

**An analysis of options for reform of South Africa's unilateral
income tax exemption of foreign pensions, with an emphasis on
the cross-border interaction with pensions derived from the
United Kingdom and Germany**

**Minor Dissertation presented in partial fulfilment of the requirements for the degree
Master of Laws (LLM) in International Taxation**

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Date of submission: 16 February 2018
(24,869 words – excluding footnotes, bibliography and
appendices)

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ACKNOWLEDGEMENTS

This minor dissertation has been equal parts challenging and exciting. It would not have been possible without the endless and priceless help from the University of Cape Town; most importantly Johann Hattingh and Jennifer Roeleveld. Thank you too, to Dr. Christian Kahlenberg from the European University Viadrina Frankfurt (Oder) for his expert knowledge and guidance on German Tax legislation.

Although incredibly rewarding, this paper had an immense effect on my personal life and to my family and friends I will forever be grateful; your patience and support was unparalleled.

My sincere thanks,

Ashley Oliver

ABSTRACT

South Africa, recently reformed the tax policy regarding the taxation a South African resident's foreign employment income and is in the process of reviewing the tax policy of foreign pensions. The unilateral foreign pension exemption was only meant to be on a temporary basis, but yet uncertainty existed ever since its introduction in 2000 of whether, and for how long, the exemption would be retained that is until 2016.

South Africa's Treasury proposed various reforms to South Africa's unilateral exemption of foreign employment income in the last two years. The prevalent nexus between the foreign employment income and foreign pension exemptions, is a strong indication that the various reforms considered for the foreign employment exemption may be considered in regards to South Africa's tax policy reform of foreign pensions. This minor dissertation seeks to answer is what the impact of the proposed future reforms are on the income tax consequences of a SA tax resident's foreign pension, in light of the recent international trends in the mitigation of double non-taxation.

The key finding arising from the research in this minor dissertation is that South African residents currently benefit from double non-taxation of UK pension annuities, UK pension lump sums and lump sums, and a German lump sum arising from a pension commitment prior to 1 January 2005.

The enactment of the proposed future reforms would result in United Kingdom pension annuity becoming taxable in South Africa. German pension benefits in the form of an annuity arising from a pension commitment prior to 1 January 2005 and after 31 December 2004 will be taxed either in Germany or South Africa, or both. In the case of a SA resident's UK lump sum or German lump sum arising from a pension commitment prior to 1 January 2005, a SA resident will continue to benefit from double non-taxation under the proposed future reforms under both the 1973 and 2008 SA-Germany DTC. In the case of a SA resident's lump sum arising from a pension commitment after 31 December 2004 it will still be taxed in Germany under both the 1973 and 2008 SA-Germany DTC, regardless of the proposed future reforms.

Following the analysis of the impact of the proposed future reforms on the income tax consequences of a South African tax resident's German or United Kingdom pension benefits,

this dissertation finally aims to provide recommendations in relation to issues identified in respect of the proposed future reforms, if any.

TABLE OF CONTENTS

I)	INTRODUCTION	3
A)	Background and Objectives	3
B)	Research Question	9
C)	Delimitations of Scope and Assumptions.....	10
D)	Research Method	12
E)	Structure of the dissertation.....	12
II)	OVERVIEW OF SOUTH AFRICA’S CURRENT INCOME TAX REGIME APPLICABLE TO A SOUTH AFRICAN RESIDENT’S FOREIGN PENSION	13
A)	Introduction.....	13
B)	A brief overview of retirement funding structure in terms of South Africa’s income tax legislation	13
C)	The current income tax consequences applicable to a South African resident’s foreign pension under South Africa’s income tax legislation	14
i)	<i>The meaning of the term ‘pension fund’ in terms of South Africa’s income tax legislation</i>	<i>14</i>
ii)	<i>The meaning of the term ‘resident’.....</i>	<i>15</i>
iii)	<i>The general meaning of the term ‘gross income’.....</i>	<i>16</i>
iv)	<i>The income tax treatment of pension benefits in the context of South Africa’s income tax legislation, German tax law and the United Kingdom tax law</i>	<i>17</i>
(a)	<i>The income tax treatment of South African pension benefits.....</i>	<i>17</i>
(b)	<i>The income tax treatment of the United Kingdom pension benefits</i>	<i>20</i>
(c)	<i>The income tax treatment of the Germany pension benefits.....</i>	<i>23</i>
(d)	<i>Concluding Remarks</i>	<i>23</i>
B)	Taxation of pension benefits under South Africa’s income tax legislation	24
C)	Conclusion Remarks	28
III)	ANALYSIS OF A ‘SUBJECT TO TAX’ CLAUSE REFORM UNDER SOUTH AFRICA’S INCOME TAX LEGISLATION	29
A)	Introduction.....	29
B)	What is the meaning of the term ‘double non-taxation’ and the OECD’s current development in preventing double non-taxation.....	29
C)	Distinguishing between the terms ‘liable to tax’ versus ‘subject to tax’	37
D)	The functionality of the ‘subject to tax’ clause as part of a unilateral foreign pension exemption in terms of South Africa’s income tax legislation	42
E)	Concluding Remarks.....	44

IV)	THE CROSS-BORDER INCOME TAX CONSEQUENCES APPLICABLE TO A SOUTH AFRICAN RESIDENT IN LIGHT OF SOUTH AFRICA’S DOUBLE TAX AGREEMENTS IN FORCE AND THE PROPOSED FUTURE REFORMS UNDER SOUTH AFRICA’S INCOME TAX LEGISLATION	45
A)	Introduction	45
B)	Overview of the pension article and terminology under South Africa’s DTCs in force	46
C)	Cross-border income tax consequences applicable to a South African resident’s United Kingdom pension benefit	50
D)	Cross-border income tax consequences applicable to a South African resident’s German pension	54
E)	Case Study 1 Findings: SA/ UK	65
i)	<i>Scenario A – Current South Africa Income Tax Legislation</i>	65
ii)	<i>Scenario B.1 - Proposed changes to South Africa Income Tax Legislation (‘Subject to tax’)</i>	65
F)	Case Study 2 Findings: South Africa / Germany.	67
i)	<i>Scenario A – Current South Africa Income Tax Legislation</i>	67
ii)	<i>Scenario B.1 - Proposed changes to South Africa Income Tax Legislation (‘Subject to tax’)</i>	68
G)	Concluding remarks in respect of the taxation issues affecting a South African resident’s UK pension or German pension based on Case Study 1 and 2	70
H)	Other potential taxation issues affecting a South African resident’s foreign pension..	71
I)	Concluding remarks in respect other potential taxation issues affecting a South African resident’s foreign pension	72
J)	Recommendations in respect of the taxation issues affecting a South African resident’s United Kingdom or German pension based on Case Study 1 and 2	73
K)	Alternative recommendations	74
V)	CONCLUSION	75
VI)	BIBLIOGRAPHY	79
VII)	APPENDIX A: OVERVIEW OF THE TAX LEGISLATION OF THE SELECTED COUNTRIES UNDER REVIEW	83
VIII)	APPENDIX B: OVERVIEW OF THE PENSION ARTICLE UNDER SOUTH AFRICA’S BILATERAL DOUBLE TAX AGREEMENTS IN FORCE AS OF 1 MARCH 2017	93
IX)	APPENDIX C: SUMMARY OF DOCUMENTED IMMIGRANTS RETIRED IN SOUTH AFRICA FOR THE LATEST YEARS AVAILABLE 2011 TO 2014.....	95

D) INTRODUCTION

A) Background and Objectives

The globalisation of economies has formed a fundamental role in the reform of retirement systems in many countries. The Organisation for Economic Co-operation and Development (OECD), the European Commission, the World Bank and the International Labour Organisation (ILO) have been influentially involved in the reform of the retirement systems for many countries over the years. The international organisations have each developed their own respective multi-pillar pension framework model for the taxonomy of pension systems throughout the world. The models were developed based on years of consulting experience in the retirement fund industry with the purpose of providing a flexible strategy in addressing the challenges faced by policymakers.¹ The OECD's model serves solely as a taxonomy for tax purposes, whereas the World Bank and ILO's models do not.² This model framework will be discussed further under the delimitations of this paper's scope.

The global reform of retirement systems of many countries includes but is not limited to the reform of their underlying system of taxation and the design of their bilateral double tax convention (DTC) - particularly in the allocation of taxing rights between the resident and source country. Globalisation has resulted in international mobility of individuals throughout the world, both for work-related reasons and personal reasons.³ Accordingly, significantly more complex cross-border taxation issues have arisen at every phase of the pension system. The current cross-border taxation issues arising include but not limited to:

- 'the tax deductibility of contributions by an expatriate or the employer to a foreign retirement fund;
- the characterisation of investment income earned by financial institutions on contributions invested,
- defining of what constitutes a pension or pension fund; and
- mismatches in the treatment of pension benefits'.⁴

¹ B. Wiberg, Will We See a Change in Tax Treaties between European Countries Concerning Taxation of Occupational Pensions, *European Taxation*, vol. 52, (The Netherlands 2012), p. 455, para. 2 and OECD, Methodology Used to Develop the Classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005), p. 28, para. 3.

² *Ibid.*

³ OECD, Commentaries, *Model Tax Convention on Income and on Capital 2014*, (The Netherlands 2015), Art. 18, n. 8.

⁴ C. Bobbett and J. F. Avery Jones, Treaty Issues related to the Treatment of Cross-Border Pension Contributions and Benefits, *Bulletin for International Taxation*, vol. 58, No.1, (The Netherlands 2004), pp. 1-13.

Cross-border taxation issues of pensions may arise when the principles of an advanced system of taxation⁵ and deferred system of taxation⁶ collide resulting in potential double taxation or double non-taxation.⁷ Internationally, there is a growing trend towards countries adopting a system of deferred taxation or fiscally substituted contributions.⁸ The risk of inconsistent mismatches arising from diverging principles of taxation may be exacerbated further by countries incorporating a pension article in their DTC which allocates exclusive taxing rights to the resident country in terms of Article 18 of the OECD Model Tax Convention⁹ (OECD Model).¹⁰ Hattingh, Hageman and Kahlenberg conclude that the effect of such mismatches may result in an ‘unsystematic legal hierarchy of taxing norms’.¹¹

South Africa (SA) has predominately had a territorial or source based system of taxation since the introduction of income tax in 1914.¹² During the pre-apartheid era in SA, SA was subjected to economic sanctions by the international community and barred from international trade and relations.¹³ The sanctions together with stringent exchange control regulations led to the decline of international trade and not much development of tax laws occurred to deal with cross-border transactions by SA legislators.¹⁴ Accordingly, this led to the exploitation by SA residents and non-residents taking advantage of the shortcomings in the existing tax laws under the territorial or source based system of taxation.¹⁵

The Katz Commission was appointed in 1997 to assess the ability of SA’s tax system to deal with the shortcomings arising as a consequence of SA’s reintegration in the global economy in the post-apartheid¹⁶ era which was augmented further by the relaxation of exchange

⁵ Advanced system of taxation, meaning that the full amount of pension contributions are not tax deductible and afterwards, the received earnings are exempt or taxed at a preferential tax rate.

⁶ Deferred system of taxation, meaning that the full amount of pension contributions are tax deductible and afterwards, the received earnings are subject to tax.

⁷ J. Hattingh, T. Hageman and C. Kahlenberg, South Africa - Recent Developments Regarding the Taxation of Pensions under Tax Treaties from a German and a South African Perspective’, *Bulletin for International Taxation*, vol. 71, No. 1, (The Netherlands 2016), p. 3, n. 2.1, para. 1.

⁸ *Ibid.*

⁹ OECD, *Model Tax Convention on Income and on Capital 2014*, (The Netherlands 2015).

¹⁰ See note 7, p. 3, para. 2

¹¹ See note 7, p. 3, para. 2

¹² A. W. Oguttu, Ensuring a right balance in applying the residence and source bases of taxation, In J. Hattingh, J. Roeleveld and C. West (eds.), *Income Tax in South Africa: The First 100 Years (1914 - 2014)*, (South Africa 2016), p. 255, para. 3 and p. 257, para. 2.

¹³ See note 12, p. 255, para. 3 et. seq.

¹⁴ See note 12, p. 255, para. 3 et. seq.

¹⁵ See note 12, p. 255, para. 3 et. seq.

¹⁶ The apartheid system in South Africa was ended through a series of negotiations between 1990 and 1993 and through unilateral steps by the National Party government.

control regulations in the mid-1997s.¹⁷ The Katz Commission recommended that SA gradually introduce the residence basis of taxation to facilitate SA's integration into the global economy.¹⁸ Shortly after that the gradual phasing out of exchange controls from 1997, a residence basis of taxation was inevitable and was introduced in 2001.¹⁹ The definition of 'gross income' in section 1 of SA's Income Tax Act, No. 58 of 1962 contains the fundamental basis of taxation in SA.²⁰ A distinction is made between the basis of taxation applied to residents and that of non-residents, where SA residents are liable to tax on their worldwide income, irrespective of the source thereof.

SA's old source-based system of taxation has provided bilateral relief from international double taxation since 1946.²¹ In 1987, SA enacted into its tax legislation a comprehensive unilateral foreign tax credit relief, whereas before 1987 such relief was provided mainly by SA's DTCs.²² From 1987 up to 2000, SA continued to maintain a territorial or source basis of taxation together with specific categories of foreign income specifically included (e.g. source deeming rules), also known as a source plus basis of taxation.²³ During this period, predominantly, but not exclusively, the tax policy preferred a foreign income exemption through the operation of the source based system, but the foreign tax credit method was used to provide relief from international double taxation as a result of instances caused by foreign income included in the source tax base.²⁴

After the introduction of the residence-based system in SA in 2001 or also known as a residence minus system of taxation²⁵ neither the unilateral exemption or the unilateral credit method has been the prominent method of relief of international double taxation.²⁶ The most prominent categories of foreign income exemptions maintained under the

¹⁷ See note 12, p. 256, para. 4.

¹⁸ See note 12, p. 257, para. 1. et seq. Additionally, in 1951 the 'Steyn Committee' recommended that the source basis of taxation be retained owing to the perceived complexity of changing to a residence system, whereas both the 'Franzsen Commission' in 1970 and 'Margo Commission' in 1987 recognised the need for the implementation of a worldwide/residence based system of taxation.

¹⁹ E. Mazansky, South Africa Changes to a Worldwide Tax System, *Bulletin for International Taxation*, vol. 55, No. 1, (The Netherlands 2001), p. 138, s. 1, para. 4.

²⁰ See note 12, p. 257, para. 2. et seq.

²¹ J. Hattingh, South Africa, *Cashiers de droit fiscal international 2011 Paris Congress - Key practical issues to eliminate double taxation of business income*, vol. 96b, (The Netherlands 2011), p. 575, para. 1.

²² See note 21, p. 575, para. 2.

²³ See note 19, p. 138, n. 1, para.4.

²⁴ See note 21, p. 575, para. 3.

²⁵ The phrase 'residence minus system of taxation' was derived mainly due to the large number of foreign income exemptions introduced in 2001, or shortly thereafter that affect a significant portion of the tax base.

²⁶ See note 21, p. 577, para. 3.

worldwide/residence system of taxation are, namely, non-portfolio foreign dividend income, foreign employment income and pension income.²⁷ The change from a source plus to a residence minus system of taxation had no significant impact on the expansion of SA's tax base to include foreign-sourced 'active income'. However, the change did impact the expansion of SA's tax base in the case of 'passive income' (e.g. interest, royalties, rentals of movable and immovable property and annuity income, excluding pensions and social security payments).²⁸

Persons who immigrate to SA to retire in the country and who then become SA tax resident, are liable to tax on their worldwide income in SA, irrespective of the source thereof.

Accordingly, a SA resident's pension benefits arising from a fund established outside of SA arising in consideration for past employment rendered outside of SA, or any social security payment is liable to income tax.²⁹ The type of pension benefit is either in the form of lump-sums or annuities arising from a pension fund or retirement fund established outside of SA. Also, pension benefits may also arise from a pension, provident or retirement fund incorporated in SA, whose funds arose as a result of a transfer of funds from a foreign pension fund or foreign retirement fund. The basis of fiscal recognition of income for tax purposes and the levying of tax thereon is the earlier of the receipt or the accrual basis.³⁰ Most of the retirement industry breaches the principle of fiscal recognition of income by recognising pension benefits upon actual payment (i.e. deferred).³¹

The unilateral exemption in terms of section 10(1)(gC) of SA's Income Tax Act, 58 of 1962 applies to a SA resident's foreign-sourced pension³² arising in consideration for past employment rendered outside of the country.³³ As a result, the foreign-sourced pension is exempt from SA's income tax base.³⁴ Accordingly, this may incentivise foreign high-net-worth individuals to formally immigrate and retire in SA to take advantage of SA's generous unilateral exemption relief of foreign pensions under SA's tax legislation. Foreign high-net-worth individuals derive a tax benefit where the source country's tax law levies no taxes on a

²⁷ See note 21, p. 577, para. 3.

²⁸ See note 19, p. 138, n. 1, para. 4.

²⁹ See note 7, p. 3, n. 1.2.2, para. 3.

³⁰ *Commissioner for Inland Revenue v Delfos* (1933) AD 242, 6 SATC 92.

³¹ C. S. Margo, Chapter 8: Retirement Fund Taxation, *Report of the Commission of Inquiry Into the Tax Structure of the Republic of South Africa*, (South Africa 1987), p. 57, para. 8.2.1.

³² The nature of the pension benefits must either be in the form of a lump sum, pension or annuity.

³³ See note 7, p. 3, n. 1.2.2, para. 3.

³⁴ See note 7, p. 3, n. 1.2.3, para. 1.

foreign pension, or the source country's right to tax under a DTC is restricted because taxing rights have been allocated exclusively to the resident country.

South Africa, recently reformed the tax policy regarding the taxation a South African resident's foreign employment income and is in the process of reviewing the tax policy of foreign pensions. The taxation of a SA resident's foreign employment income was previously exempt³⁵ by its very nature, provided that a time period test is satisfied. The exemption went hand in hand with the unilateral relief of a foreign pensions, as there is a prevalent nexus with foreign employment income.³⁶ During SA's change to a residence minus system of taxation in 2000, SA's Treasury considered whether or not to tax foreign employment and foreign pensions, but decided to exempt both forms of foreign income of SA residents.³⁷ The unilateral foreign pension exemption³⁸ was meant to be only for a temporary basis upon its introduction in 2000 because of issues regarding:

- the deductibility of foreign pension fund contributions;
- the taxation of foreign pension fund lump sum payments; and
- the administrative capacity to vet foreign pension funds for purposes of allowing tax deductions for contributions.³⁹

However, uncertainty existed ever since its introduction in 2000 of whether, and for how long, the exemption would be retained, that is until recently in 2016. SA's former Finance Minister, Gordhan, reiterated the issue of the taxation of a foreign pensions in the 2016 National Budget:

'[t]he question of how contributions to foreign pension funds and the taxation of payments from foreign funds should be dealt with raises a number of issues, which require a review. Sufficient time would be required to determine how to deal with contributions to foreign funds and the taxation of payments from foreign funds, taking into account the tax policy for South African retirement funds.'⁴⁰

³⁵ Income Tax Act, No. 58 of 1962 of the Republic of South Africa, s. 10(1)(o)(ii). Any reference to foreign employment income exemption in this paper hereinafter refers to the s. 10(1)(o)(ii) of Income Tax Act, No. 58 of 1962 of the Republic of South Africa.

³⁶ See note 7, p. 7, n. 2.3.3.2, fn. 51.

³⁷ Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000 [W.P. 2 – 2000], p. 5 - 6, 'Foreign income of resident individuals'.

³⁸ See note 35, s. 10(1)(gC). Any reference to foreign pension exemption in this paper hereinafter refers to the s. 10(1)(gC) of Income Tax Act, No. 58 of 1962 of the Republic of South Africa.

³⁹ See note 7, p. 5, n. 2.3.1, para. 3

⁴⁰ National Treasury Republic of South Africa, Budget Review 2016, (South Africa 2016).

SA's former Finance Minister, Pravin Gordhan at the 2017 National Budget Speech proposed amendments to the wording of the unilateral exemption of foreign employment income by inserting a 'subject to tax' clause. Instead of an inclusion of a 'subject to tax' clause in section 10(1)(o)(ii), SA's Treasury published Draft Taxation Laws Amendment Bill 2017⁴¹, repealing the foreign employment income exemption entirely. However, as a result of strong criticism in the form of public commentary⁴², Treasury proposed and later enacted an alternative amendment by reverting to the partial repeal of the foreign employment income exemption in the form of an 'exemption threshold'.

The enactment of the Taxation Laws Amendment Act, No.17 of 2017 revised the wording of section 10(1)(o)(ii) of SA's Income Tax Act, No. 58 of 1962 to allow for one million Rand of foreign remuneration to be exempt from tax in South Africa if the individual is outside of the Republic for the stipulated number of days required.⁴³ The purpose of both the latter reforms are aimed at preventing double non-taxation on SA resident's employment income earned abroad arising as a result of foreign countries levying negligible tax or no tax at all. However, the 'exemption threshold' in contrast to the 'subject to tax' clause, primarily aims to target high-net-worth individuals and 'reduce the impact of the amendment for lower to middle class SA residents who are earning remuneration abroad.'⁴⁴

SA has always been at the forefront of developing countries in implementing international recommendations to combat harmful tax practices, double non-taxation and the prevention of tax evasion giving rise to base erosion or profit shifting. Internationally, Germany has been at the forefront in resorting to special regulations in the allocation articles of its DTCs in respect of employment and pension income under its tax treaty policy practices.⁴⁵ A recent decision by Germany's Federal Fiscal Court held that double non-taxation is unacceptable and a 'subject to tax' clause is an effective measure to address such risks.⁴⁶ If the resident country

⁴¹ Draft Taxation Laws Amendment Bill 2017 of the Republic of South Africa.

⁴² Draft Response Document on Taxation Laws Amendment Bill 2017 and Tax Administration Laws Amendment Bill 2017 of the Republic of South Africa, p. 6, s. 2.1.

⁴³ Taxation Laws Amendment Act, No.17 of 2017 of the Republic of South Africa, p. 26, s. 16(1)(g).

⁴⁴ See note 42

⁴⁵ See note 7, p. 3, n. 2.1, para. 3.

⁴⁶ See note 7, p. 5, n. 2.3.1, para. 1.

of a retiree adopts a residence minus system of taxation for the taxation of pension income, the lack of systematisation is further evident.⁴⁷

The prevalent nexus between the foreign employment income and foreign pension exemptions, is a strong indication that the various reforms, a ‘subject to tax’ clause or an ‘exemption threshold’ may be considered in regards to South Africa’s tax policy reform of foreign pensions.

This paper aims to analyse the proposed reforms impact on the income tax considerations applicable to a SA resident’s foreign pension. This paper also aims to analysis the income tax treatment of pension benefits (i.e. lump sum or annuity) in terms of SA income tax legislation in contrast to the UK and German tax law. Additionally, this paper seeks to determine what the meaning of the term ‘subject to tax’ would be if substituted as part of the wording of SA’s foreign pension exemption. Additionally, this paper seeks to determine whether there is any similarity between the functionality of a domestic ‘subject to tax’ clause and SA’s domestic unilateral foreign credit relief.

Lastly, this paper also seeks to determine whether a ‘subject to tax’ clause or an ‘exemption threshold’ implemented under SA’s foreign pension exemption will give rise to any shortcomings in mitigating double non-taxation using a hypothetical case study considering the SA-UK DTC and SA-Germany DTC, and provide recommendations based on the findings of the , if any.

B) Research Question

The question that this paper seeks to answer is what the impact of the proposed future reforms are on the income tax consequences for a SA tax resident’s foreign pension, in light of the recent international trends in the mitigation of double non-taxation.

⁴⁷ See note 7, p. 3, n. 2.1, para. 2.

C) Delimitations of Scope and Assumptions

The OECD's pension taxonomy framework model consists of three pillars of pension plans, a publicly managed pension scheme pillar (State PAYG or/and State social security schemes), a privately managed employment-related pension scheme pillar, and lastly a personal pension plans pillar. Both a pension plan and pension fund can either be private or public.⁴⁸ This research paper's scope is restricted to an analysis of the OECD's second pillar encompassing employment-related pension schemes arising from private pension plans⁴⁹ particularly occupational pension plans⁵⁰ of approved pension funds⁵¹ and pension insurance⁵² contracts (pension plan with insurance entity).⁵³ Furthermore, this research paper is restricted to the analysis of the 'pensions' article (Art.) and 'method articles' under SA's DTCs (based on Art.18 or Art. 23A or Art. 23B of the OECD Model or United Nations Model Tax Convention⁵⁴ (UN Model).

This research paper assumes that a taxpayer is a natural person that has reached the normal age of retirement in terms of the laws of the country from which the taxpayer's pension benefits arose as a result of the services rendered under an employment contract with a

⁴⁸ Private pension plans are administered by an institution other than general government either directly by a private sector employer acting as the plan sponsor, or a private pension fund or a private sector provider, whereas public pension plans are social security and similar statutory programmes (i.e. PAYG schemes) administered by the general government. OECD, Pension fund classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005), p. 12, para. 2 and p. 18, para. 3.

⁴⁹ In accordance with the OECD's taxonomy of private pensions, a pension plan is; '[a] legally binding contract having an explicit retirement objective. This contract may be part of a broader employment contract, it may be set forth in the plan rules or documents, or it may be required by law.' Refer to OECD, Pension fund classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005), p. 12, para. 1.

⁵⁰ An occupational pension plan, the access thereto is required to be linked to employment or professional relationship between the plan member and the entity that establishes the plan, whereas with personal pension plans, are established and administered directly by a pension fund or a financial institution acting as pension provider without any intervention of employers. Furthermore, both types of pension plans may be mandatory or voluntary plans. Refer to OECD, Pension fund classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005), p. 12, para. 3 and p. 13, para. 3.

⁵¹ A pension fund is the financing vehicle of pension plans and pension insurance contracts, it consists of; '[t]he pool of assets forming an independent legal entity that is bought with the contributions to a pension plan for the exclusive purpose of financing pension plan benefits.' Refer to OECD, Pension fund classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005), p. 16, para. 2. Public pension funds are regulated under public sector law, whereas private pension funds are regulated under private sector law.

⁵² Pension insurance contracts are; '[i]nsurance contracts that specify pension plans contributions to an insurance undertaking in exchange for which the pension plan benefits will be paid when the members reach a specified retirement age or on the earlier exit of members from the plan.' Refer to OECD, Pension fund classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005), p.16, para. 2.

⁵³ In other words, direct insurance, pension funds and pension pools only, but excluding book-reserve funds/non-autonomous funds being either support funds or direct commitments as defined in the OECD, Pension fund classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005).

