

THE LONG ARM PROVISION OF CAPITAL GAINS TAX:

An analysis of the capital gains tax consequences on the indirect disposal of immovable property by non-residents in selected African countries.

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DISCLAIMER

Although this dissertation is partially based on information received from various countries, the author has given her interpretation of the relevant law and practice. Further, the law and practice are likely to change over time, and such changes may affect my interpretation and opinions. No one should act on the basis of this dissertation without further consultation.

ABSTRACT

A non-resident who disposes of a direct interest in immovable property or an indirect interest in immovable property through the disposal of shares may be subject to capital gains tax in the country in which the immovable property is situated. Certain African countries were selected and the capital gains tax consequences on disposal of such property were determined by analysing the domestic tax legislation of the country in which the property is situated. In addition, the effect of any applicable double tax agreement ('DTA') to such disposals was considered.

In certain countries - such as Angola and Nigeria - in terms of their domestic tax legislation, a non-resident will not be subject to capital gains tax in the respective country where the property is situated regardless of the value of the shares that is attributable to immovable property.

In certain countries - such as Mozambique, Namibia, Tanzania and Zimbabwe - in terms of their domestic tax legislation, a non-resident may be subject to capital gains tax upon the disposal of an interest in immovable property in the respective country in which the immovable property is held regardless of the value of the shares that is attributable to immovable property, unless a DTA provides otherwise.

In certain other countries - such as Botswana, Ghana, Lesotho and South Africa – in terms of their domestic tax legislation, a non-resident may be subject to capital gains tax upon the disposal of an interest in immovable property in the respective country in which the immovable property is held, however this will depend in general on the percentage of the value of shares that is attributable to immovable property, unless a DTA provides otherwise. Certain countries domestic tax legislation have specific provisions regulating how this percentage is determined.

A DTA may provide relief to taxpayers who are subject to capital gains tax in both their resident country and the source country, on the disposal of an interest in immovable property held in the source country. In terms of domestic tax legislation, where the non-resident is liable to pay capital gains tax in the source country, the non-resident will in general have to comply with the withholding tax and filing obligations of that country where applicable.

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1 INTRODUCTION

1.1 Background to the research topic

This chapter provides an introduction to the analysis of the capital gains tax ('CGT') effect on the indirect disposal of immovable property situated in African countries by non-residents. The background includes a brief explanation of the relevance of CGT in South Africa ('SA') to a non-resident, a discussion of Africa's potential for hosting transactions of a capital nature, the collection of tax revenue in African countries, and a discussion of the international case *Vodafone International Holdings B.V. v Union of India & ANR* 2012 INSC 60 (the 'Vodafone case') and the relevance thereof.

1.1.1 Capital gains tax from a South African perspective

1.1.1.1 An introduction to capital gains tax in South Africa

CGT was introduced into SA through the insertion of section 26A into the Income Tax Act 58 of 1962¹ by section 14 of Act 5 of 2001. This section stipulates that a taxable capital gain will be included in the taxable income of a person as determined by the Eighth Schedule to the Income Tax Act. The Eighth Schedule governs the determination of taxable capital gains and assessed capital losses.

1.1.1.2 Application of CGT in South Africa to the disposal of immovable property or an interest in immovable property in South Africa by a non-resident

Paragraph 2 of the Eighth Schedule to the Income Tax Act 58 of 1962² ('SA ITA') defines the scope of the CGT legislation and prescribes who is subject to CGT and which assets of such persons are subject to CGT. Paragraph 2 states (with effect from 1 January 2016):

- “2(1) Subject to paragraph 97, this Schedule applies to the disposal on or after valuation date of -
- (a) any asset of a resident; and
 - (b) the following assets of a person who is not a resident, namely-
 - (i) immovable property situated in the Republic held by that person or any interest or right of whatever nature of that person to or in immovable property situated in the Republic including rights to variable or fixed payments as consideration for the working of, or the right to work mineral deposits, sources and other natural resources; or
 - (ii) any asset effectively connected with a permanent establishment of that person in the Republic.

² All references in this chapter to 'section' and 'paragraph' are to sections of the Income Tax Act 58 of 1962 ('SA ITA') and paragraphs of the Eighth Schedule thereto, unless specifically indicated otherwise.

2(2) For purposes of subparagraph (1)(b)(i), an interest in immovable property situated in the Republic includes any equity shares held by a person in a company or ownership or the right to ownership of a person in any other entity or a vested interest of a person in any assets of any trust, if -

- (a) 80 percent or more of the market value of those equity shares, ownership or right to ownership or vested interest, as the case may be, at the time of disposal thereof is attributable directly or indirectly to immovable property held otherwise than as trading stock; and
- (b) in the case of a company or other entity, that person (whether alone or together with any connected person in relation to that person), directly or indirectly, holds at least 20 percent of the equity shares in that company or ownership or right to ownership of that other entity.”

Paragraph 2 makes it clear that in SA, a non-resident will be subject to CGT on the disposal of any immovable property situated in SA or any interest or right in immovable property in SA. A non-resident will have an interest in immovable property if the non-resident holds at least 20 percent of the equity shares in a company and 80 percent of the market value of the shares are attributable directly or indirectly to immovable property (which is not trading stock) in SA. The interest can be held ‘indirectly’ which means that it can be held through another company.

1.1.2 Capital gains tax in an African context

1.1.2.1 Africa’s potential for hosting transactions of a capital nature

In the past ten years, external financial flows have had a significant impact in financing Africa’s development (AfDB, OECD & UNDP, 2015:44). Foreign direct investments were expected to increase by 12 percent in 2015 to an amount of USD 55 billion (AfDB, OECD & UNDP, 2015:54). Because Africa has a rapidly urbanising population and the middle class is rising (AfDB, OECD & UNDP, 2015:44), it has an increasing amount of inward foreign investment diversifying from mainly mineral resources to consumer goods and services which include information and communication technology, retail, food and financial services (AfDB, OECD & UNDP, 2015:48).

The Organisation for Economic and Co-operation and Development (‘OECD’) defines foreign direct investment as “a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor” (OECD, 2008:17).

In 2014, the top investment countries in Africa were Egypt with a value of 5.5 billion USD, Mozambique with a value of 4.9 billion USD, Morocco with a value of 4.7 billion USD,

South Africa with a value 4.2 billion USD, the Republic of Congo with a value of 2.8 billion USD and Ghana with a value of 2.7 billion USD. Certain other countries such as Kenya, the Republic of Tanzania, Uganda and Zimbabwe have also become popular countries to invest in (AfDB, OECD & UNDP, 2015:49).

An example of a company that has invested in African countries is SABMiller. SABMiller started in SA and is now a multinational brewing and beverage company operating in 31 African countries. Another example is the Shoprite Group of Companies ('Shoprite') which is based in South African but operates in 16 countries across the continent. In 2014, Shoprite planned to open 47 new outlets across the continent with a focus in Angola and Nigeria (AfDB, OECD & UNDP, 2015:53).

It is clear from the above that African countries have great potential for hosting investment opportunities. Where transactions are of a capital nature, investors should be aware of the CGT consequences of the disposal of their investments.

1.1.2.2 Collection of tax revenue

Even though foreign direct investment has increased over the past ten years, the tax revenue collection is still inadequate to meet the economic needs of most African countries. This inadequate tax revenue is due to a combination of factors such as a significant informal sector, low levels of tax collection, high rates of tax evasion with a low taxpayer morale and a weak tax administration system (AfDB, OECD & UNDP, 2015:65).

The poorer countries in Africa rely to a large extent on the tax revenue that they receive from multinational companies. If these companies are seen to avoid their tax liability in these countries, this will decrease confidence in the entire tax system of the relevant African country (AfDB, OECD & UNDP, 2015:65).

The Global Forum on Transparency and Exchange of Information for Tax Purposes is responsible for monitoring the implementation of internationally agreed upon standards of transparency and exchange of information for tax purposes. The African countries that are members of this forum include Botswana, Burkina Faso, Cameroon, Côte d'Ivoire, Gabon, Ghana, Kenya, Lesotho, Liberia, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, Seychelles, South Africa, Tanzania, Tunisia and Uganda. All members of the forum have committed to comply with the international standards on Exchange of Information on Request in order to decrease tax evasion and enhance transparency and exchange of information throughout Africa (AfDB, OECD & UNDP, 2015:68-69).

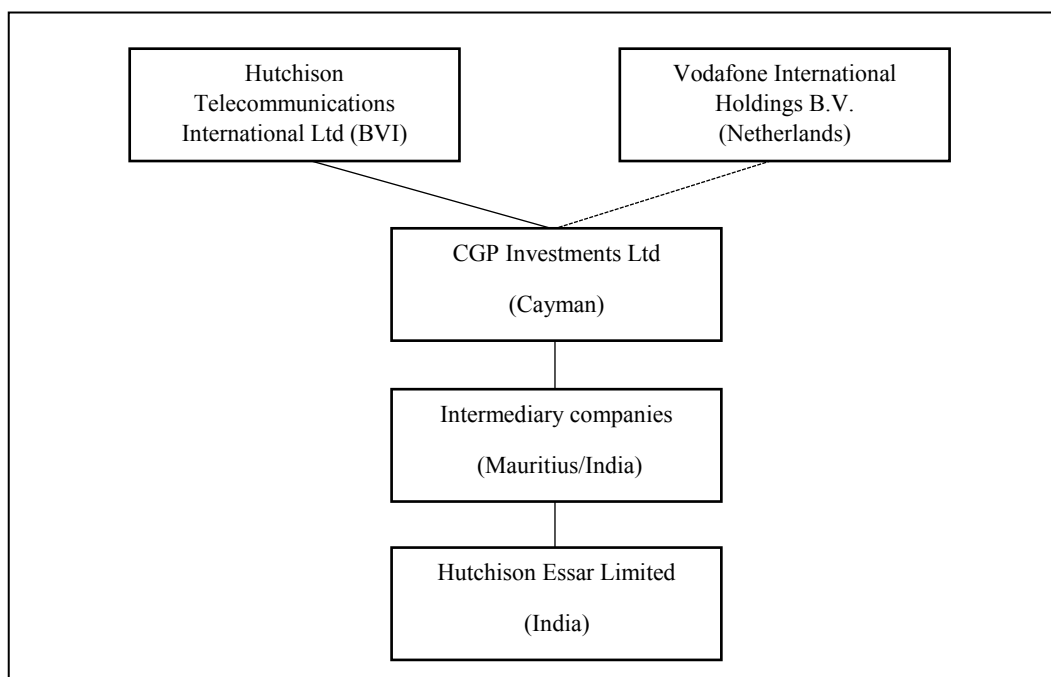
This forum will assist the African countries in knowing and monitoring when a potential CGT transaction takes place in order to enforce their legislation where applicable. Without such a forum, the respective country may simply be unaware that such a transaction took place thereby losing tax revenue.

1.1.3 Capital gains tax from a global perspective

1.1.3.1 Capital gains tax in the news

There is uncertainty from an international perspective surrounding the CGT consequences of an indirect transfer of shares as the following case illustrates.

In the Vodafone case, a British Virgin Islands ('BVI') company owned an interest in an Indian operating company through a number of overseas holding companies. The BVI company sold the sole share of its wholly owned Cayman company to Vodafone in the Netherlands in 2007 (KPMG, 2012). A diagrammatical version of the facts is depicted below:



After this transaction took place, the Indian tax authorities issued a notice to Vodafone to hold it liable for failure to withhold Indian taxes on the sales consideration to the BVI Company. After consideration of various principles including “substance over form”, “piercing the corporate veil”, tax evasion and tax planning, the Supreme Court found that the transaction was a *bona fide* foreign investment transaction and therefore the Indian domestic law provisions should not tax the capital gain from the sale of a foreign company’s shares

outside of India regardless of the fact that the transaction involved an indirect transfer of an Indian company (KPMG, 2012).

Pursuant to this judgement, the Indian Finance Minister proposed and later effected various changes to their domestic tax legislation in a budget speech in order to disregard the Supreme Court's interpretation in the Vodafone case and applied these changes retrospectively with effect from 1 April 1962 (KPMG, 2012).

1.1.3.2. The relevance of the Vodafone case

The Vodafone case has had a significant impact on similar transactions and has resulted in uncertainty surrounding the CGT consequences of the indirect disposal of shares (specifically where the underlying shares or assets are not located in the country of the non-resident) for global investors and companies.

1.2 Research objective

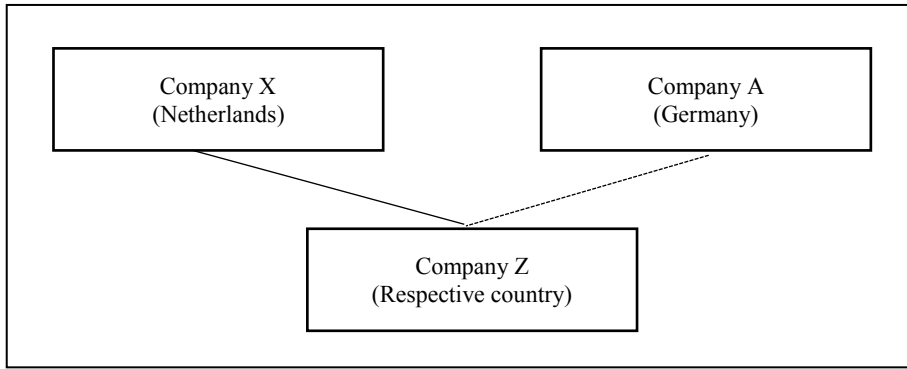
Foreign direct investment in Africa has increased over the years and it is clear that Africa has great potential for holding transactions of a capital nature. As a result of the increase of foreign direct investments in Africa and the lack of availability of legislation and information regulating the disposals thereof, there is uncertainty surrounding the CGT consequences of an indirect disposal of immovable property in African countries by a non-resident.

The research objective is to determine the CGT consequences (if any) of the disposal of a direct or indirect interest in immovable property held by non-residents in selected African countries by looking at domestic legislation as well as double tax agreements ('DTAs'). This is in order to provide some clarity to non-resident investors who may be uncertain as to what the CGT consequences of such disposals might be.

The following examples illustrate the uncertainty relating to the CGT effects on the indirect disposal of immovable property that may typically exist:

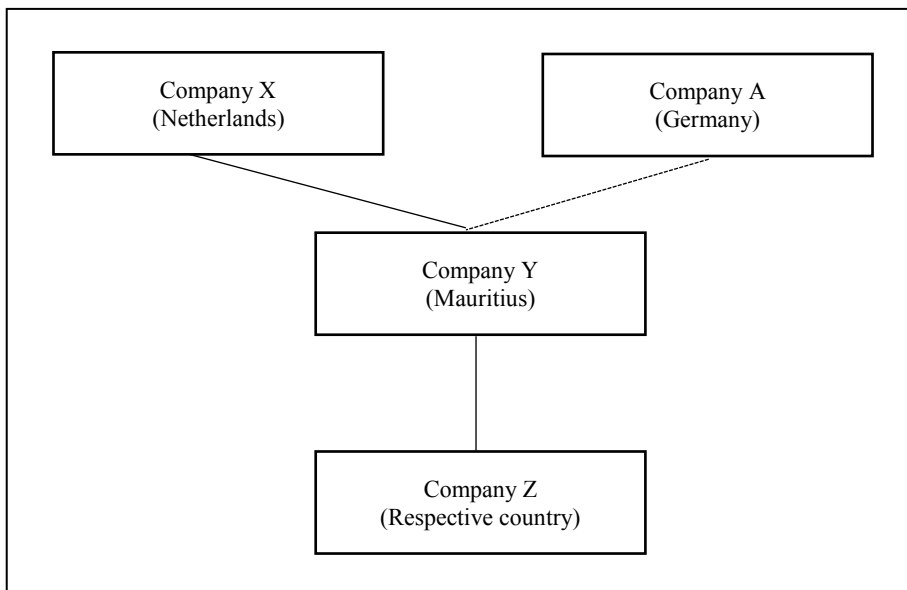
Example 1: A simple structure – a disposal of a direct interest in immovable property

Company X in the Netherlands owns shares in Company Z in the respective country. Eighty percent of the value of Company Z's shares is attributable to immovable property in respective country. Company X later sell their shares in Company Z to Company A. Are there any CGT consequences in the respective country? The scenario is depicted in the diagram below.



Example 2: A multi-tier structure – a disposal of an indirect interest in immovable property

Company X in the Netherlands owns shares in Company Y in Mauritius who in turn owns shares in Company Z in the respective country. Eighty percent of the value of Company Z’s shares is attributable to immovable property in the respective country. Company X later sell their shares in Company Y to Company A. Are there any CGT consequences in the respective country due to the disposal of shares in Mauritius? If so, how is this determined and regulated? The scenario is depicted in the diagram below.



The disposal of both a direct and indirect interest in immovable property, as illustrated in the examples above, will be analysed in this dissertation.

The following countries in Africa have been selected for analysis:

- i. Angola
- ii. Ghana
- iii. Kenya

- iv. Lesotho
- v. Madagascar
- vi. Mauritius
- vii. Namibia
- viii. Nigeria
- ix. Seychelles
- x. South Africa
- xi. Swaziland
- xii. Tanzania
- xiii. Zambia
- xiv. Zimbabwe

The selected African countries were chosen based on the receipt of information from the questionnaires that were duly completed. The tax consequences in Mauritius, Seychelles and Swaziland were considered, however these countries do not have CGT (PricewaterhouseCoopers ('PwC'), 2014) and will not be discussed further.

1.3 Research method

The methodology used in this report will involve the following:

- a) The review of relevant literature and legislation on CGT on the disposal of an interest in immovable property.
- b) The use of questionnaires (see Annexure 1) to gain knowledge of the theoretical and practical CGT laws and procedures that take place in selected African countries.

A partner at PwC, Dr Charl du Toit, has assisted the author with sending the questionnaires to either partners or managers in PwC firms with whom he has a connection in African countries as well as in Australia, Canada, the United Kingdom and the United States of America (to assist with the analysis of SA). This has assisted greatly with the author's research - all the relevant legislation was brought to the author's attention, the author received a practical explanation of the effect of the legislation in place and in most cases was able to look at the selected countries' primary tax legislation as well.

1.4 Limitations of scope

This study is limited to an analysis of the CGT effect on the disposal of a direct and indirect interest of immovable property through a disposal of shares by a non-resident. The

application of other taxes, including but not limited to, income tax, VAT, capital duty, transfer tax, stamp duty, customs duty, excise duty will not be considered (unless specifically mentioned). This study is further limited to the following African countries only: Angola, Ghana, Kenya, Lesotho, Madagascar, Mauritius, Namibia, Nigeria, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

1.5 Remaining structure

Chapters 2 to 14 will discuss the CGT effects on the indirect disposal of immovable property through the disposal of shares in the selected countries by non-residents.

Chapter 2, which deals with SA, will analyse paragraph 2(2) of the Eighth Schedule. The analysis will include the following:

- a) The history and development of paragraph 2(2).
- b) The meaning of immovable property for purposes of paragraph 2(2).
- c) How to value equity shares (including the effect of selling the shares at a discount or premium).
- d) How to determine the calculation of the percentage of value of shares which is directly or indirectly attributable to immovable property in South Africa i.e. do you include or disregard the following:
 - i. liabilities;
 - ii. self-generated goodwill;
 - iii. intra-group loans; and
 - iv. a debit deferred tax balance.
- e) A discussion on double tax treaties.
- f) Withholding tax obligations from payments to non-resident sellers of immovable property in terms of section 35A of the ITA.
- g) Tax filing obligations in terms of section 67 of the ITA.

Chapters 3 to 14 deal with the remaining selected African countries. The analysis will include the following:

- a) Whether there is taxation on capital gains and at what rate.
- b) Whether this taxation is applicable to the disposal of an interest in immovable property to a non-resident and an explanation of the relevant section.
- c) A brief discussion of the applicable double tax treaties (where applicable).

d) Withholding tax and filing obligations.

In conclusion, chapter 15 provides a general summary of the CGT consequences on the indirect disposal of immovable property in selected African countries by non-residents as well as a more country specific summary in a table format.

An example of the questionnaire that was sent out to various PwC firms (as discussed above) is provided in Annexure A.

2 SOUTH AFRICA

2.1 Introduction

In SA there is CGT on the disposal of a direct or an indirect interest in immovable property situated in SA held by a non-resident. Paragraph 2 of the Eight Schedule to the SA ITA³ defines the scope of the CGT legislation and prescribes who is subject to CGT and which assets of such persons are subject to CGT.

In SA, a non-resident will be subject to CGT on the disposal of any immovable property situated in SA or on the disposal of any interest in immovable property in SA (para 2). A non-resident will be considered to have an interest in immovable property if such non-resident holds at least 20 percent of the equity shares in a South African company and 80 percent of the market value of the equity shares is attributable directly or indirectly to immovable property in SA (para 2). Immovable property held as trading stock is excluded from the 80 percent requirement (para 2).

An indirect interest is where a person has an interest in a company through the holding of another company. Companies in which 80 percent or more of the market value of the equity shares are attributable directly or indirectly to immovable property are commonly referred to as ‘property-rich’ companies.

As there is no indication to the contrary in the SA ITA, no exception is made for shares that are listed on the Johannesburg Stock Exchange (JSE). This means that a non-resident who disposes of shares held in a South African listed or unlisted property-rich company would be liable for CGT (provided the non-resident held at least 20 percent of the company’s shares).

