

**Domestic Deeming Provisions and Double Tax Treaties:
Lessons from *Tradehold* and *Fowler***

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**This dissertation is submitted to the Department of Finance and Tax at the
University of Cape Town**

In partial fulfilment of the requirements for a

Master of Commerce

Specialising in Taxation in the field of South African Taxation

2025

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Abstract

Purpose

This thesis examines the complex interaction between domestic deeming provisions in South African domestic tax law and double tax treaties ('DTTs'), focusing on the legal and interpretative challenges that arise when statutory fictions are applied within an international tax framework. Using a comparative analysis of *Commissioner for the South African Revenue Service v Tradehold Ltd* ('Tradehold') and *Fowler v HMRC* ('Fowler'), the research investigates whether South African courts' reasoning in *Tradehold* could have been influenced by the approach taken in *Fowler*. The thesis explores whether key judicial principles or other factors justify the different outcomes in the cases or if the uncertainties in interpretation highlight the need for more explicit guidance. By assessing the principles governing the application of DTTs where domestic tax law incorporates statutory fictions, this research aims to contribute to a more structured and predictable approach to resolving cross-border tax disputes.

Research Methodology

A doctrinal legal research approach is employed, drawing on legislative analysis, case law, and academic commentary. The thesis applies comparative legal analysis to examine the South African and United Kingdom ('UK') courts' reasoning in *Tradehold* and *Fowler*, evaluating how statutory deeming provisions interact with DTT principles. Particular attention is paid to purposive interpretation as applied by the courts, assessing whether South Africa's approach aligns with international best practices. The research also explores broader interpretative

frameworks, including the role of the Vienna Convention on the Law of Treaties and Organisation for Economic Co-operation and Development ('OECD') Model Tax Convention principles, to assess their impact on the resolution of tax treaty disputes.

Results and Conclusions

The findings illustrate the South African courts in *Tradehold* adopted an approach that sought to retain the domestic statutory fiction within the DTT provisions, whereas the UK courts in *Fowler* limited the influence of the domestic deeming provision in favour of treaty autonomy and did not retain the fiction created by the deeming provision. This divergence underscores the absence of a universal standard for interpreting DTT provisions when domestic law incorporates statutory fictions. The analysis highlights the risks of inconsistent application, including double taxation or double non-taxation, which could undermine DTT objectives. This thesis concludes that clearer legislative and judicial frameworks are needed to ensure predictability and equity in tax treaty interpretation. It recommends that South African tax authorities provide more explicit guidance on the treatment of deeming provisions in an international tax context to enhance certainty for taxpayers and tax practitioners alike.

To mitigate the inconsistencies highlighted in this thesis, it is recommended that the South African Revenue Service issues binding guidance on the interpretation of deeming provisions within the context of DTTs. This could take the form of interpretative notes, similar to the OECD Commentary, which clarify when statutory fictions should be retained under DTTs and when they should not. Additionally, legislative amendments should be considered to ensure alignment between South Africa's domestic framework and international treaty obligations, particularly to prevent scenarios of double non-taxation or unintended fiscal arbitrage.

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Acknowledgements

I would like to express my sincere gratitude to the following individuals and organisations for their unwavering support and invaluable contributions to the completion of this dissertation:

My supervisor, Tracy Johnson, thank you for your trust and support in my work. Your mentorship and high standards have been instrumental in shaping the quality of my work, and I am deeply grateful for you.

My lecturers: I extend my appreciation to all my lecturers for their invaluable guidance, unwavering support, and dedication to nurturing my academic growth.

My academic advisors and mentors: I am thankful for the wisdom and encouragement provided by my academic advisors and mentors. Your insightful advice and encouragement have been invaluable in shaping the trajectory of this research.

My fellow classmates: A special thank you to Retief Ueckermann, your encouragement and support provided me with the necessary perseverance to see this through to the end.

The University of Cape Town: Thank you for providing the environment and resources essential for the completion of this dissertation. Being a part of this world-class institution has been a privilege.

Lastly, I extend my sincere appreciation to all those whom I have not mentioned by name but have supported and encouraged me in various ways.



Plagiarism Declaration

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List of Abbreviations

BEPS	Base Erosion and Profit Shifting
CFC	Controlled foreign corporation
CGT	Capital gains tax
CJ	Chief Justice
CSARS	Commissioner of the South African Revenue Service
DIRCO	Department of International Relations and Co-operation
DTT	Double tax treaty
FTT	First-Tier Tribunal
GAAR	General Anti-Avoidance Rule(s)
GG	Guernsey
HMRC	His Majesty's Revenue and Customs
ITA	Income Tax Act 58 of 1962
ITTOIA	Income Tax (Trading and other Income) Act, 2005
JSE	Johannesburg Stock Exchange
LITL	Luxembourg Income Tax Law
LU	Luxembourg
MTC	Model Tax Convention
OECD	Organisation for Economic Co-operation and Development
OECD MTC	Organisation for Economic Co-operation and Development Model Tax Convention
RSA	Republic of South Africa
RSA-LU DTT	Republic of South Africa and Luxembourg's Double Tax Treaty
RSA-UK DTT	Republic of South Africa and United Kingdom's Double Tax Treaty

SARS	South African Revenue Service
SCA	Supreme Court of Appeal
TC	Tax Court
UCT	University of Cape Town
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UN	United Nations
US	United States
UTT	United Kingdom Upper-Tier Tribunal
v/vs	Versus
VCLT	Vienna Convention on the Law of Treaties

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CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE RESEARCH

1.1 Introduction

This chapter introduces the central theme of this thesis: should the statutory fiction of deeming provisions under South Africa's Income Tax Act 58 of 1962 ('ITA') be retained when applying double tax treaties ('DTTs')? International taxation is a dynamic field where the reconciliation of domestic tax laws with DTTs remains a persistent challenge. For one, the reconciliation of domestic deeming provisions with DTTs has become increasingly relevant in the modern era of globalisation. With the Organisation for Economic Co-operation and Development's ('OECD') focus on base erosion and profit shifting ('BEPS')¹ and the growing complexity of international tax frameworks, jurisdictions face significant challenges in ensuring equitable and consistent tax treatment across borders.

Deeming provisions in South African tax law, with special reference to the ITA, are statutory mechanisms that treat hypothetical conditions as factual reality for tax purposes. For example, a deemed disposal would be treated as an *actual* disposal for tax purposes, even if no physical transfer of ownership occurred in reality.² These provisions are pivotal in preserving South Africa's tax base but create interpretative uncertainties when applied to undefined terms in DTTs. The overarching question of this thesis is, therefore, when a DTT is applied in a scenario where a statutory fiction is established through a deeming provision in domestic tax law, is the statutory fiction retained within the context of the DTT or not?

¹ Base erosion and profit shifting – see, OECD available at www.oecd.org, accessed on 20 January 2025.

² Section 9H and para 40 of the Eighth Schedule to the ITA.

Depending on the answer to this question, there could be scope for double taxation or double non-taxation. There are two types of double taxation: juridical double taxation, where the same income is taxed in the hands of the same taxpayer by two different jurisdictions, and economic double taxation, where the same income is taxed in the hands of different taxpayers, such as in the case of corporate profits and shareholder dividends.³ Conversely, double non-taxation refers to situations where income or capital gains escape taxation in any jurisdiction, often due to the misalignment of tax policies between the two engaged countries.

DTTs, as noted by Avi-Yonah,⁴ are essential tools for avoiding double taxation while ensuring equitable distribution of taxing rights between nations. However, challenges arise due to the uncertainty in interpreting how a deeming provision in domestic tax law is applied within the context of a DTT. This uncertainty arises from the inherent tension between statutory fictions created by domestic legislation and the undefined terms or principles embedded in international tax treaties. Even though the purpose of any DTT is clearly reflected in the title of the DTT, as can be seen in the DTT and its protocol between South Africa and the United Kingdom ('UK'),⁵ which reads as follows:

[The] Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland to avoid double taxation and prevent fiscal evasion with regard to taxes on income and capital gains⁶

³ For the definition of 'juridical double taxation': OECD 'Recommendation of the Council concerning the Model Tax Convention on Income and on Capital' available at <https://legalinstruments.oecd.org/public/doc/496/496.en.pdf>, accessed on 16 February 2025.

⁴ RS Avi-Yonah 'Double tax treaties: A global perspective' in W Schön (ed) *Tax and Corporate Governance* (2007) 93–110.

⁵ Convention Between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital Gains ('RSA-UK Convention') available at <https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/LAPD-IntA-DTA-2012-80-DTA-United-Kingdom-GG-24335.pdf> and <https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/LAPD-IntA-DTA-2012-81-DTA-Protocol-United-Kingdom-GG-34971.pdf>, accessed on 23 January 2025.

⁶ Ibid 2 at the title.

it is subject to interpretative ambiguities, which can lead to divergent interpretations and outcomes. By analysing two cases, this research explores these interpretative uncertainties relating to domestic deeming provisions within the context of the ITA and DTTs.

The two cases that serve as the foundation for this analysis are the South African case, *Commissioner for the South African Revenue Service v Tradehold Ltd* (*'Tradehold'*)⁷ and the UK case, *Fowler v HMRC* (*'Fowler'*).⁸ These cases provide critical insights into how courts have adopted contrasting interpretations regarding the interaction between domestic *deeming provisions* that create statutory fictions and undefined DTT terms contained in the respective DTT.

The facts in *Tradehold* are briefly as follows: When the company ceased its South African residency by relocating its place of effective management to Luxembourg ('LU'), it triggered a deemed disposal of assets under the ITA, a statutory fiction designed to tax unrealised capital gains accrued in South Africa before the taxpayer exited its tax jurisdiction. The central issue was whether this *deemed disposal* aligned with the undefined DTT term *alienation* in article 13 of the Republic of South Africa and Luxembourg's Double Tax Treaty ('RSA-LU DTT').⁹ *Alienation* typically refers to the transfer of ownership rights in property, which are actual disposals, exchanges, donations, or other forms of disposition of property or assets. The South African Supreme Court of Appeal ('SCA') delved into the broader context, intent, and purpose of the DTT. This included the ordinary meaning of *alienation*, the DTT's purpose and the negotiators' intentions, and reconciliation with international tax principles. Ultimately, the SCA treated the deemed disposal as equivalent to alienation under the DTT, thus retaining the statutory fiction under the DTT interpretation.

⁷ 2013 (4) SA 184 (SCA).

⁸ [2018] EWCA Civ 2544.

⁹ RSA-UK Convention op cit note 5.

Notably, the arguments presented by the South African Revenue Service ('SARS') in *Tradehold* reveal nuances that might have altered the outcome had they been framed differently. SARS focused on the relocation date when Tradehold Limited ('Tradehold Ltd') became a Luxembourg ('LU') resident but did not address the timing of the deemed disposal under paragraph 23(1)(g)(i) of the Eighth Schedule to the ITA. It has been argued that if SARS had argued that the deemed disposal occurred prior to the change in residency, the court might have reached a different conclusion.¹⁰ This highlighted a gap in the domestic framework at that time, which was then addressed by introducing section 9H of the ITA to clarify exit charges upon ceasing residence soon after *Tradehold*.

In contrast to this South African case, the United Kingdom Supreme Court's ('UKSC') decision in *Fowler* illustrated a divergent approach to statutory fictions under DTTs. This case involved a professional diver who, under UK domestic law, specifically the Income Tax (Trading and Other Income) Act, 2005 ('ITTOIA'), was deemed to be self-employed for tax purposes despite being *de facto* employed. The central issue was whether this statutory fiction of self-employment could be retained in the DTT's terms, which aligned taxing rights with employment income and not self-employed income. The UKSC acknowledged the domestic deeming provision, but ruled that the DTT's classification of income as employment income overrode the domestic fiction, ensuring that the DTT terms remained autonomous from domestic law. The court emphasised that the DTT must be interpreted strictly based on its terms and the intentions of the contracting states. According to the court, this approach preserved the economic reality of the diver's employment status¹¹ and avoided creating tax anomalies¹² such as *double non-taxation* or *inequitable allocation of taxing rights*.¹³

¹⁰ A Seaber 'No more exit charge?' available at https://www.thesait.org.za/news/93087/No-more_exit-charge.htm, accessed on 17 January 2025.

¹¹ *Fowler* supra note 8 paras 43 and 46–7.

¹² *Fowler* supra note 8 para 33.

¹³ *Fowler* supra note 8 paras 27, 33–4.

The outcomes of these cases highlight the interpretative differences in reconciling the statutory fictions created by the domestic tax law's *deeming provisions* with the DTT terms. It further underscores the importance and value of clear legislative and judicial guidance. Although decisions in courts of other jurisdictions do not create precedent in South Africa, the principles in *Secretary for Inland Revenue v Downing* ('*Downing*')¹⁴ state that in the international tax context, decisions of foreign courts are often persuasive due to the 'international tax language' that is being developed around DTT interpretation,¹⁵ and therefore a comparative analysis of *Tradehold* and *Fowler* is considered appropriate. This analysis includes determining if the discrepancies between the decisions of the two cases can be attributed to identifiable distinguishing factors or principles. Specifically, this thesis explores whether the court's reasoning in *Tradehold* exhibited shortcomings when compared to the approach in *Fowler* or whether key judicial or other distinguishing factors and principles between the two cases justify the differing outcomes. Furthermore, this research aims to elucidate the principles to be considered when applying a DTT in situations where domestic tax law employs statutory fictions through *deeming provisions*. Addressing these interpretative uncertainties would be valuable for providing greater clarity in future cases for tax practitioners and policymakers as they navigate potential uncertainties in international tax.

This research underscores that there is not an absolute yes or no answer to whether statutory fictions should be retained within DTTs. Instead, the appropriate treatment depends, among other things, on the specific wording of the DTT, the legislative intent of the deeming provisions and broader policy considerations. Given the lack of clear legal precedent and statutory guidance in South Africa, this thesis highlights the necessity for an authoritative framework from SARS or legislative reform to address these interpretative gaps.

¹⁴ (227/74) [1975] ZASCA 55 (19 August 1975).

¹⁵ *Ibid.*

This thesis further draws on the interpretative frameworks of leading scholars such as Michael Lang,¹⁶ Jennifer Roeleveld and Craig West,¹⁷ as well as Jonathan Schwarz,¹⁸ to address these challenges. Lang’s emphasis on purposive interpretation provides a foundational lens for aligning domestic provisions with DTT obligations. Roeleveld, West, and Schwarz complement this by addressing the practical challenges of applying statutory fictions in international tax contexts, particularly focusing on the necessity of clear legislative guidance and the importance of judicial consistency. Together, these frameworks provide the tools to analyse the interpretative approaches adopted in *Tradehold* and *Fowler*, offering insights into potential solutions for aligning domestic legislation with international DTT obligations and achieving fair and equitable outcomes.

The next chapter delves into the nature and role of domestic *deeming provisions* within the ITA, providing a detailed analysis that underpins the comparative study of the above-mentioned cases in subsequent chapters.

1.2 Research Questions

The central question of this thesis is as follows: when a DTT is considered in a situation where a *statutory fiction* has been created through a deeming provision in the domestic tax law, is the statutory fiction retained in the DTT context or not?

¹⁶ M Lang ‘The role of purpose in treaty interpretation’ in M Lang, P Pistone, J Schuch, C Staringer, & A Storck (eds) *Tax Treaty Case Law Around the Globe* (2014) 15–30.

¹⁷ J Roeleveld & C West ‘Exchange of information and cross border cooperation between tax authorities’ in X Oberson (ed) *Cahiers de droit fiscal international* (2013) 687–704 and P Pistone, J Roeleveld, J Hattingh, JFP Nogueira & C West *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019).

¹⁸ J Schwarz *Schwarz on Tax Treaties* 6 ed (2021).

In order to address the central research question, the following sub-questions arise:

- What are *deeming provisions*, and how relevant are they in South African tax law?
- Which principles of interpretation were applied in respect of the relationship between a domestic deeming provision and the relevant DTT in *Tradehold*?
- Which principles of interpretation were applied in respect of the relationship between a domestic deeming provision and the relevant DTT in *Fowler*?
- Are there distinguishing factors or principles that explain why these cases adopted different approaches?
- Are there any other principles of interpretation that are relevant (but perhaps not referred to in the above-mentioned cases) to clarify how a domestic deeming provision should be treated in a DTT context?

1.3 Research Methodology

This thesis employs a doctrinal research method, which is particularly suited to legal analysis. Doctrinal research refers to identifying, analysing, organising and synthesising laws, case legislation, and authoritative sources.¹⁹ An approach to this methodology involves applying logic to reach a conclusion. Inductive and deductive reasoning are also applied to law and legal rules, along with a thorough analysis and application of the principles relevant to the research question considered.²⁰ This method allows for a comprehensive exploration of how DTTs interact with domestic tax laws.

¹⁹ MA McKerchar 'Philosophical paradigms, inquiry strategies and knowledge claims: applying the principles of research design and conduct to taxation' (2008) 6 *eJournal of Tax Research* 18–9.

²⁰ University of Cape Town *FTX4036F_S Research Methods in Tax (2023)* p 27, available at University of Cape Town:

<https://adfs.uct.ac.za/adfs/ls/?SAMLRequest=fZHNT0QwFIVfhXQPpY0QbAYSnFk4yahkQBduTIEiTUqL3KKOTy8D%2FowlZ3nTc8859%2BsKeKd6lo621XvxMgqwnunNLD5IUbj0JnhIIFp3glgtmJ5erNj1PNZPxhrKqOQk>

Central to this methodology is the application of interpretative principles advocated by scholars such as Jennifer Roeleveld and Craig West. Roeleveld and West's emphasis on reconciling domestic statutory fictions with DTT obligations provides a critical lens for analysing the treatment of deemed disposals in *Tradehold* and *Fowler*.²¹ Their work underscores the need for judicial consistency and legislative clarity when addressing undefined DTT terms such as *alienation*, ensuring that interpretative outcomes are grounded in both practical and theoretical insights.