⁵⁴ UN, *Model Double Taxation Convention between Developed and Developing Countries*, (New York 2011).

private employer. Furthermore, this research paper assumes the taxpayer has remained under the same employment contract with the same private employer from the age of entering the employment market until the normal age of retirement.⁵⁵ This research paper is restricted to former residents of Germany and the United Kingdom (pursuant to the residence tests in those jurisdictions) who immigrated⁵⁶ to SA for retirement purposes on a permanent basis thereby becoming residents for SA tax purposes on the basis of either becoming ordinarily a resident or pursuant to fulfilling the requirements of the physical presence test.⁵⁷

This research paper is restricted to prescribed pre-tax (concessional) contributions contributed by the employer and salary sacrifice contributions (pre-tax contributions) of the employee towards the retirement fund (no additional voluntary after-tax contributions). Furthermore, this research paper is restricted to pension benefits accrued or received by the taxpayer in the form of a lump sum or annuity. This research paper excludes death, illness, termination, early retirement, disability, maternity benefits, benefits accrued, received or payable to beneficiaries or dependents. Also, this paper excludes benefits arising because of a distribution of a surplus apportionment in a pension fund, or the commutation of a lump sum. The nature of UK pension benefits is restricted to pension commencement lump sums and uncrystallised funds pension lump sum in the case of lump sums, whereas annuities are restricted to scheme pensions and living annuities in terms of the Finance Act 2004. This research paper assumes that the individual has not made any early withdrawals of benefits or transfers from the retirement fund or transfers before the normal age of retirement.

This research paper is restricted to income tax consequences only in terms of the tax legislation of SA, UK, and Germany, excluding an analysis of donations tax, withholding tax, estate duty, wealth tax and inheritance tax. Lastly, this research paper excludes the recent amendment to SA's income tax legislation effective as of the 1st March 2018 which requires

⁵⁵ In accordance with the OECD's taxonomy of private pensions, normal retirement age or retirement age means the '[a]ge from which the individual is eligible for pension benefits.' Refer to OECD, Pension Glossary, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005), p. 47.

⁵⁶ The meaning of 'immigrated' for the purpose of this analysis is 'to come to live permanently in a foreign country' and in compliance with the formal tax and exchange control immigration processes for the specific jurisdictions.

⁵⁷ Germany and the United Kingdom were selected based on having some of the highest numbers of individuals immigrating to SA over the last few years to retire according to the most recent immigration statistics available by the SA Department of Home Affairs for the years 2011, 2012, 2013 and 2014. Refer to *Appendix C: Summary of Documented Immigrants Retire in South Africa* for a detailed summary of the immigration statistics for 2011, 2012, 2013 and 2014.

the compulsory annuitisation of a portion of a provident fund member's benefits upon retirement, rather than the full amount being available upon retirement by the respective member.

D) Research Method

The doctrinal research method together with a hypothetical case study approach was used to address and conclude on the research question. This has been carried out in the form of an analysis of the relevant primary legislation, specifically the Income Tax Act, No. 58 of 1962 of the Republic of SA (ITA-SA), relevant enacted and Taxation Laws Amendment Act (TLAA), No.17 of 2017 and No.3 of 2008, the Pension Funds Act, No. 24 of 1956 (PFA), bilateral tax treaties and relevant SA case law.

The analysis also draws on foreign legislation, specifically the Income Tax Act or, *Einkommensteuergesetz* (EStG)⁵⁸ of Germany, Income Tax Earnings and Pensions Act 2003 (ITEPA-UK), Finance Act 2004 (FA-UK) and Income Tax Act 2007 (ITA-UK) of the United Kingdom (UK). The analysis also draws on selected secondary sources including foreign case law, various OECD publications, model treaties and their commentaries, and publications by various SA and international researchers.

E) Structure of the dissertation

The structure of this paper is as follows, Chapter II of this paper provides an overview of SA's current income tax regime applicable to a SA resident's foreign pension and considers the income tax treatment of foreign retirement benefits (i.e. lump sum or annuity) in terms of SA income tax legislation in contrast to the UK and German tax law. Chapter III defines the meaning of double non-taxation and the term 'subject to tax'. Chapter III also considers the functionality of the 'subject to tax' clause as part of a unilateral foreign pension exemption in terms of South Africa's income tax legislation. Chapter IV consists of hypothetical case studies, findings and recommendations in regards to the impact of the proposed reforms on the income tax consequences SA resident's foreign pension exemption.

⁵⁸ Income Tax Act of 1934 of the Federal Republic of Germany as amended by the Notice of 8 October 2009 (Federal Law Gazette I, p. 3366, 3862), most recently amended by Art. 9 of the Law of 23 December 2016 (Federal Law Gazette I, p. 3191).

II) OVERVIEW OF SOUTH AFRICA'S CURRENT INCOME TAX REGIME APPLICABLE TO A SOUTH AFRICAN RESIDENT'S FOREIGN PENSION

A) Introduction

The purpose of this chapter is to provide an overview of SA's income tax regime applicable to a SA resident's foreign pension.

B) A brief overview of retirement funding structure in terms of South Africa's income tax legislation

The tax structure of retirement funds consists of either a pension or a provident fund, whether approved or established by law.⁵⁹ Pension funds may be either ordinary pension (restricted to employees only) or retirement annuity fund (self-employed persons). Provident and ordinary pension funds are structured on either a defined benefit or defined contribution basis, or occasionally a hybrid of the two.⁶⁰ Both the ordinary pension funds and provident funds are set up by an employer for the benefit of providing pension benefits to its employees upon their retirement. A retirement annuity fund forms part of the personal private savings pillar, as defined in terms of the OECD's multi-pillar pension framework.⁶¹ A retirement annuity fund is established by an administrator, asset manager or insurer for the benefit of private individual investors who are self-employed persons or as additional retirement savings over and above an occupational pension or provident fund.⁶²

The distinction between a pension and a provident fund is merely a taxonomy established in accordance with the ITA-SA purely to distinguish between the varying tax treatments thereof.⁶³ Both pension and provident funds are pension funds as defined in terms of SA's Pension Fund Act, no.24 of 1956. The primary distinction between the two is how the retirement benefit may be taken on retirement. Pension funds require at least two-thirds of the

⁵⁹ See note 31, p. 56, para. 8.1.4. The structure has not changed over the years and remains the same in accordance with current legislation in terms of the Income Tax Act, No. 58 of 1962 of the Republic of South Africa as at the 01 June 2017.

⁶⁰ See note 31, p. 56, para. 8.1.5.

⁶¹ See note 1, p. 28, para. 3 et seq.

⁶² K. Godden, *Pension Funds, Provident Funds and Retirement Annuities-Defining Them and Their Tax Implications*, (South Africa 2010), p. 1, para. 2. The term retirement annuity fund is not discussed further in this chapter, as benefits from a retirement annuity fund are excluded from the scope of this paper.

⁶³ D. Geral, *Incorporation and registration of funds-Different types of funds*, *Black Lawyers Association and Pension Lawyers Association* (South Africa 2005), p. 16, para. 1.

value of the member's interest in the fund to be applied towards purchasing a retirement annuity, whereas the remaining one-third may be commuted for a once-off lump sum benefit.⁶⁴ A provident fund allows the whole of the member's interest to be withdrawn as a once-off lump sum or several lump sums.⁶⁵

C) The current income tax consequences applicable to a South African resident's foreign pension under South Africa's income tax legislation

i) The meaning of the term 'pension fund' in terms of South Africa's income tax legislation

The definition of a pension fund is essential in determining whether a domestic or foreign pension fund would meet the requirements of an approved 'pension fund' in terms of the ITA-SA. A fundamental criterion in determining whether a specific pension fund benefit would be included in gross income of a SA resident is dependent on whether the 'pension fund' is approved by SARS.

The definition of 'pension fund' in section 1 of the ITA-SA contains the following specific fund types, public sector funds and private sector or approved funds.⁶⁶ Private sector pension funds must be registered in terms of section 4(1) of the Pension Fund Act with the Registrar of Pension Funds at the Financial Services Board prior to conducting the business of providing pensions and related benefits.⁶⁷ Furthermore, a pension fund must be approved by the Commissioner of the SA Revenues Services (SARS) to obtain the concessional tax benefits in terms of the ITA-SA.⁶⁸

⁶⁴ A. de Koker and R. Williams, Chapter 4: Special Inclusions, *Silke on South African Income Tax*, (South Africa 2017), s. 4.6, para. 7 and See note 35, s. 1, 'pension funds', para. (c)(ii)(dd).

⁶⁵ See note 31, p. 56, para. 8.1.4.

⁶⁶ See note 35, s. 1, 'pension funds'; See note 35, Second Schedule, s. 1, 'public sector fund'. Firstly, paragraphs (a), (b) and (d) of the definition of 'pension fund' read together with the definition of 'public sector fund' in terms of the Second Schedule of ITA-SA refers to public sector funds (i.e. government or local authority funds); whereas paragraph (c) refers to private sector or approved funds. Public sector funds are excluded from the scope of this paper and are not discussed further in this chapter.

⁶⁷ See note 63, p. 6, para. 1. Only pension and provident funds established on or after 1 July 1986 must be registered in terms of s. 4(1) of the Pension Fund Act with the Registrar of Pension Funds (the Registrar) at the Financial Services Board (FSB).

⁶⁸ See note 35, s. 1, 'pension funds'. The rules of the fund for SARS approval are contained in sub-paragraphs (c)(ii) (aa)–(gg) the definition of 'pension fund'. Provided all the requirements for approval have been met, specifically the rules of the fund being complied with, the pension fund will obtain the concessional tax benefits under the ITA-SA.

ii) The meaning of the term ‘resident’

Residents are subject to income tax on their worldwide income, regardless of the territorial source, while non-residents are subject to tax only on their SA sourced income. A resident is defined as a natural person who is ordinarily resident in the Republic or not at any time during the relevant year of assessment ordinarily resident in the Republic if that person was physically present in the Republic.⁶⁹ The physical presence test is based on the number of days during which a person is physically present in SA.⁷⁰ The individual must be physically present in SA for a period or periods exceeding 91 days in aggregate during the year of assessment under consideration, 91 days in aggregate during each of the five preceding years of assessment under consideration and lastly 915 days in total during those five preceding years of assessment for the physical presence to be met.⁷¹ If the minimum number of days are met, the person is a resident for SA tax purposes and taxed on his or her worldwide income.

The term ‘ordinarily resident’ is not defined in the ITA-SA. However, SA case law offers guidance on the term’s meaning. Schreiner, J.A. in *Cohen v CIR* (1946) held that:

‘[i]f, though a man may be "resident" in more than one country at a time, he can only be "ordinarily resident" in one, it would be natural to interpret "ordinarily" by reference to the country of his most fixed or settled residence. But his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and would be described more aptly than other countries as his real home.’⁷²

Goldstone, J.A. affirms the principle in *CIR vs Kuttel* (1992) giving the unanimous judgment, held that:

‘[a] person is "ordinarily resident" where he has his usual or principal residence, that is, what may be described as his real home.’⁷³

⁶⁹ See note 35, s. 1, ‘resident’.

⁷⁰ See note 19, n. 2, para. 3.

⁷¹ See note 35, s. 1, ‘resident’.

⁷² *Cohen v Commissioner for Inland Revenue* (1946) AD 174, 13 SATC 362.

⁷³ *Commissioner for Inland Revenue v Kuttel* (1992)(3) SA 242 (A), 54 SATC 298.

iii) The general meaning of the term ‘gross income’

The tax liability of an SA resident is based on the taxable income for the year of assessment. ‘[T]axable income’ is the net amount remaining after any deductions or set off of assessed losses against ‘income’ plus any deemed amounts to be included in the taxable income of any SA resident.⁷⁴ ‘[I]ncome’ is the amount of gross income remaining of an SA resident after deducting therefrom any amounts exempt from ordinary tax for any year or period of assessment.⁷⁵ The fulfilment of the general requirements of the definition of ‘gross income’ is important in determining whether a local or foreign pension of a SA resident is within the scope of SA’s tax base or not. In terms of section 1 of the ITA-SA, ‘gross income’ is defined as:

‘[i]n relation to any year or period of assessment, means –

- (i) In the case of any resident, the total amount, in cash or otherwise, received by or accrued to in favour of such resident;

during such year or period of assessment, excluding receipts or accruals of a capital nature.’⁷⁶

Receipts or accruals of a capital nature are therefore excluded from gross income. In many instances the distinction between capital and revenue is clear (e.g. income received for the use of assets such as rentals or royalties are generally of a revenue nature. South African courts have applied various tests in determining whether sale proceeds are of capital or revenue nature. However, pension benefits in the form of lump sum benefits received represent receipts or accruals of a capital nature in contrast to annuities that may be either capital or revenue in nature depending on the portion representing the capital element thereof.

Notwithstanding the general recognition principles of amounts in gross income, the ITA-SA provides for the specific inclusion of specific amounts in gross income, including amounts of a capital nature.⁷⁷ The special inclusions place no limitations on the fiscal recognition of amounts under the general definition of ‘gross income’. Although an amount may be included

⁷⁴ See note 35, s. 1, ‘taxable income’.

⁷⁵ See note 35, s. 1, ‘income’.

⁷⁶ See note 35, s. 1, ‘gross income’.

⁷⁷ See note 35, s. 1, ‘gross income’. The special inclusions in gross income are contained in paragraphs a) - n) of the definition of ‘gross income’.

in gross income, the ITA-SA provides for the exemption of specific gross income amounts from the SA tax base in terms of section 10(1)(a)-(zK).⁷⁸

iv) The income tax treatment of pension benefits in the context of South Africa's income tax legislation, German tax law and the United Kingdom tax law

The income tax treatment of foreign retirement benefits (i.e. lump sum or annuity) in the context of South Africa's income tax legislation, German tax law and the United Kingdom tax law are analysed below. The objective is to establish whether a foreign retirement benefit aligns with definitions of SA's income tax legislation to establish if it constitutes an amount for 'gross income' purposes. The analysis is also required to be able to apply the relevant provisions the SA-UK DTC or the SA-Germany DTC for the purposes of the hypothetical case studies in Chapter IV.

The analysis below required a considerable amount of time, research and in-depth technical knowledge of the foreign legislation of the UK and Germany. Whether SARS has the technical capabilities and capacity to conduct such an extensive analysis in regard to foreign private pension benefits for multiple countries given the complexity of this area is a challenge for SARS. Sufficient documentation is vital for the taxpayer to provide proof of actual taxes levied on the pension benefit. Nevertheless, it may be futile due to the possible lack of technical expertise at SARS.

(a) The income tax treatment of South African pension benefits

Neither the ITA-SA or SA legislation define what constitutes foreign pension benefits, nor do the SA courts provide guidance thereon. The OECD's 'Private Pensions OECD Classification and Glossary' report provides a technical explanation of the meaning of the term 'pension benefit' however, this is not an international tax law meaning. The OECD has only forty-member countries and cannot be a representation of the view of the rest of the world. However, what is relevant is how the foreign tax laws of another country define pension benefits and whether they mirror SA's domestic tax definitions.

⁷⁸ See note 35, s. 10(1)(a)-(zK)

From an SA perspective, the distinction between a pension and a provident fund is merely a taxonomy established in accordance with the ITA-SA purely to distinguish between the varying tax treatment thereof. Both pension and provident funds are pension funds as defined in terms of SA's Pension Funds Act, No. 24 of 1956. The Pension Funds Act defines a pension fund as a 'pension fund organisation'.⁷⁹ Upon retirement, the nature of pension benefits that may arise from an approved pension fund or provident fund can be in the form of a once 'lump sum benefit'. However, two-thirds of the value of an approved pension fund member's interest must be utilised to provide a compulsory, non-commutable life-annuity that may either be paid by the fund itself or be purchased by the fund from a registered SA long-term insurer.⁸⁰

A 'lump sum benefit' in terms of section 1 of the ITA-SA is defined as a retirement fund lump sum benefit or a retirement lump sum withdrawal benefit.⁸¹ A 'retirement fund lump sum benefit' is defined as an amount determined in terms of its companion-piece in paragraph 2(1)(a) of the Second Schedule of the ITA-SA, which codifies the amount to be included in gross income.⁸² The former paragraph 2(1)(a) of the Second Schedule of the ITA-SA makes an explicit reference to the term 'lump sum benefit' which is defined therein as:

'(a) any amount determined in respect of the commutation of an annuity or portion of an annuity-

- (i) payable by; or
 - (ii) provided in consequence of membership or past membership of, a pension fund..., provident fund...; and
- (b) any fixed or ascertainable amount (other than an annuity)-

- (i) payable by; or
- (ii) provided in consequence of membership or past membership of, a pension fund..., provident fund..., whether in one amount or in instalments...'⁸³

⁷⁹ Pension Funds Act, No. 24 of 1956, (South Africa 1956), s. 1, 'Pension Fund'.

⁸⁰ See note 64, s. 4.6, para. 20.

⁸¹ See note 35, s. 1, 'lump sum benefit'.

⁸² See note 35, s. 1, 'retirement lump sum benefit'.

⁸³ See note 35, paragraph 2(1)(a) of the Second Schedule

An ‘annuity’ is not defined in the ITA-SA. However, SA case law offers guidance. Price J, President of the Special Court for Hearing Income Tax Appeals, in *ITC 761* (1952) referred to the main characteristics of an ‘annuity’ as,

‘an annual payment (this would probably not be defeated if it were divided into instalments); that it is repetitive – payable from year to year for, at any rate, some period [and] that it is chargeable against some person’.⁸⁴

Furthermore, in *SIR v Watermeyer* (1965), Holmes JA, who delivered the judgment of the Appellate Division of the Supreme Court stated:

‘[t]he word “annuity”, from its very nature, postulates the element of recurrence, in the sense of annual payments (even if made, say, quarterly during the year). And this element of necessary annual recurrence cannot be present unless the beneficiary has a right to receive more than one annual payment.’⁸⁵

Previous uncertainty and a ruling in *SARS v Higgs* (2006)⁸⁶ of whether a ‘living annuity’ is regarded as an ‘annuity’ under paragraph (a) of the definition of gross income has led to the amendment of the ITA-SA. The TLAA, No. 3 of 2008 inserted a definition of the term ‘living annuity’ in section 1, effective as from 1 March 2008. Sub-paragraph (a) of the definition of ‘gross income’ in section 1 was also amended to include a ‘living annuity’.⁸⁷ A ‘living annuity’ is defined in terms of section 1 of the ITA-SA as:

‘a right of a member or former member of a pension fund...,provident fund..., or his or her dependant or nominee, or any subsequent nominee, to an annuity purchased from a person or provided by that fund on or after the retirement date of that member or former member’.⁸⁸

⁸⁴ *ITC 761* (1952), 19 SATC 103 at 106. See also *ITC 768* (1953), 19 SATC 211 at 212–13; *SIR v Watermeyer* 1965 (4) SA 431 (A), 27 SATC 117 at 124; *ITC 1360* (1982), 44 SATC 168 at 174–5; *KBI en ‘n ander v Hogan* (1993) (4) SA 150 (A), 55 SATC 329 and see note 64, s. 4.3, para. 2.

⁸⁵ *SIR v Watermeyer* (1965) (4) SA 431 (A), 27 SATC 117 and see note 64, s. 4.3, para. 2.

⁸⁶ *Commissioner for the South African Revenue Services v Higgs* (2006), 68 SATC 278 (C).

⁸⁷ Taxation Laws Amendment Act, No. 3 of 2008, s. 2(1)(o)

⁸⁸ See note 35, section 1, ‘living annuity’.

(b) The income tax treatment of the United Kingdom pension benefits

From the perspective of the UK, FA-UK made fundamental changes to the tax regime for pensions with effect from the 6th April 2006. From the 6th April 2006, most of the existing tax approved pension arrangements became registered pension schemes.⁸⁹ From the 6th April 2006, all pensions and annuities paid under registered pension schemes became taxable under Part 9, Chapter 5A of ITEPA -UK.⁹⁰ Part 4, Chapter 1 of FA-UK contains the tax provisions about pension schemes, other similar schemes, and defines some basic concepts.⁹¹ FA-UK defines a ‘pension scheme’ as:

‘a scheme or other arrangements, comprised of one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons-

- (a) on retirement,
- (b) on death,
- (c) on having reached a particular age,
- (d) on the onset of serious ill-health or incapacity, or
- (e) in similar circumstances.’⁹²

The tax legislation under the FA-UK defines explicitly various types of pension schemes, the main types being occupational pension schemes and public service pension schemes.⁹³ The FA-UK defines an occupational pension scheme as:

‘a pension scheme established by an employer or employers and having or capable of having effect so as to provide benefits to or in respect of any or all of the employees of-

- (a) that employer or those employers, or
- (b) any other employer,

⁸⁹ HMRC, Employment Income Manual 74007, *HMRC Internal Manual - A guide to the Income Tax (Earnings and Pensions) Act 2003.*, (United Kingdom 2016) and HMRC, Employment Income Manual 74014, *HMRC Internal Manual - A guide to the Income Tax (Earnings and Pensions) Act 2003.*, (United Kingdom 2016).

⁹⁰ HMRC, Employment Income Manual 74014, *HMRC Internal Manual - A guide to the Income Tax (Earnings and Pensions) Act 2003.*, (United Kingdom 2016).

⁹¹ Finance Act 2004, Part 4, Ch. 1, s. 149(1)-(2).

⁹² See note 91, s. 150(1).

⁹³ See note 91, s. 150(1) - (8).

(whether or not it also has or is capable of having effect so as to provide benefits to or in respect of other persons).⁹⁴

A tax approved occupational pension scheme is required to be registered with the HMRC and must have been established wholly or mainly for the purpose of providing authorised payments.⁹⁵ The definition of ‘payment’ is not only monetary but includes a transfer of assets and any other transfer of money’s worth.⁹⁶ The tax legislation makes a distinction between authorised and unauthorised payments. Additionally, it provides a comprehensive list of authorised payments and conditions required to be fulfilled.⁹⁷ Any payments not falling within the list of authorised payments are classified as unauthorised and taxed accordingly.⁹⁸

A registered pension fund is only authorised to pay out two forms of pension benefits to its members, either in the form of a pension or lump sum.⁹⁹ The tax legislation lists the circumstances in which they can be paid by stipulating the conditions and restrictions under the ‘the pension rules’ and ‘the lump sum rule’.¹⁰⁰ ‘[T]he pension rules’, stipulate that the term ‘pension’, includes an ‘annuity’ and ‘income withdrawal’.¹⁰¹ The types of pension payments in terms of the pension rules relating to retirement are as follows:

- ‘scheme pension (an annuity from a pension scheme and defined benefits may only pay out a scheme pension);
- lifetime annuity (a purchased annuity);
- unsecured pension (either in the form of a short-term annuity or income withdrawals and only available if the member has not reached 75);
- alternatively, secured pension (in the form of income withdrawals and only available if the member has reached 75).’¹⁰²

⁹⁴ See note 91, s. 150(5).

⁹⁵ See note 91, s. 164(1).

⁹⁶ See note 91, s. 161(2).

⁹⁷ See note 91, s. 160(1) - (2).

⁹⁸ HMRC, *Employment Income Manual 026000 HMRC Internal Manual - A guide to the Income Tax (Earnings and Pensions) Act 2003.*, (United Kingdom 2016).

⁹⁹ See note 91, s. 164(a) - (b).

¹⁰⁰ See note 91, s. 165(1) - (4) and Finance Act 2004, Schedule 28, Part 1 applies to ‘pension payments’; See note 91, s. 166(1) - (4) and Finance Act 2004, Schedule 29, Part 1 applies to ‘lump sum payments’.

¹⁰¹ See note 91, s. 165(2).

¹⁰² See note 91, s. 165(1) and Finance Act 2004, Schedule 28, Part 1 applies to ‘pension payments’.

The types of lump sum payments in terms of the lump sum rules relating to retirement are as follows:

- ‘pension commencement lump sum (paid in anticipation of being entitled to a “relevant pension in the form of a living annuity, scheme pension, income withdrawal from the same scheme)
- uncrystallised funds pension lump sum
- trivial commutation lump sum.’¹⁰³

The FA-UK does not define the terms ‘pension’ or ‘annuity’, and the UK courts have not attempted to interpret the term ‘pension’ judicially.¹⁰⁴ However, UK case law offers a judicial interpretation of the term ‘annuity’ and is well entrenched in *Foley v. Fletcher* (1858)¹⁰⁵. In *Foley v. Fletcher* (1858), Baron Watson made a principal distinction between annual payments and annuities, stating that:

‘[w]here an income is purchased with a sum of money, the capital has gone and ceased to exist, the principal having been converted into an annuity’.¹⁰⁶

Additionally, Watson states that:

‘[y]ou put down, or gave up the right to, or divested yourself of, a capital sum and got back a series of payments of equal amount over a period in which the capital and income are indistinguishably blended, the whole thing being calculated so that you got something equivalent to capital and the interest when all instalments had been paid.’¹⁰⁷

¹⁰³ See note 91, s. 166(1) and Finance Act 2004, Schedule 29, Part 1 applies to ‘lump sum payments’. The Taxation Pension Act 2014 amended the Finance Act 2004, s. 166 and Schedule 29 to include uncrystallised funds pension lump sum.

¹⁰⁴ G. Loutzenhiser, Pensions, In *Tiley’s Revenue Law*, 8th ed., (United Kingdom 2016), p. 1524, n. 80.2.2, para. 1.

¹⁰⁵ *Foley v. Fletcher* (1858) 157 ER 678.

¹⁰⁶ K. Holmes, Illusionary Gains, In *The Concept of Income - A Multi-Disciplinary Analysis*, vol. 1, (The Netherlands 2001), p. 365, para. 5. Furthermore, the characteristics of an annuity being “indistinguishably and that the capital has gone and ceased to exist” is affirmed in *Coltness Iron Company v. Black* (1881) as Lord President and Lord Inglis stated that; “[a] man who employs his whole capital in the purchase of terminable annuities increases his income, and is assessed to the income tax for the full amount of the annuity. ... He might have left his money on an ordinary investment, and have consumed every year a portion of the capital in addition to the interest. ... In this case his assessable income would be only the interest accruing annually on the principal sum, ... and would not include the portion of the capital which he chose to expand year by year. But when he purchases an annuity he converts his whole estate into an income which represents no capital but that which he has paid away and exhausted to purchase income.”

¹⁰⁷ See note 106, p. 366, para. 2.

Based on the foundational principles in *Foley v. Fletcher* (1858), an ‘annuity’ is an annual payment¹⁰⁸ of income to a member of a registered pension scheme over a stipulated term in equal value to the monetary value of the invested amount. Furthermore, the term ‘lump sum’ is also not defined under the FA-UK and neither is there a judicial interpretation of the term in relation to a pension scheme payment. Therefore the ordinary meaning of the term ‘lump sum’ would be considered.

(c) The income tax treatment of the Germany pension benefits

From the perspective of the Germany, no definition exists for the different types of pension remuneration (pension, annuity or lump sum) in German tax law, but is instead a question of German insurance law. The German insurance law is complex consisting of multiple legislative acts analyses of which is beyond the scope of this paper. Therefore, no meaning of the various pension benefit terms from a German tax law perspective has been deduced for the purposes of this paper.

