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UNIVERSITY OF CAPE TOWN



The international tax consequences arising on the death of South African individuals owning Greek or Portuguese property and Greeks or Portuguese owning South African property

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

in partial fulfilment of the requirements for the degree MCom (Taxation)

Faculty of Commerce

UNIVERSITY OF CAPE TOWN

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15 August 2011

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DECLARATION

I,, hereby declare that the work on which this research paper is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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INTRODUCTION, BACKGROUND AND DEMARCATION OF THE STUDY

1.1 INTRODUCTION

South Africa levies two taxes on an individual in the event of death; namely estate duty and capital gains tax. Much debate exists on whether it is fair for South Africans to pay a “double tax” on the same assets on death. There is also a possibility that the deceased becomes liable for a third tax to foreign tax authorities when owning foreign property.

This dissertation specifically examines the international tax issues that may arise on death for a South African with either Greek or Portuguese heritage. There are currently approximately 45,000 Greek passport holding South African¹ residents and approximately 300,000 Portuguese passport holding South Africans.² The question asked by many is: “are South Africans who have Greek or Portuguese heritage subject to taxes on death in excess of the South African “double tax” (capital gains tax and Estate Duty) as a result of any foreign taxes payable?” If this is the case, are there adequate relief measures available that can be used to address this inequity?

The question is very topical at the moment on account of the current amendments in Greece with respect to the tax residency definition and the increased inheritance tax rates. It is also beneficial to include Portugal in the study as it is known to have less international double taxation issues. In effect if this is found to be true in this dissertation then Portugal can be used as a comparative benchmark, possible solutions can be derived from their policies and if the same problem arises between both South Africa and Greece and South Africa and Portugal it may be indicative of a much larger global tax issue that needs resolving.

¹ As per conversation with the Greek Consul of Cape Town, Mr. Constantinos Soulios on 14 April 2011.

² As per phone discussion with a representative of the Consulate General of Portugal in South Africa, Mr D.

² As per phone discussion with a representative of the Consulate General of Portugal in South Africa, Mr D. Gomes, on 26 May 2011.

The research undertaken is broad enough to provide value to any taxpayer who falls in the following categories:

- South African residents who own property in either Greece or Portugal e.g.
 - Immigrants from Greece or Portugal who now reside in South Africa;
 - Persons born in South Africa, but who have parents or grandparents who were at some stage or still are Greek or Portuguese residents;
 - South Africa residents who have or intend to invest in property in Greece or Portugal.
- Greek or Portuguese residents who own property in South Africa e.g.
 - South Africans who emigrated to either Greece or Portugal
 - Greeks or Portuguese who have or will inherit property in South Africa
 - Greeks or Portuguese who have or will invest in property in South Africa

These persons may end up being liable for taxes, arising on death on the same property, to two different states. Before the issue of international double taxation can be analysed, the relevant taxes levied on death by each country must be understood. The dissertation therefore, first sets out and explains how the capital gains taxes & estate duty taxes, inheritance taxes and stamp duty taxes are calculated in South Africa, Greece and Portugal respectively, limited to the scope of the research. Thereafter an in-depth analysis is undertaken which explores the possibilities of double taxation arising from the following factors:

- A taxpayer's residence, domicile or even citizenship;
- Differing situs rules for property between the two countries;
- Different property valuation methods or exemptions being applied by each country.

Once it has been established where international double taxation is likely to occur an extensive analysis on double tax relief is performed. The research looks at whether both unilateral and bilateral measures of relief exist and whether they can be used in conjunction with one another. In many instances certain provisions of domestic relief legislation or double tax agreements are unclear, ambiguous or may have anomalous affects. Where possible, submissions are made on the possible and most correct interpretation of these

provisions. This is important in helping a taxpayer ascertain whether he or she would be able to claim relief or not and the extent thereof. Areas of the relevant relief legislation needing specific interpretational focus are:

- How the tax residency of the deceased or heir affects the availability of relief;
- Which types of foreign taxes can be claimed for each measure of relief;
- Whether each relief measure can still be used if the foreign taxes are paid by a person different to the person claiming the relief; and
- Whether any further limitations exist specific to a particular relief measure.

After taking the effects of each of these factors into account the dissertation is able to conclude on which relief measures are actually applicable for use and which are the optimal measures to apply for each type of tax through an easy to use but extensive flowchart. A taxpayer is therefore able to evaluate their susceptibility to international double taxation that could arise on death. In addition, the study concludes with worked examples showing the extent of international double taxation and international double non-taxation which may occur in respect of eight different types of assets that the deceased person may be in possession of at the date of death.

1.2 AIMS OF THE RESEARCH

The objective of this dissertation is to highlight the possible international double taxation, double non-taxation and triple tax issues that individuals may be faced with in practice in the event of death, with specific reference to South Africa and either Greece or Portugal. The research aims to draw attention to and interpret the relevant legislation which is ambiguous or difficult to understand. Furthermore, the dissertation strives to analyse the adequacy and applicability of the relevant relief measures available in the event of international double taxation or double non-taxation.

Where possible the dissertation may afford solutions, suggestions or enhance estate planning information in respect of the issues raised or where legislation is unclear. It is expected that the outcome of some of the issues raised will remain unclear. This will provide areas for further research. Ultimately, the average individual who has ties between either South Africa and Greece or South Africa and Portugal should be able to use this as a guide to understanding and partially calculating the international tax effects arising due to

the possession of both local and foreign assets at date of death. Through this, the individual may be able to structure his tax affairs optimally, before it is too late.

1.3 DELINEATION AND LIMITATIONS

This dissertation only deals with the international tax effects of natural persons in the form of individuals. Individuals who have residence in any country other than South Africa, Greece or Portugal have been excluded. Any reference made to taxes paid implies taxes paid in the event of death, unless otherwise stated. No income taxes other than that relating to taxable capital gains arising in the event of death have been dealt with. No research was undertaken which explores the issues that may arise regarding the proper construction of wills and the determination of who the legitimate heirs of the estate are.

Further areas which have been specifically excluded from the scope of this study:

- assets of a permanent establishment;
- ships and aircraft;
- property in the form of limited interest rights e.g. annuities, usufructs, bare dominiums;
- donations tax, securities transfer tax, value-added tax and transfer duty;
- the impact of exchange control legislation; and
- the deductibility of debts.

There is no specific legislation in the South African Estate Duty Act No. 45 of 1955 or any other legislation which deals with *mortis causa* transfers of going concerns or participations in family owned or a closely held business.³ Such transfers have not been explored in this study.

Where possible, extracts from foreign Acts were used. However, no English versions were available and as such a summary translation of the Act into English was used.

1.4 RESEARCH METHOD

The interpretation of domestic relief in South African, Greek and Portuguese legislation as well as in any applicable double-tax agreements can prove to be very complex. As such, an extended literary review was undertaken of the relevant sections, paragraphs and articles in the South African Income Tax Act No. 58 of 1962 (referred to as the SA Income Tax Act

³ Bagraim, P. & Roeleveld, J. 2010: 693.

or the SA ITA); the South African Estate Duty Act No. 45 of 1955 (referred to as the SA Estate Duty Act or the SA EDA); the Greek Tax Code On Inheritance, Gift, Parental Benefit, Dowry and Winnings From Lottery (Law 2961/2001) (referred to as the Greek Inheritance Tax Code); the Portuguese Stamp Duty Code – DL No. 287/2003 (referred to as the Portuguese Stamp Duty Code); the Convention between the Republic of South Africa and the Hellenic Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital [Government notice 337, Government Gazette 24996 of 3 March 2003] (referred to as DTA Income SA – Greece) and the Convention between the Republic of South Africa and the Portuguese Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income [Government notice 1367, Government Gazette 31720 of 23 December 2008] (referred to as DTA Income SA – Portugal).

For interpretational guidance on the above this dissertation has undertaken a detailed study of South African Revenue Services (SARS) interpretation notes, accepted authority textbooks, manuals and tax journals, the Organisation for Economic Co-operation and Development (OECD) model tax conventions and commentaries on income taxes and on inheritance taxes, all five inheritance tax treaties in existence between South Africa and other states and a Masters dissertation. To understand the tax treatment and application of ambiguous provisions in practice, interviews were conducted or correspondence made with reputable tax specialists and legal practitioners. The opportunity was also seized during such contact to confirm a number of submissions and recommendations made in this dissertation with respect to the legal interpretation of certain provisions. A case study of twenty-five South African residents with Greek heritage was used to test whether the tie-breaker test can be used in all cases to resolve dual residency issues with regard to double tax treaty application.

1.5 THE ACADEMIC VALUE AND PRACTICAL RELEVANCE

This dissertation will provide academic value to those wishing to learn more about which persons may be liable to pay taxes on death to South Africa, Greece or Portugal and in respect of which type of taxes on which type of assets. The dissertation also provides critical insight into the applicability, interpretation and calculation of relief in respect of international double taxation. As a result this dissertation may provide valuable estate planning information and opportunities.

Academic value may also be derived from universities or other students using this dissertation for further research in similar areas or to identify new areas.

Tax practitioners, tax lawyers, accountants and other professionals in the financial planning profession could derive benefit through having these problems brought to their attention in a detailed and concise manner and in certain cases assist them in providing solutions to their clients.

SARS should make use of this dissertation to identify some of the international taxation problems that may result on death that need to be addressed. It may also assist SARS in developing guidelines or practice notes for easier interpretation of the Acts concerned.

Finally, aspects of this study can be used by activists wishing to propose to the South African Government that estate duty should be abolished. Likewise, aspects of this dissertation can be used by activists who wish to promote the continued existence of estate duty tax in South Africa with relief for capital gains tax on the same assets at death.

1.6 CHAPTER OVERVIEW

Chapter 1 introduces the research topic and highlights the problem areas that will be explored. It also sets out what objectives the dissertation aims to achieve within the boundaries of its scope. Through achieving these objectives, the academic value and practical relevance that may be obtained from this dissertation is listed.

Chapter 2 provides a brief overview of the application of the relevant provisions of the South African Income Tax Act and the South African Estate Duty Act, the Greek Inheritance Tax Code and the Portuguese Stamp Duty Code, in the event of death of a resident or property-owning person in at least one of the three countries.

Chapter 3 discusses the different definitions of resident as per tax legislation and judicial precedence that is applied in each of the three countries and explores the international taxation effects thereof. The chapter also defines which persons are liable for the taxes levied on the deceased's estate.

Chapter 4 sets out the legislative methodology applied by each of the three countries to determine the value of the different types of assets of the deceased on date of death. It also briefly examines the effect that different valuation measures may have on international double taxation.

Chapter 5 explains the territoriality links that each country applies with regard to taxation levied on death of an individual. The chapter defines the rules and deeming provisions used by each country in determining the situs of the assets of the deceased. Furthermore, the chapter highlights the possible international double taxation effects of conflicting situs rules applied by each country.

Chapter 6 discusses the unilateral and bilateral relief measures available in the event of international double taxation. It determines whether they can be used in conjunction with each other. The chapter is constructed to deal with the various issues that may limit the applicability of each relief measure through a strict interpretation of the legislative provisions. Based on the latter, the chapter is able to conclude on which relief measures are available for persons within the context of this dissertation and which of these measures are the optimal choice for each type of tax levied.

The final chapter of this study, Chapter 7, summarises the results of the research and provides concluding remarks. It also affords recommendations based on the findings of the dissertation and provides suggestions for future research.

1.7 CONCLUSION

The focus of this chapter is to provide an overall summary of the research topic, setting out the methodology used to achieve the objectives of the dissertation. It further details the value it may bring to the various persons and bodies of society and any limits on the application of the findings of this research. The chapter concludes with a short overview of the chapters in this dissertation.

CHAPTER 2

THE RELEVANT TAX LEGISLATION APPLICABLE IN THE EVENT OF DEATH OF AN INDIVIDUAL

2.1 SOUTH AFRICAN LEGISLATION

2.1.1 INTRODUCTION

Income tax is levied on any income which has accrued to the deceased before death. Any income accruing after death of the deceased accrues to the deceased's estate or the heirs.⁴ The deceased's estate (which comes into being from the date of death) is a different person for tax purposes, but is taxed according to the same rates applicable to natural persons (excluding the rebates). However, the two situations of income accruing before and after death are excluded from the scope of this paper.

The only income tax analysed in the scope of this paper relates to capital gains tax accruing due to the event of death of a natural person. Two taxes are levied on the death of a natural person. The assets held by the deceased at the date of death are subject to estate duty as per the Estate Duty Act No. 45 of 1955 as well as capital gains tax as per the Income Tax Act No. 58 of 1962.

South Africa does not levy an inheritance tax, wealth tax or capital transfer tax.⁵ There has been debate about whether a system of inheritance tax should be introduced to replace estate duty, as well as a debate as to whether estate duty should be abolished as it amounts to inequitable double taxation in that capital gains tax is levied on the same assets at death. To date, no legislation or amendments to legislation has been proposed to this effect.

2.1.2 ESTATE DUTY

Estate duty is levied on the worldwide property and deemed property⁶ of a person who is ordinarily resident in South Africa as at the date of death, with a few exceptions.⁷

⁴ SA Income Tax Act, s. 25

⁵ Bagraim, P. & Roeleveld, J. 2010: 689.

⁶ Estate Duty Act, s. 3(1)-(5).

⁷ Estate Duty Act, s. 3(2)(c)-(i).

However, as per section 3(2)(c) & (d) of the SA Estate Duty Act, natural persons who are not ordinarily resident are only subject to South African estate duty depending on whether the situs of their assets is determined to be in South Africa. This means that if a non-resident owns property situated in South Africa, he may be liable to South African estate duty in addition to the inheritance taxes applicable in that person's foreign state.

The term "ordinarily resident" is not defined in South African legislation. The meaning thereof has to be interpreted using guidance and precedence from South African court decisions to date.⁸ Furthermore, the use of "ordinarily resident" in the SA Estate Duty Act is not aligned with that of the SA Income Tax Act which applies the term "resident" which is defined in section 1 of that Act.⁹

Estate duty is levied on the "dutiable amount" of the estate. This is determined as the net value of all property and deemed property less permissible deductions¹⁰ less an abatement of R3.5 million.¹¹

A standard rate of 20 percent is levied on the dutiable amount of the deceased's estate, unless the deceased's estate includes property that has been subject to estate duty within a prior ten year period.¹² In this case, the beneficiary of the dutiable assets, who dies within ten years of the first death that resulted in estate duty tax on the same property, is entitled to a rapid succession rebate.¹³

Generally on date of death, property is either included in the estate at its fair market value or if disposed, the proceeds derived.¹⁴

Provision, in section 4(a)-(q), is also made for certain expenses and liabilities to be deducted from the above value of property that will result in a net value of the estate. Generally, all *bona fide* debts of the decedent are deductible with some restrictions

⁸ For example: *Commissioner for Inland Revenue v Kuttel* (1992), *Cohen v Commissioner for Inland Revenue* (1946) and *Robinson v Commissioner of Taxes* (1917).

⁹ See Chapter 3 for issues regarding residency.

¹⁰ Estate Duty Act, s. 4(a)-(q).

¹¹ Estate Duty Act, s. 4A.

¹² Huxham et al., 2010:713

¹³ As per Huxham et al., at page 713, the extent of the rapid succession rebate depends on the time period since the last death and ranges from 100 percent if the decedent dies within two years to 20 percent if the decedent dies within eight to ten years. The rebate is the calculated tax on the lower value of the asset in the current or previous estate. This rebate is seldom used in that most estates are left to surviving spouses as defined.

¹⁴ Chapter 4 deals with valuation measures relating to assets within the scope of this dissertation.

applying in certain cases. In the case of debts due to a person who is a non-resident, only the portion of the debt exceeding foreign assets not included as “property” in the estate are deductible.¹⁵ Other permissible deductions include expenses in respect of the deathbed, funeral, tombstone and administration and liquidation of the estate. The South African income tax liability arising in the year of death may also be claimed as a deduction.¹⁶

The deduction of great value in the estate is section 4(q), the deduction allowable when property is transferred inter-spouse to a surviving spouse on death as a result of testate (in terms of a will) or intestate (no will) succession. No estate duty is payable on property bequeathed to the surviving spouse.¹⁷ In this case, the property transferred will only be subject to estate duty on the death of the surviving spouse. However, unlike paragraph 67(3) of the Eighth Schedule of the SA Income Tax Act, there is no provision in the SA Estate Duty Act which prohibits the deduction if the surviving spouse is not ordinarily resident in South Africa. It is therefore submitted that without such a provision, if the surviving spouse is not ordinarily resident in South Africa, any foreign property that would have been subject to estate duty but for section 4(q) will also not be taxable in the hands of the surviving spouse on death. The property will therefore have escaped the estate duty net in terms of both the deceased and the spouse.

If the deceased’s property is not left to the surviving spouse, but the spouses are married out of community of property with the accrual system applying, the increase in the value of each spouse’s estate from the date of marriage to the date of death is determined and if the deceased has a larger increase then the claim of the surviving spouse is also deductible. However, the converse may apply too in the case that the surviving spouse has a larger increase, then the deceased’s estate would have a claim included in property. In the case of property of an in community of property marriage, the property is pooled and then half is deducted as a claim in respect of the surviving spouse.¹⁸

For an in depth analysis of the section 4(e) deduction allowable against the dutiable estate in certain circumstances when the deceased owns foreign property, see Chapter 6.4.

¹⁵ Estate Duty Act, s. 4(f).

¹⁶ Huxham et al., 2010: 698.

¹⁷ Estate Duty Act, s. 4(q).

¹⁸ Bagraim, P. & Roeleveld, J. 2010: 694.

Once all proved debts and permissible deductions are subtracted from the “gross property” to form the net value of the estate, a flat abatement of R3.5 million may be deducted. The final outcome is the dutiable amount of the estate to which a flat rate of 20 percent is applied.

Capital gains tax has a wider tax base than estate duty, and it is argued by some that it is unfair that the same property can end up being subject to tax under both these regimes.

2.1.3 CAPITAL GAINS TAX

Capital gains tax is levied on the worldwide assets¹⁹ of any individual who is a “resident” of South Africa on the date of their death.²⁰ This is different from estate duty which only levies tax on an individual’s worldwide assets if that person is “ordinarily resident” on date of death. Therefore, it is possible for a natural person classified as a resident as a result of meeting the physical presence test criteria to be subject to capital gains tax, but not estate duty.²¹ Capital gains tax is levied on the disposal of any asset of a resident and certain assets of non-residents.²²

In the event of death, paragraph 11 of the Eighth Schedule of the SA Income Tax Act deems there to be a disposal of the worldwide assets of a South African resident. Non-residents will also be subject to capital gains tax if they have immovable property situated in South Africa or any right to immovable property situated in South Africa or assets of a permanent establishment in South Africa.²³

The disposals arising on death are deemed to have been made at market value²⁴ to the deceased estate.²⁵ The deceased will then either have a capital gain or loss of the difference between the deemed proceeds at market value and the asset’s base cost as determined in

¹⁹ The Estate Duty Act refers to “property” and the SA Income Tax Act refers to “assets”. These two terms will be used interchangeably from now on.

²⁰ SA Income Tax Act, Eighth Schedule, paragraph 2(a).

²¹ See Chapter 3 for more information regarding the issues and effects of residency in terms of an individual.

²² SA Income Tax Act, Eighth Schedule, paragraph 2

²³ SA Income Tax Act, Eighth Schedule, paragraph 2(b). Rights in immovable property are dealt with in detail in Chapter 5.

²⁴ The market value of the assets at the date of death must be determined in accordance with the provisions of the ITA, Eighth Schedule, paragraph. 31, which sets out the rules for determining the market value of various assets.

²⁵ SA Income Tax Act, Eighth Schedule, paragraph 40(1).

Part V of the Eighth Schedule. The base cost is generally determined as the actual cost of acquiring the asset with some adjustment for assets held pre 1 October 2001 (the date of implementation of the capital gains tax legislation). The deceased estate in turn is deemed to have acquired those assets at a base cost equal to such market value.²⁶

The aggregate capital gains (losses are subtracted from gains to determine the aggregate) of the taxpayer are afforded a deductible allowance of R20,000, except in the year of death where the allowance is increased to R200,000, resulting in a net capital gain or assessed capital loss.²⁷ The R200,000 is not apportioned for part-years.²⁸ Thereafter, the taxable capital gain is determined at 25 percent of the net capital gain which is the amount included in the deceased's taxable income.²⁹ Effectively taxpayers are charged a further tax on their property in addition to estate duty at an effective rate of 10 percent on their net capital gain.³⁰ In light of this, there are strong arguments that it is inequitable that the same assets may be subject to both capital gains tax and estate duty on date of death.³¹ However, because the income tax liability in the year of death is allowed as a deduction for estate duty purposes,³² it can be argued that because all capital gains taxes that arose on death form part of this deduction, the effective capital gains tax rate in the year of death is actually only 8 percent.³³

Capital gains are not calculated on all the assets of the deceased as some assets may be specifically excluded. One such exclusion is assets inherited by the surviving spouse. In this case, a "roll-over" applies, which means the spouse inherits the asset's original cost and date of purchase.³⁴ However, the roll-over does not apply unless the surviving spouse is a South African resident or, if not, unless the assets bequeathed are immovable property situated in South Africa or relate to a permanent establishment in South Africa.³⁵ Other exclusions include assets bequeathed to an approved public benefit organization, South

²⁶ SA Income Tax Act, Eighth Schedule, paragraph 40(1).

²⁷ SA Income Tax Act, Eighth Schedule, paragraph 5.

²⁸ Huxham et al., 2010:789

²⁹ SA Income Tax Act, s. 26A and Eighth Schedule paragraph 10.

³⁰ Assuming the taxpayer has a tax bracket of 40% in the year of death (40% x 25%). The effective rate will reduce if the taxpayer is in a lower tax bracket.

³¹ Bagraim, P. & Roeleveld, J. 2010: 684.

³² See Chapter 2.1.2

³³ Assuming a marginal tax rate of 40% and provided that the net dutiable amount is greater than zero.

[40% x 25% x (1-0.2)]

³⁴ SA Income Tax Act, Eighth Schedule, paragraph 67(1).

³⁵ SA Income Tax Act, Eighth Schedule, paragraph 67(3).

African long-term insurance policies and lump-sum payments from pension, provident and retirement annuity funds.³⁶

Capital gains on personal-use assets³⁷ and cash³⁸ are disregarded (excluded) however; they are still subject to estate duty unless inherited by the surviving spouse. Examples of movable property excluded from the definition of personal-use assets that are relevant for this dissertation are aircraft exceeding a mass of 450 kilograms, boats exceeding 10 meters in length and any movable asset used mainly for purposes of trade.

As a result of the deemed disposal on death, the heir or deceased estate will inherit the asset with a stepped-up base cost of the asset's market value on date of disposal.³⁹

A taxpayer's primary residence is also afforded a concession of R1.5 million⁴⁰ which is deducted from the capital gain calculated on the disposal of a primary residence, whether on death or intestate.

2.2 RELEVANT LEGISLATION IN GREECE

The Greek Tax Code on inheritance, gift, parental benefit, dowry and winnings from lottery (Law 2961/2001) (referred to as the Greek Inheritance Tax Code) under Greek legislation governs amongst others, the taxable consequences arising on the event of death of an individual.⁴¹ The only tax liability that arises in the event of death in Greece is that of inheritance tax. Contrary to South Africa, no capital gains tax is triggered on *mortis causa* property transfers.⁴²

The difference between the Greek inheritance tax and South African estate duty is that inheritance tax is levied on the property accruing to each beneficiary of the estate while estate duty is levied on the decedent's estate before property accrues to the heirs.⁴³ This means that the taxable person under inheritance tax is the heir of the estate. However, the

³⁶ SA Income Tax Act, Eighth Schedule, paragraphs. 54 and 55.

³⁷ A personal-use asset is movable property not used in the carrying on of trade. For specific exclusions see SA Income Tax Act, Eighth Schedule, paragraph 53(3).

³⁸ SA Income Tax Act, Eighth Schedule, paragraph 1. Definition of asset.

³⁹ SA Income Tax Act, Eighth Schedule, paragraph 40.

⁴⁰ SA Income Tax Act, Eighth Schedule, paragraph 45.

⁴¹ Tsourouflis, A. 2010: 403.

⁴² Tsourouflis, A. 2010: 406.

⁴³ Tsourouflis, A. 2010: 403.

taxable event in both Greece and South Africa is still the transfer of property in the event of death of a natural person.

Tsourouflis (2010) summarises the scope of the tax as: “Greek inheritance tax is levied on the assets of an estate situated in Greece, regardless of the decedent’s nationality or domicile, as well as on foreign assets belonging to Greek nationals or people domiciled in Greece at the time of their death.” Therefore, Greece makes use of both territorial and subjective tax jurisdiction criteria to determine which assets are to be subject to inheritance tax.

Before inheritance tax is levied on these assets however, certain liabilities of the decedent are allowed to be deducted from the value of the estate assets, resulting in a net value. Liabilities are generally deductible if they are outstanding debts of the decedent incurred prior to death, but including taxes payable after death.⁴⁴ If a loan is secured by a mortgage bond, then the loan is only deductible if the immovable property over which the mortgage bond is secured is situated in Greece, if it is foreign property, it is not deductible.⁴⁵ Therefore, to a large extent the situs of the debt determines its deductibility. This makes sense as foreign immovable property is excluded from the inheritance tax base. Loans against movable property and unsecured loans incurred in Greece are further restricted in that they are only deductible in proportion to the part of the estate that is taxable in Greece.⁴⁶ Once all allowable deductions are taken into account the resultant net value of the estate is subject to inheritance tax at rates ranging from 0% - 40% depending on the nature of the heir and the asset inherited.

The rate fluctuates in stepped levels depending on the closeness of kinship between the heir and the deceased. Heirs can be categorized as Class A, Class B or Class C⁴⁷ heirs. Class A relates to relatives with the closest form of kinship which includes spouses, children, grandchildren and parents.⁴⁸ Class B includes other ascendants and descendants, brothers and sisters, stepbrothers and stepsisters, nephews and nieces, uncles and aunts, foster parents, children from a previous marriage of the spouse, and sons or daughters in

⁴⁴ Tsourouflis, A. 2010: 410.

⁴⁵ Tsourouflis, A. 2010: 410.

⁴⁶ Tsourouflis, A. 2010: 411.

⁴⁷ Tsourouflis, A. 2010: 407.