This chapter will discuss the history and development of paragraph 2, the meaning of immovable property for purposes of paragraph 2, a detailed analysis on the application of paragraph 2(2), the effect of DTAs, withholding tax and filing obligations. The analysis of paragraph 2(2) will include a discussion on how to value the equity shares (including the effect of selling the shares at a discount or premium) and whether liabilities, self-generated goodwill, a debit deferred tax account and intra-group loans should be included or disregarded in determining whether 80 percent or more of the market value of the equity shares are directly or indirectly attributable to immovable property.

³ All references in this chapter to ‘section’ and ‘paragraph’ are to sections of the Income Tax Act 58 of 1962 (‘SA ITA’) and paragraphs of the Eighth Schedule thereto, unless specifically indicated otherwise.

2.2 History

CGT was introduced into SA through the insertion of section 26A into the SA ITA by section 38 of the Taxation Laws Amendment Act 5 of 2001. This section stipulates that a taxable capital gain will be included in the taxable income of a person as determined by the Eighth Schedule to the SA ITA. The Eighth Schedule regulates the determination of taxable capital gains and assessed capital losses.

Paragraph 2(2) was later amended on 1 October 2001 by section 25 of the Revenue Laws Amendment Act 19 of 2001 and section 66 of the Second Revenue Laws Amendment Act 60 of 2001. Following the amendments paragraph 2(2) read as follows (the amendments are indicated in italics):

“(2) For purposes of subparagraph (1)(b)(i), an interest in immovable property situated in the Republic includes a direct or indirect interest of at least 20 percent held by a person (alone or together with any connected person in relation to that person) in the equity share capital of a company or in any other entity, where 80 percent or more of the value of the net assets of that company or other entity, determined on the market value basis, is, at the time of disposal of shares in that company or interest in that other entity, attributable *directly or indirectly* to immovable property situated in the Republic, *other than immovable property held by that company or other entity as trading stock.*”

The words “directly or indirectly” were inserted to clarify that the 80 percent of the company or entities net assets can be attributable directly or indirectly to immovable property situated in SA (Clause 25 of the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2001). Trading stock held as immovable property was specifically excluded from immovable property as any gain from the disposal thereof will result in business profits and will form part of gross income (Clause 66 of the Explanatory Memorandum on the Second Revenue Laws Amendment Bill, 2001).

In terms of the wording prior to 1 February 2006, the determination of the proportion of immovable property to other assets was determined based on the market value of the net assets. SARS stated the following on the determination of the calculation to determine if a company is property-rich based on the wording prior to 1 February 2006 (SARS, 2015:52):

“The view is held that the liabilities must be allocated against the assets that they finance. For example, if South African immovable property was bonded to purchase plant, the liability must be allocated against the plant. A liability that cannot be linked to a specific asset must be allocated proportionately against the assets to which it is likely to relate. For example, unless the facts indicate otherwise, current liabilities would normally finance current assets and should be allocated accordingly.”

Paragraph 2(2) was materially amended by section 64 of the Revenue Laws Amendment Act 31 of 2005 with effect from 1 February 2006. Following this amendment, paragraph 2(2) stated:

- “2(2) For purposes of subparagraph (1)(b)(i), an interest in immovable property situated in the Republic includes any equity shares held by a person in a company or ownership or the right to ownership of a person in any other entity or a vested interest of a person in any assets of any trust, if -
- (a) 80 percent or more of the market value of those equity shares, ownership or right to ownership or vested interest, as the case may be, at the time of disposal thereof is attributable directly or indirectly to immovable property held otherwise than as trading stock; and
 - (b) in the case of a company or other entity, that person (whether alone or together with any connected person in relation to that person), directly or indirectly, holds at least 20 percent of the equity shares in that company or ownership or right to ownership of that other entity.”

The above amendment was mainly put in place to deal with practical issues such as where foreign companies held their interests in South African immovable property indirectly through other intermediary companies or through a beneficial interest in a trust (Clause 64 of the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2005). Following this amendment and with effect from 1 October 2006, the three main differences according to SARS are (2015:53):

- i. “In the case of multi-tier structures the 80%+ test has been moved to the top of the chain.
- ii. The gross market value of assets of the entity must now be analysed instead of the market value of its net assets.
- iii. Vested rights in trusts are now included.”

2.3 Meaning of “immovable property” for purposes of paragraph 2(2)

Paragraph 2(1)(b)(i) refers to “immovable property” and “any interest or right of whatever nature of that person to or in immovable property”. Paragraph (2)(2) continues to define what an interest in immovable property is, however the Eight Schedule does not define “immovable property”. In fact, “immovable property” is not defined in the SA ITA. It is therefore of importance to determine what is and what is not included in immovable property in order to determine what an interest in immovable property is in order to apply paragraph 2(2) correctly.

Law of South Africa (‘LAWSA’) (2014:51) defines immovable things as “things which cannot be moved from one place to another without damage or change of form”. Examples of immovable property include land, buildings with foundations in the soil, trees, growing crops and real rights over immovable property (e.g. a usufruct or a registered lease of not less than

10 years⁴) (SARS, 2015:42). Incorporeal immovable property includes real rights over immovable property: a registered usufruct over immovable property, old and new order mineral rights, a registered praedial servitude and building restrictions (LAWSA: 2014:52). The view is held that new order rights under the Mineral and Petroleum Resources Development Act 28 of 2002 comprise immovable property (SARS, 2015:42).

Section 1 of the Administration of Estates Act 66 of 1965 defines immovable property as “land and every real right in land or minerals (other than any right under a bond) which is registrable in any office in the Republic used for the registration of title to land or the right to mine”.

Section 10 of the Deeds Registries Act 47 of 1937 defines immovable property as:

“[a]ny registered lease of land which, when entered into, was for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period amount in all to not less than ten years, a registered right of leasehold and a registered right of initial ownership contemplated in section 62 of the Development Facilitation Act, 1995.”

These definitions of immovable property from other acts cannot be ascribed to the Eighth Schedule, however it may guide us towards determining the intention of the legislature as to the meaning of immovable property.

The Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital (‘Model Tax Treaty’) may offer us guidance where the domestic tax legislation is unclear. Paragraph 2 of Article 6 of the Model Tax Treaty (OECD, 2014) states that the term “immovable property” is defined with reference to the definition in the law of the contracting country in which the property is situated and shall in any case include “property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respected landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the rights to work, mineral deposits, sources and other nature resources; ships, boats and aircraft shall not be regarded as immovable property”.

There was an amendment to the definition of the term “immovable property” in paragraph 2(2), with effect from 1 January 2016, to align the definition of immovable property with that in the OECD Model Tax Treaty in order to avoid any possible anomalies (para 5.4. of the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015).

⁴ Para (b) of the definition of “immovable property” in s 102(1) of the Deeds Registries Act 47 of 1937.

The amendment to paragraph 2(1)(b)(i) extends the definition of immovable property to include “rights to variable or fixed payments as consideration for the working of, or the right to work mineral deposits, sources and other natural resources” (para 102 of the Taxation Laws Amendment Act, 25 of 2015). This means that mining and prospecting rights are included in the definition of immovable property for purposes of paragraph 2.

2.4 Disposal of an interest in immovable property by a non-resident

2.4.1 An introduction to the disposal of an interest in immovable property

One of the requirements for a non-resident to be considered to have an interest in immovable property is that 80 percent of the market value of the equity shares in a company must be attributable directly or indirectly to immovable property in SA (para 2(2)(a)). The other requirement is that the non-resident must hold at least 20 percent of the company’s equity shares (either alone or together with any connected person) at the time of the disposal (para 2(2)(b)). Non-residents will be subject to CGT if both of these requirements are met. There is no exception for the disposal of listed shares.

The reference to the words “directly or indirectly” indicates that one must look at immovable property held by the South African company in which the non-resident owns shares as well as immovable property held by any company in which the South African company holds an interest. This is in line with SARS’ view that “in the case of multi-tier structures the 80 percent+ test has been moved to the top of the chain” (SARS, 2015:53).

The determination of whether 80 percent or more of the value of shares in a company is directly or indirectly attributable to immovable property in South Africa (the ‘calculation’) appears straightforward, however many factors require consideration.

Neither the Eighth Schedule nor the SA ITA states how to value the equity shares to determine whether the 80 percent requirement is met. The SARS Comprehensive Guide to Capital Gains Tax (Issue 5) (‘CGT guide’) however provides us with guidance. According to the CGT guide, in determining whether 80 percent or more of the value of shares in a company is directly or indirectly attributable to immovable property in SA – liabilities, intra-group loans and a debit deferred tax account must be disregarded; and self-generated goodwill should be included (SARS: 2015:54-55).

It must not be lost sight of that SARS cannot write the law nor determine the letter of the law. The CGT guide is simply an indication as to how SARS will deal with the provisions and

offers “general guidance only” (SARS, 2015:i). The court and the taxpayer will be bound by the wording of paragraph 2(2)(a) and will not be bound by the CGT guide. This is substantiated in the CGT guide where it is states (SARS, 2015:i):

“This guide is not an ‘official publication’ as defined in s 1 of the Tax Administration Act and accordingly does not create a practice generally prevailing under s 5 of that Act. It is also not a binding general ruling under s 89 of Chapter 7 of the Tax Administration Act.”

Paragraph 2(2)(a) will be analysed in more detail below together with a view on the general guidelines offered in the CGT guide. SA implemented CGT on 1 October 2001 at a time when countries such as Australia, Canada and the United Kingdom (‘UK’) already had a CGT regime in place (DLA Cliffe Dekker Hofmeyr, 2008:1). As there are many questions left unanswered in the legislation governing CGT for non-residents, the relevant legislation of Australia and the United States (‘US’) will be analysed where applicable in order to gain further insight into the intention of the legislator. Canada and UK tax legislation has been considered however did not add value for purposes of assisting with the interpretation of paragraph 2.

2.4.2 Valuation of shares

The calculation to determine whether paragraph 2(2)(a) is met is based on the percentage of the market value of the equity shares, at the time of disposal, which are attributable to immovable property.

The following questions arise:

- a. Whether one should value all the assets in order to determine the market value of the shares or whether the selling price of the shares can be used as an indication of the market value?
- b. What happens when the shares are sold at a premium or discount to the market value of the underlying assets? For example, what happens where the market value of land and buildings is R8 million and the market value of plant and machinery is R2 million, but the shares are sold for R12 million.
- c. Whether the difference between the selling price of the shares and the market value of the underlying assets is attributable to goodwill?

In Australia, there is a principal asset test which determines when a company’s underlying value is principally derived from Australian real property (section 855-30 of the Income Tax Assessment Act 1997). This test adopts a “look-through” approach to determine to what

extent the assets of an entity are attributable to Taxable Australian Real Property (as per questionnaire response). While the value of the shares will be relevant in determining the quantum of any capital gain or loss if the shares are Taxable Australian Property, only the market value of the underlying assets will determine whether CGT applies or not (as per questionnaire response). This means that a valuation of the shares themselves is therefore not required for the purposes of applying the principal asset test.

In the US, any gains or losses from the disposition of a US real property interest by a foreign person is subject to US tax (Internal Revenue Code 897). A domestic corporation is presumed to be a US real property interest unless the taxpayer has established that the domestic corporation is not and was not a US real property holding corporation during the relevant look back period (Treasury Regulation s 1.897-2 (b)(1)). A US corporation is considered to be a US real property holding corporation on a particular date if the fair market value of its US real property interests equals or exceeds 50 percent of its total interest in real property everywhere (i.e. US real property interests as well as any interests in real property located outside the US) and assets used or held for use in its trade or business (Treasury Regulation s 1.897-2 (b)(1)).

Even if a corporation is a US real property holding corporation based on the underlying asset value, the parties still have to determine the share value (as per questionnaire response). The selling price could be used as an indication to establish the fair market value (as per questionnaire response). Shares are valued based on the fair market value (as per questionnaire response). If the shares are sold for more than the fair market value of the shares, the market value of the US real property interests are generally not affected by the price at which shares are sold assuming they have already considered all forms of functional and/or economic obsolescence (as per questionnaire response). The additional amount would be attributable to other assets such as non-US real property interests assets, intangible assets, and/or goodwill (as per questionnaire response).

After considering the legislation of Australia and US, it is clear that one must not confuse

- a. the test to determine the percentage of share value attributable to immovable property (or Taxable Australian Real Property in Australia or the US real property interests in US); and
- b. the determination of how much tax is actually payable (only if applicable).

The answer to the first question (2.4.2 (a)) is that one should value the market value of all the underlying assets as well as the market value of the shares. The market value of the underlying assets will be used to determine the percentage of share value attributable to immovable property. Paragraph 2(2)(a) refers to the “80 percent of the market value of those equity shares”. It is submitted that this should be read as “80 percent or more of the market value of all the relevant underlying assets”. It is still to be determined whether liabilities, self-generated goodwill, a deferred tax asset and intra-group loans fall within what the author has called “underlying assets”.

It is submitted that the answer to the second question (2.4.2 (b)) is that when shares are sold at a premium or discount to the market value of the underlying assets, it will not affect the percentage of shares attributable to immovable property, however a portion of that difference may be attributable to self-generated goodwill (which answers the third question (2.4.2 (c))). It is further submitted that the discounted or premium selling price may be seen as the proceeds on the disposal of the shares, however SARS may use the market value of the shares instead of a discounted market value.

One has to consider the situation where for example, a buyer is only willing to pay less than the purchase price as the buyer is of the opinion that debtors are overvalued. Would one proportionately reduce all components of the calculation or would one reduce the value of debtors?

The author is still of the opinion that when shares are sold at a premium or discount to the market value of the underlying assets, it will not affect the calculation to determine the percentage of shares attributable to immovable property.

It is submitted that the answer to the example given above in 2.4.2 (b) (assuming that none of the difference was attributable to generated goodwill) is that 80 percent of the market value of the equity shares is attributable to immovable property. Provided that the non-resident owns at least 20 percent of the equity shares in that company, the non-resident will be subject to capital gains on the difference between the proceeds and the base cost. The proceeds will be R12 million.

2.4.3 Liabilities

Prior to the amendment to paragraph 2(2) by section 64 of the Revenue Laws Amendment Act, paragraph 2(2) referred to 80 percent or more of the value of the “net assets” of a

company. Following the amendment, the paragraph referred to 80 percent or more of the “market value of those shares”.

However, Smith Tabata Buchanan Boyes (‘STBB’) (2015/2106:11) is of the view that one must determine whether 80 percent or more of the value of the *net assets* of the company is directly or indirectly attributable to immovable property in SA. The author disagrees with STBB’s view as the legislature purposively amended the wording in the paragraph from “net assets” to “market value of those shares”.

SARS (2015:54) is of the opinion that liabilities should be disregarded in determining whether the 80 percent requirement is met. This is in line with paragraph 4 of article 13 of the OECD Model Tax Treaty (2014) which provides:

“4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 percent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other state.”

The OECD Commentary on the Model Tax Treaty (2014) on paragraph 4 of article 13 states:

“Paragraph 4 allows the taxation of the entire capital gain attributable to the shares to which it applies even where part of the value of the shares is derived from property other than immovable property located in the source State. The determination of whether shares of a company derive more than 50 percent of their value directly or indirectly from immovable property situated in a Contracting State will normally be done by comparing the value of such immovable property to the value of all property owned by the company *without taking into account debts or other liabilities of the company* (whether or not secured by mortgages on the relevant immovable property).”

It is submitted that the reference to “market value of those equity shares” should be interpreted as gross market value for purposes of determining what percentage of the value of equity shares is attributable to immovable property. One must therefore look to the gross market value of the shares which means that one should only look at the assets and disregard the liabilities. This is in line with SARS’ (2015:54) interpretation of disregarding liabilities (2015:54) as well as in line with article paragraph 4 of article 13 of the OECD Model Tax Treaty (2014) and the commentary thereon. This view is further substantiated by the change in the wording in para 2(2) which was changed from “net assets” to “market value”. The author is therefore of the opinion that liabilities should therefore be disregarded for the purpose of the calculation.

2.4.4 Self-generated goodwill

This refers to goodwill that is not purchased but rather self-generated by the business. The use of time-apportionment for determining the valuation date value of self-generated goodwill may be possible in appropriate circumstances (SARS, 2015:290).

SARS is of the opinion that self-generated goodwill should be included in the calculation when determining whether or not 80 percent or more of an entity's assets comprise of immovable property because it is an asset forming part of the market value of the interest in the entity even though it is not reflected in the financial statements of an entity for accounting purposes (SARS, 2015:54).

Paragraph 49 of International Accounting Standard 38 *Intangible Assets* states:

“In some cases, expenditure is incurred to generate future economic benefits, but it does not result in the creation of an intangible asset that meets the recognition criteria of this standard. Such expenditure is often described as contributing to internally generated goodwill. Internally generated goodwill is not recognized as an asset because it is not an identifiable resource (i.e. it is not separable nor does it arise from contractual or other legal rights) controlled by the entity that can be measured reliably at cost.

Differences between the market value of an entity and the carrying amount of its identifiable net assets at any time may capture a range of factors that affect the value of the entity. However, such differences do not represent the cost of intangible assets controlled by the entity.”

From the above statement, it is clear that self-generated goodwill is not recognized as an accounting asset because it is not an identifiable resource and will therefore not reflect on the financial statements. This however in itself does not mean that self-generated goodwill should not form part of the market value of an entity.

In Australia, generated goodwill would be included in the principle asset test on the basis that it will be considered a valuable asset for purposes of the principle asset test which is regulated by section 855-30 of the Income Tax Assessment Act 1997 (as per questionnaire response). This is however not explicitly stated in their law.

In the US, the goodwill and going concern value will be included in the calculation as part of assets used or held for use in its trade/business provided that the assets are not a USRPI and that the asset is used or held for use in the US corporation's trade/business (s 1.897-1 (f)(1)-(2) of the Treasury Regulation). As discussed above, the difference between the selling price and the underlying asset value would be attributable to other assets such as non-US real

property interest assets (USRPI), intangible assets, and/or goodwill. This is however also not explicitly stated in their law.

After giving consideration to the above, the author is of the opinion that this self-generated goodwill should be included in the calculation as it is a valuable asset, however the determination of the value of this self-generated goodwill may be difficult and it cannot be assumed that the difference between the selling price and the market value of the underlying assets is solely attributable to self-generated goodwill. The difference may be attributable to other intangible assets.

2.4.5 Debit deferred tax account

SARS (2015:55) is of the opinion that a debit deferred tax account should be disregarded in the calculation because it is not an asset for tax purposes.

A US corporation is considered to be a US real property holding corporation on a particular date if the fair market value of its US real property interests equals or exceeds 50 percent of its total interest in real property everywhere (i.e. US real property interests as well as any interests in real property located outside the US) and assets used or held for use in its trade or business (Treasury Regulation s 1.897-2 (b)(1)). Assets are not held in a direct relationship to the trade or business if the assets are not needed to meet the present needs (not anticipated future needs) of the trade/business (s 1.897-1(f)(2) of the Treasury Regulation). This means that assets such as excess cash, prepaid items and deferred tax assets will not be included in the calculation as to whether the fair market value of its US real property interests equals or exceeds 50 percent of its total interest in real property everywhere (i.e. US real property interests as well as any interests in real property located outside the US) and assets used or held for use in its trade or business (Kogan, 2012).

The Supreme Court of Appeal stated in *Caltex Oil (SA) Ltd v Commissioner for Inland Revenue* 1975 (1) SA 665 (A) at 14 stated that:

“The Court is only concerned with deductions permissible according to the language of the Income Tax Act and not debits made in a taxpayer’s books of accounts for deduction even though considered proper from an accountant’s point of view.”

SARS’ approach that a debit deferred tax account must be disregarded in the calculation makes sense to the author. There are various discrepancies between accounting treatment and tax treatment. For example, impairment would be deducted in the determination of accounting income as per the income statement calculation, however impairment would not

be deducted in the determination of taxable income. It is therefore no anomaly that debit deferred tax would be included in the financial statements but not in this calculation. The author is therefore of the view that deferred tax assets should be excluded from the calculation.

2.4.6 Intra-group loans

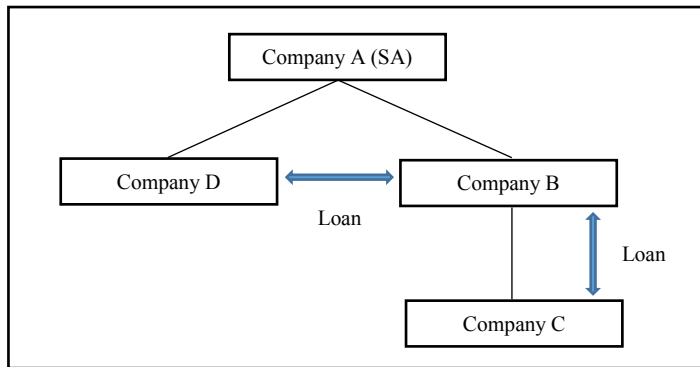
According to the CGT guide, intra-group loans receivable must be disregarded in the calculation (SARS, 2015:55). There was no mention of this in the CGT guide (issue 4) (SARS, 2010).