(d) Concluding Remarks

No definitive consensus can be made to sufficiently conclude on whether a foreign retirement benefit aligns with definitions of SA’s income tax legislation where a full analysis of the foreign tax law or foreign law cannot be performed (e.g. as the example of Germany illustrates). In such instances and for the purposes of this paper’s hypothetical case study approach, the comparative analysis must proceed on the basis of assumptions on how to compare the foreign tax treatment of foreign retirement benefits with equivalents in SA income tax legislation.

On the other hand, in instances where a full analysis of the foreign tax law or foreign law can be performed (e.g. as the example of the UK illustrates), a reasonable comparison can be made of some the aspects of the foreign tax law or foreign law to determine if there are similarities with definitions of SA’s income tax legislation. UK pension benefits compared to the definitions of retirement benefits for SA’s income tax legislation shows that some similarities can be identified. Both tax authorities require the pension fund or pension scheme to be an approved or registered fund or scheme in terms their respective domestic tax law

¹⁰⁸ The annual annuity payment may be divided up into a series of payments over the annual period.

requirements. Both the UK and SA seek guidance from their respective domestic case law in respect of the determining the meaning of the term ‘annuity’. The general consensus of both the UK and SA tax law is that an annuity is an annual payment of income over a stipulated period, recurring in nature and equal to the monetary value of the invested amount. However, in the case of a lump sum, UK tax law and SA tax law, including domestic case law of both countries, define the meaning of the term. Therefore, an ordinary meaning of the term ‘lump sum’ may be constructed in both instances.

The above comparisons also illustrate the significant challenges for tax administrators, who may be called on to analyse any possible foreign tax and general retirement regime should this be required by the tax laws that must be administered.

B) Taxation of pension benefits under South Africa’s income tax legislation

A ‘lump sum benefit’ does not meet the general definition of ‘gross income’, as the benefit represents a receipt or an accrual of a capital nature unless specifically included in their entirety under the special inclusion of paragraph (e) in terms of the definition of ‘gross income’. Paragraph (e) of the definition of ‘gross income’ specifically provides for the inclusion of a retirement fund lump sum benefit or retirement fund lump sum withdrawal benefit in gross income, other than any amount included under paragraph (eA) of the definition of ‘gross income’.¹⁰⁹ The definition of a ‘lump sum benefit’ per the Second Schedule of the ITA-SA, explicitly refers to amounts payable or arising in consequence of membership or past membership of a ‘pension fund’ or ‘provident fund’. The Second Schedule¹¹⁰ of the ITA-SA specifically defines a ‘pension fund’ and a ‘provident fund’ within the meaning prescribed under section 1 of the ITA-SA.

¹⁰⁹ See note 35, s. 1, ‘gross income’, para. (e) and (eA). Paragraph (e) of the definition of ‘gross income’ relates to the inclusion of fund benefits arising upon transferring or converting benefits from public sector funds. This is excluded from the scope of the paper as it does not relate to private sector funds.

¹¹⁰ Paragraph 2(1)(a) of the Second Schedule of ITA-SA sets out the substantive provisions dealing with the taxation of lump-sum benefits arising on the retirement of a taxpayer (i.e. retiree). Section 1 of the Second Schedule defines ‘retire’ as; ‘[i]n relation to a person who is a member of a pension fund..., provident fund..., means to become entitled to the annuity or lump sum benefit contemplated in the definition of [“retirement date”]’. The term ‘retire’ makes an explicit reference to the term ‘retirement date’, section 1 of ITA-SA defines the term as; ‘[a] member of a pension fund..., provident fund..., elects to retire and in terms of the rules of that fund, becomes entitled to an annuity or a lump sum benefit contemplated in paragraph 2(1)(a)(i) of the Second Schedule on or subsequent to attaining normal retirement age.’ Furthermore, the term ‘retirement date’ makes an explicit reference to the term ‘normal retirement age’, section 1 of ITA-SA defines the term as; ‘[i]n the case of a member of a pension fund or provident fund, the date on which the member becomes entitled to retire from employment for reasons other than sickness, accident, injury or incapacity through infirmity of mind or body’.

In relation to annuities, paragraph (a) of the definition of ‘gross income’ of the ITA-SA specifically includes annuities¹¹¹. The specific inclusion serves as an intended anti-avoidance measure to ensure the overriding of the caveat under the general definition of ‘gross income’ of the ITA-SA which excludes amounts of a capital nature. Paragraph (a) of the definition of ‘gross income’ makes no implicit reference to ‘pension fund’ or ‘provident fund’ in terms section 1 of the ITA-SA, indicating that an annuity is not required to arise from a registered SA pension fund. The ITA-SA provides for an exemption in terms of section 10(1)(gC)(ii) for certain foreign pensions received or accrued to any SA resident provided the requirements of the section be fulfilled. Section 10(1)(gC)(ii) of ITA-SA states:

‘(1) There shall be exempt from normal tax—

(gC) any— ... (ii) lump sum, pension or annuity received by or accrued to any resident from a source outside the Republic, as consideration for past employment outside the Republic other than from any pension fund..., provident fund..., as defined in section 1(1) excluding any amount transferred to that fund from a source outside the Republic in respect of that member.’¹¹²

A foreign lump sum or foreign annuity received or accrued by an SA resident other than from an approved pension fund or provident fund or established under the SA law (registered under the Pension Fund Act) is exempt from tax in SA. Transfers from a foreign pension fund established under foreign laws, any amount transferred into an approved SA fund (pension fund or provident fund) will also be exempt in terms of section 10(1)(gC) of ITA-SA.

A foreign lump sum arising from a foreign pension fund does not fulfil the general requirements of gross income because it is capital in nature. A foreign pension fund not established under SA law (registered under the Pension Fund Act), but incorporated under the foreign laws of another country would not qualify as a ‘pension fund’ or ‘provident fund’ in terms of section 1 of ITA-SA; whereas a foreign nominee company of an SA pension fund may still qualify if it has registered under the Pension Fund Act. Paragraph (e) of the definition of gross income in terms of section 1 of the ITA-SA and its companion-pieces in

¹¹¹ Paragraph (a) of the definition of gross income in terms section 1 of the ITA-SA, explicitly includes living annuities and any amount payable by way of an annuity contract or any amount payable in consequence of the commutation or termination of any such annuity contract in terms of section 10A of the ITA-SA. However, section 10A is not applicable to purchased annuities arising from an insurance ‘annuity contract’ agreement in terms of the rules of a pension fund. See note 64, s. 4.3, para. 2 and s. 4.6, para. 1, also see note 35, s.10A(1), ‘annuity contract’, para. (c).

¹¹² See note 35, s.10(1)(gC).

the Second Schedule implicitly requires that a lump sum benefit arises from a ‘pension fund’ and ‘provident fund’ as defined in terms of section 1 of the ITA-SA. As a result, a foreign lump sum arising from a foreign pension fund does not fulfil the requirements of paragraph (e) of the definition of gross income in terms of section 1 of the ITA-SA. section 10(1)(gC)(ii) of the ITA-SA, as a result, is entirely not applicable and irrelevant in the case of lump sum benefits accruing or received from a foreign pension fund as no amount is included in gross income. The exclusion of a foreign pension fund from the definition of ‘pension fund’ and ‘provident fund’ in terms of section 1 of the ITA-SA may be because SA’s policymakers acknowledged the additional challenges that SARS could face in attempting to understand the complexities of another country’s system of taxation (deferred or an advanced system of taxation).

Paragraph (a) of the definition of ‘gross income’ in terms of section 1 of the ITA-SA makes no explicit reference to a ‘pension fund’ or ‘provident fund’ in terms of section 1 of the ITA-SA. As a result, paragraph (a) of the definition of ‘gross income’ in terms of section 1 of the ITA-SA would inevitably apply to a foreign annuity arising from a foreign pension fund, regardless if it meets the general requirements of gross income. However, a foreign annuity arising from a foreign pension fund is excluded from ‘taxable income’ as it meets the requirements to be exempt in terms of section 10(1)(gC)(ii) of the ITA-SA (e.g. from a source outside the Republic, as consideration for past employment outside the Republic).

Determining whether the ‘source’ of a pension benefit arises from a ‘source within the Republic, the ITA-SA contains no explicit definition thereof. However, section 9 of the ITA-SA provides clarity by identifying a wide range of amounts deemed to have their source within SA, irrespective of their true source.¹¹³ In other words, the wide-range of deeming provisions apply, regardless of the true source of income determined in terms of SA case law. The deemed source provision in terms of section 9(2)(i) of the ITA-SA applies to a lump sum, a pension or an annuity payable by a ‘pension fund’ or ‘provident fund’ as defined in terms of section 1 of the ITA-SA.¹¹⁴ The deemed source provisions of section 9(2)(i) of the

¹¹³ A. de Koker and R. Williams, Chapter 5: Residence and source, *Silke on South African Income Tax*, (South Africa 2017), s. 5.16, para. 1.

¹¹⁴ See note 35, s. 9(2)(i). Section 9(2)(i) of ITA-SA states; ‘[a]ny amount is received by or accrues to a person from a source within the Republic if that amount – (i) constitutes a lump sum, a pension or an annuity payable by a pension fund, pension preservation fund, provident fund or provident preservation fund and the services in respect of which that amount is so received or accrued were rendered within the Republic: Provided that if the amount is received or accrues in respect of services which were rendered partly within and partly outside the Republic, only so much of that amount as bears to the total of that amount the same ratio as the period during which the services were rendered in the Republic bears to the total period during which the services were

ITA-SA would not apply because a foreign pension fund would not qualify as a ‘pension fund’ or ‘provident fund’ in terms of section 1 of the ITA-SA, regardless of whether the employment services were rendered in SA. However, in terms of SA case law, the source of a pension is the location of the services where the pension is granted, whereas for an annuity payable in terms of an insurance policy the source is the place where the contract was concluded.¹¹⁵

Although a lump sum benefit may not be included in gross income, capital gains tax in terms of the Eighth Schedule of the ITA-SA may still apply. However, any lump sum benefit from a fund, arrangement or instrument situated outside the Republic that provides similar benefits under similar conditions to an approved pension fund is also exempt from capital gains tax in accordance with paragraph 54 of the Eighth Schedule of the ITA-SA.¹¹⁶

rendered must be regarded as having been received by or accrued to the person from a source within the Republic.’

¹¹⁵ L. Olivier and M. Honiball, *Income from employment and other professional and related income*, In *International tax: A South African Perspective 2008*, 4th ed., (South Africa 2008), p. 139, n. 5.3, para. 1. Refer to ITC 72 (1926), 3 SATC 61 (U) and ITC 147 (1929), 4 SATC 281(W) in the case of pensions. *Boyd v. CIR* (1951), 3 SA 525 in the case of an annuity. However, D. Meyerowitz, In *Meyerowitz on Income Tax (2007–2008)*, (South Africa 2008), para.7.81 rejects the reasoning in *Boyd v. CIR* (1951) on the basis that the originating cause of a beneficiary’s income should be the investments which produce the income, as opposed to the contractual arrangement.

¹¹⁶ See note 35, Schedule 8, para. 54. Paragraph 54 of the Eight Schedule states: ‘[A] person must disregard any capital gain or capital loss determined in respect of a disposal that resulted in that person receiving - (a) a lump sum benefit as defined in the Second Schedule; or (b) a lump sum benefit paid from a fund, arrangement or instrument situated outside the Republic which provides similar benefits under similar conditions to a pension, pension preservation, provident, provident preservation or retirement annuity fund approved in terms of this Act.’

C) Conclusion Remarks

No tax liability for SA income tax arises for foreign lump sum receipts in contrast to a foreign annuity arising from a foreign pension fund. However, a tax liability arises in the case of a foreign annuity but is subsequently exempt under SA's unilateral foreign pension exemption. Chapter II provided a basic overview of SA's existing system of taxation of foreign pensions. The basic overview is crucial to understanding the implications of the proposed future reforms to SA's unilateral foreign pension exemption which is discussed in Chapter III and Chapter IV hereafter.

III) ANALYSIS OF A ‘SUBJECT TO TAX’ CLAUSE REFORM UNDER SOUTH AFRICA’S INCOME TAX LEGISLATION

A) Introduction

This chapter seeks to define the meaning of the term ‘subject to tax’ which may be introduced as a requirement for SA’s foreign pension exemption. The aim of such a ‘subject to tax’ requirement would be to prevent international double non-taxation. The chapter also seeks to expand on underlying application of a ‘subject to tax’ requirement considering SA’s jurisprudence and unilateral foreign tax credit relief in terms of the ITA-SA.

B) What is the meaning of the term ‘double non-taxation’ and the OECD’s current development in preventing double non-taxation

There is no universal definition of double non-taxation.¹¹⁷ A view held by some scholars is that double non-taxation arises if there are unjustified tax benefits, either from exploiting international tax rate differentials without matching the economic interest (e.g. through a conduit trust or passive letter-box company) or advantageous mismatches between domestic tax laws giving rise to qualification conflicts.¹¹⁸ The OECD’s view in terms of Action 6 of the OECD/G20 Base Profit Erosion and Profit Shifting Project (BEPS) supports this view verbatim.¹¹⁹ In other words, double non-taxation may be a possible undesired consequence of tax avoidance or evasion.¹²⁰ However, an alternative approach to defining the phenomenon of double non-taxation is to deduce a definition from the OECD’s definition of double taxation and reversing it.¹²¹ Generally, double taxation can be defined as the ‘imposition of comparable taxes in two (or more) countries on the same taxpayer in respect of the same subject matter and for identical periods’.¹²² Double non-taxation assumes that two or more

¹¹⁷ M. Helminen, General Report, *Cashiers de droit fiscal international 2016 Madrid Congress -The notion of tax and the elimination of international double taxation or double non-taxation*, vol. 101b, (The Netherlands 2016), p. 67, s. 4.1, para. 1.

¹¹⁸ F. Molina, DTCs and Double Non-Taxation, In D. Blum and M. Seiler (eds.), *Preventing Treaty Abuse*, 1st ed., vol. 101, (Austria 2016), p. 72, s. 2, para. 1.

¹¹⁹ According to paragraph 72 of Point B of the OECD BEPS Action 6 (i.e. clarification that tax treaties are not intended to be used to generate double non-taxation) considering the issue of double non-taxation, states that; ‘it has been decided to state clearly, in the title recommended by the OECD Model, that the prevention of tax evasion and avoidance is a purpose of tax treaties’.

¹²⁰ See note 118, p. 72, s. 2 para. 1.

¹²¹ See note 117, p. 67, s.4.1, para. 1.

¹²² OECD, Commentaries, *Model Tax Convention on Income and on Capital 2014*, (The Netherlands 2015), ‘General,’ n. 1.

exemption regulations are applied in the same period of time for the same income in each of the affected countries.¹²³

Double non-taxation occurs where a taxpayer is neither taxed in the resident or the source country, for a variety of underlying reasons, including the application of a bilateral DTC.¹²⁴

Double non-taxation by the same token should not be considered negative or harmful per se.¹²⁵ Double non-taxation may also arise in instances where a country may not wish to tax a particular subject matter, as taxation or non-taxation remains a political decision of the sovereign countries.¹²⁶ However, in other instances, double non-taxation may arise due to a lack of uncoordinated fiscal measures, resulting in oversight or otherwise, rather than a policy decision of the sovereign country.¹²⁷ Double non-taxation may either arise as a result of the proper use of a DTC or due to the improper use of a DTC.¹²⁸

According to S. van Weeghel, the criteria to define the improper use of a DTC is that:

‘[s]uch use must have the sole intention to avoid the tax of either or both of the contracting States and must defeat fundamental and enduring expectations and policy objectives shared by both States and therewith the purpose of the treaty in a broad sense.’¹²⁹

Van Weeghel implies that the improper use of DTCs encompasses abusive instances while the proper use of DTCs refers to non-abusive instances that cannot be defective and challenged by tax authorities.¹³⁰ Double non-taxation can be the result of the interaction between DTCs and domestic law, or by the interpretation of the corresponding DTC or by the facts that encompass the double non-taxation outcome.¹³¹ Hence, why the OECD has been actively trying to counter double non-taxation that mainly derives from the application of the OECD Model.¹³² Various forms of double non-taxation arising through the conceptualisation of the different scenarios and interactions between rules are listed below.

- ‘Domestic laws of both countries exempt the same income;

¹²³ See note 118, p. 73, s. 2 para. 1.

¹²⁴ See note 117, p. 67, s. 4.1, para. 1.

¹²⁵ See note 117, p. 67, s. 4.1, para. 1.

¹²⁶ See note 117, p. 67, s. 4.1, para. 1.

¹²⁷ See note 118, p. 73, s. 2 para. 2.

¹²⁸ See note 118, p. 73, s. 2 para. 2.

¹²⁹ See note 118, p. 73, s. 2 para. 2.

¹³⁰ See note 118, p. 73, s. 2 para. 3.

¹³¹ See note 118, p. 73, s. 2 para. 3.

¹³² See note 118, p. 73, s. 2 para. 3.

- the DTC provides for double exemption or double limitation of the taxing rights;
- the DTC grants exclusive taxing rights to a country that is prevented from exercising these due to domestic rules;
- The interpretation of the DTC by both countries leads to different results, by applying different allocation rules that prevent the other from levying taxes on the same income; and
- The interpretation of the DTC by both countries leads to different results, attributing the income to different taxpayers, regarding the treaty as limiting the exercise of the taxing rights.¹³³

Countries occasionally adopt a ‘subject to tax’ clause in granting relief in the form of an exemption either under domestic tax law or under a DTC as a mechanism to mitigate cases of double non-taxation.

The OECD/G20’s BEPS Action 6 aims at preventing the abuse of treaties and seeks to clarify that DTCs are not intended to generate double non-taxation. On the 7th June 2017, over 70 Ministers and other high-level representatives participated in the signing of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Profit Erosion and Profit Shifting (MLI) which incorporates the recommendations from the OECD/G20 BEPS Project.¹³⁴ The MLI offers governments a precise mechanism to close the gaps in existing international tax rules by transposing results from the OECD/G20 BEPS Project, such as BEPS Action 6 into DTCs worldwide.¹³⁵ The MLI may potentially modify the application of thousands of DTCs concluded to eliminate double taxation and is soon to be implemented by the respective signatories.¹³⁶ The respective signatories; includes SA, Germany and the UK as signatories to the agreement.¹³⁷

The final OECD/G20 BEPS October 2015 report on BEPS Action 6 states in the introduction paragraph that the aim and purpose of BEPS Action 6 are clarified in a reformulation of the title and preamble of the Model Tax Convention. Art. 6(1) and Art. 6(3) of the OECD/G20’s MLI is modelled on BEPS Action 6 with the intention of confirming that existing DTCs are

¹³³ See note 118, p.77 - 8, s. 2 para. 3, et seq.

¹³⁴ OECD, *Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting*, (2016).

¹³⁵ See note 134.

¹³⁶ See note 134.

¹³⁷ See note 134.

interpreted to eliminate double taxation concerning the taxes covered by those agreements without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. Art. 6(1) modifies the preamble text of a Covered Tax Agreement¹³⁸ to include the following preamble text as a minimum standard to address double non-taxation or avoidance:

‘[i]ntending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions.’¹³⁹

Art. 6(3) provides the option of a further modification to the preamble, to include the following preamble text:

‘[d]esiring to further develop their economic relationship and to enhance their co-operation in tax matters...’¹⁴⁰

The MLI modifications only apply if both signatories choose the DTC in force between the two countries to be covered under the MLI. The MLI’s clauses modify the DTCs through a process whereby signatories must notify clauses in selected DTCs and indicating those that will be subject to the reservations (the opt-in or opt-outs) in the MLI.¹⁴¹ Additionally, ‘compatibility’ clauses will resolve the conflicts that may arise between notified DTC clauses and the particular MLI clause to which a signatory signed up. However, no process exists to provide a consolidated outcome.

However, the application of the MLI clauses to the SA-Germany DTC in force would not apply, as neither SA or Germany have listed the DTC as an agreement covered by the MLI.¹⁴² The underlying reason behind the SA-Germany DTC not being covered under the MLI could

¹³⁸ Article 2(1)(a) defines a ‘Covered Tax Agreement’ as; ‘an agreement for the avoidance of double taxation with respect to taxes on income (whether taxes are also covered, that is in force between two or more Parties; and /or (i.e. States) jurisdictions or territories which are parties to an agreement described above and for whose international relations a Party is responsible...’.

¹³⁹ See note 134, Art. 6(1).

¹⁴⁰ See note 134, Art. 6(3).

¹⁴¹ J. Hattingh, The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?, *Bulletin for International Taxation*, vol. 71, No. 3/4, (The Netherlands 2017), p. 4, n. 4.2, para. 2.

¹⁴² BEPS MLI position - Federal Republic of Germany and South Africa, available online from <<http://www.oecd.org/tax/treaties/beps-mli-position-germany.pdf>> and <<http://www.oecd.org/tax/treaties/beps-mli-position-south-africa.pdf>>.

be because of the new DTC that was negotiated and signed by both countries in 2008. Alternatively, it may be that they seek to retain their rights to negotiate bilaterally rather than modify an existing DTC using the MLI. Although both countries have signed the new DTC, it has only been ratified by SA. Therefore the new 2008 SA-Germany DTC is not yet in force. The underlying reason Germany has not ratified the new DTC remains oddly unknown, although taxing rights favour the source country (Germany) in the case of pension benefits under the new DTC's pension article.¹⁴³ The application of the MLI clauses to the clauses of the SA-UK DTC in force would apply, as both SA and the UK have listed the DTC as an agreement covered by the MLI.¹⁴⁴ Both the UK and SA have indicated that they do not reserve their right for Art. 6(1) not to apply in terms of Art. 6(4) of the MLI, therefore replacing the existing preamble text of the covered DTC. Additionally, they have elected the optional wording in Art. 6(3) to apply.¹⁴⁵

From the perspective of SA regarding the interpretation changes to the preamble of a DTC, the court case, *Downing v. Secretary for Inland Revenue* (1972)¹⁴⁶ explained the approach to tax treaty interpretation. The Downing's case provided clarification of the legal hierarchy of DTCs in cases of conflict with SA's income tax legislation. In the Downing's case, the SA Special Income Tax Court in 1972 was required to determine whether a condition existed in the 1967 Switzerland-SA DTC that would imply that treaty relief in the source country (SA) was dependent on the taxpayer actually being subject to tax in the country of residence (Switzerland) where no such provisions in the DTC existed for such a condition to apply.¹⁴⁷ SARS argued that the DTC was for the avoidance of double taxation in the preamble text of the DTC. Therefore it was implicit that the DTC could not be applied because the DTC could only apply when there was indeed double taxation applicable to a subject matter by reasons of each countries domestic tax legislation.¹⁴⁸ The court disagreed with SARS and held that:

'[t]he avowed object of the [treaty] is to avoid double taxation...It appears to me to be implicit in a purpose to enter into an agreement to avoid, or to prevent, double taxation, that such

¹⁴³ South Africa - Germany DTC, 2008, Art. 17

¹⁴⁴ BEPS MLI position - United Kingdom, Art. 2 and BEPS MLI position - South Africa, Art. 2, and <<http://www.oecd.org/tax/treaties/beps-mli-position-south-africa.pdf>>.

¹⁴⁵ BEPS MLI position - United Kingdom, Art. 6 and BEPS MLI position - South Africa, Art. 6, available online from <<http://www.oecd.org/tax/treaties/beps-mli-position-united-kingdom.pdf>> and <<http://www.oecd.org/tax/treaties/beps-mli-position-south-africa.pdf>>.

¹⁴⁶ *SIR v Downing* (1975), (4) SA 518(A), 37 SATC 249.

¹⁴⁷ See note 7, p. 7 - 8, n. 2.3.3.3, para. 2.

¹⁴⁸ See note 7, p. 8, n. 2.3.3.3, para. 4.

agreement need not be confined to therapeutic measures but may include prophylactic measures as well. An agreement between two States which determines which of them shall have the sole right to levy or claim tax in specially defined circumstances, whatever their respective internal tax laws on the subject might be, would be effective prophylaxis against double taxation in those particular circumstances.¹⁴⁹

If the principles of the *Downing v. Secretary for Inland Revenue* (1972)¹⁵⁰ case are applied to the application of changes to the preamble of a DTC by the MLI's Art. 6, the MLI will modify the purpose and objective of an existing DTC. Furthermore, the principles of the latter case emphasize that double non-taxation is legally permissible in the absence of any express 'subject to tax' clause in a DTC that acts to mitigate instances of double non-taxation. Furthermore, a DTC will trump SA's domestic legislation as in instances of conflict between a DTC and SA's domestic tax legislation. In applying the new rules in terms of Art. 6 of the OECD/G20's MLI, the interpretation of the legal (both domestic and international) and factual grounds is important in distinguishing which of the various types of double non-taxation outcomes that may be prevented.¹⁵¹

From Germany's perspective, the hierarchy of sources of law is respected on the level of the federal republic (*Bund*) and the level of the states (*Länder*).¹⁵² Germany's Constitution ranks on the highest level of all the laws followed by laws enacted by parliament and regulations by government.¹⁵³ Germany follows a dualistic approach to the implementation of international treaties. Germany's DTCs are not self-executing, and Germany's federal law requires an act of Germany's federal parliament (*Bundestag*) or Germany's second chamber (*Bundesrat*) to become applicable within the scope of Germany's domestic law.¹⁵⁴ Germany's DTCs have the same rank in Germany's federal laws enacted by parliament but prevail over Germany's government regulations on a federal, state and municipal level.¹⁵⁵ In instances of conflicts with parliamentary law on a federal level, DTCs normally prevail. However, the priority of

¹⁴⁹ *SIR v Downing* (1975), (4) SA 518(A), 37 SATC 249.

¹⁵⁰ See note 149.

¹⁵¹ See note 118, p.78, s. 2 para. 3, et seq.

¹⁵² A. Rust, Chapter 9: Germany, *Tax Treaties and Domestic Law*, vol. 2, (The Netherlands 2006), p. 233, n. 9.1.1.1, para. 1. Additionally, laws enacted by Germany's parliament can be declared invalid by the Constitutional Court of Germany if they violate Germany's Constitution. Regulations enacted by Germany's government are invalid if they contrary to the laws enacted by Germany's parliament or Germany's Constitution.

¹⁵³ See note 152, p. 233, n. 9.1.1.1, para. 1.

¹⁵⁴ See note 152, p. 234, n. 9.1.1.2, para. 1. Refer to Art. 59 (2) and Art. 105(3) of Grundgesetz (GG) – Germany's Constitution.

¹⁵⁵ See note 152, p. 234, n. 9.1.1.3, para. 1.

