

Potential Cross-Border Double Taxation on Death Limits Global Investment Opportunities for Long Term South African Resident Investors

demonstrated through an analysis of the international tax consequences that arise for a South African resident who holds an investment in a portfolio of stock listed in the United States of America at the date of death

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Abstract

This dissertation examines the impact of the imposition of both estate duty and capital gains tax (CGT) by South Africa (SA) on South African resident investors at the date of death.¹ The focus of this dissertation, within this chosen area of study, is the effect of the imposition of these two taxes on cross-border transactions; this study examines the international tax consequences that arise on death, should a SA resident investor hold foreign situs assets at such time. The study uses a portfolio of stock listed in the United States of America (US) to demonstrate that the imposition of both estate duty and CGT by SA at the date of death may result in unresolved double taxation or at the very least the imposition of taxes that are confiscatory, excessive or prejudicial to SA resident investors. In order to demonstrate that double taxation may exist or that confiscatory, excessive and prejudicial taxes may arise, the study outlines the current legislation in SA and the US, as well as the relevant unilateral and bilateral relief available to such an investor. The study then goes on to determine the global tax liability that would result for the investor in question at the date of death. After determining the global tax liability, the study analyses whether the relief available to the investor is sufficient in preventing double taxation or taxes that may be considered prejudicial, confiscatory and/or excessive. Where it is found that double taxation persists or prejudicial, excessive and confiscatory taxes exists, the study recommends action that should be taken by the relevant authorities to remedy such concerns.

¹ For the purpose of this study an investor is an individual who holds a portfolio of assets for investments purposes which includes, but is not limited to, investments in listed stocks/shares.

Abbreviations

CGT – Capital Gains Tax

DTC – Davis Tax Committee

EDA – Estate Duty Act No. 45 of 1955

ETA – Estate Tax

IHT – Inheritance Tax

IHTMC – OECD Inheritance Tax Model Convention

ITA – Income Tax Act No 58 of 1962

I.R.C. – U.S. Code Title 26 Internal Revenue Code

MV – Market Value

MoU – Memorandum of Understanding

NRA – Non-resident Alien

NYSE – New York Stock Exchange

OECD – The Organisation for Economic Co-operation and Development

SA-US IHTT – South Africa – United States – Inheritance Tax Treaty (as amended through 1952 protocol)

SA-US ITT – South Africa - United States - Income Tax Treaty

SA – South Africa

SARS – South African Revenue Service

UCAET – Unified Credit Against Estate Tax

UK – United Kingdom

US – United States of America

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CHAPTER 1: INTRODUCTION, BACKGROUND AND DEMARCATION OF THE STUDY

1.1. Introduction

South Africa (SA) levies two taxes on an individual as a consequence of death, namely estate duty and capital gains tax (CGT). It is interesting to note that SA is one of the only countries in the world that levies both estate duty and CGT at the date of death, and as a consequence, there has been much research and debate over the years as to whether the imposition of both these taxes amounts to ‘double taxation’ or at the very least a confiscatory tax.²

Much of the work done in this area has, however, been relatively limited with regard to scope. This is because the primary focus of the majority of academic literature, in this regard, has been limited to the South African tax liability that arises as a consequence of death. Very little attention has been given to the international tax consequences that arise should a deceased individual, who was a South African resident at the date of death, hold foreign situs assets.

From a purely South African perspective, the combined effect of estate duty and CGT imposed on death could result in a deceased individual (who is ordinarily resident in SA at the date of death) being subject to a maximum tax liability of just under 43% of the market value (MV) of assets held at the date of death.³ Whether this is confiscatory or not is a matter of opinion, however, when compared to similar taxes imposed on death in other countries around the world, a total tax of just under 43% of the MV of the asset at

² Guglielmo Maisto *Death as a taxable event and its international ramifications* IFA Cahiers - Volume 95B (2010) at 35; and Jennifer Roeleveld ‘Chapter 20: Confiscatory Effects of Having Two Capital Transfer Taxes in South Africa’ in Miguel Poiars Maduro, Pasquale Pistone et al *Human Rights and Taxation in Europe and the World Online Books* (2011) at 365-72. According to Author Jennifer Roeleveld, in chapter twenty in the online book: *Human Rights and Taxation in Europe and the World*, excessively high taxes may be said to be confiscatory in that they can deprive a person from his or her possessions.

³ The maximum tax liability of 43% of the MV of assets held at the date of death has been calculated by adding the maximum estate duty rate of 25% of the dutiable estate of the deceased at the date of death and the maximum CGT rate of 18% of the deemed capital gains at the date of death. In order for a maximum rate of 43% of the MV of assets held at the date of death to occur, the size of the estate would have to be considerably large, resulting in the 20% estate duty charged on the value of the dutiable estate under ZAR 30 million and the s4A abatement and s4 deduction against the estate, being negligible in relation to the portion of the estate which is subject to estate duty at 25%. In addition, the base cost of assets held at the date of death would have to be insignificant in relation to the MV of such asset at the date of death, resulting in the capital gain being similar to the MV of assets held at the date of death. For more information, refer to Appendix A which demonstrates how the base cost of an asset may become marginalized over time.

the date of death does not appear to be severely misaligned with comparable taxes imposed by other countries in this regard.⁴

This is most likely not a coincidence but rather because SA (being the Davis Tax Committee (DTC), the minister of Finance and the relevant SA tax authorities) has historically considered the combined effect of the imposition of both estate duty and CGT when making CGT or estate duty rate changes or policy amendments.⁵

With this in mind, the real issue, with regard to imposing both taxes at the date of death, appears to occur in relation to cross-border transactions or foreign situs assets held by an individual (who is a SA resident) at the date of death. This is because foreign situs assets are not only subject to South African estate duty and CGT but are also subject to foreign estate or inheritance taxes. Such taxes can be significantly higher than SA estate duty; foreign estate or inheritance taxes imposed on death are, in some instances, more in line with the combined tax effects of both SA estate duty and CGT. Therefore, if the relief provided is not adequate, in that the unilateral or bilateral relief does not consider the combined effect of both SA estate duty and CGT imposed on death, the total tax liability of a deceased individual, who is a SA resident at the date of death, could be much higher than the maximum combined rate of 43% mentioned above.

If South African residents are subject to a much higher tax liability on their foreign held assets than they are subject to on their local assets and if South African residents are subject to a much higher tax liability on death than their counter parts (that are not resident in SA) investing in the same foreign assets, then it could be said that South Africa residents' investment opportunities are being limited and prejudiced. Further, this indicates that there may be an unresolved double tax issue that should be addressed.

⁴ Refer to Appendix B.

⁵ This was demonstrated when the estate duty rate was reduced in 2001 '[i]n order to compensate for the double tax exposure created when CGT is combined with estate duty' as stated in the Davis Tax Committee's *Second and Final Report on Estate Duty*. It therefore appears to be a policy decision and not a coincidence that the combined effect of CGT and estate duty imposed by SA on death is more or less in line with the rates of similar taxes imposed worldwide at the date of death. The Davis Tax Committee *Second and Final Report on Estate Duty* (2016) at 6, 10-11.

1.2. Aim of the study

This study aims to assess whether the imposition of both estate duty and CGT by SA at the date of death results in double taxation or, at the very least, gives rise to confiscatory, excessive or prejudicial taxes for SA residents who hold offshore/foreign situs assets at the date of death.

The aim of this study will be achieved by analyzing the international tax consequences for an individual who is resident in SA at the date of death and who holds a portfolio of stock listed in the United States of America (US). The study will examine the domestic laws of SA and the US in order to determine the global taxes due on such an investment for a SA resident investor at the date of death. The study will also look at the unilateral and bilateral relief available and assess whether it provides adequate and fair relief for investors in such instances. Where relief is found to be inadequate, inconsistent or unfair, the study will give suggestions as to how the situation could best be remedied.

An investment in listed stock/equities was selected as this type of investment is one of the most common and fundamental asset allocations in a diversified investment portfolio. In addition, the US was chosen as an investment location as the New York Stock Exchange (NYSE) is the biggest stock exchange in the world, and thus offers a SA investor diversification and investment exposure to some of the largest companies in the world.

1.3. Delineation and limitations of the study

This study only deals with the cross-border tax effects for a SA resident, who is a natural person (i.e. an individual), and who owns a portfolio of US listed stock, in his or her own name, at the date of death. This study does not consider the cross-border tax effects for South African residents investing in any other type of investment at the date of death nor does it consider investments in any other country. This study also does not look at complex holding structures or vehicles that certain investors may choose to use to house their foreign investments or offshore holdings.

This dissertation only deals with capital transfer taxes imposed at the date of death which, for the purpose of this study, are limited to estate duty and CGT imposed at the date of death by SA and Federal estate taxes imposed at the date of death by the US. This study acknowledges that the US may impose both Federal estate taxes and state estate or

inheritance taxes at the date of death. However, this study only considers Federal estate taxes imposed by the US Federal government and does not consider any estate or inheritance taxes that may be imposed in the US at a state level. This is because, while state estate and inheritance taxes may also give rise to instances of unresolved double taxation, and may possibly result in a further increase in the global tax liability of a SA resident investor, who holds a portfolio of US listed stock at the date of death, the aim of this study is to assess whether the structure of the taxes imposed by SA at the date of death results in cross-border double taxation. This limitation has, therefore, been included to match the scope of the South Africa - United State Inheritance Tax Treaty (SA-US IHTT) which only covers Federal estate tax imposed by the US at the date of death, thus allowing the aim of this study to better be achieved.⁶

Finally, this study does not cover any income tax effects other than the imposition of CGT at the date of death.

1.4. Research method

In order to complete this study, an extended literature review was undertaken to gain an understanding of the international tax liability due at the date of death for the investor in question. The review also covered literature which would assist in gaining insight into and developing suggested recommendations as to how the current unilateral legislation and bilateral agreements may be amended to provide better relief in the selected instance.

Literature consulted in the review includes, but is not limited to, the relevant sections, paragraphs and articles in the South African Income Tax Act No. 58 of 1962 (ITA), the South African Estate Duty Act No.45 of 1955 (EDA) and the United States Internal Revenue Code (I.R.C), as well as the relevant bilateral double taxation agreements between SA and the US, which include the South Africa – United State Income Tax Treaty (SA-US ITT) and the South Africa – United State Inheritance Tax Treaty (SA-US IHTT). In addition, selected bilateral agreements, which include both income tax and inheritance tax treaties, between the US and other selected countries as well as income tax and inheritance tax treaties between SA and other selected countries, were consulted.

⁶ South Africa – United States – Inheritance Tax Treaty (as amended through 1952 protocol) at article 1.

For further interpretational guidance the following sources were also considered: South African Revenue Services (SARS) interpretation notes, the Organisation for Economic Co-operation and Development (OECD) model tax conventions, as well as the commentaries to these model tax conventions, relevant and accepted authority textbooks, manuals and journals as well as appropriate masters dissertations and academic literature on the subject matter.

Finally, in order to inform the study, worked examples illustrating various scenarios were constructed. These examples are contained in the appendices to this dissertation.

1.5. Academic value and relevance

Understanding the international tax liabilities of cross-border investments is relevant for South African resident investors looking to diversify their investment risk through offshore investments. This issue has become even more topical with the recent implementation of automatic exchange of information as automatic exchange of information will provide countries with the necessary data and information to ensure that all taxes due, including estate taxes, which may have previously been overlooked as a result of insufficient information, are imposed and collected.

This issue is also relevant to the Finance minister, the DTC and South Africa's tax officials, as taxes that are perceived to be prejudicial, confiscatory or excessive, could have an adverse impact on the tax morality and overall attitude and behaviour of a society towards tax compliance.

Excessive taxes on death may, for example, encourage complex tax structures to be put in place to avoid such taxes. This could adversely affect tax compliance not only for estate duty and other such taxes imposed at the date death but also compliance in other areas such as income tax. This is because the complex structures set up to avoid estate duty and CGT would already be in place and thus could easily be used for other purposes.

Further, excessive taxes on death could also result in the flight of capital out of SA as residents can no longer bare exposure to such taxes. Flight of capital from the country is a huge risk for SA as it adversely impacts investment in the economy and country which in

turn impacts the overall economic growth and prosperity of the economy and the country as a whole. In addition, flight of capital decreases the available tax base.

It is, therefore, important that the full impact of such taxes is understood and policy decisions are made accordingly.

1.6. Structure of dissertation

- Chapter 1 introduces the topic of the study, as well as the relevance, aims, limitations and research methods used in the study.
- Chapter 2 provides an analysis of the taxes imposed at the date of death in SA.
- Chapter 3 highlights the key elements of the US Internal Revenue Code (I.R.C) needed to understand the relevant Federal estate taxes imposed on death by the US.
- Chapter 4 applies the SA and US domestic law to determine the total international tax liability on death for a SA resident who holds a portfolio of stock listed in the US at the date of death. This chapter also sets out the relief available.
- Chapter 5 concludes on whether the imposition of both estate duty and CGT at the date of death by SA results in double taxation.
- Chapter 6 sets out remedies or changes that should be made based on the findings of this study.
- Chapter 7 concludes on the finding and recommendations of the study.

1.7. Conclusion

This chapter outlines the study, its limitations and its academic relevance. It also gives an overview of the study and what is covered in each chapter of the study in order to achieve the aims and objectives it set out to accomplish.

CHAPTER 2: TAXES IMPOSED ON DEATH IN SOUTH AFRICA

As noted in chapter 1, death as an event, triggers two types of taxes in SA for a natural person, namely, estate duty, which is governed by the Estate Duty Act No. 45 of 1955 (EDA)⁷ and CGT which was introduced into the 8th schedule of the South Africa Income Tax Act (ITA)⁸ in 2001.⁹

2.1. Estate duty

Estate duty is levied at 20% of the dutiable amount of the deceased's estate for the first R30 million of the dutiable estate, and at 25% of the dutiable amount of the estate for any portion of the dutiable estate over and above R30 million.¹⁰ This applies to both residents and non-residents alike.¹¹

The dutiable amount of the estate is determined by taking the deceased's gross estate (which is the sum of the MV of all property and deemed property owned by the deceased at the date of death) less any s4 deductions available and the s4A primary abatement.¹²

2.1.1. Gross estate of residents at the date of death

All worldwide property and deemed property of a person who is 'ordinarily resident' in South Africa at the date of death is included in the deceased's gross estate for estate duty purposes.¹³

The EDA specifically refers to 'ordinarily resident' in determining whether a taxpayer is a resident or non-resident for estate duty purposes; this differs from the ITA, which

⁷ Estate Duty Act No 45 of 1955.

⁸ Income Tax Act No 58 of 1962.

⁹ For income tax purposes, the death of a taxpayer results in the termination of the deceased as a taxpayer at the date of death and the creation of the deceased estate as a separate taxpayer from the date of death to the date that the estate is wound up. The technicalities regarding these two separate taxpayers, that arise as a result of death, are beyond the scope of this study. The only income tax consequence included in the scope of this study is CGT imposed on death (per s9HA of the ITA). Such capital gains are included in the deceased person's final income tax return and not in the deceased estate's income tax return. Phillip Haupt *Notes on South African Income Tax* (2019) at 784.

¹⁰ Estate Duty Act op cit note 7 First Schedule s1(a); and SARS 'Estate Duty' available at <http://www.sars.gov.za/TaxTypes/EstateDuty/Pages/default.aspx> accessed on 11 February 2019. For example, if the dutiable amount of the estate is R35 million then the estate duty due will be calculated as follows: R30 million x 20% plus R5 million x 25%.

¹¹ Estate Duty Act op cit note 7 First Schedule s1(a).

¹² Estate Duty Act op cit note 7 s4 & s4A.

¹³ Paula Bagraim and Jennifer Roeleveld 'South Africa' in Guglielmo Maisto *Death as a taxable event and its international ramifications IFA Cahiers - Volume 95B* (2010) at 683.

includes individuals that are ‘ordinarily resident’ as well as individuals who meet the requirements of the physical presence test, as outline in s1 of the ITA, as residents for income tax purposes.¹⁴

The term ‘ordinarily resident’ is not defined anywhere in SA legislation but has been interpreted by South African courts as being a person’s ‘habitual abode’, ‘principal residence’ or the place to which one ‘would naturally and as a matter of course return from his[one’s] wanderings’.¹⁵

Therefore, a portfolio of US listed stock held by a deceased, who is ordinarily resident in SA at the date of death, would be included as property in such deceased’s gross estate, despite the asset having a US situs.

2.1.2. Gross estate of non-residents at the date of death

For non-residents (i.e. individuals that are not ‘ordinarily resident’ in SA at the date of death), their gross estate is limited to the South African assets owned by the deceased at the date of death. South African assets are determined in terms of the EDA and primarily include moveable and immoveable property located in SA.¹⁶

Stocks and shares in a company where change of ownership is not required to be registered in SA, are not SA assets in terms of the EDA.¹⁷ And thus, a portfolio of US listed stock held by a non-resident at the date of death would not be included as property of such a deceased’s gross South African estate.

¹⁴ ITA op cit note 8 para (a)(i) & para (a)(ii) of the definition of a “resident” in s1(1).

Per the ITA: A person is a resident by virtue of physical presence in SA if ‘that person was physically present in the Republic—

(aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the five years of assessment preceding such year of assessment; and

(bb) for a period or periods exceeding 915 days in aggregate during those five preceding years of assessment, in which case that person will be a resident with effect from the first day of that relevant year of assessment’.

¹⁵ Paula Bagraim and Jennifer Roeleveld op cit note 13 at 683; SARS Interpretation Note 3 (Issue 2) *Income Tax Act 54 of 1962: Section 1(1), Resident: Definition in relation to a Natural Person – Ordinarily Resident* (2018); and *Cohen v Commissioner for Inland Revenue* 1946 AD 174, 13 SATC 362.

¹⁶ Paula Bagraim and Jennifer Roeleveld op cit note 13 at 683; in addition exclusions from the Estate Duty Act for non-residents can be found in s3(2)(c)-(g) of the Estate Duty Act No 45 of 1955.

¹⁷ Estate Duty Act op cit note 7 s3g(ii).

2.1.3. Section 4 deduction and section 4A abatement

Section 4 of the EDA sets out the relief offered in the form of deductions.¹⁸ Such deductions include deathbed and funeral expenses, debts due in the republic (this includes the income tax liability of the deceased up to the date of death), administration charges, charitable bequests, any claim by surviving spouse in respect of an accrual under s3 of the Matrimonial Property Act, objects of art and most notably, property left to a surviving spouse (s4(q) deduction).¹⁹

The s4(q) deduction for property left to a surviving spouse is the best estate planning tool available under the current legislation; this deduction can be used to delay the payment of estate duty until the date of death of the surviving spouse. The purpose of the inter-spouse deduction is to ensure that a surviving spouse does not face severe cash flow issues which may arise in the absence of the deduction.²⁰ Under the current legislation, the s4(q) deduction does not require the surviving spouse to be a SA resident.²¹

In addition to such deductions, all estates are entitled to the s4A primary abatement which is currently R3.5 million per person.²²

It is noteworthy that the EDA does not afford different spousal relief and a different abatement to residents and non-residents, both residents and non-residents are entitled to apply the s4(q) deduction and the s4A abatement against their SA estates.

¹⁸ Estate Duty Act op cit note 7 s4.

¹⁹ Ibid.