Schwarz²² provides a historical overview of the shift from literal to purposive and autonomous approaches in DTT interpretation. His analysis highlights the importance of adapting interpretative methods to contemporary tax challenges, especially in cases involving conflicts between domestic deeming provisions and international treaties. By adopting Schwarz's perspective, this research aligns its methodology with an evolving legal landscape in addressing the interpretative uncertainties created, as mentioned.

The doctrinal method can be summarised and described as follows:²³

- Data is collected from legislation, case law, and scholarly sources.
- Principles of interpretation are systematically analysed to address the research question and sub-questions.
- A comparative analysis of *Tradehold* and *Fowler* demonstrates the application of these principles.
- Context, observations and interpretations are investigated to determine the impact that they may have on the liability for tax.

[wKIwUqj10bD2IkhF8OrrMT9fhej1toeGMbQytJTB1IzrzldzqexNErY1gMw%2BOhKcXaXF8jZTDWk5](https://www.kluweronline.com/abstract-and-citation/?fromOpenAccess=true&url=/docId/3248247), accessed on 15 August 2023.

²¹ J Roeleveld & C West 'South Africa: Transfer of seat and exit taxation: treaty override?' in ECCM Kemmeren et al. (eds) *Tax Treaty Case Law Around the Globe* (2013).

²² J Schwarz 'The evolution of tax treaty interpretation' (2010) 38 *Intertax* 229–41.

²³ T Hutchinson *Researching and Writing in Law* 4 ed (2018).

Each chapter systematically explores legislation, case law, and scholarly commentary to assess how DTTs and deeming provisions are interpreted and applied. By comparing the South African and UK tax cases, the research illustrates the doctrinal approach in practice, demonstrating the role of statutory interpretation in reconciling local and international tax objectives. The results are then interpreted with reasoning to arrive at a conclusion that addresses the research question.

1.4 Limitations of Scope

This research focuses on South Africa's domestic deeming provisions and their interaction with DTTs, specifically analysing the RSA-LU DTT and the Republic of South Africa and United Kingdom's Double Tax Treaty ('RSA-UK DTT'). While this allows for a focused analysis of judicial interpretation in select cases, certain limitations are necessary to ensure the research remains manageable.

This thesis examines the judicial interpretations in the *Tradehold* and *Fowler* cases to highlight key conflicts between statutory fictions and DTT obligations. Other international cases involving domestic deeming provisions were excluded since these two cases are the only pair dealing with domestic deeming provisions and DTT interpretation, where the treaties in question fall within the South African treaty network, making them of particular interest. The comparative analysis is limited to South Africa and the UK, excluding jurisdictions with alternative DTT models, such as the United States Model Convention. It is acknowledged that other international tax cases might also contribute to the broader international tax language regarding the interpretation of domestic deeming provisions in a DTT context. The

consideration of these other international tax cases covering this issue represents an area for further research.

This research exclusively addresses domestic *deeming provisions* and their interaction with DTTs. Other statutory mechanisms, such as exemptions, controlled foreign company rules and tax credits that could also impact DTT interpretation, are not discussed. This focus limits the thesis' ability to provide a comprehensive view of how domestic laws interact with international treaties beyond deeming provisions.

This research is specifically limited to the interpretation of tax treaties in the context of deeming provisions within the ITA. While the broader field of DTT interpretation encompasses various principles, including the Vienna Convention on the Law of Treaties ('VCLT'),²⁴ this thesis does not comprehensively analyse all aspects of DTT interpretation. Instead, it focuses narrowly on how deeming provisions as legal fictions that alter the nature or timing of events for tax purposes interact with DTTs. The analysis explores whether and how these provisions align with tax treaties' object, purpose, intent and language. By scoping out full DTT interpretation, this research aims to provide a more focused examination of the complexities arising when domestic tax rules conflict with DTT provisions.

²⁴ (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

1.5 Structure of the Research

This thesis is structured into six chapters. The content of the remaining chapters is summarised as follows:

Chapter 2 examines the definition, purpose and relevance of *deeming provisions* within the context of South African tax law, with special reference to the ITA, which establishes a foundation for later tax case analysis.

Chapter 3 analyses the *Tradehold* decisions from the tax court right through to the SCA in South Africa. It elicits how the relevant *deeming provisions* were interpreted within the context of the ITA and the RSA-LU DTT.

Chapter 4 examines the *Fowler* decisions across three levels of the UK judiciary: the First-Tier Tribunal ('FTT'), the Upper-Tier Tribunal ('UTT'), and the UKSC. It elicits how *deeming provisions* were interpreted within the context of the ITTOIA and RSA-UK DTT.

Chapter 5 contrasts the interpretative principles applied in the South African context with those used in the UK context, identifying key distinctions and their implications for international tax law before rationalising these principles and their outcomes.

Chapter 6 explores whether additional principles of interpretation could clarify the treatment of statutory fictions in a DTT context. It concludes by addressing the research question and offers recommendations on how domestic *deeming provisions* could be treated in the context of DTT interpretation to minimise interpretative uncertainties.

CHAPTER 2: DOMESTIC DEEMING PROVISIONS

2.1 Introduction to Deeming Provisions

This chapter examines the definition, purpose, and relevance of deeming provisions in South African tax law with special reference to the Income Tax Act 58 of 1962 ('ITA'). Deeming provisions, often referred to as statutory fictions, enable the law to treat certain transactions (eg, disguised dividends), entities (eg, public benefit organisations), persons (eg, tax residency), or scenarios as if they exist or occurred, regardless of their factual reality (or actual circumstances).

The primary function of a deeming provision is to address gaps, clarify ambiguities, or enforce specific policy objectives in tax legislation. They ensure that taxpayers cannot circumvent the law by relying on technicalities or the absence of explicit provisions.²⁵

The relevance of these provisions serves as essential tools in the ITA to ensure effective tax administration and to maintain fairness, equity, and integrity within the tax system. They also prevent tax avoidance, allocate tax liabilities appropriately, and ensure consistent treatment of taxpayers.²⁶

The legislature introduces deeming provisions to close loopholes, promote compliance, or implement specific policy goals. Their impact on interpretation modifies the normal interpretation of facts or transactions, requiring courts and taxpayers to apply the provisions

²⁵ The primary function of a deeming provision is to: address legislative gaps in tax law; clarify legislative ambiguities in tax law; enforce specific policy objectives in tax law.

²⁶ The relevance of a deeming provision: Deeming provisions serve as essential tools in tax law to ensure effective tax administration, to maintain fairness, to maintain equity, and to maintain integrity within the tax system, prevent tax avoidance, allocate tax liabilities appropriately, ensure consistency under the treatment of tax amongst taxpayers.

strictly as written but construing them narrowly at the same time to avoid overreach or unintended consequences, thus creating a delicate and balanced approach.²⁷

A deeming provision usually specifies the condition(s) under which the deeming occurs, ensuring precision in application. Deeming provisions may affect taxpayer behaviour by preemptively addressing strategies followed to exploit legal gaps or loopholes (eg, anti-avoidance provisions). South African courts often examine legislative intent when it comes to the interpretation of deeming provisions to resolve interpretative ambiguities, reinforcing the strict but reasonable application of these deeming provisions.

Conceptual challenges of deeming provisions often involve their fairness versus their fiction. The artificial nature of deeming provisions can sometimes lead to perceived unfairness or administrative complexity. Furthermore, overuse or poor drafting of deeming provisions can lead to abuse, creating ambiguity and potentially causing disputes and unintended tax consequences. To avoid this, South African courts interpret these provisions in light of their specific purpose to avoid overly broad or overly narrow applications.²⁸

Deeming provisions are integral to maintaining the integrity and coherence of the South African tax system. By creating structured legal fictions, also known as statutory fictions, they ensure that South African tax law adapts to evolving realities and prevents abuse. This explanation of deeming provisions sets a conceptual foundation for analysing their application in specific areas of the ITA, including areas such as cross-border taxation and anti-avoidance rules. It lays down the foundation for a later analysis of cases such as *Commissioner for the*

²⁷ The legislator introduces deeming provisions to: close loopholes, promote compliance, implement specific goals, modify the normal interpretation of facts, modify the normal interpretation of transactions, requires courts and taxpayers to apply provisions according to a balanced approach looking at the strict written word and construing then narrowly but at the same time avoiding overreach or unintended consequences.

²⁸ T Mostert *An Interpretation of the Deeming Provisions in Legislation in the Context of a Good Tax System – A South African perspective* (unpublished PhD dissertation, Rhodes University, 2021).

South African Revenue Service v Tradehold Ltd ('Tradehold')²⁹ in South Africa and *Fowler v HMRC* ('Fowler')³⁰ in the United Kingdom ('UK') in chapters 3 and 4.

2.2 Defining a Deeming Provision

Deeming provisions are not defined within the ITA, even though they are frequently used in the ITA. Johan Hattingh highlights that statutory fictions are intended to alter reality for legal purposes but must be interpreted narrowly to avoid overreach and inconsistencies in tax law.³¹ Moreover, the word “*deem*” and its many variations are also not clearly defined in the ITA. Black’s Law Dictionary defines the word deem as follows:

‘Deem’ means: [T]o treat (something) as if:

- (1) it were really something else, or
- (2) it has qualities that it does not have.³²

From this definition, it can be seen that the word deem has a highly ambiguous ordinary meaning. Therefore, if a term is not explicitly defined or understood within the ITA or its context, it becomes necessary to seek judicial interpretation to ascertain its meaning and application. This requires referring the matter to the courts, which have the authority to interpret undefined terms in light of their ordinary meaning, legislative context and relevant case law. Many courts have grappled with cases where defining a deeming provision proved necessary. Although decisions in courts of other jurisdictions do not create precedent in South

²⁹ 2013 (4) SA 184 (SCA).

³⁰ [2018] EWCA Civ 2544.

³¹ J Hattingh ‘Fowler v HMRC: Deeming provisions and DTTs’ (2021) 5 *British Tax Review* 537–52.

³² BA Garner (ed) *Black’s Law Dictionary* 8 ed (2004) 1254.

Africa, the principles in *Secretary for Inland Revenue v Downing*³³ are often applied. It states that in the international tax context, decisions of foreign courts are often persuasive due to the ‘international tax language’ that is being developed around double tax treaties (‘DTTs’) interpretation.³⁴ Thus, these outcomes have persuasive value when cases involve DTTs. This analysis draws on pivotal court cases to explain deeming provisions and how they are interpreted. These are extracted and summarised for ease of reference.

As mentioned in *Tradehold*, the UK decision in *R v Norfolk County Council*,³⁵ Cave J defined a deeming provision as follows:

Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, notwithstanding, it is not that particular thing, nevertheless it is deemed to be that thing.³⁶

This case established that a deeming provision acknowledges that the subject is not as described in reality but should be treated as such for legal purposes.

Similarly, in *Chotabhai v Minister of Justice and Registrar of Asiatics*³⁷ Maasdorp CJ stated:

... when it is said that a thing is to be deemed to be something, it is not meant to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and notwithstanding it, is not that particular thing, nevertheless, for the purposes of the ITA, it is deemed to be that thing.³⁸

³³ (227/74) [1975] ZASCA 55 (19 August 1975).

³⁴ *Ibid* para 16.

³⁵ (1891) 60 LJ QB 379.

³⁶ *Ibid* para 380 quoted by the SCA in *Tradehold* supra note 29 para 11.

³⁷ 1911 AD 13.

³⁸ *Chotabhai* supra note 37 para 59, as quoted in *CSARS v Klu Investments (Pty) Ltd* 2016 (4) SA 580 (SCA) para 15.

In addition, in the case of *S v Rosenthal* ('*Rosenthal*'),³⁹ Trolip JA explains the meaning of the word 'deem' as follows:

The words 'shall be deemed' ('word geag' – in Afrikaans) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, e.g. a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction.⁴⁰

This summary is based on the first part of the above three court cases. It focuses on the interpretative principles used in these cases, specifically the *locus classicus* of interpretation originating in *Natal Joint Municipal Pension Fund v Endumeni Municipality* ('*NJMP Fund*')⁴¹ for South Africa.

The aim in this instance – to define a deeming provision – was established by the judges who found that a deeming provision is used to indicate that the subject matter is of a type that the law considers to be relevant, even if it is not ordinarily of that type. The context of this statutory provision must also be considered.⁴²

The conclusion of the above three cases is thus that a *deeming provision* has a way of clarifying that the law will be applied in a certain manner, regardless of any preconceived notions or assumptions about that subject matter. It also addresses the fact that it cannot be defined without context, alluding to a process of interpretation.

The above-mentioned judicial interpretations provide a starting point for understanding *deeming provisions* in the context of the ITA.

³⁹ (90/78) [1979] ZASCA 95 (20 September 1979).

⁴⁰ Ibid at 75F–76A.

⁴¹ 2012 (4) SA 593 (SCA) paras 18–26.

⁴² Ibid para 18.

Further to the above cases, the following court cases are also relevant in defining deeming provisions in the ITA: *New Union Goldfields Limited v Commissioner for Inland Revenue* ('NUG'),⁴³ *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa* ('Assign Services'),⁴⁴ *Mouton v Boland Bank Ltd* ('Mouton'),⁴⁵ and *Thistle Trust v Commissioner for the South African Revenue Service* ('Thistle Trust').⁴⁶

In *NUG*, van den Heever JA stated:

I exclude from consideration all the deeming clauses contained in the ITA and those connected with them; for one the Legislature 'deems', it departs from reality.⁴⁷

Thus, when the legislature deems it appropriate, it deviates from reality.

In *Assign Services*, a deeming provision was described to give a certain subject matter a different meaning; that is, deeming provisions are often used in statutes to give the subject matter a meaning not ordinarily associated with it.⁴⁸

Therefore, in the context of tax law, a deeming provision has the power to assign a certain meaning to a subject matter even if it is not factually so and, in so doing, apply a tax consequence to that particular subject matter. This highlights the definition and the fact that it should be defined in the context of the tax law, again alluding to its interpretation.

Further to the above, adding an additional angle, it was found in *Mouton* that '[t]he intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.'⁴⁹

⁴³ 1950 (3) SA 392 (A).

⁴⁴ 2018 (5) SA 323 (CC).

⁴⁵ [2001] 3 All SA 485 (A).

⁴⁶ 2025 (1) SA 70 (CC).

⁴⁷ *Nug* supra note 43 at 407A, quoted by the SCA in *Tradehold* supra note 29 para 12.

⁴⁸ *Assign Services* supra note 44 para 92.

⁴⁹ *Mouton* supra note 45 para 13.

Therefore, a deeming provision was described in a different way in this case to the aforementioned case. In this case, the goal of the deeming provision is to lay down a hypothesis (or assumption) as far as necessary to achieve the legislative purpose, but no further.⁵⁰

Purpose and intent are distinct but interconnected concepts in legal and tax law interpretation. Purpose refers to the broader objective or goal of the legislation and answers the question: Why was the law enacted? Intent refers to the specific meaning and application lawmakers intended for particular provisions or language within the law. It answers the question: What did the legislature mean by this specific wording?

Legislative intent must align with the broader purpose of the law. South African courts interpret the intent of specific provisions in a way that supports the general purpose of the legislation, avoiding interpretations that would undermine its objectives. South African courts seem to balance the purpose and intent by analysing the text of the law as their primary source of intent, using the purpose as a guide when the intent is ambiguous. Courts then refer to extrinsic aids, such as explanatory memoranda, parliamentary debates, and historical context, to reconcile intent with purpose.

For example, in *Thistle Trust*, the 2008 amendments to paragraph 80(2) of the ITA were analysed to discern parliament's intent. The Constitutional Court emphasised that while explanatory memoranda can clarify legislative purpose, these memoranda cannot override clear statutory language; their role is to provide context when the language is ambiguous.⁵¹

⁵⁰ Ibid para 13.

⁵¹ *Thistle Trust* supra note 46 paras 136–37.

In summary, the following points have been extracted and summarised from the above-mentioned cases to provide the interpretative principles used by the South African courts to define a deeming provision:

- a deeming provision is explained and described as an assumption to a certain subject matter of which it is not ordinarily so;
- it should be inspected within the legal context it is found, and then
- it should have a specific aim or goal to achieve a specific *purpose* in the tax law but no further bearing in mind the *intent* of the legislator.

In the context of the ITA, deeming provisions are widely used to address scenarios such as deemed employment income, exit taxes and changes in residency. As an example, paragraph 12 of the Eighth Schedule to the ITA⁵² creates a deemed disposal when a taxpayer ceases to be a South African tax resident, taxing unrealised gains as if they had been realised.

2.2.1 Legal Context

When interpreting tax legislation, *context* plays a pivotal role in ensuring that statutory provisions are understood and applied in alignment with their intended purpose. According to *Black's Law Dictionary*, the word '*context*' is defined as '[t]he surrounding text of a word or a passage, used to determine the meaning of that word of passage setting or environment'.⁵³

Context refers to the broader framework within which a particular phrase or provision exists, including linguistic, systemic, and purposive dimensions. In this regard, tax legislation often involves technical language or undefined terms, which require interpretation that considers not

⁵² Para 12 of the Eighth Schedule to the ITA.

⁵³ Garner op cit note 32 at 960.

only the immediate text but also the framework, historical background, and overarching objectives of the statute. By examining the legal *context*, South African courts aim to resolve ambiguities and avoid interpretations that lead to absurdity, inequity or the circumvention of *legislative intent*. Thus, *context* serves as the bridge between the literal wording of the statute and its practical application, ensuring that the law fulfils its intended *purpose* while adhering to principles of fairness and justice.

It was observed in *S v Posel* (*'Posel'*)⁵⁴ that every case of legislative deeming must be dealt with in terms of the particular statute in which it occurs. Therefore, as a first step, it is clear that South African courts are of the view that legislative deeming must be dealt with in accordance with the legislation enacted in that specific instance, recognising the context thereof. Thus, the context is set in the situation where that subject matter occurs.

The principle of considering the context, also known as the contextual approach, is explained in detail in the judgment of *NJMP Fund* as the *locus classicus* of interpretation in South Africa.⁵⁵ Therefore, as part of defining a legal concept, it is also now clearer that it needs to be interpreted, and one of the principles of interpretation refers to the *context* of the statute.