DTCs over domestic law is a question of interpretation and in Germany is achieved by the interpretation rules of *lex specialis derogate generali* and *lex generalis posterior non-derogat legi speciali priori*.¹⁵⁶

In Germany's leading jurisprudence and doctrine, DTC overrides constitute a breach of international treaty law, but are valid in domestic law.¹⁵⁷ However, based on Vogel's interpretation of Germany's Constitution, he argues that the German Constitution subjects itself to international cooperation and legislators should respect conventions.¹⁵⁸ A recent decision by Germany's Constitutional Court supports this view. However, the Constitutional Court stated that the legislator is only allowed to disregard a convention with another country if it is the only way to avoid a violation of the fundamental principles of Germany's Constitution.¹⁵⁹

From the UK's perspective, the hierarchy of sources of law in UK law consist of three hierarchic fundamental categories of authority: 'Acts of Parliament' (statutes), subordinate legislation in the form of statutory instruments (made under the authority of an 'Act of Parliament' or other authority) and other sources of law.¹⁶⁰ Statutes form the primary legislation of the UK, whereas statutory instruments and other sources of law form the secondary legislation.¹⁶¹ 'Acts of Parliament' take precedence because of the fundamental principle parliament's sovereignty enshrined in the UK's Constitution and the extent that subordinate legislation is limited under the authority of statutes that gave rise to the enactment thereof. However, beyond the primacy of the statutes, UK law has no hierarchy of sources as such.¹⁶²

International agreements, such as DTCs, are not self-executing and have no effect in UK domestic law until incorporated into domestic law by or under the authority of a statute or

¹⁵⁶ See note 152, p. 235, n. 9.1.2, para. 2.

¹⁵⁷ See note 152, p. 237, n. 9.3.1, para. 2.

¹⁵⁸ See note 152, p. 238-9, n. 9.3.1, para. 2. In terms of Art. 20(3) of Germany's GG, comprising the rule of law, forbids treaty overrides and renders them unconstitutional, therefore rendering domestic provisions contrary to the conventions as illegal.

¹⁵⁹ See note 152, p. 238-9, n. 9.3.1, para. 3. Vogel argues that a DTC will never violate the fundamental principles of Germany's Constitution, and as a result the requirements for a breach will never be fulfilled.

¹⁶⁰ I. Roxan, Chapter 12: United Kingdom, *Tax Treaties and Domestic Law*, vol. 2, (The Netherlands 2006), p. 314, n. 12.1.1.1, para. 2.

¹⁶¹ See note 160, p. 314, n. 12.1.1.1, para. 2

¹⁶² See note 160, p. 314, n. 12.1.1.1, para. 2. However, the introduction of the law of European Communities Act 1972 provides in s. 2(1) that any provisions of the relevant European Communities treaties having direct effect on Community law have legal effect in UK law and s. 3(1) provides that any question of Community law is to be decided by the UK courts in accordance with the decisions of the ECJ. As a result, it has been accepted that Community law as incorporated in UK law by this legislation has limited the sovereignty of Parliament.

through a statutory instrument made under an authorising statute.¹⁶³ Additionally, for the implementation of the treaty through a statute, the text of the treaty will be incorporated as a schedule to the statute.¹⁶⁴ In terms of section 788(1) and section 788(3) of the ICTA-UK, UK DTCs are incorporated into UK domestic legislation provided an Order-in-Council has declared that such treaty has been made ‘with a view to affording relief from double taxation’ and ‘that it is expedient that the [treaty] should have effect’.¹⁶⁵ The principle of parliamentary sovereignty allows for the subsequent enactment of legislation amending previous legislation (i.e. repealing earlier legislation, including legislation implementing a treaty), including the language of a statute giving effect to a treaty in domestic law.¹⁶⁶ However, the subsequent repealing of legislation that implements a treaty through an act of the UK parliament is subject to the general presumptions *generalia specialibus non derogant*.¹⁶⁷

The provision of Part XVIII (also known as the credit code) of the ICTA-UK that deals with double tax relief can always override a DTC, as the majority of the UK’s DTCs’ method articles’ explicitly make reference to UK internal law.¹⁶⁸ However, the DTC is given effect ‘notwithstanding anything in any enactment’, therefore in principle, it has priority over any enactment even subsequent enactments of legislation outside of Part XVIII of the ICTA-UK.¹⁶⁹ The principle of parliamentary sovereignty means that a subsequent legislation can explicitly amend this ‘notwithstanding’ clause to effectively allow for DTC override outside of Part XVIII of the ITCA-UK.¹⁷⁰ However, the intention of the subsequent legislative amendment must be clearly to give effect to treaty override outside of Part XVIII of the ITCA-UK.¹⁷¹ As a result, it is challenging for unintentional DTC overrides to occur.¹⁷²

¹⁶³ See note 160, p. 314, n. 12.1.1.2., para.1. *Salmon v. Customs and Excise Com’rs* (1967)2 QB 116 (CA) establishes an important principle in the implementation of a treaty in instances where the statute did not in fact refer to the treaty. It was held that the statute was clearly implementing the treaty, even to the use of similar words.

¹⁶⁴ See note 160, p. 314, n. 12.1.1.2., para. 1.

¹⁶⁵ See note 160, p. 314-5, n. 12.1.1.2., para. 2.

¹⁶⁶ See note 160, p. 338-39, n. 12.3.1., para.1-2.

¹⁶⁷ See note 160, p. 338-39, n. 12.3.1., para.1-2.

¹⁶⁸ See note 160, p. 338-39, n. 12.3.1., para.1-2.

¹⁶⁹ See note 160, p. 338-39, n. 12.3.1., para.1-2.

¹⁷⁰ See note 160, p. 338-39, n. 12.3.1., para. 3.

¹⁷¹ See note 160, p. 338-39, n. 12.3.1., para. 3.

¹⁷² See note 160, p. 338-39, n. 12.3.1., para. 3. Refer to *Padmore v. IRC (No.2)* (1989), provides an example of intentional override from a UK perspective. In brief the taxpayer argued that the wording of s. 788(3) meant that only overriding legislation could be enacted in Part XVIII of the ITCA-UK. However, this argument was rejected, as the overriding intention was clear.

Art. 7 of the MLI provides an additional mechanism to mitigate instances of treaty abuse by introducing a general anti-avoidance rule in the form of a principal purpose test (PPT). The PPT contained in Art. 7(1) of the MLI states:

‘[n]otwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.’¹⁷³

The PPT provides for the denial of treaty benefits under the DTC obtained directly or indirectly because of any arrangement or transaction having regard to all the relevant facts and circumstances. The benefit will only be granted if the underlying reason aligns with the purpose and objective of preamble wording of the covered agreement (DTC). Tax authorities may attempt to apply Art. 7(1) under the MLI as a method of tackling double non-taxation of cross-border pension benefits by attempting to prove an arrangement or transaction existed purely for deriving benefits under a DTC. However, such an attempt by the tax authorities may appear aggressive and difficult to prove because of various underlying factors affecting an individual’s decision to retire in another country such as the cost of living, climate and lifestyle rather than a decision based purely for tax planning purpose.

C) Distinguishing between the terms ‘liable to tax’ versus ‘subject to tax’

A ‘subject to tax’ clause can be seen in only for a few of South Africa’s DTCs¹⁷⁴ currently in force. DTC’s contain a variety of forms and wording of ‘subject to tax’ clauses and can either apply to the source country or the resident country, however, if the clause applies to the resident country, it may also be known as a ‘regress clause’ or ‘*Rückfallklausel*’.¹⁷⁵ However,

¹⁷³ OECD, *Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting*, (2016), Art. 7(1).

¹⁷⁴ A ‘subject to tax’ clause or similar clause, appears in the following articles of South Africa’s DTCs: SA-France DTC (Art. 18); SA-Germany DTC (Art. 7(2)(b), Art. 8(2), Art. 9(1), Art. 12(1), Art. 16 and Art. 19); SA-Grenade DTC (Art.10 and Art.11); SA-Namibia DTC (Art.18 and Art.20); SA-Poland DTC (Art.18 and Art.22); SA-Sierra Leone DTC (Art.10 and Art.11); SA-Romania DTC (Art. 18 and Art.19) and SA-Taiwan DTC (Art. 18, Art.20 and Art. 21). The phrase is generally not contained in South Africa’s newer DTCs.

¹⁷⁵ E. Burgstaller and M. Schilcher, Subject-to-Tax Clauses in Tax Treaties – Austria, *European Taxation*, vol. 44, (The Netherlands 2004), p. 267, n. 2., para. 2.

some countries may include such clauses in their domestic provisions.¹⁷⁶ Neither of the phrases ‘subject to tax’ or ‘liable to tax’ is defined under ITA-SA and it has yet to be interpreted by SA Courts.¹⁷⁷ Neither the OECD Model or the UN Model has defined the phrase ‘subject to tax’ and the OECD Model Commentary provides limited guidance on the interpretation of a bilateral ‘subject to tax’ clause.¹⁷⁸

A distinction must be made between being ‘liable to tax’ (also commonly referred interchangeably as being ‘subject to unlimited tax liability’) in the sense of being a qualified resident taxpayer of a country or in the sense of a specific subject matter being taxable (i.e. ‘subject to tax’).¹⁷⁹ The concept of ‘liable to tax’ appears in Art. 4(1) of the OECD Model or UN Model, and is primarily relevant for determining whether a person is resident for DTC purposes.¹⁸⁰ In accordance with Art. 4(1) of the OECD Model or UN Model, a person must be ‘liable to tax’ in a country under the laws of that country by reason of his domicile, residence, place of management or any other criterion of a similar nature.¹⁸¹

The wording of Art. 4(1) does not explicitly require that the ‘tax’ in question must be a tax ‘on income’ or ‘on capital’ or ‘any tax’, but is implicitly dependent on the context in which the term ‘resident’ is applied to the substantive provisions of a DTC.¹⁸² SA is not a signatory to the Vienna Convention on the Law of Treaties (VCLT). However, SA courts rely on customary international law for guidance, this includes the interpretative rules of the VCLT in respect of SA’s DTCs. Art. 31 of the VCLT requires a treaty to be contextually interpreted to give effect to the text of the entire treaty.¹⁸³ In other words, the meaning of a treaty provision must be constructed considering all the other relevant provisions of a treaty. Based on Art. 31 of the VCLT, ‘liability to tax’ when considered in the context of the distributive rules of a DTC, refers to the liability for tax ‘on income’ and ‘on capital’ (depending on the

¹⁷⁶ South Africa’s Income Tax Act, No. 58 of 1962 previously contained sections referring to ‘subject to tax’, but subsequently deleted these from the legislation. For example, s. 35(1) proviso (i) which exempted non-resident companies from royalties withholding tax if the amount was ‘subject to tax in the Republic’ provided the company carried on a trade through a branch or agency in South Africa. Additionally, s. 10(1)(k)(ii) which exempted foreign dividends received by or accrued to a person to the extent the profits from which the dividend was distributed arose from amounts which ‘has been or will be subject to tax in the Republic’.

¹⁷⁷ See note 115, p. 135, n. 5.1, para. 3

¹⁷⁸ See note 3, Art. 23A, n. 35 no guidance is provided as to the meaning of ‘subject to tax’.

¹⁷⁹ See note 177, p. 135, para. 4. The ordinary dictionary meanings indicate that the phrase ‘subject to tax’ and ‘liable to tax’ means the same for domestic law purposes, however it is far more complex.

¹⁸⁰ J. Hattingh and C. West, South Africa, *Cashiers de droit fiscal international 2016 Madrid Congress - The notion of tax and the elimination of international double taxation or double non-taxation*, vol. 101b, (The Netherlands 2016), p. 743, para. 1.

¹⁸¹ See note 9, Art. 4(1) and see note 54, Art. 4(1).

¹⁸² See note 180, p. 743, para. 2.

¹⁸³ UN, *Vienna Convention on the law of treaties*, (Austria 1969), pp. 12 - 13, s. 3, Art.31

scope of taxes covered by Art. 2 of a DTC which contains the list of taxes covered by a DTC).¹⁸⁴ In the context of non-discrimination provisions, ‘liability to tax’ refers to ‘any tax’ (taxes of every kind and description).¹⁸⁵

Based on the above interpretation of ‘liable to tax’, the meaning thereof is restricted to consider how a liability arises only for those taxes covered under Art. 2 of a DTC, except in the case of non-discrimination.¹⁸⁶ Whether a person is ‘liable to tax’ based on residence, domicile etc., liability is a purely legal question and will depend on the construction of the domestic legislation, whereas the absence of a reference to liability in the term ‘subject to tax’ supports the view that a factual test must be applied.¹⁸⁷

In terms of ITA-SA, criteria are used in determining a liability for income tax, a natural person must be ordinarily a resident or satisfy a physical presence test (count in days test), and all other persons such as companies must be incorporated, established or formed in SA, or if not, have their place of effective management in SA.¹⁸⁸ The criteria for SA, by nature, all correspond to the grounds for liability listed in Art. 4(1) of the OECD Model or UN Model.¹⁸⁹ In *Weiser*, ‘liable to tax’ was differentiated from ‘subject to tax’ as having a broader meaning, stating that:

‘if a person’s connecting characteristics with a state are the same as those of persons who are fully liable and actually subject to tax, that person can be said to be liable to tax even though he is not subject to tax on part or all of his income by virtue of special provisions of the state of residence.’¹⁹⁰

In simple terms, ‘liable to tax’ refers to ‘an abstract liability to tax on a person’s worldwide income, while ‘subject to tax’ may require an effective liability to tax on a person’s income.’¹⁹¹ The question of whether ‘liable to tax’ requires a certain minimum level of tax payment obscures the difference between ‘liable to tax’ and being ‘subject to tax’. Liability is a legal concept which refers to the imposition of an obligation and what the ultimate outcome

¹⁸⁴ See note 180, p. 743, para. 2.

¹⁸⁵ See note 180, p. 743, para. 2.

¹⁸⁶ See note 180, p. 744, para. 2.

¹⁸⁷ See note 7, p. 9, n. 2.3.3.3, para. 10.

¹⁸⁸ See note 35, s.1, ‘resident’

¹⁸⁹ See note 181

¹⁹⁰ *Paul Weiser v. HMRC* (2012) UKFTT 501 TC, para.28.

¹⁹¹ *Paul Weiser v. HMRC* (2012) UKFTT 501 TC, para.30.

may be is not relevant in determining whether a person has legal liability for tax.¹⁹² In contrast, ‘subject to tax’ refers to the overall result of the taxpayer, and therefore the question of liability should not be confused with quantitative questions about a taxpayer paying sufficient levels of tax.¹⁹³

This view is confirmed in the recent dispute¹⁹⁴ concerning a non-admissibility complaint with Bundesfinanzhof (BFH) of Germany. The BFH had the opportunity on the 13 October 2015 to clarify when income can be considered ‘subject to tax’. The legal question was whether the taxpayer’s pension income was ‘subject to tax’ if declared as part of ‘income’ on the SA tax return because SA imposes tax on a worldwide income basis, but due to the SA’s unilateral foreign pension exemption, no tax was actually paid.¹⁹⁵ The Federal Fiscal Court held that the pension was only taxable ‘in principle’ as the income had to be declared pursuant to SA’s system of taxation, but the exemption of the pension meant that it was in fact not taxed.¹⁹⁶ The BFH held a similar understanding as to the German Federal Ministry of Finance, that actual taxation is established in a country when the income is included as taxable income under the worldwide or source basis. Hagemann, Hattingh and Kahlenberg concluded that:

‘[the presumption of actual taxation is not affected because any of the following conditions resulting in no taxation paid or payable: standard deductions, opportunities to claim loss relief, deduction of, or credits for foreign tax, application of participation exemptions under DTCs; and application of a EU Directives].’¹⁹⁷

In other words, an effective taxation is not necessary.¹⁹⁸ If the taxpayer does not declare the income and such income is not included in the taxpayer’s tax base, the taxpayer would not be entitled to the exemption in the resident country.¹⁹⁹

The BFH concluded that the aim of a ‘subject to tax’ clause was not the prevention of virtual double taxation, but the prevention of actual double taxation by considering not only the

¹⁹² See note 180, p. 744, para. 3.

¹⁹³ See note 180, p. 744, para. 3.

¹⁹⁴ BFH decision of 13 October 2015 (IB 68/14), published as an NV decision on 10 February 2016.

¹⁹⁵ See note 7, p. 4, n. 2.2.2, para. 1.

¹⁹⁶ See note 7, p. 4, n. 2.2.2, para. 4.

¹⁹⁷ See note 7, p. 5, n. 2.3.1, para. 3.

¹⁹⁸ The same view is shared by legal scholars in Austria and Germany, in particular Vogel. Refer to Maßgebender Zeitpunkt - Vor Art. 6-22’, In K. Vogel and M. E. Lehner (eds.), *Doppelbesteuerungsabkommen*, (Germany 2008), para. 31

¹⁹⁹ A. Rust, Article 23 – Exemption Method/Credit Method, In A. Rust and E. Reimer (eds.), *Klaus Vogel on Double Taxation Conventions*, 4th ed., vol. 2, (The Netherlands 2015), p. 1625, n. 34.

wording but also the meaning and telos thereof.²⁰⁰ Furthermore, due to earlier conflicting decisions about the interpretation of a ‘subject to tax’ clause because of the different wording, different authentic language versions and different context among the various DTCs, the BFH clarified that the latter is irrelevant.²⁰¹ The BFH’s decision gives enhanced legal certainty about the correct and unified approach to the interpretation of ‘subject to tax’ clauses and intended to end the conflicting jurisprudence of the BHF in terms of the interpretation of such clauses.²⁰² However, contradictory to the BFH’s view, Burgstaller and Schilcher’s conclude that an international common meaning of a ‘subject to tax’ clause is difficult to define and to interpret because of the various forms and bilateral character thereof.²⁰³ Burgstaller and Schilcher state that countries should continue to implement the OECD Model when concluding DTCs and rather avoid implementing ‘subject to tax’ clauses in distributive rules until there is an internationally agreed OECD proposal.²⁰⁴

In the *Tradehold* (2012) case, SARS relied on the statement of Cave J in the UK case of *R v. Norfolk County Council* (1891) with regard to the definition of the term ‘deeming’, the SA’s Supreme Court of Appeal raised no objection to the use of this dictum, in indicating that it was acceptable to consider foreign tax cases to assess the meaning of words and terms used in SA’s tax treaties.²⁰⁵ It can therefore be expected that an SA court may consider, the judicial interpretation of the recent BFH decision to determine a meaning of the term ‘subject to tax’ when used in a SA tax treaty. From a SA perspective, it can be concluded that ‘subject to tax’ has a different meaning from ‘liable to tax’ and requires that the person claiming benefit of the treaty or a unilateral double tax relief is actually required to pay tax (or would, for example, be required to do so if it had any positive income position).

²⁰⁰ See note 7, p. 4, n. 2.2.2, para. 4.

²⁰¹ See note 7, p. 6, n. 2.3.2, para. 2.

²⁰² See note 7, p. 6, n. 2.3.2, para. 2.

²⁰³ See note 175, p. 276, n.5, para. 1

²⁰⁴ See note 175, p. 276, n.5, para. 1

²⁰⁵ R. Carvalho, I. Daniels, Dewar, M. and W. Sahabodien, Is There Evidence of Increasing Harmonization in the Interpretation of Tax Treaties by Courts in Their Reference to Foreign Court Decisions? A Study of South African Case Law’, *Bulletin for International Taxation*, vol. 71, No. 10, (The Netherlands 2017), p. 10, n. 2.4, para. 1.

D) The functionality of the ‘subject to tax’ clause as part of a unilateral foreign pension exemption in terms of South Africa’s income tax legislation

After establishing the meaning of the phrase ‘subject to tax’, it is important from an SA perspective to also understand the functionality thereof as part of SA’s unilateral foreign pension exemption and whether it is similar to SA’s foreign tax credit relief under section 6quat of the ITA-SA. For example, should it be the residence or source country or both to establish whether an item is ‘subject to tax’?

Section 6quat of the ITA-SA is one of SA’s primary mechanisms for mitigating double taxation, but not the only mechanism. Section 6quat grants relief in the form of a rebate (credit) of qualifying foreign taxes on qualifying foreign-sourced amounts against ordinary taxes payable of an SA resident; thereby reducing the resident’s liability for ordinary tax on net income or taxable income in terms of the ITA-SA.²⁰⁶ However, SA’s foreign tax credit rebate is not the only mechanism of relief due to a variety of exemptions for foreign-sourced amounts.

An analysis of the primary functional elements in granting relief for SA residents from international juridical double taxation under SA’s foreign tax credit relief in terms of section 6quat of the ITA-SA, reveals the following factors:

- the purpose is to provide relief from double taxation, but protect SA’s tax base rather than SA subsidising the tax base of a foreign country by imposing a limitation rule.²⁰⁷
- the rebate restricts the foreign tax credit rebate to foreign taxes paid or payable against the SA ordinary tax payable on foreign-sourced amounts included taxable income.²⁰⁸
- the qualifying amounts must be from a ‘source’ outside the Republic (foreign)²⁰⁹;
- the foreign qualifying amounts must be included in taxable income²¹⁰ for the year of assessment²¹¹;

²⁰⁶ See note 35, s. 6quat(1A).

²⁰⁷ SARS, *Interpretation Note No.18*, (SARS 2015), p. 36, n. 4.5, para. 3.

²⁰⁸ See note 207. ‘Taxable Income’ is calculated in terms of the Income Tax Act, No. 58 of 1962 of the Republic of South Africa.

²⁰⁹ See note 35, s. 6quat(1A).

²¹⁰ See note 208.

²¹¹ See note 35, s. 6quat(1A).

- the foreign qualifying tax must be an income tax, in other words, a ‘tax on income’²¹²;
- the foreign tax must be paid or payable, but not necessarily actually paid in the same year of assessment²¹³ and
- the burden of proof is the onus of the taxpayer to prove foreign taxes was paid or payable on foreign-sourced amounts by producing supporting documentation to SARS (e.g. tax certificates, tax returns, notice of assessments etc.) to assess whether the nature of the amount and foreign taxes qualify for relief.²¹⁴

SA’s proposed ‘subject to tax’ clause reform of SA’s unilateral foreign pension exemption has the similar functional purpose as the foreign tax credit relief under section 6quat of the ITA-SA, as section 6quat requires foreign tax to be ‘paid or payable’.

The term ‘source’ as referred to under section 6quat of the ITA-SA is not defined in statutory legislation but is primarily formulated by the SA courts.²¹⁵ Nevertheless, the source of the amount is fundamental to the application of both the foreign tax credit rebate and the foreign exemption of pension benefits in the granting of relief as both require the amounts to arise from foreign sources. The foreign pension exemption can only apply if the amount is included in taxable income in the same year of assessment, as is the case with the foreign tax credit relief.

A distinguishing factor between the two mechanisms of unilateral domestic relief and ‘subject to tax’ requirement, is that the foreign tax credit rebate requires the foreign tax to be paid or payable. However, the ‘subject to tax’ clause would not necessarily require foreign tax to be paid or payable but merely actual taxation as previously discussed. Part of the process of granting unilateral domestic relief and the ‘subject to tax’ requirements under SA’s foreign pension exemption relies on the vetting process of the tax authorities, SARS.

The term ‘tax’ may not be defined when used in the proposed ‘subject to tax’ clause under the foreign pension exemption. Similarly, foreign qualifying tax under the foreign tax credit relief is not defined. The nature of the foreign ‘tax’ levied would be required to be a ‘tax on income’ for the granting of SA’s foreign pension exemption, as SA is providing relief from

²¹² See note 207, p. 20, n. 4.3.1, para. 4.

²¹³ See note 35, s. 6quat(1B)(a)(ii)

²¹⁴ See note 207, p. 42, n. 3.17, para. 1, et seq.

²¹⁵ See note 207, p. 10, n. 3.4, para. 1.

income taxes (i.e. tax on income). The mere fact that a tax is regarded as a ‘tax on income’ by the country (source country) levying the tax is not enough, and the precise nature of the foreign tax or duty must be determined by SARS in granting relief under both mechanisms of relief.²¹⁶

The application of a unilateral domestic exemption as a mechanism of relief is far more straightforward and less complicated than a foreign credit rebate from a tax administrative perspective (e.g. reviewing of supporting documentation, the nature of the foreign tax, the foreign tax regime in terms of which it was imposed, etc.) for local tax authorities, as the foreign-sourced amount is merely excluded from taxable income. However, the inclusion of a ‘subject to tax’ clause as part of a unilateral domestic exemption would increase the complexity and the administrative burden for the local tax authorities (e.g. SARS). Tax authorities would be required to determine whether an item of income was ‘subject to tax’ on a case-by-case basis based on the supporting documentation provided by the taxpayer and keep a record thereof.

E) Concluding Remarks

From a SA perspective, regardless of any ‘subject to tax’ clause included in SA’s income tax legislation, the DTC will trump domestic legislation in instances of conflict between the DTC and domestic legislation based on SA’s current jurisprudence, thereby making the ‘subject to tax’ clause potentially ineffective in mitigating double non-taxation in specific scenarios. Therefore, case studies are conducted in Chapter IV to determine the impact of the ‘subject of tax’ clause reform on the current income tax consequences applicable to SA resident’s foreign pension in light of SA’s DTCs.

²¹⁶ See note 207, p. 13, n. 3.6.1, para. 1.

IV) THE CROSS-BORDER INCOME TAX CONSEQUENCES APPLICABLE TO A SOUTH AFRICAN RESIDENT IN LIGHT OF SOUTH AFRICA'S DOUBLE TAX AGREEMENTS IN FORCE AND THE PROPOSED FUTURE REFORMS UNDER SOUTH AFRICA'S INCOME TAX LEGISLATION

A) Introduction

This chapter provides a brief overview of pension article and terminology under South Africa's DTCs for the purposes of a hypothetical case study approach to illustrate the income tax consequences applicable to a retired South African resident in light of proposed future reforms to SA's unilateral foreign pension exemption. The overview of the pension article under SA's DTCs, the OECD Model and the UN Model provides a meaningful explanation for applying a tax treaty in cases of juridical double taxation and is illustrated in the hypothetical case studies below. The hypothetical case studies considers the overall income tax consequences for a SA resident for foreign pension arising from Germany (hereinafter referred to as Case Study 1, refer to section (c) of this chapter) and the UK respectively, hereinafter referred to as Case study 2, refer to section (d) of this chapter). The two hypothetical case studies consist of two scenarios listed below

- Scenario A: Current SA income tax legislation, and
- Scenario B: Proposed changes to existing SA income tax legislation.

Scenario B is split further into sub-headings representing the proposed future reforms as listed below:

- Scenario (B.1): the 'subject to tax' clause
- Scenario (B.2): the 'exemption threshold'

The table diagram for each case study consists of the following category headings:

- type of pension benefit;
- SA income tax consequences
- the UK or German income tax consequences
- the allocation of taxing rights in terms of the pension article of the DTC in force, and;
- the overall income tax consequences after applying the relevant DTC.

The purpose of structuring the tables in this manner is to firstly illustrate the domestic income tax consequences of the resident country and source country prior to the application of the relevant DTC and secondly, the overall tax consequences of a SA resident's foreign pension after applying the respective DTC's allocation of taxing right rules.

This chapter will also discuss any issues identified from the case studies below in respect of the proposed future reforms of SA's unilateral foreign pension, a 'subject to tax' clause and an 'exemption threshold', as discussed under Chapter I, and other issues not identified in the case studies that may be relevant to consider. Additionally, this chapter will provide recommendations in respect of the issues identified in the case studies and any other recommendations in respect of other issues not identified in the case studies that may be relevant to consider. The issues and recommendations are set out in section (e).