²⁰ If the s4(q) deduction were to be withdrawn a surviving spouse may be required to sell jointly held assets to settle the outstanding estate duty liability of their deceased spouse's estate. In their *Second and Final Report on Estate Duty (2016)*, the DTC recommended that the s4(q) abatement be withdrawn on the basis that the abatement is inconsistent in its treatment of married and single parent families. The Committee recommended that the inter-spouse abatement be withdrawn and that the primary abatement be raised to R15 million, to provide more consistent protection for all types of families in South Africa. This recommendation has not been implemented and the s4(q) inter-spouse abatement still forms part of the estate duty legislation. The Davis Tax Committee op cit note 5 at 12- 17.

²¹ This appears to be a small loop hole in the EDA/ SA legislation, as certain assets bequeathed by a resident deceased to a non-resident surviving spouse may completely escape the SA estate duty net. This differs from the spousal rollover relief for CGT, governed by the ITA, which requires the spouse to be a SA resident in order for the rollover relief to apply.

²² Estate Duty Act op cit note 7 s4 and s4A. The s4A primary abatement is R3.5 million per person and is portable between spouses in that the first dying spouse is entitled to a primary abatement of up to R3.5 million, subsequently on death, the second dying spouse is entitled to an abatement of R7 million less the actual abatement claimed by his/her predeceased spouse. This allows married couples to claim a combined abatement of up to R7 million. Where a deceased has more than one predeceased spouse, such a deceased is entitled to reduce his/her abatement by the amount of any one of his/her predeceased spouse's abatements.

2.1.4. Overall effect of estate duty

Estate duty is levied on the dutiable amount of the estate of both residents and non-residents. In larger estates, the s4 deductions (excluding the s4(q) inter-spouse deduction) and the s4A abatement can be negligible in comparison to the value of the gross estate, and consequently in certain instances, SA estate duty can be imposed at a maximum of 20-25% of the MV of the assets owned by the deceased at the date of death.

2.2. Capital gains tax

Capital gains tax (CGT) is levied on the disposal or deemed disposal of capital assets; capital assets include all assets where the proceeds on disposal of the asset were not included in the taxpayer's 'gross income'.²³

For a taxpayer who is a South African resident, CGT applies to the disposal or deemed disposal of all capital assets (held worldwide).²⁴

For a taxpayer who is not a South African resident (non-resident) only disposals or deemed disposals of immovable property located in SA, as well as, the disposal or deemed disposal of any interest or rights in immovable property situated in SA and any assets of a South African permanent establishment, will be subject to CGT.²⁵

Residency for CGT is determined in accordance with s1 of the ITA, which states that a taxpayer, who is an individual, may be resident if he or she is 'ordinarily resident' or if he or she meets the requirements of the physical presence test.²⁶

CGT is not a separate tax, like estate duty, but rather forms part of income tax and is thus governed by the ITA. In determining the tax payable, a portion of the taxpayer's net capital gain is included in the taxpayer's taxable income at the relevant inclusion rate, and

²³ ITA op cit note 8 Eighth Schedule para 1-12.

²⁴ ITA op cit note 8 Eighth Schedule para 2.

²⁵ Ibid.

²⁶ ITA op cit note 8 para (a)(i) and (a)(ii) of the definition of a "resident" in s1(1).

then taxed at the normal income tax rate for the taxpayer based on the applicable rate per the income tax table.²⁷

A capital gain or loss is determined by taking the proceeds (or deemed proceeds) on disposal less the base cost of the asset.²⁸ The aggregate capital gain or loss is determined by taking all capital gains for the current year of assessment and subtracting all the corresponding capital losses for the current year of assessment, and then subsequently subtracting the annual exclusion.²⁹ The annual exclusion for individuals is R40 000 per annum and R300 000 in the year of death.³⁰ In order to determine the net capital gain, any assessed capital losses from the prior year are deducted from any current year aggregate capital gain as determined.³¹

The inclusion rate for net capital gains is currently 40% for natural persons, and thus, an individual taxpayer in the highest income tax bracket (and thus taxed at a marginal income tax rate of 45%), would be subject to an effective tax rate on capital gains of 18%.³²

2.2.1. Deemed disposal on death

In terms of s9HA of the ITA, when a person dies, he or she is deemed to have disposed of all his or her assets owned at the date of death for an amount equal to the MV of those assets at that date.³³

Section 9HA(1) provides relief from certain CGT imposed on death in the form of exclusion for the following assets:

- long term insurance policies;
- certain pension, provident or retirement annuity funds; and

²⁷ ITA op cit note 8 s26A.

²⁸ ITA op cit note 8 Eighth Schedule para 3 & 4.

²⁹ ITA op cit note 8 Eighth Schedule para 6 & 7.

³⁰ ITA op cit note 8 Eighth Schedule para 5(2). The annual exclusion may need to be apportioned for partial tax years.

³¹ ITA op cit note 8 Eighth Schedule para 10.

³² Effective tax rate is equal to the marginal income tax rate of 45% times the inclusion rate of 40% for individuals (who are natural persons as defined). SARS 'Inclusion Rate' available at <http://www.sars.gov.za/TaxTypes/CGT/Proceeds/Calc-Tax-Capital/Pages/Inclusion-rate.aspx>, accessed on 11 February 2019; and SARS 'Rates of Tax for Individuals' available at <http://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Rates%20of%20Tax%20for%20Individuals.aspx>, accessed on 11 February 2019.

³³ ITA op cit note 8 s9HA.

- assets left to a surviving spouse.³⁴

Once again, the most effective relief for CGT imposed on death is spousal rollover relief. Such relief is provided for in s9HA(2) of the ITA, the spousal rollover relief does, however, not reduce the total CGT payable, it simply delays the CGT liability.³⁵ As previously noted, such provisions act to avoid instances where a surviving spouse would be required to sell jointly held assets to cover an outstanding tax liability of his or her deceased partner. In this instance, the rollover relief is only available if the deceased's surviving spouse is a resident in the republic at such time.³⁶

2.2.2. Capital gains tax on US stock portfolio

Only SA residents would be subject CGT on a US stock portfolio held at the date of death, this is because SA residents are subject to CGT on their worldwide assets and not only on their SA situs assets.

2.2.3. Overall effect of capital gains tax on death

It could be argued that the reliefs and exclusions (excluding the spousal rollover) are once again relatively small in relation to larger taxable gains. In addition, as a result of inflation as well as asset appreciation and return on assets over time, the base costs of assets held by the deceased at the date of death could become inconsequential in comparison to the MV of such assets at the date of death.³⁷ This is particularly relevant for the US stock portfolio which is being held as a long-term investment and would therefore likely have a relatively long investment horizon.

The CGT on a long-term investment such as a portfolio of stock listed in the US could, therefore, be imposed at close to 18% of the MV of the portfolio at the date of death.

³⁴ Ibid.

³⁵ Ibid.

³⁶ This is in line with expectations as if a surviving spouse is a non-resident (while the deceased was a resident) and rollover relief is allowed, certain assets would escape SA CGT all together. Where CGT is payable by non-residents at the date of death, this restriction may, in certain instances, be slightly prejudicial to non-residents. One such example may occur when immovable property located in SA is left to a surviving non-resident spouse. The actual amount of CGT payable will, however, not increase, it is only the timing of the cash flows that may be prejudicial. This, however, does not impact the case at hand as non-residents are not subject to CGT on US held assets such as the portfolio in question. ITA op cit note 8 s9HA(2).

³⁷ Refer to Appendix A which demonstrates that base costs may become negligible when assets are held for a significant portion of time before the date of death.

2.3. Conclusion

In conclusion, a maximum tax liability of 38-43% of the MV of the assets held at the date of death by the deceased may be levied by the South African Revenue Service (SARS) as a result of death.³⁸

³⁸ Maximum estate duty of 20-25% of the MV of assets held at the date of death plus maximum CGT of 18% of the MV of assets at the date of death.

CHAPTER 3: TAXES IMPOSED ON DEATH IN THE UNITED STATES

The US imposes both Federal estate taxes, and depending on the state, either a state estate tax or possibly a state inheritance tax at the date of death.³⁹ As noted in chapter 1 (section 1.3), in order to better achieve the aim of this study, the scope of estate taxes imposed by the US has been limited to taxes imposed at a Federal level. This limitation is in line with the scope of the SA- US IHTT.⁴⁰ While state estate and inheritance taxes will not be discussed any further, it is, worth noting that where state estate taxes or state inheritance taxes are applicable, such taxes may increase both the total taxes imposed by the US as well as the total international tax liability due as a consequence of death.⁴¹

3.1. Federal estate taxes

Federal estate taxes are governed by subtitle B of title 26 of the Internal Revenue Code (I.R.C.).⁴² The estate tax liability due will depend on whether the taxpayer is a citizen of the US, a resident in the US or a non-resident Alien (NRA) of the US at the date of death.

3.1.1. Residency for estate tax purposes

Residency for the estate taxes differs from residency for Federal income tax. Federal income tax focuses on permanent residency and a substantial presence test to determine residency.⁴³ For estate taxes purposes, residency is determined with

³⁹ Estate taxes are imposed on the net value of a decedent's estate at the date of death while inheritance taxes are imposed on the beneficiary of the bequeathed assets.

⁴⁰ SA-US IHTT op cit note 6 article 1.

⁴¹ The U.S. Code Title 26 Internal Revenue Code (I.R.C) Subtitle B. Estate and Gift Taxes §2058, allows US residents to deduct from the value of the gross estate the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in their gross estate. In addition, §2106(4) allows non-residents to deduct a portion of state death taxes imposed. Before 2001, all 50 states in the US and the District of Colombia imposed estate taxes at the date of death. This was because a Federal credit was offered which offset the cost of state taxes ensuring that no domestic double taxation occurred. In 2001, however, the Federal credit was replaced with the aforementioned deduction; this resulted in many states eliminating their state level tax to prevent additional complexities and possible instances of domestic double taxation. Where a state still imposes state level estate or inheritance taxes, instances of domestic double taxation may arise as a full credit is no longer given. Furthermore, as the SA-US IHTT does not cover state level estate and inheritance taxes, cross-border double taxation may persist where state estate or inheritance taxes are applicable. As previously noted double taxation that arises as a result of the imposition of US state level estate or inheritance tax is beyond the scope of this study and will not be addressed further, it could, however, be a future area of study. Tax Policy Center 'Tax Policy Briefing Book: The State of State (and Local) Tax Policy' available at <https://www.taxpolicycenter.org/briefing-book/how-do-state-estate-and-inheritance-taxes-work>, accessed 21st May 2019.

⁴² U.S. Code Title 26 Internal Revenue Code (I.R.C).

⁴³ I.R.C op cit note 42 §7701.

reference to domicile.⁴⁴ A person is considered to be domiciled in the US if he or she lives in the US and has no present intention of leaving the US.⁴⁵

3.1.2. Estate taxes for US residents (US domiciled) and US citizens

All property, real or personal, tangible or intangible, owned at the date of death by a US citizen or US resident, regardless of where in the world it is situated, is included in that person's gross estate.⁴⁶

The taxable estate of such individual is determined by deducting certain allowances and deductions, provided for in the code, from the deceased's gross estate.⁴⁷ Such allowances/deductions include expenses (such as funeral and administration expenses), indebtedness and taxes as well as transfers for public, charitable and religious uses and bequests to certain individuals such as the surviving spouse.⁴⁸ The biggest estate planning tool for Federal estate taxes, once again, makes use of the deduction for bequests to a surviving spouse. This marital deduction allowance is, however, only available if the surviving spouse is a US citizen (unless otherwise negotiated in a bilateral agreement).⁴⁹

Once the taxable estate of the deceased has been determined, the 'tentative tax' is computed by taking the taxable estate (after deductions) and applying the applicable rates in the rate schedule.⁵⁰ The highest tax rate, in this regard, is currently 40%.⁵¹

⁴⁴ Internal Revenue Service Government Publishing Office *US Title 26 CFR Ch. I (4-1-10 Edition)* (2010) at 231-3.

⁴⁵ Deloitte 'US estate and gift tax rules for resident and non-resident aliens' available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-us-estate-and-gift-tax-rules-for-resident-and-nonresident-aliens.pdf>, accessed on 12th April 2019.

⁴⁶ I.R.C op cit note 42 §2031.

⁴⁷ I.R.C op cit note 42 §2051-2058.

⁴⁸ Ibid.

⁴⁹ There are certain instances where a surviving spouse that is a US resident (but not a US citizen) at the date of death of the deceased may also claim the allowance for marital deductions. Such instance may occur if the surviving spouse remains a resident of the US at all times after the date of death of the deceased, before becoming a US citizen, and becomes a US citizen before the deceased's final estate tax return is submitted. I.R.C op cit note 42 §2056.

⁵⁰ The 'tentative tax' is the sum of the taxable estate and the adjusted taxable gifts multiplied by the applicable rate per the schedule. As gifts are beyond the scope of this dissertation, the tentative tax can, for the purposes of this study, be calculated by taking the taxable estate multiplied by the applicable rate in the rate schedule. Refer to I.R.C § 2001(b) and Appendix D.

⁵¹ I.R.C. op cit note 42 §2001.

Certain credits against the calculated ‘tentative tax’ are also available, the main credit being the Unified Credit Against Estate Tax (UCAET). ‘...[T]he applicable credit amount is the amount of the tentative tax which would be determined under s2001(c) if the amount with respect to which such tentative tax is to be computed were equal to the applicable exclusion amount.’⁵² The applicable exclusion amount includes the basic exclusion amount of the deceased plus any unused exclusion amount of a predeceased spouse.⁵³ The current basic exclusion amount is USD 11.4 million per person for US residents or US citizens. Therefore, it follows that, up to USD 22.8 million could be excluded from a married couple’s combined estate where both individuals are US residents (domiciles) or US citizens, as required.⁵⁴

Estate taxes would, therefore, only be due on a US stock portfolio for US residents or US citizens if the deceased’s taxable estate was more than USD 11.4 million for an unmarried individual (and USD 22.8 million for the combined estate of a married couple). This unified credit against estate tax thus significantly reduces the impact of estate taxes for US citizens and US residents.⁵⁵

3.1.3. Federal estate taxes for non-resident aliens

In terms of the US Internal Revenue Code, NRAs, which include individuals that are not residents (in other words not domiciled in) nor citizens of the US, are only subject to Federal estate tax on assets that are situated in the US at the time of death. NRAs are only taxed on their US situs assets; these assets form the NRA’s gross estate.⁵⁶

⁵² I.R.C. op cit note 42 §2010(c).

⁵³ I.R.C. op cit note 42 §2010.

⁵⁴ In order for the unused portion of the exclusion amount to be used by the second dying spouse, both spouses must have been either US citizens or US residents. In addition, the unified credit against estate tax is limited to the actual estate tax imposed under §2001. IRS ‘26 CFR 601.602: Tax forms and instructions’ available at <https://www.irs.gov/pub/irs-drop/rp-18-57.pdf>, accessed on 12th April 2019.

⁵⁵ An estate would have to be in the region of USD 1 billion to incur estate taxes of 40% of the market value of assets at the date of death. Refer to worked Examples: Example 5, where it is demonstrated that estates of US residents/ citizens around USD 100,000,000 are only subject to Federal estate taxes of around 35-36%.

⁵⁶ Generally, a person is said to be domicile in the US if he or she is living in the US and intends to remain in the US, in addition, a facts and circumstances test may be applied to determine domicile. I.R.C. op cit note 42 § 2103.

For Federal estate tax purposes, shares in a US domestic corporation held by a NRA, are deemed to be property located within the US (US situs assets) and are thus subject to Federal estate taxes on death.⁵⁷

In order to determine a NRA's taxable estate for Federal estate tax purposes, certain deductions or allowances may also be applied against the NRA's gross estate.

Deductions or allowances allowed are similar to those afforded to US residents and US citizens, however, such deduction/allowances may need to be apportioned in relation to the value of the deceased's entire worldwide estate, wherever situated.⁵⁸

The marital deduction is also available to NRAs but only when the surviving spouse, to which such assets have been bequeathed, is a US citizen. As a result of this requirement, such deduction will not likely be available to many South African resident investors.⁵⁹

The 'tentative tax' is calculated in the same manner and at the same rates as used for US residents and US citizens.

In terms of credits, NRAs are only allowed a UCAET of a maximum of USD 13,000 against the 'tentative tax' calculated.⁶⁰ This equates to an exclusion amount of USD 60,000, unless otherwise amended in terms of a bilateral agreement (or DTA).⁶¹ As a result of the unified credit being set significantly lower for NRAs, Federal estate tax for NRAs who hold a US stock portfolio at the date of death, may be significantly higher than the Federal estate tax imposed on US residents or US citizens holding a similar portfolio/investment. In many instances the Federal estate taxes imposed on NRAs may amount to close to 40% of the MV of the asset at the date of death.⁶²

⁵⁷ I.R.C. op cit note 42 § 2104.

⁵⁸ I.R.C. op cit note 42 § 2106.

⁵⁹ A bilateral agreement may allow for spousal relief in other instances, however, the current SA- US Inheritance Tax Treaty in force does not make any such allowances. I.R.C. op cit note 42 § 2106.

⁶⁰ I.R.C. op cit note 42 § 2102(b)(1).

⁶¹ Deloitte op cit note 45.

⁶² A US stock portfolio of USD 1 million would be subject to Federal estate taxes of close to 33%. A stock portfolio of USD 5 million would be subject to Federal estate taxes of close to 39%. Refer to appendix C for an analysis of the Federal estate tax rates applicable to NRAs.

3.2. US capital gains tax consequences on death

Death does not trigger a CGT event for Federal tax purposes, instead, the existing estate tax code allows for a 'step up in basis at death' which allows the bequeathed asset to be passed onto the heir at the asset's MV at the date of death.⁶³ When the heir eventually sells the asset, he or she will only pay CGT on the difference between the MV of the asset when it was inherited and its value at the date of sale, therefore if an asset is held at the date of death, CGT on that asset is avoided all together and replaced with estate tax.⁶⁴

3.3. Conclusion

In the US, CGT is not imposed on death but rather replaced by estate taxes. The US imposes Federal estate taxes at a maximum rate of 40% of the MV of the assets in the deceased's estate (as defined) at the date of death. As a result of the unified credit against estate taxes, US citizens and US residents only pay estate taxes close to 40% of the MV of assets held at the date of death, when their taxable estates are extremely large (around USD 1 billion), on the other hand NRA (SA residents for the purposes of this study) will pay Federal estate taxes at rates close to 40% of the MV of their US assets held at the date of death.⁶⁵

⁶³ Penn Wharton University of Pennsylvania Budget Model 'U.S. Capital Gains and Estate Taxation: A status report and directions for a reform' available at <http://budgetmodel.wharton.upenn.edu/issues/2017/1/20/us-capital-gains-and-estate-taxation-a-status-report-and-directions-for-a-reform>, last accessed 26th February 2019; and I.R.C. op cit note 42 §1014.

⁶⁴ This is different to the South African Capital transfer taxes where both CGT and estate duty are imposed on death. Penn Wharton University of Pennsylvania op cit note 63.

⁶⁵ Refer to worked examples.