2.2.2 Interpretation: Purpose and Intent

In South Africa, the interpretation of tax legislation requires a careful balance between uncovering the legislature's intent and aligning it with the overarching purpose of the law. While intent focuses on the specific meaning that the legislator assigns to particular words or provisions, purpose emphasises the broader objectives the legislation seeks to achieve, for example, equity, efficiency, fairness or revenue collection. These two concepts are distinct yet

⁵⁴ [1977] 4 All SA 551 (N) 563.

⁵⁵ *NJMP Fund* supra note 41 paras 17–26.

interdependent, as the purpose often guides the discovery of the intent, particularly in ambiguous or undefined terms. Courts rely on interpretation principles, such as the purposive approach, to ensure that tax provisions are applied in a way that respects their legislative purpose while remaining consistent with their intended meaning (legislator's intent).

As mentioned above, the *NJMP Fund* case is the prevailing *locus classicus* of interpretation in the context of the ITA. It has consistently been applied in various tax cases in South Africa for its authoritative interpretation of legislative provisions.

The most notable passage to the *NJMP Fund*, as observed by Wallis JA, reads as follows:

The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.⁵⁶

⁵⁶ Ibid para 18.

It is apparent from the above that interpretation is a process that Wallis JA systematically approached as follows:

- interpretation attributes meaning to legal instruments and legal documents
- having regard to its *context* and circumstances.⁵⁷

Interpretation, as a process, is also:

- objective
- and provides a sensible meaning that does not undermine its purpose.⁵⁸

The key principles to consider when interpreting legal instruments and documents are:

- Language in the ordinary rules of syntax and grammar.
- The context in which the provision appears.
- The apparent purpose and intent to which it is directed.
- The material and background known to those responsible for its analysis.⁵⁹

Professor Dale Hutchison has discussed the *NJMP Fund* case, and according to him, Wallis JA's judgment effectively ended the dichotomy between the textual and the contextual approaches, stating that a balanced and unified approach promotes legal certainty and predictability since it anchors interpretation firmly within the meanings of words, but always contextualised by relevant circumstances and overarching objectives.⁶⁰

Post-*NJMP Fund*, South African courts have applied and refined these interpretational principles, a few of which are summarised next.

⁵⁷ Ibid paras 17–8.

⁵⁸ Ibid paras 18, 22.

⁵⁹ EA Kellaway *Principles of Legal Interpretation of Statutes Contracts and Wills* (1995) 100.

⁶⁰ D Hutchison *Law of Contract in South Africa* 3 ed (2017) 322–27.

In 2019, in the case of *ABSA Bank v CSARS*,⁶¹ the court emphasised a holistic approach to blending *textual* and *contextual* interpretation, thus further illustrating how courts should resolve apparent ambiguities in tax legislation by applying the *NJMP Fund* principles.

In 2020, the *Commissioner for South Africa Revenue Service v Big G Restaurants (Pty) Ltd*⁶² case reiterated the importance of the *NJMP Fund* principles. Here, the court emphasised a purposive approach to interpretation, focusing on the legislation's purpose and the broad objectives of the tax statute.

In 2023, in the case of *Commissioner for the South African Revenue Service v Medtronic International Trading SARL*,⁶³ the court also took a *purposive approach*, furthermore looking at the *intent* behind the legislation to ensure that the interpretation aligns with the law's objectives, emphasising the need for clear legislative guidelines and highlighting the uncertainties that exist when one is involved in interpreting tax laws. Notably, however, it is not always easy to establish the legislature's or DTT negotiators' intentions.

All of the above cases highlight the same principles as established in *NJMP Fund*, namely, an approach that seeks to interpret legal provisions based on their intent and purpose.

This chapter further explores anti-avoidance provisions in the context of the ITA and the *deeming provisions* found within the General Anti-Avoidance Rule ('GAAR') sections of the ITA.⁶⁴

⁶¹ 2021 (3) SA 513 (GP).

⁶² 2020 (6) SA 1 (CC) paras 39–48.

⁶³ [2023] 2 All SA 297 (SCA) para 31.

⁶⁴ Section 80A–80L of the ITA.

2.3 Deeming Provisions and Anti-Avoidance Legislation

Since anti-avoidance legislation often incorporates deeming provisions, it becomes essential to also understand how the judiciary interprets them. By altering the natural meaning of terms and concepts, deeming provisions can be used as part of anti-avoidance legislation to prevent misuse and/or abuse. However, it is crucial to maintain the integrity of tax systems by preventing tax evasion through anti-avoidance legislation. By applying the principles of interpretation in this context, courts ensure that such legislation effectively targets and mitigates these avoidance schemes. In addition, deeming provisions will be considered in relation to the principles that guide the interpretation of anti-avoidance legislation.

Anti-avoidance measures in the ITA⁶⁵ are designed to prevent taxpayers from exploiting loopholes in legislation to reduce their tax liabilities in ways that contradict the spirit and intent of the law. These measures are crucial in addressing tax avoidance schemes, particularly those involving artificial arrangements or legal fictions created to achieve tax benefits without commercial substance. The interaction between anti-avoidance rules and deeming provisions is central to preserving the tax system's integrity.

The distinction between tax avoidance and tax evasion can be summarised as follows: tax avoidance is a legal strategy used to minimise tax liability within the framework of the law, such as proper tax planning. In contrast, *tax evasion* is the practice of illegal activities aimed at evading tax liabilities, including misrepresentation, fraud, or concealment of income. While tax avoidance often involves exploiting *deeming provisions*, anti-avoidance rules ensure that these provisions cannot be misused to undermine the tax base as a whole.⁶⁶

⁶⁵ Ibid s 80A–80L.

⁶⁶ P Haupt & E Haupt *Notes on South African Income Tax 2023* 42 ed (2023) 635.

The general anti-avoidance provisions in section 80A to 80L of the ITA establish the framework for combating impermissible tax avoidance. These provisions empower the Commissioner for the South African Revenue Service ('CSARS') to disregard or recharacterise arrangements considered artificial, lacking commercial substance, or solely or mainly implemented to gain a tax benefit.

South African case law provided significant guidance on the application of anti-avoidance provisions and their interactions with *deeming provisions*. This is discussed next.

In *Meyerowitz v CIR*,⁶⁷ the importance of substance over form was highlighted in determining whether the arrangement constituted impermissible tax avoidance. The courts examined the actual substance and economic realities of a transaction rather than its legal form to identify tax avoidance schemes disguised as legitimate transactions, as seen in *Commissioner for the South African Revenue Service v NWK Ltd*.⁶⁸

In *Hicklin v SIR*⁶⁹ it was reinforced that artificial arrangements lack genuine business purpose and are subject to scrutiny under anti-avoidance rules.

Furthermore, in *ITC 1636*⁷⁰ and *CIR v Conhage (Pty) Ltd*,⁷¹ it was clarified that transactions with no commercial purpose beyond achieving a tax benefit could be disregarded by the South African Revenue Service ('SARS').

⁶⁷ [1963] 25 SATC 287 [A].

⁶⁸ 2011 (2) SA 67 (SCA) para 58.

⁶⁹ (1980 AD) 41 SATC 179.

⁷⁰ (1998) 60 SATC 267.

⁷¹ 1999 (4) SA 1149 (SCA).

Anti-avoidance measures ensure that *deeming provisions* are not misused to create unintended tax advantages. By addressing artificial or contrived arrangements, these measures:

- Preserve the integrity of the tax system.
- Ensure fair tax treatment across taxpayers.
- Maintain consistency with the underlying purpose of the ITA and its interaction with DTTs.

GAARs contained in section 80A to 80L of the ITA give power to SARS to counteract tax benefits arising from avoidance arrangements that are deemed impermissible. Interpretation of GAAR is also found in *SARS v Founders Hill (Pty) Ltd*,⁷² where the court took the view that the *purpose* of the respondent was significant in this matter. In *Commissioner for the South African Revenue Service v Bosch*,⁷³ the interpretation of GAAR and the *purposive approach* was highlighted again.

To conclude, understanding interpretation principles in anti-avoidance legislation is critical, especially in relation to *deeming provisions*. When interpreting it, it is necessary to understand both the letter and spirit of anti-avoidance legislation. From the above, it can be seen that in South Africa, interpretations that faithfully implement the legislative *purpose* and *intent* follow these principles of interpretation as found in *NJMP Fund*:

- *language* in the ordinary rules of syntax and grammar; and
- *substance over form*; and
- the *context* in which the provision appears; and
- the apparent *purpose* to which it is directed; and

⁷² 2011 (5) SA 112 (SCA).

⁷³ 83 SATC 121 para 9.

- the material and background known to those responsible for its analysis (*intent*).⁷⁴

2.4 Relevance of Deeming Provisions

Deeming provisions are designed to create legal fictions by treating certain transactions, amounts, or entities in a specified manner, regardless of their actual nature or form. This ensures consistency, clarity, and predictability in the taxation process, particularly in ambiguous situations. By defining specific circumstances where taxpayers or transactions are deemed to fall under particular rules, these provisions require careful interpretation to balance legislative intent with fairness and to avoid unintended consequences. Their relevance lies in their ability to provide a structured framework for addressing intricate tax scenarios while safeguarding the integrity of the tax system.

By exploring specific examples of *deeming provisions* in the ITA, this section illustrates the variety of ways in which the ITA applies these assumptions to create taxable events, such as *deemed disposals* and *deemed accruals of income*. Through this foundation, the subsequent analysis of cases such as *Tradehold* and *Fowler* gains context.

In the ITA, *deeming provisions* can typically first be identified by the use of specific language that indicates the *fictional* or *imputed nature* of the provisions. While the exact terminology may vary, common phrases and expressions used in the ITA that signal the presence of a deeming provision include but are not limited to the words listed in Table 1 below.

⁷⁴ *NJMP Fund* supra note 41 para 3.

Table 1: Words Contained in the ITA Reflecting Deeming Provisions

deem ⁷⁵	deemed to accrue ⁷⁶
deems ⁷⁷	deemed to have accrued ⁷⁸
deemed ⁷⁹	deemed to have so accrued ⁸⁰
deeming ⁸¹	deemed to have derived ⁸²
deemed to take ⁸³	deemed not to ⁸⁴
as if ⁸⁵	deemed disposal(s) ⁸⁶
deemed to have ⁸⁷	deemed to be incurred ⁸⁸
shall be deemed ⁸⁹	deemed to have been ⁹⁰
deemed in terms ⁹¹	considered to be ⁹²

⁷⁵ Sections 7 and 8 of the ITA.

⁷⁶ Ibid ss 7, 7E, 9, 9H and para 40 of the Eighth Schedule to the ITA.

⁷⁷ Ibid ss 8C and 9A.

⁷⁸ Ibid ss 7 and 7A.

⁷⁹ Ibid s 1's definition of: 'provident fund', resident' subsec (a)(B); 'special trust' subsec (a)(aa), s 6quat, s 7 subsec (2A)(a)(ii); 'salary' subsec (2); 'variable remuneration' subsec (2), and ss 8EA, 9, 10, 64EB,

⁸⁰ Ibid s 9H.

⁸¹ Ibid s 8E and 8F.

⁸² Ibid s 9D.

⁸³ Ibid s 55(3).

⁸⁴ Ibid s 6quin.

⁸⁵ Ibid s 11.

⁸⁶ Ibid s 9H of the Eighth Schedule to the ITA.

⁸⁷ Ibid s 58; s 1's definition of: 'gross income' subsec (c)(ii), (d)(bb), (d)(cc), (eA)(bb), (n); 'pension preservation fund' subsec (ii); 'provident preservation fund' subsec (ii); 'representative taxpayer', 'qualifying medical expenses' subsec (4)(a) and (4)(b), s 6A subsec (3)(a) and (3)(b), s 6quat subsec (f)(i), (1B)(a)(i)(aa), (1B)(b)(1D)(a), s 7 subsec (2A)(a)(i) and (2A)(b) and (3), s 7F, s 11D.

⁸⁸ Ibid s 9C and 9D.

⁸⁹ Ibid s 7 paras (1) and (2).

⁹⁰ Ibid s 9HA.

⁹¹ Ibid s 6quat of the Eighth Schedule to the ITA.

⁹² Ibid s 12J.

deem/ed to be ⁹³	deeming rule ⁹⁴
deemed exclusion ⁹⁵	deemed inclusion ⁹⁶
shall be regarded as ⁹⁷	deemed to have disposed of ⁹⁸
notwithstanding ⁹⁹	

The tables in Annexure 1 provide a detailed breakdown of the *deeming provisions* embedded within the ITA. These include examples of employment income and related taxable benefits, as summarised in Table 2, which highlights *deeming provisions* like fringe benefits, severance pay and reimbursements. Table 3 extends the analysis to contributions such as retirement fund benefits, showcasing their treatment under the Fourth Schedule to the ITA. Additionally, Table 4 provides insights into other key *deeming provisions*, including deemed income from property dispositions, donations tax and controlled foreign company income. Together, these tables illustrate the multifaceted application of *deeming provisions*, their alignment with legislative *purpose* and *intent*, and the interpretative uncertainties they pose within both domestic and international tax frameworks.

⁹³ Ibid ss 7, 8E, 8EA, 8FA, 9C, 24O; s 1's definition of: 'company' para (a); 'domestic treasury management company', 'gross income' para (eA)(bb); 'provident fund', 'relative', 'remuneration proxy' para (a); 'resident', s 6quin para (5), s 7 subsec (2A)(b) and (2B) and (2C)(a) and (2C)(b) and (2C)(c)(iii) and (4), (5), & (6), (8)(b) and (9), s 7C(1B)(b)(i) and (ii).

⁹⁴ Ibid s 9D of the Eighth Schedule to the ITA.

⁹⁵ Ibid s 10.

⁹⁶ Ibid s 6quat.

⁹⁷ Ibid s 11.

⁹⁸ Ibid s 9HA of the Eighth Schedule to the ITA.

⁹⁹ Ibid ss 10 and 11.

2.5 Conclusion

This chapter established a foundational understanding of deeming provisions within the ITA, exploring their definition, purpose and interpretative challenges. Through the analysis of legislative *purpose* and *intent* as well as judicial precedents, this research highlights how *statutory fictions* are applied to achieve specific policy objectives while also addressing potential gaps in tax legislation. While these provisions serve as critical tools to prevent *tax avoidance* and ensure compliance, their artificial nature often creates uncertainties that require careful judicial interpretation. The insights gained in this chapter lay the groundwork for exploring how South Africa's *deeming provisions* interact with DTTs in subsequent chapters, specifically focusing on resolving conflicts and ensuring equitable outcomes.

CHAPTER 3: CASE ANALYSIS – THE *TRADEHOLD* DECISIONS

3.1 Introduction

The *Commissioner for the South African Revenue Service v Tradehold Ltd* (*Tradehold*)¹⁰⁰ decisions sparked a heated debate in South African tax law, highlighting the complex interplay between domestic legislation and international tax treaties. This chapter examines these decisions¹⁰¹ to analyse how domestic deeming provisions, also known as statutory fictions, specifically the deemed disposal under South Africa's Income Tax Act 58 of 1962 ('ITA'), interact with undefined terms like alienation in a double tax treaty ('DTT'). By analysing the facts, legal arguments and judicial principles applied by the tax court right through to the Supreme Court of Appeal ('SCA'), this chapter seeks to understand why the courts upheld the use of this statutory fiction. The discussion will also consider the nuanced nature of the case, highlighting that the decision to retain a statutory fiction is not always straightforward and may depend on the specific legislative and DTT contexts. These insights provide a further foundation for the broader comparative analysis in chapter 5.

While the SCA's decision in *Tradehold* sets the binding precedent for the interpretation of domestic deeming provisions in the context of DTTs, this chapter (and thesis, overall) takes a more comprehensive approach by analysing both the tax court and the SCA decisions in detail to ensure a holistic understanding of the judicial reasoning at each stage of the case and its broader implications. By delving into all relevant aspects, including the nuances of the arguments presented, the interpretative principles applied, and the limitations identified, this chapter aims to thoroughly consider the uncertainties involved. This approach not only

¹⁰⁰ 2013 (4) SA 184 (SCA).

¹⁰¹ *Ibid* para 89.

highlights the evolution of judicial thought but also strengthens recommendations for addressing interpretative uncertainties for future cases and serves as a critical example of how South African tax law can conflict with undefined terms in a DTT as well as the objectives of the DTT, highlighting the need for clear judicial guidance to ensure fairness, equity, and consistency in cross-border taxation.