⁴⁸ Tsourouflis, A. 2010: 408.

law.⁴⁹ Class C is the wrap-up group which includes vacant successions as well as all other beneficiaries who are not included in classes A and B.⁵⁰

The Greek government introduced major modifications to the rates at which inheritance tax is levied with effect from 19 January 2010.⁵¹ Article 29 of the Greek Inheritance Tax Code was amended by the introduction of law no. 3815/2010.⁵² The amended rates have resulted in significantly increased inheritance tax liabilities and are therefore highly topical in relation to the international double tax ramifications they may have in relation to South Africa.

The rates relating to each category A, B and C have been amended and can be viewed below. In general there is a tax exempt amount for each category, but these amounts vary between types of category. The scale factor is the rate at which inheritance tax is levied depending on the tax scale applicable which in turn is determined by the value of property inherited.

Category A:⁵³

Tax scale in €	Scale factor (%)	Tax scale €	Taxable property in €	Tax which equals to €
150,000	--	--	150,000	--
150,000	1	1,500	300,000	1,500
300,000	5	15,000	600,000	16,500
Excess	10			

Figure 1. Inheritance tax rates in Greece for category A heirs.

The above table does not apply if the inherited asset is cash. Category A heirs pay a flat 10 percent on inherited cash with no tax exempt amount.⁵⁴

⁴⁹ Tsourouflis, A. 2010: 408.

⁵⁰ Tsourouflis, A. 2010: 408.

⁵¹ Iliopoulos, C. 2010. Hellenic Communication Service: Inheritance Taxes in Greece -2010 Update [Online]. Available: <http://www.helleniccomserve.com/iliopoulosinheritlaws2010.html> [12 December 2010]

⁵² Valmas & Associates – Athens Law Office 2010. Inheritance Law and Estates. [Online]. Available: <http://www.ivalaw.com/inheritance.html> [6 February 2011]

⁵³ Kosmidis & Partners. 2010. Kosmidis & Partners, solicitors. Partnering international businesses in Greece. Inheritance Tax in Greece – Legal information from Greek Lawyers Kosmidis & Partners [Online]. Available: <http://www.lawyers-greece.co.uk/inheritance-tax-in-greece.html> [6 February 2011]

Note, if the property is inherited by the surviving spouse⁵⁵ or by a minor child⁵⁶ then the above tax exempt threshold is increased to 400,000 Euros for each person (spouse and minor children), with the next 200,000 Euros above the 400,000 Euro threshold being subject to a rate of 5 percent and the excess above that being subject to a rate of 10 percent. See table below:

Tax scale in €	Scale factor (%)	Tax scale €	Taxable property in €	Tax which equals to €
400,000	--	--	400,000	--
200,000	5	10,000	600,000	10,000
Excess	10			

Figure 2. Inheritance tax rates in Greece for the spouse and minor children of the deceased.

Depending on the taxable value of property (excluding cash), Category A heirs pay inheritance tax at a rate ranging from 0 percent - 10 percent. To show the effect of the increase in rates post 19 January 2010, assume a taxable property value of 1,000,000 Euros. The tax liability on death will be 56,500 Euros.⁵⁷ However, the tax liability prior to the amendment on this same taxable property value would have been only 9,050 Euros.⁵⁸ Based on 1,000,000 Euros, this is an increase in inheritance tax liability of 524 percent, which may have a significant effect on South Africans owning property in Greece.

⁵⁴ Iliopoulos, C. 2010. Hellenic Communication Service: Inheritance Taxes in Greece -2010 Update [Online]. Available: <http://www.helleniccomserve.com/iliopoulosinheritlaws2010.html> [12 December 2010]

⁵⁵ The spouse must have been married to the decedent for at least 5 years prior to the decedent's death.

⁵⁶ A minor child is younger than 18 years old.

⁵⁷ (150,000 x 0% + 150,000 x 1% + 300,000 x 5% + 400,000 x 10%)

⁵⁸ (95,000 x 0% + 905,000 x 1%)

Category B:⁵⁹

Tax scale in €	Scale factor (%)	Tax scale €	Taxable property in €	Tax which equals to €
30,000	--	--	30,000	--
70,000	5	3,500	100,000	3,500
200,000	10	20,000	300,000	23,500
Excess	20			

Figure 3. Inheritance tax rates in Greece for category B heirs.

Depending on the taxable value of property, Category B heirs pay inheritance tax at a rate ranging from 0 percent - 20 percent. Category B heirs pay a flat 20 percent on inherited cash with no tax exempt amount.⁶⁰

Category C:⁶¹

Tax scale in €	Scale factor (%)	Tax scale €	Taxable property in €	Tax which equals to €
6,000	--	--	6,000	--
66,000	20	13,200	72,000	13,200
195,000	30	58,500	267,000	71,700
Excess	40			

Figure 4. Inheritance tax rates in Greece for category C heirs.

Depending on the taxable value of property, Category C heirs pay inheritance tax at a rate ranging from 0 percent - 40 percent. Category C heirs pay a flat rate of 40 percent on inherited cash with no tax exempt amount.⁶²

⁵⁹ Kosmidis & Partners. 2010. Kosmidis & Partners, solicitors. Partnering international businesses in Greece. Inheritance Tax in Greece – Legal information from Greek Lawyers Kosmidis & Partners [Online]. Available: <http://www.lawyers-greece.co.uk/inheritance-tax-in-greece.html> [6 February 2011]

⁶⁰ Iliopoulos, C. 2010. Hellenic Communication Service: Inheritance Taxes in Greece -2010 Update [Online]. Available: <http://www.helleniccomserve.com/iliopoulosinheritlaws2010.html> [12 December 2010]

⁶¹ Kosmidis & Partners. 2010. Kosmidis & Partners, solicitors. Partnering international businesses in Greece. Inheritance Tax in Greece – Legal information from Greek Lawyers Kosmidis & Partners [Online]. Available: <http://www.lawyers-greece.co.uk/inheritance-tax-in-greece.html> [6 February 2011]

2.3 RELEVANT LEGISLATION IN PORTUGAL

Portugal no longer imposes a system of inheritance tax on the death of an individual. This system was abolished in 2003 and was replaced by a much simpler tax in the form of a stamp duty in terms of the Portuguese Stamp Duty Code. Stamp duty levied on death applies to the entire Portuguese territory and therefore includes Madeira and the Azores.⁶³ Portuguese residents are only subject to a worldwide basis in respect of income taxes, not stamp duty taxes.⁶⁴ This means that stamp duty does not encompass the decedent's worldwide assets but rather only those assets with a Portuguese source. This is a territoriality based system and applies regardless of the residency of a taxpayer.⁶⁵ Death is not a taxable event for capital gains tax purposes as it does not result in a deemed disposal.⁶⁶ As a result, the tax basis that subjects Portuguese residents to income taxes on their worldwide income does not have an impact on this dissertation.

In general gratuitous transfers of property are subject to stamp duty.⁶⁷ Gratuitous property transfers encompass *inter vivos* and *mortis causa* property transfers made for no economic consideration.⁶⁸ Therefore, the taxable event is the transmission of assets for no economic value on the date of death of the deceased.⁶⁹ The net value of the estate is calculated on the date of death as being the aggregate sum of:

- All assets, movable and immovable, in existence and owned by the deceased as at the date of death that are situated in Portugal;⁷⁰ and
- the total value of donations made by the deceased during the lifespan of the deceased; and
- any expenses that were subject to restitution or to allotment.⁷¹

⁶² Allamani, M. 2011. BNA Tax and Accounting Centre – Greece [Online]. Available: http://taxandaccounting.bna.com/btac/T12120/split_display.adp?fedfid=16939282&vname=gtgref&fcn=6&wsn=501444000&fn=16939323&split=0#16939323 [15 May 2011]

⁶³ Fernandes Ferreira et al., 2010: 644.

⁶⁴ Fernandes Ferreira et al., 2010: 659.

⁶⁵ Fernandes Ferreira et al., 2010: 659.

⁶⁶ Fernandes Ferreira et al., 2010: 659.

⁶⁷ Portuguese Stamp Duty Code. Article 1.

⁶⁸ As “gratuitous transfer” is not defined in the Stamp Duty Code, the meaning is interpreted from Portuguese civil law.

⁶⁹ Despite the Stamp Duty Code not providing any specific rules in respect of date of taxable event, paragraph (p) of article 5 stipulates that the tax due accrues on the date of the opening of succession. According to the Civil Code, article 2031, the date of the opening of succession is the deceased's date of death.

⁷⁰ Fernandes Ferreira et al., 2010: 660.

Thereafter, the dutiable amount is calculated by subtracting from the above aggregated value of property the aggregate allowable liabilities of the deceased as at date of death.⁷² As only assets situated in Portuguese territory are included in the estate, only debts with a Portuguese situs are deductible. However, problems could arise in this respect in that there are no specific situs rules for debts laid down in the Portuguese Stamp Duty Code.⁷³ Included as an allowable deduction are taxes payable incurred on dates up to and including date of death.⁷⁴

Portugal applies a flat stamp duty rate of 10 percent which has to a large extent simplified their tax system compared to the prior progressive rates used under the old inheritance tax system.⁷⁵ However, a favourable exemption is afforded to all persons classified as legitimate heirs. Legitimate heirs pay zero stamp duty on the property inherited from the deceased.⁷⁶ Legitimate heirs include close family members of the deceased such as the spouse, people living as married couples,⁷⁷ biological descendants, adopted children and ascendants of the deceased.⁷⁸ Another exemption of significance is the exemption afforded to the transfer of personal-use goods not used in trade.⁷⁹ Therefore, in essence, stamp duty is only payable on immovable property situated in Portugal inherited by non-legitimate heirs and movable property situated in Portugal used as part of a trade and inherited by non-legitimate heirs. Therefore many cases may arise where no stamp duty is payable on the death of a resident or non-resident owning property situated in Portugal.

The existence of the above-mentioned legitimate heir exemption in conjunction with the fact that only property with a Portuguese situs are subject to stamp duty means that situations giving rise to international double taxation are very rare⁸⁰ from a Portuguese perspective. This is evident in the fact that Portugal has not entered into any double tax treaties with respect to estate and inheritance taxes.⁸¹

⁷¹ Fernandes Ferreira et al., 2010: 644.

⁷² Portuguese Stamp Duty Code. Article 20.

⁷³ Fernandes Ferreira et al., 2010: 661.

⁷⁴ Fernandes Ferreira et al., 2010: 655.

⁷⁵ Fernandes Ferreira et al., 2010: 651.

⁷⁶ Portuguese Stamp Duty Code. Article 6, paragraph (e).

⁷⁷ By means of the State Budget for 2009 (Law no. 64-A/2008, of 31 December), this exemption is also currently applicable to people living as couples (de facto unions).

⁷⁸ Fernandes Ferreira et al., 2010: 644.

⁷⁹ Fernandes Ferreira et al., 2010: 653.

⁸⁰ Fernandes Ferreira et al., 2010: 643.

⁸¹ Fernandes Ferreira et al., 2010: 663.

CHAPTER 3

ISSUES SURROUNDING TAXABLE PERSON & RESIDENCY OF THE DECEASED AND HEIRS

3.1 INTRODUCTION

This chapter analyses whether the definitions of taxable person on death are consistent between South Africa, Greece and Portugal. This is important as the outcome may lead to the occurrence of international double taxation and or may affect the applicability of relief. The definition of resident for each country is analysed, to the extent that a definition exists. Residency is important as in some instances it is the tax basis used to determine which assets are subject to tax on the death of an individual, regardless of the location of the decedent's assets. However, the criteria used in determining whether an individual is a resident of South Africa, Greece and Portugal may differ for each country. The effect this may have in relation to international double taxation is highlighted and discussed.

3.2 SOUTH AFRICA

An individual will be subject to varying taxes in South Africa depending on whether they are defined as a resident, ordinarily resident or non-resident. Individuals who meet the definition of resident are subject to capital gains tax on disposals of their worldwide assets, whilst an individual will only be subject to estate duty tax on their worldwide assets if they are ordinarily resident. Residents who are not ordinarily resident are only subject to estate duty on their South African source property. Non-residents are only subject to capital gains tax in respect of certain assets and estate duty on their South African source property. The difference between "resident" and "ordinarily resident" lies in the physical presence test. A person meets the definition of resident for income tax purposes if they are ordinarily resident in South Africa or they meet the criteria of the physical presence test.

The term "ordinarily resident" is not defined in the SA Income Tax Act or the SA Estate Duty Act. South African judicial precedence can be used along with the guidelines supplied by SARS to determine whether a taxpayer is ordinarily resident or not.⁸²

However, it is important to bear in mind that these merely provide guidance and are not conclusive; therefore disputes may still arise in practice. This can have a significant effect

⁸² SARS Interpretation Note No. 3 of 4 February 2002.

particularly in respect of persons who spend half their year in South Africa and half their year in either Greece or Portugal due to having family ties in both countries. This is often the case with individuals who had previously emigrated from Greece or Portugal to South Africa and upon retirement wish to take advantage of all-year-round summer.

Case law suggests that for a person to be ordinarily resident “*his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principle residence and it would be described more aptly than other countries as his real home*”⁸³ and “*that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration*”.⁸⁴

SARS has provided additional guidance in the form of Interpretation Note 3 of the 4th of February 2002. The interpretation note says that for an individual to be ordinarily resident in South Africa two requirements need to be met:

- the intention to become ordinarily resident; and
- steps indicative that this intention has been or is being carried out.

A non-exhaustive list of factors that can be used to take into account when considering whether the above two requirements are met can be found in the Appendix.

If an individual is not deemed to be ordinarily resident, the individual may still be a resident per the physical presence test. The physical presence test deems an individual to be a South African resident upon successfully meeting all of the following criteria:

- the individual must not be ordinarily resident;
- the individual must have spent more than 91 days in total in the current year in South Africa, whether successive or not;
- the individual must have spent more than 91 days in total in each of the previous five tax years in South Africa, whether successive or not; and
- the individual must have spent more than 915 days in total in South Africa during the previous five tax years.⁸⁵

⁸³ *Cohen v Commissioner for inland Revenue* (1946)

⁸⁴ *Commissioner for Inland Revenue v Kuttel* (1992)

⁸⁵ SA Income Tax Act, S. 1, Definition of resident.

However, an individual cannot be a resident in terms of the physical presence test from the first day of a continuous 330 day period of absence from South Africa. It also excludes persons who are deemed to be exclusively a resident of another country in terms of a double tax treaty. The effect of being deemed a resident is that that resident's worldwide assets will be subject to capital gains tax in the event of death.

Estate duty is payable in respect of the estate of the deceased and is calculated on the estate as a whole. However, the estate duty is payable by either the heir or the executor, depending on the nature of the asset as set out in each subsection of section 3 of the SA EDA on date of death.⁸⁶ This differs from both Greece and Portugal where the persons liable for tax in the event of death are the heirs of the estate and varies based on the closeness of their kinship. The person who is liable to pay the South African income tax on the taxable capital gains arising on death is the deceased. No capital gains taxes are levied on death in Greece or Portugal therefore there is no taxable person. Consequently, different persons may be liable for different taxes between the three countries. This discrepancy between South Africa and Greece or Portugal may have a significant effect on the relief available in situations where international double taxation arises.⁸⁷

There are however instances in South African law where the heir may become liable to pay the capital gains taxes (CGT) of the deceased. Paragraph 41 of the Eighth Schedule to the SA Income Tax Act states that part of the CGT arising on death can be elected to be a debt due by the heir to the state if both the following conditions are met:

- the executor of the estate is required to dispose of a property in order to have sufficient funds to pay the CGT relating to the property; and
- the heir is willing to pay the amount of CGT that exceeds 50% of the net value of the estate (before the R3,500,000 primary abatement and before the CGT liability)⁸⁸ within three years from the date on which the executor obtained permission to distribute the assets of the estate.⁸⁹

⁸⁶ Estate Duty Act, s. 11.

⁸⁷ This is analysed in depth in Chapter 6.

⁸⁸ Stein, M.L. 2004: 143.

⁸⁹ Permission must be obtained by the executor in terms of section 35(12) of the Administration of Estates Act, 1965 (Act No. 66 of 1965).

Any amount payable by the heir must be treated by the heir as an amount of tax chargeable in terms of the SA ITA.⁹⁰ The provision does not make it clear whether the CGT payable on the asset is before or after any section 6quat rebate deduction in respect of foreign capital gains taxes payable on that asset. It is submitted that because paragraph 41(1)(a) of the Eighth Schedule to the SA ITA specifically requires the tax to be “the *tax* determined in terms of this Act, which *relates* to the *taxable capital gain* of a deceased person” that it is the capital gains tax payable before any section 6quat rebate deduction in terms of the SA ITA. As a result of this, it is unclear what the implications of applying paragraph 41 will be on the applicability of section 6quat.⁹¹

3.3 GREECE

The subjective tax link for inheritance tax in Greece is “nationality” or “domicile” which is different to South Africa’s “ordinarily resident” or “resident” link. Greece applies a combination of source and residency-based taxation criteria on death of an individual. The inheritance tax liability varies depending on whether the decedent is a Greek domiciliate or national or not, with particular reference to movable assets.

Many South African citizens of Greek heritage hold Greek passports and European Union Identity Cards. Many of these citizens who are male have also completed the compulsory military service in Greece in order to allow them to live in Greece in the future if they so wish. In the eyes of the Greek Federation, such citizens may be Greek nationals. This may have far-reaching tax affects unbeknown to these South African citizens who seek European passports for their favourable travel benefits.

In terms of Greek income tax law, individuals domiciled in Greece are taxed on their worldwide income.⁹² The situation differs for inheritance tax as only immovable property situated in Greece is subject to inheritance tax. However, where being a Greek national or domiciliate is particularly significant with respect to inheritance tax is when the decedent owns foreign movable property. Movable property is subject to inheritance tax on a worldwide basis if the decedent is domiciled in Greece or is a Greek national. If the

⁹⁰ Income Tax Act, Eighth Schedule, paragraph 41(2).

⁹¹ Further analysis of this issue will be performed in Chapter 6.2.5

⁹² Tax Rates.cc [Online] Available: <http://www.taxrates.cc/html/greece-tax-rates.html> [12 December 2010]

decendent is a non-resident only movable property situated in Greece falls within the Greek inheritance tax net.

Greek tax legislation does not define the word “domicile” and as such the definition of domicile as per civil law is applied.⁹³ The tax courts have accepted this definition for purposes of tax law.⁹⁴ Article 51 of the Greek Civil Code states that a person’s domicile is in the country in which the person is primarily and permanently established.⁹⁵ A quote from correspondence with Manos Tountas says: “Under Greek civil law, domicile examines one’s physical presence in Greece and whether an individual has established themselves permanently in Greece.”⁹⁶ Domicile is a question of fact based on the circumstances surrounding each individual and is broader than “resident” but almost always encompasses residency.⁹⁷ Determining whether a person is domiciled in Greece is important for both income tax as well as inheritance tax purposes.

As per conversation with Constantinos Soulios, the Greek Consul of Cape Town, a person is a Greek national if at least one of that person’s parents is a Greek national. That person’s parents can be Greek nationals provided at least one of their parents was a Greek national. One can therefore only be a Greek national if they have “Greek blood.” A person can therefore be a Greek national irrespective of where his domicile actually is, provided the necessary procedures for registration for Greek citizenship have been complied with. As per Mr. Soulios, the South African residents who have dual citizenship with Greece would be regarded as Greek nationals. As per Mr. Tountas, these South Africans would be treated as Greek nationals because they are citizens of Greece.

The relevant question therefore is, should South Africans who have Greek heritage think twice before applying for Greek passports? The benefits of being a European citizen in addition to a South African resident are significant, but do they come at a price, the price of being liable to additional Greek inheritance taxes on their death?

According to Mr. Tountas, the Greek Inheritance Tax Code makes provision for such occurrences in paragraph 2(e) of Article 25. He explains that if a Greek national has not

⁹³ Tsourouflis, A. 2010: 414.

⁹⁴ Ernst & Young. 1992: 41.

⁹⁵ Ernst & Young. 1992: 41.

⁹⁶ Mr M. Tountas is a tax lawyer in the corporate and tax advisory services of Ernst & Young Athens. Email correspondence with Mr Tountas occurred on 4 May 2011.

⁹⁷ Tsourouflis, A. 2010: 414.

been resident in Greece for a period of 10 consecutive years prior to his death then he will be exempt from paying Greek inheritance taxes on his movable property situated outside Greece. Therefore, South African residents who hold Greek citizenship do not have to worry about the tax consequences thereof unless they intend to make Greece their home for a period of their life. Furthermore, those South Africans who return to Greece frequently should be careful of being deemed a domiciliate of Greece in addition to a resident of South Africa.

Another area where Greek nationality has an impact is hereditary succession. Both testate and intestate hereditary succession is governed by the law of the decedent's nationality on date of death.⁹⁸ This may have a significant effect as to who the legitimate and lawful heirs to the deceased's property are. This discussion is excluded from the scope of this dissertation.

Contrary to South Africa, the taxable persons liable for Greek inheritance tax arising on the death of the deceased are the heirs of the estate. However, the domicile or nationality of the heir has no bearing on the determination of the tax liability. Inheritance tax is determined solely on the situs of the assets and in the case of movable property, the domicile or nationality of the deceased. Therefore, inheritance taxes will be levied on the heirs of the estate irrespective of their nationality or domicile.⁹⁹ This discrepancy between South Africa and Greece in the treatment of taxable person as the "heir" instead of the "deceased" may have unfavourable consequences regarding relief in the event of international double taxation.

Effective from the 2011 tax year, a definition of tax resident for individuals was inserted into the Greek Income Tax Act.¹⁰⁰ Prior to this any person with a Greek domicile would be subject to taxes in Greece on their worldwide income; however there was no definition for domicile in the Greek Income Tax Act. The Greek Income Tax Act has since been amended to define a Greek resident for income tax purposes as any individual who was physically present in Greece for more than 183 days during the same calendar year, with

⁹⁸ Tsourouflis, A. 2010: 406.

⁹⁹ Tsourouflis, A. 2010: 414.

¹⁰⁰ Allamani, M. 2011. BNA Tax and Accounting Centre – Greece [Online]. Available: http://taxandaccounting.bna.com/btac/T12120/split_display.adp?fedfid=16939282&vname=gtgref&fcn=6&wsn=501444000&fn=16939323&split=0#16939323 [7 May 2011]

certain exemptions.¹⁰¹ The individual will still be a resident of Greece if he spends fewer than 183 days in Greece if his domicile is in Greece.

The effect of the amended Greek tax resident definition may be significant for South Africans with Greek heritage or with ties and family in Greece. Many of these South Africans frequent Greece annually and quite often upon retirement spend six months in Greece and six months in South Africa enjoying summer all year round. These South Africans will, from the 2011 tax year, face the risk of meeting the Greek physical presence test and being deemed a Greek resident. If this becomes the case, that individual's worldwide income will be subject to tax in Greece. The applicability and adequacy of relief measures for individuals between South Africa and Greece is currently more important than ever before as the risk of being deemed dual resident is more prevalent since the 2011 amendment.

3.4 PORTUGAL

The subjective tax link in Portugal is “domicile” which, like Greece, is also different to South Africa's “ordinarily resident” or “resident” link.¹⁰² Therefore, Portuguese nationality does not determine an individual's liability to taxation. This does not mean that the nationality of the decedent is not important. It is important to be aware that the nationality of the deceased is pivotal when it comes to the actual legitimacy of the inheritance process.¹⁰³ However, an analysis of this is outside the scope of this dissertation. The Portuguese Stamp Duty Code has specified that for an individual to be domiciled in Portugal, any of the following criteria need to be met when applied to the year in which the free transfer of property occurs:¹⁰⁴

- the individual has been present in Portuguese territory for a total period longer than 183 days (consecutive or otherwise); or
- if the individual has spent less than 183 days in Portugal, then that individual must at least have shown that at the end of the tax year (31 December) that individual has

¹⁰¹ Allamani, M. 2011. Global Tax Guide – Greece [Online]. Available: http://taxandaccounting.bna.com/btac/T12120/split_display.adp?fedfid=16939282&vname=gtgref&fcn=6&wsn=501444000&fn=16939323&split=0#16939323 [7 May 2011]

¹⁰² Fernandes Ferreira et al., 2010: 659.

¹⁰³ Fernandes Ferreira et al., 2010: 651.

¹⁰⁴ Fernandes Ferreira et al., 2010: 660.

living accommodation in circumstances that indicate the intention to keep and occupy the residence as his habitual abode.¹⁰⁵

From the above criteria it can be seen that Portugal also implements a type of “physical presence test.” However, with the number of days required being 183, it is possible for an individual to meet the physical presence test both in South Africa and in Portugal in the same tax year. Whether an individual is domiciled in Portugal or not has a significant effect on the income tax liability to the Portuguese state as Portuguese domiciliaries are liable to pay income taxes on their worldwide earnings.¹⁰⁶ Persons not domiciled in Portugal are only liable for income tax on Portuguese sourced income.¹⁰⁷ Therefore, those South African residents with Portuguese heritage who frequent Portugal regularly should be aware of the number of days spent in each country as they may end up having to pay tax on their worldwide income to both the South African and Portuguese revenue authorities. Fortunately, in Portugal there are no deemed disposals on death and as such there are no Portuguese capital gains tax implications when an individual passes away.

Portuguese stamp duty is levied on all movable and immovable assets situated in Portugal, irrespective of the domicile, nationality or residency of the deceased. However, domicile does determine whether certain shares are subject to stamp duty or not.¹⁰⁸ Therefore, residency does have an impact on international double taxation in respect of stamp duty, albeit to a lesser extent than South Africa or Greece.

The question as to which taxable person is liable for the stamp duty arising on death is a broadly discussed topic as there are opposing views as to who the taxable person on death really is. Article 3(1)-(3) (Tax Burden) of the Portuguese Stamp Duty Code states:

“1 - O imposto constitui encargo dos titulares do interesse económico nas situações referidas no artigo 1.º

2 - Em caso de interesse económico comum a vários titulares, o encargo do imposto é repartido proporcionalmente por todos eles.

3 - Para efeitos do n.º 1, considera-se titular do interesse económico:

¹⁰⁵ A further two criteria can also be used to determine domicile in Portugal namely, if an individual is a member of a crew of any ship or aircraft the company of which having its residence, head office or place of effective management in Portuguese territory; or if the individual discharges functions or commissions of a public character outside of Portuguese territory but in the service of the Portuguese state.

¹⁰⁶ Fernandes Ferreira et al., 2010: 659.

¹⁰⁷ Tax Rates.cc [Online] Available: <http://www.taxrates.cc/html/portugal-tax-rates.html> [12 December 2010]

¹⁰⁸ See Chapter 5.4

a) Nas transmissões por morte, a herança e os legatários e, nas restantes transmissões gratuitas, bem como no caso de aquisições onerosas, os adquirentes dos bens”.