CHAPTER 4: CROSS-BORDER TAXATION AND RELIEF

4.1. Global taxes due on death (before relief)

Based on the analysis of the domestic law in both SA and the US, an individual who is ordinarily resident in SA at the date of death and who holds a portfolio of US listed stock will be subject to SA estate duty, SA income tax on the capital gains made on the portfolio and US Federal estate tax.⁶⁶ For an individual who is not ordinarily resident in SA at the date of death but resident for income tax purposes (due to physical presence in SA), SA estate duty is not applicable; only SA CGT and US Federal estate taxes will be due. The worked examples show the different scenarios that may arise and what tax is due under each scenario as well as the effect of the size of the portfolio on the estate taxes due and how the size of the base cost relative to the MV of the asset at the date of death impacts the total CGT paid as a % of MV of the asset.

The maximum taxes that could be due for an individual who is ordinarily resident in SA (before relief) is just under 83% of the MV of the US stock portfolio at the date of death.⁶⁷ For individuals who are not ordinarily resident in SA but are a resident for income tax purposes (as a result of physical presence) the maximum tax liability (before relief) is just under 58% of the MV of assets held at the date of death.⁶⁸

4.2. Double tax relief

Fortunately, double tax relief is available for individuals. Such relief occurs in the form of credit relief provided in terms of the South Africa - United State Inheritance Tax Treaty (SA-US IHTT) and the South Africa - United States Income Tax Treaty (SA-US ITT),

⁶⁶ Estate duty is due because the individual was ordinarily resident in SA at the date of death, CGT is due as consequence of the deceased being a residence in SA in terms of the SA ITA (which includes individuals that are ordinarily resident and individuals who meet the requirements of the physical presence test). US Federal estate tax is due because of the situs of the asset (which is the US).

⁶⁷ The worked examples show the tax due on death (before relief) ranges between 49.4%-74.7% of the MV of the stock portfolio at the date of death for the specific examples in question. This could increase to an absolute maximum of just under 83% of the MV of the US listed stock portfolio should the value of the portfolio be significant and the base cost diminish to close to zero in relation to the value of the stock portfolio at the date of death. This absolute maximum/ limit is calculated by adding the highest applicable estate taxes rate (25% in SA and 40% in the US) and the highest marginal CGT rate of 18%.

⁶⁸ This is the absolute maximum before taking into account available relief. The actual rate is likely to be slightly lower due to the base cost of the assets in question, which will reduce the applicable CGT as a % of the MV of assets at the date of death. In addition, the small reliefs afforded in the calculation of both SA estate duty and US Federal estate tax will also reduce the rate of tax as a % of MV of assets held at the date of death. The rate of tax as a % of the MV of assets at the date of death in the worked examples is in the region of 41-53%.

which specifically applies when assigning the right to tax capital gains, as well as unilateral relief provided for domestically by the relevant countries.

4.2.1. Unilateral relief South Africa

4.2.1.1. *Estate Duty Act*

Section 16 of the EDA provides relief for taxes paid on property situated outside of South Africa which is subject to foreign death duty/taxes as well as South African estate duty. The South African estate duty will be reduced by the lesser of the foreign duty or the South African duty paid, or payable, in respect of the property.⁶⁹ This relief is only available to individuals who were ordinarily resident at the date of death, however, as South African estate duty is only imposed on the worldwide assets of individuals that are ordinarily in SA resident at the date of death, individuals that are resident for income tax purposes, owing to physical presence, but not ordinarily resident, are not prejudiced in this specific instance.⁷⁰

4.2.1.2. *Income Tax Act*

The ITA provides relief from foreign taxes paid on income from a non-South African source under s6quat(1).⁷¹ This includes any taxable capital gain from a source outside the republic. Section 6quat(1) allows relief for actual foreign taxes paid by South African tax residents.⁷² The relief can be claimed by SA residents as defined in the ITA (this includes individuals that are ordinarily resident in SA and individuals that are resident as a result of the physical presence test).

⁶⁹ Estate Duty Act op cit note 7 at s16.

⁷⁰ Such individuals will not be subject to estate duty on worldwide assets held at the date of death, they will only be subject to estate duty on SA situs assets and thus estate duty will not be imposed on a portfolio of US stock held by such an investor at the date of death.

⁷¹ ITA op cit note 8 s6quat.

⁷² Ibid.

Section 6quat(1) is limited to income tax, and therefore excess estate duty or other capital transfer taxes cannot be deducted under s6quat. As the US does not impose CGT on death, no relief under s6quat can be claimed in this instance (as no foreign tax is actually paid).⁷³

4.2.1.3. *Conclusion*

A Deceased who was ordinarily resident in SA at the date of death may apply s16 of the EDA in order to obtain some relief from foreign estate taxes imposed at the date of death. By claiming this relief, the deceased's tax liability will be reduced by the lesser of the SA estate duty due and the Federal estate taxes due; under the current laws, as US Federal estate taxes are much higher than SA estate duty, in most instances, this will effectively result in no SA estate duty being imposed on a portfolio of US stock held by an individual who is ordinarily resident in SA at the date of death.⁷⁴

As the US does not impose CGT at the date of death, no s6quat relief is available.

If all the unilateral relief available to SA tax residents was utilised, the taxes due on death, for both individuals that are ordinarily resident in SA at the date of death and individuals that are resident in SA as a result of physical presence, would be the higher of US Federal estate tax due (maximum of 40% of the MV of the stock portfolio at the date of death) and SA estate duty (maximum of 20-25% of MV of the stock portfolio at the date of death) plus South African CGT due (maximum of 18% of the MV of the stock portfolio at the date of death).⁷⁵

⁷³ The double tax problem presented here has arisen as a result of the structure of the taxes imposed by SA on death. The problem arises because the US does not impose CGT on death but rather imposes estate taxes at the rates similar to the combined rates of SA's CGT and estate duty imposed on death. The applicable relief does not consider the combined imposition of both CGT and estate duty by SA, at the date of death, in place of a single tax such as the Federal estate tax imposed by the US.

⁷⁴ Estate Duty Act op cit note 7 s16.

⁷⁵ The maximum taxes paid by a deceased that was either ordinarily resident in SA at the date of death or resident in SA due to physical presence at the date of death would be 58% of the MV of US stock portfolio.

4.2.2. Inheritance tax treaties and estate tax treaties

Globally very few inheritance tax (IHT) treaties and estate tax (ETA) treaties have been concluded.⁷⁶ This is because, IHT and ETA contribute very little income to a country's fiscus, in comparison to the effort, time and resources it takes to successfully negotiate and conclude a treaty in this regard. In addition, the complexity and lack of consistency across countries when it comes to IHT and ETA as well as the debate, in many countries, as to whether IHT or ETA should be repealed all together, are other key factors that contributes to the small number of treaties actually concluded.⁷⁷

Currently, South Africa only has four double taxation agreements, that deal with death duties, in force; South Africa has treaties with Lesotho (which includes Botswana and Swaziland), Zimbabwe, the United Kingdom (UK) and the US.⁷⁸

4.2.2.1. *South Africa - United States inheritance tax treaty relief*

The SA-US IHTT was concluded in April 1947 prior to the promulgation of the Estate Duty Act of 1955 and well before SA moved from a source to a residency based tax system and introduced CGT in 2001.⁷⁹

Taxes covered

The convention covers Federal estate tax imposed by the US, estate duty imposed by the Union (SA) as well as other taxes of a 'substantially similar character' imposed by either SA or the US.

Capital gains tax a substantially similar tax?

As the treaty in question was concluded before the introduction of CGT, there is no way that CGT could have been considered or incorporated into the applicable treaty.

The treaty in question does, however, extend its application to 'any substantially similar taxes'. It could be argued that CGT is a substantially similar tax to estate

⁷⁶ According to, Guglielmo Maisto in his IFA Cashier 2010 General Report, less than 100 IHT or ETA treaties were in place worldwide, and very few have been subsequently negotiated and concluded. Guglielmo Maisto op cit note 2 at 46.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Paula Bagraim and Jennifer Roeleveld op cit note 13 at 702.

duty/estate taxes and thus may be covered under the current SA-US IHTT. The current practice in SA, is however, not to regard CGT as a substantially similar tax to estate duty/estate taxes. This is because the general view, as presented by the DTC in its *Second and Final Report on Estate Duty*, is that CGT is an income tax which taxes capital appreciation and is fundamentally different from estate or inheritance taxes, which are primarily wealth or capital transfer taxes.⁸⁰ This view is in line with the current OECD Inheritance Tax Model Convention (IHTMC) which excludes CGT from the scope of taxes covered.⁸¹ One argument presented is that ‘... the circumstance that the death of the taxpayer is the basis for assessing the tax does not automatically make it similar to an IHT or ETA...’, the purpose of the tax needs to be examined.⁸² It is argued that the purpose of IHT and ETA is to tax enrichment of heirs which is different from the primary purpose of CGT, which is to tax capital appreciation.⁸³

In conclusion, the current practice is that CGT is not treated as a substantially similar tax to ETA or IHT under the SA-US IHTT, and only SA estate duty and US Federal estate taxes are considered for the purposes of cross-border relief.

Situs of a share or stock portfolio

The treaty deems the situs of a share or stock in a corporation to be the place in or under the laws of which such corporation was incorporated (created or organized), therefore the situs of the US stock portfolio is the US.⁸⁴

Treaty Relief

Article V of the SA-US IHTT sets out the instances in which credit relief must be provided and determines the contracting state (either SA or US) which must provide the relief.⁸⁵ Such relief can be summarized as follows:

⁸⁰ The Davis Tax Committee op cit note 5 at 10-11.

⁸¹ OECD Estate, Inheritance and Gift Model Convention: Commentary (1982) Models IBFD commentary on article 2.

⁸² Guglielmo Maisto op cit note 2 at 46.

⁸³ Ibid.

⁸⁴ South Africa – United States – Inheritance Tax Treaty (1947) Article III 2(d).

⁸⁵ South Africa – United States – Inheritance Tax Treaty (1947) Article V.

- *Domiciled in the US or ordinarily resident in SA (but not both)*

If the deceased was domiciled in the US or ordinarily resident in SA (either but not both), then in terms of Article V (2)(b) credit relief must be provided by the state of domicile or residence. Such credit is limited to tax attributable in the resident state.⁸⁶

In the case of a US situs stock portfolio, SA estate duty would only be due if the deceased was ordinarily resident in South Africa at the date of death. In this instance, in terms of the SA-US IHTT, SA would have to grant a credit for the US Federal estate tax imposed on such a resident at the date of death. This credit would be limited to the SA estate duty due on the asset in question.

There are certain instances where no relief may be granted under article V (2)(b). This occurs when the tax imposed by the US, is imposed solely because the deceased was a US national at the date of death.⁸⁷ This exception would not apply in the instance examined in this study, as the tax imposed by the US on a US stock portfolio is imposed due to situs and not solely by reason of the deceased being a US national at the date of death. Therefore, article (2)(b) will apply and investors who are ordinarily resident in SA (and not domiciled in the US) at the date of death may claim credit relief, regardless of whether the deceased was a US national or not.⁸⁸

- *Both domiciled in the US and ordinarily resident in SA (can be a US national)*

In accordance with article V (3)(a) and article III (2)(d), as the US stock portfolio is situated in the US, SA will have to grant a credit for any US

⁸⁶ Note that this treaty relief is only available to individuals who are ordinarily resident in the republic at the date of death; it is not available to individuals who are resident in the republic for income tax purposes as a result of physical presence. As previously mentioned, since individuals that are resident for income tax purposes but not resident for estate duty purposes, are not subject to estate duty on their non-SA situs assets, as a result, such individuals are not prejudiced by the fact that they are not able to invoke the rights under the SA-US IHTT.

⁸⁷ South Africa – United States – Inheritance Tax Treaty (1947) Article V.

⁸⁸ Relief from instances of double taxation for US nationals is addressed by this article in the scenario in question, however, double taxation may persist, as a result of the deceased being a US national, in other instances. For example, where a deceased was ordinarily resident in SA, a US national and held a UK situs stock portfolio at the date of death, both SA and the US could impose estate taxes on the asset but SA would not be required to give credit for any US Federal estate taxes imposed, as the US would be imposing estate taxes solely by reason of the deceased being a US national at the date of death. As a result, no credit would be required to be granted under article V (1). Further analysis of these types of potentially unresolved double tax issues is beyond the scope of this study.

Federal estate taxes imposed on the portfolio in the instance where a deceased was both domiciled in the US and ordinarily resident in SA at the date of death.⁸⁹

Conclusion

The SA- US IHTT provides double tax relief in the form of a credit against SA estate duty for US Federal estate taxes levied on a US stock portfolio. This credit is limited to the SA estate duty imposed. As SA estate duty rates are currently lower than US Federal estate tax rates, the taxes due on death for individuals that are ordinary resident in SA at the date of death will in most instances be the US Federal estate tax imposed (which is a maximum of 40% of the MV of the stock portfolio at the date of death) and South African CGT (which is a maximum of 18% of the MV of the stock portfolio at the date of death).

4.2.2.2. South Africa - United States income tax treaty relief

Article 13 of the South Africa - United States - Income Tax Treaty (SA-US ITT) covers taxing rights over capital gains. Paragraph 5 of article 13 assigns taxing rights of capital gains made on the sale of a stock portfolio to the contracting state in which the alienator is resident. Generally, it is understood that the term “alienation of property” covers gains on a deemed disposal as a result of death, if such an event results in CGT under the domestic laws of either of the contracting states.⁹⁰ A DTA is not intended and does not give taxing rights over and above the taxing rights determined in a contracting state’s domestic law, therefore a state can only levy CGT on death if it does so under its own domestic law.⁹¹

The US does not levy CGT on death, CGT will, however, be due on a US stock portfolio in instances where the deceased was resident in SA (either ordinarily resident or resident by virtue of physical presence) at the date of death. As the DTA assigns taxing rights to the state where the alienator is resident, SA will have taxing rights unless the deceased was also domiciled (or resident in the US) and under the tie breaker rules in article 4 of the DTA, the deceased is deemed to be a resident in the

⁸⁹ South Africa – United States – Inheritance Tax Treaty (1947) Article V.

⁹⁰ *OECD Model Tax Convention on Income and on Capital: Commentary* (1992) Models IBFD at 145; and Guglielmo Maisto op cit note 2 at 53.

⁹¹ *Model Tax Convention Commentary* op cit note 90 at 145.

US for the purpose of the treaty. In this specific instance, a SA resident (dual resident in US) may be able to claim treaty relief and as such may not be subject to CGT on death.⁹²

It is notable that article 4 of the DTA in question, only refers to individuals who are ordinarily resident in SA. There is, therefore, much debate as to whether individuals, who are resident in SA as a result of physical presence (and where such individuals were not residents in nor citizens of the US at the date of death), can invoke such treaty rights.⁹³ This question has far reaching double tax consequences for SA tax residents who are not ordinarily resident in SA at the date of death but who are resident at such time for income tax purposes (owing to physical presence in SA). The identified issue or area of debate does, however, not affect the tax due on death in this specific instance. This is because the US does not levy CGT at the date of death and the current SA-US IHTT treaty assigns taxing rights to the capital gains on any deemed disposal on death of a SA resident to SA. Therefore, the outcome, under the current treaty, is the same for individuals who are ordinarily resident in SA and individuals who are residents in SA as a result of physical presence (even though they are not entitled to invoke treaty rights).

⁹² This case is an exception where the deceased needs to be dual resident (in both the US and SA), in addition, the DTA should determine the deceased to be a US resident in terms of the treaty tie breaker clause. Therefore, in most instances where a person is a resident in SA at the date of death, CGT will be imposed on a US stock portfolio held at this point in time.

⁹³ It is worth noting that both the SA-US ITT and the SA-US IHTT were concluded before SA moved from a source based to resident based method of taxation, which only occurred in 2001. The definition of resident which includes the concept of physical presence was only included in the ITA when such amendments were made, and thus the concept of physical presence for SA residency would not have been considered when concluding the aforementioned treaties. As noted, article 4(1) of the SA-US ITT specifically refers to individuals who are ordinarily resident in the republic and does not cover individuals who are resident in the republic as a result of physical presence. It is thus implied that such individuals are not entitled to invoke treaty rights unless a special arrangement, ruling or Memorandum of Understanding (MoU) exists between the two contracting parties. Based on publically available information, there does not appear to be a MoU between SA and the US in this regard, nor do there appear to be any rulings or special arrangements between the two contracting states which would allow SA residents (who are resident due to physical presence) to invoke such treaty rights. As such one can only assume that such individuals, who are not ordinarily resident in SA but who are resident in SA for income tax purposes, owing to physical presence, are not entitled to invoke treaty rights for both the relevant income tax treaty and the IHT treaty. Republic of South Africa *Explanatory Memorandum on The Revenue Laws Amendment Bill* (2000).

In conclusion, SA CGT will be due on the US stock portfolio at the date of death for all SA residents.⁹⁴

4.3. International taxes due after relief

In conclusion, an individual who is ordinarily resident or resident as a result of physical presence in SA (and not a US resident or US citizen) will be liable for taxes of up to 58% of the MV of the portfolio of US listed stock held at the date of death after applying all unilateral and bilateral relief available.⁹⁵ This is made up of a maximum 40% of the MV of the assets in question (US Federal estate taxes) and 18% of the MV of the assets in question (SA CGT).

⁹⁴ There is one instance where the treaty may be invoked to avoid CGT in SA on death, this only occurs in instances where the deceased is not only resident in SA but also a resident in or a citizen of the US, at the date of death, and under article 4 of the SA-US income tax treaty, such person is deemed to be a resident of the US for treaty purposes. In this rare instance, the treaty could be invoked resulting in the taxing rights for any capital gains on the US stock portfolio to be assigned to the US. As the US does not impose CGT on death, no CGT would be due in SA or the US. It should be noted that once again, the outcome in this instance would be the same for a deceased who was ordinarily resident in SA and for a deceased who was a resident in SA as a result of physical presence, as in both instances the treaty would have been invoked on the basis of US residency or citizenship.

⁹⁵ A taxpayer cannot invoke both unilateral and bilateral relief for a single tax, the taxpayer may choose which relief to apply in instances where both forms of relief may be claimed.

CHAPTER 5: CONTESTED DOUBLE TAXATION

As noted in chapter 1, there is much debate over whether the imposition of both CGT and estate duty by SA at the date of death results in double taxation (both locally and internationally). In order to properly assess this area of contention, it is important to understand and evaluate the following:

- the accepted definition of double taxation;
- the arguments in favour of as well as the arguments against the imposition of both taxes by SA at the date of death resulting in double taxation as defined; and
- the actual treatment of the two taxes in relation to one another.

5.1. Definition of double taxation

The OECD defines double taxation as the imposition of comparable taxes, on the same taxpayer, in respect of the same taxable income or capital, at the same point in time.⁹⁶ When examining potential instances of double taxation, it is important to note that two types of double taxation exist, namely, juridical double taxation and economic double taxation. The OECD's definition of double taxation covers juridical double taxation; international juridical double taxation occurs when two or more states each impose a comparable tax on the same taxpayer at the same point in time, while domestic juridical double taxation occurs when the same state imposes comparable taxes on the same taxpayer at the same point in time.⁹⁷ In contrast, economic double taxation arises when the same economic transaction, or item of income or capital is taxed during the same period but in the hands of different taxpayers.⁹⁸

As noted in chapter 2 and 3, SA imposes estate duty on the deceased's property that forms part of his/her deceased estate, SA also imposes CGT on any deemed capital gains as part of the deceased's final income tax return. Furthermore, the US imposes taxes at the date of death in the form of Federal estate taxes imposed on the deceased's property that forms part of his/her US estate. All three of the identified taxes are imposed on the

⁹⁶ OECD 'Glossary' defines double taxation as follows: 'D[omestic] double taxation arises when comparable taxes are imposed within a Federal state by sovereign tax jurisdictions of equal rank' while 'I[n]ternational double taxation arises when comparable taxes are imposed in two or more states on the same taxpayer in respect of the same taxable income or capital, e.g. where income is taxable in the source country and in the country of residence of the recipient of such income.' OECD 'Glossary' available at <http://www.oecd.org/ctp/glossaryoftaxterms.htm>, accessed on 18th February 2019; and OECD Model Tax Convention on Income and on Capital (2017) Models IBFD.