3.2 Tradehold Tax Court Case

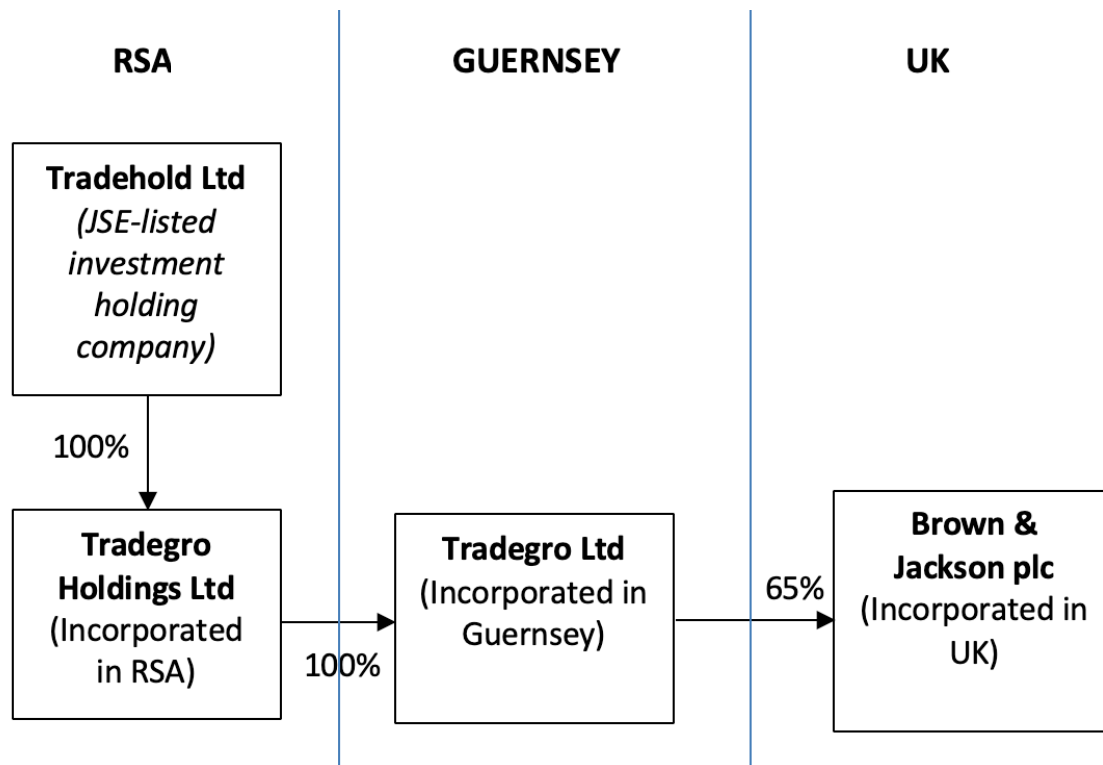
3.2.1 Tax Court: Facts

Tradehold Ltd (the Appellant) (now Collins Property Group Limited) is a JSE-listed investment holding company incorporated in South Africa.¹⁰² The Appellant held 100 per cent shareholding in Tradegro Holdings Limited ('Tradegro Holdings Ltd'), which, in turn, owned 100 per cent of the shares in Tradegro Limited ('Tradegro Ltd'), a company incorporated in Guernsey. Tradegro Ltd owned approximately 65 per cent of the issued share capital in the United Kingdom ('UK') based company, Brown & Jackson Plc.¹⁰³

¹⁰² See, SENS Announcement 'Tradehold limited name change to Collins Property Group Limited', available at <https://www.tradehold.co.za> accessed on 29 January 2025.

¹⁰³ *ITC 1848* 2010 73 SATC 170 para 2.

Figure 3.1: Schematic ownership structure of Tradehold Ltd



*Johannesburg Stock Exchange ('JSE')

The case in question, *ITC 1848 ('Tradehold TC')*,¹⁰⁴ was prompted by an additional assessment raised by the South African Revenue Service ('SARS'). This arose from a taxable capital gain on a deemed disposal by the Appellant, who had relocated its place of effective management to Luxembourg on 2 July 2002, triggering the *deemed disposal* provisions under paragraph 12 of the Eighth Schedule to the ITA. The Appellant, however, maintained a presence in South Africa with one of its executive directors.

Prior to 26 February 2003, a company's residency, as determined by the ITA, was primarily based on a source-based taxation system. In general, a country's taxation systems are structured around two primary principles: source-based taxation and residence-based taxation. Both systems serve as frameworks for determining a country's right to tax income when it comes to

¹⁰⁴ 2010 73 SATC 170.

cross-border transactions. Source-based taxation taxes income earned within a country's borders, its source of origin being that country, regardless of the taxpayer's residence. Thus, if a company was incorporated, established, or formed in South Africa, it was considered a South African tax resident under the ITA (ie, a source-based taxation system). Residence-based taxation taxes residents on their worldwide income, regardless of where it is earned. Many other countries (including Luxembourg) at that time instead aligned to international tax laws like the Organisation for Economic Co-operation and Development Model Tax Convention ('OECD MTC'),¹⁰⁵ where the tax residency status of a company is determined by establishing the company's place of effective management (ie, a residence-based taxation system).

What was nuanced about this case was that South Africa had started a transitional process from a source-based system to a residence-based system in 2001.¹⁰⁶ Although Tradehold Ltd was incorporated in South Africa and was thus treated as tax resident under South African tax law, on 26 February 2003, amendments to the ITA clarified the application of exit charges upon the cessation of residency and the ITA was updated to align with international tax practices and amended the definition expanding the *tie-breaker rule* to include any company incorporated in, or effectively managed in South Africa as a South African tax resident. These amendments sought to align South African tax law with international norms, mitigating similar interpretative issues in future cases.

On 2 July 2002, Tradehold became a dual resident for tax purposes under both jurisdictions when it relocated its place of effective management to Luxembourg under the Luxembourg Income Tax Law ('LITL').¹⁰⁷

¹⁰⁵ OECD *Model Tax Convention on Income and on Capital 2017 (Full Version)* (2019).

¹⁰⁶ Explanatory Memorandum on the Taxation Laws Amendment Bill, 2001, available at <https://osall.org.za/docs/2011/02/2001-Taxation-Laws-Amendment-Bill.pdf>, accessed on 23 January 2025.

¹⁰⁷ Loi du 4 décembre 1967 concernant l'impôt sur le revenu (tr. Law of December 4, 1967 concerning income tax) art 159, Full text available at Le Gouvernement du Grand-Duché de Luxembourg official journal publications <https://legilux.public.lu/eli/etat/leg/loi/1967/12/04/n1/jo>, accessed on 16 November 2024.

According to article 4(1)(a) of the DTT, a resident is defined based on the laws of each contracting state. Where dual residency occurs, article 4(3) resolves this by assigning residency to the state where the company's place of effective management is situated. In this case, the tie-breaker rule determined that Tradehold's place of effective management, and thus its tax residency, was in Luxembourg. This rule, as applied in Tradehold Ltd's case, allowed the court to resolve dual residency by assigning Tradehold Ltd's tax residence to Luxembourg, thereby seemingly avoiding conflicting tax obligations.

A separate but equally complex issue was also addressed. This issue is: When a DTT is considered in a situation where a statutory fiction has been created through a deeming provision in the domestic tax law, is the statutory fiction retained in the DTT context or not?

When looking at this central question, the deemed disposal of an asset was clearly defined as an exit tax in South African tax law, and thus, capital gains tax ('CGT') was chargeable under the ITA.¹⁰⁸ An exit tax is imposed on individuals or entities who change their tax residency. This exit tax is based on the unrealised gains of assets before they exit the tax jurisdiction. In the context of Tradehold Ltd, South Africa's exit tax on deemed disposals aimed to capture the value accrued within its borders before Tradehold Ltd's relocation. Thus, aligning with South Africa's right to tax domestic gains. The key legal challenge arose from the fact that the deemed disposal under the ITA is a statutory fiction that treats unrealised gains as if they were realised, while the DTT refers to alienation, a term generally understood to mean an actual (and not deemed) transfer or disposal. The court's interpretation of the DTT provisions, the lack of timing arguments, and the change in legislation all seemed to inadvertently result in double non-taxation, as Luxembourg did not recognise the deemed disposal as a taxable event. This created a scenario where capital gains accrued in South Africa

¹⁰⁸ Para 12(2)(a) of the Eighth Schedule to the ITA (as it read before the introduction of s 9H in 2012); referred to in *Tradehold* supra note 100 paras 5–7. Notably in the Taxation Laws Amendment Act 22 of 2012, introduced s 9H replacing para 12 for exit tax purposes.

entirely escaped taxation despite the DTT's objective to prevent double taxation and fiscal evasion.

3.2.2 Tax Court: Tradehold Ltd's (Taxpayer/Appellant) Arguments

The taxpayer, Tradehold, argued that, after relocating its place of effective management to Luxembourg, it became an exclusive tax resident in Luxembourg under article 4(3) of the RSA-LU DTT.¹⁰⁹ While the taxpayer accepted that paragraph 12 of the Eighth Schedule to the ITA created a deemed disposal and capital gain for domestic tax purposes, it contended that, under the DTT, taxing rights over that gain were allocated solely to Luxembourg. The taxpayer submitted that the term alienation in article 13(4) was undefined in the DTT and should be interpreted broadly to include actual and deemed disposals. It argued that excluding deemed disposals from the scope of the treaty would undermine the purpose of the DTT, which is to allocate taxing rights and prevent double taxation. The taxpayer emphasised that the economic effect of a deemed disposal mirrors that of an actual disposal, and that such events should be treated equivalently under the DTT. The taxpayer argued that the capital gain that resulted from this disposal was not taxable in South Africa but only in Luxembourg. Tradehold further asserted that South Africa's attempt to tax the gain would amount to extending its domestic taxing rights beyond what was permitted under the DTT framework, frustrating treaty certainty and leading to double taxation risks.

The key arguments can be summarised as follows:

- The Taxpayer/Appellant advocated for a broad interpretation of alienation.
- It argued that precedence should be given to the DTT over the ITA.

¹⁰⁹ *ITC 1848* supra note 104 para 10.

- purposive interpretation of the DTT (Tradehold highlighted the importance of aligning with the DTT's purpose and objective).

3.2.3 Tax Court: The South African Revenue Service's (Respondent) Arguments

SARS argued that a deemed disposal under paragraph 12 of the Eighth Schedule was a statutory fiction created purely for domestic tax purposes and did not constitute an alienation under article 13(4) of the DTT. The Commissioner contended that alienation should be interpreted according to its ordinary and natural meaning, referring only to actual transfers of ownership or real disposals. SARS submitted that if deemed disposals were included under the term alienation, taxpayers could easily avoid exit tax by emigrating to any country with a DTT containing a similar provision, which could not have been the legislature's intention.

The Commissioner emphasised that paragraph 12(1) expressly states that the deemed disposal applies for purposes of this Schedule (i.e. the Eighth Schedule) and therefore should not influence the interpretation of treaty language. Although acknowledging that the DTT prevails over domestic law under section 108 of the ITA, SARS argued that this should not extend to override domestic taxing rights where no real alienation occurred. While SARS raised several substantive legal arguments, it did not fully develop the argument that the capital gain had accrued during Tradehold's South African residency – a timing argument that might have strengthened its position.

The Commissioner argued that when Tradehold Ltd ceased to be a tax resident of South Africa, it was deemed to have disposed of all its assets (in this instance, its shareholding in Tradegro Holdings Ltd, accruing an exit tax, namely CGT). This deemed disposal resulted in

a fictional capital gain being realised in South Africa in the 2003 year of assessment in accordance with paragraph 12(1) and 12(2)(a) of the Eighth Schedule to the ITA.¹¹⁰

The Commissioner further contended that alienation, as used in the DTT, did not include a deemed disposal under the ITA; hence, the taxable capital gain that arose did not trigger the DTT. Therefore, the deemed disposal was only taxable in RSA, arguing towards a literal interpretation of alienation.¹¹¹

The key arguments can be summarised as follows:

- The Respondent advocated for a narrow interpretation of alienation.
- It argued for alignment with domestic tax law.

3.2.4 Tax Court: Ratio and Outcome

The tax court in *Tradehold* examined whether the statutory fiction of a deemed disposal, as prescribed by paragraph 12 of the Eighth Schedule to the ITA, could be treated as an alienation under article 13(4) of the RSA-LU DTT. This necessitated aligning the domestic deeming provision's statutory fiction with the DTT's undefined term alienation.

(a) Ratio

The court applied a purposive approach, interpreting alienation in a manner consistent with the DTT's objective of avoiding double taxation and ensuring equitable allocation of taxing rights. It reasoned that excluding deemed disposals from the definition of alienation would contradict

¹¹⁰ Ibid para 8 and 9.

¹¹¹ Ibid para 13.

the DTT's purpose. The court held that a deemed disposal aligns with the substance of alienation, as the economic effect mirrors an actual realisation event.¹¹²

The court rejected the literal interpretation advanced by the Commissioner, which limited alienation to actual disposals. Instead, it considered the broader context and intent of the DTT, affirming that the undefined term should be interpreted in alignment with the DTT's objectives.¹¹³

(b) Outcome

The court determined that the RSA-LU DTT granted taxing rights over capital gains to Luxembourg, as Tradehold's place of effective management was situated there under the tie-breaker rule in article 4(3). This ruling effectively precluded South Africa from taxing the deemed disposal gains.¹¹⁴

However, the decision inadvertently resulted in double non-taxation, as Luxembourg did not recognise the deemed disposal as a taxable event. The court acknowledged the outcome but emphasised that it was bound by the DTT's provisions and its interpretation of alienation.¹¹⁵

3.3 Tradehold Supreme Court of Appeal Case

3.3.1 Supreme Court of Appeal: Facts

The same facts in section 3.2.1 above apply in this case.

¹¹² Ibid paras 14 and 16.

¹¹³ Ibid para 14.

¹¹⁴ Ibid paras 12 and 16.

¹¹⁵ Ibid para 14 and 16.

Acceptance of Tradehold's argument could result in the erosion of South Africa's capital gains tax base, as taxpayers could relocate to treaty jurisdictions and avoid exit charges on accrued but unrealised gains. The effectiveness of South Africa's exit tax regime would be undermined, particularly in cases of emigration to treaty countries. Broader fiscal risks could arise if taxpayers engaged in treaty shopping or aggressive tax planning using DTTs to escape domestic tax obligations.

If SARS prevailed, taxpayers relocating their place of effective management could be exposed to exit taxes even when no actual disposal or economic realisation had occurred. This could discourage international mobility and cross-border restructuring, particularly where unrealised gains are large and liquidity is unavailable to fund immediate tax liabilities.

3.3.2 Supreme Court of Appeal: Tradehold Ltd's (Taxpayer/Respondent) Arguments

On appeal before the SCA, Tradehold Ltd largely reiterated the arguments presented in the tax court with additional emphasis or clarification during the appeal on a purposive interpretation of the DTT, prevention of tax avoidance, and the timing of the disposal.

It argued that taxing deemed disposals under domestic law would undermine the DTT's objectives by extending South Africa's taxing rights beyond the DTT's scope. In addition, Tradehold Ltd highlighted that the DTT's purpose of avoiding double taxation supported its interpretation.

They argued, however, that this precedent should not exclude the deemed disposal provisions since the DTT did not explicitly define alienation. The taxpayer, thus, argued for a

wide interpretation of alienation in article 13(4) of the RSA-LU DTA, contending that the term should include both actual and deemed disposals.¹¹⁶

In support of this argument, Tradehold submitted that the absence of any distinction between actual and deemed disposals in article 13(4) demonstrated that both types of disposals were intended to fall within the scope of the provision. It would be absurd, the taxpayer argued, for actual disposals to enjoy treaty protection while deemed disposals do not.

Although this point was not a direct focus of the arguments, Tradehold emphasised that the timing of the deemed disposal was critical. The taxpayer argued that the disposal occurred after the company's relocation to Luxembourg, reinforcing its position that South Africa lacked jurisdiction to tax the gain because, at that point, Tradehold Ltd was deemed a resident of Luxembourg under article 4(3) of the DTT.

The taxpayer placed greater emphasis on the Vienna Convention on the Law of Treaties ('VCLT'),¹¹⁷ asserting that the DTT terms must be interpreted in good faith and in light of their object and purpose. This included preventing tax base erosion through strategic relocations, double taxation, allocating taxing rights fairly between the contracting states and promoting cross-border tax certainty. Tradehold argued that South Africa's attempt to tax the gain would frustrate these objectives.¹¹⁸

3.3.3 Supreme Court of Appeal: South African Revenue Service's (Appellant) Arguments

The Commissioner largely maintained the arguments presented in the tax court, emphasising that the deemed disposal provisions in the ITA aligned with the purpose of the RSA-LU DTT

¹¹⁶ *Tradehold* supra note 1 paras 11 and 13.

¹¹⁷ (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹¹⁸ *Tradehold* supra note 1 paras 21 and 23.

and should not be treated as an alienation under article 13(4). However, SARS refined and expanded on several arguments before the SCA to strengthen its case. These are briefly discussed next.

SARS sought to discredit the taxpayer's argument that a purposive interpretation of the DTT should encompass deemed disposals. SARS emphasised that the undefined term, alienation should be interpreted narrowly in line with the ordinary meaning of the word, which refers to an actual transfer of ownership, and does not extend to statutory fictions created for domestic tax purposes.

SARS argued that the statutory fiction of a deemed disposal was created solely or mainly for domestic tax purposes and should not automatically extend to DTT interpretation. The Commissioner contended that paragraph 12 of the Eighth Schedule to the ITA specifically provides that the deemed disposal applies for purposes of this schedule and therefore has no bearing on treaty definitions or international tax obligations.

Furthermore, SARS submitted that if article 13(4) was interpreted to apply to deemed disposals, this would allow taxpayers to circumvent South Africa's exit tax provisions simply by emigrating to a country with a DTT containing similar provisions. This could certainly not have been the intention of the legislature as it would undermine the purpose of paragraph 12 and potentially erode South Africa's tax base.¹¹⁹

While SARS acknowledged that the DTT, by virtue of section 108 of the ITA, took precedence over domestic law, its position was that such precedence would not extend to override South Africa's right to levy exit tax on unrealised gains triggered by the taxpayer's emigration. SARS argued that excluding deemed disposals from the scope of article 13(4) would prevent taxpayers from escaping domestic taxation on accrued gains.¹²⁰

¹¹⁹ *Tradehold* supra note 1 para 14.

¹²⁰ *Ibid.*

Although SARS did not adequately address the timing of the deemed disposal in the tax court, as explained in section 3.2.3, this issue remained insufficiently developed in the SCA. Had SARS focused more extensively on this timing, it could have potentially argued that the gains were accrued during Tradehold Ltd's period of South African residency and should therefore be subject to tax in South Africa prior to any treaty protection arising.¹²¹

3.3.4 Supreme Court of Appeal: Ratio and Outcome

The SCA in *Tradehold* was tasked with determining whether the statutory fiction of a deemed disposal under paragraph 12 of the Eighth Schedule to the ITA could be treated as an alienation under article 13(4) of the RSA-LU DTT. The court affirmed the tax court's decision but provided additional clarification on the principles of DTT interpretation and the alignment of domestic deeming provisions with international tax agreements.