Intra-group loans will be disregarded in Australia for purposes of the principle assets test by virtue of s 855-32 of the Income Tax Assessment Act 1997, which prevents the double counting of assets within a corporate group that are not Taxable Australian Real Property and are created under arrangements under which corresponding liabilities are created in other members of the group.

There is a presumption in the regulations that the value of a US company's liquid assets that are used in its trade or business amount to up to 5 percent of the fair market value of the US company's other trade or business assets (s 1.897-1 (f)(3)(i) of the Treasury Regulation). This presumption will not apply to any liquid assets that are held or acquired for the principal purpose of preventing a corporation from qualifying as a US real property holding corporation (s 1.897-1 (f)(3)(i) of the Treasury Regulation). If an intragroup loan receivable did not arise in the ordinary course of business, then it will be disregarded in the calculation (as per questionnaire response). However, the receivable can be used in an amount up to 5 percent of the value of the remaining trade or business assets (as per questionnaire response).

After considering the Australian legislation, the author is of the view that all intra-group loans should be disregarded from the calculation as there will be a corresponding liability to that asset in another member of the group.

The author is therefore of the opinion that both intra-group loans in the diagram below should be disregarded from the calculation. Company A, a South African resident, is the company that is being disposed of. Company A holds 100 percent shareholding in Company B and Company D, and Company B holds 100 percent shareholding in Company C.



2.5 A simple example

Consider the following example:

X, a non-resident, holds a 25 percent interest in Company A who in turn holds a 30 percent interest in SA Co. X, disposed of his shares in Company A on 15 September 2015. The following assets and liabilities are part of the balance sheet of SA Co:

| | Book value | Market value on 15 September 2015 |
|--|------------|-----------------------------------|
| <i>Assets</i> | | |
| Land and buildings | R120,000 | R180,000 |
| Plant and machinery | R60,000 | R60,000 |
| Loan receivable – inter-group | R100,000 | R100,000 |
| Loan receivable – from a non-related party | R80,000 | R80,000 |
| Deferred tax | R30,000 | R30,000 |
| <i>Liabilities</i> | | |
| Long term loan | (R60,000) | (R60,000) |

The market value of self-generated goodwill was R50,000 on 15 September 2015.

The market value of the shares in SA Co is attributable to the following assets in terms of the calculation:

| | |
|--|----------------|
| Land and buildings | R180,000 |
| Plant and machinery | R60,000 |
| Loan receivable – from a non-related party | R80,000 |
| Self-generated goodwill | <u>R50,000</u> |
| Market value of the assets | R370,000 |

Only 48.6 percent ($R180,000/R370,000 \times 100$) of the value of X's shares is attributable to immovable property. X's shares are therefore not regarded as an "interest in immovable property" in SA (i.e. not property-rich) and will therefore not attract CGT in SA upon disposal of the shares.

It must be noted that even if SA Co was found to be property-rich, X would still not be subject to CGT as X only has an effective interest of 7.5 percent in SA Co.

2.6 Double Tax Agreements

2.6.1 Introduction to DTAs

Once it is determined that the sale of shares by a non-resident in a company holding South African immovable property may be subject to CGT, the applicable DTA must be considered. A DTA has the force of law as if it was enacted in the SA ITA (s108 of the SA ITA). A DTA modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict (para 17 of *Commissioner for the South African Revenue Service v Tradehold Ltd* 2013 (4) SA 184 (SCA)).

Even once the requirements of paragraph 2(2) are met, SARS may not be able to tax the non-resident on CGT in SA depending on the relevant provision of the treaty. This will depend on the particular treaty.

Article 13(4) of the OECD Model Tax Treaty states that:

“4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 percent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.”

Article 13(4) of the OECD Model Tax Treaty means that any gains that arise for a non-resident due to the disposal of shares that derive more than 50 percent of their value directly or indirectly from immovable property situated in SA may be taxed⁵ in SA.

The new SA-Mauritius treaty, effective as of 1 January 2016, significantly amended its article on capital gains on the sale of shares in property-rich companies. Article 13(4) now reads the same as article 13(4) of the OECD Model Tax Treaty (as stated above). Any gains that arise for a Mauritian resident due to the disposal of shares that derive more than 50 percent of their value directly or indirectly from immovable property situated in SA may now be taxed in SA.

Many DTAs have different articles to that in the OECD Model Tax Treaty. For example, article 13(1) of the DTAs between SA and Luxembourg, Netherlands and Cyprus state that “[g]ains derived by a resident of a Contracting State from the alienation of immovable

⁵ ‘May be taxed’ gives the source country a primary right to tax but not an exclusive right as the residence country may also tax.

property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State”.

However, article 13(4) of these same DTAs states that gains from the alienation of any property other than immovable property (as well as property specified in paragraph 2 and 3) shall be taxable only in the Contracting State of which the alienator is a resident.

The starting point is the “immovable property” definition in Article 6. Article 6(2) of the DTA between SA and Luxembourg, Netherlands and Cyprus defines immovable property as follows (the other treaties above have a similar provision):

“The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships, boats and aircraft shall not be regarded as immovable property.”

The question that arises is whether an interest in immovable property (and property-rich shares) is included in the definition of “immovable property” under the meaning of the law in SA.

2.6.2 Are property-rich shares immovable property for purposes of the DTAs

It has come to light that SARS now interprets the term “immovable property” for purposes of the DTA to include all forms of property contemplated in paragraph 2(1)(b) i.e. immovable property and an interest or right in immovable property (SARS, 2015:57). The author will discuss SARS’ view below as well as supply reasons to show why that the interpretation by SARS is contrary to the terms of the DTA.

The CGT Guide (issue 4) states that property-rich shares are not considered to be immovable property as defined, as set out in the following extract (SARS, 2010:49):

“Treaties such as those with Luxembourg, Mauritius [the old SA-Mauritius Treaty] and the Netherlands (Article 13(4) of the treaties with Luxembourg and Mauritius and Article 14(4) [sic] of the treaty with the Netherlands) provide that sales of assets other than immovable property are only taxable in the country of residence. Since shares are not ‘immovable property’ under South Africa’s domestic law it follows that the provisions of these tax treaties will override para 2(1)(b).”

SARS significantly changed their view in the latest CGT guide even though there has not been a change to the relevant provisions in the treaty nor any relevant case law since the publication of the CGT Guide (Issue 4) to justify just a change in SARS’ interpretation. According to SARS (2015:56):

“Section 35(1) of the Companies Act states that a share issued by a company is movable property. Yet para 2(2) deems equity shares in a company to be an interest in immovable property if 80 percent or more of the value of those shares is directly or indirectly attributable to immovable property in South Africa and the person holds together with connected persons, directly or indirectly, at least 20 percent of the equity shares in the company. The Eighth Schedule therefore places a different meaning on such shares than the Companies Act.”

Paragraph 2(2) however does not “deem(s) equity shares in a company to be an interest in immovable property” as per SARS’s view, but rather states that immovable property as well as an interest in immovable property will be included in the net of the Eighth Schedule for non-residents.

SARS (2015:57) also states in the CGT guide:

“[U]nder para (b) of the definition of ‘immovable property’ in s 102(1) of the Deeds Registries Act 47 of 1937 a registered lease of not less than 10 years is ‘immovable property’. A usufruct, being an incorporeal real right, is also an interest in immovable property. Having established that article 6(2) includes interests which would be regarded as immovable property under the law of South Africa it must follow that an interest in immovable property referred to in para 2(2) should also fall within article 6(2).

Section 35A imposes a withholding tax which represents an advance payment for amongst others, CGT (being the tax contemplated in article 13) when a non-resident disposes of immovable property. Section 35A(15) defines immovable property as follows:

“‘[I]mmovable property’ means immovable property contemplated in paragraph 2 (1) (b) (i) and (2) of the Eighth Schedule.’

Section 35A thus broadens the meaning of immovable property to include shares in a property-rich company. This express definition should accordingly be applied when interpreting article 6 and hence article 13(1). It would defeat the legislative intent if the very section in the Act which enables the withholding of CGT in respect of ‘immovable property’ as defined in that section does not mean ‘immovable property’ as referred to in article 13(1) which is the article governing the taxing rights in respect of the self-same ‘Capital Gains’ falling within the ambit of s 35A.”

It appears that SARS is of the opinion that the definition of “immovable property” in section 35A(15) is sufficient ground to hold that shares constituting an interest in immovable property are immovable property under the tax law of South Africa. This however cannot hold in law as the provisions in section 35A(15) are expressly preceded by the words “for purposes of this section”. It would be contrary to the intention of the legislature to ignore the clear and ordinary meaning of those words. The definition of “immovable property” in section 35A, was limited to the purpose of the withholding of specified amounts from moneys payable to a seller and was not intended to apply for all purposes of the Act. Section 35A refers solely to withholding taxes and therefore that definition should apply solely for the purposes of withholding taxes. The definition in section 35A therefore has no application outside the narrow ambit of section 35A.

Given that the words “immovable property” are not defined in the Eighth Schedule nor in section 1 of the ITA, the words should be interpreted with consideration given to the Supreme Court of Appeal judgement of *Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) which stated that a document should be interpreted according to the ordinary rules of grammar and syntax, in the context in which the provision appears and the apparent purpose to which it is directed and the material known to those responsible for its production (para 18).

It is clear that the purpose of paragraph 2(1)(b) was that an interest in immovable property should be treated for capital gains purposes in the same manner in which immovable property is treated. By implication this means that an interest or right in immovable property does not constitute immovable property. The purpose of this paragraph was to specify which assets of non-residents would fall into the scope of the Eighth Schedule i.e. be taxed on capital gains. Further, the paragraph expressly reads “immovable property or an interest or right ... to or in immovable property”. The provision (and the SA ITA) can in no way be interpreted that shares in a company constitute immovable property. If that was the intention of the legislature, the legislature would have included a provision to that effect.

Focusing specifically on the DTA between SA and Netherlands, this DTA had been negotiated (but not yet signed) in 2001. The provisions of article 13 were identical to the 1997 version of the OECD Model Tax Treaty (this was the latest version at the time). In the 1997 Commentary on Article 13 of the OECD Model Tax Convention on Income and on Capital, the following statement is made by the OECD:

“23. Certain tax laws assimilate the alienation of all or part of the shares in a company, the exclusive or main aim of which is to hold immovable property, to the alienation of such immovable property. In itself paragraph 1 does not allow that practice: a special provision in the bilateral convention can alone provide for such an assimilation. Contracting States are of course free either to include in their bilateral conventions such special provision, or to confirm expressly that the alienation of shares cannot be assimilated to the alienation of the immovable property.”

Article 13 of the OECD Model Tax Convention on Income and on Capital was amended in 2003 where Article 13.4 was added. The addition remedies the issue mentioned in the 1997 Commentary on Article 13 of the OECD Model Tax Treaty as it provides a special provision to deal with the issue of assimilation of the alienation of shares in property companies to the alienation of immovable property. Article 13.4 stated:

“4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 percent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.”

The commentary of the 2003 Commentary on Article 13 of the OECD Model Tax Treaty (paragraph 23) gave the following reason for the insertion of paragraph 13.4:

“28.3 By providing that gains from the alienation of shares deriving more than 50 percent of their value directly or indirectly from immovable property situated in a Contracting State may be taxed in that State, paragraph 4 provides that gains from the alienation of such shares and gains from the alienation of the underlying immovable property, which are covered by paragraph 1, are equally taxable in that State.”

The introduction of paragraph 13.4 makes it clear that 13.1 does not allow the practice of assimilating the alienation of shares in a property-owning company with the alienation of the underlying immovable property. If it did, then there would have been no reason to insert a paragraph 13.4 and paragraph 13.1 would rather have been amended.

The term “immovable property” as referred to in Articles 6.2 and 13.1 of the DTA should therefore also be interpreted according to the ordinary rules of grammar and syntax. One can reasonably assume that parties would have been aware of the express statement in paragraph 23 of the OECD Commentary on Article 13 that Article 13.1 did not allow the practice of assimilating the alienation of shares in a company with the alienation of underlying immovable property owned by such company.

A Protocol to the DTA between SA and Netherlands was signed on 10 October 2005 and 8 July 2008 which made no amendment to Article 13. SARS had ample opportunity and time to negotiate an amendment to Article 13 to clarify the position in line with Article 13.4 of the 2003 OECD Model Tax Treaty, but no such amendment was made.

If the legislature intended to tax property-rich shares as “immovable property”, the relevant tax treaty would be amended accordingly to expressly reflect this. An example of this is the new DTA between SA and Mauritius where this amendment was made. Article 13.4 of the DTA between SA and UK also specifically refers to shares deriving value from immovable property. Where this was not expressly reflected in the DTA, equity shares would not be treated as “immovable property”.

Therefore, until the applicable DTA is amended, a Protocol is released, domestic tax legislation is amended or there is case law on this issue – for purposes of the DTA “immovable property” does not include an interest in immovable property unless specified otherwise.

2.7 Withholding tax and tax filing obligations

Section 35A of the SA ITA deals with withholding of amounts from payments to non-resident sellers of immovable property. This section was inserted into the SA ITA to promote a proper administrative enforcement. The Explanatory Memorandum explains this in detail (clause 30 of the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2004):

“The current system of taxing locally sourced capital gains generated by non-residents is consistent with international best practice and is well-recognised by international income tax treaties. However, this system of source taxation lacks one essential element – proper administrative enforcement through withholding. Many countries that tax capital gains generated by non-residents impose a special withholding regime when the sale involves immovable property. This withholding regime is often critical because the non-resident’s connection to the source country is often tenuous, making enforcement impossible once the immovable property is sold. Enforcement is much easier in terms of the purchaser because the purchaser is the party holding the local immovable property upon completion of the transaction. As a side matter, this form of withholding is not internationally utilised in the case of capital gains generated by non-residents when those gains are associated with a local permanent establishment. No withholding is required in these instances because the non-resident’s practical connection to the source country is much more extensive.”

Any person (the “purchaser”) who must pay an amount to any other person who is non-resident (the “seller”), on the disposal of immovable property, must withhold a certain percentage from the amount. The purchaser must withhold 5 percent where the seller is a natural person, 7.5 percent where the seller is a company and 10 percent where the seller is a trust (s35A(1) of the SA ITA). The seller may apply to the Commissioner for a directive that no amount or a reduced amount be withheld by the purchaser (s35A(2) of the SA ITA). Therefore, where a non-resident company disposes of an asset to a person (not necessarily a South African resident), the person purchasing the asset is obligated to withhold 7.5 percent from the purchase price.

The obligation to withhold the tax is on the purchaser regardless of whether that person is a South African resident or not and regardless of whether the amount of the purchase price is capital or revenue in nature. For example, when a non-resident (seller) sells its shares in a South African company to a non-resident company (purchaser) and the seller is not subject to South African CGT on the disposal, it can apply to SARS for a directive that no amount be withheld by the purchaser in respect of the disposal. Failure to pay the withholding tax will result in interest and a penalty of 10 percent of the purchase price on the disposal of the immovable property (s35A(9) of the SA ITA).

In terms of section 67 of the SA ITA, any person who at any time becomes liable for any income tax (which includes CGT) or becomes liable to submit a return (e.g. if a person

derives any capital gain from a South African source) is required to register as a taxpayer with SARS.

2.8 Conclusion

In SA, a non-resident will be subject to CGT on the disposal of any immovable property situated in SA or on the disposal of any interest in immovable property in SA unless a DTA provides otherwise. A non-resident will be considered to have an interest in immovable property if such non-resident holds at least 20 percent of the equity shares in a company and 80 percent of the market value of the equity shares in the company are attributable directly or indirectly to immovable property in SA. Immovable property held as trading stock is excluded from the 80 percent requirement (para 2(2)).

With regard to the valuation of the shares, the market value of the underlying assets will be used to determine the percentage of share value attributable to immovable property. The CGT liability will only be determined once both the requirements in paragraph 2 are met. The author submits that when shares are sold at a premium or discount to the market value of the underlying assets, it will not affect the percentage of share value attributable to immovable property, however it may affect the CGT liability.

The author submits that when determining the percentage of the market value of the equity shares that is attributable to immovable property – liabilities, a deferred tax asset and intra-group loans should be disregarded whilst self-generated goodwill should be included.

Once it is determined that the sale of shares by a non-resident in a company holding South African immovable property may be subject to CGT, the applicable DTA must be considered. For purposes of the DTA, “immovable property” does not include an interest in immovable property unless specified otherwise, until the applicable DTA is amended, a Protocol is released, domestic tax legislation is amended or there is case law on this issue.

Upon the disposal of immovable property, the purchaser of the shares must withhold a certain percentage from the purchase price where the payment is made to any other person who is non-resident. When a non-resident (seller) sells its shares in a South African company to a non-resident company (purchaser) and the seller is not subject to South African CGT on the disposal, it can apply to SARS for a directive that no amount be withheld by the purchaser in respect of the disposal.

3 ANGOLA

3.1 Introduction

Resident entities in Angola are subject to Corporate Income Tax ('Código do Imposto Industrial'/'CIT') at a standard rate of 30 percent levied on worldwide income obtained in Angola or abroad including capital gains arising from the sale of immovable properties or shares located in Angola (PwC, 2015).

Non-resident entities with a permanent establishment ('PE') in Angola are also subject to CIT, at the standard 30 percent rate, levied on the global income deriving from business activities carried-out in Angola, including capital gains arising from the sale of immovable properties or shares located in Angola if such properties or shares are allocated to the PE (art 4 of the Código do Imposto Industrial/Industrial Income Tax Code ('ITC')).

On the other hand, non-resident entities without a PE in Angola are subject to CIT at the standard 6.5 percent rate levied on the income deriving from services rendered in Angola to entities located herein (Ferreira, 2015:37).

3.2 Capital gains tax on the indirect disposal of immovable property

There is no rule regarding the taxation of income derived from the indirect disposal of immovable property, through a disposal of shares by a non-resident in Angola (such rule exists only for real estate transfer tax purposes) (as per questionnaire response). The real estate transfer tax is levied at a rate of 2 percent on the higher of the declared transaction price and thirty times the officially fixed rent for urban buildings (twenty times the officially fixed annual rent for other property) (Ferreira, 2015:45).

The disposal of shares in an Angolan company by a non-resident (without a PE in Angola) will not be subject to taxation in Angola, irrespective of whether the Angolan company holds immovable property situated in Angola or not (as per questionnaire response).

3.3 Double Tax Agreements ('DTAs')

There are no DTAs concluded by Angola (PwC, 2014).

The tax authorities in Angola do not have processes in place for transparency and exchange of information (including with regard to immovable property) (as per questionnaire response). However, the draft of the Angolan General State Budget for the year 2016 foresees a legislative authorization to adjust domestic tax legislation in the context of international

policies and agreements with the purpose to introduce rationality in the collection, processing and exchange of fiscal information (as per questionnaire response).

3.4 Conclusion

The disposal of an Angolan company's shares by a non-resident (without a PE in Angola) is not subject to taxation in Angola irrespective of whether the Angolan company holds immovable property situated in Angola or not. This applies to a simple as well as a multi-tier structure.

4 BOTSWANA

4.1 Introduction

In Botswana, residents are taxed on their corporate income at a rate of 22 percent and non-residents are taxed on their corporate income at a rate of 30 percent (PwC, 2014).

Section 35 of the Income Tax Act Chapter 52:01 ('Botswana's ITA') read together with the Tenth Schedule of Botswana's Income Tax and the Income Tax (Amendment) Act states that tax is payable on the gains from the disposal of specified capital assets which includes (unless the disposal is in the ordinary course of business):

- i. all movable and immovable property of a business carried on by the company in Botswana;
- ii. investments in debentures and shares; and
- iii. resident property.

The gains derived will be included in the gross income of the taxpayer (Amos, 2016:8).

4.2 Capital gains tax on the indirect disposal of immovable property

As mentioned above, the disposal of shares is subject to CGT (s35 of Botswana's ITA). The disposal of shares in a company that owns immovable property as their underlying dominant assets shall be deemed to be a sale of immovable property (para 4(e) to the Tenth Schedule of Botswana's ITA).

Where the capital gain arises from the sale of shares, only 75 percent of the amount realized is taxable (para 4(f) to the Tenth Schedule of Botswana's ITA). This means that non-residents will be taxed at an effective rate of 22.5%. Where the sale of shares is deemed to be a sale of immovable property, 100 percent of the amount realised is taxable (para 4(f) to the Tenth Schedule of Botswana's ITA). This means that non-residents will be taxed at an effective rate of 30 percent where the sale of shares is deemed to be a sale of immovable property (para 4(f) to the Tenth Schedule of Botswana's ITA).

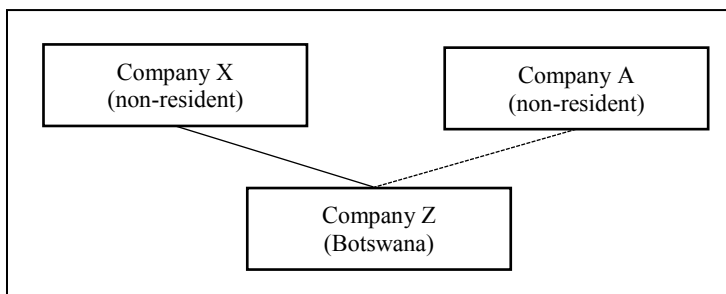
There will be an exemption from CGT if the shares disposed of are in a resident public company or traded on the Botswana Stock Exchange and the taxpayer held the shares for at least one year prior to their disposal (para 1(d) to the Tenth Schedule of Botswana's ITA). The exemption only applies to equity shares where 49 percent or more of those equity shares have been released for trading on the stock exchange (para 1A to the Tenth Schedule of Botswana's ITA).