⁹⁷ OECD op cit note 96.

⁹⁸ Prof. Dr. Klaus Vogel et al *Klaus Vogel on Double Taxation Conventions* 3rd ed (1997) at 10.

deceased and his/her estate at the date of death, and therefore where such taxes are comparable, both domestic juridical double taxation and international juridical double taxation may arise.⁹⁹ The area of contention in this study is, therefore, whether the taxes in questions are comparable and thus meet the definition of juridical double taxation.¹⁰⁰

5.2. Academic arguments

5.2.1. Argument against occurrence of double taxation

Based on an extended review of the relevant academic literature in this regard, the main argument put forth, in the academic community, as to why the imposition of both CGT and estate duty by SA at the date of death does not amount to double taxation, is that the taxes are fundamentally dissimilar. As discussed briefly in chapter 4 (4.2.2.1.), certain parties contend that CGT is an income tax, that taxes capital appreciation, while estate duty or estate tax is a wealth or capital transfer tax, that taxes the transfer of assets from one taxpayer to another, and thus the imposition of the two taxes at the same point in time on the same assets (or part thereof) does not amount to double taxation, as the taxes serve different purposes and are therefore not comparable.¹⁰¹

5.2.2. Argument that double taxation may persist

The counter argument proposed, by authors on this matter, is that while CGT may be governed by the income tax act, it is still a tax on capital, and thus even though CGT only taxes the appreciation of wealth, while estate duty/estate taxes tax the transfer of wealth, the taxes are comparable (in that they are both taxes imposed on capital assets). It is therefore argued that the imposition of two capital taxes on the same

⁹⁹ In this instance economic double taxation is not a concern as all taxes are imposed on the same taxpayer; economic double taxation would exist, in similar circumstances if, for example, one of the countries in question imposed inheritance tax at the date of death (taxing the heir rather than the deceased and his/her estate) and the other country still imposed estate taxes on the deceased and his/her deceased estate at the date of death resulting in the same economic transaction being taxed during the same period (at the date of death) but in the hands of different taxpayers (the heir and the deceased/ deceased estate). For the purpose of this study the deceased and his/her estate are treated as a single taxpayer. Domestic juridical double taxation persists if SA estate duty and CGT are comparable taxes, while international juridical double taxation may persist in instances where both SA CGT and SA estate duty are found to be comparable in relation to US Federal estate tax. It is generally accepted that SA estate duty and US Federal estate taxes are comparable and thus, the issue, is whether SA CGT can be said to be a comparable/ serve the same purpose as SA estate duty and/or US Federal estate tax.

¹⁰⁰ Economic double taxation will not be addressed further in this study.

¹⁰¹ Guglielmo Maisto op cit note 2 at 46; and The Davis Tax Committee op cit note 5 at 6.

capital assets (or portion thereof), at the same point in time amounts to double taxation as defined.¹⁰²

In addition, it is put forth, that regardless of whether the imposition of both CGT and estate duty by SA at the date of death amounts to double taxation, in the strict sense of the definition, where the same asset (or part thereof) is taxed at the same point in time, an excessive, prejudicial or confiscatory tax may occur, for which a clear policy or policy decision for the implementation of such tax needs to have been made.¹⁰³ SA has made a clear policy decision to impose both estate duty and CGT at the date of death, however, policy makers appear to have only considered the impact of such an imposition on a SA resident's SA tax liability.¹⁰⁴ The same consideration appears not to have been given to potential international/cross-border transactions or foreign situs assets held by SA residents at the date of death, and consequently, the bilateral and unilateral relief is not adequate in preventing the imposition of an international tax liability that could be said to be confiscatory, excessive or prejudicial.¹⁰⁵

5.2.3. Conclusion

Based on the analysis of the academic literature setout above, it is evident that this area remains an area of contention. It is worth noting, however, that even if it is found that the imposition of such taxes does not amount to double taxation in the strict sense of the definition, given the nature of the tax, in that the same asset (or portion therefore) is being taxed twice at the same point in time, it is likely that a confiscatory, excessive or prejudicial taxes may exist, particularly on cross-border transactions where no adjustment or relief, in the form of lower estate tax rates, can be made by SA.¹⁰⁶

¹⁰² Jennifer Roeleveld op cit note 2 at 145.

¹⁰³ Ibid.

¹⁰⁴ This was demonstrated through the reduction of the SA estate duty rate when CGT was first introduced.

¹⁰⁵ As SA cannot reduce or control the rates at which foreign estate taxes are imposed on foreign situs assets, any relief or compensation would have to be addressed through bilateral or unilateral relief.

¹⁰⁶ SA tax authorities can amend the local estate duty rates to compensate/ provide relief for the imposition of CGT (in addition to estate duty) at the date of death, such amendments or relief, do not, however, necessarily assist in providing relief from the imposition of excessive, prejudicial or confiscatory taxation where assets are held internationally/ cross-border.

5.3. Treatment of the taxes

To further assess whether the imposition of both estate duty and CGT by SA at the date of death could result in double taxation or taxes that may be considered confiscatory, excessive or prejudicial, the behaviour and treatment of these taxes, in relation to one another, is analysed below.

5.3.1. Local treatment of the taxes

Locally, both CGT and estate duty appear to be considered in relation to one another. This was clearly illustrated by the DTC, in their *Final Report on Estate Duty*, which noted that: “[i]n order to compensate for the double tax exposure created when CGT is combined with estate duty or donations tax, the estate duty and donations tax rate was reduced to 20 per cent [when CGT was first introduced in 2001].”¹⁰⁷ It could be argued that this statement indicates that domestic juridical double taxation exists, for which domestic relief is given in the form of an estate duty rate reduction.

Alternatively, it is contended that this statement, at the very least, indicates that SA tax authorities consider or have in the past considered the combined effects of estate duty and CGT imposed on death, when making rate changes or policy amendments, to ensure that taxes imposed domestically are not confiscatory, prejudicial or excessive. It, therefore, follows that, SA tax authorities should apply the same consideration to the combined effect that the imposition of both these taxes have on SA residents, who hold foreign situs assets at the date of death, to ensure that excessive, prejudicial or confiscatory taxes do not persist in this instance. As SA tax authorities cannot reduce the estate or inheritance rates applicable in other countries (in order to reduce the overall tax imposed at the date of death), SA tax authorities should consider the combined effect of the imposition of both CGT and estate duty by SA when negotiating bilateral double taxation agreements and when formalising domestic laws that provide unilateral relief from double taxation.

5.3.2. International treatment of the taxes

Internationally, states appear to either impose CGT, inheritance tax (IHT) or estate tax (ETA) on death (interchangeably) and while relief is generally only granted for IHT

¹⁰⁷ The Davis Tax Committee op cit note 5 at 10-11.

and ETA, there are increasing instances in which credit for IHT and ETA is given against CGT and vice versa.¹⁰⁸ This implies that these taxes, on an international level, are, in some instances, considered comparable for cross-border relief purposes or at the very least it is inferred that relief should be given to ensure that cross-border taxes imposed on death are not excessive or confiscatory.

If this is taken a step further, it could be argued that if such taxes are imposed interchangeably, in that countries, at a Federal level, either impose estate tax, inheritance tax or CGT at the date of death, but very seldom a combination of such taxes, then such taxes may be considered comparable taxes as they are imposed by countries at the same point in time (at the date of death) to achieve the same or very similar purposes (which can be said to be the taxation of wealth accumulation, whether in the form of asset accumulation and/or asset appreciation, at the date of death).¹⁰⁹

This argument is further supported by the abolishment of estate or inheritance taxes in many countries in recent years, which has, in some instances, been replaced with the imposition of CGT either at the date of death or when the asset is subsequently sold by the heir.¹¹⁰

5.3.3. Conclusion on treatment of taxes

In conclusion, it is evident that the imposition of CGT at the date of death, is at the very least considered, both locally and internationally, in relation to the imposition of estate taxes. This implies the impact of the imposition of both CGT and estate duty at the date of death needs to be carefully considered along with appropriate relief or adjustments which need to be provided for, in order to avoid excessive, confiscatory or prejudicial taxes from being imposed in instances where a deceased is subject to both CGT and estate taxes at the date of death.

¹⁰⁸ Guglielmo Maisto op cit note 2 at 42. In addition, refer to Appendix E for instances where countries allow credit for CGT imposed against estate taxes or inheritance taxes and vice versa.

¹⁰⁹ As noted in chapter 1, South Africa is one of the only countries in the world that imposes CGT on assets included in the estate of the deceased. In the 2010 IFA Cahiers, it was noted that South Africa was “the only country under review which applies IHT and capital gains tax on the transfer of assets falling under the estate”. It is therefore reasonable to conclude that countries do not usually impose an estate or inheritance tax combined with CGT on death.

¹¹⁰ Refer to Appendix F for countries who have abolished or repealed IHT or ETA.

5.4. Conclusion

From the above analysis, it is evident that the matter, of whether the imposition of both CGT and estate duty by SA at the date of death amounts to double taxation, is clearly contested and unresolved. There is, however, a strong argument that while the imposition of these two taxes at the date of death may not amount to double taxation, in the strict sense of the definition, the imposition of these two taxes, where proper relief is not provided for, in many instances results in excessive, prejudicial and/or confiscatory taxation of SA residents investing abroad.

This argument is further supported by the findings noted in chapters 2-4 of this study and the worked examples presented in the appendices of the study, all of which clearly demonstrate that SA residents are subject to higher taxes on their US listed stocks (US or foreign situs assets) than on their local assets, and that they are subject to much higher taxes than their US counterparts holding the same assets (US listed stocks) at the date of death. This clearly demonstrates that the imposition of these two taxes by SA at the date of death is resulting in taxation that is, at the very least, prejudicial, excessive and confiscatory for SA residents looking to diversify their portfolio risk through offshore investment in the US stock exchange.

Finally, the treatment of the taxes in relation to one another, both locally and internationally, further supports the argument that CGT imposed at the date of death and estate taxes need to be considered in relation to one another when determining unilateral and bilateral relief, in order to prevent excessive, prejudicial or confiscatory taxes from arising.

It is, therefore, proposed that amendments to the unilateral and/or the bilateral relief currently in place should be made to address the identified issue.

CHAPTER 6: RECOMMENDED AMENDMENTS

Based on the analysis in chapters 2-5, there are a number of key issues which are causing the large discrepancies in the taxes imposed on a SA resident that holds US listed stock (foreign situs assets) at the date of death and the taxes imposed on such a resident's local assets as well as the taxes imposed on said resident's US counterpart who holds the same type of assets at the date of death but who is not a SA resident at such time.

The primary issue in this regard, is twofold, firstly, as noted, SA imposes both estate duty and CGT at the date of death, secondly while imposing both taxes simultaneously, SA fails to consider the combined effect of the imposition of such taxes when negotiating bilateral relief and when establishing unilateral relief for the international tax liability that arises in this instance (where the deceased holds foreign situs assets at the date of death).

In addition, in the specific instance examined in this study, the discrepancies are further exasperated by the fact that the SA-US Inheritance Tax Treaty has not been negotiated adequately to ensure that SA residents investing in the US are not prejudiced in comparison to their US counterparts in terms of exemption and rollover reliefs available.

Each of these issues as well as the recommended amendments that could be made to address such issues will be discussed further in point 6.1. – 6.4. below.

6.1. SA to impose only one tax at the date of death

One of the easiest ways to address the issues identified above, is for SA tax authorities and policy makers to follow suite, and either abolish estate duty, leaving the imposition of only CGT by SA at the date of death, or make changes to the CGT legislation and allow for a system similar to the UK or the US where no CGT is imposed at the date of death on assets already subject to estate taxes. In this instance, SA could also allow a 'step up' of the base cost to the MV at the date of death for assets inherited by beneficiaries which have already been subject to estate taxes, thus ensuring that only estate duty/estate taxes are imposed on such assets at the date of death.¹¹¹

¹¹¹ Alternatively, if authorities still wanted to capture the capital gains, instead of allowing a 'step up basis' on death, they could merely postpone the payment of CGT until the asset is sold by the beneficiary/ heir. This would delay the payment of CGT and ease the current cash flow burden imposed at death but it would not reduce the CGT payable to the state in the long run.

Based on the current bilateral treaties and unilateral relief in place, the former suggestion (the abolishment of estate duty and the imposition of only CGT at the date of death) would not resolve the double tax nor the confiscatory tax issues at hand. This is because, SA residents would still be subject to a maximum US Federal estate tax of 40% of the MV of assets held at the date of death and SA CGT at a maximum of 18% of the MV of assets held at the date of death. If estate duty was to be abolished and CGT was to be the only tax imposed by SA at the date of death, the relevant bilateral agreements and/or unilateral relief would need to be re-negotiated and/or amended to allow estate taxes to be offset against CGT imposed at the date of death and vice versa (depending on the changes made to the CGT rules in SA) in order to ensure that no confiscatory tax persisted.

If the latter change was made to ensure that CGT was not imposed at the date of death by SA, then the confiscatory tax issue would be resolved. SA resident investors investing in US listed stock would only be subject to estate taxes equal to the higher of US Federal taxes or SA estate duty (which under the current legislation would be a maximum tax of 40% of the MV of assets at the date of death).¹¹²

6.2. Ensure all necessary considerations are taken into account when determining adequate bilateral and unilateral relief

Alternatively, if SA tax authorities and policy makers opt to maintain the imposition of both taxes at the date of death, then they need to consider the combined impact of the imposition of both these taxes, with reference to foreign situs assets and the related international tax liability that arises at the date of death, when negotiating bilateral treaty relief and determining the unilateral relief available in such instances.

The following amendments could be made to address the current confiscatory tax issues highlighted in this study:

¹¹² In order to compensate for the loss of revenue or the fact that CGT is no longer imposed at the date of death, SA may choose to increase estate duty rates. This would follow the logic of the DTC which recommended that estate duty rates be reduced when CGT was implemented, following this, it is reasonable that estate duty rates be increased when CGT on death is removed. This increase in rates is really only appropriate/ fair if estate duty is imposed in the place of CGT and a 'step up' basis is given to the heir/ beneficiary so that they only pay CGT on the difference between the price of the asset on sale and the MV at the date of inheritance. Where no 'step-up' of the base cost is granted, the CGT is simply delayed, and thus a big increase in estate duty would be prejudicial as CGT would be paid on the full appreciation of the same asset in future (the cash flow is simply delayed) in addition to estate duty at higher rates.

- SA tax authorities and policy makers could re-negotiate the SA-US Inheritance Tax Treaty or request an amendment to the current treaty by protocol which would update the definition of ‘substantially similar tax’, for the purpose of the treaty, to include CGT imposed by SA at the date of death. This will allow excess US estate taxes (over and above the SA estate duty) imposed on SA residents to be offset against any SA CGT imposed on death (limited to the actual SA CGT imposed).

This amendment would assist in instances where the SA resident is ordinarily resident in SA, and thus a resident for estate duty purposes and for the purposes of the SA-US Inheritance Tax Treaty. This amendment would ensure that the maximum tax liability that arises for an individual who is ordinarily resident in SA at the date of death and who holds US listed stock at such time, would be limited to the higher of the US Federal estate taxes imposed at the date of death and the SA taxes (being estate duty and CGT) imposed at such time.¹¹³

It is important to note that this amendment alone, would, however, not assist SA residents who are residents in SA as a result of physical presence. This is because the US-SA Inheritance Tax Treaty only applies to individuals who are ordinarily resident in SA at the date of death. Such individuals will, therefore, still be subject to the higher of US Estate Taxes and SA estate duty plus SA CGT, resulting in a maximum tax of 58% of the MV of the asset at the date of death (after relief). In order to take this into account, SA would also need to request that the definition of a SA resident in the current SA-US Inheritance Tax Treaty be amended to include individuals that are resident in SA as a result of physical presence.

- Alternatively, SA could amend its unilateral relief. This is a more complete option, as it would be applicable to both individuals that are ordinarily resident in SA and individuals who are resident in SA as a result of physical presence. It is also likely to be less time consuming and administratively burdensome to negotiate and implement. For example, SA’s unilateral relief could be revised to

¹¹³ The relief here could be modeled on the relief negotiated in the Canada - United States - Income and Capital Tax Treaty (as amended through 2007) at Article XXIX B.

allow any excess foreign estate taxes (over and above the foreign estate taxes offset against SA estate duty under s16 of the Estate Duty Act) to be deducted against any CGT tax payable on foreign situs assets (which are subject to excess foreign estate taxes over and above the SA estate duty imposed on such assets).¹¹⁴ This amendment should be made to ensure the maximum tax liability for the foreign situs asset (US listed stock portfolio) would be the higher of the US Federal estate tax and SA taxes imposed at the date of death (estate duty and CGT).¹¹⁵

- Both of the amendments recommended above could also be implemented simultaneously or in unison.

6.3. Engage in more astute treaty negotiations

Finally, to assist in the large discrepancies in the difference in the tax liability of a SA resident that holds US listed stock at the date of death and his/her US counterpart that holds the same assets at the date of death, SA could be more astute in treaty negotiation and aim, where possible, to gain better or more equal relief for SA residents investing in the US.

Currently, the US affords very little relief to SA investors in the form of rollover relief and credits against estate taxes. As it stands, the standard unified credit against estate taxes for NRAs, which is only USD 60,000 (exclusion amount which equates to a USD 13,000 credit), applies to SA residents that invest in the US. This is extremely low when compared to the unified credit against estate taxes for US residents, which is currently USD 11.4 million (exclusion amount). Further, the US does not currently afford any spousal rollover relief to SA resident investors (unless the surviving spouse is a US citizen). This credit relief and the spousal rollover relief are instrumental in easing the US

¹¹⁴ This could be enacted by amending s6quat to include a reference to excess foreign estate taxes paid over and above foreign estate taxes allowed as a deduction under the s16 of the EDA. This deduction, under s6quat, should be limited to the actual capital gains tax imposed by SA on such assets as the date of death. Effectively this amendment should allow excess foreign estate taxes to be offset against CGT imposed by SA at the date of death, resulting in the maximum tax liability imposed on foreign situs assets at the date of death, being the higher of SA estate duty plus SA CGT and foreign estate tax.

¹¹⁵ This principle would be similar to the principles applied by other states such as Germany which allows a credit for SA CGT imposed due to death against IHT in some instances. Refer to appendix E.

Federal estate tax liability and resulting cash flow burden that may arise for a surviving spouse.