(a) Ratio

The SCA adopted a purposive approach to interpreting alienation in article 13(4) of the RSA-LU DTT as broad enough to encompass deemed disposals. The court reasoned that the DTT's purpose was to prevent double taxation and ensure the equitable allocation of taxing rights. Excluding deemed disposals from the scope of alienation would undermine these objectives.¹²²

Relying on article 3(2) of the OECD MTC, the court emphasised that undefined terms in a DTT should generally be interpreted by reference to the domestic law of the country applying the DTT unless the context requires otherwise. In this case, the court found that the domestic

¹²¹ Ibid paras 4 and 14.

¹²² Ibid paras 23–5.

definition of alienation included statutory fictions like deemed disposals, supporting its alignment with the DTT.¹²³

The SCA reinforced the principle that the economic substance of a deemed disposal mirrored that of an actual disposal, making it reasonable to treat the statutory fiction as equivalent to alienation for DTT purposes.

The court reiterated that DTT provisions take precedence over conflicting domestic laws under South African law. This affirmed the tie-breaker rule's determination that Tradehold was a resident of Luxembourg, granting Luxembourg exclusive taxing rights under article 13(4).¹²⁴

(b) Outcome

The court upheld the tax court's ruling that the deemed disposal aligned with the DTT's interpretation of alienation. Consequently, capital gains arising from the deemed disposal were not taxable in South Africa, as the DTT allocated taxing rights to Luxembourg.¹²⁵

While the SCA's interpretation avoided double taxation, it inadvertently resulted in double non-taxation. The deemed disposal was not recognised as a taxable event under Luxembourg's tax laws, leaving the gains untaxed in both jurisdictions. The court noted this anomaly but emphasised its obligation to interpret the DTT within the scope of its provisions and objectives.¹²⁶

The court highlighted the challenges posed by legislative gaps and the timing of events at the time. It acknowledged that the absence of clear provisions addressing the timing of the deemed disposals at the time of the case weakened SARS' position. The later introduction of

¹²³ Ibid para 25.

¹²⁴ Ibid paras 16 and 26.

¹²⁵ Ibid paras 26 and 27.

¹²⁶ Ibid para 26.

section 9H of the ITA addressed such gaps, providing clarity on exit taxes in subsequent cases.¹²⁷

3.4 Conclusion: Judicial Interpretation Principles from *Tradehold*

The *Tradehold* case provides critical insights into the judicial principles applied when reconciling domestic deeming provisions with undefined terms in a DTT. These principles highlight the interpretative uncertainties faced by courts in navigating undefined DTT terms, statutory fiction, and legislative intent. South African courts established the following key principles:

(a) Purposive Interpretation of DTT Terms

The SCA adopted a purposive approach to interpreting the RSA-LU DTT, emphasising the DTT's primary objective of avoiding double taxation and ensuring equitable allocation of taxing rights. This approach required aligning the undefined term alienation in article 13(4) with the broader goals of the DTT rather than limiting it to its literal or narrow meaning. The court reasoned that excluding deemed disposals from the scope of alienation would undermine these objectives.¹²⁸

¹²⁷ SAIT Technical 'Revised exit charge upon ceasing to be a resident in South Africa' available at <https://www.thesait.org.za/news/112272/Revised-exit-charge-upon-ceasing-to-be-a-resident-in-South-Africa-.htm> accessed on 29 January 2025.

¹²⁸ *Tradehold* supra note 1 paras 23–5.

(b) The Contextual Interpretation of Undefined Terms

The SCA relied on article 3(2) of the OECD MTC, which allows undefined terms in a DTT to be interpreted with reference to the domestic laws of the country applying the DTT unless the context indicates otherwise. The court reconciled the domestic definition with the DTT's objectives by interpreting alienation to include statutory fictions like deemed disposals. This principle underscores the importance of considering both domestic and international tax contexts when interpreting undefined DTT terms.¹²⁹

(c) Precedence of Treaties of Domestic Law

The court reaffirmed the principle that DTT provisions take precedence over conflicting domestic laws under South African law. This principle guided the resolution of conflicts between the statutory fiction of deemed disposal under the ITA and the RSA-LU DTT, ultimately giving effect to the DTT's tie-breaker rule.¹³⁰

(d) Substance Over Form

The SCA emphasised that the economic substance of a deemed disposal mirrored that of an actual disposal, justifying its treatment as equivalent to alienation under the DTT. This principle reinforces the importance of aligning statutory fictions with the economic realities they are designed to represent.¹³¹

¹²⁹ *Tradehold* supra note 1 para 25.

¹³⁰ *Ibid* paras 16 and 26.

¹³¹ *Ibid* para 25.

(e) *Judicial Limitations and Legislative Oversight*

The court highlighted several limitations in the arguments presented by the CSARS. Notably, SARS did not effectively argue the timing of the deemed disposal, which may have influenced the outcome. The decision also exposed legislative gaps, particularly regarding the alignment of exit tax provisions with DTT obligations. These gaps were subsequently addressed through amendments, such as the introduction of section 9H of the ITA, which clarified exit charges.¹³²

(f) *Addressing Double Non-Taxation*

While the court prioritised preventing double taxation, the decision inadvertently resulted in double non-taxation, as Luxembourg did not recognise the deemed disposal as a taxable event. This highlighted the risks of retaining statutory fictions in a DTT context without adequate legislative safeguards to address tax avoidance or fiscal gaps.

The principles established in *Tradehold* are contrasted with those in *Fowler v HMRC* (*'Fowler'*)¹³³ in chapter 5, where the United Kingdom Supreme Court took a divergent approach by not retaining the statutory fiction in the DTT context. Key areas of comparison include:

- The reliance on purposive versus literal interpretations of undefined DTT terms.
- The role of legislative intent and DTT objectives in reconciling statutory fictions.
- The implications of prioritising economic substance over form in achieving equitable tax outcomes.

¹³² SAIT Technical op cit note 127.

¹³³ [2018] EWCA Civ 2544.

This comparative analysis illustrates the absence of a universal standard for reconciling domestic statutory fictions with DTTs. While *Tradehold* favoured a purposive approach, retaining the fiction to align with South African tax principles, *Fowler* took a stricter view that preserved the DTT's autonomy from domestic law. The key distinction lies in the UK's judicial inclination to prioritise DTT language over domestic constructs, whereas South African courts opted for a more flexible context-driven analysis. This divergence suggests that unless explicitly addressed in a DTT, courts may continue to apply differing standards, reinforcing the need for legislative clarity to prevent interpretative inconsistency for future disputes.

These judicial principles provide a foundation for exploring the broader implications of retaining or not retaining the statutory fictions within the international tax frameworks, which are further examined in the context of the *Fowler* decision in chapter 4. Chapter 4 builds on these findings by analysing the *Fowler* cases, providing a comparative perspective on how the UK courts addressed similar conflicts between domestic and DTT provisions.

CHAPTER 4: CASE ANALYSIS – THE *FOWLER* DECISIONS

4.1 Introduction

This chapter examines the *Fowler v HMRC* (*Fowler*) decisions¹³⁴ to analyse how domestic deeming provisions, specifically the reclassification of employment income as trading income under the United Kingdom's ('UK') Income Tax (Trading and Other Income) Act, 2005 ('ITTOIA'), interact with undefined terms like employment income in a double tax treaty ('DTT') context. By analysing the facts, legal arguments, and judicial principles applied, this chapter seeks to extract insights into why the United Kingdom Supreme Court ('UKSC') ruled that, while the statutory fiction existed under domestic law, the DTT's classification of income, governed its treatment within the DTT framework. The discussion also considers any nuances in the cases, which highlights that the decision to retain statutory fiction is not always clear-cut and may depend on the specific legislative and DTT contexts. These insights and those extracted in chapter 4 form the foundation for the broader comparative analysis in chapter 5.

While the UKSC decision in *Fowler* establishes a significant precedent in the UK for the interpretation of domestic deeming provisions in the context of DTTs, this thesis takes a more comprehensive approach by analysing all three judicial levels in detail to ensure a holistic understanding of the judicial reasoning at each stage and its broader implications. This analysis thoroughly considers the uncertainties involved by delving into all relevant aspects, including the nuances of the arguments presented, the interpretative principles applied, and the limitations identified. Such an approach highlights the evolution of judicial thought and strengthens recommendations for addressing interpretative uncertainties in future cases. The

¹³⁴ *Fowler v HMRC* [2016] TC05009 para 13; *The Commissioners for HM Revenue and Customs v Martin Frederick Fowler* [2017] UKUT 219 (TCC) at 93; [2018] EWCA Civ 2544 para 4.

Fowler case serves as a critical example of how the UK tax law's definition can conflict with an undefined term in a DTT and the objectives of the DTT, underscoring the need for clear judicial guidance to ensure fairness, equity, and consistency in cross-border taxation.

Although decisions from courts in other jurisdictions do not establish precedent in South Africa, the principles outlined in *Secretary for Inland Revenue v Downing* ('*Downing*')¹³⁵ state that, within the international tax context, rulings from foreign courts are often persuasive due to the international tax language being developed around DTT interpretation.¹³⁶

4.2 *Fowler* United Kingdom First-Tier Tribunal

4.2.1 First-Tier Tribunal: Facts

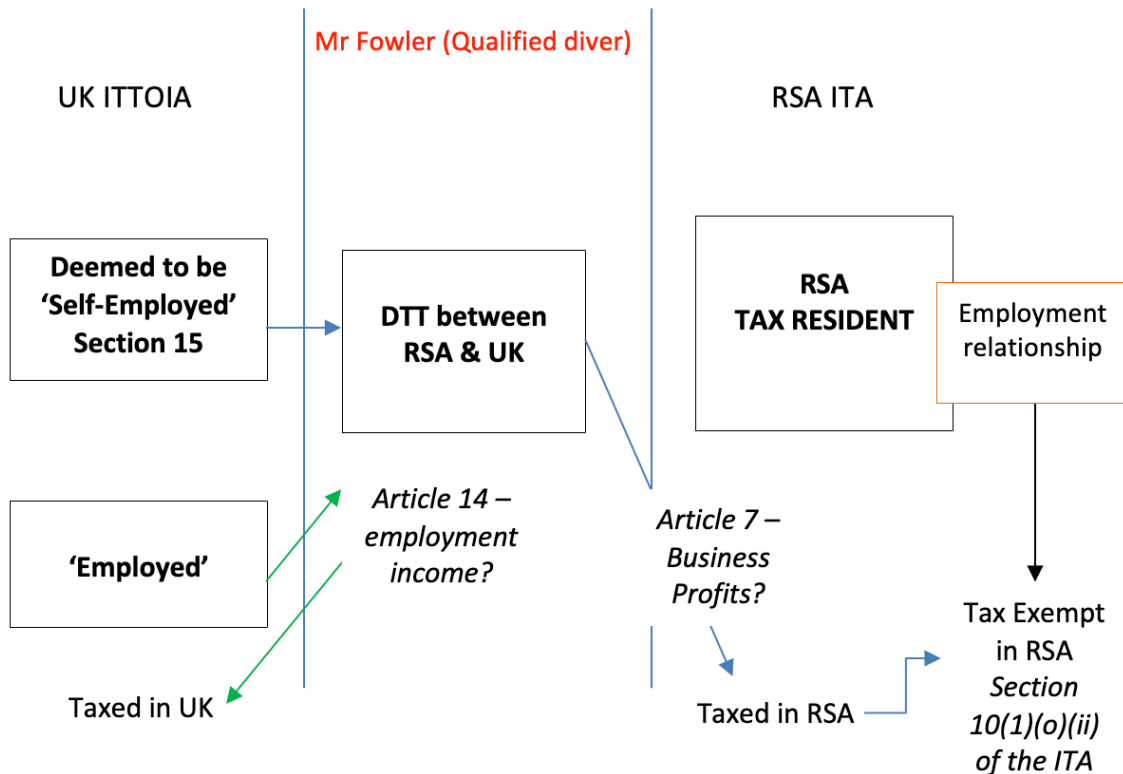
This case concerned Mr Fowler, a tax resident in the Republic of South Africa and a qualified diver by profession. He was employed under contract for offshore oil companies and conducted diving activities in the waters of the UK's Continental Shelf during the 2011/2012 and 2012/2013 tax years for these companies. The dispute arose due to UK domestic law, specifically section 15 of the ITTOIA, in terms of which his income was deemed to be derived from self-employed activities, creating a statutory fiction for domestic tax purposes. While the RSA-UK DTT, which came into force on 17 December 2002, modelled the Organisation for Economic Co-operation and Development ('OECD') framework for resolving disputes, it was undecided if the DTT should not retain the statutory fiction and allocate taxing rights for employment income under article 14 to the country where the services were performed, or,

¹³⁵ (227/74) [1975] ZASCA 55 (19 August 1975).

¹³⁶ *Ibid* para 15.

retain the fiction and allocate the taxing rights for self-employment under article 7 to the taxpayer’s country of residence.

Figure 4.1: Schematic Representation of the *Fowler* Case in Dispute



4.2.2 First-Tier Tribunal: Fowler’s (Taxpayer/Appellant) Arguments

Fowler contended that the statutory fiction created by section 15 of the ITTOIA transformed his income into trading income, aligning it with article 7 of the DTT. Consequently, as trading income, the earnings were taxable only in South Africa, his country of residence.¹³⁷

He maintained that the DTT must adopt the income’s recharacterisation status under UK domestic law.

¹³⁷ *FTT Fowler* supra note 134 at 17.

Fowler further argued that the DTT's reference to *employment income* must be interpreted based on its plain and ordinary meaning. He emphasised that this approach aligns with broader DTT principles, which aim to provide clarity and consistency across jurisdictions. By adhering to the ordinary meaning, Fowler contended that the DTT avoids undue complexity and respects the intentions of the contracting states.¹³⁸ The key arguments can be summarised as follows:

- literal interpretation of the DTT's terms;
- the primacy of domestic recharacterisation; and
- preventing overreach of the scope and objectives of the DTT.

4.2.3 First-Tier Tribunal: Her Majesty's Revenue and Customs' (Respondent) Arguments

Her Majesty's Revenue and Customs ('HMRC')¹³⁹ argued that the income retained its character and its nature as employment income for DTT purposes despite the domestic deeming provision. They maintained that the DTT allowed the UK to tax employment income earned within its jurisdiction.¹⁴⁰

HMRC further contended that the deeming provision was for domestic purposes only and did not extend to DTT interpretation. The key arguments can be summarised as follows:

- retention of original income character and nature;
- DTT allocation under article 14; and

¹³⁸ Ibid at 19.

¹³⁹ At the time of the case, Queen Elizabeth II was the reigning monarch, and the official designation was "Her Majesty's Revenue and Customs (HMRC). Following the accession of King Charles III, it is now "His Majesty's Revenue and Customs," but this thesis retains the original designation for consistency with the case law reference.

¹⁴⁰ *FTT Fowler* supra note 134 at 21.

- statutory fictions created by domestic tax law should not be retained in DTT interpretation.

4.2.4 First-Tier Tribunal: Ratio and Outcome

(a) Ratio

The First-Tier Tribunal ('FTT') concluded that section 15 of the ITTOIA effectively transformed Fowler's income into trading income for tax purposes. This statutory fiction meant that the income should be treated as business profits under article 7 of the DTT, which allocates taxing rights to the country of residence. The tribunal determined that the reclassification aligned with the DTT's framework and purpose, retaining the domestic deeming provision in the context of the DTT.¹⁴¹

(b) Outcome

The tribunal ruled in favour of Fowler, holding that his income was not subject to UK taxation under the DTT.¹⁴² The decision affirmed the application of article 7, exempting the trading income from taxation in the UK and ensuring that it was taxable only in South Africa as his country of residence. However, due to the foreign income exemption in South Africa, Fowler's trading income was exempt from tax in South Africa, resulting in double non-taxation.¹⁴³

¹⁴¹ Ibid at 38.

¹⁴² Ibid at 40.

¹⁴³ In the 2003 tax year, s 10(1)(o)(ii) of the ITA provided an exemption for remuneration earned by South African tax residents working abroad under specific conditions. The relevant provision at that time stated:

There shall be exempt from normal tax—

(o) any form of remuneration—

4.3 *Fowler* United Kingdom Upper-Tier Tribunal

4.3.1 Upper-Tier Tribunal: Facts

The Upper-Tier Tribunal ('UTT') adopted the factual matrix established by the FTT.

4.3.2 Upper-Tier Tribunal: *Fowler's* (Taxpayer/Respondent) Arguments

Fowler reiterated his arguments from the FTT, emphasising the reclassification of his income as trading income under section 15 of the ITTOIA and its implications for the DTT.

He argued that the domestic deeming provision under section 15 of the ITTOIA, which reclassified his income as trading income, should be decisive for DTT interpretation.¹⁴⁴

In addition, *Fowler* maintained that the statutory fiction created by section 15 of the ITTOIA transformed his income into 'business profits', which, under article 7 of the DTT, would be taxable only in South Africa as his country of residence.¹⁴⁵

Fowler relied on the FTT's decision to reinforce his claim that the deeming provision aligned with the DTT's structure and that article 14's allocation of taxing rights for employment income was no longer applicable after reclassification.¹⁴⁶

-
- (ii) derived by any person as an officer or crew member of a ship engaged—
 - (aa) in the international transportation for reward of passengers or goods; or
 - (bb) in the prospecting, exploration or mining (including surveys and other work of a similar nature) for any minerals (including natural oils) from the seabed outside the Republic, if such person was outside the Republic for a period or periods exceeding 183 days in aggregate during the year of assessment.

¹⁴⁴ *UTT Fowler* supra note 134 paras 24 and 26.

¹⁴⁵ *Ibid* para 27.

¹⁴⁶ *Ibid* para 28.

- While focusing on the deeming provision, Fowler argued that the nature of his work (as a diver employed under contract) reflected a clear economic arrangement that should be respected, considering his residency status.¹⁴⁷ The key arguments can be summarised as follows:
- literal interpretation of DTT terms;
- alignment with domestic recharacterisation;
- precedent from the FTT; and
- economic substance.