B) Overview of the pension article and terminology under South Africa's DTCs in force

Articles dealing with private pensions in SA's DTCs mostly use the following wording:

'(1) Subject to the provisions of paragraph 2 of Article 18, pensions and other similar remuneration, and annuities, arising in a Contracting State and paid to a resident of the other Contracting State, may be taxed in the first-mentioned State.

(2) The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.'²¹⁷

SA, reserved its right to include a reference to annuities under art. 18 of the OECD Model and may include an explicit definition of the term, 'annuity' or 'living annuity' depending on whether it is agreed with the other Contracting State.²¹⁸ The origin of this variation arises from SA's domestic legislation with respect to the special inclusion of annuities under paragraph (a) of gross income. SA has not reserved its right to exclude a reference to 'past employment' under art. 18 of the OECD Model, however it is absent from the majority of

²¹⁷ C. West, Status Quo of South African Tax Treaty Policy, *International Taxation in China*, (2016), p. 7, 'Miscellaneous (pensions, students, other income)' para. 1.

²¹⁸ See note 3, 'Positions on the Article'

SA's seventy-eight DTCs in force.²¹⁹ The term 'past employment' is dealt with below as part of the discussion of regarding the term 'pension' from a tax treaty perspective.

Art. 18 of the OECD Model Art. 18 states:

'[s]ubject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.'²²⁰

The terms 'pensions' and 'past employment' are not explicitly defined in the provisions of the OECD Model or SA's DTC model wording. However, Art. 18 OECD Model Comm., no.5, refers to the ordinary meaning of the word of 'pension' as covering only 'periodic payments'. However, the CARICOM Agreement has the advantage of a definition of 'pensions', which the model DTCs do not have.²²¹ Art. 19(3) of the CARICOM Agreement states that:

'... the word "pensions" means periodic payments made after retirement or death in consideration for services rendered, or by way of compensation for injuries received in connection with past employment'.²²²

In the context of the above definition, it would appear that the term 'pensions' is not constrained to arise as a result of past employment, but merely casually refers to the consideration of services, therefore stating succinctly what is normally regarded by individuals as pensions that arise from past services, and reflects the type of definition in many countries' domestic laws.²²³ However, there have been divergent views that have arisen on whether the term should have an autonomous interpretation.²²⁴

²¹⁹ The following SA DTCs include a reference to 'past employment' Austria-SA DTC (Art. 18(1)), Belgium-SA DTC (Art. 18(1)), Brazil-SADTC (Art. 18(1)), Bulgaria-SA DTC (Art. 17(1)), China-SA DTC (Art. 18(1)), Czech Republic-SA DTC (Art. 18(1)), France-SADTC (Art. 18(1)), Germany-SA 1973 DTC (Art. 16(1)), Greece-SADTC (Art. 18(1)), Hong Kong-SA DTC (Art. 17(1)), Hungary-SA DTC (Art. 18(1)), Israel-SADTC (Art.19(1)), Italy-SADTC (Art. 18(1)), Kuwait-SA DTC (Art.18(1)), Portugal-SADTC (Art.18(1)), Spain-SA DTC (Art.17(1)), United Kingdom-SA DTC (Art. 17(1)), United States-SADTC (Art.18(1)) and Zimbabwe-SA DTC (Art.18(1)).

²²⁰ See note 9, Art. 18.

²²¹ K. Holmes, Chapter 18: Other Distributive Rules, *International Tax Policy and Double Tax Treaties – An Introduction to Principles and Application*, 2nd ed., (The Netherlands 2014), Ch. 18.2.3, para. 1

²²² See note 221, Ch. 18.2.3, para. 1.

²²³ See note 221, Ch. 18.2.3, para.1.

²²⁴ R. Ismer, Article 18: Pensions, In A. Rust and E. Reimer (eds.), *Klaus Vogel on Double Taxation Conventions*, 4th ed., vol. 2, (The Netherlands 2015), p. 1438, n. 17.

Ismer concludes that:

‘[i]n any event, it seems reasonable to infer the following core meaning from the choice of words and from the systematic context: While the Latin origin of the word (pension) simply means payment, from the ordinary meaning of the term in English and in French it can be derived that it covers only periodically recurrent payments, which do necessarily have to have a constant amount, whereas one-time payments can only constitute similar remuneration. From the wording, it also becomes clear that the provision deals with gross payments only.’²²⁵

Pension payments are characterised by a specific insurance function, providing a substitute for income generated from labour dependent work or alternatively providing means of securing a livelihood when an individual is typically no longer able to earn his living through work as a result of old age.²²⁶ The payment should provide insurance against certain contingency risks to the employee, such as reaching retirement age.²²⁷ The payments must be contingent upon the realisation of such risks and provide insurance against such risks if the risks do not materialise or later cease to exist, the pension payments will cease to exist as well.²²⁸ Traditionally, the nature of these associated contingency risks is longevity, as pensions provide economic security in an individual’s old age, this is affirmed in the history of tax treaties.²²⁹ During the history of treaty negotiations the term ‘retirement’ was inserted before the term ‘pensions’, but subsequently deleted indicating a broader meaning should apply to provide an insurance function mitigating biometric risks such as longevity, premature death and disability.²³⁰

The OECD Model makes an explicit reference to ‘in consideration of past employment’. The term ‘employment’, has the same meaning under Art. 15 of the OECD Model. The fundamental characteristic distinguishing employment from business profits is the extent of subordination and entrepreneurial risk.²³¹ In other words, employment is a person that is engaged to work under an employment contract or a ‘contract of service’ in exchange for

²²⁵ See note 224, p. 1439, n. 18.

²²⁶ See note 224, p. 1439, n. 19.

²²⁷ See note 224, p. 1440, n. 21.

²²⁸ See note 224, p. 1440, n. 22.

²²⁹ See note 224, p. 1440, n. 23.

²³⁰ See note 224, p. 1440, n. 23 and p. 1441, n. 29.

²³¹ M. Lang, Chapter 9: Income from Employment, *Introduction to the Law of Double Taxation Conventions*, 2nd ed., (The Netherlands 2013), Ch. 9.9.1, n. 346.

remuneration in the form of salaries and wages for the work performed by an employer.²³² Employment requires that the person is under the control of their employer in carrying out the work or service performed particularly in respect of the work content, methods, hours of work, and has the power to dismiss an employee for inadequate or poor performance of the tasks required.²³³

The phrase ‘past employment’ requires that an employment relationship giving rise to the ‘pension’ or ‘other similar remuneration’ is terminated, regardless of whether new employment is taken up with the same employer.²³⁴ The phrase ‘in consideration of’ implicitly implies that a relevant casual connection between the pension or other similar remuneration and the past employment is required.²³⁵

A ‘pension’ covers only periodically recurrent payments, whereas once-off payments can only constitute ‘other similar remuneration’. The phrase ‘other similar remuneration’ is also not explicitly defined, but widens the scope of the application of the Art. 18 of the OECD Model provision.²³⁶ Firstly, the former term widens the scope of Art. 18 of the OECD Model to include remuneration in kind (e.g. accommodation, free food, or company cars etc.) and non-periodic payments, such as single sum or lump sum payments in lieu of periodic payments.²³⁷ The similarity is asserted in the form of the related insurance function of the payments and their coverage of biometric risks.²³⁸ However, Art. 18 of the OECD Model only applies to payments that are in consideration of past employment; it would therefore not apply, for example, to an annuity acquired directly by the annuitant from the capital that has not been funded from an employee pension scheme. In contrast to SA’s DTC model wording, there is no explicit reference to ‘in consideration of past employment’, but rather an explicit reference to ‘annuities’, therefore widening the scope of the article to include and align with SA’s income tax legislation.

²³² K. Holmes, Chapter 17: Personal Services, *International Tax Policy and Double Tax Treaties – An Introduction to Principles and Application*, 2nd ed., (The Netherlands 2014), Ch. 17.1, para. 2

²³³ See note 232, para. 2.

²³⁴ See note 224, p. 1444, n. 35.

²³⁵ See note 224, p. 1445, n. 39.

²³⁶ See note 224, p. 1442, n. 31.

²³⁷ See note 224, p. 1442, n. 31.

²³⁸ See note 224, p. 1442, n. 31.

C) Cross-border income tax consequences applicable to a South African resident's United Kingdom pension benefit

i) UK Case Study 1: Scenario A – Current South Africa Income Tax Legislation				
Type of foreign pension benefit	SA Income Tax Consequences	UK Income Tax Consequences for non-residents	Allocation of taxing rights in terms of applying Article 17 of the SA-UK DTC (in force 2002)	Overall Income Tax Consequences after applying the SA-UK DTC
1. Annuity (Scheme Pension or Living Annuity)	A foreign annuity is exempt from tax in SA in accordance with SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA. The full amount of the foreign annuity is not taxable in SA.	Authorised pension payments in the form of scheme pensions and lifetime annuity as defined in terms of Part 4 of the FA-UK section 165(1) rule 3 and rule 4 are fully taxable at the individual's marginal tax rate under the rules Part 9 ITEPA-UK ²³⁹ , Chapter 5A, sections 579A-579D. The full amount of a foreign pension annuity is taxable in the UK.	A UK annuity benefit falls within the scope of Art. 17(1)(a) or Art. 17(1)(b) as either a 'pension' or 'annuity'. Art. 17(1) grants exclusive taxing rights to the resident country, and only SA may levy tax accordingly.	Double non-taxation arises. SA is granted exclusive taxing rights in terms of the SA-UK DTC. However, SA unilaterally exempts foreign pensions under its domestic tax legislation, and UK's right to tax is restricted in terms of the SA-UK DTC.

²³⁹ Finance Act 2004, Schedule 31 amended Part 9 of ITEPA 2003 (pension income) amending the taxation of benefits under registered pension by inserting Chapter 5A – Pensions under Registered Pension Schemes, sections 579A – 579D.

<p>2. Lump Sums (Pension Commencement Lump Sums (PCLS) or Uncrystallised Funds Pension Lump Sum (UFPLS))</p>	<p>A foreign lump sum receipt or accrual is capital in nature and excluded from the general definition of gross income in terms of section 1 of ITA-SA. Paragraph (e) of the definition of gross income in terms of section 1 of ITA-SA overrides the exclusion of capital amounts with the special inclusion of retirement lump sums arising from a pension fund as defined in terms of section 1 of ITA-SA. However, the special inclusion of paragraph(e) of the gross income definition in terms of section 1 of ITA-SA will not apply, as a foreign pension fund not established under SA law (registered under the Pension Fund Act), but incorporated under foreign laws in another country, does not qualify as a pension fund as defined in section 1 of ITA-SA which is a requirement for inclusion. Any lump sum benefit from a foreign pension fund situated outside the Republic is also exempt from capital gains tax in accordance with paragraph 54 of the Eighth Schedule of ITA-SA. Therefore, the full amount is not taxed in SA.</p>	<p>Authorised lump sum payments in the form of PCLS in terms of the FA-UK²⁴⁰ section 166(1)(a) and UFPLS and 166(1)(ba) are taxable under the rules Part 9 ITEPA-UK, Chapter 5A, sections 579A-579D. However, in accordance with Part 1 of Schedule 29 paragraph 2 of the FA-UK only a permitted maximum of 25% of the value of the pension benefit is allowed as a PCLS, the residual is taken as a lump sum is classified as unauthorised payment, unless the residual is taken as a lifetime annuity or a scheme pension in terms of paragraph 1 above. The PCLS is fully exempt in terms of section 636A(1)(a) from income tax. However, the residual unauthorised lump sum payment²⁴¹ is taxed at 40% in terms of 208 of FA-UK. In terms of section 636A(1)(e) read together with section 636A(1B) and section 636A(1C), 25% of the UFPLS²⁴² is exempt from income tax, the residual is taxable at the marginal tax rate in terms of sections 579A-579D. The full PCLS is taxable in the UK, whereas only 75% in the case of UFPLS.</p>	<p>A UK lump sum benefit falls within the scope of Art. 17(1)(a) or Art. 17(1)(b) as either ‘other similar remuneration’. Art. 17(1) grants exclusive taxing rights to the resident country, and only SA may levy tax accordingly.</p>	<p>Double non-taxation arises. SA is granted exclusive taxing rights in terms of the SA-UK DTC, but no tax is levied as lump sums fall outside the scope of gross income and UK’s right to tax is restricted in terms of the SA-UK DTC.</p>
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²⁴⁰ Taxation Pension Act 2014 amended the following legislation: Part 9 of ITEPA 2003 (pension income) sections 579A – 579D and section 636A; Part 4 of Finance Act 2004 sections 166(1)-(2); Schedule 29 of the Finance Act 2004 to insert paragraph 4A ‘uncrystallised funds pension lump sum’. The respective legislation was amended to include the new form of pension benefit, ‘uncrystallised funds pension lump sum’.

²⁴¹ The unauthorised lump sum payment made by a registered pension scheme reach or go above a set threshold within a certain period of time, a further income tax charge called the unauthorised payments surcharge will apply of 15% in terms of section 209 of the Finance Act 2004. The time period is generally if an unauthorised payment is made within a twelve month period and constitute up to 25% or more of the person’s pension rights.

²⁴² UPLS may be in the form of a once-off lump sum or several lump sums.

ii) UK Case Study 1: Scenario B.1 - 'Subject to tax'				
Type of foreign pension benefit	SA Income Tax Consequences	UK Income Tax Consequences for non-residents	Allocation of taxing rights in terms of applying Article 17 of the SA-UK DTC (in force 2002)	Overall Income Tax Consequences after applying the SA-UK DTC
1. Annuity (Scheme Pension or Living Annuity)	A foreign annuity is exempt from tax in SA in accordance with SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA provided that tax is levied on foreign annuity amounts (i.e. not exempt) in the UK in accordance with the 'subject to tax' clause. However, the UK may not levy tax as its taxing rights are restricted under the SA-UK DTC. Therefore, the foreign annuity is taxable in South Africa, as SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA would not apply.	Refer table (C)(i) as the same tax consequences for a UK annuity apply.	Refer to the table (C)(i) as the same allocation of taxing rights for a UK annuity apply.	Single taxation arises in SA. SA is granted exclusive taxing rights in terms of SA-UK DTC. The UK is restricted from levying a tax in terms of the SA-UK DTC under its domestic legislation, therefore SA levies tax thereon.
2. Lump Sums (Pension Commencement Lump Sums (PCLS) or Uncrystallised Funds Pension Lump Sum (UFPLS))	Refer to the table (C)(i) as the same tax consequences for a UK lump sum apply. Regardless of a 'subject to tax' clause in SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA, the foreign lump sum is not taxable in South Africa, as it falls outside the scope of gross income.	Refer to the table (C)(i) as the same tax consequences for a UK lump sum apply.	Refer to the table (C)(i) as the same allocation of taxing rights for a UK lump sum apply.	Double non-taxation arises. SA is granted exclusive taxing rights in terms of the SA-UK DTC, but no tax is levied as lump sum fall outside the scope of gross income and UK's right to tax is restricted in terms of the SA-UK DTC.

iii) UK Case Study 1: Scenario B.2 - 'Exemption threshold'				
Type of foreign pension benefit	SA Income Tax Consequences	UK Income Tax Consequences for non-residents	Allocation of taxing rights in terms of applying Article 17 of the SA-UK DTC (in force 2002)	Overall Income Tax Consequences after applying the SA-UK DTC
1. Annuity (Scheme Pension or Living Annuity)	A foreign pension annuity will be included in gross income, but only partially exempt from tax in SA in accordance with SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA. The portion of the annuity benefit exceeding the exemption threshold under the section 10(1)(gC) of ITA-SA is taxed in South Africa; the balance is exempt.	Refer to the table (C)(i) as the same tax consequences for a UK annuity apply.	Refer to the table (C)(i) as the same allocation of taxing rights for a UK annuity apply.	Partial double non-taxation. SA is granted exclusive taxing rights in terms of the SA-UK DTC. However, SA does not levy a tax on the full amount of the foreign pension annuity, but only on the portion exceeding the exemption threshold. Furthermore, the UK's right to tax is restricted in terms of the SA-UK DTC.
2. Lump Sums (Pension Commencement Lump Sums (PCLS) or Uncrystallised Funds Pension Lump Sum (UFPLS))	Refer to the table (C)(i) as the same tax consequences for a UK lump sum apply.	Refer to the table (C)(i) as the same tax consequences for a UK lump sum apply.	Refer to the table (C)(i) as the same allocation of taxing rights for a UK lump sum apply.	Double non-taxation arises. SA is granted exclusive taxing rights in terms of the SA-UK DTC, but no tax is levied as lump sum fall outside the scope of gross income and UK's right to tax is restricted in terms of the SA-UK DTC.

D) Cross-border income tax consequences applicable to a South African resident's German pension

i) German Case Study 1: Scenario A - Current South Africa Income Tax Legislation				
(Applicable to Direct Insurance (Direktversicherung), Pension Fund (Pensionsfonds) and Pension Pool (Pensionskasse).				
Type of foreign pension benefit	SA Income Tax Consequences	German Income Tax Consequences refer to for non-residents	The allocation of taxing rights in terms of Article 17 of the SA-Germany DTC (in force 1973)	Overall Income Tax Consequences after applying SA-Germany DTC
1. Annuity (Leibrenten) (If the pension commitment was made before 1 January 2005)	A foreign annuity is exempt from tax in SA in accordance with SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA. The full amount of the foreign annuity is not taxable in SA.	A foreign annuity benefit (including living annuity) are deemed to be 'other income' under category 7 of §2(1) of EStG and are taxable at the individual's marginal tax rate. The proportion of the annuity payment which does not represent a repayment of capital in accordance with § 22 nr.5 EStG is the amount subject to tax under category 7 of §2(1) of EStG. ²⁴³ A life annuity only the profit share portion ('Ertragsanteil') is the amount subject to tax in accordance with § 22 nr.1, clause 3 of the EStG.	A German annuity benefit falls within the scope of Art. 16(1) as a 'pension'. Art. 16(1) grants exclusive taxing rights to the resident country (SA) unless the subject matter is not subject to tax in SA (i.e. exempt) then Germany may levy thereon.	Single taxation arises in Germany. SA is granted exclusive taxing rights however, SA unilaterally exempts foreign pensions under its domestic tax legislation. However, due to the 'subject to tax' clause in the SA-Germany DTC, Germany may levy a tax thereon as SA does not exercise its right to tax. Therefore, Germany will levy tax thereon under its domestic legislation and in accordance with the DTC.
2. Lump-sum (Kapitalabfindung) (If the pension commitment was made	A foreign lump sum receipt or accrual is capital in nature and excluded from the general definition of gross income in terms of section 1 of ITA-SA. Paragraph (e) of the definition of gross income in terms of section 1 of ITA-SA overrides the exclusion of capital amounts with the special inclusion of retirement lump sums	The foreign lump sum benefit is tax-exempted, provided the additional requirements are met (§20 (1) nr.6 in terms of the old EStG and § 9a clause 1 nr.3 EStG).	A German lump-sum benefit falls within the scope of Art. 16(1) as 'other similar remuneration'. Art. 16.(1) grants exclusive taxing rights to the resident	Double non-taxation, as SA is granted exclusive taxing rights in terms of the SA-Germany DTC, but no tax is levied as lump sum fall outside the scope of gross income for SA in terms of ITA-SA. However, due to the 'subject to tax'

²⁴³ The annuity is full taxable provided the premiums paid by the employer were tax exempt. However, if contributions were taxed at a flat rate of 20%, the contributions are not taken into account in the determination of income for assessment purposes. The flat-rate levy satisfies the tax liability of the taxpayer (sections 40(3) and 40a(5) of the EStG).

before 1 January 2005)	arising from a pension fund as defined in terms of section 1 of ITA-SA. However, the special inclusion of paragraph(e) of the gross income definition in terms of section 1 of ITA-SA will not apply, as a foreign pension fund not established under SA law (registered under the Pension Fund Act), but incorporated under foreign laws in another country, does not qualify as a pension fund as defined in section 1 of ITA-SA which is a requirement for inclusion. Any lump sum benefit from a foreign pension fund situated outside the Republic is also exempt from capital gains tax in accordance with paragraph 54 of the Eighth Schedule of ITA-SA. Therefore, the full amount is not taxed in SA.		country (SA) unless the subject matter is not subject to tax in SA (i.e. exempt) then Germany may levy thereon.	clause in the SA-Germany DTC, Germany may levy a tax, but no tax is levied thereon under its domestic legislation.
3. Annuity (Leibrenten) (If the pension commitment was made after 31 December 2004)	Refer to the table (D)(i) to the tax consequences for annuity (Leibrenten) benefit (#1), as the same tax consequences apply.	A foreign annuity benefit (including living annuity) are deemed to be 'other income' under category 7 of §2(1) of EStG and are taxable at the individual's marginal tax rate. The proportion of the annuity payment which does not represent a repayment of capital in accordance with § 22 nr.5 EStG is the amount subject to tax under category 7 of §2(1) of EStG. ²⁴⁴	Refer to the table (D)(i) for the allocation of taxing rights for an annuity (Leibrenten) benefit (#1), as the same allocation of taxing rights apply.	Single taxation arises in Germany. Refer to the table (D)(i) to the overall tax consequences for an annuity (Leibrenten) benefit (#1), as the same overall tax consequences apply.
4. Lump-sum (Kapitalabfindung) (If the pension commitment was made after 31 December 2004)	Refer to the table (D)(i) to the tax consequences for a lump sum (Kapitalabfindung) benefit (#2), as the same tax consequences apply.	A foreign lump sum benefit is deemed to be income under Category 5 of the EStG and taxed at a final flat rate withholding	Refer to the table (D)(i) for the allocation of taxing rights for lump sum (Kapitalabfindung) benefit (#2), as the same allocation of taxing rights apply.	Single taxation arises in Germany. SA is granted exclusive taxing rights in terms of the SA-Germany DTC, but no tax is levied as lump sum fall outside the scope of gross income for SA in terms of ITA-SA. However, due to the 'subject to tax' clause in the SA-Germany DTC,

²⁴⁴ The annuity is full taxable provided the premiums paid by the employer were tax exempt.

		tax of 25% in accordance with sections 20, 32d and 43(5) of the EStG ²⁴⁵ .		Germany may levy a tax thereon as SA does not exercise its right to tax. Therefore, Germany will levy tax thereon under its domestic legislation and in accordance with the DTC.
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²⁴⁵ However, if the final flat withholding tax exceeds the individual's marginal income tax rate, the individual may opt for an assessment. Taxpayers can apply to have the individual income tax rate applied if that is more advantageous for them. In that case, the applicable tax rate is the marginal income tax rate up to 25% (section 32d(4) of the EStG).

ii) German Case Study 1: Scenario B.1 - ‘Subject to tax’

(Applicable to Direct Insurance (Direktversicherung), Pension Fund (Pensionsfonds) and Pension Pool (Pensionskasse)).

SA and Germany signed a new DTC on the 9 September 2008, which has been ratified by SA but has yet to be ratified by Germany. Art. 17 of the new DTC deals with pensions, annuities and similar payments states:

‘[p]ensions and other similar payments, and annuities, arising in a Contracting State and paid to a resident of the other Contracting State, may be taxed in the first-mentioned State.’

Germany’s right to tax former German residents under the new DTC is not restricted, and therefore it does not affect the German tax liability of SA residents retired from Germany. If the phrase, ‘if they are taxed’ in the new DTC is given the same meaning as the ‘subject to tax’ requirement in the 1973 DTC, Germany will not grant an exemption in terms of the method Art. 22(3) of the new DTC to avoid double taxation, if the pension income was not in fact taxed in SA.

The inclusion of a ‘subject to tax’ clause in SA’s domestic income tax legislation and the application of the new 2008 SA-Germany DTC results in an annuity benefit arising from a pension commitment that was made before 1 January 2005 and after 31 December 2004 being solely subject to tax in Germany as their right to tax is not restricted in terms of the SA-Germany DTC. SA will have to grant the exemption in terms of section 10(1)(gC) in the case of both types of annuities to mitigate double taxation. Additionally, a lump sum benefit arising from a pension commitment that was made after 31 December 2004 is solely subject to tax in Germany, whereas a lump sum benefit arising from a pension commitment that was made before 1 January 2005, will still result in double non-taxation as neither SA or Germany levies tax under their respective domestic laws. In the case of SA, the lump sum falls outside the scope of gross income for SA in terms of ITA-SA, and therefore tax is not levied thereon.

Type of foreign pension benefit	SA Income Tax Consequences	German Income Tax Consequences refer to for non-residents	The allocation of taxing rights in terms of Article 17 of the SA-Germany DTC (in force 1973)	Overall Income Tax Consequences after applying the SA-Germany DTC
<p>1. Annuity (Leibrenten) (If the pension commitment was made before 1 January 2005)</p>	<p>A foreign annuity is exempt from tax in SA in accordance with SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA provided that tax is levied on foreign annuity amounts (i.e. not exempt) in the Germany in accordance with the 'subject to tax' clause. Germany levies taxes on foreign annuities, but there right to levy tax is restricted in terms of the SA-Germany DTC unless SA doesn't exercise its right to tax, Germany may levy tax due to a 'subject to tax' clause contained in the SA-Germany DTC. SARS will probably take an aggressive approach to protect SA's tax base and not grant the exemption in terms of section 10(1)(gC) of the ITA-SA. SARS will use its discretion to levy tax on the foreign pension annuity by arguing that due to the inclusion of a domestic 'subject to tax' clause as part of the exemption in terms of section 10(1)(gC) of the ITA-SA it allows SARS to levy tax because Germany's right to levy tax is restricted in terms of the SA-Germany DTC and only if SA decides not to exercise this right may Germany tax in terms of regress proviso. Therefore, the foreign annuity is taxable in South Africa, as SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA would not apply.</p>	<p>A foreign annuity benefit (including living annuity) are deemed to be 'other income' under category 7 of §2(1) of EStG and are taxable at the individual's marginal tax rate. The proportion of the annuity payment which does not represent a repayment of capital in accordance with § 22 nr.5 EStG is the amount subject to tax under category 7 of §2(1) of EStG.²⁴⁶ A life annuity only the profit share portion ('Ertragsanteil') is the amount subject to tax in accordance with § 22 nr. 1, clause 3 of the EStG.</p>	<p>A German annuity benefit falls within the scope of Art. 16(1) as a 'pension'. Art. 16(1) grants exclusive taxing rights to the resident country (SA) unless the subject matter is not subject to tax in SA (i.e. exempt) then Germany may levy thereon.</p>	<p>Single taxation arises in SA. SARS will use its discretion to levy tax on the foreign pension annuity by arguing that due to the inclusion of a domestic 'subject to tax' clause as part of the foreign pension exemption in terms of section 10(1)(gC) of the ITA-SA, it allows SARS to levy tax because Germany's right to levy tax is restricted in terms of the SA-Germany DTC.</p>

²⁴⁶ The annuity is full taxable provided the premiums paid by the employer were tax exempt. However, if contributions were taxed at a flat rate of 20%, the contributions are not taken into account in the determination of income for assessment purposes. The flat-rate levy satisfies the tax liability of the taxpayer (sections 40(3) and 40a(5) of the EStG).