If the shares are sold at a premium, the excess amount may also attract CGT (as per questionnaire response). If shares are sold at a discount, the Botswana Unified Revenue Service may consider the market value for purposes of calculating the CGT liability (as per questionnaire response).

4.3 Examples of disposals of interests in immovable property

4.3.1 A simple structure – a disposal of a direct interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Botswana. Eighty percent of the value of Company Z's assets is attributable to immovable property in Botswana. Company X then sells its shares in Company Z to Company A, another non-resident company.

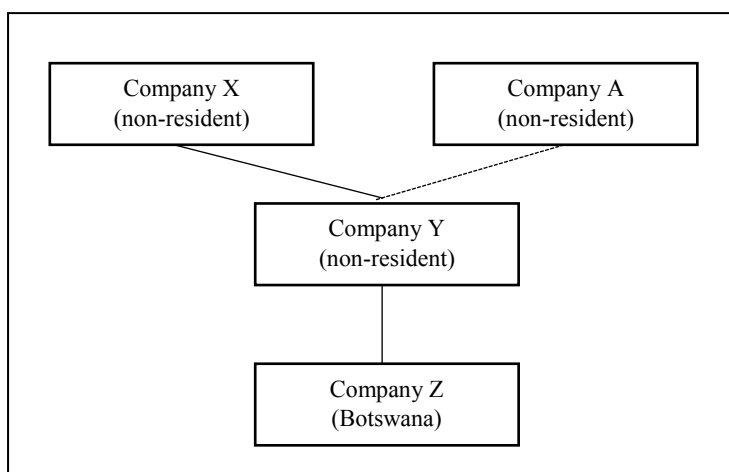


In this example, the disposal of shares will be considered a disposal of immovable property as the underlying dominant asset of Company Z is immovable property. The non-resident will therefore be taxed on the capital gain at a rate of 30%.

This example as well as all further examples only look at domestic tax legislation and do not take into account the effect of DTAs.

4.3.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a tax resident in Botswana. Eighty percent of the value of Company Z's assets is attributable to immovable property in Botswana. Company X sells its shares in Company Y to Company A, another non-resident company.



In this example, there is no tax implication for the non-resident upon the disposal of the shares, unless Company Z is a mining company.

4.4 Double Tax Agreements ('DTAs')

A DTA with Botswana may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Botswana has a DTA with Barbados, France, India, Mauritius, Namibia, Russia, Seychelles, SA, UK and Zimbabwe (PwC, 2014).

Article 14 of the DTA between Botswana and India and Article 13 of the DTA between Botswana and France allocates the taxing right to the country in which the immovable property is located upon the disposal of shares where the shares derive their value or a greater part of their value, directly or indirectly, from immovable property.

Article 14 of the DTA between Botswana and UK has a similar provision however shares substantially and regularly traded on the stock exchange are excluded from the specific provision.

All the DTAs with Botswana contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident. The DTA between Botswana and Barbados, Mauritius, Namibia, Russia, SA, Seychelles and Zimbabwe do not contain a specific provision relating to shares. The gain on disposal will therefore be taxable in the state in which the alienator is resident.

The DTA between SA and Barbados and Seychelles also states in Article 13(5):

“Notwithstanding the provisions of paragraph 4, gains from the alienation of shares or other corporate rights of a company which is a resident of one of the Contracting States derived by an individual who was a resident of that State and who after acquiring such shares or rights

has become a resident of the other Contracting State, may be taxed in the first-mentioned State if the alienation of the shares or other corporate rights occur at any time during the six years next following the date on which the individual has ceased to be resident of that first-mentioned State.”

Article 14(5) of the DTA with Botswana and Mauritius, Namibia and SA contains the same paragraph as above however the “six years” is replaced with “ten years”.

In general, all the DTAs with Botswana contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident unless specified otherwise.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Botswana.

4.5 Conclusion

A direct disposal of shares (in a simple structure) by a non-resident in a Botswana company will be subject to CGT (s35 of Botswana’s ITA) unless a DTA provides otherwise. The rate of CGT will be 30 percent if the dominant underlying assets in the Botswana company is immovable property and 22.5 percent if the dominant underlying assets in the Botswana company is not immovable property (para 4(f) to the Tenth Schedule of Botswana’s ITA read together with PwC, 2014).

There will be an exemption from CGT if the shares disposed of are in a resident public company or traded on the Botswana Stock Exchange and the taxpayer held the shares for at least one year prior to their disposal (para 1(d) to the Tenth Schedule of Botswana’s ITA). The exemption only applies to equity shares where 49 percent or more of those equity shares have been released for trading on the stock exchange (para 1A to the Tenth Schedule of Botswana’s ITA).

There will be no CGT on the indirect disposal of shares (in a multi-tier structure), unless the company in Botswana is a mining company.

5 GHANA

5.1 Introduction

Previously, Ghana's income tax law was regulated by the Internal Revenue Act 2000, Act 592 as amended 'IRA' which was effective up to 31 December 2015 (as per questionnaire response). The tax on capital gains was 15 percent while tax on corporate income was generally 25 percent (PwC, 2014). In terms of section 97 of the IRA, the following assets are subject to CGT:

- “i) buildings of a permanent or temporary nature situated in Ghana;
- ii) business and business assets, including goodwill, of a permanent establishment situated in Ghana;
- iii) land situated in Ghana;
- iv) *shares of a resident company*;
- v) part of, or any right or interest in, to or over any of the assets referred to in (i) to (iv);

and to the extent that they are not chargeable assets as a result of paragraph (i) to (iv); any of the following assets of a resident person:

- i) buildings of a permanent or temporary nature wherever situated;
- ii) business and business assets, including goodwill, wherever situated;
- iii) land wherever situated;
- iv) *shares of a company*;
- v) part of, or any right or interest in, to or over any of the assets referred to in (i) to (iv) above.”

Under the current legislation, the Income Tax Act 2015, Act 896 – ‘Ghana's ITA’ (effective from 1 January 2016), a gain from the realisation of capital assets and liabilities of the business is taxable; where a capital asset includes an asset to the extent to which it is employed in a business or investment; but excludes trading stock or a depreciable asset (as per questionnaire response). Immovable property will fall within the definition of capital asset and its disposal could give rise to tax (as per questionnaire response). Under Ghana's ITA the gains from disposal of capital assets are included in arriving at the taxable income of a person from business and taxed at the general corporate income tax rate of 25 percent (as per questionnaire response).

Only the position under the current legislation – Ghana's ITA - is discussed further.

5.2 Capital gains tax on the indirect disposal of immovable property

There will be tax on the disposal of an interest in immovable property if the non-resident owns at least 25 percent or more of the voting power of the resident company (i.e. the company in Ghana) or if the property of the resident company consists, directly or indirectly through one or more interposed entities, principally of immovable property or interests in

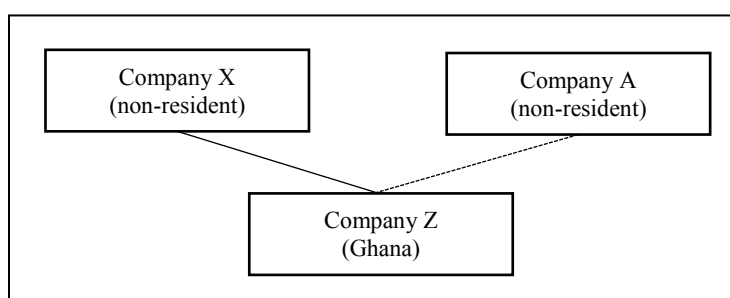
land or buildings situated in Ghana (s106 of Ghana's ITA). There is no exemption for listed shares (as per questionnaire response).

The resident entity will be deemed to have realised its assets and liabilities at the market value and re-acquired it at the same value if there is a change in the underlying ownership of the resident entity by more than 50 percent (s42 of Ghana's ITA). Again, there is no exemption for listed shares (as per questionnaire response).

5.3 Examples of disposals of interests in immovable property

5.3.1 A simple structure – a disposal of a direct interest in immovable property

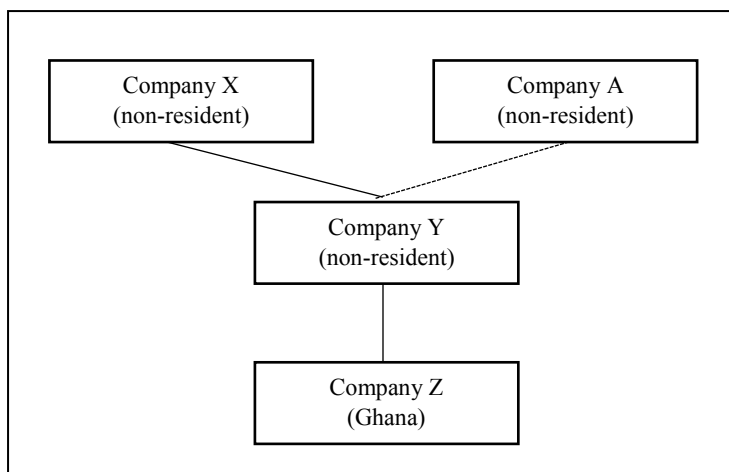
Consider the following example: Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Ghana. Eighty percent of the value of Company Z's assets is attributable to immovable property in Ghana. Company X then sells its shares in Company Z to Company A, another non-resident company.



As mentioned earlier, Company Z will be taxed at a rate of 25 percent if Company X owns at least 25 percent of the voting power in Company Z or if the property of Company Z consists, directly or indirectly through one or more interposed entities, principally of immovable property or interests in land or buildings situated in Ghana (s106 of Ghana's ITA). As Eighty percent of the value of Company Z's assets is attributable to immovable property in Ghana, the capital gain will be taxed at a rate of 25 percent.

5.3.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a tax resident in Ghana. Eighty percent of the value of Company Z's assets is attributable to immovable property in Ghana. Company X sells its shares in Company Y to Company A, another non-resident company.



There will be no capital gains consequences arising from the disposal by Company X of its shares in Company Y as this does not result in a disposal of shares in a resident entity.

However, if within any three year period, there is a change in underlying ownership of Company Z by more than 50 percent, company Z is deemed to have realised its assets and liabilities at the market value and re-acquired it at the same value (s42 of Ghana’s ITA).

5.4 Withholding tax and filing obligations

Based on the examples above, no withholding tax will arise on the indirect disposal of immovable property (as per questionnaire response). However, where a gain is derived, a CGT return is required to be filed within 30 days (Munyandi, 2015:18).

5.5 Double Tax Agreements (‘DTAs’)

A DTA with Ghana may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Ghana has a DTA with Belgium, Denmark, France, Germany, Italy, Netherlands, SA, Switzerland and the United Kingdom. A DTA with Barbados is awaiting conclusion and/or ratification (PwC, 2014).

Article 13 of the DTA between Ghana and Denmark, France, Germany, Italy, SA, Switzerland and UK allocates the taxing right to the country in which the immovable property is located, where the shares derive their value or the greater part of their value directly or indirectly from immovable property.

The DTA between Ghana and Netherlands contains a similar provision however the taxing right is allocated to the country in which the immovable property is situated only where the shares derive 90 percent of their value directly or indirectly from immovable property and where the resident owns, directly or indirectly, a minimum of 5 percent of the issued shares.

In general, all the DTAs with Ghana contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident unless specified otherwise.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Ghana.

Ghana does not have a transparency and exchange of information process specifically with respect to immovable property (as per questionnaire response). There is however a general provision in Ghana's ITA on the general disclosure of information via an agreement with another country (s20 of Ghana's ITA).

5.6 Conclusion

CGT will be levied in a simple structure where there is a disposal of shares in a resident company where the non-resident owns at least 25 percent or more of the voting power of the resident company or if the property of the resident company consists, directly or indirectly through one or more interposed entities, principally of immovable property or interests in land or buildings situated in Ghana (s106 of Ghana's ITA), unless a DTA provides otherwise.

No CGT will be levied on the disposal of shares in a multi-tier structure where no shares in a resident company are directly disposed of. However, the resident entity will be deemed to have realised its assets and liabilities at the market value and re-acquired it at the same value if there is a change in underlying ownership of the resident entity by more than 50 percent (s42 of Ghana's ITA).

6 KENYA

6.1 Introduction

Kenya re-introduced tax on capital gains on the disposal of property situated in Kenya with effect from 1 January 2015 after nearly 30 years of suspension (Kenya Revenue Authority, 2015:1). Property is broadly defined under the Income Tax Act, Rev 2012, Chapter 470 ('Kenya's ITA') to include land, buildings, investment shares and every description of property, whether movable or immovable (Eighth Schedule to Kenya's ITA).

Kenya's ITA also introduced, with effect from 1 January 2015, a tax on the net gains derived from the disposal of an interest in a person owning immovable property in the mining and petroleum industry (as per questionnaire response). For the purposes of this tax, "immovable property" means a mining right, an interest in a petroleum agreement, mining information or petroleum information (as per questionnaire response).

The rate of tax applicable on the gains from the disposal of property (other than an interest in a person owning immovable property in the mining and petroleum industry) is 5 percent (Kenya Revenue Authority, 2015:1). This rate is different from the corporate income tax rate which is 30 percent for resident corporates and 37.5 percent for non-residents with permanent establishments (PwC, 2014).

The rate of tax that applies on the net gains derived from the disposal of an interest in a person owning immovable property in the mining and petroleum industry is the corporate income tax rate (i.e. 30 percent for residents and 37.5 percent for non-residents with permanent establishments) (PwC, 2014).

6.2 Capital gains tax on the indirect disposal of immovable property

6.2.1 Taxation of gains on disposal of shares in a company outside the mining and petroleum industry

The provisions on the taxation of gains on the direct disposal of property outside the mining and petroleum industry are contained in the Eighth Schedule (as per questionnaire response). There are no specific rules on the taxation of an indirect transfer of property (including shares) under the Eighth Schedule (as per questionnaire response).

Section 3(2)(f) of Kenya's ITA brings gains accruing in the circumstances prescribed in the Eighth Schedule into the net of income which is taxable in terms of Kenya's ITA. Paragraph 2 of the Eighth Schedule provides that: "...income in respect of which tax is chargeable

under section 3(2)(f) is the whole of a gain which accrues to a company or an individual on or after 1st January, 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015.”

As paragraph 2 refers to the transfer of “property”, it is necessary to know what “property” is defined as. The Eighth Schedule states that the term “property” in the case of a company has the meaning assigned in the Interpretation and General Provisions Act (para 1(1)(a)).

Section 3 of the Interpretation and General Provisions Act defines the word "property":

““[P]roperty” includes money, goods, choses in action, land and every description of property, whether movable or immovable; and also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as herein defined.”

Section 3 further defines immovable property as follows:

““[I]mmovable property" includes land, whether covered by water or not, any estate, right, interest or easement in or over any land and things attached to the earth or permanently fastened to anything attached to the earth, and includes a debt secured by mortgage or charge on immovable property.”

This means that a direct disposal of shares (which is considered property) in any company that is incorporated in Kenya is liable to CGT in Kenya at 5 percent regardless of whether the company owns immovable or movable property (s34(1)(j) of Kenya’s ITA).

6.2.2 Taxation of gains on disposal of shares of a company within the mining and petroleum industry – Where a company derives at least 20 percent value from immovable property in Kenya

Section 3(2)(g) of Kenya’s ITA brings the “net gain derived on the disposal of an interest in a person, if the interest derives twenty percent or more of its value, directly or indirectly, from immovable property in Kenya” into the tax net.

For the purposes of taxing net gains on the disposal of an interest in a person that owns immovable property in the mining and petroleum industry in Kenya, immovable property is defined under Kenya’s ITA as follows (s3(2)(g)):

““Immovable property” means a mining right, an interest in a petroleum agreement, mining information or petroleum information.”

The amount of the net gain to be included in income chargeable to tax is computed according to the following formulae (s15(5A) of Kenya’s ITA):

$$\text{Net taxable gain} = A \times B/C$$

Where –

A is the amount of the net gain; B is the value of the interest derived, directly or indirectly, from immovable property in Kenya; and C is the total value of the interest.

“Net gain” is defined to mean the consideration for the disposal reduced by the cost of the interest (s3(3) of Kenya’s ITA).

The calculation considers the interest in a person and not the assets/liabilities (as per questionnaire response). The Ninth Schedule to Kenya’s ITA defines “interest in a person” to include “a share or other membership interest in a company, an interest in a partnership or trust, or any other ownership interest in a person”.

The value of the shares is the consideration received on the transfer/disposal of the shares or where the transaction involves related parties, the value will be the higher of the open market value of the shares and the consideration (as per questionnaire response). There is no provision that requires valuation of all the assets (as per questionnaire response). However in order to determine the open market value, it is expected that a valuation may need to be done (as per questionnaire response). This market value would not differ if the shares were sold at a premium or at a discount on the gross market value (as per questionnaire response).

Consider the following example: If the market value of land and buildings is KES 2 million and the market value of plant and machinery is KES 1 million, the market value of the assets would be KES 3 million. The shares are then sold for KES 4 million. The entire consideration of KES 4 million will be used in the determination of gains that should be subject to tax on capital gains given that the property being disposed is the shares and not the immovable property (as per questionnaire response).

Tax upon the total income of a person other than an individual is chargeable at the corporation tax rate (s34(1)(e) of Kenya’s ITA). The corporation tax rate under the Third Schedule is 30 percent for resident corporates and 37.5 percent for non-residents with permanent establishments in Kenya.

6.2.3 Taxation of gains on disposal of shares of a company within the mining and petroleum industry – Where a company derives less than 20 percent value from immovable property in Kenya

The provisions on the taxation of such gains are contained in the Eighth Schedule. Under Paragraph 3(1) of the Eighth Schedule to the ITA, “[i]ncome is not chargeable to tax under

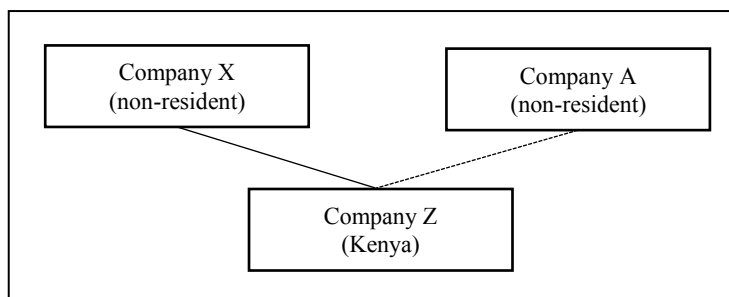
section 3(2)(f) where, and to the extent that, it is chargeable to tax under any other provision of this Act”.

As such, given that gains on the sale of shares in a company that derives less than 20 percent of its value from immovable property in the mining and petroleum industry in Kenya is excluded from tax under section 3(2)(g), it thus follows that the gains should then be taxed under section 3(2)(f).

6.3 Examples

6.3.1 A simple structure – a disposal of a direct interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Kenya. Eighty percent of the value of Company Z’s assets is attributable to immovable property in Kenya. Company X then sells its shares in Company Z to Company A, another non-resident company.



Where Company Z does not own immovable property in the mining and petroleum industry, gains accruing to Company X on the disposal of its shares in Company Z would be liable to tax on capital gains at a rate of 5 percent regardless of whether the company owns immovable or movable property. Note that the tax of 5 percent only applies where a gain accrues on the disposal of property that is situated in Kenya. Shares are considered to be situated in Kenya if their share registry is in Kenya.

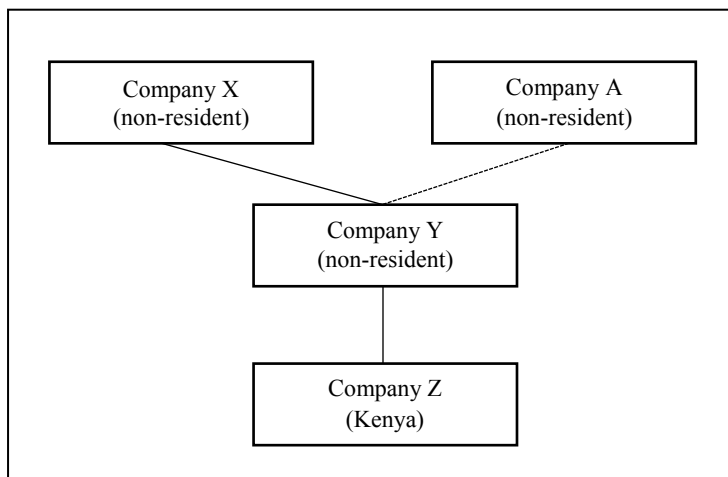
If Company Z derives 20 percent or more of its value in immovable property in the mining and petroleum industry in Kenya, then net gains on sale of its shares should be subject to tax at the corporate income tax rate (s3(2)(g) of the ITA).

However, where Company Z derives less than 20 percent of its value from immovable property in the mining and petroleum sector, the taxation of the net gains thereof would be guided by the Eighth Schedule to the ITA. Under the aforesaid schedule, net gains from the disposal of shares in Company Z would be subject to tax at the rate of 5 percent.

In all the above cases, the tax is payable by the seller (in this case Company X).