Translated, the article provides that the tax burden arising on succession is due by the recipients of the economic interest in their proportionate share.

However, there are conflicting arguments that the estate is the taxable person and not the heir. This is in light of the fact that stamp duty is levied on the net value of the estate and not on the individual hereditary quotas and secondly because the tax was due by the succession estate and should be paid by the head of the family, regardless of the inheritance that the head obtained as a beneficiary of the estate.¹⁰⁹ This is evident from Article 2(a) of The Portuguese Stamp Duty Code which states:

“2 - Nas transmissões gratuitas, são sujeitos passivos do imposto as pessoas singulares para quem se transmitam os bens, sem prejuízo das seguintes regras:

a) Nas sucessões por morte, o imposto é devido pela herança, representada pelo cabeça-de-casal, e pelos legatários;

b) Nas demais transmissões gratuitas, incluindo as aquisições por usucapião, o imposto é devido pelos respectivos beneficiários”.

As per correspondence with Antonio Neves, the practice in Portugal is that the heirs to the estate are liable to pay the stamp duty, regardless of their residency.¹¹⁰

The issue of who the taxable person is may have an effect on the ability of the person who actually paid the tax, to claim relief in the event of double taxation if the relief can only be applied by the taxable person.¹¹¹

3.5 CONCLUSION

The definition of taxable person on death is different for South Africa, Greece and Portugal. In South Africa the taxable person is the deceased while in Greece the taxable person is the heir. The taxable person in Portugal is also the heir; however there are still conflicting arguments that the taxable person is in fact the estate.

¹⁰⁹ Fernandes Ferreira et al., 2010: 656.

¹¹⁰ Antonio Neves is a director of tax at Ernst & Young, Lisbon office. Correspondence took place on 6 May 2011.

¹¹¹ Whether this limitation exists in the various relief measures available is analysed for each relief measure in Chapter 6.

The rules used to determine residency also differ among the three countries. South Africa applies two different residency tests, ordinarily resident for estate duty purposes and residency for capital gains tax purposes. The subjective link for inheritance tax in Greece is the domicile or nationality of the decedent whilst that of Portugal is only domicile. Residency has a far greater impact for South Africa which applies a residency based tax system compared to Greece and Portugal which apply predominantly source based systems. Greece does however subject a Greek resident to inheritance tax on their worldwide movable assets. Greece is also the only state of the three that may levy inheritance taxes based on the nationality of an individual, regardless of their residence or domicile. However, certain South African residents with Greek citizenship do not have to worry about being subject to Greek inheritance taxes provided they did not reside in Greece for a prior consecutive ten year period.

Prior to the 2011 tax year Greece has never had a definition for resident for an individual for income tax purposes. Greece has newly implemented a physical presence test of 183 days which is similar to the test of 183 days as applied by Portugal, while South Africa requires at least 91 days in each of the current and five preceding years and an aggregate of 915 days in those preceding five years. Residents of South Africa with ties in either of the two countries should be cautious when travelling between countries so as not to be deemed a dual resident and consequently be subject to taxes in both states on their worldwide income, with specific reference to CGT.

The differences in residency definitions, source versus residence tax basis and who the taxable person is, or may give rise to situations where international double taxation occurs between South Africa and Greece or Portugal in the event of the death of an individual. The availability and adequacy of relief in the event of this is dealt with in Chapter 6.

CHAPTER 4 VALUATION OF ASSETS

4.1 INTRODUCTION

The method used to value the deceased's assets on death is important as it directly affects the amount of tax levied by each state. This chapter analyses the different valuation methods applied by each country on the different classes of assets, covering immovable and movable property in general and specifically covering farmland, listed shares and non-listed shares. If these methods differ between South Africa, Greece and Portugal then partial double taxation could occur despite the availability of relief.

4.2 SOUTH AFRICA

Generally, the value of assets to be included in the deceased estate is the fair market value of the property as at the date of death. However, if the asset is sold to an unconnected third party then the proceeds received will represent the value of the property at date of death for estate duty. The fair market value is defined as being the “*price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market*”.¹¹² However, if the property in question is immovable property relating to bona fide farming operations which are carried out in South Africa, the fair market value is reduced by 30%.¹¹³ For estate planning purposes, it is optimal not to sell farming land in the course of the liquidation of the estate as the proceeds are not awarded the same 30% concession.¹¹⁴ It is important to note that the reduction in market value will not apply in respect of any farmlands owned by the deceased in Greece or Portugal as the provision only applies to farming operations carried out in South Africa.

Shares in listed companies are valued at the current listed price at date of death unless the executor of the estate sells the shares in which case the proceeds would be used instead.¹¹⁵ Shares in any unlisted companies and members' interests in close corporations require an auditor's or directors' valuation of the value of the unlisted shares or members' interest,

¹¹² Estate Duty Act, s. 1

¹¹³ Estate Duty Act, s. 1 Definition of “fair market value”.

¹¹⁴ PricewaterhouseCoopers. 2005. Estate Duty 1271 – An estate duty pitfall for farmers [Online]. Available: <http://www.saica.co.za/integritax/> [24 April 2011] & Beneke et al., 2010: 16-6(3).

¹¹⁵ Bagraim, P. & Roeleveld, J. 2010: 693.

regardless of whether they had been sold or not.¹¹⁶ However, no set rule has been prescribed as to the type of valuation method that may be used in the auditor's or directors' valuation.¹¹⁷

It is however important to bear in mind that as per section 8 of the SA EDA, the Commissioner has the power to adjust the value submitted to a value that in his opinion represents the dutiable amount.

4.3 GREECE

Greece requires all assets subject to inheritance tax on the death of an individual to be valued at their fair market value.¹¹⁸ The Greek Inheritance Tax Code provides specific rules for valuing certain categories of assets. Immovable property is valued according to an imputed market value system.¹¹⁹ This objective value approach is calculated according to a set of predetermined value indicating factors such as location, age, size and marketability.¹²⁰ The value of listed shares becomes the closing price of the shares a day prior to the decedent's death.¹²¹ Unlisted shares on the other hand take on an accounting value on date of death.¹²² Movable property must be valued on date of death at market value.¹²³

Comparing the above valuation measures to those applied by South Africa on death of an individual, it is more likely that discrepancies may occur in values calculated by each country of immovable property and unlisted shares. The objective value approach used in Greece often results in a value less than market value.¹²⁴ As per Chapter 4.2, there is no prescribed rule in South Africa as to the valuation method that should be used by the director or auditor in valuing unlisted shares. The valuation method applied may result in a different valuation to the accounting valuation approach applied in Greece.

¹¹⁶ Bagraim, P. & Roeleveld, J. 2010: 693.

¹¹⁷ Bagraim, P. & Roeleveld, J. 2010: 693.

¹¹⁸ Tsourouflis, A. 2010: 411.

¹¹⁹ Tsourouflis, A. 2010: 409.

¹²⁰ Tsourouflis, A. 2010: 409.

¹²¹ Tsourouflis, A. 2010: 409.

¹²² Factors affecting the accounting value of unlisted shares are provided by article 12 of the Greek Income Tax Code e.g. prior five years' operating profits, the investors return on equity, the value of the company's immovable property and any other factors affecting the shares' market value.

¹²³ Tsourouflis, A. 2010: 409.

¹²⁴ Whitfield, R. B. 2008. *Taxation implications arising from South African residents owning or having a tax interest in fixed property in Greece*. Pretoria, South Africa: UNISA. (M Com (Taxation)). [Pdf]

Many South Africans with Greek heritage own farming property in Greece in the form of olive or almond groves. Article 25 of the Greek Inheritance Tax Code used to provide an exemption for Greek property that was inherited by the deceased's children if it was used for bona fide farming operations. However, this full exemption has been repealed by Law 3842/2010 (effective from 23 April 2010). Therefore, the value of farming property to be subject to Greek inheritance tax is the imputed market value (i.e. the objective value).

4.4 PORTUGAL

The Portuguese Stamp Duty Code lays out specific valuation rules in articles 13 to 21. The value of immovable property for stamp duty purposes is the value used by the municipality for property tax purposes as at the date of death.¹²⁵ The value attributed to movable property is based on the higher of its official value or the value declared by the head of the family, unless there is a specific rule provided in the Stamp Duty Code regarding the valuation of that asset.¹²⁶

Discrepancies between the valuation of immovable property in South Africa and Portugal may only occur if the value used for municipal property tax purposes does not approximate the market value of the property. This should only occur if municipal property values are not updated on a yearly basis or if there is a drastic change in the property market during the tax year in which the individual passes away.

As per correspondence with Antonio Neves, the value of shares on date of death “*depends on the legal nature of the company. For limited liability companies, as a rule, the value is based on the balance sheet, which may be adjusted (namely in case the company owns real estate, being considered the tax value of the property). For stock corporations, the value is calculated based on a specific formula that takes into account the balance sheet, which may need to be adjusted, as well as the profits obtained by the company during the last 2 years*”. If this information is not available on date of death the closest available date in the last six months may be used.¹²⁷ See Appendix 2 for the share valuation formulas.

¹²⁵ Portuguese Stamp Duty Code, Article 13.

¹²⁶ Fernandes Ferreira et al., 2010: 655.

¹²⁷ Portuguese Stamp Duty Code, Article 15(3).

4.5 CONCLUSION

In general, property is valued at market value at date of death in South Africa, Greece and Portugal. Discrepancies may arise in practice between the three states as to the value attributed to property in respect of immovable property, farming property and unlisted shares.

The valuation differences highlighted in this chapter may result in partial double taxation. If the foreign tax payable is larger than the local tax payable, partial double taxation occurs due to the relief being limited to the lesser of the foreign and local tax payable on the same transaction. The partial double taxation will occur in the country providing the relief, which is the country in which the situs of the property is not located.

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5.1 INTRODUCTION

The situs or deemed situs of an asset needs to be established if a country applies a territoriality link with regards to taxation in the event of death. South Africa, Greece and Portugal all apply territoriality links in respect of certain assets. If the territoriality links of South Africa coincide with either Greece or Portugal it could result in international double taxation as the asset will be subject to tax on death in both countries. It would be expected that the more likely areas where territoriality links could coincide lie in assets in the form of shares in companies owning predominantly immovable property or movable assets. Further complications could arise where even if assets are not physically located in a territory, the country could have specific situs rules which deem the asset to be situated in that country.

5.2 SOUTH AFRICA

The tax basis of South Africa is a residency basis as opposed to a source basis. Therefore, in the event of death, if an individual is a resident (for capital gains tax purposes) or ordinarily resident (for estate duty purposes) that individual's worldwide assets will be subject to tax, regardless of their situs. Situs does have a significant influence on whether the asset is subject to tax or not in South Africa when the individual is a non-resident (for capital gains tax and estate duty purposes) or a resident only in terms of the physical presence test (for estate duty purposes).

If the decedent is a non-resident all assets situated in South Africa are subject to capital gains tax, subject to exclusions.¹²⁸ If the decedent is not ordinarily resident only assets situated in South Africa are subject to estate duty. In these two instances, determining the situs of assets is very important as it determines whether the assets are subject to tax on death in South Africa or not.

¹²⁸ An example of an exclusion would be shares listed on the Johannesburg Securities Exchange (JSE), which are situated in SA, held by a non-resident.

The situs of shares is in South Africa when change of ownership of the shares is required to be registered in South Africa.¹²⁹ As per the South African Companies Act No. 71 of 2008 all South African companies are deemed to be registered in South Africa as even registration in a branch register is deemed to be part of a principal register situated in South Africa.¹³⁰ Therefore only shares in companies¹³¹ registered outside South Africa are excluded from the South African situs net e.g. shares in a company listed on a foreign stock exchange.

The situs of movable property is where the asset is situated. Similarly, the situs of immovable property is the physical location of the property. As two different taxes are levied in South Africa on death, there may be different situs rules for each in relation to specific assets. For capital gains tax purposes it is important to note that immovable property includes equity shares where a non-resident holds directly or indirectly at least 20 percent of the equity shares in a company of which 80 percent of the value of the shares is attributable directly or indirectly to immovable property otherwise than held as trading stock situated in South Africa.¹³²

Therefore, even if the situs of shares is not in South Africa due to the shares being registered in either Greece or Portugal, the situs is still deemed to be South Africa as the shares are deemed to be immovable property with its situs in South Africa. This may result in double taxation as the shares may still have a foreign situs in the eyes of the foreign country. In this situation there may also be problems with regards to relief.

However, this deeming provision found in the SA Income Tax Act in paragraph 2 of the Eighth Schedule, is not present in the SA Estate Duty Act. Therefore, a non-resident holding shares in a foreign company with the majority of the value of which is attributable to South African immovable property, may avoid being subject to South African estate duty in relation to these shares even though the immovable property is situated in South Africa.

¹²⁹ Huxham et al., 2010:694

¹³⁰ *Lamb vs CIR* 1955 (1) SA 270 (A),

¹³¹ The definition of company in Section 1 of the SA Income Tax Act includes close corporations.

¹³² SA Income Tax Act, Eighth Schedule, paragraph 2.

5.3 GREECE

Greece applies a combination of source and residency criteria in determining the taxes levied on death. All assets situated in Greece belonging to the deceased are subject to Greek inheritance tax, irrespective of his or her domicile or nationality. Therefore, it is important to determine the situs of assets as the territoriality link is the primary link with respect to the taxability of assets on death in Greece. The residency link only comes into play with regard to movable assets. An individual with Greek domicile or nationality is subject to inheritance tax on his worldwide movable assets.

In order to eliminate disputes, paragraph 2 of article 3 of the Greek Inheritance Tax Code provides a list of assets deemed to be situated in Greece. Due to the doctrine of independence of the Greek tax law from private international law the situs rules in the Greek Inheritance Tax Code are applicable irrespective of any private international rules with regard to asset location and ownership.¹³³ The majority of the assets on the deemed situs list are excluded from the scope of this dissertation except for shares, movable assets and cash.

As per the deemed situs list, shares in companies having a registered seat in Greece have their situs in Greece.¹³⁴ However, the Greek Inheritance Tax Code does not incorporate a broad definition for immovable property¹³⁵ due to the fact that shares in companies with the majority of its value attributable to immovable property are not included in the immovable property definition.¹³⁶ This means that the situs of the immovable property owned by the company is not taken into account when determining the situs of the shares. This conforms to the method applied under South African estate duty, but is contrary to the method applied for capital gains tax in South Africa.

This narrow definition of immovable property may lead to instances where international double taxation occurs. One such instance is where the shares held by a Greek resident in a Greek company are registered in Greece whilst the company's immovable property is situated in South Africa. On death of that Greek resident, the Greek Inheritance Tax Code

¹³³ Tsourouflis, A. 2010: 415.

¹³⁴ Greek Inheritance Tax Code, Article 3, paragraph 2(e).

¹³⁵ Unlike the Eighth Schedule of the SA Income Tax Act, paragraph 2(2)(a)

¹³⁶ Tsourouflis, A. 2010: 415.

will deem those shares to have a situs in Greece and therefore be subject to Greek inheritance tax while also being subject to capital gains tax in South Africa as a result of those shares being deemed to be immovable property situated in South Africa for income tax purposes. However, as the SA Estate Duty Act includes no such similar deeming provision no estate duty is levied in such a scenario.

The situs for movable property is the physical location of that property.¹³⁷ This territorial link is important for individuals without Greek domicile or nationality as their movable assets will be subject to Greek inheritance tax based on whether they have Greek situs or not. However, if the decedent has Greek domicile or nationality then his worldwide movable assets are subject to inheritance tax in Greece. This is the only case where Greek inheritance tax is levied regardless of the situs of the assets. This may give rise to international double taxation.

The important question to ask in this regard is: which assets fall into the category of movable property? More specifically, are incorporeal shares in a company regarded as movable or immovable property? The outcome is important as that will determine whether they will be included in the Greek inheritance tax net or not. As the tax is levied by Greece, one needs to determine the answer to this question in terms of the principles applied in Greek law. Upon correspondence with Manos Tountas, it is confirmed that the practice in Greece is to regard shares as movable property. This therefore prevents Greek domiciliates from avoiding taxes through owning their immovable property in Greece through a foreign registered company. However, as the deceased's foreign movable assets are only subject to inheritance tax if that person is a Greek domiciliate or national, it means that non-Greek South African residents may be able to escape being taxed on their immovable property in Greece if they are owned through a foreign registered company.

Amounts deposited in Greek bank accounts are deemed to have a situs in Greece irrespective of the domicile or nationality of the bank account holder.¹³⁸ However, there are no South African capital gains tax consequences on foreign currency disposals¹³⁹ on

¹³⁷ Greek Inheritance Tax Code, Article 3, paragraph 2(j)

¹³⁸ Greek Inheritance Tax Code, Article 3, paragraph 2(k)

¹³⁹ SA Income Tax Act, Eighth Schedule, paragraph 86.

death provided the foreign currency is a personal foreign currency asset.¹⁴⁰ If the cash that is held by a South African resident in a Greek bank account is deposited for investment purposes there will be a capital gains effect on its deemed disposal¹⁴¹ on the death of that resident unless the heir inheriting the foreign cash is the spouse of the decedent.¹⁴² If the heir inheriting the foreign cash is a non-resident spouse, then the asset will escape being subject to CGT as non-residents are not subject to CGT on non-SA source assets.

5.4 PORTUGAL

In Portugal the situs of assets is very important as stamp duty is levied on death based purely on assets with a Portuguese situs and irrespective of the domicile of the decedent. However, as only assets with a Portuguese situs are subject to stamp duty on death, the scope for occurrences of international double taxation is narrower than for Greece.

The Portuguese Stamp Duty Code lays out a list with rules regarding the deemed situs of certain assets. If the rules deem an asset to be situated in Portugal whilst also situated in South Africa, double taxation issues could arise. Of the total deeming list, two assets are within the scope of this dissertation namely movable assets and shares. Movable assets have a deemed situs in Portugal if they are registered in Portugal or if they are subject to register or licence in Portuguese territory.¹⁴³

The situs of shares generally follows the residency of the company provided that the decedent is domiciled in Portugal. If shares are not registered in Portugal, they are deemed to be located in Portugal when the company has its place of effective management in Portugal or if its head office or permanent establishment is in Portugal.¹⁴⁴ However, if the decedent is not domiciled in Portugal the shares are not deemed to have a Portuguese situs.

¹⁴⁰ “personal foreign currency asset” is defined in paragraph 84 as any foreign currency asset of a person which constitutes :

- a) *an amount which constitutes a unit of foreign currency in cash or cash equivalent, held primarily for the regular payment of personal expenses; or*
- b) *any one account held in the relevant foreign currency with a banking institution from which funds can be immediately withdrawn, which account is used primarily for the regular payment of personal expenses”.*

¹⁴¹ SA Income Tax Act, Eighth Schedule, paragraph 87.

¹⁴² SA Income Tax Act, Eighth Schedule, paragraph 95.

¹⁴³ Portuguese Stamp Duty Code, Article 4(4).

¹⁴⁴ Fernandes Ferreira et al., 2010: 661.

A conflict with the situs of shares could arise when the shares are registered in South Africa but the company's place of effective management, head office or permanent establishment is in Portugal. In this instance both South Africa and Portugal deem the situs of the shares to be situated in their respective country. A further scenario where international double taxation could occur is where a Portuguese domiciled resident holds shares in a company that is effectively managed in Portugal, but 80 percent or more of the value of the company is attributable to immovable property situated in South Africa. In this case the situs of the shares would be deemed to be Portugal for stamp duty purposes while the shares will be deemed to be immovable property situated in South Africa for capital gains tax purposes, but will be excluded from estate duty.

5.5 CONCLUSION

Establishing the situs of assets is essential as South Africa, Greece and Portugal all apply territoriality links for the taxability of various types of property on death. In South Africa, determining the situs of the asset is especially important for non-residents as only their assets with a South African situs may be subject to estate duty and capital gains tax. Situs conflicts may also occur where a non-resident holds shares in a company registered in Portugal or Greece, of which at least 80% of its value is attributable to immovable property situated in South Africa. Shares in such companies may end up escaping the estate duty net altogether.

Determining the situs of assets from a Greek perspective is crucial as all assets situated in Greece belonging to the deceased are subject to Greek inheritance tax irrespective of his domicile or nationality. There are no deemed situs rules for shares in companies holding immovable property situated in Greece. However, these shares do not escape being taxed on death as inheritance tax is levied on the deceased's worldwide movable property, provided the deceased is a Greek domiciliate or national.

It is of primary importance to ascertain the situs of assets with regards to Portuguese stamp duty as only assets with a Portuguese situs are taxable in the event of death. Conflict in situs issues may arise with South Africa as the situs of shares is deemed to be in Portugal when the company has either its place of effective management, head office or permanent establishment in Portugal.

Therefore, all three countries apply situs links with regard to the taxability of assets in the event of death, many of which overlap, which could result in international double taxation.

6.1 METHODS OF RELIEF AVAILABLE WHEN INTERNATIONAL DOUBLE TAXATION OCCURS**6.1.1 INTRODUCTION**

In the event of international double taxation, a taxpayer should be aware of all the available avenues that may be used as a means of providing relief. In many instances there are two broad categories of relief that a taxpayer may choose from in order to alleviate double taxation, namely unilateral (domestic) and bilateral (treaty) relief.

This dissertation highlights the potential problem areas, submits solutions and explores the applicability and methodology of the various unilateral methods of relief afforded by South Africa, Greece and Portugal in respect of income taxes and inheritance type taxes arising solely as a result of the taxable event of death of an individual. Furthermore, the dissertation investigates whether bilateral treaty relief is available between either South Africa and Greece or South Africa and Portugal, which taxes they encompass, and concludes on the adequacy, applicability and limitations thereof.

The analysis of unilateral and bilateral relief with respect to capital gains is particularly important as the treatment thereof varies from country to country. Some countries do not tax capital gains; some countries do not tax them as taxable income, some countries only tax companies on their capital gains and others do not recognise the disposal on the same date.¹⁴⁵

6.1.2 BACKGROUND ON UNILATERAL AND BILATERAL RELIEF

Unilateral relief refers to the domestic relief provisions afforded by domestic legislation of a particular country and may take the form of three alternative methods. The deduction method affords a deduction against income for taxes paid to a foreign tax authority on income not subject to a rebate. The credit method differs from the deduction method in that it allows residents a rebate after the final tax liability has been calculated i.e. it is a

¹⁴⁵ Silke, J. 2004: 18(1): 18.

deduction against actual taxation and not against income, but still in respect of foreign taxes paid to foreign tax authorities. The exemption method renders foreign sourced income exempt from being taxed in a resident's state.

Bilateral relief usually takes the form of a double tax treaty or convention signed between two contracting states. Tax treaties generally take the form of either a credit or exemption approach. In addition to these approaches, tax treaties may grant a contracting state the sole right to tax a certain type of income.¹⁴⁶ Tax treaties are usually based on the Organisation for Economic Co-operation and Development Model Tax Convention¹⁴⁷ (OECD MTC). South Africa is not a member state of the OECD but has so-called "observer status".¹⁴⁸ South African courts have also accepted that guidance may be obtained from the OECD MTC Commentary when interpreting tax treaties that South Africa has entered into despite South Africa not being a member state of the OECD.¹⁴⁹

In South Africa, once an international tax treaty is enacted it has the same standing as other domestic legislation.¹⁵⁰ Section 231 of the Constitution of the Republic of South Africa Act, 1996 states that all international agreements, which include international tax treaties, are to be incorporated as part of South African law. The domestic procedures for incorporating international tax treaties into South African tax law are set out in section 108(2) of the SA Income Tax Act and section 26 of the SA Estate Duty Act. In summary, section 108(2) and section 26 state that after parliament has approved an international tax agreement and once it has been published in the *Government Gazette*, the provisions of the tax treaty acquire the force of law. However, once a treaty is enacted, it cannot result in more tax being levied than provided for under the domestic legislation.¹⁵¹

In Greece, international tax treaties are privileged to a higher rank than the domestic law. Article 28 of the Greek Constitution states that once international tax agreements are ratified, not only do they form part of the domestic Greek law, but they override any

¹⁴⁶ This occurs when the double tax treaty uses the word "shall" instead of "may" when referring to the taxing rights attributable to a particular income.

¹⁴⁷ The two standard treaties relevant to this article are the OECD Income and Capital Model Convention (2008) and the OECD Estate, Inheritance and Gift Model Convention (1982).

¹⁴⁸ Olivier et al., 2008:9.

¹⁴⁹ *Secretary for Inland Revenue v Downing* 37 SATC 249.

¹⁵⁰ Olivier et al., 2008: 36.

¹⁵¹ Huxham et al., 2010: 450.

contrary legislation. This means that unilateral relief only comes into effect if there are no bilateral relief measures available.¹⁵²

The superior ranking of double tax conventions above domestic law is the same in Portugal as it is in Greece.¹⁵³ Therefore, if a taxpayer wishes to seek relief from double taxation, only double tax treaty relief may be used, unless no treaty exists between two contracting states.¹⁵⁴

The unilateral relief that this dissertation analyses in Chapters 6.2 – 6.6 is the South African section 6quat of the SA ITA, section 16(c) and section 4(e) of the SA EDA and Greek inheritance tax domestic relief. The Portuguese Stamp Duty Code has no provision for domestic relief. The bilateral relief measures that will be analysed are the Double Tax Conventions on Taxes on Income and Capital that South Africa signed with each Greece and Portugal and are found in Chapters 6.9 & 6.10. No double tax agreements in respect of inheritance taxes or estate taxes have been signed between South Africa and Greece or with Portugal. The use of unilateral relief measures in addition to bilateral relief is analysed in Chapter 6.1.3.

6.1.3 THE ISSUE OF A TAXPAYER USING UNILATERAL RELIEF IN ADDITION TO BILATERAL RELIEF

It is a commonly known principle and loosely applied phrase that domestic relief provisions may not be used in addition to that afforded in international double tax treaties. Section 6quat of the SA Income Tax Act states:

“2) *The rebate under subsection (1) and the deduction under subsection (1C) shall not be granted in addition to **any relief** to which the resident is entitled **under any agreement** between the governments of the Republic and the said other country for the **prevention of or relief from double taxation**, but may be granted in substitution for the **relief to which the resident would be so entitled**”.* [Own emphasis added].

¹⁵² Tsourouflis, A. 2010: 420.

¹⁵³ Almeida Fernandes et al., 2010: 651.

¹⁵⁴ Almeida Fernandes et al., 2010: 655.

From the highlighted wording of section 6quat (2) it seems as though the provision has been written wide enough to include all international double taxation agreements i.e. those in respect of taxes on income and capital as well as those in respect of inheritance taxes.