Better negotiation regarding these two issues in the SA-US Inheritance tax treaty would go a long way in providing relief for SA investors. SA could follow article XXIX B of the Canada - United States - Income and Capital Tax Treaty as guidance for the negotiation. Article XXIX B (2) of the treaty negotiates a significantly more appropriate unified credit for Canadian residents with US estates:

In determining the estate tax imposed by the United States, the estate of an individual (other than a citizen of the United States) who was a resident of Canada at the time of the individual's death shall be allowed a unified credit equal to the greater of:

- (a) the amount that bears the same ratio to the credit allowed under the law of the United States to the estate of a citizen of the United States as the value of the part of the individual's gross estate that at the time of the individual's death is situated in the United States bears to the value of the individual's entire gross estate wherever situated; and*
- (b) the unified credit allowed to the estate of a nonresident not a citizen of the United States under the law of the United States.¹¹⁶*

While article XXIX B (3) of the treaty negotiates an additional credit against US estate taxes for the passing of the estate to the surviving spouse of the Canadian deceased:

In determining the estate tax imposed by the United States on an individual's estate with respect to property that passes to the surviving spouse of the individual (within the meaning of the law of the United States) and that would qualify for the estate tax marital deduction under the law of the United States if the surviving spouse were a citizen of the United States and all applicable elections were properly made (in this paragraph and paragraph 4 referred to as "qualifying property"), a non-refundable credit computed in accordance with the provisions of paragraph 4 shall be allowed in

¹¹⁶ Canada - United States - Income and Capital Tax Treaty (as amended through 2007) at Article XXIX B(2).

*addition to the unified credit allowed to the estate under paragraph 2 or under the law of the United States...*¹¹⁷

Article XXIX B (4)

The amount of the credit allowed under paragraph 3 shall equal the lesser of:
(a) the unified credit allowed under paragraph 2 or under the law of the United States (determined without regard to any credit allowed previously with respect to any gift made by the individual), and
*(b) the amount of estate tax that would otherwise be imposed by the United States on the transfer of qualifying property.*¹¹⁸

South Africa would need to see what concessions it could make in order to try to negotiate better relief in this regard for SA residents.

As previously noted, under the current South African Estate Duty Act, non-residents are not specially excluded from the s4(q) deduction nor is there a different s4A abatement applicable for non-residents.¹¹⁹ South Africa therefore does not treat US investors differently from SA resident investors for the purposes of spousal rollover relief and the abatement (equivalent to US unified credit against estate taxes).

6.4. Future area of study: more holistic approach to resolve double taxation on death from an international/global perspective

Throughout the literature review performed for the purposes of this study, it was evident that the debate over whether to abolish estate and inheritance taxes is very topical. The primary arguments put forward for a repeal of such taxes focus on:

- the limited amount of revenue raised by the taxes compared to the cost of administering and collecting such taxes;
- the difficulty in dealing with avoidance schemes which are often put in place to avoid such taxes; and
- the undesirable effects of double taxation.¹²⁰

¹¹⁷ Canada - United States - Income and Capital Tax Treaty (as amended through 2007) at Article XXIX B(3).

¹¹⁸ Canada - United States - Income and Capital Tax Treaty (as amended through 2007) at Article XXIX B(4).

¹¹⁹ Estate Duty Act No 45 of 1955.

¹²⁰ Guglielmo Maisto op cit note 2 at 34.

It was consistently highlighted that the imposition of estate and inheritance taxes by countries causes double tax or confiscatory tax consequences for cross-border transactions in many instances (these include but are not limited to instances where assets are held in states other than the resident state at the date of death or assets are left to heirs/beneficiaries in different states). Instances of double taxation or persistent confiscatory taxes arise primarily as a result of the very different, very complex estate or inheritance tax rules across countries as well as the imposition of other taxes such as CGT (and wealth taxes) either in place of or alongside such taxes (as demonstrated to an extent in this study).¹²¹

Based on the findings of this review, it is proposed that it is time for a global overhaul of the taxes imposed on death. Such overhaul should endeavour to implement more consistent, simpler taxes at the date of death, thus reducing or eliminating cross-border issues.

One such suggestion could be the abolishment of estate and inheritance taxes altogether (on an international scale). Such taxes could be replaced, where necessary or desired by the resident state, with the imposition of CGT at the date of death or the imposition of CGT when the asset is sold by the beneficiary/heir. In this instance, the related income tax treaties would also need to be amended to ensure that the taxing rights to the CGT imposed at the date of death were allocated appropriately.¹²²

6.5. Conclusion

There are a number of amendments that SA tax authorities and policy makers could implement to reduce or mitigate the confiscatory tax which currently persists for a SA resident who holds US listed stock (foreign situs assets) at the date of death.

When implementing any of the suggested amendments SA tax authorities and policy makers need to look at the international tax liability issue holistically. Policy makers need to understand the fundamental causes of the confiscatory tax, and ensure that any

¹²¹ Guglielmo Maisto op cit note 2.

¹²² The intricacies and feasibility of such a suggestion is an interesting future research area will not be covered in any more detail in this study.

amendments made, adequately resolve the current issues at hand for SA residents who are ordinarily resident in SA as well as for individuals who are resident in SA as a result of physical presence.

SA tax authorities should also aim to resolve similar issues not specifically addressed in this study but that arise as a result of the same root cause, being the imposition of both estate duty and CGT at the date of death by SA and the lack of consideration of the combined effect of such an imposition when negotiating and determining bilateral and unilateral relief.

The easiest and most complete solution would appear to be to amend the unilateral relief provided under s6quat of the ITA and allow any excess foreign estate taxes paid (over and above those already allowed as a deduction against SA estate duty under s16 of the EDA) to be deducted against the CGT imposed on such an asset as a result of the deemed disposal at death (such deduction should be limited to the actual CGT imposed).

CHAPTER 7: CONCLUSION OF THE STUDY

Based on the results of this study, it is unclear whether the imposition of both estate duty and CGT by SA at the date of death results in juridical double taxation as defined. For juridical double taxation to exist, the taxes imposed must be comparable; and as determined in chapter 5, whether estate taxes and CGT can be said to be comparable taxes (in that they serve the same purpose) remains an area of unresolved uncertainty.

While the issue of double taxation remains contested, chapters 2-5 of this study clearly demonstrate that the imposition of both estate duty and CGT by SA at the date of death results in a confiscatory, excessive and prejudicial global tax liability for a SA resident who holds foreign situs assets (portfolio of US listed stock) at the date of death. This is because the unilateral and bilateral relief afforded to such investors does not consider the combined effect of the imposition of both estate duty and CGT by SA at the date of death. And as a result, the relief provided is not complete and adequate in preventing excessive, confiscatory and prejudicial taxes from arising on a global scale. This results in SA resident investors being subject to much higher taxes on their foreign held assets than on their local assets and SA resident investors being subject to much higher taxes than their US resident (non-SA resident) counterparts holding the same assets.

As mentioned in chapter 1 of this study, SA tax authorities should take note of taxes which are or may be perceived as confiscatory, excessive or prejudicial, as the continued imposition of such taxes may adversely impact the overall tax compliance and tax morality of a society.

Therefore, based on the findings of this study, it is recommended that SA tax authorities take the necessary steps to amend SA's unilateral relief available to SA resident investors. In addition, where feasible, authorities should re-negotiate treaties or request treaty amendments (as suggested in chapter 6 of the study) to remedy the identified issues. When making such amendments or make changes to any of the legislation in question, SA tax authorities need to ensure that they treat international or cross-border transactions in the same manner and with the same consideration given to local transactions/assets; SA tax authorities need to ensure that they consider the combined effect of the imposition of both estate duty and CGT by the state at the date of death when negotiating bilateral relief and when determining unilateral relief from double taxation at the date of death.

APPENDICES:

Appendix A: Illustration of the marginalisation of the base cost relative to the MV of an asset over time

The following table demonstrates how the base cost of an asset relative to the market value of such asset diminishes overtime as a result of inflation and growth.

An inflation rate of 4.5% was used to demonstrate how the base cost of an asset may diminish over time relative to the MV of such asset.¹²³ An inflation rate of 4.5% could be considered to be a relatively low inflation rate given that the average inflation rate from 1968 to 2019 was 9.02%, it is, however, within the South Africa Reserve Bank's target inflation band of 3-6% and is thus considered to be a reasonable inflation estimate.¹²⁴

Assumptions:

Base cost	1,000,000
Inflation estimate:	4.50%
CGT Rate	18.00% ¹²⁵

No. of years since purchase (n)	Base Cost (Cost)	MV at selected point in time Cost x (1 + 4.5%) ⁿ	Base cost as a % of MV	Capital Gain	CGT	CGT as a % of MV
-	1,000,000	1,000,000	100%	-	-	0%
1	1,000,000	1,045,000	96%	45,000	8,100	1%
2	1,000,000	1,092,025	92%	92,025	16,565	2%
3	1,000,000	1,141,166	88%	141,166	25,410	2%
4	1,000,000	1,192,519	84%	192,519	34,653	3%
5	1,000,000	1,246,182	80%	246,182	44,313	4%
10	1,000,000	1,552,969	64%	552,969	99,534	6%
15	1,000,000	1,935,282	52%	935,282	168,351	9%
20	1,000,000	2,411,714	41%	1,411,714	254,109	11%
25	1,000,000	3,005,434	33%	2,005,434	360,978	12%
30	1,000,000	3,745,318	27%	2,745,318	494,157	13%
40	1,000,000	5,816,365	17%	4,816,365	866,946	15%
50	1,000,000	9,032,636	11%	8,032,636	1,445,875	16%
75	1,000,000	27,146,996	4%	26,146,996	4,706,459	17%

¹²³ This was the actual inflation rate on the 24th April 2019. Trading Economics 'South Africa's Inflation Rate' available at <https://tradingeconomics.com/south-africa/inflation-cpi>, accessed 24th April 2019.

¹²⁴ South African Reserve Bank 'Inflation Target' available at <https://www.resbank.co.za/MonetaryPolicy/DecisionMaking/Pages/InflationMeasures.aspx>, accessed 24th April 2019; and Trading Economics 'South Africa's Inflation Rate' available at <https://tradingeconomics.com/south-africa/inflation-cpi>, accessed 24th April 2019.

¹²⁵ This is the CGT rate applicable to an individual in the highest income tax bracket in SA. It is calculated as follows: 40% (inclusion rate) multiplied by 45% (highest income rate tax in the top income tax bracket).

Even at a relatively low inflation rate of 4.5%, the table clearly demonstrated that the base cost of an asset becomes insignificant relative to the MV of the asset over time as a result of inflation. In addition to inflation, assets such as shares usually experience long term growth (increase in value over time) which would further decrease the value of the base cost relative to the MV of the asset overtime.

Appendix B: A global comparison of capital transfer taxes (and rates charged) on death by selected countries

Selected Country	Inheritance tax levied on beneficiary*	Estate taxes levied on the deceased estate**	Capital gains tax at date of death	Maximum capital transfer tax on death***	
South Africa	No inheritance tax on beneficiaries.	20-25% of value of dutiable estate at the date of death. ¹²⁶	Up to 18% of the deemed capital at the date of death. The MV of assets at date of death (less the based cost) is used to determine the gain. ¹²⁷	43%	Up to 38-43% of MV of assets at the date of death. ¹²⁸
United Kingdom	No inheritance tax on beneficiaries.	40% of the value of the estate at death. ¹²⁹	Revaluation of base cost of assets, no CGT on death (CGT replaced by estate tax). ¹³⁰	40%	Up to 40% of the value of the estate at death (approx. 40% of MV of assets at the date of death where estates are very large).
USA	No inheritance tax on beneficiaries.	40% of the value of the estate at death. ¹³¹	Revaluation of base cost of assets, no CGT on death (CGT replaced by estate tax). ¹³²	40%	Up to 40% of the value of the estate at death (approx. 40% of MV of assets at the date of death where estates are large).
Australia	No inheritance tax on beneficiaries.	No estate taxes.	No CGT on death, the beneficiaries and executors of an estate, in effect, 'step into the shoes' of the deceased and full CGT is only imposed when the asset is sold by the beneficiary or heir. ¹³³	0%	CGT is only imposed when the asset is sold by the beneficiary/heir or when the asset is sold by the executor on behalf of the estate.

¹²⁶ Refer to Chapter 2.

¹²⁷ Ibid.

¹²⁸ As explained in Chapter 2 of this study, the maximum capital transfer tax that may be imposed by SA at the date of death is 43% of the MV of assets held at the date of death. This occurs in instances where the deceased's estate is very large and the base cost of the asset in question is small/insignificant relative to the MV of such asset at the date of death. This results in capital gains tax being imposed at a rate of close to 18% of the MV of the asset at the date of death. In addition, for this maximum rate to occur, estate duty would need to be imposed at a rate close to 25% of the MV of assets at the date of death. This will only occur in instances where the deductions and the abatement available against the estate as well as the portion of the estate under R30 million, and thus taxed at 20% of the dutiable estate, are extremely small in comparison to the overall value of the estate. This maximum rate would occur in very rare instances but has been calculated to illustrate the absolute maximum tax that could be imposed by SA at the date of death.

¹²⁹ HMRC 'Inheritance Taxes' available at <https://www.gov.uk/inheritance-tax>, assessed 4th April 2019

¹³⁰ HMRC 'Guidance HS282 Death, personal representatives and legatees (2018) Updated 6 April 2018' available at <https://www.gov.uk/government/publications/death-personal-representatives-and-legatees-hs282-self-assessment-helpsheet/hs282-death-personal-representatives-and-legatees-2018>, assessed 4th April 2019

¹³¹ Refer to Chapter 3.

¹³² Ibid.

¹³³ Australian Government - Australian Tax Office 'Deceased estates and capital gains tax' available at <https://www.ato.gov.au/general/capital-gains-tax/deceased-estates-and-inheritances/deceased-estates-and-capital-gains-tax/>, accessed 4th April 2019.

Canada	No inheritance tax on beneficiaries.	No estate taxes.	CGT imposed on death, deemed disposal of assets at MV. Inclusion rate of 50%. ¹³⁴	16.5%	CGT on death, levied at up to 16.5% of MV of assets held at the date of death. ¹³⁵
Netherlands	Inheritance tax is levied on the value of all property inherited from an individual who at the time of death was a resident of the Netherlands. ¹³⁶	No estate taxes.	No CGT on death.	10-40% ¹³⁷	Inheritance tax is levied on the beneficiary/ heir. The rate levied depends on the relationship between the beneficiary/heir and the deceased as well as on the amount inherited. ¹³⁸
France	A beneficiary is liable for inheritance tax based on the amount inherited (and based on the circumstances of the inheritance) on a sliding scale of 5% to 45%. ¹³⁹	No estate taxes.	No CGT on death.	5%-45%	Inheritance tax of 5%-45% based on the value of assets inherited by the beneficiary.

**In the context of this table, inheritance tax refers to instances where the beneficiary is liable for the tax on the capital transfer.*

***In the context of this table, estate taxes are taxes levied on the deceased estate at the date of death.*

****For the purpose of this table capital transfer taxes include estate taxes, inheritance taxes and CGT imposed at the date of death.*

From the table above it is evident that the type of taxes imposed on death as well as the rates of taxes imposed vary from country to country, however, a tax of between 38%-43% of the MV of assets held at the date of death, while on the higher end of rates and taxes imposed, does not appear to be excessive based on similar taxes imposed by other countries at the date of death. The combined rate of taxes imposed by SA at the date of death, is more or less in line with rates imposed by the UK and the US (who impose estate taxes of up to 40% of the value of estate at the date of death).

¹³⁴ Erica Alini ‘Does Canada really need an inheritance tax?’ *Global News* 2nd August 2018.

¹³⁵ Capital gains are included in a person’s income tax return at 50% (inclusion rate). The highest marginal income tax bracket for Canada is currently 33%, therefore CGT imposed at death can result in a maximum tax liability of 16.5% (33% x 50%) of the MV of assets held at the date of death (assuming that the base cost and other deductions are marginal in comparison with the MV of assets at the date of death).¹³⁵ In addition to CGT which is implemented as part of Federal income tax, states may impose probate fees at the date of death. Canada Federal Income Tax Rates can be found at: Government of Canada ‘9.2.4 Tax brackets and rates Financial Consumer Agency of Canada’ available at <https://www.canada.ca/en/financial-consumer-agency/services/financial-toolkit/taxes-quebec/taxes-quebec-2/5.html>, accessed 4th April 2019.

¹³⁶ Library of Congress ‘Global Legal Monitor Netherlands: Inheritance and Gift Tax Lowered’ available at <https://www.loc.gov/law/foreign-news/article/netherlands-inheritance-and-gift-tax-lowered/>, accessed 24th April 2019.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ The Spectrum IFA Group ‘UK Inheritance Tax Vs French Succession Tax available at <https://www.spectrum-ifa.com/uk-inheritance-tax-v-french-succession-tax/>, assessed 24th April 2019.

Appendix C: Federal estate taxes imposed on non-resident aliens

This table illustrates the Federal estate tax rate imposed on NRAs as a % of the MV of their US assets held at the date of death. A US portfolio of around USD 1 million may be subject to Federal estate taxes of around 33% of the MV of assets held at the date of death. While, a US resident or citizen holding the same assets in the US, will not pay any Federal taxes. The table demonstrates the large discrepancies in the Federal estate tax rates charged by the US on NRAs who hold US situs assets (example being US listed stock) when compared to the Federal estate tax rates charged on US residents or citizens holding the same assets. The large discrepancies arise primarily because of the large unified credit against estate taxes afforded to US residents and citizens (which is not afforded so graciously to NRAs).

It is acknowledged that this table has limitations, as US residents are subject to Federal estate taxes on their worldwide assets while NRAs are only subject to Federal taxes on their US situs assets, and thus one could argue that a smaller unified credit for NRAs is justified. The unified credit against estate taxes of USD60,000 granted to NRAs under the US I.R.C. is, however, extremely small and results in higher Federal tax rates being charged on NRAs who may have relatively small international estates.

MV of US Stock Portfolio at date of death	Federal Estate Tax Calculation NRA	Federal Estate Tax NRA	Federal Estate Tax as % of MV of US Stock Portfolio at date of death NRA	Federal Estate Tax Calculation Resident or US citizen	Federal Estate Tax Resident or US citizen	Federal Estate Tax as % of MV of US Stock Portfolio at date of death Resident or US citizen
USD 1 000 000	USD 345 800 less credit USD 13 000	USD 332 800	33.28%	No Estate tax as taxable estate less than USD 11.4 mil.	0	0%
USD 5 000 000	(5 000 000 – 1 000 000) x 40% Plus 345 800 less 13 000	USD 1 932 800	38.67%	No Estate tax as taxable estate less than USD 11.4 mil.	0	0%
USD 10 000 000	(10 000 000 – 1 000 000) x 40% Plus 345 800 less 13 000	USD 3 932 800	39.33%	No Estate tax as taxable estate less than USD 11.4 mil.	0	0%
USD 50 000 000	(50 000 000 – 1 000 000) x 40% Plus 345 800 less 13 000	USD 19 932 800	39.87%	(50 000 000 – 11 400 000) x 40 % (50 000 000 – 22 800 000*) x 40 %	USD 15 440 000 USD 10 880 000	30.88% 21.76%
USD 100 000 000	100 000 000 – 1 000 000) x 40% Plus 345 800 less 13 000	USD 39 932 800	39.93%	(100 000 000 – 11 400 000) x 40 % (100 000 000 – 22 800 000*) x 40 %	USD 35 440 000 USD 30 880 000	35.44% 30.88%

**Married couple combined relief.*

From the above table, it is evident that there is a large discrepancy between the net rate of Federal estate tax imposed on US residents or citizens and the net rate of Federal estate tax imposed on NRAs. This large discrepancy is caused by the large difference in the credits available to NRAs compared to US residents or citizens.