6.3.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a company tax resident in Kenya. Eighty percent of the value of Company Z's assets is attributable to immovable property in Kenya. Company X later sells its shares in Company Y to Company A, another non-resident company.



As discussed earlier, the substantive provisions relating to tax on gains from the transfer of property (including shares) in a company that does not own immovable property in the mining and petroleum industry in Kenya are contained in the Eighth Schedule. There are no specific rules on the taxation of an indirect transfer of property (including shares) under the Eighth Schedule. As such, gains from the disposal of shares in Company Y should not attract CGT in Kenya. This is because the shares being disposed of or transferred are not considered to be situated in Kenya as their share registry is not in Kenya.

If Company Z derives 20 percent or more of its value in immovable property in the mining and petroleum industry in Kenya, then the net gains on sale of shares in Company Y would be subject to tax at the corporate income tax rate. Net gains in this case will be computed using the formula provided above. Where Company Z derives less than 20 percent of its value from immovable property in the mining and petroleum sector, the taxation of the net gains thereof would be guided by the Eighth Schedule to Kenya's ITA. There are no specific rules on the taxation of an indirect transfer of property (including shares) under the Eighth

Schedule to Kenya's ITA. As such, gains from the disposal of shares in Company Y should not attract CGT in Kenya.

6.4 Withholding tax and filing obligations

The seller, Company X in the examples above, as a non-resident not having a permanent establishment in Kenya, can be assessed in its name or appoint an agent in Kenya who can do all the tax payment and filing requirements on its behalf (as per questionnaire response). The tax is payable by the seller (as per questionnaire response). Where the seller will opt to be assessed in its own name, it will be required to register for tax in Kenya in order to pay the tax and also file the tax return thereof (Omondi, 2015:16).

There are no withholding tax obligations from payments to non-residents specifically with regard to the CGT on the indirect disposal of immovable property (Omondi, 2015:24). Tax on capital gains is accounted through a self-assessment mechanism by the seller (whether resident or non-resident) (Omondi, 2015:16).

6.5 Double Tax Agreements ('DTAs') and exchange of information

The agencies of the Kenya government are interlinked and usually exchange information with the Kenya Revenue Authority (as per questionnaire response). In addition, the Kenya Revenue Authority has recently been very aggressive on rental income from immovable property and it goes without saying that the disposal of any immovable property will also attract questions by the Kenya Revenue Authority (as per questionnaire response).

There is a view that the tax authority is able to enforce the relevant tax legislation (based on experience) (as per questionnaire response).

A DTA with Kenya may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Kenya has a DTA with Canada, Denmark, France, Germany, India, Norway, SA, Sweden, UK and Zambia. A DTA with Italy, Mauritius, SA, UAE and East African Double Tax Agreement is awaiting conclusion and/or ratification (PwC, 2014).

Article 13 of the DTA between Kenya and Canada allocates the taxing right to the country in which the immovable property is located where the shares derive their value principally from immovable property.

Article 13 of the DTA between Kenya and France and SA contains a similar provision however specifically includes shares that “directly or indirectly” derive their value principally from immovable property.

In contrast, Article 1 of the DTA between Kenya and India states that gains from a disposal of shares may not be taxed in the country where the immovable property is situated in the scenario where the shares derive their value principally from immovable property.

Article 13(2) of the DTA between Kenya and Sweden states:

“Gains derived from the sale, transfer or exchange of any capital assets other than real property by a resident of a Contracting State who does not carry on a trade or business in the other Contracting State through a permanent establishment situated therein shall be exempt from tax in that other State.”

Article 13 of the DTA between Kenya and Germany states that gains from the alienation of shares of a company which is a resident of a contracting state may be taxed in that state.

In general, the DTAs with Kenya contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident. The DTA between Kenya and Denmark, Norway, UK and Zambia does not have a specific provision that relates to the disposal of shares which results in the gain being taxed in the country in which the alienator is a resident unless specified otherwise.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Kenya.

6.6 Conclusion

There will be CGT in a simple structure upon the disposal of shares in a company resident in Kenya unless a DTA provides otherwise. The CGT will be a rate of 5 percent where the company does not own immovable property in the mining and petroleum industry or the company Z derives less than 20 percent or more of its value in immovable property in the mining and petroleum industry in Kenya. The CGT will be at a rate of 30 percent for resident corporates and 37.5 percent for non-residents with permanent establishments in Kenya where Company Z derives 20 percent or more of its value from immovable property in the mining and petroleum sector.

There will be no CGT consequences in a multi-tier structure where the shares being disposed of are not situated in Kenya when there is a disposal of shares in a company that does not own immovable property in the mining and petroleum industry in Kenya or when a company

disposes of shares that derives less than 20 percent of its value from immovable property in the mining and petroleum sector in Kenya. There will however be CGT consequences in a multi-tier structure where the shares being disposed of are not situated in Kenya if the Company resident in Kenya derives 20 percent or more of its value in immovable property in the mining and petroleum industry in Kenya.

7 LESOTHO

7.1 Introduction

In Lesotho, the tax on capital gains forms part of income tax and is taxed at a rate of 25 percent (PwC, 2015). Section 103 of the Income Tax Act 1993 Consolidate Version ('Lesotho's ITA') provides a comprehensive set of source rules for identifying whether income is Lesotho-source income. This is particularly relevant for the taxation of non-residents, as only Lesotho-source income is included in the gross income of a non-resident taxpayer under section 17(3), or subject to withholding tax under section 107. Any income, which is not Lesotho-source income, is treated as foreign-source income under subsection (2). This is particularly relevant to the foreign tax credit allowed to residents under section 105, as credit is only allowed for foreign tax paid in respect of foreign-source income (s103 of The Kingdom of Lesotho Income Tax Order 1993 Explanatory Memorandum).

7.2 Capital gains tax on the indirect disposal of immovable property

The relevant provision of Lesotho's ITA states that (s103(1)(d)):

"103(1) Income is Lesotho-source income if it is -...

- (d) derived from immovable property located in Lesotho, including gains from the disposal of an interest in such immovable property and from the disposal of shares in a company the property of which consists directly or indirectly principally of interests in immovable property located in Lesotho; or..."

Based on section 103(1)(d), a non-resident will be taxed in Lesotho when:

- i. there is a disposal of immovable property located in Lesotho;
- ii. there is a disposal of an interest in immovable property; or
- iii. there is a disposal of shares in a company in which the property consisted directly or indirectly principally of interests in immovable property located in Lesotho.

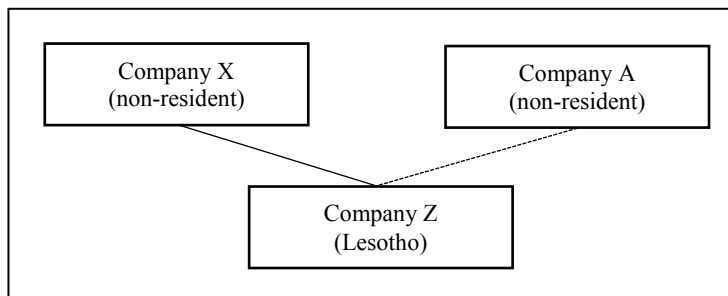
There is no further information given in Lesotho's ITA nor the Explanatory Memoranda as to the definition of "interests in immovable property" (as per questionnaire response).

7.3 Examples

7.3.1 A simple structure – a disposal of a direct interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Lesotho. Eighty percent of the value of

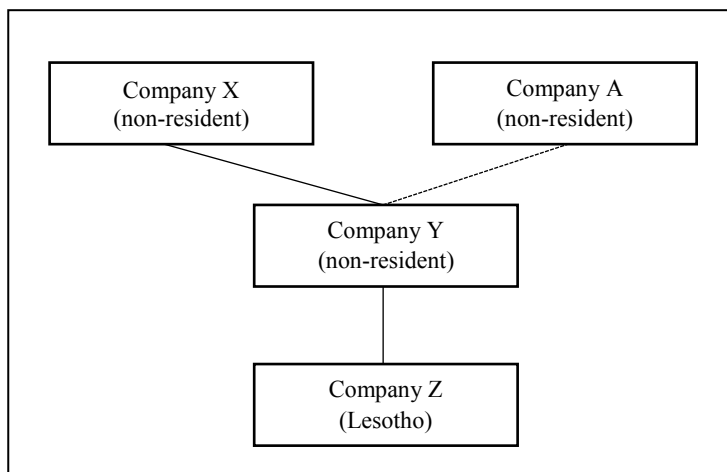
Company Z's assets is attributable to immovable property in Lesotho. Company X then sells its shares in Company Z to Company A, another non-resident company.



In this example, there was a disposal of shares in Company Z which will be Lesotho-source income provided the property in Company Z in Lesotho consists directly or indirectly principally of interests in immovable property located in Lesotho. As non-residents are taxed on Lesotho-source income, the non-resident will be subject to CGT which is incorporated into income tax and will be taxed at a rate of 25 percent.

7.3.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a company tax resident in Lesotho. Eighty percent of the value of Company Z's assets is attributable to immovable property in Lesotho. Company X later sells its shares in Company Y to Company A, another non-resident company.



In the example, there are no tax implications for a non-resident.

In my opinion, section 103(1)(d) provides room for taxing CGT in a multi-tier structure. However, in practice there are no tax implications on the indirect sale of shares (as per questionnaire response).

7.4 Valuation of shares

Shares are valued based on the open market value (as per questionnaire response). The selling price can be an indication of the value of shares (as per questionnaire response). If the shares were sold at a premium or at a discount on the gross market value, the value would be apportioned (as per questionnaire response).

7.5 Withholding tax

There are withholding tax obligations for payments to non-residents in regard to the CGT on the indirect disposal of immovable property (s107 of Lesotho's ITA).

7.6 Double Tax Agreements ('DTAs')

In practice, the Lesotho Revenue Authority has found it difficult to administer and enforce section 103(1)(d) (as per questionnaire response). Lesotho does not have processes in place for transparency and exchange of information (as per questionnaire response).

A DTA with Lesotho may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Lesotho only has DTAs with SA, United Kingdom and Mauritius (PwC, 2014).

Article 13 of the DTA between Lesotho and Mauritius allocates the taxing right to the country in which the immovable property is located where the shares derive their value principally from immovable property.

The DTA between Lesotho and SA has no specific provision relating to capital gains. The taxing right would be dealt with in terms of the business profits article or the "other income" article.

The DTA between Lesotho and UK states that each contracting state may tax capital gains in accordance with the provisions of its domestic law.

In general, the DTAs with Lesotho contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident unless specified otherwise.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Lesotho.

7.7 Conclusion

In a simple structure where there is a direct disposal of shares in a company in Lesotho, non-residents will be subject to CGT at a rate of 25 percent when the property in the company in Lesotho consists directly or indirectly principally of interests in immovable property located in Lesotho unless a DTA provides otherwise. There will be no CGT consequences in a multi-tier structure where there is an indirect disposal of shares in a company in Lesotho.

8 MADAGASCAR

8.1 Introduction

Prior to 1 January 2016 the disposal of immovable property in Madagascar did not give rise to tax on capital gains (as per questionnaire response). This was regulated by the Loi n° 2015 – 050 du 29 décembre 2015 portant Loi de Finances pour 2016 ('Loi') (as per questionnaire response). However, the Finance Law 2016 introduced new provisions in relation to the application of tax on capital gains on the disposal of immovable property which was incorporated into the Loi with effect from 1 January 2016 (as per questionnaire response).

8.2 Capital gains tax on the indirect disposal of immovable property

Article 01.01.04 of the Loi states that the disposal of shares deriving value from immovable property as from 1 January 2016 may give rise to CGT. The following is now also considered as income earned in Madagascar (Article 01.01.04 of the Loi):

“3 b The transfer of shares in entities for which all or part of entity value is derived directly or indirectly from properties situated in Madagascar, or rights relating to such properties.”

The rate of CGT is 20 percent applicable on the difference between the selling price and the cost price (PwC, 2015). In the event that the cost price is not identifiable, it will be fixed at a flat rate of 75 percent of the selling price (as per questionnaire response).

8.3 Double Tax Agreements ('DTAs')

A DTA with Madagascar may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Madagascar has DTAs with France and Mauritius. A DTA with Canada is awaiting conclusion and/or ratification (PwC, 2014).

Article 13 of the DTA between Madagascar and France and Mauritius states:

“Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6, or from the alienation of shares or similar rights in companies whose purpose is the construction or acquisition of immovable property or groups of immovable property which is destined to be divided into parts and allocated to their members to be owned or used, or whose purpose is the management of such immovable property or groups of immovable property so divided and allocated, or in companies whose assets consist principally of immovable property, may be taxed in the other Contracting State where the immovable property is situated. The provisions of this paragraph shall not apply to immovable property used by a company for the purposes of its industrial, commercial or agricultural activities or in the performance of non- commercial professional activities.”

In terms of this provision, the taxing right is allocated to the country in which the immovable property is located where the shares derive their value principally from immovable property.

Both the DTA between Madagascar and France and Mauritius contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Madagascar.

8.4 Conclusion

With effect from 1 January 2016, there is CGT on the disposal of shares where part or all of its value is derived, directly or indirectly, from immovable property situated in Madagascar unless a DTA provides otherwise.

9 MOZAMBIQUE

9.1 Introduction

The disposal of immovable property by a non-resident company is subject to CGT in Mozambique (as per questionnaire response). When immovable property is directly disposed of by a non-resident company (i.e. the property is not held through another company in Mozambique) then an effective tax rate of 16 percent will apply (32 percent corporate tax rate with a 50 percent deemed inclusion rate) (as per questionnaire response). The disposal of shares is also subject to CGT (as per questionnaire response).

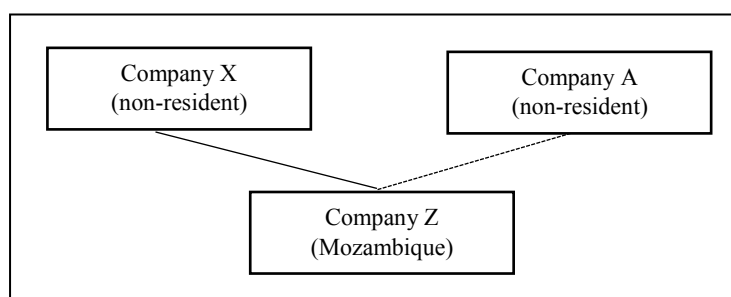
9.2 Capital gains tax on the indirect disposal of immovable property

The direct or indirect disposals of shares in Mozambican companies are subject to CGT in Mozambique at an effective rate of 32 percent, irrespective of the proportion of the value that is attributable to immovable property (as per questionnaire response).

9.3 Examples

9.3.1 A simple structure – a disposal of a direct interest in immovable property

Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Mozambique. Eighty percent of the value of Company Z's assets is attributable to immovable property in Mozambique. Company X then sells its shares in Company Z to Company A, another non-resident company.

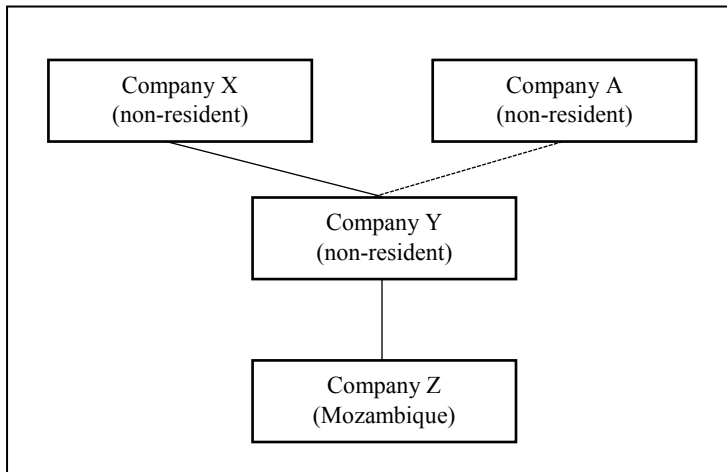


The capital gain derived by Company X from the sale of the shares in Company Z will be subject to 32 percent CGT in Mozambique. Company X will be required to register for tax, and pay the tax in Mozambique.

9.3.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a company tax resident in Mozambique.

Eighty percent of the value of Company Z’s assets is attributable to immovable property in Mozambique. Company X later sells its shares in Company Y to Company A, another non-resident company.



The capital gain derived by company X from the sale of the shares in company Y will be subject to 32 percent CGT in Mozambique as it will be regarded as the indirect disposal of company Z in Mozambique. Company X will be required to register for tax, and pay the tax in Mozambique.

9.4 Double tax agreements (‘DTAs’)

A DTA with Mozambique may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Mozambique has DTAs with Macau, Mauritius, India, Italy, Portugal, SA, United Arab Emirates and Vietnam⁶ (PwC, 2014).

Article 13 of the DTA between Mozambique and India, SA and United Arab Emirates allocates the taxing right on a gain, upon disposal of shares of the capital stock of a company, to the country in which the immovable property is located where the shares derive their value, directly or indirectly, principally from that immovable property. The DTA between Mozambique and India has an additional provision stating that gains from the disposal of other shares in a company may be taxed in the country in which the company is a resident.

Assuming that shares of any kind will not be considered “immovable property” under the law of the country in which the property is situated - in terms of the article 13 of the DTA

⁶ The Mozambique – Vietnam DTA (2010) is only available in Portuguese and Vietnamese, and therefore has not formed part of the discussion.

between Mozambique and Italy, Macau and Mauritius - gains from the disposal of shares will be taxed only in the country in which the alienator is a resident.

The DTA between Mozambique and Portugal has a unique provision. Article 13 states:

“Gains from the alienation of participations in the capital of a company which is a resident of a Contracting State may be taxed in that State, but the tax so charged on the capital gain realized, after deduction of any capital loss sustained, shall not exceed 10 percent of the positive balance thereof, if any; the capital gain and capital loss being computed as the difference between the value of alienation and of acquisition, as adjusted, of such participations.”

It is my understanding that this provision means that gains from the disposal of shares in a company may be taxed in the country in which the company is a resident (assuming that shares of any kind will not be considered “immovable property” under the law of the country in which the property is situated).

In general, the DTAs with Mozambique contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident unless specified otherwise.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Mozambique.

9.5 Conclusion

There will be CGT at a rate of 32 percent on the direct and indirect disposal of shares regardless of what percentage of the shares are attributable to immovable property unless a DTA provides otherwise. This will apply to a simple structure as well as a multi-tier structure.

10 NAMIBIA

10.1 Introduction

Namibia does not have CGT, other than profits on the sale of mining licences/rights (PwC, 2014). Immovable property is not defined in Namibia's domestic law (as per questionnaire response). In terms of the common law definition, immovable property relates to land and anything that is permanently attached to land (as per questionnaire response).

10.2 Capital gains tax in Namibia on the indirect disposal of immovable property

Shares are considered to be movable property and accordingly, the sale of shares in a company owning property in Namibia will not be subject to tax in Namibia (as per questionnaire response).

However, there will be tax consequences if a mining right/licence is disposed or when there is an alienation or transfer of shares in a company/member's interest in a company holding a mineral licence/right (as per questionnaire response). In terms of the gross income definition, any sale, donation, expropriation cession, grant, or other alienation or transfer of ownership of a licence or right to mine minerals is subject to tax in Namibia (section 1(o) of the Income Tax Act 24 of 1981). The paragraph also specifically includes a sale of shares in a company owning a licence or right to mine minerals in Namibia (as per questionnaire response).

In September 2015, the Minister of Finance tabled a new Income Tax Amendment Bill (as per questionnaire response). The newly proposed paragraph (o) in section 1(a) of the Income Tax Amendment Bill further includes the sale, donation, expropriation, cession, grant or any other alienation or transfer of ownership of any share or member's interest in a company that holds a mineral licence or mineral right *whether directly, or indirectly* (as per questionnaire response). This also extends to companies in the oil and gas industry (as per questionnaire response).

10.3 Double tax agreements ('DTAs')

Namibia has a DTA with Botswana, France, Germany, India, Malaysia, Mauritius, Romania, Russia, SA, Sweden and the United Kingdom (PwC, 2014). It is not necessary to analyse the provisions of these DTAs as Namibia does not tax the gain on the disposal of shares.

10.4 Conclusion

There are no CGT consequences on the disposal of shares (in a simple structure) nor an indirect disposal of shares (in a multi-tier structure) of a Namibian company regardless of

whether the value of the shares is attributable to immovable property. There will however be CGT consequences of the disposal of shares holding a mineral license or right.

11 NIGERIA

11.1 Introduction

CGT was introduced in Nigeria in 1967 (as per questionnaire response). The legislation governing taxation of capital gains in Nigeria is the Capital Gains Tax Act CAP C1 LFN 2010 ('CGTA'). Capital gains are gains accruing to any person (company/corporate body or individual) on the disposal of a chargeable asset (as per questionnaire response). Section 3 of the CGTA defines chargeable assets as all forms of property including options, debts, any currency other than the Naira and any form of property created by the person disposing of it whether located in Nigeria or not.

Nigeria levies CGT at a rate of 10 percent on the difference between the selling price and the acquisition price plus costs of improvements plus incidental costs of acquisition and disposal (s11 of CGTA).