However, does this mean that if section 6quat relief is used for relief on income taxes, that double tax agreements on inheritance taxes may no longer be utilised? Or does it only mean that if section 6quat relief is used for relief on income taxes, then double tax agreements on income taxes may not be used in conjunction with domestic relief? The latter interpretation would be the instinctive interpretation of the rule as inheritance tax is a completely different tax in nature to that of income tax. Furthermore, there is no restriction disallowing a decedent from making use of both section 6quat for income tax relief and section 16(c) for estate duty relief. If this is the case, why would the taxpayer be prevented from using section 6quat relief and instead of choosing section 16(c) relief, he chose an inheritance tax treaty?

No guidance on this is provided in the OECD Income and Capital Model Convention (2008) or in the OECD Estate, Inheritance and Gift Model Convention (1982) as they do not contain any provisions which prohibit the use of the double tax treaties in addition to domestic relief. This limitation can only be found in the relevant domestic legislation of the two Contracting States in question.

An extract of section 16(c) of the SA Estate Duty Act reads:

“without in any way modifying or adding to the rights of any person under an agreement entered into by the Government of the Republic with the Government of any other country or territory relating to the prevention of or relief from double taxation in respect of estate duty”. [Own emphasis added].

From an estate duty perspective, a taxpayer is not allowed to use section 16 domestic relief in addition to that of bilateral treaty relief *in respect of estate duty*. Therefore, no limitation exists that prohibits domestic relief in respect of estate duty being used simultaneously with double tax treaties in respect of income taxes. If this is the case for the SA Estate Duty Act, why would the limitation imposed in section 6quat relief in the SA Income Tax Act be applied so widely?

It is therefore submitted that the wording of section 6quat should be read in light of the Act to which it relates otherwise it will result in a consequence that could not have been intended. As section 6quat relief is incorporated in the SA Income Tax Act, the use of the words “*under any agreement... for the prevention of or relief from double taxation*” should be limited to agreements that relate only to taxes levied by the SA Income Tax Act. Furthermore, the taxes covered by section 6quat exclude inheritance and estate duty taxes (see Chapter 6.2). Therefore, if foreign inheritance taxes paid are excluded from the scope of section 6quat, then the restriction prohibiting additional use of double tax agreements should also exclude from its scope inheritance tax double treaties. Section 6quat(2) also ends off by saying that section 6quat “*may be granted in substitution for the relief to which the resident would be so entitled*”. This may provide interpretational guidance as to the meaning of “*any relief to which the resident is entitled under any agreement*”. [Own emphasis added]. Which relief would the resident *be entitled to*? The only relief that the taxpayer would be entitled to in lieu of section 6quat, a section that applies in the event of foreign income taxes being payable on foreign source assets, is that of international double tax treaties on income and on capital.

As per Article 2 of the OECD Estate, Inheritance and Gift Model Convention (1982), the Taxes Covered by the Convention reads as:

“There shall be regarded as taxes on estates and inheritances taxes imposed by reason of death in the form of taxes on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donationes mortis causa”. [Own emphasis added].

Therefore, income taxes arising by reason of death are likewise excluded from the scope of inheritance tax treaties that are drafted on the premise of the OECD Estate, Inheritance and Gift Model Convention (1982). Furthermore, the five death treaties that South Africa is currently entered into seem to align with the definition of “Taxes Covered” as in the Model Convention and exclude income taxes.¹⁵⁵ Therefore, the use of inheritance tax treaties does not provide extra relief to what section 6quat provides, but provides an entirely separate form of relief on different types of taxes. In respect of all of the above, it is therefore

¹⁵⁵ As per inspection of the “Taxes Covered” section of the inheritance tax treaties that South Africa signed with Sweden, Zimbabwe (Southern Rhodesia), United States of America, United Kingdom and Lesotho (Basutoland, Bechuanaland & Swaziland).

submitted that *any relief...under any agreement* relates only to any international tax treaty in respect of income taxes and excludes inheritance tax double treaties.

If this were the case, it would be possible for a South African taxpayer to choose one of the following four combinations of relief in respect of foreign income taxes and inheritance taxes paid on foreign source assets:¹⁵⁶

- Section 6quat of the SA ITA & section 16(c) of the SA EDA; or
- Section 6quat of the SA ITA & double tax treaties in respect of inheritance taxes; or
- Double tax treaties on taxes on income and capital & section 16(c) of the SA EDA; or
- Double tax treaties on taxes on income and capital & double treaties in respect of inheritance taxes.

However, the implication of the above is that if section 6quat is used, it must be applied across all assets, movable and immovable, that gave rise to foreign income taxes for which the decedent is seeking relief from. Therefore, the restriction of the use of income tax treaties in addition to section 6quat does not apply to foreign taxes incurred on an asset-for-asset basis, but on foreign taxes arising from the decedent's assets in their entirety. For example, it would not be possible for the decedent to use section 6quat relief in respect of foreign income arising from foreign movable assets in addition to a double tax treaty on taxes on income in respect of foreign immovable assets so as to obtain the optimal relief mix in respect of foreign income taxes paid as this would amount to section 6quat (1) being *granted in addition to any relief to which the resident is entitled under any agreement between the governments of the Republic and the said other country.*¹⁵⁷ [Own emphasis added].

This may give rise to complications when the decedent owns property in more than one foreign country. If relief may not be chosen to apply on an asset-per-asset basis as illustrated above, but instead in respect of the total assets of the estate, then would that prevent the decedent from choosing the optimal relief available against income taxes paid on foreign source income on a country-for-country basis? If this is the case the following issue would arise: if the deceased owned property in a foreign state that has not entered

¹⁵⁶ Bear in mind that as per Chapter 6.3, if an inheritance tax treaty is in existence between two countries, inheritance treaty relief must always be applied above section 16(c).

¹⁵⁷ This is not allowed in terms of section 6quat(2).

into a double tax treaty on income taxes with South Africa, then the only relief available for foreign income taxes paid on those foreign assets would be section 6quat. However, if section 6quat is applied in respect of those foreign assets, then as established earlier, section 6quat would have to be applied to the deceased's assets in their entirety. This would therefore include all the decedent's other foreign properties, including those situated in different foreign countries, irrespective of whether treaty relief is available or not between South Africa and those other countries.

Therefore, based on the above reasoning, if a South African decedent owned property in Greece, Portugal and the Country Z,¹⁵⁸ and if section 6quat domestic relief was chosen in respect of foreign income taxes paid on properties situated in Country Z, then the decedent would be forced to use section 6quat in respect of his properties situated in Greece and Portugal despite the existence of a well drafted double tax treaty on income and capital between South Africa and those two states. On the contrary, if the South Africa – Greece and South Africa - Portugal income tax treaty was used to provide relief for foreign income taxes paid on the decedent's property in Greece and Portugal, then no relief would be available in respect of foreign income taxes payable in Country Z as that would amount to section 6quat being used in addition to the use of a double tax treaty on income taxes.

The outcome of such an issue arising would be unjust. However, this alone affords no assistance. As stated by Rowlatt J in *Cape Brandy Syndicate v IRC (1921) King's Bench* at 71 "there is no equity about a tax". Upon analysis of section 6quat (2), the use of the word *country* in its single sense as opposed to the word "countries" could mean that the scope of section 6quat is to be applied on a country-by-country basis. If this were the case, section 6quat (2) would give rise to fewer anomalies. Therefore, it is submitted that the wording of section 6quat (2) should be interpreted to prohibit the use of section 6quat in addition to an income tax treaty with a particular country, but the prohibition is restricted to a per country basis. As per conversation with Ranecia Unthank,¹⁵⁹ that is exactly how the provision is treated in practice.

¹⁵⁸ Country Z is a notional country that represents any country that has not entered into a double tax agreement in respect of income taxes with South Africa. South Africa has only entered into double tax treaties on income with 64 countries. As per Matt Rosenberg (2011), there are 195 countries in the world. Country Z can therefore be any one of the 91 remaining countries.

¹⁵⁹ Ranecia Unthank is a manager of International Tax Services at Ernst & Young Inc. (Cape Town) and the conversation took place on 4 April 2011.

As section 16(c) of the SA EDA also only makes use of the word *country* in its singular sense, a similar conclusion is submitted for section 16(c) in that the provision is applied on a country-by-country basis irrespective of whether treaty relief has been used in relation to another country or not.

On a separate note, as foreign domestic relief is not in terms of *any agreement* between the two Contracting States, it is submitted the South African domestic relief may be used in conjunction with foreign domestic relief. Therefore, a decedent may make use of section 16(c) in the South African Estate Duty Act as well as the equivalent domestic relief provision in Greece and Portugal's domestic legislation.¹⁶⁰

6.1.4 CONCLUSION

The general saying of “treaty relief may not be used in addition to domestic relief” is a little more complicated than just that. In many circumstances a taxpayer may use treaty relief in addition to domestic relief in the same year of assessment and in respect of the same foreign assets, but perhaps not for the same taxes.

Treaty relief may be used in conjunction with South African domestic relief provided they are applied in respect of foreign taxes that are different in nature. This can even be in respect of the same foreign asset; provided the one relief is used for income taxes and the other relief is used for inheritance taxes. Treaty relief can even be used in conjunction with domestic relief on the same type of tax (e.g. income tax) provided they are used in respect of foreign taxes payable to different foreign countries. Therefore, a different method of relief may be used in respect of each different type of foreign tax payable to each separate foreign country determined on a country-by-country basis.

¹⁶⁰ See Chapter 6.5 for more information on Greek domestic relief. There is no domestic relief available in terms of the Portuguese Stamp Duty Code, see Chapter 6.6.

6.2.1 THE BACKGROUND OF SECTION 6quat

The South African Income Tax Act provides a method of relief against international double taxation in the form of section 6quat. Section 6quat allows as a deduction from the South African income tax liability any foreign tax payable in respect of foreign income that has been included in South African taxable income.¹⁶¹

The section 6quat deduction is not a deduction against income as is a section 11 deduction, but is rather in the form of a rebate which is deductible after the final South African income tax has been determined. However, this rebate provides only limited relief in that the rebate may not exceed the South African income tax payable on that foreign income.¹⁶² If such a situation arises, the excess rebate may be carried over into the following financial year for a maximum of seven years.¹⁶³ This carry over does not apply to rebates in respect of foreign source capital gains.¹⁶⁴ Furthermore, this carry over privilege is lost in the year of death, meaning that all excess unclaimed rebates from the current and prior years would be lost forever. Therefore, partial double taxation may occur in respect of taxes payable on foreign source capital gains arising in the event of death of an individual.

The section 6quat rebate is not applicable if the foreign tax authorities have levied tax on income from a South African source.¹⁶⁵ However, if foreign tax is paid on South African source income, section 6quat(1C) of the SA ITA allows a deduction similar to section 11 deductions against income as defined.¹⁶⁶ The foreign taxes payable in respect of which the rebate relates to must be converted into South African Rands using the average exchange rate over the South African tax year of assessment and not the foreign year of assessment.¹⁶⁷ Therefore, even though foreign capital gains arose on a fixed date, the

¹⁶¹ SA Income Tax Act, S. 6quat (1).

¹⁶² SA Income tax Act, S. 6quat (1D)

¹⁶³ SA Income Tax Act, S. 6quat (1B)(a)(iii).

¹⁶⁴ SA Income tax Act, S. 6quat (1B)(a)(iB)

¹⁶⁵ Huxham et al., 2010:424

¹⁶⁶ Income definition as in the SA Income Tax Act, S. 1

¹⁶⁷ SA Income Tax Act, S. 6quat (4).

average and not the spot exchange rate must be used to convert the foreign taxes levied thereon.

6.2.2 RESIDENCE

Relief in the form of a section 6quat rebate is only available to residents of South Africa.¹⁶⁸ This means that where a Greek or Portuguese domiciled decedent is a non-resident for South African tax purposes and double taxation occurs then the provisions of section 6quat are inapplicable. Therefore, relief in terms of section 6quat is limited in its scope and is ineffective unless the decedent meets the residency definition for South Africa.

6.2.3 TYPES OF FOREIGN TAXES APPLICABLE

The most important issue surrounding the effectiveness and applicability of the section 6quat rebate, with specific reference to providing relief in situations of international double taxation arising between South Africa and either Greece or Portugal on death of an individual, is the issue of which foreign taxes payable fall within the scope of the section 6quat relief.

This issue is important because of the nature of the foreign taxes payable in the event of death in Greece and Portugal. In both Greece and Portugal there are no disposals or deemed disposals of property on death of an individual and as such there are no income taxes payable on that property. Instead, inheritance tax and stamp duty are payable in Greece and Portugal respectively which both differ in nature from income taxes. This may limit the applicability of relief for these foreign taxes under section 6quat as section 6quat is a provision of the SA Income Tax Act.

As there is no case law available at present that can be used for guidance in answering this question as to which foreign taxes qualify as a rebate in terms of section 6quat, the wording of the statute must be analysed in order to determine the intention behind the section 6quat legislation.

¹⁶⁸ SA Income Tax Act, S. 6quat (1).

Extracts from the section 6quat of the SA ITA legislation reads as follows:

“1) *Subject to the provisions of subsection (2), a rebate determined in accordance with this section shall be deducted from the normal tax payable by any resident in whose taxable income there is included--*

e) any taxable capital gain contemplated in section 26A, from a source outside the Republic which is not deemed to be from a source in the Republic;

1A) *For the purposes of subsection (1), the rebate shall be an amount equal to the sum of any **taxes on income** proved to be payable to any sphere of government of any country other than the Republic, without any right of recovery by any person (other than a right of recovery in terms of any entitlement to carry back losses arising during any year of assessment to any year of assessment prior to such year of assessment), by--*

*a) such resident **in respect of***

*iii) any amount of **taxable capital gain** as contemplated in subsection (1)(e);*

which is so included in that resident's taxable income

1B) *Notwithstanding the provisions of subsection (1A)—*

*iB) the **taxes contemplated in subsection (1A)(a)(iii) which are attributable to any taxable capital gain** in respect of an asset which is not attributable to a permanent establishment of the resident outside the Republic, must in aggregate be limited to the amount of normal tax which is attributable to that taxable capital gain”. [Own emphasis added].*

The above italicised section 6quat (1A) seems to make it clear that only *taxes on income* are applicable for the purposes of the section 6quat (1) rebate. It is submitted that Greek inheritance tax and Portuguese stamp duty are not a *tax on income* as they are not taxes *in respect of any amount of taxable capital gain* or *attributable to any taxable capital gain* but are rather a form of wealth tax. As there are no foreign taxes on income payable to either the Greek or Portuguese tax authorities on death of an individual, the rebate from

South African tax payable in respect of foreign source taxable capital gains arising on death is zero.

The only guidance stipulated in section 6quat regarding *taxes on income* is section 6quat(3) which is of no help in determining the issue at hand:

“3) **‘taxes on income’** does not include any compulsory payment to the government of any other country which constitutes a consideration for the right to extract any mineral or natural oil”. [Own emphasis added].

It is therefore submitted that as no income taxes are payable to either the Greek or Portuguese taxation authorities in the event of death of an individual, section 6quat is an ineffective and inapplicable relief method available.¹⁶⁹

6.2.4 DOES IT MATTER WHO IS LIABLE TO PAY THE FOREIGN TAX?

A significant issue arises in the hypothetical scenario where CGT arises in Greece or Portugal in the event of death. Can the section 6quat rebate be claimed by the South African resident irrespective of whether he was the actual taxpayer who paid or was liable to pay the foreign tax? If the heir is liable to pay the foreign tax instead of the deceased, would the deceased still be able to claim section 6quat relief in respect of the foreign taxes paid albeit by another taxpayer?

An extract from section 6quat of the SA ITA legislation reads as follows:

“1A) For the purposes of subsection (1), the rebate shall be an amount equal to the sum of **any taxes on income proved to be payable** to any sphere of government of any country other than the Republic, without any right of recovery by any person (other than a right of recovery in terms of any entitlement to carry back losses arising during any year of assessment to any year of assessment prior to such year of assessment), **by--**

a) **such resident** in respect of

¹⁶⁹ With specific reference to providing relief on double taxation between South Africa and either Greece or Portugal on the death of an individual.

iii) any amount of taxable capital gain as contemplated in subsection (1)(e);

which is so included in that resident's taxable income". [Own emphasis added].

It is therefore submitted that section 6quat relief may only be used by a resident if he himself is liable to pay the foreign taxes because the act specifically indicates that the foreign taxes must be *payable...by that resident* and the taxable capital gain must have been included in the taxable income of *that resident*. Therefore, even if Greek inheritance tax or Portuguese stamp duty is a qualifying foreign tax for section 6quat rebate purposes, the use thereof would not be permitted as the foreign tax is not paid by the same South African resident claiming the section 6quat rebate. The impact of the "same taxpayer restriction" is not significant in terms of this dissertation as no capital gains taxes are levied on death in Greece and Portugal.

As shown in Chapter 3.2, if paragraph 41 of the Eighth Schedule of the SA Income Tax Act is applied, the heir can be liable for part of the South African capital gains tax arising on death of the deceased. It is important to analyse the implications thereof on the applicability of section 6quat. Would the heir also be entitled to the provisions of section 6quat if the foreign taxes were paid by the deceased on the same asset giving rise to the capital gain in South Africa? It is submitted that section 6quat relief cannot be applied because the foreign tax is paid by the deceased, while the relief is claimed by the heir.

How would the outcome change if in addition to electing paragraph 41 the heir also pays the foreign taxes due on that asset? It is submitted that paragraph 41 merely renders the capital gains tax payable by the heir; it does not deem the taxable capital gain of the deceased to be included in the income of the heir. As a result section 6quat (1)(e) of the SA ITA is inapplicable as the rebate shall only be *deducted from the normal tax payable by any resident in whose taxable income there is included any taxable capital gain*. [Own emphasis added].

It is however important to note from the above that section 6quat can be applied even if the foreign income taxes have not yet been paid as they are only required to be *payable*.

6.2.5 FURTHER LIMITATIONS OF SECTION 6quat

The rebate under subsection (1) and the deduction under subsection (1C) cannot be used in addition to bilateral double tax treaty relief.¹⁷⁰ If foreign tax payable is recoverable due to the election of double tax treaty relief, the taxpayer will not be afforded relief in terms of section 6quat.¹⁷¹ However, the availability of double tax treaty relief does not in itself mean that treaty relief applies above section 6quat. Under South African law, a treaty does not have a superior status over domestic legislation.¹⁷² The taxpayer has the choice to elect whether section 6quat or double tax treaty relief should be applied when international double taxation occurs.¹⁷³ It is therefore important for taxpayers who are subject to international double taxation to determine whether double tax treaty relief is available and whether it provides superior relief to section 6quat in the circumstances prevailing at the time.

Relief in terms of a section 6quat rebate may only be claimed when normal tax becomes payable in South Africa.¹⁷⁴ If read with section 20 of the SA ITA, no normal tax is payable if a taxpayer is in an assessed loss position and therefore the section 6quat rebate cannot be claimed in that year.¹⁷⁵ The issue is whether the rebate could be carried forward in terms of section 6quat (1B)(a)(ii) to a period where tax becomes payable again. The issue becomes even more problematic if the rebate relates to foreign source capital gains, as section 6quat (1B)(a)(ii) specifically excludes the carry forward of rebates relating to foreign taxes in respect thereof. In addition, the SARS Interpretation Note No. 18 of 31 March 2003 on section 6quat rebates does not deal with any matters relating to the applicability of the provision in circumstances where individuals have assessed losses. This is an issue requiring further study. SARS Interpretation Note No. 18 does however provide guidance on whether the section 6quat (1B) *total normal tax payable* figure used in calculating the rebate is before or after the primary and secondary rebate. SARS have indicated that the tax payable on taxable capital gains is the before rebate amount.¹⁷⁶

¹⁷⁰ SA Income Tax Act, s. 6quat (2).

¹⁷¹ See Chapter 6.1.3 for an in-depth analysis of the use of double tax treaties in conjunction with section 6quat.

¹⁷² Olivier, L. 2010: 723.

¹⁷³ SA Income Tax Act, s. 6quat (2).

¹⁷⁴ SA Income tax Act, s. 6quat (1B)(a).

¹⁷⁵ Olivier, L. 2008: 8.

¹⁷⁶ The Taxpayer. 2003: 94-95.

6.2.6 CONCLUSION

Relief from international double taxation in the form of section 6quat relief is only available to residents of South Africa. The relief does not eliminate all double taxation as it is limited to the lower of foreign and South African taxable payable on foreign source income. Furthermore, the relief only applies in respect of foreign taxes payable on income. Therefore, Greek inheritance tax and Portuguese stamp duty payable on death of an individual is excluded from the scope of section 6quat rebates. However, even if these two death taxes were not excluded as a result of not being a tax on income, section 6quat could still not be applied as those foreign taxes are not paid by the same resident claiming the section 6quat rebate.

A double tax treaty cannot be used in addition to section 6quat, although the choice of preferred relief mechanism lies with the taxpayer. There are also unresolved issues regarding the use of the rebate during and following the years where an individual has an assessed loss. Therefore, section 6quat is not adequate in addressing the relief needed in situations where double taxation occurs between South Africa and Greece nor South Africa and Portugal, in the event of death of an individual.

6.3 SECTION 16(c) – SOUTH AFRICAN ESTATE DUTY ACT

6.3.1 BACKGROUND OF SECTION 16(c)

The South African Estate Duty Act provides a method of relief against international double taxation in section 16. This relief allows as a deduction from a South African estate duty liability any foreign death duties paid in respect of any foreign source property that has also been included in the South African estate duty tax net.

The section 16 deduction is limited in that the deduction allowed may not exceed the South African estate duty payable on that foreign property.¹⁷⁷ If the foreign tax exceeds the limit, there is no indication in the SA Estate Duty Act as to whether the excess deduction may be rolled over to the surviving spouse, as may apply to succession rebates, or to the heirs. Therefore, it is submitted that the deduction of excess foreign taxes will be lost forever. In this event it is possible for partial double taxation to still occur.

6.3.2 RESIDENCE

Relief in the form of section 16 is only available to individuals who are ordinarily resident in South Africa. The application of section 16 is therefore more restricted than for section 6quat of the SA ITA, which only required the taxpayer to be a resident. This means that where a Greek or Portuguese domiciled decedent is a non-resident in South Africa or is only a resident as per the physical presence test and double taxation occurs as a result of the situs or deemed situs of the assets being in South Africa, the provision of section 16 will be inapplicable. Therefore, relief in terms of section 16 is limited in its scope and is ineffective unless the decedent meets the guidelines provided for being ordinarily resident in South Africa as discussed in Chapter 3.2.¹⁷⁸

6.3.3 TYPES OF FOREIGN TAXES APPLICABLE

Section 16 provides relief in respect of foreign taxes incurred on the death of an individual. The issue is which foreign taxes are applicable and consequently within the scope of the deduction, with specific reference to foreign *income* taxes arising on death. Furthermore, if foreign income taxes are found to be within the scope of section 16, can relief be claimed

¹⁷⁷ Estate Duty Act, s. 16(c).

¹⁷⁸ Estate Duty Act, s. 16(c).

in the form of section 6quat of the SA ITA and section 16 in respect of the same foreign income taxes? The answers to these issues require further analysis as they are not made clear in the wording of the SA Estate Duty Act.

An extract from section 16(c) of the SA EDA legislation reads as follows:

“There shall be deducted from any duty payable under this Act--

- c) *without in any way modifying or adding to the rights of any person under an agreement entered into by the Government of the Republic with the Government of any other country or territory relating to the prevention of or relief from double taxation in respect of estate duty, any amount of **any death duties** proved to the satisfaction of the Commissioner to have been **paid** to any other State in respect of any property situate outside the Republic and included in the estate of any person who at the date of his death was ordinarily resident in the Republic: Provided that the deduction under this paragraph shall not exceed the duty imposed on such property by this Act”.*
[Own emphasis added].

There is no definition for *death duties* available in the SA Estate Duty Act. Applying the literal meaning of the word¹⁷⁹ as per the Oxford Advanced Learners Dictionary, it means “inheritance tax”¹⁸⁰ and as per the Oxford Dictionary: “a tax levied on **property** after the owner’s death”.¹⁸¹ Own emphasis has been given to the word “property” as stamp duty payable on death in Portugal is also a tax on property arising on death. It is important to bear in mind that a tax on property is different to a tax on income. Section 1 of the SA EDA defines *Duty* as *estate duty payable under this act*. This gives reinforcement as to the intended meaning of *death duty* as being a tax on property on death because estate duty is also a tax on property and not on income. Furthermore, domestic relief for foreign income taxes is already available under section 6quat in the SA Income tax Act. The word *any* used before *death duties* allows for a broad interpretation of the phrase *death duties*.

¹⁷⁹ As per applying the Cardinal Rule. “The courts have held that what this rule means is that in the interpretation of fiscal laws, our courts must apply *the literal language of a statute*, where such language is unambiguous and its meaning is clear.” Steyn, M. T. 2010. *Interpretation of fiscal legislation*. Cape Town: University of Cape Town. [Course notes.]

¹⁸⁰ Oxford Advanced Learners Dictionary. 2011. *Oxford Advanced Learners Dictionary*. [Online]. Available: <http://www.oxfordadvancedlearnersdictionary.com/dictionary/death-duty>. [6 March 2011]

¹⁸¹ Oxford Dictionary. 2011. *Oxford Dictionary*. [Online]. Available: http://www.oxforddictionaries.com/view/entry/m_en_gb0208280#m_en_gb0208280. [6 March 2011]

Therefore, it is submitted that “*any death duties proved to the satisfaction of the Commissioner to have been paid to any other State*” includes all foreign taxes levied on property of an individual on death and include inheritance tax, estate duty and stamp duty tax, but excludes any foreign income taxes. Therefore, it is submitted that both Greece’s inheritance tax and Portugal’s stamp duty tax are applicable for use of relief in terms of the section 16(c) deduction.

6.3.4 DOES IT MATTER WHO IS LIABLE TO PAY THE FOREIGN TAX?

The issue as to whether section 16(c) of the SA EDA relief may be applied only by the South African resident if he paid the foreign tax is of great importance. This is because the liability for Greek inheritance tax and Portuguese stamp duty on death of an individual is payable by the heirs of the decedent and not the decedent himself.

The SA Estate Duty Act does not make it clear, but it is submitted that section 16 relief is claimable irrespective of whether the decedent paid or the heirs paid the foreign death taxes. This is because the section is written very broadly, only requiring that the foreign taxes to have actually been paid without making any mention as to who must have paid them. If the SA EDA intended for the relief to be restricted, it would have been worded similar to section 6quat of the SA ITA which specifically stipulates the same-taxpayer restriction.

