec. 26 (1) of the EDA and sec. 21 (1) of the German ErbStG, which has to be read in accordance with sec. 2 of the German AO (Abgabenordnung - General Tax Code) and Article 59 (2) sentence 1 of the German Grundgesetz (German Constitution / Basic Law).

158) *Cf.,* ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 212 and the tax law provisions mentioned in footnote 153.

159) [...] Treaties concluded by the State President that impose or increase any tax are illegal and have no effect. See, ***A. Passos,*** Tax Treaty Law, p. 63 *et seq.* / Similar, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 212 *seq.*

160) *Vide,* ***A. Passos,*** Tax Treaty Law, p. 63 / For the German Tax Law, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 212, 213

161) Or to use the terminology of ***A. Passos,*** Tax Treaty Law, p. 63:'Only domestic tax laws may levy taxes.'

162) See, ***A. Passos,*** Tax Treaty Law, p. 63 / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 213, 214 / But see also the works of ***R. S. Martha,*** The Jurisdiction to Tax in International Law / ***C. van Raad,*** Nondiscrimination in International Tax Law.

163) *Vid.,* ***A. Passos,*** Tax Treaty Law, p. 63, 64 / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 213, 214 / Compare, sec. 26 (2) of the EDA and sec. 21 (1) of the German ErbStG, which has to be read in accordance with sec. 2 of the German AO (Abgabenordnung - General Tax Code) and Article 59 (2) sentence 1 of the German Grundgesetz (German Constitution / Basic Law).

a contracting state or the ambivalence of their dogmatic nature. In modern tax law negotiations concerned with the conclusion of bilateral tax treaties, the coordination of economic outline conditions, the assimilation of terms of competition, the possibility of investment promotion or simply the exchange of information between the tax authorities are, often as important as all the other aspects mentioned.[164]

V.2. The OECD Model Convention on Estates and Inheritances and on Gifts

Because the need for relief from double taxation is as old as the first tax regulations of modern times, the discussion about model conventions for double [death] taxation agreements among the nations of the world has a long history.[165] The League of Nations, the United Nations and the OECD have developed and drafted more than one model double [death] taxation agreement through the decades.[166]

In today's [death] tax treaty practice most of the world's important industrial nations follow the Model Convention on Estates and Inheritances designed by the OECD. The general introduction to the model conventions on [death] taxes in this context will therefore be limited to the OECD models.[167]

The Organization for European Economic Cooperation (OEEC) was created in 1948 in pursuance of the goal of encouraging rapid economic reconstruction in Europe and, in particular, of removing obstacles to international trade and capital movements and of eliminating arbitrary discrimination in international economic relations caused by double [death] taxation.[168] For a variety of reasons, this organisation and its reorganized sucessor, the Organization for Economic Cooperation and Development[169] (OECD), turned out to be effective bodies to resume international consultation in the domain of taxation.[170] In 1956, the Fiscal Committee of the OECD came into force, started by initiatives by both the Netherlands and Switzerland regarding issues of international taxation.[171] Consisting of tax experts of the member governments, the OECD Fiscal Committee is a body which draws up model conventions for the prevention of double taxation with respect to taxes on inco-

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164) *Cf.*, ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 212.

165) The first 'bilateral tax treaties' in International (Tax) Law were concluded by Belgium and Luxemburg in 1843 and France and the Netherlands in 1845. These treaties were designed for the exchange of information between the tax authorities in these countries. The first double taxation agreement that embodies the classical 'curtailing character' of a bilateral tax treaty was entered into by the United Kingdom and the Suisse State (Kanton) of Waardt in 1872.

166) Compare, ***C. van Raad,*** Nondiscrimination in International Tax Law, p. 28 *et seqq.* and ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 224, 225.

167) The OECD member countries are: Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, Finland, France, Greece, Ireland, Iceland, Italy, Japan, Luxemburg, Norway, New Zealand, the Netherlands, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America. Before the OECD Model Conventions were produced, the ***League of Nations*** drew up ***Model Conventions*** on double income taxation by the Convention of Mexico (1943) and the Convention of London (1946). Today the so-called ***UN-Model*** of 1980, the ***USA-Model*** of 1981 and the ***Andes Model Convention*** of 1971 are existing parallel to the OECD Model Conventions. See, ***A. Passos,*** Tax Treaty Law, p. 73 / ***C. van Raad,*** Nondiscrimination in International Tax Law, p. 28 *et seqq.* / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 225.

168) See, ***A. Passos,*** Tax Treaty Law, p. 73 / ***C. van Raad,*** Nondiscrimination in International Tax Law, p. 30.

169) The OEEC was originally established to administer the Marshall Plan Aid and the cooperative effort for European recovery from the Economic disaster of the Second World War. In 1961, when it was felt, that the original aims of the OEEC had been fulfilled, it was succeeded by the OECD, (Convention of December 14, 1960, in force September 30, 1961).

170) *Cf.*, ***C. van Raad,*** Nondiscrimination in International Tax Law, p. 30.

171) Resolution C (56) 49 of March 16, 1956 of the Council of the OEEC.

me and profits[172] *and* with respect to taxes on estates and inheritances and on gifts[173].
The OECD has adopted the method of unanimous consensus, and it relies on recommendations that can be made only if there is unanimity. The recommendations of the OECD have the character of an intergovernmental compromise among the member countries, but are not binding or self-executing *per se*. In order to be valid and enforceable in the OECD member countries the Model Convention always has to be embodied in a bilateral double [death] tax treaty between the countries involved.[174] When, in spite of all the efforts at compromise, unanimity cannot be reached, the OECD members have resorted to so-called reservation, which indicates, that although voting in favour of the rule to be recommended, they reserve their position with respect to the particular point.[175]
In connection with the problem of reservation it has been argued [176] that the absence of a reservation by a member country or the adoption of a different wording for a specific article is a strong indication that the wording of the specific provision has been accepted as it was in the commentary applying to that provision.[177]

In 1963 the Fiscal Committee of the OECD produced its first important model convention, the 'Draft Double Taxation Convention on Income and Capital'. Ever since, most of the authors dealing with OECD Conventions focus mainly on the OECD Conventions on Income and Capital.[178]
Although todays 'net' of double taxation agreements on death duties is not as 'tight' as in the income tax sector, and the conclusion of 'death' tax treaties seems not to be as important - the OECD Fiscal Committee produced its first 'Model Convention on Estates and Inheritances and on Gifts' in 1966.
The Model Convention produced by the Committee in 1966 is a secluded double death tax treaty system in itself. It shows up no references to the earlier drafted OECD Income Tax Convention of 1963. This is chiefly the result of the Fiscal Committee recognizing that although there are similarities between double taxation agreements in the income tax sector and in the death duty sector, the differences prevail.[179]
The 'Model Convention on Estates and Inheritances and on Gifts' of 1966 contained seventeen articles and included commentaries and recommendations concerned with the interpretation of these articles.[180]
During the revision of the OECD Model Convention on Income Taxes and its commentaries in 1977 the Fiscal Committee also decided to revise the Model Convention on Death Du-

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172) See, 'Draft Double Taxation Convention on Income and Capital' of 1963, Paris 1963 / 'Draft Double Taxation Convention on Income and Capital' of 1977, Paris 1978. ***A. Passos,*** Tax Treaty Law, p. 73 *seqq.* / ***C. van Raad,*** Nondiscrimination in International Tax Law, p. 30 *et seq.*

173) Compare, 'Model Convention on Estates and Inheritances and Gifts' of 1966, Paris 1967 / 'Model Convention on Estates and Inheritances and Gifts' of 1982, Paris 1983.

174) See, (Hrsg.) ***Bundesministerium der Finanzen,*** Musterabkommen zur Vermeidung der Doppelbesteuerung der Nachlässe, Erbschaften und Schenkungen, Bericht des Fiskalausschusses der OECD 1982, Bonn 1987, p. 11 *et seqq.*, p. 15 *et seqq.*. The afore mentioned work is a translation of the original English and French texts and commentaries of the 'Model Convention on Estates and Inheritances and Gifts' of 1966 and 1982 into German, with additional notes.

175) ***A. Passos,*** Tax Treaty Law, p. 74, 75 / ***Bundesministerium der Finanzen,*** *op. cit.*, p. 16.

176) See, ***Bundesministerium der Finanzen,*** *op. cit.*, p. 16 / The full scale of arguments for the German Tax Law can be found in: ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 225 *seqq.* / For the South-African Law see ***A. Passos,*** Tax Treaty Law, p. 75.

177) See ***A. Passos,*** Tax Treaty Law, p. 75.

178) *Cf.* ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 225 *seqq.* / ***A. Passos,*** Tax Treaty Law, p. 73 *seqq.* / ***E. Danziger,*** (1989) 2 Juta's Foreign Tax Review, p. 39 *et seqq.*

179) ***Bundesministerium der Finanzen,*** *op. cit.*, p. 15.

180) See, ***Bundesministerium der Finanzen,*** *op. cit.*, p. 158 *et seqq.*

ties of 1966.[181]

In 1982 the new OECD 'Model Convention on Estates and Inheritances and on Gifts' was presented to the member countries. This 'new' model convention contained additional commentaries and supplements to the articles of the old convention. The 1982 Model Convention contains 16 articles and is divided into six main parts.[182]

Although the OECD member countries tried in 1982 to draft a 'Model Convention on Estates and Inheritances and on Gifts' that was to be applicable to all member states, the differences between the several death tax systems of the members in some cases led to reservation. These reservations on certain points of the Convention indicated, as mentioned above, that although these countries were voting in favour of the 1982 Convention to be recommended, they reserved their position with respect to particular rules or regulations of the Convention.[183]

Although South-Africa is not a member country of the OECD the Republic has many foreign trade partners that are member nations of this Organization.[184] By entering double [death] taxation agreements with these countries and by adopting the wording of the OECD drafts in its bilateral tax conventions, it is generally submitted that the Republic thereby expresses a presumed intention of adopting the wording as it is interpreted by the OECD commentaries on the articles of the model conventions.[185]

Although the Republic has entered quite a number of double taxation agreements with OECD member countries on the basis of the 'Draft Convention on Income and Capital', and a persuasive influence of the commentaries on the OECD Model Convention's articles that are part of these treaties is generally accepted in South-African Tax Law,[186] the situation on the 'death duty sector' is a different one.

Of the five double death duty agreements entered into by the Republic of South-Africa and other countries, only the regulations of the 'most recent' bilateral agreement, concluded with the United Kingdom of Great Britain and Northern Ireland in 1978, can be compared with the articles embodied in the OECD 'Model Convention on Estates and Inheritances and on Gifts'.[187] The double death duty agreements entered into with the two other OECD member countries, Sweden (1961) and the United States of America (1947), were concluded before either the first model convention of the OECD was drafted in 1966 or the OECD, respectively the OEEC, was founded in 1948. The double death duty agreements with Lesotho (1944) and Zimbabwe (1933) are even older.

Consequently a presumed intention of adopting the wording as it is interpreted by the OECD commentaries on the articles of the 'Model Convention on Estates and Inheritances

181) Compare, ***Bundesministerium der Finanzen,*** *op. cit.*, p. 12.

182) ***Bundesministerium der Finanzen,*** *op. cit.*, p. 25 to 150.

183) ***Bundesministerium der Finanzen,*** *op. cit.*, p. 16.

184) The Federal Republic of Germany being one of them. For the other nations *cf. supra,* footnote 164 on p. 25 of this work.

185) This statement given by ***A. Passos,*** Tax Treaty Law, p. 75 was originally created for South-African double taxation agreements, entered into with OECD countries on the income tax sector; but it is *mutatis mutandis* also applicable to double death duty agreements entered by the Republic and OECD nations.

186) See, ***A. Passos,*** Tax Treaty Law, p. 63 and 75 / *Cf.,* footnote 6 on page II of the preface.

187) Compare the regulations of the 'Model Convention on Estates and Inheritances and Gifts' of 1966, Paris 1967 or ***Bundesministerium der Finanzen,*** *op. cit.*, p. 158 *et seqq.* and the text of the Convention between the Republic and United Kingdom of Great Britain and Northern Ireland, Proc. No. 224 Government Gazette 1978, in: ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.2, 31.8, 31.14, 31.26, 31.34 and appendices A-152, A-157, A-162, A-173, A-181.

and on Gifts' and a persuasive influence on double death duty agreements concluded by the Republic can only be assumed in relation to the death tax treaty with the United Kingdom of Great Britain and Northern Ireland of 1978.

In constrast to the Republic of South-Africa, the Federal Republic of Germany is a member nation of the OECD. To date Germany has entered five double death taxation agreements with other member states of the OECD. The agreements with Greece (1912, renewed in 1953) and Austria (1955) were concluded before the first model convention of the OECD was drafted in 1966.[188]
Therefore the intention of adopting the wording as it is interpreted by the OECD commentaries on the articles of the `Model Convention on Estates and Inheritances and on Gifts' can only be presumed in relation to the other three death tax treaties concluded by the Federal Republic of Germany and Sweden[189] (1935, renewed in 1951 and revised in 1990, 1993), the Federal Republic of Germany and Switzerland[190] (1980) and the Federal Republic of Germany and the United States of America[191] (1982, 1986).

V.3. The South-African regulations dealing with the power to enter into double death duty agreements

In order to enter a double taxation agreement in the above mentioned form (and perhaps to embody the OECD Model Convention on Estates and Inheritances and Gifts in this agreement) the Republic of South-Africa and any foreign state would have to conclude a convention in Public International (Tax) Law.
For the entering into conventions of Public International (Tax) Law it would be unreasonable to assume that any contracting state can be fully informed about the internal allocation of competences in the constitution of another state. Therefore Public International Law presumes by a legal fiction that in general the head of state or its equivalent has the right to represent the state on issues of Public International Law.[192]
According to the regulations of the South-African Constitution, the South-African head of state has the right to represent the country on issues of Public International Law; consequently the South-African Constitution is in conformity with the aforementioned presumption.

In South-Africa the State President is both head of the legislature and head of the executive.[193] As head of the executive branch of government the State President exercises powers which derive from either one of two sources, Parliament or the executive

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188) See, ***Ebenroth,*** Erbrecht, p. 998 *et seqq.* and fn. 3, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 103 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 27 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 15 and 24.

189) See especially, ***Meincke,*** ErbStG - commentary, sec. 2, para. 15 and 25.

190) ***Meincke,*** ErbStG - commentary, sec. 2, para. 15 and 26 *et seqq.*. for the special reservations in accordance with the double death taxation agreements Germany - Switzerland see para. 29 / ***Klempt,*** DStZ 1980, p. 150 *seqq.* / ***Hundt,*** DB 1982, p. 1124 *seqq.*

191) ***Meincke,*** ErbStG - commentary, sec. 2, para. 15 and 30 *seqq.* / ***Flick,*** DStR 1986, p. 487 *et seqq.* / ***Michel,*** DStR 1981, p. 73 *seqq.*.

192) *Cf.*, ***W. A. Joubert,*** LAWSA (1981), vol. 11, para. 340 / ***J. Ipsen,*** Staatsorganisationsrecht, p. 140, para. 393 / ***Seidl-Hohenveldern,*** Völkerrecht, p. 51, para. 151 *et seqq.* / ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 301 *et seqq.* / But compare also Art. 7 (2) of the Vienna Convention on the Law of treaties and International Organizations or between International Organizations.

193) See, ***G. Carpenter,*** Introduction to South-African..., p. 323.

prerogative.[194] Executive prerogatives may be defined as discretionary powers of a common law, rather than statutory, origin.[195] Nevertheless sec. 6 (3) of the 1983 Constitution contains a list of powers of the State President.[196] In sec. 6 (3) (e) of the 1983 Constitution the State President, as South-African executive body, is granted the constitutional power to ratify international conventions, treaties and agreements.[197]
Because not all the powers listed in sec. 6 (3) and (4) of the Republic of South-Africa Constitution Act 110 of 1983 distinguish clearly between prerogative and other powers[198] there is uncertainty in South-African Constitutional Law concerning this distinction.[199] But as far as the wording of sec. 6 (3) (e) of the 1983 Constitution is concerned the *dicta* of the South-African Courts[200] and other authorities[201] are unequivocal. The power of the State President to ratify international conventions, treaties and agreements, listed in sec. 6 (3) (e), is seen as a clear executive prerogative of the President. This means, that the State President exercises this power on his own or the power is delegated by the State President and wielded by one of his cabinet ministers.[202]

The general powers granted to the State President under sec. 6 (3) (e) of the 1983 Constitution are furthermore elaborated in sec. 26 of the EDA and sec. 108 of the Income Tax Act 58 of 1962 (ITA[203]).[204] In accomplishment of the executive prerogative embodied in sec. 6 (3) (e) of the Constitution, sec. 26 of the EDA (sec. 108 of the ITA) especially authorises the State President to enter into agreements with other countries in order to avoiddouble death taxation.
The EDA provides in sec. 26 (1) (sec. 108 [1] of the ITA) that the State President may enter into double taxation agreements with the government of other countries with the object of preventing, mitigating or discontinuing the levying of estate duty on the same property both in South-Africa and in these countries, or with a view to rendering reciprocal assistance in the administration of and the collection of estate duty under the laws relating

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194) Compare, ***L. Boulle / B. Harris / C. Hoexter,*** Constitutional and Administrative Law, p. 172.
195) *Cf.*, in detail, ***G. Carpenter,*** Introduction to South-African..., p. 308 / ***L. Boulle / B. Harris / C. Hoexter,*** Constitutional and Administrative Law, p. 175 *seqq.* / ***D. Basson / H. Viljoen,*** Constitutional Law, p. 41 *et seqq.* .
196) For details see, ***G. Carpenter,*** Introduction to South-African..., p. 308 / The Republic of South-Africa Constitution Act 110 of 1983 can also be found in the work of ***D. Basson / H. Viljoen,*** Constitutional Law, p. 348 *et seqq.*
197) See also, ***G. Carpenter,*** Introduction to South-African..., p. 308.
198) See the critizism of ***D. Basson / H. Viljoen,*** Constitutional Law, p. 43 and footnote 49 on p. 43 and ***S. A. de Smith,*** Constitutional and Administrative Law, p. 137.
199) Compare the detailed information given by, ***G. Carpenter,*** Introduction to South-African..., p. 308 *seqq.* / ***L. Boulle / B. Harris / C. Hoexter,*** Constitutional and Administrative Law, p. 175 *et seqq.*, especially p. 177 *seqq.* / ***D. Basson / H. Viljoen,*** Constitutional Law, p. 42 *et seqq.* .
200) See especially the latest *dictum* by ***Friedman J.*** in the case ***Boesak v. Minister of Home Affairs,*** 1987 (3) SA 665 (C) at 674A - 678B (especially at 677G).
201) ***D. Basson / H. Viljoen,*** Constitutional Law, p. 43 and footnote 49 on p. 43 / ***G. Carpenter,*** Introduction to South-African..., p. 308 *seqq.* / ***L. Boulle / B. Harris / C. Hoexter,*** Constitutional and Administrative Law, p. 175 *et seqq.*, especially p. 177 *seqq.*
202) *Vide,* ***D. Basson / H. Viljoen,*** Constitutional Law, p. 43 and footnote 49 on p. 43.
203) Please notice that the ***Income Tax Act 58 of 1962*** in the following will be referred to by the abbreviation ***ITA.***
204) The parallel citing of the similar or nearly identical provision of sec. 108 ITA is necessary-because any double death tax treaty entered into by the Republic of South-Africa and another country will also have to provide for regulations concerned with the prevention of double taxation of donations. For details concerning the application of sec. 108 ITA see, ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, chap. 27, para. 1632 seqq. / ***C. Divaris / M. Stein,*** Silke on South African Income Tax, Vol. 2, chap. 24, para. 24.1 *seqq.* / ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. 1, chap. 30, para. 30.1. *seqq.*

to estate duty in force in South-Africa and these countries.[205]

Being a part of the executive prerogative of the State President, bilateral double death taxation agreements entered into by the President in accordance with the regulations of sec. 6 (3) (e) of the 1983 Constitution and sec. 26 of the EDA (sec. 108 of the ITA) are not subject to discussion and approval by Parliament.[206] For this reason no amendments may be introduced by Parliament to the text of a treaty negotiated and drafted by the South-African executive body.[207]

Although this constitutional prerogative of the State President seems to go very far, the presidential powers to influence South-African tax legislation via double death taxation agreements are limited. They are mainly controlled and 'curtailed' by the wording of the executive prerogative granted to the President under sec. 6 (3) (e) of the 1983 Constitution and the wording of the further empowerment contained in sec. 26 (1) of the EDA (sec. 108 [1] of the ITA).[208]

According to sec. 26 (1) EDA (sec. 108 [1] of the ITA) the contents and effects of double death tax treaties entered into by the President are circumscribed by the objective to prevent, mitigate or discontinue the levying of estate duty on the same property both in South-Africa and in the contracting countries. Furthermore they are limited to the rendering of reciprocal assistance in the administration of and in the collection of estate duty under the laws relating to estate duty in force in South-Africa and the other contracting countries.[209]

Consequently the State President has no power whatsoever to increase or impose a tax liability on the South-African taxpayer via the conclusion of a double death tax agreement.[210]

Once an agreement has been concluded, it must be published by proclamation by the State President in the *Government Gazette*, and copies must be tabled for notification in the House of Assembly. It is only in compliance with these provisions that a double death tax treaty can be enacted and later enforced under the (tax) law of South-Africa.[211]

As mentioned above, bilateral double death duty agreements are conventions of Public International (Tax) Law, and because they do not need to be transformed by an explicit Act of Parliament they can be said to have a quasi-normative or quasi self-executing

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205) See also, ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.1 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, chap. 13.1., p. 220 *seqq.*

206) *Vide,* ***W. A. Joubert,*** LAWSA (1981), vol. 11, para. 342.

207) ***W. A. Joubert,*** LAWSA (1981), vol. 11, para. 342 / ***A. Passos,*** Tax Treaty Law, p. 63.

208) *Cf.,* ***H. Booysen,*** Volkereg, p. 94 *et seqq.* (especially p. 95 *seq.*) / Similar, ***A. Passos,*** Tax Treaty Law, p. 63.

209) See, ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.1 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, chap. 13.1., p. 220 *seqq.* / ***A. Passos,*** Tax Treaty Law, p. 63, 64.

210) Simply because this would exeed the executive prerogative granted to the State President. Generally the law-giving function (*viz.* the tax liability-giving function in this instance) is vested in the South-African Parliament. If a double taxation agreement entered by the State President would impose or increase a tax liability on the taxpayer, it would be effected by legislative intervention and a formal process of specific introduction through Parliament would be required to give this ('defective') tax treaty an application in domestic tax law. See, ***H. Booysen,*** Volkereg, p. 94 *et seqq.* / ***W. A. Joubert,*** LAWSA (1981), vol. 11, para. 342.

211) Sec. 26 (2) and (3) EDA (sec. 108 [2] and [3] of the ITA) / ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.1 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, chap. 13.1., p. 220 *seqq.*

character[212] in the domestic Law of the Republic as soon as they are concluded by the State President within the regulations of the presidential executive prerogative.[213] Because of this, bilateral death duty treaties entered into by the State President are binding, confering rights or imposing obligations on physical and legal persons directly and without the intervention of an internal validation by Parliament, as soon as the proclamation in the *Gazette* has taken place.[214]

To the extent that double death tax treaties have the effect of exempting or relieving the burden of estate duties levied in the Republic and to the extent that they have the same effect in the co-contracting countries, the value of the provisions of the agreements is by statute equal to other domestic statutory tax law in South-Africa.[215] The double death taxation agreements entered into by South-Africa may therefore modify, and in some instances override, the South African Estate Duty Act 45 of 1955.[216]
Because double death tax treaties by definition in sec. 26 (2) EDA (sec. 108 [2] ITA) are part of the statutory law, they are equal to this law.
Consequently, it is submitted, a domestic tax provision may also override a treaty provision if it is specifically intended to do so and is enacted after a treaty has become part of the South-African Tax Law. But the enactment of such an act has to be closely observed, as it may cause a breach of the treaty and a violation of Public International Law (the so called *treaty overriding problem*).[217]

The power of termination of a double death duty agreement is also conferred on the State

212) If one can speak of the self executing character of bilateral double death duty agreements entered into by the Republic of South-Africa at all, it can only be a *quasi-normative* or *quasi self-executing character*. Although bilateral double death duty agreements confer rights and impose obligations on physical and legal persons directly and without the intervention of Parliament they *cannot be* said to be *normative or self-executing per se* - because there are other internal implementing provisions. (***A. Passos,*** *op. cit.*, p. 63 has a different opinion).
a. The terminology of Public International Law uses the terms 'normative' or 'self-executing' normally in the context of the 'direct' and 'automatic' application of universally recognized customary Public International Law (gewoonteregtelike volkereg / Völkergewohnheitsrechts) in domestic law systems; but double [death] tax treaties are by no means a part of universally recognized customary Public International Law. They are bilateral agreements or contracts of International Law. And in order to integrate double taxation agreements as a part of the South-African tax law the State President has to conclude the double tax treaties in accordance with certain South-African Tax Law provisions (internal implementing provisions). For the distinction see, ***W. A. Joubert,*** LAWSA (1981), vol. 11, para. 339 *et seqq.* and para. 347 *et seqq.* / Furthermore, ***H. Booysen,*** Volkereg, p. 61 *seqq.* (p. 78 *et seqq.* [at p. 79, 80]).
b. The application of [customary] Public International Law in South-African Law in general and the application of certain rules of Public International Law as self-executing or normative in particular is controversial, ***H. Booysen,*** Volkereg, p. 78 *et seqq.* (at p. 79, 80) /***W. A. Joubert,*** LAWSA (1981), vol. 11, para. 339 *et seqq.* and para. 347 *et seqq.* / ***G. Carpenter,*** Introduction to South-African..., p. 417 and footnote 79 *ad. loc.*

213) Compare the work of, ***H. R. Hahlo / E. Kahn,*** The South-African Legal System..., p. 114 *ibid.*, footnote 24 and the *dictum* of ***Stein C. J.,*** in : ***Pan American World Airways Incorporated v. S. A. Fire & Accident Insurance C., Ltd.,*** 1965 (3) S.A. 150 *seqq.* (A.D.) at p. 161. Similar, ***A. Passos,*** Tax Treaty Law, p. 63.

214) Sec. 26 (2) EDA (sec. 108 [2] of the ITA) / ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.1 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, chap. 13.1., p. 220 *seqq.* / ***A. Passos,*** Tax Treaty Law, p. 63, 64 / ***H. Booysen,*** Volkereg, p. 94 *et seqq.* / ***W. A. Joubert,*** LAWSA (1981), vol. 11, para. 342.

215) This results from Sec. 26 (2) EDA (sec. 108 [2] of the ITA) / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, chap. 13.1., p. 220 *seqq.* / ***A. Passos,*** Tax Treaty Law, p. 63, 64.

216) See sec. 26 (2) EDA (sec. 108 [2] of the ITA) and also to be concluded from sec. 16 (c) EDA - per *argumentum e contrario.*

217) ***A. Passos,*** Tax Treaty Law, p. 64 / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 215.

President. The President may revoke the proclamation of an agreement at any time by a further proclamation in the *Government Gazette,* copies of which, again for notification, must be tabled in the House of Assembly.[218] The agreement will cease to have effect on the date fixed in the proclamation containing the revocation, but the revocation will not affect the validity of anything previously done under the agreement.[219]
As long as a double death taxation agreement is incorporated in the South-African domestic tax law, the South-African Courts are competent to decide a claim connected with the treaty.[220]

Because the Republic has until now entered only five double death taxation agreements, the history of the conclusion of agreements concerned with double death taxes in South-Africa is a short one.
In 1933 South-Africa concluded the first double taxation agreement with the Republic of Southern Rhodesia (today Zimbabwe); and although there are certain dogmatic and legal difficulties in establishing whether this agreement is still in force, it is submitted that the double death taxation agreement with Zimbabwe remains until today.[221]
The double death tax treaties with Lesotho (1944) and the United States (1947 ratified in 1952) were concluded under the Death Duties Act 29 of 1922 but were continued by sec. 31 (2) of the EDA and remain in force today. Only the double death duty agreements with Sweden (1961) and the United Kingdom of England and Northern Ireland (1978) were entered in accordance with sec. 26 of the EDA. Of the latter two treaties only the agreement with the United Kingdom follows the 'modern standard' of double death taxation agreements concluded in 'compliance' with the OECD Model Convention on Estates and Inheritances and on Gifts'.[222]

V.4. The German regulations dealing with the power to enter into double death duty agreements

The regulation of the German ErbStG concerned with the entering of the Federal Republic of Germany into double death taxation agreements can be said to be not as 'detailed' as the regulations regarding the conclusion of double death tax treaties provided by the South-African Estate Duty Act 45 of 1955.
Whereas the regulations of sec. 6 (3) (e) of the 1983 Constitution and sec. 26 of the South African EDA (sec. 108 of the ITA) deal *expressis verbis* with the contracting of double [death] tax treaties; and furthermore provide detailed 'information' about the 'procedure' of how the Republic of South-Africa has to enter into double [death] taxation agreements, the comparable German inheritance tax regulation, embodied in sec. 21 of the ErbStG, is mainly concerned with unilateral relief from international double death taxation.[223]
According to sec. 21 (1) of the ErbStG unilateral relief from international double death ta-

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218) Sec. 26 (4) and (5) EDA (sec. 108 [3] of the ITA) / Sec. 26 (2) EDA (sec. 108 [2] of the ITA) , ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.1
219) Sec. 26 (4) EDA (sec. 108 [3] of the ITA) / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, chap. 13.1., p. 220 *seqq.*
220) ***A. Passos,*** Tax Treaty Law, p. 64.
221) For details see, ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates, chap. 31, para. 31.2.
222) For further information, ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estatesl chap. 31, para. 31.8, 31.14, 31.26, 31.34 / *Supra,* part A. V.2., p. 27.
223) Compare sec. 26 of the South-African EDA (sec. 108 of the ITA) with sec. 21 (1) of the German ErbStG.

xation is granted under the *provision that the regulations of a double [death] taxation agreement are not applicable*;[224] a further definition or mentioning of the term double [death] taxation is not to be found in the German ErbStG.

But the ErbStG is not the only tax law codification that applies to the sector of the German inheritance taxes. The German tax system distinguishes between `general´ tax law codifications and `particular´ tax law codifications; depending on the subject matter the tax codifications deal with. The ErbStG is concerned chiefly with the taxation of inheritances and donations and can therefore be characterized as a `particular´ tax codification. In addition to the ErbStG regulations the German inheritance tax is influenced by the `universal´ tax law regulations embodied in the Abgabenordnung. The Abgabenordnung (AO[225] - German Fiscal Code) can be defined as a `general´ tax law codification embodying comprehensive tax regulations that are applicable for most of the other so called `particular´ taxes.[226] In order to give general definitions for and to avoid the repetition of terms in all the other `particular´ tax codifications, the rules laid down in the AO were created to be concise tax regulations. The AO embodies mainly general regulations concerned with tax liability, the collection of taxes and the law dealing with fiscal offences.[227]

Double [death] taxation agreements are the subject of sec. 2 of the AO. But sec. 2 of the Abgabenordnung provides `only´ that *double [death] taxation treaties concluded with foreign states, in accordance with Art. 59 (2) sentence 1 of the German Constitution are superior to the German tax law legislation, in so far as they were transformed into domestic law.*[228]

Consequently neither sec. 21 of the ErbStG as a `particular´ tax law codification, nor sec. 2 of the German AO as a `general´ tax law codification, provide regulations to enter double [death] taxation agreements, but refer for the conclusion of double [death] tax treaties to Art. 59 of the German Constitution. The negotiation and conclusion of a double [death] taxation agreement under German Tax Law is therefore predominated by the reference to the regulations of the German Constitution and a double [death] tax treaty that is concluded and transformed according to the rules of the Constitution is then also adopted by sec. 2 AO and sec. 21 (1) of the ErbStG for the domestic inheritance tax law.

As in South-Africa, the representation of the Federal Republic of Germany, on international issues is carried out by the executive power.[229]

But in contrast to the `strong´ position[230] of the State President under the South-African-

224) Or do not exist.

225) ***Abgabenordnung,*** as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany on the 16th of March 1976 (BGBl. I 1976, p. 613 *seqq*, as corrected in BGBl. I 1977, p. 269 *seqq.*) and lastly ammended by the Taxation Law Amendment Act of the 25th of August 1992 (BGBl. I, p. 1548 *seqq.*). Please notice that the ***Abgabenordnung*** in the following will be referred to by the abbreviation ***AO.***

226) See, ***Tipke / Lang,*** Steuerrecht, p. 15 *seq.* / According to ***Lammerding / Sudau / Brauel,*** Abgabenordnung und FGO, p. 21 para. 1, the AO can be characterized as the ***Basic (Constitutional) Law of Taxes*** (Steuergrundgesetz) or as ***the Collective, All-Covering, Univeral Tax Law Codification*** (Mantelgesetz).

227) *Cf.,* ***Lammerding / Sudau / Brauel,*** Abgabenordnung und FGO, p. 21 *seqq.*, para. 1 to 1.4. / ***Tipke / Lang,*** Steuerrecht, p. 15 *seq.*

228) ***Lammerding / Sudau / Brauel,*** Abgabenordnung und FGO, p. 24 para. 1.5. / ***Kluge,*** Das deutsche Internationale Steuerrecht, p. 214.

229) ***J. Ipsen,*** Staatsorganisationsrecht, p. 337, para. 1035 / ***Hesse,*** Grundzüge des Verfassungsrechts..., p. 261 / ***Maunz,*** in: Maunz/Dürig/Herzog/Scholz, Grundgesetz Kommentar, Art. 59, para. 3.

230) *Cf. supra,* part A. V.3., p. 28 *seqq.* of this work / ***G. Carpenter,*** Introduction to South-African..., p. 301 / ***L. Boulle / B. Harris / C. Hoexter,*** Constitutional and Administrative Law, p. 154 *et seqq.* / ***D. Basson / H. Viljoen,*** Constitutional Law, p. 46 *et seqq.*

Constitution of 1983, the concept of the German Constitution (the Bonner Grundgesetz of 1949 - GG[231]) provides a different role for the Federal President within the executive power of the Federal Republic of Germany.[232]
According to Art. 59 (1) of the GG the Federal President represents the Federation in its international relations and concludes international treaties (and therefore also bilateral double [death] taxation agreements) on behalf of the Federation. This assignment of powers to the Federal President corresponds with the the practice of Public International Law[233] and the tradition of earlier constitutional approaches to be found in German Constitutional history.[234]

The right granted to the Federal President in Art. 59 (1) of the GG[235] is a comprehensive right to represent the Federal Republic in the external relationship (Vertretung im Außenverhältnis) to foreign countries; and the ratification of international (double death tax) treaties, conventions and agreements by the Federal President is a *conditio sine qua non* for the commencement of an international (double death tax) treaty entered into by the Federal Republic of Germany.[236]
But on the other hand it has to be stressed that the President of the Federal Republic of Germany is unequivocally regarded as having the constitutional position of a mere representative of the state. In conformity with this conception Art. 59 (1) of the Bonner Grundgesetz is seen mainly as a contribution to and an emphasis of the `constitutional concept´ that the office of the Federal President is also an internationally representative position.[237]
The limitation of the presidential powers to a mere representative position on international issues results chiefly from the fact that Art. 59 (1) of the GG neither indicates a presidential right to make important decisions concerning Public International Law, nor expressly includes a presidential right to participate in or attend to negotiations about international (tax) law treaties.[238]
Furthermore Art. 59 (1) of the GG does not set out the complete allocation of competences given to other bodies or organs of the German state (Staatsorgane) and the significant influence of domestic or internal mechanisms of decision-making on international relations and treaties (Vertretung im Innenverhältnis).[239]

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231) ***Grundgesetz für die Bundesrepublik Deutschland*** as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany on the 23rd of May 1949 (BGBl. 1949, p. *seqq*), as amended. Please notice, that the ***Grundgesetz für die Bundesrepublik Deutschland*** in the following will be referred to by the abbreviation ***GG.***

232) For the role of the Federal President see, ***J. Ipsen,*** Staatsorganisationsrecht, p. 138 *seqq*, para. 385 *seqq.* / ***Hesse,*** Grundzüge des Verfassungsrechts..., p. 260 / ***Kimminich,*** VVDStRL 25 (1966), p. 2 *et seqq.* / ***Erichsen,*** Jura 1985, p. 323 *seqq.* and p. 425 *seqq.*

233) *Cf.,* Art. 7 (2) of the Vienna Convention on the Law of treaties and International Organizations or between International Organizations. *Vide supra,* part A. V.3., p. 28 of this work.

234) Compare, Art. 11 of the Reichsverfassung (Constitution of the German Reich) of 1871 and Art. 45 of the Weimarer Reichsverfassung (Constitution of the German Reich) of 1919.

235) An English translation of the text of the Bonner Grundgesetz can be found in the work of, ***Karpen*** (editor), The Constitution of the Federal Republic of Germany, p. 226 *et seqq.*

236) ***J. Ipsen,*** Staatsorganisationsrecht, p. 140 *seq.*, para. 394 *seq* / ***Hesse,*** Grundzüge des Verfassungsrechts..., p. 261 / ***Maunz,*** in: Maunz/Dürig/Herzog/Scholz, Grundgesetz Kommentar, Art. 59, para. 3 *et seqq.*

237) See, ***J. Ipsen,*** Staatsorganisationsrecht, p. 140 *seq.*, para. 394, 395 *seq* / ***Hesse,*** Grundzüge des Verfassungsrechts..., p. 261 / ***Maunz,*** in: Maunz/Dürig/Herzog/Scholz, Grundgesetz Kommentar, Art. 59, para. 5, 11, 16 *et seqq.* / ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 65.

238) ***J. Ipsen,*** Staatsorganisationsrecht, p. 140 *seq.*, para. 395 and p. 337, para 1090.

239) See, ***J. Ipsen,*** Staatsorganisationsrecht, p. 140 *seq.*, para. 395 *seq* / ***Kimminich,*** VVDStRL 25 (1966), p. 69 *et seqq.* / ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 65.

The curtailment of the presidential power finds further support in the wording of the constitutional regulations concerned with the Federal Government. According to Art. 62 of the Bonner Grundgesetz *the Federal Government consists of the Federal Chancellor and the Federal Ministers;* and Art. 65 sentence 1 of the GG states that *the Federal Chancellor determines, and is responsible for, the general policy guidelines.* On considering the importance of Art. 65 of the GG it has to be appreciated that it would impose a considerable contradiction to the systematic attitude of the German Constitution if the important matters of foreign policy or international relations and treaties were excluded from the Government and appropriated to the State President.[240]
Consequently the German Constitutional Law provides no powers whatsoever for an own foreign policy of the Federal President;[241] and negotiations about treaties, conventions, agreements and relations on an international basis are the task of the Federal Government represented by the Federal Chancellor, the Federal Ministers or other authorized representatives of the Government.[242]

As a result of the aforementioned facts the presidential right to represent the Federal Republic on the matter of international relations as enshrined in Art. 59 (1) of the GG, is described and characterized in German legal terminology as an incongruent right.
That is to say, the constitutional and public international law `abilities´ (verfassungsrechtliches "Können") regarding the external relationship (Vertretung im Außenverhältnis) to foreign countries granted to the Federal President by Art. 59 (1) of the GG and the legal fiction of Public International Law (in general the head of state has the right to represent the state in international law[243]) go further than the Federal President`s constitutional `authority´ (verfassungsrechtliches "Dürfen") in the internal relationship (Innenverhältnis) with other bodies or organs of the German State (Staatsorgane).[244]
And although - in theory - the Federal President is able to conclude a binding contract on the level of Public International Law, the presidential executive power is curtailed by the internal responsibility towards other bodies and organs of the German State.

In short, the negotiations about double [death] tax treaties, conventions and agreements on a bilateral basis are the task of the Federal Government represented by the Federal Chancellor, the Federal Ministers or other authorized representatives of the Government.
The Federal President has a mere representative position under the German constitution and his right to represent the Federal Republic of Germany in the conclusion of double taxation agreements according to Art. 59 (1) of the GG is limited to the ratification of the treaties entered into by the German Government.

A bilateral double [death] taxation agreement entered into by the Government of the Federal Republic of Germany and a foreign government or head of state is a convention or treaty of Public International Law. According to Art. 25 of the Bonner Grundgesetz *the ge-*

240) ***J. Ipsen,*** Staatsorganisationsrecht, p. 141 *seq.*, para. 396.
241) ***Kimminich,*** VVDStRL 25 (1966), p. 69 *et seqq.* / ***J. Ipsen,*** Staatsorganisationsrecht, p. 141 *seq.*, para. 396 *seq* / ***Hesse,*** Grundzüge des Verfassungsrechts..., p. 259 *seqq.* / ***Maunz,*** in: Maunz/ Dürig/Herzog/Scholz, Grundgesetz Kommentar, Art. 59, para. 5 / ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 65.
242) *Cf.*, ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 65 / ***J. Ipsen,*** Staatsorganisationsrecht, p. 337 *seq.*, para. 1091.
243) Art. 7 (2) of the Vienna Convention on the Law of treaties and International Organizations or between International Organizations.
244) ***J. Ipsen,*** Staatsorganisationsrecht, p. 140 *seq.*, para. 394, 395 *seq*

neral rules of (customary) Public International Law are an integral part of the federal law and can take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory. But a bilateral convention of Public International Law is an international *agreement* or *convention* and therefore not comparable to customary Public International Law, finding its application in German Law according to Art. 25 of the GG.
For this reason double death tax treaties are not normative or self-executing in relation to the German statutory tax law, but have to be transformed by the German legislature in order to be enacted into the domestic tax law of the Federal Republic.[245]
This is especially laid down in Art. 59 (2) sentence 1 of the GG which provides that *treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of the federal law, of the bodies competent in any specific case for such federal legislation.*
The constitutional regulation of Art. 59 (2) sentence 1 GG embodies the transformation of so called `Staatsverträge´ (State Treaties respectively double [death] tax treaties)[246], which can only be transformed into domestic law by the bodies competent (gesetzgebende Körperschaften) to enact such federal legislation the `Staatsvertrag´ is concerned with.[247]

The bodies competent for the transformation of double death tax treaties entered into by the German Government are the Bundestag (Federal Parliament, Lower House of Parliament) and the Bundesrat (Federal Council, Upper House of Parliament).[248] The Bundestag has to transform the double death taxation agreement via a transformation bill into domestic (federal) law and the transformation bill then requires the additional approval of the Bundesrat in order to be properly enacted in German law.[249]
The passing of the transformation bill is placed in the period of time between the signing and the ratification of the double death taxation treaty. The transformation process in the Lower House of Parliament and the Upper House of Parliament is therefore started before the double death tax treaty comes into operation (before the instrument of ratification is exchanged or deposited by the Federal President).
Once an agreement has been concluded and transformed by the Lower and the Upper House of Parliament the transformation bill will be signed by the Federal Chancellor, the Federal President and the Federal Ministers involved, and promulgated in the Federal Law Gazette.[250]

As soon as double [death] taxation agreements are transformed by the Lower and the Upper House of the German Parliament they have the status of domestic (federal) statutory law and will be applied according to the `general´ tax regulations embodied in sec. 2 AO

245) In detail, ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 58 *et seqq* / ***Seidl-Hohenveldern,*** Völkerrecht, p. 121 *et seqq*, para. 377 *et seqq.* / ***J. Ipsen,*** Staatsorganisationsrecht, p. 338 *seq.*, para. 1093.

246) In addition to the regulation about the transformation of so called `Staatsverträgen´ (State Treaties) - Art. 59 (2) also embodies a provision concerned with the transformation of so called `Verwaltungsabkommen´ (Administrative Agreements) - Art. 59 (2) sentence 2.

247) ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 66 *et seqq* / ***Seidl-Hohenveldern,*** Völkerrecht, p. 132, para. 427 / ***J. Ipsen,*** Staatsorganisationsrecht, p. 338 *seq.*, para. 1093 *seqq* / ***Maunz,*** in: Maunz/Dürig/Herzog/Scholz, Grundgesetz Kommentar, Art. 59, para. 16 *et seqq.*

248) See, ***E. Menzel / K. Ipsen,*** Völkerrecht, p. 66 *et seqq* / ***Seidl-Hohenveldern,*** Völkerrecht, p. 132, para. 427 / ***J. Ipsen,*** Staatsorganisationsrecht, p. 338 *seq.*, para. 1093 *seqq* / ***Maunz,*** in: Maunz/Dürig/Herzog/Scholz, Grundgesetz Kommentar, Art. 59, para. 16 *et seqq.*

249) In the Federal Republic of Germany the passing of a Bill is a complex process. For a comprehensive description of this process see, ***J. Ipsen,*** Staatsorganisationsrecht, p. 85 *seqq.*, para. 173 *et seqq.*, p. 110 *seqq.*, para. 281 *seqq.*, p. 142 *seqq.*, para. 403 *et seqq.* / ***Hesse,*** Grundzüge des Verfassungsrechts..., p. 204 *et seqq.*

250) Art. 82 (1) of the GG / See, ***J. Ipsen,*** Staatsorganisationsrecht, p. 142 *seqq.*, para. 403 *et seqq.*

and the `particular´ inheritance tax regulations embodied in sec. 21 (1) ErbStG.
Sec. 2 AO provides that *double [death] taxation treaties that were concluded with foreign states, in accordance with Art. 59 (2) sentence 1 of the German Constitution are superior to the German tax legislation, if and so far as they have been transformed into domestic law.*
The wording of sec. 2 AO indicates the original intention of the federal tax legislator to introduce a superior status to double [death] tax agreements transformed into German Tax Law.[251]
But it has to be considered that the AO itself merely has the rank of `simple´ federal statute law. The AO was concepted, passed and adopted by the Lower (Bundestag) and Upper House of Parliament (Bundesrat) as a `normal´ federal tax law codification. Consequently the AO has no status equal with or comparable to the German Constitution. Therefore the AO is unable to grant a higher status to a transformed double death duty agreement than that of `normal federal tax law´ - the status which was granted to the AO itself.
As a result of this the prevailing view in German Tax Law is that double [death] taxation agreements cannot have a superior status of law *per* sec. 2 AO (just because their character is influenced by Public International Law).[252] But on the other hand German Tax Law recognizes that double death tax treaties, according to sec. 2 AO, are of a somehow special status, which at least has to be interpreted as a *lex specialis status* in relation to other regulations of German Tax Law.[253]
Transformed double death tax treaties therefore have the character of enforceable domestic tax law provisions (to be exact, a *lex specialis character*) with a public international law origin.
Double death taxation agreements entered into by the Federal Republic of Germany may therefore modify, and in some instances override, the German ErbStG, while on the other hand they also may be overridden by later enacted domestic tax provisions (*treaty override problem*[254]). As long as double [death] tax treaties are embodied in the German statutory law they are to be applied by the German tax administration as well as the German Fiscal Courts.[255]

Like South-Africa, the Federal Republic of Germany has until now entered just five double

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251) See, **Kluge,** Das deutsche Internationale Steuerrecht, p. 214.
252) Compare also, **Kluge,** Das deutsche Internationale Steuerrecht, p. 214.
253) **Tipke / Lang,** Steuerrecht, p. 93 / **Kluge,** Das deutsche Internationale Steuerrecht, p. 214.
254) The `tax law relationship´ between the Conventions of International Tax Law and German Tax Law is controversial; but it can be observed that the established rule *lex posterior derogat legi priori* is also generally applicable with regard to Conventions of International Tax Law and German Domestic Tax Law; and *vice versa*.
However, according to authorities in the German Tax Law literature the established rule *`lex posterior derogat legi priori´* has to be narrowed either, if the contracting governments of a double taxation agreement have consented and embodied a binding clause in the treaty, stating that the contents of the treaty can and must not be modified by domestic tax provisions enacted after the agreement was transformed into national law;
or, if the contracting governments follow the principle to interpret public international law regulations (*lex specialis*) more favourable than the rules embodied in domestic law (application of the rule *lex posterior generalis non derogat legi priori specialis*).
The practical application of double death tax agreements in Germany can mainly be described as a twofold: At first the legal consequences connected with the application of a double death tax treaty (*lex specialis*) are monitored. In the second step the domestic tax law (*lex generalis*) is applied additionally; but only in so far as it is not counterproductive to the legal consequences connected with the application of the double death tax treaty.
For futher information see, **Kluge,** Das deutsche Internationale Steuerrecht, p. 213 *seqq.*
255) *Cf.*, **Kluge,** Das deutsche Internationale Steuerrecht, p. 214.

death taxation agreements.

The history of the conclusion of agreements concerned with double death taxation begins within German territory in the year 1910. In 1910 the German Reich entered the first double death taxation agreement with Greece. This agreement came into force in 1912.[256] With the defeat of Germany at the end of the Second World War in 1945, and the new foundation and constitution of the Federal Republic of Germany in 1949, the agreement had to be renegotiated and was renewed by the Federal Republic of Germany and Greece in 1953.[257] A double death tax treaty with Sweden was first concluded in 1935.[258] For the reasons mentioned above, this treaty also had to be renewed in 1951.[259] After renegotiating the old treaty of 1951, a new double death tax agreement with Sweden was signed in 1990 and came into force on the first of January 1993.[260] Further double death taxation agreements were entered by the Federal Republic and Austria in 1955;[261] the Federal Republic and Switzerland in 1980;[262] and the Federal Republic and the United States of America in 1986.[263] An existing double death tax agreement with Israel[264] was suspended in 1981 because the Treasury of Israel stopped levying death taxes on its taxpayers at that time.[265] Whereas the double death tax treaties with Austria and Greece were concluded before the drafting of the first OECD Model Convention, the double death taxation agreements entered into by Germany and Israel, Sweden, Switzerland and the United States can be seento follow mainly[266] the 'modern standard' of the OECD Model Conventions on Estates and Inheritances and on Gifts.

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256) See, RGBl. II 1912, 173 *et seqq.*

257) BGStBl. I 1953, p. 377 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 15 / ***Ebenroth,*** Erbrecht, p. 998, *ibid.* fn. 3 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 103 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 27 *seqq.*

258) RGBl. II 1935, p. 859 *et seqq.* / RStBl. 1936, p. 85 *seqq.*

259) BStBl. I 1951, p. 284.

260) The newly drafted death tax treaty between Germany and Sweden was signed on the 04.05.1990. For further information see, ***Meincke,*** ErbStG - commentary, sec. 2, para. 15 / ***Ebenroth,*** Erbrecht, p. 998, *ibid.* fn. 3

261) BGBl. II 1955, p. 755 *seqq.* / BStBl. I 1955, p. 375 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 15, 16 *seqq.* and 24 *seq.* / ***Ebenroth,*** Erbrecht, p. 998, *ibid.* fn. 3 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 103 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 27 *seqq.*

262) BGBl. II 1980, p. 594 *seqq.* / BStBl. I 1980, p. 243 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 15, 16 *seqq.* and 26 *seqq.* for the special reservations in accordance with the double death taxation agreement Germany - Switzerland see para. 29 / ***Klempt,*** DStZ 1980, p. 150 *seqq.* / ***Hundt,*** DB 1982, p. 1124 *seqq.* / ***Ebenroth,*** Erbrecht, p. 998, *ibid.* fn. 3 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 103 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 27 *seqq.*

263) BGBl. II 1982, p. 847 *seqq.* / BStBl. I 1982, p. 765 *et seqq.* / BStBl. I 1986, p. 478 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 15, 16 *seqq.* and 30 *seqq.* / ***Flick,*** DStR 1986, p. 487 *et seqq.* / ***Michel,*** DStR 1981, p. 73 *seqq..* / ***Ebenroth,*** Erbrecht, p. 998, *ibid.* fn. 3 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 103 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 27 *seqq.*

264) BGBl. II 1985, p. 394 *seqq.* / BStBl. I 1985, p. 99 *et seqq..* See especially, ***Meincke,*** ErbStG - commentary, sec. 2, para. 15, 16 *seqq.* and 24 *seq.* / ***Ebenroth,*** Erbrecht, p. 998, *ibid.* fn. 3.

265) ***Ebenroth,*** Erbrecht, p. 998, *ibid.* fn. 3.

266) The double death taxation agreements entered into by the Federal Republic of Germany and the other OECD partner countries follow the OECD Model Conventions just 'mainly' because the countries do have different tax systems and therefore there can be no uniform model they can follow strictly - every agreement has to serve the needs of the contracting countries involved. Especially if an OECD nation has reservations against particular articles of the model convention these reservations do have to be taken into account when a double death taxation agreement is entered with this country.

V.5. Summary

The 'few' bilateral double death taxation agreements entered into by the Republic of South-Africa as well as the 'few' bilateral death tax treaties concluded by the Federal Republic of Germany follow the general aim of relieving the double [death] tax burden imposed on those taxpayers who otherwise would be paying identical death taxes in both countries at the same time.
The relief granted by double death taxation agreements is achieved mainly by 'curtailing' domestic tax claims or by 'assimilating' and 'synchronizing' the main aspects of the comparable tax legislations of the contracting countries.
Whereas the latest double death tax treaties entered into by both countries follow mainly the Model Conventions on Estates and Inheritances and on Gifts, which were set up by the OECD, the older treaties either follow the ideals embodied in earlier concepts or cannot be regarded as following a special 'model pattern'.
On comparing the hierarchy of double death tax treaties and national law in both countries it can be stated that the South-African and German law do not share a uniform view or concept of how the relationship between, and the application of the existing double taxation agreements to, the domestic (tax) law have to be classified.

The entering into double taxation agreements and the transformation or adoption of these agreements by the Republic of South-Africa is an executive prerogative of the State President (*viz.*, sec. 6 [3] [e] of the 1983 Constitution, sec. 26 EDA and sec. 108 ITA). The assentof Parliament to these agreements is not necessary and a quasi normative or quasi self-executing character can therefore be assumed for the application of double death tax treaties into the domestic South-African Tax Law. Double death taxation agreements are by statute equal to other South-African Tax Law (*viz.* sec. 26 [2] EDA and sec. 108 [2] ITA) and may therefore modify and in some instances overrride domestic tax law, but a domestic tax law provision may also override an agreement provision if it is specifically intended to do so and is enacted after a treaty has become part of the South-African Tax Law - *lex posterior derogat legi priori* (the so called *treaty overriding problem*).

In the Federal Republic of Germany the entering of double taxation agreements is also appropriated to the executive power. But negotiations about double [death] tax treaties on a bilateral basis are the task of the Federal Government represented by the Federal Chancellor, the Federal Ministers or other authorized representatives of the Government (Art. 62, 65 of the GG).
The Federal President is a mere representative of the state and his right to represent the Federal Republic of Germany at the conclusion of double taxation agreements according to Art. 59 (1) of the GG is limited to the ratification of the treaties entered into by the German Government. Double death taxation agreements that were entered into and concluded by the Federal Government have to be transformed into domestic (federal) inheritance tax law. The transformation is achieved by the passing of a transformation bill in the Bundestag (Lower House of Parliament) and an additional approval to this bill in the Bundesrat (Upper House of Parliament).

Although the relationship between the transformed double taxation agreements (Art. 59 [2] sentence 1 of the GG, sec. 2 AO and sec. 21 [1] ErbStG) and the German [inheritance] tax law is controversial, it is the prevailing opinion of the authorities in the German Tax Law

literature that transformed double death tax treaties have the character of enforceable domestic tax law provisions with a public international law origin.
It is furthermore recognized that transformed double death tax agreements are *lex specialis* in relation to other German inheritance tax regulations and may therefore modify, and in some instances override, the German ErbStG, while on the other hand they also may be overridden by later enacted domestic tax provisions (the *treaty override problem*[267]).

267) *Supra,* part A. V.4., p. 37 *a.h.l.* fn. 251, **Kluge,** Das deutsche Internationale Steuerrecht, p. 213.

B. Death duties in South-Africa - the Estate Duty Act 45 of 1955

I. General

As already observed, the main objective of modern estate planning has been described as `the arrangement, management, securement and disposition of a person`s estate, so that he, his familiy and other beneficiaries may enjoy and continue to enjoy the maximum of his estate and his assests during his lifetime and after his death, no matter when death occurs´[1].

Bearing this objective in mind, Prof. S.W.L. de Villiers once stated, that '*[...] it must be emphasized that estate planning is one of the most difficult and subjective areas of the law and therefore also one of the most frustrating. One looks in vain for certainty on nearly every legal question and you are constantly haunted, not only by the spectre of things you have overlooked, but also by the awareness that future events, statutory and otherwise, will in all probability devastate your carefully laid plans. Consequently, even though you may be undaunted by the challenge posed by a planning problem, it is advisable to be realistic about the odds against you and to cover yourself by being conservative in your advice.*[2]
These observations indicate the complexity and the variety of the different branches and aspects of law that have to be taken into account if a [tax] law practitioner or a tax specialist wants to draw up and achieve a comprehensive and carefully laid estate plan.

Indeed, if one has a closer look at the branches of law that are typically involved in the drawing up of an estate plan, it can be observed, that estate planning and the administration of estates are distinguished and influenced by a variety of different branches of law, mainly Private Law, Commercial Law and Tax Law as a branch of the Commercial Law.
Accordingly, a [tax] law practitioner who wants to achieve a comprehensive and carefully laid estate plan has to apply the Law of Succession, the Law of Trusts, the Law of Contracts, Revenue Law and perhaps Company Law[3] in order to draw up a suitable estate plan for a client.
In doing so the estate planner has to take the statutes of the afore mentioned branches of law into account; and the Wills Act 7 of 1953, the Intestate Succession Act 81 of 1987, the Matrimonial Property Act 88 of 1984, the Maintenance of Surviving Spouses Act 27 of 1990, the Trust Property Control Act 57 of 1988, the Companies Act 61 of 1973, the Close Corporations Act 69 of 1984, the Immovable Property Act 94 of 1965, the Subdivision of Agricultural Land Act 70 of 1970, the Income Tax Act 58 of 1962, the Estate Duty Act 45 of 1955 and the Administration of Estates Act 66 of 1965 illustrate[4] the `vast´ amount of

1) *Vide supra,* part A. I., p. 1 and ***D. Meyerowitz,*** in: The Taxpayer 14 (1965), p. 1 *et seqq.* (at p. 1) / following this definition, ***G. A. Urquhart,*** S.A. Company Law Journal, Estate Planning Seminar 1983, p. 1 *et seqq.* (at p. 1) / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chapter 1, para. 102 / *cf.* similar, ***W. Abrie,*** Estates - Planning and Administration, p. 2 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 220.

2) *Cf.,* ***S. W. L. de Villiers,*** `The approach to estate planning´, in: 1981 MB, p. 41.

3) These are the main sources of law for estate planning, *cf.* ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chapter 3, 6, 7, 10 and 13 / ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates..., chap. 3, 4, 5, 19, 23, 24, 27 *et seqq.* But this enumeration is not embodying all sources of law.

4) See also, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chapter 4, para. 402 and ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates..., p. vi.

legislation which the planner has to master.
And yet the complexity and the spectre of the different aspects of law concerned with estate planning (and the administration of deceased estates) are exacerbated when particular items of property of an estate show up a relation to `International [Tax] Law´.[5]
In all the different branches of the law additional difficulties arise whenever a matter involves more than one country and therefore more than one legal system.
Most of these difficulties result from the fact that different legal systems differ not only in their terminology, but also in their systematic and dogmatic attitude[6] the quest for solutions to juridical problems.
Tax law in general and estate duty in particular are no exception, and difficulties in the above mentioned form can be observed in the [death] tax law and therefore also in estate planning and administration mostly where foreign [death] tax law or foreign private law provides the basis for, conflicts or simply interacts with the South-African [Death] Tax Law.

Consequently it has to be stated that international estate planning or the administration of a deceased estate with a `foreign´ element imposes new legal problems and `uncertainties´ for the South-African estate planner because it adds to and `combines´ the problems of foreign [death tax] legislation and of foreign private law with the `difficulties´ occuring in connection with domestic law provisions.[7]

Most estate plans under South-African Law are based on and constructed around a will and it can be said that it would be very difficult to make an estate plan without a will.[8]
In order to draw up a precise estate plan the planner will use all the legal concepts available to him and will especially make use of the particular estate planning tools that are applicable to the individual estate he is planning for.
Where the planning of a will is concerned, these tools are typically the testamentary trust (*trust mortis causa*) or the trust *inter vivos,* the *usufruct* and the *fideicommissium.*[9]
But although the drawing of a will may be the general foundation for a carefully laid estate plan, the limitation of taxes occuring at the time of the death of a testator and the anticipation of problems related to the administration of a deceased estate also play an important role in estate planning.

The tax environment plays a particular role in the protection of the estate assets because both, the assets and the cash reserves of an estate may be influenced substantially by the taxes levied at the time of the death of a person. As a consequence these taxes can have

5) For the definition of International Tax Law *v. s.,* part A. II.1. - II.1.3., p. 5 *seqq.*
6) For an example for the different systematic and dogmatic attitude of the South-African and German death duty legislation *vide supra,* part A. III, p. 10 *et seqq.* of this work.
7) Similar, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chapter 17, para. 1702.
8) See, ***W. Abrie,*** Estates - Planning and Administration, p. 57 / The importance of the drafting of a will is emphasized in all literary works concerned with estate planning. *Cf.,* ***D. Meyerowitz,*** in: Meyerowitz on the Administration of Estates..., chap. 5, para. 5.1. *et seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chapter 13, para. 1301 *et seqq.*
9) These are just the tools that are either established through a will or influenced by a will. See, ***W. Abrie,*** Estates - Planning and Administration, p. 32 *seqq.*, p. 294, 304, 307, 308, 317 *et seqq.* and 330 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estatesn, chap. 3, 4, 5, 23, 24 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6, 7, 13, 14 / ***J. H. Jordaan,*** Estate & Financial Planning, p. 19 *seqq.*, p. 97 *seqq.*, p. 125 *et seqq.*, p. 170 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 1 *seqq.*, p. 29 *seqq.*, p. 177 *et seqq.* / But there are furthermore tools to be taken into account, like companies, partnerships, options, the use of preference shares or life insurances, *vide supra,* part. A. I., p. 1 *seq.* and footnote 5 *ad hunc locum.*

a material effect on the size of the residue of an estate which will eventually remain for the heirs and beneficiaries.[10]
The limitation of taxes therefore has to be taken into account at an early planning stage and on drawing up a modern estate plan, today`s estate planner is, amongst other difficulties, also confronted by the different problems connected with the calculation and minimisation of a possible tax liability.

When a South-African deceased estate is administered and distributed by the executor(s), taxes in the form of income tax[11], estate duty[12], donations tax[13], transfer- and stamp duty[14], and value added tax (VAT)[15] may be levied, and on drawing up an estate plan the estate planner must take these taxes into consideration.[16]
All these taxes may influence a single deceased estate, but the most important tax, payable on the death of a person, is the tax levied according to the provisions of the Estate Duty Act 45 of 1955, [17] Estate Duty.

Because the anticipation of an estate duty liability which is levied on a deceased estate is an important part of modern estate planning, it is necessary to consider the provisions of the Estate Duty Act 45 of 1955 and to expound the additional legal problems and `uncertainties´ introduced to the South-African estate planning environment and the administration of deceased estates by aspects of international estate planning.

It would be beyond the scope of this work to discuss all the complex problems that can be related to international estate planning and the administration of international estates in detail; and the focus of what follows is chiefly on a particular aspect of [international] estate planning, namely the anticipation and calculation of an estate duty liability according to the regulations of the EDA in general and the problems and effects of double taxation occuring in relation to other countries (especially the Federal Republic of Germany) in particular.

A special emphasis will be placed on the unilateral relief regulations (*viz.*, the International Tax Law[18]) provided by the EDA to prevent international double taxation.
By way of elaboration on the aforementioned aspects, it is appropriate to undertake a theoretical analysis of the problems associated with property situate outside the Republic but included in the property of a deceased dying as a resident in South-Africa, as well as research into the special provisions applicable in the calculation of the amount of estate duty levied on the South-African property of a person dying not `ordinarily resident´ in the Republic.

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10) *Cf.*, ***W. Abrie,*** Estates - Planning and Administration, p. 57 *seq.*
11) See, ***W. A. Joubert,*** LAWSA (1992), Vol. 22 Part. 1, para. 732 *et seqq.* / ***K. Huxham / P. Haupt,*** Notes on South-African Inome Tax, chap. 29, para. 29.2, p. 524 *seq.*
12) *Cf.* only, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3.
13) ***W. A. Joubert,*** LAWSA (1992), Vol. 22 Part. 1, para. 688 *et seqq.* / ***K. Huxham / P. Haupt,*** Notes on South-African Inome Tax, chap. 25, p. 466 *et seq.*
14) Compare, ***W. Abrie,*** Estates - Planning and Administration, p. 58.
15) See, ***W. Abrie,*** Estates - Planning and Administration, p. 58.
16) ***W. Abrie,*** Estates - Planning and Administration, p. 58.
17) Please notice that the ***Estate Duty Act 45 of 1955*** in the following will be furtheron referred to by the abbreviation ***EDA*** or simply the ***Act.***
18) For the definition of International Tax Law see, *supra,* part A. II.1. - II.1.3., p. 5 *seqq.* of this work.

Finally the laws that are related to the South-African Law of estate duty and the South-African International Tax Law (*viz.*, the Laws of Succession, Trusts and the Conflict of Laws) will also be mentioned in general and discussed in detail where necessary.

II. Brief introduction to the basic principles of and the relations and interaction between the Administration of Estates Act 66 of 1965, the South-African Law of Succession, their international aspects and the Estate Duty Act 45 of 1955

II.1. A short excursus: the German Law[19]

The German ErbStG (Inheritance Tax Act) levies inheritance taxes directly on an heir who has acquired any property or assets due to an inheritance or bequest under the Law of Succession which is codified in the fifth book (sec. 1922 to sec. 2385) of the German civil law codification, 'Bürgerliches Gesetzbuch' (BGB).[20] The German civil law follows the principle of universal succession (Gesamtrechtsnachfolge) and according to sec. 1922 BGB an heir succeeds without any acts of transfer, delivery or cession (*ipso iure*) to the assets and liabilities of a deceased.[21]

The German ErbStG and the German civil law are linked up closely and several regulations of the inheritance tax act refer directly to regulations of the Law of Succession and the Law of Donations which are embodied in the BGB.[22]

The ErbStG does not define the preconditions for, the elements of and the basis for the inheritance tax liability separately, but refers to the accession of property to an heir (by succession or donation), as codified in the BGB (Erbanfallsteuer[23]). Therefore the proceedings and the elements of the regulations of the German ErbStG are decisively influenced by the German civil law.[24]

Because of this the German civil law has an authoritative, decisive and influencing role in relation to the German inheritance tax law and the German tax law terminology refers to this relationship as the 'Prinzip der Maßgeblichkeit des Zivilrechts für das Erbschaftsteuerrecht' (the principle of the governing authority [domination] of the Civil Law [especially the Law of Succession and the Law of Donations] over the Inheritance Tax Law).[25]

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19) Some aspects of the German Inheritance Tax Law will be presented more detailed in part C of this work. The following reference to the German Law is intended merely as a comparative introduction to the general outlook on the South-African Law of Succession, Administration of Estates and Estate Duty.

20) See, ***Ebenroth,*** Erbrecht, p. 10, p. 922 *seq.*, p. 928 / ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 26, 30, 41 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25, 32 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, p. 178, para. 1.1.

21) ***Gursky,*** Erbrecht, p. 3 *et seqq.* / ***Ebenroth,*** Erbrecht, p. 10 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, p. 1 *seq.* , para. 1.

22) *Vide,* sec. 3 (1) No. 1 and 2, sec. 4, sec. 5, sec. 7 (1) No. 4 to 6, sec. 15 (3), sec. 20 (3), sec. 29 (1) No. 2 and 3 of the ErbStG / ***Meincke,*** ErbStG - commentary, Einführung, para. 7.

23) *Vide supra,* part A. III.2., p. 13 of this work.

24) See, ***Meincke,*** ErbStG - commentary, Einführung, para. 7 / ***Ebenroth,*** Erbrecht, p. 922 *seq.*, p. 928 / ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 30 *seqq.* and p. 37.

25) ***BFH,*** BStBl. II 1987. p. 175 *seq.* / ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 37 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 8 *seqq.* / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 7 (1.3.) / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 23 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, p. 179 *seqq.*, para. 2.

II.2. The South-African Law of Succession, Administration of Estates and Estate Duty

In the Republic of South-Africa the passing of property and assets from a deceased to an heir is mainly and decisively influenced by the regulations of the Law of Succession, the Administration of Estates Act 66 of 1965 and the Estate Duty Act 45 of 1955.[26]

On examining and comparing the relations and interaction between the provisions of the South-African Law of Succession, the Administration of Estates Act 66 of 1965 and the Estate Duty Act 45 of 1955, it can be stated that neither a principle of `governing authority of the Law of Succession over the Administration of Estates Act and the Estate Duty Act´, nor any similar or comparable principle is applicable under South-African Law.

This is mainly the result of the systematic attitude evinced by the South-African [Tax] Law towards the levying of death taxes, which differs substantially from the systematic attitude shown by the German [Tax] Law.[27]

The death duties levied under South-African Law developed parallel to the `evolution´ of the South African Law of Succession. Since the last century the South-African law of Succession developed slowly but constantly[28] away from the original Roman-Dutch system of succession to today`s system, which is influenced by and comparable to the English system of succession.[29]

Similar to the present German Law, the Roman and Roman-Dutch Law followed the principle of universal succession on adiation.[30] If an heir adiated under Roman-Dutch Law, he succeeded without any acts of transfer, delivery or cession (*ipso iure*) to the assets and liabilities of the deceased.[31] But as early as the 19th century a development was initiated which slowly led to the replacement of the original Roman-Dutch system of universal succession by the English system of executorship.[32]

Whereas in former times death taxes were not only levied as estate duties on deceased estates, but also as succession duties[33] (payable by the heirs according to the rules of the

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26) These are only the main sources of influence. Please note, that the passing of property on death is furthermore influenced by the regulations of the Acts mentioned in part B. I., p. 40 of this work.

27) Compare *supra,* part A. III. to III.3., p. 10 *seqq.* of this work.

28) See, ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 4 *et seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. t, para. 11 / ***F. J. van Zyl,*** Universele Opvolging in die Suid Afrikaanse Erfreg, p. 9 *et seqq.* / The courts played a major role in this development and it was held by ***Watermeyer JA*** in ***Estate Smith v. Estate Follett*** 1942 AD p. 346 *seqq.* (at p. 383), that `under our system of administration of the estates of deceased persons an heir is in effect an residuary legatee´ [...] and the `[...] notion of an inheritance as the whole estate of a deceased person, a *universitas* of rights and liabilities, which vests on adiation in the heir no longer exists in our law.´

29) ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 4 *et seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 1 *seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 1, para. 1.

30) *Cf.,* ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 4 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 6, 7, para. 13, 14.

31) ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 1 *et seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 6, 7, para. 13, 14 / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 115, 116.

32) This development is shown in detail in, ***F. J. van Zyl,*** Universele Opvolging in die Suid Afrika
p. 4 *seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 4, para. 11.

33) See *supra,* part A. IV.3. p. 16 *seqq. ad hunc locum,* footnotes 91, 93, 94. ***Statutes of the Cape of Good Hope 1652-1895,*** Vol. I, 1652-1871, p. 919 *et seqq.,* Act to impose Duties on Succession to Property, ***Act No. 5 of 1864 / Colony of Natal,*** Acts of the Parliament of the Colony of Natal, Session of 1905, Act to impose Duties on Succession to Property, ***Act No. 35 of 1905 /*** As amended by ***Colony of Natal / The Statute Law of the Orange River Colony,*** Chapter

Roman-Dutch Law of Succession and therefore according to their family relationship to the deceased[34]), the levying of succession duty 'vanished' nearly parallel to the development of the South-African Law of Succession from the Roman-Dutch to the English system of succession.[35]

When the Roman-Dutch rules were still in force and a succession duty was levied by the diffent Provinces, an heir had to pay succession duty directly after he acquired (*ipso iure*) ownership of his share of the property and assets of the deceased;[36] and a similar relation to the existing relation between the German civil law and the German inheritance tax law existed between the Roman-Dutch Succession Law and the Succession duties in those times.

But under the present South-African succession system the transfer and taxation of property and assets from a deceased to an heir is completely different.

The present South-African Law of Succession is mainly influenced by the English system, especially as regards the interpretation of wills, the testamentary trust (*trust mortis causa*) and executorship.[37]

The interposition of the executor between the deceased and the beneficiaries of an estate has not only profoundly altered the legal position of heirs and legatees compared to the Roman-Dutch position[38], but has also altered the relation between the Law of Succession and the levying of death duties.

Presently an heir does not automatically acquire ownership of his share of the residue; he is not personally liable for the debts of the deceased, and is not charged with the administration of the estate.[39]

Under the present law the heir is entitled to the residue or a certain fraction of the residue of a deceased estate.[40] The residue can be characterized as the amount of property and assets remaining, after funeral expenses, debts and other liabilities of the deceased, as well as the costs of administration, taxes, and legacies have been paid.[41]

Consequently, and due to the present system of executorship and administration of estates, South-African estate duty is paid before an heir succeeds to the share of the inheritance left to him by the deceased (in accordance with today's Law of Succession).

For the needs of the present system of succession, the Estate Duty Act 45 of 1955 has de-

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LXVIII of the Law Book, Succession Duty / Chapter II of the ***Death Duties Act No. 29 of 1922.***

34) Although the appointment of an executor already existed at the time of the levying of succession duties the position of the executor did not affect or influence the legal position of the heir as the universal successor of the deceased. The executor had a mere assisting position - helping the heir in the winding up of the estate and the payment of his succession duty and other liabilities. *Cf.*, ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 4 *seq.*

35) It was 'abolished' by the introduction of the ***Estate Duty Act 45 of 1955.***

36) See, sec. 1 *seqq.* of the ***Cape of Good Hope*** Act to impose Duties on Succession to Property, ***Act No. 5 of 1864*** / sec. 1 *seqq.* ***of the Colony of Natal*** Act to impose Duties on Succession to Property, ***Act No. 35 of 1905*** / sec. 1, 2, 3, of the ***Orange River Colony*** Succession Duty / sec. 8 *seqq.* of chapter II and the second schedule of the ***Death Duties Act No. 29 of 1922.***

37) See, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 1, para. 1.

38) Compare, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 5, para. 12.

39) ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 116 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 5, para. 12.

40) ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 4 / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 116, 117 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 5, 6 para. 12, 13 / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 86, 87.

41) ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 4.

veloped an own terminology[42] and in contrast to the existing German inheritance tax law and the old `Roman-Dutch influenced´ succession duties, it defines the preconditions, the elements and the basis for the estate duty liability[43] separately and autonomously from other legislation such as the Administration of Estates Act 66 of 1965 and the South-African Law of Succession.

But despite the fact that the Estate Duty Act 45 of 1955 establishes the determination of liability for estate duty separately and autonomously as aforesaid, it has to be acknowledged that the assessment and levying of estate duty on a deceased estate is not a process which occurs `independently´ from other acts or steps involved in the transfer of property from a deceased to an heir; on the contrary, estate duty is always levied where a deceased estate is administered according to the rules of the Administration of Estates Act 66 of 1965 and subsequently distributed in accordance with the rules of the South-African Law of Succession.

For this reason the following provides for a short introduction to the general principles of the administration of [international] deceased estates and the general rules of [international] succession under South-African Law.

II.2.1. Brief introduction to the Administration of Deceased Estates[44]

Before the estate of a deceased person can be distributed in accordance with the South-African Law of Succession, the deceased estate has to be administered and during this process estate duty [if any estate duty is payable] has to be paid.

Under the modern South-African system of executorship, the administration of a deceased estate is the task of the executor(s)[45] and the administrator(s)[46].

The statutory provisions under which the executor of a deceased estate is granted letters

42) The South-African estate duty is levied on the basis of the total property of a deceased, less exemptions, as set out in the regulations of the EDA. See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.1, 27.3. The amount of an estate duty liability under South-African Law is assessed independently from the value of property and assets a single heir aquires from a deceased by succession: The assessment of an estate duty liability does especially not refer to the rules of succession connected to the family relation between an heir and a deceased and other regulations of the South-African Law of Succession.

43) See, sec. 1 to sec. 5 of the EDA and especially the definition of the term `property´ in sec. 3 of the EDA, which can be characterized as the central term of the EDA.

44) An `in depth´ discussion of all the problems that can be related to the administration of deceased estates would be beyond the scope of this work. For further information on this topic see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 1 and 6 to 26 / ***L. A. Kernick,*** Administration of Deceased Estates / ***G. A. Urquhart / D. M. Davis,*** Estate Planning / ***W. Abrie,*** Estates - Planning and Administration, p. 147 *et seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 320 *et seqq.*

45) The executor is the `key´ person in the administration of the passing of property from a deceased to an heir, but it would be beyond the scope of this work to enlarge on all theaspects of executorship. See therefore, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 8 to 17 / ***L. A. Kernick,*** Administration of Deceased Estates chap. 3 to 7 / ***W. Abrie,*** Estates - Planning and Administration, p. 161 *et seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates p. 40 *seqq.* / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 329 *et seqq.* / ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 4 *et seqq* (especially p. 6) / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 22 *seqq.* / ***A. P. J. Bouwer,*** Die Beredderingsproses van..., p. 22 *seqq.*, p. 296 *seqq.*, p. 371 *seqq.*

46) The administrator (more often referred to as the trustee) is the person who carries out the administration of a deceased estate. The executor can act as the administrator himself, or he can appoint an agent to act as the administrator. For an `in depth´ distinction between the tasks of the `executor´ and the `administrator´ see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 23, para. 23.1 / ***W. Abrie,*** Estates - Planning and Administration, p. 148, 150 / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 25 *seqq.*

of executorship by the Master of the Supreme Court and under which he administers and distributes the deceased estate are mainly laid down in the Administration of Estates Act 66 of 1965; and the manner in which the estate of a person is administered, his liabilities are discharged, his assets are distributed, or other incidental matters of a deceased estate are handled, is governed by these rules.[47]

The deceased's estate comprises the aggregate of all his assets and liablilities[48] and the executor who has been appointed to administer the estate must obtain possession of the assets of a deceased person, including rights of action, to realize such of the assets as may be necessary for the payment of the debts of the deceased, as well as taxes and the costs of administering and winding-up the estate, to make those payments, and to distribute the assets that remain after the debts, taxes and other expenses have been paid (the residue) among the beneficiaries who succeed to the deceased.[49]

Accordingly the administration of a deceased estate can, in brief, be described as the process, in accordance with legal requirements and under the supervision of the Master of the Supreme Court, by which the a deceased person's liabilities are settled and the remainder of his estate (the residue) is awarded to his testate and/or intestate beneficiaries, according to the Law of Succession.[50]

II.2.2. Brief introduction to the international dimension of the Administration of Estates

Because a deceased estate comprises all the assets and liabilities of a deceased, no matter where they are situated, an international or foreign element is introduced to the administration of estates as soon as a deceased estate incorporates assets and liabilities that are situated outside the Republic and a South-African executor needs to administer property in a foreign country, or if an executor of a foreign estate was appointed abroad and wishes to deal with the property of a deceased person that is situated within the Republic.[51]

With the occurence of a foreign element in the above-mentioned form a variety of problems can arise in relation to the administration of deceased estates.

One example of the difficulties that can occur in the administration of international estates is connected to the South-African system of executorship.