Appendix D: The 2019 estate rates schedule ¹⁴⁰

If the amount with respect to which the tentative tax to be computed is:	The tentative tax is:
Not over USD 10,000	18 percent of such amount.
Over USD 10,000 but not over USD 20,000	USD 1,800, plus 20 percent of the excess of such amount over USD 10,000.
Over USD 20,000 but not over USD 40,000	USD 3,800, plus 22 percent of the excess of such amount over USD 20,000.
Over USD 40,000 but not over USD 60,000	USD 8,200 plus 24 percent of the excess of such amount over USD 40,000.
Over USD 60,000 but not over USD 80,000	USD 13,000, plus 26 percent of the excess of such amount over USD 60,000.
Over USD 80,000 but not over USD 100,000	USD 18,200, plus 28 percent of the excess of such amount over USD 80,000.
Over USD 100,000 but not over USD 150,000	USD 23,800, plus 30 percent of the excess of such amount over USD 100,000.
Over USD 150,000 but not over USD 250,000	USD 38,800, plus 32 percent of the excess of such amount over USD 150,000.
Over USD 250,000 but not over USD 500,000	USD 70,800, plus 34 percent of the excess of such amount over USD 250,000.
Over USD 500,000 but not over USD 750,000	USD 155,800, plus 37 percent of the excess of such amount over USD 500,000.
Over USD 750,000 but not over USD 1,000,000	USD 248,300, plus 39 percent of the excess of such amount over USD 750,000.
Over USD 1,000,000	USD 345,800, plus 40 percent of the excess of such amount over USD 1,000,000.

Appendix E: Examples of credits given for CGT against estate taxes and vice versa

Country	Related Country	Relief
Canada	United States of America	Canada levies CGT on death while the US imposes estate taxes; as a result, the Canada–US income tax treaty allows a US estate tax credit for certain Canadian capital gains taxes levied upon death. ¹⁴¹
Germany	South Africa	Germany allows a credit for IHT purposes for any capital gains tax levied in South Africa at the date of death. ¹⁴²
UK	N/A	The UK allows credit for capital gains taxes levied on death in place of IHT or ETA. ¹⁴³

¹⁴⁰ Section C Title 26. Internal Revenue Code Subtitle B. Estate and Gift Taxes Chapter 11. ESTATE TAX Subchapter A. Estates of Citizens or Residents Part I. Tax Imposed s2001. Imposition and rate of tax

¹⁴¹ Canada - United States - Income and Capital Tax Treaty (as amended through 2007) at Article XXIX B.

¹⁴² Guglielmo Maisto op cit note 2 at 42.

¹⁴³ Ibid.

Appendix F: Analysis of countries that have abolished estate or inheritance taxes

Country	Type of Tax abolished	Date	Replaced with CGT?
Canada	Canada repealed Federal estate taxes in 1971 and replace the tax with CGT imposed on death. ¹⁴⁴	1971	Yes.
Australia	Australia abolished estate taxes at a Federal level in 1979, CGT was subsequently introduced in 1985, and while CGT is not imposed on death, CGT assets, inherited by individuals will be subject to full CGT when sold, such gain will be calculated as the sales price less the cost of the asset for the deceased (when originally purchased) and thus while death is not an event that causes CGT, when the asset is eventually sold, the entire again will be taxed. ¹⁴⁵	1979	To some extent CGT replaces estate taxes. It is, however, not imposed at the date of death but rather when the asset is subsequently sold by the beneficiary.
New Zealand	New Zealand abolished estate taxes in 1992 and does not impose CGT. ¹⁴⁶	1992	No.

It is interesting to note that an additional 13 countries have repealed estate or inheritance taxes since 2000, such countries include: Macau (2001), Portugal (2004), Slovak Republic (2004), Sweden (2005), Russia (2005), Hong Kong (2005), Singapore (2008), Austria (2011), Liechtenstein (2011), Brunei (2013), Czech Republic (2014), Norway (2014) and Hungary (for close relatives in 2006).¹⁴⁷

¹⁴⁴ Wolfe D. Goodman *QC Death Taxes in Canada, in the Past and in the Possible Future* Canadian Tax Journal / Revenue Fiscale Canadienne (1995), Vol. 43, No. 5 / no 5 pages 1360 – 1367

¹⁴⁵ Sam Reinhardt and Lee Steel 'A brief history of Australia's tax system' https://www.taxsuperandyou.gov.au/sites/default/files/01_Brief_History.pdf lasted accessed 5th April 2019 at page 9; and Bina Brown (21 August 2011) 'Negotiating inheritance's death and taxes: An inheritance can often mean having to handle life's two grim inevitables' *The Sydney Morning Herald: Money Planning and Budgeting* <https://www.smh.com.au/money/planning-and-budgeting/negotiating-inheritances-death-and-taxes-20110820-1j3eg.html>, accessed 5th April 2019.

¹⁴⁶ Alan Cole 17 March 2015 'Estate and Inheritance Taxes around the World' *Tax Foundation* https://taxfoundation.org/estate-and-inheritance-taxes-around-world/#_ftn7, accessed 5th April 2019.

¹⁴⁷ Guglielmo Maisto op cit note 2 at 34.

WORKED EXAMPLES

A scenario analysis has been performed to illustrate the international tax liabilities that arises on death for a deceased individual who at the date of death was a South African resident (ordinarily resident or resident as a result of physical presence in SA) and who held a portfolio of US listed stock at such time. The worked example also includes the international tax liabilities that arises for a deceased individual who at the date of death was a US citizen or US resident individual and who held a portfolio of US listed stock at such point in time. This scenario has been included to demonstrate the vast differences in the tax liabilities due for South African residents and US citizens or residents who hold the same US assets at the date of death.

The aim of the worked examples is to provide guidance on how to calculate the international tax liability that arises in relation to a portfolio of US listed stock at the date of death. The worked examples also aim to clearly illustrate the high tax liability that SA resident investors face at the date of death when holding a diversified, international portfolio of investments which may include US listed stock.

In order to demonstrate the aims and objectives of this working example, the tax effects for an individual holding a portfolio of US listed stock at the date of death has been analysed for the following possible scenarios:

Example 1: Deceased individual is ordinarily resident in SA and is not a resident in nor a citizen of the US at the date of death.

Example 2: Deceased individual is a resident in SA based on physical presence and is not a resident in nor a citizen of the US at the date of death.

Example 3: Deceased individual is ordinarily resident in SA and is a resident in or a citizen of the US at the date of death.

Example 4: Deceased individual is a resident in SA based on physical presence and is a resident in or a citizen of the US at the date of death.

Example 5: Deceased individual is a resident in or citizen of the US but not resident in SA at the date of death.

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

The investment portfolio held at the date of death consists of S&P 500 EFT TRUST (NYSEARCA: SPY) shares. Assume that the investment was held for 10 years before the date of death; assume the investment was purchased on 11th of March 2009 and that the date of death was 11 March 2019. Assume the shares in S&P 500 EFT TRUST were purchased at USD 721.36 per share on 11 March 2009 (this was the actual closing price on this date) and that the MV of one share in the S&P 500 EFT was USD 2 783.30 on the 11 March 2019 (the actual closing value on this date).¹⁴⁸ Assume that the USD/ZAR spot rate at the date of death was 14.3050 (the actual spot rate at close on 11 March 2019).¹⁴⁹ Actual price data was used to better illustrate the type of gains and market movements that can occur over a 10 year investment period.

In all cases, assume that the deceased pays income tax in South Africa at a marginal tax rate of 45 percent and that the annual exclusion of ZAR 300 000 has been used for other gains made in the year of death (not available for offset against the CGT imposed on the share portfolio at the date of death). Unless otherwise stated, assume that the portfolio is not left to a surviving spouse and that there is no s4A abatement nor a unified credit against estate taxes from a predeceased spouse available for use against the current deceased's estate.

Assume that the portfolio of US listed stocks is the only asset held by the deceased at the date of death and that the deductible expenses are immaterial. While it is unlikely that the deceased will only hold the US portfolio at the date of death, this assumption has been made to simplify the calculation and try to isolate the tax effects of holding this type of investment at the date of death. The tax liability relating to the portfolio will be higher than the worked example where the deceased holds other assets with significant market values (in relation to the US portfolio) at the date of death. This is because the effect of the s4A abatement and/or

¹⁴⁸ Markets Insider 'Historical Prices for S&P 500' available at https://markets.businessinsider.com/index/historical-prices/s&p_500/31.12.2008_11.3.2019, accessed 24th April 2019.

¹⁴⁹ Pound Sterling Live 'The Us Dollar to South African Rand Historical Exchange Rates Conversion Page' available at <https://www.poundsterlinglive.com/best-exchange-rates/best-us-dollar-to-south-african-rand-history>, accessed 24th April 2019.

the unified credit against estate taxes, where applicable, as well as the effect of lower tax rates on the first portion of an estate will become less significant as the value of the estate increases.

The study recognises that this assumption will to some degree affect the extent of the large discrepancy in the effective Federal tax rates imposed on SA resident investors in relation to their US resident counter parts who hold the same assets. This is because, US residents are subject to Federal estate tax on their worldwide income while SA resident investors are only subject to Federal estate taxes on their US situs assets/ investments. The huge difference in the unified credit would, however, still result in prejudicial rates for SA investors in most instances, except in instances of exceptionally large estates (over USD 1 billion). This study shows the extreme impact of this difference and highlights the need for treaty negotiation for a better, more fair credit system such as the credit afforded in the Canada –United States Income and Capital Tax Treaty (as amended through 2007).

Finally, in example 3 where the deceased is both a resident in SA (ordinarily resident) and a US resident/citizen assume that the tie breaker rules in the relevant income tax treaty determine the deceased to be resident in SA for the purpose of the treaty.¹⁵⁰

Summary of assumptions for worked examples:

Investment period (years)	10	(inclusion rate of 40% for individuals x marginal tax rate of 45%)
ZAR/USD	14.3050	
CGT rate	18%	
S&P 500 share price 11 March 2009	USD 721.36	
S&P 500 share price 11 March 2019	USD 2,783.30	

Summary of estate duty rate and s4A abatement for worked examples:

Section 4A abatement	ZAR 3,500,000	(no portable abatement from spouse)
Estate duty rate (<30m)	20%	
Estate duty rate (>30m)	25%	

¹⁵⁰ Refer to chapter 4.2.2.2.

Summary of Federal estate tax for worked examples:

NRA unified credit against estate tax	USD 13,000	per Appendix D above
US resident or citizen unified credit against estate tax	USD 11,400,000	
Federal estate tax rate for portion of the estate in excess of USD 1 000 000	40%	

Summary of the outcome of listed examples:

The table below summarises the total tax liability due in each of the illustrative scenarios. The table also includes the international tax liability that would arise should the suggested recommendations in chapter 6.2. of the study, be implemented.

Example:	Estimated Total International Tax Liability as a % of MV of assets held at date of death Portfolio: USD 10,000,000	Estimated Total International Tax Liability as a % of MV of assets held at date of death Range for different size portfolios USD 500,000 – USD 100,000,000	Estimated Total International Tax Liability if suggested amendments in chapter 6.2. applied. Tax would be the higher of the Federal estate taxes imposed by the US and SA taxes imposed (estate duty plus CGT) Range for different size portfolios USD 500,000 – USD 100,000,000
<i>Example 1:</i> SA ordinarily resident only	52.5%	41.9%-53.2%	28.6%-39.9%
<i>Example 2:</i> SA tax resident (physical presence) only	52.5%	41.9%-53.2%	28.6%-39.9%
<i>Example 3:</i> SA ordinarily and US citizen or US resident	33.3%	20.9%-48.8%	20.9%-35.4%
<i>Example 4:</i> SA tax resident (physical presence) and US citizen or US resident	0%	0%-35.4%	0%-35.4%
<i>Example 5:</i> US resident or citizen of the US but not resident in SA at the date of death.	0%	0%-35.4%	0%-35.4%

From the table above, it is evident that SA residents are subject to significantly higher taxes on their US assets than their US counterparts and that such measures as suggested in chapter 6.2. should be implemented to ease the effects of the prejudicial taxes imposed on SA resident investors.

Example 1: Deceased individual is ordinarily resident in SA and is not a resident in nor a citizen of the US at the date of death.

The following tax liabilities arise for an individual who was ordinarily resident in SA at the date of death:

- SA Estate duty on worldwide assets which includes a portfolio of US listed stocks;
- SA CGT (income tax on worldwide income and gains, specifically imposed in terms of s9HA of Income Tax Act, which resolves that a deemed disposal of assets occurs for CGT purposes at the date of death); and
- US Federal estate tax (as a NRA, tax is due on US situs assets).

As the deceased was ordinarily resident in SA at the date of death, unilateral relief from SA estate duty is provided in terms of s16 of the Estate Duty Act as well as relief in terms of Article V (2)(b) of the SA-US IHTT. Both forms of relief are limited to the SA estate duty imposed. There is no relief for CGT as in terms of the SA-US ITT, SA has taxing rights for capital gains made on portfolio of US listed stock. Further, the US does not impose CGT on death, so no foreign CGT is actually paid, and thus no s6quat unilateral relief can be claimed.

In effect, after taking into account relief available, individuals in this example will be subject to US Federal estate taxes and SA CGT. For the given scenario, the total of taxes range from 41.9%-53.2% of the MV of assets held at the date of death, depending on the size of the portfolio.

Assumed MV of US portfolio at the date of death		SA Taxes due on death				
		Capital Gains Tax South Africa Per s9HA deemed disposal on death at MV Deceased was resident in SA at the date of death therefore taxed on worldwide gains				
USD	ZAR	Base cost of asset (USD)	Gain (USD)	Gain (ZAR)	CGT	CGT
	MV of portfolio at date of death (USD) x (ZAR/USD exchange rate at the date of death)	Portfolio value at the date of death (USD)/ (current value of a share) x (cost of a share)	MV of portfolio at the date of death (USD) (s9HA) – base cost of portfolio (USD)	Gain in USD x (ZAR/USD spot rate at the date of death) = gain (ZAR) ¹⁵¹	Gain (ZAR) x 18% (CGT rate)	As a % of MV of total assets at date of death.
USD 500,000	ZAR7,152,500	USD 129,587	USD 370,413	ZAR 5,298,755	ZAR 953,776	13.3%
USD 1,000,000	ZAR 14,305,000	USD 259,174	USD 740,826	ZAR 10,597,511	ZAR 1,907,552	13.3%
USD 2,500,000	ZAR 35,762,500	USD 647,936	USD 1,852,064	ZAR 26,493,777	ZAR 4,768,880	13.3%
USD 5,000,000	ZAR 71,525,000	USD 1,295,872	USD 3,704,128	ZAR 52,987,554	ZAR 9,537,760	13.3%
USD 10,000,000	ZAR 143,050,000	USD 2,591,744	USD 7,408,256	ZAR 105,975,108	ZAR 19,075,519	13.3%
USD 15,000,000	ZAR 214,575,000	USD 3,887,615	USD 11,112,385	ZAR 158,962,661	ZAR 28,613,279	13.3%
USD 25,000,000	ZAR 357,625,000	USD 6,479,359	USD 18,520,641	ZAR 264,937,769	ZAR 47,688,798	13.3%
USD 50,000,000	ZAR 715,250,000	USD 12,958,718	USD 37,041,282	ZAR 529,875,538	ZAR 95,377,597	13.3%
USD 100,000,000	ZAR 1,430,500,000	USD 25,917,436	USD 74,082,564	ZAR 1,059,751,076	ZAR 190,755,194	13.3%

SA Taxes due on death (continued)		
Estate duty South Africa Deceased was ordinarily resident in SA therefore subject to estate duty on worldwide property and deemed property		
Dutiable amount of the estate MV of assets less CGT (S4(b) ETA) - 3 500 000 (s4A ETA) ¹⁵²	Estate duty liability IF (dutiable amount of the estate is less than ZAR 30 000 000 then estate duty is: dutiable amount of the estate x 20%, but if the dutiable amount of the estate is greater than ZAR30 000 000 then the estate duty is: ZAR 30 000 000 x 20% + (dutiable amount of the estate - ZAR 30 000 000) x 25%)	Estate duty as a % of MV of asset at date of death
ZAR 2,698,724	ZAR 539,745	7.5%
ZAR 8,897,448	ZAR 1,779,490	12.4%
ZAR 27,493,620	ZAR 5,498,724	15.4%
ZAR 58,487,240	ZAR 13,121,810	18.3%
ZAR 120,474,481	ZAR 28,618,620	20.0%
ZAR 182,461,721	ZAR 44,115,430	20.6%
ZAR 306,436,202	ZAR 75,109,050	21.0%
ZAR 616,372,403	ZAR 152,593,101	21.3%
ZAR 1,236,244,806	ZAR 307,561,202	21.5%

¹⁵¹ In terms of para 43(1) eighth schedule of SA ITA, for assets bought and sold in the same foreign currency by a natural person, the gain or loss is first calculated in the foreign currency and then translated into ZAR (resulting in the FOREX gain or loss not being subject to capital gains tax).

¹⁵² In reality it is unlikely that a SA resident investor investing in US stocks would have no other estate, however, in order to simplify this example and focus on the issue at hand, this assumption has been made. The impact of this assumption is that where a SA estate exists, the SA estate duty due on the US stock portfolio may be larger as the ZAR3,500,00 abatement may have been used against other assets. In certain instances, the estate may be larger than ZAR 30,000,000 resulting in a high rate being applied. It is interesting to note, however, that this does not impact the overall outcome of the example as a result of the unilateral and bilateral relief provided. In terms of both the unilateral relief and the bilateral relief SA is obliged to give a credit against SA estate duty for foreign estate taxes due (limited to SA estate duty on that asset). For larger estates, the Federal estate tax at just under 40% will always exceed the SA estate duty even at rates of 25%, and as a result the net effect is in that a credit for the full SA estate duty will be given for foreign estate taxes due.