4.3.3 Upper-Tier Tribunal: His Majesty’s Revenue and Customs’ (Appellant) Arguments

HMRC argued that the original classification of income as employment income should prevail for DTT purposes, irrespective of the domestic deeming provision. They asserted that DTT terms must reflect the substance of the income rather than domestic legal fictions.¹⁴⁸

HMRC contended that Fowler’s income fell squarely within the ambit of article 14 of the DTT, which permits taxation in the UK as the country where the employment services were performed. They further emphasised that the statutory fiction under section 15 of the ITTOIA was introduced for domestic tax purposes and was not intended to alter the classification of income in international treaties. They argued that importing such fictions into DTT interpretation would undermine the DTT’s integrity.¹⁴⁹

Moreover, HMRC highlighted the policy rationale behind retaining the original classification, arguing that disregarding the substance of the income would create opportunities

¹⁴⁷ Ibid para 29.

¹⁴⁸ *Fowler* supra note 134 at 32.

¹⁴⁹ UTT *Fowler* supra note 134 para 35.

for tax avoidance and jeopardise the UK's taxing rights over income earned within its jurisdiction. The key arguments can be summarised as follows:

- retention of original income character (substance over form principle);
- application of article 14;
- limitations of domestic fictions in DTT contexts; and
- aligning with the purpose of the DTT, which is to prevent tax avoidance.

4.3.4 Upper-Tier Tribunal: Ratio and Outcome

(a) Ratio

The UTT affirmed the FTT's reasoning that the statutory fiction created by section 15 of the ITTOIA reclassified Fowler's income as trading income for domestic tax purposes. However, the UTT clarified that this reclassification could not override the DTT's framework, which prioritised the actual substance of the income. The court placed significant weight on article 14 of the DTT, asserting that the DTT's allocation of taxing rights for employment income should prevail over domestic deeming provisions.¹⁵⁰

(b) Outcome

The UTT ruled in favour of HMRC, overturning the FTT's decision. In doing so, the court concluded that Fowler's income remained employment income under the DTT, making it taxable in the UK under article 14 of the RSA-UK DTT. This decision reinforced the principle

¹⁵⁰ *Fowler* supra note 134 para 40.

that domestic deeming provisions must be carefully reconciled with the specific language and objectives of international treaties.¹⁵¹

The UTT upheld the FTT's decision, affirming that the statutory fiction of self-employment could not be retained within the DTT's context. The court emphasised the ordinary meaning of DTT terms and the need to interpret them in alignment with their object and purpose.¹⁵² This reasoning laid the groundwork for the UKSC's analysis by highlighting the tension between domestic tax provisions and the broader objectives of DTT law, which became a focal point in the final appeal.¹⁵³

4.4 *Fowler* United Kingdom Supreme Court

4.4.1 Supreme Court: Facts

The UKSC accepted the factual findings of the lower courts.

4.4.2 Supreme Court: Fowler's (Taxpayer/Appellant) Arguments

Under UK law, Fowler argued that section 15 of the ITTOIA reclassified his employment income as trading income for all income tax purposes. He contended that this reclassification should also apply in the context of the DTT, following article 3(2) of the DTT, which allows undefined terms to adopt their meaning under domestic law unless the context requires otherwise.¹⁵⁴

¹⁵¹ Ibid para 45.

¹⁵² Ibid para 50.

¹⁵³ Ibid para 47.

¹⁵⁴ UKSC *Fowler* supra note 134 para 17.

Fowler maintained that, as trading income, his earnings fell within the ambit of article 7 of the DTT (business profits), which allocates taxing rights exclusively to the country of residence – South Africa, in this case. He argued that this interpretation aligned with the DTT’s objective of avoiding double taxation.¹⁵⁵

Fowler emphasised that section 15 of the ITTOIA was specifically designed to facilitate consistency in the classification of income for tax purposes. He argued that disregarding this deeming provision in the DTT context would create inconsistency and undermine the logic of the domestic law.¹⁵⁶ The key arguments can be summarised as follows:

- reclassification of income under domestic law;
- article 7 versus article 14; and
- purpose of the deeming provision.

4.4.3 Supreme Court: Her Majesty’s Revenue and Customs’ (Respondent) Arguments

HMRC argued that section 15 of the ITTOIA was intended solely or mainly for domestic tax purposes and did not alter the fundamental classification of employment income under the DTT. They contended that the statutory fiction could not redefine employment income as business profits within the DTT framework.¹⁵⁷

HMRC maintained that Fowler’s income clearly fell under article 14 of the DTT, which allocates taxing rights to the country where the employment services are performed. They argued that the statutory fiction did not change the underlying economic reality of the employment relationship.¹⁵⁸

¹⁵⁵ Ibid para 18.

¹⁵⁶ Ibid para 19.

¹⁵⁷ Ibid para 20.

¹⁵⁸ Ibid para 22.

HMRC asserted that allowing the statutory fiction to override the DTT's allocation rules would undermine the DTT's objectives, including preventing double non-taxation and fiscal evasion. They emphasised that the DTT must be interpreted in light of real-world facts unless explicitly stated otherwise.¹⁵⁹

HMRC highlighted that the economic reality of Fowler's work as an employee should take precedence over the domestic legal fiction. They argued that the deeming provision served as a domestic administrative tool and was not intended to influence substantive DTT rights.¹⁶⁰ The key arguments can be summarised as follows:

- limitations of statutory fictions;
- application of article 14;
- consistency with DTT objectives; and
- preservation of economic substance.

4.4.4 Supreme Court: Ratio and Outcome

(a) Ratio

The UKSC adopted a purposive approach to interpreting the RSA-UK DTT, focusing on the DTT's objectives of equitable tax allocation and preventing fiscal evasion. The court concluded that the statutory fiction created by section 15 of the ITTOIA could not redefine the employment relationship under the DTT.¹⁶¹

¹⁵⁹ Ibid para 23.

¹⁶⁰ Ibid para 25.

¹⁶¹ Ibid para 30.

(b) *Outcome*

The UKSC reversed the decisions of the lower tribunals, ruling in favour of HMRC. It held that Fowler's income as a diver fell within article 14 (income from employment) rather than article 7 (business profits). The statutory fiction under the ITTOIA was deemed inapplicable within the context of the DTT. Consequently, the income was taxable in the UK, where the services were performed, aligning with the DTT's purpose and the principle of territoriality.¹⁶²

4.5 Conclusion: Judicial Interpretation Principles from *Fowler*

The *Fowler* case highlights significant judicial principles concerning the application of statutory fictions in the context of DTTs. Across its progression from the FTT to the UKSC, the case revealed the complexities of reconciling domestic tax provisions with international DTT obligations. The UKSC's ultimate decision to not recharacterise employment income under the DTT provides critical guidance for DTT interpretation. Fowler established the following key judicial principles:

(a) *Literal vs Purposive Interpretation*

The FTT and UTT initially sided with Fowler, interpreting the domestic deeming provision under section 15 of the ITTOIA to mean his income should be classified as 'business profits' under article 7 of the DTT, which allocates taxing rights exclusively to the country of residence.

The UKSC, however, upheld a purposive approach, focusing on the DTT's objective of ensuring a fair allocation of taxing rights. It concluded that the statutory fiction under the

¹⁶² Ibid para 33.

ITTOIA could not alter the fundamental nature of income as employment income for DTT purposes.

(b) Retention of Domestic Statutory Fictions

The UKSC ruled that while domestic deeming provisions like section 15 of the ITTOIA are valid for determining tax treatment under national law, they do not override or redefine the nature of income within the framework of a DTT unless explicitly stated. This principle safeguards the autonomous interpretation of DTT terms.

(c) Economic Substance Over Legal Form

Across all levels of adjudication, the courts examined the tension between legal fiction and economic reality. The UKSC ultimately prioritised the substance of Fowler's employment relationship, affirming that his income remained *employment income* under article 14 of the DTT, irrespective of its reclassification under domestic law.

(d) Preventing Tax Anomalies

The UKSC highlighted the risks of tax anomalies, such as double non-taxation, which could arise from an expansive application of domestic deeming provisions in DTT contexts. This decision underscores the importance of aligning DTT interpretation with its overarching objectives of preventing fiscal evasion and ensuring equitable taxation.

(e) DTT Primacy and Contextual Interpretation

The UKSC reinforced the principle that treaties must be interpreted autonomously and in light of their object and purpose. It rejected the notion that domestic provisions could automatically dictate DTT outcomes, maintaining the primacy of DTT obligations in international tax law.

The judicial principles established in *Fowler* diverge significantly from those in *Tradehold*, reflecting differences in judicial philosophy and legislative context.

These principles provide a foundation for the comparative discussion in chapter 5, where the implications of retaining or not retaining a statutory fiction in international tax contexts will be further analysed. The decision in *Fowler* reinforces the importance of balancing domestic legislative objectives with the autonomy and fairness of DTT interpretation, offering a valuable framework for future cross-border tax disputes.

CHAPTER 5: DOUBLE TAX TREATIES: INTERACTIONS WITH DEEMING PROVISIONS IN SOUTH AFRICAN AND INTERNATIONAL CONTEXTS

5.1 Introduction

This chapter examines and compares the judicial principles in *Commissioner for the South African Revenue Service v Tradehold Ltd* (*Tradehold*)¹⁶³ and *Fowler v HMRC* (*Fowler*),¹⁶⁴ focusing on why the statutory fiction was retained in *Tradehold* but not in *Fowler*. It explores whether there are distinguishing factors or specific identifiable judicial principles that justify the differing outcomes and assesses the implications if *Fowler's* reasoning had been applied in *Tradehold*.

Beyond a direct comparison of the cases, this chapter further expands on broader principles of double tax treaty ('DTT') interpretation, including the Vienna Convention on the Law of Treaties ('VCLT'),¹⁶⁵ article 3(2) of the Organisation for Economic Co-operation and Development ('OECD') Model Treaty, and the overall purpose of DTTs.

The chapter ultimately seeks to answer the following key questions:

- Which principles of interpretation were applied in respect of the relationship between a domestic deeming provision and the relevant DTT in *Fowler*? In *Tradehold*, the statutory fiction was retained, while in *Fowler*, the statutory fiction was not retained.
- Are there distinguishing factors or principles that explain why these cases adopted different approaches?

¹⁶³ 2013 (4) SA 184 (SCA).

¹⁶⁴ [2018] EWCA Civ 2544.

¹⁶⁵ (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

- Could the reasoning in *Fowler* have influenced the decision in *Tradehold* and are there principles from *Fowler* that can address the interpretative challenges in *Tradehold*?

By addressing these questions, the chapter aims to clarify the legal reasoning behind the differing outcomes in *Tradehold* and *Fowler* and assesses whether specific interpretative principles could provide a more predictable framework for resolving conflicts between domestic statutory fictions and treaty provisions.

5.2 *Fowler* vs *Tradehold*: A Comparative Analysis of the Judicial Principles Applied

5.2.1 Key Differences in Approach

The outcome of the courts in *Tradehold* and *Fowler* were divergent. As seen in *Tradehold*, the court retained the statutory fiction of the deemed disposal, aligning it with the undefined DTT term, alienation, under article 13 of the Republic of South Africa and Luxembourg's Double Tax Treaty ('RSA-LU DTT'). The effect of article 13(4) was that Luxembourg had exclusive taxing rights, ultimately overriding South Africa's exit tax.

In *Fowler*, however, the United Kingdom Supreme Court ('UKSC') acknowledged the deeming provision but ruled that the DTT itself classified the income as employment income, not retaining the domestic fiction. The court reasoned that the reclassification of income in the domestic law could not override the true economic nature of the income, ensuring that taxing rights remained in line with the DTT's intended purpose.

5.2.2 Comparison of Judicial Principles Between *Tradehold* and *Fowler*

The courts in both *Tradehold* and *Fowler* employed a purposive approach when interpreting the DTT. However, their application of *purposive reasoning* differed in how they treated domestic deeming provisions, balanced economic reality versus legal fiction, and applied DTT terms in relation to domestic tax law.

In *Tradehold*, the SCA applied a purposive approach by interpreting the undefined DTT term alienation broadly to determine whether the South African exit tax provisions could apply. The court recognised that a deemed disposal is a statutory fiction, yet it concluded that in this specific case, the DTT's broad wording allowed the deemed disposal to qualify as an alienation under article 13(4) of the RSA-LU DTT. However, this was not an automatic alignment with South African domestic tax law; rather, it was a context-dependent interpretation of the DTT term.

The court's reasoning permitted South African domestic tax law to influence DTT meaning, but this was contingent on the specific language of the DTT and the facts at hand. The outcome was that South Africa lost taxing rights due to the DTT's allocation of taxing authority to Luxembourg. While the court upheld a purposive approach, it engaged with domestic law to interpret an undefined DTT term rather than rigidly applying an autonomous meaning. The decision inadvertently led to double non-taxation, as South Africa lost taxing rights.

In *Fowler*, the UK Supreme Court also used a purposive approach, but rather than broadening the meaning of the DTT, it focused on preserving the integrity of the DTT classification by ensuring that domestic deeming provisions did not distort the application of DTT terms. The court acknowledged the existence of a deeming provision in UK tax law, but it held that this could not override the DTT's classification of income. Instead, the court ruled that deemed income should retain its fundamental DTT classification based on economic

substance rather than being recharacterised due to a domestic legal fiction. The court in *Fowler* emphasised the importance of autonomous DTT interpretation, ruling that domestic law could not reshape or override DTT classifications. This approach reinforced DTT coherence and certainty, ensuring that domestic deeming provisions did not distort the intended tax treatment of income. The decision helped avoid risks of double non-taxation, as the classification of income under the DTT was maintained consistently.

In short, *Tradehold* demonstrated a broad and flexible reading of DTT terms where context allowed, whereas *Fowler* upheld a stricter DTT-based classification approach by restricting the domestic law's influence, ensuring DTT terms retained an autonomous meaning.

In summary, both courts sought to align the DTT application with economic and legal principles, but *Tradehold* left room for domestic influence in interpretation, whereas *Fowler* strictly maintained the autonomous nature of the DTT terms.

5.2.3 Distinguishing Factors of the Cases

Several key factors influenced the divergent judicial outcomes, of which the following are most distinct:

(a) Nature of the Fiction

In *Tradehold*, the fiction intended to ensure that an unrealised capital gain be taxed before a taxpayer exited the jurisdiction, aligning with South Africa's residence-based tax principles, however retaining this fiction meant that South Africa forfeiting their taxing rights as the consequence was that Luxembourg had exclusive taxing rights. In *Fowler*, the

fiction reclassified income for administrative convenience but did not affect when or where taxation occurred.

(b) Purpose of the DTT Terms Involved

Tradehold focused on alienation, an undefined DTT term that allowed for judicial discretion within the context in which it was found. *Fowler* centred on employment income, and the DTT provided its own classification of income, which overrode domestic fiction.

(c) Impact on Taxing Rights

Retaining the fiction in *Tradehold* resulted in South Africa forfeiting its taxing rights, as Luxembourg acquired exclusive taxing rights under the treaty. Not retaining the fiction in *Fowler* prevented the misallocation of employment taxation rights under the DTT.

Arnold suggests that the lack of an international advisory body for DTT interpretation leads to inconsistencies between jurisdictions. The divergence between the *Fowler* and *Tradehold* cases exemplifies this issue, reinforcing the need for a global approach to DTT interpretation.¹⁶⁶

5.3 Other Relevant Aspects of DTT Interpretation

5.3.1 The Role of the Vienna Convention on the Law of Treaties

¹⁶⁶ BJ Arnold ‘The interpretation of tax treaties: Looking to the future’ (2017) 71 *Bulletin for International Taxation* 1–10.

The VCLT provides the general framework for interpreting treaties, emphasising good faith, ordinary meaning, and the DTT's object and purpose. Both *Tradehold* and *Fowler* applied a purposive interpretation, but their conclusions differed due to many factors, including the underlying tax policy objectives, purpose and context.

South Africa adopted the legal framework and rules of the VCLT. Although South Africa is not a party to the VCLT, it is nevertheless bound by its provisions. According to the South African Department of International Relations and Co-operation ('DIRCO'), the VCLT is regarded as a declaratory customary international law and binds all states regardless of whether they are a party to it.¹⁶⁷

As South Africa has adopted the framework of the VCLT and follows the Organisation for Economic Co-operation and Development Model Tax Convention ('OECD MTC'), it would be prudent to start with the analysis of articles 31 to 32 of the VCLT (and later article 3(2) of the OECD MTC) when looking at DTT interpretation within the South African tax system's framework. Articles 31 and 32 of the VCLT read as follows:

Article 31 – General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:

¹⁶⁷ 'DIRCO on General Information of international agreements' available at: <https://dirco.gov.za/general-information/#:~:text=South%20Africa%20is%20not%20a,the%20provisions%20of%20the%20convention>, accessed on 8 October 2024.

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Accordingly, article 31(1) of the VCLT governs DTT interpretation and requires that it be done in good faith, giving the terms their ordinary meaning within their context and in light of the DTT's object and purpose.

Thus, in interpreting a DTT, the terms should be interpreted within their context and in light of their object and purpose as close as possible to the ordinary meaning of the words. The DTT should also be interpreted in a manner that is fair and equitable to both parties. The parties should also take into account any relevant rules of law, be it domestic or international. The DTT should also not be interpreted in a way that would be contrary to any contracting state's policy.

According to South Africa's *locus classicus*¹⁶⁸ on interpretation, it is clear that South Africa has adopted a similar approach to the interpretation of the Income Tax Act 58 of 1962 ('ITA').

Article 32 – Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

¹⁶⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

When looking at the outcome of *Fowler*,¹⁶⁹ this article supported the findings of the case in the way in which the courts interpreted the deeming provision, which is of utmost importance when considering interpretation rules as laid out.

5.3.2 Article 3(2) of the OECD Model and its Role in Defining Undefined Terms

The OECD and its MTC¹⁷⁰ have been used as a central document for drafting and interpreting DTTs around the world, including in South Africa.¹⁷¹ Although South Africa is not a member of the OECD, it holds observer status in certain OECD committees and has been an OECD Key Partner since 2007.¹⁷² Consequently, South Africa aligns its tax policies and practices with the OECD guidelines and principles.