Originating from the fact that most of the European continental systems of 'administering and inheriting estates' in general, and the German system of 'administering and inheriting estates' in particular, follow the Roman Law concept of universial succession (succession *ipso iure* by the heir),[52] European or German 'deceased estates' are mostly 'administered' by the heirs.

Accordingly the role of the heir as an 'executor' as it can be found in the European law systems (especially the German system) differs from the role of the executor as the

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47) *Cf.*, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 1, para. 1 / ***W. Abrie,*** Estates - Planning and Administration, p. 148 / ***H. J. Erasmus,*** in: Lee and Honoré, Family..., p. 365 / ***A. P. J. Bouwer,*** Die Beredderingsproses van..., p. 22.

48) See, ***SA General Electric Co. (Pty) Ltd v. Sharfman*** 1981 (1) SA p. 592 *seqq.* (at p. 597) / ***Clarkson v. Gelb*** 1981 (1) SA p. 288 *seqq* (at p. 293) / ***CIR v. Emary*** 1961 (2) SA p. 621 *seqq.* (at p. 624) / ***CIR v. Estate Crewe*** 1943 AD p. 656 *seqq* (at p. 667, 668) / ***W. Abrie,*** Estates - Planning and Administration, p. 148 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 2, para. 6.

49) ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 4, para. 10 / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 22 *seqq.*

50) *Cf.*, ***W. Abrie,*** Estates - Planning and Administration, p. 148.

51) See, ***L. A. Kernick,*** Administration of Deceased Estates, p. 61 *seq.* / ***C. F. Forsyth,*** Private International Law, p. 228 *seq.* and p. 328 *seqq.*

52) *Vide supra,* part B. I., p. 41 and part A. III. and III. 2., p. 10, 11, 13 of this work.

South-African Law understands it.
As a consequence a European or a German heir who inherits `property´ which is situated in the Republic may have difficulties in obtaining a document which the Master will recognize as being a foreign equivalent of the South-African letters of executorship as defined in sec. 1 of the Administration of Estates Act.
But this is only one of the problems that can occur in the process of administering an international estate under South-African Law. The difficulties in the administration process will differ from case to case, and it is therefore advisable to monitor and approach the problems connected with the administration of an international deceased estate at an early planning or administration stage.
However, some of the aspects of the administration of international deceased estates that are especially related to the payment of estate duty will briefly be dealt with at a later stage (see, part B. III.7.1.8. to III.7.1.8.b., p. 121 *seqq.* of this work).

II.2.3. Brief introduction to the South-African Law of Succession[53)]

When the process of administering a deceased estate is completed, the final step to conclude the transfer of property and assets from a deceased to an heir is the beneficial distribution of the residue of a deceased estate to the heir(s) according to the rules of the South-African Law of Succession.[54)]
But apart from its distributive character, the South-African Law of Succession also provides additional tools with which to plan a deceased estate in advance and to influence a possible estate duty liability. For this reason there follows a brief introduction to both aspects of the Law of Succession.

II.2.3.1. General

The legal personality of a natural person is terminated by death and the South-African Law of Succession deals with the rules governing the devolution of the estate of a person upon death.[55)] When a person dies, the surplus of his property remainig after the administration, namely any surplus after payments of debts, taxes and other liabilities and costs of administration (residue), is transferred to the persons entitled to succeed him.[56)] The rules of

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53) The following is only meant to be a `Brief introduction to the South-African Law of Succession´. For further aspects, that are not included in this introduction see the works of: ***Corbett / Hahlo / Hofmeyr / Kahn,*** The Law of Succession in South Africa / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of Succession / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, Wills and Succession, Administration of Deceased Estates and Trusts / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession, Students´ Handbook / ***D. Hutchison,*** in: Wille`s Principles of South African Law, p. 353 *seqq.* / ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 363 *et seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 3, 4, 5, 18 and 19 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 13 / ***W. Abrie,*** Estates - Planning and Administration, p. 8 *seqq.* and p. 32 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 1, 2, 3 / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning, Hoofstuk 19 / ***A. P. J. Bouwer,*** Die Beredderingsproses van..., Hoofstuk 19 en Hoofstuk 20.

54) *Cf.,* ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 634.

55) See, ***B. van Heerden,*** in: Wille`s Principles of..., p. 64 / ***D. S. P. Cronjé,*** The South African Law of..., p. 29 / ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 1.

56) *Cf.,* ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 1, para. 1 / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 105 / Similar, ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 1. See, ***B. van Heerden,*** in: Wille`s Principles of..., p. 64 / ***D. S. P.***

the Law of Succession determine how the scope of the respective benefits is established[57] and the Law of Succession can therefore be characterized as the totality of the legal rules which control the transfer of those assets of the deceased which are subject to distribution among beneficiaries, or those assets of another over which the deceased had the power of disposal.[58]

II.2.3.1.a. Testate and intestate succession

Under today`s South-African Law of Succession, the property and assets of a deceased are mainly[59] distributed either under a will (*successio ex testamento*), which is governed by the statutory provisions of the Wills Act 7 of 1953[60] or according to the rules of intestate succession (*successio ab intestatio, successio legitima*), which are laid down in the Intestate Succession Act 81 of 1987[61].

Whether there is a will or not, there is invaribly an heir who succeeds to the whole or a portion of the residue of the deceased estate. If an heir takes under a will he is a testamentary heir and if there is no will he is termed as an heir *ab intestato.*[62]

Under a will the testator can furthermore bequeath a specific thing, a collection of things or a sum of money to a person other than the heir: this person is called a legatee.[63]

II.2.3.1.b. Adiation, repudiation and collation

The beneficiaries under a will or upon intestacy are not obliged to accept an inheritance or a legacy. They have the right either to accept (adiate) or to reject (repudiate) their part of the residue;[64] but in most cases the beneficiaries of a succession will adiate because they can only gain by adiating. Even if the estate is insolvent, the worst that can happen to an heir under the South-African Law of Succession is that he will get nothing.[65] Other than under German Law for example, where an heir is personally liable for the debts and other

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Cronjé, The South African Law of..., p. 29 / ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 1.

57) ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 1.

58) See, ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 1 / ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 1.

59) For other forms of succession like the succession by contract see, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 124 *seqq.*, para. 191 *et seqq.* / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 295 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IX.

60) For a comprehensive discussion of testate succession see, ***Corbett / Hahlo / Hofmeyr,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., part II, p. 29 to p. 548 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 33 *seqq.* , para. 51 *et seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk III - X / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, and the other authors mentioned in part B. II.2.3., p. 49, footnote 53 of this work.

61) For the distribution of property and assets according to the rules of intestate succession see, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 21 *seqq.* , para. 36 *et seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk II / ***W. Abrie,*** Estates - Planning and Administration, p. 8 *seqq.* / and some of the other authors mentioned in part B footnote 53 of this work.

62) *Cf.,* ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 1 , para. 2 / ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 2.

63) ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 2.

64) See, ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 14 *seqq.* / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 133 *seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 11 *seqq.*, para. 17 *seqq.*

65) ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 14.

liabilities of a deceased estate (sec. 1967 BGB[66]), a South-African heir benefits from the system of executorship and cannot be held personally liable for debts of a deceased estate.[67]

If a direct descendent of a deceased wants to share as an heir under South-African law, irrespectively if he is a testamentary heir or an heir *ab intestato,* he has not only to accept (adiate) his inheritance, but in some cases he is furthermore obliged to collate.[68] Collation aims at the equality of distribution of the deceased's estate to his children and comprises certain kinds of gifts an heir received from or certain debts an heir owed to the deceased during his lifetime.[69] The term collation generally describes the situation, when a direct descendent of a deceased received a benefit of the assets and property of the deceased (e.g. as a portion of his inheritance in advance[70]) during the deceased's lifetime; if this is the case, an heir is 'normally' obliged to report this benefit, so that it can be added to the property of the deceased estate and taken into account in the process of distributing the estate, in order to give each heir his 'fair share' of the deceased estate.

II.2.3.2. The Law of Succession, the testamentary trust and limited interests

Whereas the aforementioned aspects of the South-African Law of Succession are of general importance for the distribution of deceased estates, a particularly useful tool for estate planning purposes is the ability to create a testamentary trust (*trust mortis causa*) and other limited interests under a will.[71]

By creating a *trust mortis causa* or limited interest under a will the planner can utilize the will to do more than just arrange for the orderly distribution of assets and property after death. He can take wider ranging succession decisions and estate duty considerations into account and use the testamentary techniques mentioned to create a comprehensive and concise estate plan.

Due to its flexibility the creation of testamentary or other trusts is widely used in modern estate planning and it can be observed that the creation of limited interests under a will is less popular than it used to be as an estate planning tool.[72]

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66) But under German Law the heir has also got the choice either to adiate (Annahme der Erbschaft) or to repudiate (Ausschlagung der Erbschaft) the inheritance. See, sec. 1942 *seqq.* of the BGB, especially sec. 1943, sec. 1944, sec. 1945 and sec. 1946 of the BGB and ***Ebenroth,*** Erbrecht, p. 230 *et seqq.* / ***Gursky,*** Erbrecht, p. 70 *seqq.*

67) See, ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 14

68) For the problem of collation see, ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 17 *et seqq.* / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 147 *seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 17 *seqq.,* para. 27 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk X.

69) See, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 17, para. 27 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk X., p. 597.

70) For a variety of cases that 'normally' lead to collation see, ***Hahlo,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 22 *et seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk X., p. 603 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 19, para. 31.

71) In addition to the above mentioned testamentary tools a testator has the possibility of use further testamentary techniques e.g. to set up a joint will, to make a simple bequests, to create annuities or to use the technique of massing of estates. However, this is meant to be a short introduction to the Law of Succession and for this reason these aspects will not be dealt with furtheron. For additional information on these aspects see the literary sources qouted on p. 49 footnote 53 of this work.

72) It would be beyond the scope to evalute the importance of testamentary and other trust or limited interests in this work. For this topic see, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6 para. 6139 to 6148 and chap. 13 para. 1305 to 1378 / ***P. A. Olivier,*** Trust Law and Practice, p. 224 *et seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 82 *seqq.* and p.

Nevertheless, both the creation of a testamentary trust and the creation of limited interests can influence the estate duty liability of a deceased estate and a short introduction to these testamentary techniques is accordingly provided.

II.2.3.2.a. The limited interests

The most important limited interests under a will are created either by a *fideicommissum* (fiduciary interest) or a *usufruct* (usufructuary interest).
In addition it is possible to create further limited interests, so-called `other like interests´, such as *usus* and *habitatio*. But these `other like interests´ are less important for estate planning and estate duty purposes than the *fideicommissum* and the *usufruct*.[73]

aa. The fideicommissa[74]

At the outset it should be mentioned that there are a number of possibilities to create a *fideicommissum*[75] otherwise than in terms of a will, but our discussion is limited to the testamentary *fideicommissum*.
The most usual type of a *fideicommissum* under a will is where a testator (the *fideicommittens*) transfers property to a beneficiary (the `first´ heir as the *fiduciary* or *fiduciarius*) subject to a provision that, if a certain condition is fulfilled (e.g. the death of the *fiduciary*), the property has to be made over to a further beneficiary (the `second´ heir as the *fideicommissary* or *fideicommissarius*).[76]
A *fideicommissum* under a will often provide for the property of the testator to be made over to beneficiaries more than once (so-called multiple or *multiplex fideicommissum*);[77] and where a *fideicommissum* has the effect that the `first´ heir (as the *fiduciary*[78]) `in-

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108 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 3, 19 / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning, Hoofstuk 5, 19, 20, 21, 22 / ***A. P. J. Bouwer,*** Die Beredderingsproses van..., Hoofstuk 20.

73) For a thorough examination of *usus* and *habitatio* see, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 378 *seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 115 *seqq.*, para. 177 *seqq.* / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 281 *seqq.* / ***do.,*** LAWSA (1991) Vol. 25, para. 83 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IV.

74) The *fideicommissa* cannot be examined *in extenso* in this work, see therefore ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 257 to 377 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 86 *seqq.*, para. 142 *seqq.* / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 100 *seqq.* / ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 426 *et seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 293 *seqq.* / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 65 *seqq.* / For an evaluation for estate planning purposes see, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6 para. 6145 to 6148 and chap. 13 para. 1310 to 1311 and para. 1338 to 1345 / ***W. Abrie,*** Estates - Planning and Administration, p. 82 *seqq.*

75) For the *fideicommissum inter vivos* see, ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 341 *seqq.*

76) ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 293 *seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 86, para. 142 / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 258 *seqq.*

77) For the distinction between *multiplex fideicommissa* and *unicum* or *simplex fideicommissa* see, ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 431 / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 291 *seqq.*

78) For a nearer description of the *fiduciary* see, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 298 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 319 *seqq.* / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 103 *et seqq.*

herits' the [in most cases immovable[79]] property of the testator under the condition that it shall pass to the 'second' heir (as the *fideicommissary*[80]) after the death of the *fiduciary*, the *fiduciary* is the owner of the property and the *fideicommisary* has only a personal legal claim against the *fiduciary* in compliance with the conditions of the will.[81]

Should the *fideicommissary*, as the second heir, die before the *fiduciary*, as the first heir, the *fiduciary* will obtain the full right of ownership over the property, unless the testator indicated further *fideicommisarii* by the means of a *multiplex fideicommissum.*[82]

Although the *fiduciary* becomes the owner of the property after the death of the testator, his right in the property is usually limited by the claims the future owner, the *fideicommissary*, has to it.[83]

'Normally' the rights of the *fiduciary* are limited to an advantageous use of the property (he can enjoy the property but has to maintain its essential qualities - *salva rei substantia*)[84] and the *fiduciary* is limited in his capacity to alienate (e.g. to sell, to donate or to bequeath) the property, since he is not allowed to do anything that will adversely affect the rights of the *fideicommissary* to the [immovable] property.[85]

Before 1965 it was possible to construct a *multiplex fideicommissum* over property for an unlimited number of *fideicommissary* substitutions. But since the introduction of the Immovable Property Act 94 of 1965 the *fideicommissary* substitution for immovable property is limited to two subsequent *fideicommissarii* and contradictory provisions made under a will or in another document are void.[86] However, if a *fideicommissium* is created over assets other than immovable property the number of *fideicommissary* substitutions is theoretically unlimited.[87]

Finally an exception to the rule of the 'normal' *fideicommissum* has to be mentioned - the *fideicommissum residui.*

A *fideicommissum residui* is created, as soon as the testator bequeathes property to a *fiduciary* subject to the condition that so much of the property, as may be left on the fulfillment of a certain condition (e.g. the death of the *fiduciary*) must pass to the

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79) A *fideicommissum* can be created for movable and immovable property, corporeal or incorporeal, see ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 99.

80) For the legal position of the *fideicommissary* see, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 108 *seqq.*, para. 167 *seqq.* / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 285 *seqq.* and 298 *seqq.* / ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 432 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 332 *seqq.*

81) *Cf.,* ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 298 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 319 *seqq.*

82) ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 300 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 321.

83) *Cf.,* ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 103 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 319 *et seq.* / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 301.

84) See, ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 103.

85) For the problems that are connected to the alienation of property by the *fiduciary* see, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 101 *seqq.*, para. 162 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 321 *et seqq.* / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 301 *seqq.*

86) See, sec. 6 and 7 of the Immovable Property Act 94 of 1965 and ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 294 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 323 *et seqq.* / ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 431 *seq.*

87) *Cf.,* ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 98, para. 157 / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 261.

fideicommissary.[88]

In contrast to the `normal' *fideicommissum* the *fiduciary* has the capacity to alienate the [immovable] property he `inherited' under a *fideicommissum residui.* But the capacity of the *fiduciary* to alienate all the [immovable] property is limited by a rule of common law, namely that the *fiduciary* has to retain at least one quarter of the [immovable] property to pass it on to the *fideicommissary*, unless the will of the testator grants the *fiducary* the explicit right to alienate the property in total.[89]

bb. The usufruct[90]

In the decision of *Estate Watkins-Pinchford v. CIR*[91] it was held that `The broad distinction between a *fideicommissum* (fiduciary interest) and a *usufruct* (usufructuary interest) is that in the case of a fiduciary interest, the *fiduciary* has a vested right in the *corpus* of the fideicommissary property and may on the failure (to fulfill a certain condition or perhaps the death) of *fideicommissaries,* aquire the full *dominium* (ownership) in the property in respect of which he holds a fiduciary interest, whereas in the case of a usufructuary interest the *usufructuary* has no vested right in the *corpus* of the property in respect of which the usufruct is held and can never aquire the full *dominium* (ownership) of that property.'[92]

The *usufruct* is a personal servitude[93] and it is created under a will when the testator gives a beneficiary (the *usufrutuary*) the right to use and enjoy a specific [movable or immovable[94]] asset and to take its fruits (an income out of the assets or the property), whereas the right of ownership in the asset is given to someone else (the bare dominium

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88) For the *fideicommissum residui* compare, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 336 / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 111 *seqq.,* para. 170 *seqq.* / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 109 *seqq.* / ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 444 *et seq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 315 *seqq.* / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 68 *seq.*

89) See, ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 111 *seq.,* para. 172 / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 338 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 317.

90) It would be beyond the scope of this work to deal with all the aspects of the *usufruct.* For additional information see therefore ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 61 *seqq.* / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 278 *seqq.* / ***do.,*** LAWSA (1991) Vol. 25, para. 64 *seqq.* / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 111 *seqq.* / ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 453 *et seqq.* / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 378 *et seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 113 *seqq.,* para. 174 *seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 262 *seqq.* / For an evaluation for estate planning purposes see, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6 para. 6145 to 6148 and chap. 13 para. 1312 and para. 1346 to 1368 / ***W. Abrie,*** Estates - Planning and Administration, p. 82 *seqq.*

91) ***Estate Watkins-Pinchford v. CIR*** 1955 (2) SA 437 (A) / The Taxpayer 4 (1955), p. 114.

92) Cf., the dictum held by ***Centlivres CJ.*** in ***Estate Watkins-Pinchford v. CIR*** 1955 (2) SA p. 437 *seqq.* (at p. 447) / The Taxpayer 4 (1955), p. 114 (at p. 115).

93) ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 113, para. 174 / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 278 / For a more detailed definition ***W. A. Joubert,*** LAWSA (1991) Vol. 25, para. 64 / ***C. G. van der Merwe,*** in: Lee and Honoré, Family, Things and Succession, p. 311.

94) A *usufruct* may be constituted over movables or immovables, whether corporeal or incorporeal, see ***W. A. Joubert,*** LAWSA (1991) Vol. 25, para. 66 / ***C. G. van der Merwe,*** in: Lee and Honoré, Family, Things and Succession, p. 311 / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 379.

holder).[95] Because the *usufructuary* is not the owner of the asset he draws his advantages (fruits) from, he is not allowed to consume or destroy the usufructuary property, affect its value or alter its character.[96]

For this reason things that are consumed by use (*res consumptibles*) cannot be the object of a usufruct, but may be the object of a so-called quasi-*usufruct.*[97]

The ultimate beneficiary of a *usufruct* is the owner (bare dominium holder) and at the end of the duration of a *usufruct* the usufructuary property has to be restored (*salva rei substatia*) to its owner. For the duration of the *usufruct* the right of ownership of the bare dominium holder is limited to the *bare dominium* and he acquires full ownership only when the *usufruct* ends.[98]

II.2.3.2.b. The testamentary trusts

Apart from the creation of limited interests, the creation of trusts under a will (testamentary trusts, which themselves can give rise to a `limited interest´) is an often encountered legal institution under South-African Law and today`s estate planning and administration of deceased estates is in fact characterized and dominated by the creation of a whole variety of trusts.[99]

The South-African Law of Trusts supports this trend by providing the possibility to create a number of different types of trusts, and the different characteristics of trusts and their flexibility are often utilized to make them a vehicle for several kinds of estate and estate duty planning purposes.[100]

In contrast to the formation of testamentary trusts (trusts *mortis causa*), trusts may also be created by an act *inter vivos*, and presently *inter vivos* trusts are used in estate planning as often, perhaps even more often, than trusts *mortis causa* because they incorporate a high degree of flexibility and give the founder a tool to influence and plan his estate during his lifetime.[101]

The Law of Trusts builds a complex area of the South-African law in general and of estate planning in particular, and it would be beyond the scope of this work to give a detailed

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95) *Cf.,* ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 378 *et seqq.* / ***H. J. Erasmus / M. J. de Waal,*** The South African Law of..., p. 113 *seq,* para. 174 *seq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 262 *seqq.* / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 111, 112.

96) For the rights and duties of the *usufructuary* see especially, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 386 *et seqq.*

97) ***W. A. Joubert,*** LAWSA (1991) Vol. 25, para. 67 / The quasi-usufruct is also described in the works of, ***C. G. van der Merwe,*** in: Lee and Honoré, Family, Things and Succession, p. 311 / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 379, 380 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 270 *seq.*

98) See, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession in South Africa, p. 378 *seq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, p. 264, 265 *seq.*

99) For a general introduction to trusts, the variety of different trusts and the classification of trusts under South-African Law see, ***P. A. Olivier,*** Trust Law and Practice, p. 16 *seqq.,* p. 107 *et seqq.* / ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 1 *seqq.,* especially, p. 10, 11 / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 426 *seqq.*

100) See, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6 para. 6139 to 6142, chap. 7 and chap. 13 para. 1321 to 1330 / ***W. Abrie,*** Estates - Planning and Administration, p. 108 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 17 to 20 / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning, Hoofstuk 20 / ***J. H. Jordaan,*** Estate & Financial Planning, p. 124 *seqq.*

101) *Cf.,* ***J. H. Jordaan,*** Estate & Financial Planning, p. 124 *seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6 para. 6139 to 6142, chap. 7 and chap. 13 para. 1321 to 1330 / ***W. Abrie,*** Estates - Planning and Administration, p. 108 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 17 to 20

summary of all the problems and questions concerning *inter vivos* trusts, testamentary trusts or other kinds of trusts.[102]
The following is therefore intended as a basic introduction to and a synopsis of the principles applicable to testamentary trusts[103] to point out the importance and the basic elements of trusts *mortis causa* for the administration of estates and estate planning.

Until today the South-African Law of Trusts has not stopped developing, yet it can be stated that the Republic has a unique trust law, based on Roman-Dutch principles, but also influenced by the English law and furthermore formed by the legislature, the courts and legal practitioners in order to satisfy the requirements of modern practice.[104]

A milestone in the development of the South-African trust law was laid in 1988, when the South-African trust law was codified in the Trust Property Control Act 57 of 1988.
Although today`s South African trust law is mainly based on this Act, it does not provide a full codification of the Law of Trusts and several aspects of the Law of Trusts are therefore governed by common law rules and the precedent of the courts.[105]

Since the first application and introduction of trusts and trust law on South-African territory, the South-African courts have played a major role in developing this branch of the law and the decisive and influential role of the courts in the `evolution´ of the South-African Law of Trusts becomes evident if one has a brief look at the development of the testamentary trust.
Based on the influential *dictum* of *Innes C.J.* in the *locus classicus* of this area, *Estate Kemp v. McDonald`s Trustee*[106] the South-African trust *mortis causa* was characterized and traditionally seen as a special version of the *fideicommissum*,[107] but the practice of

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102) For further information on trusts in general and a closer examination of *inter vivos* trusts in particular see the works of ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts / ***P. A. Olivier,*** Trust Law and Practice / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, Wills and Succession, Administration of Deceased Estates and Trusts, which deal with all the different aspects of trust law. Confer also to the older works of, ***L. I. Coertze,*** Die Trust in die Romeins-Hollandse Reg / ***P. Frere-Smith,*** Manual of South African trust law / ***D. Shrand,*** Trusts in South-Africa.

103) The testamentary trusts are dealt with *in extenso,* in the works of ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts / ***P. A. Olivier,*** Trust Law and Practice / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, Wills and Succession, Administration of Deceased Estates and Trusts / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 402 *seqq.* / Estates and Trusts / ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 114 *et seqq.* / ***H. J. Erasmus,*** in: Lee and Honoré, Family, Things and Succession, p. 454 *et seqq.* / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IV, p. 343 *seqq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 23 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 6 para. 6139 to 6142, chap. 7 and chap. 13 para. 1321 to 1330 / ***W. Abrie,*** Estates - Planning and Administration, p. 108 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 17 to 20 / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning, Hoofstuk 20 / ***J. H. Jordaan,*** Estate & Financial Planning, p. 124 *seqq.*

104) See, ***M. J. de Waal / M. C. Schoeman / N. J. Wiechers,*** Law of Succession..., p. 114 *et seq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 110 / ***P. A. Olivier,*** Trust Law and Practice, p. 1 to 22.

105) *Cf.,* ***W. Abrie,*** Estates - Planning and Administration, p. 110 / ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 3 *seqq.*

106) ***Estate Kemp v. McDonald`s Trustee,*** 1915 AD p. 491 *seqq.*

107) *Cf.,* the *dictum* delivered *per* ***Innes C.J.*** in ***Estate Kemp v. McDonald`s Trustee,*** 1915 AD p. 491 *seqq.* (at p. 499) and the work of ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 402 *seqq.* is still following this decision.

comparing *fideicommissa* and trusts *mortis causa* was never beyond doubt;[108] and in 1984 a unanimuos decision of the Appellate Division in the case of *Braun v. Blann*[109] finally rejected this long held view and today the testamentary trust is acknowledged as a separate and unique figure of law.[110]

aa. The creation of testamentary trusts

The foundation of a testamentary trust is embodied in the will of the founder (testator) and is therefore the result of a unilateral legal act.[111]

In order to form a valid trust the testator has to abide by the *essentialia* for the creation of a trust, *viz.* (a) the testator must intend to create a trust, (b) he must express his intention in a mode apt to create an obligation, (c) the property subject to the trust must be defined with reasonable certainty, (d) the trust object, which may either be personal or impersonal must be defined with reasonable certainty and (e) the trust object must be lawful.[112]

A testamentary trust is constituted when a testator bequeathes property to a person (the trustee, administrator) upon terms which require the trustee to assume control of the property and to administer it for the benefit of another person or other persons appointed by the will or for an impersonal object or purpose (the beneficiaries).[113]

Consequently three parties, *viz.* the founder, the trustee and one or more beneficiaries to the trust, are involved in its creation.

bb. The trustee

In general terms the trustee[114] under a trust can be characterized as the person who is called upon to administer assets and property for the benefit of others (the beneficiaries) without enjoying any personal interest therein.[115]

He is `normally´ regarded as the owner (when the trustee is vested with the *dominium* in the trust property) of the trust assets and property, but all the benefits arising from the trust property and assets always accrue to the income and/or capital beneficiaries of the trust.[116] A trustee, in his capacity as such, is neither allowed to aquire personal

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108) See for example the concurring dictum of ***Solomon J.A.*** in ***Estate Kemp v. McDonald's Trustee,*** 1915 AD p. 491 *seqq.* (at p. 512, 513) / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IV., p. 344 to 348.

109) ***Braun v. Blann and Botha, N.N.O. and Another*** 1984 (2) SA p. 850 *seqq.*

110) See the *dictum per* ***Joubert J.A.*** in: ***Braun v. Blann and Botha, N.N.O. and Another*** 1984 (2) SA p. 850 *seqq.* (at p. 866B), where it was held that *'I am of the view that it is both historically and jurisprudentially wrong to identify the trust with the fideicommissum and to equate a trustee to a fiduciary.'*

111) *Cf.,* ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 96 / ***P. A. Olivier,*** Trust Law and Practice, p. 23 *seq.* / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 430 *seqq.*

112) See, ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 96 and *seqq.* / *Cf.,* ***W. Abrie,*** Estates - Planning and Administration, p. 119, 120 / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 430 *seqq.* / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 409 *seqq.* / ***P. A. Olivier,*** Trust Law and Practice, p. 23, 25, 32 *seqq.*

113) *Cf.,* ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 403 / ***J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IV, p. 343 *seqq.*

114) For a detailed description of the trustee see, definition of trustee and trust in sec. 1 of the Trust Property Control Act 57 of 1988, and ***P. A. Olivier,*** Trust Law and Practice, p. 52 *seqq.* / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 145 to 193 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IV, p. 348 *seqq.* / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 414 *seqq.*

115) *Cf.,* ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 403 to 405 and 414.

116) See also, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 403

benefits[117] from the administration of a trust, nor is he allowed to aquire benefits from the termination of a trust; and on the death of a trustee his heirs or legatees do not succeed to the trust property.[118]

cc. The beneficiary

During the process of administering a testamentary trust the trustee is typically obliged to distribute the benefits of a trust to the beneficiaries. For this reason the founder of a trust has to identify a specific trust beneficiary or a trust beneficiary who can be determined when his trust *mortis causa* comes into force.[119] The only exception to this rule is the creation of a trust with an impersonal object (e.g. when a testamentary trust is constituted as a charitable trust).[120]

The beneficiaries[121] under a trust can be several juristic *personae, i.e.* either natural persons or corporate bodies.[122]

The origin, nature and extent of a beneficiaries rights are determined by the relationship between the trustee, the trust property and the beneficiary.[123]

The ownership of the trust property and assets can be vested either in the trustee (so-called *'fiducia'* or ownership trust[124]) or in the beneficiaries of a trust (so-called `bewind' trust[125]). Depending on the status of ownership vis-à-vis the trustee the beneficiaries` rights vary and can be categorised mainly as personal rights of the beneficiary against the trustee for the trustee`s compliance with his duties under the trust deed[126], the beneficiaries rights to the trust property,[127] the beneficiaries rights in respect of the trust income,[128] or the beneficiaries rights in respect of the trust capital[129].

dd. The termination of testamentary trusts

A testamentary trust is `normally' terminated with the fulfillment or accomplishment of

117) His only possible beneficial interest as trustee is the renumeration which he may receive for the duties performed by him, see, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 403.

118) See, ***P. A. Olivier,*** Trust Law and Practice, p. 20.

119) *Cf.,* ***P. A. Olivier,*** Trust Law and Practice, p. 84 / ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IV, p. 351 *seqq.* / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 441.

120) ***W. Abrie,*** Estates - Planning and Administration, p. 132.

121) The position of the beneficiary is described `in depth' in the works of, ***N. J. van der Merwe / C. J. Rowland,*** Die Suid-Afrikaanse Erfreg, Hoofstuk IV, p. 351 *seqq.* / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 424 *seqq.* / ***P. A. Olivier,*** Trust Law and Practice, p. 84 *seqq.* / ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 469 to 528.

122) See, ***P. A. Olivier,*** Trust Law and Practice, p. 84 *seqq.* / ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 441.

123) *Cf.,* ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 442 / ***P. A. Olivier,*** Trust Law and Practice, p. 87 / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 424 *seqq.* / ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 471 to 528.

124) For the definition of the ownership trust see, sec. 1 `trust' (a) of the Trust Property Control Act 57 of 1988. The term `ownership trust' is used in accordance with the use in ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 4 *et seqq.*

125) For the `bewind trust' see, sec. 1 `trust' (b) of the Trust Property Control Act 57 of 1988, and ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 4 *et seqq.*

126) *Cf.,* ***W. A. Joubert,*** LAWSA (1988) Vol. 31, para. 442 / ***P. A. Olivier,*** Trust Law and Practice, p. 87, 88 / ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 426 *seqq.* / ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 473 to 480.

127) See, ***P. A. Olivier,*** Trust Law and Practice, p. 88 *seqq.*

128) In detail, ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 518 to 528 / ***P. A. Olivier,*** Trust Law and Practice, p. 89, 90.

129) For details see, ***T. Honoré and E. Cameron,*** Honoré`s South African Law of Trusts, p. 494 to 518 / ***P. A. Olivier,*** Trust Law and Practice, p. 90, 91.

the object or purpose of the trust,[130] or if the trust has run its course and the scheme of devolution for the residue of the trust assets and property has been carried out and completed in accordance with the will of the founder (testator).[131]
In addition to these reasons for the termination of a testmentary trust, a trust may be terminated by operation of law, for instance by statute (the termination of trusts under South-African Law is partly embodied in the codification of the Trust Property Control Act 57 of 1988 [in sec. 13] and the Immovable Property Act 94 of 1965 [in sec. 8]), failure of the beneficiary, renunciation or repudiation by a beneficiary, destruction of the trust property, or the operation of a resolutive condition.[132]

II.2.3.3. Summary

The South-African Law of Succession regulates the final step to conclude the transfer of property and assets from a deceased to an heir after the administration of the deceased's estate has been completed.
In order to reach this goal the South-African Law of Succession incorporates two main features: (a) it provides for the distribution of the residue of a deceased estate to the heirs and legatees of a deceased person and (b) it provides tools for wider ranging estate planning and succession decisions of a testator.
Under a will a testator can use the tools given to him by the Law of Succession to create a *fideicommissum,* a *usufruct* or another like interest to provide and plan for his heirs.
But the testamentary tools that are provided for a testator under South-African Law are not restricted to the use of such limited interests.
A testator is furthermore able either to create a trust *mortis causa* under a will or to influence the administration and distribution of his estate during his lifetime by creating an *inter vivos* trust in accordance with the South-African Law of Trusts [and the South-African Law of Succession].
Consequently the South-African Law of Succession and the South-African Law of Trusts play a major part in the process of planning and later on administering a deceased estate.

II.2.4. Brief introduction to the international dimension of the South-African Law of Succesession, Conflict of Laws and Private International Law

A brief introduction to the basic principles of and interaction between the Administration of Estates Act 66 of 1965, the South African Law of Succession, their international aspects and the Estate Duty Act 45 of 1955 would not be complete without short introduction to the problems that arise from the international conflict of [succession] laws.
The solution of a conflict of succession laws according to the rules of private international law can also influence the distribution of property and assets from a deceased to his heirs and the following is therefore intended as a short introduction to this topic.[133]

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130) See, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 439, 440 / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 465, 466.
131) Compare, ***Corbett,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 439, 440
132) ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 465, 466.
133) This introduction cannot deal with all the aspects of private international law, for additional information see, ***C. F. Forsyth,*** Private International Law / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 605 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, Building Contracts to Conflict of Laws, para. 516 *seqq.* / ***E. Spiro,*** The Conflict of Laws / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 19, 20 / See also, ***J. H. C. Morris,*** Dicey and Morris on the Conflict of Laws / ***Cheshire, G. H. / P. M. North / J. J.***

Naturally a short introduction cannot provide the details for a discussion of all the problems associated with a conflict of succession laws and its relation to the administration of international deceased estates, or a possible estate duty liability levied thereon. Further aspects are alluded to in the footnotes.

II.2.4.1. General

The conflict of (succession) laws, or private international law, is that branch of law which comes into operation when a legal relationship of a private law matter (e.g. the Law of Succession) has some connection with a foreign (e.g. the German) legal system, and this branch then determines the appropriate law to govern that relationship.[134]
Private international law is therefore especially concerned with the problems of the choice of law or the appropriate legal system where there is a connection between one or more juridicial elements, facts, acts, events or interests involved in the issue and another country or countries.[135]

II.2.4.2. The choice of law and the problem of characterization

Before private international law can distinguish the appropriate choice-of-law rule, the juridicial nature of the claim or question emerging from the complex of facts introduced by a case has to be defined.
In the process of administering and distributing an international deceased estate, questions like `does the proprietary claim of a surviving spouse arise out of a matrimonial property right or a right of succession ?´ or `is a *donatio mortis causa* connected with the law of contract or the law of succession?´[136] may arise and these questions have to be answered if an estate which is rooted in two different legal systems has to be distributed according the succession rules of either one or both of the systems.
In the conflict of laws questions like these are termed `the question of characterization´[137], sometimes also styled as `classification´.[138] On the European Continent and in Germany the term used is `qualification´[139]. It is essentially a problem of subsumption and the further questions on how `characterization´ takes place and whether it has to be made in accordance with the national law (*lex fori*)[140] or the foreign law (*lex*

Fawcett, Cheshire`s Private International Law / ***M. Wolff,*** Private International Law / For the aspects of German private international law see, ***von Bar,*** Internationales Privatrecht / ***Kegel,*** Internationales Privatrecht / ***Raape / Sturm,*** Internationales Privatrecht / ***Wengler,*** Internationales Privatrecht.

134) See, ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 516.

135) *Cf.,* ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 605.

136) These are the examplary questions put by, ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 616 and p. 616 *et seqq.*

137) See, ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 616 /***C. F. Forsyth,*** Private International Law, p. 59 *seqq.* / ***J. H. C. Morris,*** Dicey and Morris on the Conflict of Laws, p. 31 *seqq.*

138) ***Cheshire, G. H. / P. M. North / J. J. Fawcett,*** Cheshire`s Private International Law, p. 42 *seqq.*, but the term classification has also got other connotations and should perhaps not be employed, ***J. H. C. Morris,*** Dicey and Morris on the Conflict of Laws, Vol. 1, p. 31, footnote 2 *a.h.l.*

139) See, ***von Bar,*** Internationales Privatrecht, Vol. I, p. 499 *seqq.* /***Kegel,*** Internationales Privatrecht, p. 196 *et seqq.* / ***Raape / Sturm,*** Internationales Privatrecht, Vol. I, p. 275 *et seqq* / But this term has also got other meanings and should therefore not be transliterated into English, see, ***J. D. Falconbridge,*** Essays on the Conflict of laws, p. 55.

140) For the characterization according to the *lex fori* see, ***F. Kahn,*** (1891) Ihering`s Jahrbücher, Vol. 30, p. 1 *seqq.* / ***Bartin,*** (1897) Clunet, Vol. 24, p. 255 *seqq.*, p. 466 *seqq.*, p. 720 *seqq.* / ***J.***

causae)[141] or in another way[142] are significant and difficult questions in private international law.[143]

An elaboration of and a distinction between these problems would be beyond the scope of this work and the topic is explored in detail elsewhere.[144]

II.2.4.3. The choice of law in international succession

As soon as the problem of characterizing the judicial nature of a case is solved and the judicial nature of a claim is recognized as being a claim which has to be subsumed under the Law of Succession, the appropriate choice-of-law rules can be selected.

Under South-African private international law the choice of law rules in succession on death follow in general the unitary (in the form of the *lex ultimi domicilii*) and the *scission* (in the form of the *lex situs*) principle.[145]

The unitary principle is based on the idea that a single law should govern the distribution of a deceased estate. South-African private international law applies the unitary principle for the order of succession to a deceased`s movables which are determined by his *lex ultimi domicilii*, irrespective of where those movables are situated.[146]

With immovables however, the *scission* principle applies and the distribution of immovables is determined by the *lex situs* of each immovable. This means that the succession in the immovable estate of a deceased person is divided up according to where the immovables are situated and distributed according to the various *leges situum*[147] (in this case according to the rules of different Laws of Succession).

Consequently the parallel application of the unitary and the *scission* principle on a succession to a deceased estate with an international element can lead to the application and governing of two different Laws of Succession over one and the same [international] deceased estate, if a deceased for example leaves movable property and assets in South-Africa, while he also owns immovable property in a foreign country (e.g. the Federal Republic of Germany).[148]

H. C. Morris, Dicey and Morris on the Conflict of Laws, Vol. 1, p. 34 / ***C. F. Forsyth,*** Private International Law, p. 62 *seq.* / ***von Bar,*** Internationales Privatrecht, Vol. I, p. 513 *seqq.*

141) For the idea to characterize according to the lex causae see, ***M. Wolff,*** Private International Law, p. 146 to 157 (especially p. 154 *seq.*) / ***J. H. C. Morris,*** *op. cit.*, p. 36 / ***C. F. Forsyth,*** Private International Law, p. 63 *seq.* / ***von Bar,*** Internationales Privatrecht, Vol. I, p. 501 *seqq.*

142) ***E. Rabel,*** The Conflict of Laws, Vol. 1, p. 54 *et seqq.* / See especially, ***J. H. C. Morris,*** *op. cit.*, p. 37 *et seqq.* / ***von Bar,*** Internationales Privatrecht, Vol. I, p. 507 *seqq.*

143) *Cf.*, ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 616 *et seq.*

144) See, ***C. F. Forsyth,*** Private International Law, p. 59 *et seqq.* / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 616 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 519 / ***J. H. C. Morris,*** Dicey and Morris on the Conflict of Laws, p. 31 *seqq.* / ***Cheshire, G. H. / P. M. North / J. J. Fawcett,*** Cheshire`s Private International Law, p. 42 *seqq.*

145) *Cf.*, ***C. F. Forsyth,*** Private International Law, p. 314 *et seqq.* / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 634 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 547.

146) ***C. F. Forsyth,*** Private International Law, p. 314, 315 / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 634 *seqq.*

147) See also, ***C. F. Forsyth,*** Private International Law, p. 314, 315 *seq.* / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 634 *seqq.*

148) As soon as the South-African private international law refers an issue to a foreign law (e.g. the German law), further problems can occur. Under German private international law the applicable Law of Succession on international deceased estates is determined by Art. 25 (1) EGBGB (Einführungsgesetz zum Bürgerlichen Gesetzbuch - Introductory Law to the German Civil Law Codification) which states *`The succession on death is governed by the lex patria (national law), of the country whose citizenship the deceased held at the time of his death.´* Consequently German private international law applies the *lex patriae* (national law, Heimatrecht) of the deceased to establish the governing choice-of-law rules in succession on death

For this reason the parallel application of the *lex ultimi domicilii* on movables and the application of the *lex situs* for immovables is controversial and has been the subject of criticism by two of the most authoritative authors dealing with South-African international private law.[149]

But although the attitude evinced by South-African private international law towards [international] deceased estates has been critizised, the above division shown prevails and the distribution of the movable estate of a deceased is dominated by his domicile, whereas the distribution of his immovables is dominated by the *lex situs* thereof.[150]

II.2.4.3.a. Intestate succession

As a result of the aforementioned facts, today's South-African private international law on intestate succession follows the general rule that the *lex ultimi domicilii* governs the distribution on intestacy of a deceased's movables, while his immovables are distributed in accordance with their respective *lex siti.*[151]

II.2.4.3.b. Testate succession

Compared to the problems that can be connected to intestate succession under South-African private international law, the problems introduced to the area of South-African private international law are even more complex when a foreign succession law is involved in the testate distribution of property and assets from a deceased estate to an heir.[152]

One prerequisite for the distribution of an international deceased estate is the existence of a valid will. The [statutory] rules dealing with the determination of whether a valid will exists or not constitute a major part of South-African private international law on testate succession.[153]

(Art. 25 [1] EGBGB). For details see, ***Kegel,*** Internationales Privatrecht, p. 645 *et seqq.*
This could lead to problems if for example a South-African citizen (C) were to leave South-Africa permanently to settle down and aquire a domicile in Germany. If C dies leaving movables and immovables in South-Africa and immovables in Germany, applying the rules of South-African private international law would lead to the conclusion that for the movables (according to the unitary principle and the *lex ultimi domicilii*) and for the German immovables (following the *scission* principle and the *lex situs*) German Law would apply, while for the South-African immovables (*lex situs*) South-African law would apply. On turning to the German private international law it would be discovered that the succession into movables and immovables is governed by the *lex patriae*, which would lead this case back to the South-African Law, because C held the South-African citizenship at the time of his death. This is not the place to solve the new problems that arise from the circular reference of the South-African Law to the German Law and from the German Law back to the South-African. However, it may be stated that this problem is known to the private international law as the problem of *renvoi* and other works deal with this problem *in extenso.* See, ***C. F. Forsyth,*** Private International Law, p. 69 *et seqq.* / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 624 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 520 / ***J. H. C. Morris,*** Dicey and Morris on the Conflict of Laws, p. 64 *seqq.* / For the German Law see, Art. 3, 4, 5 EGBGB and ***Kegel,*** Internationales Privatrecht, p. 645 *et seqq.*

149) See, ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 634 *seq.* / ***C. F. Forsyth,*** Private International Law, p. 314.

150) *Cf.,* ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 547 / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 634 *seq.* / ***C. F. Forsyth,*** Private International Law, p. 314, 315.

151) For detailed information on the intestate succession see, ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 548 / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 636 *et seq.* / ***C. F. Forsyth,*** Private International Law, p. 315, 316.

152) The problems of testate succession and its relation to private international are dealt with *in extenso* in the works of ***C. F. Forsyth,*** Private International Law, p. 316 *et seqq.* / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 637 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 549 / ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 19, 20 .

153) See, ***C. F. Forsyth,*** Private International Law, p. 316 *seqq.*

The legislator has provided sec. 3*bis* (1) to 3*bis* (5) of the Wills Act 7 of 1953 to create statutory regulations to test the formal validity of a will.[154] Parallel to the just mentioned statutory provisions, the validity of an international [foreign] will under South-African private international law can be distinguished furthermore by common law rules, established by the South-African courts to test the validity of an international [foreign] will.[155]
But the problems connected with the question whether and how a foreign will applies under the rules of South-African private international law on testate succession are not only limited to the test whether a [foreign] will is valid or not.
The South-African private international law on testate succession also deals with further questions and tests in order to establish the capacity of a [foreign] testator to make a [foreign] will[156], to interpret a [foreign] will[157], to revoke a [foreign] will[158] or to deal with other problems, that can be connected to the recognition of a [foreign] will under South-African private international law.[159]
A detailed summary of all the problems that can be connected with testate succession under South-African private international law would once more be beyond the scope of this work.
A detailed discussion of these problems can be found in the works mentioned in the footnotes.

II.2.4.4. Summary

On summing up the international dimension of the South-African Law of Succession (the private international law relation of the South-African succession law to foreign laws of succession) it can be stated that a conflict of [succession] laws cannot only influence the distribution of property and assets from a deceased to an heir, but is also capable of influencing the related legal matters of the administration of [international] deceased estates and the amount of estate duty levied thereon.
Because the above mentioned aspects provide only a rudimentary introduction to the complex problems of the South-African private international law on succession, it has to be emphasized once more that it is necessary to take the difficulties of a conflict of succession laws into account when an estate is planned or if a deceased estate reveals a relation to more than one system of law.
As in the process of administering international deceased estates, the difficulties of a conflict of succession laws will differ from case to case and it is therefore once again advisable to monitor and approach the problems that may be introduced by the conflict between South-African and foreign succession laws at an early planning or administration stage.

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154) *Cf.,* ***I. Isaacs / M. Horwitz,*** The South African Law of Testate Succession, p. 19, 20 / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 641, 643 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 549 / ***C. F. Forsyth,*** Private International Law, p. 318 *et seqq.*

155) ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 641 *et seq.* / ***C. F. Forsyth,*** Private International Law, p. 317, 318.

156) For details see the works of, ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 637 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 549 / ***C. F. Forsyth,*** Private International Law, p. 321 *et seqq.*

157) In detail, ***C. F. Forsyth,*** Private International Law, p. 325 *et seq.* / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 648 *seqq.* / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 549.

158) ***C. F. Forsyth,*** Private International Law, p. 327 *et seq.* / ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 657 *seqq.*

159) ***C. F. Forsyth,*** Private International Law, p. 323, 324, 326 *et seq.*

II.3. Summary

Whereas the German Inheritance Tax Law (ErbStG) does not define the preconditions for, the elements of and the basis for the inheritance tax liability of the inheritance taxpayer separately, but is in fact governed and decisively influenced by the regulations of the German civil law,[160] the application of a comparable or similar principle to the relations and interactions between the regulations of the Estate Duty Act 45 of 1955 and the South-African law codifications dealing with the administration of estates, the South-African succession law and the Estate Duty Act 45 of 1955 is unknown.
Compared to the regulations embodied in the German ErbStG the EDA has an own terminology and defines the regulations and the basis for an estate duty liability, which is levied on a deceased estate, separately and autonomously from the regulations of the Administration of Estates Act 66 of 1965, the Law of Succession and other laws or acts.

But nevertheless it has to be acknowledged that the levying of an estate duty under the EDA is not an isolated process. Estate duty is always levied where a deceased estate is administered and distributed according to the rules of the Administration of Estates Act 66 of 1965 and the South-African Law of Succession.

The levying of estate duty builds a part of the administration process of a deceased estate and this process can be influenced by the Law of Succession; and it is important to mention in this context that the South-African Law of Succession not only provides for the distribution of the residue of a deceased estate, but can also influence the administration process and the estate duty liability via the creation of limited interests or trusts *mortis causa* and other trusts (created according to the rules of the Law of Trusts).

Consequently it can be stated that although the EDA has a separate terminology and defines the regulations and the basis for an estate duty liability separately and autonomously from other acts, the regulations and limits of the Law of Succession, the Administration of Estates Act and other laws (e.g. the Law of Trusts) relate to and interact with the EDA and have to be monitored and consulted if an estate plan is drawn up or if a deceased estate is administered, or an estate duty liability has to be assessed.

The interaction of the EDA and the Law of Succession, the Administration of Estates Act and other laws (e.g. the Law of Trusts) can be additionally influenced by the problems of the administration of international estates and and their final distribution according to the private international law rules of succession described briefly above.

Although the above-mentioned international aspects were not described and examined in detail, the brief intoduction given to the problems connected with international deceased estates may suffice as a warning that the difficulties of these international aspects have to be monitored before an international deceased estate can be administered, estate duties paid and the residue distributed; for some aspects of estate duty on deceased estates in the Republic of South-Africa - with special reference to the problems and effects of double taxation occcurring in relation to foreign death taxes (here the German ErbStG) - are also

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160) Principle of the governing authority [or the dominantion of] of the German civil law [especially the Law of Succession and the Law of Donations] over the German Inheritance Tax Law. *Vide supra*, part B. II.1. p. 44 of this work.

partly related to and interact with the international aspects of South-African administration of international deceased estates, South-African private international (succession) law and the international aspects of other branches of the South-African Law.

III. The Estate Duty Act 45 of 1955 and aspects of estate duty in relation to international deceased estates in the Republic of South-Africa

Having touched upon the relation and interaction between the administration of deceased estates, the South-African Law of Succession, their international aspects and the Estate Duty Act 45 of 1955, it is necessary to examine certain aspects of South-African estate duty which is imposed and levied on international deceased estates.

Most of the questions and problems that arise from the levying of estate duty on international deceased estates by the Republic occur as soon as a foreign element is introduced to the process of estate duty taxation.
The introduction of a foreign element to the imposition of South-African estate duty taxation is rooted chiefly in and can be traced back to two main `initiating situations´.
The first `situation´ which introduces a `foreign element´ to the South-African estate duty assessment is the possibility that a South-African or a foreign (e.g. German) citizen dies as an `ordinarily resident´ of the Republic either in South-Africa or abroad (e.g. Germany), and leaves an estate consisting of property and assets situated not only in the Republic but also in a foreign country (here the Federal Republic of Germany).
The second `scenario´ can be described as a situation where a foreign (e.g. a German) or a South-African citizen dies either in South-Africa or abroad (in Germany), not being an `ordinarily resident´ of the Republic and leaves a deceased estate consisting of property and assets which are not only situated abroad (in Germany) but also within the Republic.

It would be beyond the scope of this work to expound the whole subject of estate duty in terms of the Estate Duty Act 45 of 1955. There are other expert works dealing fully with this matter.[161]
The aim of the following is therefore limited to a general discussion of certain aspects applicable to the levying of estate duty on international deceased estates in particular those arising out of the two `initiating factors´ described above. In addition South-African International [Death] Tax Law, especially the unilateral relief regulations provided by the EDA under sec. 3 (2) (c)-(h) and sec. 16 (c) of the Act, will be examined.[162]

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161) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, 28, 29, 30, 31 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, especially chap. 3 / ***W. Abrie,*** Estates - Planning and Administration, p. 289 / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning, Hoofstuk 3 / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 390 to 408 / ***P. A. Olivier,*** Trust Law and Practice, p. 210 *seqq.* / ***J. H. Jordaan,*** Estate & Financial Planning / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, 28, 29 / And the, on some aspects outdated, works of, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 10 to 16 / ***L. A. Kernick,*** Administration of Deceased Estates, chap. 10 / ***P. A. Olivier,*** Boedelbeplanning / ***A. P. J. Bouwer,*** Die Beredderingsproses van..., Hoofstuk 16 / ***D. Shrand,*** The Administration of Deceased Estates..., chap. XIII and XIV / ***do.,*** The Making of a Will, Including Tax Planning / ***H. B. Joffe,*** Administration of Estates.

162) But see also sec. 4 (e) and (f) of the EDA.

III.1. General

In South-Africa estate duty is levied by the Commissioner of Inland Revenue in terms of the Estate Duty Act 45 of 1955, as amended. The Estate Duty Act 45 of 1955 came into operation on April 1st 1955 and during the time of its existence it underwent a number of changes, the most important during 1988, as a direct result of the 1987 Margo Commissions report on the tax structure of the Republic.[163]

III.1.1. The scope of the Estate Duty Act

III.1.1.1. The wide scope of the Estate Duty Act and international deceased estates

According to sec. 3 (1) of the EDA[164] estate duty is presently levied on `all property´ and on `all property deemed to be property´ of the `estate´ of `any person´ at the time of his death, the essential concept (or basis) for the assessment of estate duty liability under the EDA being the term `property´ as envisaged in sec. 3 of the Act.
For purposes of the levy of estate duty on international deceased estates, it is important to notice that the wording of this provision indicates no domiciliary, residential or geographical limitation in respect of the property and persons falling within the net of the Act.[165]

III.1.1.2. Limitation of the wide scope of the Estate Duty Act by the definition of `property´

The wide and seemingly unlimited scope introduced by the all-embracing provision of sec. 3 (1) is curtailed by the requirement that a[n] [deceased] estate, in order to be taxable, must consist of `property´ as defined in sec. 3 (2) of the Act.[166]
Sec. 3 (2) of the Act narrows the scope of the EDA by defining and limiting the term `property´ to certain items of property and assets of a deceased estate.
By this means the Act excludes certain categories of property and assets of a deceased estate from `property´ and it is significant, that the possible exclusion of certain categories of property and assets is chiefly[167] related to the question whether a deceased person was `ordinarily resident´ or `not ordinarily resident´ in the Republic of South-Africa at the time of his death (sec. 3 [2] [c]-[h]).[168]
The wide scope of sec. 3 (1) of the Act is further mitigated by provisions which allow the deduction in determining the dutiable amount of a[n] [deceased] estate, of the value of

163) For a basic characterization of the South-African estate duty system and an introduction to its the historic background see, part A III.1., p. 12 and part A. IV.3. p. 16 *seqq.* of this work.
164) References to certain sections of an Act without further specification of the Act are references to the Estate Duty Act 45 of 1955.
165) *Cf.*, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.2 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 306 / ***W. Abrie,*** Estates - Planning and Administration, p. 292.
166) See also, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.2, 27.4, 27.5.
167) There are also other statutory provisions excluding certain categories from being `property´ under the regulations of the EDA, see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.20.
168) See, ***W. Abrie,*** Estates - Planning and Administration, p. 294 *seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 325 to 328 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.3.4. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.10 *seqq.* / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 24 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 110 *et seq.*

'property' situate outside the Republic which was aquired by the deceased before he first became ordinarily resident in the Republic or aquired 'property' in certain other circumstances (sec. 4 [e] and [f]).[169]
Finally the scope of South-African estate duty may also be influenced by the ability to deduct any foreign death duty payable on property situate outside the Republic (e.g. German Inheritance Taxes payable on property situate outside the Republic)[170] and enter double [death] taxation agreements with other countries or states.[171]

III.1.2. The charge and the basic assessment rules under the Estate Duty Act[172]

Estate duty is levied on the dutiable amount of an estate and the dutiable amount is determined by a series of steps.

At first the total of the estate is determined by summing up the value of all the 'property' and all property which is 'deemed to be property' in terms of sec. 3 of the Act. This total amount of property is referred to as the gross value of the estate.
The gross value of the estate is reduced by all the deductions and exemptions allowed in sec. 4 of the EDA, and the remainder is termed the net value of the estate.
In the next step the net value is reduced by an abatement of currently R 1 million (sec. 4 A of the Act).
The balance left after this step is called the dutiable amount, and the estate duty liability of an estate is presently calculated by levying a flat rate of 15% on the dutiable amount to assess the amount of estate duty payable by the taxpayer.

From the calculated estate duty liability there may be further deductions if transfer duties or foreign duties were paid on property included in the estate, or if successive deaths happen within a period, or if the Republic entered a double [death] taxation agreement with another country.[173]

III.2. The elements constituting an international deceased estate

As mentioned above, estate duty is levied on all 'property' and 'property deemed to be property' of the estate of 'any person' at the time of his death.[174] Consequently the

169) *Cf.*, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 365 to 367 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.1 and 27.3 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 149 *seq.*

170) *Cf.*, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.1 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 162 *seq.*

171) For further information on double taxation agreements *vide supra,* part. A. V.3., p. 28 *seqq.* of this work. See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.1 and chap. 31 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 27 *seq.*

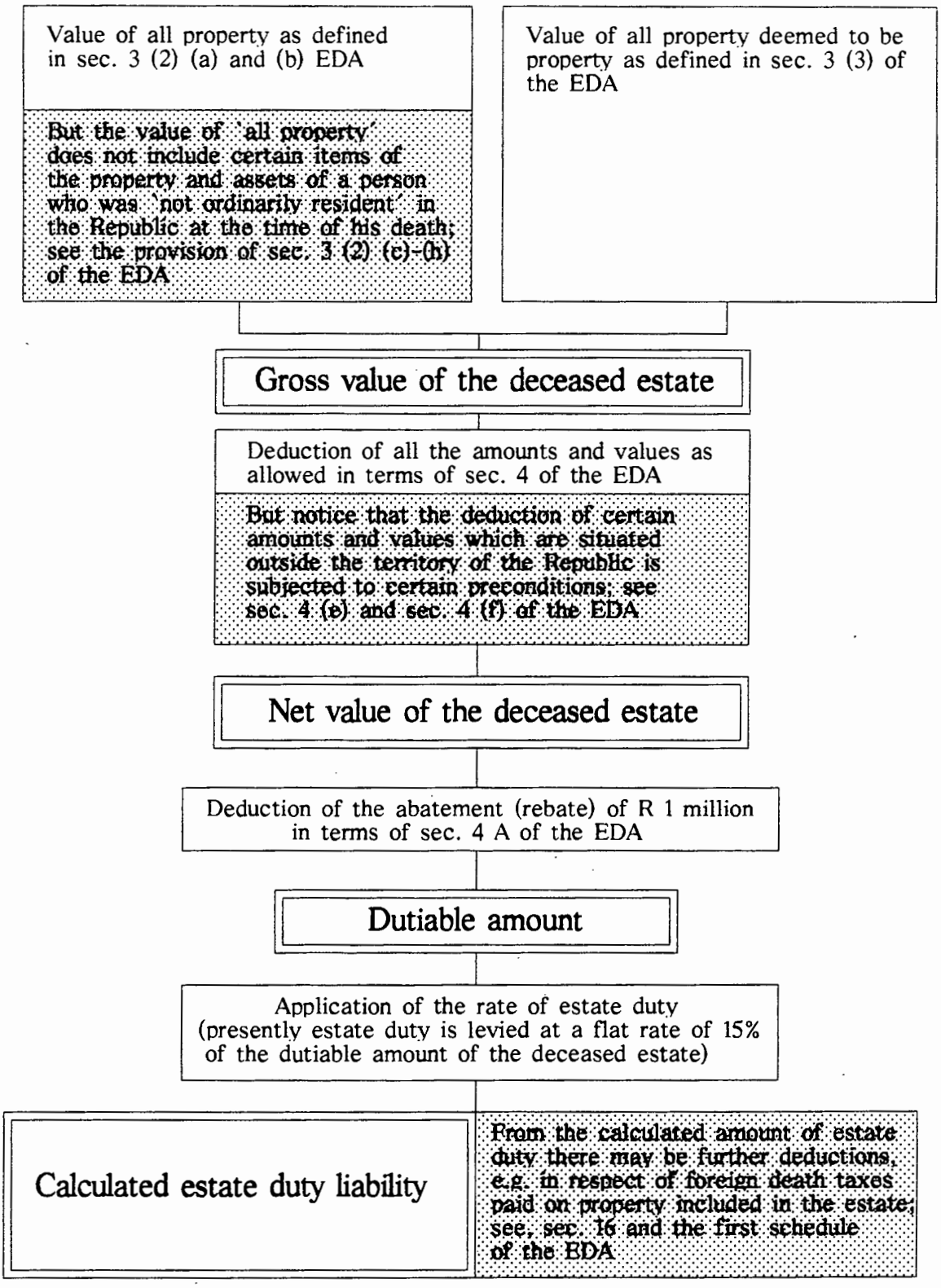
172) For the calculation and the basic assessment rules under the Estate Duty Act and the influence of sec. 3 (2) (c)-(h), sec. 4 (e) and (f) and sec. 16 of the EDA on this calculation see the graphic illustration on p. 67a.

173) For an introduction to the basics of estate duty calculation see also, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.2. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.1 and 27.3 / ***W. Abrie,*** Estates - Planning and Administration, p. 292 *seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 309.

174) See, sec. 3 (1) EDA and / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.3.1. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.4 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 312 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 21.

The calculation of the dutiable amount on which South-African estate duty is levied - with special reference to the regulations embodied in sec. 3 (2) (c)-(h), sec. 4 (e)-(f) and sec. 16 (c) of the Estate Duty Act 45 of 1955

Literary sources: ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates, chap. 27, para. 27.1 / ***W. Abrie,*** Estates - Planning and Administration, p. 292 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 103 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 309, fig. 3.1.



EDA distinguishes two components, namely `property' and `property which is deemed to be property'.

It is therefore important to consider what is meant by `property' of an [international] estate and what is meant by `property deemed to be property' in the context of an international deceased estate.

It has already been pointed out that an international element can be introduced to estate duty taxation in two ways, *viz.* where a South-African or a foreign (e.g. German) citizen dies as an `ordinarily resident' of the Republic and leaves an estate which consists of property and assets which are not only situated in South-Africa, but also in a foreign country (e.g. in the Federal Republic of Germany); or where a foreign (e.g. German) or a South-African citizen dies `not' being an `ordinarily resident' of the Republic and leaves a deceased estate consisting of property and assets which are not only situated abroad (*viz.*, in Germany), but also within the Republic.[175]
The following research into the meaning of `property' in the context of a[n] [international] deceased estate and of the meaning of `property deemed to be property' in relation to a[n] [international] deceased estate will therefore be twofold - in accordance with the aforementioned distinction between international deceased estates of `ordinarily resident' persons and `non-resident' persons in the Republic.

III.2.1. The `property' in an international deceased estate

III.2.1.1. The `property' in an international deceased estate where the deceased was `ordinarily resident' in South-Africa

The special exclusion of certain categories of foreign `property' from [international] estates, as laid down in sec. 3 (2) (c)-(h), is only applicable in the case of `non-residents' of the Republic of South-Africa, and if sec. 3 (2) (c)-(h) is read together with the comprehensive manner in which the term `property' is defined by sec. 3 (1) and sec. 3 (2) (a)-(b) of the Act, it can be concluded that the estate of an `ordinarily resident' of the Republic is generally liable to pay estate duty on the South-African, as well as on the world wide, property and assets included in his estate at the time of his death.[176]
Keeping this conclusion in mind the provisions of sec. 3 (1) and 3 (2) (a)-(b) of the EDA have to be read or interpreted in the way that the international estate of an `ordinarily resident' of the Republic is determined by summing up the value of all his South-African and world wide (foreign) rights in or to property, movable or immovable, corporeal or incorporeal, in order to embody them in the taxable international `property' of his estate.[177]

This way of interpreting the provisions of sec. 3 (1) and sec. 3 (2) (a)-(b) will be referred to as the `international interpretation' of these provisions; and the `international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b) provides furthermore that the international esta-

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175) Vide supra, part B. III., p. 65 of this work.
176) See, sec. 3 (1) and sec. 3 (29 (a)-(b) of the EDA and *cf.*, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 2 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.2 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 306.
177) *Cf.*, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 2 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.2 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 306.

te of a deceased person who is `ordinarily resident´ in South-Africa at the time of his death, specifically includes any fiduciary, usufructuary or other like interest in South-African and foreign property (including a right to an annuity charged upon South-African and foreign property) held by the deceased immediately prior to his death[178] and any right to a South-African or foreign annuity (other than a right to an annuity charged upon any South-African and foreign property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased.[179]

III.2.1.1.a. The South-African `property´ in an international deceased estate where the deceased was `ordinarily resident´ in South-Africa

On the one hand the international interpretation of sec. 3 (1) and 3 (2) (a)-(b) provides nothing new; and as far as South-African `property´ is included in the international estate of a deceased who was `ordinarily resident´ in the Republic at the time of his death, this `property´ and its aspects are governed by the rules dealing with the problems of [South-African] `property´.[180]

III.2.1.1.b. The foreign `property´ in an international deceased estate where the deceased was `ordinarily resident´ in South-Africa

On the other hand, it can be observed that the `international interpretation´ of sec. 3 (1) and sec. 3 (2) (a)-(b) introduces a new aspect to the interpretation of the term `property´ for it also includes any `foreign property´ in the international estate of a deceased if such `property´ was owned by a deceased who was `ordinarily resident´ in the Republic at the time of his death.

A detailed definition of the categories of `any foreign property´ falling within the limits of an international deceased estate of an `ordinarily resident´ of the Republic is to be found neither in the provisions of the EDA nor in the leading works dealing with the problems connected with the levying of estate duty on international deceased estates.

But although the items of `foreign property´ that fall within the scope of an international deceased estate are not defined *expressis verbis* by the Act or by South-African authors, it is often stated that `all foreign property is included in the property of an international deceased estate´[181] and that the `world wide property and assets´[182] constitute the `property´ of the international deceased estate of an `ordinary resident´ of the Republic at the time of his death.

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178) *Cf.*, sec. 3 (2) (a) of the EDA.

179) *Cf.*, sec. 3 (2) (b) of the EDA

180) For further questions concerning South-African `property´ see the expert works dealing *in extenso* with the problems connected to South-African movable or immovable, corporeal or incorporeal property, annuities, fiduciary interests, usufructuary interests, other like interests and further aspects.
Especially, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.5 *seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 312 to 324 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.3 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 21 *seqq* / ***W. Abrie,*** Estates - Planning and Administration, p. 293 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 11.

181) *Cf.*, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.2 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 306.

182) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 2

Consequently it can be concluded that the term 'foreign property', as it is used in South-African tax terminology for estate duty purposes, is the result of reading and understanding sec. 3 (1) and sec. 3 (2) (a)-(b) of the EDA in a 'wide' and 'comprehensive' sense and that the term 'foreign property' is deduced from sec. 3 (1) and sec. 3 (2) (a)-(b) by an international interpretation of these provisions.[183]

aa. The 'wide and comprehensive international interpretation' of the term 'foreign property' according to sec. 3 (1) and sec. 3 (2) (a)-(b) EDA

Due to the 'wide' and 'comprehensive' understanding and the international interpretation and deduction of the term 'any foreign property' from sec. 3 (1) and 3 (2) (a)-(b) of the EDA, the categories of 'foreign property' which are included in a South-African deceased estate with an international element can generally be characterized as the sum of the value of all the deceased's rights in or to foreign property, movable or immovable, corporeal or incorporeal (*cf.*, sec. 3 [1] and sec. 3 [2]).

In this context 'foreign property' also includes any foreign fiduciary, usufructuary or other like interest in foreign property (including a right to a foreign annuity charged upon foreign property) held by the deceased immediately prior to his death (*cf.*, sec. 3 [2] [a]);
and especially any right to a foreign annuity (other than a right to an annuity charged upon any foreign property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased (*cf.*, sec. 3 [2] [b]).

bb. An additional possibility of specifying the 'wide and comprehensive international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b) by reading sec. 3 (2) (c)-(h) of the EDA *a contrario, e contrario, ex contrariis*

The aforementioned comprehensive interpretation of sec. 3 (1) and sec. 3 (2) (a)-(b) shows the wide scope of 'foreign property' which can be included in the international deceased estate of an 'ordinary resident' of the Republic.

Because the 'international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b) defines the term 'any foreign property' very widely but not in detail, it may be necessary to find an additional possibility to define and specify some of the items that 'undoubtedly' fall within the wide scope of the term 'foreign property'.
In order to specify, to test or to give special examples and hints to some of the aspects that 'clearly' fall within the categories of the above mentioned 'international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b), it might be of use to read the provisions that were provided by the South-African tax legislator in sec. 3 (2) (c)-(h) of the EDA *a contrario.*[184]

In sec. 3 (2) (c)-(h) of the EDA certain categories of 'foreign property' are expressly excluded from being 'property' in the taxable 'international deceased estate' of a person who is 'not ordinarily resident' in South-Africa at the time of his death.
If the wording of this provision is read in its opposite sense (*argumentum a contrario, e contrario, ex contrariis*) and the words *'does not include'* and *'not ordinarily resident'* are

183) *Cf.*, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 2 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.2 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 306.

184) For the possibility to interpret a statute *a contrario* see, ***G. E. Devenish,*** Interpretation of Statutes, p. 129 and p. 265, 266 / ***L. C. Steyn,*** Die Uitleg van Wette, p. 49 *seqq.*

substituted by the words *'includes'* and *'ordinarily resident'*, sec. 3 (2) (c)-(h) of the EDA *argumentum a contrario* provides a clear 'hint' and specific examples of what is meant by the wide and comprehensive international interpretation of sec. 3 (1) and 3 (2) (a)-(b); and the categories of foreign property that have to be included in the 'international deceased estate' of an 'ordinarily resident' of the Republic can therefore be specified if sec. 3 (1) and sec. 3 (2) (a)-(b) is read together with sec. 3 (2) (c)-(h) *a contrario.*

Sec. 3 (2) (a)-(b) can be read together with 3 (2) (c)-(h) *a contrario* as follows:

3 (2) *"Property"* means any right in or to *foreign* property, movable or immovable, corporeal and incorporeal, and *includes* -

(a) any fiduciary, usufructuary or other like interest in *foreign* property (including a right to an annuity charged upon *foreign* property) held by the deceased immediately prior to his death

(b) any right to a *foreign* annuity (other than a right to an annuity charged upon any *foreign* property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the date of his death

but does include,

(c) in the case of a deceased who was *ordinarily resident* in the Republic at the time of his death, any right in immovable property situate outside the Republic;

(d) any right in movable property physically situate outside the Republic if the decesased was *ordinarily resident* in the Republic at the time of his death;

(e) any *[foreign]* debt not recoverable by or by right of action not enforceable in the Courts of the Republic[185] if the deceased was *ordinarily resident* in the Republic at the date of his death;

(f) any *[foreign]* goodwill, licence, patent, design, trade mark, copyright or other similar right not registered or enforceable in the Republic or

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185) If sec. 3 (2) (e) of the EDA is read *argumentum a contrario* the result of the *a contrario* interpretation might contradict with the decision held in ***CIR v. Isaacs*** 1960 (1) SA 126 (AD) and ***Estate Brownstein v. CIR*** 1957 (3) SA 512 (AD). However, the Court in these cases was dealing with provisions under the Death Duties Act 29 of 1922 and came to the conclusion that it is necessary that a debt must be recoverable or by right of action enforceable in the Courts of South-Africa (in terms of sec. 3 [2] [f] of the Death Duties Act 29 of 1922), to be included in the 'property' of a deceased estate see, ***Estate Brownstein v. CIR*** 1957 (3) SA 512 (AD), The Taxpayer 6 (1957), p. 175 *seqq.* / ***CIR v. Isaacs*** 1960 (1) SA 126 (AD), The Taxpayer 8 (1959), p. 238 *seqq.* The reasononing of the Courts in these decisions is still applicable for the property of a 'non-resident' of the Republic which is falling within the limits of sec. 3 (2) (e) of the EDA, see ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.13. It would be beyond the scope of this work to discuss the just mentioned aspects in detail and the 'writers' intention at this point is merely to draw the readers attention to what might be a new aspect or view regarding the interpretation of sec. 3 (2) (e).

not attaching to any trade, business or profession in the Republic if the deceased was *ordinarily resident* in the Republic at the time of his death;

(g) in the case of a deceased who was *ordinarily resident* in the Republic at the time of his death -
  (i) any stocks or shares held by him in a body corporate which is not a company; and
  (ii) any stocks or shares held by him in a company, provided any transfer whereby any change of ownership in such stocks or shares is recorded is not required to be registered in the Republic;

(h) any rights to any income produced by or proceeds derived from any *[foreign]* property referred to in paragraph (e), (f) or (g).

cc. Summary - the 'foreign property' that falls within the scope of an international deceased estate where the deceased was 'ordinarily resident' in South-Africa

On summing up the 'foreign property' which falls within the 'wide and comprehensive international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b) and its possible specification by reading sec. 3 (2) (c)-(h) *a contrario,* it can be stated that a South-African international deceased estate - apart from its South-African 'property' - also embodies a wide range of 'foreign property', either movable or immovable, corporeal or incorporeal in the 'property' of an international deceased estate, if such rights were owned by a deceased who was 'ordinarily resident' in the Republic at the time of his death.

This means, that the sum of the taxable 'international property' of a deceased who was 'ordinarily resident' in South-Africa at the time of his death and also owned 'property' in the Federal Republic of Germany, can comprise categories such as fixed property, motor vehicles, furniture and household effects, shares, fixed deposits and other cash investments, works of art, jewellery and other items that were owned by the deceased and are situated in Germany, as a part of his taxable 'international property'; and that there is probably no tangible German [foreign] asset which is excluded by the 'international definition' of 'property' as laid down in sec. 3 (1) and sec. 3 (2) (a)-(b) of the EDA [and sec. 3 (2) (c)-(h) *a contrario*].

In addition to that, the 'wide and comprehensive' understanding of the 'international interpretation' of sec. 3 (1) and 3 (2) (a)-(b) leads to the further conclusion that the Act's reference to any right also means that German [foreign] rights such as an option to aquire land or shares have to be included in the international definition of 'property', provided that such rights do not lapse at the date of death of the deceased.

The international interpretation of sec. 3 (1) and sec. 3 (2) (a)-(b) also includes German [foreign] incorporeal things such as goodwill, copyrights, patents, designs, trademarks, etc.

Finally, the 'wide' scope of the 'international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b) also comprises any German [foreign] fiduciary, usufructuary or other like interests in German [foreign] property (including a right to an annuity charged upon German [foreign] property) held by the deceased immediately prior to his death and any German [foreign] right to a German [foreign] annuity (other than a right to an annuity charged upon any German [foreign] property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased.

dd. Difficulties that can occur if 'foreign property' is included in the deceased estate of an 'ordinary resident'

Although the South-African EDA has a separate terminology and defines the preconditions of and basis for estate duty liability separately and autonomously from the regulations of the Administration of Estates Act 66 of 1965, the Law of Succession and other laws, the EDA also interacts with other laws and acts.[186]

The categories of 'property' which are embodied in sec. 3 (2) (a) of the EDA illustrate this statement, and it can be observed that sec. 3 (2) (a) of the Act interacts with the South-African private law (the Law of Succession or the Law of Property) and refers to any fiduciary, usufructuary or other like interest that was created according to the rules of the Law of Succession or the Law of Property and held by the deceased immediately prior to his death.[187]

As mentioned before, in the cases of 'international deceased estates' sec. 3 (2) (a) of the Act includes 'foreign property',[188] *viz.*, fiduciary, usufructuary and other like interest, in the 'property' held by the deceased immediately prior to his death.

α. The problem

When using the terms 'fiduciary, usufructuary and other like interests' [in sec. 3 (2) (a)] the South-African EDA generally refers to the use of these terms as they are introduced by the *South-African* Law of Property or the *South-African* Law of Succession.

But as soon as certain categories of 'foreign property' have to be included in the international deceased estate of an 'ordinary resident' of the Republic, it can be observed that this *'foreign property'* (e.g. foreign fiduciary, usufructuary or other like foreign interests) *follows neither the rules of the South-African legal system [e.g. the South-African Law of Property or the South-African Law of Succession] nor is it expressly covered by the terms of the EDA.*

'Foreign property' and 'foreign rights in or to foreign property' are rooted in foreign legal systems which often differ from the South-African legal system not only in their terminology but often also in their general systematic and dogmatic attitude.

For this reason problems may be encountered in applying the EDA as soon as categories of 'foreign property' in the international deceased estate of an 'ordinary resident' of the Republic (e.g. his 'foreign fiduciary interests', his 'foreign usufructuary interests' and his other 'like interests') have to be established for and subsumed under the terminology of the South-African Estate Duty Act.

It may therefore be questioned how the South-African estate duty system can establish whether 'foreign property' or 'a foreign right in or to foreign property' can be included in the property of an international deceased estate under the relevant provisions of sec. 3 (1) and sec. 3 (2) (a)-(b) of the EDA for estate duty purposes, if it does not expressly provide for such an inclusion.

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186) *Vide supra*, part B. II.2. p., 45 and B. II.3., p. 64 *seq.* of this work.

187) See, part. B. II.2.3.2., p. 51 *seqq.* of this work and sec. 3 (2) (a) of the EDA.

188) *Vide*, part B. III.2.1.1., p. 68, 69 and III.2.1.1.b., p. 69 *seqq.* of this work.

β. A possible solution to the problem

The solution of a problem like this is normally associated with the conflict of laws or private international law;[189] and at first it could be assumed that it might be possible to apply the rules of private international law *mutatis mutandis* in order to find a solution to the above mentioned problem.

But it has to be taken into account that the conflict of laws is a branch of national private law, and it is therefore doubtful whether the rules of international private law can be applied to questions concerned with the payment of estate duty on international deceased estates, *viz.* [international] tax law.[190]

Private international law is primarily concerned with the solution of problems connected to the characterization of certain international [private law] cases and the solution of problems that are connected to the establishment of the appropriate choice-of-law rules in these cases which deal with more than one legal [private law] system. One of the main aspects of private international law is the solution of the problem of characterization; and it can be observed that the conflict of laws characterizes in order to find the territorially most appropriate legal system to solve cases of an international conflict of law [private law] and to find the rules that have to be applied by the deciding court.[191]

However, the applicable legal system to levy South-African estate duty on 'foreign property' which is included in the international deceased estate of an 'ordinarily resident' of the Republic is already provided by the 'international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b) [and sec. 3 (2) (c)-(h) *a contrario*]; and all 'foreign property' or the 'world wide property and assets' of a deceased who died as an 'ordinarily resident' of the Republic is included in the 'property' (tax basis) for the estate duty liability which is levied on his estate according to the rules of the South-African EDA.

Consequently there can be no doubt about the scope of application of the EDA in relation to 'foreign property': the EDA is territorially applicable to all 'foreign property' as soon as a deceased was 'ordinary resident' in the Republic at the time of his death.

For this reason it can be stated that the question of how the 'foreign property' of a person is to be established for the South-African estate duty system is generally not dependant on or related to the rules of private international law, but has to be solved in another way.

As soon as a regulation of the EDA interacts with the terminology of another South-African law or act (e.g. private law, succession law or property law), the question whether this regulation of the EDA can also interact with the terminology of a foreign law or act has also to be put.

If this question can be answered in the affirmative, a further question - namely, whether the terminology of a foreign law dealing with 'foreign property' or 'foreign rights in or to foreign property' can be compared to the 'property' as defined in the terminology of the South-African estate duty system, has to be put.

It was mentioned above that the categories of 'property' which are embodied in sec. 3 (2)

189) For a brief introduction to the basic principles of private international law see, part B. II.2.4., p. 59 *seqq.*

190) For the conflict of Laws see also, part B. II.2.4., p. 59 *seqq.* and the literary sources mentioned in that part of the work.

191) *Vide,* part B. II.2.4.1., p. 60 of this work and ***Kahn,*** in: Corbett, Hahlo, Hofmeyr, Kahn, The Law of Succession..., p. 605 / ***W. A. Joubert,*** LAWSA (1977) Vol. 2, para. 516.