Federal Estate Tax US		
The portfolio of stock held by the NRA is a US situs asset held at the date of death and it is thus subject to Federal estate tax		
Federal estate tax (USD) If taxable estate (which is assumed to be the MV of the portfolio) is over USD 1 000 000 then USD 324 800 + (taxable estate less USD 1 000 000) x 40% - USD 13 000 (NRA unified credit against estate tax)	Federal estate taxes in (ZAR) Federal estate tax (USD) x (ZAR/USD exchange rate)	US tax liability on death – before relief As a % of MV of assets at the date of death
USD 142,800 ¹⁵³	ZAR 2,042,754	28.6%
USD 311,800	ZAR 4,460,299	31.2%
USD 911,800	ZAR 13,043,299	36.5%
USD 1,911,800	ZAR 27,348,299	38.2%
USD 3,911,800	ZAR 55,958,299	39.1%
USD 5,911,800	ZAR 84,568,299	39.4%
USD 9,911,800	ZAR 141,788,299	39.6%
USD 19,911,800	ZAR 284,838,299	39.8%
USD 39,911,800	ZAR 570,938,299	39.9%

Relief available				
DTA relief: SA CGT	Unilateral relief: SA CGT	DTA Relief: Estate taxes	Unilateral relief: Estate taxes	Summary of relief: CGT: No relief Estate Duty: Unilateral relief and DTA relief is the same, either (but not both) forms of relief may be invoked
SA-US ITT is applicable as the deceased was ordinarily resident in SA at the date of death. No DTA relief available as SA has sole taxing rights on capital gains in terms of article 13(5) of the applicable DTA.	As the deceased was a SA tax resident at the date of death, s6quat is applicable where foreign taxes have been paid. However, since the US does not impose CGT on death, no foreign capital gains tax has been paid and thus s6quat cannot be claimed.	SA-US IHTT is applicable as deceased was ordinarily resident in SA at the date of death. In terms of Article V (2)(b) of the applicable treaty, SA is required to give credit relief for double taxation. Such relief is limited to the SA estate duty imposed.	As the deceased was ordinarily resident in SA at the date of death, s16 of the Estate Duty Act provides unilateral relief for property situated outside of the republic (such as the portfolio of US stock) which is subject to foreign death duty as well as South African estate duty. The relief is the lesser of the foreign estate taxes and the SA estate taxes.	-ZAR 539,745
				-ZAR 1,779,490
				-ZAR 5,498,724
				-ZAR 13,121,810
				-ZAR 28,618,620
				-ZAR 44,115,430
				-ZAR 75,109,050
-ZAR 152,593,101				
-ZAR 307,561,202				

¹⁵³ As the estate is less than USD 1,000,000 the Federal estate tax is calculated as follows (in accordance with the applicable Federal estate taxes rates in appendix D): USD 70 800 + 34% (USD 500 000 – USD 250 000) – USD 13 000 (NRA unified credit against estate taxes).

Summary of Global Tax Liability							
Total SA Tax Liability before relief (ZAR) <small>(Estate duty plus CGT)</small>	Total SA Tax Liability on death before relief <small>As a % of MV of assets at the date of death</small>	Total US Tax Liability before relief (ZAR) <small>(Federal estate tax)</small>	Total US Tax liability on death before relief <small>As a % of MV of assets at the date of death</small>	Total Global Tax Liability before relief (ZAR) <small>(SA estate duty plus SA CGT plus US Federal estate tax)</small>	Total Global Tax Liability before relief <small>As a % of MV of assets at the date of death.</small>	Total Global Tax Liability- after relief (ZAR)	Total Global Tax Liability- after relief <small>As a % of MV of assets at the date of death</small>
ZAR 1,493,521	20.9%	ZAR 2,042,754	28.6%	ZAR 3,536,275	49.4%	ZAR 2,996,530	41.9%
ZAR 3,687,042	25.8%	ZAR 4,460,299	31.2%	ZAR 8,147,341	57.0%	ZAR 6,367,851	44.5%
ZAR 10,267,604	28.7%	ZAR 13,043,299	36.5%	ZAR 23,310,903	65.2%	ZAR 17,812,179	49.8%
ZAR 22,659,570	31.7%	ZAR 27,348,299	38.2%	ZAR 50,007,869	69.9%	ZAR 36,886,059	51.6%
ZAR 47,694,140	33.3%	ZAR 55,958,299	39.1%	ZAR 103,652,439	72.5%	ZAR 75,033,818	52.5%
ZAR 72,728,709	33.9%	ZAR 84,568,299	39.4%	ZAR 157,297,008	73.3%	ZAR 113,181,578	52.7%
ZAR 122,797,849	34.3%	ZAR 141,788,299	39.6%	ZAR 264,586,148	74.0%	ZAR 189,477,097	53.0%
ZAR 247,970,698	34.7%	ZAR 284,838,299	39.8%	ZAR 532,808,997	74.5%	ZAR 380,215,896	53.2%
ZAR 498,316,395	34.8%	ZAR 570,938,299	39.9%	ZAR 1,069,254,694	74.7%	ZAR 761,693,493	53.2%

Example 2: Deceased individual is a resident in SA based on physical presence and is not a resident in nor a citizen of the US at the date of death

The following tax liabilities arise for an individual who was not ordinarily resident in SA at the date of death but was resident in SA as a result of physical presence:

- No SA estate duty due on the portfolio of US listed stock as the deceased individual was not a resident in SA for estate duty purposes (not ordinarily resident in SA at the date of death), therefore no estate duty is imposed by SA on the portfolio of US listed stock which is not an SA situs asset;
- SA CGT is imposed, as the deceased was a resident for income tax purposes, income tax, including CGT is imposed on worldwide income and gains in terms of s9HA; and
- US Federal estate tax is due for the NRA as the portfolio of US listed stock is a US situs asset.

No relief from foreign estate taxes paid can be claimed. This is because s16 of the Estate Duty Act only grants relief to individuals who were ordinarily resident in SA at the date of death, further, the relief is limited to SA estate duty paid and as no SA estate duty was paid no relief would be granted even if s16 was applicable.

No bilateral relief is available for US Federal estate taxes as the SA-US IHTT only applies to individual who are ordinarily resident in SA at the date of death.¹⁵⁴ In this instance, however, no SA estate duty is due/has been paid and thus no relief is required.

¹⁵⁴ It is worth noting that both the SA-US ITT and the SA-US IHTT were concluded before SA moved from the source to resident based taxation. The definition of resident which included the concept of physical presence was only included in the act when such amendments were made and thus the concept of physical presence for SA residency would not have been regarded when concluding such treaties. As the Estate Duty Act defines residency as an individual that is ordinarily resident in SA and does not extend residency to cover the concept of physical presence it would make sense that the SA-US IHTT would follow suit. In addition, it is worth noting, that even if the IHT treaty was applicable, as no SA estate duty is imposed on deceased persons who are not ordinarily resident but resident as a result of physical presence, no credit relief would be granted as the credit relief provided for in the treaty is limited to the actual SA estate duty imposed on the asset.

Further, there is no relief for CGT as the US does not impose CGT on death and thus no s6quat can be applied. In addition, the SA-US ITT only applies to individuals who are ordinarily resident in SA and thus treaty benefits cannot be invoked by individuals who are resident as a result of physical presence.¹⁵⁵

In conclusion, individuals in this example will be subject to US Federal estate taxes and SA CGT. For the given scenario, such taxes range from 41.9%-53.2% of the MV of assets held at the date of death, depending on the size of the portfolio. It is interesting to note that the tax liability (after relief), in the given scenario, is the same for SA residents regardless of whether they are ordinarily resident in SA at the date of death, as in scenario 1, or resident as a result of physical presence, as in scenario 2.

Assumed MV of US portfolio at the date of death (USD)		SA Taxes due on death*				
		Capital Gains Tax South Africa Per s9HA deemed disposal on death at MV Deceased was resident in SA at the date of death therefore taxed on worldwide gains				
USD	ZAR MV of portfolio at date of death (USD) x (ZAR/USD exchange rate at the date of death)	Base cost of asset (USD) Portfolio value at the date of death (USD)/ (current value of a share) x (cost of a share)	Gain (USD) MV of portfolio at the date of death (USD) (s9HA) – base cost of portfolio (USD)	Gain (ZAR) Gain in USD x (ZAR/USD spot rate at the date of death) = gain (ZAR)	CGT Gain (ZAR) x 18% (CGT rate)	CGT As a % of MV of total assets at date of death.
USD 500,000	ZAR 7,152,500	USD 129,587	USD 370,413	ZAR 5,298,755	ZAR 953,776	13.3%
USD 1,000,000	ZAR 14,305,000	USD 259,174	USD 740,826	ZAR 10,597,511	ZAR 1,907,552	13.3%
USD 2,500,000	ZAR 35,762,500	USD 647,936	USD 1,852,064	ZAR 26,493,777	ZAR 4,768,880	13.3%
USD 5,000,000	ZAR 71,525,000	USD 1,295,872	USD 3,704,128	ZAR 52,987,554	ZAR 9,537,760	13.3%
USD 10,000,000	ZAR 143,050,000	USD 2,591,744	USD 7,408,256	ZAR 105,975,108	ZAR 19,075,519	13.3%
USD 15,000,000	ZAR 214,575,000	USD 3,887,615	USD 11,112,385	ZAR 158,962,661	ZAR 28,613,279	13.3%
USD 25,000,000	ZAR 357,625,000	USD 6,479,359	USD 18,520,641	ZAR 264,937,769	ZAR 47,688,798	13.3%
USD 50,000,000	ZAR 715,250,000	USD 12,958,718	USD 37,041,282	ZAR 529,875,538	ZAR 95,377,597	13.3%
USD 100,000,000	ZAR 1,430,500,000	USD 25,917,436	USD 74,082,564	ZAR 1,059,751,076	ZAR 190,755,194	13.3%

*No estate duty is due as the deceased was not ordinarily resident in SA at the date of death and therefore not a resident for estate duty purposes. The SA estates of non-residents only include SA situs assets, as the US stock portfolio is not a SA situs asset, no SA estate duty is due in this instance. The only SA tax due at the date of death will be CGT.

¹⁵⁵ Article 4(1) of the SA-US Income Tax Treaty specifically refers to individuals who are ordinarily resident in the republic and does not cover individuals who are resident in the republic as a result of physical presence and thus based on available information, it is implied that such individuals are not entitled to invoke treaty rights. Refer to chapter 4.2.2.2.

US Taxes due on death		
Federal Estate Tax US		
The portfolio of stock held a NRA is US situs asset held at the date of death and this therefore subject to Federal estate tax		
Federal estate tax (USD) If taxable estate (which is assumed to be the MV of the portfolio) is over USD 1 000 000 then USD 324 800 + (taxable estate less USD 1 000 000) x 40% - USD 13 000 (NRA unified credit against estate tax)	Federal estate taxes in (ZAR) Federal estate tax (USD) x (ZAR/USD exchange rate)	US tax liability on death – before relief As a % of MV of assets at the date of death
USD 142,800 ¹⁵⁶	ZAR 2,042,754	28.6%
USD 311,800	ZAR 4,460,299	31.2%
USD 911,800	ZAR 13,043,299	36.5%
USD 1,911,800	ZAR 27,348,299	38.2%
USD 3,911,800	ZAR 55,958,299	39.1%
USD 5,911,800	ZAR 84,568,299	39.4%
USD 9,911,800	ZAR 141,788,299	39.6%
USD 19,911,800	ZAR 284,838,299	39.8%
USD 39,911,800	ZAR 570,938,299	39.9%

Relief available				
DTA relief: SA CGT	Unilateral relief: SA CGT	DTA Relief: Estate taxes	Unilateral relief: Estate taxes	Summary of relief: No relief available
The SA-US Income Tax Treaty is not applicable as the deceased was not ordinarily resident in SA nor US resident at the date of death. Article 4 of the treaty does not include SA residents that are residents as a result of physical presence. ¹⁵⁷	No unilateral relief in the form of s6quat (ITA) as no CGT imposed on death in the US and therefore no foreign capital gains tax has been paid.	SA-US IHTT treaty is not applicable as the deceased was not ordinarily resident in SA nor resident in or citizen of the US as required by Article III of the SA/US IHT treaty in order to be able to invoke treaty rights. ¹⁵⁸	Deceased was not ordinarily resident in SA at the date of death, therefore s16 of Estate Duty Act is not applicable.	ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -

¹⁵⁶ As the estate is less than USD 1,000,000 the Federal estate tax is calculated as follows (in accordance with the applicable Federal estate taxes rates in appendix D): USD 70 800 + 34% (USD 500 000 – USD 250 000) – USD 13 000 (NRA unified credit against estate taxes).

¹⁵⁷ Refer to note chapter 4.2.2.2.

¹⁵⁸ Ibid.

Summary of Global Tax Liability							
Total SA Tax Liability before relief (ZAR) (Estate duty plus CGT)	Total SA Tax Liability on death before relief As a % of MV of assets at the date of death	Total US Tax Liability before relief (ZAR) (Federal estate tax)	Total US Tax liability on death before relief As a % of MV of assets at the date of death	Total Global Tax Liability before relief (ZAR) (SA estate duty plus SA CGT plus US Federal Estate Tax)	Total Global Tax Liability before relief As a % of MV of assets at the date of death	Total Global Tax Liability- after relief (ZAR)	Total Global Tax Liability- after relief As a % of MV of assets at the date of death
ZAR 953,776	13.3%	ZAR 2,042,754	28.6%	ZAR 2,996,530	41.9%	ZAR 2,996,530	41.9%
ZAR 1,907,552	13.3%	ZAR 4,460,299	31.2%	ZAR 6,367,851	44.5%	ZAR 6,367,851	44.5%
ZAR 4,768,880	13.3%	ZAR 13,043,299	36.5%	ZAR 17,812,179	49.8%	ZAR 17,812,179	49.8%
ZAR 9,537,760	13.3%	ZAR 27,348,299	38.2%	ZAR 36,886,059	51.6%	ZAR 36,886,059	51.6%
ZAR 19,075,519	13.3%	ZAR 55,958,299	39.1%	ZAR 75,033,818	52.5%	ZAR 75,033,818	52.5%
ZAR 28,613,279	13.3%	ZAR 84,568,299	39.4%	ZAR 113,181,578	52.7%	ZAR 113,181,578	52.7%
ZAR 47,688,798	13.3%	ZAR 141,788,299	39.6%	ZAR 189,477,097	53.0%	ZAR 189,477,097	53.0%
ZAR 95,377,597	13.3%	ZAR 284,838,299	39.8%	ZAR 380,215,896	53.2%	ZAR 380,215,896	53.2%
ZAR 190,755,194	13.3%	ZAR 570,938,299	39.9%	ZAR 761,693,493	53.2%	ZAR 761,693,493	53.2%

Example 3: Deceased individual is ordinarily resident in SA and is a resident in or a citizen of the US at the date of death

The following tax liabilities arise for an individual who was ordinarily resident in SA at the date of death and either a resident in or citizen of the US at the date of death:

- SA estate duty on worldwide assets which would include the portfolio of US listed stocks;
- SA CGT (income tax on worldwide income and gains, specifically imposed in terms of s9HA of income tax act which resolves that a deemed disposal of assets occurs for CGT purposes at the date of death); and
- US Federal estate tax on worldwide assets (as a result of residency/citizenship).

Unilateral relief from foreign estate taxes can be claimed in terms of s16 of the Estate Duty Act as the deceased is ordinarily resident and the asset has foreign situs. The deceased is also a resident for US Federal tax purposes, however, no relief from foreign estate taxes (which in this instance is SA estate duty can be claimed) as the asset (the US portfolio of list stock) is a US situs asset and not a foreign asset.¹⁵⁹ Bilateral relief can be claimed in accordance with Article V (3)(a) of the SA-US IHTT, the treaty states that as the US stock portfolio is situated in the US, SA must grant credit relief (limited to the actual SA estate duty imposed on the asset).¹⁶⁰

Once again, there is no unilateral relief from CGT in terms of s6quat (ITA). Bilateral relief from CGT, depends, however, on residency in terms of the tie breaker in article 4 of the US/SA income tax act. Where individuals are found to be resident in SA, SA has sole taxing rights to CGT on deemed disposal imposed on death, however, if an individual is found to be resident in the US per the tie breaker clause in article 4, then the US will have sole taxing rights on capital gains and SA will not be able to impose CGT on death. As the assumption has been made that the tie breaker rules determine that the deceased is an SA resident. There is no bilateral relief from CGT.

In conclusion, after applying the available relief, individuals in this example will be subject to US Federal estate taxes and SA CGT. For the given scenario, such taxes range from

¹⁵⁹ I.R.C. op cit note 42 §2014(a).

¹⁶⁰ Refer to chapter 4.2.2.1.

20.9%-48.8% of the MV of assets held at the date of death, depending on the size of the portfolio.

The impact/effect of the large US unified credit against estate tax (which is applicable as a result of US residency/citizenship) on the total global tax liability is noteworthy, the total taxes in the given scenario range from 20.9%-48.8% (in example 3 where the larger unified credit is applicable) compared to a range of 41.9%-53.2% (as demonstrated in example 1 and 2 where the standard NRA unified credit is applicable). Application of the larger US unified credit also increases the amount of SA estate duty payable to the South African government, this is because it increases the instances where SA estate duty imposed exceeds US Federal estate taxes (and thus there are increased instances where the credit against SA estate duty is limited to the Federal estate tax payable, resulting in higher SA estate duty being imposed and collected).

Assumed MV of US portfolio at the date of death (USD)		SA Taxes due on death				
		Capital Gains Tax South Africa Per s9HA deemed disposal on death at MV Deceased was resident in SA at the date of death therefore taxed on worldwide gains				
USD	ZAR MV of portfolio at date of death (USD) x (ZAR/USD exchange rate at the date of death)	Base cost of asset (USD) Portfolio value at the date of death (USD)/ (current value of a share) x (cost of a share)	Gain (USD) MV of portfolio at the date of death (USD) (s9HA) – base cost of portfolio (USD)	Gain (ZAR) Gain in USD x (ZAR/USD spot rate at the date of death) = gain (ZAR)	CGT Gain (ZAR) x 18% (CGT rate)	CGT As a % of MV of total assets at date of death
USD 500,000	ZAR 7,152,500	USD 129,587	USD 370,413	ZAR 5,298,755	ZAR 953,776	13.3%
USD 1,000,000	ZAR 14,305,000	USD 259,174	USD 740,826	ZAR 10,597,511	ZAR 1,907,552	13.3%
USD 2,500,000	ZAR 35,762,500	USD 647,936	USD 1,852,064	ZAR 26,493,777	ZAR 4,768,880	13.3%
USD 5,000,000	ZAR 71,525,000	USD 1,295,872	USD 3,704,128	ZAR 52,987,554	ZAR 9,537,760	13.3%
USD 10,000,000	ZAR 143,050,000	USD 2,591,744	USD 7,408,256	ZAR 105,975,108	ZAR 19,075,519	13.3%
USD 15,000,000	ZAR 214,575,000	USD 3,887,615	USD 11,112,385	ZAR 158,962,661	ZAR 28,613,279	13.3%
USD 25,000,000	ZAR 357,625,000	USD 6,479,359	USD 18,520,641	ZAR 264,937,769	ZAR 47,688,798	13.3%
USD 50,000,000	ZAR 715,250,000	USD 12,958,718	USD 37,041,282	ZAR 529,875,538	ZAR 95,377,597	13.3%
USD 100,000,000	ZAR 1,430,500,000	USD 25,917,436	USD 74,082,564	ZAR 1,059,751,076	ZAR 190,755,193.69	13.3%

SA Taxes due on death (continued)		
Estate Duty South Africa		
Deceased was ordinarily resident in SA therefore subject to Estate Duty on worldwide property and deemed property.		
Dutiable amount of the estate MV of assets less CGT (S4(b) ETA) - 3 500 000 (s4A ETA)	Estate duty liability IF (dutiable amount of the estate is less than ZAR 30 000 000 then Estate duty is dutiable amount of the estate x 20%, but if the dutiable amount of the estate is greater than ZAR30 000 000 then the Estate Duty liability is ZAR 30 000 000 x 20% + (dutiable amount of the estate - ZAR 30 000 000) x 25%)	Estate duty As a % of MV of asset at date of death
ZAR 2,698,724	ZAR 539,745	7.5%
ZAR 8,897,448	ZAR 1,779,490	12.4%
ZAR 27,493,620	ZAR 5,498,724	15.4%
ZAR 58,487,240	ZAR 13,121,810	18.3%
ZAR 120,474,481	ZAR 28,618,620	20.0%
ZAR 182,461,721	ZAR 44,115,430	20.6%
ZAR 306,436,202	ZAR 75,109,050	21.0%
ZAR 616,372,403	ZAR 152,593,101	21.3%
ZAR 1,236,244,806	ZAR 307,561,202	21.5%