<p>2. Lump-sum (Kapitalabfindung) (If the pension commitment was made before 1 January 2005)</p>	<p>A foreign lump sum receipt or accrual is capital in nature and excluded from the general definition of gross income in terms of section 1 of ITA-SA. Paragraph (e) of the definition of gross income in terms of section 1 of ITA-SA overrides the exclusion of capital amounts with the special inclusion of retirement lump sums arising from a pension fund as defined in terms of section 1 of ITA-SA. However, the special inclusion of paragraph(e) of the gross income definition in terms of section 1 of ITA-SA will not apply, as a foreign pension fund not established under SA law (registered under the Pension Fund Act), but incorporated under foreign laws in another country, does not qualify as a pension fund as defined in section 1 of ITA-SA which is a requirement for inclusion. Any lump sum benefit from a foreign pension fund situated outside the Republic is also exempt from capital gains tax in accordance with paragraph 54 of the Eighth Schedule of ITA-SA. Therefore, the full amount is not taxed in SA.</p>	<p>The foreign lump sum benefit is tax-exempted, provided the additional requirements are met (§20 (1) nr.6 in terms of the old EStG and § 9a clause 1 nr.3 EStG).</p>	<p>A German lump-sum benefit falls within the scope of Art. 16(1) as ‘other similar remuneration’. Art. 16(1) grants exclusive taxing rights to the resident country (SA) unless the subject matter is not subject to tax in SA (i.e. exempt) then Germany may levy thereon.</p>	<p>Double non-taxation, as SA is granted exclusive taxing rights in terms of the SA-Germany DTC, but no tax is levied as lump sum fall outside the scope of gross income in terms of ITA-SA. However, due to the ‘subject to tax’ clause in the SA-Germany DTC, Germany may levy a tax, but no tax is levied thereon under its domestic legislation.</p>
<p>3. Annuity (Leibrenten) (If the pension commitment was made after 31 December 2004)</p>	<p>Refer to the table (D)(ii) to the tax consequences for an annuity (Leibrenten) benefit (#1), as the same tax consequences apply.</p>	<p>A foreign annuity benefit (including living annuity) are deemed to be ‘other income’ under category 7 of §2(1) of EStG and are taxable at the individual's marginal tax rate. The proportion of the annuity payment which does not represent a repayment of capital in accordance with § 22 nr.5 EStG is the amount subject to tax under category 7 of §2(1) of EStG.²⁴⁷</p>	<p>Refer to the table (D)(ii) to the allocation of taxing rights for an annuity (Leibrenten) benefit (#1), as the same allocation of taxing rights apply.</p>	<p>Single taxation arises in SA. Refer to the table (D)(ii) to the overall tax consequences for an annuity (Leibrenten) benefit (#1), as the same overall tax consequences apply.</p>

²⁴⁷ The annuity is full taxable provided the premiums paid by the employer were tax exempt.

<p>4. Lump-sum (Kapitalabfindung) (If the pension commitment was made after 31 December 2004)</p>	<p>Refer to table (D)(ii) to the tax consequences for a lump sum (Kapitalabfindung) benefit (#2), as the same tax consequences apply, regardless of a ‘subject to tax’ clause in SA’s unilateral exemption in terms of section 10(1)(gC) of ITA-SA, the foreign lump sum is not taxable in South Africa, as it falls outside the scope of gross income.</p>	<p>A foreign lump sum benefit is deemed to be income under Category 5 of the EStG and taxed at a final flat rate withholding tax of 25% in accordance with sections 20, 32d and 43(5) of the EStG²⁴⁸.</p>	<p>Refer to the table (D)(ii) for the allocation of taxing rights for lump sum (Kapitalabfindung) benefit (#2), as the same allocation of taxing rights apply.</p>	<p>Single taxation arises in Germany. SA is granted exclusive taxing rights in terms of the SA-Germany DTC, but no tax is levied as lump sum fall outside the scope of gross income in terms of ITA-SA. However, due to the ‘subject to tax’ clause in the SA-Germany DTC, Germany may levy a tax thereon as SA does not exercise its right to tax. Therefore, Germany will levy tax thereon under its domestic legislation and in accordance with the DTC.</p>
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²⁴⁸ However, if the final flat withholding tax exceeds the individual’s marginal income tax rate, the individual may opt for an assessment. Taxpayers can apply to have the individual income tax rate applied if that is more advantageous for them. In that case, the applicable tax rate is the marginal income tax rate up to 25% (section 32d(4) of the EStG).

iii) German Case Study 1: Scenario B.2 - 'Exemption threshold'

(Applicable to Direct Insurance (Direktversicherung), Pension Fund (Pensionsfonds) and Pension Pool (Pensionskasse)).

The inclusion of an exemption threshold in SA's domestic tax legislation and the application of the new 2008 SA-Germany DTC results in an annuity benefit arising from a pension commitment that was made before 1 January 2005 and after 31 December 2004 being partially exempt in SA up to the threshold stipulated in terms of section 10(1)(gC) of the ITA-SA. SA will only levy a tax on the residual benefit exceeding the threshold in terms of section 10(1)(gC) of the ITA-SA. However, as Germany's right to levy tax is not restricted, Germany may levy a tax on the entire amount of both types of annuity benefits. Section 6*quat*(1)(a) of the ITA-SA refers to 'income' (i.e. gross income less exemptions) received or accrued, the residual benefit exceeding the threshold will be 'income' that qualifies for unilateral relief. Furthermore, under the treaty relief in terms of the new 2008 SA-Germany DTC, Art. 22(2), states;

'In the case of a resident of South Africa, subject to the provisions of the law of South Africa regarding the deduction from tax payable in South Africa of tax payable in any country other than South Africa (which shall not affect the general principle hereof), German tax paid by residents of South Africa in respect of income taxable in the Federal Republic of Germany, in accordance with the provisions of this Agreement, shall be deducted from the taxes due according to South African fiscal law. Such deduction shall not, however, exceed an amount which bears to the total South African tax payable the same ratio as the income concerned bears to the total income.'

In terms of the wording of the SA-Germany DTC, there will be 'taxes due' in SA on the residual benefit. The term 'income' in the phrase 'the income concerned' will be defined in terms of SA income tax legislation and guidance from SA case law at the time of application of the SA-Germany DTC. Therefore, the limitation will apply to 'the income concerned' will arguably be interpreted in terms of Art. 3(2) of the SA-Germany DTC. As a result, SA will have to grant relief in the form of a foreign tax credit rebate in terms of the SA-Germany DTC to mitigate double taxation from the tax levied on the residual benefit exceeding the threshold in terms of section 10(1)(gC) of the ITA-SA.

Additionally, a lump sum benefit arising from a pension commitment that was made after 31 December 2004 is solely subject to tax in Germany, whereas a lump sum benefit arising from a pension commitment that was made before 1 January 2005, will still result in double non-taxation as neither SA or Germany levies tax under their respective domestic laws. In the case of SA, the lump sum falls outside the scope of gross income for SA in terms of ITA-SA, and therefore tax is not levied thereon.

Type of foreign pension benefit	SA Income Tax Consequences	German Income Tax Consequences refer to for non-residents	The allocation of taxing rights in terms of Article 17 of the SA-Germany DTC (in force 1973)	Overall Income Tax Consequences after applying the SA-Germany DTC
<p>1. Annuity (Leibrenten) (If the pension commitment was made before 1 January 2005)</p>	<p>A foreign pension annuity will be included in gross income, but only partially exempt from tax in SA in accordance with SA's unilateral exemption in terms of section 10(1)(gC) of ITA-SA. The portion of the annuity benefit exceeding the exemption threshold under the section 10(1)(gC) of ITA-SA is taxed in South Africa; the balance is exempt.</p>	<p>A foreign annuity benefit (including living annuity) are deemed to be 'other income' under category 7 of §2(1) of EStG and are taxable at the individual's marginal tax rate. The proportion of the annuity payment which does not represent a repayment of capital in accordance with § 22 nr.5 EStG is the amount subject to tax under category 7 of §2(1) of EStG. A life annuity only the profit share portion ('Ertragsanteil') is the amount subject to tax in accordance with § 22 nr. 1, clause 3 of the EStG.been taxed at a flat rate of 20 percent.)</p>	<p>A German annuity benefit falls within the scope of Art. 16(1) as a 'pension'. Art. 16(1) grants exclusive taxing rights to the resident country (SA) unless the subject matter is not subject to tax in SA (i.e. exempt) then Germany may levy thereon.</p>	<p>Single taxation arises in SA and Germany. SA is granted exclusive taxing rights in terms of the SA-Germany DTC. However, SA does not levy a tax on the full amount of the foreign pension annuity, but only on the portion exceeding the exemption threshold. Germany levies taxes on foreign annuities, but there right to levy tax is restricted in terms of the SA-Germany DTC unless SA doesn't exercise its right to tax, Germany may levy tax due to a 'subject to tax' clause contained in the SA-Germany DTC. Therefore, due to the 'subject to tax' clause in the SA-Germany DTC, Germany may levy a tax on the portion of the foreign annuity that SA does not exercise its right to tax.</p>

<p>2. Lump-sum (Kapitalabfindung) (If the pension commitment was made before 1 January 2005)</p>	<p>A foreign lump sum receipt or accrual is capital in nature and excluded from the general definition of gross income in terms of section 1 of ITA-SA. Paragraph (e) of the definition of gross income in terms of section 1 of ITA-SA overrides the exclusion of capital amounts with the special inclusion of retirement lump sums arising from a pension fund as defined in terms of section 1 of ITA-SA. However, the special inclusion of paragraph(e) of the gross income definition in terms of section 1 of ITA-SA will not apply, as a foreign pension fund not established under SA law (registered under the Pension Fund Act), but incorporated under foreign laws in another country, does not qualify as a pension fund as defined in section 1 of ITA-SA which is a requirement for inclusion. Any lump sum benefit from a foreign pension fund situated outside the Republic is also exempt from capital gains tax in accordance with paragraph 54 of the Eighth Schedule of ITA-SA. Therefore, the full amount is not taxed in SA.</p>	<p>The foreign lump sum benefit is tax-exempted, provided the additional requirements are met (§20 (1) nr.6 in terms of the old EStG and § 9a clause 1 nr. 3 EStG).</p>	<p>A German lump-sum benefit falls within the scope of Art. 16(1) as ‘other similar remuneration’. Art. 16(1) grants exclusive taxing rights to the resident country (SA) unless the subject matter is not subject to tax in SA (i.e. exempt) then Germany may levy thereon.</p>	<p>Double non-taxation, as SA is granted exclusive taxing rights in terms of the SA-Germany DTC, but does not levy tax by granting a unilateral exemption. However, due to the ‘subject to tax’ clause in the SA-Germany DTC, Germany may levy a tax, but no tax is levied thereon under its domestic legislation.</p>
<p>3. Annuity (Leibrenten) (If the pension commitment was made after 31 December 2004)</p>	<p>Refer to the table (D)(iii) to the tax consequences for an annuity (Leibrenten) benefit (#1), as the same tax consequences apply.</p>	<p>A foreign annuity benefit (including living annuity) are deemed to be ‘other income’ under category 7 of §2(1) of EStG and are taxable at the individual's marginal tax rate. The proportion of the annuity payment which does not represent a repayment of capital in accordance with § 22 nr.5 EStG is the amount subject to tax under category 7 of §2(1) of EStG.²⁴⁹</p>	<p>Refer to the table (D)(iii) for the allocation of taxing rights for an annuity (Leibrenten) benefit (#1), as the same allocation of taxing rights apply.</p>	<p>Single taxation arises in SA and Germany. Refer to the table (D)(iii) to the tax consequences for an annuity (Leibrenten) benefit (#1), as the same overall tax consequences apply.</p>

²⁴⁹ The annuity is full taxable provided the premiums paid by the employer were tax exempt.

<p>4. Lump-sum (Kapitalabfindung) (If the pension commitment was made after 31 December 2004)</p>	<p>Refer to the table (D)(iii) to the tax consequences for a lump sum (Kapitalabfindung) benefit (#2), as the same tax consequences apply.</p>	<p>A foreign lump sum benefit is deemed to be income under Category 5 of the EStG and taxed at a final flat rate withholding tax of 25% in accordance with sections 20, 32d and 43(5) of the EStG²⁵⁰.</p>	<p>Refer to the table (D)(iii) for the allocation of taxing rights for lump sum (Kapitalabfindung) benefit (#2), as the same allocation of taxing rights apply.</p>	<p>SA is granted exclusive taxing rights in terms of the SA-Germany DTC, but no tax is levied as lump sum fall outside the scope of gross income. However, due to the 'subject to tax' clause in the SA-Germany DTC, Germany may levy a tax thereon as SA does not exercise its right to tax. Therefore, Germany will levy tax thereon under its domestic legislation and in accordance with the DTC.</p>
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²⁵⁰ However, if the final flat withholding tax exceeds the individual's marginal income tax rate, the individual may opt for an assessment. Taxpayers can apply to have the individual income tax rate applied if that is more advantageous for them. In that case, the applicable tax rate is the marginal income tax rate up to 25% (section 32d(4) of the EStG).

E) Case Study 1 Findings: SA/ UK

Based on the analysis of the existing and the proposed future reforms of SA's unilateral foreign pension exemption in terms of the ITA-SA, several findings arise in regard to the taxation of SA resident's UK pension.

i) Scenario A – Current South Africa Income Tax Legislation

Based on SA's current income tax legislation, double non-taxation arises in the following instances.

1. SA is granted exclusive taxing rights in regards to a UK pension annuity (see Chapter IV(C)(i)(1)) in terms of the SA-UK DTC. However, SA unilaterally exempts foreign pensions and UK's right to tax is restricted in terms of the SA-UK DTC.
2. Exclusive taxing rights are granted to SA in terms of a DTC in regard to a UK pension lump sum (see Chapter IV(C)(i)(2)), but SA does not levy income tax as a lump sum falls outside the scope of gross income and the UK's ability to levy tax is restricted in terms of the SA-UK DTC.

ii) Scenario B.1 - Proposed changes to South Africa Income Tax Legislation ('Subject to tax')

Based on proposed change to SA's income tax legislation with the inclusion of an 'subject to tax' clause under the foreign pension exemption, double non-taxation will arise but not in all instances, therefore the proposed reform partially prevents double non-taxation. Double non-taxation arises in the following instance.

1. A UK pension lump sum (see Chapter IV(C)(ii)(2)) will remain untaxed. The proposed change to SA's income tax legislation will not affect the fact a lump sum falls outside the scope of gross income for SA tax purposes and the UK's ability to levy tax is restricted.

However, the proposed change to SA's income tax legislation mitigates double non-taxation in the following instance.

2. A UK pension annuity (see Chapter IV(C)(ii)(1)) becomes subject to single taxation in SA as the UK's ability to levy tax is restricted.

**iii) Scenario B.2 - Proposed changes to South Africa Income Tax Legislation
(‘Exemption Threshold)**

Based on proposed change to SA's income tax legislation with the inclusion of an ‘exemption threshold’ under the foreign pension exemption, double non-taxation will arise but not in all instances, therefore the proposed reform partially prevents double non-taxation. Double non-taxation arises in the following instance.

1. A UK pension lump sum (see Chapter IV(C)(iii)(2)) will remain untaxed. The proposed change to SA's income tax legislation will not affect the fact a lump sum falls outside the scope of gross income for SA tax purposes and the UK's ability to levy tax is restricted.

However, the proposed change to SA's income tax legislation partially prevents double non-taxation in the following instance.

2. A UK pension annuity (see Chapter IV(C)(ii)(1)) becomes subject to single taxation in SA as the UK's ability to levy tax is restricted.

The only difference between current and proposed changes to SAs income tax legislation is the fact that SA does not levy a tax on the full amount of the UK pension annuity, but only on the portion exceeding the exemption threshold. Therefore, a significant portion of the UK pension annuity still remains untaxed, as the UK's ability to levy tax is restricted.

F) Case Study 2 Findings: South Africa / Germany.

Based on the analysis of the existing and the proposed future reforms of SA's unilateral foreign pension exemption in terms of the ITA-SA, several findings arise in regards to the taxation of SA resident's German pension.

i) Scenario A – Current South Africa Income Tax Legislation

Based on SA's current income tax legislation, double non-taxation arises in the following instances.

1. Exclusive taxing rights are granted to SA in terms of the existing 1973 SA-Germany DTC but the DTC contains an exception, a 'subject to tax' clause. The exception grants Germany the right to levy tax if the amount is not subject to tax in SA (i.e. exempt). However, in the case of a German pension lump sum benefit arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(i)(2)), a lump sum falls outside the scope of gross income for SA tax purposes and Germany's Tax Law exempts the latter amount.
2. In terms of the new 2008 SA-Germany DTC exclusive taxing rights are granted to neither SA or Germany. If the phrase, 'if they are taxed' in the new DTC is given the same meaning as the 'subject to tax' requirement in the 1973 SA-Germany DTC, Germany will not grant an exemption in terms of the method Art. 22(3) of the new SA-Germany DTC to avoid double taxation, if the pension income was not in fact taxed in SA. However, in the case of a German pension lump sum benefit arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(i)(2)), a lump sum falls outside the scope of gross income for SA tax purposes and Germany's Tax Law exempts the latter amount.

The 'subject to tax' clause in the 1973 SA-Germany DTC and if the phrase, 'if they are taxed' in the new 2008 SA-Germany DTC is given the same meaning as the 'subject to tax' requirement in the 1973 SA-Germany DTC, will prevent double non-taxation in the following instance.

3. A German pension annuity arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(i)(1)), a German pension annuity and lump sum benefit arising from a pension commitment that was made after 31 December 2004 (see Chapter IV(D)(i)(3) and (D)(i)(4) is subject to single taxation in Germany because of the 'subject to tax' clause in the SA-Germany DTCs (i.e. 1973 and 2008 DTCs).

It is therefore evident that a 'subject to tax' clause contained in a DTC prevents double non-taxation in the above scenarios. Specifically this will be when the resident country exempts the foreign pension, but the source country levies tax thereon under its domestic tax and is not restricted to do so because of the 'subject to tax' clause included in the DTC.

ii) Scenario B.1 - Proposed changes to South Africa Income Tax Legislation ('Subject to tax')

Based on proposed change to SA's income tax legislation with the inclusion of an 'subject to tax' clause under the foreign pension exemption, double non-taxation will still arise but not in all instances, therefore the proposed reform partially may meet its objective. Double non-taxation may yet arise in the following instance.

1. A German pension lump sum benefit arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(ii)(2)) under both the 1973 SA-Germany DTC and the new 2008 SA-Germany DTC will remain untaxed. The proposed change will not affect the fact that a lump sum falls outside the scope of gross income for SA tax purposes and Germany's Tax Law exempts the latter amount.

However, the inclusion of a domestic 'subject to tax' clause in SA's income tax legislation under the foreign pension exemption prevents double non-taxation in the following instances.

2. A German pension annuity arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(ii)(1)) and a German pension annuity benefit

arising from a pension commitment that was made after 31 December 2004 (see Chapter IV(D)(ii)(3) is subject to single taxation in South Africa regardless of the ‘subject to tax’ clause in the SA-Germany DTCs (i.e. 1973 and 2008 DTCs).

3. A German lump sum benefit arising from a pension commitment that was made after 31 December 2004 (see Chapter IV(D)(ii)(4) remains subject to single taxation in Germany because of the ‘subject to tax’ clause in the SA-Germany DTCs (i.e. 1973 and 2008 DTCs).

It is therefore evident that a ‘subject to tax’ clause under SA’ foreign pension exemption prevents double non-taxation as in the case of a ‘subject to tax’ clause under the SA-Germany DTCs (i.e. 1973 and 2008 DTCs) but the domestic ‘subject to tax’ clause operates on a reciprocal basis (i.e. single taxation arises in SA).

iii) Scenario B.2 - Proposed changes to South Africa Income Tax Legislation (‘Exemption Threshold)

Based on proposed change to SA’s income tax legislation with the inclusion of an ‘exemption threshold’ under the foreign pension exemption, double non-taxation will arise but not in all instances, therefore the proposed reform partially prevents double non-taxation. Double non-taxation arises in the following instance.

1. A German pension lump sum benefit arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(iii)(2)) under both the 1973 SA-Germany DTC and the new 2008 SA-Germany DTC will remain untaxed. The proposed change will not affect the fact that a lump sum falls outside the scope of gross income for SA tax purposes and Germany’s Tax Law exempts the latter amount.

However, the inclusion of an ‘exemption threshold’ in SA’s income tax legislation under the foreign pension exemption partially prevents double non-taxation in the following instances.

1. A German pension annuity arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(iii)(1)) and a German pension annuity benefit arising from a pension commitment that was made after 31 December 2004 (see

Chapter IV(D)(iii)(3) is subject to single taxation in South Africa but only on the portion exceeding the exemption threshold.

2. The portion of a pension benefit up to the exemption threshold in regards to a German pension annuity arising from a pension commitment that was made before 1 January 2005 (see Chapter IV(D)(iii)(1)) and a German pension annuity benefit arising from a pension commitment that was made after 31 December 2004 (see Chapter IV(D)(iii)(3) is subject to single taxation in Germany because of the ‘subject to tax’ clause in the SA-Germany DTCs (i.e. 1973 DTC). However, in the case of the new SA-Germany DTC (i.e. 2008 DTC), Germany’s right to levy tax is not restricted in terms of the DTC. Germany may levy a tax on the entire amount of both the latter German pension annuities. Section 6*quat*(1)(a) of the ITA-SA refers to ‘income’ (i.e. gross income less exemptions) received or accrued, the residual benefit exceeding the threshold will be ‘income’ that qualifies for unilateral relief.
3. A German lump sum benefit arising from a pension commitment that was made after 31 December 2004 (see Chapter IV(D)(i)(4) remains subject to single taxation in Germany because of the ‘subject to tax’ clause in the SA-Germany DTCs (i.e. 1973 and 2008 DTCs).

G) Concluding remarks in respect of the taxation issues affecting a South African resident’s UK pension or German pension based on Case Study 1 and 2

The analysis performed in this minor-dissertation illustrates that a domestic ‘subject to tax’ clause only mitigates double non-taxation if SA is allocated taxing rights in terms of a DTC and exercises its right to levy domestic tax in relation to an amount, regardless of whether the source country’s ability to levy tax may restricted in terms of a DTC or not.

On the other hand, an ‘exemption threshold’ will partially prevent double non-taxation where a source country does not exercise its right to levy domestic tax on foreign pensions regardless of whether the source country’s ability to levy tax may restricted in terms of a DTC or not.

If the source country is allocated taxing rights in terms of a DTC and exercises its right to levy domestic tax on foreign pensions; the SA resident will suffer taxation in both SA and the source country. The SA resident will suffer double taxation on the residual benefit exceeding the 'exemption threshold' in terms of the amended section 10(1)(gC) of the ITA-SA.

Therefore, SA will have to grant a section 6quat relief in the form of a foreign tax credit rebate for the foreign tax suffered in the source country by the SA resident, provided the requirements are met.

The 'exemption threshold' may increase SA's tax revenue collections provided the source country's right to levy domestic tax on foreign pensions is not exercised, or negligible tax is levied or the source country's right is restricted in terms of a DTC.

H) Other potential taxation issues affecting a South African resident's foreign pension

Other issues that should be considered but not highlighted in the above case studies is that fact that SA's reforms will not mitigate double non-taxation arising as a result of countries applying different tax treaty allocation rules because of characterising an amount differently under a DTC, thereby preventing the other from levying taxes on the same income.

A disadvantage of a 'subject to tax clause' under domestic legislation or a DTC that provides relief in the form of an exemption results in a disproportionate relief in comparison to the tax charged on the foreign pension. In other words, a taxpayer would still be entitled to an exemption relief for the full foreign pension amount, although negligible or no tax levied as a result of assessed losses in the source country.

Furthermore, SARS' endeavour of being at the forefront of African countries in implementing the MLI, BEPS recommendations and tackling issues of double non-taxation is admirable. However, in regards to both of the proposed future reforms, SARS will require significantly more technical resources in order to understand the complexity of the underlying foreign country's system of taxation in determining whether a foreign pension may be taxed or not, and when and how much double tax relief should be granted.²⁵¹

²⁵¹ See note 180, p. 734, s. 1.1.3, para. 1.

D) Concluding remarks in respect other potential taxation issues affecting a South African resident's foreign pension

Based on an analysis conducted for this paper of SA's seventy-eight DTCs in force, only seventy-six DTCs contain a pension article. Of the seventy-six DTCs containing a pension article, SA's taxing rights are allocated as follows:

- twenty-four DTCs grant SA the exclusive taxing rights. However, eleven of those DTCs include a 'subject to' exemptions (i.e. 'subject to tax' clause or 'included in taxable income' in the resident country) and one of those DTCs include a change in residency clause exception²⁵² and;
- fifty DTCs do not restrict the source country's right to levy tax²⁵³ but four of the source country's levy no personal income tax.²⁵⁴and;
- two DTCs grant the source country exclusive taxing rights.²⁵⁵

²⁵² The following SA DTCs grant SA exclusive taxing rights but with no exceptions are as follows: SA-Austria DTC (Art. 18(1)), SA-Belgium DTC (Art. 18(1)), SA-Bulgaria DTC (Art. 17(1)), SA-China (People's Rep.) DTC (Art. 18(1)), SA-Czech Republic DTC (Art. 18(1)), SA-Hungary DTC (Art. 18(1)), SA-Israel DTC (Art. 19(1)), SA-Italy DTC (Art. 18(1)), SA-New Zealand DTC (Art. 18(1)), SA-Spain DTC (Art. 18(1)), SA-United Kingdom DTC (Art. 18(1)) and SA-Russia DTC (Art. 17(1))

The following DTCs include a subject to being included in 'taxable income' of resident State exception: SA-Australia DTC (Art. 18(1)), SA-Poland DTC (Art. 18(1)), SA-Romania DTC (Art. 18(1)), SA-Taiwan DTC (Art. 18(1)), SA-Zambia DTC (Art. VII(1)), SA-Denmark DTC (Art. 18(1)). The following DTCs include a 'subject to tax' clause: SA-France DTC (Art. 18(1)), SA-Germany DTC (Art. 16(1)), SA-Grenada DTC (Art. XI(1)), SA-Namibia DTC (Art. 18(1)), SA-Sierra Leone DTC (Art. XI(1)). The following DTC includes a change in residency clause: Only twelve of the twenty-one DTCs that grant SA exclusive taxing rights make an explicit reference to an annuity.