(a) of the EDA interact with the South-African Law of Succession [or the South-African Law of Property] because they refer to any fiduciary, usufructuary or other like interest that was created according to the rules of the Law of Succession [or the Law of Property] and held by the deceased immediately prior to his death. The provision of sec. 3 (2) (a) can also interact with a foreign law, because the 'international interpretation' of sec. 3 (2) (a) furthermore embodies 'foreign property' (*viz.*, 'foreign fiduciary interests', 'foreign usufructuary interests' or 'other like foreign interests') in the taxable 'property' of an international deceased estate.
Having confirmed that the EDA (e.g. sec. 3 [2] [a]) can also interact with the terminology of a foreign law or act, the further question, whether the terminology of a foreign law dealing with 'foreign property' or 'foreign rights in or to foreign property' can be compared to the 'property' as defined in the terminology of the South-African estate duty system, has to be put.

The answer to the question whether a 'foreign fiduciary interest' or a 'foreign usufructuary interest' builds a part of the taxable 'foreign property' of an international deceased estate cannot just depend on the question whether a foreign private law (e.g. a Law of Succession or a Law of Property) provides a terminological or systematic equivalent to the South-African fiduciary or usufructuary interest as it is laid down in sec. 3 (2) (a) of the EDA.
If this were the case, the inclusion of 'foreign property' into the categories of the taxable property of an international deceased estate under sec. 3 (2) (a) of the EDA would be degraded to a mere coincidental or arbitrary taxation of some international estates which show up a relation to foreign law systems that are comparable to the South-African system and embody the same definitions of fiduciary or usufructuary interests.

The question how the terminology of a foreign law or act can be applied and established under the South-African estate duty system, and what items of 'foreign property' fall within the categories of taxable international property (e.g. under sec. 3 [2] [a] of the EDA) can only be solved by analysing and characterizing[192] the items of 'foreign property' or 'foreign rights in or to foreign property' in relation to the South-African [the EDA's] items of property. As soon as 'foreign property' or 'foreign rights in or to foreign property' can be characterized as being comparable or congruent to the South-African [the EDA's] items of property it will be possible to apply the wording of the EDA (e.g. sec. 3 [2] [a]) analogously to the 'foreign property' which is included in an international deceased estate.

On using the just described interpretative means in the context of comparing the nature of 'foreign property' or 'foreign rights in or to foreign property' and on establishing whether this property can be characterized as being comparable to the term 'property' as it is used in the regulations of the EDA, the items of property that are expressly covered by the EDA and their congruity in relation to 'foreign property' or 'foreign rights in or to foreign property' have to be subsumed under a common factor - a *tertium comparationis*.
The scope and the significant elements of the *tertium comparationis* are of importance and can only be found by comparing the main aspects of the 'normally' applicable domestic law regulations with the foreign law rules that are involved in the process.

192) In this context the term 'characterizing' is meant untechnically and by no means in the sense this term has got in the terminology of private international law.

Important factors on assessing a *tertium comparationis* can be the wording of regulations, the systematic position of certain regulations in a law system, the history of certain regulations dealing with specific 'property', the *ratio* or *telos* of the foreign and the domestic law regulations or perhaps even a comparison between the economic consequences of the foreign and the domestic law provisions.

After the congruity of the categories of 'foreign property' or 'foreign rights in or to foreign property' and its South-African 'property counterpart' has been positively confirmed the property rules of the EDA can be applied to the property which is governed by foreign law.
The application of the property regulations of the EDA is then achieved by transposing the provisions of the EDA from one set of circumstances expressly covered by this statute (e.g. [South-African] fiduciary, usufructuary and other like interests are included in the deceased estate for estate duty purposes, as set out in sec. 3 [2] [a] of the EDA) to the cognate or congruous 'foreign' set of circumstances not expressly set out in the EDA, in order to include them in the scope of the statute[193] (e.g. [foreign] fiduciary, usufructuary and other like [foreign] interests, are also included in the deceased estate for estate duty purposes, as can be seen in the 'international interpretation' of sec. 3 [2] [a] of the EDA[194]).

γ. A short example

As mentioned above, if an 'ordinary resident' of the Republic dies, the determination of his world wide property forms part of the basis for the assessment of South-African estate duty liability thereon.[195]

On determinig the basis for South-African estate duty liability the question may arise what kind of 'foreign property', e.g. according to sec. 3 (2) (a) of the EDA, is included and whether foreign rights to foreign property, like a 'Nießbrauch' (sec. 1030 to 1089 BGB) which was owned by a deceased South-African resident in German real estate according to German law, falls within the scope of sec. 3 (2) (a) of the South-African EDA.
Sec. 3 (2) (a) includes any fiduciary, usufructuary and other like interests in South-African property in an international deceased estate and the 'international interpretation' of sec. 3 (2) (a) embodies any fiduciary, usufructuary and other like interests in foreign (here German) property in the international estate of a deceased.
In order to see whether a German 'Nießbrauch' which was owned by a South-African resident qualifies as 'foreign property' according to the 'international interpretation' of sec. 3 (1) and 3 (2) (a)-(b) and would therefore have to be included in his taxable international estate, it is necessary to examine what has to be understood by the term 'Nießbrauch'.

The regulations concerning the 'Nießbrauch' can be found in the third book (Drittes Buch) of the BGB, which includes the Law of Property (Sachenrecht). The fifth chapter (fünfter Abschnitt) of the third book has got the heading 'Dienstbarkeiteng (personal servitudes) and the second title (zweiter Titel) of the fifth chapter embodies the regulations about the 'Nießbrauch'.

193) For an introduction to the preconditions of an analogous interpretion of a statute see, ***L. C. Steyn,*** Die Uitleg van Wette, p. 41 *seqq.* / ***G. E. Devenish,*** Interpretation of Statutes, p. 76 *et seqq.* / ***Hahlo / Kahn,*** The South African Legal System, p. 308. *seqq.*
194) *Vide,* part B. III.2.1.1., p. 68, 69 and III.2.1.1.b., p. 69 *seqq.* of this work.
195) *Vide supra,* part B. III.2.1.1., p. 68, 69 and III.2.1.1.b., p. 69 *seqq.* of this work.

According to sec. 1030 and sec. 1059 of the BGB the German 'Nießbrauch'[196] is a personal servitude and can basically be defined as an inalienable (or untransferable) and non-inheritable right to reap the fruits of (or use) something (property or rights) belonging to another.
If this definition of 'Nießbrauch' is compared to the definition of the South-African usufruct, given *supra*, it can at once be seen, that although the German 'Nießbrauch' generally forms a part of the German Law of Property and the South-African usufruct [as a part of the South-African Law of Property] is more often utilized as a means of the South-African Law of Succession, the basic elements of both the 'Nießbrauch' and the usufruct are the same.
Consequently it can be concluded that a 'Nießbrauch' owned by a deceased South-African resident forms a part of the 'foreign property' of his taxable international deceased estate, because the 'Nießbrauch' can be treated as a usufruct in foreign property analogous to and in accordance with the 'international interpretation' of sec. 3 (2) (a) of the EDA.

The above example illustrates how sec. 3 (2) (a) of the EDA can be applied analogously to comparable 'foreign property', in order to include this property as the basis for an estate duty assessment.
On using the analogous application of sec. 3 (1) and 3 (2) (a)-(b) [and sec. 3 (2) (c)-(h)*a contrario*] of the EDA in all situations involving comparable 'foreign property' of a deceased South-African 'resident', most 'foreign property' which is comparable to the 'property' rules of the EDA can be included in the taxable property of an international deceased estate. Even if 'foreign property' is governed by foreign law rules it can be 'utilized' for estate duty purposes, as long as it is comparable to South-African 'property' as defined in sec. 3 (1) and 3 (2) (a)-(b) [and sec. 3 (2) (c)-(h) *a contrario*] of the EDA.

III.2.1.1.c. Summary

The property of an international deceased estate where the deceased was 'ordinarily resident' in the Republic at the time of his death embodies all his South-African property and assets as set out in sec. 3 (1) and 3 (2) (a)-(b) of the EDA. In addition to that the international estate of a deceased South-African resident is also liable to pay estate duty on his 'world wide' or 'foreign property'. To assess the 'foreign property' of an international deceased estate the provisions of sec. 3 (1) and 3 (2) (a)-(b) of the Act can be interpreted in an international way; and to specify certain items of the 'foreign property' of an international estate the provisions of sec. 3 (2) (c)-(h) may be read *a contrario*.
If 'foreign property' is governed by foreign regulations, the provisions of sec. 3 (1) and 3 (2) (a)-(b) [and sec. 3 (2) (c)-(h) *a contrario*] of the Act cannot always be applied directly. In these cases the foreign regulations have to be compared to the provisions that constitute the 'property' (tax basis) for South-African estate duty liability. If the regulations that govern certain categories of 'foreign property' under foreign law are comparable to the South-African provisions, the 'property' rules of sec. 3 (1) and 3 (2) (a)-(b) [and 3 (2) (c)-(h) *a contrario*] can be applied analogously to the foreign categories of property and it will be included in the South-African tax basis of an international deceased estate.

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196) For further information on the 'Nießbrauch', see ***Petzoldt,*** in: Münchener Kommentar, Band 4, §§ 1030 to 1089 (especially § 1030) / ***Ronke,*** in: Erman, BGB Handkommentar, 2. Band, §§ 1030 to 1089 (especially § 1030) / ***Bassenge,*** Palandt, Handkommentar zum BGB, §§ 1030 to 1089 (especially § 1030).

III.2.1.2. The 'property' in an international deceased estate where the deceased was 'not ordinarily resident' in South-Africa

In contrast to an 'ordinary resident' of the Republic whose international deceased estate is liable to pay estate duty on his world wide property as set out above, the international deceased estate of a person who is 'not ordinarily resident' in South-Africa at the time of his death is generally only liable to pay estate duty on the property and assets that are situated within the Republic (in accordance with the so-called *situs* principle).[197]
The distinction between a person who is recognized as an 'ordinary resident' and a person who is 'not ordinarily resident' in the Republic at the time of his death is therefore important for the assessment of an estate duty liability on an international deceased estate and the following is intended as a short excursus on the meaning of the term 'ordinarily resident' in South-African tax terminology.

III.2.1.2.a. Meaning of the terms 'ordinarily resident' and 'not ordinarily resident'

On the one hand the EDA of the Republic does not provide a legal fiction [or a fiction of law][198] indicating a certain period of time (e.g. six months) after which a person definitely can be regarded as an 'ordinarily resident' for tax purposes in the Republic,[199] but on the other hand it can be observed, that binding South-African judicial authority exists, in which the meaning of the term 'ordinarily resident' is circumscribed [and defined] for the EDA or any other South-African taxing statute.[200]
Nevertheless, the question whether a deceased was 'ordinarily resident' in the Republic at the time of his death has to be regarded as a question of fact which is decided by the courts from case to case.
The central and most prominent judgements dealing with the meaning of the term in the Income Tax Act are the cases of *Cohen v. CIR*[201] and *CIR v. Kuttel*[202].
Whereas the older judgement in *Cohen's* case by *Schreiner J.A.* laid down the principles of the South-African interpretation of the phrase 'ordinarily resident', the more recent decisi-

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197) Compare sec. 3 (1), sec. 3 (2) (a)-(b) and sec. 3 (2) (c)-(h) / See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.10 to 27.19 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 325 to 328 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.3.4. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 24 *seqq* / ***W. Abrie,*** Estates - Planning and Administration, p. 295 *seq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 11.

198) In contrast to the South-African EDA, sec. 2 (1) No. 1 lit. a of the German ErbStG (Inheritance Tax Act) and sec. 9 sentence No. 2 of the Abgabenordnung (AO - German Fiscal Code, see also part A. V.4., p. 33 especially footnotes 225, 226) provide a legal fiction for an inheritance tax liability of the heirs of a natural person (an individual) who had his domicile (residence) or his customary place of abode (ordinary residence) within the Federal Republic of Germany at the time of his death (sec. 2 (1) No. 1 lit. a ErbStG). Sec. 9 sentence No. 2 AO provides for the legal fiction that a person has his customary place of abode or is 'ordinarily resident' (for tax reasons) in Germany, as soon as the person stays in the Federal Republic for a coherent period of more than six months time counting from the first day of arrival in Germany (short interruptions or breaks to leave the country are not interfering with the coherence of this period). However, this fiction is not coming into force if a person enters the Federal Republic to visit the country, to recreate, to undergo medical treatment, for a course of baths or similar private purposes, as long as the person does not stay in Germany for more than a year (sec. 9 sentence No. 3 of the AO).

199) See the just explained provisions of sec. 2 (1) No. 1 lit. a of the ErbStG and sec. 9 sentence 2 and 3 of the AO.

200) *Cf.,* the recent decision in ***CIR v. Kuttel*** 1992 (3) SA 242.

201) ***Cohen v. CIR*** 1946 AD 174.

202) ***CIR v. Kuttel*** 1992 (3) SA 242.

on held in *CIR v. Kuttel* by *Goldstone J.A.* can be seen as an important confirmation of the older judgement for present purposes.[203]

After referring to different passages of earlier English decisions dealing with the `English interpretation´ of the term `ordinarily residence´[204] *Schreiner J.A.* in *Cohen v. CIR* in the course of an *obiter dictum* gave the following meaning to the term `ordinary residence´: *`[H] his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principle residence and it would be described more aptly than other countries as his real home. If this suggested meaning were given to "ordinarily" it would not, I think, be logical permissible to hold that a person could be "ordinarily resident" in more than one country at the same time.´*[205] This interpretation of the words `ordinarily residence´ is still valid and was recently confirmed by *Goldstone J.A.* in *CIR v. Kuttel*[206].

From the decision *Cohen v. CIR* and the more recent decision in *CIR v. Kuttel* it can be concluded, that the expression `ordinarily resident´ involves residence with some degree of continuity in a place, and excludes from estate duty those persons who are visiting South-Africa only accidentally or temporarily.

Consequently a deceased [`foreigner´] (e.g. a German) cannot be regarded as having been `ordinarily resident´ in the Republic if he maintained no place of abode in South-Africa at the time of his death, his visits to South-Africa were only occasional and his real permanent home was outside the Republic. But on the other hand a deceased [`foreigner´] (e.g. a German) may well be regarded as having been `ordinarily resident´ in South-Africa during his lifetime, if he maintained a home in South-Africa which he occupied regularly from time to time, even though he may also have maintained an abode in another country at the same time.[207]

From the above mentioned it cannot be concluded whether a person may be ordinarily resident in more than one country at the same time or must be regarded as being ordinarily resident only in the country of his most fixed or settled residence.[208]

Finally it has to be stated, that the domicile of a deceased person as his `normal´ permanent home is irrelevant to the question where he is ordinarily resident at the time of his death, because a person may be domiciled in a country without being ordinarily resident there, and, vice versa, may be ordinarily resident in a country without being domiciled there.[209]

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203) See, ***CIR v. Kuttel*** 1992 (3) SA 242 (at 248 *seq.*) where ***Goldstone J.A.*** respectfully adopts the formulation of `ordnarily resident´, held by ***Schreiner J.A.*** in the case of ***Cohen v. CIR*** 1946 AD 174 (at p. 185) / Taxgram July 1992, p. 8.

204) ***Schreiner J.A.*** referred especially to the decisions of the cases ***Levene v. IRC*** [1928] All ER 746, [1928] AC 217 / ***IRC v. Lysaght*** [1928] AC 234.

205) See the *dictum* of ***Schreiner J.A.*** in the case of ***Cohen v. CIR*** 1946 AD 174 (at p. 185).

206) *Cf.,* ***CIR v. Kuttel*** 1992 (3) SA 242 (at 248 *seqq.*).

207) A similar situation was decided in the case of ***CIR v. Kuttel*** 1992 (3) SA 242 *seqq.* Although P. C. Kuttel who was the respondent in this income tax case was not regarded as being `ordinarily resident´ in the Republic, (although at one point he spent more than one third of his time in the Republic) the question whether a deceased [person] was [is] `ordinarily resident´ in the Republic at the time of his death [for tax reasons] remains an open one and is still a question of fact which is decided by the courts from case to case.

208) ***Schreiner J.A.*** in ***Cohen v. CIR*** 1946 AD 174 (at p. 185) came to the conclusion that *`[...] it would not, I think, be logical permissible to hold that a person could be "ordinarily resident" in more than one country at the same time.´* But this question remains an open one and on looking at the legal fiction provided by the German ErbStG (*vide supra,* part B. III.2.1.2.a., p. 78, footnote 198) it could theoretically be assumed that a situation can occur in which a person might be regarded as an `ordinarily resident´ in South-Africa as well, as in Germany.

209) See, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 29.

III.2.1.2.b. The 'property' of a 'non-resident' of the Republic

According to the unilateral relief regulations embodied in sec. 3 (2) (c)-(h) of the EDA, the estate of a deceased person who was 'not ordinarily resident' in the Republic at the time of his death is only liable to pay estate duty on property which is situated in South-Africa (in accordance with the so-called *situs* principle), but is not liable to pay South-African estate duties on his 'foreign' or world wide property and assets.

aa. The foreign 'property' of an international deceased estate where the deceased was 'not ordinarily resident' in South-Africa

As mentioned above, the unilateral relief regulations of sec. 3 (2) (c)-(h) of the EDA exclude certain categories from the South-African estate of a non-resident of the Republic and a deceased who is not 'ordinarily resident' in South-Africa at the time of his death does not pay taxes on:

Any rights in immovable property situate outside the Republic (sec. 3 [2] [c] EDA).[210]

Any rights in movable property physically situate outside the Republic[211] (sec. 3 [2] [d] EDA). Any debts not recoverable or by right of action not enforceable in the Courts of the Republic (sec. 3 [2] [e] EDA). Included here are especially annuities the right to which cannot be enforced in South-Africa[212] or life insurances that were issued by a foreign insurer.[213]

Any goodwill, licence, patent, design, trade mark, copyright or other similar right not registered or enforceable in the Republic or not attaching to any trade, business or profession in the Republic (sec. 3 [2] [f] EDA).[214]

Any stocks or shares held by him in a body corporate which is not a company (sec. 3 [2] [g] [i] EDA).[215]

Any stocks or shares held by him in a company, provided any transfer whereby any change of ownership in such stocks or shares is recorded is not required to be registered in the Republic (sec. 3 [2] [g] [ii] EDA).[216]

Any rights to any income produced by or proceeds derived from any property referred to in

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210) It would be beyond the scope of this work to give a detailed summary of the following categories that are not included in the deceased estate of a person dying 'not' being an 'ordinarily resident' of the Republic. Most of these provisions are self-explanatory, but if further information is required see the expert works of, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 325 to 328 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.3.4. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.10 to 27.19 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 24 *seqq* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 11, p. 110 *seq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 295 *seq.*

211) For details see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.12 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 328.

212) See, ***Estate Brownstein v. CIR*** 1957 (3) SA 512 (AD), The Taxpayer 6 (1957), p. 175 *seqq.* / ***CIR v. Isaacs*** 1960 (1) SA 126 (AD), The Taxpayer 8 (1959), p. 238 *seqq.*

213) *Cf.*, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 328 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.3.4. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.13

214) In detail, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 328 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.14 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 25.

215) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.15 to 27.17 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 328.

216) See also, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.15 to 27.17 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 328.

paragraph (e), (f) or (g) (sec. 3 [2] [h] EDA).[217]

bb. The South-African 'property' of an international deceased estate where the deceased was 'not ordinarily resident' in South-Africa

From the above mentioned exclusions or exceptions made by the 'International [Death] Tax Law' rules under sec. 3 (2) (c)-(h) of the Act the general rule can be deduced, that the international deceased estate of a person who was 'not ordinarily resident' in the Republic at the time of his death will comprise only so much of his property as is situated in the Republic of South-Africa. The South-African property of a non-resident person is governed by the rules of sec. 3 (1) and 3 (2) (a)-(b) of the EDA and comprises all his South-African rights in or to property, movable or immovable, corporeal or incorporeal (in accordance with the so-called *situs* principle). It comprises specifically any fiduciary, usufructuary or other like interest in South-African property (including a right to an annuity charged upon South-African property) held by the deceased immediately prior to his death and any right to a South-African annuity (other than a right to an annuity charged upon any South-African property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased.

The assessment of the South-African deceased estate of a non-resident of the Republic is therefore governed by the same rules as the assessment of the South-African deceased estate of an 'ordinarily resident'.[218]

III.2.1.2.c. Summary

The property of an international deceased estate where the deceased was 'not ordinarily resident' in South-Africa at the time of his death comprises only his South-African property and assets as set out in sec. 3 (1) and sec. 3 (2) (a)-(b) of the EDA. According to the rules that are laid down in sec. 3 (2) (c)-(h) of the Act the 'property' of a non-resident of the Republic does not include certain categories of his property and assets which are either physically situate outside the Republic or those assets in respect of which change of ownership can only be effected outside South-Africa.

Although the decision of the case *CIR v. Kuttel* lays down certain criteria for establishing whether a person was 'ordinarily resident' in the Republic or not it could be seen that the meaning of the term 'ordinarily resident' or 'not ordinarily resident' as it is used in sec. 3 (2) (c)-(h) is not defined categorically in the Act or by the South-African courts and the question whether a deceased was 'ordinarily resident' in the Republic at the time of his death is a question of fact which is decided by the courts from case to case according to the test criteria laid down laid down in *Kuttel's* case.

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217) For further information see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.19 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 328.

218) For a detailed discussion of these rules the reader may once more be referred to the expert works dealing with these problems, *cf.,* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.5 *seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 312 to 324 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.3 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 21 *seqq* / ***W. Abrie,*** Estates - Planning and Administration, p. 293 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 11.

III.2.2. The 'deemed property' of an international deceased estate

For estate duty purposes the international estate of any person consists not only of the 'property' of that person at the date of his death, but also of property which in accordance with sec. 3 (3) of the EDA is 'deemed to be property' of the deceased at the date of his death.[219] In sec. 3 (3) of the Act certain events or phenomena are described as 'property deemed to be property' because they 'normally' or 'actually' would not be regarded as property for estate duty purposes.[220]

III.2.2.1. The 'deemed property' in an international deceased estate where the deceased was 'ordinarily resident' in South-Africa

On determining the 'deemed property' of an international deceased estate the 'deemed property', like the 'property' included in the estate of a deceased person according to sec. 3 (1) and 3 (2) of the Act, can be distinguished into South-African and foreign property 'deemed to be property' of an 'ordinarily resident' of the Republic and the question arises whether there are also certain South-African or foreign categories or phenomena that have to be included in the South-African estate of a person who died being a 'non-resident' of South-Africa.

III.2.2.1.a. The South-African 'property deemed to be property' in an international deceased estate where the deceased was 'ordinarily resident' in South-Africa

The six categories of South-African property and assets which are 'deemed to be property' in the international deceased estate of an ordinarily resident of the Republic are enumerated in sec. 3 (3) of the EDA.

aa. *Domestic policies* of insurance on the life of the deceased

The first category of South-African property being 'deemed property' of an international estate of a deceased who died as an 'ordinarily resident' of the Republic is *domestic policies* of insurance on the deceased's life (sec. 3 [3] [a] of the Act).[221]

In order to be qualified as 'deemed property' an insurance policy taken out on the life of the deceased must be a domestic policy as described in sec. 1 of the Insurance Act 27 of 1943.

Basically the expression domestic policy means a policy issued at any place, and consequently it can also include policies which were taken out on the life of the deceased in a

219) It would be beyond the scope of this work to deal with all the questions related to 'deemed property' in detail and the reader may therefore also be referred to the works of, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.28 to 27.52 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, especially chap. 3, para. 329 to 359 / ***W. Abrie,*** Estates - Planning and Administration, p. 296 *seqq.* / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 393 to 398 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 60 *seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 12 / ***L. A. Kemick,*** Administration of Deceased Estates, p. 78, 79 / ***P. A. Olivier,*** Boedelbeplanning, p. 42, 43.

220) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.28 / ***W. Abrie,*** Estates - Planning and Administration, p. 296.

221) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.29 to 27.42 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 331 to 340 / ***W. Abrie,*** Estates - Planning and Administration, p. 296 *seqq.* / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 393 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.2.

foreign country (e.g. a life insurance which was concluded in Germany [see, sec. 1 of the Insurance Act 27 of 1943]).[222] In the terms of sec. 1 of the Insurance Act 27 of 1943 the inclusion of a life policy depends mainly on the clause of the policy which relates its payability to a certain country. In general it can be stated that any policy which is made payable within the Republic has to be regarded as a 'domestic policy', no matter where it was issued,[223] and conversely a policy which is made payable outside the Republic has to be regarded as a foreign policy [provided that the owner of the policy has agreed in writing that the policy shall either be regarded as a 'domestic policy' or as a 'foreign policy' (in the latter case)].[224]
In accordance with sec. 3 (3) (a) (i)-(ii) of the EDA domestic insurance policies on the life of a deceased are subject to further exclusions of certain insurance policy proceeds.
The amount of insurance policies which is included in the deemed property of a deceased estate is valued by assessing the full amount due and recoverable under the policy and by deducting therefrom the premiums paid by the beneficiary including interest at six *per cent per annum* on the premiums, from the date of payment to the date of death.

A further discussion of the problems connected to the issuing of 'domestic policies' on the life of a deceased and their inclusion in a deceased estate would be beyond the scope of this work.[225]

bb. Payments from pension and other funds on the death of the deceased
The second phenomenon which is deemed to be property in the South-African property of a deceased who was ordinarily resident in the Republic are the payments from pension and other funds on the death of the deceased (sec. 3 [3] [a]*bis* of the EDA).
The Act does not define the term fund, but in practice sec. 3 (3) (a)*bis* of the Act refers to an amount due and payable by any fund, such as a pension, provident, benefit or retirement annuity fund.[226]
The payments made by such funds on or as a result of the death of a deceased can be distinguished into two types of payments - a lump sum payment and an annuity. According to sec. 3 (3) (a)*bis* (i) an annuity payable by a pension fund or a retirement annuity fund as defined in the Income Tax Act is exempt from estate duty, whereas single or lump sum payments, on the other hand, do not enjoy such exemption, and are therefore dutiable un-

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222) *Cf.*, ***W. Abrie,*** Estates - Planning and Administration, p. 297 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.30.

223) See for details, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.30.

224) See, sec. 1 of the Insurance Act 27 of 1943 and ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.30.

225) For details the reader should therefore refer to the expert works dealing with this topic *in extenso.* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.29 to 27.42 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, especially chap. 3, para. 331 to 340 / ***W. Abrie,*** Estates - Planning and Administration, p. 297 *seqq.* / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 61*seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 12, p. 113, 114 /And the recent articles by, ***D. Meyerowitz / P. Meyerowitz / D. M. Davis / T. S. Emslie,*** in: The Taxpayer 42 (1993), p. 23 *seqq.* / ***do.,*** in: The Taxpayer 42 (1993), p. 64 *seqq.*

226) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.43 / ***W. Abrie,*** Estates - Planning and Administration, p. 299 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.3.

der sec. 3 (3) (a)*bis* (ii) of the Act.[227]

The amount of fund payments which is included in the deemed property of a deceased estate is assessed similarly or analogously to the evaluation method used to establish the value of insurance policies for estate duty purposes.

To establish the value of a fund according to sec. 3 (3) (a)*bis* of the EDA the total amount due and payable by the fund [the fund must be under a legal obligation to pay - *ex gratia* payments do not fall within sec. 3 (3) (a)*bis*] is assessed and afterwards reduced by deducting from the total amount the contributions or considerations paid by the beneficiary, including interest at six *per cent per annum* on the contributions or considerations, from the date of payment to the date of death.[228]

The inclusion of the payments from pension and other funds on the death of an `ordinary resident´ deceased of the Republic as South-African property deemed to be property in the estate duty liability of an international deceased estate depends on the fact that the benefit of these funds has to be `property´ as defined in part B. III.2.1. to III.2.1.1.c., p. 68 *seqq.* of this work.

According to the `international interpretation´ of the term `property´, payable fund benefits will be deemed to be property in the deceased estate of an `ordinarily resident´ of the Republic, wheresoever the fund may be constituted or situated and whenever and to whomever the benefits of these funds may be payable.[229]

cc. Property donated under a *donatio mortis causa*

The property donated under a *donatio mortis causa* (sec. 3 [3] [b] of the Act) is the third category of property which has to be included as deemed property in the international deceased of an `ordinarily resident´ of the Republic.[230]

A *donatio mortis causa* is a donation made by someone in anticipation of his death, but the donated property only constitutes deemed property in the deceased estate if the donor does die and the property was delivered to the donee prior to the donor`s death.[231]

Until the donor of a *donation mortis causa* has died a donation of this nature is incomplete and if the donated property has already been delivered to the donee, the donor may claim its return.[232]

In the cases where the donor dies, but the property was not delivered prior to his death, this property will have to be included in the gross value of the deceased estate both as actual and as deemed property of the deceased. However, in these cases a deduction must be allowed for the claim of the donee to the property as a debt due by the deceased, since there would otherwise be a double liability for estate duty on the same property.[233]

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227) *Cf.*, ***Abrie,*** Estates - Planning and Administration, p. 299 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.3. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, especially chap. 3, para. 341 *seqq.*

228) For a graphical illustration of this process refer to ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.3. / See also, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.43 / ***W. Abrie,*** Estates - Planning and Administration, p. 299.

229) See also, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.43.

230) For further information on the *donatio mortis causa* see, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.4. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 90 / ***W. Abrie,*** Estates - Planning and Administration, p. 299 *seq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, especially chap. 3, para. 348, 349 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.45 / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 12, p. 115 *seqq.*

231) *Cf.*, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 90 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.45

232) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.45.

233) See, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 90.

In contrast to the *donatio mortis causa* a *donatio inter vivos* (former sec. 3 [3] [c] of the Act read together with sec. 3 [4] of the EDA) made by a deceased during his lifetime is no longer included in the 'deemed property' of the deceased estate of an 'ordinarily resident' of the Republic, if he died on or after the 16th of March 1988.[234]

dd. Accruals under the Matrimonial Property Act 88 of 1984

A further item which is regarded as being deemed property of a deceased who is 'ordinarily resident' in the Republic at the time of his death is the accrual which can occur under the regulations [especially sec. 3] of the Matrimonial Property Act 88 of 1984 (sec. 3 [3] [cA] of the EDA).[235]

In terms of sec. 3 (3) (cA) of the EDA a claim against the surviving spouse or the estate of a surviving spouse has to be regarded as deemed property when the accrual in the estate of the surviving spouse is larger than the deceased's accrual. In the reverse situation, where a surviving spouse holds a claim against the deceased estate, this claim constitutes an estate liability which can be deducted from the gross value of the deceased estate.[236]

ee. Payments in respect of the issue or allotment of shares in a family company

Included in the deemed South-African property of a deceased are also his payments in respect of the issue or allotment of shares in a family company (sec. 3 [3] [cB] and sec. 3 [4] of the Act).[237]

The provisions of sec. 3 (3) (cB) and sec. 3 (4) of the Act include any amount paid, in cash or otherwise, in respect of shares in a family company[238] allotted or issued to a deceased, to the extent that the amount paid exceeds the nominal value of the shares. Sec. 3 (3) (cB) and sec. 3 (4) therefore apply to those cases in which a deceased pays a higher buying price for a share with a lower nominal value. In this instance the factual excess or premium (difference between the buying price and the nominal value) paid by the deceased is (since the 9th of July 1993 was) regarded as a donation to the company and included in

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234) For the former situation see, ***J. N. Swart,*** The Planning and Administration of Estates, chap. 12, p. 115 *seqq.* / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 91 *seqq.*

235) ***G. A. Urquhart / D. M. Davis,*** Estate Planning, especially chap. 3, para. 355, 356 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.52 and chap. 15, para. 15.48 *seqq.* / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.6. / ***W. Abrie,*** Estates - Planning and Administration, p. 300 / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 12, p. 118 *seqq.* .

236) *Cf.,* ***W. Abrie,*** Estates - Planning and Administration, p. 300 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, especially chap. 3, para. 355, 356 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., especially chap. 27, para. 27.52 and chap. 15, para. 15.48 *seqq.*

237) Originally it was planned to delete sec. 3 (3) (cB) and sec. 3 (4) of the EDA by the introduction of the latest Taxation Law Amendment Act, which took effect on the 9th of July 1993. However, the deletion of sec. 3 (3) (cB) and sec. 3 (4) of the Act which should have taken effect from the 9th of July 1993 onwards, was reversed afterwards and the deemed South-African property of a deceased still includes the payments he made in respect of the issue or allotment of shares in a family company (sec. 3 [3] [cB] and sec. 3 [4] of the Act). For information on further changes of the EDA see, ***D. Meyerowitz / P. Meyerowitz / D. M. Davis / T. S. Emslie,*** The Taxpayer 42 (1993), p. 120g and 120h.

238) A family company is defined in sec. 1 of the Act as a company not quoted on the stock exchange and which (a) at the relevant time, before or on the death of the deceased (b) was controlled or capable of being controlled (c) directly or indirectly (d) through a majority of shares, or any other interest, or any other manner (e) by the deceased or (f) by the deceased *and* one or more of his relatives (the term relative is also defined in sec. 1 of the EDA). For further information on these aspects see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.46 *seqq.* / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.7. / ***W. Abrie,*** Estates - Planning and Administration, p. 300 *seq.*

his estate as property deemed to be property.[239]

However, it must be noted that the deeming provisions of sec. 3 (3) (cB) and sec. 3 (4) EDA only applies to transactions between the deceased and the family company where the company which alloted or issued the shares to the deceased was or became a family company in relation to the deceased, either *immediately* prior to the allotment or issue, or at the time of the allotment or issue, or at any time after the allotment or issue (see, sec. 3 [4] of the EDA). Consequently this section does not encompass those situations where existing shares in a family company are transferred between the deceased and other shareholders.[240]

ff. Property which the deceased was competent to dispose of for his own benefit or for the benefit of his estate

Finally the deemed property of a person who was `ordinarily resident´ in the Republic at the time of his death also includes the South-African property which the deceased was competent to dispose of for his own benefit or for the benefit of his estate (sec. 3 [3] [d] of the EDA). This last category of deemed property is a widely defined provision which was created to include in the gross value of a deceased estate a phenomenon which would otherwise have escaped the estate duty net.[241]

But due to its wide definition sec. 3 (3) (d) restricts itself to prevent the possibility of double taxation occuring in relation to other categories of `property´ and `property deemed to be property´ already defined in sec. 3 (1), 3 (2) and 3 (3) of the Act.[242]

In addition to this self-limitation of sec. 3 (3) (d) of the Act, it can be observed that sec. 3 (5) (a)-(d) narrows its provisions further.[243]

III.2.2.1.b. The foreign `property deemed to be property´ in an international deceased estate where the deceased was `ordinarily resident´ in South-Africa

The international deceased estate of a person who died as an `ordinarily resident´ of the Republic embodies his South-African as well as his world wide property and an introduction to the property which is `deemed to be property´ in an international deceased estate of such a person [according to the regulations embodied in sec. 3 (3) (a)-(d) of the EDA] would be incomplete if certain categories of foreign property were not mentioned which can perhaps also be regarded as `deemed property´ for South-African estate duty purposes,

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239) The same applies to the situation where the deceased would transfer assets of a higher value to a family company in exchange for the issue of shares that sum up to a lower value. Once again the difference between the nominal value and the `donated´ value will be included in his property as property deemed to be property. See, ***W. Abrie,*** Estates - Planning and Administration, p. 300 *seq.*

240) *Cf.,* ***W. Abrie,*** Estates - Planning and Administration, p. 300 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.46 *seqq.* / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.7.

241) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.49 *seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 301.

242) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.49 *seqq.*

243) It is therefore the prevailing opinion of most of the expert authors dealing with the regulation embodied in sec. 3 (3) (d) that there are only a few possibilities to apply this regulation. For further details see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.49 *seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 357 to 359 / ***W. Abrie,*** Estates - Planning and Administration, p. 301 / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 394 *et seq.* / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.4.8. / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 12, p. 122 *seq.*

if sec. 3 (3) (a)-(d) is interpreted in a wide or international sense. The following is therefore meant to introduce the reader to some of the aspects of foreign property which can perhaps be regarded as deemed property in an international deceased estate according to a wider application of sec. 3 (3) (a)-(d) of the Act.

aa. *Foreign policies* of insurance on the life of the deceased

It was already mentioned above that only *domestic policies* on the life of a deceased who was ordinarily resident in South-Africa at the time of his death form a part of his deemed property for estate duty purposes. A *foreign policy* can therefore not be regarded as property deemed to be property in his estate.[244]

But although 'foreign policies' are normally not included under the regulation of sec. 3 (3) (a) of the Act, they are taxable under the provisions of the EDA as soon as the proceeds of a foreign policy are payable to the deceased estate of a person who died 'ordinarily resident' in the Republic.

This circumstance results mainly from the fact that the proceeds of a foreign policy payable on the death of an 'ordinary resident' of the Republic constitutes a proprietary right which continues in the estate of the deceased[245] and which has to be included in the international property of a deceased estate according to the 'international interpretation' [as defined in part B. III.2.1. to III.2.1.1.c., p. 68 *seqq.* of this work] of sec. 3 (1) and sec. 3 (2) (a)-(b) of the EDA .[246]

bb. Payments from foreign pension and other foreign funds on the death of the deceased

In accordance with the above mentioned facts (see part B. III.2.2.1.a.bb., p. 83 *seq.*) the payments or benefits from foreign pension and other funds on the death of a deceased also follow the 'international interpretation' of the term 'property' and payable foreign fund benefits will be deemed to be property in the deceased estate of an 'ordinarily resident' of the Republic, wheresoever the fund may be constituted or situated and whenever and to whomever the benefits of these funds may be payable.[247]

cc. Property donated under a [foreign] *donatio mortis causa*

If foreign property is donated under the rules of a South-African *donatio mortis causa* this donation in anticipation of death will constitute deemed property according to sec. 3 (3) (b) of the EDA.

If foreign property is transferred by the deceased according to foreign law, it has to be established whether this transaction can be characterized as a *donatio mortis causa* in comparison to the terminology of the South-African *donatio mortis causa* as it is referred to in sec. 3 (3) (b) of the EDA[248] . As soon as a transaction which took place under a foreign law can positively be identified as being a transaction comparable or congruent to a *donatio mortis causa* as it is intended in sec. 3 (3) (b) of the EDA, the provisions of this sub-section can analogously be applied to the foreign transfer of property. The transfer of

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244) *Cf.,* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.30, 27.31 / ***W. Abrie,*** Estates - Planning and Administration, p. 297.

245) See the decision held in the case ***CIR v. Hersov's Estate*** 1952 (4) SA 559 (AD) and ***D. Meyerowitz,*** in: The Taxpayer 1 (1952), p. 236 *et seq.*

246) See also the conclusion drawn by, ***W. Abrie,*** Estates - Planning and Administration, p. 297 / more detailed, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.31.

247) Compare, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.43.

248) For a possible method to compare and characterize a foreign *donatio mortis causa* to a South-African *donatio mortis causa* see, part B. III.2.1.1.b.dd.β., p. 74 *seqq.* of this work.

foreign property under a [foreign] *donatio mortis causa* will then constitute deemed property in the international deceased estate of a deceased who was 'ordinarily resident' in South-Africa at the time of his death.
But in relation to the German law, for example, difficulties in establishing whether a deceased transferred property under a *donatio mortis causa* comparable to South-African law will not occur, because sec. 2301 of the BGB (German civil law codification) deals with the 'Schenkungsversprechen von Todes wegen' (*donatio mortis causa*). The German *donatio mortis causa* as it is laid down in sec. 2301 of the BGB can be compared to the South-African *donatio mortis causa*[249] and if a deceased who was 'ordinarily resident' in the Republic at the time of his death chose to transfer [German] property according to the rules of sec. 2301 BGB the transferred property will have to be regarded as deemed property in the international deceased estate of that person (analogous to the provision of sec. 3 [3] [b] EDA).

dd. Accruals under the matrimonial property regime of a foreign law
The wording of sec. 3 (3) (cA) EDA deems only the accrual of property and assets which occurs under the regulations of sec. 3 of the Matrimonial Property Act 88 of 1984 to be property in the deceased estate of an 'ordinarily resident' of the Republic and a claim against the surviving spouse or the estate of a surviving spouse which is governed by the matrimonial property regime of a foreign law[250] cannot *per se* be regarded as being deemed property according to sec. 3 (3) (cA) of the EDA.
However it would be misleading to assume that a claim of a deceased against his surviving spouse or the estate of his surviving spouse which is rooted in the matrimonial property regime of a foreign law system is not included in his international deceased estate.
A claim of a deceased against his surviving spouse, if this claim occurs under the accrual system of a foreign matrimonial property regime, will have to be regarded as a proprietary right of the deceased, which is transferred to, continued in or coming to live[251] in the estate of the deceased. A claim of a deceased against his surviving spouse which accrues from a foreign matrimonial property regime will therefore have to be included as 'property' in the international property of a deceased estate - once again according to the wide and comprehensive 'international interpretation' of sec. 3 (1) and sec. 3 (2) (a)-(b).
Vice versa the claims held by the surviving spouse against the deceased estate under a foreign matrimonial property regime will constitute an estate liability of the deceased which can be deducted from the gross value of his deceased estate.

ee. Payments in respect of the issue or allotment of shares in a foreign family company
On establishing an answer to the question whether the deceased's payments in respect of the issue or allotment of shares in a foreign family company (a German family 'Kommanditgesellschaft' for example) has to be included in his international deceased estate (as

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249) For a detailed description of the German *donatio mortis causa* see, ***Gursky,*** Erbrecht, p. 65 *seqq.* / ***Brox,*** Erbrecht, p. 455 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 445 *seqq.* / ***Ebenroth,*** Erbrecht, p. 348 *seqq.*

250) A constellation like this can occur, when a foreign couple married without an antenuptial contract in a foreign country where they were domiciled at that time and afterwards emigrated to South-Africa or became 'ordinarily resident' here. See for further information, ***C. F. Forsyth,*** Private International Law, p. 252 *seqq.*

251) Depending on the foreign matrimonial property regime, see ***C. F. Forsyth,*** Private International Law, p. 252 *seqq.*

deemed property analogous to sec. 3 [3] [cB] and sec. 3 [4] of the EDA)[252] the participation of a deceased in a foreign company and the legal structure of the foreign company has to be analysed and characterized in comparison to the South-African provisions dealing with these matters.[253]

The first precondition in the process of qualifying a foreign company as a foreign family company for estate duty purposes (analogous to sec. 3 [3] [cB] and sec. 3 [4] of the Act) is the necessity, that a foreign family company has to have a company structure, comparable to the structure of a South-African family company [as it is laid down in sec. 1 of the EDA].

A foreign (e.g. German) family company can consequently only be characterized as a family company for South-African estate duty purposes if the foreign (e.g. German) company is not quoted on the [foreign] (e.g. German) stock exchange and if the foreign (e.g. German) company (a) at the relevant time, before or on the death of the deceased (b) was controlled or capable of being controlled (c) directly or indirectly (d) through a majority of shares, or any other interest, or in any other manner (e) by the deceased or (f) by the deceased *and* one or more of his relatives[254].

If the legal structure of a foreign family company is compared to the detailed definition of the term family company as it is laid down in sec. 1 of the EDA and an answer to the question whether the foreign company is comparable to the South-African structure of a family company cannot be found, the general means of comparing, characterizing and analysing a foreign company can used as a further indication whether the foreign company is a family company in the sense of the regulations of the EDA.

A comparison between the wording of the foreign and the domestic statutes or law dealing with the foundation and running of [family] companies, the systematic position of certain [family] company law regulations in the foreign and domestic law system, the history of the foreign and domestic [family] company law regulations, and the *ratio* or *telos* of the foreign and the domestic [family] company law regulations or perhaps even a comparison between the economic consequences of the foreign and the domestic [family] company law provisions will be helpful to find out whether a foreign company is a foreign family company for estate duty purposes.[255]

In relation to German law it can be observed that there is more than one possibility for a deceased who was `ordinarily resident´ in the Republic at the time of his death to be involved in a German company which is comparable to a family company as it is defined in sec. 1 of the South-African EDA.[256]

252) Sec. 3 (3) (cB) and sec. 3 (4) of the EDA do not provide *expressis verbis* for such an inclusion.

253) As introduced in part B. III.2.1.1.b.dd.β., p. 74 *seqq.* of this work.

254) In the cases of an analysis of foreign family companies for South-African estate duty purposes the [foreign] relatives or family relations of the deceased will also have to be established according to the definition of the term `relative´ in sec. 1 of the EDA.

255) Compare, part B. III.2.1.1.b.dd.β., p. 74 *seqq.* of this work.

256) Comparable family companies under German Law can be constituted for example as:
a. `BGB-Gesellschaften´ `Gesellschaft bürgerlichen Rechts (GbR)´ (partnerships under the Civil Code / civil law associations / non-trading partnerships), sec. 705 to 740 BGB:
Important forms of `BGB-Gesellschaften´ are business associations of persons who are not merchants as defined by the Commercial Law Code (Handelsgesetzbuch - HGB), e.g. partnerships of lawyers (advocats / attorneys). A `BGB-Gesellschaft´ has got no legal personality and the management of affairs is carried out jointly by the partners. The assets of a `BGB-Gesellschaft´ are owned jointly by the partners in co-ownership (Gesamthandsgemeinschaft). For an introduction see, ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 74 *seqq.*

However, it can be stated that the basic model of a German family company, which can be compared to the definition of a South-African family company, is the `Kommanditgesellschaft´ (KG - limited partnership)[257].

The `Kommanditgesellschaft´ or `KG´ is governed by the rules of sec. 161 to 177 of the `Handelsgesetzbuch´ (HGB - Commercial Law Code) and can be described as a [family] partnership for the conduct of a commercial enterprise under a common firm name [often a family name], consisting of one or more `Komplementäre´ (general partners[258]) and at least one `Kommanditist´ (limited partner[259]). The `KG´ is seen as the basic model of the German family company because the foundation and running of a `KG´ allows the participation of several family members in the company according to their abilities (education [e.g. as a craftsman, bookeeper, etc.], age, monetary involvement, etc.).[260]

Compared to the preconditions of the South-African family company as set out above it can be stated that a German family `KG´ would `normally´ be comparable to a South-African family company as defined in sec. 1 of the EDA.[261]

After it is established that a person who was `ordinarily resident´ in South-Africa at the time of his death was involved in a `foreign family company´ whose legal structure is comparable to the South-African family company structure, but which is governed by foreign law (e.g. involvement in a German family `KG´ governed by sec. 161 to 177 of the HGB), it has to be asked whether a monetary participation of the deceased in this foreign family company can analogously be subsumed under the provisions of sec. 3 (3) (cB) and sec. 3 (4) of the EDA.

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b. `offene Handelsgesellschaften (oHG)´ (general partnership), sec. 105 to 160 HGB:
The `oHG´ is a commercial partnership to carry on a business under a firm name. All partners are jointly and severally liable for the firm`s debts. The `oHG´ can in its own name aquire rights, incur liabilities and sue or be sued. For details see, ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 128 *seqq.*

c. `Kommanditgesellschaften´ see the introduction to the `KG´ given in the text and ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 167 *seqq.*

d. `Familiengesellschaften mit beschränkter Haftung (GmbH)´ (company with a limited liability / private [limited] company), GmbH-Gesetz, GmbH Law Codification:
The `GmbH´ is a business entity with a separate legal personality and a fixed [share] capital, contributed by the initial shareholders. The share capital of the company is at least DM 50.000, the original investment of each shareholder at least DM 500. Only the company`s assets are liable to the company`s creditors. The shareholders liability is limited to their investment. The agents of a company are the managing director, the shareholders meeting and a supervisory board. See, ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 221 *seqq.*

e. `GmbH & Co. KG´ (limited [commercial] partnership with a GmbH as a general partner):
The `GmbH & Co. KG´ is a limited partnership (`Kommanditgesellschaft´ [KG]) with a private [limited] company as a general [personally liable] partner (`Komplementär´) and the shareholders of the `GmbH´ [alone or with others] as limited partners (`Kommanditisten´). ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 182 *seqq.*

257) For details concerning the `Kommanditgesellschaft´ see, ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 167 *seqq.* for the taxation of `Kommanditgesellschaften´ see, ***Knobbe-Keuk,*** Bilanz- und Unternehmensteuerrecht, p. 416 *seqq.*

258) According to sec. 161 (2), 128, 129 of the HGB the `Komplementär´ is a partner in the `KG´ who has got the full personal liability for the liabilities of a `Kommanditgesellschaft´, see ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 168.

259) The `Kommanditist´ is a partner in the `KG´ whose liability in respect of the partnership`s creditors is limited to the specific amount of his contribution (sec. 171 to 176 HGB). ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 168

260) *Cf.,* ***Kraft / Kreutz,*** Gesellschaftsrecht, p. 168.

261) It would be beyond the scope of this work to compare the preconditions of a South-African family company and the `Kommanditgesellschaft´ thoroughly, it may therefore be allowed to give this statement without a further comparison.

The provisions of sec. 3 (3) (cB) and sec. 3 (4) of the Act have to be applied analogously as soon as the deceased payed a higher buying price for a share in a foreign family company which usually has a lower nominal value. In this situation the factual excess or premium paid by the deceased has to be regarded as a donation to the foreign family company and has to be included in his international deceased estate as property deemed to be property analogous to sec. 3 (3) (cB) and sec. 3 (4) of the Act.[262]

ff. Foreign property which the deceased was competent to dispose of for his own benefit or for the benefit of his estate

It was mentioned above that sec. 3 (3) (d) of the Act applies to situations that are not expressly laid down in the EDA and which without the existence of this provision would have escaped the estate duty net.[263] Although there are only a few possibilities for applying the provisions of sec. 3 (3) (d) EDA on South-African `property´ and South-African `property deemed to be property´, an analogous utilisation of this provision on foreign `property´ and foreign `property deemed to be property´ in the international deceased estate of a person dying `ordinarily resident´ in South-Africa must be considered.
By this means certain categories and phenomena of foreign `property´ and foreign `property deemed to be property´ could be embodied in the tax net of the EDA which otherwise would or could escape estate duty because of their possible relation to a foreign law.
Only by this extensive interpretation of sec. 3 (3) (d) EDA can an inclusion of all the `world wide property´ in the international deceased estate of a person dying as an `ordinary resident´ of the Republic be achieved for estate duty purposes.

III.2.2.1.c. Summary

On characterizing the categories of `deemed property´ that have to be included in the international deceased estate of a person who died as an `ordinary resident´ of the Republic it can be seen that the `deemed property´ of such an estate is generally defined in sec. 3 (3) (a)-(d) of the Act.
However, certain `foreign property´ which `normally´ [as South-African property] would be included in the deceased estate of an `ordinarily resident´ as property `deemed to be property´ according to sec. 3 (3) (a)-(d) of the EDA either falls within the wide categories of the `international interpretation´ of sec. 3 (1) and 3 (2) (a)-(b) of the Act [as a (foreign) proprietary right of the deceased][264] and is included in his international estate as `foreign property´ or can be included as `deemed foreign property´ of such an estate on applying sec. 3 (3) (a)-(d) analogously to comparable categories of foreign property[265].

III.2.2.2. The `deemed property´ in an international deceased estate where the deceased was `not ordinarily resident´ in South-Africa

Whereas the `property´ of a person who was `ordinarily resident´ in the Republic at the time of his death comprises his South-African `property´ as well as his world wide property and assets, the `property´ of a person who was `not ordinarily resident´ in South-Africa at the time of his death includes only his `property´ as defined in sec. 3 (1) and sec. 3 (2)

262) Compare also legal consequences connected to the direct application of sec. 3 (3) (cB) and sec. 3 (4) of the Act as mentioned in part B. III.2.2.1.a.ee., on p. 85 *seq.* of this work.
263) See, part B. III.2.2.1.a.ff., on p. 86 of this work.
264) *Cf.*, part B. III.2.2.1.b.aa., bb. and dd., p. 86, 87, 88 of this work.
265) See, part B. III.2.2.1.b.cc. and ee., p. 87, 88 of this work.

(a)-(b) of the Act situated or by right of action enforceable and recoverable within the Republic (in accordance with the so-called *situs* principle).
In this context sec. 3 (2) (c)-(h) of the EDA specifies that most categories of property and assets which are either physically situate outside South-Africa or those assets in respect of which change of ownership can only be effected outside the Republic are exempt from being property in the deceased estate of a person who was 'not ordinarily resident' in South-Africa at the time of his death.
Consequently the categories of 'deemed property' that will have to be included in the estate of a person who died 'not ordinarily resident' in the Republic will also have to follow this main distinction.
Because the foreign property of a 'not ordinarily resident' deceased is generally excluded from being property in his taxable South-African estate, it would be contradictory if other 'further' categories of foreign property of a 'non-resident' of the Republic would be classified as being 'deemed property' in his estate at the time of his death.
It can therefore be concluded that the 'deemed property' which is included in the deceased estate of a 'non-resident' of South-Africa is in general limited to the categories of 'deemed property' as laid down in sec. 3 (3) (a)-(d) of the EDA and situated or by right of action enforceable and recoverable in South-Africa.

The 'deemed property' which is included in the deceased estate of a 'non-resident' of the Republic will therefore mainly comprise the following categories:

Domestic policies of insurance taken out on the 'non-resident' deceased's life will have to be considered 'deemed property' in his estate [according to sec. 3 (3) (a) of the EDA] as long as they are made payable or by right of action enforceable and recoverable within the Republic[266].
The *payments or benefits from pension and other funds on the death of a* 'not ordinarily resident' *deceased* [as intended in sec. 3 (3) (a)*bis* of the Act] are deemed to be property for South-African estate duty purposes if the right thereto is enforceable in the courts of the Republic.[267]
A *donatio mortis causa* [sec. 3 (3) (b) EDA] has to be included in the South-African deceased estate of a 'non-resident' as soon as a 'non-resident' deceased transferred or disposed of 'property' which otherwise would have been included in his dutiable South-African estate as property defined in sec. 3 (1) and sec. 3 (2) (a)-(b) of the EDA and which is situated or by right of action enforceable and recoverable within the Republic.[268]
If a 'non-resident' of the Republic falls within the matrimonial property regime of the *Matrimonial Property Act 88 of 1984* [sec. 3 (3) (cA) of the Act] only so much of a claim against the surviving spouse or the estate of the surviving spouse can be regarded as 'deemed property' in his South-African deceased estate as by right of action is enforceable and recoverable in the Republic. *Vice versa,* a surviving spouse holds a claim against the South-African deceased estate [which can be deducted as an estate liability from the gross value of the South-African deceased estate] of a 'non-resident' only if this claim is also

266) For further information on *domestic policies* see, part B. III.2.2.1.a.aa., p. 82 *et seq.* of this work.

267) See, part B. III.2.2.1.a.bb., p. 83 *et seq.* and part B. III.2.2.1.b.bb., p. 87 of this work / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 27, para. 27.43.

268) Under the above mentioned circumstances it does not matter whether the *donatio mortis causa* occured in accordance with South-African law regulations or foreign law regulations. It is only important, that the transferred or disposed property under a *donatio mortis causa* was South-African property, as defined above.

of South-African nature, *viz.,* by right of action enforceable and recoverable in the Republic.

Payments made by a 'non-resident' deceased *in respect of the issue or allotment of shares in a family company* [as meant by sec. 3 (3) (cB) and sec. 3 (4) EDA] are only 'deemed to be property' in his deceased estate if they were made to a family company within the Republic[269] and in accordance with the above mentioned circumstances.[270]

The final and all embracing provision of sec. 3 (3) (d) of the Act, deeming property to be *property* of a deceased if he was *competent to dispose of this property for his own benefit or for the benefit of his estate* applies to the estate of a person who was 'not ordinarily resident' in the Republic at the time of his death only in the cases indicated above[271], and even in these few cases only if the property or right to property is situated or by right of action enforceable and recoverable in South-Africa.

On summarizing the categories of 'deemed property' which have to be included in the South-African deceased estate of a person who was a 'non-resident' of the Republic at the time of his death it can generally be stated that these categories are limited to the items that are characterized in sec. 3 (3) (a)-(d) of the EDA and situated or by right of action enforceable or recoverable in South-Africa.

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269) This can be deduced from sec. 3 (2) (g).

270) See, part B. III.2.2.1.a.ee., p. 85 *et seq.* of this work.

271) *Cf.,* part B. III.2.2.1.a.ff., p. 86 of this work

III.2.3. Summary of the elements constituting an international deceased estate

It can be seen that the elements which constitute an international deceased estate for South-African estate duty purposes consist of two components, *viz.*, the 'property' and the 'property deemed to be property' of a deceased person.
In order to establish the exact items of 'property' and the exact items of 'property deemed to be property', which form part of the estate of a deceased, it is furthermore necessary to see whether a deceased was 'ordinarily resident' or 'not ordinarily resident' in the Republic at the time of his death.
In accordance with these distinctions the following elements which constitute an international deceased estate for South-African estate duty purposes can generally be established.

III.2.3.1. The elements constituting the international deceased estate of an 'ordinarily resident' of the Republic

The property of an international deceased estate where the deceased was 'ordinarily resident' in the Republic at the time of his death embodies all his South-African property and assets as set out in sec. 3 (1) and 3 (2) (a)-(b) of the EDA.
In addition to that the international estate of a deceased South-African resident is also liable to pay estate duty on his 'world wide' or 'foreign property'.
To assess the 'foreign property' of an international deceased estate the provisions of sec. 3 (1) and 3 (2) (a)-(b) of the Act can be interpreted in an international manner; and to specify certain items of the 'foreign property' of an international estate the provisions of sec. 3 (2) (c)-(h) may be read *a contrario*.
If 'foreign property' is governed by foreign regulations, the provisions of sec. 3 (1) and 3 (2) (a)-(b) [and sec. 3 (2) (c)-(h) *a contrario*] of the Act cannot be applied directly. In these cases the foreign regulations have to be compared to the provisions that constitute 'property' for a South-African estate duty liability. If the regulations that govern certain categories of 'foreign property' under a foreign law are comparable to the South-African regulations, the 'property' rules of sec. 3 (1) and 3 (2) (a)-(b) [and 3 (2) (c)-(h) *a contrario*] can be applied analogously to the foreign categories of property and it will be included in the South-African tax net applicable to an international deceased estate.

The categories of 'deemed property' that have to be included in the international deceased estate of a person who died as an 'ordinarily resident' of the Republic have to be characterized as follows.

It can be seen, that the 'deemed property' of such an estate is generally defined in sec. 3 (3) (a)-(d) of the Act.
However, certain 'foreign property' which 'normally' [as South-African property] would be included in the deceased estate of an 'ordinary resident' as property 'deemed to be property' according to sec. 3 (3) (a)-(d) of the EDA either falls within the wide categories of the 'international interpretation' of sec. 3 (1) and 3 (2) (a)-(b) of the Act [as a (foreign) proprietary right of the deceased] and is included in his international estate as 'foreign property' or can be included as 'deemed foreign property' of such an estate by applying sec. 3 (3) (a)-(d) analogously to comparable categories of foreign property.

III.2.3.2. The elements constituting the international deceased estate of a person 'not ordinarily resident' in the Republic

The property of an international deceased estate where the deceased was 'not ordinarily resident' in South-Africa at the time of his death embodies only his South-African property and assets as set out in sec. 3 (1) and sec. 3 (2) (a)-(b) of the EDA.
The general attitude of the EDA to exclude the 'foreign property' of a 'non-resident' deceased is especially laid down in the unilateral relief regulations which are embodied in sec. 3 (2) (c)-(h) of the EDA.
According to the rules laid down in sec. 3 (2) (c)-(h) of the Act the 'property' of a non-resident of the Republic does not include certain categories of his property and assets which are either physically situate outside the Republic or those assets in respect of which change of ownership can only be effected outside South-Africa.
Although the decisions in *Cohen v. CIR* and *CIR v. Kuttel* provide certain guidelines as to how to establish whether a person was 'ordinarily resident' in the Republic or not, the meaning of the term 'ordinarily resident' or 'not ordinarily resident' as it is used in sec. 3 (2) (c)-(h) is not explicitly defined and the question whether a deceased was 'ordinarily resident' in the Republic at the time of his death must be regarded as a question of fact to be decided by the courts from case to case.

The categories of 'deemed property' which have to be included in the South-African deceased estate of a person who was a 'non-resident' of the Republic at the time of his death can generally be described as categories limited to the items characterized in sec. 3 (3) (a)-(d) of the EDA and situated or by right of action enforceable or recoverable in the Republic of South-Africa.

III.3. The allowable deductions

After all 'property' and 'property deemed to be property' has been included in an [international deceased] estate, and the value of this estate has been assessed according to the rules of the evaluation of property, as laid down in sec. 5 (1) to (5) of the Act, the total or gross value of the [international deceased] estate has been established.[272]
In order to determine the net value of the estate the next step to be taken is the subtraction of all the deductions which are allowed in terms of sec. 4 (a) to (q) of the Act.
Sec. 4 (a) to (q) of the EDA uses the term 'ordinarily resident' only in subsec. (b), (e) and (f), but does not really distiguish under which circumstances the allowable deductions are deductible from the gross value of the estate of an 'ordinarily resident' or from the gross value of the estate of a 'non-resident', although it was shown above that these estates by no means have the same scope.
However, it can be argued that the scope of the allowable deductions under sec. 4 of the Act is governed by one of the basic principles of the EDA, *viz.*, that the gross value of the deceased estate of a 'non-resident' is mainly built by his South-African property and assets, whereas the gross value of the deceased estate of an 'ordinarily resident' is assessed by compiling his South-African and his world-wide property and assets.

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272) See, ***W. Abrie,*** Estates - Planning and Administration, p. 301 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.1. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 360.

According to this it could be concluded that the sec. 4 deductions from the gross value of the estate of a 'non-resident' can only be allowed, if they are directly connected to the gross value of his South-African property and assets, whereas sec. 4 deductions from the gross value of the estate of an 'ordinarily resident' would have to be allowed if they can be connected to the gross value of his international deceased estate.

It would be beyond the scope of this work to explore and explain all the possible details connected to the deductions that are listed in the provisions of sec. 4 (a) to (q). The following is therefore intended as a short introduction to certain aspects of deductions, to highlight details of importance for South-African estate duty taxation levied on international deceased estates.[273]

III.3.1. Funeral and death-bed expenses

According to sec. 4 (a) of the Act so much of the funeral and death bed expenses are deductible as the Commissioner considers to be fair and reasonable. These expenses normally include all costs related to the last illness of the deceased and include payments to doctors, nursing homes, chemists, etc.[274] Sec. 4 (a) furthermore includes the costs related to the burial or cremation of the deceased, and by the latest Taxation Laws Amendment Act,[275] even the deduction of the cost of a tombstone.[276]
However, the costs of conveying a body of the deceased in or out of the country or from one part of the country to another cannot be deducted.[277]
Because the gross value of the estate of a deceased who died as an 'ordinarily resident' of the Republic embodies his South-African property as well as his world wide property, it can be concluded that the funeral and death bed expenses of this person are deductible no matter where in the world the funeral took place [if the deceased died overseas and was buried there], as long as these costs can be considered to be fair and reasonable.
On the other hand the funeral costs of a deceased who owned property in South-Africa, but was a 'non-resident' at the time of his death are not deductible from the gross value of his estate, as long as the funeral took place outside the Republic [when the deceased died abroad and was buried there]. In these cases the burial costs of a 'non-resident' deceased are not of South-African origin and they are 'normally' deductible under the foreign death

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273) The reader may therefore be referred to the works of, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.1 to 28.27. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 360 to 395 / ***W. Abrie,*** Estates - Planning and Administration, p. 301 *et seqq.* / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning, Hoofstuk 3 / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 396 to 398 / ***P. A. Olivier,*** Trust Law and Practice, p. 210 *seqq.* / ***J. H. Jordaan,*** Estate & Financial Planning / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 127 *et seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 13 / ***L. A. Kernick,*** Administration of Deceased Estates, chap. 10.

274) *Cf.,* ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 127 *et seq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 125 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.2. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 361 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5.

275) As published in, ***D. Meyerowitz / P. Meyerowitz / D. M. Davis / T. S. Emslie,*** The Taxpayer 42 (1993), p. 101 *seqq.*, especially 120g *et seq.*

276) See, ***D. Meyerowitz / P. Meyerowitz / D. M. Davis / T. S. Emslie,*** The Taxpayer 42 (1993), 120g.

277) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.2. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 127.

tax law which is applicable in the country of the deceased's 'ordinarily residence'.[278] However, it could be argued that the funeral expenses of a 'non-resident' can be deductible from the gross value of his South-African estate if the deceased died within the Republic and was buried here. In these cases the funeral and death bed expenses for the 'non-resident' deceased are of South-African origin, if they were paid for out of the 'South-African property' of the deceased.[279]

III.3.2. Debts due within the Republic

Sec. 4 (b) EDA allows a deduction in respect of all claims against the estate, including payment of unenforceable claims. But in order to qualify for deduction the debts have to have certain features. A debt is deductible, if it is (a) owed by the deceased[280] (b) to a person or persons 'ordinarily resident' in the Republic[281] and (c) settled out of property which is included in the estate[282].

Sec. 4 (b) of the Act therefore requires that the creditor of the deductible debt has to be 'ordinarily resident'[283] in the Republic at the time of the death of the debtor; although it is irrespective where the debt was incurred[284].

If the creditor is not 'ordinarily resident' in the Republic at the date of death of the deceased [the debtor] a deduction of the deceased's debt under sec. 4 (b) of the EDA is not permitted; but the debt might then be deductible under sec. 4 (f) of the Act.[285]

When all the above mentioned requirements for the deductibility of a South-African debt are met, the amount of the debt can be deducted from the gross value of the estate of a person who died as an 'ordinary resident' of the Republic as well as from the South-African property left by a 'non-resident'.

III.3.3. The administration charges - costs of administration and liquidation

Under the provisions of sec. 4 (c) the general costs of winding up the deceased estate,

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278) Because the gross value of the deceased estate of a 'non-resident' of the Republic mainly consists of his South-African property and assets, it would be contradictory to allow a *per se* deduction of foreign costs from the gross value of an estate which is generally embodying property situated or by right of action enforceable and recoverable within the Republic South-Africa. A deduction from the gross value of the South-African estate of a 'non-resident' on the one side can only be allowed, if it is directly connected to an expense paid out of his South-African estate on the other side.

279) In this case the deduction of the funeral costs of the 'non-resident' are directly connected to an expense paid out of his South-African estate. Consequently a deduction according to sec. 4 (a) of the Act should be allowed.

280) For details see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.4. / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 362 / ***W. Abrie,*** Estates - Planning and Administration, p. 302.

281) More detailed, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.5. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 129 *et seqq.*

282) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.6.

283) For details on the use of the term 'ordinarily residence' see, part B. III.2.1.2.a., p. 78 *seqq.* of this work.

284) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.5. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 129 *et seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 302 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5.

285) See, ***W. Abrie,*** Estates - Planning and Administration, p. 302 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.5 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 129 *et seqq.*, p. 132.

such as the costs of realising assets, the costs of collecting debts, the executor's remuneration, the costs of advertising for creditors and advertising the account, etc.[286] can be deducted from the gross value of the estate.[287] But it has to be observed that income accruing after the death of the deceased is not 'property' and expenses in connection with such income are not deductible from the estate.[288]
The administration charges are deductible in cases where the estate of a deceased of an 'ordinarily resident' of the Republic is administered as well as in those cases where the South-African estate left by a 'non-resident' is administered according to the rules of the South-African Administration of Estates Act 66 of 1965.

III.3.4. Expenses connected to the compliance with the EDA

The provisions of sec. 4 (d) of the EDA allow the deduction of the expenditure, incurred in order to comply with the EDA, for example, with the requirements of the Master or the Commissioner. Sec. 4 (d) of the Act therefore mainly includes legal costs incurred by the executor in settling a dispute with the Revenue authorities or costs of providing security, costs of valuing an estate, etc., but it has to be noted that sec. 4 (d) of the EDA does not allow the deduction of expenditure already deducted under sec. 4 (c).[289]
The expenses connected to the compliance with the EDA are deductible from the gross value of the estate of a person who died as an 'ordinary resident' of the Republic as well as from the gross value of the South-African estate left by a 'non-resident' if they are connected to the 'non-resident's' South-African property.

III.3.5. Foreign property

It was shown above[290], that the international deceased estate of a person who died as an 'ordinary resident' of the Republic consists of his South-African as well as his world wide property, irrespective of where this property is situated.
The value of certain 'foreign property' which is included in the international deceased estate of an 'ordinary resident' of the Republic at the time of his death, however, can be deducted from the gross value of his estate, according to the rules of sec. 4 (e) of the Act. The deduction of sec. 4 (e) EDA depends chiefly on the time and the manner in which the deceased aquired the 'foreign property and assets', and the Act introduces special preconditions for the allowable deduction of 'foreign property' which is included in his

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286) For further details see therefore, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 29, para. 29.1. to 29.24. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 397 to 3120 / ***W. Abrie,*** Estates - Planning and Administration, p. 314 *et seqq.* / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.7. / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 14 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 109 *et seq.* .

287) See, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 363 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.8.

288) ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 363 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.8.

289) For details see, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.9. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 125 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 128 *et seq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 303.

290) See, part B. III.2.1.1., p. 68 *seqq.* of this work.

international deceased estate.[291]

Although sec. 4 (e) of the EDA cannot really be described as a provision which is designed to give 'full' unilateral relief from international double taxation [like sec. 3 (2) (c)-(h) of the EDA, for example], it can be observed, that sec. 4 (e) of the Act provides a partial relief for certain categories of 'foreign property' which are embodied in the international deceased estate of deceased persons who were not always 'ordinarily resident' in the Republic and whose estate would otherwise perhaps attract the payment of double death taxes.

A further indication of this special character of sec. 4 (e) of the Act is the fact that it is in practice not consistent with sec. 4 (e) to substract 'foreign property' from the gross value of the deceased estate of a person born in South-Africa who, having left the country, returns to it and at the date of his death possesses foreign assets, aquired while he was living overseas.[292]

In order to be deductible the 'foreign property' of an 'ordinarily resident' of the Republic must be situated outside the Republic [at the date of death of the deceased] *and*

(i) it must have been aquired by the deceased, before he became 'ordinarily resident' in the Republic for the first time [e.g. the 'foreign property' of a person who immigrated to South-Africa], *or*

(ii) if he aquired it after he became 'ordinarily resident' in the Republic for the first time,

(aa) he must have aquired it by donation from a non-resident (but not from a 'foreign company'), *or*
(bb) he must have inherited it from a non-resident, *or*

(iii) he must have aquired it out of the proceeds from the disposal of the 'foreign property' mentioned in (i) and (ii), or out of any income from such 'foreign property'.[293]

In this context it has furthermore to be mentioned that if the 'foreign property' which falls within the scope of sec. 4 (e) of the Act is sold and the proceeds are used to buy an asset in South-Africa, the allowable deduction under sec. 4 (e) of the EDA would be lost.[294]

The allowable deduction under sec. 4 (e) of the EDA is only deductible from the gross value of the estate of a person who died as an 'ordinary resident' of the Republic.

III.3.6. Foreign debts - debts due outside the Republic

Sec. 4 (f) of the Act is concerned with the allowable deduction of debts due to persons li-

291) *Cf.*, ***W. Abrie,*** Estates - Planning and Administration, p. 303.
292) *Cf.*, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 150.
293) See for details, ***W. Abrie,*** Estates - Planning and Administration, p. 303 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.13. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 126 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 149 *et seqq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 365, 366.
294) See, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 366 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.13.

ving outside South-Africa. Such debts are only allowable as deductions if and to the extent to which they have been paid out of the proceeds of assets which are included in the gross value of the estate as 'property' for estate duty purposes.[295] Debts of the deceased, due by him to foreign creditors ['non-residents' of the Republic], must first be paid from the foreign assets which are not 'property', and it is only the excess which is then deducted from the gross value of the estate according to sec. 4 (f) of the EDA.[296]

For example, if the South-African property of a deceased amounts to R 100 000, foreign property that is not included in the estate amounts to R 40 000 and foreign debts amount to R 10 000, no portion of the foreign debt is deductible under sec. 4 (f) of the EDA, since the non-dutiable foreign property exceeds R 10 000.

If on the other hand the foreign debts had amounted to R 50 000, R 10 000 of this amount would have been deductible as the excess of the foreign debts (R 50 000) over the non-dutiable foreign assets (R 40 000).

If all the foreign property and assets of a deceased are dutiable, all foreign debts are deductible. If the foreign assets consist of both dutiable and non-dutiable assets, the excess of the foreign debts over the non-dutiable foreign assets can be deducted.[297]

It has to be emphasized that the debts of the deceased have to be owed to a person or persons 'ordinarily resident' outside South-Africa in order to rank for deduction.[298]

If all the above-mentioned requirements for the deductibility of a foreign debt are met, the amount of the debt can be deducted from the gross value of the estate of a person who died as an 'ordinary resident' of the Republic as well as from the South-African property left by a 'non-resident' [but only if the foreign debts exceed the 'non-resident's' 'foreign property and assets'].

III.3.7. Limited interests aquired by the way of donation

The provisions of sec. 4 (g) of the EDA provide, that if the deceased held a usufruct, a fiduciary interest or an annuity charged upon property[299], transferred to him by a donation during his lifetime and the right to which reverts to the original donor on his death, the value of the limited interest held by him is deducted from the total value of his estate.

This provision 'generally' refers to South-African limited interests and the South-African limited interests which were aquired in the above mentioned way can be deducted from the gross value of the estate of a person who died as an 'ordinary resident' of the Republic as well as from the South-African property left by a 'non-resident'.

Because the gross value of an international deceased estate of an 'ordinary resident' of the Republic in addition to his South-African property also comprises his world wide property, it could be argued that 'foreign limited interests' held by an 'ordinarily resident' of the Republic at the time of his death might also be deductible under sec. 4 (g), as soon as they form a part of the gross value of his international deceased estate and can be cha-

295) In detail, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.14. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 367 / ***W. Abrie,*** Estates - Planning and Administration, p. 302 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 132 *et seq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 126.

296) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 132 *et seq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.14./ ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 367.

297) See, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 133.

298) *Cf.,* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.14./ ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 367.

299) As defined in sec. 3 (2) (a) of the EDA, see also part B. III.2.1., p. 68 *et seqq.* of this tesis.

racterized as 'foreign limited interests which were aquired by the way of donation' [comparable[300] to the interests meant in sec. 4 (g) of the Act].
From the gross value of the deceased estate of a person who was 'not ordinarily resident' in South-Africa at the time of his death a deduction of 'foreign limited interests which were aquired by the way of donation' is not possible because these interests were not included in his South-African estate in the first place.[301]

III.3.8. Donations to charitable institutions and other similar bequests

A further deduction is allowed by sec. 4 (h) of the EDA in respect of the value of any property which is included in the gross value of the deceased estate and which accrues to certain institutions which carry on activities which are mainly concerned with the support and furtherance of charity, education and religion and which are exempt from income tax in terms of the Income Tax Act 58 of 1962 [as long as they were not otherwise allowed as a deduction under sec. 4 of the EDA].[302]
In order to be deductible from the gross value of the estate of a deceased the value of property of the deceased, in terms of his will or any other manner, must accrue or have accrued to

(i) any charitable, educational or religious institution of a public character which is exempt from tax in terms of sec. 10 (1) (f) of the ITA and any fund which has been approved by the Commissioner under that section[303]; *or*

(ii) a public institution in the Republic which is exempt from tax in terms of sec. 10 (1) (cB) (i) (aa) to (dd) of the ITA, i.e. an institution formed to:

  (aa) conduct or promote scientific, technical or industrial research; *or*
  (bb) to provide medical, dental, blood transfusion, hospital or nursing services; *or*
  (cc) to engage in or promote nature conservation or animal protection activities; *or*
  (dd) to engage in or promote activities which the CIR is satisfied are of a cultural nature;[304] *or*

(iii) the State or any local authority within the Republic;[305] *or*

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300) A method for a comparison between the South-African and the foreign limited interests can be found in part B. III.2.1.1.b.dd.β. and γ., p. 74 of this work.

301) See, part B. III.2.1.2., p. 78 *seqq.*

302) For details see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.16. / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 370, 371 / ***W. Abrie,*** Estates - Planning and Administration, p. 304 *seqq.* / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 133 *et seq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 126, 127.

303) The abbreviation ITA refers to the Income Tax Act 58 of 1962. For details on sec. 10 (1) (f) ITA see, ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. I, chap. 9, para. 9.11. / ***C. Divaris / M. Stein,*** Silke on South-African Income Tax, Vol. I, chap 6., para. 6.16, 6.16A. / ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, para. 557 to 560A.

304) For further information on sec. 10 (1) (cB) (i) (aa) to (bb) of the ITA see, ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. I, chap. 9, para. 9.3. / ***C. Divaris / M. Stein,*** Silke on South-African Income Tax, Vol. I, chap 6., para. 6.45 / ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, para. 562.

305) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.16.

(iv) any company, society or association within the Republic which is exempt from tax in terms of sec. 10 (1) (cF) of the ITA, i.e. which has been formed to provide residential accommodation to aged or retired persons.[306]

If a deceased in terms of his will or in any other manner transferred parts of his property and assets to a charitable institution or made a bequest in accordance with the above mentioned requirements of the ITA, the amount of the value of this property can be deducted from the gross value of his estate when he died as an `ordinary resident´ of the Republic as well as from his South-African property when he died as a `non-resident´ of the Republic [but in these cases only if the `non-resident´ transferred South-African property to a South-African charitable institution].
In the cases where the gross value of the international deceased estate of an `ordinary resident´ of the Republic also comprises donations he made to any foreign charitable, educational or religious institution, it is arguable that these donations might have to be seen as an allowable deduction in the sense of sec. 4 (h) (i) of the EDA [if these donations can be compared to the donations meant in secn 4 (h) (i)].[307] However, it has to be observed that sec. 4 (h) (i) does not explicitly provide for such a deduction and sec. 4 (h) (ii) to (iv) only mentions South-African institutions.

III.3.9. Improvement made to property by the beneficiary

In the cases where the value of any property which is included in the gross value of the deceased estate has been enhanced by impropvements made at the expense of the person to whom the property accrues upon the death of the deceased, the amount by which the value of such property has been increased by those improvements is deductible from the deceased`s estate according to sec. 4 (i) of the EDA.[308] In order to be deductible the value of the property must have increased (a) due to improvements made by the beneficiary of such property, (b) during the lifetime of the deceased and (c) with the deceased`s consent.[309]
The deductible amount is based on the amount by which the improvements have increased the deceased`s property`s value and not the true cost of improvement. If improvements made at the cost of R 5 000 increase the value of the property by R 15 000, the deduction will be R 15 000.[310]
The improvements made to the deceased`s property by the beneficiary can be deducted

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306) For detailed information on sec. 10 (1) (cF) of the ITA see, ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. I, chap. 9, para. 9.7. / ***C. Divaris / M. Stein,*** Silke on South-African Income Tax, Vol. I, chap 6., para. 6.24A / ***D. Meyerowitz / E. Spiro,*** Meyerowitz and Spiro on Income Tax, para. 562B.