It is therefore submitted that section 16(c) relief may be used by an ordinarily resident person even if the Greek inheritance tax or Portuguese stamp duty tax arising on death is paid by an heir of the estate.

6.3.5 FURTHER LIMITATIONS OF SECTION 16(c)

The provisions of section 16(c) cannot be used in addition to bilateral double tax treaty relief if any is available. This is because section 16(c) states that *no additional or modified rights* are awarded above existing double treaty relief. There are opinions that the effect of these words is to afford superiority to treaty relief so that double tax agreements must be

applied over section 16(c) if they are in existence.¹⁸² Therefore a taxpayer may not always have a choice of relief as is the case in section 6quat¹⁸³ of the SA ITA.

The wording of section 16 clearly states that foreign death taxes must be proved to be *paid* before the relief can be applied. This is unlike section 6quat which only requires that the foreign income tax be proved to be *payable*. The only way to avoid losing the section 16 relief is to keep the estate open until the foreign death taxes are actually paid.¹⁸⁴

The SA Estate Duty Act also has no provision indicating which exchange rate must be used to convert the foreign taxes payable into South African Rands when calculating the deduction. As the tax is due at a single point in time and not for a full financial period it is submitted that the conversion rate be a spot rate rather than an average rate. However, it is unclear as to whether the spot rate on the date the foreign tax was paid or the spot rate on the date that the liability arose is to be used. As section 16(c) makes specific reference to the foreign tax *paid* and not *payable* the author submits that the spot rate on the date that the foreign tax liability was actually paid be used when converting the foreign tax into Rands.¹⁸⁵

There is no provision stipulating how the estate duty attributable to the foreign property is to be determined. It is the accepted practice of the Commissioner to use the following formula:¹⁸⁶

Duty Attributable to the foreign property	=	$\frac{\text{Value of foreign property included in the net value of the estate}}{\text{Net Value of the estate}}$	X	Estate duty payable on the dutiable amount of the estate
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Figure 5. Formula used to calculate the estate duty attributable to the foreign property.

As per section 4 of the SA Estate Duty Act, the net value of the estate is the total of all property and deemed property less any deductions, but before the deduction of the R3.5 million abatement.

¹⁸² Stein, M. L. 2004: 89.

¹⁸³ For further reference see Chapter 6.1.3.

¹⁸⁴ Bagraim, P. & Roeleveld, J. 2010: 684.

¹⁸⁵ This view is supported by David Clegg (Director of taxation – Ernst & Young CT) as per conversation 28 April 2011.

¹⁸⁶ Stein, M.L. 2004: 90.

Section 16(c) only provides relief for double taxation that has occurred on assets situated outside South Africa. Therefore, section 16 does not address the instances shown in Chapters 3 - 5 where double taxation occurs on assets situated in South Africa.

The SA Estate Duty Act does not have a provision similar to that of section 6quat (1C) of the SA Income Tax Act (a deduction for foreign taxes paid on South African source income). In addition, the portion of foreign death duties paid which do not qualify for a section 16(c) deduction because they were levied on South African source property, cannot be claimed as a section 4(1)(f) deduction of foreign debts due in terms of the SA EDA as they are not debts due to *persons ordinarily resident outside the Republic*.¹⁸⁷

6.3.6 CONCLUSION

Relief from international double taxation of death duties in the form of a section 16(c) deduction against estate duty is only available to individuals ordinarily resident in South Africa. The relief does not eliminate all double taxation as it is limited to the lower of foreign death taxes and South African estate duty payable on the assets situated outside South Africa. Procedures used and accepted in practice, in addition to submissions, have had to be made in respect of many of the issues surrounding the applicability and methodology of the relief, due to the wording of the section being unclear or insufficient.

The relief only applies in respect of foreign death taxes that have actually been paid. Foreign death duties include Greek inheritance tax and Portuguese stamp duty tax but exclude foreign income taxes. It is submitted that the section is drafted wide enough for relief to still be claimable despite the heir, a different taxpayer, paying the foreign tax.

Therefore, in the event of death causing double taxation to occur between South Africa and Greece or South Africa and Portugal, section 16(c) relief provides wider and more adequate relief than section 6quat.

For a summary of the possible inconsistencies that are evident between relief provided in the event of death by section 6quat of the SA ITA and section 16(c) of the SA EDA, see Table 1 of the Appendix.

¹⁸⁷ Meyerowitz, D. 2004: 28-10.

6.4 SECTION 4(e) – SOUTH AFRICAN ESTATE DUTY ACT

6.4.1 BACKGROUND

South African domestic legislation allows for additional relief in respect of certain foreign source immovable properties. The relief follows the exemption method approach which is contrary to section 16(c) which follows the credit method approach. Therefore, certain foreign properties are allowed as a deduction from the dutiable estate and in effect render these foreign properties exempt from estate duty in South Africa. Section 4(e) reads as follows:

- “e) *the amount included in the total value of all property of the deceased as representing the value of any right in or to property situate outside the Republic acquired by the deceased--*
- i) *before he became ordinarily resident in the Republic for the first time; or*
 - ii) *after he became ordinarily resident in the Republic for the first time, by--*
 - aa) *a donation if at the date of the donation the donor was a person (other than a company) not ordinarily resident in the Republic; or*
 - bb) *inheritance from a person who at the date of his death was not ordinarily resident in the Republic; or*
 - iii) *out of the profits and proceeds of any such property proved to the satisfaction of the Commissioner to have been acquired out of such profits or proceeds”*. [Own emphasis added].

6.4.2 UNDERSTANDING THE LEGISLATION OF SECTION 4(e)

Section 4(e) of the SA EDA describes four different scenarios where relief may be available for a decedent who owned property situated in Greece or Portugal. Section 4(e)(i) only applies if the decedent acquired property in Greece or Portugal before becoming ordinarily resident in South Africa *for the first time*. This means that if the decedent was originally a South African resident, emigrated and subsequently purchased property in Greece or Portugal while having a non-resident status, and then later returned to South

Africa and became ordinarily resident again, this deduction will not apply in respect of those foreign properties acquired as they were acquired after he became ordinarily resident for the second time.

Section 4(e)(ii) is a problematic provision in that it can be interpreted in two ways, the taxation implications thereof being significant. The provision only applies if foreign property is received via donation or inheritance from a person who is non-resident at the time of donation or death respectively. The foreign property needs to be acquired by the deceased *after he became ordinarily resident in the Republic for the first time*. Does this mean that the provision only applies if the decedent was first a non-resident before becoming ordinarily resident or could the provision still apply if the decedent had been ordinarily resident in South Africa his entire life?

It is arguable that a person becomes ordinarily resident in South Africa on being born in South Africa, and provided that the deceased remained ordinarily resident in South Africa his entire life, when he acquired the donated or inherited property during his lifetime, it would then be acquired *after he became ordinarily resident in the Republic for the first time*.¹⁸⁸ If a person was born ordinarily resident in South Africa, emigrates at age forty, then returns to South Africa at age fifty to be ordinarily resident until death, one would say he became ordinarily resident in South Africa for the *second time*. By reason of this, it would mean that *he became ordinarily resident in the Republic for the first time* in the period from birth until age forty.

The counter-argument however would be that *after he became ordinarily resident* infers that the person must have been a non-resident prior to this in order for him to *become* ordinarily resident.¹⁸⁹ In addition, by use of this approach, section 4(e)(ii) would match the scope and intent of section 4(e)(i) which only applies if the decedent was a non-resident prior to becoming ordinarily resident.

SARS have issued no guidance on how to treat the issue, nor is there any binding case law that could be used for interpretation. However, the outcome of this issue has significant consequences with particular reference to this dissertation as many South Africans with Greek or Portuguese heritage are born in South Africa and inherit property from non-

¹⁸⁸ Stein, M. L. 2004: 81.

¹⁸⁹ Stein, M. L. 2004: 81.

resident parents (parents who have emigrated back to Greece or Portugal to retire) or non-resident grandparents living in Greece or Portugal.¹⁹⁰ Under the second argument, none of the ordinarily residents in South Africa who were born in South Africa would be able to make use of this deduction for estate duty purposes on the date of their eventual death. If the first argument applies, the provision can be used for useful estate planning purposes. As per David Clegg, in practice the deduction that is applied reflects the approach in the first argument.¹⁹¹

The fourth type of property that could qualify for a deduction on death is property acquired out of the proceeds from sale of properties acquired in section 4(e)(i) and (ii). Therefore, if an ordinarily resident person sells a property situated in Greece or Portugal that he acquired before becoming ordinarily resident in South Africa and used those proceeds to purchase another foreign property, then the section 4(e) deduction will still apply to that newly acquired foreign property. However, this provision in the SA Estate Duty Act may have a negative economic consequence for South Africa. South African residents disposing of foreign source property that would qualify for the section 4(e) deduction are disincentivised from investing those proceeds in South Africa due to the tax saving opportunities of rather investing those proceeds in offshore immovable property.

6.4.3 CONCLUSION

Section 4(e) of the SA Estate Duty Act provides additional relief for the deceased through exempting certain foreign immovable property from estate duty. Other than section 4(e)(ii) being ambiguous, the relief measure is satisfactory as there are no limitations, but only in respect of the foreign assets that fall within the ambit of section 4(e). The relief measure may provide significant relief for South African residents and should not be overlooked during estate tax planning.

¹⁹⁰ Submission made from personal involvement and experience in the Greek community of South Africa and the Portuguese community of Cape Town.

¹⁹¹ As per conversation with David Clegg on 28 April 2011. David Clegg is a director in taxation at Ernst & Young Inc. (Cape Town).

6.5 UNILATERAL RELIEF: GREECE

6.5.1 BACKGROUND

The Greek taxation authorities allow as a deduction from Greek inheritance tax any foreign taxes that arose on death of an individual that are payable to foreign tax authorities if it results in international double taxation. The tax credit is afforded on a country by country basis.¹⁹² The scope of application is, however, limited as the relief is only afforded to foreign taxes arising from movable property situated outside Greece.¹⁹³ This means that there is no relief from foreign taxes payable on immovable property situated outside Greece and any movable property situated in Greece.

This relief mechanism may therefore be insufficient in addressing some of the scenarios described in Chapters 3 - 5 where double taxation could arise. The relief is also limited as the credit awarded may not exceed the inheritance tax payable in Greece on the foreign movable property, which could still result in partial double taxation.¹⁹⁴

6.5.2 RESIDENCE

Domestic relief in Greece is only available if the decedent is either a Greek national or domiciled in Greece at time of death.¹⁹⁵ The relief applies irrespective of the nationality or domicile of the heir even though the heir is the person liable for Greek inheritance tax and is also the person who will be claiming the relief. However, this does not mean that it is impossible for South African residents to make use of the relief. As shown in Chapter 3 it is possible for an individual to be resident in South Africa and simultaneously be a Greek national or be domiciled in Greece. In conclusion, the relief in terms of the credit method is limited in its scope and is ineffective unless the decedent meets the guidelines provided for Greek nationality or domicile as discussed in Chapter 3.

¹⁹² Tsourouflis, A. 2010: 403.

¹⁹³ Tsourouflis, A. 2010: 419.

¹⁹⁴ Tsourouflis, A. 2010: 419.

¹⁹⁵ Tsourouflis, A. 2010: 418.

6.5.3 TYPES OF FOREIGN TAXES APPLICABLE

Greek domestic relief provides relief in respect of foreign taxes incurred on death of an individual. The issue is which foreign taxes are applicable and consequently within the scope of the deduction. As inheritance tax is a tax on property, the deductibility of foreign income taxes arising on death needs to be addressed.

The issue is whether credit will still be awarded in Greece in respect of foreign capital gains that arose on death. This is an important question because in terms of Greek legislation, there are no deemed disposals on the death of an individual. Therefore, if Greece does not recognise the disposal, would they still accept foreign income taxes arising on death from a deemed disposal which is only recognised in a foreign country to be credited against inheritance tax?

As there is no formal requirement that the foreign tax to be credited must be of the same nature as domestic inheritance tax, it is submitted that taxes other than inheritance taxes are permitted to be deducted, provided they occur in the event of death.¹⁹⁶ This would mean that foreign capital gains taxes could be claimed in terms of Greek domestic relief. It must be noted that there are certain academics that hold the opinion that the relief does not include capital gains tax. However, on strict interpretation of the law, there is no justification for not including capital gains tax in the relief¹⁹⁷ and as such this is the stance the dissertation follows regarding the relief of foreign capital gains tax for purposes of Diagram 1 and the worked examples in the Appendix.

Despite Greek domestic relief having a wide scope which may include foreign capital gains taxes, the impact of this is deemed, for purposes of this dissertation, not significant. This is because foreign capital gains tax can only be claimed in respect of a select few assets and if there is no treaty relief. The reason for this is because Greek domestic relief only applies to foreign taxes arising from movable property situated outside Greek territory. In addition, if movable property is situated in South Africa then South African capital gains tax will only be levied on those movable assets to the extent that they are not

¹⁹⁶ Tsourouflis, A. 2010: 418.

¹⁹⁷ Tsourouflis, A. 2010: 418.

personal-use assets as defined¹⁹⁸ or to the extent that they are not shares listed on the Johannesburg Securities Exchange (JSE) held by non-residents. Furthermore, even the capital gains taxes on certain movable assets which qualify for Greek relief would not be able to be claimed as treaty relief exists. As shown in Chapter 6.1.3, treaty relief supersedes Greek domestic relief. Therefore, because a bilateral treaty on income taxes is in existence between Greece and South Africa, the foreign capital gains taxes paid may not be claimed in respect of Greek domestic relief, but instead bilateral relief must be used.

6.5.4 DOES IT MATTER WHO IS LIABLE TO PAY THE FOREIGN TAX?

Upon death of a Greek national or domicile, the inheritance tax is payable by the heirs of the estate and not the decedent. However, foreign taxes due to South Africa on death are payable by the decedent and not the heirs. The issue is whether foreign taxes payable on death by the decedent to the South African tax authorities can be used for relief by the heir despite the fact that the heir was not the actual person who paid those foreign taxes.

The issue is answered in the positive in that it is possible for the heir to claim the foreign taxes paid by the decedent as a credit in terms of the domestic relief provided by the Greek inheritance tax law.¹⁹⁹

6.5.5 FURTHER LIMITATIONS OF GREEK UNILATERAL CREDIT RELIEF

There are no major further limitations in addition to the issues dealt with above. However, a further restriction to keep in mind is the fact that relief is only applicable in respect of foreign taxes that have actually been paid or assessed. Therefore, no notional tax credits are awarded.²⁰⁰

Greek domestic relief cannot be used in addition to bilateral treaty relief.²⁰¹ Furthermore, if a treaty is in existence with Greece, the treaty must be applied instead of domestic relief as treaty relief is afforded a higher rank in the hierarchy of legal instruments.²⁰² As seen in Chapter 6.7 and Chapter 6.9, no inheritance tax treaty exists between Greece and South

¹⁹⁸ Examples of movable property excluded from the definition of personal-use asset that are relevant for this dissertation are aircrafts exceeding a mass of 450 kilograms, boats exceeding 10 meters in length and any movable asset used mainly for purposes of trade.

¹⁹⁹ Tsourouflis, A. 2010: 419.

²⁰⁰ Tsourouflis, A. 2010: 419.

²⁰¹ Tsourouflis, A. 2010: 420.

²⁰² Tsourouflis, A. 2010: 420.

Africa, but there is an income tax treaty. Therefore, Greek domestic relief may only be used in respect of estate duty paid on movable assets in addition to Greek inheritance tax. Any CGT levied in South Africa must be dealt with in terms of the DTA Income SA – Greece as treaty relief must be applied above domestic relief in Greece.

6.5.6 CONCLUSION

Unilateral credit relief is only applicable if the decedent has a Greek domicile or nationality. However, the relief is afforded to the heir, as that is the person liable for the Greek inheritance taxes on death of the decedent. The relief applies to the heir even if the decedent (as opposed to the heir) paid the foreign taxes due on death. However, the relief is only applicable if international double taxation occurs as a result of foreign taxes being levied on foreign movable property in the event of death. Foreign taxes levied on movable property include foreign capital gains tax, unless an income tax treaty is in existence. This is because treaty relief is afforded superiority in terms of Greek legislation. The Greek unilateral relief may still result in partial double taxation due to the relief being limited to the Greek inheritance tax payable in respect of that particular asset.

Therefore, the relief is inadequate to use as a stand-alone in addressing the double taxation issues that may arise between Greece and South Africa on the death of an individual. At best, it can be used for additional relief in respect of South African estate duty paid on movable property situated in South Africa.

6.6 UNILATERAL RELIEF: PORTUGAL

6.6.1 BACKGROUND

According to the Portuguese Constitution, tax conventions prevail above the application of domestic relief.²⁰³ Portuguese General Tax Law makes provision for domestic methods of relief in the event of international double taxation arising in respect of taxes on income only.²⁰⁴ However, as a double tax treaty in respect of income taxes is in existence between South Africa and Portugal, treaty relief must be applied instead of unilateral relief. Furthermore, as Portuguese stamp duty levied on death is not an income tax by nature, and because no income taxes arise in the event of death of an individual in Portugal, Portuguese unilateral relief is inapplicable with respect to the scope of this dissertation. In addition, no domestic relief is afforded by the Portuguese Stamp Duty Code in the event of international double taxation occurring on the death of an individual.²⁰⁵

6.6.2 CONCLUSION

Therefore, if international double taxation occurs on death between South Africa and Portugal, then relief is limited to bilateral treaty relief or domestic relief provided by South African legislation as Portugal provides no domestic relief that is applicable to relieving double taxation occurring in the event of death.

²⁰³ Almeida Fernandes et al., 2010: 651, 652, 655.

²⁰⁴ Fernandes Ferreira et al., 2010: 662.

²⁰⁵ Fernandes Ferreira et al., 2010: 662.

6.7 INHERITANCE TAX TREATIES: SOUTH AFRICA – GREECE

No inheritance tax treaty between South Africa and Greece is in existence nor is there such a treaty currently under construction. Therefore, no treaty relief is available to alleviate or prevent international double taxation occurring with respect to Greek inheritance tax and South African estate duty tax. However, it will be investigated below whether inheritance and estate duty taxes are encompassed in the foreign tax scope envisaged under treaty relief in respect of taxes on income and capital.

6.8 INHERITANCE TAX TREATIES: SOUTH AFRICA – PORTUGAL

No inheritance tax treaty between South Africa and Portugal is in existence nor is there such a treaty currently under construction. Therefore, no treaty relief is available to alleviate or prevent international double taxation occurring with respect to Portuguese stamp duty tax and South African estate duty tax. However, it will be investigated below whether stamp duty and estate duty are encompassed in the foreign tax scope envisaged under treaty relief in respect of taxes on income and capital.

6.9 TREATY IN RESPECT OF TAXES ON INCOME AND CAPITAL: SOUTH AFRICA – GREECE

6.9.1 RESIDENCE

Only persons who are resident of at least one of the two contracting states can seek relief in terms of this tax treaty. Due to this, it is important to analyse the definition of Resident as stated in Article 4 of the DTA Income SA – Greece as it seems to be more restrictive than that applied by the unilateral relief measures available. An extract of Article 4 below states:

“Resident

1. For the purposes of this Convention, the term “resident of a Contracting State” means:

- a) in the Hellenic Republic, any person who, under the laws of the Hellenic Republic, is liable to tax therein **by reason of his domicile, residence, place of management or any other criterion of a similar nature**, but this term does not include any person who is liable to tax in the Hellenic Republic in respect only of income from sources in the Hellenic Republic or capital situated therein;*
- b) in South Africa, any individual who is **ordinarily resident** in South Africa and any person other than an individual which has its place of effective management in South Africa;*
- c) that State and any political subdivision or local authority thereof”.*

[Own emphasis added].

In terms of paragraph 1(a) of the DTA Income SA – Greece it is important to note that the definition of Greek resident does not include a Greek national. This is aligned with the Greek Income Tax Act, which only taxes persons with a Greek domicile on their worldwide income. Only Greek inheritance tax is levied on both Greek nationals and domiciliaries. The scope of use of this treaty in the event of double taxation is therefore

more limited than for Greek unilateral relief as per the Greek Inheritance Tax Code which includes Greek nationals in its user base.

Furthermore, the use of this treaty by South African individuals is also limited in that only persons ordinarily resident in South Africa qualify to use the treaty. Therefore, if a person is merely a resident in South Africa, bilateral treaty relief is not an applicable solution to double taxation on income between the two contracting states. The only other measure available would be that of section 6quat of the SA ITA, which is available to any resident of South Africa.

It should be made clear though that the use of this treaty does not apply to heirs of the Greek estate. Upon analysis of paragraph 1(a) of the DTA Income SA – Greece the use of the wording *by reason of* seems to limit the scope of the treaty even further. An individual is only deemed a resident in terms of the treaty, from a Greek perspective, if the person is liable to tax in Greece *by reason of* his domicile or residence. This treaty provision therefore excludes heirs from the definition of Greek resident as an heir is liable to taxes based on what he inherits irrespective of his domicile or residence. The taxes are payable not *by reason of* him having a Greek domicile (he does not even have to have a Greek domicile and can still be liable), but rather due to the domicile or nationality of the decedent and furthermore the source of the property of the deceased. Paragraph 1(a) also specifically excludes from the definition of Greek residence a person who is only liable to taxes on income and capital due to the source thereof originating in Greece. Therefore, it is clear that heirs of the Greek estate may not seek relief in terms of this treaty for taxes levied on death of the deceased.

As shown in Chapter 3 there are many instances where a taxpayer may be deemed a resident of both Greece and South Africa over the same period of time. Dual residency is one of the factors that may cause double taxation between South Africa and Greece on death of an individual. It is therefore important to determine whether the double tax agreement between the two contracting states addresses this issue adequately.

Article 4 of the DTA Income SA – Greece has a tie-breaker test which aims at providing guidance on determining which of the contracting states the person is the ultimate resident of. An extract of Article 4 is below:

“2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

- a) he shall be deemed to be a resident only of the State in which he has a **permanent home** available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (**centre of vital interests**);*
- b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an **habitual abode**;*
- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a **national**;*
- d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by **mutual agreement**”.*

[Own emphasis added].

The above tie-breaker test is useful in alleviating the problems that may arise as a result of dual residency, but does not alleviate the problem in all circumstances. As evidence for the latter submission I have performed a case study analysis. To see the procedures and outcome of the application of the tie-breaker test on one of the case study subjects see Table 2 of the Appendix.

The use of bilateral treaty relief is beneficial for an individual if the tie-breaker test deems an individual to be a resident of Greece instead of South Africa. If the individual is deemed a resident of South Africa, he will be subject to capital gains tax on his worldwide assets in

the event of death. If the individual is deemed a resident of Greece, he will only be subject to capital gains tax on certain of his immovable property situated in South Africa.²⁰⁶ Therefore, if an individual has issues with regard to dual residency, the treaty should be used if he expects the outcome thereof to deem him a resident of Greece.

6.9.2 TYPES OF FOREIGN TAXES APPLICABLE

Treaties are not to be used for guidance on all taxes, but rather only those taxes that have specific mention in the treaty itself. The income and capital treaty that South Africa signed with Greece applicable to income earned post 1 January 2004 applies a general description of the taxes covered rather than the exact taxes encompassed.

An extract of the taxes covered in Article 2 of the DTA Income SA – Greece reads as:

*“1. This Convention shall **apply to taxes on income and on capital** imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.*

*2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, **including taxes on gains from the alienation of movable or immovable property**, as well as taxes on capital appreciation.*

3. The existing taxes to which the Convention shall apply are in particular:

a) In the case of the Hellenic Republic:

i) the income and capital tax on natural persons;

ii) the income tax and capital tax on legal persons; (hereinafter referred to as “Hellenic tax”).

b) In the case of South Africa:

i) the normal tax;

²⁰⁶ Limited to paragraph 2(2)(b) of the Eighth Schedule, South African Income Tax Act.

ii) the secondary tax on companies; (hereinafter referred to as “South African tax”).

4. The Convention shall apply also to any **identical or substantially similar taxes** which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any substantial changes which have been made in their respective taxation laws”.

[Own emphasis added].

Upon analysis of the above extract, it is clear that capital gains tax is within the scope of the convention, but no explicit mention or general description includes inheritance or estate duty type taxes in the scope of the income and capital treaty. The mention of a tax on capital refers to the type of tax covered in article 22 of the DTA Income SA – Greece, which is a tax levied on the possession of capital, being different in nature to a tax levied on an individual’s net assets on death. As stated in International Tax: A South African Perspective: “Article 22 deals with taxes on the mere possession of wealth and capital, other than taxes on estates and inheritance or gifts and transfer duty, in other words so-called wealth taxes”.²⁰⁷ Therefore, it is clear that the scope of taxes on income and capital excludes the likes of estate and inheritance taxes. For further interpretational guidance, the Commentary on the OECD Income and Capital Model Convention can be used. An extract of the commentary on paragraph 2 of Article 2 of the DTA Income SA – Greece is quoted below. If it were to be interpreted that the taxes covered, with specific reference to paragraph 2, should include estate or inheritance taxes, specific mention of it would have been made. This is not the case, as seen below:

“Paragraph 2

3. This paragraph gives a definition of taxes on income and on capital. Such taxes comprise taxes on total income and on elements of income, on total capital and on elements of capital. They also include taxes on profits and gains derived from the alienation of movable or immovable property, as well as taxes on capital appreciation. Finally, the definition extends to taxes on the total amounts of wages or salaries paid by

²⁰⁷ Olivier, L. 2008: 180.

undertakings ("payroll taxes"; in Germany, "Lohn-summensteuer"; in France, "taxe sur les salaires"). Social security charges, or any other charges paid where there is a direct connection between the levy and the individual benefits to be received, shall not be regarded as "taxes on the total amount of wages".

Reservations on the Article

12. *Greece holds the view that "taxes on the total amounts of wages or salaries paid by enterprises" should not be regarded as taxes on income and therefore will not be covered by the Convention.*

(Added on 21 September 1995; see HISTORY)".

Therefore, no bilateral treaty relief is available to prevent or alleviate double taxation occurring with respect to inheritance and estate duty tax between South Africa and Greece in the event of death of a resident of one or both of those states.

Another important outcome of determining that inheritance and estate duty taxes are not within the ambit of the income and capital treaty signed between South Africa and Greece is that the above tie-breaker test found in Article 4 of the DTA Income SA – Greece cannot be used to alleviate double taxation problems relating to inheritance and estate duty taxes caused as a result of dual residency. Consequentially, the tie-breaker test can only be used to alleviate dual residency problems relating to income double tax issues.