11.2 Capital gains tax in Nigeria on the indirect disposal of immovable property

CGT would apply to the disposal of most forms of property including a disposal of immovable property (as per questionnaire response). However, disposals of shares are exempt from Nigerian CGT (s30 of the CGTA). This means that a sale of shares in a company owning land or other immovable property is exempt from Nigerian CGT. Not surprisingly, it is normal practice to own land in a single asset company, so it can be sold free of CGT (as per questionnaire response). This also avoids having to pay the governor's consent fee (as per questionnaire response). The only tax on the sale of the shares is the stamp duty of 2.50 USD per transaction (i.e. not per share) (as per questionnaire response).

Nigeria does not have any legislation on indirect disposals of immovable property (as per questionnaire response). Regardless of whether the shares sold are in a Nigerian company or a foreign company, there is no deemed disposal of Nigerian property and no Nigerian CGT liability (as per questionnaire response). From time to time, Nigerian politicians have complained about tax foregone on large so called gains, for example, when foreign oil companies have merged e.g. the Exxon acquisition of Mobil - as they see this as a disposal of Nigerian property (as per questionnaire response). There is no provision in Nigerian's tax law to subject these transactions to tax and no bill to change this has been introduced in the national assembly to date (as per questionnaire response).

11.3 Double tax agreements ('DTAs')

Nigeria has a DTA with Belgium, Canada, China, Czech Republic, France, Netherlands, Pakistan, Philippines, Romania, Slovakia, SA and the United Kingdom (PwC, 2014). It is not necessary to analyse the provisions of these DTAs as Nigeria does not tax the gain on the disposal of shares.

11.4 Conclusion

There are no CGT consequences on the disposal of shares (in a simple structure) nor an indirect disposal of shares (in a multi-tier structure) of a Nigerian company regardless of whether the value of the shares is attributable to immovable property.

12 TANZANIA

12.1 Introduction

According to Tanzanian domestic tax legislation, capital gains are subject to corporate income tax at a rate of 30 percent (PwC, 2014). The legislation does not distinguish between movable and immovable property (as per questionnaire response).

The chargeable income of a non-resident from any employment, business or investment shall be the person's income from the employment, business or investment for the year of income, but only to the extent that the income has a source in Tanzania (s6(1)(b) of the Income Tax Act, 2004 ('Tanzanian ITA')). A payment will have a source in Tanzania where the payment was made in respect of the acquisition of a domestic asset, incurring of a domestic liability or realization of such an asset or liability (s69(1)(i) of the Tanzanian ITA)).

12.2 Capital gains tax in Tanzania on the disposal of an indirect interest in immovable property

A domestic asset is an asset owned by a resident person, an interest in land or buildings situated in Tanzania and shares in a resident corporation where the owner directly or indirectly holds at least 25 percent of the voting rights (s3 of the Tanzanian ITA).

Capital gains arising from the direct sale of shares will be subject to 30 percent corporate income tax on the capital gain obtained upon the disposal of shares provided the share owner directly or indirectly holds at least 25 percent of the voting rights (as per questionnaire response). The gain is calculated as the difference between the proceeds and the cost of the acquisition of the shares (s36(1) of the Tanzanian ITA), unless it is a transfer to an associated entity (s44(1)(a) of the Tanzanian ITA).

Resident companies will not be subject to CGT on the disposal of listed shares; and non-residents will not be subject to CGT on the disposal of shares for shareholdings below 25 percent or shares listed on the Dar es Salaam Stock Exchange (Hira, 2016:12).

12.3 Change in controls ('CIC')

Section 56 of the of the Tanzanian ITA deals with change in controls. The main changes to this section were in paragraph 26 of the Finance Act 2012 (although minor changes were made in paragraph 37 of the Finance Act 2014) (as per questionnaire response). According to the Bill Supplement to the Finance Act 2012, the objective of these amendments was:

“...widening the tax base by including in tax net gains on the sale of shares or securities held in a resident entity to counteract the current tax avoidance practice of selling local companies through overseas holding companies...” (Ernst & Young, 2013)

Section 56(1) of the of the Tanzanian ITA as amended by the paragraph 26 of the Finance Act 2012 and paragraph 37 of the Finance Act 2014 states:

“When the underlying ownership of an entity changes by more than fifty percent as compared with that ownership at any time during the previous two years, the entity shall be treated as realising any assets owned and any liabilities owed by it immediately before the change.”

The CIC provisions are triggered where the ultimate ownership of an entity changes by more than fifty percent as compared with that ownership at any time during the previous two years (section 56(1) of the Tanzanian ITA). The CIC rules can be applied up the chain, so that regardless of where the disposal or dilution occurs, the disposal/dilution that, in a two year cycle, results in a more than 50 percent aggregate change in the shareholders in a Tanzania company (or PE), could trigger the CIC rules and resultant Tanzania tax charge for the Tanzania company (as per questionnaire response). Section 56 applies to both movable and immovable property; however does not apply to day-to-day transactions on the stock exchange (as per questionnaire response).

When a CIC occurs, the consequences are the following:

- a) The accounting (and tax year) of the entity is split into two separate periods of tax assessment, one ending on the CIC date and the other starting on the next day (section 56(3) of the Tanzanian ITA).
- b) The Tanzanian entity is deemed to have disposed of any assets owned by it immediately before the change, and to re-acquire these assets immediately after such change. Both the deemed disposal and re-acquisitions are deemed to take place at market value (s56(1) of the Tanzanian ITA).
- c) Gains from the deemed disposal are taxed at the level of the Tanzanian entity at a rate of 30 percent (PwC, 2014).

If the Tanzanian company has incurred tax losses before the change in control, these losses can be offset against any gains resulting from the deemed disposal of assets (section 56(2) of the Tanzanian ITA). These losses can be offset as indicated provided that for a period of two years after the change in control, the Tanzanian company continues to conduct the same business and in the same manner as in the last 12 month period before the CIC (section 56(4))

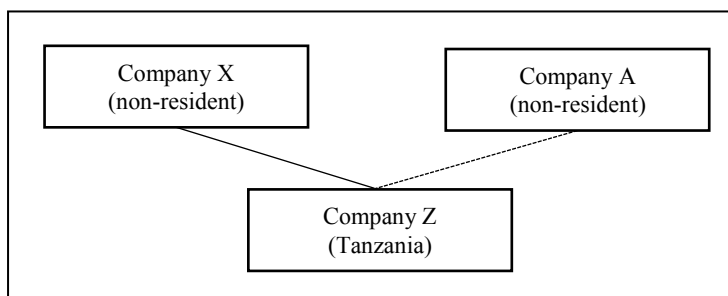
of the Tanzanian ITA). The local entity will otherwise forfeit any unutilised losses and tax credits (section 56(2) of the Tanzanian ITA).

All assets are rebased to market value and tax depreciation on qualifying assets will be claimed on the rebased amounts (as per questionnaire response). No tax depreciation can be claimed on goodwill realised upon application of the CIC provisions (as per questionnaire response).

12.4 Examples

12.4.1 A simple structure – a disposal of a direct interest in immovable property

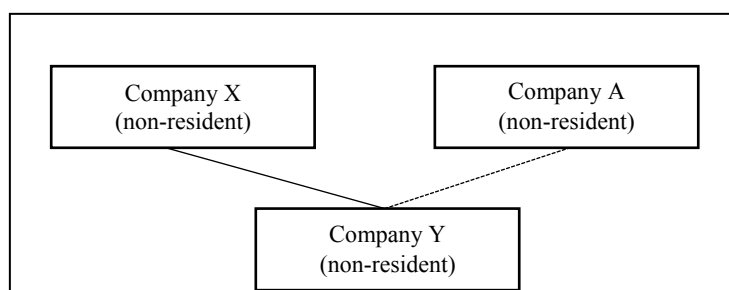
Consider the following example: Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Tanzania. Eighty percent of the value of Company Z's assets is attributable to immovable property in Tanzania. Company X then sells its shares in Company Z to Company A, another non-resident company.



The shares in Company Z would be considered a domestic asset as defined in section 3 provided that Company X directly or indirect holds at least 25 percent of the voting power. The gain on the disposal of the shares would therefore be subject to corporate income tax in Tanzania at a rate of 30 percent regardless of whether Company Z holds immovable property.

12.4.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a company tax resident in Tanzania. Eighty percent of the value of Company Z's assets is attributable to immovable property in Tanzania. Company X later sells its shares in Company Y to Company A, another non-resident company.



Company Z (the Tanzanian entity) will be treated as realising its assets and liabilities at market value where the underlying share ownership (ultimate shareholders) of the Tanzanian entity changes by more than 50 percent in any two year period. The gain or loss on the realisation of the assets and liabilities will be subject to income tax at 30 percent in the Tanzanian entity. Assets will include goodwill where a gain can apply to the extent the market value of the company as a whole exceeds the market value of the other assets.

12.5 Withholding tax

On disposal of a Tanzanian entity, the non-resident company making the disposal is required to pay an upfront amount of 20 percent of the gain obtained in the transaction prior to the transfer of titles and the balance of 10 percent is required to be paid at the time of filing the income tax return (s90(1)-(2) of the Tanzanian ITA). However, in practise non-residents pay an upfront amount of 30 percent before the transfer through their associates who are resident in Tanzania (as per questionnaire response).

12.6 Double Tax Agreements ('DTAs')

A DTA with Tanzania may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Tanzania currently has DTAs with Canada, Denmark, Finland, India, Italy, Norway, SA, Sweden and Zambia. The East African Community Income Tax Treaty (with Kenya, Uganda, Rwanda and Burundi) is currently awaiting conclusion and/or ratification (PwC, 2014).

Article 13(4) of the DTA between Tanzania and Canada states:

“Gains derived by a resident of a Contracting State from the alienation of:

(a) shares (other than shares quoted on an approved stock exchange in the other State) forming part of a substantial interest in the capital stock of a company which is a resident of that other State the value of which shares is derived principally from immovable property situated in that other State; ...

may be taxed in that other State.

For the purposes of this paragraph, the term "immovable property" includes the shares of a company referred to in subparagraph (a) or ... but does not include any property, other than rental property, in which the business of the company, partnership, trust or estate is carried on."

Article 13(4) of the DTA therefore allocates the taxing right on a gain, upon disposal of certain shares forming a substantial interest of the capital stock of a company, to the country in which the immovable property is located where the shares derive their value principally from that immovable property.

Article 13(5) states:

"Gains from the alienation of shares of a company which is a resident of Tanzania, other than shares to which paragraph 4 applies, may be taxed in Tanzania provided that the person alienating the shares owns less than 25 percent of the capital stock of the company immediately before the alienation."

Article 13 of the DTA between Tanzania and India and SA allocates the taxing right upon a gain from the disposal of shares of the capital stock of a company, to the country in which the immovable property is located where the shares derive their value, directly or indirectly, principally (more than 50 percent) from that immovable property.

Assuming that shares of any kind will not be considered "immovable property" under the law of the country in which the property is situated - in terms of the Article 13 of the DTA between Tanzania and Denmark, Finland, Italy, Norway and Sweden - gains from the disposal of shares will be taxed only in the country in which the alienator is a resident.

The DTA between Tanzania and Zambia does not have a specific provision relating to capital gains.

In general, the DTAs with Tanzania contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident unless specified otherwise.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Tanzania.

12.7 Conclusion

There will be CGT on the direct disposal of the shares (in a simple structure) at a rate of 30 percent regardless of whether the company holds immovable property if the person holding the shares holds at least 25 percent of the voting power directly or indirectly and the shares

are not listed on the Dar es Salaam Stock Exchange, unless a DTA provides otherwise (s3 of the Tanzanian ITA).

A Tanzanian company may be treated as realising its assets and liabilities at market value and be taxed at a rate of 30 percent where the underlying share ownership (ultimate shareholders) of the Tanzanian entity changes by more than 50 percent in any two year period (s56 of the Tanzanian ITA).

13 ZAMBIA

13.1 Introduction

Zambia does not have CGT per se, however there is a property transfer tax ('PTT') on the disposal of property (s4 of the Property Transfer Act 340 ('PTA')). Property includes (s2 of the PTA):

- i. land and any structures on land in the Republic;
- ii. shares; and
- iii. mining rights.

It must be noted that the Income Tax Act 1996 (as amended) in Zambia does not define immovable property (as per questionnaire response), however it is referred to in the Act, for example in s82B, where it states that "property shall include money, cheques, movable and immovable property".

13.2 Capital gains tax in Tanzania on the disposal of an indirect interest in immovable property

Zambia's tax system is based on the UK's system (as per questionnaire response). Transactional tax is charged on the transfer of ownership of property (which includes shares regardless of the value of the shares attributable to immovable property) on the difference between market value and the original cost of the property (as per questionnaire response). This is more akin to stamp duty than CGT (as per questionnaire response). PTT is charged at a rate of 10 percent of the realized market value of the property (before deductions) (s4 of the PTA) whereas corporate income tax is charged at 35 percent of income after deductions (PwC, 2014).

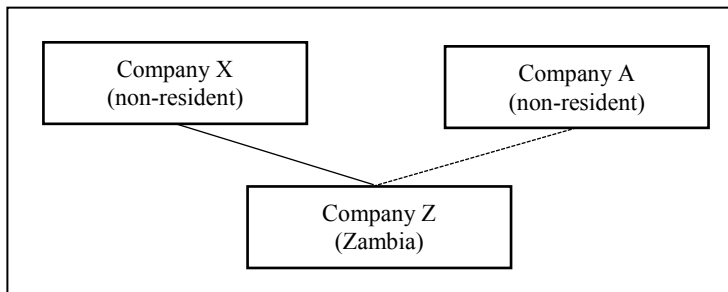
13.3 Valuation of shares

Where shares are realised, the value is the price at which the shares could be sold in an open market or the nominal value if greater (s5 of the PTA). Shares in a listed company would be valued at market value (as per questionnaire response). In practice, non-listed shares are valued based on the net asset valuation method (liabilities are considered for this valuation) (as per questionnaire response).

13.4 Examples

13.4.1 A simple structure – a disposal of a direct interest in immovable property

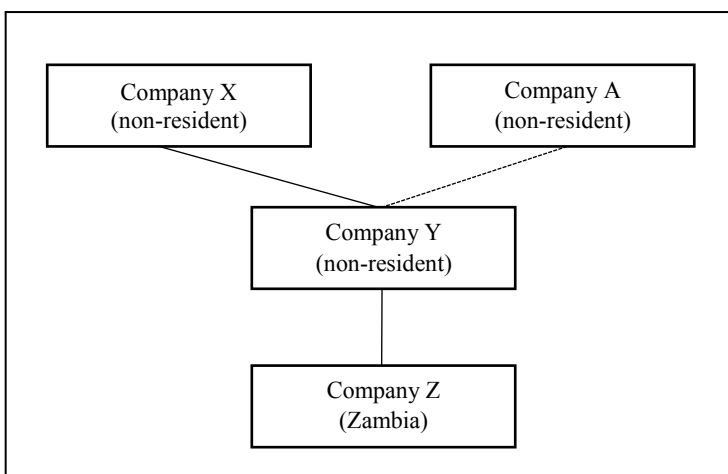
Consider the following example: Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Zambia. Eighty percent of the value of Company Z's assets is attributable to immovable property in Zambia. Company X then sells its shares in Company Z to Company A, another non-resident company.



As discussed above, the definition of property includes shares (s2 of the PTA). Therefore regardless of whether Company Z in Zambia holds immovable property or not, this disposal will be subject to PTT (s4 of the PTA).

13.4.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a company tax resident in Zambia. Eighty percent of the value of Company Z's assets is attributable to immovable property in Zambia. Company X later sells its shares in Company Y to Company A, another non-resident company.



In this example where there is a disposal by a non-resident (Company Y), there is no PTT as a disposal of an indirect holding does not result in PTT. PTT only arises on the transfer of Zambian property i.e. shares incorporated in Zambia. It must be noted that if Company Z held mining rights, then the indirect disposal will become chargeable.

13.5 Withholding tax and filing obligations

There are no specific withholding tax requirements on capital gains (as per questionnaire response). However, one cannot transfer shares or mining rights without first accounting for PTT (as per questionnaire response). This means that you must have either paid PTT, received PTT clearance or received a PTT exemption certificate (s67 of the Mines and Minerals Development Act, No. 11 of 2015).

Upon the transfer of shares, the taxpayer must file a tax return within 30 days of the transfer (s9 of the PTA).

13.6 Double Tax Agreements ('DTAs')

Zambia has DTAs with Canada, Denmark, Finland, Germany, India, Ireland, Italy, Japan, Kenya, Mauritius, Netherlands, Norway, Romania, SA, Sweden, Switzerland, Tanzania, China, Uganda and United Kingdom. A DTA with Yugoslavia and Zimbabwe is awaiting conclusion and/or ratification (PwC, 2014).

However, none of the DTAs override the domestic provisions on the disposal of shares. The disposal of shares results in a property transfer tax which is not regulated by the DTAs (as per questionnaire response).

There is a general exchange of information provision in section 12(a) of the DTA. It is submitted that the tax authorities are able to enforce the relevant legislation in place (as per questionnaire response).

13.7 Conclusion

A direct disposal of shares (in a simple structure) in a Zambian company by a non-resident will be subject to PTT regardless of whether the value of the shares are attributable to immovable property (s4 of the PTA). However, an indirect disposal of shares in a Zambian company will not result in PTT. However, in such a scenario there will be PTT if the company held mining rights.

14 ZIMBABWE

14.1 Introduction

In Zimbabwe, there is a tax on corporate income (known as company tax) and on capital gains. Company tax is at a rate of 25.75 percent (PwC, 2014). Residents and non-residents will be taxed on capital gains (or gross proceeds) on the disposal of listed securities, property and unlisted securities (PwC, 2014).

CGT is regulated under the Capital Gains Tax Act (Chapter 23:01) ('Zimbabwe's CGTA') and the tax is imposed under the Finance Act (Chapter 23:04). CGT is charged on gains realised by a company from the disposal of immovable property or a marketable security situated in Zimbabwe (as per questionnaire response). Capital gains are computed and taxed separately from any other income (Munyandi, 2015:12).

14.2 Capital gains tax on the disposal of an interest in immovable property

CGT is charged on the disposal of immovable property and any marketable security (collectively known as "specified assets") (as per questionnaire response). A marketable security includes an unlisted share (s2 and s8 of Zimbabwe's CGTA). Immovable property is commonly the land itself as well as any permanent improvements thereon (as per questionnaire response).

Zimbabwe "dollarised" its currency (i.e. from the Zimbabwe dollar to the US Dollar) on 1 February 2009 – this is known as the demonetisation of the Zimbabwe dollar (Munyandi, 2015:7). This meant that that it was difficult to determine "cost" figures when computing CGT on assets acquired before 1 February 2009 (as per questionnaire response). As a result, there is a differentiation in the tax rate of specified assets before and after that date. Any specified assets disposed of after 1 Feb 2009 in US Dollars that were acquired before that date are simply charged CGT at 5 percent of proceeds (as per questionnaire response). Any specified assets that are acquired after 1 February 2009 and subsequently disposed of are charged CGT at a rate of 20 percent (s38 of Chapter 23:04 Finance Act). The sale of shares for companies that are listed on the Zimbabwe Stock Exchange are subject to CGT at 1 percent whether they were acquired before or after 1 Feb 2009 (PwC, 2014).

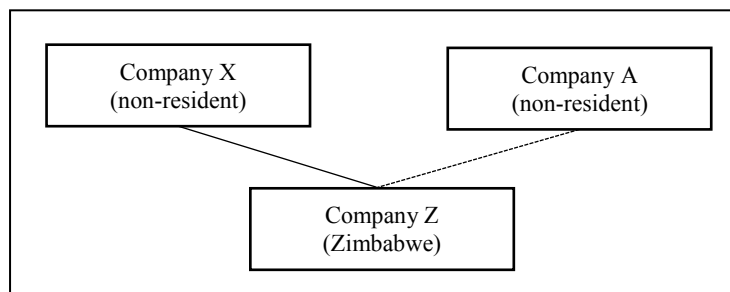
In cases where a non-resident sells shares in a Zimbabwean company, it does not matter what the underlying assets are, these will need to be valued by an independent valuator to arrive at a fair market value for the shares being disposed (as per questionnaire response).

The most commonly used method of valuing shares is the Net Asset Value method, especially where the seller is a majority owner (as per questionnaire response). Valuations that are prepared by a firm of Chartered Accountants may also be accepted (as per questionnaire response). The market value of shares would include the current values of all the assets less liabilities (as per questionnaire response). The Commissioner General may alter a value if he considers that it is greater or lower than the fair market value (s14 of Zimbabwe's CGTA).

14.3 Examples

14.3.1 A simple structure – a disposal of a direct interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in Zimbabwe. Eighty percent of the value of Company Z's assets is attributable to immovable property in Zimbabwe. Company X then sells its shares in Company Z to Company A, another non-resident company.