307) This results mainly from the fact, that any charitable, educational or religious institution of a public character also means any foreign charitable, educational or religious institution of a public character. See, sec. 4 (h) (i) of the EDA, read together with sec. 10 (1) (f) of the ITA, and ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. I, chap. 9, para. 9.11. / ***C. Divaris / M. Stein,*** Silke on South-African Income Tax, Vol. I, chap 6., para. 6.16, 6.16A.

308) For details see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.23. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 372 / ***W. Abrie,*** Estates - Planning and Administration, p. 306, 307 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 143 *et seq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 127, 128.

309) ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5.

310) See also the examples of ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5 / ***W. Abrie,*** Estates - Planning and Administration, p. 307.

from the gross value of the estate of a person who died as an `ordinarily resident´ of the Republic as well as from the gross value of the South-African estate left by a `non-resident´, if the improvements made by the beneficiary are connected to the `non-resident`s´ South-African property.

If the gross value of the international deceased estate of an `ordinarily resident´ of the Republic is enhanced by improvements made to the deceased`s foreign property by the beneficiary of this property, it could once more be arguable that the value of these improvements might have to be seen as an allowable deduction by analogy to sec. 4 (i) of the EDA [if the improvements made by the beneficiary to the deceased`s foreign property can be compared to the improvements meant in sec. 4 (i)]; but it must be observed, that this section does not explicitly provide for such a deduction.

III.3.10. Improvements to fiduciary or usufructuary interest

A similar deduction to that available in terms of sec. 4 (i) of the Act applies under sec. 4 (j) of the EDA, where the value of any fiduciary, usufructuary or other like interest which ceases upon the death of a deceased has been enhanced by improvements made at the expense of the person to whom the benefit of the interest will fall on the death of the deceased.[311]

The allowable deduction is equal to the enhancement of the value of the property, calculated at the time of death of the deceased and not at the time that the improvements were made.[312] In order to have an allowable deduction the improvements to the fiduciary or usufructuary interest have to be made during the lifetime of the deceased and with his consent.[313]

The improvements made to the fiduciary or usufructuary interest by the beneficiary can be deducted from the gross value of the estate of a person who died as an `ordinary resident´ of the Republic as well, as from the gross value of the South-African estate left by a `non-resident´, if the improvements made by the beneficiary are connected to the `non-resident`s´ South-African property.

If the gross value of the international deceased estate of an `ordinary resident´ of the Republic is enhanced by improvements to his foreign fiduciary or usufructuary interests by the beneficiary of these limited interests, it could once again be arguable that the value of these improvements might have to be seen as an allowable deduction by analogy to sec. 4 (j) of the EDA [if the improvements made by the beneficiary to the deceased`s foreign limited interests can be compared to the improvements envisaged by sec. 4 (j)]; but once again it must be observed, that this section does not explicitly provide for such a deduction.

III.3.11. Insurance policies and registered stock

The provisions of sec. 4 (k) and sec. 4 (l) of the Act were deleted from the EDA with ef-

311) More detailed in the works of, ***W. Abrie,*** Estates - Planning and Administration, p. 307 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.24. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 128 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 144 *et seq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 373.

312) For a practical example see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.24 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5.

313) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.24 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5.

fect from the 16th of March 1988.[314]

III.3.12. Accrual claims against the estate

Where the surviving spouse or the estate of the surviving spouse has a claim against the estate of the deceased [according to sec. 3 of the Matrimonial Property Act 88 of 1984], because the accrual in the estate of the deceased is larger than the surviving spouse`s accrual, this claim is in accordance with sec. 4 (1A) of the EDA deductible from the gross value of the deceased`s estate.[315]

The claim of the surviving spouse against the deceased estate can deducted from the gross value of the estate of a person who died as an `ordinary resident´ of the Republic as well as from the gross value of the South-African estate left by a `non-resident´ [if he was married according to South-African law and the South-African property of the `non-resident´ deceased was governed by the matrimonial property regime of the Matrimonial Property Act 88 of 1984].

Because sec. 4 (1A) explicitly only refers to claims under the Matrimonial Property Act 88 of 1984 it is questionable what will happen to the accrual claims a surviving spouse or the estate of a surviving spouse has against the international deceased estate of an `ordinary resident´ under a foreign matrimonial property regime [if the spouses were married under a foreign law and the marriage was governed by a foreign matrimonial property regime].

III.3.13. Limited interests created by a predeceased spouse

According to sec. 4 (m) of the Act, the value of a usufructuary or another similiar right [*n.b.* that a fiduciary interest is excluded] or an annuity charged upon property can be deducted from the gross value of the deceased`s estate, if such a usufruct, right or annuity was created by the predeceased spouse of the deceased.[316]

In order to be deductible in accordance with sec. 4 (m) of the EDA the value of such property must first be included in the gross value of the deceased estate and then deducted.

But this deduction is not claimable if a deduction in respect of the value of such interest or right was allowed in the determination of the net value of the deceased estate of the predeceased spouse under the provisions of sec. 4 (q) of the Act, that is to say, where the usufruct, similar right or annuity had been left to the second dying spouse.[317]

The limited interests that were created by a predeceased spouse can be deducted from the gross value of the estate of a person who died as an `ordinary resident´ of the Republic as

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314) ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 374 to 377 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 128, 129 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 141 *et seq.*

315) For more details see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.7. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 378, 379 / ***W. Abrie,*** Estates - Planning and Administration, p. 307 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 129.

316) See also, ***W. Abrie,*** Estates - Planning and Administration, p. 307, 308 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.19. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 129, 130 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 146 *et seq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 380.

317) ***W. Abrie,*** Estates - Planning and Administration, p. 308 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.19.

well as from the gross value of the South-African estate left by a 'non-resident' [if the usufructuary, the annuity or other similar rights that were created by a predeceased spouse are connected to the 'non-resident's' South-African property].

III.3.14. Books, pictures, statuary or other works of art lent to the State

Where the gross value of a deceased's estate includes books, paintings, sculptures or other works of art, the value of these objects of art can be deducted from the gross value of his estate if the deceased lent the items mentioned to the state or any other local authority in the Republic for a period of at least 30 years in terms of a notarial deed, and the deceased died within that period [sec. 4 (o) of the Act].[318]

Books, pictures, statuary or other works of art lent to the State can be deducted from the gross value of the estate of a person who died as an 'ordinarily resident' of the Republic as well as from the gross value of the South-African estate left by a 'non-resident' [if the aforementioned books, pictures, statuary or other works of art are included in the 'non-resident's' South-African property].

If foreign books, pictures, statuary or other works of art, which are included in the gross value of the international deceased estate of a person who died as an 'ordinarily resident' of the Republic are lent to the South-African state, their value will also have to be deducted from the gross value of his estate in terms of sec. 4 (o) of the Act. But sec. 4 (o) of the Act does not explicitly provide for the situation where foreign [or South-African] objects of art are lent to a foreign state under the same preconditions as mentioned above; and it seems to be questionable and doubtful whether the value of such objects of art [which are included in the gross value of an international deceased estate of an 'ordinarily resident' of the Republic], is deductible in terms of sec. 4 (o) of the EDA.

III.3.15. The value of deemed property taken into account in the valuation of shares

The value of any property deemed to be property [according to sec. 3 (3) of the Act[319]] of the deceased which the Commissioner is satisfied has been taken into account in valuing unquoted shares [sec. 5 (1) (f) of the Act] included as property [as defined[320]] in the estate ranks for deduction in full provided that this value is not otherwise deductible under sec. 4 of the Act [sec. 4 (p) of the EDA].[321]

The value of deemed property which was also taken into account in the valuation of unquoted shares [sec. 5 (1) (f) of the Act] can be deducted from the gross value of the estate of a person who died as an 'ordinary resident' of the Republic as well as from the gross value of the South-African estate left by a 'non-resident' [if the deemed property built a part of the non-residents South-African property and was taken into account in the valuation of unquoted shares (sec. 5 (1) (f) of the Act) he held in a South-African compa-

318) For details see, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 385 to 387 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 130 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 143 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.25. / ***W. Abrie,*** Estates - Planning and Administration, p. 308.

319) See also, part B. III.2.2., p. 82 *et seqq.* of this work.

320) *Cf.,* part. B. III.2.1., p. 68 *et seqq.* of this work.

321) See, ***W. Abrie,*** Estates - Planning and Administration, p. 308, 309 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.26. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 131 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 147 *et seq.* / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 388.

ny].
But the application of the deduction rule of sec. 4 (p) of the Act mentioned above will become more problematic, where the gross value of the international deceased estate of an 'ordinary resident' of the Republic also embodies foreign property deemed to be property, which was taken into account in the evaluation of foreign unquoted shares [and it is questionable whether sec. 4 (p) or sec. 4 (p) analogously provide for such a deduction].

III.3.16. The amounts which accrued to the surviving spouse

The value of all property which is included in the gross value of the deceased's estate and which accrues to the surviving spouse, either in the terms of a will or by intestate succession, can be deducted to the extent that it has been included in property [sec. 4 q of the EDA].[322] Sec. 4 (q) includes, for example, usufructs, fiduciary rights and annuities charged upon property which accrued to the surviving spouse, for example, due to donations or bequests made by a third party.[323] The deduction also applies to the proceeds of a policy on the deceased's life which accrues to the surviving spouse, whether in terms of a will or as a result of a cession of the policy which the deceased made during his lifetime.[324]
However, it must be observed that the deduction of amounts already deducted under other provisions of sec. 4 EDA is not allowed.
The sec. 4 (q) deduction must furthermore be reduced by any amount which the surviving spouse has to dispose of to any other person or trust in terms of the will of the deceased; and it is also not allowed to make a deduction under sec. 4 (q) of the Act if the deceased established a trust for the benefit of the surviving spouse and if someone other than the spouse can also benefit from the trust.[325]
The amounts which accrued to the surviving spouse can be deducted from the gross value of the estate of a person who died as an 'ordinarily resident' of the Republic as well as from the gross value of the South-African estate left by a 'non-resident' [if the accruing amounts are included in the 'non-resident's' South-African property].
Finally it can be stated that the application of sec. 4 (q) will also be difficult where it has to be applied to foreign property which is included in the gross value of the property of an international deceased estate of an 'ordinary resident' of the Republic.

III.3.17. Summary

In order to determine the net value of a[n] [international] deceased estate, the gross value of the estate has to be reduced by the deductions that are allowed under sec. 4 (a) to (q) of the EDA.
On examining the provisions of sec. 4 (a) to (q) of the Act it can be seen that the allowable deductions in terms of sec. 4 (a) to (q) do not explicitly distinguish between the deductions that have to be made from the international [world wide] estate of a deceased

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322) More detailed, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 388 to 393 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 131 *et seqq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.17. / ***W. Abrie,*** Estates - Planning and Administration, p. 309.

323) See, ***W. Abrie,*** Estates - Planning and Administration, p. 309.

324) *Cf.*, ***W. Abrie,*** Estates - Planning and Administration, p. 309.

325) See, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.5. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 388 to 393 / ***W. Abrie,*** Estates - Planning and Administration, p. 309.

who was 'ordinarily resident' of the Republic at the time of his death, and the deductions that have to be made from the [mainly] South-African estate of a 'non-resident' person owning property in South-Africa at the time of his death; although it was indicated earlier that these estates usually have a different scope.
As a result the application of the regulations of sec. 4 (a) to (q) becomes difficult as soon as a foreign element is introduced to a[n] [international] deceased estate and the deductions in terms of sec. 4 (a) to (q) of the EDA have to be applied to these estates.

One possible approach to deal with and to overcome the difficulties introduced by the international aspects of a deceased estate in the context of the application of sec. 4 (a) to (q) is to refer to one of the basic principles of the EDA, *viz.*, the principle that the gross value of the deceased estate of a 'non-resident' is mainly comprised of his South-African property and assets, whereas the gross value of the deceased estate of an 'ordinary resident' is assessed by compiling his South-African and his world-wide property and assets.
In accordance with this principle of the EDA, deductions from the gross value of the estate of a 'non-resident', in terms of sec. 4 of the Act, can only be allowed if they are directly connected to the gross value of his South-African property and assets[326], whereas deductions from the gross value of the estate of an 'ordinary resident', in terms of sec. 4 of the Act, will be allowed if they can be connected to the gross value of his international deceased estate and certain other factors as laid down in the several sub-sections of sec. 4 of the Act.

The general attitude of the EDA to exclude the possibility of levying double death duties on 'foreign property' by granting unilateral relief finds a further elaboration in sec. 4 (e) of the EDA.
Although sec. 4 (e) of the EDA cannot really be described as a regulation which is designed to give a 'full' unilateral relief from international double taxation [like sec. 3 (2) (c)-(h) of the EDA], it can be observed that sec. 4 (e) of the Act provides partial relief for certain categories of 'foreign property' which are embodied in the international estate of deceased persons who were not always 'ordinarily resident' in the Republic (e.g. immigrants) and whose estate would otherwise perhaps attract the payment of double death taxes.

III.4. The abatement in terms of sec. 4 A of the Estate Duty Act

After the gross value of the international deceased estate of an 'ordinary resident' or a 'non-resident' of the Republic has been reduced by the applicable allowable deductions of sec. 4 (a) to (q) of the EDA, the net value of the estate has been established.[327]
Since the partial implementation of the Margo Report proposals in the EDA[328] and the

326) Sec. 4 deductions are directly connected to the gross value of the South-African estate of a 'non-resident' if the expense for which an allowable deduction in terms of sec. 4 of the EDA is claimed, can directly be linked to an expense which was paid out of [or which was paid with a special regard to] the South-African estate [property and assets] of the 'non-resident' on the other side.

327) *Cf.*, ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 360 / ***W. Abrie,*** Estates - Planning and Administration, p. 301 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.1.

328) *Vide supra,* part A. IV.3. p. 18 of this work and ***M. Stein,*** (1988) 3 Tax Planning, p. 140, 142 / ***D. Meyerowitz / P. Meyerowitz / D. M. Davis,*** The Taxpayer 37 (1988), p. 120(d).

introduction of a new sec. 4A to the Act, the dutiable amount for estate duty purposes is assessed by a further and substantial deduction of R 1 million from the net value of the deceased estate.[329]

After the abatement [rebate] of R 1 million which is allowed in terms sec. 4A of the EDA, has been deducted from the net value of the [international] deceased estate of an `ordinarily resident´ or from the net value of the South-African estate of a `non-resident´ of the Republic, the dutiable amount of the international respectively South-African estate concerned [for South-African estate duty purposes] has been established.[330]

According to the first schedule of the EDA the rate of estate duty [at a flat rate of 15%] has to be applied on the dutiable amount and the estate duty liability on the international estate of a deceased person is basically assessed.

III.5. Other rebates and deductions

Although most of the deductions which are allowed under the regulations of the EDA are embodied in the terms of sec. 4 (a) to (q) of the Act, there are a number of other rebates and deductions by which the South-African estate duty liability of an international deceased estate of both an `ordinarily resident´ and a `non-resident´ of the Republic can be reduced.[331]

However, in contrast to the allowable deductions in terms of sec. 4 (a) to (q) these rebates and deductions are not substracted from the gross value of a deceased estate, but directly from the otherwise payable amount of estate duty.[332]

These rebates and deductions are laid down in sec. 16 of the Act and in the First Schedule to the EDA. The deductions and rebates which are directly deductible from the amount of estate duty comprise a rebate for rapid succession in terms of the First Schedule to the EDA as well as a deduction for transfer duties paid, in terms of sec. 16 (a) of the Act, and a deduction for foreign death duties paid in respect of the same deceased estate in a foreign country [sec. 16 (c) EDA].

Because the scope of this work is limited to some aspects of estate duty on deceased estates in the Republic of South-Africa - with special reference to the problems and effects of double taxation occuring in relation to the German ErbStG (Inheritance Tax Act) a short introduction to the first two possible rebates and deductions will suffice, but the unilateral relief provision granted by sec. 16 (c) of the EDA will be dealt with in greater detail.

III.5.1. Rebate for rapid succession - rebate on successive deaths

The first rebate that can be deducted from the payable amount of estate duty is the rebate for rapid succession in terms of the First Schedule of the EDA.

The rebate on successive deaths follows the broad principle of the EDA that property in a

329) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 28, para. 28.1. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 394, 395 / ***W. Abrie,*** Estates - Planning and Administration, p. 309 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.6.

330) ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.6. / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 394, 395.

331) See also, ***W. Abrie,*** Estates - Planning and Administration, p. 310.

332) ***W. Abrie,*** Estates - Planning and Administration, p. 310 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 160 *seqq.* .

deceased estate shall not be subjected to double taxation [neither domestic nor international double taxation[333]]. In cases where property is included in the deceased estate of a [second] person which formed part of the deceased estate of another [first] person who died less than ten years before the [second] deceased, a measure of relief is available [see, First Schedule to the EDA].[334]

In terms of the First Schedule to the EDA the amount of estate duty based on property included in the estate of the first dying and in the estate of the second dying can be reduced [according to the apportionment method[335]] by

100% if the second dying person dies within two years ot the first dying person
80% if the period is two to four years
60% if the period is four to six years
40% if the period is six to eight years, and
20% if the period is eight to ten years, after the death of the first dying person,

provided that the property or underlying property resulted in estate duty when the first person died. The reduction cannot be more than the estate duty paid on the death of the first dying person.[336]

The rebate in terms of the First Schedule of the EDA can be deducted from the amount of estate duty of a person who died as an 'ordinary resident' of the Republic as well as from the amount of South-African estate duty payable by a 'non-resident' [if the property or underlying property resulted in South-African estate duty when the first person died and thereafter built a part of the non-residents South-African property].

If the property or underlying property can be characterized as foreign property in the international deceased estate of an 'ordinary resident' of the Republic, the rebate in terms of the First Schedule of the EDA should also be deductible if the foreign property resulted in South-African estate duty when the first owner died.

III.5.2. Transfer duty

In terms of sec. 16 (a) of the EDA the payable amount of estate duty can furthermore be reduced by any amount of transfer duty which [...] has been paid in respect of the aquisition from the deceased or his estate of any property included in the estate for the purposes of the assessment of duty by any person liable for the duty attributable to that property.

This means that if someone aquired property from a first dying or from his estate and paid transfer duty on it, this transfer duty can be deducted from the payable amount of estate duty levied on his property, provided that the second dying who was liable for the payment of transfer duty on the property in the first case is also liable for the estate duty in re-

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333) For a definition of the terms domestic and international double taxation *vide supra*, part A. II.2.2. and II.2.3., p. 8 *seqq.* of this work.

334) See, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.11. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 162 *seqq.* / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 165 *et seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 310 *seq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.9.

335) For a detailed introduction to the apportionment method see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.9.

336) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 165 / ***W. Abrie,*** Estates - Planning and Administration, p. 310 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.9. / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.11.

spect of that property in the second case.[337]
Presently there is probably no constellation under which transfer duty can or has to be deducted from the payable amount of estate duty levied on a deceased estate, because transfer duty is not payable in respect of the aquisition of property by inheritance [either testate or intestate][338] and another typical case of aquiring property, by the way of donation, was removed from liability for estate duty.[339]
Nevertheless, as soon as transfer duty is paid on property in the above mentioned way, the deduction in terms of sec. 16 (a) of the EDA can be substracted from the amount of estate duty of a person who died as an 'ordinary resident' of the Republic as well as from the amount of South-African estate duty payable by a 'non-resident'.

III.5.3. The deduction of foreign death duties

As mentioned above, it is one of the basic principles of the EDA not to subject the property and assets which are included in a[n] [international] deceased estate to [domestic or international] double taxation. This principle applies especially where a foreign element (e.g. foreign property or foreign taxation) is introduced to the assessment of a South-African estate duty liability.
One example of this principle are the above-mentioned provisions of sec. 3 (2) (c) to (h) and sec. 4 (e) of the EDA. These provisions can be regarded as special unilateral relief regulations, designed to grant relief from double taxation under certain special circumstances.
It can be seen, that the provisions of sec. 3 (2) (c) to (h) and sec. 4 (e) of the Act were especially designed and expressily refer either to situations where the foreign property of a 'non-resident' [sec. 3 (2) (c) to (h)] or the foreign property of a person who was not always 'ordinarily resident' in South-Africa and only later in his life became 'ordinarily resident' in the Republic [for example, immigrated to South-Africa] is exempt from a South-African estate duty liability.
In contrast to the provisions of sec. 3 (2) (c)-(h) and sec. 4 (e) of the Act, sec. 16 (c) of the EDA deals with unilateral relief in those cases where the international deceased estate of a person who died as an 'ordinary resident' of the Republic did not only attract South-African estate duty but also foreign death duties.[340]
According to sec. 16 (c) of the Act a deduction of foreign death duties from the South-African estate duty liability is allowed if the foreign property of an 'ordinarily resident' person of the Republic is the subject of foreign death duties and South-African estate duty at the same time; and the deduction of foreign death duties in terms of sec. 16 (c) of the EDA can be applied where (a) the deceased was 'ordinarily resident' in the Republic at the date of his death; and (b) the foreign death duties were paid on property situate outsi-

337) For further information see, ***W. Abrie,*** Estates - Planning and Administration, p. 313 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.9. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 160 *seqq.* / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 163 *et seq.*

338) See, sec. 9 (1) (e) of the Transfer Duty Act 40 of 1949 and ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8. / ***W. Abrie,*** Estates - Planning and Administration, p. 313 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.9.

339) *Cf.,* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8.

340) *Cf.,* ***J. N. Swart,*** The Planning and Administration of Estates, p. 162 *seqq.* / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 162 *et seq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8. / ***W. Abrie,*** Estates - Planning and Administration, p. 313, 314.

de the Republic [foreign property] but included in the deceased's [world wide or international] estate for the purpose of South-African estate duty.[341]

However, the deductible amount of foreign death duties cannot exceed the estate duty imposed in the Republic and the deduction is limited to the amount of estate duty payable on the property concerned in the Republic.[342] This means, that the foreign death duties attributable to the property concerned as well as the South-African estate duty attributable to such property must both be ascertained, and only the lesser of the two amounts is deductible.

Although the Act lays down no method as to how either the foreign death duty or the South-African estate duty attributable to the property has to be ascertained, the amount of estate duty paid on a certain property item which is included in the international deceased estate of an 'ordinary resident' of the Republic is normally determined on an appotionment basis, which is following the formula[343]:

$$Z = \frac{A}{B} \times C$$

where Z = the duty attributable to the property
A = the net value of the category or item of property concerned
B = the total net value of the [international] deceased estate
C = the total amount of payable South-African estate duty
[before the deduction of the foreign duty]

The attributable foreign death duty which is levied on the property concerned can be ascertained by several methods. If a particular amount of foreign death duty is levied on the item or category of property concerned this amount will be the attributable amount of death duties levied on the foreign property for the purpose of sec. 16 (c) of the EDA. If an apportionment of the foreign death duties is necessary to establish the attributable amount of foreign duties on the property concerned, it is submitted that the provisions of the foreign death duty law dealing with this matter should be followed.[344] Finally, if there are no foreign provisions dealing with this matter it is submitted that the practical solution for the problem arising will be to establish the attributable amount according to the apportionment basis as it is assessed under the EDA.[345]

But once the attributable amount of South-African estate duty and the attributible amount of the foreign death duty concerning a certain item of property has been established, the application of sec. 16 (c) of the EDA is a simple one. If for example the foreign death duties on 'double taxed' property amounts to R 3000 while the payable amount of estate du-

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341) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 163.

342) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 162 *et seq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 313, 314 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.9. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 162.

343) *Cf.,* ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 163 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8. read together with para. 30.9. and ***CIR v. Bulman*** 1987 (1) SA 659 (AD), The Taxpayer 36 (1987), p. 117.

344) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8.

345) *Cf.,* also ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8.

ty amounts to R 1500, the deduction is limited to R 1500. If, the foreign death duties amount to R 3000 and the payable South-African estate duty amounts to R 4000, the deduction will be R 3000.
The deduction in terms of sec. 16 (c) of the Act is expressly only allowed to a person who died as an 'ordinary resident' of the Republic and a 'non-resident' can therefore not claim a deduction in terms of sec. 16 (c), even though he may be liable for both foreign death duties (e.g. German Inheritance Taxes) and South-African estate duty on the same [South-African] property.[346]
If South-Africa has entered into a double death taxation agreement with a foreign country where the property of an 'ordinary resident' of the Republic is situated and taxed on his death, the estate of the deceased must seek relief in terms of the relevant double taxation agreement, and is not entitled to the deduction in terms of sec. 16 (c) of the Act.[347]
Since the Republic of South-Africa and the Federal Republic of Germany until today have not entered into a double death taxation agreement, a person who died as an 'ordinary resident' of the Republic and also owned property in Germany at the date of his death is entitled to a deduction in terms of sec. 16 (c) of the EDA if his estate is also liable for the payment of German Inheritance Taxes on this property.

III.6. A short excursus to the valuation of property in the 'international deceased estate'

The Estate Duty Act 45 of 1955 does not only provide for a general description of all [foreign] property and [foreign] assets which have to be included in the [international] estate of an 'ordinary resident' or a 'non-resident' of the Republic at the time of his death[348]; in sec. 5 (1) to sec. 5 (5) the Act provides detailed regulations in terms of which the property and assets which are included in the [international] estate of a deceased person have to be valued for South-African estate duty purposes.

For present purposes it is sufficient to research and compare the provisions of both the South-African EDA and the German ErbStG, which impose death duties on the same categories of property and assets of the same taxpayer at the same time. For this reason it is not necessary and would be beyond the scope of this work to give a detailed introduction to all the aspects that can be connected to the valuation of [international] deceased estates for South-African estate duty purposes.
Nevertheless, it has to be acknowledged, that the valuation of [international] deceased estates plays a major role in the assesment of an international estate for estate planning purposes or of the value of an international deceased for estate duty purposes, and the following is therefore intended as a brief introduction towards the problems that can arise when the categories of 'foreign property' which are included in an international deceasedestate have to be valued for South-African estate duty purposes.

If the provisions which deal with the valuation of an estate under sec. 5 (1) to (5) of the EDA are compared to the provisions which constitute the allowable deductions in terms of

346) See, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 163.
347) *Vide,* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.8. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 163 / ***W. Abrie,*** Estates - Planning and Administration, p. 313, 314
348) See *supra,* part B. III.2., p. 67 *seqq.*

sec. 4 (a) to (q) of the EDA, it can at once be seen that sec. 5 (1) to (5), like sec. 4 (a) to (q) of the Act, does not really distinguish between the valuation of the South-African estate of a 'non-resident' and the valuation of an international estate of a person who was 'ordinarily resident' in South-Africa at the time of his death.
However, in dealing with the establishment of the categories of property which are included in an international deceased estate for South-African estate duty purposes we saw that the EDA distinguishes mainly between the gross value of the deceased estate of a 'non-resident' and the gross value of the deceased estate of an 'ordinary resident' of the Republic.
It was furthermore shown that the property and assets which are included in the gross value of the deceased estate of a 'non-resident' of the Republic are mainly comprised of his South-African property and assets, whereas the gross value of the deceased estate of an 'ordinary resident' of the Republic is assessed by compiling his South-African and world-wide property and assets.[349]
As far as the South-African property of the [international] deceased estate of an 'ordinary resident' and a 'non-resident' person of the Republic is concerned, it can therefore be concluded that the valuation of the South-African estate [property and assets] of a 'non-resident' has to follow the same rules and principles used in the valuation process of the South-African property and assets which are embodied in the international deceased estate of an 'ordinarily resident' of the Republic at the time of his death.

The different aspects that have to be regarded in the valuation process of the aforementioned South-African property are dealt with *in extenso* elsewhere.[350]

Whereas the valuation of South-African property which is included in the [international] deceased estate of an 'ordinary resident' or a 'non-resident' of the Republic provides nothing new [*viz.*, the valuation of this property generally follows the valuation rules which are laid down in sec. 5 (1) to (5) of the EDA], the valuation of property becomes difficult where foreign property is included in the international deceased estate of a person who died as an 'ordinary resident' of the Republic and where this foreign property has to be valued for South-African estate duty purposes.

In order to establish an applicable valuation method for 'foreign property' which is included in the international deceased estate of a person who died as an 'ordinary resident' of the Republic two possible methods of valuing this property are conceivable.
One solution could be to connect the value of foreign property to the value it was given in accordance with foreign valuation regulations.
For example, if a particular foreign death tax (e.g. German Inheritance Tax) is levied on foreign property which also has to be valued for South-African estate duty purposes, it could be possible to use [to adopt] the assessed foreign (e.g. German) value of the property as the value applicable for South-African estate duty purposes [if such a value was established by a foreign law especially for the property concerned].

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349) See also, part B. III.2.1.1., p. 68 *et seqq.* and part B. III.2.1.2., p. 78 *seqq.*

350) For further details see therefore, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates, chap. 29, para. 29.1 to 29.24 / ***G. A. Urquhart / D. M. Davis,*** Estate Planning, chap. 3, para. 397 to 3120 / ***W. Abrie,*** Estates - Planning and Administration, p. 314 *et seqq.* / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.7. / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 14 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 109 *et seq.*

But this solution of the valuation problem would be misleading. Foreign valuation rules are always designed to serve a foreign [death] tax law (e.g. the German ErbStG) and they are therefore 'exclusively' designed for the needs of a foreign tax law system (e.g. the German tax law system).
Consequently it can be stated that foreign property which is valued under the regulations of a foreign [death] tax law (e.g. the German Inheritance Tax Law) is 'exclusively' valued for foreign death duty purposes. A valuation of foreign property in accordance with foreign regulations will therefore generally arrive at a different value, which will be either higher or lower than the value which would be established for this property if it were valued according to the South-African valuation provisions in terms of sec. 5 (1) to (5) of the EDA.

Bearing these problems in mind the only possible solution to achieve a valuation which can fully serve the purposes of the EDA and which can also be assessed and utilized in accordance with the rules of the Act is a valuation of foreign property according to the valuation rules of sec. 5 (1) to (5) of the EDA, which have to be applied either directly (e.g. sec. 5 [1] [a] of the Act) or analogously (e.g. sec. 5 [1] [b], [c] of the EDA) to the foreign property which is included in the international deceased estate of an 'ordinary resident' of the Republic at the time of his death.[351]
Further problems in the context of valuing foreign property can occur when, for example, foreign property is disposed of by a *bona fide* purchase and sale in the course of the liquidation of the estate [sec. 5 (1) (a) of the Act]. If such foreign property was sold in a foreign country it will have to be valued at the price realised by the sale. In the course of valuing the realised sale price, the price which normally will have been paid in a foreign currency (e.g. German mark) will then have to be converted into South-African Rand.
In this context the question of the appropriate date on which the realised sale price has to be converted into Rand can arise (possible solutions can be e.g., the date of death of the deceased, the date of sale of the foreign property, the date of the payment of the estate duty liability, the date of the final assessment of the estate duty liability, etc.[352] or, the date of transaction[353] related to the property).
However, these difficulties are only a small part of the problems which can be connected to the valuation of foreign property which is included in the international deceased estate of a person who died as an 'ordinary resident' of the Republic.

351) The analogous application of the valuation provisions of sec. 5 EDA will take place where an item of foreign property which is comparable to the property as defined in terms of the EDA [see, part B. III.2.1.1.b.dd.α. to III.2.1.1.b.dd.γ.] is building a part of the international deceased estate of a person who died as an 'ordinarily resident' of the Republic [e.g. foreign annuities or foreign fiduciary or usufructuary interests which are included in the international deceased estate of a person who died as an 'ordinarily resident' of the Republic could be valued analogous to sec. 5 (1) (b), (c) of the Act].

352) For a possible solution and nearer information see, ***L. A. Kernick,*** Administration of Deceased Estates, p. 36 *et seq.* / Perhaps the principles which were established for the inclusion and conversion of receipts and accruals in foreign currency under the Income Tax Act can be applied *mutatis mutandis,* see, ***A. P. de Koker / G. A. Urquhart,*** Income Tax in South Africa, Vol. 1, chap. 5, para. 5.4.6. / ***C. Divaris / M. Stein,*** Silke on South African Income Tax, Vol. 1, chap. 2, para. 2.18.

353) The latest Taxation Laws Amendment Act introduced a new sec. 24I to the Income Tax Act 58 of 1952. The new sec. 24I of the ITA introduces the 'transaction date' as the time and date on which foreign currency has to be converted into Rand and it is therefore perhaps possible to adopt these new principles *mutatis mutandis* for the conversion of foreign currency into Rand for estate duty purposes. For further information on the new provision of sec. 24I ITA see, ***D. Meyerowitz / P. Meyerowitz / D. M. Davis / T. S. Emslie,*** The Taxpayer 42 (1993), p. 114 *et seqq.*

It would be beyond the scope of this work to deal with all these problems in detail, but this brief introduction to the problems that can be connected to the valuation of foreign property can be concluded by stating that the valuation of foreign property can impose certain difficulties to the assessment of a South-African estate duty liability, and that these problems should not be underestimated in practice.

III.7. A short introduction to the liability for the payment of estate duty on international deceased estates and the Administration of the Estate Duty Act

Whereas the foregoing has dealt mainly with the characterization of the component elements of an [international] deceased estate[354], and the characterization of the allowable deductions[355], abatements[356] and other rebates and deductions[357] which can or have to be substracted from the [international] deceased estate of a 'non-resident' or an 'ordinary resident' in order to arrive at the amount of South-African estate duty; the remaining paragraphs dealing with the levying of South-African estate duty on international deceased estates are intended as a short introduction to persons who are liable for the payment of South-African estate duty on international deceased estates as well as a short introduction to the main aspects of the Administration of the Estate Duty Act.
Once again it would be beyond the scope of this work to highlight all the problems that can be connected to these topics.[358]

III.7.1. The liability for the payment of estate duty on international deceased estates

On reading sec. 11 (a) to (b), sec. 12 and sec. 13 (1) to (3) of the EDA it can at once be seen that it is the executor of an [international] deceased estate who is liable for the payment of South-African estate duty, regardless whether the estate was left by an 'ordinary resident' or a 'non-resident' of the Republic.[359]
According to sec. 12 of the EDA the executor of an [international] deceased estate, in his capacity as executor, is primarily liable for the whole amount of estate duty, which is in the first instance payable by and recoverable from him.[360] This includes also the payment

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354) See, part B. III.2. to III.2.3.2., p. 67 to 95 of this work.
355) *Vide*, part B. III.3. to III.17., p. 95 to 107 of this work.
356) *Vide supra*, part B. III.4., p. 107 *seqq.*
357) See *supra*, part B. III.5. to III.5.3., p. 108 to 112.
358) The reader should therefore also consult the works of, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 1 to 26 and 30 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10, 27.13, 27.14 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176 *et seqq.* and p. 222 *et seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 15, p. 158 *seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 325 *et seqq.* and 330 *seq.* / ***P. A. Olivier / G. P. J. van den Berg,*** Praktiese Boedelbeplanning, Hoofstuk 3 / ***T. Honoré and E. Cameron,*** Honoré's South African Law of Trusts, p. 398 to 400 and p. 408 / ***L. A. Kernick,*** Administration of Deceased Estates.
359) *Cf.*, also ***W. Abrie,*** Estates - Planning and Administration, p. 325 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14.
360) See, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10.

of estate duty which is afterwards recoverable from other persons.[361]
In terms of secn 11 (a) (i) to (ii) and (b) (i) to (ii) of the Act other people than the executor may ultimately be liable for the estate duty attributable to certain property in the estate, and under the provision of sec. 13 (1) to (3) of the EDA the executor may recover the appropriate amount of payable estate duty from them.[362]
However, the executor`s liability is limited to his capacity as an executor, and it can therefore not exceed the amount of the available assets which are included in a[n] [international] deceased estate.[363]
In sec. 11 (a) and (b) of the Act the estate duty liability of certain persons is distinguished in accordance with the property classification of sec. 3 (2) (`[foreign] property´) and sec. 3 (3) (`[foreign] property deemed to be property´) of the EDA.[364]

III.7.1.1. Usufructs and fiduciary interests

According to sec. 11 (a) (i) and sec. 3 (2) of the Act a person to whom a benefit accrues from a fiduciary or usufructuary right or other like interest[365], which was held by the deceased immediately prior to his death and which ceased on his death to the benefit of that person, is liable for the amount of estate duty attributable to this right.[366]
The person to whom the advantage accrues by the death of a deceased is normally the fideicommisary (the successive holder of the right[367]) of a ceasing fiduciary interest or the holder of the bare dominium in property subject to a ceasing usufructuary interest. In the cases of usufructs which accrue to different persons successively, such successor will be liable for the duty.[368]
The nationality of a person to whom the benefit from one of the above mentioned rights accrues is irrelevant and whether the person is `ordinarily resident´ in the Republic or not, the person will normally be liable for the attributable amount of estate duty levied thereon and the executor is entitled to recover any duty paid in respect of the right which accrued to that person [sec. 13 (1) of the Act].
However, the establishing of the person liable and the establishing of the attributable amount of a South-African estate duty liability can be difficult where a deceased, who was `ordinarily resident´ in the Republic at the time of his death, owned and left a `foreign limited interest´ in `foreign property´ which was established under a foreign law and which now forms a part of his international deceased estate for South-African estate duty

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361) *Vide,* ***J. N. Swart,*** The Planning and Administration of Estates, chap. 15, p. 159 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176

362) Compare also, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176

363) ***W. Abrie,*** Estates - Planning and Administration, p. 326 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159.

364) See also, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14.

365) For further information on other like interest see, part B. II.2.3.2.a., p. 52 of this work.

366) In detail, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176 *et seq.* / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159 / ***W. Abrie,*** Estates - Planning and Administration, p. 326.

367) For details *cf.,* part B. II.2.3.2.a.aa. and bb. on p. 52 *seqq.* of this work.

368) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 177 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14.

purposes.[369]

III.7.1.2. Annuities charged upon property

In terms of sec. 11 (a) (i) and sec. 3 (2) of the EDA a person is also liable for the attributable amount of estate duty which is levied on the value of the right to an annuity charged upon property held by the deceased immediately prior to his death and ceasing on his death, when the advantage of the annuity accrues to the person on the death of the deceased.[370] In these cases the beneficiary who is liable for the payment of the duty is usually the owner of the property from which the annuity was paid, because the owner (as the person paying the annuity) is benefitted since his obligation to pay the annuity out of his property ends with the death of the deceased.[371] But upon the death of the deceased the annuity can also become payable to someone else and in these cases the `new´ beneficiary (e.g., usufructuary or annuitant) will be liable for the payment of the duty.[372]
As in the above mentioned case of usufructuary and fiduciary interests, which are included in an international deceased estate, the nationality of a person to whom the benefit from an annuity accrues will be irrelevant for his estate duty liability and whether the person is `ordinarily resident´ in the Republic or not, the person will normally be liable for the attributable amount of estate duty levied on such an annuity and the South-African executor of an international deceased estate is entitled to recover any duty he paid in respect of the annuity which accrued to that person [sec. 13 (1) of the Act].
But the establishing of the person liable and the establishing of the attributable amount of a South-African estate duty liability can again be difficult where a deceased, who was `ordinarily resident´ in the Republic at the time of his death, owned and left a `foreign annuity´ payable from `foreign property´ which was established under a foreign law and which now forms a part of his international deceased estate for South-African estate duty purposes.[373]

III.7.1.3. Annuities which are not charged upon property

In the cases where an annuity is not charged upon property the person who is liable for the payment of the attributable amount of estate duty is once again the person to whom the advantage accrues from the death of the deceased [sec. 11 (a) (i) and sec. 3 (2) of the Act].[374] In these constellations the beneficiary is normally the person who had to pay the annuity and who on the death of the deceased no longer needs to pay it. But if the person

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369) For the problem how foreign limited interests have to be included in the international deceased estate of an `ordinarily resident´ see, part B. III. 2.1.1.b.dd.α. to γ., p. 73 *seqq.* of this work.

370) See, ***W. Abrie,*** Estates - Planning and Administration, p. 327 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 178.

371) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 178 / ***W. Abrie,*** Estates - Planning and Administration, p. 327.

372) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159

373) For the problem how foreign annuities have to be included in the international deceased estate of an `ordinarily resident´ see, part B. III. 2.1.1.b.dd.α. to γ., p. 73 *seqq.* of this work.

374) See also, ***J. N. Swart,*** The Planning and Administration of Estates, p. 159 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 178, 179 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***W. Abrie,*** Estates - Planning and Administration, p. 327 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10.

paying the annuity on the death of the deceased has to continue his payments to another person, the other person will be liable for the payment of the attributable amount of estate duty and the executor can recover this amount from these persons in terms of sec. 13 (1) of the EDA.[375]

The problems which can occur in establishing the person liable and/or in establishing the attributable amount of a liability for annuities which are not charged upon South-African property, but have a foreign element [are included in an international deceased estate], will *mutatis mutandis* be the same problems already mentioned in the context of the liability for the payment of the attributable amount which is levied on annuities which are charged upon property.[376]

III.7.1.4. Life insurance policies

In accordance with sec. 11 (b) (i) and sec. 3 (3) (a) of the Act the person who is liable for the estate duty attributable to a policy which is included in a deceased estate[377] is the person who is entitled to the proceeds of the policy.[378]

When the proceeds under a policy which was taken out on the life of the deceased are not recoverable by the executor they are usually recoverable either by the owner of the policy (if it was not owned by the deceased) or by a beneficiary nominated in the policy to receive the proceeds upon the death of the insured (if it was owned by the deceased).[379]

If the amount due under the policy is payable to the estate and the proceeds are collected by the executor, the estate is liable for the duty [sec. 11 (b) (i) of the EDA]. In all the other cases the executor is once again entitled to collect the attributable estate duty which he is required to pay from the person concerned [sec. 13 (1) of the Act].[380]

The nationality of a person to whom the benefit of a `domestic insurance policy´[381] accrues is once again irrelevant and whether the person is `ordinarily resident´ in the Republic or not, the person will normally be liable for the attributable amount of estate duty levied on a domestic life insurance policy as long as it is payable within the Republic and the executor is entitled to recover any duty he paid in respect of the proceeds of a policy which accrued to that person [sec. 13 (1) of the Act].

These principles will also apply in cases where an `ordinary resident´ deceased took out a foreign insurance policy on his life where the proceeds of this policy are by right of action enforceable in the Republic or payable to the South-African estate of the deceased.[382]

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375) *Cf.*, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 178, 179 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14.

376) See above, part B. III.7.1.4., p. 118 of this work.

377) For the inclusion of life insurance policies see, part B. III.2.2.1.a.aa., p. 82 *seq.*, B. III.2.2.1.b.aa, p. 86 *seq.* and B. III.2.2.2., p. 91 *seqq.* of this work.

378) See, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 179 / ***W. Abrie,*** Estates - Planning and Administration, p. 327 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159.

379) Compare, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 179 / ***W. Abrie,*** Estates - Planning and Administration, p. 327.

380) ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 179.

381) For the definition of the term `domestic life policy´ see, part B. III.2.2.1.a.aa., p. 82 *seq.*, B. III.2.2.1.b.aa, p. 87 *seq.* and B. III.2.2.2., p. 91 *seqq.* of this work.

382) See, part B. III.2.2.1.b.aa, p. 86 *seq.*

III.7.1.5. Pension fund benefits and retirement annuities

The person liable for the estate duty levied on a benefit due and payable by a fund to a person other than the executor on or as a result of the death of the deceased is the person to whom the benefit accrues [sec. 11 b (iA) and sec. 3 (3) (a)*bis*].[383]

Presently the property deemed to be property which has to be included in the [international] deceased estate in terms of sec. 3 (3) (a)*bis* of the Act consists mainly of lump sum benefits which are paid by a fund as a result of a member's death. If the benefits of a pension fund are payable to the estate the executor is liable for the payment of estate duty thereon. If on the other hand the fund is payable to a person nominated by the deceased, e.g. his widow or his child, they are liable for the payment of the duty and the executor is entitled to recover the attributable amount of estate duty from these persons [sec. 13 (1) of Act].[384]

Since the annuity portion of payments by pension funds and retirement annuity funds are exempt from estate duty, there is no liability in those cases.[385]

Any person [whether the person is 'ordinarily resident' in the Republic or not] to whom a due and payable benefit of a pension fund accrues, in the above mentioned sense, will be liable for the payment of the attributable amount of estate duty levied thereon and the executor is entitled to recover any duty he paid in respect of the right which accrued to that person, regardless of the nationality of this person [sec. 13 (1) of the Act].

Although the establishing of the liable person and/or the establishing of the attributable amount of estate duty which is levied on a 'foreign pension fund benefit' which is included in a[n] [international] deceased estate of an 'ordinarily resident' of the Republic may be more 'difficult' than the liability assessment on South-African pension fund benefits, the same rules will apply to those funds.[386]

III.7.1.6. Donations made by the deceased

Presently the majority of donations which are referred to under sec. 11 (b) (ii) of the Act are exempt from estate duty (provided that the deceased died after the 16th of March 1988).[387] However, if an estate does include a dutiable donation in terms of sec. 3 (3) (b) or sec. 3 (3) (cB) of the Act, the estate duty which is attributable thereto is recoverable, by the executor, from the person who benefitted from the donation (the donee) [sec. 13 (1) of the Act].[388]

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383) *Cf.*, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 179 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159 / ***W. Abrie,*** Estates - Planning and Administration, p. 327.

384) ***J. N. Swart,*** The Planning and Administration of Estates, p. 159 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14 / ***W. Abrie,*** Estates - Planning and Administration, p. 327.

385) For an introduction to the problems connected to fund benefits and retirement annuities see, part B. III.2.2.1.a.bb., p. 83 *seq.*, B. III.2.2.1.b.bb., p. 87 and B. III.2.2.2., p. 91 *seqq.* of this work.

386) See also, part B. III.2.2.1.b.bb., p. 87.

387) *Vide,* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10 / ***W. Abrie,*** Estates - Planning and Administration, p. 327, 328 / For the situation prior to the 16th of March 1988 see, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 179, 180 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159.

388) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.14 / ***W. Abrie,*** Estates - Planning and Administration, p. 328 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 179, 180.

The nationality of the donee is irrelevant and whether the donee is 'ordinarily resident' in the Republic or not, he will normally be liable for the attributable amount of estate duty levied thereon and the executor is entitled to recover any duty paid in respect of the right which accrued to that person [sec. 13 (1) of the Act].
However, it must be observed, that the establishing of the liable donee and/or the establishing of the attributable amount of payable estate duty which is levied on a 'foreign donation' [comparable to a donation meant in terms of sec. 11 (b) (ii)] may be more 'difficult' than the liability assessment on South-African donations, when the donation was established under a foreign law and forms a part of the [international] deceased estate of an 'ordinary resident' of the Republic[389].

III.7.1.7. The apportionment of estate duty

Since the executor is in terms of sec. 12 and 13 (1) of the EDA required to recover the attributable amount of estate duty he paid in the place of those persons who are ultimately liable for the payment of this duty, the estate duty attributable to the relevant property has to be established.[390]
The attributable duty is determined in accordance with the following general formula[391]

$$Z = \frac{A}{B} \times C$$

where Z = the duty attributable to the property
A = the net value of the category or item of property concerned
B = the total net value of the [international] deceased estate
C = the total amount of payable South-African estate duty
[before the deduction of the foreign duty]

In cases where 'foreign property' and 'foreign property deemed to be property' are included in the [international] deceased estate of a person who died as an 'ordinarily resident' of the Republic, the persons liable and the attributable amount of South-African estate duty which is payable by these persons on the property items mentioned must be assessed in accordance with the rules laid down in sec. 11, 12 and 13 of the EDA [where the 'foreign property' of a deceased is included in his international deceased estate and these rules are applicable].

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389) In introduction to the difficulties concerning 'foreign donations' is given in part B. III.2.2.1.b. cc., p. 87.

390) Compare, ***W. Abrie,*** Estates - Planning and Administration, p. 328, 329 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.15 to 30.16. / ***J. N. Swart,*** The Planning and Administration of Estates, p. 159, 160 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 180 *et seqq.*

391) See, ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.15 to 30.16. / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 180 *et seqq.*

III.7.1.8. The executor of an international deceased estate

It was mentioned before[392] that the administration of estates and the position and tasks of an executor become difficult as soon as a deceased estate shows up an international [foreign] element.
It would be beyond the scope of this work to deal with all the problems that can occur in the administration of deceased estates and the following is therefore intended merely as a brief introduction to a few aspects of these difficulties.[393]

The South-African administration of deceased estates is governed by a system of executorship and it is a well known fact, that no person may deal with any property and assets in the Republic belonging to a deceased person, whether or not this person died 'ordinarily resident' in the Republic, except under the supervision and authority of a Master of the Supreme Court of one of the Provinces.[394]
The problems arising from the system of executorship in relation to the administration of international deceased estates can therefore mainly be distinguished into two main sources, *viz.,* (a) where a foreign [*id est,* 'non-resident'] person wants to administer the international deceased estate of an 'ordinary resident' of the Republic or where a foreign person wants to administer the South-African estate which was owned by a 'non-resident' deceased within the Republic, and (b) where a South-African executor administers the international deceased estate of a person who was 'ordinarily resident' in South-Africa at the time of his death and where this deceased estate contains 'foreign property' or 'foreign property deemed to be property'.

III.7.1.8.a. Brief introduction to the problems relating to foreign executors

The fact that a person has received letters of executorship in some country other than the Republic of South-Africa will not entitle him to deal with the property and assets of a deceased estate which are situated in the Republic.[395] Before the foreign executor is entitled to administer a South-African estate [whether this estate was owned by an 'ordinarily resident' of the Republic or not] he must be authorized by the Master.[396]
The Master gives this authority either by issuing letters of executorship or, in certain circumstances, by signing and sealing letters of executorship previously issued by some other state[397] and a less formal procedure is allowed where a deceased left only movable property within the Republic[398].

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392) Part B. II.2.2., p. 48 *seq.* of this work.
393) A more detailed approach can be fund in the works of, ***L. A. Kernick,*** Administration of Deceased Estates / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 1 to 26 and 30 / ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.10, 27.13, 27.14 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 176 *et seqq.* and p. 222 *et seqq.* / ***J. N. Swart,*** The Planning and Administration of Estates, chap. 15, p. 158 *seqq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 325 *et seqq.* and 330 *seq.*
394) Compare also, part B. II.2. to II.2.2., p. 44 *seqq.* of this work.
395) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 8, para. 8.12 and chap. 10, para. 10.1 to 10.3 / ***L. A. Kernick,*** Administration of Deceased Estates, especially chap. 7, p. 61 *seqq.*, chap. 9, p. 74, chap. 3, p. 36, chap. 2, p. 21.
396) See also, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 10, para. 10.1 / ***L. A. Kernick,*** Administration of Deceased Estates, chap. 7, p. 61 *seq.*
397) For this procedure see, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 10, para. 10.1 to 10.2 / ***L. A. Kernick,*** Administration of Deceased Estates, chap. 7, p. 61 *seq.*
398) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 10, para. 10.3.

Difficulties in this practice can occur, as soon as a foreign law system does not follow the methodical approach to the administration of deceased estate by the use of a system which is similar to the South-African system of executorship.
It was shown above[399] that originating from the fact that most of the European continental systems of 'administering and inheriting estates' in general and the German system of 'administering and inheriting estates' in particular follo the Roman Law concept of universial succession (succession *ipso iure* by the heir), European or German 'deceased estates' are mostly 'administered' by the heirs.
Accordingly the role of the heir as 'executor' as it can be found in the European law systems (especially under the German system) differs from the role of the executor as the South-African Law understands it.
As a consequence a European or a German heir who inherits 'property' which is situated in the Republic may have difficulty obtaining a document which the Master will recognize as being a foreign equivalent of the South-African letters of executorship as defined in sec. 1 of the Administration of Estates Act 66 of 1965.[400]

Further problems related to a foreign executor or the administration of an international deceased estate can be the requirement to give security and to choose a *domicilium citandi et executandi* in the Republic or to act through an agent situated in South-Africa, when the executor is not 'ordinarily resident' in the Republic[401]; other difficulties may arise from the translation of foreign documents[402], the certifying of foreign documents[403], the ascertainment of foreign property and assets, the valuation of foreign property and assets, or some of the other special requirements which are laid down in sec. 20, 21, 22, 23, 24, and 25 of the Administration of Estates Act 66 of 1965.[404]

III.7.1.8.b. Foreign items or categories of property which are included in a deceased estate

As soon as foreign items or categories of property are included in a deceased estate it must be observed, that exchange control rulings and other special rulings have to be obtained when the international estate of a deceased is administered according to South-African Law.[405]
According to the exchange control rules foreign assets which are not brought to the Republic, but which are included in an international deceased estate, have to be disclosed to the authorities by the heir or legatee concerned.[406] The asset may be retained in the foreign country provided that the income deriving from this asset is brought into the Republic and that the nature of the asset is not changed without the consent of the authorities.

399) In part B. II.2.2., p. 48 *seq.* of this work.
400) See also, ***L. A. Kemick,*** Administration of Deceased Estates, chap. 7, p. 61 *seq.* and ***C. F. Forsyth,*** Private International Law, p. 228 *seqq.* and p. 328 *seqq.*
401) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 10, para. 10.1 to 10.2 / ***L. A. Kemick,*** Administration of Deceased Estates, chap. 7, p. 61 *seq.*
402) ***L. A. Kemick,*** Administration of Deceased Estates, chap. 7, p. 61 *seqq.*, chap. 9, p. 74, chap. 3, p. 36, chap. 2, p. 21 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 8, para. 8.12 and chap. 10, para. 10.1 to 10.3.
403) See also, ***L. A. Kemick,*** Administration of Deceased Estates, chap. 7, p. 61 *seqq.*, chap. 9, p. 74, chap. 3, p. 36, chap. 2, p. 21 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 8, para. 8.12 and chap. 10, para. 10.1 to 10.3.
404) *Cf.,* especially, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 8, para. 8.12 and chap. 10, para. 10.1 to 10.3.
405) See for that, ***L. A. Kemick,*** Administration of Deceased Estates, chap. 9, p. 74, chap. 3, p. 36, chap. 2, p. 21.
406) *Vide,* ***L. A. Kemick,*** Administration of Deceased Estates, chap. 3, p. 36, chap. 2, p. 21.

If the heir or legatee concerned is also a non-resident and the asset is dealt with directly by a South-African executor, the executor must obtain exchange control permission before releasing the asset to a beneficiary.[407]
Under the present foreign exchange rules, whether the estate is that of an `ordinary resident´ or a `non-resident´ of the Republic, legacies and inheritances to non-resident beneficiaries and to foreign accounts of `ordinarily residents´ may only be transferred by commercial banks and then only up to a limited amount per beneficiary [and only as financial rands]. For any amount exceeding this limit a permission of transfer must be sought from the Reserve Bank.[408]

However, since the problems that can occur in the process of administering an international estate under South-African Law will differ from case to case and this work cannot deal with all these aspects, this short introduction is concluded by stating that it is of importance for the executor of an international deceased estate to monitor and approach the problems that can be connected to the administration of such an estate with utmost care.[409]

III.7.2. Brief introduction to the Administration of the Estate Duty Act

In terms of sec. 6 (1) of the Act the Commissioner of Inland Revenue [CIR] is responsible for the administration of the EDA. The powers conferred and the duties imposed upon him by the Act may be excercised or performed by him personally or by delegation to an official acting under his control or direction [sec. 6 (2) of the EDA]. In terms of notice 125 published in the Government Gazette of the 27th of January 1956 the CIR delegated many powers and duties to the Master of the Supreme Court as well as the Assistant Masters and the officers who hold administrative rank in the Masters` offices.[410]
All the decisions made by these officers (the Master and his administrative staff) and a notice or communication issued or signed by any of these officers may be withdrawn or amended by the CIR or by the officer himself. But until it is withdrawn, the decision, notice or communication is deemed to have been made, issued or signed by the CIR.[411]
The Commissioner may call upon certain persons involved in the administration of a deceased estate to produce documents, *viz.,* deeds, plans, instruments, books, accounts, trade lists, translations of documents, etc. in terms of sec. 8*bis* (1) of the Act.[412] Under sec. 8*bis* (2) to (5) of the Act the CIR is furthermore allowed to require a person whom he considers able to furnish information to appear for examination under oath, and to excercise certain other additional administrative powers in order to establish, assess and secure an estate duty liability (e.g. by seizing books, records and documents).[413]

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407) ***L. A. Kemick,*** Administration of Deceased Estates, chap. 3, p. 36, 37.
408) See especially, ***L. A. Kemick,*** Administration of Deceased Estates, chap. 9, p. 74.
409) *Cf.,* ***L. A. Kemick,*** Administration of Deceased Estates, chap. 7, p. 61 *seqq.,* chap. 9, p. 74, chap. 3, p. 36, chap. 2, p. 21 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 8, para. 8.12 and chap. 10, para. 10.1 to 10.3.
410) Notice 125 of 1956 can be found in ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., Appendices, p. A-125 to A-127 / see also, ***Abrie,*** Estates - Planning and Administration, p. 330.
411) See, sec. 6 (3) EDA and ***W. Abrie,*** Estates - Planning and Administration, p. 330, 331 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.3 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 158 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 222.
412) See, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 222, 223 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.2.
413) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.2. / See, ***A.***

As soon as the executor of a[n] [international] deceased estate has completed an estate duty return in terms of sec. 7 of the Act, the CIR must assess the estate duty payable and issue a notice of assessment to the executor or, if there is no executor, to any other person liable for the duty [sec. 9 (1) of the EDA].[414]

If there is an executor, a person who is liable for an attributable amount of estate duty (e.g. a donee, usufructuary or annuitant) will be notified of the amount of his liability by the executor.

The sum of estate duty assessed by the Commisioner must be paid on the date and in the place which is stated on the assessment. It may be paid in one sum or in instalments, which can be permitted by the CIR depending on the circumstances [see, sec. 9 (2) of the EDA].[415]

An executor or any other person (e.g. a donee, usufructuary or annuitant) liable for an amount of estate duty levied on a[n] [international] deceased estate, who is aggrieved by an assessment for estate duty may object to the assessment and, should the CIR disallow his objection, appeal to the Special Court for Hearing Income Tax Appeals [in terms of sec. 24 (1), (2), (3) and (4) of the EDA].[416] At the Special Court Appeal the objector is limited to the grounds specified in the objection which he has to lodge in writing with the CIR in terms of sec. 24 (5), (6) and 24 (1) of the Act.[417] The Special Court may, as it deems fit, confirm, vary or set aside the decision of the CIR or refer the case back to the CIR for further investigation and assessment [sec. 24 (7) EDA].[418]

After the Special Court has decided the case either the objector (then appellant) or the Commissioner can appeal against the decision in the terms of sec. 24 (8) EDA.

The first appeal will be to the local or provincial division of the Supreme Court and, if either the appellant or the CIR is dissatisfied with the decision of that Court, the next appeal will go to the Appellate Division. By agreement between the objector and the Commissioner either party may appeal directly from the Special Court to the Appellate Division.

An appeal to the local or provincial division or to the Appellate Division lies on both a question of law and a question of fact.[419]

For the hearing at the Special Court and a possible further appeal, the EDA deems the provisions of sec. 83 (8) to (12) and (14) to (17), sec. 84, 85, 86, and 86A of the Income Tax Act 58 of 1962 and the regulations made under that Act relating to appeals to the Special Courts or against decisions of that court to apply, *mutatis mutandis,* to appeals un-

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S. Silke / M. Stein, Estate Duty, Principles and Planning, p. 222, 223.

414) *Cf.,* ***J. N. Swart,*** The Planning and Administration of Estates, p. 158 / ***W. Abrie,*** Estates - Planning and Administration, p. 330 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 223 *seqq.* / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.4. and para. 30.10.

415) See, ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.10.

416) *Vide,* ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 27, para. 27.14. / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.18 to 30.23. / ***W. Abrie,*** Estates - Planning and Administration, p. 330, 331 / ***J. N. Swart,*** The Planning and Administration of Estates, p. 165 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 228 *et seq.*

417) *Cf.,* ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.18 and 30.23 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 228 *et seq.*

418) See also, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 228 *et seq.* / ***W. Abrie,*** Estates - Planning and Administration, p. 330, 331 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.23.

419) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 228.

der the EDA.[420]

Lastly, it must be mentioned that assessed amount of estate duty which is levied on a[n] [international] deceased estate is payable by the executor or any other person who is liable to pay the assessed estate duty and the amount is a debt due to the state and is recoverable in terms of sec. 25 of the EDA.[421] An action may therefore be instituted against any person liable for the payment of a certain amount of estate duty, even though some other person may also be obliged to pay the amount of that duty [see, sec. 25 (2) of the Act].
Normally an action will be instituted first against the executor of the estate, irrespective of who is liable for the payment of the [in these cases attributable] estate duty because the executor is primarily liable for its payment and is later on entitled to recover the paid duty from the person who is ultimately liable for its payment [e.g. a donee, a fideicommissary, a usufructuary or an annuitant].[422]

III.8. Brief Summary

In researching the aspects of South-African estate duty, which is levied on [international] deceased estates in the Republic, it can be seen that the elements which constitute an [international] deceased estate for South-African estate duty purposes consist of two elements, namely, `property´ and `property deemed to be property´.[423]
However, in order to establish the exact categories of `property´ and the exact categories of `property deemed to be property´, it is furthermore necessary to see whether a deceased was `ordinarily resident´ or `not ordinarily resident´ in the Republic at the time of his death.[424]
Whereas the `property´ [`property deemed to be property´] included in the deceased estate of an `ordinarily resident´ of the Republic consists of a compilation of his South-African as well, as his `world wide´ or `foreign´ property and assets, the deceased estate of a `non-resident´ is governed by the general principle that his estate is only liable for South-African estate duty when he owned property and assets within the Republic at the time of his death.

Difficulties in establishing the international estate of an `ordinary resident´ of the Republic can arise from the fact that his estate will, apart from his South-African `property´ [`property deemed to be property´], normally also contain property and assets which were owned by him in a foreign country, and from the fact that this `property´ [`property deemed to be property´] is usually governed by foreign regulations and, what is more, often even owned under a foreign law.
However, the difficulties connected with the legal nature of `foreign property´ [`foreign property deemed to be property´] and the question whether this foreign property can be regarded as property for the purposes of South-African estate duty [because it is governed by a foreign law terminology] can be overcome by comparing the foreign property categories

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420) ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.21 / ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 229.
421) Compare, ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 230, 231 / ***D. Meyerowitz,*** in: Meyerowitz on Administration of Estates..., chap. 30, para. 30.24.
422) ***A. S. Silke / M. Stein,*** Estate Duty, Principles and Planning, p. 230, 231.
423) See, part B. III.2.1., p. 68 *seqq.* and part B. III.2.2., p. 82 *seqq.* of this work.
424) *Vide*, part B. III.2.1., p. 68 *seqq.* and part B. III.2.2., p. 82 *seqq.* of this work.

concerned, that is to say, their legal nature, to the South-African property categories which are expressly laid down in the EDA.[425]
Should foreign property, which was owned by an 'ordinarily resident' deceased in a foreign country and under foreign law provisions, be comparable to the property categories which are expressly laid down in the EDA, this property has to be included in his taxable international deceased estate for South-African estate duty purposes.

In contrast to the assessment of the property and assets of an 'ordinary resident' the assessment of the deceased estate of a 'non-resident' is governed by the unilateral relief provisions of sec. 3 (2) (c)-(h) of the EDA.
The unilateral relief of sec. 3 (2) (c)-(h) EDA provides, *expressis verbis,* that the property which has to be included in the deceased estate of a 'non-resident', for South-African estate duty purposes, consists mainly of his South-African property, but an explicit provision stating what kinds of 'property deemed to be property' are to be included in his estate is not to be found under the regulations of the EDA.
Nevertheless, in accordance with the general attitude which is expressed in sec. 3 (2) (c)-(h) of the EDA, by the fact that the taxable property of a 'non-resident' consists only of those items of property which are situated within the Republic at the time of his death, it can be deduced that the 'deemed property' which has to be included in his South-African estate can generally be limited to those property categories which are laid down in sec. 3 (3) (a)-(d) of the EDA and which are situated or by right of action enforceable or recoverable in the Republic of South-Africa.[426]

After all 'property' and 'property deemed to be property' in the deceased estate of either an 'ordinary resident' or a 'non-resident' of the Republic has been compiled (the sum of all compiled property being the gross value of the deceased estate), the deductions which are allowed in terms of the EDA are subtracted from the gross value of the deceased estate, to arrive at the net value of the deceased estate.
The provisions dealing with the allowable deductions under the EDA do not distinguish between the deductions which can be made from the gross value of the deceased estate of an 'ordinary resident' of the Republic or from the gross value of the deceased estate of a 'non-resident';[427] and difficulties in establishing the allowable deductions can and will occur where a 'foreign element' is present.

Although a further unilateral relief regulation is provided in terms of sec. 4 (e) of the EDA for situations in which the deceased aquired foreign property by the way of donation or inheritance from a non-resident, it has to be stated that this relief is only available in certain circumstances and to certain persons;[428] and apart from this regulation the application of the majority of the allowable deductions in terms of the EDA will remain difficult where a 'foreign element' is present.

It might therefore be advisable to deal with and to overcome the difficulties introduced by the international aspects of a deceased estate, in the context of allowable deductions, by referring once again to one of the basic principles of the EDA, *viz.,* the principle that the

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425) As shown in, part B. III.2.1.1.b.dd. α. to γ., p. 73 *et seqq.*
426) Compare, part B. III.2.2.2., p. 91 *et seqq.*
427) *Cf.,* part B. III.3., p. 95 *et seqq.*
428) Part B. III.3.5., p. 98 *seq.* of this work.

gross value of the deceased estate of a `non-resident´ is comprised mainly of his South-African property and assets, whereas the gross value of the deceased estate of an `ordinarily resident´ is assessed by compiling his South-African and his world-wide property and assets.
In accordance with this principle, deductions from the gross value of the estate of a `non-resident´ will be allowable deductions where they are directly connected to the gross value of his South-African property and assets, whereas deductions from the gross value of the estate of an `ordinarily resident´ can be characterized as allowable deductions as soon as they can be connected to the gross value of his international deceased estate and certain other factors laid down in the provisions of the EDA dealing with this matter.[429]

After the gross value of the deceased estate of an `ordinary resident´ or a `non-resident´ has been reduced by the allowable deductions, the net value of the estate has been established. From both, the net value of the `international´ deceased estate of an `ordinarily resident´ and the net value of the South-African deceased estate of a `non-resident´ there will be a further deduction (abatement) of R 1 million, and the remainder after this deduction is termed the dutiable amount of the estate.[430]

On this dutiable amount estate duty is levied at a flat rate of currently 15%.

However, if successive deaths occured in a certain period of time or if transfer duty was paid in respect of the aquisition of property from the deceased or his estate, the calculated estate duty liability can furthermore be reduced by these amounts.[431]
A further deduction from the estate duty liability calculated is allowed by the unilateral relief regulation of sec. 16 (c) of the EDA for cases where foreign death duties were paid on property situate outside the Republic but which was also included in the deceased`s [world wide or international] estate for the purpose of South-African estate duty.[432]
Whereas the deduction of foreign death duties is only allowed in cases where an `ordinary resident´ deceased paid foreign death duties on foreign property [it would be contradictory if it would also apply for a `non-resident´, because his foreign property is not included in the estate duty assessment in the first place (sec. 3 [2] [c]-[h] of the Act)], the deduction of a rapid succession rebate and a transfer duty deduction can also be made from the South-African deceased estate of a `non-resident´ if it has been paid to South-Africa authorities.[433]

Although this work does not specifically focus on the aspects of valuing a[n] [international] deceased estate, it has to be mentioned furthermore that difficulties in the process of assessing an international deceased estate for South-African estate duty can also occur where `foreign property´, which is included in the deceased estate of an `ordinary resident´, has to be valued for estate duty purposes.[434]

Finally, the administration of an international deceased estate and the determination of the person who is liable for the payment of estate duty can be difficult, where a foreign ele-

429) *Cf.,* part B. III.3., p. 95 *et seqq.*
430) See, part B. III.4., p. 107 *seq.*
431) Part B. III.5. to III.5.2., p. 108 to 110.
432) See especially, part B. III.5.3., p. 110 *seqq.*
433) Part B. III.5. to III.5.3., p. 108 to 112.
434) *Vide supra,* part B. III.6., p. 112 *seqq.*

ment forms a part of the estate which is assessed and administered according to the South-African EDA.

The EDA often does not clearly distinguish between the deceased estate of an `ordinary resident´ or a `non=resident´, the application of the provisions of the Act mostly becomes difficult where a `foreign element´ is introduced to the assessment of a South-African estate duty liability, and other works dealing with the levying of estate duty in South-Africa deal only partly with the levying of South-African estate duty on [international] deceased estates.

Reflecting about the question other works on South-African estate duty and the EDA deal-only partly with the problems which can be introduced by the taxation of international deceased estates it seems that these circumstances may be rooted in the fact that the transfer of assets from the Republic to foreign countries is governed by the South-African exchange control rules.

Resulting from the fact that the South-African exchange control rules are designed to restrict the ability of `ordinary residents´ of the Republic alienating their assets to or investing in foreign countries, most South-Africans will not be able to aquire or to invest in foreign property and assets during their lifetime.

For the levying of South-African estate duty on [international] deceased estates this circumstance can therefore lead to the consequence that the practice will actually only provide a few deceased estates which will contain a considerable amount of foreign property and assets that have to be included in the international deceased estate of an `ordinary resident´ of the Republic at the time of his death.

C. Death duties in Germany - the Erbschaftsteuergestz (Inheritance Tax Act) of the 17th of April 1974

I. General

Having dealt with South-African estate duty, what follows is intended to be a general introduction to the German Erbschaftsteuergesetz (ErbStG - Inheritance Tax Act of the 17th of April 1974 as amended) and more particularly a review of the provisions of the ErbStG which are designed to grant unilateral relief from international double death taxation (German International [Death] Tax Law).
It would be beyond the scope of this work to provide a thorough examination and an `in depth´ analysis of all the questions and problems connected to the German inheritance tax.

A general introduction to the term `German International Death Tax Law´, a basic characterization of the German ErbStG, a short outline of the history of the German inheritance tax and an introduction to the German regulations dealing with the power to enter into double death duty agreements has already been given[1]; and the following presentation of the German ErbStG is therefore restricted to a basic discussion of the problems connected with and imposed by the German ErbStG on aspects of inheritance taxation on [international] deceased estates [or rather inheritances].

As under South-African Law a study of the regulations of the ErbStG or the `Nachlaßplanung´ (`estate planning´ or inheritance tax planning) according to the rules of the ErbStG can be characterized as a complex process which includes the necessity to take a variety of different branches and aspects of law into account.
The branches of law involved in German `estate planning´ comprise the Public [*id est,* Administrative] Law, the Private Law, the Commercial Law and last, but not least, the German Tax Law and its variety of different Tax Law codifications.
Within these branches of law the different regulations and principles, for example, of the Law of Succession, the Law of Contracts and several aspects of the Tax Law and the Commercial Law do have to be taken into account to research the ErbStG or to plan a deceased estate according to German Law.[2] Once again it would be beyond the scope of this work to deal with all the aspects which can be connected, for example, to the German Law of Succession, and the reader is referred to other literary sources dealing with the problems of the German law of Succession, where a discussion of certain problems cannot be provided.

The statutory basis for the levying of German Inheritance Taxes is provided by the Erbschaft- und Schenkungsteuergesetz (Inheritance and Donations Tax Act) of the 17th of April 1974[3], as amended; but other statutory regulations like the Erbschaftsteuerdurchfüh-

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1) For further deatails see, part A. II.1.2., p. 6, part A. III.2., p. 13, part A. IV.4., p. 18 *seqq.* and part A. V.4., p. 32 *et seqq.* of this work.
2) *Cf.,* ***Ebenroth,*** Erbrecht, p. 921 *seqq.*
3) ***Erbschaft- und Schenkungsteuergesetz,*** (Inheritance and Donations Tax Act), as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 17th of April 1974 (BGBl. I 1974, p. 933 *seqq.*), as amended.

rungsverordnung[4] (ErbStDV - Regulations for the Implementation of the ErbStG) and several Verwaltungsvorschriften[5] (administrative regulations and directions used by the German Fiscal Administration), which are especially designed to support and clarify the regulations of the ErbStG, have also to be taken into account in planning a German deceased estate [or German inheritances].

In addition to this statutory basis of the German ErbStG, the Act furthermore interacts with the German Civil Law codification (BGB), some aspects of the German Commercial law and the Tax Law codifications of the Abgabenordnung (AO - Fiscal Law Code)[6], the Bewertungsgesetz (BewG - Valuation Law)[7], the Außensteuergesetz (Law to Prevent International Fiscal Evasion)[8], the Einkommensteuergesetz (EStG - Income Tax Act)[9], the Körperschaftsteuergesetz[10] (KStG - Corporation Income Tax Act), the Vermögensteuergesetz (VStG - Wealth Tax Act)[11], the Grunderwerbsteuergesetz (GrEStG - tax levied on the transfer of real property / Transfer Tax Act)[12], and other tax law codifications.[13]

II. Brief introduction to the basic principles of the German Inheritance Tax Act (ErbStG)

II.1. The relation and interaction between the German Law of Succession and the German Erbschaftsteuergesetz

As already mentioned before, the German inheritance tax, as a part of the German Tax Law, is codified in the Erbschaft- und Schenkungsteuergesetz (Inheritance and Donations Tax Act) of the 17th of April 1974.

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4) ***Erbschaftsteuerdurchführungsverordnung,*** (Regulations for the Implementation of the ErbStG), as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 19th of January 1962 (BGBl. I 1962, p. 22 *seqq.*), as amended.

5) A concise compilation of the administrative regulations and directions used by the German Fiscal Administration can be found in the works of ***Tipke / Lang,*** Steuerrecht, p. 457.

6) ***Abgabenordnung*** (Fiscal Law Code) as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 16th of March 1976 (BGBl. I 1976, p. 613 *seqq.*, BGBl. I 1977, p. 269 *seqq.*), as amended.

7) ***Bewertungsgesetz*** (Valuation Law) in the revised form, as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 1st of February 1991 (BGBl. I 1991, p. 231 *seqq.*), as amended.

8) ***Außensteuergesetz*** (Law to Prevent International Fiscal Evasion), as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 8th of September 1972 (BGBl. I 1972, p. 1713 *seqq.*), as amended.

9) ***Einkommensteuergesetz*** (Income Tax Act), as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 7th of September 1990 (BGBl. I 1990, p. 1898 *seqq.*, BGBl. I 1991, p. 808 *seqq.*), as amended.

10) ***Körperschaftsteuergesetz*** (Corporation Income Tax Act), as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 11th of March 1991 (BGBl. I 1991, p. 639 *seqq.*), as amended.

11) ***Vermögensteuergesetz*** (Wealth Tax Act), as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 14th of January 1990 (BGBl. I 1990, p. 2467 *seqq.*), as amended.

12) ***Grunderwerbsteuergesetz*** (Transfer tax Act), as announced officially in the Bundesgesetzblatt (Federal Law Gazette) of the Federal Republic of Germany, on the 17th of December 1982 (BGBl. I 1982, p. 1777 *seqq.*), as amended.

13) Because it would be beyond the scope of this work to deal with the interaction between the ErbStG and other tax law codifications see the works of, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 25 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 18 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 22 / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 10 *seqq.*, p. 34 *seq.* / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 13 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 3, p. 18/1 *seqq.*

On the sector of the tax law, the state (Federal Republic of Germany) as a sovereign legal entity (hoheitlicher Rechtsträger) imposes taxes on its citizens (taxpayers) and creates a relation of subordination between the citizen and the state; and since a subordinative relation between a citizen and the state is a strong indication of a public law relation between the citizen (taxpayer) and the German state (according to the 'Subordinationstheorie' [theory of subordination]) the German Tax Law is traditionally regarded as being a part of the German Public Law.[14]

However, as indicated above, the German Inheritance Tax, apart from being a part of the German Public Law, is also influenced by the German Civil Law codification, 'Bürgerliches Gesetzbuch' (BGB).[15]

The German ErbStG and the German civil law are closely linked and several regulations of the Inheritance Tax Act refer directly to regulations of the Law of Succession and the Law of Donations embodied in the BGB.[16]

The ErbStG does not define the preconditions for, the elements of and the basis for the inheritance tax liability separately, but refers to the accession of property to an heir (by succession or donation), as codified in the BGB (Erbanfallsteuer[17]). Therefore the proceedings and elements of the regulations of the German ErbStG are decisively influenced by the German civil law.[18]

In terms of sec.[19] 1 (1) No. 1 of the ErbStG[20], for example, the levying of inheritance taxes is directly connected to the value of the property or assets an heir aquired from a deceased in terms of sec. 1922 of the BGB; another example of the connection between the levying of inheritance taxes and the BGB is sec. 3 (1) No. 2 of the ErbStG, in terms of which *a donatio mortis causa* [sec. 2301 of the BGB] is also defined as being a taxable aquisition of an heir on the death of a deceased. Consequently it can be stated that the ErbStG levies inheritance taxes directly on an heir who has acquired any property or assets due to an inheritance or bequest under the Law of Succession which is codified in the fifth book (sec. 1922 to sec. 2385) of the BGB.[21]

As a result it can be stated that the German civil law has an authoritative, decisive and influencing role in relation to the German inheritance tax law and German tax law terminology refers to this relationship as the 'Prinzip der Maßgeblichkeit des Zivilrechts für das Erbschaftsteuerrecht' (the principle of the governing authority [domination] of the Civil

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14) See, ***Ebenroth,*** Erbrecht, p. 921.

15) *Vide,* part B. II.1., p. 44 of this work.

16) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 41 *seqq.* / ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 37 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 23 / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 7 (1.3) / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 4, p. 28 *seq.*

17) *Vide supra,* part A. III.2, p. 13 of this work.

18) ***Meincke,*** ErbStG - commentary, Einführung, para. 7 / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 7 (1.3) / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 4, p. 28 *seq.* / ***Ebenroth,*** Erbrecht, p. 922 *seq.*

19) The quoted German statutes of the ErbStG, the BGB and other laws are normally using §§ signs to mark their sections. Yet, in this work it may be allowed to refer to the §§ of German law as sections, because the South-African reader may find it easier to read through a text referring to sec. rather than §§. However, on comparing the quoted sections to the text of the German codifications the reader should keep in mind that he has to look out for the respective §§.

20) Sections of the Erschafts- und Schenkungsteuergesetz will furtheron be quoted either as sections of the ErbStG or the Act. A quoted section of an Act without a further specification of the Act will be a section of the ErbStG.

21) ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 7 (1.3) / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 4, p. 28 *seq.* / ***Ebenroth,*** Erbrecht, p. 922 *seq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, p. 178, para. 1.1.

Law [especially the Law of Succession and the Law of Donations] over the Inheritance Tax Law).[22]

II.2. The justification of levying inheritance taxes

The levying of a tax on inheritances or on donations, that is to say the levying of a tax on the enrichment of an heir or donee, aquired by the way of inheritance or donation, is basically justified by the writers and the courts dealing with the application of the German inheritance tax on the basis of the argument, that it is necessary to redistribute the property and assets (Vermögensmasse) compiled and concentrated in the estate of a deceased during his lifetime.[23]

Whereas the aforementioned justification for the levying of inheritance taxes as such (Erbschaftsbesteuerung dem Grunde nach) can be said to be unequivocally shared by the majority of the German Tax Law authorities, the justification of a certain amount or rate of death taxes (Erbschaftsbesteuerung der Höhe nach) is an ambivalent issue.[24]

It was shown above, that the German inheritance tax system (Erbanfallsteuersystem) is influenced mainly by the idea that a person who benefits from the deceased`s death should be subject to personal taxation in respect of this benefit.[25] Like the income of a person - the enrichment of an heir by the aquisition of property due to an inheritance is regarded as an advancement of the heir`s financial capacity and is therefore taxable. In this context the central term in the justification of the imposition of the German ErbStG is the financial capacity (finanzielle Leistungsfähigkeit) of the heir.