6.9.3 DOES IT MATTER WHO IS LIABLE TO PAY THE FOREIGN TAX?

As established in Chapter 3.3 the Greek inheritance tax that arises on death is payable by the heir of the estate. However, inheritance taxes are not covered in this treaty. Furthermore, no capital gains taxes are levied in Greece on the death of an individual. In South Africa, both the estate duty tax and the capital gains tax that arise in the event of death are paid by the decedent himself. Therefore the issue as to whether relief is still claimable even if the foreign taxes are not paid by the same person claiming the relief is not significant in terms of this treaty, with specific references to taxes payable on death.

6.9.4 FURTHER LIMITATIONS

Article 13 of the DTA Income SA – Greece of the double tax convention deals specifically with taxes on capital gains and gives guidance as to which country may levy taxes based on the type of asset the capital gain was calculated on. An issue raised in Chapter 5 of this dissertation was the double taxation that may occur in respect of shares in a company, the majority of the value of which is attributable to immovable property. Article 13 of the DTA Income SA – Greece does not have a distinct provision that deals with capital gains arising from this type of property. This is unlike in the case of the South Africa – Portugal treaty, which makes specific mention of the taxing rights on capital gains in respect of exactly such shares.

Paragraph 1 of Article 13 of the DTA Income SA – Greece makes reference to gains on immovable property as referred to in Article 6. An extract of Article 6 is as follows:

“2. The term “immovable property” shall have the meaning which it has under the law of the Contracting State in which the property in question is situated”.

[Own emphasis added].

The issue is: which *property* is the provision referring to, the shares that are disposed of or the underlying immovable property that the shares represent, as they may be situated in different contracting states? Furthermore, shares are movable property and dealt with under a separate provision altogether.

It is submitted that the term *property* refers to the actual shares disposed of and not the underlying property because:

- Article 13 deals with capital gains on the disposal of property and the property disposed of is the actual shares in a property owning company and not the underlying immovable property that the company owns; and
- paragraph 23 of the Commentary on paragraph 1 of Article 13 found in the OECD Income and Capital Model Convention (Commentary) (2000) states that:

“23. Certain tax laws assimilate the alienation of all or part of the shares in a company, the exclusive or main aim of which is to hold immovable property, to the alienation of such immovable property. In itself paragraph 1 does not allow that

practice: a special provision in the bilateral convention can alone provide for such an assimilation. Contracting States are of course free either to include in their bilateral conventions such special provision, or to confirm expressly that the alienation of shares cannot be assimilated to the alienation of the immovable property”.

No such special provision which assimilates the disposal of shares in a company and the disposal of its underlying property (which is attributable for the majority of the value of the shares) exists in the South Africa – Greece treaty. As stated above, paragraph 1 in itself does not provide for such assimilation; and

- no specific mention is made which gives additional taxing rights to property owning shares, unlike the case with the South Africa – Portugal treaty;²⁰⁸ and
- Greece has no legislation which deems the source of the shares held in companies, the majority of the value of which is attributable to immovable property, to be the source of the underlying immovable property²⁰⁹ (unlike the case of the South African Income Tax Act).

Therefore, if it is the law of the contracting state in which the property in question is situated that applies,²¹⁰ and the property is the actual shares disposed of, then if the shares are registered in Greece, the law of Greece applies. This means that the shares retain their nature and source in terms of the treaty despite the underlying property being situated in South Africa. The source deeming provision of a right in immovable property in terms of paragraph 2(2)(b) of the Eighth Schedule of the SA ITA is therefore rendered inapplicable when applying this treaty.

²⁰⁸ See Chapter 6.10.

²⁰⁹ As confirmed through correspondence from Mr. Manos Tountas on 4 May 2011.

²¹⁰ As per the above quote of paragraph 2 of Article 6.

The implication of this is Paragraph 1 of Article 13 of the DTA Income SA – Greece is not applicable for certain shares in property companies if the decedent is a Greek resident. As seen below, paragraph 1 applies in the situation where the gains are made on property situated in a different contracting state to the state of the resident.

“Article 13

Capital Gains

*1. Gains derived by a **resident of a Contracting State** from the alienation of **immovable property** referred to in Article 6 and **situated in the other Contracting State** may be taxed in that other State”.*

The property shares are not dealt with under paragraph 1 as the above paragraph 1 only applies to immovable property. However, even if it can be argued that the shares are immovable property due to the majority of the value thereof being attributable to immovable property, paragraph 1 still cannot be applied if the shares disposed of are registered in Greece and the decedent is a resident of Greece. Paragraph 2 of Article 13 does not apply as that only relates to movable property forming part of the business property of a permanent establishment or a fixed base for the purpose of performing independent personal services as well as paragraph 2 only applies if the movable property is situated in a contracting state other than the state of the resident. Paragraph 4 of Article 13 will apply in the event of paragraph 1 and 2 not applying:

*“4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, **shall be taxable only** in the Contracting State of which the alienator is a resident”.*

However, paragraph 22 of the Commentary on paragraph 1 of Article 13 found in the OECD Income and Capital Model Convention (Commentary) (2000) states that:

“22. Paragraph 1 states that gains from the alienation of immovable property may be taxed in the State in which it is situated. This rule corresponds to the provisions of Article 6 and of paragraph 1 of Article 22. It applies also to immovable property forming part of the assets of an enterprise. For the definition of immovable property paragraph 1 refers to Article 6. Paragraph 1 of Article 13 deals only with gains which a resident of a Contracting State derives from the alienation of immovable property situated in the other

Contracting State. It does not, therefore, apply to gains derived from the alienation of immovable property situated in the Contracting State of which the alienator is a resident in the meaning of Article 4 or situated in a third State; the provisions of paragraph 1 of Article 21 shall apply to such gains.

(Amended on 29 April 2000)”.

[Own emphasis added].

Therefore, the Commentary guides us to paragraph 1 of Article 21 (Other Income) in situations where the disposed property is situated in the same country to which the alienator is a resident.

“1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State”.

Therefore, the outcomes of both paragraph 4 of Article 13 and paragraph 1 of Article 21 are the same being that if the decedent is a Greek resident, the gains on shares are taxable only in Greece, irrespective of the underlying property being situated in South Africa. If the decedent is a South African resident, the gain on shares is taxable in South Africa even if the shares are registered in Greece.

It is in situations like this that the tie-breaker test becomes exceptionally important in solving cases of dual residency. If the outcome renders the decedent to be a Greek resident, no capital gains tax is payable on death on those shares, whereas a South African resident would be subject to capital gains tax on those shares in the event of death.

Paragraph 21 of the Commentary on Article 13 found in the OECD Income and Capital Model Convention (Commentary) (2000) states that:

“21. As capital gains are not taxed by all States, it may be considered reasonable to avoid only actual double taxation of capital gains. Therefore, Contracting States are free to supplement their bilateral convention in such a way that a State has to forego its right to tax conferred on it by the domestic laws only if the other State on which the right to tax is conferred by the Convention makes use thereof. In such a case, paragraph 4 of the Article should be supplemented accordingly. Besides, a modification of Article 23 A as suggested in paragraph 35 of the Commentary on Article 23 A is needed”.

No such clause was inserted in Article 13 of the DTA Income SA – Greece. The absence of such a clause allows for there to be a situation where, if the decedent is a Greek resident, no capital gains tax is levied in the event of death on shares registered in Greece, even if the majority of the value of the shares is attributable to property situated in South Africa.

In addition, the following commentary on paragraph 1 of Article 21 found in the OECD Income and Capital Model Convention (Commentary) (2000) confirms that it is possible for no taxes to be levied by both of the contracting states:

“3. The rule set out in the paragraph applies irrespective of whether the right to tax is in fact exercised by the State of residence, and thus, when the income arises in the other Contracting State, that State cannot impose tax even if the income is not taxed in the first-mentioned State”.

It is also important to bear in mind that the above rationale and reasoning regarding the taxing rights of capital gains is not limited to shares registered in Greece. Provided the decedent is a resident of Greece, exclusive taxing rights are awarded to the Greek taxation authorities on any assets situated in Greece.²¹¹ This is the case even if the decedent is deemed to be a South African resident due to meeting the physical presence test in terms of domestic law, provided the tie-breaker test deems the decedent to be a Greek resident. Therefore, invoking the treaty for relief is particularly beneficial if the tie-breaker test is sure to render the decedent a resident of Greece as he will not be liable to capital gains tax in the event of death on his property situated in Greece, even if the South African physical presence test renders him a resident of South Africa.

An additional limitation of the DTA Income SA – Greece in respect of income is the absence of a provision that allows the carry-forward of any excess foreign taxes that were disallowed as a credit in a particular tax year.²¹² This is unlike section 6quat of the SA Income Tax Act where excess foreign taxes on income are permitted to be carried forward in certain circumstances.²¹³

²¹¹ Paragraph 4 of Article 13 and Paragraph 1 of Article 21.

²¹² As per inspection of the Convention between the Republic of South Africa and the Hellenic Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (2003).

²¹³ See Chapter 6.2 for specific circumstances where carry-forward of excess foreign taxes is allowed.

The treaty also does not stipulate how the duty attributable to the property in South Africa or Greece is to be calculated. It is the Commissioner's practice to use the following formula if relief is to be provided by South African tax authorities in terms of the treaty:²¹⁴

Duty Attributable to the foreign property	=	$\frac{\text{Value of foreign property included in the net value of the estate}}{\text{Net Value of the estate}}$	X	Estate duty payable on the dutiable amount of the estate
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Figure 6. Formula used to calculate the estate duty attributable to the foreign property.

6.9.5 CONCLUSION

Bilateral treaty relief from taxes on income and on capital can only be invoked if the decedent was either ordinarily resident in South Africa or was domiciled in Greece (therefore being only a Greek national is not sufficient). Relief in terms of the treaty is not designed for heirs of the estate, in the context of this dissertation. In the event of double taxation arising due to the decedent having dual residency, the tie-breaker test can be used to determine which of the two contracting states the decedent is a resident of. However situations may still arise where the tie-breaker test is not able to establish the country of residency.

It is more favourable for the decedent to invoke the treaty if the tie-breaker test deems him to be a Greek resident rather than a South African resident as no capital gains tax will be levied at all on death on property situated in Greece. Property situated in Greece includes shares registered in Greece even if the majority of the value of the shares is attributable to immovable property situated in South Africa. In this scenario, invoking the treaty will lead to double non-taxation. Unfortunately, the treaty does not cover inheritance or estate duty taxes, but does cover capital gains taxes payable on death. As a result of this, the treaty is only an adequate method of relief in limited circumstances, the majority of which deal with dual residency issues.

²¹⁴ Stein, M. L. 2004: 93.

6.10 TREATY IN RESPECT OF TAXES ON INCOME AND CAPITAL: SOUTH AFRICA – PORTUGAL

6.10.1 RESIDENCE

In order for a decedent to invoke this treaty, he has to be a resident of either South Africa or Portugal. The definition of resident is different to the definition of resident in the similar South Africa – Greece treaty in that this treaty is less restrictive. The definition of resident as set out in Article 4 of the DTA Income SA – Portugal has no distinction of the definition to be used by South Africa and Portugal. Consequently, the decedent only has to be resident of South Africa as opposed to ordinarily resident (as is the case in the similar South Africa – Greece treaty). Furthermore, the definition of resident under the treaty is aligned with the definition of resident for Portuguese taxation purposes i.e. domicile. An extract of the full definition of resident can be read as:

“Article 4

Resident

*1. For the purposes of this Convention, the term “resident of a Contracting State” means any person who, **under the laws of that State**, is liable to tax therein by reason of that person’s **domicile, residence, place of management or any other criterion of a similar nature**, and also includes that State and any political or administrative subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources therein”. [Own emphasis added].*

It should also be made clear that the use of this treaty does not apply to heirs of the Portuguese estate. The reasoning for this is identical to that found in Chapter 6.9 of this dissertation due to the identical use of the wording *by reason of* in paragraph 1(a) of Article 4 of the DTA Income SA – Greece.

In the event of double taxation due to dual residency, the treaty also makes use of a tie-breaker test. The wording of the test is the same as the wording used in the in the DTA Income SA – Greece.²¹⁵ Based on the case study discussed in Chapter 6.9 and referenced

²¹⁵ See Chapter 6.9 for an extract of the tie-breaker test. The tie-breaker test used in the treaty between South Africa and Greece on taxes on income and capital is the same as the tie-breaker test used between South Africa and Portugal.

to the Appendix the tie-breaker test does not solve all dual residency issues. However, there are instances where the outcome of the tie-breaker test is particularly significant.

A Portuguese resident's immovable property situated in Portugal may be subject to capital gains tax on death in terms of the South African Income Tax Act as a result of the decedent meeting the criteria of the physical presence test and hence being deemed a South African resident. In such a scenario, the use of bilateral treaty relief is beneficial, provided that the tie-breaker test renders the decedent to be a resident of Portugal and not of South Africa. This is because, if the decedent is deemed to be a Portuguese resident in terms of the treaty, the exclusive taxing right of gains on immovable property situated in Portugal is awarded to the Portuguese taxing authorities.²¹⁶ This is favourable as Portuguese taxing authorities levy no capital gains taxes in the event of death. The decedent will only pay capital gains taxes on immovable property situated in South Africa.

The above does not apply to all property situated in Portugal. The South Africa – Portugal treaty caters for shares in companies the majority of the value of which is attributable to immovable property. In this instance the source of the shares is deemed to be the situs of the underlying immovable property. This is unlike the case in the South Africa – Greece treaty where the source is determined by the tax laws of the contracting state to which the individual is a resident of.²¹⁷ An extract of paragraph 4 of Article 13 of the South Africa – Portugal treaty states that:

*“4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State **may be taxed in that State**”.* [Own emphasis added].

Where a provision states that income *may be taxed* in a state, Article 23 may need to be used for guidance. Article 23 of the DTA Income SA – Portugal deals with the methods available for the elimination of double taxation. Double taxation may occur when a treaty

²¹⁶The reasoning behind this is identical to that found in the South Africa – Greece treaty. If the individual is a resident of a contracting state and the immovable property disposed of is situated in the same contracting state, then Paragraph 5 of Article 13 and Paragraph 1 of Article 21 apply (instead of paragraph 1 of Article 13). See extracts of the relevant provisions and commentary on these provisions in Chapter 6.9 Note, paragraph 5 of Article 13 of this treaty is equivalent to paragraph 4 of Article 13 of the similar South Africa – Greece treaty.

²¹⁷ See chapter 6.9 to compare this to the tax treatment as applied in the similar South Africa – Greece treaty in respect of shares in companies the majority of the value of which is attributable to immovable property.

uses the phrase *may be taxed in that State* as in such cases both Contracting States of the treaty have a right to tax the income.²¹⁸ This differs from the phrase *shall only be taxed in that State* which prohibits the other Contracting State from taxing the income.²¹⁹ According to paragraph 4 of Article 13, if shares are registered in Portugal, but the majority of the value of those shares is attributable to immovable property situated in South Africa, then the gains arising on the disposal of those shares on death may be taxed in South Africa even if they are also taxed in Portugal, irrespective of the residency of the decedent. As no capital gains taxes are levied by Portugal on property on the death of an individual, no double taxation occurs and as a result Article 23 need not be used. Despite double taxation not occurring, this treaty achieves the result that double non-taxation does not occur on such property, an occurrence which is possible under the similar DTA Income SA – Greece.

A conflict may arise in practice as to the extent of shares that fall within the scope of paragraph 4 of Article 13 i.e. what exactly does “*consists directly or indirectly principally of immovable property*” mean? It is submitted that *principally* means “more than fifty percent”. This is because the OECD Income and Capital Model Convention has a similar provision in Article 13 which states:

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

However, it could be argued that *principally* means “more than eighty percent” as that is the benchmark used by the SA Income Tax Act.²²⁰ If the DTA Income SA - Portugal is not aligned with the SA Income Tax Act it would mean that if the treaty was applied, immovable property that would not be subject to CGT in terms of paragraph 2(2)(b) of the SA Income Tax Act could become taxable in terms of the DTA Income SA - Portugal.

²¹⁸ Huxham et al. 2010: 451.

²¹⁹ Huxham et al. 2010: 451.

²²⁰ SA Income Tax Act, Eighth Schedule, paragraph 2(2)(b).

6.10.2 TYPES OF FOREIGN TAXES APPLICABLE

Only the taxes specifically mentioned or described in the DTA Income SA – Portugal are covered by the treaty. The taxes covered by the treaty can be found in Article 4. As the provisions of Article 4 of the DTA Income SA – Portugal are substantially similar to those found in Article 4 of the similar DTA Income SA – Greece,²²¹ the same conclusions can be deduced. That is that the taxes covered that arise on death of an individual are limited to capital gains taxes. Therefore stamp duty and estate duty taxes are excluded from the scope of the treaty.

It is important to bear in mind that due to the treaty not covering stamp duty and estate duty taxes arising on death, the tie-breaker test cannot be used to determine dual residency double taxation issues relating to these taxes. Consequently, the tie-breaker test can only be used to alleviate dual residency problems relating to double tax issues on income.

6.10.3 DOES IT MATTER WHO IS LIABLE TO PAY THE FOREIGN TAX?

As established in Chapter 3.4 of this dissertation the Portuguese stamp duty tax that arises on death is payable by the heir of the estate. However, stamp duty taxes are not covered in the DTA Income SA – Portugal. Furthermore, no capital gains taxes are levied in Portugal on death of an individual. In South Africa, both the estate duty tax and the capital gains tax that arise in the event of death are paid by the decedent himself. Therefore the issue as to whether relief is still claimable even if the foreign taxes are not paid by the same person claiming the relief is not significant in terms of this treaty, with specific reference to taxes payable on death.

6.10.4 FURTHER LIMITATIONS

The DTA Income SA – Portugal does not include an article that permits the carry-forward of excess foreign taxes that were not allowed as a credit in a particular tax year.²²²

²²¹ See Chapter 6.9 for extracts and an analysis of the provisions of the Taxes Covered article found in the similar South Africa - Greece treaty.

²²² As per inspection of the Convention between the Republic of South Africa and the Portuguese Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (2008).

6.10.5 CONCLUSION

The DTA Income SA – Portugal can only be invoked if the decedent was either a resident of South Africa or was domiciled in Portugal. Relief in terms of the treaty is not designed for heirs of the estate, in the context of this dissertation. In the event of double taxation arising due to the decedent having dual residency, the tie-breaker test can be used to determine which of the two contracting states the decedent is a resident of. However, situations may still arise where the tie-breaker test is not able to establish the country of residency. It is more favourable for the decedent to invoke the treaty if the tie-breaker test will deem him to be a resident of Portugal rather than a South African resident as in that case no capital gains taxes will be levied at all in the event of death on property situated in Portugal. However, if the property in question relates to shares registered in Portugal, the majority of the value of which is attributable to immovable property situated in South Africa, capital gains tax will be levied on death in terms of the South African Income Tax Act as the treaty contains a source deeming provision. Unfortunately, the treaty does not cover inheritance or estate duty taxes, but does cover capital gains taxes payable on death. As a result of this, the treaty is only an adequate method of relief in limited circumstances, the majority of which deal with dual residency issues.

6.11 CONCLUSION ON THE OPTIMAL CHOICE OF USE OF UNILATERAL AND BILATERAL RELIEF

Many different measures of unilateral and bilateral relief can be applied in the event of international double taxation arising on death. However it is not a straightforward decision choosing the optimal combination of relief measures. Many factors need to be considered as the effect thereof could have a significant effect on the outcome of a relief measure. The most important factors that need to be established beforehand are the residency of the deceased, the situs of the asset, the taxes levied on the asset, the person liable for the taxes, the person who paid the taxes, whether bilateral relief is available and whether bilateral relief is applied above unilateral relief in terms of each country's domestic law.

A flowchart has been formulated to illustrate the effect each of these factors have on the optimal choice of relief available between South Africa and Greece and South Africa and Portugal, found in Appendix 1. The flowchart is the best means of illustrating the various avenues available for a taxpayer as the interactions of the different factors can become very complicated. The conclusion of the optimal measure of relief for the different scenarios and properties that the deceased may possess at date of death is therefore determinable using the flowchart in Appendix 1.

7.1 CONCLUDING REMARKS AND RECOMMENDATIONS

It seems unfair that the same assets may be subject to three taxes on death. From a fiscal perspective, it seems unfair that zero taxes are levied on certain assets on death. The worked examples found in the Appendix, have been calculated on assumed data so as to highlight the possible areas, in the event of death, where double taxation may occur in South Africa, where international double and triple taxation occurs between South Africa and Greece and South Africa and Portugal and where double non-taxation occurs. These worked examples also provide the basis for further recommendations that may be of benefit to individuals for estate planning purposes and to SARS for improving legislation.

It is suggested by some academics that in order to alleviate the double taxing of assets on death estate duty should be abolished and be incorporated as part of capital gains taxes. This is not recommended as section 6*quat* relief of the SA Income tax Act was shown to be the least adequate relief measure to use in terms of this study. Furthermore, as many countries do not levy capital gains taxes on death, all existing income tax double tax agreements that South Africa has entered into would have to be amended so as to include foreign inheritance type taxes as an applicable “tax covered” by the treaty, otherwise there would be no relief for foreign inheritance taxes paid in the absence of section 16(c) of the SA Estate Duty Act. Alternatively, South Africa would have to enter into inheritance tax treaties with many more countries as currently only five agreements are in place.

Section 6*quat* of the SA ITA could be amended to alleviate possible triple taxation through allowing a deduction for foreign inheritance taxes paid that were not allowed to be deducted under section 16(c) of the SA EDA due to the application of limits.

It is recommended that South African residents with Greek citizenship take note of the number of days they spend in Greece when doing their compulsory military service. Due to the recent amendments, if that South African stays in Greece for longer than 183 days he may be liable to pay income tax to Greece on his worldwide income. Furthermore, on

death, he may have to pay inheritance tax on his worldwide movable property if he passes away within ten years of leaving Greece.²²³

Based on Worked Example 1 in the appendix which shows the taxes levied on immovable property other than a primary residence on death, it is much less costly from a death duties perspective for Greek and Portuguese domiciliaries to invest their money in property in Greece and Portugal rather than in South Africa. Levying estate duty in addition to capital gains tax could be seen as a deterrent to foreign investment in South Africa.

South Africans with property in Greece should be aware of the additional tax consequences of leaving property to category B or C heirs such as brothers, sisters and sons in law. As seen in Worked Example 1, the effective tax rate could end up being as high as 69 percent.

As seen in Worked Example 6, South African residents should transfer their cash in Greece to South Africa before date of death as Greek Inheritance tax rates on cash are higher than for any other asset.

If South African residents own farming property in Greece they are afforded no different treatment to the taxing of other immovable property unless the deceased's child will take over bona fide farming on the land. See Worked Example 3.

The SA Income Tax Act and the SA Estate Duty Act are not aligned with respect to primary residence deductions which can relate in 20 percent of the benefit afforded by the primary residence exemption being eaten away due to increased estate duty taxes. The SA Estate Duty Act should allow for a notional tax deduction for the income tax that would have had to be paid on the primary residence had there been no primary residence deduction so that the income tax benefit is not partially set-off by the South African estate duties levied.

From an estate planning perspective, if a South African with Greek heritage acquires foreign property that is entitled to a section 4(e) deduction in terms of the SA EDA, a tax saving of up to 38 percent can be realised if the property or the proceeds thereof is kept in Greece, provided the heir is a category A heir. This can pose a disincentive for South

²²³ Worked example 5 illustrates the taxes payable on death if a South African is a Greek national who has stayed in Greece for a period of ten years prior to death.

Africans to bring their investments in Greece to South Africa. However, if the heir falls in the category of B or C in terms of the Greek Inheritance Tax Code, then the section 4(e) deduction of the SA EDA will be outweighed by the large Greek inheritance taxes levied on such heirs. In this case, taxes would be saved if investments in Greek property were realised and moved to South Africa. In the same context, if the property is situated in Portugal, it is almost always beneficial to keep such property in Portugal as zero estate duty and stamp duty may be payable on such property on death.

The SA Income Tax Act has South African source deeming provisions which combat persons owning property through a foreign company so as to re-route the source of the physical location of the asset to the situs of the foreign shares. The SA Estate Duty Act shows weaknesses in this regard, as seen in Worked Example 5 where a non-resident can escape paying estate duty on property situated in South Africa through the property being owned by a non-resident company with shares which have a foreign source.

However, the income tax double tax agreement awards full taxing rights to the Greek domicile as there is no source deeming provision in the agreement. Therefore if the treaty is applied the Greek deceased can escape South African income tax liability. This exemption in addition to the latter paragraph shows that it is possible for SARS to receive absolutely zero taxes from immovable property situated in SA if owned by a non-resident through a company whose shares are registered in Greece. The same does not apply for Portugal as the DTA Income SA – Portugal does contain a relevant source deeming provision.

The latter paragraph illustrates that double non-taxation with respect to income taxes is possible in regard to certain shares. Double non-taxation with respect to income taxes may also occur in respect of cash, movable property not used for trade and property inherited by the spouse.

The examples also show instances where South Africa may provide additional concessions, deeming certain events exempt from tax e.g. no estate duty or capital gains tax is payable by the spouse on property inherited. However, if this same concession is not provided by a foreign state then the objective behind providing the concession is to a large extent nullified and any intended benefit eroded. In the event of this the additional taxation amounts to more than partial double taxation, it even amounts to more than double

taxation. If South Africa levies zero taxes on property inherited by the spouse, while Greece levy 500,000 Euros (as seen in Worked Example 8), then the additional taxes levied are infinite from a proportional point of view. I call this type of double taxation, “apeiros” double taxation, which comes from the Greek language and translates to infinite or without limit.

7.2 SUGGESTIONS FOR FUTURE RESEARCH

The following areas have not been explored by this dissertation, but would be of great value and interest and are therefore suggested for future research:

- The issues that may arise regarding the deductibility of local and foreign debt. This is of particular importance if an individual has ties with Portugal as there is no legislation that deals with specific situs rules of debts in the Portuguese Stamp Duty Code;
- how one would determine the base cost of foreign property received as a result of an inheritance or donation for which the original cost is not known nor the market value as at 1 October 2001, for capital gains tax purposes;
- the possible international double taxation effects on death from conflicting situs rules in Greece and South Africa for ships or aircraft and whether adequate relief is available. This is of particular importance for Greece as a result of its large shipping industry ;
- the applicability of the section 6quat rebate in the year where individuals have an assessed loss. The SARS Interpretation Note No 18 of 31 March 2003 on section 6quat rebates does not deal with this matter ;
- additional research can be performed on the many areas highlighted in this dissertation where the meaning of the legislation in section 6quat, the SA Estate Duty Act or any double tax treaties proved to be unclear ;
- a similar research approach as this topic may be performed but using foreign countries other than Greece and Portugal; and
- whether South African estate duty and capital gains taxes would still be levied on death in instances where foreign property is owned, evidenced by title deeds, but financial benefits are currently not obtained from the property due to other persons staying in your property without your permission e.g. Zimbabwean farm owners who were forced off their farms and subsequently immigrated to South Africa or Cypriots who

immigrated to South Africa as a result of the 1974 Turkish invasion of Cyprus and whose property in the northern side of Cyprus is still illegally occupied by Turks.