²⁵³ The following SA DTCs do not restrict the source country's right to levy tax are as follows: SA-Algeria DTC (Art. 18(1)), SA-Belarus DTC (Art. 17(1)), SA-Botswana DTC (Art. 17(1)), SA-Brazil DTC (Art. 18(1)), SA-Canada DTC (Art. 18(1)), SA-Chile DTC (Art. 17(1)), SA-Congo (Dem. Rep.) DTC (Art. 17(1)), SA-Croatia DTC (Art. 18(1)), SA-Cyprus DTC (Art. 18(1)), SA-Egypt DTC (Art. 18(1)), SA-Ethiopia DTC (Art. 17(1)), SA-Ghana DTC (Art. 18(1)), SA-Greece DTC (Art. 18(1)), SA-India DTC (Art. 18(1)), SA-Indonesia DTC (Art. 18(1)), SA-Iran DTC (Art. 18(1)), SA-Ireland DTC (Art. 18(1)), SA-Kenya DTC (Art. 18(1)), SA-Korea (Rep.) DTC (Art. 18(1)), SA-Kuwait DTC (Art. 18(1)), SA-Lesotho DTC (Art. 17(1)), SA-Luxembourg DTC (Art. 18(1)), SA-Malaysia DTC (Art. 19(1)), SA-Malta DTC (Art. 18(1)), SA-Mauritius DTC (Art. 17(1)), SA-Mexico DTC (Art. 17(1)), SA-Mozambique DTC (Art. 17(1)), SA-Netherlands DTC (Art. 17(1)), SA-Nigeria DTC (Art. 18(1)), SA-Norway DTC (Art. 18(1)), SA-Oman DTC (Art. 17(1)), SA-Pakistan DTC (Art. 18(1)), SA-Qatar DTC (Art. 17(1)), SA-Rwanda DTC (Art. 18(1)), SA-Saudi Arabia DTC (Art. 18(1)), SA-Seychelles DTC (Art. 18(1)), SA-Singapore DTC (Art. 17(1)), SA-Slovak Republic DTC (Art. 17(1)), SA-Swaziland DTC (Art. 18(1)), SA-Sweden DTC (Art. 18(1)), SA-Switzerland DTC (Art. 18(1)), SA-Tanzania DTC (Art. 17(1)), SA-Thailand DTC (Art. 18(1)), SA-Tunisia DTC (Art. 18(1)), SA-Turkey DTC (Art. 18(1)), SA-Uganda DTC (Art. 19(1)), SA-Ukraine DTC (Art. 17(1)), SA-United Arab Emirates DTC (Art. 17(1)), SA-United States of America DTC (Art. 18(1)), SA-Zimbabwe DTC (Art. 18(1)) Only the SA-Chile DTC, SA-Switzerland DTC and the SA-USA DTC make no explicit reference to an annuity.

²⁵⁴ The respective countries that do not levy personal income tax, but may levy tax in terms of their DTC with SA are: Oman, Qatar, United Arab Emirates, Kuwait and Saudi Arabia.

²⁵⁵ The following SA DTCs grant exclusive source taxing rights are as follows: SA-Hong Kong DTC (Art. 17(1)) and SA-Finland DTC (Art. 18(1))

J) Recommendations in respect of the taxation issues affecting a South African resident's United Kingdom or German pension based on Case Study 1 and 2

Based on the analysis conducted for this paper, both the proposed future reforms may possibly increase SA's tax revenues, if a foreign pension arises from:

- one of the five countries within SA's DTC network where no exclusive taxing rights are granted to SA under the DTC but no personal income tax is levied²⁵⁶; or
- one of the twenty-four DTCs where SA has exclusive taxing rights; or
- one of the fifty DTCs that do not restrict the source country's right to levy tax provided the source country's personal income tax rates are less than South Africa's personal income tax rates applicable to a specific amount.

The 'exemption threshold' would partially prevent double non-taxation but would appear to be the more reasonable of the two proposed future reforms. The 'exemption threshold' method would not interfere with existing provisions contained within DTCs aimed at preventing double non-taxation such as a 'subject to tax' clause. Furthermore, the 'exemption threshold' method would be a more reasonable reform because the exemption method is less complex from an administrative perspective for SARS in potentially increasing tax revenues for SA. In addition, the 'exemption threshold' method would provide a relative amount of relief if the individual suffered tax under an advanced system of taxation²⁵⁷.

SA does not levy tax on foreign pension lump-sums because a foreign pension fund is not falling within the definition of 'pension fund' or 'provident fund' in terms of section 1 of the ITA-SA. SARS should retain the existing definition of a 'pension fund' or 'provident fund' because of the following reasons:

- lump sums benefits are generally accepted as capital amount do not constitute gross income for SA tax purposes, and
- SARS intended to exclude vetting of foreign pension funds and social security funds by introducing the section 10(1)(gC) foreign pension exemption because of the administrative complexities involved such as the need to become familiar with the

²⁵⁶ The respective countries that do not levy personal income tax, but may levy tax in terms of their DTC with SA are: Oman, Qatar, UAE, Kuwait and Saudi Arabia.

²⁵⁷ Advanced system of taxation, meaning that the full amount of pension contributions are not tax deductible and afterwards, the received earnings are exempt or taxed at a preferential tax rate.

general retirement laws of a foreign country and the difficult issue whether social security payments should be seen as part of retirement income or not.

K) Alternative recommendations

An alternative solution to preventing double non-taxation that has been suggested by academics is the implementation of an exit tax on pension benefits when a taxpayer decides to retire in another country. However, for the proposal of an exit levy, a few considerations arise. A proper classification in the case of exit taxes is unclear as to whether it constitutes a 'tax on income' or a 'tax on capital' or not, as it subjects the capital appreciation of assets, although they have not yet been alienated, to tax.²⁵⁸ The taxation of fictitious income is difficult to classify because tax may have characteristics of both a tax on income and a tax on capital.²⁵⁹ Paragraph 9 of the commentary on Art. 13 of the OECD Model considers such tax as a 'tax on income'. DTCs in force between countries that is not patterned on the OECD Model may exclude taxes on capital appreciation.²⁶⁰

A DTC may restrict the ability of source country to levy such an exit tax if the exit levy falls within the scope of a DTC as either a 'tax on income' or a 'tax on capital', making it ineffective in preventing double non-taxation. Alternatively, it may not fall within the scope of the DTC, and therefore it may be effective in preventing double non-taxation by levying a 'tax' in the source country. Due to the uncertainty as to how to classify an exit levy it may not be such an effective solution, as it may give rise to double taxation or double non-taxation.

²⁵⁸ See note 117, p. 39, s. 2.2.5.4, para. 2.

²⁵⁹ See note 117, p. 39, s. 2.2.5.4, para. 2.

²⁶⁰ See note 117, p. 39, s. 2.2.5.4, para. 2.

V) CONCLUSION

Under SA's current income tax legislation, SA's residents benefit from the unilateral foreign pension exemption in terms of section 10(1)(gC) of the ITA-SA which exempts foreign pension annuities and foreign pension lump sums. Regardless of the latter exemption, foreign pension lump sums fall outside the scope of SA's gross income for SA tax purposes, as a foreign pension fund does not meet the definition of a 'pension fund' in terms of SA's income tax legislation.

SA residents currently benefit from double non-taxation in the case of a UK pension annuity and UK pension lump sum. Double non-taxation arises because the SA-UK DTC restricts the UK's rights to levy tax and SA unilaterally exempts foreign pension annuities, whereas a lump sum falls outside the scope of gross income for SA tax purposes.

In respect of a SA resident's German pension benefits, SA residents previously benefited from double non-taxation in the case of a German pension annuity and German pension lump sum, until recently. A recent BFH decision in the IB68/14 case on the 13th October 2016 clarified the meaning of 'subject to tax' in order to resolve any ambiguity in the international tax community as to its meaning. The BFH decision impacts SA residents negatively, as their German pensions no longer benefit from double non-taxation if their German pension is not subject to 'actual taxation' (i.e. not exempt) in SA. However, effective taxation is not required and will not alter the presumption of 'actual taxation'.

As result of the BFH decision in IB68/14 case, Germany is currently entitled to levy tax on a SA resident's German pension because of the subject to tax' clause in the 1973 SA-Germany DTC and that German pensions are not subject to 'actual taxation' under SA's income tax legislation. Germany's right to tax former German residents under the new 2008 SA-Germany DTC is not restricted, and therefore it does not affect the German tax liability of SA residents. If the phrase, 'if they are taxed' in the new DTC is given the same meaning as the 'subject to tax' requirement in the 1973 DTC, Germany will not grant an exemption in terms of the method Art. 22(3) of the new DTC to avoid double taxation, if the pension income was not in fact taxed in SA.

In terms of the SA-Germany DTC of 1973 and the new 2008 DTC, Germany is entitled to exercise its right to levy tax on annuities arising from a pension commitment prior to 1 January 2005 and after 31 December 2004, and lump sums arising from a pension

commitment that was made after 1 December 2004. However, lump sums arising from a pension commitment prior to 1 January 2005 remain untaxed in Germany provided Germany's domestic exemption requirements are met.

The impact of the proposed future reforms under SA's unilateral foreign pension exemption on the cross-border income tax consequences of SA resident's UK or German pensions gives rise to completely different outcomes in regards to the taxation thereof, except in the case of lump sums.

In the case of a SA resident's UK pension annuity, the proposed future reforms would result in the UK annuity becoming taxable in SA. The proposed domestic 'subject to tax' clause reform would prevent double non-taxation, whereas the proposed 'exemption threshold' reform would only partially prevent double non-taxation, as only the residual amount exceeding the threshold would be taxable in SA.

In the case of a SA resident's German pension annuity arising from a pension commitment prior to 1 January 2005 and after 31 December 2004 will still be taxed either in Germany or SA, or both. However, it is evident that a 'subject to tax' clause under SA's foreign pension exemption prevents double non-taxation as in the case of a 'subject to tax' clause under the SA-Germany DTCs (i.e. 1973 and 2008 DTCs) but operates on a reciprocal basis. Therefore, the proposed domestic 'subject to tax' clause reform would prevent double non-taxation but the latter annuities will be taxed solely in SA instead of Germany. The proposed 'exemption threshold' reform would only partially prevent double non-taxation, as only the residual amount exceeding the threshold would be taxable in SA in respect of the latter annuities. The portion not exceeding the threshold would be taxable entirely in Germany because of the 'subject to tax' clause under the SA-Germany DTC of 1973.

However, in the case of the new SA-Germany DTC (i.e. 2008 DTC), Germany's right to levy tax is not restricted in terms of the DTC. Germany may levy a tax on the entire amount of both the latter annuities resulting in double taxation on the residual amount above the exemption threshold. Section 6quat(1)(a) of the ITA-SA refers to 'income' (i.e. gross income less exemptions) received or accrued, the residual benefit exceeding the threshold will be 'income' that qualifies for unilateral relief. The SA resident will suffer double taxation on the residual benefit exceeding the 'exemption threshold' in terms of the amended section 10(1)(gC) of the ITA-SA. Therefore, SA will have to grant a section 6quat relief in the form

of a foreign tax credit rebate for the German tax suffered by the SA resident, provided the requirements are met.

In the case of a SA resident's UK lump sum or German lump sum arising from a pension commitment prior to 1 January 2005, a SA resident will continue to benefit from double non-taxation under the proposed future reforms under both the 1973 and 2008 SA-Germany DTC. In the case of a SA resident's lump sum arising from a pension commitment after 31 December 2004 it will still be taxed in Germany under both the 1973 and 2008 SA-Germany DTC, regardless of the proposed future reforms.

Based on the analysis conducted for this paper, both the proposed future reforms may possibly increase SA's tax revenues, if a foreign pension arises from:

- one of the five countries within SA's DTC network where no exclusive taxing rights are granted to SA under the DTC but no personal income tax is levied²⁶¹; or
- one of the twenty-four DTCs where SA has exclusive taxing rights; or
- one of the fifty DTCs that do not restrict the source country's right to levy tax provided the source country's personal income tax rates are less than South Africa's personal income tax rates applicable to a specific amount.

The 'exemption threshold' would partially prevent double non-taxation but would appear to be the more reasonable of the two proposed future reforms. The 'exemption threshold' method would not interfere with existing provisions contained within DTCs aimed at preventing double non-taxation such as a 'subject to tax' clause. Furthermore, the 'exemption threshold' method would be a more reasonable reform because the exemption method is less complex from an administrative perspective for SARS in potentially increasing tax revenues for SA. In addition, the 'exemption threshold' method would provide a relative amount of relief if the individual suffered tax under an advanced system of taxation²⁶².

SA does not levy tax on foreign pension lump-sums because a foreign pension fund is not falling within the definition of 'pension fund' or 'provident fund' in terms of section 1 of the

²⁶¹ The respective countries that do not levy personal income tax, but may levy tax in terms of their DTC with SA are: Oman, Qatar, UAE, Kuwait and Saudi Arabia.

²⁶² Advanced system of taxation, meaning that the full amount of pension contributions are not tax deductible and afterwards, the received earnings are exempt or taxed at a preferential tax rate.

ITA-SA. SARS should retain the existing definition of a 'pension fund' or 'provident fund' because of the following reasons:

- lump sums benefits are generally accepted as capital amount do not constitute gross income for SA tax purposes, and
- SARS intended to exclude vetting of foreign pension funds and social security funds by introducing the section 10(1)(gC) foreign pension exemption because of the administrative complexities involved such as the need to become familiar with the general retirement laws of a foreign country and the difficult issue whether social security payments should be seen as part of retirement income or not.

VI) BIBLIOGRAPHY

South African Statutes:

- Constitution of 1996 of the Republic of South Africa
- Income Tax Act, No. 58 of 1962 of the Republic of South Africa
- Pension Funds Act, No. 24 of 1956
- Revenue Laws Amendment Act, No. 59 of 2000 of the Republic of South Africa
- Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000 [W.P. 2 – 2000]
- Taxation Laws Amendment Act, No. 3 of 2008 of the Republic of South Africa
- Taxation Laws Amendment Act, No. 17 of 2017 of the Republic of South Africa

Foreign Statutes:

- Einkommensteuergesetz (Income Tax Act) of 1934 of the Federal Republic of Germany
- Income Tax Earnings and Pensions Act 2003 of the United Kingdom
- Finance Act 2004 of the United Kingdom
- Taxation Amendment Act 2014 of the United Kingdom
- Income Tax Act 2007 of United Kingdom

South African Case Law:

- *City of Johannesburg v. Renzon and Sons (Pty) Ltd* (2010) (1) SA 206
- *Cohen v Commissioner for Inland Revenue* (1946), AD 174, 13 SATC 362
- *Commissioner for Inland Revenue v Delfos* (1933), AD 242, 6 SATC 92
- *Commissioner for Inland Revenue v Kuttel* (1992) (3) SA 242 (A), 54 SATC 298
- *Commissioner for Inland Revenue v Peoples Stores (Walvis Bay) (Pty) Ltd* (1990) (2) SA 353 (A), 52 SATC 9 21
- *Commissioner for the South African Revenue Services v Higgo* (2006), 68 SATC 278 (C)
- *SIR v Downing* (1975) (4) (SA 518(A), 37 SATC 249
- *COT v. Booyens Estate, Ltd.* (1918), AD576, 32 SATC 10
- *ITC 761* (1952), 19 SATC 103
- *Lategan v Commissioner for Inland Revenue* (1926) CPD 203, 2 SATC 16
- *Mooi v Commissioner for Inland Revenue* (1972) (1) SA 675 (A), 34 SATC 1
- *SIR v Watermeyer* (1965) (4) SA 431 (A), 27 SATC 117
- *South African Reserve Bank and Another v Shuttleworth and Another* (2015) (5) SA 146 (CC); (2016), 78 SATC 23
- *ITC 72* (1926), 3 SATC 61 (U)
- *ITC 147* (1929), 4 SATC 281(W)
- *Boyd v. CIR* (1951), 3 SA 525

Foreign Case Law:

- BFH decision of 13 October 2015 (I B 68/14), published as an NV decision on 10 February 2016
- *Paul Weiser v. HMRC* (2012) UKFTT 501 TC
- *Foley v. Fletcher* (1858) 157 ER 678
- *Union of India v. Azadi Bachao Andolan* (2003) 263 ITR 706
- *ADIT v. Green Emirate Shopping & Travels* (2005) 100 ITD 203 (Mum)
- *ITO v. Mahavirchand Mehta* (2011) 11 taxmann.com 194 (Mum)
- *Coltness Iron Co v Black* (1881) (6) App Cas 315

Other:

- de Koker and R. Williams, Chapter 4: Special Inclusions, *Silke on South African Income Tax*, (South Africa 2017).
- A. de Koker and R. Williams, Chapter 5: Residence and source, *Silke on South African Income Tax*, (South Africa 2017).
- A. Rust, Chapter 9: Germany, *Tax Treaties and Domestic Law*, vol. 2, (The Netherlands 2006).
- A. Rust, Article 23 – Exemption Method/Credit Method, In A. Rust and E. Reimer (eds.), *Klaus Vogel on Double Taxation Conventions*, 4th ed., vol. 2, (The Netherlands 2015).
- A. W. Oguttu, Ensuring a right balance in applying the residence and source bases of taxation, In J. Hattingh, J. Roeleveld and C. West (eds.), *Income Tax in South Africa: The First 100 Years (1914 - 2014)*, (South Africa 2016).
- B. Wiberg, Will We See a Change in Tax Treaties between European Countries Concerning Taxation of Occupational Pensions, *European Taxation*, vol. 52, (The Netherlands 2012).
- C. S. Margo, Chapter 8: Retirement Fund Taxation, In *Report of the Commission of Inquiry Into the Tax Structure of the Republic of South Africa*, (South Africa 1987).
- C. West, Status Quo of South African Tax Treaty Policy *International Taxation in China*, (2016).
- D. Geral, Incorporation and registration of funds-Different types of funds, *Black Lawyers Association and Pension Lawyers Association* (South Africa 2005).
- D. Meyerowitz, In *Meyerowitz on Income Tax (2007 – 2008)*, (South Africa 2008).
- E. Burgstaller and M. Schilcher, Subject-to-Tax Clauses in Tax Treaties – Austria, *European Taxation*, vol. 44, (The Netherlands 2004).
- E. Mazansky, South Africa Changes to a Worldwide Tax System, *Bulletin for International Taxation*, vol. 55, No. 1, (The Netherlands 2001).
- F. Molina, DTCs and Double Non-Taxation, In D. Blum and M. Seiler (eds.), *Preventing Treaty Abuse*, 1st ed., vol. 101, (Austria 2016).
- G. Loutzenhiser, Pensions, In *Tiley's Revenue Law*, 8th ed., (United Kingdom 2016).
- HMRC, Employment Income Manual 74007, *HMRC Internal Manual - A guide to the Income Tax (Earnings and Pensions) Act 2003.*, (United Kingdom 2016).

- HMRC, Employment Income Manual 74014, *HMRC Internal Manual - A guide to the Income Tax (Earnings and Pensions) Act 2003.*, (United Kingdom 2016).
- HMRC, Employment Income Manual 026000 *HMRC Internal Manual - A guide to the Income Tax (Earnings and Pensions) Act 2003.*, (United Kingdom 2016).
- I. Roxan, Chapter 12: United Kingdom, *Tax Treaties and Domestic Law*, vol. 2, (The Netherlands 2006).
- J. Hattingh and C. West, South Africa, *Cashiers de droit fiscal international 2016 Madrid Congress -The notion of tax and the elimination of international double taxation or double non-taxation*, vol. 101b, (The Netherlands 2016).
- J. Hattingh, South Africa, *Cashiers de droit fiscal international 2011 Paris Congress- Key practical issues to eliminate double taxation of business income*, vol. 96b, (The Netherlands 2011).
- J. Hattingh, T. Hageman and C. Kahlenberg, South Africa - Recent Developments Regarding the Taxation of Pensions under Tax Treaties from a German and a South African Perspective' *Bulletin for International Taxation*, vol. 71, No.1, (The Netherlands 2016).
- J. Hattingh, The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?, *Bulletin for International Taxation*, vol. 71, No. 3/4, (The Netherlands 2017).
- K. Godden, *Pension Funds, Provident Funds and Retirement Annuities-Defining Them and Their Tax Implications*, (South Africa 2010).
- K. Holmes, Illusionary Gains, In *The Concept of Income - A Multi-Disciplinary Analysis*, vol. 1, (The Netherlands 2001).
- K. Holmes, Chapter 17: Personal Services, *International Tax Policy and Double Tax Treaties – An Introduction to Principles and Application*, 2nd ed., (The Netherlands 2014).
- K. Holmes, Chapter 18: Other Distributive Rules, *International Tax Policy and Double Tax Treaties – An Introduction to Principles and Application*, 2nd ed., (The Netherlands 2014).
- L. Olivier and M. Honiball, Income from employment and other professional and related income, In *International tax: A South African Perspective 2008*, 4th ed., (South Africa 2008).
- Maßgebender Zeitpunkt - Vor Art. 6-22', In K. Vogel and M. E. Lehner (eds.), *Doppelbesteuerungsabkommen*, (Germany 2008).
- M. Helminen, General Report, *Cashiers de droit fiscal international 2016 Madrid Congress -The notion of tax and the elimination of international double taxation or double non-taxation*, vol. 101b, (The Netherlands 2016).
- M. Lang, Chapter 9: Income from Employment, *Introduction to the Law of Double Taxation Conventions*, 2nd ed., (The Netherlands 2013).
- National Treasury Republic of South Africa, Budget Review 2016, (South Africa 2016).
- OECD, Commentaries, *Model Tax Convention on Income and on Capital 2014*, (The Netherlands 2015).
- OECD, Pension fund classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005).

- OECD, Pension Glossary, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005).
- OECD, Methodology Used to Develop the Classification, *Private Pensions OECD Classification and Glossary*, (The Netherlands 2005).
- OECD, *Model Tax Convention on Income and on Capital 2014*, (The Netherlands 2015).
- OECD, *Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting*, (The Netherlands 2016).
- R. Carvalho, I. Daniels, Dewar, M. and W. Sahabodien, Is There Evidence of Increasing Harmonization in the Interpretation of Tax Treaties by Courts in Their Reference to Foreign Court Decisions? A Study of South African Case Law' *Bulletin for International Taxation*, vol. 71, No. 10, (The Netherlands 2017).
- R. Ismer, Article 18: Pensions, In A. Rust and E. Reimer (eds.), *Klaus Vogel on Double Taxation Conventions*, 4th ed., vol. 2, (The Netherlands 2015).
- UN, *Model Double Taxation Convention between Developed and Developing Countries*, (New York 2011).
- UN, *Vienna Convention on the law of treaties*, (Austria 1969), p. 12, s. 3, Art.31(1) and Art.31(2)
- C. Bobbett and J. F. Avery Jones, Treaty Issues related to the Treatment of Cross-Border Pension Contributions and Benefits, *Bulletin for International Taxation*, vol. 58, No.1, (The Netherlands 2004), pp. 1-13.

VII) APPENDIX A: OVERVIEW OF THE TAX LEGISLATION OF THE SELECTED COUNTRIES UNDER REVIEW

GERMANY

Tax on Private Pension Funds - Contributions (pre-tax)

Description of Retirement Fund	Retirement Age (Official)	Contributions (pre - tax)	Tax Deductibility of Contributions
Direct Insurance (Direktversicherung)	Age 67 (birth years 1947 and younger), subject to exceptions (refer to below)	Voluntary employer contributions (deemed as part of employee contributions) (fringe benefit - subject to an exemption) and voluntary employee salary sacrifice contributions (deemed part of employer contributions). Salary sacrifice plus employer contributions within the exemption limitations is the total pre-tax contributions.	Employer contributions (including salary sacrifice contributions) deductible as a company expense (§4(e) of EStG), however non-deductible for the employee (only in respect of pre-tax) but a deferral of taxation for the employee in relation to the employer contributions.
Pension Fund (Pensionsfonds)	Age 67 (birth years 1947 and younger), subject to exceptions (refer to below)		
Pension Pool (Pensionskasse)	Age 67 (birth years 1947 and younger), subject to exceptions (refer to below)		
Source of Information:	<ul style="list-style-type: none"> • https://www.issa.int/en/country-details?countryId=DE&regionId=EUR&filtered=false; http://www.gesetze-im-internet.de/estg/BJNR010050934.html; • <i>Perdelwitz, Germany - Individual Taxation sec. 3., Country Analyses IBFD (accessed 27 Mar. 2017), https://online-ibfd-org.ezproxy.uct.ac.za/document/ita_de_s_3.;</i> • <i>A. Perdelwitz, Germany - Individual Taxation sec. 1., Country Analyses IBFD (accessed 27 Mar. 2017), [https://online-ibfd-org.ezproxy.uct.ac.za/document/ita_de_s_1.];</i> • https://www.oecd.org/daf/fin/private-pensions/tax-treatment-pensions-country-profiles.pdf 		

Description of Retirement Fund	Limitations on Contributions
Direct Insurance (Direktversicherung)	Total pre-tax employer contributions of the employer, exceeding the tax exemption are taxed at the marginal tax rate. Contributions of the employer from the first employment relationship to a Pensionsfonds, a Pensionskasse or a Direktversicherung scheme for the establishment of a funded occupational pension scheme in the form of an annuity are exempt from tax up to 4% of the annual social security ceiling of EUR 76,200 (former West Germany) and EUR 68,400) in 2017 plus EUR 1,800 (for contracts concluded after 31 December 2004) (§3 of EStG, paragraph 63). Pension commitments under contracts concluded before 1 January 2005, the total annual contributions (including employer contributions) up to EUR 1,752 are taxed at a flat final withholding tax rate of 20 percent if this rate is more beneficial than the employee's marginal income tax rate (only applicable to Direktversicherung and Pensionskasse)
Pension Fund (Pensionsfonds)	
Pension Pool (Pensionskasse)	
Source of Information:	<ul style="list-style-type: none"> • https://www.issa.int/en/country-details?countryId=DE&regionId=EUR&filtered=false;http://www.gesetze-im-internet.de/estg/BJNR010050934.html • Perdelwitz, Germany - Individual Taxation sec. 3., Country Analyses IBFD (accessed 27 Mar. 2017), https://online-ibfd-org.ezproxy.uct.ac.za/document/ita_de_s_3. • A. Perdelwitz, Germany - Individual Taxation sec. 1., Country Analyses IBFD (accessed 27 Mar. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/ita_de_s_1.] • https://www.oecd.org/daf/fin/private-pensions/tax-treatment-pensions-country-profiles.pdf

Tax on Private Pension Funds - Accessing of Contribution Benefits

<p>If the individual was born before 1 January 1955 and agreed with his/her employer before 1 January 2007 the retirement age under the pension fund or pension insurance contract agreement, the individual can continue to the regular retirement age at the age of 65 for reasons of trust. Furthermore, if the individual is a woman born before 1952, the retirement age is decreased to 60. However, the individual must have met the following requirements; 15 years as a member under the insurance agreement and following the individual's 40th year, has already contributed more than 10 years of compulsory contributions.</p>	
Source of Information:	<ul style="list-style-type: none"> • http://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/2_Rente_Reha/01_Rente/01_allgemeines/03_rentenarten_und_leistungen/01_die_regelaltersgrenze_node.html • http://www.deutsche-rentenversicherung.de/Allgemein/de/Navigation/2_Rente_Reha/01_Rente/01_allgemeines/02_freiwillige_versicherung/00_freiwillige_versicherung_node.html

Tax on Private Pension Funds - Benefits arising from pre-tax Contributions

<p>Resident of Germany</p> <p>Residents are liable to income tax on their worldwide income. Non-residents are generally liable to this tax on certain German-sourced income, including pension benefits. Resident individuals are subject to income tax on their worldwide income falling under one or several of the following categories under section 2 of the EStG):</p> <p>§2(1) Subject to income tax:</p> <ol style="list-style-type: none"> 1. income from agriculture and forestry; 2. income from a trade or business;

	<p>3. income from independent professional services;</p> <p>4. income from employment, including compensation from past employment;</p> <p>5. income from capital investment;</p> <p>6. rental income from immovable property and certain tangible movable property and income from royalties; and</p> <p>7. other income (gains from private transactions, alimony, annuities, etc.).</p>
Source of Information:	<ul style="list-style-type: none"> • https://www.gesetze-im-internet.de/estg/BJNR010050934.html; A. Perdelwitz, Germany - Individual Taxation sec. 1., Country Surveys IBFD (accessed 28 Mar. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_de_s_1.]