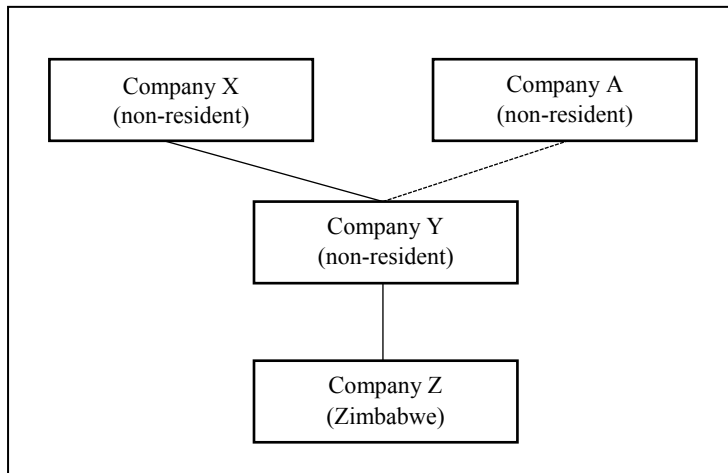


In this scenario, the gain made on the sale of the shares would be taxed at the CGT rate of 20 percent regardless of the value of the shares that is attributable to immovable property (provided the shares were acquired after 1 February 2009) (s38 of Chapter 23:04 Finance Act and s8 of Zimbabwe's CGTA).

14.3.2 A multi-tier structure – a disposal of an indirect interest in immovable property

Consider the following example: Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a company tax resident in Zimbabwe. Eighty percent of the value of Company Z's assets is

attributable to immovable property in Zimbabwe. Company X later sells its shares in Company Y to Company A, another non-resident company.



In the scenario above, the non-resident company would not be liable to any Zimbabwe CGT regardless of the percentage of immovable property owned in Company Z in Zimbabwe, unless a DTA provides otherwise.

This type of structure is therefore advantageous for a foreign investor who anticipates selling his shares at some point in the future.

14.4 Withholding tax and filing obligations

A withholding tax amounting to 15 percent of gross proceeds applies to all immovable property sales unless a tax clearance is obtained from the Revenue Authority (s14 of Zimbabwe's CGTA). When obtaining a tax clearance certificate, the seller must file a CGT return, usually done before the transfer of immovable property (or shares in a company) (as per questionnaire response).

14.5 Double Tax Agreements ('DTAs')

A DTA with Zimbabwe may modify the domestic law and may apply in preference to the domestic law to the extent that there is any conflict. Zimbabwe has a DTA with Bulgaria, Canada, France, Germany, Kuwait, Malaysia, Mauritius, Netherlands, Norway, Poland, SA, Sweden and UK. Zimbabwe has treaties awaiting conclusion and/or ratification in Botswana, Democratic Republic of Congo, Indonesia, Namibia, Serbia (and Montenegro), Seychelles, Tanzania, Tunisia and Zambia (PwC, 2015).

Article 13 of the DTA between Zimbabwe and Germany and Netherlands and Article 14 of the DTA between Zimbabwe and Canada and Norway allocates the taxing right on a gain, upon disposal of shares, to the country in which the company is a resident.

Article 13 of the DTA between Zimbabwe and Bulgaria, Mauritius and Poland allocates the taxing right on a gain, upon disposal of shares of the capital stock of a company, to the country in which the immovable property is located where the shares derive their value, directly or indirectly, principally from that immovable property. This means that where more than 50 percent of the assets relate to immovable property situated in Zimbabwe, then CGT will apply in Zimbabwe.

Article 13(2) of the DTA between Zimbabwe and France states:

“Gains from the alienation of shares or other corporate rights in a company or any other legal person which owns directly or indirectly immovable property situated in a State may be taxed in that State, where, under the law of that State, such gains are subject to the same taxation rules as gains from the alienation of immovable property. This provision shall not apply if immovable property owned by a company or any other legal person is assigned to business activities carried on by this company or this other legal person. In this case the provision of Article 7 shall apply.”

Article 7 as referred to above relates to business profits.

Assuming that shares will not be considered “immovable property” under the law of the country in which the property is situated - in terms of the Article 13 of the DTA between Zimbabwe and Kuwait, Malaysia and UK - gains from the disposal of shares will be taxed only in the country in which the alienator is a resident.

There is no specific provision relating to CGT in the DTA between SA and Zimbabwe.

In general, the DTAs with Zimbabwe contain a provision that gains, other than that specifically referred to in the CGT article, shall be taxable only in the contracting state of which the alienator is a resident unless specified otherwise.

It is necessary to look at the specific DTA of relevance in order to determine whether the DTA may provide relief and override the domestic law in Zimbabwe.

There is a view that the tax authorities in Zimbabwe do not have processes in place for transparency and exchange of information specifically with regard to immovable property and are not able to enforce the relevant legislation in practice (as per questionnaire response).

14.6 Conclusion

Where a non-resident sells his unlisted shares in a Zimbabwe company, there will be CGT levied at a rate of 20 percent on the gain on the disposal in Zimbabwe for shares acquired after 1 February 2009 and at a rate of 5 percent on the proceeds on the sale of unlisted shares acquired prior to 1 February 2009 regardless of what percentage of the value of shares is attributable to immovable property, unless a DTA provides otherwise. Listed shares are taxed at a rate of 1 percent of gross proceeds.

Where a non-resident sells his shares in a non-resident company who in turn owns shares in a Zimbabwe company, there will be no CGT in Zimbabwe on the disposal of shares unless in theory a DTA provides otherwise.

Therefore there are no CGT consequences in Zimbabwe on the indirect disposal of immovable property in Zimbabwe through a disposal of shares by a non-resident.

15 CONCLUSION

15.1 Introduction

This dissertation analysed the CGT consequences on the indirect disposal of immovable property in selected countries by non-residents as well as briefly discussing relevant issues such as DTAs, withholding tax and filing obligations. This analysis was done based on the domestic tax legislation of the selected countries as well as the responses received from the questionnaires. It must be noted that when a CGT liability arises in both the source country and the country of residence, domestic tax legislation or a DTA may provide relief in certain instances.

15.2 General summary

A non-resident who disposes of a direct interest in immovable property or an indirect interest in immovable property through the disposal of shares may be subject to CGT in the country in which the immovable property is situated. Certain African countries were selected and the CGT consequences on disposal of such property were determined by analysing the domestic tax legislation of the country in which the property is situated. In addition, the effect of any applicable double tax agreement ('DTA') to such disposals was considered.

In certain countries - such as Angola and Nigeria - in terms of their domestic tax legislation, a non-resident will not be subject to CGT in the respective country where the property is situated regardless of the value of the shares that is attributable to immovable property.

In certain countries - such as Mozambique, Namibia, Tanzania and Zimbabwe - in terms of their domestic tax legislation, a non-resident may be subject to CGT upon the disposal of an interest in immovable property in the respective country in which the immovable property is held regardless of the value of the shares that is attributable to immovable property, unless a DTA provides otherwise.

In certain other countries - such as Botswana, Ghana, Lesotho and South Africa – in terms of their domestic tax legislation, a non-resident may be subject to CGT upon the disposal of an interest in immovable property in the respective country in which the immovable property is held, however this will depend in general on the percentage of the value of shares that is attributable to immovable property, unless a DTA provides otherwise. Certain countries' domestic tax legislation have specific provisions regulating how this percentage is determined.

A DTA may provide relief to taxpayers who are subject to CGT in both their resident country and the source country, on the disposal of an interest in immovable property held in the source country. In terms of domestic tax legislation, where the non-resident is liable to pay CGT in the source country, the non-resident will in general have to comply with the withholding tax and filing obligations of that country where applicable.

15.3 Summary of the CGT consequences on the indirect disposal of immovable property in selected African countries by non-residents in table format

| | A simple structure – a disposal of a direct interest in immovable property situated in selected African country (column 1) | A multi-tier structure – a disposal of an indirect interest in immovable property situated in selected African country (column 2) |
|---------------------|--|--|
| South Africa | <p>A non-resident will be subject to CGT if such non-resident holds at least 20 percent of the equity shares in the SA company and 80 percent of the market value of the equity shares in the SA company are attributable directly or indirectly to immovable property in SA (held otherwise than as trading stock).</p> <p>The market value of the underlying assets will be used to determine the percentage of shares attributable to immovable property.</p> <p>When determining the percentage of the market value of the equity shares that is attributable to immovable property – liabilities, a deferred tax asset and intra-group loans should be disregarded whilst self-generated goodwill should be</p> | Refer to column 1 |

| | | |
|-----------------|---|---|
| | <p>included.</p> <p>When shares are sold at a premium or discount to the market value of the underlying assets, it will not affect the percentage of shares attributable to immovable property, however a portion of that difference may be attributable to self-generated goodwill.</p> | |
| Angola | <p>There will be no CGT consequences on the disposal irrespective of whether the Angolan company holds immovable property or not.</p> | Refer to column 1 |
| Botswana | <p>There will be CGT at an effective rate of 30 percent if the dominant underlying assets in the Botswana company is immovable property and at a rate of 22.5 percent if the dominant underlying assets in the Botswana company is not immovable property (unless the disposal is in the ordinary course of business.</p> <p>There will be an exemption from CGT if the shares disposed of are in a resident public company or traded on the Botswana Stock Exchange and the taxpayer held the shares for at least one year prior to their disposal. The exemption only applies to equity shares where 49 percent or more of those equity</p> | <p>There will be no CGT unless the company in Botswana is a mining company.</p> |

| | | |
|----------------|--|--|
| | shares have released for trading on the stock exchange. | |
| Ghana | There will be CGT at a rate of 25 percent upon disposal if the non-resident owns at least 25 percent or more of the voting power of the resident company or if the property of the resident company consists, directly or indirectly through one or more interposed entities, principally of immovable property or interests in land or buildings situated in Ghana. | There will be no CGT consequences unless there is a change in underlying ownership of the resident entity by more than 50 percent. |
| Kenya | There will be CGT upon disposal at a rate of 5 percent where the company does not own immovable property in the mining and petroleum industry or the Kenyan company derives less than 20 percent or more of its value in immovable property in the mining and petroleum industry in Kenya. The CGT will be at a rate of 30 percent for resident corporates and 37.5 percent for non-residents with permanent establishments in Kenya where the company derives 20 percent or more of its value from immovable property in the mining and petroleum sector. | There will be no CGT consequences in a multi-tier structure where the shares being disposed of are not situated in Kenya when there is a disposal of shares in a company that does not own immovable property in the mining and petroleum industry in Kenya or when a company disposes of shares that derives less than 20 percent of its value from immovable property in the mining and petroleum sector In Kenya. There will however be CGT consequences in a multi-tier structure where the shares being disposed of are not situated in Kenya if the Company situated in Kenya derives 20 percent or more of its value in immovable property in the mining and petroleum industry in Kenya. |
| Lesotho | There will be CGT upon disposal | There will be no CGT consequences. |

| | | |
|-------------------|---|---|
| | at a rate of 25 percent when the property in the company in Lesotho consists directly or indirectly principally of interests in immovable property located in Lesotho. | |
| Madagascar | There will be CGT at a rate of 20 percent if the value of the shares is derived directly or indirectly from properties situated in Madagascar. | Refer to column 1 |
| Mozambique | There will be CGT at a rate of 32 percent irrespective of what percentage of the shares are attributable to immovable property. | Refer to column 1 |
| Namibia | There will be no CGT consequences regardless of whether the value of the shares is attributable to immovable property. There will however be CGT consequences of the disposal of shares holding a mineral licence or right. | Refer to column 1 |
| Nigeria | There will be no CGT consequences regardless of whether the value of the shares is attributable to immovable property. | Refer to column 1 |
| Tanzania | There will be CGT at a rate of 30 percent regardless of whether the company holds immovable property if the person holding the shares holds at least 25 percent of the voting power directly or indirectly and the shares are not | The Tanzanian company may be treated as realising its assets and liabilities at market value and be taxed at a rate of 30 percent where the underlying share ownership (ultimate shareholders) of the Tanzanian entity changes by more than 50 percent in |

| | | |
|-----------------|--|--|
| | listed on the Dar es Salaam Stock Exchange. | any two year period. |
| Zambia | There will be property transfer tax which is similar to CGT at a rate of 10 percent regardless of whether the value of the shares are attributable to immovable property. | There will be no property transfer tax. There will however be property transfer tax if the Zambian company held mining rights. |
| Zimbabwe | Where a non-resident disposes of unlisted shares in a Zimbabwe company, there will be CGT levied at a rate of 20 percent on the gain on the disposal in Zimbabwe for shares acquired after 1 February 2009 and at a rate of 5 percent on the proceeds on the sale of unlisted shares acquired prior to 1 February 2009 regardless of what percentage of the value of shares is attributable to immovable property. Listed shares are taxed at a rate of 1 percent of gross proceeds. | There are no CGT consequences. |

ANNEXURE 1 – THE QUESTIONNAIRE

Background to the questionnaire

In South Africa (“SA”), a non-resident will be subject to capital gains tax (“CGT”) on the disposal of any immovable property situated in SA or any interest or right in immovable property in SA. A non-resident will have an interest in immovable property if the non-resident holds at least 20 percent of the equity shares in the company and 80 percent of the market value of the shares are attributable directly or indirectly to immovable property (which is not trading stock) in SA. The interest can be held “indirectly”, typically through the medium of another company.

My research for purposes of my dissertation for masters in commerce specialising in South African tax will focus on the indirect disposal of immovable property in African countries (as well as the UK, US, Canada and Australia) through a disposal of shares by a non-resident.

Questionnaire information

This research has been approved by the Commerce Faculty Ethics in Research Committee. Your participation in this research is voluntary. You can choose to withdraw from the research at any time.

The questionnaire will take approximately 30 minutes to complete. Due to the nature of the study you will need to provide the researchers with some form of identifiable information however, all responses will be confidential and used for the purposes of this research only.



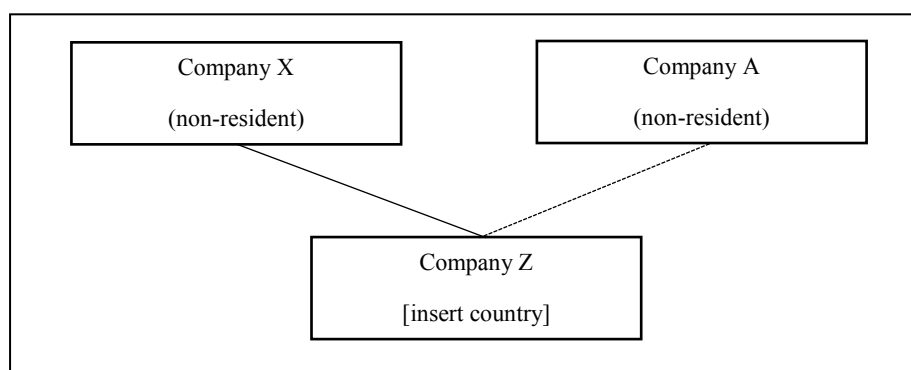
Questions

1. Does the disposal of immovable property give rise to tax on capital gains? If so, does the rate at which such gains are taxed differ from the corporate income tax rate?

If the disposal of immovable property does not give rise to a tax on capital gains, there is no need to answer any further questions.

2. Would such a tax on capital gains apply to the disposal of an indirect interest in immovable property owned by a company, through the disposal of shares in that company held by a non-resident? Please refer to the two practical examples below to illustrate the scenario referred to in this question:

Example 1

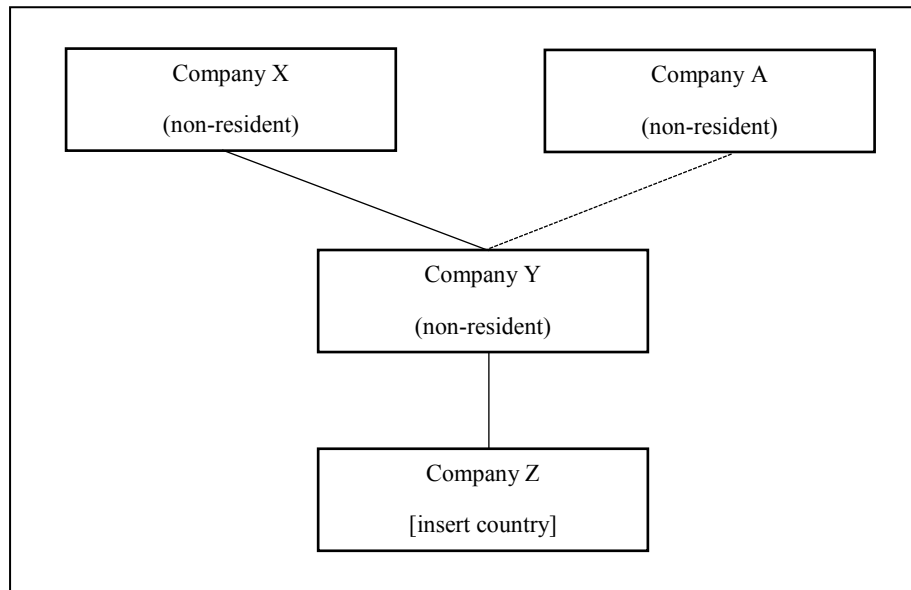


Company X, a non-resident company, owns shares in Company Z, a company which is tax resident in [insert country]⁷. Company Z is a property rich company.⁸ Company X then sells its shares in Company Z to Company A, another non-resident company. What are the CGT consequences in [insert country]? Would the CGT consequences differ if Company Z was not a property rich company?

⁷ Please replace with your country of residence.

⁸ In South Africa, a company which has 80 percent or more of the value of its assets directly or indirectly attributable to immovable property is commonly referred to as a property rich company.

Example 2



Company X, a non-resident company, owns shares in Company Y, another non-resident company, which in turn owns shares in Company Z, a company tax resident in [insert country]. Company Z is a property rich company. Company X later sells its shares in Company Y to Company A, another non-resident company. What are the CGT consequences in [insert country] due to the disposal of shares in Company Y? Would the CGT consequences differ if Company Z was not a property rich company?

Would such a tax on capital gains apply to the disposal of an indirect interest in movable property (opposed to immovable property) owned by a company, through the disposal of shares in that company held by a non-resident?

3. If there are CGT consequences in [insert country] in example 1 and 2 above, please provide a detailed explanation of the applicable section(s) of the tax legislation.
4. Were there any recent changes to the tax legislation referred to above, subsequent to the Supreme Court's judgment in *Vodafone International Holdings B.V. v Union of India & ANR* in 2012? If yes, what were the changes to the tax legislation?
5. What is the definition of 'immovable property' in your tax legislation / general law?

6. If the section(s) referred to in question 3 refer(s) to a *calculation* of the percentage of value of shares which is directly or indirectly attributable to immovable property in [insert country], please refer to the below queries:
- a) Kindly describe the mechanics of this calculation.
 - b) Please indicate whether one would include or disregard the following in the calculation:
 - liabilities;
 - generated goodwill;
 - intra-group loans; and
 - a debit deferred tax balance etc.?
 - c) Would the treatment of a long term loan differ if it financed immovable property as opposed to movable property?
 - d) Please supply a practical example of the calculation.
7. With specific reference to the 'value of shares' directly or indirectly attributable to immovable property referred to in question 6 above, please consider the following questions:
- a) How should the 'value of shares' be determined?
 - b) Should one value all the assets in order to do determine the market value of the shares or could the selling price of the shares be used as an indication of the market value?
 - c) Would this market value differ if the shares were sold at a premium or at a discount on the gross market value?
 - d) Consider the following example: If the market value of land and buildings is [insert currency symbol of country] 2 million and the market value of plant and machinery is [insert currency symbol of country] 1 million, the market value of the assets would be [insert currency symbol of country] 3 million. If the shares are then sold for [insert currency symbol of country] 4 million, how would the value of the shares directly or indirectly attributable to immovable property in [insert country] be determined?
8. Are there any specific double tax treaties in place that deal with the issue or override the issue of paying capital gains taxes on the indirect disposal of immovable property in the country in which the immovable property is held (which come to mind)?

9. Do the tax authorities in [insert country] have processes in place for transparency and exchange of information specifically with regard to immovable property and, in your view, are the tax authorities able to enforce the relevant legislation in practice?
10. Are there any withholding tax obligations from payments to non-residents specifically with regard to the CGT on the indirect disposal of immovable property?
11. With reference to question 10, are there any tax filing obligations that need to be complied with in this regard?

Please could you provide all relevant legislation and other relevant documentation (for example interpretation notes or practice notes) in respect of question 1 to 11 and indicate which sections of the tax legislation are applicable.

BIBLIOGRAPHY

SOUTH AFRICA

Books

- i. Clegg, D. 2015. *LexisNexis Concise Guide to Capital Gains Tax*. South Africa: Lexis Nexis.
- ii. Stein, ML. 2014. *Stein on Capital Gains Tax*. South Africa: Lexis Nexis.
- iii. Williams, RC. 2001. *Income Tax and Capital Gains Tax in South Africa*. South Africa: Butterworth Publishers (Pty) Ltd.
- iv. Williams, RC. 2005. *Capital Gains Tax: A Practitioner's Manual*. South Africa: Juta & Co Ltd.

Case law

- v. *Caltex Oil (SA) Ltd v Commissioner for Inland Revenue* 1975 (1) SA 665 (A).
- vi. *C:SARS v Tradehold Ltd* 2013 4 SA 184 (SCA).
- vii. *Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
- viii. *Pan American World Airways Inc. v SA Fire and Accident Insurance* 1965 (3) SA 150 (A).
- ix. *Secretary for Inland Revenue v Downing* 1975 (4) SA 518 (A).
- x. *Vodafone International Holdings B.V. v Union of India & ANR* 2012 INSC 60.