US Taxes due on death		
Federal Estate Tax US		
Residents for estate taxes (citizens or domiciliary) are taxed on their worldwide assets held at the date of death		
Federal estate tax (USD) If taxable estate (which is assumed to be the MV of the portfolio) is over USD 11 400 000 then USD 324 800 + (taxable estate less USD 1 000 000) x 40% - (USD324 800 + (USD 11 400 000 - USD 1 000 000) x 40%) (unified credit against estate tax), otherwise the estate tax is zero as the estate is less than the unified credit against estate tax	Federal estate taxes in (ZAR)	US tax liability on death – before relief As a % of MV of assets at the date of death
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD 1,440,000	ZAR 20,599,200	9.6%
USD 5,440,000	ZAR 77,819,200	21.8%
USD 15,440,000	ZAR 220,869,200	30.9%
USD 35,440,000	ZAR 506,969,200	35.4%

Relief available				
DTA relief: SA CGT	Unilateral relief: SA CGT	DTA Relief: Estate taxes	Unilateral relief: Estate taxes	Summary of relief: Estate Duty relief Unilateral relief and DTA relief is the same, either (but not both) forms of relief can be evoked ¹⁶¹
Relief will depend on the tie breaker rules in the SA-US ITT, where an individual is found to be a SA resident in terms of the tie breaker rules in article 4, SA will have taxing rights for the capital gains on death (this is the assumption made in this example). Where an individual is found to be a resident in the US per article 4 of the treaty, the US will have sole taxing rights and SA may not impose CGT.	No Unilateral relief as no CGT imposed in the US and thus no s6quat deduction (ITA) as no foreign tax has been paid on income or capital gains.	In accordance with Article V (3)(a), as the US stock portfolio is situated in the US per article III (2)(d), SA will have to grant a credit for any US Federal estate taxes imposed on portfolio in instances where the deceased was both domiciled in the US and ordinarily resident in SA at the date of death. Once again this is limited to the SA estate duty imposed.	As the individual is ordinarily resident in SA, relief for foreign estate taxes paid can be claimed under s16 of the Estate Duty Act.	-ZAR 0 ¹⁶²
				-ZAR 0
				-ZAR 0
				-ZAR 0
				-ZAR 20,599,200 ¹⁶³
				-ZAR 75,109,050 ¹⁶⁴
				-ZAR 152,593,101
				-ZAR 307,561,202

Summary of Global Tax Liability							
Total SA Tax Liability before relief (ZAR) (Estate duty plus CGT)	Total SA Tax Liability on death before relief As a % of MV of assets at the date of death	Total US Tax Liability before relief (ZAR) (Federal estate tax)	Total US Tax liability on death before relief As a % of MV of assets at the date of death	Total Global Tax Liability before relief (ZAR) (SA estate duty plus SA CGT plus US Federal Estate Tax)	Total Global Tax Liability before relief As a % of MV of assets at the date of death	Total Global Tax Liability- after relief (ZAR)	Total Global Tax Liability- after relief As a % of MV of assets at the date of death
ZAR 1,493,521	20.9%	ZAR -	0.0%	ZAR 1,493,521	20.9%	ZAR 1,493,521	20.9%
ZAR 3,687,042	25.8%	ZAR -	0.0%	ZAR 3,687,042	25.8%	ZAR 3,687,042	25.8%
ZAR 10,267,604	28.7%	ZAR -	0.0%	ZAR 10,267,604	28.7%	ZAR 10,267,604	28.7%
ZAR 22,659,570	31.7%	ZAR -	0.0%	ZAR 22,659,570	31.7%	ZAR 22,659,570	31.7%
ZAR 47,694,140	33.3%	ZAR -	0.0%	ZAR 47,694,140	33.3%	ZAR 47,694,140	33.3%
ZAR 72,728,709	33.9%	ZAR 20,599,200	9.6%	ZAR 93,327,909	43.5%	ZAR 113,927,109	53.1%
ZAR 122,797,849	34.3%	ZAR 77,819,200	21.8%	ZAR 200,617,049	56.1%	ZAR 125,507,998	35.1%
ZAR 247,970,698	34.7%	ZAR 220,869,200	30.9%	ZAR 468,839,898	65.5%	ZAR 316,246,797	44.2%
ZAR 498,316,395	34.8%	ZAR 506,969,200	35.4%	ZAR 1,005,285,595	70.3%	ZAR 697,724,394	48.8%

¹⁶¹ Relief granted for Federal estate taxes is limited to the lesser of the SA estate duty and the Federal estate tax.

¹⁶² No Federal estate tax charged therefore credit is zero.

¹⁶³ Estate duty is greater than Federal estate tax therefore the credit is limited to the Federal estate taxes.

¹⁶⁴ Estate duty is less than Federal estate tax therefore the credit is limited to the estate duty on the asset.

Example 4: Deceased individual is a resident in SA based on physical presence and is a resident in or a citizen of the US at the date of death

The following tax liabilities arise for an individual who was not ordinarily resident in SA at the date of death but was resident in SA as a result of physical presence and who was a citizen or resident of the US at the date of death:

- No SA estate duty due on the portfolio of US listed stock as the deceased individual is not a resident in SA for estate duty purposes (not ordinarily resident in SA at the date of death), therefore no estate duty is imposed by SA on the portfolio of US listed stock which is not an SA situs asset;
- SA CGT is imposed, as the deceased is a resident for income tax purposes, income tax, including CGT is imposed on worldwide income and gains in terms of s9HA; and
- US Federal estate taxes imposed on worldwide assets (due to US residency).

For estate taxes, no unilateral relief will be granted from the US as the asset is a US situs asset, in addition no SA estate duty is actually imposed.¹⁶⁵ The deceased is entitled to invoke treaty rights under the SA-US IHTT as deceased is a US resident citizen. In terms of Article V (2)(b) of the IHT, the US as the state of residence would be required to grant relief, however, as SA does not impose estate duty there would be no credit relief available as such relief is limited to the lower of the US Federal estate tax and the SA estate duty imposed.¹⁶⁶

The US does not impose CGT and thus no relief under s6quat (ITA) can be claimed.

In terms of bilateral relief, the deceased is likely to be determined as a resident in the US in terms of article 4 of the SA-US ITT as the treaty does not specifically refer to SA residents who are resident by virtue of physical presence in the republic but rather refers to ordinarily resident. Therefore, the US will have sole taxing rights with regards to CGT in terms of article 13(5) of the applicable treaty and the deceased would be able to invoke bilateral treaty relief to ensure that SA cannot impose CGT on such gains.

In effect, after taking into account the applicable treaties and all available relief, only Federal estate taxes will be due for individuals in this scenario.

¹⁶⁵ I.R.C. op cit note 42 §2014(a).

¹⁶⁶ Refer to chapter 4.2.2.2.

Assumed MV of US portfolio at the date of death (USD)		SA Taxes due on death *				
		Capital Gains Tax South Africa Per s9HA deemed disposal on death at MV Deceased was resident in SA at the date of death therefore taxed on worldwide gains				
USD	ZAR MV of portfolio at date of death (USD) x (ZAR/USD exchange rate at the date of death)	Base cost of asset (USD) Portfolio value at the date of death (USD)/ (current value of a share) x (cost of a share)	Gain (USD) MV of portfolio at the date of death (USD) (s9HA) – base cost of portfolio (USD)	Gain (ZAR) Gain in USD x (ZAR/USD spot rate at the date of death) = gain (ZAR)	CGT Gain (ZAR) x 18% (CGT rate)	CGT As a % of MV of total assets at date of death.
USD 500,000	ZAR 7,152,500	USD 129,587	USD 370,413	ZAR 5,298,755	ZAR 953,776	13.3%
USD 1,000,000	ZAR 14,305,000	USD 259,174	USD 740,826	ZAR 10,597,511	ZAR 1,907,552	13.3%
USD 2,500,000	ZAR 35,762,500	USD 647,936	USD 1,852,064	ZAR 26,493,777	ZAR 4,768,880	13.3%
USD 5,000,000	ZAR 71,525,000	USD 1,295,872	USD 3,704,128	ZAR 52,987,554	ZAR 9,537,760	13.3%
USD 10,000,000	ZAR 143,050,000	USD 2,591,744	USD 7,408,256	ZAR 105,975,108	ZAR 19,075,519	13.3%
USD 15,000,000	ZAR 214,575,000	USD 3,887,615	USD 11,112,385	ZAR 158,962,661	ZAR 28,613,279	13.3%
USD 25,000,000	ZAR 357,625,000	USD 6,479,359	USD 18,520,641	ZAR 264,937,769	ZAR 47,688,798	13.3%
USD 50,000,000	ZAR 715,250,000	USD 12,958,718	USD 37,041,282	ZAR 529,875,538	ZAR 95,377,597	13.3%
USD 100,000,000	ZAR 1,430,500,000	USD 25,917,436	USD 74,082,564	ZAR 1,059,751,076	ZAR 190,755,194	13.3%

**No estate duty is due as the deceased was not ordinarily resident in SA at the date of death and therefore not a resident for estate duty purposes. The SA estates of non-residents only include SA situs assets, as the US stock portfolio is not a SA situs asset, no SA estate duty is due in this instance. The only SA tax due at the date of death will be CGT.*

US Taxes due on death		
Federal Estate Tax US		
Residents for estate taxes (citizens or domiciliary) are taxed on their worldwide assets held at the date of death		
Federal estate tax (USD) If taxable estate (which is assumed to be the MV of the portfolio) is over USD 11 400 000 then USD 324 800 + (taxable estate less USD 1 000 000) x 40% - (USD324 800 + (USD 11 400 000 - USD 1 000 000) x 40%) (unified credit against estate tax), otherwise the estate tax is zero as the estate is less than the unified credit against estate tax.	Federal estate taxes in (ZAR)	US tax liability on death – before relief As a % of MV of assets at the date of death
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD 1,440,000	ZAR 20,599,200	9.6%
USD 5,440,000	ZAR 77,819,200	21.8%
USD 15,440,000	ZAR 220,869,200	30.9%
USD 35,440,000	ZAR 506,969,200	35.4%

Relief available				
DTA relief: SA CGT	Unilateral relief: SA CGT	DTA Relief: Estate taxes	Unilateral relief: Estate taxes	Summary of relief: No SA CGT per article 4 and article 13(5) of the SA- US Income Tax Treaty
Per article 4 of the DTA, such a person will be able to invoke the treaty as a US resident and not as an SA resident as article 4 refers to SA individuals that are ordinarily resident and as such, per article 13(5), the US will have sole taxing rights to any capital gains including those that arise on death. Therefore, in terms of the treaty, SA does not have taxing rights to tax such gains.	No Unilateral relief as no CGT imposed in the US and thus no s6quat deduction (ITA) as no foreign tax has been paid on income or capital gains.	Once again, the treaty can be invoked by the individual as a resident of the US and not of SA as the treaty refers to individuals that are ordinarily resident in SA. As no Estate duty is imposed in SA, there would be no credit relief granted. ¹⁶⁷	As SA does not impose Estate duty, no unilateral relief is granted in this regard. Further s16 of the Estate Duty Act is only applicable to deceased estates of individuals who were ordinarily resident at the date of death.	-ZAR 953,776
				-ZAR 1,907,552
				-ZAR 4,768,880
				-ZAR 9,537,760
				-ZAR 19,075,519
				-ZAR 28,613,279
				-ZAR 47,688,798
				-ZAR 95,377,597
				-ZAR 190,755,194

Summary of Global Tax Liability							
Total SA Tax Liability before relief (ZAR)	Total SA Tax Liability on death before relief	Total US Tax Liability before relief (ZAR)	Total US Tax liability on death before relief	Total Global Tax Liability before relief (ZAR)	Total Global Tax Liability before relief	Total Global Tax Liability- after relief (ZAR)	Total Global Tax Liability- after relief
(Estate duty plus CGT)	As a % of MV of assets at the date of death	(Federal estate tax)	As a % of MV of assets at the date of death	(SA estate duty plus SA CGT plus US Federal Estate Tax)	As a % of MV of assets at the date of death.		As a % of MV of assets at the date of death
ZAR 953,776	13.3%	ZAR -	0.0%	ZAR 953,776	13.3%	ZAR -	0.0%
ZAR 1,907,552	13.3%	ZAR -	0.0%	ZAR 1,907,552	13.3%	ZAR -	0.0%
ZAR 4,768,880	13.3%	ZAR -	0.0%	ZAR 4,768,880	13.3%	ZAR -	0.0%
ZAR 9,537,760	13.3%	ZAR -	0.0%	ZAR 9,537,760	13.3%	ZAR -	0.0%
ZAR 19,075,519	13.3%	ZAR -	0.0%	ZAR 19,075,519	13.3%	ZAR -	0.0%
ZAR 28,613,279	13.3%	ZAR 20,599,200	9.6%	ZAR 49,212,479	22.9%	ZAR 20,599,200	9.6%
ZAR 47,688,798	13.3%	ZAR 77,819,200	21.8%	ZAR 125,507,998	35.1%	ZAR 77,819,200	21.8%
ZAR 95,377,597	13.3%	ZAR 220,869,200	30.9%	ZAR 316,246,797	44.2%	ZAR 220,869,200	30.9%
ZAR 190,755,194	13.3%	ZAR 506,969,200	35.4%	ZAR 697,724,394	48.8%	ZAR 506,969,200	35.4%

¹⁶⁷ Refer to chapter 4.2.2.2.

Example 5: Deceased individual is a resident in or citizen of the US but not resident in SA at the date of death

The following global tax liabilities are due in this scenario:

- Federal estate taxes are due (citizen of/resident in US);
- No SA estate duty as the taxpayer is not ordinarily resident in South Africa and the asset is not an SA situs Asset; and
- No SA CGT as the taxpayer is not resident in SA and the asset is not located in SA.

A US citizen who holds US situs assets (US stock portfolio) is subject to US Federal estate tax on the portfolio of 0%-35.4% of the MV of the asset at the date of death depending on the value/size of the portfolio (limited to USD 100 000 000).¹⁶⁸

This example was included to illustrate that SA resident investors are not only subject to additional SA tax on US investments (due to CGT imposed by SA on death), but that the Federal estate taxes imposed on the NRA investor are significantly higher than such taxes imposed on a US investor holding the same portfolio. This is because of the large discrepancy in the unified credit against estate taxes available to US resident or citizens and the unified credit against estate taxes available to NRAs under the US I.R.C. While this example may slightly exaggerate the impact of this credit, as it does not consider the US estate of a US resident or citizen (against which some of the unified credit will be applied), the vast difference in credits still has a significant impact on the net rate of US Federal estate tax imposed on a NRA investor when compared to a US citizen/US resident investor and results in NRA investors paying substantially higher rates of Federal estate taxes on US investments than US residents/US citizens who own the same assets at the date of death.

¹⁶⁸ Federal estate taxes reach rates of approximately 40% of the MV of assets at the date of death as the value of assets approaches USD 1 000 000 000.

Assumed MV of US portfolio at the date of death (USD)		SA Taxes due on death						
		Capital Gains Tax Per s9HA deemed disposal on death at MV. Deceased was not a resident in SA at the date of death therefore no CGT on disposal of foreign situs assets		Estate Duty Deceased was not ordinarily resident in SA therefore will not be subject to Estate Duty on the US stock portfolio (foreign situs asset)			Total tax liability	
USD	ZAR MV of portfolio at date of death (USD) x (ZAR/USD exchange rate at the date of death)	CGT	CGT As a % of MV of asset at date of death	Dutiable amount of the estate MV of assets less CGT (S4(b) ETA) - 3 500 000 (s4A ETA)	Estate Duty liability	Estate Duty As a % of MV of asset at date of death	Total SA tax liability ZAR - before relief (Estate Duty plus CGT)	Total SA tax liability on death As a % of MV of assets at the date of death - before relief
USD 500,000	ZAR 7,152,500	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 1,000,000	ZAR 14,305,000	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 2,500,000	ZAR 35,762,500	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 5,000,000	ZAR 71,525,000	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 10,000,000	ZAR 143,050,000	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 15,000,000	ZAR 214,575,000	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 25,000,000	ZAR 357,625,000	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 50,000,000	ZAR 715,250,000	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%
USD 100,000,000	ZAR 1,430,500,000	ZAR -	0.0%	ZAR -	ZAR -	0.0%	ZAR -	0.0%

Federal Estate Tax US Residents for estate taxes (citizens or domiciliary) are taxed on their worldwide assets held at the date of death.		
Federal estate tax (USD) If taxable estate (which is assumed to be the MV of the portfolio) is over USD 11 400 000 then USD 324 800 + (taxable estate less USD 1 000 000) x 40% - (USD324 800 + (USD 11 400 000 - USD 1 000 000) x 40%) (unified credit against estate tax), otherwise the estate tax is zero as the estate is less than the unified credit against estate tax.	Federal estate taxes in (ZAR)	US tax liability on death – before relief As a % of MV of assets at the date of death
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD -	ZAR -	0.0%
USD 1,440,000	ZAR 20,599,200	9.6%
USD 5,440,000	ZAR 77,819,200	21.8%
USD 15,440,000	ZAR 220,869,200	30.9%
USD 35,440,000	ZAR 506,969,200	35.4%

Relief available				
DTA relief: SA CGT	Unilateral relief: SA CGT	DTA Relief: Estate taxes	Unilateral relief: Estate taxes	Summary of relief: No double taxation so no need for relief
No CGT in SA therefore no relief needed.	No CGT in SA therefore no relief needed.	No estate duty in SA therefore no relief needed.	No estate duty in SA, therefore no relief needed.	ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -
				ZAR -

Summary of Global Tax Liability							
Total SA Tax Liability before relief (ZAR) (Estate duty plus CGT)	Total SA Tax Liability on death before relief As a % of MV of assets at the date of death	Total US Tax Liability before relief (ZAR) (Federal estate tax)	Total US Tax liability on death before relief As a % of MV of assets at the date of death	Total Global Tax Liability before relief (ZAR) (SA estate duty plus SA CGT plus US Federal Estate Tax)	Total Global Tax Liability before relief As a % of MV of assets at the date of death.	Total Global Tax Liability- after relief (ZAR)	Total Global Tax Liability- after relief As a % of MV of assets at the date of death
ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%
ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%
ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%
ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%
ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%	ZAR -	0.0%
ZAR -	0.0%	ZAR 20,599,200	9.6%	ZAR 20,599,200	9.6%	ZAR 20,599,200	9.6%
ZAR -	0.0%	ZAR 77,819,200	21.8%	ZAR 77,819,200	21.8%	ZAR 77,819,200	21.8%
ZAR -	0.0%	ZAR 220,869,200	30.9%	ZAR 220,869,200	30.9%	ZAR 220,869,200	30.9%
ZAR -	0.0%	ZAR 506,969,200	35.4%	ZAR 506,969,200	35.4%	ZAR 506,969,200	35.4%

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