1. SARS INTERPRETATION GUIDANCE ON RESIDENCY

SARS has provided additional guidance in the form of Interpretation Note 3 of the 4th of February 2002. The interpretation note says that for an individual to be ordinarily resident in South Africa two requirements need to be met:

- the intention to become ordinarily resident ; and
- steps indicative that this intention has been or is being carried out.

A non-exhaustive list of factors that can be used to take into account when considering whether the above two requirements are met, as per the practice note are:

- most fixed and settled place of residence
- habitual abode (habits and mode of life)
- place of business and personal interest
- status of individual in a country (immigrant, work permits, restrictions and conditions etc.)
- situs of personal belongings
- nationality
- family and social relations (school, church, sport clubs, social clubs)
- political, cultural and other activities
- application for permanent residence
- period abroad (length, purpose, nature, frequency and reasons for visits)

2. FORMULAS TO BE USED TO VALUE SHARES FOR PORTUGUESE STAMP DUTY PURPOSES, AS PER ARTICLE 15

This appendix is inserted for purposes of additional information to Chapter 4.4. The relevant sections of Article 15 of The Portuguese Stamp Duty Code regarding the determination of the value of shares read as follows (in Portuguese):

3 - O valor das acções, títulos e certificados da dívida pública e outros papéis de crédito é o da cotação na data da transmissão e, não a havendo nesta data, o da última mais próxima dentro dos seis meses anteriores, observando-se o seguinte, na falta de cotação oficial:

a) O valor das acções é o correspondente ao seu valor nominal, quando o total do valor assim determinado, relativamente a cada sociedade participada, correspondente às acções transmitidas, não ultrapassar (euro) 500 e o que resultar da aplicação da seguinte fórmula nos restantes casos:

$$V_a = 1/2n[S + ((R1 + R2)/2)f]$$

em que:

V_a representa o valor de cada acção à data da transmissão;

n é o número de acções representativas do capital da sociedade participada;

S é o valor substancial da sociedade participada, o qual é calculado a partir do valor contabilístico correspondente ao último exercício anterior à transmissão com as correcções que se revelem justificadas, considerando-se, sempre que for caso disso, a provisão para impostos sobre lucros;

R1 e R2 são os resultados líquidos obtidos pela sociedade participada nos dois últimos exercícios anteriores à transmissão, considerando-se $R1 + R2 = 0$ nos casos em que o somatório desses resultados for negativo;

f é o factor da capitalização dos resultados líquidos calculado com base na taxa de juro aplicada pelo Banco Central Europeu às suas principais operações de refinanciamento, tal como publicada no Jornal Oficial da União Europeia e em vigor na data em que ocorra a transmissão;

b) No caso de sociedades constituídas há menos de dois anos, quando tiver de recorrer-se ao uso da fórmula, o valor das respectivas acções é o que lhes corresponder no valor substancial, ou seja:

$$V_a = S/n \text{ [Own emphasis added].}$$

As per correspondence with Rogerio M. Fernandes Ferreira, the meaning of the above extract is as follows:

“Under the terms of Article 15 of the Portuguese Stamp Duty Code, the value of shares corresponds to its official value in the market with reference to the date when the transfer occurs.

When such value does not exist with reference to such date, it should be considered the official value in the market of the closest date within the previous six months.

However, if the shares do not have an official market value, the following rules must be considered:

a) The value of the shares shall correspond to its nominal (face) value, when the total value determined in such a way, regarding each participated company, corresponding to the transferred shares, does not exceed 500 Euro;

In the remaining cases, the value of the shares shall be determined by the application of the following formula: $V_a = 1/2n[S + ((R_1 + R_2)/2) f]$

where:

V_a - represents the value of each share upon the date of transmission;

n – is the number of representative shares;

S – is the substantial value of the participated company, which is calculated considering the accounting value corresponding to the last tax period prior to the transfer, with the application of any justified corrections, considering, whenever necessary, the provision for profit taxes;

R_1 and R_2 – are the net results obtained by the participated company in the last two tax periods prior to the transfer, considering $R_1 + R_2 = 0$ whenever such result is negative;

f – is the capitalization factor of the net results calculated based on the interest rate applied by the European Central Bank to its main refinancing operations, published in the European Union Official Journal, and into force at the date of the transfer;

b) In the case of companies incorporated for less than two years, when it is necessary to apply the above mentioned formula, the value of the shares shall be the value that corresponds to them in the substantial value, e.g.: $V_a = S/n$ ”

TABLE 1

SUMMARY OF INCONSISTENCIES BETWEEN RELIEF PROVIDED BY SECTION 6quat (INCOME TAX ACT) AND SECTION 16(c) (ESTATE DUTY ACT) IN THE EVENT OF DEATH

Note: Data was obtained from Chapters 6.1 – 6.3 of this dissertation.

Possible inconsistency	Section 6quat	Section 16(c)
Which residency status must a taxpayer be to qualify to be able to use the relief measure?	Resident of SA	Ordinarily Resident of SA
Which foreign taxes are afforded possible relief in terms of the provision?	Foreign income taxes	Foreign estate duty taxes
Do the foreign taxes have to be <i>actually paid</i> ?	No - payable	Yes
Does it provide limited or full relief?	Limited	Limited
Due to limited relief, may the excess foreign taxes be carried forward or passed onto heirs?	No – no CGT carry-forward	No – no succession relief
Is there any form of relief available for foreign taxes paid on SA source assets?	Yes, section 6quat(1C)	No such relief available
Does relief still apply if foreign taxes are paid on the same foreign assets but by a different person (e.g. heir) to the person claiming the relief (e.g. deceased)?	No	Yes
Which exchange rate must be used to convert the foreign taxes paid to Rands?	Average rate over SA year of assessment	Submitted – spot on date of payment
Does the taxpayer have the choice whether to use domestic relief or treaty relief?	Yes	No – must use DTA if exists.

TABLE 2**DUAL CITIZENSHIP CASE STUDY: APPLICATION OF THE TIE-BREAKER TEST**

A case study was performed to determine whether the tie-breaker test can be used in all cases to resolve dual residency issues with regard to double tax treaty application. Twenty-five South African families of Greek descent made up the sample population. The sample of twenty-five families was obtained from the Hellenic Community of Cape Town membership database. In each case the head of the family was questioned and urged to give as much detail as possible. Consistent questionnaires were used to obtain feedback from the sample population.

The results of one case, sample number 13 as seen on page 106, is examined as it was the only case out of the sample that may provide a conclusion to the stated objective of the case study.

Note, the methodology of application of the tie-breaker test is obtained from Chapter 6.9.1

Facts of the case:

Sample number 13 is a retired mother who was born in Greece but immigrated to South Africa. She stays in Cape Town for the period roughly November to April with the remainder of the year spent at her house in Greece. Therefore approximately half the year she spends in South Africa and the other half in Greece. She stays with her son in South Africa and her daughter when in Greece. The mother owns both properties. The mother has two bank accounts, one in South Africa and one in Greece. The Greek and South African bank accounts receive income from pensions in Greece and South Africa respectively. Her medical aid subscription was taken out in South Africa and she does not have a similar subscription in Greece, although the reason for this is because the healthcare system is free in Greece. She frequently attends the local neighbourhood Greek Orthodox church in both countries, but has no other memberships to clubs, gyms etc. She lives the same simple lifestyle in South Africa and Greece, maximising on all year round summer.

Sample # 13		
<u>Objective:</u>	Determine whether the tie-breaker test is sufficient to solve a real-life dual residency issue.	
<u>Applying the facts to the tie-breaker test criteria:</u>	<u>South Africa</u>	<u>Greece</u>
Permanent home?	Yes	Yes
Centre of vital interests?	Yes: Church, property owner, pension income & looks after her son	Yes: Church, property owner, pension income & looks after her daughter
Habitual Abode?	Yes: roughly 6 months	Yes: roughly 6 months
National?	Yes, South African passport and ID	Yes, Greek passport and ID
<u>Outcome so far:</u>	The tie-breaker test has failed to isolate one country as her country of residence for purposes of the treaty. The only other means possible is mutual agreement between South Africa and Greece. ²²⁴	
<u>Conclusion:</u>	The tie-breaker test is helpful in determining to which state an individual is a resident for purposes of the treaty, however there are instances where not even the tie-breaker test can solve dual residency issues between Greece and South Africa.	

²²⁴ I was unable to establish what the likelihood of such a mutual agreement being reached between the two countries is in practice in my research.

DIAGRAM 1.

OPTIMAL DOUBLE TAX RELIEF METHODS AVAILABLE IF THE DECEASED HAS SOME FORM OF DUAL RESIDENCY OR DUAL CITIZENSHIP BETWEEN SOUTH AFRICA AND GREECE OR SOUTH AFRICA AND PORTUGAL

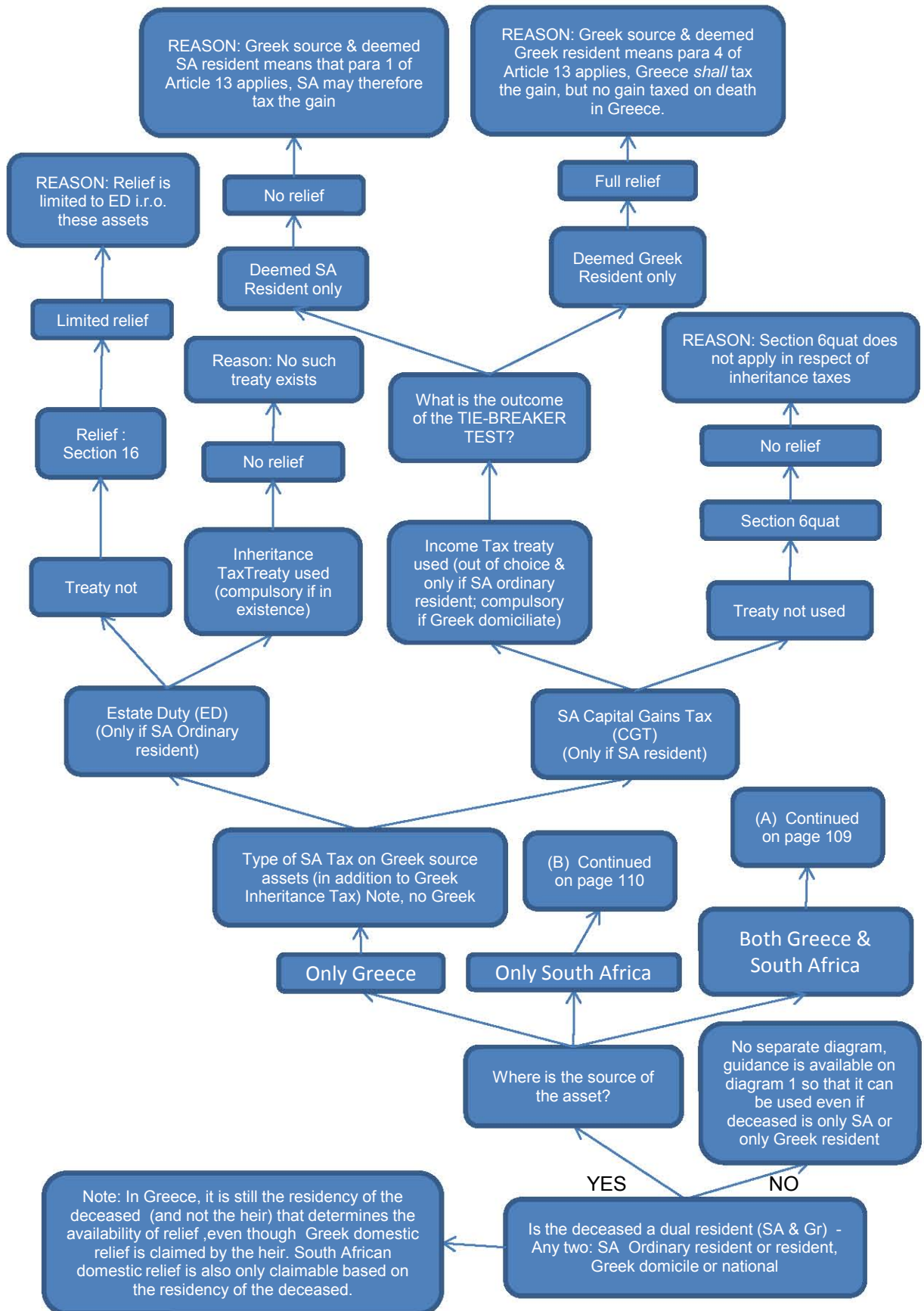
Objective

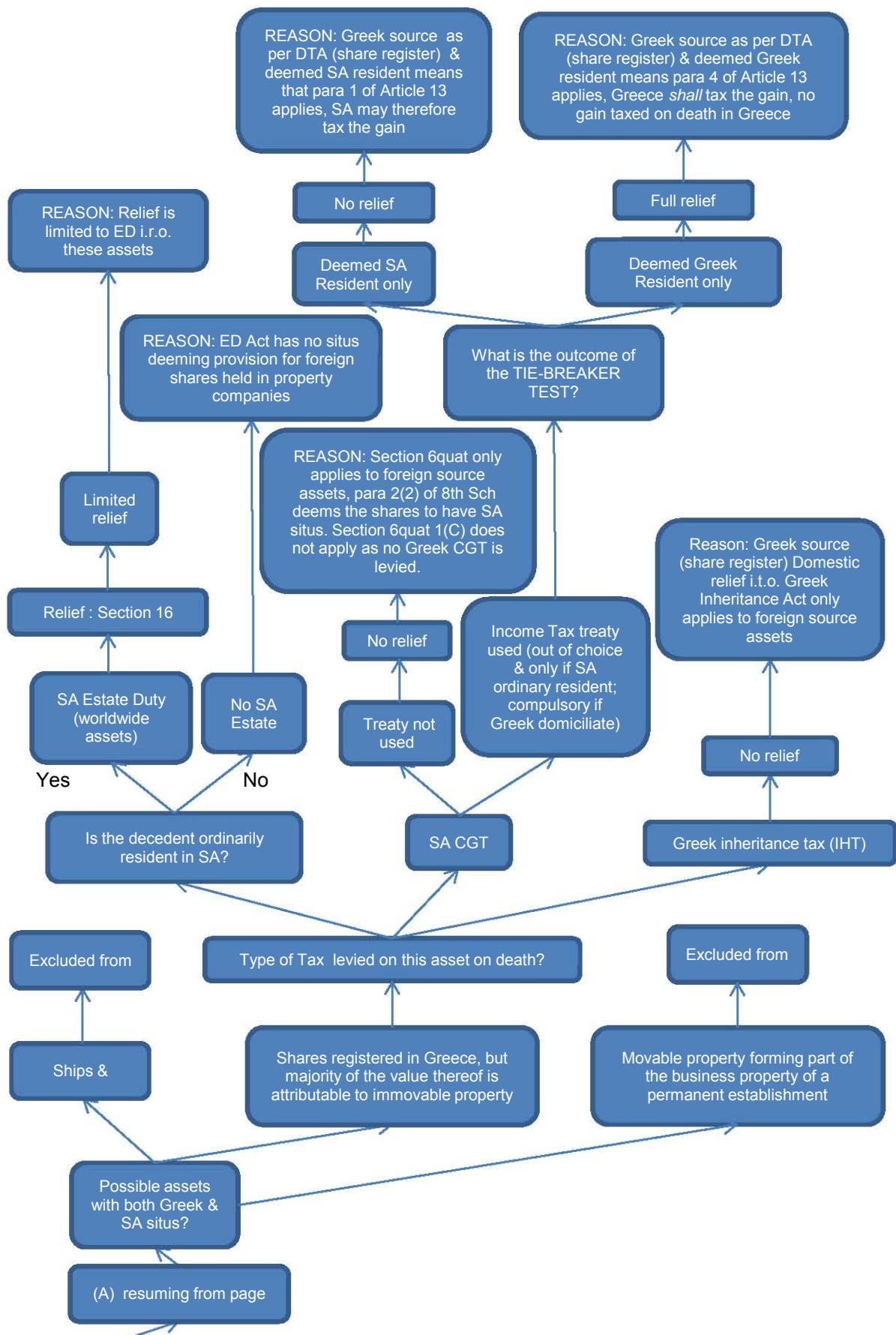
The diagram is designed to provide an individual with a quick and summarized flowchart of the optimal relief options available to him or her given the facts and circumstances of each particular case. The diagram also highlights the areas for which no relief measures may be available.

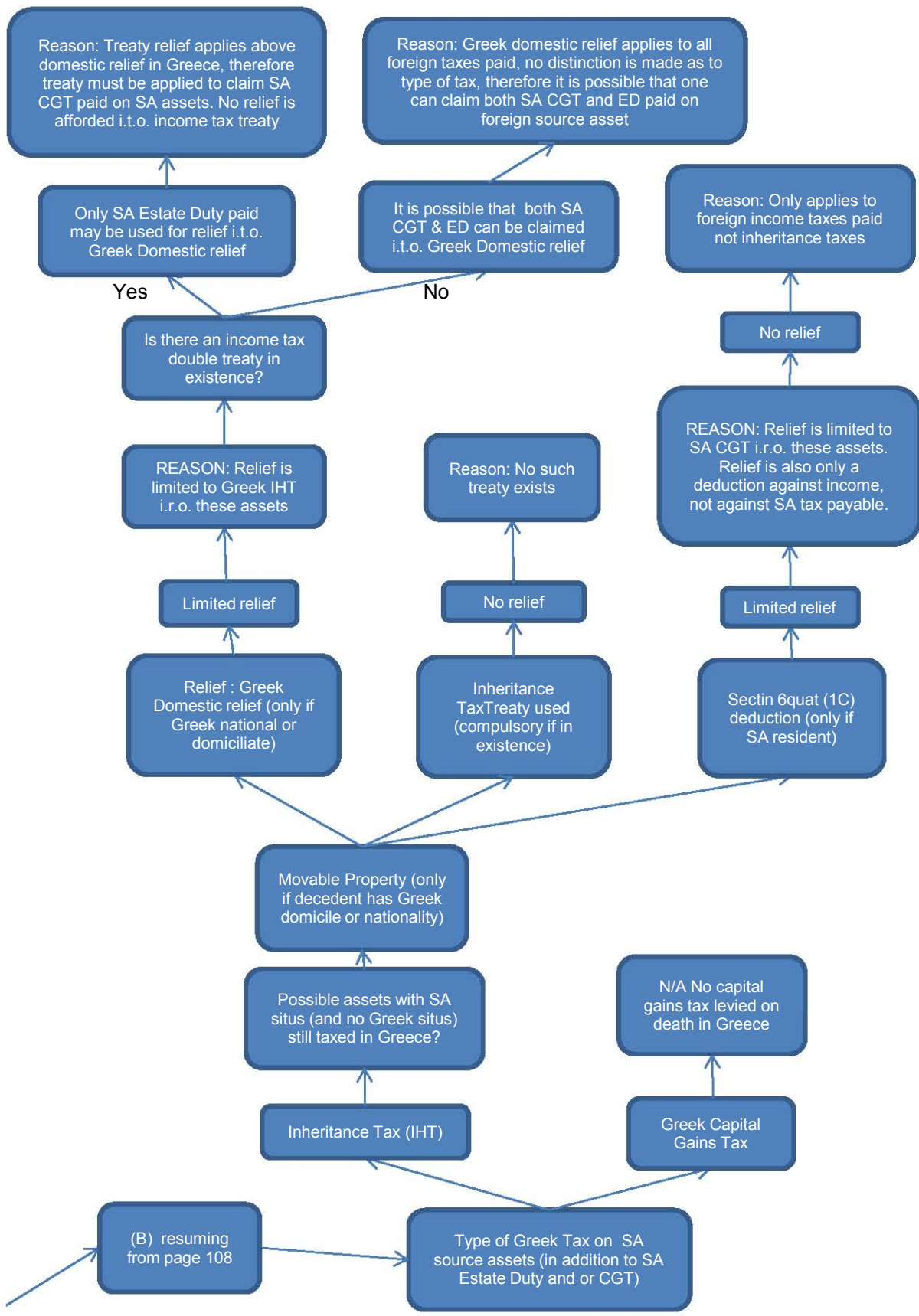
Determining the optimal method of relief or whether relief is even available is a complex task as the outcome is dependent on many different factors. Different outcomes can arise from adjusting just one of the following main factors: residency, domicile or nationality of the deceased; the situs of each asset as at date of death taking into account each country's situs rules; what the nature of the taxes are that could be levied on those assets; whether bilateral treaty relief exists and if it does, whether it is compulsory to apply the treaty for a specific type of tax.

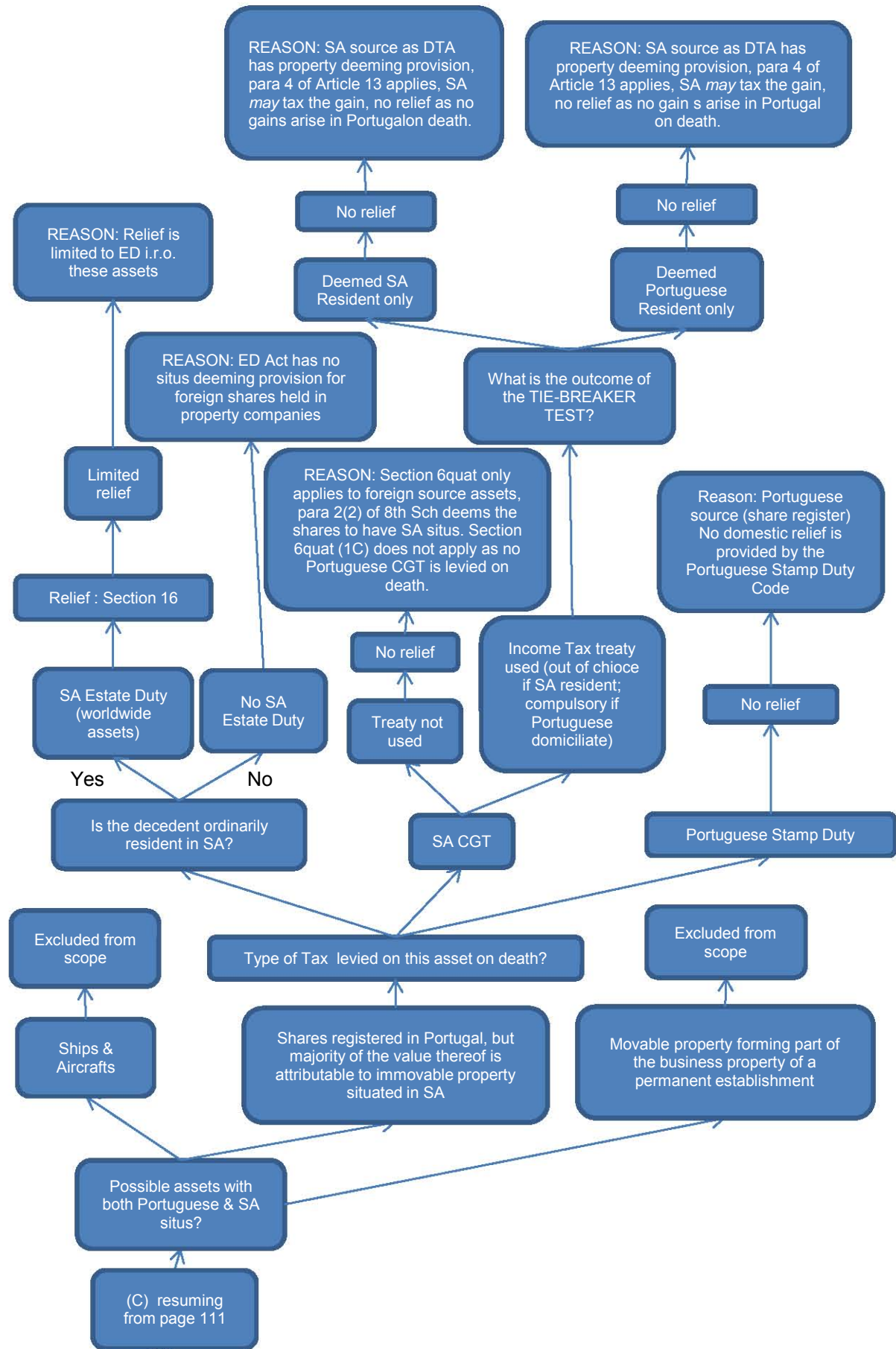
Reasons have been provided for the eventual outcome of each arm however Chapters 1 – 7 must be consulted for an in-depth analysis and for further references.