But when is the financial capacity of an heir exhausted and the amount of inheritance taxes too high to be justified as an appropriate amount of payable tax ?

A general limitation which indicates when the amount of death taxes payable exceeds an appropriate amount and starts to become inappropriate can be specified on looking at the fundamental rights (Grundrechte) which are granted to the individual by the German Constitution (Bonner Grundgesetz von 1949).

Art. 14 (1) of the Bonner Grundgesetz guarantees the individual right (e.g. to the taxpayer) to own property and the individual right for the provision of a law of succession by the German state; and in terms of Art. 6 (1) of the Grundgesetz marriage and family shall enjoy the special protection of the state.[26]

It would therefore be a violation of the basic individual right of the taxpayer enshrined in Art. 14 (1) of the Grundgesetz (the guarantee to own property and the gurantee to the provision of a law of succession), if the amount of death taxes payable were too high and an heir had to give away his whole inheritance or even his own property and assets to pay off his inheritance tax liability (in these cases the inheritance tax rates and inheritance tax brackets of the ErbStG would contain a forbidden, so-called `Erdrosselungsteuer´ - a tax designed to suffocate the taxpayer economically, and the taxpayer concerned would be entitled to lodge a complaint of unconstitutionality against these provisions with the German Constitutional Court).

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22) See, ***BFH,*** BStBl. II 1987, p. 175 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 41 *seqq.* / ***Crezelius,*** Erbschaft- und Schenkungsteuer, p. 37 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 23 / ***Ebenroth,*** Erbrecht, p. 922 *seq.*

23) See, ***Ebenroth,*** Erbrecht, p. 922 *seq.* / ***Oberhauser,*** Handbuch der Finazwissenschaften, Vol. II, p. 491 *seqq.* / ***Schneider,*** StuW 1979, p. 38 *seqq.* (at p. 41).

24) See, ***Ebenroth,*** Erbrecht, p. 922.

25) *Vide supra,* part A. III.2., p. 13 of this work.

26) See, ***Leisner,*** Verfassungsrechtliche Grenzen der Erbschaftsbesteuerung, p. 39 *seqq.*, p. 103 *seqq.* / ***Meincke,*** ErbStG - commentary, Einführung, para. 5, 6.

An inappropriate amount of taxes payable in the above mentioned sense would also be an infringement upon the taxpayer's individual rights which are guaranteed in Art. 6 (1) of the Grundgesetz. In Art. 6 (1) of the Grundgesetz the German state has bound itself especially to protect marriage and family and it would be contradictory and inconsistent with Art. 6 (1) of the Grundgesetz to grant a special protection on the one hand and to take away the property and assets, which were left by the deceased for the maintenace of his spouse and children, *i.e.* his family, on the other hand.[27]
For this reason it is the goal of the different rates and brackets of taxation, embodied in sec. 15 and sec. 19 of the Inheritance Tax Act (depending on the family relationship between deceased and heir; and the value of the inheritance) to follow the ideal of an equal distribution of property and assets in accordance with the financial capacity of the heir and in accordance with Art. 14 (1) and Art. 6 (1) of the Bonner Grundgesetz.[28]

However, an inappropriatly high death tax rate not only interferes with the individual rights granted by the Bonner Grundgesetz, since it can furthermore be said to be counterproductive in terms of the national economy (Volkswirtschaftslehre), because an excessive death taxation, for example, of partnerships (`Personengesellschaften´,[29] comparable to family companies) can lead to the destruction of economically productive and valuable business entities, based on the fact that the payment of inheritance taxes often influences the property and assets which were owned in and by the family company.[30]
Some authors dealing with the German inheritance tax law criticise the present attitude of the ErbStG to levy inheritance taxes on the shares [*i.e.* shares or property and assets] held in a partnership at the time of the death of one of the partners of such a partnership and compare the taxable shares in a partnership to shares held in a company limited by shares, which will not be affected by the death of one of the shareholders or to a company in public ownership which will also not be affected by inheritance taxes, because the state and its companies [in public ownership] do not die.[31]
Since a discussion of all the aspects connected with this critizism would be beyond the scope of this work we leave the problems connected with the justification for levying inheritance taxes at this stage.[32]

II.3. Short introduction to the basic principles of the German Inheritance Tax Act

According to German inheritance tax terminology the examination of the provisions of the German ErbStG can basically be diverted into two main streams, namely, the regulations of the German ErbStG, which deal with the introduction or imposition of inheritance taxation, as such (`Besteuerung dem Grunde nach´), and the regulations, which deal with the establishment of the applicable amount of payable inheritance taxes (`Besteuerung der Höhe nach´).[33]

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27) Compare, ***Leisner,*** Verfassungsrechtliche Grenzen der Erbschaftsbesteuerung, p. 39 *seqq.*, p. 103 *seqq.* / ***Meincke,*** ErbStG - commentary, Einführung, para. 5, 6 / ***Ebenroth,*** Erbrecht, p. 922.
28) ***Oberhauser,*** Handbuch der Finazwissenschaften, Vol. II, p. 493 *seq.*
29) Family companies in the above mentioned sense are often partnerships as described in part B. III.2.2.1.b.ee., p. 89, 90 in footnote 256 of this work.
30) See, ***Ebenroth,*** Erbrecht, p. 922, 923.
31) For this critizism see also, ***Ebenroth,*** Erbrecht, p. 923.
32) For a detailed critizism of the present taxation of family companies on the death of a partner see, ***Stihl,*** Erbschaftsteuer - Bedrohung für Familienunternehmen, in: DIHT: Erbschaftsteuer Gefahr für den Mittelstand, p. 7 *seqq.*
33) For this diversion see also, ***Ebenroth,*** Erbrecht, p. 924.

Whereas the 'Besteuerung dem Grunde nach' mainly deals with the question which taxpayer will be liable for the payment of inheritance taxes and on what basis he will be liable for the payment of death taxes,[34] the 'Besteuerung der Höhe nach' deals with the question in which tax bracket (in terms of sec. 15 ErbStG) an heir will fall on the one hand, and which rate of taxation (in terms of sec. 19 ErbStG) has to be applied to his inheritance on the other hand. The 'Besteuerung der Höhe nach' depends furthermore on the result of the valuation of the heirs share of the inheritance, which is assessed in accordance with the rules of the 'Bewertungsgesetz' (Valuation Law) and other valuation mechanisms which are implemented in the ErbStG.[35]
The German ErbStG follows this diversion in so far, as its division into main chapters and its systematical approach recognize the 'Besteuerung dem Grunde nach' and the 'Besteuerung der Höhe nach'.

The First chapter (sec. 1 to sec. 9 of the Act) of the ErbStG is headed by the title 'tax liability' and lays down the provisions which deal with the questions concerning the taxable events ('steuerpflichtige Vorgänge'), the questions concerning the persons which are liable to pay inheritance taxes, the questions which are dealing with (a) the definition of the taxable acquisition by death ('Erwerb von Todes wegen'), (b) the *donatio inter vivos* ('Schenkung unter Lebenden'), (c) the so-called 'earmarked gifts' ('Zweckzuwendungen') and (d) the questions when an inheritance tax liability of 'foundations' ('Stiftungen') will arise.[36]
The determination of the value of an inheritance is embodied in the second and third chapter of the ErbStG. These chapters are headed by the titles 'valuation' and 'assessment of the tax' and the regulations of sec. 10 to sec. 13 of the ErbStG and sec. 14 to 19 of the Act contain the rules of the inheritance tax assessment, especially the rate of taxation, the tax brackets and the tax-free amounts applicable to an heir as the potential taxpayer of inheritance taxes.[37]

The last two chapters of the ErbStG, containing the provisions of sec. 20 to sec. 39 of the ErbStG, deal with the administration of the German Inheritance Tax Act and for this reason they can be subsumed under neither the diversion into 'Besteuerung dem Grunde nach' nor under the diversion into 'Besteuerung der Höhe nach'.

III. The regulations of the German ErbStG and the assessment of an inheritance tax liability according to the German ErbStG

Having given a brief introduction to the basic principles and main structures of the German Inheritance Tax Act, what follows is intended as a brief analysis of the regulations of the German ErbStG and an introduction to the basic principles of the assessment of an inheritance tax liability according to the German ErbStG.

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34) See, ***Ebenroth,*** Erbrecht, p. 924.
35) Compare, ***Ebenroth,*** Erbrecht, p. 924.
36) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 90 *seq.* But a short introduction to the basic principles of the ErbStG can also be found in, ***Brox,*** Erbrecht, p. 22 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 927 *seqq.* / ***Leipold,*** in: Münchener Kommentar, Vol. 6, Einleitung to sec. 1922 BGB, para. 122 *seqq.*
37) See also, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 90 *seq.* / ***Brox,*** Erbrecht, p. 22 *seqq.* /

III.1. The 'Besteuerung dem Grunde nach'

As indicated above, the provisions of the German ErbStG can be diverted into the 'Besteuerung dem Grunde nach' and the 'Besteuerung der Höhe nach'.
What follows will take this diversion into account and, after dealing with the provisions connected to this diversion, the questions and problems that can be connected with and imposed by the levying of German inheritance taxes on international deceased estates will be considered.

III.1.1. The object of the German inheritance tax

In dealing with taxes German tax law terminology differentiates, *inter alia,* between the object of a tax ('Steuerobjekt')[38] and the subject of a tax ('Steuersubjekt').[39] The object of a tax can broadly be defined as the sum of the factual preconditions laid down in a tax act and on which a tax liability is based; and the question to be put in order to establish the object of a tax is the question: 'What categories or items are taxable in terms of the concerned tax act ?'
The following will therefore deal with the answering of the question what categories or items are taxable in terms of the German ErbStG.

III.1.1.1. General

In contrast to the South-African law, the German Law of Succession does not follow a system of executorship. Where the deceased estate of a person has to be administered, inheritance taxes have to be paid and the property and assets of a deceased have to be distributed according to his will, it is the heir of the deceased who must deal with these matters.
This results mainly from the fact that the German Law of Succession is governed by the principle of universal succession ('Gesamtrechtsnachfolge') and the heir[s] of a deceased succeed[s] without any acts of transfer, delivery or cession (*ipso iure*) to the assets and liabilities of the deceased. This *ipso iure* transfer of all the property and assets from a deceased to an heir is termed as the 'Erwerb von Todes wegen' ('acquisition of property and assets by the heir[s] at the death of the deceased') and forms the initiating or connecting factor for the assessment of an inheritance tax liability in accordance with the German ErbStG.
In contrast to the South-African Estate Duty Act, the German ErbStG does not levy a final tax on the property and assets of a deceased's estate ('Nachlaßsteuer'), but taxes the enrichment which was acquired by an heir due to an inheritance or bequest from the deceased ('Erbanfallsteuer').

In terms of sec. 1 (1) No. 1 to 3 of the ErbStG the enrichment of an heir or donee,[40]

Lange / Kuchinke, Erbrecht, p. 927 *seqq.* / ***Leipold,*** in: Münchener Kommentar, Vol. 6, Einleitung to sec. 1922 BGB, para. 122 *seqq.* / ***Ebenroth,*** Erbrecht, p. 924 /

38) For a nearer definition of the taxable object in general, see ***Tipke / Lang,*** Steuerrecht, p. 140.

39) The subject of taxes ('Steuersubjekt') is defined in, ***Tipke / Lang,*** Steuerrecht, p. 131, 139 *seq.*

40) The German Inheritance and Donations Tax Act embodies the provisions for the taxation of inheritances as well, as the provisions for the taxation of donations (sec. 1 (1) and 1 (2) of the ErbStG). Therefore explanations, given in connection with the taxation of inheritances under the German ErbStG can often also be applied to the problems connected with the taxation

which was or is caused by an acquisition of property and assets on the death of a deceased (`Erwerb von Todes wegen´), by a *donatio inter vivos* (`Schenkung unter Lebenden´) or an `earmarked gift´ (`Zweckzuwendung´), is a taxable event in accordance with the ErbStG and therefore the object of the German inheritance tax. A further object of taxation in terms of sec. 1 (1) No. 4 of the ErbStG is the property which is owned by a family foundation (`Familienstiftung´).[41] But it has to be acknowledged that sec. 1 (1) No. 4 does not introduce a tax which is levied on the passing of property and assets from a deceased to an heir, but a tax which is levied on the property and assets of a family foundation and which occurs periodically every 30 years (`Erbersatzsteuer´).[42]

It can be seen that the German ErbStG is closely linked to the provisions of the German Law of Succession (`principle of the governing authority of the Civil law [BGB] over the Inheritance Tax Law´),[43] and often the solution of conflicts, which can be found under the regulations of the German Civil law [BGB] for civil law cases, will also apply in the context of the German inheritance tax law.[44]
However, in practice the principle of the governing authority of the Civil law [BGB] over the Inheritance Tax Law is not applied strictly and under certain circumstances there are deviations from this principle.[45] For the South-African reader one of the most interesting deviations from this principle will be the fact that an interest free loan, which is granted by the deceased to an heir and which can `normally´ not be qualified as a donation in terms of the German BGB, is qualified as a taxable donation for inheritance tax purposes by the Bundesfinanzhof (Federal Fiscal Court / Supreme Tax Court). The Bundesfinanzhof qualifies an interest-free loan as a taxable donation in terms of sec. 1 (1) No. 2 and sec. 7 (1) No. 1 of the ErbStG and justifies this decision by the argument that the object of the donation in these cases is the gratuitous lending of capital (`unentgeltliche Kapitalüberlassung´), *i.e.* the right to use the capital gratuitious and without a counter-performance (`die gewährte Nutzungsmöglichkeit´).[46]
And what is more, even the ErbStG itself deviates from the principle of the governing authority of the Civil law [BGB] over the Inheritance Tax Law in some of its regulations [see for example, sec. 3 (1) No. 4, sec. 3 (2) No. 4 and sec. 6 (2) sentence 1 of the Act].

The enrichment of an heir by the aquisition of property and assets on the death of a deceased or by a donation *inter vivios,* as the basic taxable events of the German ErbStG, are completed by a number of other taxable events which are expressly laid down in sec. 3 of the ErbStG. If an event [although it might be connected to an inheritance or a donation], is not laid down in sec. 3 *et seqq.* of the Act, it is not taxable in terms of the German ErbStG.[47]
Furthermore it has to be acknowledged that the levying of German inheritance and donations taxes is not only limited to the taxation of the transfer of property and assets from a deceased to an heir which occured within the limits of the Federal Republic. The German

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of donations. Especially the tax brackets in and the rate of tax of both inheritances and donations are indentical (see, sec. 15 and 19 of the ErbStG).

41) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 93 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 32 *seqq.*

42) See, ***Ebenroth,*** Erbrecht, p. 928.

43) *Cf.,* part B. II.1., p. 44 and part C. II.1., p. 130 *seq.,* of this work.

44) With this conclusion, ***Ebenroth,*** Erbrecht, p. 928.

45) See especially the decision of the ***BFH*** in: BStBl. II 1979, p. 631.

46) ***BFH*** in: BStBl. II 1979, p. 631.

47) ***Ebenroth,*** Erbrecht, p. 928.

ErbStG can and will also tax the transfer of property and assets from a deceased to an heir which occured in a foreign country, as soon as a foreign or international event of inheritance can be subsumed under the categories of sec. 3 of the ErbStG and as soon as the taxable event falls within the scope of the limited (`beschränkte´) or (`unlimited´) inheritance tax liability of an heir according to the ErbStG.[48]
In accordance with the basic taxable events that are laid down in sec. 1 (1) No. 1 to 4 of the Act, the following analysis of the taxable objects of the ErbStG will be a fourfold. Firstly there will be a short introduction to the taxable acquisition of property and assets in terms of sec. 1 (1) No. 1 and sec. 3 to sec. 6 of the Act. Secondly the taxation of donations *inter vivos* in terms of sec. 1 (1) No. 2 and sec. 7 of the ErbStG will be highlighted, followed by a brief introduction to the inheritance taxation of `earmarked gifts´ (`Zweckzuwendungen´) in terms of sec. 1 (1) No. 3 and sec. 8 of the Act, and last, but not least, a brief introduction to the taxability of `family foundations´ in terms of sec. 1 (1) No. 4 and sec. 9 (1) No. 4 ErbStG will form the final part of this short analysis of the taxable objects of the ErbStG.

III.1.1.2. The acquisition of property and assets by an heir on the death of a deceased according to sec. 1 (1) No. 1 and sec. 3 to sec. 6 of the ErbStG

The scope of the taxable categories which can and have to be connected to the legal term `acquisition of property and assets by an heir on the death of a deceased´ [`Erwerb von Todes wegen´] are laid down in sec. 3 to sec. 6 of the ErbStG. According to sec. 3 to sec. 6 of the Act all cases in which an heir is enriched by the transfer of property and assets from a deceased or from the deceased`s estate to his estate, either by testate or intestate succession or by a legacy, are comprised within these categories.[49]
In this context the regulations of sec. 3 (1) No. 1, No. 2 and No. 4 of the Act are of a special importance.[50]

III.1.1.2.a. The acquisiton of property and assets in terms of sec. 3 (1) No. 1 of the ErbStG

In accordance with the principle of universal succession, the German ErbStG defines the transfer of property and assets from a deceased to an heir [as an accession or enrichment in the estate of the heir, in terms of sec. 1922 BGB (`Erbanfall´[51])], as the main taxable event for inheritance tax purposes [see, sec. 3 (1) No. 1 of the Act].
In terms of sec. 3 (1) No. 1 of the Act it is irrelevant whether a taxpayer (an heir) acquired property and assets from a deceased by the way of testate or intestate succession.
In the special cases where a `Vorerbschaft´ (inheritance of a prior heir) and a `Nacherbschaft´ (inheritance of a reversionary heir)[52] in terms of sec. 2100 BGB[53] has taken pla-

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48) *Vide,* ***Ebenroth,*** Erbrecht, p. 928 and *infra,* part C. IV.1. to IV.4., p. 182 *seqq.* of this work.
49) ***Ebenroth,*** Erbrecht, p. 930 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 93 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 32 *seqq.*
50) ***Ebenroth,*** Erbrecht, p. 930.
51) For further information see, part A. III.2., p. 13 of this work.
52) In terms of sec. 2100 *seqq.* BGB, the `Vorerbschaft´ is an inheritance where the use of the property and assets, which were inherited by the heir is limited by the appointment of a reversionary heir [`Nacherbe´], who is entitled to the use of the property and assets of a deceased estate (or a share in the estate) on the determination of the interest of a prior (or limited) heir.
53) For detailed information see, ***Gursky,*** Erbrecht, p. 133 *seqq.* / ***Brox,*** Erbrecht, p. 219 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 315 *seqq.* / ***Grunsky,*** in: Münchener Kommentar, Vol. 6, com-

ce or is taking place, the transfer of property and assets from a deceased to the prior heir as well as the transfer of the property and assets from the prior heir to the reversionary heir is regarded as a taxable event in terms of sec. 3 (1) No. 1 of the ErbStG.[54]

If an heir repudiates his inheritance, in terms of sec. 1944 *seqq.* BGB[55], the inheritance will be affected in so far as the heir will not have aquired his inheritance *ex tunc* and will consequently not be liable for inheritance taxes in terms of sec. 3 (1) No. 1 of the Act.[56]

A taxable acquisition by death in terms of sec. 3 (1) No. 1 of the Act occurs furthermore in those cases where property and assets were acquired by the claim of an illigitemate child to receive the equivalent of his statutory share in the deceased`s estate [`Erbersatzanspruch´, sec. 1934a *seqq.* of the BGB[57]], where property and assets were acquired by a legacy [`Vermächtnis´, sec. 2147 *seqq.* of the BGB[58]], or in those cases where a descendant, the parents or the spouse of the testator were excluded from succession by will or contract of inheritance, but aquired property or assets by claiming the payment of a compulsary portion of the deceased estate[59] [`Pflichtteilsanspruch´, sec. 2303 *et seqq.* of the BGB[60]].

As far as the `Erbersatzanspruch´ and the `Pflichtteilsanspruch´ are concerned it has to be noted that they are only taxable if they were claimed.[61]

If property and assets were acquired under a contract of inheritance, they are also taxable in terms of sec. 3 (1) of the ErbStG but the beneficiary of a contract of inheritance is allowed to deduct the actual value of his counter-performance [which he probably gave for being appointed as an heir] from the value of the property and assets he aquired from the testator.[62]

Sec. 3 (1) No. 1 of the Act is completed by the regulation of sec. 3 (1) No. 3 of the ErbStG, which provides for the taxation of other like events to acquire property and assets from the deceased at the time of his death (`sonstige Erwerbe´). Other like events in terms of sec. 3 (1) No. 3 of the Act will be events to which the regulations dealing with legacies, in terms of sec. 2303 of the BGB, can be applied analogously. Other like events

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mentary to sec. 2100 to sec. 2146 / ***Ebenroth,*** Erbrecht, p. 378 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 2100 to sec. 2146.

54) See, ***Ebenroth,*** Erbrecht, p. 931 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 16.

55) For further information on the repudiation see, ***Leipold,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 1944 / ***Ebenroth,*** Erbrecht, p. 231 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 1944 / ***Gursky,*** Erbrecht, p. 71 *seqq.* / ***Brox,*** Erbrecht, p. 194 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 108 *seqq.* .

56) For details see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 111 *seq.*

57) Further information on the `Erbersatzanspruch´ can be found, in: ***Gursky,*** Erbrecht, p. 23 *seqq.* / ***Brox,*** Erbrecht, p. 57 *seqq.* / ***Leipold,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 1934a / ***Ebenroth,*** Erbrecht, p. 378 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 1934a / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 109 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 40.

58) For details, ***Brox,*** Erbrecht, p. 264 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 351 *seqq.* / ***Gursky,*** Erbrecht, p. 156 *seqq.* / ***Skibbe,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 2147 / ***Ebenroth,*** Erbrecht, p. 304 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 2147 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 116 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 40 *seqq.*

59) The compulsary `Pflichteils´ portion of an heir under German Law is one-half of the value of his statutory inheritance share (sec. 2303 BGB)

60) ***Gursky,*** Erbrecht, p. 143 *seqq.* / ***Brox,*** Erbrecht, p. 328 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 579 *seqq.* / ***Frank,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 2303 / ***Ebenroth,*** Erbrecht, p. 621 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 2303.

61) See, ***Ebenroth,*** Erbrecht, p. 931 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 119 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 43.

62) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 109 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 35.

which are taxable in terms of this regulation are the surviving spouses entitlement to personal chattels [`Voraus des Ehegatten´, sec. 1932 BGB[63] (although in practice the `Voraus´ will normally be exempt from the levying of inheritance taxes in terms of sec. 13 (1) No. 1 a and b of the Act)], the `thirtieth´ [`Dreißigste´, sec. 1969 BGB[64]] and lump sum payments in terms of sec. 13 (1) of the `Höfeordnung´[65].

In addition to these cases where property and assets which are taxable in terms of sec. 3 (1) No. 1 of the ErbStG were acquired according to the rules of the German Law of Succession, the regulation of sec. 3 (1) No. 1 of the ErbStG contemplates and taxes furthermore property and assets that were acquired according to the rules of a foreign Law of Succession, if and so far as the acquisition that was effected under the foreign law can be compared to an acquisition of property and assets in accordance with the German Law of Succession or the German inheritance tax law.[66]

This wide interpretation of sec. 3 (1) No. 1 of the ErbStG results mainly from the fact that the reference in sec. 3 (1) No. 1 of the ErbStG to sec. 1922 *seqq.* of the BGB, in the view of the Bundesfinanzhof (Federal Fiscal Court / Supreme Tax Court), also embodies a reference to foreign laws of succession, as long as (a) the foreign succession rules are comparable to the German rules of succession, (b) the German private international law arrives at the conclusion the that the foreign law rules apply to the concerned succession and (c) the taxpayer can be held liable for the payment of German inheritance taxes in terms of sec. 2 of the ErbStG.[67]

III.1.1.2.b. The acquisition of property and assets in terms of sec. 3 (1) No. 2 of the ErbStG

Property and assets which were acquired by a *donatio mortis causa* [in terms of sec. 2301 BGB[68]] are taxable in terms of sec. 3 (1) No. 2 of the ErbStG.

Like a donation in terms of the BGB a taxable *donatio mortis causa* in terms of sec. 3 (1) No. 2 of the ErbStG can be characterized as an enrichment of the donee on the basis that the donor was not under a legal obligation to donate something to the donee, but gave [in the anticipation of death] something to the donee out of his own free will and without re-

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63) See especially, ***Brox,*** Erbrecht, p. 52 / ***Ebenroth,*** Erbrecht, p. 89 *seq.*, p. 932 / ***Lange / Kuchinke,*** Erbrecht, p. 167 *seqq.* / ***Gursky,*** Erbrecht, p. 21 / ***Leipold,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 1934 / ***Keidel,*** in: Palandt, BGB - commentary, sec. 1934 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 114 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 36 *seqq.*

64) The `Dreißigster´ is a maintenance to be furnished by the heir for the first thirty days after the devolution of the estate to members of the household of the deceased who were maintained by the deceased during his lifetime. ***Gursky,*** Erbrecht, p. 113 / ***Siegmann,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 1969 / ***Keidel,*** in: Palandt, BGB - commentary, sec. 1969.

65) The `Höfeordnung´ is a law, which is especially relating to the inheritance of farms and forests. However, it has to be acknowledged, that the `Höfeordnung´ is only in force in some of the German Länder (Provinces). ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 115 *seq.*

66) See, ***BFH*** BStBl. II 1972, p. 462 / ***BFH*** BStBl. II 1977, p. 425 / ***BFH*** BStBl. II 1986, p. 615 / ***Meincke,*** ErbStG - commentary, sec. 3, para. 12 and 30 and *infra,* part C. IV.5., p. 194 *seqq.*

67) See also, ***BFH*** BStBl. II 1972, p. 462 / ***BFH*** BStBl. II 1977, p. 425 / ***BFH*** BStBl. II 1986, p. 615 / ***Meincke,*** ErbStG - commentary, sec. 3, para. 12 and 30.

68) For a thourough examination of the German *donatio mortis causa* see, ***Gursky,*** Erbrecht, p. 65 *seqq.* / ***Brox,*** Erbrecht, p. 453 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 443 *seqq.* / ***Musielak,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 2301 / ***Ebenroth,*** Erbrecht, p. 348 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 2301 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 122 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 44 *seq.*

ceiving or stipulating for anything in return.[69]

III.1.1.2.c. The acquisition of property and assets in terms of sec. 3 (1) No. 4 of the ErbStG

A further taxable acquisition of property and assets by an heir on the death of a deceased is laid down in sec. 3 (1) No. 4 of the Act.
Sec. 3 (1) No. 4 of the ErbStG taxes the gain of a pecuniary benefit which accrues to an heir from a contract for the benefit of a third party which was concluded in respect of the event of the death of the deceased and entered into by the deceased during his lifetime.[70]
Typical categories which clearly fall within the scope of this regulation are life insurances (`Lebensversicherungen´) payable to third parties on the death of the deceased, other insurances for surviving dependants, and payments to the dependants arising from occupational or company pension schemes (`betriebliche Alterversorgung´).[71]

III.1.1.2.d. The acquisition of property and assets in terms of sec. 3 (2) of the ErbStG

The provisions of sec. 3 (2) No. 1 to sec. 3 (2) No. 7 of the ErbStG are broadly regarded as being self explanatory, when they are read together with the sections they refer to in the German Law of Succession.[72] The following is therefore only meant to highlight a few of these provisions.

aa. The transfer of property to a family foundation in terms of sec. 3 (2) No. 1 ErbStG

The transfer of property and assets from a deceased to a family foundation (`Familienstiftung´) is taxable in terms of sec. 3 (2) No. 1 of the Act.[73] But before property and assets can be transferred from the deceased to a family foundation, the family foundation has to be founded and drawn up by the deceased under a will, under a contract of inheritance or by a legacy.
The family foundation is a juristic person and can only come to life with the permission of the state authorities of the Federal Republic (sec. 80 BGB), but once a family foundation has been created according to sec. 80 of the BGB it will be treated as if it came to life on the date of death of the deceased (sec. 84 BGB).[74]
The aims and goals of a family foundation are enshrined in the statutes of the family foundation and the property and assets that were transferred to the foundation have to be used in accordance with its statutes.[75] The earnings which can be derived from a family foundation are exempt from the levying of inheritance taxes, but after a period of 30 years

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69) See, ***BFH,*** BB 1991, p. 401.
70) For further details see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 125 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 47 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.5, p. 187 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 17 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 13, p. 62/7 *seqq.*
71) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 47 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.5, p. 187
72) See, ***Ebenroth,*** Erbrecht, p. 936.
73) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 134 / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 49 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.6, p. 190 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 19 *seq.*
74) *Cf.,* ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.6, p. 190 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 134 *seq.*
75) ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.6, p. 190.

a family foundation is liable to pay inheritance taxes on its property and assets.[76]
Although the creation of a German family foundation seems to be similar to the creation of a trust according to South-African or Anglo-American law, it would be wrong to assume that both the German family foundation and the South-African testamentary trust are identical or even comparable.[77] This is mainly rooted in the fact that the South-African testamentary trust is not a legal person[78], whereas it can be stated, that a German family foundation is a *legal persona.*[79]

bb. The acquisition of property and assets in terms of sec. 3 (2) No. 2 ErbStG

By a testamentary disposition the deceased can impose on an heir or a legatee an obligation (`Auflage´) which he has to fulfill in order to aquire the property and assets which were bequeathed to him [see, sec. 1940 BGB[80]]. Refering to this fact, sec. 3 (2) No. 2 of the ErbStG states that only after an heir or legatee complied with the testamentary obligation which was burdened on him will his inheritance be liable for inheritance taxes.[81]

cc. The regulation of sec. 3 (2) No. 4 of the ErbStG

If an heir or a legatee received a compensation from the deceased or the main heir for repudiating his part of the inheritance, for repudiating his legacy or for repudiating an `Ersatzanspruch´ or a `Pflichtteilsanspruch´[82], the compensation received will be taxable in accordance with sec. 3 (2) No. 4 of the ErbStG.[83]

dd. The regulation of sec. 3 (2) No. 6 of the ErbStG

Where a reversionary heir (`Nacherbe´) sells his expectancy to the property and assets [which would normally be transferred to him by the prior heir] to a third party, he will be taxed according to sec. 3 (2) No. 6 of the ErbStG.
In accordance with sec. 3 (2) No. 6 of the Act the selling price received is deemed to be aquired from the deceased and is taxable under this provision.[84]

III.1.1.3. The taxation of the *donatio inter vivos* according to sec. 1 (1) No. 2 and sec. 7 of the ErbStG

Having considered the different categories which are subject to a taxable transfer of pro-

76) See, sec. 1 (1) No. 4 of the ErbStG.
77) ***Ebenroth,*** Erbrecht, p. 948 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.6, p. 190.
78) *Cf.,* ***CIR v. MacNeillie's Estate*** 1961 (3) SA 833 (at p. 840) / ***T. Honoré and E. Cameron,*** Honore´s South African Law of trusts, p. 53 *seqq.* / ***P. A. Olivier,*** Trust Law and Practice, p. 61 *seqq.*, p. 173, although a trust is defined as a person for Income tax purposes, see ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 28, para. 28.2.3., chap. 29, para. 29.3.1.
79) ***Ebenroth,*** Erbrecht, p. 948 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.6, p. 190.
80) For further information see, ***Brox,*** Erbrecht, p. 283 *seqq.* / ***Ebenroth,*** Erbrecht, p. 334 *seq.* / ***Lange / Kuchinke,*** Erbrecht, p. 381 *seqq.* / ***Gursky,*** Erbrecht, p. 163 / ***Leipold,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 1940 / ***Keidel,*** in: Palandt, BGB - commentary, sec. 1940.
81) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 135 / ***Pohlmann,*** Erbschaftsteuer, p. 15 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 49 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.7, p. 191 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 20.
82) *Vide supra,* part C. III.1.1.2.a., p. 137 *seq.* and footnotes 55, 58 *ad hunc locum.*
83) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 136 / ***Pohlmann,*** Erbschaftsteuer, p. 16 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 49 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.8, p. 191 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 21.
84) See also, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 137 *seq.* / ***Pohlmann,*** Erbschaftsteuer, p. 16 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 51 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 21.

perty and assets from a deceased to an heir [so-called aquisition by the death of a deceased (`Erwerb von Todes wegen´) in terms of sec. 1 (1) No. 1 and sec. 3 to 6 of the ErbStG], a short introduction to the principles of the taxation of donations in terms of sec. 1 (1) No. 2 and sec. 7 of the ErbStG now follows.[85]

III.1.1.3.a. General

Because there is a strong bond between the payment of inheritance taxes and the avoidance of inheritance taxes by donations *inter vivos*, the German tax legislator has embodied the rules for the taxation of donations within the regulations of the Inhertiance and Donations Tax Act, the ErbStG.[86]

The statutory definition of taxable donations *inter vivos* is laid down in the regulations of sec. 1 (1) No. 2 and sec. 7 (1) to (7) of the ErbStG and on reading through the provisions of sec. 7 (1) No. 1 to No. 10, it can at once be seen that the categories which constitute a liability for the payment of inheritance taxes on donations *inter vivos*, further the categories which fall within the ambit of sec. 516 BGB [the definition of the donation *inter vivos* for the purposes of the German civil law].[87]

In terms of sec. 7 (1) No. 1 of the Act donations *inter vivos* are defined as all kinds of generous bestowals (`freigebige Zuwendungen´) by which the beneficiary of a bestowal (the `Zuwendungsempfänger´) is enriched;[88] and after having defined the wide scope of taxable donations *inter vivos* the ErbStG additionally clarifies and exemplifies the scope of a donation *inter vivos* in sec. 7 (1) No. 2 to 10 of the Act.[89]
Whereas a donation, as a bilateral contract, in terms of sec. 516 of the BGB can only be performed when both, the donor (`Schenker´) and the donee (`Beschenkter´ or `Schenkungsempfänger´) have agreed on the gratuitious nature of the donation, a generous bestowal in terms of sec. 7 (1) No. 1 of the Act depends only on the intention of the donor of a bestowal (`Zuwendender´) to enrich a beneficiary (`Zuwendungsempfänger´).[90]
On making a donation in terms of sec. 516 of the BGB, both parties to the contract, the donor and the donee, have to agree on the gratuitiousness of the donation and a donation in terms of sec. 516 of the BGB therefore depends on the subjective intentions of the contracting parties.

85) Because the following part of this work cannot deal with all the problems that can be connected to the priciples of the taxation of donations the reader should also refer to the works of, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 157 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 16 *seqq.*, p. 25 *seq.* / ***Degen,*** Fallkommentar zum Erbschaft- und Schenkungsteuerrecht, p. 97 *seqq.* / ***Pietsch / Schulz,*** Grundfälle Erbschaftsteuer, Schenkungsteuer, p. 138 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 64 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.5, p. 186 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 27 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 32, p. 111 *seqq.* / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 40 *seqq.* (2.4) / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 50 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 7 / ***Kapp,*** ErbStG - commentary, sec. 7 / ***Moench,*** ErbStG - commentary, sec. 7 / ***Troll,*** ErbStG - commentary, sec. 7.

86) *Cf.*, ***Ebenroth,*** Erbrecht, p. 937.

87) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 64 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 7 para. 7 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 157 *et seqq.*

88) Compare, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 157 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 16 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 64 *seqq.*

89) ***Ebenroth,*** Erbrecht, p. 937 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 64 *et seq.*

90) *Vide,* ***BFH,*** BStBl. II 1987, p. 80 / ***Meincke,*** ErbStG - commentary, sec. 7, para. 11 / ***Moench,*** ErbStG - commentary, sec. 7, para. 3 / ***Troll,*** ErbStG - commentary, sec. 7, para. 2.

In contrast to this, the establishing of a donation *inter vivos*, for the purposes of sec. 7 (1) No. 1 of the ErbStG, can be judged or manifested by an objective examination of the fact that the donor of a generous bestowal had the intention to gratuitously enrich the receiver of the bestowal.[91]

The precondition for a donation and a generous bestowal in terms of sec. 516 BGB or sec. 7 (1) No. 1 of the ErbStG is the enrichment of the beneficiary; and an enrichment of the beneficiary can be assumed as soon as the value of the enriching item of a donation or bestowal on the one hand objectively exceeds a possible loss which might on the other hand be connected to the enrichment.

An objective enrichment of the beneficiary of a generous bestowal is therefore one of the main preconditions of sec. 7 (1) No. 1 of the ErbStG.[92]

However, it has to be acknowledged that it is not necessary, that the nature or materia of the item which constitutes an enrichment of the beneficiary on the one hand has to be of the same nature or materia (`stoffgleich´) as a possible loss which is exceeded by the connected enrichment on the other hand. As a result so-called `indirect donations´ (`mittelbare Schenkungen´)[93] are also taxable in terms of sec. 7 (1) No. 1 ErbStG.[94]

The liability for the payment of donations tax can neither be excluded by the fact that a donation was made under a resolutive condition (`auflösende Bedingung´[95] [see sec. 5 (1) of the Bewertungsgesetz - Valuation Law]) nor by the fact that the donation is encumbered with a charge (`Auflage´)[96] or by the fact that the parties to a contract try to hide a donation in the so-called onerous terms of a contract (`Wahl der Form eines lästigen Vertrages´ [sec. 7 (4) of the Act]).[97]

A further precondition for the tax liability of a donation *inter vivos* is the fact that the donation or generous bestowal must have been performed in order to create a liability in terms of sec. 7 (1) No. 1 of the ErbStG.[98] But it must be observed, that even a donation which was made subject to subsequent revocation is regarded as a performed donation for inheritance tax purposes.[99]

Normally a donations tax liability which came into existence with the performance of a donation *inter vivos* in the above mentioned sense is not affected by circumstances which lead to the omission of the enrichment of the beneficiary after the performance. However,

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91) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 157 *et seq.* / ***Meincke,*** ErbStG - commentary, sec. 7, para. 11 / ***Ebenroth,*** Erbrecht, p. 938 / ***Moench,*** ErbStG - commentary, sec. 7, para. 3

92) ***Meincke,*** ErbStG - commentary, sec. 7, para. 12 *seqq.*

93) The term `indirect donation´ is used in the German tax law terminology for cases, in which, for example, person A wants to donate real estate to person B. For this purpose person A transfers DM 100.000 to person B and person B buys the real estate with the money he received from A. For further information see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 178 *et seqq.*

94) For further information on indirect donations see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 178 *et seqq.* / ***Ebenroth,*** Erbrecht, p. 938 / ***Meincke,*** ErbStG - commentary, sec. 7, para. 10, 17 / ***Moench,*** ErbStG - commentary, sec. 7, para. 24 *seqq.*

95) If a donation is made under a resolutory condition, this means that upon the occurrence of the resolutary condition (`auflösende Bedingung´, sec. 158 (2) BGB) the exisiting donation will normally be terminated and the prior status will be reestablished.

96) For nearer information on donations which were encumbered with a charge see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 160 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 81 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 54 *seq.* / ***Meinke,*** ErbStG - commentary, sec. 7, para. 94 *seqq.*

97) See, ***Ebenroth,*** Erbrecht, p. 938.

98) ***BFH,*** BStBl. II 1987, p. 179.

99) *Cf.*, ***Troll,*** ErbStG - commentary, sec. 7, para. 6 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 169 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 7, para. 61.

in cases where a beneficiary cannot be held responsible for a subsequent omission of the enrichment, sec. 29 of the ErbStG provides for certain deviations from the above mentioned principle.[100]

In terms of sec. 29 (1) No. 1 of the ErbStG the tax liability of a donee will lapse in cases where a donee has to return the donation because the donor has put forward a claim for the return of the donation. If the claim for the return of a donation is limited to a partial return of the donation, the tax liability of the donee will be curtailed to the enrichment which is left in his hands after the return of the donation (sec. 175 (1) No. 2 of the Abgabenordnung - Fiscal Law Code). In these situations or cases the donee will be treated like a `Nießbraucher´ [`usufructuary´] for the period of time in which he was able to reap the fruits of the donation [in terms of sec. 29 (2) of the Act].

Consequently a donee will always be enriched as soon as a donation was performed and he had the possibility to reap the fruits of the donation, even if he has to return the item of the donation later on.[101]

The same applies in those cases, where a donation was made under a resolutive condition. Upon the occurrence of the resolutive condition the tax liability of the donee will be curtailed to the enrichment which is left in his hands after the resolution took place (sec. 5 (2) of the Bewertungsgesetz [Valuation Law]), and on assessing the value of the enrichment which is left with the donee, the value of the proceeds he derived from the donation will have to be taken into account.[102]

If the parties to a contract enter a mutual contract and the performance of one of the parties is markedly out of proportion in comparison to the counter-performance of the other party, German tax terminology terms this situation as a taxable `mixed donation´ (`gemischte Schenkung´).[103]

The gratuitious bestowal [the difference between the performance and the counter-performance of the contracting parties] which arises in these cases is one form of trying to hide a donation in the so-called onerous terms of a contract (sec. 7 (4) of the Act).[104]

On assessing the value of the enrichment which occurs during the performance of a `mixed donation´ [the assessment of the taxable difference between the performance and the counter-performance of the contracting parties] the question arises how the value of the mutual performances must be valued for donations tax purposes, either by civil law

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100) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 364 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 16 *seqq.*, p. 95 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 187 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 79 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 29, para. 6.

101) *Cf.*, ***Kapp,*** ErbStG - commentary, sec. 7, para. 61 / ***Meincke,*** ErbStG - commentary, sec. 29, para. 16 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 364 *et seqq.*

102) See, ***Rössler / Troll,*** Bewertungsgesetz und Vermögensteuer, commentary, sec. 5, para. 5.

103) A `mixed donation´ can be assumed, for example, in cases, where a person sells real estate, with a current market value of DM 1 million to another person for the selling price of DM 0.2 million. In these cases the performance of paying the buying price of DM 0.2 million is markedly out of proportion in comparison to the counter-performance, the conveyance of real estate at the value of DM 1 million; and a gratiuous bestowal (donation) amounting to the difference between the buying price and the current market value of the real estate can be assumed. See furthermore, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 159 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 81 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 27 *seqq.* / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 46 *seqq.* (2.4.3.) / ***Meincke,*** ErbStG - commentary, sec. 7, para. 27 *seqq.*

104) See, ***Ebenroth,*** Erbrecht, p. 939.

standards[105] or by tax law standards.[106] It would be beyond the scope of this work to enlarge on the controversial positions suggested by German tax law terminology in this context and it may therefore be allowed to state that in the practice of the Bundesfinanzhof (Federal Fiscal Court / Supreme Tax Court) a contract, under which a mixed donation occurs, is split up into a gratuitious element and an element where the exchange of performances has actually taken place.[107] On using this method the Bundesfinanzhof attempts to identify the real elements of a donation from the mixed donation which was hidden in the terms of a so-called onerous contract.
For the taxation of a `mixed donation´ in a case where real estate with a current market value of DM 1 million is sold to another person for the selling price of DM 0.2 million this means that in these cases a generous bestowal of $^4/_5$ of the fair market value [DM 800 000] is taxable in terms of sec. 7 (1) No. 1 of the ErbStG.[108]

III.1.1.3.b. The taxation of so-called `anticipated successions´

Another problematic area the German inheritance and donations tax has to deal with is the area where an heir aquires property and assets from a deceased during the lifetime of the deceased. In Germany the anticipation of the death of a deceased and the transfer of property and assets to his heirs during his lifetime is a much used tool in estate planning to minimise the inheritance tax burden which would otherwise be levied on all his property and assets, if they were transferred to his heirs at the date of his death [`vorweggenommene Erbfolge´].[109]
On disposing of property and assets during his lifetime, the deceased and his heirs will benefit from the fact that the increase in the value of the transferred property and assets will accrue in the hands of the heirs and that the early disposal of property and assets to an heir opens the door to use tax-free amounts, allowed in terms of the ErbStG, more than once.[110]
Further advantages of an anticipated succession arise from the fact that the deceased will be able to control the distribution of his property and assets during his lifetime and perhaps to secure and provide for his old age income.[111] In Germany the anticipated succession [`vorweggenommene Erbfolge´] is mainly utilized where a partnership [`Personengesellschaft´, comparable to a family company] or shares [*i.e.* property and assets] in a partnership are held by the person who is planning his estate or where this person owns an estate, which consists of a `vast´ amount of property and assets.
But it has to be acknowledged that this popular inheritance tax avoidance scheme will not be tax-free, but will often attract the levy of donation taxes on the transferred property

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105) For an `in depth´ discussion see especially, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 160 *et seqq.* / ***Ebenroth,*** Erbrecht, p. 939, 940.
106) See the discussion of this problem in the decisions of the Bundesfinanzhof, ***BFH*** BStBl. II 1980, p. 260; ***BFH*** BStBl. II 1982 p. 83; ***BFH*** BStBl. II 1982 p. 714 and ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 160 *et seqq.* .
107) See also, ***BFH*** BStBl. II 1980, p. 260; ***BFH*** BStBl. II 1982 p. 83; ***BFH*** BStBl. II 1982 p. 714.
108) See, ***BFH,*** BStBl. II 1980, p. 260, BStBl. II 1982, p. 714 / ***Meincke,*** ErbStG - commentary, sec. 7, para. 7 / ***Moench,*** ErbStG - commentary, sec. 7, para. 24.
109) For the problems that can be connected to a `vorweggenommene Erbfolge´ see, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 163 *seq.* and p. 781 *seqq.* / ***Ebenroth,*** Erbrecht, p. 940.
110) Compare, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 783 / ***Ebenroth,*** Erbrecht, p. 940.
111) For further information, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 784 / ***Ebenroth,*** Erbrecht, p. 940.

and assets.[112]

This results mainly from the fact that the transfer of property and assets from a person to his heirs [to be] is normally regarded as a donation in terms of sec. 7 (1) No. 1 of the ErbStG. Even in the cases where the beneficiary of an anticipated succession is obliged to pay a counter-performance in order to receive property and assets from the disposing person [e.g. where the beneficiary is obliged to pay a lump sum payment to his siblings, who will not benefit from the transfer of property and assets to him], the transfer of property and assets will attract the payment of inheritance taxes, because the real value of the transferred estate will normally exceed the counter-performance given in `exchange´.[113]

According to the rulings of the German courts the transfer of estates under an anticipated succession has to be regarded as a donation in general and as a `mixed donation´, an `indirect donation´ or as a `donation which is encumbered with a charge´ [`Auflagenschenkung´] in particular.

Whereas the reason for the taxation of donations, `mixed donations´ and `indirect donations´ can be attributed to sec. 7 (1) No. 1 of the ErbStG, the reasons for the taxation of `donations which are encumbered with a charge´ were controversial for a long time and have only recently been clarified by a decision[114] of the Bundesfinanzhof (Federal Fiscal Court / Supreme Tax Court).

Difficulties in connection with the taxation of `donations which are encumbered with a charge´ (for example, donations which are connected to a `Nießbrauch´ [comparable to a usufruct[115]] or to other rights of use or other conditions and which are payable by the donee) arose mainly from the question how the taxation of the value of the enrichment of the donee could be achieved.

Because sec. 10 of the ErbStG originally only deals with the manifestation and taxation of the enrichment of a person which can be connected to the transfer of property and assets on the death of a deceased, it was controversial whether these principles would also apply to the enrichment by `donations which are encumbered with a charge´.

However, the Bundesfinanzhof decided that the taxation of the enrichment of a beneficiary which was aquired by a `donation which is encumbered with a charge´ can be derived directly from sec. 7 (1) No. 1 of the Act, as soon as the beneficiary has to counter-perform in cash payments or in payments in kind [e.g. by paying certain sum of money to someone in connection with the donation] in order to benefit from the donation (so-called `Leistungsauflage´).[116] In these cases the beneficiary is enriched in a way, which is comparable to a `mixed donation´ and will therefore be taxable in terms of sec. 7 (1) No. 1 of the ErbStG.[117]

On the other hand the beneficiary of a donation which is encumbered with a charge will be taxed for the whole accesion of property and assets he received when he gained `ownership´ over the donated item (e.g. `the bare dominium´ in the case of a `Nießbrauch´ [usufruct]), even though he might not be able to reap the fruits of his property and assets

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112) ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 783 *et seq.*

113) See, ***Ebenroth,*** Erbrecht, p. 940.

114) Especially, ***BFH*** BStBl. II 1989, p. 524 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 81 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 160 *et seqq.* / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 785 *seqq.*

115) *Vide supra,* part B. III.2.1.1.b.dd.γ., p. 76 of this work.

116) See, ***BFH*** BStBl. II 1989, p. 524.

117) ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 785 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 160 *et seqq.*

(so-called 'Nutzungs- or Duldungsauflage').[118] However, the burden which is laid on a donation by the encumberance of a 'Nutzungs- or Duldungsauflage' can be assessed in terms of sec. 13 to 16 of the Bewertungsgesetz [Valuation Law] and will be deductible if the regulation of sec. 25 of the ErbStG is not violated by this deduction.[119]

III.1.1.3.c. The taxation in terms of sec. 7 (1) No. 5 and 6 of the ErbStG

Even if a donation in terms of the German civil law did not occur, the item which enriched a beneficiary may be taxable in terms of the German ErbStG.
For example, although the furnishings which were paid for by the parents, in respect of the marriage of a child or to set up the career or the independent living of a child ('Begründung einer selbständigen Lebensstellung'), cannot in terms of sec. 1624 of the BGB, be regarded as a donation in the terms of the civil law, these payments will attract donations tax in terms of sec. 7 (1) No. 1 of the ErbStG.[120]
The same applies to lump sum payments which were made in respect of the renunciation of a future inheritance in terms of sec. 1934d, 2346 and 2352 of the BGB, read together with sec. 2325 BGB. Although these lump sum payments cannot be regarded as a donation for the purposes of the BGB, the ErbStG provides for their taxation under sec. 7 (1) No. 5 and 6 of the Act.[121]

III.1.1.3.d. The taxation of donations *inter vivos* which are related to 'partnerships'

It must furthermore be mentioned, that the gratuitious or partly-gratuitious transfer of shares in a partnership ('Personengesellschaft', mainly family companies) is also a taxable donation in terms of sec. 7 (5) of the ErbStG. It would be beyond the scope of this work to explain the full meaning of sec. 7 (5) of the Act, because it can only be understood in the light of an 'in depth' analysis of the regulations and methods of valuing a partnership which are connected to the German Civil and Commercial law.[122]

In terms of sec. 7 (7) of the ErbStG a donation *inter vivos* can also be assumed in those cases where a share or parts of a share which are owned in a partnership are transferred to the other partners of the partnership under the condition (a) that this transfer was agreed upon and laid down in the partnership agreement and (b) that the transfer is connected to the event of the withdrawal of one of the partners from the partnership.

In these cases the value of the transferred share will be assessed according to the rules of sec. 12 of the ErbStG and the difference between the value of the share at the date of the withdrawal of the partner and the value of the lump sum payment claimable by the partner

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118) Compare, ***BFH*** BStBl. II 1989, p. 524.

119) ***BFH*** BStBl. II 1989, p. 524 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 81 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 160 *et seqq.* / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 785 *seqq.* / ***Ebenroth,*** Erbrecht, p. 941.

120) Compare, ***Ebenroth,*** Erbrecht, p. 944.

121) ***Meincke,*** ErbStG - commentary, sec. 7, para. 107, 110 / ***Moench,*** ErbStG - commentary, sec. 7, para. 166 / ***Troll,*** ErbStG - commentary, sec. 7, para. 52 / ***Langenfeld / Gail,*** Handbuch der Familienunternehmen, sec. VII, para. 43 *seqq.* (2.4.2).

122) In order to understand the problems that are connected to sec. 7 (5) of the ErbStG it can be recommended to refer to, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 801 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 200 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 74 / ***Meincke,*** ErbStG - commentary, sec. 7, para. 121 *seqq.* / ***Kapp,*** ErbStG - commentary, sec. 7, para. 167 / ***Troll,*** ErbStG - commentary, sec. 7, para. 65.

on the date of the withdrawal from the partnership will be taxable.
The German tax law terminology regards sec. 7 (7) of the ErbStG as a regulation which corresponds [`Korrespondenzvorschrift´] with sec. 3 (1) No. 2 sentence 2 of the Act.[123]
The regulation of sec. 7 (7) also applies to shares which are held in a company limited by shares [`Kapitalgesellschaft´].[124]
The taxable object of a donation in terms of sec. 7 (7) of the ErbStG is the difference between the actual value of the share the partner owns in the partnership at the date of his withdrawal from the partnership (according to sec. 12 of the Act) and the value of the lump sum payment he received [but which did not represent the full value of the share he owned in the partnership]. But in contrast to the gratuitiuos bestowal in terms of sec. 7 (1) No. 1 of the Act must be noted, that a donation in terms of sec. 7 (7) of the ErbStG cannot be regarded as a gratuitious bestowal, but is the result of the partnership agreement.[125]

Finally the regulations on the donation *inter vivos* also deal with the distribution of excessive partnership profits (`überhöhte Gewinnbeteiligungen´). The regulation for the taxation of excessive partnership profits which is embodied in sec. 7 (6) of the ErbStG deals with the delimitation of the taxation of partnership profits according to the rules of the Income Tax Act or according to the rules of the Inheritance Tax Act.[126]
As long as the profits distributed to a partner of a partnership are in proportion to the profits distributed to and received by the other partners of the partnership, these profit will be taxable according to the rules of the Income Tax Act. But as soon as `partnership profits´ which normally would not be paid to a another partner are paid to one of the partners, these so-called excessive partnership profits will be taxed as a donation in terms of sec. 7 (6) of the ErbStG.[127]

The excessive partnership profits in terms of sec. 7 (6) of the Act are regarded as an independent donation (`selbständige Schenkung´) and are taxed at their net present value (`Kapitalwert´).

But apart from the fact that the taxation of excessive partnership profits is embodied in sec. 7 (6) ErbStG, a variety of questions concerning the establishment of these profits and the assessment of their present net value were left open and are still unanswered.[128]

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123) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 215 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 7, para. 142 *seqq.* / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 807 *et seqq.*

124) See, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 808 *et seqq.* ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 217 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 23, p. 83 *seqq.*

125) See, ***Ebenroth,*** Erbrecht, p. 945.

126) *Vide,* ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 805 *et seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 212 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 95 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 25, p. 89 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 7, para. 133 *seqq.* / ***Kapp,*** ErbStG - commentary, sec. 7, para 190.

127) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 212 / ***Meincke,*** ErbStG - commentary, sec. 7, para. 133 *et seq.*

128) Sec. 7 (6) of the ErbStG is a very controversive regulation, see ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 805 *et seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 212 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 95 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 25, p. 89 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 7, para. 133 *seqq.* / ***Kapp,*** ErbStG - commentary, sec. 7, para 190 / ***Moench,*** ErbStG - commentary, sec. 7, para. 211, 213.

III.1.1.4. The taxation of so-called 'earmarked-gifts' ('Zweckzuwendungen) in terms of sec. 1 (1) No. 3 and sec. 8 of the ErbStG

'Zweckzuwendungen' or, to use a comparable English expression, 'earmarked gifts' which are taxable in terms of sec. 1 (1) No. 3 and sec. 8 of the ErbStG, can be defined as generous bestowals which are made on the death of a deceased or which are made as generous bestowals *inter vivos* and which are encumbered with the charge to use the generous bestowal for a certain purpose or which are bestowed for a certain purpose, in a way that the enrichment of the beneficiary of the generous bestowal is reduced or decreased by the purpose connected to the bestowal.[129)]

The peculiarity of a taxable 'earmarked gift' ('Zweckzuwendung') in terms of sec. 1 (1) No. 3 and sec. 8 of the ErbStG results mainly from the fact that the bestowed property and assets are not bestowed to serve a certain person [e.g. the beneficiary] or to serve the interests of the donor of the generous bestowal.[130)] An 'earmarked gift' ('Zweckzuwendung') can therefore not be assumed in cases where a beneficiary, for example, receives the deposits of a savings account with the charge to pay for the maintenance of the grave of the deceased.[131)]

The creation of an 'earmarked gift' ('Zweckzuwendung') can therefore be characterized as the creation of a separate estate ('Sondervermögen' in its narrower meaning as a 'Zweckvermögen') for the performance of a certain purpose and the legal position of the beneficiary of an 'earmarked gift' ('Zweckzuwendung') is the position of a 'Treuhänder' (comparable to the position of a trustee or a fiduciary). If the purpose of an 'earmarked gift' is charitable or of public benefit, the 'earmarked gift' will be exempt from inheritance taxes in terms of sec. 13 (1) No. 16b of the ErbStG.[132)]

An 'earmarked gift' ('Zweckzuwendung') can therefore be assumed where, for example, a deceased bestows a precious art collection on a beneficiary and encumbers this generous bestowal with the charge to hand over the art collection to a museum for a permanent exhibition.[133)]

III.1.1.5. The taxation of foundations ('Stiftungen') in terms of sec. 1 (1) No. 4 and sec. 9 (1) No. 4 of the ErbStG

The German Inheritance and Donations Tax Act furthermore taxes the property and assets of a foundation if the creation of the foundation was mainly influenced by family interests ['family foundation' ('Familienstiftung')].

The creation of a foundation is mainly influenced by family interests when the foundation in terms of its statutes is devoted to serving family interests and the furtherance of family

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129) More detailed information in connection with the 'Zweckzuwendung' can be found in, ***Meincke,*** ErbStG - commentary, sec. 8, para. 4 *seqq.* / ***Troll,*** ErbStG - commentary, sec. 8 para. 1 / ***Rose,*** Die Substanzsteuern, p. 162 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 218 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 25 / ***Pietsch / Schulz,*** Grundfälle Erbschaftsteuer, Schenkungsteuer, p. 95 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 100 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.63, p. 190 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 35 / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 71.

130) ***Meincke,*** ErbStG - commentary, sec. 8, para. 4 / ***Troll,*** ErbStG - commentary, sec. 8 para. 1 / ***Rose,*** Die Substanzsteuern, p. 163 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 218.

131) With this conclusion, ***BFH*** BStBl. II 1987, p. 861.

132) See, sec. 13 (1) no. 16b of the Act.

133) This example can be found in, ***Ebenroth,*** Erbrecht, p. 946 / Similar, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 219 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 35.

interests can be regarded as the main goal of the foundation.[134] The taxation of family foundations in terms of sec. 1 (1) No. 4 and sec. 9 (1) No. 4 of the ErbStG is designed to prevent the accumulation of property and assets which would occur if the property and assets which are transferred to an `immortal´ family foundation would be exempt from tax.[135]

According to sec. 1 (1) No. 4, sec. 3 (2) No. 1 and sec. 7 (1) No. 8 of the ErbStG a family foundation is taxed for the first time at the moment of its creation, that is to say, at the moment where property and assets are transferred from a deceased to a foundation [see, sec. 3 (2) No. 1] or at the moment where property and assets are transferred from a donor to a foundation [see, sec. 7 (1) No. 8].

Although the creation of a South-African trust can be characterized as being comparable to the creation of a separate estate (`Sondervermögen´) in terms of the German tax terminology, the creation of a South-African trust *inter vivos* or the creation of a South-African testamentary trust will not fall within the scope of sec. 7 (1) No. 8 or sec. 3 (2) No. 1 of the ErbStG because the South-African trust cannot be characterized as a legal person.[136] Nevertheless it has to be acknowleged that the creation of a South-African trust may well fall within the scope of sec. 1 (1) No. 3 and sec. 8 of the Act (as a taxable `Zweckvermögen´).[137]

After its creation the German family foundation is subjected to a periodic tax which occurs every 30 years in terms of sec. 1 (1) No. 4 and sec. 9 (1) No. 4 of the ErbStG.

The recurring process of taxing a family foundation is completed by the use of the legal fiction that in terms of sec. 15 (2) sentence 3 of the ErbStG the tax-free amounts for two fully entitled successors to the foundation may be deducted from the tax which is levied from the foundation every 30 years.

In contrast to the South-African trust the German family foundation is subjected to a strict and global taxation of its property and assets and has therefore nearly no practical value for estate planning purposes. Yet the creation of a family foundation has the advantage that a testator or a donor can transfer all his property and assets to a family foundation to prevent a dissipation of his estate.

A further advantage of a family foundation is the fact that nobody owns the foundation - the foundation is independent of ownership.

A foundation is exempt from the levying of inheritance taxes as soon as it is devoted to serving charitable, ecclesiastical or public interests [sec. 13 (1) No. 16b of the ErbStG].

Difficulties can occur in cases, where a foundation is devoted to serving charitable, ecclesiastical or public interests as well as family interests and opinions as to when a `mixed foundation´ is mainly devoted to family interests are divided.

In terms of sec. 15 (2) of the Außensteuergesetz (Law to Prevent International Fiscal Evasion) a foundation can be characterized as a family foundation as soon as the relatives of

134) For furthergoing information about German family foundations see, ***Rose,*** Die Substanzsteuern, p. 163 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 197 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 101 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 2.6, p. 190 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 19, 31 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 9, para. 34, 39, 53, 56, sec. 15 para. 22.

135) See, ***Ebenroth,*** Erbrecht, p. 948.

136) *Cf.,* ***CIR v. MacNeillie's Estate*** 1961 (3) SA 833 (at p. 840) / ***T. Honoré and E. Cameron,*** Honore´s South African Law of trusts, p. 53 *seqq.* / ***P. A. Olivier,*** Trust Law and Practice, p. 61 *seqq.*, p. 173, although a trust is defined as a person for Income tax purposes, see ***K. Huxham / P. Haupt,*** Notes on South African..., chap. 28, para. 28.2.3., chap. 29, para. 29.3.1.

137) For further information on the taxation of Anglo-American trusts in accordance with the German ErbStG see, ***Otto,*** RIW 1991, p. 491 *seqq.* / ***Ebenroth,*** Erbrecht, p. 948.

the deceased or the donor who created the foundation participate to the extent of more than 50% of the earnings of a foundation.[138]
The German Fiscal administration takes the point of view, that a foundation is a family foundation as soon as the relatives of the deceased or the donor who created the foundation participate to the extent of more than 25% of the earnings of a foundation and there are additional characteristics of the foundation indicating its family character.[139]
Finally some authors dealing with the taxation of family foundations draw the line at the point where the participation in the earnings exceeds 75%.[140]

On the dissolution of a [family] foundation or an association whose sole purpose was directed at the administration of property and assets, the dissolution is taxable as a donation *inter vivos* in terms of sec. 7 (1) Nr. 9 of the Act. In terms of sec. 15 (2) sentence 2 of the ErbStG the establishment of the tax bracket depends on the [family] relation between the deceased or the donor who created the foundation or the association and the beneficiary of the dissolution. However, the minimum tax bracket which will be applied on a dissolution in the above mentioned sense is tax bracket II in terms of sec. 15 of the Act.
If a foundation or an association is dissolved shortly after the last payment of taxes in terms of sec. 1 (1) No. 4 and sec. 9 (1) No. 4 of the ErbStG (up to four years), sec. 26 of the Act grants a pro rata deduction of either 25% or 50% on the payable tax in terms of sec. 7 (1) No. 9.

III.1.2. The subject of the German inheritance tax

It was mentioned above[141] that German tax terminilogy differentiates between the object of a tax (`Steuerobjekt´) and the subject of a tax (`Steuersubjekt´).
The subject of a tax can broadly be defined as the person to whom the object of a tax will be allocated and who will therefore be liable for the payment of the taxable amount constituted in the taxable object;[142] and the question to be put in order to establish the subject of a tax will therefore be: `Who is liable for the payment of the tax ?´
In accordance with this question what follows will deal with the answer to the question in relation to the inheritance and donations taxes, levied in terms of the German ErbStG.

III.1.2.1. General

In the context of the ErbStG, sec. 20 of the Act defines generally who will be liable for the payment of inheritance and donations taxes levied in on the taxable objects in terms of the Act.
In cases where an acquisition of property and assets by succession, in terms of sec. 1 (1) No. 1 and sec. 3 of the ErbStG, has taken place, the beneficiary of the acquisition, *viz.*, the heir[s] or the beneficiary of a donation *mortis causa*, will be liable for the payable amount of inheritance taxes.[143] The beneficiary of an acquisition by succession can be

138) See, sec. 15 (2) of the AStG.
139) FinMin BW Erlaß (`decree of the Finance Administration´) of the 28th of October 1983, DStR 1983, p. 744.
140) See, ***Ebenroth,*** Erbrecht, p. 949.
141) *Vide supra,* part C. III.1.1., p. 135 of this work.
142) See, ***Tipke / Lang,*** Steuerrect, p. 139.
143) For details, *cf.*, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 322 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 24 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 37 *seqq.* /

held liable to pay the amount of payable inheritance taxes even out of his own property and assets. If the beneficiary of an acquisition by death gratuitiously bestows his acquired property and assets or parts of his acquired property and assets on a third party before the payable amount of inheritance taxes was paid, it is also possible that the third party will be held liable for the payable amount of taxes levied on the property and assets he received [sec. 20 (5) of the ErbStG].

In cases where a donation *inter vivos* took place, the donor and the donee as 'Gesamtschuldner'[144] ('joint and several debtors') are liable for the payment of the payable amount of taxes [sec. 20 (1) ErbStG read together with sec. 44 of the Abgabenordnung].

Where an 'earmarked gift' in terms of sec. 1 (1) No. 3 and sec. 8 of the ErbStG is taxable, not the final beneficiary but the person who is the 'Treuhänder' of the 'earmarked gift' is liable for the payment of the taxes ['sec. 20 (1) of the Act]. If property and assets are transferred to a family foundation the family foundation will be liable for the payment of the payable amount of inheritance taxes. It is the duty of the person or the foundation who is liable for the payment of inheritance or donations taxes, in terms of the ErbStG, to report the acquisition of property and assets to the locally competent tax office of the German Financial Administration ('Finanzamt' [sec. 30 (1) of the ErbStG]).

III.1.2.2. 'Vorerbschaft' and 'Nacherbschaft'

In contrast to the principles discussed above for the payment of a tax liability in those cases where a 'normal' acquisition by succession has taken place, the German ErbStG provides special rules for those cases in which a 'Vor- and Nacherbschaft'[145] in terms of sec. 2100 *seqq.* of the BGB takes place or has taken place. The 'Vor- and Nacherbschaft' is an inheritance where the use of the property and assets inherited by a 'prior heir' ('Vorerbe') is limited by the appointment of a 'reversionary heir' ('Nacherbe'), who is entitled to use the property and assets of a deceased estate on the determination of the interest of the prior heir.[146] For these cases sec. 6 (1) of the ErbStG provides that the 'prior heir', for tax reasons, shall be treated as if he acquired the property and assets of the deceased as a 'normal' heir, irrespective of the fact that his acquisition is limited.

In terms of sec. 20 (4) ErbStG the 'prior heir' has to pay inheritance taxes out of the property and assets he acquired.[147]

After the interest of the 'prior heir' in the acquired property and assets has ceased to exist, and the 'reversionary heir' gains full ownership over the deceased estate, the property and assets will also be taxed in the hands of the 'reversionary heir'. However, in terms of sec. 10 (4) of the ErbStG the acquisition of an expectancy over the reversionary part of an inheritance to the heirs of a 'reversionary heir' will not attract inheritance taxes.

As a result of the taxation of the 'Vor- and Nacherbschaft' German tax law literature

Rose, Die Substanzsteuern, p. 165 *seq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 60 / ***Meincke,*** ErbStG - commentary, sec. 20 / ***Kapp,*** ErbStG - commentary, sec. 20 / ***Moench,*** ErbStG - commentary, sec. 20 / ***Troll,*** ErbStG - commentary, sec. 20.

144) On the occurence of a 'Gesamtschuldnerschaft' each of the debtors is liable for the whole obligation, but the creditor is entitled to one performance only (sec. 421 *seqq.* of the BGB). See also, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 323.

145) For further information *vide supra,* part C. III.1.1.2.a., p. 137, footnote 53 *ad hunc locum.*

146) See, sec. 2100 *seqq.* of the BGB and ***Gursky,*** Erbrecht, p. 133 *seqq.* / ***Brox,*** Erbrecht, p. 219 *seqq.* / ***Lange / Kuchinke,*** Erbrecht, p. 315 *seqq.* / ***Grunsky,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 2100 to sec. 2146 / ***Ebenroth,*** Erbrecht, p. 378 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 2100 to sec. 2146.

147) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 324, 325 / ***Ebenroth,*** Erbrecht, p. 950.

strongly advises against the utilization of this form of succession and recommends instead the creation of a 'Nießbrauch' ['usufruct'] in favour of the person who otherwise would be the 'prior heir', in order to achieve the same goals which would otherwise be achieved by a 'Vor- and Nacherbschaft'.[148]

III.1.2.3. The continued community of property ('fortgesetzte Gütergemeinschaft')

Where a marriage was governed by the matrimonial property regime of the 'fortgesetzten Gütergemeinschaft'[149] in terms of sec. 1483 *seqq.* BGB, the ErbStG deviates from the regulation of sec. 1483 (1) sentence 2 of the BGB, and the part of the inheritance which accrues to the surviving spouse from the total property and assets of the deceased estate in terms of the 'fortgetzten Gütergemeinschaft' is treated as if it accrued to the descendants [sec. 20 (2) and sec. 4 of the ErbStG]. Nevertheless, the surviving spouse will be liable for the whole amount of taxes levied on the deceased estate, whereas the descendants will only be liable to pay inheritance taxes on the proportion of the inheritance which accrued to them.[150]

III.1.2.4. The plurality of heirs ('Mehrheit von Erben')

In terms of the ErbStG a plurality of heirs ('Mehrheit von Erben') will be assessed separately for the payable amount of inheritance taxes they are liable for.[151] Independently from the tax liability of the other heirs, every single heir is liable for the amount of taxes which is levied on the part of the property and assets which he acquired by the way of succession. The applicable tax brackets and rates of tax will therefore vary depending on the person included in a plurality of heirs. If a plurality of heirs acquired the property and assets of a deceased in proportional shares, the amount of taxes payable will depend on the proportional share a single heir received in comparison to the aggregate value of the whole amount of inherited property and assets; but will not be assessed on the compilation of the value of single items of property and assets he received.
This general notion of the ErbStG changes only where property and assets were acquired under a legacy. In these cases the payable amount of taxes will be directly connected to the taxable value of the item inherited.

III.1.2.5. The execution of a will ('Testamentsvollstreckung')

If the deceased made a will and arranged for the execution of his will in terms of sec. 2197 *seqq.* of the BGB, the executor ('Testamentsvollstrecker') of the will is obliged to pay the general tax debts of the deceased [see sec. 34 (3) of the Abgabenordnung (AO)], as well as the amount of inheritance taxes, which is levied on the deceased estate [*cf.*, sec. 32 (1) sentence 2 of the ErbStG].[152]
In terms of sec. 149 of the AO and sec. 31 (5) of the ErbStG the executor of a will is fur-

148) Compare, ***Ebenroth,*** Erbrecht, p. 951.
149) Gütergemeinschaft is one of the matrimonial property regimes under the German BGB. It is created by a marriage contract between the spouses. The spouses may agree by marriage contract, that after the death of one spouse the community of property may be continued between the survivor and the common descendants [see, sec. 1483 *seqq.* of the BGB].
150) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 324 / ***Ebenroth,*** Erbrecht, p. 951.
151) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 324 *seqq.*
152) *Cf.*, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 85 *seqq.*, p. 240, p. 376 *seqq.* / ***Ebenroth,*** Erbrecht, p. 953.

thermore obliged to submit the inheritance tax return for a deceased estate as soon as the locally competent tax office of the German Financial Administration (`Finanzamt´) requires him to do so. If an executor does not comply with the requirements of the German Fiscal Administration, he can be held liable in terms of sec. 69 AO.[153] In terms of sec. 80 AO the executor of a will is also entitled to appeal against the assessed amount of inheritance taxes, if he is acting on behalf and with the permission of the heirs.
Finally it has to be stated that in the cases of the execution of a will, the executor is regarded as the person who is qualified to receive the inheritance tax assessment from the German Financial Administration. In these cases a tax assessment received by the executor is deemed to have been received by the heirs.[154]

III.1.2.6. The personal tax liability (`persönliche Steuerpflicht´)

A further precondition for the levying of inheritance taxes by the German Fiscal Administration is the fact that the taxable event has to fall within the ambit and the scope of the German Tax law in general and within the ambit and the scope of the ErbStG in particular. A liability for the payment of German inheritance taxes occurs as soon as one of the connecting factors for the personal tax liability of a taxpayer, laid down in sec. 2 of the ErbStG, can be applied to a person (the deceased, the heir, the donor or the donee) who transferred or acquired property and assets by succession or donation.[155]
If a deceased [testator or bequeather] or a donor of property and assets can be regarded as a `resident´ (`Inländer´) of the Federal Republic of Germany, the property and assets acquired by an heir or a donee clearly fall within the scope of the so-called `unlimited tax liability´ (`unbeschränkte Erbschaftsteuerpflicht´) in terms of sec. 2 (1) No. 1 of the ErbStG.[156]
According to the `unlimited tax liability´, which is defined in sec. 2 (1) No. 1 of the ErbStG, all acquisitions of property and assets [no matter where these acquisitions took place and even if they took place in a foreign country] are liable for the payment of German inheritance or donations taxes, as soon as they were transferred from the estate of a `resident´ deceased or from the estate of a `resident´ donor to an heir or a donee.[157]
The definition of those persons who are regarded as being `residents´ or who are deemed to be `resident´ for German inheritance and donations tax puposes is laid down and can be found in sec. 2 (1) No. 1 lit. a. to d. of the ErbStG.[158]

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153) ***BFHE*** 146, p. 465 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 376 *seqq.*
154) ***BFH*** BStBl. II 1991, p. 49 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, 376 *seqq.* / ***Ebenroth,*** Erbrecht, p. 953.
155) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 24 *seqq.*
156) For the term `unbeschränkte Steuerpflicht´ see furthermore, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 37 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 3 *seqq.* / ***Troll,*** ErbStG - commentary, sec. 7 para. 2 *seqq.*
157) ***Meincke,*** ErbStG - commentary, sec. 2, para. 3 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *seq.* / ***Troll,*** ErbStG - commentary, sec. 7 para. 2 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 *et seqq.*
158) See, sec. 2 (1) No. 1 lit. a to d of the Act and ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 37 *seqq.*

In contrast to the 'unlimited tax liability', a 'limited tax liability' ('beschränkte Steuerpflicht') is laid down in sec. 2 (1) No. 3 of the ErbStG for those cases in which neither the deceased [at the date of his death] nor the donor or the donee [at the date of the donation] were 'residents' of the Federal Republic.[159]

Under these circumstances the tax liability of the persons involved is limited to those cases in which the acquired property and assets can be regarded as domestic property and assets in terms of sec. 121 (2) of the Bewertungsgesetz (Valuation Law).[160]

These facts are of the utmost importance in the context of the focus of this work, and we therefore return to this aspect, to point out the problems which can arise and which are imposed by the German ErbStG on aspects of inheritance taxation on [international] deceased estates [or rather international inheritances].

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159) For the term 'beschränkte Steuerpflicht' see also, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 *et seq.* / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 29 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 37 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 42 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.* / ***Troll,*** ErbStG - commentary, sec. 7 para. 13 *seqq.*

160) See especially, ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 *et seq.*

III.2. The 'Besteuerung der Höhe nach'

Having discussed the basic principles of the establishment of a German inheritance tax liability, as such ('Besteuerung dem Grunde nach'), we shall now deal with a basic introduction to the mechanisms and principles associated with the question how the heir's or donee's share of an inheritance is valued for inheritance tax purposes and how the tax bracket and rate of taxation which is applicable for the heir or donee concerned ('Besteuerung der Höhe nach') is established according to the rules of the German ErbStG.

The ascertainment of the fact that someone is liable for the payment of inheritance taxes because he acquired property and assets by succession ('Erwerb von Todes wegen'), by donation or by any of the other taxable events laid down in sec. 1 (1) No. 1 to 4 and sec. 3 to 9 of the ErbStG, can only be seen as the first step towards establishing the ineritance or donations tax liability of a person under the regulations of the German ErbStG.

A far more complicated aspect in the context of establishing an inheritance tax liability according to the rules of the German ErbStG is the ascertainment of the amount of inheritance taxes payable ('Besteuerung der Höhe nach'), which will finally be owed and payable to the German Treasury.
The ascertainment of the amount of taxes payable is influenced by quite a few possibilities for the bequeather, the heir, the donor or the donee, to influence the valuation of the transferred or acquired property and assets [and therefore the amount of taxes payable] before or in its stage of valuation for inheritance tax purposes; provided that the person is able and willing to use the [sometimes complicated] tools the German ErbStG provides for the valuation of an inheritance or a donation to influence the value of the transferable estate.

It would be beyond the scope of this work to enlarge on all the problems connected with the 'Besteuerung der Höhe nach', and the following is intended merely as a short introduction to the principles of this part of the German ErbStG.

III.2.1. General

The German inheritance tax taxes the net value of the property and assets acquired by an heir, a legatee or a donee; and a tax liability in accordance with the ErbStG can therefore only occur in those cases where an heir, a legatee or a donee is actually enriched by an acquisition by succession or by an acquisition by donation, that is to say where a money's worth advantage ('geldwerter Vorteil') was achieved by the heir or the donee.
In this context it can be stated that the taxable acquisition by an heir or a donee can be characterized as the enrichment of a beneficiary by succession or donation which is not expressly exempt from the levying of inheritance and donations taxes.
In terms of sec. 10 (1) sentence 2 of the ErbStG the enrichment by an acquisiton *mortis causa* [by succession] ('Erwerb von Todes wegen') is defined as the enrichment of an heir caused by an acquisition of property and assets in terms of sec. 3 of the Act and which was valued in terms of sec. 12 of the ErbStG and reduced by the deductible debts and other charges.

The taxable enrichment of an heir is his factual economic enrichment.[161] For example, if an heir sells the property and assets he acquired by succession to a third party and the third party pays a certain amount of money to the selling heir, the selling price paid to the heir is deemed to be the taxable enrichment acquired by the heir by the way of succession. For inheritance tax purposes the substitute or surrogate, for which the inherited property and assets were exchanged, are regarded as the original enrichment achieved by the *mortis causa* acquisition of property and assets, regardless of the original value of the inheritance disposed of. Consequently it can be said that the German Inheritance Tax Act only taxes the factual or real enrichment of the heir.[162]

III.2.2. The value of the property and assets that were acquired by succession

III.2.2.1. The value of the enrichment by succession (`Erbschaftswert´)

In terms of sec. 10 of the ErbStG the value of the deceased estate (`Erbschaftswert´, `Bruttobereicherung´or `Bruttowert II´) can be characterized as the gross value of the property and assets acquired by an heir on the death of a deceased (`Wert der Zuwendung oder Erbschaft´ or `Bruttowert I´) and reduced by the debts applicable to the inherited property and assets (`Nachlaßschulden´ [e.g. debts owed by the deceased, legacies, etc. in terms of sec. 10 (5) No. 1 and 2 of the Act]) as well as by the attributable costs of winding-up and administering the deceased estate (`Nachlaßkostenschulden´ [e.g. funeral costs, administration costs, etc. in terms of sec. 10 (5) No. 3 of the ErbStG]).[163]
The definition of the deductible reductions, allowed in terms of sec. 10 (5) of the Act, is conclusive and it is furthermore necessary to mention that only those debts and costs are deductible for inheritance tax purposes [in terms of sec. 10 (5) of the ErbStG] which are economically connected to the taxable items on the date of valuation (`Bewertungsstichtag´).
An economic connection between the debts and costs in terms of sec. 10 (5) ErbStG on the one hand and the taxable property and assets included in the inheritance on the other hand can only be assumed where the debts and costs are directly and causally retraceable to circumstances associated with the relevant property and assets.[164]

III.2.2.1.a. The deduction of debts (`Nachlaßschulden´) from the deceased estate

In terms of sec. 10 (5) No. 1 and No. 2 of the ErbStG an heir is entitled to deduct the debts applicable to the gross value of the property and assets he acquired [in terms of sec 1922 *seqq.* of the BGB] on the death of a deceased.[165]
Deductible are especially the debts owed by the deceased and the amount of the legacies an heir has to finance and to pay out of the gross value of the property and assets he ac-

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161) See, ***Meincke,*** ErbStG - commentary, sec. 9, para. 3 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 220 *et seqq.*

162) *Cf.,* ***BFH*** BStBl. II 1991, p. 412 / ***Meincke,*** ErbStG - commentary, sec. 9, para. 3.

163) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 230 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 24 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 109 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 52 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 95, p. 42/5 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 10, para. 2, 31 *seqq.* / ***Troll,*** ErbStG - commentary, sec. 10, para. 31.

164) See, ***FG Münster*** EFG 1987, p. 309 / ***Ebenroth,*** Erbrecht, p. 958.

165) *Vide,* ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 109 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 54 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 234 *et seqq.*

quired from the deceased.
Deductible are furthermore the amounts an heir has to pay on the occurence of so-called 'Verschaffungsvermächtnissen' ['demonstrative legacies', in terms of sec. 2170 of the BGB[166]]. In the terms and clauses of a 'Verschaffungsvermächtnis' a testator can oblige an heir under a will to buy or to acquire a special property item or an asset, which is not included in the gross value of the property and assets the heir acquired from him, in order to hand it over to a legatee. In these cases an heir is entitled to deduct the current market value [which he had to pay in order to get the special property item or asset] from the gross value of the property and assets he acquired from the deceased.
Furthermore, deductible in terms of sec. 10 (5) No. 2 of the ErbStG are the amounts of money which were paid by an heir from the gross value of the property and assets he acquired from the deceased, in respect, for example, of the claims of an illigitemate child of the deceased to receive the equivalent of his statutory share ('Erbersatzanspruch'[167]), in compliance with the fulfilment of an obligation which was imposed on the heir by the deceased ('Auflage'[168]), in respect of the claims of compulsary portions, which were claimed from the deceased estate ('Pflichtteilsanspruch[169]) or which were paid as a compensation for the repudiation of the inheritance or a part of the inheritance by a third party to the third party ('Erbschaftsausschlagung'[170]).
Another category of debts which can be deducted from the gross value of the property and assets acquired by an heir are the tax debts of the deceased aquired by the heir in terms of sec. 45 AO. However, this does not apply to the inheritance tax liability [see, sec. 10 (8) of the ErbStG].
Finally it can be observed that the debts of the deceased that he owed to the heir, who aquired the gross value of his property and assets by succession, can be deducted by the heir from these property and assets in terms of sec. 10 (3) of the ErbStG.

III.2.2.1.b. The deduction of costs ('Nachlaßkostenschulden') from the deceased estate

A further deduction allowed in terms of sec. 10 (5) of the Act is the costs associated with the gross value of the property and assets acquired on the death of the deceased [sec. 10 (5) No. 3 of the ErbStG].[171]

Included in these deductible costs, in terms of sec. 10 (5) No. 3 of the Act, are especially the net present values ('Kapitalwert') of the costs connected with the funeral of the deceased, the net present value of the costs for the maintenance of the grave of the deceased[172] and further costs connected with the winding-up and the administration of the property and assets an heir acquired from a deceased (e.g. legal fees, fees for tax consul-

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166) For further information concerning the 'Verschaffungsvermächtnisse' see, ***Gursky,*** Erbrecht, p. 161 / ***Brox,*** Erbrecht, p. 276 *seq.* / ***Lange / Kuchinke,*** Erbrecht, p. 378 *seq.* / ***Skibbe,*** in: Münchener Kommentar, Vol. 6, commentary to sec. 2170 / ***Ebenroth,*** Erbrecht, p. 322 *seqq.* / ***Keidel,*** in: Palandt, BGB - commentary, sec. 2170.
167) *Vide supra,* part C III.1.1.2.a., p. 138, footnote 57 *ad hunc locum.*
168) *Cf.,* part C III.1.1.2.c.bb., p. 141, footnote 80.
169) *Supra,* part C III.1.1.2.a., p. 138, footnote 60.
170) See, part C III.1.1.2.c.cc., p. 141, footnote 83.
171) ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 54 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 237 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 10, para. 42 *seqq.*
172) Detailed information on this topic can be found in, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 237 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 10, para. 42 *seq.*

tants, administration fees, etc.[173]). In terms of sec. 10 (5) No. 3 sentence 3 of the Act a cost lump sum of DM 10 000 can be deducted from the gross value of the property and assets an heir acquired from a deceased. However, the lump sum deduction in terms of sec. 10 (5) No. 3 sentence 3 of the ErbStG depends on the preconditions that (a) the exact amount of deductible costs cannot be ascertained, but (b) the deductible lump sum cost really did occur.[174]

Not deductible in terms of sec. 10 (5) No. 3 of the ErbStG are the costs which can be connected to the reaping of fruits from the gross value of the property and assets an heir acquired from a deceased or which are connected to the factual or legal maintenance or to the increase of the gross value of the acquired property and assets[175] (`Nachlaßverwaltung´).

III.2.2.2. The principle of the valuation on a fixed day (`Stichtagsprinzip´)

Sometimes the items embodied in the gross value of the property and assets an heir acquired from a deceased, are influenced by value fluctuations (an increase or a decrease of their value [e.g. where foreign currencies or shares quoted at the stock exchange were owned by the deceased]).

In order to value, for example, shares included in the gross value of a deceased estate, it is theoretically possible to value these shares at an average value (e.g. at the value the concerned shares have on the basis of an assessment of the average value of their quotation on the stock exchange during the last twelve months before the death of the shareholder occured).

However, this is not the principle the German ErbStG applies to the valuation of property and assets which are exposed to fluctuations in value. According to the rules of the ErbStG, property and assets which are influenced by a fluctuation of value have to be valued according to the principle of the valuation on a fixed-day (`Stichtagsprinzip´).

The fixed-day of valuation (`Bewertungsstichtag´) depends on the date on which the inheritance tax liability of an heir or the donations tax liability of a donee comes into existence [in terms of sec. 11 and sec. 9 of the ErbStG].[176]

In cases where an heir acquired property and assets from a deceased, the inheritance tax liability of the heir is connected to and comes into existence on the date of the death of the deceased [see, sec. 9 (1) No. 1 of the ErbStG].[177] Consequently the fixed-day for the valuation of inherited property and assets is normally the date of the death of the deceased.

According to sec. 9 (1) No. 2 of the Act a donations tax liability comes into existence on

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173) For details see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 237 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 26 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 40 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 10, para. 44 *seqq.*

174) ***BFH*** NV 1991, p. 243 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 238 / ***Pohlmann,*** Erbschaftsteuer, p. 26 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 40 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 10, para. 42.

175) Compare, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 242 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 10, para. 51 *et seqq.*.

176) For information concerning the fixed-day valuation ingeneral see, ***Meincke,*** ErbStG - commentary, sec. 11, para. 1 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 120 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 45 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 247 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 34, p. 145 *et seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 6 *seq.*

177) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 247 / ***Meincke,*** ErbStG - commentary, sec. 11, para. 4.

the date on which the donation or the generous bestowal is performed[178] and the beneficiary of the donation has gained the power of disposal over the donated property or assets.[179] As a result the fixed-day for the valuation of donated or bestowed property and assets is the date of the performance of the donation.
Apart from its importance for the determination of the valution of property and assets according to the principle of the valuation on a fixed-day, the date on which an inheritance tax liability comes into existence is furthermore of importance for the characterization of the personal tax liability (`persönliche Steuerpflicht´) in terms of sec. 2 of the Act, for the consideration of cases in which the same property and assets were the object of earlier acquisitions by succession (`Brücksichtigung früherer Erwerbe´) in terms of sec. 14 of the Act, and for the determination of the applicable tax bracket in terms of sec. 15 of the ErbStG.
In the cases where a `Zweckzuwendung´ [`earmarked gift´] is created, the inheritance tax liability comes into existence on the date of the obligation of the `Treuhänder´ to administer the `earmarked gift´ [sec. 9 (1) No. 3 of the Act] and, finally, in the cases of family foundations the tax will come into existence on the date of the licensing of the foundation by the state authorities [sec. 9 (1) No. 1 lit. c of the ErbStG].

Special problems of establishing the date on which an inheritance tax liability, in terms of the German ErbStG, will come into existence can occur in those cases where foreign property and assets which are administered and distributed according to the rules of a foreign Law of Succession fall within the ambit and the scope of the ErbStG.
In practice difficulties occur mostly where the foreign Administration of Estates and the foreign Law of Succession differs completely from the German system of universal succession[180].
Most of the difficulties mentioned arise from the fact, that the German ErbStG, whose rules were designed for the taxation of a succession which occurs under the German system of universal succession, was originally not designed to cope with a Law of Succession or an attitude of administration of deceased estates, which is, for example, governed by a system of executorship, like under Anglo-American or South-African law.
For this reason a number of decisions of the German Bundesfinanzhof (Federal Fiscal Court / Supreme Tax Court) deal with the question whether a German inheritance tax liability will also come into existence if a succession is governed by foreign rules of succession and foreign methods of administering a deceased estate.
Although none of the decisions mentioned expressly dealt with the South-African rules of succession or the South-African methods of administering deceased estates, some of the aspects of these *dicta* may also be applicable *mutatis mutandis* to a succession which takes place under South-African law.
In some of its decisions the Bundesfinanzhof had to deal with the question whether or not the appointment and interposition of an *administrator* between the deceased and the beneficiaries of an inheritance would prevent a German inheritance tax liability from coming into existence.[181] On dealing with this matter the Bundesfinanzhof came to the conclusion that the duties of an *administrator* under Anglo-American law are comparable to the du-

178) ***BFH*** BStBl. II 1980, p. 307.
179) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 247 / ***Meincke,*** ErbStG - commentary, sec. 11, para. 4.
180) ***Meincke,*** ErbStG - commentary, sec. 9, para. 25 / see also, ***Otto,*** RIW 1982, p. 491 *seqq.*
181) See, ***BFH*** BStBl. III 1957, p. 211 *seq.* / ***BFH*** BStBl. II 1977, p. 427 *seq.* / ***BFH*** BStBl. II 1988, p. 808 / ***Meincke,*** ErbStG - commentary, sec. 9, para. 25 / ***Otto,*** RIW 1982, p. 491 *seqq.*

ties of a German 'Nachlaßabwickler' (someone who winds-up and administers a deceased estate). According to the Bundesfinanzhof the interposition of an *administrator* between the deceased and the heir has no 'negative' consequences on the 'directness of the appointment of the heir' (unbedingte Erbeinsetzung). Consequently the position of the heir as a direct beneficiary of the deceased was not influenced by the appointment of an *administrator*, and because the duties of an *administrator* are comparable to the duties of a German 'Nachlaßabwickler' the Bundesfinanzhof decided that the heir was liable for the payment of German inheritance taxes and that the liability of the heir for the payment of German inheritance taxes came into existence on the date of death of the deceased.[182)]

In another decision dealing with Anglo-American law the Bundesfinanzhof drew the conclusion that the tax liability of an heir for German inheritance tax purposes will be suspended, *i.e.* subject to a condition precedent ('aufschiebend bedingt') where the person who is interposed between the deceased and the beneficiary can be regarded as the *executor* of the deceased estate as well as the *trustee* of a testamentary trust based on the same deceased estate.[183)]

However, in accordance with the first-mentioned decision, it has to be acknowledged that the heir would have been liable for the payment of German inheritance taxes and the liability of the heir for the payment of German inheritance taxes would have come into existence on the date of death of the deceased, had the interposed person in the second case been only the *executor* of the deceased estate.[184)]

The fact that the liability for the payment of German inheritance taxes in the second case was suspended or rather subjected to a condition precedent ('aufschiebend bedingt') is attributable to the circumstance that a *trustee* was interposed between the deceased and the beneficiary.

Because the trustee of a trust *mortis causa* is normally regarded as the owner of the trust assets and property and the beneficiary is only entitled to a certain amount of distributed trust benefits,[185)] the creation of a trust has 'negative' consequences on the 'directness of the appointment of the heir' ('unbedingte Erbeinsetzung'). After a trust *mortis causa* has been created, an heir has neither direct access to the property and assets of the trust nor has he acquired the property and assets of the deceased, for they are included in the trust. Consequently the position of the heir as a direct beneficiary of the deceased, which is vital for the existence of a German inheritance tax liability, is influenced 'negatively' by the creation of a trust *mortis causa*.

In the practice of the Bundesfinanzhof the interposition of a trust between the transfer of the property and assets from a deceased to an heir is therefore seen as a suspension or a subjection of the German inheritance tax liability to the condition precedent, that on the termination of the trust, the heir will be liable for the payment of German inheritance taxes because on the termination of the trust he will finally acquire the remainder of the property and assets of the deceased.[186)]

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182) See, ***BFH*** BStBl. II 1977, p. 427 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 9, para. 25.

183) See, ***BFH*** BStBl. III 1961, p. 312 / ***BFH*** BStBl. II 1972, p. 462 *seq.* / ***BFH*** BStBl. II 1986, p. 615 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 9, para. 25.

184) ***BFH*** BStBl. II 1988, p. 808 / ***Meincke,*** ErbStG - commentary, sec. 9, para. 25.

185) *Cf.*, part B. II.2.3.2.b., p. 55 *seqq.* of this work. ***BFH*** BStBl. III 1961, p. 312 / ***BFH*** BStBl. II 1972, p. 462 *seq.* / ***BFH*** BStBl. II 1986, p. 615 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 9, para. 25.

186) ***Meincke,*** ErbStG - commentary, sec. 9, para. 25 / ***BFH*** BStBl. III 1958, p. 79 / ***BFH*** BStBl. III 1961, p. 312 / ***BFH*** BStBl. II 1972, p. 462 *seq.* / ***BFH*** BStBl. II 1986, p. 615 *seqq.*

III.2.2.3. The principles of valutation that are governing the German inheritance tax law

In terms of sec. 12 (1) of the ErbStG the valution of property and assets acquired according to the rules of the German Inheritance Tax Act is governed by the regulations that are embodied in the first part [sec. 1 to sec. 16] of the Bewertungsgesetz (BewG - Valuation Law).[187]

III.2.2.3.a. The general rule

The central regulation of the BewG for the purposes of the valuation of property and assets in terms of the ErbStG is sec. 9 of the BewG.
According to sec. 9 (1) of the BewG property and assets are usually valued at their fair market value (`gemeiner Wert´). The fair market value of property and assets in terms of sec. 9 BewG can be characterized as the selling price which can be achieved by a *bona fide* purchase and sale of the concerned or comparable property and assets (`Marktpreisprinzip´). Consequently unusual prices and values, like prices that can be achieved by a purchase and sale of the concerned or comparable property and assets, for example, on a `black market´ (`Schwarzmarktpreise´) are not included in the valuation of property and assets for inheritance tax purposes.[188]
As soon as a taxpayer falls within the scope of the so-called `unlimited tax liability´ (`unbeschränkte Steuerpflicht´)[189] for German inheritance tax purposes, the German ErbStG will also levy inheritance or donations taxes on his foreign [deceased] estate or, more properly, on the foreign property and assets he acquired either by succession or by donation.
In these cases foreign property and foreign assets acquired either by succession or by donation will normally also be valued at their fair market value [in accordance with sec. 12 (1) of the ErbStG and sec. 9 (1) of the BewG].[190]

III.2.2.3.b. The valuation of economic entities

The valuation of economic entities for inheritance tax purposes is laid down in sec. 2 of the BewG, and on reading sec. 2 (1) of the BewG it can at once be seen that economic entities usually are valued in their capacity as economic entities and that their value therefore has normally to be assessed in its entirety and by a standard procedure (`Einheitswert´).[191]
However, the BewG deviates from this valuation principle, where the entirety of the business capital or the operating assets (`Betriebsvermögen´) of a commercial enterprise (`Gewerbebetrieb´) have to be valued for inheritance tax purposes. In cases where the entirety or standard value of the operating assets of a company (`Einheitswert des Betriebsvermö-

187) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 250 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 122 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 45 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 35, p. 148 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 8 *seqq.*

188) See, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 35, p. 158 *et seqq.* ***Ebenroth,*** Erbrecht, p. 961.

189) *Vide supra,* part C. III.1.2.6., p. 154 *seq.* and *infra,* part C. IV.2., p. 183 *seqq.* of this work.

190) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 277.

191) *Vide,* ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 250 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 126 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 45 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 35, p. 150/1 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 8 *seqq.*

gens') have to be established, the properties and assets concerned are valued on the basis of the valuation of every single economic asset ('Wirtschaftsgut') that is included in the company [sec. 109 (1) BewG].[192]

During this valuation process every single economic asset that is included in the company, is valued at its partial value ('Teilwert') [sec. 10 sentence 1 of the BewG] and the total value of the company is assessed by summing up the partial values that were established for its single economic assets.[193]

In this context it must be mentioned, that the partial value of a single economic asset is defined in terms of sec. 10 sentence 2 of the BewG as the amount a buyer of an economic entity ('Gesamtunternehmen') would pay for every single economic asset included in this entity on the basis of a total purchase price and under the precondition that the buyer of the economic entity would carry on the business afterwards.

On assessing the partial value of a single economic asset the operating results and the possibility of future business profits of the concerned economic entity are excluded from the valuation process.

The maximum amount of the partial value of a single economic asset is limited by the costs associated with its replacement by a similar or a comparable economic asset ('Wiederbeschaffungskosten').

On the 1st of January of 1993 the Taxation Laws Amendment Act of 1992 came into force and sec. 12 of the ErbStG as well as sec. 10 and sec. 109 of the BewG were redrafted.

In terms of the new sec. 109 of the BewG all taxpayers who determine their profits in terms of sec. 4 (1) or sec. 5 of the Einkommensteuergesetz (Income Tax Act)[194] are obliged to value their economic assets at the amount of the tax value they have in the tax balance[195] of their commercial enterprise [sec. 109 (1) of the BewG].

As a consequence the principle of valuing economic assets ('Wirtschaftsgüter') on the amount of their partial value ('Teilwert') in terms of sec. 10 sentence 1 and 2 BewG has lost its former importance. This is mainly rooted in the fact that the economic assets

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192) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 126 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 275 *seqq.*

193) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 275 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 127 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 35, p. 148 *et seqq.*

194) The taxpayers that fall within the scope of sec. 4 (1) and sec. 5 of the Einkommensteuergesetz are so-called 'Gewerbetreibende' ('persons engaged in a trade or business') who are obliged to draw up a balance for tax purposes.
A 'Gewerbe' within the meaning of the German Industrial Code ('Gewerbeordnung') is defined as any independent activity carried on for profit and not merely temporarily, excluding, however, the exploitation of natural resources (mining, agriculture, forestry, etc.) and the learned and artistic professions.

195) The German tax law distinguishes between the so-called 'Handelsbilanz' ('commercial balance') and the so-called 'Steuerbilanz' ('tax balance'). German commercial enterprises often draw up a 'commercial balance' as well, as a 'tax balance'.
In contrast to the process of drawing up a 'tax balance', the process of drawing up a 'commercial balance' grants a commercial enterprise wider means and certain tools to influence the commercial balance in a 'positive or negative way', depending on the financial goals of the concerned commercial enterprise.
In the past the partial value of single economic assets for inheritance tax purposes was often assessed according to its value shown in the commercial balance ('Handelsbilanz'). Consequently the commercial enterprises could influence the partial value of the economic assets for their purposes. By introducing the valuation of single economic assets according to the values which legally have to be shown in the 'tax balance', a commercial enterprise can be controlled much better by the Financial Administration and is furthermore forced to assess and show up the 'real' value of certain economic assets for inheritance tax purposes.

(`Wirtschaftsgüter´) of a commercial enterprise which is obliged to draw up a balance for tax purposes (`bilanzierungspflichtiger Gewerbebetrieb´), and to which sec. 10 of the BewG mainly applies, now have to be valued at the amount of the value they have in the tax balance of the commercial enterprise.
For the valuation of economic assets (`Wirtschaftsgüter´) that were owned by a deceased in a commercial enterprise the Taxation Laws Amendment Act has the consequence that these assets now also have to be valued at the amount of the value they have in the tax balance of the commercial enterprise at the date of the death of the deceased.
But nevertheless, for inheritance tax purposes, some items of the economic assets of deceased persons who were engaged in a trade or business, but were not obliged to draw up a balance (`nicht-bilanzierende Gewerbetreibende´), and some items of the economic assets of deceased persons who were working on a free-lance basis (`Freiberufler´), will still be valued in accordance with the principle of valuing economic assets (`Wirtschaftsgüter´) on the amount of their partial value (`Teilwert´).

If a deceased held shares in a company, the amount of inheritance taxes levied on these shares is assessed in accordance with the current market value (`Verkehrswert´) of the shares at the date of death.[196]
The current market value of a share, held in a company, is based on the capital the deceased paid into and owned in the company, plus the attributable value of the company`s assets (`Guthaben´) that can be allocated to the deceased.[197]
The current market value of a share which was owned in a company is furthermore influenced by the claims a deceased held against the company in respect of payments from the company`s pension fund or in respect of the payments of a survivor`s pension by the company to his surviving dependants. In order to assess the attributable value of these claims, the claims the deceased held against the company have to be multiplied by the gains and losses distribution key, which [according to German law] is embodied in the company agreement, drafted on the foundation of the company.[198]

III.2.2.3.c. The valuation of foreign economic entities

It has already been mentioned that as soon as a taxpayer falls within the scope of the so-called `unlimited tax liability´ (`unbeschränkte Steuerpflicht´)[199] for German inheritance tax purposes, the German ErbStG will also levy inheritance or donations taxes on the foreign property and assets he acquired either by succession or by donation.
For the valuation of foreign business capital or foreign operating assets (`ausländisches Betriebsvermögen´) included in a foreign commercial enterprise (`ausländischer Gewerbebetrieb´) and acquired either by succession or by donation, sec. 12 (6) of the ErbStG provides a special arrangement. Because a valuation in terms of sec. 12 (2) to sec. 12 (4) cannot be applied on foreign business capital or foreign operating assets, sec. 12 (6) of the ErbStG refers to sec. 31 of the BewG as far as the valuation of such foreign capital or foreign assets is concerned.
In terms of sec. 31 of the BewG foreign business capital or foreign operating assets have

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196) ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 132 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 260 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 45 *seqq.*
197) See especially, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 133 *seqq.*
198) ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 133 *seqq.*
199) *Vide supra,* part C. III.1.2.6., p. 154 *seq.* and *infra,* part C. IV.2., p. 183 *seqq.* of this work.

to be valued at their fair market value.[200]
However, this rule only applies to those cases in which the assessment and valuation of foreign business capital or foreign operating assets for German inheritance or donations tax liability is not expressly excluded by the conclusion of an international double death duty agreement.

III.2.2.4. The valuation of real estate for inheritance tax purposes

The principles of valuation that govern German inheritance tax law have been dealt with and it has been seen that the central rule of valuing property and assets for German inheritance tax purposes is the establishment of the fair market value of property and assets in terms of sec. 12 (1) of the ErbStG and sec. 9 (1) of the BewG.

Nevertheless, it has to be mentioned that important exceptions to this rule are laid down in sec. 12 (1a) to (6) of the ErbStG and the most significant of these is the exception embodied in sec. 12 (2) of the ErbStG.[201]
According to sec. 12 (2) of the Act real estate (`Grundstücke´) included in a deceased estate which has to be valued for inheritance tax purposes is not valued in accordance with its fair market value, but according to the so-called `Einheitswert´ (`standard value´).[202]

The standard value according to which inherited real estate (`Grundstücke´) has to be valued for German inheritance tax purposes is a value which is fixed by state authorities and which in accordance with sec. 21 of the BewG has to be newly assessed and fixed every three years for business entities [sec. 21 (1) No. 2 of the BewG] and newly assessed and fixed every six years where real estate is concerned [sec. 21 (1) No. 1 of the BewG].
But in practice the authorities dealing with the new assessment and fixing of the standard values often delay the new assessment and at present it can be said that the standard values assessed and fixed by authorities on the occasion of the last assessment are `a far cry from reality´ when compared to the `fair market prices´ on the real estate market of the Federal Republic.[203]

In accordance with sec. 121a of the BewG real estate which cannot be qualified as property used for forestry or agricultural purposes has to be valued at a rate of 140% of its standard value. The standard value for real estate was assessed and fixed by the authorities for the last time on the 1st of January 1964 and today real estate which has to be valued for German inheritance tax purposes will in reality be valued at only about 20% of its fair market value.[204]

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200) See especially, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 277.

201) For detailed information on the valuation of real estate see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 272 *et seqq.* / especially, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 123 *seq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 6.1, p. 209 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 36, p. 219 *seqq.*

202) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 123 *seq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 6.11, p. 209 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 36, p. 219 *seqq.*

203) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 123 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 49 *seq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 6.11, p. 209 *seq.*

204) ***Ebenroth,*** Erbrecht, p. 963 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 272 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 123 *seq.* / ***Troll,*** Nachlaß und Erbe im Steu-

The passing of real estate (`Grundstücke´) on the death of a deceased is therefore priviliged in comparison to other forms of property passing from one person to another and resulting from this several tools to minimise inheritance tax liability utilise the passing of property by succession.[205]

Nevertheless, the German ErbStG will also levy inheritance or donations taxes on foreign `real estate´ where the acquisition of the concerned `real estate´ [either by succession or by donation] falls within the scope of the so-called `unlimited tax liability´ in accordance with the German ErbStG.
In contrast to the valuation of German `real estate´, foreign `real estate´ included in an acquisition by succession or by donation is not valued at its `standard value´, but at its fair market value in terms of sec. 31 (1) and sec. 31 (2) of the BewG. This is mainly attributable to the fact that the principles of valuation laid down in terms of sec. 12 (2) of the ErbStG and sec. 21 and sec. 121a of the BewG were especially designed for German `real estate´ and can therefore not be applied to the valuation of foreign `real estate´.[206]

III.2.2.5. The valuation of other economic assets (`Wirtschaftsgüter´) for inheritance tax

In so far as the regulations of sec. 12 to sec. 16 of the BewG do not provide for a different method of valuation, all property and assets acquired by an heir by the way of succession have to be valued at their fair market value in terms of sec. 12 (1) of the ErbStG and sec. 9 of the BewG.
This applies especially to all movable property not forming a part of the assets of an enterprise or the operating assets of a company of the deceased (e.g. jewellery, household effects, furniture, works of art, etc.).[207]
In terms of sec. 11 (1) of the BewG all possible kinds of securities (`Wertpapiere´ [e.g., stocks and shares, treasury bonds, bills of exchange, cheques, etc.]) have to be valued at their market rate or stock exchange price if they are traded on the market or on the stock exchange on the date on which the `fixed-day valuation´ (`Stichtagsbewertung´)[208] of the inherited property and assets takes place.[209]
A deposit of securities (`Wertpapierdepot´) which was acquired by an heir from a deceased has therefore to be valued at the date of the death of the deceased.[210]
However, if certain circumstances indicate that the `real value´ (`tatsächlicher Wert´), for example, of company shares is higher than their market or stock exchange value, that is to say, in those cases where the number of inherited company shares enable an heir to dominate a company, the value of the inherited shares can be altered for inheritance tax purposes according to sec. 11 (3) of the BewG.
This principle applies even in those cases where the number of shares which would enable one holder of the shares to control a company is split between a plurality of heirs and lea-

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errecht, para. 6.1, p. 209 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 36, p. 219 *seqq.*

205) See, ***Ebenroth,*** Erbrecht, p. 963.

206) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 277.

207) Cf., ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 21 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 35, p. 158 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 260 *et seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 120 *seqq.*

208) *Vide supra,* part C. III.2.2.2., p. 159 *seqq.*

209) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 260 *et seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 120 *seqq.*

210) ***BFH*** NV 1991, p. 243.

ds to a situation where the splitting of the shares prevents a single heir of the plurality from controlling the company.[211]

Securities other than bonds and shares which are traded on the stock exchange (e.g. shares that were held in a company limited by shares (`Kapitalgesellschaft´) which is not quoted on the stock exchange) are valued according to their market value at the date of the death of the deceased and their market value is established according to the fair market value (`gemeiner Wert´) that would have been achieved by a *bona fide* purchase and sale of comparable or similar securities [sec. 11 (2) sentence 1 of the BewG]. On assessing the fair market value of shares in an unquoted company limited by shares (`Kapitalgesellschaft´), priority is given to a valuation in accordance with the selling price other shares of this company achieved, if they were sold up to twelve months prior to the death of the deceased [sec. 11 (2) sentence 2 of the BewG].
If a selling price for unquoted company shares cannot be deduced from previous sales of company shares, the fair market value of the concerned shares has to be estimated by taking the business capital or the operating assets of the company, and since the 1st of January 1993 also its operating results and possible future business profits, into account [see, sec. 12 (1a) of the ErbStG].

In terms of sec. 12 (1) of the BewG claims against third parties arising from contracts concluded by the deceased as well as debts owed by the deceased have to be valued in accordance with their nominal value (`Nennwert´). Deductions from and additions to the nominal value of claims against third parties can be made where (a) the total claim or a part of the deceased`s claim is uncollectable (e.g. where a debtor fell into insolvency) [see, sec. 12 (2) of the BewG][212] or where (b) the deceased granted an interest-free loan to a third party.[213]

Other rights (`sonstige Rechte´) and especially the right to reap the fruits of certain property and assets (`Nutzungsrechte´), like a `Nießbrauch´ (`usufruct´) for example, are valued in accordance with the rules of sec. 13 to sec. 16 of the BewG.[214]
In terms of sec. 13 BewG, the maximum value of a `Nießbrauch´ (`usufruct´) for inheritance tax purposes will be its annual value multiplied by eighteen. In this context the annual value of a `Nießbrauch´ is determined by its gross profits *per annum* reduced by the costs which have to be invested by the beneficiary of the `Nießbrauch´ in order to reap the fruits thereof.[215]

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211) ***BFH*** BStBl. II 1991, p. 725.
212) See, ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 66 / ***Troll,*** ErbStG - commentary, sec. 12, para. 51 *seqq.* / ***Rössler / Troll,*** Bewertungsgesetz und Vermögensteuer - commentary, sec 12, para. 34 *seqq.* .
213) *Vide supra,* part C. III.1.1.1., p. 136 / ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 66.
214) For deatails refer to, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 137 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 35, p. 186 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 269 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 88 *seqq.*
215) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 138 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 103.

III.2.2.6. The special characteristics of the valuation of partnership or family company shares

III.2.2.6.a. The special characteristics of the valuation of partnership or family company shares acquired by succession

As soon as partnership or family company shares (`Anteile an Personengesellschaft´) owned by a deceased at the time of his death have to be valued for inheritance tax purposes, further special rules for the valuation of inherited property and assets have to be taken into account.[216] Additional difficulties on assessing or valuing shares that were owned in a German partnership or family company arise from the fact that (a) the German Civil and Commercial law provides for a variety of different possibilities to create a partnership or a family company and (b) from the fact that all these different types of partnerships or family companies will have individual partnership or family company agreements, which can also influence the inheritance taxation of the shares that were owned in these business entities.

aa. Where a partnership or a family company is terminated on the death of a shareholder

If a partnership or a family company is terminated and dissolved on the event of the death of one of the partners, the share of the deceased partner will be taxed in the hands of the heir[s] who acquired his share by succession. On a partner`s death the share that was held by him in a family company is valued in terms of sec. 12 (5) of the ErbStG.[217]

The date of the valuation of partnership or family company shares for inheritance tax purposes is the date of the death of the partner concerned (according to the `principle of the valuation on a fixed-day´).[218]

On the `fixed-day of valuation´ (`Bewertungsstichtag´) the `tax value´ (`Steuerwert´) of the partnership or family company assets (`Gesellschaftervermögen´) has to be assessed and furthermore attributed or distributed to the partners in accordance with their share of participation in the partnership or family company.[219] If the factual distribution of the partnership and family company assets among the partners lags behind the assessed tax value of the partnership`s and family company`s assets, the inheritance tax liability of the heir[s] has [have] to be assessed in accordance with the factual distribution value, since the heir[s] would otherwise be burdened with an amount of inheritance taxes that was assessed on an enrichment that exceeds the `real´ enrichment he [they] actually acquired by way of sucession.[220]

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216) It would be beyond the scope of this work to enlarge on all aspects that can be connected to the valuation of partnership or company shares, see therefore ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 781 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 51, p. 110, p. 185 *seqq.*, p. 207 *seqq.*, p. 251 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 130 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 6.4, p. 217 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 12 aF, para. 134 *seqq.*

217) ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 795 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 251 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 130 *seqq.*

218) See, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 791.

219) ***Moench,*** ErbStG - commentary, sec. 12, para. 30 / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 793 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 251 *seqq.*

220) *Vide,* ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 796.

bb. Where a partnership or family company carries on business despite the death of a shareholder

If a partnership or a family company carries on business after the death of one of its partners and the heir[s] of the deceased partner step into his share and standing in the partnership or family company, the inherited share in the partnership or family company will be valued as if the heir[s] were entitled to inherit or succeed to the legal or contractual value of the lump sum payment the deceased partner would have received on his withdrawal from the partnership or the family company.[221]

In addition, the inheritable share in a partnership or in a family company can also be valued in accordance with the value of the respective properties and assets shown in the books of the partnership or in the books of the family company, if the will of the deceased and the partnership agreement or the family company agreement provide for such a valuation [`Buchwertklausel´].[222]

However, as soon as the value of the inherited share which is documented in the books of the partnership or family company lags behind its factual value, the heir of the share will be enriched by the amount that exceeds the book value.

In these cases a taxable donation *mortis causa* in terms of sec. 3 (1) No. 2 sentence 2 of the ErbStG can be assumed for the additional enrichment of the heir.[223]

If a partnership or a family company carries on business after the death of a shareholder and his will as well as the partnership agreement or the family company agreement specifically provide for an heir [or heirs] of the deceased partner to take over his share and standing in the company (`Nachfolgeklausel´[224]), the value of the inherited share will have to be assessed in terms of sec. 12 (5) of the ErbStG.

According to sec. 12 (5) of the ErbStG the value of the business capital or the operating assets of the partnership or family company (`Gesellschaftsvermögen´) has to be assessed as a whole [in its entirety].

Having assessed this value, the value of the operating assets or the value of the business capital on the fixed-day of valuation[225] will be attributed to the other partner[s] of the business and the heir[s] of the deceased. The heir[s] will then have to pay the applicable amount of inheritance taxes which is levied on the value of the share attributed to him [or attributed to them].[226]

If a plurality of heirs is entitled to succeed to a share and standing in a partnership or to a share and standing in a family company, every single heir inherits the value which is attributable to the proportional share of the inheritance he is entitled to.

If the will and the partnership agreement or the family company agreement provide only for one specific heir from a plurality of heirs to step into the deceased`s partnership share as well as his standing in the partnership or family company, and the other heirs only in-

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221) See especially, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 796 *seq.*

222) ***Moench,*** ErbStG - commentary, sec. 12, para. 94 / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 796 *seq.*

223) See especially, ***Moench,*** ErbStG - commentary, sec. 12, para. 94 / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 796 *seq.*

224) For further details, see ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 797 *seq.*

225) ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 797, 798 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 251 *seqq.*

226) See, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 798 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 251 *seqq.*

herit a share in the partnership or family company, the German law terminology terms this circumstance as a so-called `qualifizierte [qualified] Nachfolgeklausel´.[227]
In the cases of a so-called `qualifizierte Nachfolgeklausel´ the inherited shares in the partnership or family company are valued according to the principles mentioned above [for the cases of a `Nachfolgeklausel´] and the fact that only one heir steps into the standing of the deceased in the partnership or family company is unimportant for the valuation of the shares inherited by all of them.[228]
In this context it has to be stressed that the valuation of the taxable enrichment of the heirs who do not step into the standing of the deceased in the partnership or family company embodies also the enrichment received exclusively by the single heir who steps into the standing of the deceased in the respective partnership or family company.[229]

Finally it has to be mentioned, that the inheritance of a share and standing in a family company can depend on the decision of an heir to join the partnership or family company, if the will of the deceased as well as the partnership agreement or the family company agreement provided for an express right of a person to enter the partnership or family company under certain circumstances [e.g. for an heir to enter the partnership or family company on the death of the deceased] (`Eintrittsklausel´[230]).
If an heir utilises this right to step into the share and standing that was held by the deceased in the partnership or family company at the time of the death of the deceased, his inherited share will be valued in accordance with the tax value (`Steuerwert´) his share shows in the tax balance of the partnership or family company.
If from a plurality of heirs only one heir is chosen and entitled to utilize the aforementioned possibility to step into the share and standing in a partnership or family company, the above mentioned valuation principles that apply in the cases of a `qualifizierten Nachfolgeklausel´ can be applied *mutatis mutandis* to this situation.[231]

III.2.2.6.b. The special characteristics of the valuation of partnership or family company shares which were acquired by a donation *inter vivos*

As in the cases where shares owned in a partnership or in a family company were subject to a transfer by succession, the valuation of partnership or family company shares that were transferred in terms of a donation *inter vivos* is assessed in accordance with the tax value of the concerned share in the tax balance of a partnership or family company.[232]

If the donor of a share in a partnership or family company first donates a certain amount of money to the donee and the donee afterwards buys a share in the partnership or family company using the amount of money donated to him by the donor for this purpose, difficulties in distiguishing the real item of the donation can occur.[233]

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227) For detailed information concerning the `qualifizierte Nachfolgeklausel´ see, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 798.
228) See, ***BFH*** BStBl. II 1983, p. 329.
229) This attitude of the ***BFH*** is critizised by, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 798.
230) Details can be found in, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 799 *seq.*
231) See, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 800.
232) For further information on this topic refer to, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 801 *seqq.*
233) For this problem see, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 801 *seqq.* / ***Ebenroth,*** Erbrecht, p. 967.

However, it can be observed that these cases reveal a strong affinity to the so-called `indirect donation´ mentioned above and will be valued accordingly.[234]

If the donee plans to use the amount of money donated to him by the donor to purchase a share in the family company and the tax value of the share, according to the tax balance of the partnership or family company, is lower than the amount of money he received, it can be assumed that the share itself was intended to be the item of the donation.[235]

In cases where a donation of a share in a partnership or a family company was made with reference to the value of the share as it documented in the books of the partnership or family company, this so-called `Buchwertklausel´[236] will not be taken into consideration on valuing the donated share for inheritance and donations tax purposes. In these cases the donations tax will be assessed with reference to the value of the received share in terms of the tax balance of the partnership or family company. If the value of the donated share in the family company exceeds the value of the share as documented in the books of the company, for example where the share in a partnership or family company also embodies hidden reserves, etc., the amount which exceeds the book value will be regarded as a donation in terms of sec. 7 (5) of the ErbStG.[237]

All in all it can be stated that the valuation of company shares for German inheritance tax purposes depends mainly on the legal structure of the company concerned.
In cases where individually-owned firms, partnerships, family companies or shares held in these companies or partnerships are taxed at the time of the transfer of these business entities by succession, it can be stated in summary that they are mainly valued in accordance with the standard value of the entirety of their business capital or operating assets.
In contrast to the partnerships and family companies mentioned, companies limited by shares have to be valued at the fair market value of their shares. Companies limited by shares and companies limited by shares which are quoted at the stock exchange will therefore be more affected by the levying of inheritance taxes than individually-owned firms, partnerships, family companies or shares held in these companies or partnerships.

As far as the principles for the valuation of foreign partnerships and family companies are concerned, the above mentioned rules, established for the valuation of commercial enterprises in general, can be applied *mutatis mutandis.*[238]

III.2.3. The value of the enrichment of the heir (`Bruttowert der Bereicherung´)

In terms of sec. 10 (1) sentence 1 of the ErbStG the gross value of the enrichment an heir aqcuired by succession, reduced by the allowable deduction of debts owed by the deceased (see, part C. III.2.2.1.a, p. 157 *seq.*) and furthermore reduced by the allowable deduction of costs that can be connected to the winding-up and administration of the inherited deceased estate (see, part C. III.2.2.1.b. p. 158 *seq.*), has to be regarded as the value of his enrich-

234) *Vide supra,* part C. III.1.1.3.a., p. 143 of this work and footnotes 93, 94 *ad hunc locum.*
235) See, ***FG Hessen,*** UVR 1990, p. 310 / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 802 / ***Ebenroth,*** Erbrecht, p. 967.
236) See especially, ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 802 *seqq.*
237) This conclusion is drawn by, ***Kapp,*** ErbStG - commentary, sec. 7, para. 184 / ***Moench,*** ErbStG - commentary, sec. 7, para. 23 / ***Troll,*** ErbStG - commentary, sec. 7, para. 67a / ***Knobbe-Keuk,*** Bilanz- und Unternehmenssteuerrecht, p. 803.
238) *Vide supra,* part C. III.2.2.3.c., p. 164.

ment ('Bruttobereicherung') for inheritance and donations tax purposes [under the precondition that, and in so far as the enrichment or parts of the enrichment do not fall within the scope of the tax-free amounts ('Freibeträge') that are laid down in sec. 5, 13, 16, 17 and 18 of the Act].

If a plurality of heirs is enriched by an acquisition *mortis causa* the value of the enrichment of a single heir, which is included in the gross value of the enrichment of a plurality of heirs, is assessed in accordance with his proportional share in the inheritance. To arrive at the value of the enrichment ('Bruttobereicherung') of a single heir, the debts and costs attributable to his proportional share in the inheritance have to be deducted from the gross value of his original proportional enrichment.[239]

In terms of sec. 10 (2) of the ErbStG the tax liability of an an heir or a donee will be added to the value of his enrichment as soon as the deceased or the donor imposed the payment of the inheritance or donations tax liability, which is levied on the property and assets acquired by the heir or donee, on a third party, or in the cases of a donation, pays the payable amount of taxes himself.

Consequently it can be said, that the German ErbStG assumes in these cases, that the tax liability was intended as bestowed on the heir or the donee. However, this rule applies only to the taxes payable on the main acquisition by succession or donation.[240]

III.2.4. The net value of the enrichment of the heir

In accordance with sec. 10 (1) sentence 1 of the ErbStG the net value of the enrichment of an heir or a donee, on which his German inheritance and donations tax liability will be assessed and levied, is determined by following two main steps.

The first step is the determination and assessment of the value of the enrichment ('Bruttobereicherung') of an heir by compiling the gross value of his enrichment and deducting therefrom the debts owed by the deceased and the costs connected with the winding-up and administration of the inherited property and assets.

After the value of the enrichment of an heir has been assessed, the tax-free amounts ('Freibeträge') as laid down in sec. 5, 13, 16, 17 and 18 of the ErbStG have to be deducted therefrom to arrive at the net value of the enrichment of the individual heir.

The following is therefore intended as a short introduction to the principles and rules concerning the tax-free amounts ('Freibeträge') that can be deducted from the value of the enrichment of an heir in order to arrive at the taxable net value of his enrichment.

III.2.4.1. The statutory (matrimonial) property regime of the community of surplus ('Zugewinngemeinschaft') in terms of sec. 1363 *seqq.* of the BGB

The first tax-free amount that can be deducted from the value of the enrichment of an heir in order to arrive at the net value of his enrichment is related to the German Family law and applies only to the surviving spouse of a deceased.

The German Family law distinguishes between two main types of matrimonial property regimes: the matrimonial property regime of the community of surplus ('Zugewinngemein-

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239) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 230 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 24 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 109 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 52 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 95, p. 42/5 *et seqq.*

240) See, ***Meincke,*** ErbStG - commentary, sec. 10, para. 24.

The calculation of a German inheritance tax liability - the assessment of the net value of the enrichment an heir acquired by inheriting property and assets, and the calculation of the German inheritance tax liability which is levied on this enrichment by the German ErbStG

Literary sources: ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p.119 / ***Ebenroth,*** Erbrecht, p. 957.

The gross value of the enrichment an heir acquired by inheritance
(`Steuerpflichtiger Erwerb´, `Bruttowert I´ or `Wert der Zuwendung´ in terms of sec. 1 (1) No. 1, sec. 3 to sec. 6 of the ErbStG and valued in accordance with sec. 12 of the ErbStG and the relevant sections of the BewG)

Reduced by the deduction of debts owed by the deceased
(`Nachlaßverbindlichkeiten´ or `Nachlaßschulden´ as laid down in sec. 10 (5) No. 1 and No. 2 of the ErbStG)

Further reduced by the deductible costs which can be connected and attributed to the enrichment an heir acquired by inheritance
(`Nachlaßkostenschulden´ as laid down in sec. 10 (5) No. 3 of the ErbStG)

The value of the enrichment an heir acquired by inheritance
(`Erbschaftswert´, `Bruttowert II´ or `Bruttowert´ in terms of sec. 10 (1) sentence 1 of the German ErbStG)

Deduction of the tax-free amount connected to the matrimonial property regime of the community of surplus (sec. 5 of the ErbStG) (`Zugewinngemeinschaft´)

Deduction of the tax-free amounts and tax exemptions laid down in sec. 13 of the ErbStG (`sachliche Steuerbefreiungen´)

Deduction of the tax-free amounts laid down in sec. 16 of the ErbStG (`persönliche Steuerbefreiungen´)

Deduction allowed in terms of sec. 17 and sec. 18 of the ErbStG (`Versorgungsfreibetrag´ and `Mitgliederbeiträge´)

The net value of the enrichment an heir acquired by inheritance
(`eingetretene Bereicherung´ or `Nettowert der Bereicherung´, see sec. 10 (1) sentence 1 of the ErbStG)

Application of the suitable tax-bracket / tax class and rate of taxation in accordance with sec. 15 and sec. 19 of the German ErbStG

Calculated inheritance tax liability

From the calculated amount of payable inheritance taxes there may be further deductions, e.g. in respect of foreign death taxes paid on the same enrichment see, sec. 21 of the ErbStG (other deductions are allowed in accordance with sec. 14 and sec. 27 of the ErbStG)

schaft') in terms of sec. 1363 *seqq.* BGB[241] and the matrimonial property regime of the separation of property ('Gütertrennung') in terms of sec. 1414 BGB.[242]

According to sec. 1363 of the BGB, spouses who are married in accordance with the German Civil law automatically choose to live under the matrimonial property regime of the community of surplus ('Zugewinngemeinschaft')[243] and for this reason the tax-free amount that is laid down in sec. 5 of the ErbStG refers explicitly to this form of matrimonial property regime.

If the marriage of a couple is governed by the German matrimonial property regime of the community of surplus in terms of sec. 1363 *seqq.* BGB and the matrimonial property regime is terminated by the death of one of the spouses, the regulation of sec. 5 (1) sentence 1 of the ErbStG provides that the amount of surplus the surviving spouse would have been entitled to if the matrimonial property regime would have been terminated during the lifetime of the deceased spouse (e.g. divorce), cannot be regarded as an acquisition by succession in terms of sec. 3 of the ErbStG and is therefore exempt from the levying of inheritance taxes.[244]

Sec. 5 of the ErbStG distinguishes basically between two events, the aforementioned termination and equalisation of the surplus achieved under a 'Zugewinngemeinschaft' on the death of one of the two spouses[245] and the termination and equalisation of the surplus which is rooted in another event (e.g. a divorce).[246] If a 'Zugewinngemeinschaft' is terminated by another event, for example, by a divorce, the equalised surplus will be exempt from inheritance taxation in terms of sec. 5 (2) of the ErbStG.[247]

It was mentioned above that in terms of sec. 5 (1) sentence 1 of the ErbStG the determination of the inheritance tax-free amount of the surplus achieved by a spouse on the death of the other spouse is deemed to be the amount of surplus the surviving spouse would have been entitled to if the matrimonial property regime had been terminated during the lifetime of the deceased spouse (e.g. divorce).

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241) Despite its name ('Zugewinngemeinschaft'), the statutory matrimonial property regime is not a true community of property between spouses but a separation of property with 'Zugewinnausgleich' [The 'Zugewinnausgleich' can be characterized as follows: On the termination of the 'Zugewinngemeinschaft', the surplus effected by each spouse in his/her assets is equalized; different rules apply according to whether the regime is terminated by death (sec. 1371 BGB) or by some other event (e.g. divorce) (sec. 1372 *seqq.* BGB)].
Under the matrimonial property regime of the 'Zugewinngemeinschaft' each spouse owns and administers independently his/her own property, being liable only for debts incurred by himself/herself. Any additional wealth created during the period of the regime (surplus) remains the property of the spouse who created it. It will, however, be equalized on termination of the regime.

242) In addition to these two basic types of matrimonial property regimes the German Family law furthermore provides for the community of property ('Gütergemeinschaft') in terms of sec. 1415 *seqq.* BGB, the continued community of property ('fortgesetzte Gütergemeinschaft') in terms of sec. 1483 *seqq.* BGB [see also part. C. III.1.2.3.] and other forms of matrimonial property regimes which can be entered into on the basis of a marriage contract between the spouses ('Ehevertrag') in terms of sec. 1408 *seqq.* BGB.

243) Provided that the spouses do not expressly enter into another type of matrimonial property regime by drafting up a marriage contract.

244) For further information on the regulation of sec. 5 of the ErbStG see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 141 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 54 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 7.23, p. 248 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 23 *seqq.* / ***Moench,*** ErbStG - commentary, sec. 5 / ***Troll,*** ErbStG - commentary, sec. 5 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 28, p. 90/6 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 68 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 5 / ***Kapp,*** ErbStG - commentary, sec. 5.

245) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 142, 144 *et seqq.*.

246) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 142 *et seqq.*

247) See, ***Meincke,*** ErbStG - commentary, sec. 5, para. 50 *seqq.*

The method of the ErbStG, to apply this legal fiction on assessing the tax-free amount of the surviving spouse, is based mainly on the idea that the amount a surviving spouse would have achieved on the termination of the `Zugewinngemeinschaft´ during the lifetime of the deceased spouse (e.g. divorce) cannot be regarded, e.g., as a gratuitious bestowal by the deceased, for it is based on the contributions of the surviving spouse to the property and assets of the matrimonial property.[248]
However, it is beyond the scope of this work to discuss the provisions of sec. 5 of the ErbStG and its relation to the German Family law in detail.[249]

Nevertheless it has to be noted, that the choice of the `right´ matrimonial property regime is of a special importance for an inheritance tax liability that will occur sooner or later; and yet most of the German expert works dealing with the assessement of the inheritance tax liability of surviving spouses state that neither the matrimonial property regime of the separation of property (`Gütertrennung´) nor the matrimonial property regime of the community of surplus (`Zugewinngemeinschaft´) can be regarded as an ideal solution for inheritance tax purposes. For this reason the authors dealing with this matter recommend a mixture of the advantages of both matrimonial property regimes as the ideal solution for inheritance tax purposes.[250]

III.2.4.2. The tax exemptions in terms of sec. 13 of the ErbStG

It has already been mentioned that in order to arrive at the taxable net value of the enrichment of an heir the value of his enrichment must be reduced by the tax-free amounts laid down in sec. 5, 13, 16, 17 and 18 of the ErbStG; and the second possibility of deducting a tax-free amount from the value of the enrichment of an heir is embodied in sec. 13 of the Act.
The exemption of certain items from the levying of inheritance taxes, or rather the allowance of tax-free amounts (`Steuerbefreiungen´) on certain inherited items, can be introduced for different reasons. The tax-free amounts granted under the regulations of sec. 13 of the ErbStG are rooted in the nature of the specifically exempt items enumerated in sec. 13, and the German tax law terminology therefore terms these exemptions as `sachliche Steuerbefreiungen´ (`tax-free amounts or tax exemptions which are connected to the nature of a certain taxable object or item´).[251]
The regulations embodied in sec. 13 (1) No. 1 to 18 and sec. 13 (2) and (3) of the ErbStG provide an `all-embracing´ enumeration of `sachliche Steuerbefreiungen´ and as soon as the enrichment an heir acquired by succession includes one of the categories laid down in sec. 13 of the ErbStG, he can deduct the value of this category from the value of his enrichment.[252]

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248) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 141 *et seqq.* / ***Meincke,*** ErbStG - commentary, sec. 5, para. 8 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 54 *seqq.*

249) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 54 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 141 *et seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 28, p. 90/6 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 68 *seqq.* / / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 7.23, p. 248 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 23 *seqq.*

250) *Cf.,* ***Ebenroth,*** Erbrecht, p. 970.

251) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 277 / For a general definition of the term `sachliche Steuerbefreiungen´ see, ***Tipke / Lang,*** Steuerrecht, p. 141.

252) For further information of sec. 13 of the ErbStG refer to, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 177 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 56 *seqq.* / ***Rose,*** Die Substantsteuern, p. 169 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 146 *seqq.* / ***Troll,***

Most of the tax-free amounts laid down in the provisions of sec. 13 of the Act are self-explanatory and the following is therefore merely intended to highlight some of the provisions that are laid down in sec. 13 of the Act.[253]

In practice the most important tax-free amounts embodied in sec. 13 of the ErbStG are the inheritance tax exemptions for household effects, including clothes, cutlery, china and other personal belongings[254] acquired from a deceased (sec. 13 (1) No. 1a of the Act) and included in the value of the enrichment (`Bruttobereicherung´) of an heir.
The value of these belongings is deductible up to a value of DM 40.000 in cases where the acquiring heir falls within the categories of tax brackets I and II in terms of sec. 15 of the Act and up to DM 10.000 for cases where an heir falls within the scope of tax brakkets III and IV in terms of sec. 15 of the Act (sec. 13 (1) No. 1b of the Act).

An additional deduction for movable property in general can be made from the value of the enrichment of an heir, as long as the fair market value of these movables does not exceed the value of DM 5.000 in cases where an heir falls within the scope of tax brackets I and II of the ErbStG and DM 2.000 in cases where an heir falls within the scope of tax brakkets III and IV of the Act (sec. 13 (1) No. 1b and sec. 15 of the Act).
All deductible tax-free amounts that occur in terms of sec. 13 of the Act can be substracted cumulatively from the value of the enrichment acquired by an heir (sec. 13 (1) of the ErbStG).[255]

If their maintenance is in the public interest, the costs of their maintenance exceeds their earnings or if they are open for research or education, some taxable objects, such as real estate, objects of art, art collections, scientific collections, libraries or archives, can be exempt from the levying of inheritance taxes in terms of sec. 13 (1) No. 2 of the ErbStG.[256]
Furthermore all kinds of donations, bestowals and foundations that were made or created in respect of religious, ecclesiastical or charitable purposes [sec. 13 (1) No. 16 of the ErbStG] are exempt from the levying of inheritance taxes.[257]
In this context sec. 29 (1) No. 4 of the ErbStG grants a refund of inheritance taxes paid to those taxpayers who bestowed the property and assets they acquired by the way of succession or donation to a domestic foundation which reveals a religious, ecclesiastical or charitable nature or which is in the public interest.[258]
Furthermore all donations and bestowals that are or were made in respect of an adequate maintenance or education in terms of sec. 13 (1) No. 12 of the ErbStG are exempt from

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Nachlaß und Erbe im Steuerrecht, para. 4.2, p. 197 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 59 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 37, p. 224/3 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 29 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 13 / ***Kapp,*** ErbStG - commentary, sec. 13 / ***Moench,*** ErbStG - commentary, sec. 13 / ***Troll,*** ErbStG - commentary, sec. 13.

253) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 146 *seqq.*

254) See the enumeration in ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 146 *seqq.*

255) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 177.

256) ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 149 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 37, p. 230.

257) ***Meincke,*** ErbStG - commentary, sec. 13, para. 49 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 154 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 288 *et seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 37, p. 253 *seqq.*

258) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 188 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 366 / ***Meincke,*** ErbStG - commentary, sec. 29, para. 11 *seqq.*

the levying of inheritance taxes.
Sec. 13 (1) No. 12 of the Act includes especially all payments that comply with four preconditions: (a) they have to be payable in respect of the maintenance of a certain person, (b) they may not be based on a legal obligation to pay them, (c) they have to be paid regularly and (d) the beneficiary has to be dependent upon these payments. The adequacy of the payments is estimated and judged on a relative basis[259] (sec. 13 (2) of the Act).
Finally it has to be noted that customary or usual occassional gifts in terms of sec. 13 (1) No. 14 of the ErbStG are also exempt from the payment of inheritance and donations taxes.[260] Whether or not an occasional gift can be classified as a customary or usual gift is judged on the cicumstances of the occasion.
All in all it can be stated that the regulation of sec. 13 of the ErbStG provides a number of important tax-free amounts and on assessing inherited property and assets for a German inheritance liability it is alway advisable to refer to this section of the ErbStG.

III.2.4.3. The personal tax exemptions in terms of sec. 16 of the ErbStG

In contrast to the 'sachlichen Steuerbefreiungen' which are laid down in sec. 13 of the ErbStG, sec. 16 to 18 of the ErbStG grant so-called 'persönliche Steuerbefreiungen', which are also deductible from the value of the enrichment an heir or a donee acquired either by succession or by donation.[261]
In terms of the German inheritance tax law terminology 'persönliche Steuerbefreiungen' can be defined as tax-free amounts which are connected to certain personal features of a taxpayer.
The 'persönlichen Steuerbefreiungen' enumerated in terms of sec. 16 of the ErbStG allow exemptions from the payment of inheritance and donations taxes and connect these tax-free amounts to personal features of an heir or a donee. As soon as an heir or a donee complies with the personal features required for the allowance of a tax-free amount in terms of sec. 16 of the ErbStG (e.g. where the taxpayer is the spouse, the child, the grandchild or in some other manner related to the deceased or to the donor), certain amounts of the enrichment an heir or a donee acquired either by succession or by donation will be exempt.

In terms of sec. 16 (1) No. 1 of the Act spouses are exempt from the payment of inheritance and donations taxes up to an enrichment of DM 250.000. Children and grandchildren are exempt from the payment of inheritance and donations taxes up to a received enrichment of DM 90.000 (sec. 16 (1) No. 2 of the ErbStG). The tax-free amount of beneficiaries that fall within tax brackets III and IV of the Act varies between DM 3.000 and DM 50.000 (sec. 16 (1) No. 3 to 5 and sec. 15 of the Act).[262]

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259) *Cf.*, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 37, p. 243 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 152 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 285 *et seqq.*

260) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 287 *et seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 37, p. 251 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 153.

261) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 311 / A general definition of the term 'sachliche Steuerbefreiungen' is given in, ***Tipke / Lang,*** Steuerrecht, p. 139.

262) For an 'in depth' discussion of sec. 16 of the ErbStG see, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 40, p. 268/18b *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 310 *et seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 163 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 58 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 16, para. 8 *seqq.*

The personal tax exemptions in terms of sec. 16 can be deducted from the value of the enrichment of an heir or donee idependently from and additionally to other tax-free amounts that are also included in the ErbStG (e.g. sec. 13 (1) No. 1a of the ErbStG).[263]
The personal tax-free amounts (`persönliche Steuerbefreiungen´) in terms of sec. 16 of the Act apply to all enrichments acquired in terms of sec. 1 of the ErbStG.
In terms of sec. 16 (2) of the ErbStG a general deduction of DM 2.000 is allowed in those cases where an heir or a donee is subjected to a `limited tax liability´[264] in terms of sec. 2 (1) No. 3 of the ErbStG.

However it is of utmost importance to note that the personal tax exemptions for donations and inheritances in terms of sec. 16 of the ErbStG can only be activated or deducted every 10 years (sec. 14 (1) of the ErbStG).

III.2.4.4. The tax exemption in terms of sec. 17 of the ErbStG

Sec. 17 of the ErbStG provides further personal tax-free amounts (`persönliche Steuerbefreiungen´) which can be deducted from the value of the enrichment of a surviving spouse and from the value of the enrichment of the children of a deceased at the time of his death. The deductible amounts in terms of sec. 17 of the Act are so-called `Versorgungsfreibeträge´ [`marital exemptions´] but in contrast to the allowable tax-free amounts in terms of sec. 16 of the Act, the tax-free amounts granted under sec. 17 of the ErbStG can only be deducted on the death of a person.[265]
On the death of a spouse the surviving spouse can claim a special `marital exemption´ [`Versorgungsfreibetrag´] of DM 250.000 in addition to the tax-free amount in terms of sec. 16 (1) No. 1 of the ErbStG [sec. 17 (1) of the Act].
In addition to their tax free amount in terms of sec. 16 (1) No. 2 of the Act the children of the deceased are entitled to a `Versorgungsfreibetrag´ which depends on their age at the date of the death of the deceased [see, sec. 17 (2) of the ErbStG].[266]

1. Age of the child: up to 5 years of age: DM 50.000
2. Age of the child: older than 5 years of age up to 10 years of age: DM 40.000
3. Age of the child: older than 10 years of age up to 15 years of age: DM 30.000
4. Age of the child: older than 15 years of age up to 20 years of age: DM 20.000
5. Age of the child: older than 20 years of age up to 27 years of age: DM 10.000

Since the tax-free amounts in terms of sec. 17 of the ErbStG are largely self-explanatory they will not be discussed further.[267]

III.2.4.5. The tax exemption in terms of sec. 18 of the ErbStG

The last regulation dealing with personal tax-free amounts in terms of the ErbStG is sec. 18 of the Act. According to sec. 18 of the ErbStG the payment of membership fees (`Mit-

263) See, ***Meincke,*** ErbStG - commentary, sec. 16, para. 1 *seqq.*
264) *Vide supra,* part C. III.1.2.6., p. 154 of this work.
265) ***Meincke,*** ErbStG - commentary, sec. 16, para. 4 *seqq.*, 10 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 40, p. 268/22 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 312 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 164 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 58 *seq.*
266) ***Meincke,*** ErbStG - commentary, sec. 16, para. 10 *seqq.*
267) See for further information, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 164 *seqq.*

gliederbeiträge') to associations which do not only provide for a support and furtherance of their members are tax-free if they do not exceed the amount of DM 500 *per annum.*[268]

III.2.5. The levying of taxes on the net value of the enrichment of an heir or donee

It has been mentioned that only the net value of the property and assets acquired by an heir, legatee or donee is taxable in terms of sec. 10 (1) sentence 1 of the German Inheritance and Donations Tax Act. The net value of the enrichment of an heir, legatee or donee is the basis of the assessment for the individual inheritance and donations tax liability on which the suitable tax bracket and the progressive graduated inheritance tax rate are applied.

III.2.5.1. The consideration of earlier enrichments by the same person in terms of sec. 14 of the ErbStG

In terms of sec. 14 of the ErbStG all property and assets an heir, a legatee or a donee acquires from the same person during a ten year period prior to his death or during a ten year period prior to his present donation have to be aggregated for inheritance and donations tax purposes.[269] The amount of inheritance and donations taxes which is normally levied on this total sum of enrichment will then be reduced by the sum of taxes associated with the earlier enrichment of the beneficiary.[270]

This means, for example, that if a father donates DM 100.000 to his son in the year 01 and donates further DM 90.000 to his son in the year 03, the assessment of the donations tax liability of the son in the year 03 will be as follows:
Enrichment of the son in the year 03 plus the enrichment of the son in the year 01, DM 90.000 + DM 100.000 = DM 190.000.
The tax liability of the son will be DM 4000 (DM 190.000 less the tax free amount of DM 90.000 in terms of sec. 15 (1) [tax bracket I] and 16 (1) No. 2 of the Act = DM 100.000; the applicable rate of taxation in terms of sec. 19 of the ErbStG is 4%).
The 'normally' payable amount of taxes for the whole enrichment will then be reduced by the sum of taxes associated with the earlier enrichment of the beneficiary (Tax liability of the son in the year 01 = DM 300 [DM 100.000 less the tax free amount of DM 90.000 in terms of sec. 15 (1) [tax bracket I] and 16 (1) No. 2 of the Act = DM 10.000; the applicable rate of taxation in terms of sec. 19 of the ErbStG is 3%]).
In terms of sec. 14 of the ErbStG the tax liability of the son in the year 03 will therefore be DM 4000 less DM 300 = DM 3700.[271]

However, the apparently simple assessment of inheritance and donations taxes in accordance with sec. 14 of the ErbStG can in some cases become so complicated, that a solution is

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268) For additional information refer to, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 317 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 40, p. 268/28 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 18.

269) For details, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 38, p. 264 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 291 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 158 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 66 *seq.*

270) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 158 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 66 *seq.*

271) This example is given in ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 291.

almost impossible,[272] but a detailed discussion of all the problems connected with the application of sec. 14 ErbStG is beyond the scope of this work.[273]

III.2.5.2. Rebate on successive deaths

Like the South-African Estate Duty Act, the German ErbStG also provides for a rebate on successive deaths, that is to say the German ErbStG provides for a rebate on the successive transfer of the same property and assets by inheritance.[274]
The special rebate mentioned above is granted in terms of sec. 27 of the ErbStG for cases in which property and assets, acquired *mortis causa* by heirs who can be allocated within the scope of tax bracket I or II of the ErbStG, were already acquired *mortis causa* less than ten years earlier by persons who also fell within tax bracket I or II of the Act [sec. 15 of the ErbStG].
In these cases sec. 27 of the ErbStG provides for a graduated rebate on the taxable amount levied on the property and assets - in question.[275]
A rebate of 50% of the payable amount of inheritance taxes will be allowed where the prior acquisition *mortis causa* took place less than one year before the present levying of inheritance taxes. Then the rebate gradually decreases and the last category of rebates in terms of sec. 27 of the Act applies to inheritances where the prior acquisition *mortis causa* took place more than eight but less than ten years before the present levying of inheritance taxes, and allows a rebate of 10% of the amount of inheritance taxes.

Once again it can be stated that the tax-free amounts in terms of sec. 27 of the ErbStG are self-explanatory and need not be discussed further.

III.2.5.3. The applicable tax bracket and the applicable rate of taxation

As soon as the net value of the enrichment of an heir or donee has been established, the individually payable amount of inheritance or donations tax can be assessed in accordance with sec. 15 and sec. 19 of the ErbStG. The assessment of the applicable amount of taxes payable by an heir or donee takes place in two steps.

The first step of the assessment process is the allocation of an heir or donee into the applicable tax bracket in terms of sec. 15 of the ErbStG.
In terms of sec. 15 of the Act, the German ErbStG distinguishes between four main tax brackets (Steuerklassen I bis IV) and the allocation of an heir or donee into the appropriate tax bracket depends mainly on the family relationship between the deceased and the

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272) See, for example, ***BFH*** BStBl. II 1978, p. 220.

273) See, especially ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 38, p. 264 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 291 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 158 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 66 *seq.*

274) Compare the First Schedule of the South-African Estate Duty Act and sec. 27 of the German ErbStG.

275) For detailed information concerning sec. 27 of the ErbStG, see ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 355 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 68 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 68 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 27 / ***Kapp,*** ErbStG - commentary, sec. 27 / ***Moench,*** ErbStG - commentary, sec. 27 / ***Troll,*** ErbStG - commentary, sec. 27.

heir or between the donor and the donee.[276] The degree of ascendance, descendance or generally the family relationship between the heir and the deceased on the one hand, or the donee and the donor on the other hand, has to be ascertained in accordance with the rules of the German BGB.

The second step in assessing the inheritance or donations tax liability of an heir or a donee is the establishment of the applicable rate of taxation that has to be applied to the net value of the enrichment of the heir or donee.
In terms of sec. 19 of the ErbStG the German rates of inheritance taxes are levied on a progressive basis, that is to say, the levied amount of inheritance and donations taxes increases in accordance with the value of the respective inheritance or donation.
Consequently it can be stated that the applicable rate of taxation depends (a) on the value of the inheritance (donation) in terms of sec. 19 of the ErbStG and (b) on the above mentioned tax brackets in terms of sec. 15 of the Act.[277]

The German ErbStG distinguishes between the following four tax brackets:
Tax bracket or tax class I (Steuerklasse I) comprises the deceased`s spouse, children, step-children, and children of pre-deceased children or step-children.[278] The rate of taxation varies from 3% (up to DM 50.000) to 35% (over DM 100 million).[279]
Under tax bracket II (Steuerklasse II) the descendants of children listed under Steuerklasse I (other than children of pre-deceased children or step-children) and parents, grandparents and more remote ancestors with respect to acquisitions *mortis causa* are taxed[280] at rates that vary from 6% (up to DM 50.000) to 50% (more than DM 100 million).[281]
Tax class III (Steuerklasse III) taxes parents, grandparents and more remote ancestors with respect to acquisitions by donation, brothers and sisters and their direct descendants, step-parents, sons-in-law, daughters-in-law, parents-in-law and the divorced spouse[282] at rates between 11% (up to DM 50.000) and 65% (over DM 100 million).[283]
In the last tax bracket - Steuerklasse IV - the German ErbStG taxes all other beneficiaries of aquisitions by reason of death or donation and the receivers of `earmarked gifts´ (Zweckzuwendungen)[284] at variable rates from 20% (up to DM 50.000) up to 70% (more than DM 100 million).[285]

In recent years the question arose whether partners who live in a so-called extra-marital cohabitation (`nichteheliche Lebensgemeinschaft´), should be treated like husband and wife living in a lawful marriage and therefore fall within the scope of tax bracket I of the ErbStG.

276) In detail, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 303 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 30 *seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 161 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 7, p. 245 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 54 *seqq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 39, p. 268/9 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 / ***Meincke,*** ErbStG - commentary, sec. 15 / ***Kapp,*** ErbStG - commentary, sec. 15 / ***Moench,*** ErbStG - commentary, sec. 15 / ***Troll,*** ErbStG - commentary, sec. 15.
277) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 167.
278) See, sec. 15 (1) tax bracket I.
279) Sec. 19 (1) the applicable rate of taxes for tax bracket I.
280) Compare, sec. 15 (1) tax bracket II.
281) *Vide,* sec. 19 (1) the applicable rate of taxes for tax bracket II.
282) Sec. 15 (1) tax bracket III.
283) *Cf.,* sec. 19 (1) the applicable rate of taxes for tax bracket III.
284) Sec. 15 (1) tax bracket IV.
285) Sec. 19 (1) the applicable rate of taxes for tax bracket IV.

This matter was first brought before the Bundesfinanzhof and subsequently before the Bundesverfassungsgericht (German Constitutional Court).
However, it was held by both courts[286] that the general notion of the ErbStG to treat partners of an extra-marital cohabitation (`nichteheliche Lebensgemeinschaft´) as not being comparable or equal to a lawful married couple neither conflicts with the German Civil Law nor with the German Constitution. Consequently partners living in an extra-marital cohabitation (`nichteheliche Lebensgemeinschaft´) cannot benefit from being put into tax bracket I of the ErbStG. They will therefore `normally´ fall within tax bracket IV of the ErbStG.[287]

If partners who are living in an extra-marital cohabitation (`nichteheliche Lebensgemeinschaft´) want to benefit from being allocated to tax bracket I of the ErbStG they will either have to marry or one of the partners will have to adopt the other partner in order to establish a family relationship that falls within tax bracket I of the Act.[288]

In relation to their father, illigitemate children are children in terms of tax bracket I of the ErbStG. Nevertheless, in order to be assessed for inheritance taxes in accordance with tax bracket I of the ErbStG, the paternity of the deceased in relation to the illigitemate child must have been positively determined.
Because the claim of an illigitemate child to receive the equivalent of of his statutory share in the deceased`s estate [`Erbersatzanspruch´ in terms of sec. 1934a *seqq.* of the BGB[289]] can only be claimed if the paternity of the deceased was positively determined beforehand, the `Erbersatzanspruch´ of an illigitemate child will always fall within tax bracket I of the ErbStG.

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286) See, ***BVerfG*** BStBl. II 1984, p. 172 / ***BVerfG*** NJW 1990, p. 1593 / ***BVerfG*** NJW 1990, p. 760 / ***BFH*** BStBl. II 1983, p. 114 / ***BFH*** BStBl. II 1988, p. 1006

287) Cf., ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 303 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 161 / ***BVerfG*** BStBl. II 1984, p. 172 / ***BVerfG*** NJW 1990, p. 1593 / ***BVerfG*** NJW 1990, p. 760 / ***BFH*** BStBl. II 1983, p. 114 / ***BFH*** BStBl. II 1988, p. 1006.

288) See, ***Ebenroth,*** Erbrecht, p. 976.

289) *Vide supra,* part C. III.1.1.2.a., p. 137 and footnote 57 *ad hunc locum.*

IV. The German International Inheritance Tax Law

Having dealt with a basic introduction to the German ErbStG and having briefly highlighted the assessment of an inheritance tax liability in accordance with the regulations of the Act, the following provides for a further analysis of the aspects that can be connected to the German International Inheritance Tax Law.[290]

Although it is intended to cover all the problems and aspects raised by an analysis of German International Inheritance Tax Law as concisely as possible, it would be beyond the scope of this work to deal with all the associated problems in detail.

IV.1. General

In order to be taxable in accordance with the rules of the German ErbStG, a taxable event has to fall within the scope and the ambit of the Act, and the liability of an heir to pay German inheritance taxes can and will occur only where his personal liability (`persönliche Steuerpflicht´) for the payment of German inheritance taxes can positively be established in accordance with the inheritance tax rules embodied in sec. 2 of the ErbStG.

In accordance with sec. 2 of the ErbStG it can be stated that scope of the liability of a taxpayer for the payment of German inheritance or donations taxes depends mainly on the personal features of the deceased and the heir on the one hand and of the donor and the donee on the other hand.
If a deceased or an heir on the one hand or a donor or a donee on the other hand can be regarded as a `resident´ (`Inländer´) of the Federal Republic of Germany, the enrichment by property and assets transferred and acquired either by succession or by donationclearly falls within the scope of the so-called `unlimited tax liability´ (`unbeschränkte Erbschaftsteuerpflicht´) in terms of sec. 2 (1) No. 1 sentence 1 of the ErbStG.[291]

In contrast to the `unlimited tax liability´, a `limited tax liability´ (`beschränkte Steuerpflicht´) can only be assumed in those cases where neither the deceased and the heir on the one hand, nor the donor and the donee on the other hand, were `residents´ of the Federal Republic [see, sec. 2 (1) No. 3 of the ErbStG].[292]

Whereas other German tax law codifications[293] refer expressly to `unlimited tax liabili-

290) For an introduction to the term `International Tax Law´ see, part A. II.1. and part A. II.1.2., p. 5 *seq.* of this work.

291) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25 *seq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 1.2, p. 178 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 37 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 3 *seqq.* / ***Moench,*** ErbStG - commentary, sec. 2, para. 13 / ***Troll,*** ErbStG - commentary, sec. 2, para. 2.

292) Compare, ***Ebenroth,*** Erbrecht, p. 999 / ***Rose,*** Substanzsteuern, p. 164 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 *seq.* / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 29 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 9, p. 260 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 37 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 42 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.*

293) See, for example, sec. 1 and sec. 2 of the German Vermögensteuergesetz (VStG - Wealth Tax Act)

ty' and 'limited tax liability', sec. 2 of the ErbStG uses neither of these terms *expressis verbis*, but it has to be stated that German tax law terminology customarily also utilizes these terms in the context of the German ErbStG.[294]

In accordance with sec. 2 (1) No. 1 sentence 1 of the ErbStG the scope of the 'unlimited tax liability' of a taxpayer includes the levying of German inheritance or donations taxes on the enrichment received from world wide [or international] acquisitions of property and assets either by succession or donation.
The German tax law terminology therefore characterizes sec. 2 (1) No. 1 sentence 1 of the ErbStG as being governed by the so-called 'Universalitätsprinzip'[295] ('principle of universality', *i.e.* the levying of taxes on domestic and international enrichment by succession or donation).

The 'limited inheritance and donations tax liability' on the other hand is said to be governed by the 'Territorialitätsprinzip'[296] ('principle of territoriality') and taxes only the enrichment acquired either by succession or donation in which none of the taxpayers involved was a 'resident' of the Federal Republic and only where the acquired property and assets can be regarded as being domestic property and assets in terms of sec. 2 (1) No. 3 of the ErbStG read together with sec. 121 (2) of the BewG.[297]

In addition to 'unlimited' and 'limited inheritance tax liability' which occurs and is levied in terms of sec. 2 of the ErbStG, sec. 4 of the Außensteuergesetz (AStG - 'Law to Prevent International Fiscal Evasion) introduces a further category of inheritance tax liability. Sec. 4 of the AStG introduces the so-called 'erweiterte beschränkte Steuerpflicht' ('extended limited inheritance tax liability') for cases where a deceased or a donor emigrated less than ten years prior to his death or prior to a donation to a tax haven.
If the inheritance or donations taxes levied according to the taxation rules of the tax haven amount to less than 30% of the sum of the inheritance or donations taxes which would have been payable according to rules of the German ErbStG [sec. 4 (2) AStG], the taxpayer will also be liable for a partial payment of German inheritance or donations taxes [sec. 4 (1) of the ErbStG].[298]

However, it must be noted that the scope of the 'unlimited tax liability' of a taxpayer [sec. 2 (1) No. 1 sentence 1 of the ErbStG] can be curtailed in terms of an international double death taxation agreement.[299]

For those cases in which the Federal Republic of Germany has not entered into a double death duty agreement with a foreign country [e.g. the Republic of South-Africa], sec. 21 of the ErbStG provides partial unilateral relief by allowing the deduction of foreign inheritan-

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294) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 3 and para. 10.
295) See, ***Ebenroth,*** Erbrecht, p. 999.
296) For further information, ***Ebenroth,*** Erbrecht, p. 1000.
297) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 29 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 37 *seq.*
298) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 105 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 29 *et seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 37 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 13.
299) ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 27 *seq.* / ***Ebenroth,*** Erbrecht, p. 1000 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100.

ce taxes paid from the amount of German inheritance taxes.[300]

IV.2. The 'unlimited tax liability' in terms of sec. 2 (1) No. 1 sentence 1 of the ErbStG

As already indicated above, the 'unlimited tax liability' ('unbeschränkte Steuerpflicht') for the payment of German inheritance taxes, in terms of sec. 2 (1) No. 1 sentence 1 of the ErbStG occurs as soon as a deceased or an heir can be regarded as a 'resident' ('Inländer') of the Federal Republic of Germany. An 'unlimited inheritance tax liability' will only be excluded in those cases where the persons concerned are not 'residents' of the Federal Republic.[301]

An enrichment by an acquisition of property and assets by succession is included in the scope of the 'unlimited tax liability' for the payment of German inheritance taxes if the relevant acquisition reveals no relation to a foreign country whatsoever, or where the involvement of a 'foreign element' included in the enrichment by an acquisition of [foreign] property and [foreign] assets is deemed to be of no importance because the deceased or the heir falls within one of the 'unlimited liability categories' or 'connecting factors' ('Anknüpfungspunkte') laid down in sec. 2 (1) No. 1 lit. a. to d. or sec. 2 (1) No. 2 of the ErbStG.[302]

IV.2.1. Acquisitions of property and assets which reveal no foreign element

Enrichments resulting from acquisitions *mortis causa* by which the property and assets of a deceased citizen of the Federal Republic are transferred to an heir who is also a citizen of the Federal Republic clearly fall within the scope of the 'unlimited tax liability' for German inheritance tax purposes, as long as both of them reside in Germany at the time of the transfer.