In the *ITC 1878*,¹⁷³ the tax court referred to the use of the Commentary on the OECD MTC in the context of the interpretation of the double taxation agreement between Switzerland and South Africa. According to the judge, the explanations provided in the OECD Commentary are of immense value in understanding and interpreting any article contained in the DTT. In the case of *SIR v Downing* ('*Downing*'),¹⁷⁴ Corbett JA drew on the Commentary on the OECD MTC to interpret the DTT provisions between South Africa and Switzerland.

While many of South Africa's DTTs include articles that align with the OECD MTC available at the time of negotiation, it should be borne in mind that this is not always the case. South Africa's treaties are negotiated on a case-by-case basis, and certain provisions may

¹⁶⁹ See *Fowler* supra note 8 para 33.

¹⁷⁰ OECD *Income and Capital Model Convention and Commentary (Condensed Version)* (2017).

¹⁷¹ OECD 'MTC key message' available at: <https://www.oecd.org/en/topics/policy-issues/tax-treaties.html>, accessed on 8 October 2024.

¹⁷² OECD 'South Africa and the OECD' available at <https://www.oecd.org/en/countries/south-africa.html>, accessed on 8 January 2025.

¹⁷³ (2015) 77 SATC 349 at 353.

¹⁷⁴ 37 SATC 249

reflect principles from the United Nations ('UN') Model or other models¹⁷⁵ or even unique agreements that do not follow any established model.¹⁷⁶ MTCs, including the OECD MTC, often serve as starting points for treaty negotiations, providing a framework for consistency and fair application of international tax principles. However, the specific language of a DTT article – and its alignment or deviation from the OECD or UN or other models – will determine the relevance and applicability of the Commentaries to these models. Therefore, understanding treaties requires careful consideration of their specific language, the domestic tax laws involved, and the guiding principles established by instruments such as the VCLT and the relevant MTCs.

The role of article 3(2) in interpreting undefined terms within DTTs has been widely discussed in academic literature. The OECD MTC emphasises that undefined terms should generally be interpreted in accordance with the domestic law of the contracting state applying the DTT unless the context requires otherwise. This provision plays a crucial role in the South African approach to DTT interpretation.

According to article 3(2) of the OECD MTC which reads as follows:

As regards to the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning it has at that time under the law of the State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

¹⁷⁵ United States Model Income Tax Convention, the intra-Asean Model to name a few.

¹⁷⁶ SARS 'A full summary of all bilateral double taxation agreements and protocols amending the DTA Agreements of RSA' available at <https://www.sars.gov.za/wp-content/uploads/Legal/Agreements/LAPD-IntA-DTA-2013-01-Status-Overview-of-All-DTAs-and-Protocols.pdf>, accessed on 8 January 2025.

This clause means that, for the purposes of applying the DTT, undefined terms should generally take on the meaning given to them under the domestic law of the state applying the treaty, unless the context requires otherwise.

Article 3(2) of the OECD MTC allows domestic law to define undefined treaty terms unless the treaty provides otherwise. In *Tradehold*, this flexibility enabled the court to incorporate domestic fiction into the treaty interpretation. In contrast, *Fowler* involved a defined treaty term (employment income), overriding the court's ability to rely on domestic law.

Article 3(2) of the OECD MTC provides a critical framework for resolving interpretative disputes in DTTs. Klaus Vogel (2015) contends that tax treaty interpretation must strike a balance between treaty autonomy and domestic legal concepts. His analysis of article 3(2) highlights the potential risks of relying too heavily on domestic law without considering broader international standards.¹⁷⁷

Article 3(2) stipulates that undefined terms in a treaty should, unless the context otherwise requires, be interpreted in accordance with the domestic law of the state applying the treaty. This provision introduces flexibility but also raises challenges, as domestic laws may define terms inconsistently with treaty objectives.

Avery Jones emphasises that the OECD Commentary, while not legally binding, plays a critical role in guiding judicial interpretations of undefined treaty terms. He argues that courts should integrate OECD guidance where possible to ensure consistency in international tax law.¹⁷⁸

The *Tradehold* case demonstrates South Africa's willingness to integrate domestic fictions into DTT interpretation, while *Fowler* reflects the United Kingdom's (UK) commitment to maintaining treaty autonomy. The *Fowler* case exemplifies the cautious application of article

¹⁷⁷ K Vogel *Double Taxation Conventions: A Commentary* 4ed (2015).

¹⁷⁸ JF Avery Jones 'The influence of the OECD Commentaries on treaty interpretation' (2011) 65 *Bulletin for International Taxation* 75–92.

3(2). The UKSC emphasised the primacy of DTT terms over domestic deeming provisions, stating that treaties should operate within the real world, unless the DTT context explicitly incorporates domestic law. This interpretation aligns with the OECD Commentary, which discourages using domestic fictions to alter the meaning of DTT terms.

These cases also reveal the limitations of article 3(2) of the OECD MTC. The provision allows for the integration of domestic law but fails to provide clear guidelines on when and how such integration should occur. This ambiguity contributes to interpretative uncertainties and complicates cross-border tax administration.

Philip Baker KC highlights the importance of a balanced approach to DTT interpretation, arguing that excessive reliance on domestic legal concepts may distort the intended allocation of taxing rights. His analysis suggests that courts must consider whether a statutory fiction undermines or aligns with the treaty's purpose.¹⁷⁹

5.3.3 Purpose and Intent of a Double Tax Treaty: Beyond Just Avoiding Double Taxation

While tax treaties aim to avoid double taxation, they primarily serve to allocate taxing rights between jurisdictions. Some treaties explicitly prevent double non-taxation, while others do not. *Tradehold* and *Fowler* demonstrate how different DTT interpretations can lead to outcomes that either preserve or override domestic tax law.

In summary of Lord Reed in *Anson v Commissioners for HM Revenue & Customs*¹⁸⁰ regarding the interpretation of treaties, the above is echoed by the following statement:

¹⁷⁹ P Baker *Double Taxation Conventions and International Tax Law* 4 ed (2019).

¹⁸⁰ [2015] UKSC 44.

Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.¹⁸¹

The language in a DTT is typically borrowed from a template. In the case of South Africa, the OECD MTC and the UN Model have particular reference. There is an apparent difficulty in integrating the terms of the DTT and the words used in domestic law, as can be seen in *Tradehold* and *Fowler*. In *Fowler*, the outcome appears to have changed the literal interpretation (of such DTT terms under the domestic law's literal meaning where uncertainty existed) to an investigative approach using a purposive interpretation of such terms instead. Purposive interpretation is a method of interpreting the provisions of a legal instrument that focuses on the purpose and intent of the provisions rather than their literal meaning.

In an article on *Fowler*, Johan Hattingh¹⁸² describes four ways in which the legislator uses words to deem certain subjects taxable, which in the context of South African domestic tax law will provide the same outcome. The four ways described are as follows:

- apply the same tax to subject x and subject y;
- treat a certain legal qualification as if it were something else;
- change the meaning of the word to something else; and
- specify how taxation should be applied.

¹⁸¹ Ibid para 56.

¹⁸² J Hattingh & JA Jones '*Fowler v Revenue and Customs Commissioners* [2020] UKSC 22' (2020) 22 *International Tax Law Reports* 681–88.

International tax cases on this topic have established some rules for the interaction between DTTs and domestic tax laws around the world. In *Inland Revenue Commissioners v Banco Do Brasil*,¹⁸³ the judge concluded that a DTT is a contract between sovereign states, and a primary objective of each state in concluding a double taxation convention is to obtain the best possible bargain for its citizens and residents, it is not concerned with third parties. As such, the judge ruled that the DTT must be interpreted in accordance with its original intent and purpose. The judge also stated that the DTT should be interpreted in accordance with the domestic law of each state.

According to Lord Wilberforce, in *James Buchanan & Co Ltd v Babco Forwarding & Shipping*,¹⁸⁴ the language should be interpreted without reference to technical rules of English law or English precedent, but on the basis of broad general principles, and that ‘consideration of the purpose of an enactment is always a legitimate part of the interpretation process’.¹⁸⁵ Furthermore, Lord Wilberforce also stated that the court should always interpret the law in a way that is ‘fair, just and equitable’ and in line with the intentions of the statute.

*Fothergill v Monarch Airlines Ltd*¹⁸⁶ Lord Diplock stated that a DTT only applies between its parties. In cases where ambiguous provisions are found in a particular article, a purposive construction may be appropriate based on the legislation of the UK that sets out the Convention’s language as a whole. It is possible to resort to ‘supplementary methods of interpretation’ if adopting this approach to the article leaves the meaning of the relevant provision unclear or ambiguous or results in a manifestly absurd or unreasonable result. These include *travaux praeparatorios* (‘legislative history’ – as it is called in the United States).

¹⁸³ [1990] STC 285.

¹⁸⁴ [1978] AC 141 para 15.

¹⁸⁵ *Ibid* para 15.

¹⁸⁶ [1981] AC[BD1] 251.

Such material may include the preparatory work of the relevant committee, previous drafts of the provision, and statements made during the legislative process. This material can provide valuable insight into the intent and purpose of the provision. It can also provide insight into how the courts interpret the provision. Additionally, the material can provide guidance on how to comply with the terms of the provision.

Rebecca Kysar asserts that tax treaties must be interpreted holistically, considering not just the DTT language but also the broader economic and fiscal objectives. She highlights that overly rigid interpretations of DTT terms can create opportunities for tax avoidance, as seen in cases where courts have failed to align statutory fictions with economic reality.¹⁸⁷

South Africa's approach to interpreting DTTs is informed by the *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁸⁸ case, which advocates a purposive approach. This method has been applied in several tax cases, including *Tradehold* and *ABSA Bank v CSARS*,¹⁸⁹ to ensure that DTT interpretation aligns with legislative intent and international obligations.

5.4 Judicial Precedents and Legal Authority

The Constitution of the Republic of South Africa, 1996 ('Constitution') governs the incorporation and application of international agreements, including DTTs. Sections 231 to 233 of the Constitution outline the requirements for incorporating treaties into domestic law, while section 108 of the ITA empowers the National Executive to conclude DTTs for tax purposes.

The legal authority of DTTs in South Africa has been debated extensively in case law. *Tradehold* affirmed that DTTs take precedence over conflicting domestic laws, provided they

¹⁸⁷ RM Kysar 'Interpreting tax treaties' (2016) 101 *Iowa Law Review* 1387–1446.

¹⁸⁸ 2012 (4) SA 593 (SCA) paras 18–26.

¹⁸⁹ 2021 (3) SA 513 (GP).

are incorporated into national legislation. In the *Commissioner for the South African Revenue Service v Van Kets*,¹⁹⁰ the court suggested that DTTs and domestic laws should be reconciled to avoid conflict. In *AM Moolla Group Ltd v Gap*,¹⁹¹ it was argued that domestic legislation should prevail if conflicts arise.

The prevailing South African view, as established in *Tradehold*, is that DTTs override conflicting domestic laws when incorporated correctly. However, this principle is not without limitations, particularly where DTTs interact with deeming provisions that cause statutory fictions. Although this alignment preserved the DTT's intent to avoid double taxation, it inadvertently created double non-taxation.

Comparing these cases with other jurisdictions and OECD interpretations can further inform whether statutory fictions should be retained or ignored in DTT application. The consistency in the application of judicial approaches remains a key consideration for international tax law. Similarly, Schwarz underscores the need for a purposive interpretation to address these ambiguities more effectively.¹⁹² As Lang emphasises, the alignment of domestic statutory fictions with international treaties requires a clear understanding of the underlying provisions.¹⁹³ Schwarz highlights the tension between domestic statutory fictions and DTT objectives.¹⁹⁴ The court's treatment of deemed disposal as equivalent to alienation illustrates the flexibility of statutory interpretation. However, this raises questions about the scope of

¹⁹⁰ 2012 (3) SA 399 (WCC) para 18 as cited in I du Plessis 'The incorporation of double taxation agreements into South African domestic law (2015) 18 *Potchefstroom Electronic Law Journal* 1187–204.

¹⁹¹ As cited in Du Plessis op cit note 190 at 1187–204.

¹⁹¹ 2005 (2) SA 412 (SCA). See article 21 paras 2 and 3 in the 2002 RSA-UK Double Taxation Convention as amended by the 2010 Protocol.

¹⁹² J Schwarz *Schwarz on Tax Treaties* 6 ed (2021).

¹⁹³ M Lang 'The role of purpose in treaty interpretation' in M Lang, P Pistone, J Schuch, C Staringer, & A Storck (eds) *Tax Treaty Case Law Around the Globe* (2014) 15–30.

¹⁹⁴ J Schwarz 'The evolution of tax treaty interpretation' (2010) 38 *Intertax* 229–41.

domestic deeming provisions in overriding the economic reality, as emphasised by Avi-Yonah.¹⁹⁵

In the context of the DTT, Roeleveld critiques the legislative drafting of domestic deeming provisions, emphasising their potential to create interpretative conflicts within international tax frameworks.¹⁹⁶

Avi-Yonah¹⁹⁷ argues that anti-avoidance measures must balance preventing tax abuse with maintaining international tax co-operation. In the context of DTT's, this balance is particularly challenging when domestic *deeming provisions* are at odds with DTT objectives. For instance, in *Commissioner for the South African Revenue Service v NWK Ltd*,¹⁹⁸ the court prioritised economic substance over legal form, aligning with Lang's purposive interpretation approach.¹⁹⁹ Applying this principle to deeming provisions can help resolve conflicts between the ITA and DTTs.

5.5 Hypothetical Summarised Application of *Fowler's Approach to Tradehold*

Had the UKSC's reasoning in *Fowler* been applied in *Tradehold*, the outcome would likely have been different. A strict interpretation of alienation may have led to the domestic fiction created by the deeming provision not to be retained, thereby preventing South Africa from taxing the unrealised gains upon emigration.

¹⁹⁵ RS Avi-Yonah 'Double tax treaties: A global perspective' in W Schön (ed) *Tax and Corporate Governance* (2007) 93–110.

¹⁹⁶ Roeleveld and West in P Pistone, J Roeleveld, J Hattingh, JFP Nogueira & C West *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019) 11–196.

¹⁹⁷ Avi-Yonah op cit note at 195 93–110.

¹⁹⁸ 2011 (2) SA 67 (SCA).

¹⁹⁹ M Lang 'The role of purpose in treaty interpretation' in M Lang, P Pistone, J Schuch, C Staringer, & A Storck (eds) *Tax Treaty Case Law Around the Globe* (2014) 15–30.

This would also have resulted in double non-taxation, as Luxembourg did not recognise deemed disposals as taxable events at the time in any event. The risks involved with this approach include treaty shopping, amongst other things.

The contrast highlights how DTT interpretation is not uniform and must be assessed within the context of each country's tax system, the nuances of each case, the policy objectives, and the specific wording of the DTT.

5.6 Conclusion

The analysis of *Tradehold* and *Fowler* illustrates that while both cases applied a purposive approach, their treatment of domestic deeming provisions in relation to DTTs diverged based on, amongst other things, the specific context, treaty wording, and judicial reasoning. The key issue lies in whether domestic tax law can influence the interpretation of treaty terms, particularly when statutory fictions are involved.

The differing applications of purposive reasoning in the two cases raise important considerations for treaty interpretation. While *Tradehold* demonstrates flexibility in aligning domestic law with treaty terms, *Fowler* reinforces the need for consistency and certainty in international tax law. The question remains whether a stricter approach, as seen in *Fowler*, should be applied universally or whether context should dictate when domestic law can influence treaty meaning.

Ultimately, these cases highlight the ongoing challenge of balancing domestic tax objectives with international treaty obligations. As South Africa continues to interpret its DTTs, careful consideration must be given to whether domestic legal fictions should shape treaty application or whether a more autonomous treaty-based approach, as seen in *Fowler*, is preferable. The

answer depends on the specific nuances of each case, treaty wording, the nature of the deeming provision, and the broader policy implications of the interpretation.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This chapter expands on the analysis of *Commissioner for the South African Revenue Service v Tradehold Ltd* ('*Tradehold*')²⁰⁰ and *Fowler v HMRC* ('*Fowler*')²⁰¹ by examining additional interpretative principles that could clarify how domestic deeming provisions could be treated in a double tax treaty ('DTT') context. While both cases applied a purposive approach, their outcomes differed, highlighting the complexities of aligning domestic tax law with DTTs.

A key focus of this chapter is to identify whether other principles can provide clearer guidance on the interaction between domestic deeming provisions and DTTs. These principles may help address uncertainties in treaty application, ensuring that statutory fictions do not lead to unintended tax consequences, such as double non-taxation or inequitable allocation of taxing rights.

In addition, this chapter considers practical measures South Africa can adopt to enhance taxpayer certainty and administrative clarity in the interpretation of DTTs. Given the complexities surrounding statutory fictions, recommendations will focus on potential legislative refinements, improved guidance from SARS, and judicial consistency in addressing DTT conflicts.

By exploring these issues, this chapter aims to provide structured insights that support more predictable and coherent DTT applications, reducing uncertainty for tax authorities, tax practitioners and taxpayers navigating cross-border taxation.

²⁰⁰ 2013 (4) SA 184 (SCA).

²⁰¹ [2018] EWCA Civ 2544.

6.2 Additional Principles of Interpretation for Deeming Provisions in a DTT Context

While *Tradehold* and *Fowler* provide valuable judicial insight, they do not exhaustively address all interpretative approaches relevant to resolving conflicts between domestic deeming provisions and DTTs. Additional principles can contribute to refining the approach taken by courts and tax authorities in future disputes.

Many tax treaties follow the OECD Model, which promotes an autonomous interpretation of DTT terms rather than allowing domestic law to dictate meaning. Avery Jones argues that the OECD Commentaries should be more widely accepted as authoritative interpretative tools, particularly in jurisdictions where treaty misalignment is a risk. His research supports a purposive reading of treaties over a strict reliance on domestic law fictions.²⁰² The approach in *Fowler* reinforces this principle by prioritising the DTT's classification of income over domestic deeming rules. South Africa could benefit from further guidance on legislation or case law to determine when a term should be given an autonomous meaning rather than being influenced by domestic statutory fictions.