Double tax treaties

- iv. *Agreement between the Government of Cyprus and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*. 1997. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 10].
- v. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains*. 2002. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 10].
- vi. *Agreement between the Republic of South Africa and the Government of the Republic of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal*

- Evasion with respect to Taxes on Income*. 1996. Terminated. Available: IBFD Tax Treaty Database by subscription [2016, February 10].
- vii. *Agreement between the Republic of South Africa and the Government of the Republic of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2013. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 10].
- viii. *Convention between the Republic of South Africa and the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*. 1998. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 10].
- ix. *Convention between the Republic of South Africa and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*. 2005. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 10].

Legislation/government publications

- x. Administration of Estates Act, No. 66 of 1965. Available: <http://www.justice.gov.za/legislation/acts/1965-066> percent20admin percent20estates.pdf [2016, January 3].
- xi. Deeds Registries Act, No. 47 of 1937. Available: <http://www.ruraldevelopment.gov.za/phocadownload/Acts/deeds> percent20registries percent20act percent2047 percent20of percent201937.pdf [2016, January 3].
- xii. Explanatory Memorandum on the Second Revenue Laws Amendment Bill, 2001. 2001. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2001-04> percent20- percent20Memorandum percent20Objects percent20Second percent20Revenue percent20Laws percent20Amendment percent20Bill percent202001.pdf [2015, August 12].
- xiii. Explanatory Memorandum on the Revenue Laws Amendment Bill, 2001. 2001. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2001-01> percent20- percent20 percent20Explanatory percent20Memorandum percent20Revenue percent20Laws percent20Amendment percent20Bill percent202001.pdf [2015, August 12].
- xiv. Explanatory Memorandum on the Revenue Laws Amendment Bill, 2004. 2004. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep->

- EM-2004-02 percent20- percent20 percent20Explanatory percent20Memorandum percent20Revenue percent20Laws percent20Amendment percent20Bill percent202004.pdf [2015: August 12].
- xv. Explanatory Memorandum on the Revenue Laws Amendment Bill, 2005. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2005-01-percent20-percent20Explanatory-percent20Memorandum-percent20Revenue-percent20Laws-percent20Amendment-percent20Bill-percent202005.pdf> [2015, August 12].
- xvi. Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2015-01-percent20-percent20Explanatory-percent20Memorandum-percent20on-percent20the-percent20TLA-percent20Bill-percent2029-percent20of-percent202015.pdf> [2016, January 2013].
- xvii. Income Tax Act, No. 58 of 1962. 2014. Professional Tax Handbook 2014/2015, Vol. 1. LexisNexis, South Africa.
- xviii. Taxation Laws Amendment Act, No. 5 of 2001. 2001. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/AmendActs/LAPD-LPrim-AA-2001-01-percent20-percent20Taxation-percent20Laws-percent20Amendment-percent20Act-percent202001.pdf> [2015, August 12].
- xix. Taxation Law Amendment Act, No 25 of 2015. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/AmendActs/LAPD-LPrim-AA-2016-02-percent20-percent20Taxation-percent20Laws-percent20Amendment-percent20Act-percent2025-percent20of-percent202015-percent20GG-percent2039588.pdf> [2016, January 13].
- xx. Revenue Laws Amendment Act, No. 19 of 2001. 2001. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/AmendActs/LAPD-LPrim-AA-2001-02-percent20-percent20Revenue-percent20Laws-percent20Amendment-percent20Act-percent202001.pdf> [2015, August 12].
- xxi. Revenue Laws Amendment Act, No. 31 of 2005. 2006. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/AmendActs/LAPD-LPrim-AA-2005-03-percent20-percent20Revenue-percent20Laws-percent20Amendment-percent20Act-percent202005.pdf> [2015, August 12].
- xxii. Second Revenue Laws Amendment Act, No. 60 of 2001. 2001. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/AmendActs/LAPD-LPrim-AA-2001-03>

percent20- percent20Second percent20Revenue percent20Laws percent20Amendment percent20Act percent202001.pdf [2015, August 12].

Journals

- xxiii. Law of South Africa. 2014. *Movables and Immovables*. Volume 27. 2nd ed. South Africa: LexisNexis.
- xxiv. Law of South Africa. 2014. *Incorporeal Movables and Immovables*. Volume 27. 2nd ed. South Africa: LexisNexis.

Websites

- xxv. African Economic Outlook 2015. 2015. *Regional Development and Spatial Inclusion*, AfDB, OECD & UNDP. Available: <http://www.africaneconomicoutlook.org/en/outlook> [2015, June 1].
- xxvi. DLA Cliffe Dekker Hofmeyr. 2008. Capital Gains Tax and Immovable Property. Real Estate Newsletter Spring 2008. Available: <http://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/files/CDH-CGT-and-Immovable-Property.pdf> [2015, December 10].
- xxvii. International Accounting Standards 38 Intangible Assets. Available: http://ec.europa.eu/internal_market/accounting/docs/consolidated/ias38_en.pdf [2015, December 10]
- xxviii. KPMG, 2012. Expert Committee Issues Draft Report on Retrospective Amendments Relating to Indirect Transfer. Available: <https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/taxnewsflash/Documents/india-oct16-2012no5.pdf> [2015, June 1].
- xxix. OECD (2014), *Model Tax Convention on Income and on Capital: Condensed Version 2014*, OECD Publishing. Available: http://dx.doi.org/10.1787/mtc_cond-2014-en. [2015, June 1].
- xxx. OECD (2008), OECD Benchmark Definition of Foreign Direct Investment, 4th edition, OECD Publishing, Paris. Available: <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>. [2015: June 1].
- xxxi. OECD (2012), “Commentary on Article 13: Concerning the taxation of capital gains”, in *Model Tax Convention on Income and on Capital 2010 (Full Version)*, OECD

- Publishing. Available: <http://dx.doi.org/10.1787/9789264175181-47-en> [2015, June 1].
- xxxii. Smith Tabata Buchanan Boyes. 2015/2106. *Buying Property in South Africa as a Resident or Non-Resident*. Available: <http://www.stbb.co.za/wp-content/uploads/2014/09/Buying-Property-in-South-Africa-as-a-resident-or-non-resident.pdf> [2015, December 8].
- xxxiii. South African Revenue Service. 2006. *Responses to Written Representations by Organisations to the Portfolio Committee on Finance on the Draft Revenue Laws Amendment Bill, 2005*. Available: <http://www.sars.gov.za/AllDocs/LegalDoclib/RespDocs/LAPD-LPrep-Resp-2005-02-percent20-percent20Response-percent20Document-percent20Revenue-percent20Laws-percent20Amendment-percent20Bill.pdf> [2015: August 13].
- xxxiv. South African Revenue Service. 2010. *Comprehensive Guide to Capital Gains Tax (Issue 4)*. Available: http://c.ymcdn.com/sites/www.thesait.org.za/resource/resmgr/capital_gains_tax/comprehensive_cgt_guide_issu.pdf [2015, May 18].
- xxxv. South African Revenue Service. 2015. *Comprehensive Guide to Capital Gains Tax (Issue 5)*. Available: <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-CGT-G01-percent20-percent20Comprehensive-percent20Guide-percent20to-percent20Capital-percent20Gains-percent20Tax-percent20-percent20External-percent20Guide.pdf> [2016, January 3].

ANGOLA

Legislation

- i. *Código do Imposto Industrial* (Industrial Income Tax Code). [Provided with questionnaire]
- ii. *Código do Imposto sobre Aplicação de Capitais* (Investment Income Tax Code). [Provided with questionnaire]

Other

- iii. Ferreira, VA. 2015. *Angola – Corporate Taxation*. IBFD, Amsterdam. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/kbase/#topic=doc&url=/collections/kf/html/kf_ao.html&WT.z_nav=Navigation&colid=4914 [2015: November 20].

- iv. PricewaterhouseCoopers. 2015. Angolan Tax Reform, 2015. [Provided with questionnaire]
- v. PricewaterhouseCoopers. 2015. *Angola – Draft Law of the General State Budget*. Available: <http://www.pwc.pt/en/pwcinfo/fisco/flash/2015/pwc-tax-flash-angola-draft-law-state-budget.htm> [2015: November 12].
- vi. PricewaterhouseCoopers. 2014. *Tax Summary: Angola*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/angola_2014.pdf [2016, 2 January 2015].

BOTSWANA

Double tax treaties

- i. *Agreement between the Government of the Republic of India and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2006. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
- ii. *Agreement between the Government of the Republic of Botswana and the Republic of Seychelles for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 2004. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
- iii. *Agreement between the Government of the Republic of Botswana and the Government of the Republic of Zimbabwe for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 2004. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
- iv. *Convention between the Government of Barbados and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 2005. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
- v. *Convention between the Government of the French Republic and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 1999. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
- vi. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Botswana for the Avoidance*

- of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 2005. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
- vii. *Convention between the Republic of Mauritius and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains*. 1995. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
 - viii. *Convention between the Republic of Namibia and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2004. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
 - ix. *Convention between the Republic of South Africa and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2003. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].
 - x. *The Government of the Republic of Botswana and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2003. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 11].

Legislation

- xi. *Income Tax Act Chapter 52:01*. [Provided with questionnaire]
- xii. *Income Tax (Amendment) Act, 2011*. [Provided with questionnaire]

Other

- xiii. Amos, J. 2016. *Botswana – Corporate Taxation*. Available: http://online.ibfd.org/collections/gtha/printversion/pdf/gtha_bw.pdf [2016, January 7].
- xiv. PricewaterhouseCoopers. 2014. *Tax Summary: Botswana*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/botswana_2014.pdf [2016, 7 January 2015].

GHANA

Double tax agreements

- i. *Agreement between the Federal Republic of Germany and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, on Capital and on Capital Gains.* 2004. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- ii. *Convention between the Government of the French People and the Government of the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains.* 1993. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- iii. *Convention between the Government of the Italian Republic and the Government of the Republic of Ghana for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion.* 2004. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- iv. *Convention between the Government of the Republic of South Africa and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains.* 2004. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- v. *Convention between the Government of the United Kingdom of Great Britain and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains.* 1993. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- vi. *Convention between the Kingdom of Belgium and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains.* 2005. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- vii. *Convention between the Kingdom of Denmark and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains.* 2014. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- viii. *Convention between the Kingdom of Netherlands and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains.* 2008. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- ix. *Convention between the Swiss Confederation and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to*

Taxes on Income, on Capital and on Capital Gains. 2008. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].

Legislation

- x. Income Tax Act 2015, Act 896. [Provided with questionnaire]
- xi. Internal Revenue Act 2000, Act 592 as amended. [Provided with questionnaire]

Other

- xii. Munyandi, K. *Ghana – Corporate Taxation*. IBFD, Amsterdam. Available: http://online.ibfd.org/collections/gtha/printversion/pdf/gtha_gh.pdf [2015: October 22].
- xiii. PricewaterhouseCoopers. 2014. *Tax Summary: Ghana*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/ghana_2014.pdf [2016, 2 January 2015].

KENYA

Double tax agreements

- i. *Agreement between the Canada and Kenya for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*. 1983. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].
- ii. *Agreement between the Government of the Republic of South Africa and the Government of the Republic of Kenya for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2010. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].
- iii. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 1973. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].
- iv. *Agreement between the Republic of Kenya and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital*. 1997. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].

- v. *Convention between the Government of the Republic of Kenya and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.* 1972. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].
- vi. *Convention between India and Kenya for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.* 1985. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- vii. *Convention between the Republic of Kenya and the Government of the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.* 1972. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- viii. *Convention between the Republic of Kenya and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.* 2007. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- ix. *Convention between the Republic of Kenya and the Government of the Kingdom of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.* 1973. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].
- x. *Convention between the Republic of Zambia and the Government of the Kingdom of the Republic of Kenya for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.* 1968. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 15].

Legislation

- xi. *Income Tax Act, Rev. 2012*, Chapter 470. [Provided with questionnaire]
- xii. *Interpretation and General Provisions Act.* [Provided with questionnaire]

Other

- xiii. Kenya Revenue Authority, Jan 2015, <http://www.kra.go.ke/notices/pdf2014/Capital-Gains-Tax-Guidelines.pdf> [2015, December 29]
- xiv. Omondi, F. 2015. Kenya – Corporate Taxation. IBFD, Amsterdam. Available: <http://ip->

online2.ibfd.org.ezproxy.uct.ac.za/collections/gtha/printversion/pdf/gtha_ke.pdf
[2016, January 14].

- xv. PricewaterhouseCoopers. 2014. *Tax Summary: Kenya*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/kenya_2014.pdf [2016, January 2].

LESOTHO

Double tax agreements

- i. *Agreement between the Government of the Republic of Mauritius and the Government of the Kingdom of Lesotho for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 1997. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].
- ii. *Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 1995. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].
- iii. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Lesotho for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 1997. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 20].

Legislation and other government publications

- iv. *Income Tax Act 1993 Consolidate Version*. [Provided with questionnaire]
- v. The Kingdom of Lesotho Income Tax Order 1993 Explanatory Memorandum. [Provided with questionnaire]

Other

- vi. PricewaterhouseCoopers. 2014. *Tax Summary: Lesotho*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/lesotho_2014.pdf [2016, 2 January].

MADAGASCAR

Double tax agreements

- i. *Convention between the Government of the French People and the Government of the Democratic Republic of Madagascar for the Avoidance of Double Taxation, the Prevention of Fiscal Evasion and the Establishment of Rules for Administrative Assistance with respect to Taxation.* 1983. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 25].
- ii. *Convention between the Government of the Republic of Mauritius and the Government of the Republic of Madagascar for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.* 1994. In force. Available: IBFD Tax Treaty Database by subscription [2016, February 25].

Legislation

- iii. Finance Law 2016. [Provided with questionnaire]
- iv. *Loi n° 2015 – 050 du 29 décembre 2015 portant Loi de Finances pour 2016.* [Provided with questionnaire]

Other

- v. Marinho, AT. 2016. Madagascar – Corporate Taxation. IBFD, Amsterdam. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/gtha/printversion/pdf/gtha_mg.pdf [2016, January 14].
- vi. PricewaterhouseCoopers. 2014. *Tax Summary: Madagascar.* Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/madagascar_2014.pdf [2016, 2 January].

MAURITIUS

Other

- i. PricewaterhouseCoopers. 2014. *Tax Summary: Mauritius.* Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/mauritius_2014.pdf [2016, 2 January].

MOZAMBIQUE

Double tax agreements

- i. *Agreement between the Government of the Republic of India and the Government of the Republic of Mozambique for the Avoidance of Double Taxation and the*

- Prevention of Fiscal Evasion with respect to Taxes on Income*. 2010. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 6].
- ii. *Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mozambique for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital*. 2003. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 6].
- iii. *Agreement between the Republic of Mauritius and the Republic of Mozambique for the Avoidance of Double Taxation with respect to Taxes on Income*. 1997. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 6].
- iv. *Convention between the Government of the Macau Special Administrative Region and the Government of the Republic of Mozambique for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2007. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 6].
- v. *Convention between the Government of the Republic of Mozambique and the Government of the Italian Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 1998. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 6].
- vi. *Convention between the Portuguese Republic and the Republic of Mozambique for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 1991. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 6].
- vii. *Convention between the Republic of South Africa and the Republic of Mozambique for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2007. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 6].

Legislation

- vii. *Imposto sobre o Rendimento das Pessoas Colectivas*. [Provided with questionnaire]

Other

- viii. Ferreira, VA. 2016. Mozambique – Corporate Taxation. IBFD, Amsterdam. Available: http://online.ibfd.org/collections/gtha/printversion/pdf/gtha_mz.pdf [2016: January 7].

- ix. PricewaterhouseCoopers. 2014. *Tax Summary: Mozambique*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/mozambique_2014.pdf [2016, January 7].

NAMBIA

Legislation

- i. *Income Tax Act No. 24 of 1981*. [Provided with questionnaire]
- ii. *Income Tax Amendment Bill*. [Provided with questionnaire]

Other

- iii. PricewaterhouseCoopers. 2014. *Tax Summary: Namibia*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/namibia_2014.pdf [2016, 2 January 2015].

NIGERIA

Legislation

- i. *Capital Gains Tax Act CAP C1 LFN 2010*. [Provided with questionnaire]

Other

- i. PricewaterhouseCoopers. 2014. *Tax Summary: Nigeria*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/nigeria_2014.pdf [2016, 2 January 2015].

TANZANIA

Double tax agreements

- i. *Agreement between Canada and the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*. 1995. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].
- ii. *Agreement between the Government of the Republic of India and the Government of the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 2011. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].

- iii. *Agreement between the Government of the Republic of South Africa and the Government of the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.* 2005. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].
- iv. *Convention between Denmark and Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.* 1976. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].
- v. *Convention between Finland and Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital.* 1976. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].
- vi. *Convention between the Government of the Republic of Zambia and the Government of the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.* 1968. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].
- vii. *Convention between the Kingdom of Norway and the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital.* 1976. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].
- viii. *Convention between Sweden and Tanzania for the Avoidance of Double Taxation with respect to Taxes on Income and Capital.* 1976. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].
- ix. *Convention between Tanzania and Italy for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.* 1973. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 7].

Legislation and other government publications

- viii. *Bill Supplement to the Finance Act 2012.* [Provided with questionnaire]
- x. *Finance Act 2012.* [Provided with questionnaire]
- xi. *Finance Act 2014.* [Provided with questionnaire]
- xii. *Income Tax Act 2004.* [Provided with questionnaire]

Other

- xiii. Ernst & Young. 2013. Tanzania amends Capital Gains Tax rules to include change in control and single installment tax payment. Available: [http://www.ey.com/Publication/vwLUAssets/Tanzania_amends_Capital_Gains_Tax_rules_to_include_change_in_control_and_single_installment_tax_payment/\\$File/2013_G_CM3378_Tanzania_percent20amends_percent20Capital_percent20Gains_percent20Tax_percent20rules.pdf](http://www.ey.com/Publication/vwLUAssets/Tanzania_amends_Capital_Gains_Tax_rules_to_include_change_in_control_and_single_installment_tax_payment/$File/2013_G_CM3378_Tanzania_percent20amends_percent20Capital_percent20Gains_percent20Tax_percent20rules.pdf) [2015, October 6].
- xiv. Hira, N. 2016. *Tanzania – Corporate Taxation*. IBFD. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/gtha/printversion/pdf/gtha_tz.pdf [2016, January 6].
- xv. PricewaterhouseCoopers. 2014. *Tax Summary: Tanzania*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/tanzania_2014.pdf [2016, 2 January 2015].

SEYCHELLES

Other

- i. PricewaterhouseCoopers. 2014. *Tax Summary: Seychelles*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/seychelles_2014.pdf [2016, 2 January 2015].

SWAZILAND

Other

- i. PricewaterhouseCoopers. 2014. *Tax Summary: Swaziland*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/swaziland_2014.pdf [2016, 2 January 2015].

ZAMBIA

Legislation

- ii. *Income Tax Act 1966* (as amended). [Provided with questionnaire]
- iii. *Mines and Minerals Development Act, No. 11 of 2015*. [Provided with questionnaire]
- iv. *Property Transfer Act 340*. [Provided with questionnaire]

Other

- v. PricewaterhouseCoopers. 2014. *Tax Summary: Zambia*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/zambia_2014.pdf [2016, 2 January 2015].

ZIMBABWE

Double tax agreements

- i. *Agreement between the Federal Republic of Germany and the Republic of Zimbabwe for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Capital and Capital Gains*. 1988. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- ii. *Agreement between the Government of the Republic of South Africa and the Government of Southern Rhodesia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 1965. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- iii. *Agreement between the Government of the Republic of Zimbabwe and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Capital and Capital Gains*. 1992. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- iv. *Agreement between the Government of the Republic of Zimbabwe and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*. 1994. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- v. *Agreement between the Government of the Republic of Zimbabwe and the Government of the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Capital and Capital Gains*. 1993. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- vi. *Agreement between the Government of the State of Kuwait and the Government of the Republic of Zimbabwe for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*. 2006. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- vii. *Convention between the Government of the Republic of Zimbabwe and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Capital Gains and*

- Capital*. 1993. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- viii. *Convention between the Government of the Republic of Zimbabwe and the Government of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Capital and Capital Gains*. 1992. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- ix. *Convention between the Kingdom of Netherlands and the Republic of Zimbabwe for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 1989. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- x. *Convention between the Kingdom of Norway and the Republic of Zimbabwe for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Capital and Capital Gains*. 1989. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- xi. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Zimbabwe for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 1982. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- xii. *Convention between the Republic of Zimbabwe and the People's Republic of Bulgaria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 1988. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].
- xiii. *Convention between the Republic of Zimbabwe and Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*. 1989. In force. Available: IBFD Tax Treaty Database by subscription [2016, January 8].

Legislation

- xiv. Chapter 23:01 *Capital Gains Tax Act*. [Provided with questionnaire]
- xv. Chapter 23:04 *Finance Act*. [Provided with questionnaire]

Other

- xvi. Munyandi, M 2016. *Zimbabwe – Corporate Taxation*. IBFD, Amsterdam. Available: http://ip-online2.ibfd.org.ezproxy.uct.ac.za/collections/gtha/printversion/pdf/gtha_zw.pdf [2016, January 6].
- xvii. PricewaterhouseCoopers. 2014. *Tax Summary: Zimbabwe*. Available: http://www.pwc.co.za/en/assets/pdf/tax-summaries/zimbabwe_2014.pdf [2015, November 1].