Non- Resident of Germany	
<p>Non-residents, irrespective of their nationality, may elect to be deemed residents for German income tax purposes if at least 90% of their worldwide income is subject to German taxation or if their income not subject to German taxation does not exceed EUR 8,820 (EUR 8,652 before 1 January 2017) (section 1(3) of the EStG). Income from German sources which under a tax treaty is either not taxed in Germany or is taxed only at a limited rate (e.g. dividend, interest and royalties) is income not subject to German taxation in determining the 90% or EUR 8,820 limit. Deemed residents are, in principle, treated in the same manner as residents, irrespective of the income category.</p>	
Source of Information:	<ul style="list-style-type: none"> • https://www.gesetze-im-internet.de/estg/BJNR010050934.html; A. Perdelwitz, Germany - Individual Taxation sec. 1., Country Surveys IBFD (accessed 28 Mar. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_de_s_1.]

Additional Information (Applicable to both Pension fund and Pension Fund (Direct Insurance))	
<p>Investment income from Direct insurance, Pensionskasse and Pensionsfonds investment income is tax exempt. There is no ceiling on the lifetime value of private pension funds. No tax applies on the accumulation of funds. However, the benefit payments are taxable to the extent that the employer contributions included as a fringe benefit were exempt from taxable income.</p>	
Benefits - Employee or Institution's hands?	
<p>Pension payments are subject to tax in the hands of the employee.</p>	
Source of Information:	<ul style="list-style-type: none"> • Perdelwitz, Germany - Individual Taxation sec. 1., Country Surveys IBFD (accessed 28 Mar. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_de_s_1.]; • https://www.issa.int/en/country-details?countryId=DE&regionId=EUR&filtered=false; https://www.oecd.org/daf/fin/private-pensions/tax-treatment-pensions-country-profiles.pdf

Tax on Private Pension Funds - Tax on benefits arising from pre-tax Contributions

Type of Withdrawal	Tax Rate	Tax Consequences
<p>Annuity (Leibrenten) (If the pension commitment was made before 1 January 2005)</p>	<p>Fully taxable (<i>if the premiums paid by the employer were tax exempt as discussed above</i>) at the individual's marginal income tax (<i>Only the part of benefits financed by interest on the contributions made is taxed in the case of direct insurance and pension institutions where contributions up to an amount of EUR 1,752 may apply, have been taxed at a flat rate of 20 percent.</i>)</p>	<p>Annuities deemed to be 'other income' under category 7 of §2(1) of EStG. The proportion of the annuity payment which does not represent a repayment of capital is fully taxable as income according to § 22 nr. 5 EStG. However, contributions which are taxed at a flat rate of 20% is not taken into account in the determination of income for assessment purposes. The flat-rate levy satisfies the tax liability of the taxpayer (sections 40(3) and 40a(5) of the EStG).</p> <p>For life annuities, income is computed as the excess of each payment over the proportionate share of the invested capital spread over the life expectancy of the annuitant. The income, (i.e. the excess) is fixed as a percentage of the payments, which depends on the age of the recipient when he first received pension payments. Only the profit share is taxable ('Ertragsanteil') according to § 22 nr. 1, clause 3 of the EStG, e.g. 74% for 2017.</p>
<p>Lump-sum (Kapitalabfindung) (If the pension commitment was made before 1 January 2005)</p>	<p>Exempt, if additional requirements are met.</p>	<p>Lump sum payment may be tax-exempted if additional requirements are met (§20 (1) nr. 6 in terms of the old EStG and § 9a clause 1 nr. 3 EStG).</p>
<p>Annuity (Leibrenten) (If the pension commitment was made after 31 December 2004)</p>	<p>Fully taxed at the individual's marginal income tax rate (<i>if the premiums paid by the employer were tax exempt as discussed above</i>)</p>	<p>Annuities deemed to be 'other income' under category 7 of §2(1) of EStG. The proportion of the annuity payment which does not represent a repayment of capital is fully taxable as income according to § 22 nr. 5 EStG.</p>
<p>Lump-sum (Kapitalabfindung) (If the pension commitment was made after 31 December 2004)</p>	<p>Fully taxed (<i>Final flat withholding tax (sections 20, 32d and 43(5) of the EStG).</i>)</p>	<p>The taxable amount should be the difference of lump-sum payment less contributions paid (as no tax-exemption according to § 3 nr. 63 EStG should be applicable in case of lump-sum payments in the distribution phase). All income from private capital investment under Category 5 is taxed separately by way of a final flat withholding tax at a rate of 25%. However, if the final flat withholding tax exceeds the individual's marginal</p>

		income tax rate, the individual may opt for an assessment. taxpayers can apply to have the individual income tax rate applied if that is more advantageous for them. In that case, the applicable tax rate is the marginal income tax rate up to 25% (section 32d(4) of the EStG).
Source of information:	<ul style="list-style-type: none"> Perdelwitz, Germany - Individual Taxation sec. 1., Country Surveys IBFD (accessed 28 Mar. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_de_s_1.]; https://www.issa.int/en/country-details?countryId=DE&regionId=EUR&filtered=false; https://www.gesetze-im-internet.de/estg/ 	

Personal Income Tax Rates of Residents

Individual income tax is imposed at progressive rates under complex tables (section 32a of the [EStG](#)). Abbreviated tables are presented below (for 2017).

Tax table for single taxpayers

Annual taxable income (EUR)			Marginal rate (%)			Tax payable (EUR)		
Up to		8,820	0			0		
8,821	–	13,769	14.00	–	23.97	0	–	940
13,770	–	54,057	23.97	–	42	940	–	14,229
54,058	–	256,303	42			14,229	–	99,172
Over		256,303	45			99,172		

Source of Information: A. Perdelwitz, Germany - Individual Taxation sec. 1., Country Analyses IBFD (accessed 30 June 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/ita_de_s_1.]

Personal Income Tax Rates of Non- Residents

Non-residents are subject to German income tax in respect of German-sourced income in terms of sections 1 and 49-50a of the EStG, unless a double taxation convention applies, limiting this rule. Additionally, a German national who emigrates to a foreign country remains subject to an extended tax liability in terms of section 2 of the Foreign Tax Law (AStG), provided that for 10 years from his departure, such national:

- has been subject to unlimited German taxation for at least 5 of the 10 years preceding his departure;
- has moved to a country which imposes no or low taxes on income (this is assumed if the income tax imposed is more than one third lower than it would be in Germany for a single person with an annual income of EUR 77,000 or if the individual is subject to a preferential taxation which diminishes his tax burden considerably in comparison to other taxpayers in that particular country); and
- has retained essential economic ties with Germany. Essential economic ties with Germany are presumed if, inter alia:
 - he holds a substantial shareholding in a German resident company;
 - he receives income from Germany which exceeds either 30% of his worldwide income or EUR 62,000; or
 - his assets, the profits of which would be subject to unlimited German taxation if he were a resident taxpayer, exceed 30% of his total assets or exceed EUR 154,000.

Source of Information: A. Perdelwitz, Germany - Individual Taxation sec. 1., Country Analyses IBFD (accessed 30 June 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/ita_de_s_1.]

UNITED KINGDOM

Tax on Private Pension Funds - Contributions (pre-tax)

Description of Retirement Fund	Retirement Age (Official)	Contributions (pre - tax)	Tax Deductibility of Contributions
Pension Fund	Age 65 subject to exceptions (refer to below)	Employer contributions and employee voluntary savings sacrifice contributions (deemed as part of employer contributions). Salary sacrifice plus employer contributions are the total pre-tax contributions within the exception limitations. (Not a fringe benefit)	Employer contributions (including salary sacrifice contributions) deductible as a company expense, however non-deductible for the employee (only in respect of pre-tax), but a deferral of taxation for the employee in relation to the total employer contributions.
Pension Fund (Direct Insurance)	Age 65 subject to exceptions (refer to below)		
Source of Information:		<ul style="list-style-type: none"> • https://www.issa.int/en/country-details?countryId=GB&regionId=EUR&filtered=false; Z.G. Kronbergs, United Kingdom - Individual Taxation sec. 1., Country Surveys IBFD (accessed 4 Apr. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_uk_s_1.]; • https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim42775; https://www.gov.uk/guidance/pension-schemes-work-out-your-tapered-annual-allowance#work-out-your-adjusted-income; https://www.gov.uk/tax-on-your-private-pension/annual-allowance 	

Description of Retirement Fund	Limitations on Contributions
Pension Fund	Total pre-tax contributions of the employer, exceeding the tax exemption are taxed at the individual's marginal tax rate. Employer contributions are tax-exempt up to an annual allowance of £40,000 (both employer and employee contributions are counted). Total pension contributions (employee and employer) in excess of the annual allowance are taxed at a rate that is tailored to recoup the full individual's marginal rate income tax relief that a member benefited from instead of the current fixed rate. An individual may bring forward any unused annual allowance from the 3 tax years before the relevant tax year. However, where there has been a tapered reduction in the annual allowance, the unused allowance to be carried forward will be determined based on the unused tapered annual allowance. For the 2016 to 2017 tax year (and onwards), the individual will have a reduced ('tapered') annual allowance if the individual's 'adjusted income' (the individual's net income plus the employer's contributions -including salary sacrifice contributions) is over £150,000 and the individual's 'threshold income' (individual's net income less the gross amount of your pension contributions, where tax relief has been given to at the source and add any reduction of employment income for pension provision through salary sacrifice arrangements set up after 8 July 2015 for that year) is above £110,000. The annual allowance in the same year will be reduced. For every £2, the individual's 'adjusted income' goes over £150,000, the annual allowance for that year decreases by £1. The decrease is limited to a minimum tapered annual allowance of £10,000 for the year.
Pension Fund (Direct Insurance)	
Source of Information:	<ul style="list-style-type: none"> • https://www.issa.int/en/country-details?countryId=GB&regionId=EUR&filtered=false; Z.G. Kronbergs, United Kingdom - Individual Taxation sec. 1., Country Surveys IBFD (accessed 4 Apr. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_uk_s_1.]; • https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim42775; • https://www.gov.uk/guidance/pension-schemes-work-out-your-tapered-annual-allowance#work-out-your-adjusted-income; https://www.gov.uk/tax-on-your-private-pension/annual-allowance

Tax on Private Pension Funds - Accessing of Contribution Benefits

<p>All plans should have the same retirement age for men and women, usually 65, but sometimes 60. Prior to the 17th May 1990, most pension schemes operated different retirement ages for men and women, however, in the case, Douglas Harvey Barber v Guardian Royal Exchange Assurance Group at the European Court of Justice in 1990 made this practice illegal. Early retirement is possible under most plans, with or without actuarially reduced benefits, depending on the personal needs of the sponsoring employers. For tax approval purposes HM Revenue & Customs allows early retirement at age 55 (earlier for retirement on the grounds of incapacity). It is not permitted to defer taking a pension beyond the age of 75.</p>	
Source of Information:	<ul style="list-style-type: none"> • https://www.issa.int/en/country-details?countryId=GB&regionId=EUR&filtered=false; http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0262

Tax on Private Pension Funds - Benefits arising from pre-tax Contributions

Resident of UK	
A resident individual is, in principle, subject to tax on his worldwide income and capital gains. Relief is, however, available in respect of offshore employment income in the following circumstances. An individual who is resident but not domiciled in the United Kingdom and is not deemed to be so domiciled is chargeable to income tax on a specially advantageous basis in respect of offshore employment income under an employment with an employer resident outside the United Kingdom, the duties of which are performed wholly outside the United Kingdom (sections 22 and 23 of ITEPA 2003). The individual is only subject to tax on amounts remitted to the United Kingdom. If he remits nothing, there is no charge to tax for that tax year.	
Source of Information:	Z.G. Kronbergs, <i>United Kingdom - Individual Taxation sec. 6., Country Surveys IBFD</i> (accessed 4 Apr. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_uk_s_6.]
Non- Resident of UK	
Non-residents are liable to income tax on all UK-source income, subject to reductions or exemptions given in a double tax treaty. UK -source income subject to UK tax includes pension, rental income, savings interest and wages. A non-resident may be subject to the PAYE system on a pension paid to him by a resident of the UK (i.e pension fund or insurance entity or employer) if the pension exceeds the prescribed minimum rate and is not wholly in respect of an employment which was carried on abroad. Non-resident individuals will not be allowed to claim a personal allowance as they are not eligible, unless a citizen of a European Economic Area (EEA) country - including British passport-holders.	
Source of Information:	<ul style="list-style-type: none"> • https://www.gov.uk/tax-uk-income-live-abroad; • https://www.gov.uk/tax-uk-income-live-abroad/personal-allowance; Z.G. Kronbergs, <i>United Kingdom - Individual Taxation sec. 6., Country Surveys IBFD</i> (accessed 4 Apr. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_uk_s_6.] •

Additional Information (Applicable to both Pension fund and Direct Insurance)	
Investment income from Direct insurance and Pension Funds is tax exempt. There is a cap on the total amount that can be accumulated in a private pension plan (lifetime allowance). Pension savings are tested against the lifetime allowance when individuals take their pension benefits and on certain other key events This is currently set at GBP 1 million in 2016 and then updated by the consumer price index from April 2018. Individuals building up pension savings worth more than the lifetime allowance will pay a tax charge on the excess. Any excess over this limit will be taxed when the pension benefits are drawn. If the amount in excess of the lifetime allowance is taken as a lump sum, the lifetime allowance charge is 55% of the excess, and if it is taken as a pension, the charge is 25% of the excess. Pension income is taxed in the same way as employment income at the individual's marginal tax rate, with the tax being deducted at source under PAYE by the payer of the pension (i.e. pension fund or insurance company). 75% of the benefit payments (in any form) from the pension pot are taxable, provided 25% of your pension pot is taken as tax-free cash lump sum either in the form of annuity or as several smaller lump-sums making up 25% of the pension pot. In respect of defined benefit schemes, the individual is deemed to have a pot size 20 times the annual pension in order to calculate the tax-free lump sum.	
Benefits - Employee or Institution's hands?	
Pension payments (annuities or annual payments) are subject to tax in the hands of the employee, however registered pension funds are responsible for making PAYE payments to HM Revenue and Customs at the basic tax rate of 20% (sections 900 to 903 of ITA 2007). These withholding taxes do not represent the final determination of tax liability, but are offset against the amount of tax owed at the time the tax return is filed.	
Source of Information:	<ul style="list-style-type: none"> • https://www.oecd.org/daf/fin/private-pensions/tax-treatment-pensions-country-profiles.pdf;

	<ul style="list-style-type: none"> • Z.G. Kronbergs, United Kingdom - Individual Taxation sec. 1., Country Surveys IBFD (accessed 4 Apr. 2017) [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_uk_s_1.]; • https://www.pensionwise.gov.uk/tax
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Tax on Private Pension Funds - Tax on benefits arising from pre-tax Contributions

Type of Withdrawal	Tax Rate	Tax Consequences	Source of Information
Purchased Annuity (Guaranteed income)	Individuals marginal tax rate (refer to rates below)	Taxable, however, 25% of the individual's pension pot may be withdrawn as single, tax-free cash sum. The remaining 75% is used to purchase an insurance policy that provides a guaranteed income for the rest of the individual's life. The purchased annuity, however, is subject to tax at the individual's marginal tax rate. The individual's personal allowance (personal allowance is an amount of the individual's income that is treated as falling outside the income tax net, sections 35-37 of ITA 2007. It takes the form of a deduction from total income. Of GBP 11,500) does not reduce the 25% tax-free cash sum amount.	https://www.pensionwise.gov.uk/guaranteed-income
Adjustable Income	Individuals marginal tax rate (refer to rates below)	Taxable, however, 25% of the individual's pension pot may be withdrawn as single, tax-free cash sum. The remaining 75% is invested to provide the individual with regular income, but the individual may change the regular amount or rather withdraw cash sums if necessary. However, the remaining 'adjusted income' is subject to tax at the individual's marginal tax rate. The individual's personal allowance (personal allowance is an amount of the individual's income that is treated as falling outside the income tax net, sections 35-37 of ITA 2007. It takes the form of a deduction from total income of GBP 11,500) does not reduce the 25% tax-free cash sum amount.	https://www.pensionwise.gov.uk/adjustable-income

Single Once-Off Lump-sum	Individuals marginal tax rate (refer to rates below)	Taxable, however, 25% of the individual's pension pot forming part of the single once-off lump-sum is tax free. The remaining 75% is subject to tax at the individual's marginal tax rate. The individual's personal allowance (personal allowance is an amount of the individual's income that is treated as falling outside the income tax net, sections 35-37 of ITA 2007. It takes the form of a deduction from total income of GBP 11, 500) does not reduce the 25% tax-free cash sum amount.	https://www.pensionwise.gov.uk/take-whole-pot
Several Multiple Lump-sums	Individuals marginal tax rate (refer to rates below)	Taxable, however, 25% of the individual's pension pot forming the several cash lump-sums is tax free. The remaining 75% is taxable is subject to tax at the individual's marginal tax rate. The individual's personal allowance (personal allowance is an amount of the individual's income that is treated as falling outside the income tax net, sections 35-37 of ITA 2007. It takes the form of a deduction from total income of GBP 11, 500) does not reduce the 25% tax-free cash sum amount.	https://www.pensionwise.gov.uk/take-cash-in-chunks

Personal Income Tax Rates of Residents

Set out below are the income tax rates and bands for 2016/17 and 2017/18:

	Income tax band (GBP): 2016/17			Income tax band (GBP): 2017/18		
Basic rate (20%)	0	–	32,000	0	–	33,500
Higher rate (40%)	32,001	–	150,000	33,501	–	150,000
Additional rate (45%)	Over		150,000	Over		150,000

Finance (No. 2) Act 2015 provides that the main rates of income tax will be locked in for the duration of the current session of Parliament, i.e. until 7 May 2020, unless there is an unexpected dissolution before that date.

Source of Information: Z.G. Kronbergs, United Kingdom - Individual Taxation sec. 1., Country Surveys IBFD (accessed 4 Apr. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_uk_s_1.]

Personal Income Tax Rates of Non- Residents

Non-residents are liable to income tax on all UK-source income, subject to reductions or exemptions given in a double tax treaty. Income derived by non-residents from employment in the UK is subject to the same rates of tax (including where relevant, higher rate and additional rate income tax) as residents, subject to any tax treaty provision.

Source of Information: Z.G. Kronbergs, United Kingdom - Individual Taxation sec. 6., Country Surveys IBFD (accessed 4 Apr. 2017). [https://online-ibfd-org.ezproxy.uct.ac.za/document/gthb_uk_s_6.]

VIII) APPENDIX B: OVERVIEW OF THE PENSION ARTICLE UNDER SOUTH AFRICA'S BILATERAL DOUBLE TAX AGREEMENTS IN FORCE AS OF 1 MARCH 2017

Double Tax Agreement	Region	Double Tax Agreement Paragraphs
<p>Germany - South Africa Income Tax Treaty (1973): Article 16 Pensions</p>	<p>Europe (OECD Member)</p>	<p>1. Pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment, shall be taxable only in that State if such income is subject to tax in that State.</p>
		<p>2. Notwithstanding the provisions of paragraph 1, pensions and other similar remuneration paid by, or out of funds created by, a Contracting State, a land or any political subdivision thereof in consideration of past employment shall be exempt from tax in the other Contracting State.</p>
		<p>3. The provisions of paragraph 2 shall also apply to pensions and similar remuneration paid in consideration of past employment by the Deutsche Bundesbank, the Deutsche Bundesbahn, the Deutsche Bundespost and the corresponding organizations of South Africa, including the Department of Transport, and the Tourist Corporation of the Republic of South Africa.</p>
		<p>4. Paragraph 2 shall likewise apply in respect of pensions, annuities and other recurring or non-recurring remuneration paid to any individual by a Contracting State, a land or any political subdivision thereof as compensation for an injury or damage sustained as a result of hostilities or political persecution.</p>
<p><i>Source of Information for South Africa - Germany DTC:</i> http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTC-2012-39%20-%20DTC%20Germany%20GG%203898.pdf</p>		

Double Tax Agreement	Region	Double Tax Agreement Paragraphs
<p>United Kingdom - South Africa Income Tax Treaty (2002): Article 17 Pensions and annuities</p>	<p>Europe (OECD Member)</p>	<p>1. Subject to the provisions of paragraph 2 of Article 18 of this Convention:</p> <p>(a) pensions and other similar remuneration paid in consideration of past employment, and</p> <p>(b) any annuity paid, to an individual who is a resident of a Contracting State shall be taxable only in that State.</p> <hr/> <p>2. The term ‘annuity’ means a stated sum payable to an individual periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.</p> <p>(a) Contributions borne by an individual who is in employment in a Contracting State to a pension scheme established in and recognised for tax purposes in the other Contracting State shall be deducted, in the first-mentioned State, in determining the individual's taxable income, and treated in that State in the same way and subject to the same conditions and limitations as contributions made to a pension scheme that is recognised for tax purposes in that first-mentioned State, provided that:</p> <p>(i) the individual was not a resident of that State, and was contributing to the pension scheme, or to another pension scheme for which it has been substituted, immediately before that individual began to exercise employment in that State; and</p> <p>(ii) the pension scheme is accepted by the competent authority of that State as generally corresponding to a pension scheme recognised as such for tax purposes by that State.</p> <p>(b) Contributions to a pension scheme referred to in sub-paragraph (a) of this paragraph by the enterprise paying the remuneration of that individual shall not be treated as the taxable income of that individual and shall be allowed as a deduction in computing the profits of the enterprise.</p> <p>(c) For the purposes of sub-paragraph (a) of this paragraph:</p> <p>(i) the term ‘a pension scheme’ means an arrangement in which the individual participates in order to secure retirement benefits payable in respect of the employment referred to in sub-paragraph (a); and</p> <p>(ii) a pension scheme is recognised for tax purposes in a State if the contributions to the scheme would qualify for tax relief in that State.</p>
<p>Source of Information for South Africa - United Kingdom DTC: http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-DTC-2012-80%20-%20DTC%20%20United%20Kingdom%20GG%2024335.pdf;</p>		

IX) APPENDIX C: SUMMARY OF DOCUMENTED IMMIGRANTS RETIRED IN SOUTH AFRICA FOR THE LATEST YEARS AVAILABLE 2011 TO 2014

Appendix E: Number of retired recipients of permanent residence permits by country of nationality				
Country	2011	2012	2013	2014
Europe				
Albania				
Austria	3		5	
Belarus				
Belgium	7	1	2	4
Bosnia Herzegovina				
Bulgaria				
Croatia				
Czech Republic				
Denmark			3	
Estonia	1			
Finland				
France	1		4	3
Germany	61	11	41	15
Georgia		1		
Greece			1	
Hungary			1	
Iceland				
Ireland	1	1	5	
Isle Of Man	2			
Italy	1		2	3
Latvia				
Lithuania				
Luxembourg				2
Moldova				
Norway			2	
Poland	3			
Portugal	2		1	1
Romania	1		1	
Russian Federation	5		3	2
Serbia And Montenegro				
Slovakia				
Spain				
Sweden	6		2	
Switzerland	6	1	6	6
The Netherlands	22	2	2	3
Turkey				
UK	85	30	27	24
Ukraine			1	

Appendix E: Number of retired recipients of permanent residence permits by country of nationality				
Country	2011	2012	2013	2014
Yugoslavia				
North America				
Canada	3		2	1
USA	9	2	3	3
West Indian islands				
Central and South America				
Argentina				
Bahamas				
Brazil	1		1	
Chile		1		
Colombia				
Cuba				
French Guinea				
Guyana	16	1		1
Jamaica	2			
Mexico				
Peru				1
Trinidad and Tobago				
Uruguay				
Venezuela				
Australasia				
Australia	6		2	1
Christmas Island				
Kiribati	1			
New Zealand				
Middle East				
Afghanistan				
Bahrain				
Iran	1			
Iraq				
Israel				
Jordan				
Kuwait				
Lebanon				
Palestine				
Syria				
Asia				
Bangladesh			1	
China	5	3	4	5
India			1	
Indonesia				

Appendix E: Number of retired recipients of permanent residence permits by country of nationality				
Country	2011	2012	2013	2014
Japan				
Laos				
Mongolia				
Myanmar				
Nepal				
Pakistan	1			
Philippines	1			
South Korea	43		6	11
Sri Lanka				
Taiwan				
Tajikistan				
Thailand				
Uzbekistan	1			
Vietnam				
Africa				
SADC				
Angola	2		1	
Botswana				
DRC	5	1	1	1
Lesotho			1	
Madagascar				
Malawi			1	
Mauritius	2			
Mozambique				1
Namibia				
Swaziland	1			
Tanzania				
Zambia			2	1
Zimbabwe			1	
East and Central Africa				
Burundi				
Cameroon				
Chad		1		
Congo			1	
Eritrea				
Ethiopia	2			
Gabon				
Kenya	3			
Rwanda	1			
Somalia				
Uganda				
West Africa				
Benin				1
Burkina Faso	1			

Appendix E: Number of retired recipients of permanent residence permits by country of nationality				
Country	2011	2012	2013	2014
Côte D'Ivoire				
Ghana				
Guinea				
Liberia				
Mali				
Mauritania				
Niger				
Nigeria	1	1		
Senegal	1			
Sierra Leone	1			
Togo				
North Africa				
Algeria				
Egypt				
Libya				
Morocco				
The Sudan				
<ul style="list-style-type: none"> • Source of information - 2011: https://www.statssa.gov.za/publications/D03514/D035142011.pdf • Source of information - 2012: http://www.statssa.gov.za/publications/P03514/P035142012.pdf • Source of information - 2013: http://beta2.statssa.gov.za/publications/D03514/D035142013.pdf • Source of information - 2014: http://www.statssa.gov.za/publications/P03514/P035142014.pdf 				