The introduction of a foreign element to the levying of German inheritance taxes is also excluded in those cases, where, for example, foreign securities or deposits of foreign securities ('ausländische Wertpapiere') which are stored in the vaults of a German bank or in the vaults of a foreign bank on German territory were acquired by a succession in which only German citizens who are living in the Federal Republic were involved.[303]

IV.2.2. Acquisitions of property and assets which reveal a foreign element

An 'unlimited inheritance tax liability' will also occur in cases where the involvement of a 'foreign element' which is included in the acquisition of [foreign] property and [foreign] assets is deemed to be of no importance because the deceased or the heir falls within one of the 'unlimited liability categories' or 'connecting factors' ('Anknüpfungspunkte') which are laid down in sec. 2 (1) No. 1 of the ErbStG.

An 'unlimited inheritance tax liability' can always be assumed in those cases where either

300) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 / ***Ebenroth,*** Erbrecht, p. 1000.

301) For details, ***Meincke,*** ErbStG - commentary, sec. 2, para. 6 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101.

302) See, ***Ebenroth,*** Erbrecht, p. 1000.

303) With this example, ***Ebenroth,*** Erbrecht, p. 1000 / See furthermore, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 37 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *seq.* / ***Moench,*** ErbStG - commentary, sec. 2, para. 13 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 100 *seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25 *seq.*

the deceased or his heir is a `resident´ (`Inländer´) of the Federal Republic of Germany. The preconditions for the definition of the term `resident´ of the Federal Republic of Germany for inheritance tax purposes are laid down in sec. 2 (1) Nr. 1 lit. a. to d. and sec. 2 (2) of the ErbStG.

IV.2.2.1. The regulation of sec. 2 (1) No. 1 lit. a. of the ErbStG

First of all, all natural persons, irrespectively of their original citizenship,[304] who have established their residence (`Wohnsitz´) or their customary place of abode (`gewöhnlicher Aufenthalt´) within the territory of the Federal Republic of Germany are residents for inheritance tax purposes [in terms of sec. 2 (1) No. 1 lit. a. of the Act].[305]
Territory in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG is not only the territory of the Federal Republic in its literal sense, but also the part of the continental shelf owned by Germany under the North Sea [sec. 2 (2) of the Act].

The definition of the legal terms `residence´ (`Wohnsitz´) and `customary place of abode´ (`gewöhnlicher Aufenthalt´), embodied in sec. 2 (1) No. 1 lit. a. of the ErbStG, can be found in sec. 8 respectively sec. 9 of the Abgabenordnung (AO - Fiscal Law Code).

IV.2.2.1.a. The residence (`Wohnsitz´) of a taxpayer in terms of sec. 8 AO

In terms of sec. 8 AO residence is established where a person owns a home and the circumstances under which the home is owned lead to the conclusion that he will maintain and use this home.
The tax law definition of the term `residence´ is based on factual circumstances and refers only to external features or characteristics. As soon as someone owns a home and the circumstances under which the home is owned lead to the conclusion that the person will maintain and use this home, residence in terms of sec. 8 AO is established; a contrary intention or opinion of the concerned person is irrelevant for [inheritance] tax purposes.[306]
For [inheritance] tax purposes and in terms of sec. 8 AO it is therefore possible that a person has more than one place of residence at the same time.[307]
For example, if a foreigner owns part of a semi-detached house in Germany and uses this house twice a year for a long period, he establishes his [inheritance tax] residence at this house and has to be regarded as a `resident´ of the Federal Republic in terms of sec. 2 (1) No. 1 lit. a of the ErbStG and sec. 8 AO. His heirs are therefore subjected to an `unlimited tax liability´ in terms of sec. 2 (1) No. 1 sentence 1 of the ErbStG.[308]

304) ***BFH*** BStBl. III 1962, p. 276 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6.

305) See, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 25 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Pohlmann,*** Erbschaftsteuer, p. 21 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 1.2., p. 178 / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *et seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 37 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6 / ***Moench,*** ErbStG - commentary, sec. 2, para 13 *seqq.*

306) ***BFH*** BStBl. II 1970, p. 153 / ***BFH*** BStBl. II 1989, p. 182 / ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 60 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6.

307) ***BFH*** BStBl. II 1984, p. 11 / ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 60.

308) ***BFH*** BStBl. II 1989. p. 182 / ***FG Hamburg*** RIW 1988, p. 753. The last mentioned decision involved a South-African citizen who died while she was on a trip to Germany. Because the woman concerned owned a flat in Stuttgart and had rented a flat in Munich, it was held that her heirs were liable for the payment of German inheritance taxes, because she esta-

In terms of sec. 8 AO a `residence´ for [inheritance] tax reasons can also be assumed where a foreigner rents a flat which is furnished with another`s persons furniture but visits this flat regularly.[309)]

IV.2.2.1.b. The customary place of abode (`gewöhnlicher Aufenthalt´) of a taxpayer in terms of sec. 9 AO

Sec. 9 sentence 1 of the AO provides for the legal fiction, that someone establishes his `customary place of abode´ in the Federal Republic of Germany, as soon as he enters Germany and the circumstances indicate that he does not only want to stay temporarily within the Federal Republic.[310)]

In addition to this basic definition of the term `customary place of abode´, sec. 9 sentence No. 2 of the AO provides furthermore that a person has his `customary place of abode´ or is `ordinarily resident´ (for tax purposes) in Germany as soon as he stays in the Federal Republic for a coherent period of more than six months from the first day of arrival in Germany. Short interruptions or breaks to leave the country do not interfere with the coherence of this period.[311)]

However, this fiction comes not into force if a person enters the Federal Republic to visit the country, to recreate, to undergo medical treatment, for a course of baths or similar private purposes, as long as he does not stay in Germany for more than a year (sec. 9 sentence No. 3 of the AO).[312)]

IV.2.2.2. The regulation of sec. 2 (1) No. 1 lit. b. of the ErbStG

A further category of persons who have to be regarded as `residents´ (`Inländer´) for the purposes of German inheritance taxation is laid down in sec. 2 (1) No. 1 lit. b. of the ErbStG.[313)]

In terms of sec. 2 (1) No. 1 lit. b. of the Act all German citizens who have not had their `ordinary residence´ or their `customary place of abode´ in a foreign country for a period exceeding five years and who have not maintained residence in Germany during this period of time, are considered to be `residents´ for German inheritance tax purposes.

Consequently all German citizens who gave up their residence in Germany and moved or emigrated to a foreign country will still fall within the scope of the `unlimited inheritance tax liability´ of the German ErbStG for five years after they moved abroad.

German tax law terminology terms this circumstance as the so-called `extended unlimited

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blished a residence in terms of sec. 8 of the AO within the Federal Republic. The question whether her `real home´ where she spent most of her time was in South-Africa was regarded as irrelevant for the answer to the question, whether or not she established a `residence´ in terms of sec. 8 of the AO within the Federal Republic. It was regarded as decisive, however, that the deceased owned a flat in Germany which she maintained and used frequently. See also, ***BFH*** NV 1987, p. 301 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6.

309) ***BFH*** BStBl. II 1970, p. 153 / ***FG Hamburg*** EFG 1988, p. 424 / ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 60 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101.

310) ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 61 *seq.*

311) See, ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 61, 62.

312) Compare especially, ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 62.

313) For further details see, ***Troll,*** ErbStG - commentary, sec. 2, para. 5 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101.

inheritance tax liability' ('erweiterte unbeschränkte Steuerpflicht').[314]
The purpose of the regulation embodied in sec. 2 (1) No. 1 lit. b. of the Act is to prevent the avoidance of German inheritance taxes by temporarily establishing an 'ordinary residence' or a 'customary place of abode' in another country.[315]
Sec. 2 (1) No. 1 lit. b. of the ErbStG applies only to cases in which the deceased as well as the heir are situated in a foreign country, for otherwise sec. 2 (1) No. 1 lit. a. of the Act would already provide for the 'unlimited tax liability' of the heir concerned.[316]
In the cases of sec. 2 (1) No. 1 lit. b. of the ErbStG the German Financial Administration will often be faced with the factual problem of knowing that a transfer of property and assets between a dececeased and an heir took place in a foreign country.
The interference of sec. 2 (1) No. 1 lit. b. of the German ErbStG with the sovereign tax legislation, or rather the parallel levying of inheritance taxes by a foreign country, does not detract from the lawfulness of this regulation.[317]

However, if a German citizen, prior to his emigration to a foreign country, did not maintain a 'residence' within the Federal Republic but had only his 'customary place of abode' there, the fact of German citizenship will not lead to an 'unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 lit. b. of the Act.[318]
On the other hand German citizenship will lead to an 'unlimited inheritance tax liability' in those cases where a person maintaines a residence in Germany and later on emigrates [or returns] to another country even if his 'real home' was never in Germany.

Let us take the case of a student who holds Canadian and German citizenship, has his 'real home' in Canada, and moves to Germany to do post-graduate studies at a German university [he establishes residence in terms of sec. 8 AO in the German university town]. After one year of study he returns to Canada. Before the period of five years in terms of sec. 2 (1) No. 1 lit. b. of the ErbStG expires, his Canadian father dies and leaves him a 'fortune'.
Although the student has his 'real home' in Canada and, apart from the fact that he holds a German passport and has studied for one year at a German university, has no personal or financial interest in the Federal Republic, he nevertheless falls within the scope of the 'unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 lit. b. of the Act,[319] because he holds the German citizenship and the capital gains tax levied in Canada is not comparable to the German inheritance tax.[320]

For this reason the regulation of sec. 2 (1) No. 1 lit. b. of the ErbStG is a subject of much controversy in German tax law.
The construction of an 'extended unlimited inheritance taxation' in terms of sec. 2 (1) No. 1 lit. b. of the Act is regarded mainly as 'overdimensioned' because it potentially taxes

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314) ***Troll,*** ErbStG - commentary, sec. 2, para. 5 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 68.
315) With this conclusion, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Ebenroth,*** Erbrecht, p. 1002.
316) See, ***Meincke,*** ErbStG - commentary, sec. 2, para. 6 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Ebenroth,*** Erbrecht, p. 1002.
317) ***BFH*** BStBl. II 1977, p. 574.
318) See especially, ***Troll,*** ErbStG - commentary, sec. 2, para. 5b.
319) This example can be found in, ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 76 / ***Ebenroth,*** Erbrecht, p. 1003.
320) See, ***Helmer,*** DStR 1989, p. 488 (at p. 488, 489).

persons who only hold German citizenship, but have no `real interest´ in or business with the Federal Republic.[321] Especially if one considers the uncurtailed freedom of movement within the limits of the European Community and those cases, where a person is the holder of dual nationality, one can see that the regulation of sec. 2 (1) No. 1 lit. b. of the ErbStG is excessively onerus and for this reason German tax specialists recommend, that sec. 2 (1) No. 1 lit. b. of the Act should be redrafted.[322]

IV.2.2.3. The regulation of sec. 2 (1) No. 1 lit. c. of the ErbStG

`Inländer´ (`residents´) for German inheritance tax purposes are furthermore those taxpayers who fall within the scope of sec. 2 (1) No. 1 lit. c. of the ErbStG.
According to sec. 2 (1) No. 1 lit. c. of the Act German citizens who (a) established their `residence´ or their `customary place of abode´ in a foreign country but (b) are employed by a German `corporation under public law´ (`Körperschaft des öffentlichen Rechts´, e.g. employees of a German embassy or consulate), and (c) receive their earnings from the Federal Republic of Germany, fall within the scope of the `unlimited tax liability´ for German inheritance tax purposes if they would (d) otherwise only fall within the scope of a `limited death tax liability´ levied by the foreign country in which they live.[323]
The same applies to their relatives or next of kin who share their foreign residence and also possess German citizenship.[324]
However, sec. 2 (1) No. 1 lit. c. of the ErbStG will only apply in those cases where the persons concerned do not already fall within the `extended unlimited tax liability´ in terms of sec. 2 (1) No. 1 lit. b. of the Act.

IV.2.2.4. The regulation of sec. 2 (1) No. 1 lit. d. of the ErbStG

Finally it has to be mentioned, that `residents´ (`Inländer´) according to sec. 2 (1) No. 1 lit. d. of the ErbStG include corporations (`Körperschaften´), associations of persons (`Personenvereinigungen´) and estates (`Vermögensmassen´, e.g. family foundations) that have established their domicile [for business purposes] (`Sitz´) or their management board (`Geschäftsleitung´) within the Federal Republic of Germany.[325]
The terms `Sitz´ (`domicile [for business purposes]´) and `Geschäftsleitung´ (`management board´) are defined in sec. 11 respectively sec. 10 of the AO.
In terms of sec. 10 of the AO the above mentioned legal entities have their `management board´ within the Federal Republic of Germany where the centre of their managerial supervision (`geschäftliche Oberleitung´) is situated within the Federal Republic.[326]
A legal entity in the above mentioned sense will have its domicile [for business purposes]

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321) See the critizism of sec. 2 (1) No. 1 lit. b. of the ErbStG by, ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 76.
322) See, ***Ebenroth,*** Erbrecht, p. 1002.
323) *Vide,* ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 40 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Ebenroth,*** Erbrecht, p. 1003.
324) ***Ebenroth,*** Erbrecht, p. 1003 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6.
325) In detail, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101 / ***Pohlmann,*** Erbschaftsteup. 21 / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 1.2, p. 178 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 36 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 41 / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 6.
326) See, ***BFH*** BStBl. II 1977, p. 857 / ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 63.

within the Federal Republic if the place from which its business is directed (and which is laid down in its statutes, in its corporation agreement or by the statutes of the German Civil or Commercial law as its domicile [for business purposes]) is situated within the Federal Republic.[327]

In contrast to natural persons the aforementioned legal entities cannot fall within the scope of an 'extended unlimited inheritance or donations tax liability' in terms of sec. 2 (1) No. 1 lit. b. of the Act.

On establishing whether a corporation ('Körperschaft'), an association of persons ('Personenvereinigung') or an estate ('Vermögensmasse') is resident within the Federal Republic it is sufficient that either their 'Sitz' ('domicile [for business purposes]') in terms of sec. 11 AO or their 'Geschäftsleitung' ('management board') in terms of sec. 10 AO is situated within German territory.[328]

IV.2.2.5. Final remarks regarding the 'unlimited tax liability' in terms of sec. 2 (1) No. 1 sentence 1 of the ErbStG

It has been shown that the German ErbStG provides a broad definition of persons who can be regarded as 'residents' ('Inländer') for German inheritance tax purposes.

In this context, it is important to keep in mind that an 'unlimited tax liability' [and therefore a levying of inheritance or donations taxes on the world wide acquisition of property and assets, as defined in sec. 1 (1) and sec. 3 to sec. 9 of the ErbStG] for the payment of German inheritance taxes will occur as soon as either the deceased or the heir on the one hand, or the donor or the donee on the other hand can be regarded as being 'resident' in Germany in terms of sec. 2 (1) No. 1 lit. a. to d. and sec. 2 (2) of the Act.

It has furthermore to be stressed that sec. 2 (1) No. 1 lit. a. of the ErbStG regards all persons, regardless of their original citizenship, as 'residents' for German [inheritance] tax purposes if they fall within the wide categories of the legal fictions laid down in sec. 8 and sec. 9 of the AO.

The date on which a person has to be qualified as a German 'resident' for inheritance tax purposes differs depending on whether the 'unlimited tax liability' for German inheritance tax purposes is derived from either the deceased or the donor on the one hand, or the heir or the donee on the other hand.

If the 'unlimited tax liability' of a taxpayer is derived from the deceased or the donee, the deceased must have been a German 'resident' in terms of sec. 2 (1) No. 1 lit. a. to d. of the ErbStG at the date of his death, whereas in the cases of a donation the donor must have had the 'personal quality' ('persönliche Eigenschaft') of a 'resident' of the Federal Republic at the time when the donation was made.[329]

In the cases where the 'unlimited tax liability' for the payment of German inheritance taxes is derived from the heir or the donee, the heir or the donee must reveal the 'personal quality' of being a 'resident' of the Federal Republic at the time when the tax liability comes into force ('Entstehungszeitpunkt der Steuerschuld').[330]

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327) ***Lammerding / Sudau / Brauel,*** Abgabenordnung und Finanzgerichtsordnung, p. 63.

328) See, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 41 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101.

329) For further information see, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 101, 102 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 7.

330) ***Meincke,*** ErbStG - commentary, sec. 2, para. 7.

In some cases the very wide scope of the German `unlimited inheritance tax liability´, which is mainly rooted in the wide definition of the term `resident´ (`Inländer´) in sec. 2 (1) No. 1 lit. a. to d. of the ErbStG, will be curtailed by an international double death taxation agreement entered into by the Federal Republic and a foreign country.[331]
For cases in which the `unlimited tax liability´ for the payment of German inheritance and donations taxes is not so limited, sec. 21 of the ErbStG will provide a certain degree of unilateral relief where double taxation arises from an `unlimited tax liability´ of the individual taxpayer.[332]

IV.3. The `limited tax liability´ in terms of sec. 2 (1) No. 3 of the ErbStG

It was indicated above that it is only in those cases where neither the deceased and the heir on the one hand nor the donor and the donee on the other hand were `residents´ of the Federal Republic that a `limited inheritance or donations tax liability´ (`beschränkte Steuerpflicht´) in terms of sec. 2 (1) No. 3 of the ErbStG comes into force.[333]
In cases where a limited taxation in terms of sec. 2 (1) No. 3 of the ErbStG takes place, only the enrichment by domestic property and assets, in terms of sec. 121 (2) of the BewG, acquired either by succession or donation falls within the tax base for German inheritance tax assessment.[334]
The persons involved in a taxable acquisition in accordance with sec. 2 (1) No. 3 of the ErbStG do not include those who have established either their `residence´ or their `customary place of abode´ within the territory of the Federal Republic of Germany; or to whom one of the circumstances laid down in sec. 2 (1) No. 1 lit a. to d. of the ErbStG is applicable.[335]
The citizenship of the persons who are liable for the payment of a limited inheritance tax is irrelevant.
These principles also apply *mutatis mutandis* to corporations (`Körperschaften´), associations of persons (`Personenvereinigungen´) and estates (`Vermögensmassen´). As long as these legal entities are not domiciled [for business purposes] in the Federal Republic and their management board is not situated in Germany, it is irrelevant where they are situated.[336]

To establish the categories of domestic property and assets whose acquisition falls within a `limited tax liability´ for German inheritance and donations tax purposes, sec. 2 (1) No. 3 sentence 1 of the ErbStG refers to sec. 121 (2) of the BewG.

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331) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 102.
332) Compare, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 102 / ***Ebenroth,*** Erbrecht, p. 1000.
333) ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 42 *seqq.* / ***Rose,*** Substanzsteuern, p. 164 / ***Pohlmann,*** Erbschaftsteuer, p. 21 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 29 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 *seq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 9, p. 260 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 37 *seq.* / ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 67, 68 / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 57 *seq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.*
334) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 42 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.*
335) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 / ***Ebenroth,*** Erbrecht, p. 1004.
336) ***Ebenroth,*** Erbrecht, p. 1004 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 37 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104

The scope of sec. 121 (2) No. 1 to No. 9 of the BewG does not embrace all possible categories of domestic property and assets that can be acquired or owned by a foreigner in Germany.
Sec. 121 (2) No. 1 to No. 9 of the BewG provides only for a limited enumeration of property and asset categories and comprises only very important economic assets (`Wirtschaftsgüter´), revealing an especially `close´ relation to the domestic (German) economy.[337]
This `close´ relation between certain property and assets and the domestic economy of the Federal Republic, in terms of sec. 121 (2) of the BewG, is mainly based upon (a) the effective connection of an asset with a domestic place of business or economic entity (`Betriebstätte´), (b) the situation of property and assets in Germany or (c) the registration of certain property and assets in a domestic register or book.[338]
The enumerated categories of domestic property and assets especially include `real estate´ which is situated in Germany (sec. 121 (2) No. 1 and 2 of the BewG) and business capital or operating assets of domestic commercial enterprises (sec. 121 (2) No. 3 of the BewG).

A further category of domestic property and assets is embodied in sec. 121 (2) No. 4 of the BewG and sec. 1 (2) of the Außensteuergesetz - AStG. In terms of these regulations, directly or indirectly held shares in a domestic company limited by shares (`Kapitalgesellschaft´) fall within the scope of sec. 121 (2) No. 4 of the BewG if these shares are (a) held solely by the person who is liable for the payment of the tax or (b) held cumulatively with other shares that are held by a relative or person who is otherwise related to the person who is liable for the payment of the tax. The final precondition for the application of sec. 121 (2) No. 4 of the BewG is fulfilled if (c) the shares amount to more than 10% of the value of the company concerned (sec. 121 (2) No. 4 of the BewG and sec. 1 (2) of the Außensteuergesetz - AStG).[339]
In terms of sec. 121 (2) No. 9 of the BewG the taxable domestic property and assets of a person furthermore includes those rights of use which can be connected to the categories of domestic property enumerated in sec. 121 (2) No. 1 to No. 8 of the BewG.
These rights of use are especially the `Nießbrauch´ (`usufruct´) and other categories of limited rights that can be connected to the `real estate´ and business capital or operating assets of the categories enumerated in sec. 121 (2) No. 1 to No. 8 of the BewG.[340]

The term domestic property and assets (`Inlandsvermögen´) is defined exhaustively under sec. 121 (2) of the BewG.
Categories of domestic property and assets that are not enumerated in sec. 121 (2) of the BewG cannot be characterized as domestic property and assets for inheritance tax purposes, even if they are situated within the Federal Republic of Germany.
These categories of property and assets comprise especially securities (`Wertpapiere´) that were deposited in the vaults of a German bank, bank and savings accounts at a German

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337) For details concerning the enumerated categories of property and assets in sec. 121 (2) No. 1 to No. 9 of the BewG see, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 6, p. 42 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 9, p. 260 *seqq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 37 *seq.* / ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 67, 68 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 *seq.*

338) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104.

339) *Cf.,* ***Meincke,*** ErbStG - commentary, sec. 2, para. 12 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 *seq.* / ***Rössler / Troll,*** Bewertungsgesetz und Vermögensteuer - commentary, sec. 121, para. 5 and para. 23 *seqq.*

340) See, ***Ebenroth,*** Erbrecht, p. 1004.

bank or unsecured debts owed by a domestic (German) debtor.[341]

Taxes levied on the basis of a 'limited tax liability', in terms of sec. 2 (1) No. 3 of the ErbStG, cannot be reduced by a foreign amount of death taxes levied on the same property.
Sec. 21 (1) sentence 1 of the ErbStG provides only for the deduction of foreign taxes from tax arising from an 'unlimited tax liability' in terms of sec. 2 (1) No. 1 of the ErbStG occured.[342]

IV.4. The 'extended limited inheritance tax liability' in terms of sec. 4 AStG

The 'limited tax liability' in terms of sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) of the BewG is extended in those cases where a deceased or a donor emigrated less than ten years prior to his death or prior to a donation to a tax haven.[343]
The 'extended limited inheritance tax liability' in terms of sec. 2 and sec. 4 of the Außensteuergesetz (AStG - Law to Prevent Fiscal Evasion) comes into force where a deceased or a donor emigrated to and lived [lives] in a tax haven where less than 30% of a comparable amount of German inheritance or donations taxes payable are levied on the enrichment received by an acquisition of property and assets.[344]
In these cases the enrichment by property and assets acquired from a deceased or a donor will be subjected to an 'extended limited inheritance tax liability' for the payment of German inheritance and donations taxes for a further ten years from the year he left Germany to live in the tax haven concerned.[345]
As the term 'extended limited inheritance tax liability' indicates, as soon as one of the abovementioned persons left Germany for a tax haven, the tax liability for the acquisition of domestic property and assets, as laid down in sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) of the BewG, is extended to further categories, so-called extended domestic property and assets ('erweitertes Inlandsvermögen').
Like the 'limited inheritance tax liability' in terms of sec. 2 (1) No. 3 of the ErbStG, the 'extended limited inheritance tax liability' in terms of sec. 2 and 4 of the AStG depends on the precondition that either the deceased and the heir on the one hand, or the donor and the donee on the other hand, cannot be regarded as 'residents' ('Inländer') of the Federal Republic of Germany.[346]
If this precondition is met, the 'extended limited inheritance tax liability' embodies especially the following categories of property and assets, in addition to the categories already mentioned in the context of the so-called 'limited inheritance tax liability', in terms of sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) No. 1 to No. 9 of the BewG[347]:

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341) Compare, ***Ebenroth,*** Erbrecht, p. 1005.
342) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 105 / *Infra,* part C. IV.6.1.1., p. 198 *seq.*
343) For further deatails see, ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 161 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 105 *et seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 9.2, p. 261 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 39 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 13.
344) ***Troll,*** ErbStG - commentary, sec. 2, para. 25 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 13 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 105 *seq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 9.2, p. 261 *seq.*
345) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 106.
346) ***Meincke,*** ErbStG - commentary, sec. 2, para. 13.
347) For the categories of property and assets that already fall within the scope of sec. 121 (2) No. 1 to No. 9 of the BewG *vide supra,* part C. IV.3., p. 190 *seqq.* of this work.

(a) Debts owed to the deceased by debtors situated within the Federal Republic, regardless of whether these debts are secured or unsecured;
(b) Bonds and shares held in domestic companies limited by shares, regardless of their value;
(c) The payments or benefits from pension funds and other periodic performances (`wiederkehrende Leistungen´) claimable from domestic debtors;
(d) [Life] insurance claims against domestic insurers;
(e) Movable economic assets (`bewegliche Wirtschaftsgüter´), even if they are not used in a trade or business.[348]

In terms of sec. 2 (1) No. 1 lit. b. of the ErbStG all citizens who gave up their residence in Germany and moved or emigrated to a foreign country are subjected to an `unlimited inheritance tax liability´ for further five years after they moved abroad.[349] Consequently the `extended limited inheritance tax liability´ in terms of sec. 2 and 4 AStG will only apply to the final five years of the ten year period laid down in sec. 2 (1) of the AStG.
The `extended limited inheritance tax liability´ in terms of sec. 2 and 4 of the AStG refers explicitly to the person of the deceased and to the person of the donor, and only comes into force when the following preconditions are met:

(a) For a period of at least five years, within the last ten years prior to their emigration to a tax haven, the deceased or the donor must have been liable for the payment of Income Taxes in accordance with sec. 1 (1) of the German `Einkommensteuergesetz´ (EStG);[350]
(b) The foreign country in which the deceased or the donor have established their residence must be a `tax haven´ (`Niedrigsteuerland´) in terms of sec. 2 (2) AStG;[351]
(c) The deceased or donor must have direct or indirect financial or economical interests within the Federal Republic (sec. 2 (3) and (4) AStG);
(d) The amount of payable inheritance and donations taxes levied in the tax haven may not exceed 30% of the German inheritance or donations tax payable on the same acquisition of property and assets (sec. 4 (2) AStG); and
(e) the application of sec. 2 (1) AStG may not be excluded by an international double death taxation agreement entered into between the Federal Republic and the respective foreign country (tax haven).

Taxes levied by the German Financial Administration on the basis of an `extended limited tax liability´ in terms of sec. 2 and 4 of the AStG cannot be reduced by a foreign amount of death taxes paid on the same property.
In terms of sec. 21 (1) sentence 1 of the ErbStG unilateral relief is only provided for those cases where a taxpayer is liable to pay German inheritance taxes based upon an `unlimited tax liability´ in terms of sec. 2 (1) No. 1 lit. a. to d. of the ErbStG as well as a foreign death tax liability based upon the same property.[352]

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348) See especially, ***Meincke,*** ErbStG - commentary, sec. 2, para. 13 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 107.
349) *Vide supra,* part C. IV.2.2.2., p. 186 *seqq.* of this work.
350) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 106.
351) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 106.
352) ***Meincke,*** ErbStG - commentary, sec. 21, para. 8 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p.

IV.5. Chargeable foreign acquisitions by succession

As indicated above, the German ErbStG is closely linked to the German civil law and several regulations of the German Inheritance Tax Act refer directly to regulations of the Law of Succession and the Law of Donations which are embodied in the German 'Bürgerliches Gesetzbuch' (BGB).[353]
The ErbStG does not define the preconditions for, the elements of and the basis for the inheritance or donations tax liability separately, but refers in sec. 1 (1) No. 1 to 4 of the Act and in sec. 3 to 6 of the ErbStG to the accession of property to an heir (by succession or donation), as it is codified in sec. 1922 *seqq.* BGB.[354]

Consequently it can be stated that the ErbStG levies inheritance taxes directly from an heir who has acquired any property or assets due to an inheritance or bequest under the Law of Succession which is codified in the fifth book (sec. 1922 to sec. 2385) of the BGB;[355] and the relation between the ErbStG and the BGB has already been described as the 'Prinzip der Maßgeblichkeit des Zivilrechts für das Erbschaftsteuerrecht' (the principle of the governing authority [domination] of the German civil law [especially the Law of Succession and the Law of Donations] over the Inheritance Tax Law).[356]

IV.5.1. The problem

It has furthermore been seen that if an heir is subjected to an 'unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 of the ErbStG, he is taxed on the basis of the priciple of universality ('Universalitätsprinzip'), that is to say the German Financial Administration levies inheritance taxes on his domestic and international enrichment by succession.[357]
As a result the German ErbStG levies German inheritance taxes also in cases where foreign property and assets were acquired by an heir under a foreign Law of Succession (e.g. the South-African Law of Succession) or under a foreign Law of Donations (e.g. the South-African Law of Donations).

But as in the problematic cases, such as where certain categories of 'foreign property' have to be included in the international deceased estate of an 'ordinarily resident' of the Republic for South-African estate duty purposes[358], it can be observed, that foreign property and assets, which were acquired by an heir under a foreign Law of Succession (e.g. the South-African Law of Succession) or under a foreign Law of Donations (e.g. the South-African Law of Donations), *neither follow the rules of the German legal system [i.e. the German Law of Succession as laid down in sec. 1922 seqq. of the BGB or the German Law of Donations] nor are they expressly included in the regulations of the ErbStG, because the ErbStG refers mainly to the system, the rules and the models of succession, as laid down in sec. 1922 seqq. of the BGB.*[359]
For this reason there may also be problem in applying the regulations of the German

107 / *Vide infra*, part C. IV.6.1.1., p. 198 *seq.*
353) *Vide supra*, part B. II.1., p. 44 / part C. III.1.1.1., p. 135 of this work.
354) See especially, part C. III.1.1.2. to III.1.1.2.c.dd., p. 137 *seqq.* of this work.
355) *Supra*, part C. III.1.1.2. to III.1.1.2.c.dd., p. 137 *seqq.*
356) See, B. II.1., p. 44 / part C. III.1.1.1., p. 135.
357) *Supra*, part C. IV.1., p. 183 and C. IV.2. to IV.2.2.5., p. 184 *seqq.*
358) See, part B. III.2.1.1.b.dd.α. to γ., p. 73 *seqq.*
359) *Supra*, part C. III.1.1.2. to III.1.1.2.c.dd., p. 137 *seqq.*

ErbStG where foreign property and assets were acquired by an heir under a foreign (e.g. the South-African) Law of Succession or under a foreign (e.g. the South-African) Law of Donations.

IV.5.2. The solution for the problem in the German law

It can generally be assumed that if a foreign law provides a terminological or systematic equivalent to the German Law of Succession, there are no problems and the regulations of the ErbStG can be applied [analogously] to tax the enrichment an heir acquired by succeeding to foreign property or foreign assets in accordance with a foreign Law of Succession.[360]
However, in reality foreign Laws of Succession will normally not provide for a lot of terminological or systematic equivalents to the German Law of Succession.
Consequently it can be stated that if the levying of German inheritance taxes on the enrichment of an heir who acquired foreign property and assets by succeeding to a deceased under a foreign Law of Succession would only comprise the levying of inheritance taxes on successions for cases where a foreign law provides terminological or systematic equivalents to the German Law of Succession, the German taxation of inheritances with an international element would lead to a `coincidental' or arbitrary taxation.[361]

This problem was appreciated very early in German law and more than one decision of the Reichsfinanzhof (Supreme Tax Court of the German Reich)[362] and of the Bundesfinanzhof (Federal Fiscal Court / Supreme Tax Court)[363] has dealt with the problem how foreign Laws of Succession interact with the German ErbStG and whether or not a foreign Law of Succession can be compared to the German Law of Succession and which consequences this comparison will have for the levying of German inheritance taxes on the enrichment of an heir who acquired foreign property and assets under a foreign Law of Succession.[364]

Today the problem of the interaction between a foreign Law of Succession and the German ErbStG is solved and governed by a number of decisions of the Bundesfinanzhof.[365]
An enrichment by foreign property and foreign assets acquired by an heir in accordance with a foreign Law of Succession can generally be regarded as taxable in terms of the German ErbStG.[366]

The Bundesfinanzhof answers the question whether or not an acquisition *mortis causa* which took place under a foreign Law of Succession can be compared to the German Law of Succession, and is therefore taxable in terms of the ErbStG, in several steps.
First the Bundesfinanzhof ascertains, determines, characterizes and analyses the rules of a foreign Law of Succession under which an acquisition *mortis causa* took place.

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360) See, ***Ebenroth,*** Erbrecht, p. 1007.
361) Compare, part B. III.2.1.1.b.dd.β., p. 75.
362) See the decisions held in ***RFH*** StuW 1923, No. 253 / ***RFH*** StuW 1923, No. 309 / ***RFH*** StuW 1929, p. 1739 / ***RFHE*** 27, p. 73 / and ***Möller,*** Erbschaftsteuergesetz und ausländisches Erbrecht, p. 96 *seqq.*
363) See, ***BFH*** BStBl. III 1956, p. 363 / ***BFH*** BStBl. III 1960, p. 385 / ***BFH*** BStBl. II 1972, p. 462 / ***BFH*** BStBl. II 1977, p. 425 / ***BFH*** BStBl. II 1979, p. 438 / ***BFH*** BStBl. II 1986, p. 615.
364) See especially, ***Möller,*** Erbschaftsteuergesetz und ausländisches Erbrecht, p. 25 *seqq.*
365) *Cf.,* ***BFH*** BStBl. III 1956, p. 363 / ***BFH*** BStBl. III 1960, p. 385 / ***BFH*** BStBl. II 1972, p. 462 / ***BFH*** BStBl. II 1977, p. 425 / ***BFH*** BStBl. II 1979, p. 438 / ***BFH*** BStBl. II 1986, p. 615.
366) ***Meincke,*** ErbStG - commentary, sec. 3, para. 30.

Next, the established rules of the foreign Law of Succession are compared to the regulations embodied in the German Law of Succession.
During this process the wording of the foreign and the German rules, the systematic position of certain rules in the foreign law system and in the German law system, the history of the foreign and German rules and the *ratio* or *telos* of the foreign and the German succession rules are compared.

If the German Law of Succession does not provide for a comparable or parallel regulation or rule, the third step taken by the Bundesfinanzhof is an analysis of the economic significance and consequences of the transfer of the concerned property and assets from the deceased to the heir according to the foreign rules of succession.
Finally the analysed foreign succession law rule and its economic consequences are subsumed under the regulations of the German ErbStG. On subsuming the foreign succession law rule and its economic consequences under the regulations of the ErbStG it has to be established whether or not the foreign transfer of property and assets from a deceased to an heir and its economic significance and consequences falls within the meaning and the purpose of the concerned regulation of the ErbStG.[367]

In this context the question can occur whether or not the enrichment of an heir, based on the transfer of property and assets in accordance with the South-African Law of Succession, can be regarded as comparable to the German Law of Succession and can therefore be taxed in accordance to the provisions of the ErbStG.
In contrast to the German law, the South-African Law of Succession does not follow the system of universal succession.
The South-African Law of Succession and the South-African administration of deceased estates is governed by a system of executorship.[368] The main feature of the system of executorship, in contrast to the German law, is the interposition of an executor between the deceased and the beneficiaries of a succession.
Consequently a South-African heir does not automatically aquire ownership of his share of the deceased estate, whereas the typical feature of the German Law of Succession is the succession *ipso iure* (*i.e.,* the succession of an heir without any acts of transfer, delivery or cession to the assets and liabilities of a deceased).[369]

However, although the South-African Law of Succession is governed by a system of executorship and a deceased estate is therefore administered and distributed by an executor, it can be accepted that the heirs who benefit from a South-African deceased estate acquire property and assets in terms of sec. 3 (1) No. 1 of the ErbStG and are consequently liable for the payment of German inheritance taxes, as soon as they fall within the scope of the `German inheritance tax liability´ in accordance with sec. 2 of the ErbStG.
Even though the beneficiaries of a South-African succession can only be regarded as `indirect beneficiaries´ of the deceased, they will at least have to be classified as legatees (`Vermächtnisnehmer´) in the terminology of the German Law of Succession; and are therefore taxable according to the rules of the ErbStG, as soon as they fall within the scope of the `German inheritance tax liability´ in terms of sec. 2 of the ErbStG.
Another indication of the taxability of property and assets acquired by an heir in accordan-

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367) See especially, **Kluge,** Das deutsche Internationale Steuerrecht, p. 304 *seqq.*
368) *Supra,* part B. II.2., p. 45 *seqq.*
369) *Vide supra,* part B. II.1., p. 44 / part C. III.1.1.1., p. 135 of this work.

ce with the South-African Law of Succession is the fact that although an heir did not acquire his part of the inherited property and assets 'directly' the executor of a South-African deceased estate cannot be regarded as the person who is enriched by the succession at all.
It can therefore be concluded that the enrichment of an heir by the acquisition of property and assets according to the South-African Law of Succession, in terms of the German law terminology, is subject to the condition precedent ('aufschiebend bedingt') that the executor of the South-African estate distributes the attributable share of the inheritance to the heir.
Consequently a German inheritance tax liability levied on the enrichment acquired by a beneficiary by a succession according to South-African Law will come into existence, as soon as the beneficiary of the South-African succession receives his share of the inheritance, thereby falling within the scope of the 'German inheritance tax liability' in accordance with sec. 2 of the ErbStG.[370]

IV.6. The unilateral relief regulation embodied in sec. 21 of the ErbStG

As soon as a taxpayer falls within the scope of the so-called 'unlimited inheritance tax liability' ('unbeschränkte Steuerpflicht') in terms of sec. 2 (1) No. 1 of the ErbStG, German inheritance taxes are levied not only on the enrichment received by acquiring domestic property and assets in accordance with the German or a foreign Law of Succession, but also on the enrichment the taxpayer received by acquiring foreign property and assets either by a succession following foreign or German succession law rules.
Consequently the enrichment a taxpayer received by acquiring foreign property and assets is subject to German inheritance tax liability as well as to a foreign death tax liability, and in these cases a taxpayer would 'normally' have to carry the burden of double taxation.
To prevent the occurence of double death taxation the Federal Republic of Germany has the power to enter into bilateral double death duty agreements.[371]
However, where the Federal Republic of Germany has not concluded an international double death taxation agreement, it is one of the basic principles of the ErbStG not to subject a taxpayer to the payment of double death taxes.
To achieve this aim and to provide unilateral relief from double death taxation in those cases where a double death duty agreement has not been entered into, the German inheritance tax legislator enacted sec. 21 of the ErbStG.[372]

In terms of sec. 1 (2) of the ErbStG sec. 21 of the Act is also applicable to those cases where liability for the payment of a double donations tax can occur.[373]

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370) Compare also, part C. III.1.1.2.c.aa. p. 140 *seq.* and C. III.2.2.2., p. 159 *seqq.* of this work.
371) This possibility was discussed *in extenso* in part A. V.4., p. 32 *seqq.* of this work.
372) For further details see, ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 71, 72 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 329 *et seqq.* / ***Pohlmann,*** Erbschaftsteuer, p. 96 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 175 *seqq.* / ***Troll,*** Nachlaß und Erbe im Steuerrecht, para. 7.34, p. 254 *seq.* / ***Hofmann,*** Erbschaft- und Schenkungsteuer, p. 39 *seq.* / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 278 *seqq.* / ***Diedenhofen / Troll,*** Erbschaft- und Schenkungsteuer, p. 3 / ***Rose,*** Substanzsteuern, p. 183 / ***Meincke,*** ErbStG - commentary, sec. 21, para. 1 *seqq.* / ***Kapp,*** ErbStG - commentary, sec. 21, para. 1 *et seqq.* / ***Moench,*** ErbStG - commentary, sec. 21, para. 1 *seqq.* / ***Troll,*** ErbStG - commentary, sec. 21, para. 1 *seqq.*
373) See, ***Meincke,*** ErbStG - commentary, sec. 21, para. 1 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 330 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 175.

Nevertheless, the following will deal only with the unilateral relief provided by sec. 21 of the ErbStG where double death duties are levied.
Sec. 21 of the ErbStG is especially designed to provide a partial unilateral relief in those cases where the enrichment a taxpayer received by acquiring foreign property and assets is subjected to a German inheritance tax liability as well as to a foreign death tax liability.

IV.6.1. The preconditions for the allowable deductions in terms of sec. 21 of the ErbStG

If a taxpayer has to carry the burden of double death taxation the amount of foreign death taxes payable may be deducted from the amount of his German inheritance tax liability in terms of sec. 21 of the ErbStG. A deduction of foreign death taxes in accordance with sec. 21 of the ErbStG is subjected to certain preconditions.[374]

In order to benefit from a deduction of the amount of foreign death taxes which is levied on the same enrichment for which he is liable to pay German inheritance taxes, the taxpayer has first of all to apply to the locally competent tax office of the German Financial Administration (`Finanzamt´).[375]
On assessing the amount of inheritance taxes a taxpayer is liable for, the German Financial Administration does not deduct foreign death duties paid *ex officio*.[376] A taxpayer will therefore have to apply to the `Finanzamt´ in order to benefit from a deduction of payable foreign death taxes. However, the taxpayer is entitled [has a legal claim against the German Financial Administration] to claim a deduction of foreign death taxes as soon as the payable amount of foreign death taxes meets certain preconditions.[377]

IV.6.1.1. `Unlimited tax liability´ of the taxpayer

The first precondition for the deduction of foreign death taxes paid is that the taxpayer has to fall within the scope of the `unlimited tax laibility´ for the payment of German inheritance taxes in terms of sec. 2 (1) No. 1 of the ErbStG [sec. 21 (1) sentence 1 of the Act].[378]
A deduction of foreign death taxes paid will therefore not be possible in cases where a taxpayer is liable for the payment of German inheritance taxes on the basis of (a) a `limited tax liability´ in terms of sec. 2 (1) No. 3 of the ErbStG[379] or (b) on the basis of an `extended limited inheritance tax liability´ in terms of sec. 2 and 4 of the AStG[380].

In those cases, where neither the deceased nor the heir can be regarded as `residents´ of the Federal Republic, the heir is subjected to a `limited inheritance tax liability´ in terms of sec. 2 (1) No. 3 of the Act. He is liable for the payment of German inheritance taxes levied on domestic (German) property and assets in terms of sec. 121 (2) of the BewG.

374) These preconditions can especially be found in, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 330 *et seqq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 176 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 21, para. 5.
375) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 330.
376) ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 176.
377) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 330 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 176.
378) ***Meincke,*** ErbStG - commentary, sec. 21, para. 8 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 279 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 331 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 177.
379) For the term `limited tax liability´ *vide supra,* part C. IV.3., p. 190.
380) For details concerning the `extended limited tax liability´ *supra,* part C. IV.4., p. 192.

Even if a foreign country levies taxes on the same property and assets at the same time sec. 21 ErbStG will not grant unilateral relief by deducting the amount of paid foreign death taxes from a payable German inheritance tax liability, and the foreign heir has to pay his German inheritance tax liability in full.[381]
This is justified by the argument that on an international level German inheritance tax law should prevail in relation to property which is located in the Federal Republic of Germany.

In other words the German inheritance taxation of German property and assets takes place according to the *situs* principle (`Belegenheitsprinzip´) and prevails over other death tax liabilities levied on the same property in foreign countries (e.g. in a country of ordinary residence).[382]

The same applies in those cases where a foreigner and former holder of the German citizenship falls within the scope of the so-called `extended limited inheritance tax liability´ in terms of sec. 2 and sec. 4 of the AStG. In these cases the deceased`s heirs are liable for the payment of German inheritance taxes levied on his extended domestic (German) property and assets.[383]
Even if a foreign country levies taxes on the same property and assets at the same time sec. 21 ErbStG will not grant a unilateral relief by deducting an amount of paid foreign death taxes from the payable German inheritance tax liability and the [foreign] heir has to pay his German inheritance tax liability in full.
However, German tax specialists often critizise the attitude of the German inheritance tax legislator forbidding a deduction for foreign death duties paid in these cases.
Their critizism is based on the fact that in the cases where a tax liability in terms of sec. 2 and sec. 4 comes into force, the German inheritance tax liability is not only connected to the principle to tax domestic property and assets owned by a foreigner in Germany (`*situs* principle´), but is also and mainly rooted in an `overdimensioned´ fiscal policy to tax the property and assets of former citizens and residents.[384]

IV.6.1.2. Non existence of a double death duty agreement

A deduction of foreign death taxes paid, in terms of sec. 21 of the ErbStG, is furthermore only possible if the Federal Republic and the foreign country concerned have not entered into a double death duty agreement [sec. 21 (1) sentence 1 of the ErbStG].[385]

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381) See, ***Meincke,*** ErbStG - commentary, sec. 21, para. 8 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 279 ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 71.

382) ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 71.

383) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 331 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 177 / ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 71.

384) This critizism is brought forward by ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 71 / *Cf.,* also the critizism which is brought forward by ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 76 and ***Ebenroth,*** Erbrecht, p. 1002 in connection with the so-called `extended unlimited inheritance tax liability´, part C. IV.2.2.2., p. 187, 188 of this work.

385) ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 282 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 331 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 177.

IV.6.1.3. The foreign tax has to be comparable to the German inheritance tax

The third precondition for the deduction of foreign death taxes is the requirement that the amount of foreign death taxes for which the taxpayer seeks a deduction is levied in accordance with a death duty act comparable to the German Inheritance Tax Act.[386]
However, the term `comparable to the German ErbStG´ has to be interpreted in a wide sense.[387] A comparable tax is every tax which can be directly connected to and which is levied on the occurence of the death of a person.[388] Irrelevant are especially the name of the foreign act, its terminology and its specific form of levying the tax.
A death tax which does not levy a death duty on the enrichment of an heir (`Erbanfallsteuer´) but is levied as a final tax on the property and assets of a deceased`s estate (`Nachlaßsteuer´) [like the South-African Estate Duty Act, for example] can therefore also be characterized as a death tax comparable to the levying of German inheritance taxes in accordance with the regulations of the ErbStG.[389]
In these cases it is submitted that it is sufficient that the estate duty concerned (`Nachlaßsteuer´) levies a charge on the deceased estate.[390]
The amount of taxes which can be deducted from the amount of German inheritance taxes is the amount of such tax which can be attributed to the property and assets an heir received by succession.[391]

IV.6.1.4. Foreign property and assets

Sec. 21 of the ErbStG allows only a deduction of foreign death taxes which were levied on foreign property and assets. A definition of the categories that can be characterized as foreign property and assets can be found in sec. 21 (2) of the ErbStG.
On characterizing the categories of foreign property and assets, sec. 21 (2) of the ErbStG refers to sec. 121 (2) of the BewG and distinguishes between two main categories of deductible taxes levied on foreign property and assets.

(a) The deceased has to be considered as a `resident´ of the Federal Republic[392] at the time his death. In these cases sec. 21 (2) No. 1 of the ErbStG permits only a `narrow´ definition of allowable deductions of foreign death taxes levied on foreign property and assets.[393]
In terms of sec. 21 (2) No. 1 of the Act foreign death taxes are only deductible if they

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386) ***Troll,*** ErbStG - commentary, sec. 21, para. 2 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 21, para. 10, 11 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 178 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 278 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 332 *seq.*

387) See, ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 278 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 332.

388) Compare, ***Troll,*** ErbStG - commentary, sec. 21, para. 2 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 21, para. 11

389) *Cf.,* ***BFH*** BStBl. II 1990, p. 786 / ***Meincke,*** ErbStG - commentary, sec. 21, para. 11 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 178

390) See especially, ***BFH*** BStBl. II 1990, p. 786.

391) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 333.

392) See, ***Meincke,*** ErbStG - commentary, sec. 21, para. 8 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 279 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 331 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 177.

393) ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 281 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 177 / ***Meincke,*** ErbStG - commentary, sec. 21, para. 27 *seqq.*

were levied on foreign items of property and assets which are comparable to the categories of property and assets enumerated in sec. 121 (2) No. 1 to No. 9 of the BewG [e.g. foreign taxes levied on foreign 'real estate' (sec. 121 (2) No. 2 of the BewG), and foreign taxes levied on foreign business capital or operating assets (sec. 121 (2) No. 3 of the BewG)[394]].

(b) In cases where the deceased cannot be considered a 'resident' of the Federal Republic at the time of his death, sec. 21 (2) No. 2 provides for a wide scope of deductible foreign taxes.[395]
If the deceased was a non-resident of Germany at the time of his death, the deductions from the amount of German inheritance taxes levied on the same property and assets are allowed for foreign death taxes which are levied on all his foreign property and assets except for the taxes levied on his domestic (German) property and assets in terms of sec. 121 (2) No. 1 to No. 9 BewG.[396]
The reason for the wider scope of deductible taxes embodied in sec. 21 (2) No. 2 of the ErbStG can be found in the person of the deceased. Normally the property and assets of a deceased who was not 'resident' in Germany at the time of his death will already have been taxed by a foreign country. To this extent the German tax legislator provides only for a taxation of domestic property and assets situated within the Federal Republic. By this means a possible double taxation is to a certain extent excluded.[397]

IV.6.1.5. Foreign tax must have been paid

In order to be deductible from the amount of German inheritance taxes payable the foreign death taxes must actually have been paid.[398]

IV.6.1.6. Foreign tax liability may not be older than five years

The final precondition for the deduction of payable foreign death taxes is the fact that the foreign death tax liability may only be deducted if it did not come into existence more than five years prior to the German inheritance tax liability [sec. 21 (1) sentence 4 of the ErbStG].[399]

IV.6.2. The deductible amount of foreign death taxes

If all the abovementioned preconditions for the deductibility of foreign death duties are met, the deductible amount of foreign death duties can be substracted from the amount of German inheritance taxes payable. In terms of sec. 21 (1) of the ErbStG only those amounts of foreign death taxes paid, which are levied on foreign property and assets that

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394) For the scope of sec. 121 (2) No. 1 to No. 9 of the BewG see also, part C. IV.3., p. 190.
395) ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 281 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 177 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 331, 332 / ***Meincke,*** ErbStG - commentary, sec. 21, para. 31 *seq.*
396) ***Meincke,*** ErbStG - commentary, sec. 21, para. 31 *seq.*
397) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 332.
398) ***Meincke,*** ErbStG - commentary, sec. 21, para. 33, 34 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 282 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 333 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 178, 179.
399) See also, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 334 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 179, 180.

are also taxed by the German Inheritance Tax Act can be deducted from the amount of German inheritance taxes payable.

Sec. 21 of the ErbStG does not deal with the problem of how the exchange rate of the amount of foreign taxes paid has to be converted into Deutsche Mark, in order to deduct this amount from the amount of German inheritance taxes levied on the same foreign property and assets.
However, it can be accepted, that in practice a payable foreign amount of death taxes is converted into Deutsche Mark at the exchange rate prevailing on the date the German inheritance tax liability comes into existence.[400]

On making the deduction of the amount of foreign taxes paid from the amount of German inheritance taxes payable the German ErbStG distinguishes between (a) those cases in which the enrichment of an heir is solely based on an acquistion of foreign property and assets, (b) those cases in which the enrichment of an heir comprises foreign property and assets as well as domestic property and assets and (c) those cases in which the enrichment of an heir comprises foreign property and assets in several different foreign countries.

IV.6.2.1. The enrichment is solely based on an acquistion of foreign property and assets

In those cases where the enrichment of an heir is solely based on an acquistion of foreign property and assets and where the heir is subjected to an 'unlimited inheritance tax liability' in terms sec. 2 (1) No. 1 of the German ErbStG, the foreign taxes paid in respect of the foreign property and assets acquired by the heir are deductible in full.[401]
But the deductible amount of paid foreign death taxes cannot exceed the amount of German inheritance taxes payable, that is to say the heir will not be granted a refund on paid foreign death taxes by the German Financial Administration to the extent that this amount exceeds the amount of the German inheritance taxes.[402]
If the same enrichment of an heir by foreign property and assets is subjected to the levying of more than one foreign death tax, each of the taxes paid can be deducted from the amount of German inheritance taxes payable.[403] A deduction of foreign death taxes is on the other hand excluded where the foreign property and assets are exempt from the levying of German inheritance taxes, for example in terms of sec. 13[404] of the ErbStG.[405]
In cases where the enrichment of an heir is based solely on an acquistion of foreign property and assets, and the deductible amount of paid foreign death taxes is less than the amount of payable German inheritance taxes, the German inheritance tax liability will only be reduced by the attributable amount of foreign death taxes levied on the property and assets concerned.[406]

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400) ***BFH*** BStBl. III 1963, p. 402 / ***BFH*** BB 1990, p. 1320 / ***Kapp / Ebeling / Grune,*** Handbuch der Erbengemeinschaft, para. 43, p. 278, 280 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 180 / ***Meincke,*** ErbStG - commentary, sec. 21, para. 17.

401) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 335.

402) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 335 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 181.

403) ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 181.

404) *Vide supra,* part C. III.2.4.2., p. 174 *seqq.*

405) ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 181 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 336.

406) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 336.

The deductible amount is determined in accordance with the following formula:[407]

$$A = \frac{B \times C}{D}$$

where A = amount of foreign duties deductible from the German inheritance tax liability (`Anrechnungsbetrag´)

B = amount of German inheritance taxes levied on the enrichment by foreign property and assets (`deutsche Steuer´)

C = foreign property and assets for which foreign death duties were paid (`Auslandvermögen, das der ausländischen Steuer unterlegen hat´)

D = value of the taxable enrichment by foreign property and assets for German inheritance tax purposes[408] [`Bruttobereicherung durch Auslandsvermögen´][409] (`Wert des steuerpflichtigen Erwerbs im Inland´)

IV.6.2.2. The enrichment comprises foreign property and assets as well as domestic property and assets

As soon as the enrichment of an heir comprises foreign property and assets as well as domestic property and assets it can and often does happen that the amount of foreign death taxes deductible exceeds the amount of payable German inheritance taxes levied on the foreign property and assets concerned at the same time.

In order to grant a unilateral relief from international double taxation the excess of foreign death taxes paid could theoretically be deducted from an amount of German inheritance taxes levied on other (e.g. domestic) property and assets.

However, this is not the method the German ErbStG applies in terms of sec. 21 of the Act.

Sec. 21 of the ErbStG is based on the principle that the amount of German inheritance taxes levied on domestic property and assets is not reduced by the deduction of an amount of paid foreign death taxes levied on foreign property and assets which is also included in the enrichment of the heir.[410]

Where the enrichment of an heir comprises foreign property and assets as well as domestic property and assets the deductible amount of foreign death taxes paid is curtailed to prevent an `excessive´ deduction of foreign death duties paid, *i.e.* the amount which exceeds the attributable amount of German inheritance taxes levied at the same time.

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407) See especially, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 336.

408) For German inheritance tax purposes foreign property and assets are always valued in accordance with the German valuation regulations embodied in the ErbStG or in the BewG. In this context foreign methods of valuing property and assets are irrelevant. ***Ebenroth,*** Erbrecht, p. 1011 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 336.

409) This value is assessed on ascertaining the gross value of the enrichment an heir acquired by succeeding to foreign property and assets and by deducting therefrom the debts owed by the deceased, which are attributable to the inherited foreign property and assets and by substracting furthermore the attributable costs that can be connected to the winding-up and the administration of the inherited foreign property and assets. See also, part C. III.2.3., p. 171 *seq.* of this work.

410) See, ***Meincke,*** ErbStG - commentary, sec. 21, para. 20 *seqq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 336 *seq.* / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 181, 182.

In this context sec. 21 (1) sentence 2 of the ErbStG provides for the deduction of foreign death duties paid in accordance with a so-called `Anrechnungshöchstbetrag´ (`maximum amount of paid foreign death taxes deductible´). The `maximum amount of paid foreign death taxes deductible´ is the highest possible amount which may be deducted from the German inheritance tax liability, and an amount of paid foreign death taxes which exceeds the `Anrechnungshöchstbetrag´ can consequently not be recovered from the German Financial Administration and is payable in full by the taxpayer.
In accordance with sec. 21 (1) sentence 2 of the ErbStG the following formula applies in the assessment of the so-called `Anrechnungshöchstbetrag´:[411]

$$E = \frac{F \times G}{H}$$

where E = the highest possible and allowable amount of foreign duties deductible from the German inheritance tax liability (`Anrechnungshöchstbetrag´)
F = amount of German inheritance taxes levied on the enrichment by domestic and foreign property and assets (`deutsche Erbschaftsteuer´)
G = foreign property and assets that are subjected to the levying of foreign death taxes (`steuerpflichtiges Auslandvermögen´)
H = value of the taxable enrichment by domestic and foreign property and assets for German inheritance tax purposes[412] (`Bruttobereicherung´)[413] (`steuerpflichtiger Gesamterwerb´)

IV.6.2.3. The enrichment comprises foreign property and assets in several different foreign countries

It has been shown that a foreign death tax which is paid by an heir on the enrichment he received by the acquisition of foreign property and assets which exceeds the amount of German inheritance taxes levied on the same property and assets can generally only be deducted up to the sum of the so-called `Anrechnungshöchstbetrag´ (`maximum amount of deductible paid foreign death taxes´).
The excess can consequently not be recovered from the German Financial Administration and is payable in full by the taxpayer.[414]
As soon as the enrichment of an heir comprises foreign property and assets in several different foreign countries, the deductible `Anrechnungshöchstbetrag´ for German inheritance tax purposes is assessed separately for each country in which the heir acquired property and assets by succession, and paid foreign death taxes on the property and assets concer-

411) Examples for the application of the following formula can be found in, ***Meincke,*** ErbStG - commentary, sec. 21, para. 22 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 337 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 182 / ***Ebenroth,*** Erbrecht, p. 1011, 1012.
412) It was already mentioned above, for German inheritance tax purposes foreign property and assets are always valued in accordance with the German valuation regulations embodied in the ErbStG or in the BewG. In this context foreign methods of valuing property and assets are irrelevant.
413) *Vide supra,* part C. III.2.3., p. 171 *seq.* of this work.
414) ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 337.

ned (so called *per country limitation*, sec. 21 (1) sentence 3 of the ErbStG).[415]
The `Anrechnungshöchstbetrag´ which is assessed separately for each country is the maximum amount of taxes that can be deducted from payable German inheritance taxes in respect of foreign death duties levied and paid in the respective foreign country.
The taxpayer cannot deduct an amount of foreign death taxes paid which exceeds the `Anrechnungshöchstbetrag´ assessed for a certain country, by carrying over the excess to the `Anrechnungshöchstbetrag´ assessed for another country.
If an amount of death taxes paid in a foreign country exceeds the assessed `Anrechnungshöchstbetrag´, the excess cannot be recovered from the German Financial Administration and is payable in full by the taxpayer.
It is especially not possible to set off the excess of foreign taxes paid in a certain foreign country against an amount of foreign taxes paid in another country which lags behind the deductible `Anrechnungshöchstbetrag´ allowed for German inheritance tax purposes (as the name *per country limitation* principle also indicates).[416]

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415) For further details and examples for the application of the so-called *per country limitation* see, ***Meincke,*** ErbStG - commentary, sec. 21, para. 23 *seq.* / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 337, 338 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 182 / ***Ebenroth,*** Erbrecht, p. 1011, 1012.

416) See, ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 337, 338 / ***Schulze zur Wiesche,*** Lehrbuch der Erbschaftsteuer, p. 182

V. Summary

An analysis of the aspects of German inheritance taxes which are levied on the enrichment an heir acquires by succeeding to [foreign] property and [foreign] assets of a deceased reveals the fact that the elements which constitute the basis for the levying of German inheritance taxes [on the international enrichment of an heir] differ from the South-African estate duty levied on [international] deceased estates.

In contrast to the South-African Estate Duty Act, the German ErbStG does not levy a final tax on the property and assets of a deceased estate (`Nachlaßsteuer´) but taxes the enrichment acquired by an heir due to an inheritance or bequest from the deceased (`Erbanfallsteuer´).[417]
The system of taxing the heir rather than the estate of a deceased is rooted in the fact that the German Law of Succession does not follow a system of executorship but is governed by the principle of universal succession, and a German heir succeeds to the property, assets and liabilities of a deceased without any acts of transfer, delivery or cession (*ipso iure*).

The German ErbStG can be diverted into two main streams (a) the `Besteuerung dem Grunde nach´ and (b) the `Besteuerung der Höhe nach´.[418]

The `Besteuerung dem Grunde nach´ deals mainly with the question, which taxpayer will be liable for the payment of inheritance taxes and on what basis he will be liable.

The basis on which inheritance taxes are levied in accordance with the ErbStG is closely linked to the provisions of the German Civil Law in general and the German Law of Succession in particular (`principle of the governing authority of the Civil law [BGB] over the Inheritance Tax Law [ErbStG]´); and it can be observed that the ErbStG does not define the preconditions for, the elements of and the basis for the inheritance or donations tax liability separately, but refers in sec. 1 (1) No. 1 to No. 4 and in sec. 3 to sec. 6 of the Act to the acquisition of property and assets transferred in terms of a succession as codified in sec. 1922 *seqq.* of the German Bürgerliches Gesetzbuch (BGB).[419]

As soon as a `foreign element´ is introduced to the process of levying inheritance taxes according to the regulations of the ErbStG difficulties, can arise from the fact that the German ErbStG refers mainly to the regulations, the terminology and the systematic approach of the German Law of Succession codified in sec. 1922 *seqq.* of the BGB, whereas foreign property and assets acquired by succession under a foreign law follow the rules of a foreign Law of Succession.
Because the taxation rules of sec. 1 (1) No. 1 to No. 4 and sec. 3 to sec. 6 of the ErbStG expressly refer to sec. 1922 *seqq.* of the BGB, it is questionable whether the rules of the German ErbStG can be applied and whether German inheritance taxes can be levied where the taxable enrichment of an heir is based on a succession which takes place under a foreign Law of Succession.

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417) *Vide supra*, part A. III.2., p. 13 / part B. II.1., p. 44 / part C. III.1.1.1., p. 135.
418) *Supra*, part C. II.3., p. 133 *seqq.*
419) See, part B. II.1., p. 44 / part C. II.2., p. 130 *seqq.* / part C. III.1.1.1., p. 135 / part C. III.1. to III.1.1.2.c.dd., p. 135 *seqq.*

However the practice of the Bundesfinanzhof indicates, that the enrichment acquired by an heir due to a succession in accordance with a foreign law can generally be regarded as a taxable acquisition *mortis causa* ('Erbanfall') in terms of sec. 1 (1) No. 1, sec. 3 (1) No. 1 of the German ErbStG.[420]

Although the South-African Law of Succession is governed by a system of executorship and a deceased estate is administered and distributed by an executor, it can be concluded, that the heirs who benefit from a South-African deceased estate acquire property and assets in terms of sec. 3 (1) No. 1 of the ErbStG and are consequently liable for the payment of German inheritance taxes as soon as they fall within the scope of the 'German inheritance tax liability' in accordance with sec. 2 of the ErbStG.[421]
According to the German civil law and the German inheritance tax law terminology, the beneficiaries of a South-African succession can only be regarded as 'indirect beneficiaries' of the deceased, mainly because the South-African Law of Succession interposes an executor between the deceased and the beneficiaries of a succession, and a South-African heir does therefore not succeed *ipso iure* to the property, assets and liabilities of a deceased.
The enrichment of an heir by an acquisition of property and assets according to the South-African Law of Succession is, in terms of the German BGB and ErbStG, subjected to the condition precedent ('aufschiebend bedingt') that the executor of the South-African estate distributes the attributable share of the inheritance to the heir concerned.[422]
Consequently a German inheritance tax liability levied on the enrichment a beneficiary acquired by a succession according to South-African Law will only come into force when the beneficiary of the South-African succession receives his share of the inheritance and accordingly falls within the scope of the 'German inheritance tax liability' in accordance with sec. 2 of the ErbStG.[423]

In order to be taxable in accordance with the rules of the German ErbStG, a[n] [international] taxable event has furthermore to fall within the scope and the ambit of the Act, and the liability of an heir to pay German inheritance taxes can and will occur only where his personal liability ('persönliche Steuerpflicht') for the payment of German inheritance taxes can positively be established in accordance with the inheritance tax rules embodied in sec. 2 of the ErbStG.
In accordance with sec. 2 of the ErbStG it can be stated that scope of the liability of a taxpayer for payment of German inheritance or donations taxes depends mainly on the personal features of the deceased or the heir on the one hand and of the donor or the donee on the other hand.
Sec. 2 (1) No. 1 lit. a. of the ErbStG provides for a so-called 'unlimited inheritance tax liability' ('unbeschränkte Steuerpflicht') for persons who can be regarded as 'residents' ('Inländer') of the Federal Republic because they have either established a 'residence' ('Wohnsitz') in terms of sec. 8 AO or their 'customary place of abode' ('gewöhnlichen Aufenthalt') in terms of sec. 9 AO is within the Federal Republic.[424]
Particularly striking is the fact that a foreigner who regularly travels to Germany and owns a house or a flat within the Federal Republic is regarded as a resident of the Federal Re-

420) *Ut supra,* part C. IV.5. to IV.5.2., p. 194 *seqq.*
421) Part C. IV.5.2., p. 196, 197.
422) See, part C. IV.5.2., p. 197 and compare, part C. III.2.2.2., p. 159 *seqq.*
423) *Vide supra,* C. IV.5.2., p. 197 and compare, part C. III.2.2.2., p. 159 *seqq.*
424) Part C. IV.2.2.1. to IV.2.2.1.b., p. 185 *seqq.*

public in terms of sec. 8 AO and falls within the scope of the so-called `unlimited inheritance tax liability´, although his `real home´ may be in another [foreign] country.[425]
Sec. 2 (1) No. 1 lit. b. of the ErbStG extends this `unlimited inheritance tax liability´ to a so-called `extended unlimited inheritance tax liability´ (`erweiterte unbeschränkte Steuerpflicht´).
The provision of sec. 2 (1) No. 1 lit. b. of the Act is based primarily on the German citizenship of the deceased or his heir and can give rise to hardship in those cases where someone is the holder of a dual nationality.[426] For this reason sec. 2 (1) No. 1 lit. b. is widely critizised and German tax specialists recommend that this section of the ErbStG should be redrafted.[427]
Under sec. 2 (1) No. 1 lit. c. certain German citizens who work for institutions of the Federal Republic in a foreign country are also subjected to an `unlimited inheritance tax liability´.[428]

Foreigners who cannot be regarded as `residents´ of the Federal Republic fall within the scope of the so-called `limited inheritance tax liability´ (`beschränkte Steuerpflicht´) in terms of sec. 2 (1) No. 3 of the ErbStG.
They are only liable for the payment of German inheritance taxes which is levied on the enrichment by certain property items laid down in sec. 121 (2) No. 1 to No. 9 of the BewG and situated within the Federal Republic of Germany. The enumeration of taxable property items in terms of sec. 121 (2) BewG is exhaustive and property items not enumerated in this section of the BewG are exempt from the levying of German inheritance taxes, although they may be situated within the territory of the Federal Republic.[429]

Where a deceased moved to a tax haven less than ten years prior to his death, the property and assets acquired by an heir from this person can be taxed in terms of the so-called `extended limited inheritance tax liability´ (`erweiterte beschränkte Steuerpflicht´) as laid down in sec. 2 and sec. 4 of the AStG. Although the deceased gave up his `residence´ (`Wohnsitz´) in Germany and the heir would normally be taxed as if the deceased were a foreigner, sec. 2 and sec. 4 of the AStG are designed to prevent the avoidance of German inheritance taxes by emigration to a tax haven. In cases where an `extended limited inheritance tax liability´ occurs, the heir will have to pay inheritance taxes levied on certain other domestic or German property items in addition to those items enumerated in sec. 121 (2) of the BewG.[430]

As a result it can be stated that the scope and the amount of German inheritance taxes payable depends on the fact whether the heir is subjected to an `unlimited inheritance tax liability´ (in terms of sec. 2 (1) No. 1 lit. a., c. and d., sec. 2 (1) No. 2 of the ErbStG), to an `extended unlimited inheritance tax liability´ (in terms of sec. 2 (1) No. 1 lit. b. of the ErbStG), to a `limited inheritance tax liability´ (in terms of sec. 2 (1) No. 3 of the ErbStG) or lastly to an `extended limited inheritance tax liability´ (in terms of sec. 2 and sec. 4 of the AStG).

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425) See especially part C. IV.2.2.1.a., p. 185 and footnote 308 *ad hunc locum.*
426) *Cf.,* part C. IV.2.2.2., p. 186 *seqq.*
427) Especially, part C. IV.2.2.2., p. 187 *seq*
428) *Vide,* part C. IV.2.2.3., p. 188.
429) See, part C. IV.3., p. 190 *seqq.*
430) *Vide supra,* C. IV.4., p. 192 *seq.*

Because there is a strong bond between the payment of German inheritance taxes and the avoidance of inheritance taxes by donations *inter vivos*, the German inheritance tax legislator also provides for the taxation of donations within the provisions of sec. 1 (1) No. 2 and sec. 7 (1) No. 1 to 10 and sec. 7 (2) to (7) of the German ErbStG.[431]

Finally the `Besteuerung dem Grunde nach´ also embodies an inheritance tax liability for the enrichment a person received by a `Zweckzuwendung´ (`earmarked gift´) in terms of sec. 1 (1) No. 3 and sec. 8 of the ErbStG.[432] Also taxable are property and assets which are transferred to a `family foundation´ (`Familienstiftung´) in terms of sec. 1 (1) No. 4 and sec. 3 (2) No. 1 of the ErbStG[433]. After its creation a `family foundation´ is subjected to an additional levying of inheritance taxes in thirty year intervals (sec. 1 (1) No. 4 and sec. 9 (1) No. 4 of the ErbStG).[434]
In this context it has to be emphasized that a German `family foundation´ is not equivalent to a South-African trust.[435]

In contrast to the South-African law where the executor of a deceased estate is mainly liable for the payment of estate duty levied on a deceased estate, the German ErbStG normally levies inheritance taxes directly from an heir who acquired an enrichment by the transfer of property and assets by succession (sec. 20 of the ErbStG).[436]

Whereas the `Besteuerung dem Grunde nach´ deals mainly with the question which taxpayer will be liable for the payment of inheritance taxes and on what basis he will be liable, the `Besteuerung der Höhe nach´ deals with the question in which tax bracket an heir will fall on the one hand and which rate of taxation has to be applied to his inheritance (enrichment) on the other.
The `Besteuerung der Höhe nach´ depends mainly on the result of the valuation of the heir`s share of the inheritance, which is assessed according to the rules of the BewG and other valuation mechanisms to be found in sec. 11 and 12 of the ErbStG.

The German Inheritance and Donations Tax Act levies inheritance taxes on the net value of property and assets (enrichment) acquired by an heir by succession.
To arrive at the net value of the enrichment an heir acquired by succession, the first step is to ascertain the gross value of the enrichment he received by succeeding to property and assets in terms of sec. 1 (1) No. 1 and sec. 3 to sec. 6 of the ErbStG, read together with sec. 1922 *seqq.* of the BGB [`Bruttowert I der Bereichung´].[437]
In the next step the `value of the enrichment of an heir´ [`Bruttowert II der Bereicherung´ or just `Bruttowert der Bereicherung´] has to be ascertained. In terms of sec. 10 (1) sentence 1 of the ErbStG, the gross value of the enrichment acquired by an heir by succession, reduced by the allowable deduction of debts owed by the deceased (sec. 10 (5) No. 1 and No. 2 of the ErbStG) and furthermore reduced by the allowable deduction of costs that can be connected to the winding-up and administration of the inherited deceased estate (sec. 10 (5) No. 3 of the Act), is the `value of the enrichment of an heir´ [`Brutto-

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431) *Supra*, part C. III.1.1.3. to III.1.1.3.d., p. 141 *seqq.*
432) Part C. III.1.1.4., p. 149.
433) Part C. III.1.1.2.c.aa., p. 140 *seq.* and part C. III.1.1.5., p. 149 *seqq.*
434) *Cf.*, part C. III.1.1.2.c.aa., p. 140 *seq.* and part C. III.1.1.5., p. 149 *seqq.*
435) See especially, part C. III.1.1.2.c.aa., p. 141 and part C. III.1.1.5., p. 149 *seqq.*
436) *Vide supra*, part C. III.1.2. to III.1.2.6., p. 151 *seqq.*
437) Part C. III.2.2. to III.2.2.1.b., p. 157 *seqq.* / part III.2.3. and III.2.4., p. 171 *seq.*

wert der Bereicherung']. [438]
After the `value of the enrichment' of an heir has been ascertained, the last step to arrive at the net value of the enrichment he acquired by succession is to deduct the `tax-free' amounts or `tax-exemptions' (`Freibeträge') laid down in sec. 5, 13, 16, 17 and 18 of the ErbStG from the `value of the enrichment'. [439]

The valuation of property and assets included in the taxable enrichment acquired by an heir *mortis causa* is governed by the regulations embodied in the first part [sec. 1 to 16] of the BewG (sec. 12 (1) of the ErbStG). [440]

Whereas the German ErbStG differentiates and provides different rules for the valuation of German property and assets, it can be observed that the general rule for the valuation of foreign property and assets is their valuation at fair market value. [441]
Particularly striking is the fact that inherited German `real estate' (`Grundstücke') is valued at a standard value, which is only about 20% of its fair market value, whereas inherited foreign real estate is generally valued at its fair market value (sec. 12 (6) of the ErbStG and sec. 31 of the BewG). [442]

The applicable rate of taxation is levied on the net value of the enrichment in accordance with the applicable tax-bracket (in terms of sec. 15 and sec. 19 of the ErbStG).
Presently the rate of inheritance taxes levied in accordance with sec. 15 and 19 of the ErbStG varies from the lowest rate of inheritance taxation at 3%, where the heir falls within tax-bracket I (`Steuerklasse I') and the net value of his enrichment does not exceed DM 50.000, to the highest rate of taxation at 70%, where the heir falls within tax-bracket IV (`Steuerklasse IV') and the net value of his enrichment exceeds DM 100 million. [443]

The assessed amount of German inheritance taxes payable can finally be reduced by the amount of taxes paid by the taxpayer on enrichments received from the same person up to ten years prior to the inheritance or donation in question (sec. 14 of the ErbStG) [444] or by a rebate which is granted on the successive transfer of the same property and assets by inheritance (sec. 27 of the ErbStG). [445]

The German International Tax Law is governed and influenced mainly by the personal tax liability (`persönliche Steuerpflicht') of a taxpayer.
It was mentioned above, that the scope and the amount of German inheritance taxes payable depends on whether the heir or the deceased can be considered as a `resident' (`Inländer') or a citizen of the Federal Republic.
If either of them can be characterized as a `resident' of the Federal Republic, the heir will be subjected to an `unlimited inheritance tax liability' (in terms of sec. 2 (1) No. 1 lit. a., c. and d., sec. 2 (1) No. 2 of the ErbStG), or to an `extended unlimited inheritance tax liability' (in terms of sec. 2 (1) No. 1 lit. b. of the ErbStG).
If the heir or the deceased cannot be regarded as a `resident' for inheritance tax purposes

438) Part C. III.2.4., p. 172.
439) See, part C. III.2.4. to III.2.4.5., p. 172 *seqq.*
440) *Vide supra,* part C. III.2.2.3. to III.2.2.6.b., p. 162 *seqq.*
441) See, part C. III.2.2.3.a., p. 162 / part C. III.2.2.3.c., p. 164 *seq.* / part C. III.2.2.4., p. 166.
442) See especially, part C. III.2.2.4., p. 166.
443) *Cf.,* part C. III.2.5.3., p. 179 *seqq.*
444) Compare, part C. III.2.5.1., p. 178 *seq.*
445) See, part C. III.2.5.2., p. 179.

the heir will be subjected to a 'limited inheritance tax liability' (in terms of sec. 2 (1) No. 3 of the ErbStG).
An inheritance liability *sui generis* is the 'extended limited inheritance tax liability' in terms of sec. 2 and sec. 4 of the AStG. The 'extended limited inheritance tax liability' will only come into force where the deceased emigrated to a tax haven ten years prior to his death.[446]

The unilateral relief granted in terms of sec. 21 of the ErbStG depends on the personal tax liability of the heir concerned. One of the most important preconditions to benefit from the unilateral relief granted in terms of sec. 21 of the ErbStG is the fact that the taxpayer has to fall within the scope of the 'unlimited inheritance tax liability' for the payment of German inheritance taxes in terms of sec. 21 (1) sentence 1 of the Act.[447]
A sec. 21 deduction of foreign death taxes paid will therefore not be possible in cases where a taxpayer is liable for the payment of German inheritance taxes on the basis of (a) a 'limited tax liability' in terms of sec. 2 (1) No. 3 of the ErbStG[448] or (b) on the basis of an 'extended limited inheritance tax liability' in terms of sec. 2 and 4 of the AStG.[449]

If a taxpayer falls within the scope of an 'unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 of the ErbStG, the allowable deduction in terms of sec. 21 of the ErbStG is diverted into an allowable deduction for 'residents' of the Federal Republic (sec. 21 (2) No. 1 of the ErbStG) and an allowable deduction for 'non-residents' of the Republic (sec. 21 (2) No. 2 of the Act).[450]

All in all it can be stated that the German International Inheritance Tax Law provides a wide scope for taxing heirs who are enriched by international property and assets they acquired by succession.

Whereas foreigners who cannot be regarded as 'residents' ('Inländer') of the Federal Republic and who do not fall within the scope of the 'unlimited tax liability' in terms of sec. 2 (1) No. 1 of the ErbStG are only liable to pay German inheritance taxes on property and assets (in terms of sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) of the BewG) which are situated within the Federal Republic, the ErbStG provides a wide scope for taxing the domestic and foreign property and assets of inheritance taxpayers once either the deceased or the heir falls within the wide scope of the so-called 'unlimited inheritance tax liability' according to sec. 2 (1) No. 1 of the ErbStG.

The wide scope of the German inheritance taxation of domestic and foreign property is embodied also in the institution of the so-called 'extended unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 lit. b. of the ErbStG and in the institution of the so-called 'extended limited inheritance tax liability' in terms of sec. 2 and sec. 4 of the AStG. German tax specialists often term these as 'overdimensioned' international inheritance tax law regulations, which should be reformed.[451]

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446) *Vide supra,* part C. IV.2. to IV.4., p. 184 *seqq.*
447) *Vide,* part C. IV.6.1.1., p. 198 *seq.*
448) See, part C. IV.6.1.1., p. 198, 199.
449) See especially, part C. IV.6.1.1., p. 199.
450) In detail, part C. IV.6.1.4., p. 200 *seq.*
451) *Ut supra,* part C. IV.2.2.2., p. 186 *seqq.* / part C. IV.6.1.1., p. 199.