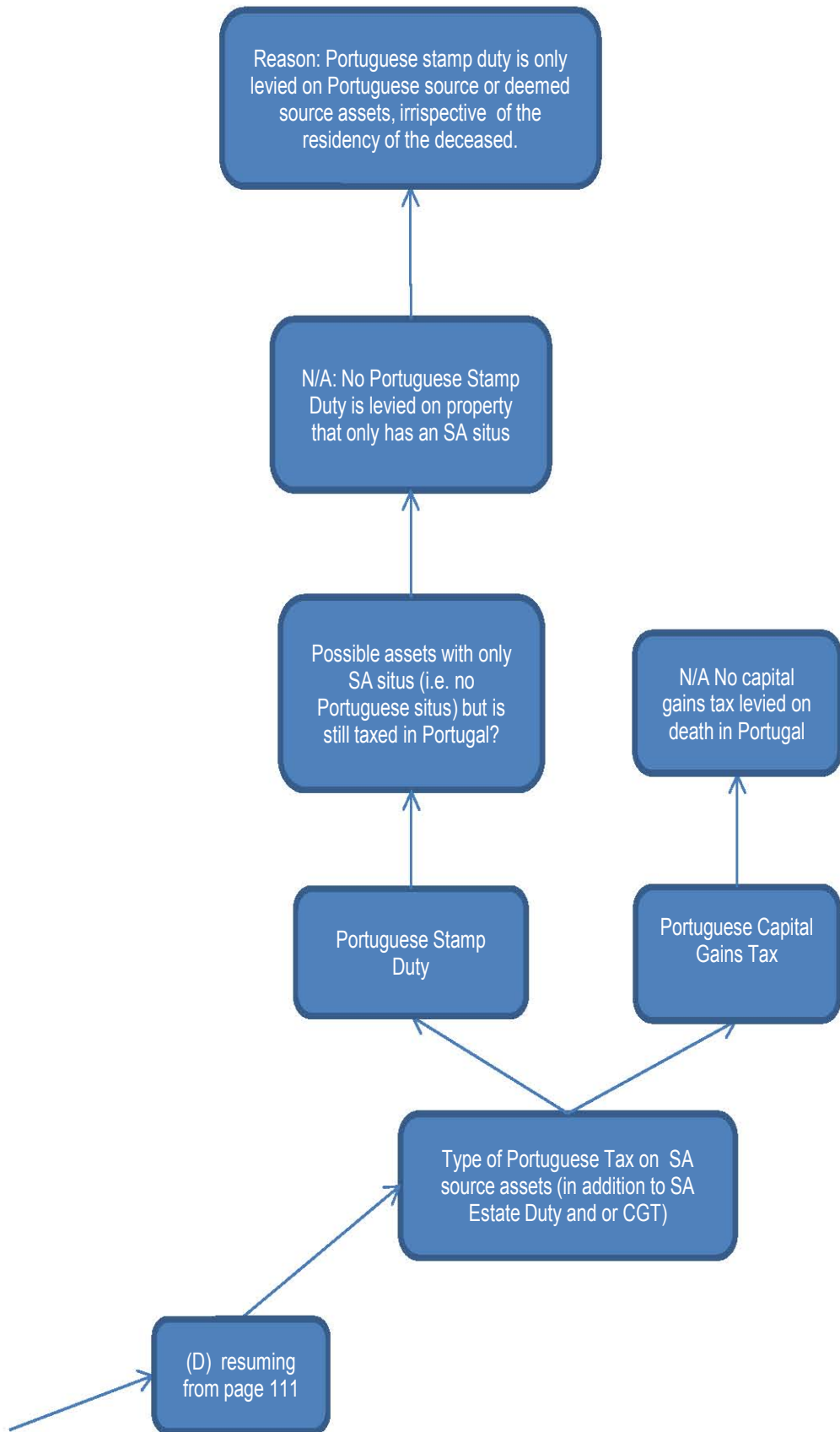
The diagram extends over six pages in total, starting at pages 108 and ending at page 113. Page 108 to page 110 deals only with a South Africa – Greece perspective. Page 111 to page 113 deals only with a South Africa – Portugal perspective. Page 108 shows the relief options available for double taxation on Greek source assets. Page 110 shows the relief measures available for double taxation on South African source assets. Page 109 shows the relief measures available for double taxation occurring on assets that are deemed to have a Greek situs by Greek legislation and simultaneously deemed to have a South African situs by South African Income Tax legislation. Page 111, 113 and 112 show the relief measures available for Portuguese, South African and dual-source assets respectively. Each flowchart starts at the bottom of the page and flows upwards depending on the outcome of each question.











WORKED EXAMPLES

A scenario analysis was performed which analyses the tax effects on death for eight different types of assets. In most cases the tax effects are examined from a South African, Greek and Portuguese perspective.

The objective of the examples, in addition to providing guidance on how to calculate tax liabilities arising on death relating to certain assets, is to apply the findings of the research to a hypothetical scenario so as to determine where areas of international double taxation, international double non-taxation, partial double taxation or triple taxation may occur between South Africa and Greece and or South Africa and Portugal in the event of death.

The tax affects arising on death for South African, Greek and Portuguese residents are analysed for the following types of assets:

- Example 1: Immovable property other than a primary residence
- Example 2: Primary residence
- Example 3: Property used for farming
- Example 4: Property dealt with in section 4(e) of the SA Estate Duty Act
- Example 5: Property company shares
- Example 6: Cash
- Example 7: Movable property
- Example 8: Property inherited by the spouse

The standard data and assumptions used by each example, unless stated otherwise are:

Assume a property with market value of R10,000,000 and base cost of R5,000,000 on the date of death. The Rand – Euro spot rate at date of death is R10:1€, which is the same spot rate at the date the foreign taxes are actually paid and also represents the average exchange rate for the South African tax year in which the death occurred. The primary and secondary rebate that a South African may claim is ignored when calculating the final tax liability. In all cases assume the deceased pays income tax in South Africa at the marginal tax rate of 40 percent. Unless otherwise stated, the heir is not the spouse of the deceased. The reason for this is because zero estate duty and capital gains taxes are paid to SARS in respect of assets inherited by the spouse.

EXAMPLE 1**IMMOVABLE PROPERTY OTHER THAN A PRIMARY RESIDENCE**

Source: Greece

Deceased residency: Ordinarily resident in SA

Heir: Three scenarios, Category A, B & C heirs as defined in the Greek Inheritance Tax Act, excluding the spouse or minor child.

Taxes levied on death

Greek CGT 0 € Reason: No CGT levied on property in the event of death

Greek Inheritance tax R 565,000

Objective value of property 1,000,000 €

Tax payable if Category A heir (excl. Spouse or minor child):

Tax scale in € '000	Scale factor (%)	Tax scale €'000	Taxable property in €'000	Tax which equals to €'000
150	--	--	150	--
150	1	1.5	300	1.5
300	5	15	600	16.5
Excess (400)	10	40	1000	56.5

Converted to Rands (R10:1 Euro) 56,500 € R 565,000

SA Capital Gains Tax R 488,000

Proceeds at Market value 10,000,000

Less base Cost -5,000,000

5,000,000

Allowance -120,000

4,880,000

Taxable capital gain (25%) 1,220,000

Capital gains tax (40%) R 488,000

section 6quat rebate R 0 Reason: Does not apply for inheritance taxes paid.

SA Estate Duty R 637,400

Market value of property 10,000,000 Reason: (1000,000 € x R10)

Less Income tax liability -488,000

Less abatement -3,500,000

Dutiable amount 6,012,000

Estate duty (20%) 1,202,400

Section 16 rebate -565,000

R 637,400

Net Tax Paid: R 1,690,400 Reason: (565,000 + 488,000 + 637,400)

Effective tax rate based on dutiable amount: 28% Reason: (1,690,400 / 6,012,000)

Tax payable if Category B heir:

Tax scale in € '000	Scale factor (%)	Tax scale €'000	Taxable property in €'000	Tax which equals to €'000
30	--	--	30	--
70	5	3.5	100	3.5
200	10	20	300	23.5
Excess (700)	20	140	1000	163.5

Converted to Rands (R10:1 Euro) 163,500 € R 1,635,000

Greek CGT 0 €

SA Capital Gains Tax R 488,000

SA Estate duty before deduction 1,202,400
 section 16 deduction -1,202,400 Reason: Relief limited to lower of local
 R 0 and foreign tax paid

Net Tax Paid: R 2,123,000 Reason: (1,635,000 + 488,000)

Effective tax rate based on dutiable amount: 35% Reason: (2,123,000 / 6,012,000)

Tax payable if Category C heir:

Tax scale in € '000	Scale factor (%)	Tax scale €'000	Taxable property in €'000	Tax which equals to €'000
6	--	--	6	--
66	20	13.2	72	13.2
195	30	58.5	267	71.7
Excess (733)	40	293.2	1000	364.9

Converted to Rands (R10:1 Euro) 364,900 € R 3,649,000

Greek CGT 0 €

SA Capital Gains Tax R 488,000

SA Estate duty before deduction 1,202,400
 section 16(c) deduction -1,202,400 Reason: Relief limited to lower of local
 R 0 and foreign tax paid

Net Tax Paid: R 4,137,000 Reason: (3,649,000 + 488,000)

Effective tax rate based on dutiable amount: 69% Reason: (4,137,000 / 6,012,000)

WHAT IF?

A) If the deceased was a Greek domiciliate and the property was still sourced in Greece then the tax payable would only be Greek inheritance tax ranging R565k, R1,635k, R3,649k. The additional cost of being SA ordinary resident is therefore R1,125,400; R488,000; R488,000 respectively.

B) If the deceased is a Greek domiciliate and property is situated in SA, then no Greek inheritance tax is payable. The tax payable to SA would be R1,690,400 (488,000 + 1,202,400) irrespective of the heir type.

WHAT IF?

Source: Portugal
Deceased residency: Ordinarily resident in SA
Heir: Legitimate heir (as per Portuguese Stamp Duty Act)
Non-legitimate heir

Taxes levied on death

Portuguse CGT	0 €	Reason:	No CGT levied on property in the event of death
SA Capital Gains Tax	R 488,000	Reason:	Same as example 1
Portuguese stamp duty:			
Legitimate heir	0 €	Reason:	No stamp duty levied on property inherited by legitimate heir
Non-legitimate heir			
Market value of property	1,000,000 €		
Stamp duty @10%	100,000 €	R 1,000,000	
SA estate duty tax section 16	1,202,400	Reason:	Same as example 1 before the section 16 rebate (legitimate heir)
	0		
SA estate duty tax section 16	1,202,400		
estate duty liability	<u>-1,000,000</u>	Reason:	Non-legitimate heir is subject to Portuguese stamp duty
	202,400		

Conclusion: As the definition of legitimate heir is very wide, it is more likely in practice that the taxes payable under the legitimate heir scenario to occur.

If an heir is classified as a legititmate heir then zero Portuguese Stamp duty taxes are levied on death in respect of property inherited by that heir. Only a non-legitimate heir is subject to stamp duty in Portugal.

From a tax planning perspective, it is more beneficial for a South African resident to hold foreign property in Portugal than in Greece due to the tax savings in the event of death.

**EXAMPLE 2
PRIMARY RESIDENCE**

Deceased residency: Ordinarily resident in SA
Source: By nature of a primary residence, it is expected to follow the residence of the deceased.

Taxes levied on death

Greek CGT 0 € Reason: No CGT levied on property in the event of death.
Greek Inheritance tax 0 € Reason: Not levied on SA source property.

SA Capital Gains Tax R 338,000

Proceeds at Market value	10,000,000
Less base Cost	<u>-5,000,000</u>
	5,000,000

Primary residence allowance	-1,500,000
Allowance	<u>-120000</u>
	3,380,000

Taxable capital gain (25%)	845,000
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Capital gains tax (40%) R 338,000
section 6quat rebate R 0 Reason: No foreign taxes paid

SA Estate Duty

Market value of property	10,000,000	Reason: Converted 100,000 Euro at R10.
Less Income tax liability	-338,000	
Less abatement	<u>-3,500,000</u>	
Dutiable amount	6,162,000	
Estate duty (20%)	1,232,400	
Section 16 rebate	<u>0</u>	
	R 1,232,400	

Net Tax Paid: R 1,570,400 Reason: (1,232,000 + 338,000 + 0 + 0)

Effective tax rate based on dutiable amount: 25% Reason: (1,570,400 / 6,112,000)

Conclusion: Capital gains taxes decrease by 31% due to primary residence exclusion (R150,000 saving compared to example 1 without the exclusion).

However, the benefit from the reduction in income taxes is offset by estate duty tax, which increased by R30,000 due to the lower income tax liability at year end.

By nature a primary residence is situated in the same country as that where a person is ordinarily resident or domiciled. Therefore, the likelihood of international double taxation occurring is slim.

EXAMPLE 3
PROPERTY USED FOR FARMING

Source: Greece
Deceased residency: Ordinarily resident in SA
Heir: Category A heirs as defined in the Greek Inheritance Tax Act, excluding the spouse or minor child in all cases.
An heir who is the deceased's son who will perform bona fide farming on the land

Taxes levied on death

SA Capital Gains Tax	R 488,000	Reason: Same as example 1
Greek CGT	0 €	Reason: No CGT levied on property in the event of death
Greek Inheritance tax	R 565,000	Reason: Same as example 1 No exemption applies as the exemption provision has been repealed with effect from 23 April 2010.
SA Estate Duty	1,202,400	Reason: Same as example 1
Section 16 rebate	<u>-565,000</u>	The 30% reduction to market value does not apply as the farm is situated in territory outside South Africa.
	R 637,400	

Conclusion: Note, as it is only in remote cases that a South African resident will own farming property in Greece, the example is based on the most likely circumstances. In these circumstances it can be seen that neither the South African nor Greek domestic exemptions or reductions would apply, resulting in foreign farming property being taxed in the same manner as immovable property other than a primary residence, as seen in Example 1.

EXAMPLE 4
PROPERTY DEALT WITH IN SECTION 4(e) OF THE ESTATE DUTY ACT

Source: Greece
 Deceased residence: Ordinary SA resident
 Means of acquiring property
 1. Property acquired before deceased become ordinarily resident in SA for the first time
 2. Property acquired from a non-resident through donation or inheritance after deceased became ordinarily resident in SA for the first time.
 3. Property acquired out of the proceeds that arose from the disposal of Property in points (1) & (2) above.
 Heir: Three scenarios, Category A, B & C heirs as defined in the Greek Inheritance Tax Act, excluding the spouse or minor child in all cases.

Taxes levied on death

Greek CGT		0 €		Reason: No CGT levied on property in the event of death
Greek Inheritance tax	Cat A heir	56,500 €	R 565,000	Reason: Same as example 1
	Cat B heir	163,500 €	R 1,635,000	Reason: Same as example 1
	Cat C heir	364,900 €	R 3,649,000	Reason: Same as example 1
SA Capital Gains Tax		R 488,000		Reason: Same as example 1
SA Estate Duty		R 0		
Market value of property		10,000,000		
Less Section 4(e) deduction		-10,000,000		
Less abatement		NA		
Dutiable amount		0		
Estate duty (20%)		0		
Section 16 rebate		0		Reason: Relief limited to lower of local and foreign tax paid, therefore zero.
Net tax paid:	Cat A heir	R 1,053,000		
	Cat B heir	R 2,123,000		
	Cat C heir	R 4,137,000		

Conclusion: Compared to the net taxes paid in example 1. taxes payable on death will only be saved by the heirs if foreign property, acquired in the means of point 1, 2 & 3 above, was to be inherited by a Cat A heir as the Greek inheritance taxes for category B & C heirs are so large.

As a result, it may be more beneficial from a tax planning perspective to bring foreign investments to South Africa if the deceased knows that the heirs one day will be either category B or C heirs. The Greek inheritance taxes outweigh the benefit provided from section 4(e) for these category heirs

From a tax planning perspective, a 38% reduction in net taxes paid will be realised if foreign property, which was acquired in the means detailed in points 1, 2 & 3 above, was kept abroad, provided the heir was going to be a category A heir, which is the most likely scenario.

WHAT IF?

Source: Portugal
 Deceased residency: Ordinarily resident in SA
 Heir: Legitimate heir (as per Portuguese Stamp Duty Act)
 Non-legitimate heir

Taxes levied on death

SA Capital Gains Tax R 488,000 Reason: Same as example 1

SA Estate Duty
 Market value of property 10,000,000
 Less Section 4(e) deduction -10,000,000
 Less abatement NA
 Dutiable amount 0
 Estate duty (20%) 0
 Section 16 rebate 0

Portuguese CGT 0 € Reason: No CGT levied on property in the event of death

Legitimate heir 0 € Reason: No stamp duty levied on property inherited by legitimate heir

Non-legitimate heir
 Market value of property 1,000,000 €
 Stamp duty @10% 100,000 € R 1,000,000

Conclusion: Double non-taxation with respect to inheritance taxes may occur if portuguese property meets the criteria for a section 4(e) deduction (EDA) and the Portuguese property is inherited by a legitimate heir.

It is beneficial for South African residents who have Portuguese heritage and who have property in Portugal, to keep their property investments in Portugal provided they meet the criteria of section 4(e). The section 4(e) deduction will be lost if the property or the proceeds from the disposal thereof is invested in South Africa.

EXAMPLE 5
PROPERTY COMPANY SHARES

Deceased's residence: Ordinary resident in SA
 Source of immovable property South Africa
 Source of shares in property-owning co: Greece

Taxes levied on death

SA Capital Gains Tax: R 488,000 Reason: Same as example 1
 SA resident taxed on capital gains on worldwide assets
 Greek CGT: 0 € Reason: No CGT levied on property in the event of death

Heir type: Cat A Cat B Cat C
 Greek Inheritance Tax R 565,000 R 1,635,000 R 3,649,000

SA Estate Duty: R 637,400 R 0 R 0

Reason: The above liabilities are the same as example 1, as an ordinary resident is subject to estate duty on worldwide property, therefore source does not make a difference.

Conclusion: From an estate planning perspective there is no death tax benefit from owning immovable property situated in South Africa through a Greek registered company if the deceased is ordinary resident in SA.

WHAT IF?

Deceased's residence: Greek domicile
 Source of immovable property South Africa
 Source of shares in property-owning co: Greece

Taxes levied on death

SA Capital Gains Tax: R 488,000 Reason: Same as example 1

Reason: Para 2(2)(b) deems the source of the interest in the property to be SA. A non-resident is taxed on SA source gains.

SA Capital Gains Tax R 0 Reason: After DTA on income applied

Reason: If the deceased is a Greek domiciliate and applies for relief under the DTA on income taxes then, in the absence of a relevant deeming provision for shares in property companies, the source of the asset is the same state as the residence of the deceased, as such the treaty gives exclusive taxing rights to Greece, therefore no capital gains tax can be levied by SARS.

Greek CGT: 0 € Reason: No CGT levied on property in the event of death

Heir type: Cat A Cat B Cat C
 Greek Inheritance Tax R 565,000 R 1,635,000 R 3,649,000

Reason: Inheritance tax levied on Greek shares as they have source in Greece

SA Estate Duty: R 0 R 0 R 0

Reason: Estate Duty Act does not have similar deeming provision of para 2(2)(b) in the Income Tax Act. No estate duty is levied on a non-resident's assets which don't have SA source.

Conclusion: It is beneficial for a Greek domiciled individual to own property in SA through a company registered in Greece as he may be able to escape paying both capital gains tax and estate duty tax on death.

WHAT IF?

Deceased's residency: Ordinarily resident in SA
Source of immovable property: Greece
Source of shares in property-owning co: South Africa

Taxes levied on death

SA Capital Gains Tax:	R 488,000	Reason: Same as example 1
Greek CGT:	0 €	Reason: No CGT levied on property in the event of death
Greek Inheritance Tax	0 €	Reason: Non-residents are only taxed in Greece on Greek source assets Shares are not Greek source
SA Estate Duty Tax	R 1,202,400	Reason: Same as example 1 without a section 16 rebate due to zero Greek inheritance taxes levied.
Net tax paid	R 1,690,400	

Conclusion: The facts of this scenario are identical to example 1, except the property in Greece in this example is owned through a South African registered company. The tax savings of doing this will only arise when the Greek inheritance taxes that would be levied on these Greek properties exceed the SA estate duty tax. Comparing this scenario to example 1, tax benefits will only arise through this structure if the heir will be deemed a category B or C heir.

HOWEVER:

If the South African resident was also a citizen of Greece, then because he is a Greek national Greek inheritance tax will be levied on his worldwide movable assets. Shares are regarded as movable property in Greece. Therefore, Greek inheritance tax will be levied on these property shares registered in South Africa.

If the South African resident who has Greek citizenship has not resided in Greece for a period of ten consecutive years before date of death then he will be exempt from paying Greek inheritance tax on his movable property situated outside Greece.

WHAT IF?

Deceased's residence: Portuguese domiciliate
Source of immovable property: South Africa
Source of shares in property-owning co: Portugal

Taxes levied on death

SA Capital Gains Tax:	R 488,000	Reason: Same as example 1
Portuguese CGT	0 €	Reason: Same as example 1
Portuguese Stamp Duty	0 €	Reason: Same as example 1 (legitimate heir)
SA Estate Duty Tax	R 0	Reason: Non-resident not taxed on non-SA source shares

Conclusion: A Portuguese resident can save paying SA estate duty on his immovable property situated in SA if he structures the ownership through a Portuguese registered company.

EXAMPLE 6**CASH**

Source: Greece
 Deceased residency: Ordinarily resident in SA
 Heir: Three scenarios, Category A, B & C heirs as defined in the Greek Inheritance Tax Act, excluding the spouse or minor child in all cases.

Value of cash in Greece 100,000 € (Or R1,000,000)
 Value of cash in SA R 3,500,000
 Total value of property: R 4,500,000 (1,000,000 + 3,500,000)
Taxes levied on death

Greek CGT 0 €

SA CGT R 0 Reason: No CGT is levied on cash as the proceeds equal the base cost

HOWEVER: If the cash is deposited for investment purposes then there will be CGT levied in terms of paragraph 87 of the 8th Schedule.

Greek inheritance tax

There is no exemption for taxes levied on cash in Greece and a flat rate applies

Category A heir @10% 10,000 € R 100,000

Category B heir @20% 20,000 € R 200,000

Category C heir @40% 40,000 € R 400,000

Market value of property

SA property 3,500,000
 foreign cash 1,000,000
 less abatement -3,500,000
 Dutiable amount 1,000,000

Estate Duty @20% 200,000

section 16 44,444 44,444 44,444 (200,000 x 1/4.5)

foreign taxes	R 100,000	R 200,000	R 400,000
Limited to	44,444	44,444	44,444

Final estate duty payable 155,556 155,556 155,556

Dutiable amount relating to foreign cash 222,222 (1m - 1/4.5 x 3.5m)

Effective tax rate relating to foreign cash 45% 90% 180%
 (100,000/222,222) (200,000/222,222) (400,000/222,222)

Reason: The section 16 deduction is limited to the lower of the SA estate duty payable in respect of the foreign property or the foreign taxes paid.

Duty attributable to foreign property = $\frac{\text{Value of foreign property included in net value of}}{\text{Net value of estate}} \times \text{Estate Duty}$

Conclusion: Due to the high rates of inheritance tax levied on cash in Greece, from a tax planning perspective it may be beneficial to transfer cash investments held in Greece to a South African bank.

EXAMPLE 7
MOVABLE PROPERTY

Source: Greece
 Deceased's residency: Ordinarily resident in South Africa
 Type of movable asset: Movable assets that meet the definition of personal-use asset as in paragraph 53 of the 8th Schedule of the Income Tax Act
 Type of heir: Category A heirs as defined in the Greek Inheritance Tax Act, excluding the spouse or minor child in all cases.

Taxes levied on death

SA Capital Gains tax	R 0	Reason:	No CGT levied on personal-use assets
Greek CGT	0 €	Reason:	No CGT levied on property in the event of death
Greek Inheritance Tax Cat A heir	56,500 € R 565,000	Reason:	Same as example 1
Cat B heir	163,500 € R 1,635,000	Reason:	Same as example 1
Cat C heir	364,900 € R 3,649,000	Reason:	Same as example 1
SA Estate Duty	R 735,000		
Market value of property	10,000,000	10,000,000	10,000,000
Less Income tax liability	-	-	-
Less abatement	-3,500,000	-3,500,000	-3,500,000
Dutiable amount	<u>6,500,000</u>	<u>6,500,000</u>	<u>6,500,000</u>
Estate duty (20%)	1,300,000	1,300,000	1,300,000
Section 16 rebate	-565,000	-1,300,000	-1,300,000
	<u>R 735,000</u>	<u>R 0</u>	<u>R 0</u>

Note: the section 16 rebate is limited to the lower of the local and foreign tax on the foreign asset

Net Tax Paid: R 1,300,000 R 1,635,000 R 3,649,000

Effective tax rate based on
 dutiable amount: 20% 25% 56%

Conclusion: The limit imposed that, section 16 rebate is limited to the lower of the SA estate duty and the foreign tax attributable to a foreign asset, results in the net tax being paid to always be the higher of the South African or foreign tax.

From a tax planning perspective it may be more beneficial to relocate movable assets to South Africa if the SA ordinarily resident deceased knows that category B or C heirs will be inheriting the movable property that is situated in Greece.

From a tax planning perspective, it makes no difference where the situs of movable property is if the SA estate duty is larger than the Greek inheritance tax as the net tax paid will remain the same, provided the deceased is ordinarily resident in SA.

EXAMPLE 8

PROPERTY INHERITED BY THE SPOUSE

Source: Greece
Deceased residency: Ordinarily resident in SA
Heir types: Spouse (therefore Category A)
Type of property: Immovable and movable property other than cash situated in Greece.

Taxes levied on death

Greek CGT 0 € Reason: No CGT levied on property in the event of death
SA Capital Gains Tax R 0 Reason: No CGT levied on property inherited by the spouse of the deceased, provided the spouse is ordinarily resident in SA.
Greek Inheritance Tax 50,000 € Reason: Calculated using table below
Objective value of property 1,000,000 € Reason: Same as example 1

Tax scale in € '000	Scale factor (%)	Tax scale €'000	Taxable property in €'000	Tax which equals to €'000
400	--	--	400	--
200	5	10	600	10
Excess (400)	10	40	1000	50

Reason: If property is inherited by the spouse then the first 400,000 Euro are exempt, with the next 200,000 Euro being subject to 5% and the excess being subject to a flat rate of 10%.

SA Estate Duty R 0 Reason: No estate duty is levied on property inherited by the spouse

Conclusion:

The concession afforded by the Estate Duty Act and Income Tax Act whereby no taxes are levied if the heir to the property is the deceased's spouse, is offset by Greece still taxing property situated in Greece, albeit at a lower rate (50,000 Euros versus 56,500 Euros as in Example 1).

This can still be seen as a form of double taxation, as the tax levied should be zero, but due to international taxes, the property becomes taxable. In effect, this amounts to more than double taxation, looking at it from a proportional point of view, it is an infinite double tax.

The Estate Duty Act does not have the same proviso as the Income Tax Act which requires the spouse inheriting the property to be ordinarily resident in South Africa for the exemption to apply. Therefore, it is possible for foreign property inherited by a non-resident spouse to escape being subject to estate duty tax in its entirety.

Act to give effect to an agreement entered in to between the government of the Union of South Africa and the government of Southern Rhodesia for the prevention of the levying of death duties under the laws of the two territories in respect of the same assets [Act No. 22 of 1933]

Agreement between the officer administering the government of the Union of South Africa and the High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland for the prevention of the levying of death duties under the laws of the Union of South Africa and the territories of Basutoland, the Bechuanaland Protectorate and Swaziland in respect of the same assets [Proclamation number 204 of 13 October 1944]

Agreement between the government of the Union of South Africa and the Royal Government of Sweden for the avoidance of double taxation with respect to death duties [Proclamation 113, Government Gazette 102 of 27 October 1961]

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Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on estates of deceased persons and on gifts [Proclamation number 1315, Government Gazette 6509 of 22 June 1979]

Convention between the Republic of South Africa and the Portuguese Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income [Government notice 1367, Government Gazette 31720 of 23 December 2008]

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