Lang examines the OECD Model Tax Convention and warns that treaty overrides by domestic laws can erode tax certainty. He suggests that tax authorities should issue clear interpretative guidance to prevent unintended conflicts between domestic and treaty provisions.²⁰³

One key challenge in the analysis with deeming provisions is their inconsistent application across jurisdictions. The principle of consistency suggests that domestic laws should not distort a DTT's intended effect. Where a statutory fiction is applied in one jurisdiction but not in

²⁰² JF Avery Jones 'The influence of the OECD Commentaries on treaty interpretation' (2011) 65 *Bulletin for International Taxation* 245–68.

²⁰³ M Lang 'The OECD Model Tax Convention and treaty overrides: A persistent dilemma' (2018) 58 *European Taxation* 245–60.

another, it creates uncertainty. South African courts should consider aligning with international best practices by adopting a neutral and predictable framework for evaluating whether a deeming provision should influence a DTT's interpretation.

The principle of substance over form plays a significant role in tax law but is not always applied uniformly in DTT interpretation. *Fowler* embraced this approach by not retaining the fiction created by the recharacterisation of employment income under domestic law. In contrast, *Tradehold* allowed domestic fiction to shape the DTT interpretation. South Africa should consider refining its approach by ensuring that, where domestic deeming provisions introduce statutory fictions, courts consider whether the fiction aligns with the economic reality of the transaction. Baker contends that domestic law should not unduly influence treaty interpretation, particularly concerning statutory fictions. He highlights that South Africa's broad approach in *Tradehold* risks undermining the DTT's autonomy.²⁰⁴

This principle of effective treaty interpretation suggests that a DTT should be interpreted in a manner that achieves its intended purpose of avoiding double taxation and preventing tax avoidance. Courts should be cautious of interpretations that lead to double non-taxation or create an opportunity for treaty abuse. Future South African jurisprudence could strengthen this principle by explicitly weighing the impact of deeming provisions on the effective functioning of DTTs.

6.3 Reducing Uncertainty: Recommendations for South African Tax Policy and Administration

Given the interpretative challenges highlighted in *Tradehold* and *Fowler*, South Africa can take concrete steps to enhance legal certainty for taxpayers and prevent unintended tax outcomes.

²⁰⁴ P Baker *Double Taxation Conventions and International Tax Law* 5ed (2020).

Michael Lang and Pasquale Pistone argue that the lack of uniform guidance on the treatment of domestic deeming provisions in a DTT context creates risks of both double taxation and double non-taxation. They advocate for explicit legislative amendments to prevent interpretative discrepancies.²⁰⁵ The South African Income Tax Act does not currently provide clear guidance on how statutory fictions should interact with DTTs. A statutory framework or interpretative guidance could be introduced to clarify when domestic deeming provisions apply and how they should be reconciled with DTT provisions to provide legislative clarity on the interaction between domestic law and DTTs.

South African courts have discretion in interpreting DTTs, but a more structured approach could improve predictability. The judiciary could develop a set of guiding principles based on international best practices, for resolving conflicts between domestic tax laws and treaty obligations. This would help ensure consistency in decision-making. SARS could issue clearer guidance or practice notes regarding the treatment of statutory fictions in a DTT context. This would provide taxpayers with a more predictable compliance framework and reduce litigation risk significantly. Although South Africa is not a member of the OECD, it follows OECD guidelines in many areas of tax law. Greater reliance on OECD and UN Model Treaty Commentaries in judicial reasoning and SARS guidance could help align South African tax policy with international norms and enhance legal certainty.

South Africa could renegotiate certain treaties where interpretative uncertainties have led to disputes, particularly where a treaty lacks specific provisions addressing statutory fictions. Incorporating more explicit terms for deeming provisions could prevent future inconsistencies in treaty application. Given the complexity of DTT interpretation, SARS could implement a more robust advance ruling system, allowing taxpayers to obtain clarity on how a deeming

²⁰⁵ M Lang & P Pistone 'The role of the OECD in the development of global tax standards' (2018) 10 *World Tax Journal* 311–34.

provision would be treated under a specific DTT before a dispute arises. This would improve compliance and reduce legal uncertainty.

Further to this, the OECD's BEPS project has introduced significant reforms aimed at aligning tax treaty principles with the prevention of base erosion and profit shifting. The recommendations outlined in the BEPS reports suggest that domestic anti-avoidance measures should accompany the treaty-based solutions.²⁰⁶

6.4 Conclusion

The differing outcomes in *Tradehold* and *Fowler* illustrate the interpretative challenges that arise when domestic deeming provisions interact with international tax treaties. While both cases adopted a purposive approach, their application led to different conclusions, highlighting the need for a more structured approach to such conflicts.

Addressing the central research question—whether a statutory fiction created through a deeming provision is retained in a DTT context—the answer is not rigid or absolute. The analysis shows that the outcome depends on several factors: the purpose of the fiction, its alignment with the DTT's objectives, the specific wording of the DTT, the context of the deeming provision, and the interpretative approach adopted and applied by the courts. *Tradehold* demonstrated that statutory fictions might be retained in treaty interpretation where the DTT does not explicitly exclude them, whereas *Fowler* reaffirmed that treaty terms should be interpreted autonomously, without undue influence from domestic law.

South African courts and tax authorities can provide clearer guidance in future cases by incorporating additional interpretative principles such as autonomous meaning, consistency,

²⁰⁶ OECD 'Addressing base erosion and profit shifting available at <https://www.oecd.org/tax/beps/2015-final-reports/>, accessed on 14 February 2025.

substance over form, and effective treaty interpretation. Further, South Africa can take proactive steps to improve legal certainty by introducing legislative clarity, enhancing SARS guidance, aligning with international best practices, and offering better support mechanisms for taxpayers.

A more coherent and predictable approach to DTT interpretation will not only benefit taxpayers but also strengthen South Africa's position in international tax co-operation, reducing the risk of disputes and ensuring fair tax outcomes in cross-border transactions.

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ANNEXURE 1

Table 2: Deeming provisions relating to employment income

Section	Income Type	Definition	Deeming Provision	Tax Implication
Section 1 – Gross Income, paragraph (c)	Amounts for services rendered	Salaries and Wages: regular payments received by an individual from their employer as compensation for services rendered. Commissions and Overtime: Payments based on commissions for sales or additional compensation for working beyond regular hours.	Deeming payments received from an employer as compensation for services rendered to form part of individual’s gross income, including any commission and overtime payments.	Amounts for services rendered are taxable.
Section 1 – paragraph (i) read with the Seventh Schedule	Fringe benefits (taxable benefits derived by reason of employment or the holding of any office)	Director’s Fees: Payments made to individuals serving as directors on company boards.	Director’s fees are deemed fringe benefits forming part of remuneration.	Amounts received as a fringe benefit are taxable.

Section 1 – Gross Income – paragraph (n)	Other amounts to include in gross income	Leave Pay: payments made for accrued and unused leave days when an employee leaves their job.	Deems amount paid by employer for unused leave days as income.	Amounts received for leave pay are taxable.
Section 7B	Bonuses	Additional payments, often based on performance or other criteria, provided by an employer to an employee.	Deems bonuses based on performance as employment income.	Amounts received for bonuses are taxable.
Section 8(1)	Employment income, annuities and pensions, benefits and allowances related to employment, fees commissions and bonuses related to employment	Explicitly identifies and stipulates specific types of income that must be included in the calculation of taxable income.	Deems certain amounts payable to employees as employment income.	Certain specified amounts received by employees from employers are taxable.
Paragraph 2 of the Seventh Schedule	Allowances, advances, reimbursive travel and subsistence	A taxable benefit is deemed to have been granted by the employer if, as a benefit or advantage of, or by virtue of such employment	Allowances, advances, reimbursive travel and subsistence allowances	Allowances, advances, reimbursive travel

<p>Paragraph 2 of the Seventh Schedule...Continued</p>	<p>allowances and allowances for holders of public office</p>	<p>or as a reward for services rendered or to be rendered, the employee is granted one of the benefits described in Paragraph 2 of the Seventh Schedule, namely: Acquisition of an asset at less than the actual value (money excluded); Right of use of a motor vehicle; Right of use of an asset (excluding a motor vehicle and residential accommodation); Meals, refreshments or meal and refreshment vouchers Residential accommodation; Free or cheap services; Low or interest-free loans; Subsidy in respect of loans (interest or capital repayments); Payment of employee's debt or release of the employee from the obligation to pay a debt;</p>	<p>and allowances for public office are deemed as income.</p>	<p>and subsistence allowances and allowances for public office are taxable.</p>
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		<p>Medical fund contributions paid on behalf of an employee;</p> <p>Medical costs (other than contributions) paid for the benefit of an employee;</p> <p>Contributions to a benefit fund;</p> <p>Contribution to bargaining council;</p> <p>Payment to an insurer under an insurance policy; and/or;</p> <p>Any benefit granted to the relative of employee and others¹.</p>		
Section 10(1), (nA), (nB), (nC), (nD), (nE), (o), (q), (qA)	Exemptions	Although not a deeming provision perse, this part of the ITA specifies that certain types of income should not be included in taxable income under specified conditions and circumstances. In effect giving rise to a similar effect as a deeming provision.	N/A	Certain amounts are excluded from tax.

¹ SARS Guide for Employers in Respect of Employees Tax (2023 tax year) – PAYE-GEN-01-G17, Revision: 1 at 35, available at <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/PAYE-GEN-01-G17-Guide-for-Employers-iro-Employees-Tax-for-2023-External-Guide.pdf>, accessed on 29 October 2024.

Table 3: Deeming provisions extract from the Fourth Schedule to the ITA

Section	Income Type	Definition	Deeming Provision	Tax Implication
Paragraph 2(4)(a), (b) and (bA) of the Fourth Schedule Section 11F	Retirement Fund Contributions:	From 1 March 2016, contributions made, or an amount paid by the employer of the person on behalf of or for the benefit of that person will be a taxable fringe benefit and a deemed contribution in the hands of the employee. Therefore, current contributions = contributions actually made by the employee plus employer contributions/payments (deemed employee contributions).	Deems contributions made by an employer to a retirement fund of an employee as a fringe benefit.	Fringe benefits are taxable.
Definition of 'Severance benefit' in section 1 Definition of 'Gross income' in section 1 Paragraph 9(3)	Severance Pay:	Compensation received by an employee upon termination of employment. Severance benefit means any amount (other than a lump sum benefit or an amount contemplated in paragraph (d) (ii) or (iii) of definition of gross income) received by or accrued to a person by way of a lump sum from or by arrangement with person's employer or an associated institution in relation to that employer in respect of relinquishment, termination, loss, repudiation, cancellation or variation of person's office or employment or of person's appointment (or right or claim to be	Certain payments made at the termination of services are taxable via a specific table.	Severance benefits are taxable as lump sums via the retirement table, taking into account the first R500 000 tax-free portion.

Section	Income Type	Definition	Deeming Provision	Tax Implication
of the Fourth Schedule		<p>appointed) to any office or employment, if such: Person has attained the age of 55 years; Relinquishment, termination, loss, repudiation, cancellation or variation is due to the person becoming permanently incapable of holding the person's office or employment due to sickness, accident, injury or incapacity through infirmity of mind or body; Termination or loss is due to:</p> <p>Person's employer having ceased to carry on or intending to cease carrying on the trade in respect of which the person was employed or appointed.</p> <p>Person having become redundant in consequence of a general reduction in personnel or a reduction in personnel of a particular class by the person's employer, unless, where the person's employer is a company, the person at any time held;</p> <p>More than five per cent of the issued share capital; or</p> <p>Members' interest in the company.</p>		

Section	Income Type	Definition	Deeming Provision	Tax Implication
		<p>Provided that any such amount which becomes payable in consequence of or following upon the death of a person must be deemed to be an amount which accrued to such person immediately prior to his or her death.</p>		
	Advance:	<p>Amounts advanced by an employer to an employee, typically to cover future expenses.</p>	<p>These may be considered as fringe benefits depending on the terms and conditions of repayment.</p>	<p>Advances are taxable under certain circumstances.</p>
Paragraph 1 of the Fourth Schedule	Reimbursement:	<p>When an employer reimburses an employee for business-related expenses.</p>	<p>These amounts may be considered as tax-free payments.</p>	<p>Amounts are generally not considered taxable income provided they are for actual, legitimate business expenses and are properly documented.</p>

Section	Income Type	Definition	Deeming Provision	Tax Implication
Paragraph 11 of the Fourth Schedule	Loans:	Financial assistance provided by employers to employees at an interest-free or low interest rate.	The difference between the interest rate charged and the prescribed interest rate set is considered a tax benefit to the employee.	This tax benefit must be included in the employee's income.
Paragraph 2B of the Fourth Schedule	Accrued Benefits:	Amounts accruing to an employee under any arrangement or in respect of any office or employment, including long-term bonuses and deferred compensation.	Amounts that an employee has worked for but not yet been paid and only typically recorded at the end of an accounting period, ie Accrued salary and wages, accrued leave, accrued sick leave, accrued bonuses, and	These amounts are taxable to the employee as income.

Section	Income Type	Definition	Deeming Provision	Tax Implication
			other accrued fringe benefits.	
Paragraph 2(4) of the Fourth Schedule	Retirement Fund Contributions:	Employee contributions to retirement funds or pension schemes that are deductible for tax purposes.	Deems these amounts as taxable fringe benefits.	Taxed at the employee's marginal tax rate and also tax deductions allowed within specified limits.
Paragraph 1 of the Fourth Schedule	Gratuities and Benefits:	Non-cash benefits, such as the provision of a company vehicle, housing, or other benefits in kind.	These amounts are considered remuneration.	These amounts are taxable however a portion of a severance benefit may qualify for tax-free treatment under the R500 000 exemption rule

Section	Income Type	Definition	Deeming Provision	Tax Implication
Paragraph 2(2B) of the Fourth Schedule	Pension and Annuity Income:	Periodic payments from a pension or annuity fund.	Deemed to be remuneration.	Subject to PAYE.
Paragraph 11A of the Fourth Schedule Section 8B Paragraph 11A of the Fourth Schedule	Broad-Based Employee Share Plan: Acquisition of equity shares	If an employee acquires any equity share by virtue of any qualifying equity share held by the employee, that other equity share so acquired is deemed to be a qualifying equity share which was acquired on the date of grant of the qualifying equity share so held by the employee.	If an employee acquires shares at a discount or under a share incentive scheme, the difference between the market value and the amount paid is deemed a taxable fringe benefit.	Included in remuneration and subject to PAYE. If shares are restricted, taxation may be deferred until restrictions lift.

Table 4: Examples of other deeming provisions found in the ITA

Section of the ITA	A brief description
Section 1	Definitions where 'resident' induces deeming provisions
Section 7	Deemed income from property dispositions
Section 7C	Deeming a donation subject to donations tax
Section 7(2)	Deems income from a source within South Africa if transferred assets were initially sourced within the country
Section 7(3)	Deems income from a trust to be from a donor where assets were disposed of for less than the actual value
Section 7(8)	If a resident has made a donation, settlement or other disposition of property, the income from that asset is deemed to be from the resident donor
Section 9D	Deems income from a controlled foreign company to be from a South African resident
Section 11	Deeming provisions regarding allowable deductions
Section 15 Deems receipts or accruals from mining operations as income	Section 22(3) Deems the value of trading stock on hand at year-end to be income
Section 24C Deeming of future expenditure on contracts	Section 24J Deems the income or expenditure of interest to accrue daily
Section 25B	Trust income deemed to be that of the beneficiary
Section 50B	Deemed accrual rate: instruments with yield on maturity

Table 5 – Conflicts between ITA deeming provisions and DTTs

Deeming Provision	Purpose of the ITA	Conflict with DTT	Resolution/Approach
Deemed Disposal	Tax unrealised gains on assets when a taxpayer exits South African jurisdiction.	Undefined in many DTTs, which typically refer to actual ‘alienation’ rather than statutory fictions. This creates potential conflicts over taxing rights when no actual sale or transfer occurs.	Purposive interpretation, treating ‘deemed disposal’ as equivalent to ‘alienation’ to prevent double non-taxation or loss of tax revenue.
Fringe benefits	Tax non-cash income benefits provided to employees, such as company vehicles or housing.	Some DTTs may exempt certain employment-related benefits from taxation, creating discrepancies in how fringe benefits are treated under local and DTT law.	Align DTT provisions with domestic definitions by explicitly clarifying the scope of taxable benefits in DTT negotiations.
Deemed Income from South African Trusts	Tax income from assets transferred to a trust by treating the income as if the donor earned it.	DTTs typically assign taxing rights based on residency, which may not account for the domestic ‘deemed’ attribution of income to the donor.	Use purposive interpretation to reconcile residency-based taxing rights with the source-based nature of the deemed income provision.

Deeming Provision	Purpose of the ITA	Conflict with DTT	Resolution/Approach
Controlled Foreign Company Income	Tax income of a controlled foreign corporation (CFC) as if the South African shareholder earned it.	Tax income of a CFC as if the South African resident shareholder earned it. DTTs often allocate taxing rights to the jurisdiction where the CFC operates, potentially ignoring the deemed attribution of income to the shareholder.	Introduce mutual agreements in treaties to explicitly address CFC rules, ensuring alignment with international tax objectives.
Deemed accrual of Interest	Tax interest income on a daily accrual basis, regardless of when it is actually paid.	Tax interest income on a daily accrual basis, regardless of when it is actually paid.	DTTs may allocate taxing rights to the jurisdiction where the payer is resident, leading to conflicts if the interest is deemed to accrue but not yet received. Clarify DTT terms to ensure deemed accruals are recognised under DTT provisions when taxation aligns with economic substance.

Deeming Provision	Purpose of the ITA	Conflict with DTT	Resolution/Approach
Deemed Residency	Treat individuals as residents for tax purposes based on specific conditions, such as length of stay.	DTTs typically use tie-breaker rules to determine residency, which may conflict with domestic deeming rules.	Ensure tie-breaker rules in treaties explicitly consider the circumstances of deemed residency to prevent dual or non-residency issues.