Finally it has to be stated that the assessment of the unilateral relief granted under sec. 21 of the ErbStG is divided into (a) those cases in which the enrichment of an heir is solely based on an acquistion of foreign property and assets, (b) those cases in which the enrichment of an heir comprises foreign property and assets as well as domestic property and assets and (c) those cases in which the enrichment of an heir comprises foreign property and assets in several different foreign countries.[452]

452) Part C. IV.6.2. to IV.6.2.3., p. 201 *seqq.*

D. Conclusion

I. General

Having discussed both South-African estate duty levied on [international] deceased estates and German inheritance taxes levied on the enrichment of an heir by a succession to [international] property and assets, the following embodies a theoretical discussion of possible problems connected with the double taxation of South-African / German deceased estates.

What follows will show selected problems connected with the double taxation of South-African / German deceased estates and will especially deal with the unilateral relief granted where a deceased estate or the enrichment of an heir is subjected to both the South-African Estate Duty Act and the German ErbStG.
After the unilateral relief granted by both systems has been discussed, a brief conclusion and a recommended solution for problems arising will be offered.

II. Selected problems concerning the double taxation of South-African / German deceased estates

The problem of double taxes levied on South-African / German deceased estates arises from two main categories, *viz.* (a) where a South-African [international] deceased estate of a person who died as an `ordinarily resident´ of the Republic comprises South-African as well as German property and assets, and where neither the deceased nor the heir who succeeds to his South-African and German property and assets fall within the wide definition of the term `resident´ (`Inländer´) for German inheritance tax purposes; and (b) and those categories, where a South-African [international] deceased estate of a person who died as an `ordinarily resident´ of the Republic comprises South-African as, well as German property and assets, and either the deceased or the heir who succeeds to his South-African and German property and assets falls within the wide definition of the term `resident´ (`Inländer´) for German inheritance tax purposes.
A third category is introduced by those cases where a `resident´ deceased (`Inländer´) for German inheritance tax purposes can be regarded as a `non-resident´ deceased for South-African estate duty purposes, whose South-African deceased estate is liable for the payment of South-African estate duty on his property and assets situated or by right of action enforceable and recoverable in South-Africa, as well as for the payment of German inheritance taxes levied on the enrichment his heir acquired by a succession to the same property and assets.

II.1. The international deceased estate of an `ordinary resident´ of the Republic comprises South-African as well as German property and neither the deceased nor the heir can be subsumed under the term `resident´ (`Inländer´) for German inheritance tax purposes

As soon as the international deceased estate of an `ordinary resident´ of the Republic comprises South-African as well as German property and assets, the estate will be liable for the payment of South-African estate duty on the deceased`s South-African and German

property and assets, because the world-wide property and assets of an `ordinarily resident´ of the Republic form the basis for the South-African estate duty liability of an `ordinary resident`s´ deceased estate.[1]

II.1.1. No unilateral relief granted in terms of sec. 21 of the German ErbStG

In those cases where neither the deceased nor his heir can be subsumed under the term `resident´ for German inheritance tax purposes, the heir of a South-African deceased who succeeds to German property and assets falls within the scope of the so-called `limited tax liability´ in terms of sec. 2 (1) No. 3 of the German ErbStG as far as the German property and assets which are embodied in the South-African international deceased estate are concerned.[2]
This means that the heir of an `ordinary resident´ of the Republic of South-Africa is liable to pay German inheritance taxes on the German property and assets (his enrichment) he acquired from the deceased by succession (sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) No. 1 to No. 9 of the BewG).[3]
Consequently the German property and assets which are embodied in the South-African deceased estate of an `ordinary resident´ are subjected to South-African estate duty[4] as well as to German inheritance taxes in terms of sec. 1 (1) No. 1, sec. 3 (1) No. 1 and sec. 2 (1) No. 3 of the ErbStG read together with sec. 121 (2) No. 1 to No. 9 of the BewG.[5]

In cases where a `non-resident´ of the Federal Republic is subjected to a `limited inheritance tax liability´ which is levied on the enrichment he acquired by succeeding to German property and assets in terms of sec. 121 (2) No. 1 to No. 9 of the BewG, the German inheritance taxation takes place according to the *situs* principle (`Belegenheitsprinzip´). The levying of inheritance taxes on German property and assets in accordance with the *situs* principle prevails over other possible death tax liabilities levied on the same property and assets in a foreign country (here the South-African estate duty levied simultaneously on the German property and assets).[6]

Consequently the heir who succeeds to German property and assets in this category cannot claim a deduction of the attributable South-African estate duty he paid in South-Africa in respect of German property and assets. He has to pay his German inheritance tax liability in full and no deduction of the South-African estate duty paid may be claimed from the amount of German inheritance taxes payable in terms of sec. 21 of the ErbStG, because the heir falls within the scope of the so-called `limited inheritance tax liability´ in terms of sec. 2 (1) No. 3 of the ErbStG.[7]

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1) *Vide supra,* part B. III.2.1.1. to III.2.1.1.c, p. 68 *seqq.* / part B. III.2.2.1. to III.2.2.1.c., p. 82 *seqq.* / part B. III.2.3.1., p. 94.
2) *Supra,* part C. IV.3., p. 190 *seqq.* of this thesis.
3) Part C. IV.1., p. 183 / part. C. IV.3., p. 190 *seqq.*
4) *Cf.,* for the South-African Law, part B. III.2.1.1. to III.2.1.1.c, p. 68 *seqq.* / part B. III.2.2.1. to III.2.2.1.c., p. 82 *seqq.* / part B. III.2.3.1., p. 94.
5) For the German Law, part C. III.1.1. to III.1.1.2.c.dd., p. 135 *seqq.* and part C. IV.1., p. 183 / part. C. IV.3., p. 190 *seqq.*
6) *Vide,* part C. IV.3., p. 190 *seqq.*, part C. IV.6.1.1., p. 198 *seq.* / ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 71 / ***Schulz,*** Erbschaftsteuer, Schenkungsteuer, p. 104 / ***Meincke,*** ErbStG - commentary, sec. 2, para. 10 *seqq.*
7) See, part C. IV.6.1.1., p. 198 *seq.*

II.1.2. The unilateral relief granted in terms of sec. 16 (c) of the South-African EDA

However, in cases (a) where the deceased can be considered as an 'ordinary resident' of the Republic of South-Africa at the date of his death, and (b) where German inheritance taxes were paid on German property and assets, but where the German property and assets are also included in the deceased's estate for South-African estate duty, sec. 16 (c) of the South-African Estate Duty Act provides the possibility of deducting German inheritance taxes paid from the South-African estate duty liability.[8]
In these cases the deductible amount of paid German inheritance taxes will be limited to the amount of South-African estate duty which is attributable to the same property and assets. Any excess of German inheritance taxes paid is therefore not deductible from the amount of South-African estate duty payable.[9]

Consequently the double taxation problem which can occur in those cases where the international deceased estate of an 'ordinary resident' of the Republic comprises South-African as well as German property and neither the deceased nor the heir can be subsumed under the term 'resident' ('Inländer') for German inheritance tax purposes is solved mainly by the application of the deduction allowed in terms of sec. 16 (c) of the EDA.

In terms of sec. 16 (c) of the EDA the amount of German inheritance taxes levied on German property and assets in terms of sec. 1 (1) No. 1, sec. 3 (1) No. 1, sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) No. 1 to (9) of the BewG, can be deducted from the attributable amount of South-African estate duty levied on the same German property and assets.[10]

II.1.3. Problems connected with unilateral relief

Nevertheless, although the deduction, in terms of sec. 16 (c) of the EDA, of German inheritance taxes paid seems to be unproblematic, it must be acknowledged that the payment of a German inheritance tax liability by a South-African heir who acquired German property and assets in terms of a South-African succession can bear administrative and other problems of a more theoretical nature.
First of all, South-African deceased estates are administered by an executor and a SouthAfrican estate duty liability is normally paid by the executor.[11] It is therefore questionable who is liable to pay a German inheritance tax liability, the final heir who succeeds to German property and assets, or the executor who adminsters the international deceased estate including the German property and assets.
A further, more theoretical, problem is the question when the German inheritance tax liability of the South-African heir has to be paid and when it can be deducted from theamount of estate duty levied on the same property and assets.
It was shown above that a German inheritance tax liability levied on the enrichment of an heir or a beneficiary acquired by a succession according to South-African Law will only come into force when a beneficiary who falls within the scope of a German 'inheritance tax liability' in accordance with sec. 2 of the ErbStG receives his share of the

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8) *Ut supra*, part B. III.5.3., p. 110 *seqq.*
9) Compare *supra*, part B. III.5.3., p. 111 *seq.*
10) *Cf.*, part B. III.5.3., p. 110 *seqq.*
11) For the person liable to pay South-African estate duties see, part B. III.7., p. 115 *seqq.*

inheritance.[12]

However, according to the South-African Law of Succession and the South-African Administration of deceased estates the beneficiary of a succession succeeds only to the residue of the deceased estate, that is to say he receives his share of the inheritance only after an estate duty liability which is levied on the deceased estate and consequently also on the German property and assets has been paid.

These are just two examples of administrative or theoretical difficulties that can arisewhere a German inheritance tax liability can be deducted from a South-African estate duty liability in terms of sec. 16 (c) of the EDA.

This is not the place to attempt a solution of these or other problems, but a tax practitioner or the tax administration faced with the payment and deduction of German inheritance taxes payable should bear these problems in mind, where the international deceased estate of a deceased who was 'ordinarily resident' in the Republic includes German property and assets.

Similar problems could occur in those cases where a deceased who was 'ordinarily resident' in the Republic at the time of his death emigrated from Germany to South-Africa for tax reasons. His heir would then be liable for the payment of German inheritance taxes in terms of sec. 2 and sec. 4 of the AStG ('extended limited inheritance tax liability'). But since South-Africa cannot be considered as a tax haven ('Niedrigsteuerland') in terms of sec. 2 (2) and 4 (2) of the AStG, the matter need not be pursued further.[13]

II.2. The international deceased estate of an 'ordinary resident' of the Republic comprises South-African as well as German property and either the deceased or the heir or both can be subsumed under the term 'resident' ('Inländer') for German inheritance tax purposes

The statement of affairs becomes difficult once the double taxation of South-African / German deceased estates arises from the fact that the international deceased estate of an 'ordinary resident' of the Republic comprises South-African as well as German property and either the deceased or the heir or both can be subsumed under the term 'resident' ('Inländer') for German inheritance tax purposes.

In the leading South-African judgments dealing with the question whether or not a person can be considered to be 'ordinarily resident' for South-African tax purposes, the question whether or not a person can be 'ordinarily resident' in more than one country at the same time remains an open one.[14]

However, it is clear that the German Tax Law provides for the possibility that a person (a taxpayer) can have more than one 'place of residence' ('Wohnsitz', in terms of sec. 8 AO) at the same time.[15]

As soon as a person establishes his 'place of residence' ('Wohnsitz', in terms of sec. 8 AO) or his 'customary place of abode' ('gewöhnlichen Aufenthalt', in terms of sec. 9 AO) in Germany, he is regarded as a 'tax resident' ('Steuerinländer') of the Federal Republic of Germany for inheritance tax purposes (sec. 2 (1) No. 1 lit. a. of the ErbStG and sec. 8,

12) See, part C. IV.5.2., p. 195 *seq.* and compare part C. III.2.2.2., p. 160 *seq.*

13) *Vide supra,* part C. IV.4., p. 192 *seqq.*

14) ***Cohen v. CIR,*** 1946 AD 174 (at p. 185) / ***CIR v. Kuttel,*** 1992 (3) SA 242 (at p. 248) / *cf.*, part B. III.2.1.2.a., p. 78 *seqq.*

15) See, especially ***BFH*** BStBl. II 1984, p. 11 / part. C. IV.2.2.1.a., p. 185 *seq.*

sec. 9 of the AO).[16]

Because the factual scope for establishing a 'place of residence' in Germany for inheritance tax purposes is very wide,[17] it can happen that either a South-African deceased who had his 'real home' in South-Africa and is 'ordinarily resident' in the Republic for South-African estate duty purposes, or his heir, can simultaneously also be 'tax residents' of the Federal Republic of Germany.[18]

To repeat the example of the wide scope of the term 'to establish a residence in Germany' ('Wohnsitz') given *supra*, if a South-African citizen owns, for example, a semi-detached house in Germany and uses this house@twice a year for a sufficient period, he establishes his 'residence' at this place and has to be regarded as a 'tax resident' of the Federal Republic in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG and sec. 8 AO.[19]
Practically this can lead to problematic cases where the international deceased estate of an 'ordinary resident' of the Republic comprises South-African as well as German property and either the deceased or the heir can be subsumed under the term 'resident' ('Inländer') for German inheritance tax purposes.

Because the German ErbStG provides different possibilities for deducting paid foreign death taxes and the different possibilities depend on whether or not the deceased was a 'tax resident' ('Steuerinländer') of the Federal Republic, or whether or not his heir was a 'tax resident' of Germany, the following presentation of the diffculties of double taxation that can occur on the levying of death taxes on South-African / German deceased estates and the possible unilateral relief that can be granted either by sec. 16 (c) the South-African EDA or by sec. 21 of the German ErbStG is divided into three main categories.

(a) At the time of his death the deceased was 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, and the succeeding heir can also be regarded as a 'tax resident' of the Federal Republic.
(b) At the time of his death the deceased was 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, but the succeeding heir cannot be regarded as a 'tax resident' of the Federal Republic.
(c) At the time of his death the deceased was 'ordinarily resident' for South-African estate duty purposes and only the succeeding heir can be regarded as a 'tax resident' of the Federal Republic.

II.2.1. At the time of his death the deceased was 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, and the succeeding heir can also be regarded as a 'tax resident' of the Federal Republic

The first category which can produce a South-African / German double taxation problem arises from those cases where a deceased was 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, and the

16) Part C. IV.2.2.1. to IV.2.2.1.b., p. 185 *seqq.*
17) See, part. C. IV.2.2.1.a., p. 185 *seq.*, especially footnote 308 *ad hunc locum.*
18) *Vide supra*, part. C. IV.2.2.1.a., p. 185 *seq.*
19) Compare, part. C. IV.2.2.1.a., p. 185.

succeeding heir can also be regarded as a 'tax resident' of the Federal Republic.

As soon as a deceased was 'ordinarily resident' in South-Africa at the time of his death, his world-wide property and assets will form the basis for the estate duty liability which has to be paid on his international deceased estate.[20]

If the same deceased can also be regarded as a 'tax resident' of the Federal Republic of Germany, because he either established his 'residence' ('Wohnsitz') within the Federal Republic or he established his 'customary place of abode' ('gewöhnlichen Aufenthalt') in Germany, his heir will be liable for the payment of German inheritance taxes in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG.[21]
However, as the heading of this paragraph indicates, the 'unlimited tax liability' of the heir in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG can furthermore arise from the fact-that the heir himself has to be regarded as a 'tax resident' of the Federal Republic of Germany.
It was shown above that the tax liability in terms of sec. 2 (1) No. 1 lit. a. of the German ErbStG constitutes a so-called 'unlimited inheritance tax liability'[22] and the heir who is subjected to an 'unlimited inheritance tax liability' will be taxable in accordance with the so-called principle of universality.[23]
In accordance with the principle of universality an heir is liable for the payment of German inheritance taxes for the enrichment he acquired by succeeding to domestic as well as foreign property and assets.[24]
Consequently the South-African Commisioner of Inland Revenue and the German Financial Administration will respectively tax the world-wide property and assets embodied in the deceased estate of an 'ordinary resident' of the Republic and the world-wide property and assets (the enrichment) acquired by the heir of the same deceased by succession.[25]

As a result all the property and assets in the deceased estate of an 'ordinarily resident' of the Republic who is simultaneously a 'tax resident' of the Federal Republic of Germany will be subjected to both South-African and German taxation.

II.2.1.1. The unilateral relief granted in terms of sec. 21 (2) No. 1 of the German ErbStG

Because the heir of a deceased who was simultaneously 'ordinarily resident' in the Republic and a 'tax resident' of the Federal Republic of Germany falls within the wide scope of the so-called 'unlimited inheritance tax liability' (in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG) the heir is able to benefit from the unilateral relief granted in terms of sec. 21 of the German ErbStG.[26]
As soon as a deceased at the time of his death has to be considered as a 'tax resident' of the Federal Republic, sec. 21 (2) No. 1 of the ErbStG grants the heir unilateral relief,

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20) *Vide supra*, part B. III.2.1.1. to III.2.1.1.c, p. 68 *seqq.* / part B. III.2.2.1. to III.2.2.1.c., p. 82 *seqq.* / part B. III.2.3.1., p. 94.
21) *Ut supra*, part C. IV.2.2.1. to IV.2.2.1.b., p. 185 *seqq.*
22) *Supra*, part C. IV.1., p. 182 and part C. IV.2.2.1. to IV.2.2.1.b., p. 185 *seqq.*
23) Part C. IV.1., p. 183.
24) See also, part C. IV.1., p. 183.
25) *Cf.*, for the South-African Law, part B. III.2.1.1. to III.2.1.1.c, p. 68 *seqq.* / part B. III.2.2.1. to III.2.2.1.c., p. 82 *seqq.* / part B. III.2.3.1., p. 94 and for the German Law, part C. III.1.1. to III.1.1.2.c.dd., p. 135 *seqq.* and part C. IV.1., p. 183 / part. C. IV.3., p. 190 *seqq.*
26) Refer to, part C. IV.6.1.1., p. 198 *seq.*

for those death taxes which were paid in respect of foreign property and assets which can be compared to the categories of domestic property and assets enumerated in sec. 121 (2) No. 1 to No. 9 of the BewG [e.g. foreign taxes levied on foreign 'real estate' ('Grundstücke' in terms of sec. 121 (2) No. 2 of the BewG) or foreign taxes levied on foreign business capital or operating assets (sec. 121 (2) No. 3 of the BewG)].[27)]

The heir of a deceased who was a 'tax resident' of the Federal Republic can therefore deduct South-African estate duty paid in respect of the property items mentioned from German inheritance taxes payable up to the 'Anrechnungshöchstbetrag' ('maximum amount of deductible paid foreign death taxes'), which is assessed in terms of sec. 21 (1) sentence 2 of the ErbStG.[28)]

However, in the cases examined here it is striking that the unilateral relief provision of sec. 21 (2) No. 1 of the ErbStG reflects only the scope of the non-deductible tax liability of a foreigner who is liable for German inheritance taxes according to the *situs* principle (in terms of a 'limited inheritance tax liability' sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) of the BewG)[29)] as the scope of a deductible amount of foreign death taxes paid for a 'tax resident' of the Federal Republic (see, sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG).[30)]
And, what is more, it can be observed that the universal scope of the ErbStG to subject 'tax residents' of the Federal Republic to an 'unlimited tax liability' includes more foreign property and assets in the basis for the German inheritance tax liability than just those property items enumerated in sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG.
In this context it is of further significance to note that foreign taxes paid which do not fall within the categories laid down in sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG cannot be deducted from German inheritance taxes levied on an enrichment by these property items.[31)]

As a result double taxes which are levied by the German ErbStG and the South-African EDA on property and asset categories which are not expressly included in sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG will be payable in full and cannot be avoided or relieved by reference to sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG.[32)]

The deductibility of foreign death taxes in terms of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG may grant a sufficient unilateral relief in cases where a 'tax resident' of the Federal Republic is a 'tax resident' of Germany only and where he has to pay German inheritance taxes and South-African estate duty as a 'non-resident' of the Republic, which in accordance with the *situs* principle will be limited to property and assets he owned in South-Africa.
But in cases where a 'tax resident' of the Federal Republic can also be regarded as an

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27) See, part C. IV.6.1.4., p. 200 *seq.*
28) For the assessment of the so-called 'Anrechnungshöchstbetrag' see, part C. IV.6.2.2., p. 203 *seq.*
29) For further information on the 'limited tax liability' refer to, part C. IV.3., p. 190 *seqq.*
30) See, ***Lethaus,*** IWB Fach 3, Gruppe 9, (1985), p. 71.
31) ***Meincke,*** ErbStG - commentary, sec. 21, para. 30.
32) Compare, ***Meincke,*** ErbStG - commentary, sec. 21, para. 30.

'ordinarily resident' of the Republic of South-Africa, the unilateral relief provided in terms of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG grants only a limited unilateral relief in respect of paid foreign death taxes, because the provisions of the ErbStG and the BewG mentioned do not envisage all categories of property and assets which are taxed by the South-African EDA and the German ErbStG in accordance with the principle of taxing the world-wide property and assets of a deceased who was 'ordinarily resident' in the Republic as well as a 'tax resident' of the Federal Republic at the time of his death.

II.2.1.2. The unilateral relief granted in terms of sec. 16 (c) of the South-African EDA

However, it is possible in these cases that sec. 16 (c) of the EDA may grant unilateral relief from double taxation on South-African property and assets which do not fall within the unilateral relief categories of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG.
But as already observed,[33] sec. 16 (c) of the EDA grants a unilateral relief only in those cases (a) where the deceased can be considered to be 'ordinarily resident' in the Republic of South-Africa at the time of his death, and (b) where foreign death taxes (German inheritance taxes) were paid on *foreign (i.e. German)* property and assets which are also included in the South-African deceased estate liable for the payment of South-African estate duty.
Whereas the cases examined here fulfil the first precondition of sec. 16 (c) of the EDA, because the deceased has to be regarded as an 'ordinary resident' of the Republic at the time of his death, it must be acknowledged that the second precondition of sec. 16 (c) EDA is not complied with.
On the one hand it can be confirmed that the German inheritance taxes which are levied on German property and assets and which are included in the deceased estate of an 'ordinary resident' can be deducted from the attributable amount of South-African estate duty payable.
But on the other hand it must be observed that the German inheritance taxes which are levied on South-African property and assets due to the wide 'unlimited tax liability' of the heir, which is rooted in the German ErbStG cannot be deducted from the South-African estate duty payable for they are levied on South-African and not German property and assets.

Consequently it can be concluded that sec. 16 (c) of the South-African EDA will not grant unilateral relief in those cases where German inheritance taxes are levied simultaneously on South-African property and assets owned within the Republic by a deceased who was 'ordinarily resident' in the Republic as well as 'tax resident' in Germany.

II.2.1.3. Other problems

Further problems in the context of the cases just examined can occur from the fact that unilateral relief from double taxation in terms of sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG will only be granted where the deductible foreign death tax has actually been paid.[34]

33) *Ut supra*, part B. III.5.3., p. 110 *seqq.* and part D. II.1.2., p. 215.
34) Compare part B. III.5.3., p. 110 *seqq.* and part C. IV.6.1.5., p. 201.

As a result, the above mentioned possiblities of seeking unilateral relief will lead to the administrative problem that in practice the unilateral relief regulations cannot be applied cumulatively but only alternatively.
In the cases examined here the fact that unilateral relief will be granted alternatively rather than cumulatively can lead to the following results.
The taxpayer who is liable to pay German inheritance taxes as well as South-African estate duty because at the time of his death the deceased was 'ordinarily resident' for South-African estate duty puposes as well as a 'tax resident' for German inheritance tax purposes has to decide whether he pays German inheritance taxes first and benefits from the unilateral relief granted in terms of sec. 16 (c) of the EDA or whether he pays South-African estate duty first and benefits from the unilateral relief granted in terms of sec. 21 (1), 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG.

In both cases the taxpayer will be left with property items on which he is liable to pay double death duties.
For example, if the taxpayer pays the German inheritance tax liability first and seeks unilateral relief in terms of sec. 16 (c) of the South-African EDA, he can only deduct the German inheritance taxes paid on German property and assets from the attributable value these property and asset items reveal in his South-African estate duty liability. In these cases he will be liable to pay German inheritance taxes as well as South-African estate duty on his South-African property and assets.
On the other hand, if the taxpayer pays the South-African estate duty liability first and applies for unilateral relief in terms of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG he can only deduct South-African estate duty which was levied on certain South-African property items and which can only be deducted up to the maximum amount of deductible paid foreign death taxes ('Anrechnungshöchstbetrag'), in terms of sec. 21 (1) sentence 2 of the ErbStG.[35] In these cases the taxpayer will be liable to pay German inheritance taxes as well as South-African estate duty on his German property and assets. In addition he will be liable for the payment of double death duties on his South-African property and assets which do not fall within the scope of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG and which are subjected to a South-African estate duty liability as well as a German inheritance tax liability.

But even if both unilateral relief regulations were to be applied cumulatively the result would only be a partial relief from double taxation. This results mainly from the fact that the wide scope of the so-called 'unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 lit. a. of the German ErbStG and its attitude of taxing the world-wide enrichment an heir acquired by succeeding to domestic and foreign property and assets is only compensated by an insufficient unilateral relief granted in terms of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG.[36]
The insufficiency of this unilateral relief, combined with the fact that sec. 16 (c) of the South-African EDA only grants a unilateral relief where *foreign (in this case German)* property and assets included in the estate of a deceased who was 'ordinarily resident' in the Republic at the time of his death are subjected to double taxation, points to the observation that some South-African property and asset items will be subjected to double taxa-

35) *Vide supra*, part C. IV.6.2.2., p. 203 *seq.*
36) For substantial critizism of sec. 21 (1) No. 1 of the ErbStG see, ***Meincke,*** ErbStG - commentary, sec. 21, para. 30.

tion even if the unilateral relief regulations of sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG were to be applied cumulatively.

For these reasons it can be concluded that in cases where a deceased was an 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, and where the succeeding heir can be regarded as a 'tax resident' of the Federal Republic, the deceased estate or the enrichment of the heir will be subjected to a partial South-African / German double death taxation.
It can be concluded further that the unilateral relief regulations provided by the South-African and the German ErbStG do not have the scope to provide a sufficient unilateral relief from the double taxation problem mentioned, even if the provisions of sec. 16 (c) of the EDA or sec. 21 of the ErbStG were to be applied cumulatively. The double taxation problem would only be solved partially.

Finally it has to be mentioned that the problems mentioned *supra* in part D. II.1.3., p. 215 *seq.* can be applied and added *mutatis mutandis* to these problems of double taxation, which occur as soon as a deceased can be considered as an 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, and where the succeeding heir can be regarded as a 'tax resident' of the Federal Republic.

II.2.1.4. Final remarks

This double taxation problem is of further importance in those cases where a deceased emigrated or moved from Germany to South-Africa and dies, for example, four years after he came to the Republic. In these cases the deceased will regularly be characterized as an 'ordinarily resident' of the Republic.
On the other hand he will still fall within the ambit of sec. 2 (1) No. 1 lit. b. of the German ErbStG.[37] His heir, whether or not he can be considered as a 'tax resident' of the Federal Republic, will therefore fall within the category of the so-called 'extended unlimited tax liability' in terms of sec. 2 (1) No. 1 lit. b of the ErbStG because the deceased was still a 'tax resident' of the Federal Republic in terms of sec. 2 (1) No. 1 lit. b. of the ErbStG.[38]
The problems resulting from this fact are the same as those mentioned above and apply *mutatis mutandis* to the category under discussion.

II.2.1.5. Summary

Finally it can be stated that the wide scope of the German Inheritance Tax Act concerning persons who are regarded as 'tax residents' of the Federal Republic in terms of sec. 2 (1) No. 1 of the ErbStG can lead to difficulties where the deceased can also be considered to be 'ordinarily resident' for South-African estate duty puposes.
Especially where an 'unlimited German inheritance liability' or an 'extended unlimited inheritance tax liability', which includes the enrichment of an heir by domestic as well as foreign property and assets, conflicts with the attitude of taxing the world-wide property and assets of a deceased who was 'ordinarily resident' for South-African estate duty pur-

37) For details see, part C. IV.2.2.2., p. 186 *seqq.*
38) Part C. IV.2.2.2., p. 186 *seqq.*

poses, the simultaneous levying of taxes by both death tax acts will lead to a partial double taxation of South-African / German deceased estates.
The unilateral relief regulations of sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG do not grant a full relief in these cases.

II.2.2. At the time of his death the deceased was 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, but the succeeding heir cannot be regarded as a 'tax resident' of the Federal Republic

The second category of cases, where a deceased can be characterized as an 'ordinary resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, but the succeeding heir cannot be regarded as a 'tax resident' of the Federal Republic embodies the same problems mentioned above in D. II.2.1. to II.1.5., p. 217 *seqq.*
The only difference is that the 'unlimited inheritance tax liability' of the heir to pay German inheritance taxes is not based on the fact that the person of the heir can be regarded as a 'tax resident' of the Federal Republic.
But it has been observed that the fact that a deceased can be regarded as a 'tax resident' of the Federal Republic of Germany, because he either established his 'residence' ('Wohnsitz') within the Federal Republic or established his 'customary place of abode' ('gewöhnlichen Aufenthalt') in Germany, is sufficient to subject his heir to an 'unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 lit. a. of the German ErbStG, even if the heir is a 'non-resident', *id est* a foreigner.[39]
In this context it should furthermore be mentioned that an heir can also be subjected to an 'unlimited inheritance tax liability' where the deceased falls within the ambit of the so-called 'extended unlimited inheritance tax liability' in terms of sec. 2 (1) No. 1 lit. b. of the ErbStG.[40]
Consequently the taxable enrichment of the heir acquired by succession comprises his enrichment by domestic (German) as well as foreign (South-African) property and assets.
If the same deceased was 'ordinarily resident' in South-Africa at the time of his death, his world-wide property and assets will also form the basis for the estate duty liability which has to be paid on his international deceased estate, and the problems mentioned above in D. II.2.1. to II.1.5., p. 217 *seqq.* can be applied *mutatis mutandis* to this category.

II.2.3. At the time of his death the deceased was 'ordinarily resident' for South-African estate duty purposes and only the succeeding heir be regarded as a 'tax resident' of the Federal Republic

In the last category of cases, where a deceased can be qualified as an 'ordinarily resident' for South-African estate duty purposes but only the succeeding heir is a 'tax resident' of the Federal Republic, the double taxation problem has a different dimension.

It was mentioned above that as soon as a deceased was 'ordinarily resident' in South-Africa at the time of his death, his world-wide (German and South-African) property and assets give rise to a South-African estate duty liability payable on his international dece-

39) *Vide supra*, part C. IV.2.2.1. to IV.2.2.1.b., p. 185 *seqq.*
40) See, part C. IV.2.2.2., p. 186 *seqq.*

ased estate.[41]

Under the category examined here, the deceased cannot be regarded as a `tax resident´ of the Federal Republic of Germany. Nevertheless, a South-African / German double taxation problem will arise from the fact that the heir who succeeds to the South-African and German property of the deceased has to be regarded as a `tax resident´ of the Federal Republic.
Because the heir is a `tax resident´ of Germany he falls within the scope of the so-called `unlimited inheritance tax liability´ in terms of sec. 2 (1) No. 1 lit. a. of the German ErbStG.[42] As soon as an heir falls within the `unlimited inheritance tax liability´ for German inheritance tax purposes, his enrichment is taxed according to the principle of universality, that is to say the enrichment the heir acquired by succeeding to domestic (German) as well as foreign (South-African) property and assets is taxable in terms of sec. 1 (1) No. 1, sec. 3 to 6 and sec. 2 (1) No. 1 lit. a. of the ErbStG.[43]
Consequently all property and assets which are included in the deceased estate of an `ordinary resident´ of the Republic will be subjected to South-African / German double death taxation if the heir of the deceased is a `tax resident´ of the Federal Republic of Germany.[44]

II.2.3.1. The unilateral relief granted in terms of sec. 21 (2) No. 2 of the German ErbStG

In the cases examined here, the heir of a deceased who is `ordinarily resident´ of the Republic falls within the wide scope of the so-called `unlimited inheritance tax liability´ (in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG) and therefore has the possibility of benefitting from the unilateral relief granted in terms of sec. 21 of the German ErbStG.[45]
As soon as a deceased at the time of his death has to be considered as a `non-resident´ (`kein Inländer´), the heir who falls within the `unlimited inheritance tax liability´ for German inheritance tax purposes is granted unilateral relief in terms of sec. 21 (2) No. 2 of the ErbStG. Sec. 21 (2) No. 2 of the ErbStG provides unilateral relief for death taxes paid in respect of all foreign property and assets acquired from the deceased by succession, except for those taxes levied on domestic property and assets situated within the Federal Republic in terms of sec. 121 (2) No. 1 to No. 9 of the BewG.[46]

The heir of a deceased who was a `non-resident´ (`kein Inländer´) for German inheritance tax purposes can therefore deduct South-African estate duty paid in respect of all South-African property and assets acquired from the deceased by succession from the amount of German inheritance taxes payable.
However, the amount of South-African estate duty paid which can be deducted from the amount of German inheritance taxes payable cannot exceed the `maximum amount of deductible paid foreign death taxes´ (`Anrechnungshöchstbetrag´) assessed in accordance with sec. 21 (1) sentence 2 of the ErbStG.[47]

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41) Compare part B. III.2.1.1. to III.2.1.1.c, p. 68 *seqq.* / part B. III.2.2.1. to III.2.2.1.c., p. 82 *seqq.* / part B. III.2.3.1., p. 94.
42) Part C. IV.2.2.1. to IV.2.2.1.b., p. 185 *seqq.*
43) Compare, part C. IV.1., p. 183.
44) *Cf.,* part C. IV.1., p. 183 and part C. IV.2.2.1. to IV.2.2.1.b., p. 185 *seqq.*
45) Part C. IV.6.1.1., p. 198 *seq.*
46) See, part C. IV.6.1.4., p. 200 *seq.*
47) Compare, part C. IV.6.2.2., p. 203 *seq.*

It can therefore be observed that the German ErbStG grants full unilateral relief from foreign death taxes (South-African estate duty) in those cases where the enrichment acquired by a `tax resident´ of the Federal Republic of Germany originates from a deceased who was a `non-resident´of the Federal Republic.
The unilateral relief in terms of sec. 21 (2) No. 2 of the ErbStG is only excluded where the German Inheritance Tax Act levies inheritance taxes on the enrichment acquired by succeeding to German property and assets in terms of sec. 121 (2) No. 1 to No. 9 of the BewG. Foreign taxes levied on the same German property and assets are not deductible because the German inheritance taxation takes place according to the *situs* principle (`Belegenheitsprinzip´).[48] The levying of inheritance taxes on German property and assets in accordance with the *situs* principle prevails over other possible death tax liabilities on the same property and assets in a foreign country (here the South-African estate duty levied simultaneously on the German property and assets).[49]

II.2.3.2. The unilateral relief in terms of sec. 16 (c) of the South-African EDA

However, in these cases it is possible that sec. 16 (c) of the South-African EDA may grant unilateral relief from double taxes levied on the German property and assets of the deceased which fall within the categories of sec. 121 (2) No. 1 to No. 9 and are therefore not deductible in terms of sec. 21 (2) No. 2 of the ErbStG.
As indicated above, sec. 16 (c) grants unilateral relief in those cases where (a) the deceased was `ordinarily resident´ in the Republic of South-Africa at the time of his death, and where (b) foreign death taxes (German inheritance taxes) were paid on foreign (i.e. German) property and assets which are also included in the South-African deceased estate liable for the payment of South-African estate duty.[50]
While it is not possible to deduct foreign death taxes paid by an heir in a foreign country in respect of South-African property and assets from the amount of South-African estate duty levied on the same property and assets, it is possible to deduct the foreign death taxes (German inheritance taxes) paid in respect of foreign property and assets from the attributable amount of South-African estate duty levied on the same foreign property and assets.[51]

Consequently it can be concluded, that sec. 16 (c) of the South-African EDA allows for the deduction of German inheritance taxes levied on German property and assets also included in the South-African deceased estate.

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48) Part C. IV.3., p. 190 *seqq.*, part C. IV.6.1.1., p. 198 *seq.*
49) *Vide*, part C. IV.3., p. 190 *seqq.*, part C. IV.6.1.1., p. 198 *seq.* / ***Lethaus***, IWB Fach 3, Gruppe 9, (1985), p. 71 / ***Schulz***, Erbschaftsteuer, Schenkungsteuer, p. 104 / ***Meincke***, ErbStG - commentary, sec. 2, para. 10 *seqq.*
50) *Ut supra*, part B. III.5.3., p. 110 *seqq.* and part D. II.1.2., p. 215, part D. II.2.1.2., p. 220.
51) Compare, part B. III.5.3., p. 110 *seqq.*

II.2.3.3. Other problems

It seems that the unilateral relief under discussion, *id est* which relates to those cases where the deceased was 'ordinarily resident' for South-African estate duty puposes and where only the succeeding heir can be regarded as a 'tax resident' of the Federal Republic, is unproblematic in comparison to the unilateral relief and the double taxation problem introduced by the previously examined cases.
Nevertheless, it would be wrong to assume that these cases do not give rise to problems.

First of all, as mentioned above, the unilateral relief in terms of sec. 16 (c) of the South-African EDA as well as in terms sec. 21 of the German ErbStG is only granted where the foreign death tax has been paid.[52)]
This can and will lead to the administrative problem that although the double taxation problem could be solved were sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG to be applied cumulatively, the administrative practice seems to be to apply them alternatively.

It therefore seems that the taxpayer will once again have to decide whether he pays German inheritance taxes first and benefits from the unilateral relief granted in terms of sec. 16 (c) of the EDA or whether he pays South-African estate duty first and benefits from the unilateral relief granted in terms of sec. 21 (1), 21 (2) No. 2 of the ErbStG.

Once more the taxpayer will be left with property items on which he is liable to pay double death duties.
For example, if the taxpayer pays the German inheritance tax liability first and seeks unilateral relief in terms of sec. 16 (c) of the South-African EDA, he can only deduct the German inheritance taxes paid on German property and assets from the attributable value these property and asset items give rise to in his South-African estate duty liability.
In these cases he will be liable to pay German inheritance taxes as well as South-African estate duty on his South-African property and assets.
On the other hand, if the taxpayer pays his South-African estate duty liability first and applies for unilateral relief in terms of sec. 21 (2) No. 2 of the ErbStG, he can deduct the amount of South-African estate duty paid in respect of all his inherited South-African property items up to the 'Anrechnungshöchstbetrag' ('maximum amount of deductible paid foreign death taxes'), in terms of sec. 21 (1) sentence 2 of the ErbStG.[53)]
In these cases the taxpayer will be liable to pay German inheritance taxes as well as South-African estate duty on his German property and assets, but the double tax liability for the payment of South-African estate duty and German inheritance taxes on his inherited South-African property and assets will be reduced substantially by the unilateral relief granted in terms of sec. 21 (2) No. 2 of the ErbStG.

However, the ideal situation for the taxpayer in the just mentioned cases would be to seek unilateral relief from South-African / German double taxation under a cumulative application of sec. 16 (c) of the South-African EDA and sec. 21 (1), 21 (2) No. 2 of the German ErbStG.

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52) See, part B. III.5.3., p. 110 *seqq.* and part C. IV.6.1.5.
53) *Vide supra,* part C. IV.6.2.2., p. 203 *seq.*

In addition to the problems mentioned it has to be acknowledged that the problems discussed *supra* in part D. II.1.3. p. 215 *seq.* will apply *mutatis mutandis* to the situation where an heir is liable for the payment of South-African / German death taxes because the deceased was `ordinarily resident´ for South-African estate duty purposes and the succeeding heir has to be regarded as a `tax resident´ of the Federal Republic.

II.2.3.4. Summary

It can therefore be stated that in those cases where the deceased was `ordinarily resident´ for South-African estate duty purposes and the succeeding heir is a `tax resident´ of the Federal Republic, a sufficient unilateral relief could be achieved if the unilateral relief regulations of sec. 16 (c) of the South-African EDA and sec. 21 (2) No. 2 of the German ErbStG were applied cumulatively.
However, according to administrative practice the unilateral relief regulations mentioned will only be applied alternatively because it is necessary to pay a foreign death duty first in order to benefit from the unilateral relief granted either by sec. 16 (c) of the South-African EDA or sec. 21 (2) No. 2 of the German ErbStG.
In addition, other problems like the question who is liable to pay German inheritance taxes, the final heir who succeeds to German property and assets (and who has to be considered as the `tax resident´ of the federal Republic) or the executor who adminsters the international deceased estate, including the South-African and the German property and assets, can also arise in this context.

II.3. The deceased estate of a `non-resident´ of the Republic is subjected to South-African estate duty as well as to German inheritance taxes because the deceased was also a `resident´ of the Federal Republic of Germany

The final category which will be examined is that where a deceased has to be considered as a `non-resident´ of the Republic whose South-African deceased estate is liable for the payment of South-African estate duty as well as for the payment of German inheritance taxes because the deceased was a `tax resident´ (`Inländer´) for German inheritance tax purposes.

As soon as the international deceased estate of a `non-resident´ person of the Republic comprises South-African property and assets, his estate will be liable for the payment of South-African estate duty on those property and assets which are situated or by right of action enforceable or recoverable in the Republic of South-Africa.[54)]

If the same deceased can also be regarded as a `tax resident´ of the Federal Republic of Germany, because he either established his `residence´ (`Wohnsitz´) or his `customary place of abode´ (`gewöhnlichen Aufenthalt´) in Germany, his heir (independently from the question whether or not the heir is a `tax resident´ of the Federal Republic) will be liable for the payment of German inheritance taxes in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG (`unlimited inheritance tax liability´).[55)]

The same applies to those cases where the deceased falls within the ambit of sec. 2 (1)

54) Compare, part B. III.2.1.2., p. 78 *seqq.* / part B. III.2.2.2., p. 91 *seqq.* and part B. III.2.3.2., p. 95.
55) *Ut supra,* part C. IV.2.2.1. to IV.2.2.1.b., p. 186 *seqq.*

No. 1 lit. b. of the German ErbStG.[56]
Because the deceased was a 'tax resident' of the Federal Republic at the time of his death his heir, whether or not he can be considered as a 'tax resident' of the Federal Republic, will fall within the category of the so-called 'extended unlimited tax liability' in terms of sec. 2 (1) No. 1 lit. b of the ErbStG.[57]

Because an heir who is subjected to an 'unlimited inheritance tax liability' or an 'extended unlimited inheritance tax liability' is assessed for the payment of German inheritance taxes on the basis of the so-called principle of universality,[58] the enrichment he acquired by succeeding to domestic as well as foreign (here South-African) property and assets forms the basis of his German inheritance tax liability.
As a result the South-African property and assets of the deceased which were already subjected to a South-African estate duty assessment will also be taxed in terms of the German ErbStG and therefore be subjected to double death taxation.

II.3.1. No unilateral relief granted in terms of sec. 16 (c) of the South-African EDA

In those cases, where a deceased cannot be subsumed under the term 'ordinarily resident' for South-African estate duty purposes, only those items of his deceased estate which are situated within the Republic and which are by right of action enforceable and recoverable within South-Africa form his taxable deceased estate for South-African estate duty purposes.[59]
In these cases the South-African estate duty taxation takes place according to the *situs* principle and the South-African EDA as well as the German ErbStG is based on the principle that the levying of estate duty or inheritance taxes in accordance with the *situs* principle prevails over other possible death tax liabilities levied simultaneously on the same property and assets in a foreign country (here the German inheritance tax liability which is levied simultaneously on the same South-African property and assets).[60]

The principle that the South-African estate duty taxation takes place in accordance with the so-called *situs* principle and that estate duty liability assessed in accordance with this principle on South-African property and assets prevails over other possible death tax liabilities levied on the same property and assets in a foreign country, is mirrored in the unilateral relief regulation of sec. 16 (c) of the South-African EDA.
It has been observed that the unilateral relief granted in terms of sec. 16 (c) of the South-African EDA depends mainly on the precondition that the deceased (a) was 'ordinarily resident' in the Republic of South-Africa at the date of his death, and (b) that foreign (here German) inheritance taxes were paid on foreign (here German) property and assets.[61]
In the cases examined here the deceased cannot be regarded as 'ordinarily resident' in the Republic. The German inheritance tax liability levied on German property and assets is not deductible from the South-African estate duty liability which arises because it is not inclu-

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56) See, part C. IV.2.2.2., p. 186 *seqq.*
57) Compare, part C. IV.2.2.2., p. 186 *seqq.*
58) Part C. IV.1., p. 183.
59) See. part B. III.2.1.2., p. 78 *seqq.* / part B. III.2.2.2., p. 91 *seqq.* and part B. III.2.3.2., p. 95.
60) *Cf.,* part B. III.2.1.2., p. 78 *seqq.* / part B. III.2.2.2., p. 91 *seqq.* / part B. III.2.3.2., p. 95 and part B. III.5.3., p. 110 *seqq.*
61) *Vide supra,* part B. III.5.3., p. 110 *seqq.*

ded in the basis on which the South-African estate duty liability is assessed.
In so far as the German ErbStG levies taxes in addition to the South-African EDA on South-African property and assets, the inheritance taxes paid are not deductible in terms of sec. 16 (c) of the South-African EDA because they were levied in respect of South-African property and assets but not in respect of foreign (*viz.*, German) property and assets.

Consequently sec. 16 (c) of the South-African EDA will not grant a unilateral relief by deducting the amount of German inheritance taxes paid in cases where the deceased estate of a non-resident is liable to pay South-African estate duty on South-African property and assets, and where German inheritance taxes were levied on the same property and assets.

II.3.2. The unilateral relief granted in terms of sec. 21 (1) No. 1 of the German ErbStG

Because the heir of a deceased who was a `tax resident´ of the Federal Republic of Germany falls within the wide scope of the so-called `unlimited inheritance tax liability´ (in terms of sec. 2 (1) No. 1 lit. a. of the ErbStG) or within the scope of the `extended unlimited inheritance tax liability´ (in terms of sec. 2 (1) No. 1 lit. b. of the ErbStG) the heir has the possibility of benefitting from the unilateral relief granted in terms of sec. 21 of the German ErbStG.[62]
As already mentioned, once a deceased at the time of his death has to be considered as a `tax resident´ of the Federal Republic, sec. 21 (2) No. 1 of the ErbStG grants the heir unilateral relief for those death taxes paid in respect of foreign property and assets which can be compared to the categories of domestic property and assets enumerated in sec. 121 (2) No. 1 to No. 9 of the BewG [e.g. foreign taxes levied on foreign `real estate´ (`Grundstücke´ in terms of sec. 121 (2) No. 2 of the BewG) or foreign taxes levied on foreign business capital or operating assets (sec. 121 (2) No. 3 of the BewG)].[63]

The heir of a deceased who was a `tax resident´ of the Federal Republic can therefore deduct South-African estate duty paid in respect of the property items mentioned from the German inheritance taxes payable up to the `Anrechnungshöchstbetrag´ (`maximum amount of deductible paid foreign death taxes´), which is assessed in terms of sec. 21 (1) sentence 2 of the ErbStG.[64]

In contrast to the cases examined in part D. II.2.1.1., p. 218 *seqq.*, it is striking that in terms of the unilateral relief provision of sec. 21 (2) No. 1 of the ErbStG, which mirrors the scope of the non-deductible tax liability of a foreigner who is liable to pay German inheritance taxes according to the *situs* principle (in terms of a `limited inheritance tax liability´ sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) of the BewG),[65] as the scope of the deductible amount of foreign death taxes paid by a `tax resident´ of the Federal Republic (see, sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG) seems to be more appropriate in the cases examined here.[66]
This results mainly from the fact that the unilateral relief which is granted in terms of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) No. 1 to No. 9 of the BewG corresponds with the scope of the South-African estate duty levied on the deceased estate of a `non-

62) Refer to, part C. IV.6.1.1., p. 198 *seq.*
63) Compare, part C. IV.6.1.4., p. 200 *seq.*
64) Part C. IV.6.2.2., p. 203 *seq.*
65) For details concerning the `limited tax liability´ refer to, part C. IV.3., p. 190 *seqq.*
66) See, ***Lethaus***, IWB Fach 3, Gruppe 9, (1985), p. 71.

resident' in accordance with a similar *situs* principle, comparable to the scope of the domestic property and asset categories which are normally taxed according to the comparable *situs* principle embodied in sec. sec. 2 (1) No. 3 of the ErbStG and sec. 121 (2) of the BewG.[67]

However, foreign taxes paid (here South-African estate duty) which do not fall within the categories laid down in sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG cannot be deducted from German inheritance taxes levied on an enrichment by these property items.[68]
For this reason there can still be a few property and asset categories which are not expressly included in sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG, but on which South-African estate duty is levied.
For these categories South-African estate duty and German inheritance taxes will be payable in full and cannot be avoided or relieved by refering to sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG.[69]

But, all in all, it can be stated that the deductibility of foreign death taxes in terms of sec. 21 (2) No. 1 of the ErbStG and sec. 121 (2) of the BewG grants a sufficient unilateral relief in cases where a 'tax resident' of the Federal Republic is a 'tax resident' of Germany only and where the double taxation problem is limited to those taxes levied in accordance with the *situs* principle on property and assets he owned as a 'non-resident' of the Republic in South-Africa.

II.3.3. Problems connected with unilateral relief

Problems that can occur in the cases examined here are once again of a more administrative and theoretical nature, namely those already mentioned in D. II.1.3., p. 215 *seq.*

II.4. Summary

In discussing selected double taxation problems which can occur when an international deceased estate or the international enrichment of an heir by acquiring property and assets due to a succession is taxed by the South-African EDA as well as the German ErbStG, it can be seen that the grade of double taxation and the grade of relief granted in these cases depends on the category under which the double taxtion problem arises.

Although the South-African EDA and the German ErbStG provide for unilateral relief from double taxation the problems which arise cannot be avoided altogether.

Especially where the international deceased estate of an 'ordinary resident' of the Republic is also taxed by the German ErbStG, for example because the deceased can be regarded as a 'tax resident' of the Federal Republic as well as an 'ordinarily resident' for South-African estate duty purposes, it can be concluded that the double taxation problems arising under these categories can be solved neither by the unilateral relief granted in

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67) Compare part B. III.2.1.2., p. 78 *seqq.* / part B. III.2.2.2., p. 91 *seqq.* and part B. III.2.3.2., p. 95 and part C. IV.3., p. 190 *seqq.*
68) ***Meincke,*** ErbStG - commentary, sec. 21, para. 30.
69) Compare, ***Meincke,*** ErbStG - commentary, sec. 21, para. 30.

terms of sec. 16 (c) of the South-African EDA nor by the unilateral relief granted in terms of sec. 21 of the German ErbStG.[70]

In these cases the property and asset categories on which the South-African estate duty liability and the German inheritance tax liability are assessed are of a far wider scope (the world-wide property and assets of the deceased or the heir are taxed in accordance with the principle of universality) than the unilateral relief granted by both tax systems where double taxation occurs.[71]

It has been established not only that the unilateral relief granted by both tax systems lagsbehind the universal categories of property and assets on which estate duty and inheritance taxes are levied, but also that the unilateral relief provisions provided by the EDA as well as the ErbStG seem to be able to be utilized only alternatively in administrative practice.[72]

Whereas in some cases of double taxation an almost sufficient unilateral relief can be achieved by a cumulative application of both the South-African and the German unilateral relief provisions,[73] in practice the cumulative application of both sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG is problematic due to the fact that a foreign death tax in accordance with both unilateral relief regulations must have been paid before it can be deducted either from a payable amount of South-African estate duty or from a payable amount of German inheritance taxes.[74]

On the other hand it can also be seen that even if the unilateral relief provision of the EDA and the ErbStG were applied cumulatively, under some categories in which the deceased was `ordinarily resident´ in the Republic as well as a `tax resident´ (`Steuerinländer´) for German inheritance tax purposes, he would still be subjected to a certain amount of double taxation.[75]

In contrast to these cases, *i.e.* where double taxation arises, because the deceased can be regarded as an `ordinary resident´ for South-African estate duty purposes as well as a `tax resident´ for German inheritance tax purposes, or where double taxation takes place because the deceased can be regarded as an `ordinarily resident´ for South-African estate duty purposes and his heir can be characterized as a `tax resident´ of the Federal Republic, the unilateral relief granted by the South-African EDA and by the German ErbStG seems to be sufficient where neither the deceased nor the heir have the personal feature of being a `double tax resident´.

If neither the deceased nor the heir have the personal feature of being a `double tax resident´, that is to say where the deceased and the heir can be regarded either as `non-residents´ for German inheritance tax purposes who are subjected to a double taxation of German property and assets,[76] or where the deceased is a `non-resident´ for South-African estate duty purposes and the South-African property and assets acquired by the heir are subjected to double taxation, the unilateral relief provided by sec. 16 (c) of the EDA and sec. 21 of the ErbStG seems to be sufficient.[77]

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70) See, part D. II.2. to II.2.2., p. 216 *seqq.*
71) Part D. II.2.1.1.1. to II.2.1.5., p. 218 *seqq.*
72) *Vide supra,* part D. II.2.1.3., p. 220 *seqq.*
73) *Supra,* part D. II.2.3., p. 223 *seqq.* and part D. II.2.3.3., p. 226.
74) See especially, part B. III.5.3., p. 110 *seqq.* and part C. IV.6.1.5., p. 201.
75) Part D. II.2.1.3., p. 221.
76) *Ut supra,* part. D. II.1., p. 213 *seqq.*
77) Compare, part D. II.3., p. 227 *et seqq.*

Nevertheless, even though these cases of double taxation and the unilateral relief granted in these circumstances seems to be generally unproblematic, difficulties can be seen in the process of granting unilateral relief.
Difficulties which occur in the process of granting unilateral relief result mainly from the different systematic attitudes shown by the South-African EDA and the German ErbStG towards the levying of death taxes.

Firstly South-African deceased estates are administered by an executor and a South-African estate duty liability is normally paid by the executor. It is therefore questionable who is liable to pay a German inheritance tax liability, the final heir who succeeds to German property and assets or the executor who adminsters the international deceased estate, including the German property and assets.
A more theoretical problem is the question when the German inheritance tax liability of a South-African heir has to be paid and when it can be deducted from the amount of estate duty levied on the same property and assets.
It was shown above that a German inheritance tax liability levied on the enrichment of an heir or beneficiary by a succession according to South-African Law will only materialise when the beneficiary falling within the scope of a German 'inheritance tax liability' in accordance with sec. 2 of the ErbStG receives his share of the inheritance.[78)]
However, according to the South-African Law of Succession and the South-African Administration of deceased estates, the beneficiary of a succession succeeds only to the residue of the deceased estate, that is to say he receives his share of the inheritance after an estate duty liability levied on the deceased estate and consequently also on the German property and assets has been paid.

These problems are only two examples of administrative or theoretical difficulties that can occur where a German inheritance tax liability is deductible from a South-African estate duty liability in terms of sec. 16 (c) of the EDA or *vice versa*.
Similar problems apply to those cases mentioned at the beginning of this summary.

It can therefore be concluded that a 'basic' unilateral relief is granted by sec. 16 (c) of the EDA as well as by sec. 21 of the ErbStG, as soon as double taxation on South-African / German deceased estates occurs.

However, it has to be acknowledged that the granted unilateral relief is insufficient in those cases where the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, or where double taxation takes place because the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes and his heir can be characterized as a 'tax resident' of the Federal Republic. In these cases several pitfalls exist as 'traps' for the taxpayer who is subjected to the payment of double death taxes on South-African / German inheritances, and the tax practitioner or the tax administration faced with the problems introduced by the categories discussed should bear them in mind when the international deceased of a person is planned or administered for estate duty purposes.

In those cases where the deceased and the heir can be regarded as 'non-residents' for German inheritance tax purposes and are subjected to double taxation of German property

78) See, part C. IV.5.2., p. 195 *seq.* and compare part C. III.2.2.2., p. 160 *seq.*

and assets, or where the deceased is a 'non-resident' for South-African estate duty purposes and the South-African property and assets acquired by the heir are subjected to double taxation, the unilateral relief provided by sec. 16 (c) of the EDA and sec. 21 of the ErbStG can, all in all, be regarded as sufficient.
But nevertheless, in these generally 'unproblematic' cases of double taxation, where the levying of double taxes is basically relieved by the unilateral relief provisions embodied in sec. 16 (c) of the EDA and sec. 21 of the ErbStG, 'problems' connected to the administration of the unilateral relief and 'problems' of a more theoretical nature arising from the different systematic attitudes of levying death taxes are introduced to the process of granting unilateral relief.
Although the pitfalls left for the taxpayer in these cases are by far not as hazardous as those introduced by the double taxation problem in the previously discussed categories, it is still vital to plan carefully for those cases in which double death taxes can be imposed on a South-African / German deceased estate.
The ascertainment of the administrative procedure and the question how a unilateral relief will be granted is especially of utmost importance because the South-African system of levying estate duty as a final tax on the property and assets of a deceased's estate can be said to be completely different when compared to the attitude of the German ErbStG to levy inheritance taxes on the enrichment of an heir acquired due to an inheritance or bequest from the deceased.

II.5. No pitfall without a loophole

It has been shown that the levying of double death taxes on South-African / German inheritances gives rise to several pitfalls, especially in those cases where the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, or where double taxation takes place because the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes and his heir can be characterized as a 'tax resident' of the Federal Republic.

But it should also be observed that pitfalls often embody a 'loophole', and 'loopholes' often embody a pitfall.

In the context of South-African / German double taxation of inheritances a possible 'loophole' arises in relation to the South-African Law of Trusts and the difficulties of the German ErbStG in establishing the date on which a German inheritance tax liability will come into force, if property and assets of a succession are not directly transferred to an heir, but are subjected to a trust.

As already mentioned, the German ErbStG levies inheritance taxes on the enrichment of an heir acquired due to an inheritance or bequest from a deceased in terms of sec. 1922 *seqq.* of the BGB.
It was furthermore shown that an heir who inherits property and assets according to the South-African Law of Succession acquires property and assets in terms of sec. 3 (1) No. 1 of the ErbStG and is liable for the payment of German inheritance taxes as soon as he falls within the scope of the 'German inheritance tax liability' in accordance with sec. 2

of the ErbStG.[79]

Even though the German Law of Succession and the German Inheritance Tax Law regard the beneficiary of a South-African succession as mere 'indirect beneficiary' of the deceased (because the South-African Law of Succession is governed by a system of executorship and a deceased estate is therefore administered and distributed by an executor), the beneficiary of a South-African succession must at least be classified as a legatee ('Vermächtnisnehmer') for German inheritance tax purposes. A South-African heir is therefore taxable in accordance with the rules of the ErbStG as soon as he falls within the wide scope of the 'German inheritance tax liability' in terms of sec. 2 of the ErbStG.[80]

On the other hand it can be observed that the taxation of the enrichment of an heir acquired by succeeding to property and assets according to the South-African Law of Succession, in terms of the German law terminology, is subjected to the condition precedent ('aufschiebend bedingt') that the executor of the South-African estate distributes the attributable share of the inheritance to the heir.[81]

Consequently a German inheritance tax liability levied on the enrichment acquired by a beneficiary by a succession according to South-African Law will only come into force if the beneficiary of the South-African succession receives his share of the inheritance, and therefore falls within the scope of the 'German inheritance tax liability' in accordance with sec. 2 of the ErbStG.[82]

The circumstance that a German inheritance tax liability levied on the enrichment a beneficiary acquired by a succession according to South-African Law is subjected to the condition precedent ('aufschiebend bedingt'), namely that the executor of the South-African estate distributes the attributable share of the inheritance to the heir, can be utilized to avoid the payment of German inheritance taxes by subjecting South-African property and assets to a trust.

It was indicated above that the sole interposition of an *executor* between the deceased and the beneficiary of an inheritance does not prevent a German inheritance tax liability from coming into force.

However, the position is a different once a *trustee* is interposed between the deceased and the beneficiary.[83]

Because the trustee of a testamentary trust or a trust *inter vivos* is normally regarded as the owner of the trust assets and property, and the beneficiary is only entitled to a certain amount of distributed trust benefits,[84] the creation of a trust has 'negative' consequences on the 'directness of the appointment of the heir' ('unbedingte Erbeinsetzung'). After a testamentary trust has been created, an heir has neither direct access to the property and assets of the trust nor does he acquire the property and assets of the deceased, which are included in the trust.

Consequently the position of the heir as a direct beneficiary of the deceased, which is vi-

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79) *Vide supra,* part C. IV.5.2., p. 196 *seq.*

80) *Cf.,* part C. IV.5.2., p. 196 *seq.*

81) Part C. IV.5.2., p. 197.

82) Compare also, part C. IV.5.2., p. 196 *seq.* and C. III.2.2.2., p. 159 *seqq.* and part C. III.1.1.2.c.aa. p. 140 *seq.* of this thesis.

83) *Vide supra,* part D. III.2.2.2., p. 160 *seqq.* / ***BFH*** BStBl. III 1958, p. 82 / ***BFH*** BStBl. II 1988, p. 808 / ***Meincke,*** ErbStG - commentary, sec. 9, para. 25.

84) *Cf.,* part B. II.2.3.2.b., p. 55 *seqq.* of this thesis. ***BFH*** BStBl. III 1958, p. 82 / ***BFH*** BStBl. III 1961, p. 312 / ***BFH*** BStBl. II 1972, p. 462 *seq.* / ***BFH*** BStBl. II 1986, p. 615 *seqq.* / ***Meincke,*** ErbStG - commentary, sec. 9, para. 25.

tal for the existence of a German inheritance tax liability, is influenced 'negatively' by the creation of a trust *mortis causa.*
In the practice of the Bundesfinanzhof (Federal Fiscal Court / Supreme Tax Court) the interposition of a trust, *viz.* of a *trustee,* between the transfer of the property and assets from a deceased to an heir is therefore seen as a suspension or a subjection of the German inheritance tax liability to the condition precedent that only on the termination of the trust will the heir become liable for the payment of German inheritance taxes, because only on the termination of the trust (or on the distribution of assets from the trust) will he finally acquire the property and assets of the deceased.[85)]

This point of view has been upheld by the Bundesfinanzhof in several decisions[86)] and it can therefore perhaps be utilized for the avoidance of a German inheritance tax liability in those cases where the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes as well as a 'tax resident' for German inheritance tax purposes, or where double taxation takes place because the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes and his heir can be characterized as a 'tax resident' of the Federal Republic.

The passing of property and assets to a trust and the nomination of an heir as the beneficiary of the trust does not create a German inheritance tax liability, for the heir of the deceased, although he may fall within the scope of the German inheritance tax liability in terms of sec. 2 of the ErbStG, is not enriched by an acquisition of property and assets due to an inheritance or bequest (and the enrichment of an heir can be regarded as the most vital precondition for an inheritance tax liability in terms of sec. 1 (1) No. 1 and sec. 3 to sec. 6 of the German ErbStG).
By transferring property and assets into a trust the German inheritance tax liability of the heir is suspended or rather subjected to the condition precedent that the heir will only be held liable for the payment of German inheritance taxes on the termination of the trust (or on the distribution of assets from the trust), because only then will he actually acquire the property and assets of the deceased.[87)]

The just mentioned facts will apply especially where the created trust is constituted as a discretionary trust, for in these cases the trustee of a testamentary trust or a trust *inter vivos* has the discretion to influence or withhold the distribution of the trust benefits,[88)] and the beneficiary has normally neither direct access to the property and assets of the trust nor does he acquire the property and assets of the deceased.[89)]

However, the statement of affairs can become difficult where the beneficiary of a trust has a vested right to the assets of a trust, but these assets are administered by a trustee.
The word 'vested' has a number of meanings and a right can be said to be vested in a person when he owns it.[90)] '*When it is said that a right is vested in a person, what is usually meant is that such a person is the owner of that right - that he has all rights of*

85) ***Meincke,*** ErbStG - commentary, sec. 9, para. 25 / ***BFH*** BStBl. III 1958, p. 79 / ***BFH*** BStBl. III 1961, p. 312 / ***BFH*** BStBl. II 1972, p. 462 *seq.* / ***BFH*** BStBl. II 1986, p. 615 *seqq.*
86) See especially, ***BFH*** BStBl. III 1958, p. 79 / ***BFH*** BStBl. III 1961, p. 312 / ***BFH*** BStBl. II 1972, p. 462 *seq.* / ***BFH*** BStBl. II 1986, p. 615 *seqq.*
87) *Vide supra,* part D. III.2.2.2., p. 161 *seq.*
88) ***T. Honoré and E. Cameron,*** Honoré's SouthAfrican Law of Trusts, p. 392, 393, 473
89) See also ***T. Honoré and E. Cameron,*** Honoré's SouthAfrican Law of Trusts, p. 392, 393, 473
90) ***T. Honoré and E. Cameron,*** Honoré's SouthAfrican Law of Trusts, p. 471 *seqq.*, 364 *seqq.*

ownership in such right including the right of enjoyment'[91]
In these cases it can therefore be questionable whether or not the beneficiary of the trust is enriched by the vested right he holds in the assets of the trust and whether or not he will be liable for the payment of German inheritance taxes.

In the decisions of the Bundesfinanzhof a clear and explicit distinction beween the discretionary trust and a trust where the beneficiary has a vested right to the assets of a trust cannot be found.
Nevertheless it has to be acknowleged that in the latter case the position of the beneficiary is `closer´ to a taxable enrichment in terms of the ErbStG as in the former case of the discretionary trust.

This is not the place to attempt a solution of the just introduced problem, but a tax practitioner or estate planner faced with the question whether or not he can avoid double taxation on South-African / German deceased estates by creating a trust should carefully examine and analyse the possibity to utilize and create a trust to avoid a German inheritance tax liability.
However, apart from the possible difficulties which can be connected to the creation of a trust where the beneficiary has a vested right to the trust assets, it can be stated that the transfer of property and assets to a discretionary trust seems to be an appropriate means to avoid the negative consequences of South-African / German double taxation.

III. Final conclusion

Having discussed South-African estate duty levied on international deceased estates and German inheritance taxes levied on the enrichment of an heir by a succession to international property and assets, it can be said, that the South-African system of levying estate duty as a final tax on the deceased`s estate and the German system of levying inheritance taxes on the enrichment of an heir acquired due to an inheritance or bequest from the deceased differ substantially in their scope and in their attitude to levying tax on succession in general.

Whereas the South-African Law of Succession, the South-African Administration of deceased estates and South-African estate duty are influenced and governed by a system of executorship, that is to say the executor winds-up and administers the deceased estate, pays the amount of estate duty levied on the deceased estate and finally distributes the residue of the property and assets of a succession to the heir, the German Law of Succession is governed by the *ipso iure* succession of the single heir which takes place without any acts of transfer, delivery or cession and the heir as a `Universalerbe´ (`universal heir´) succeeds to the assets and liabilities of the deceased.
It must furthermore be observed that South-African estate duty is levied on the net value of the compilation of the deceased`s property and assets irrespectively of the `personal qualities´ of the heir, whereas the German Inheritance Tax Act levies inheritance taxes on the net value of the enrichment of an heir acquired from the deceased by succession and furthermore connects the levying of inheritance taxes to certain personal features of the

91) ***Jewish Colonial Trust v. Estate Nathan,*** 1940 AD 163 (at 175) / ***CIR v. Estate Bews*** 1943 NPD 327 / ***T. Honoré and E. Cameron,*** Honoré`s SouthAfrican Law of Trusts, p. 471.

heir (e.g. subjects the heir to a certain amount of taxes payable in accordance with his degree of [family] relation to the deceased or subjects the heir to an `unlimited inheritance tax liability´ payable as soon as the heir or the deceased can be regarded as a `tax resident´ of the Federal Republic).

In contrast to the South-African Estate Duty Act, which levies estate duty either on the world-wide estate of an `ordinary resident´ or on the South-African estate of a `non-resident´, the German ErbStG provides for a different and wider scope to establish the inheritance tax liability of an heir.
In accordance with the regulations of the German ErbStG, the inheritance tax liability of an heir can in general be divided into the `unlimited inheritance tax liability´[92], the `extended unlimited inheritance tax liability´[93], the `limited inheritance tax liability´[94] and the `extended limited inheritance tax liability´.[95]

Only where neither the heir nor the deceased can be regarded as `residents´ (`Inländer´) or rather `tax residents´ (`Steuerinländer´) can a `limited inheritance tax liability´ of an heir be assumed. In these cases the heir will be liable for the payment of inheritance taxes on an enrichment which he acquired by succeeding to German property and assets (in accordance with the so-called *situs* principle).
The `extended limited inheritance tax liability´ is a tax liability *sui generis,* which was created especially for German citizens who emigrate or move to a tax haven. Here an heir will be liable for the payment of inheritance taxes on an enrichment which he acquired by succeeding to German property and assets and other additional (extended) domestic property categories.

In establishing the fact when a taxpayer falls within the categories of the so-called `unlimited inheritance tax liability´ or the so-called `extended unlimited inheritance tax liability´, and is therefore liable for the payment of inheritance taxes levied on his international enrichment by succession (in accordance with the so-called priciple of universality), it was shown that the question whether or not a taxpayer is subjected to an `unlimited tax liability´ depends on the main question whether or not he or the deceased can be regarded as a `tax resident´ of the Federal Republic.[96]
In the context of answering the question whether a person is `resident´ of the Federal Republic for German inheritance tax purposes, it is striking that the scope of the term `resident´ for German inheritance tax purposes is very wide, and that in the opinion of the Bundesfinanzhof someone can be regarded as a `tax resident´ in more than one country at the same time.[97]

The wide scope of the interpretation of the term `tax resident´ in terms of the German ErbStG and the wide scope of the `unlimited inheritance tax liability´ of a taxpayer which results from the classifaction of the deceased or his heir as a `tax resident´ of the Federal Republic can lead to a variety of different problems of double death taxation on South-African / German inheritances as soon as the deceased can also be regarded as an `ordi-

92) Compare, part C. IV.2.2.1., p. 185 *seq.*
93) *Ut supra,* part C. IV.2.2.2., p. 186 *seqq.*
94) Part C. IV.3., p. 190 *seqq.*
95) *Supra,* part C. IV.4., p. 192 *seqq.*
96) Part C. IV.2.2.1.a. and IV.2.2.1.b., p. 185 *seqq.* and especially footnote 308 *ad hunc locum.*
97) *Ut supra,* part C. IV.2.2.1.a. p. 185 *seq.* and especially footnote 308 *ad hunc locum.*

nary resident' for South-African estate duty purposes.[98]

To grant relief in those cases where a deceased who is 'tax resident' in more than one country at the time of his death or where his property and assets are taxed in more than one country at the time of his death, the South-African Estate Duty Act as well as the German Inheritance Tax Act provide basic unilateral relief, embodied in sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG.[99]
However, these unilateral relief provisions provide a relief only to a certain extent and can by no means avoid the full scope of double taxation problems which can arise in the process of taxing South-African / German inheritances.

It can be seen that the unilateral relief granted is especially not sufficient in those cases where the deceased can be regarded as an 'ordinary resident' for South-African estate duty purposes and as a 'tax resident' for German inheritance tax purposes, or where double taxation takes place because the deceased can be regarded as an 'ordinary resident' for South-African estate duty purposes and his heir can be characterized as a 'tax resident' of the Federal Republic.[100]

Even where the deceased and the heir can be regarded either as 'non-residents' for German inheritance tax purposes who are subjected to a double taxation of German property and assets but 'sufficient' unilateral relief is provided by sec. 16 (c) of the EDA,[101] or in those cases where the deceased can be regarded as 'non-resident' for South-African estate duty purposes and the South-African property and assets acquired by the heir are subjected to double taxation but 'sufficient' unilateral relief is provided by sec. 21 of the ErbStG,[102] further 'problems' arise which are related to the administration of the unilateral relief granted and to other 'problems' of a more theoretical nature due to the different systematic attitudes of levying death taxes on international deceased estates or international inheritances.[103]

It can therefore be concluded that the view expressed in the introduction to this work seems to be justified.
A full scale prevention of double death taxes levied on South-African / German inheritances cannot be avoided without a bilateral agreement.[104]
This results mainly from the fact that the systems of unilateral relief granted by sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG are not synchronized and several pitfalls are left as 'traps' for the taxpayer subjected to double death taxation.[105]

A close examination of these pitfalls yields the conclusion that although a 'basic' unilateral relief on international double death taxation is granted by sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG, these provisions are only designed to cope with international double death duties up to a certain degree and in some cases they do

98) For selected problems of South-African / German double taxation see, part D. II., p. 213 *seqq.*
99) *Cf.*, part B. III.5.3., p. 110 *seqq.* and part C. IV.6., p. 197 *seqq.*
100) See, part D. II.2. to II.2.2., p. 216 *seqq.*
101) Refer to part D. II.1., p. 213 *seqq.*
102) *Supra*, part D. II.3., p. 227 *seqq.*
103) Part D. II.1.3., p. 215 *seq.* and part D. II.3.3., p. 230.
104) Part A. I., p. 3, 4.
105) See for that selected problems of South-African / German double taxation, part D. II., p. 213 *seqq.*

not even apply.

IV. Recommendation to enter into a double taxation agreement

It has been established that although the South-African as well as the German tax legislator have provided unilateral relief provisions which provide that any death duty paid to any other state in respect of any property situate outside the legislating country shall be deducted from any duty payable under the death duty act of the legislating country[106], the existing unilateral relief provisions of sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG do not provide sufficient relief from the levying of double death taxes on South-African / German international deceased estates or international inheritances.[107]

A full avoidance of the double death taxation problem on South-African / German deceased estates can only be achieved if the Republic of South-Africa and the Federal Republic of Germany decide to enter into a double death taxation agreement.

A double death taxation agreement between the Republic of South-Africa and Federal Republic of Germany could and should especially embody a solution for the double death tax problem introduced by those cases where the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes, as well as a 'tax resident' for German inheritance tax purposes, or where double taxation takes place because the deceased can be regarded as an 'ordinarily resident' for South-African estate duty purposes and his heir can be characterized as a 'tax resident' of the Federal Republic.[108]
In this context a double taxation agreement between the Republic of South-Africa and the Federal Republic of Germany could and should provide for a review and perhaps an exclusion of the so-called 'unlimited inheritance tax liability' or the so-called 'extended unlimited inheritance tax liability'[109] introduced by sec. 2 of the German ErbStG. This is of special importance where a deceased can also be considered as an 'ordinarily resident' of the Republic of South-Africa.
In cases where a person can be regarded as an 'ordinarily resident' for South-African estate duty purposes as well as a 'resident' for German inheritance tax purposes a solution could perhaps be found in establishing the fact where a person (either the deceased [for South-African estate duty purposes] or the deceased or the heir [for German inheritance tax purposes]) had his 'real home' (e.g. the state to which his personal and economic relations are closer [his centre of vital interests]).

A double death taxation agreement between the Republic of South-Africa and Federal Republic of Germany could and should furthermore provide a solution for those cases where the deceased and the heir can be regarded either as 'non-residents' for German inheritance tax purposes who are subjected to a double taxation of German property and assets and where a 'sufficient' unilateral relief is provided by sec. 16 (c) of the EDA, and for those cases where the deceased can be regarded as a 'non-resident' for South-African estate

106) *Vide supra*, part B. III.5.3., p. 110 *seqq.*, part C. IV.6., p. 197 *seqq.* and selected problems of South-African / German double taxation in part D. II., p. 213 *seqq.*
107) Compare, selected problems of South-African / German double taxation in part D. II., p. 213 *seqq.*
108) These are the most problematic cases, as indicated in part D. II.2. to II.2.2., p. 216 *seqq.*
109) Compare, part C. IV.2.2.1., p. 185 *seq.* and part C. IV.2.2.2., p. 186 *seqq.*

duty purposes and the South-African property and assets acquired by the heir are subjected to double taxation and where 'sufficient' unilateral relief is provided by sec. 21 of the ErbStG.
In either of these cases further 'problems' are associated with the administration of the unilateral relief granted and with other 'problems' which arise from the different systematic attitudes of levying death taxes in accordance with the rules of the South-African EDA or in accordance with the rules of the German ErbStG.
In the cases mentioned it is vital to coordinate the levying of death taxes or the relief granted from double taxation, because the property and assets concerned are taxed in accordance with the so-called *situs* principle and the country in which the property and assets are situated will not deduct foreign death taxes levied on the same property and assets.[110]
In cases where South-African estate duty or German inheritance taxes are levied in accordance with the *situs* principle on domestic property and assets it might therefore be advisable to grant the sole right to levy death duties to the state (either the Republic of South-Africa or the Federal Republic of Germany) where the categories of domestic property and assets concerned are territorially situated or where these property and assets are by right of action enforceable and recoverable.

Finally, it is recommended that the South-African Commissioner of Inland Revenue and the German Financial Administration should find a basis for exchanging information, because further 'problems' are introduced by and to the levying of South-African / German double death taxes in as much as the process of administering estate duty which is levied on South-African international deceased estates differs and conflicts with the administration of German inheritance taxes which are levied on the same property and assets.
Other problems which result from the different systematic attitudes to levying either South-African estate duty as a final tax on the property and assets of a deceased estate or German inheritance taxes on the enrichment of an heir acquired due to an inheritance or bequest from the deceased, can also be solved by an international double death taxation agreement.

However, the problems connected with South-African / German double death taxation, and the recommendations made for the avoidance of these problems, reflect only a part of the problems introduced by double death taxes levied on South-African / German deceased estates or inheritances.
These and other problems connected with the levying of double death duties on international deceased estates or international inheritances are dealt with in detail in the 1982 OECD 'Model Convention on Estates and Inheritances and on Gifts'[111], which was drafted as a Model Convention for the avoidance of international double death taxation between OECD member nations.

As a member nation of the OECD, the Federal Republic of Germany has concluded several

110) *Supra*, part D. II.1., p. 213 *seqq.* and part D. II.3., p. 227 *seqq.*
111) See, (Hrsg.) ***Bundesministerium der Finanzen,*** Musterabkommen zur Vermeidung der Doppelbesteuerung der Nachlässe, Erbschaften und Schenkungen, Bericht des Fiskalausschusses der OECD 1982, Bonn 1987, p. 25 to 150. The aforementioned work is a translation of the original English and French texts and commentaries on the 'Model Convention on Estates and Inheritances and Gifts' of 1966 and 1982 into German. *Cf.*, part A. V., p. 21 *seqq.* and especially part A. V.2., p. 25 *seqq.*

double death duty agreements on the basis of the 1982 OECD `Model Convention on Estates and Inheritances and on Gifts´;[112] and although the Republic of South-Africa is not a member nation of the OECD it was observed *supra* that South-Africa has entered into several double taxation agreements on income taxes by following OECD Model Conventions because several of the major foreign trade partners of the Republic are member nations of this organization.[113]
Consequently it can be concluded that the Republic of South-Africa and the Federal Republic of Germany have a `tradition´ of entering into double taxation agreements on the basis of OECD Model Conventions.[114]

Bearing these preconditions in mind it is finally recommended that the Republic of South-Africa and the Federal Republic of Germany should utilize the 1982 OECD `Model Convention on Estates and Inheritances and on Gifts´ as a guideline to enter into an `individually suitable´ double death taxation agreement to prevent their taxpayers from carrying the burden of double death taxation which is presently relieved only partially and insufficiently by the unilateral relief regulations embodied in sec. 16 (c) of the South-African EDA and sec. 21 of the German ErbStG.[115]

112) Part A. V.2., p. 28 and part A. V.4., p. 38.
113) *Ut supra*, part A. V.2., p. 27 *seq.*
114) For further information on the general characterization and function of double death duty agreements and for additional information on the South-African and German regulations dealing with the power to enter into double death duty agreements, see part A. V.1., p. 22 *seqq.*, part A. V.3., p. 28 *seqq.* and part A. V.4., p. 32 *seqq.*
115) See, selected problems of South-African / German double taxation in part D. II., p. 213 *seqq.*