

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

REPORTABLE
CASE NO: 13446/2011

In the matter between:

**THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICE**

Applicant

and

WERNER VAN KETS

Defendant

CORAM	:	D M DAVIS J
JUDGMENT BY	:	DAVIS J
FOR THE PLAINTIFFS	:	ADV SHOLTO-DOUGLAS (SC) ADV N BAWA
INSTRUCTED BY	:	STATE ATTORNEY
FOR THE RESPONDENTS	:	ADV T S EMSLIE (SC)
INSTRUCTED BY	:	JARVIS PUDNEY ATTORNEYS
DATE OF HEARINGS	:	22 AUGUST 2011
DATE OF JUDGMENT	:	22 NOVEMBER 2011

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JUDGMENT: 22 November 2011

DAVIS J:

Introduction

[1] Applicant seeks orders declaring that section 74A and 74B of the Income Tax Act 58 of 1962 ('the Act') may be invoked by applicant for the purpose of obtaining information from respondent and any other person in the Republic of South Africa in order to comply with its obligations under a double taxation agreement or treaty which has been concluded and which contains a provision for the exchange of information.

[2] Applicant received a letter on 16 March 2009 which contained a request from the Australian Tax Office ('ATO') for information in terms of the double tax treaty ('DTA') between South Africa and Australia. This request and subsequent requests were made by the ATO pursuant to article 25 of the applicable DTA.

[3] The request related to an investigation of the income tax affairs of a Mr Duncan Paul Saville, in particular his possible offshore wealth and his involvement with a Labuan, Malaysia entity known as Republic Life Common Fund (L) Limited ('RLCF') which transferred approximately 62 million Australian Dollars into Australia during the period 2004 to 2007. There appears to be no dispute with regard to these facts and the subsequent request which had been made by the ATO. The information which was provided to applicant by the ATO indicated that the respondent resided in South Africa and was a director of RLCF, a fact which has been confirmed by respondent.

[4] It also does not appear to be disputed that respondent possesses information which ATO has requested from applicant and that such information cannot be obtained, in that respondent has refused to disclose this information on the basis that it is confidential, that he was not so authorised, nor has he permission to so disclose.

[5] The crisp issue for determination is whether the words 'any taxpayer' which are employed in section 74A and 74B of the Act can be interpreted to include a

person who is not a taxpayer as defined in section 1, but who, in terms of the DTA, has been identified as the person who can provide the information pursuant to the request which, in this case, has been initiated by the ATO.

The applicable legislation

[6] Sections 74A and 74B, to the extent that they are relevant to this dispute, provide as follows:

“74 A The Commissioner ... may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing) documents or things as the Commissioner ... may require.

74 B The Commissioner ... may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person, with reasonable prior notice, to furnish, produce or make available any such information, documents of things as the Commissioner ... may require to inspect, audit, examine or obtain.”

[7] The definition of taxpayer in section 1 is as follows:

“‘taxpayer’ means any person chargeable with any tax leviable under this Act and includes every person required by this Act to furnish any return.”

[8] Respondent has adopted the attitude that there is nothing in the context of either section 74A or section 74B which suggests that the word 'taxpayer' in the phrase 'any taxpayer' as employed in these two sections should be given a meaning, other than the defined meaning, that is a person who pays taxes. In other words, respondent's case is that the words 'any taxpayer', as employed in these two sections, refer to persons who are liable for South African income tax or other taxes levied in terms of the Act or are required to furnish any return relating to South African income tax or other taxes levied in terms of the Act.

[9] By contrast, applicant's case is that sections 74A and 74B are the means by which applicant invokes the power to obtain information requested by foreign tax authorities, pursuant to agreements that South Africa has concluded and, in terms of which, it is obliged to provide this information. In many cases, information would not relate to a South African taxpayer. Thus, on the approach adopted by respondent, applicant contends that it would then have no legislative mechanism at its disposal to obtain the necessary information within its own jurisdiction to meet the request from foreign authorities, even though the information found in South Africa, notwithstanding that it relates to foreign taxpayers. In short, applicant contends that sections 74A and 74B can be invoked for the purpose of the administration of the Act and, to that end, they include the power to obtain information for the purposes of meeting South Africa's obligation under the applicable DTA.

[10] Expressed differently, respondent's case is that section 74A and section 74B only apply to information which is possessed by a taxpayer as defined in terms of section 1. On this basis, applicant would have no legal means at its disposal to provide any information to foreign authorities, pursuant to a request made for information so long as it does not relate to a South African taxpayer. To answer this dispute, it is necessary to examine the law relating to the DTA.

The significance of the Double Tax Agreement with Australia

[11] Section 108(1) of the Act provides that the national executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government with the view to the prevention, mitigation of discontinuance of the levying, under the laws of South Africa and of such other country, of tax in respect of the same income, profits or gains, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration and the collection of taxes under the laws of South Africa and of such other country.

[12] Section 108(2) of the Act provides that, after the approval by Parliament of any such agreement, as contemplated in s 231 of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution'), the arrangement thereby shall be notified by publication in the Gazette and the arrangement so notified shall thereupon have effect as if enacted in the Act.

[13] The agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income between South Africa and Australia was signed on 1 July 1999 and came into force on 21 December 1999. See Government Notice 1538 of 1999 published in the Government Gazette 20761 of 24 December 1999. See also protocol amending this DTA was entered into falls on 12 November 2008. See Government Notice 1368 published in Government Gazette 31721 of 23 December 2008.

[14] The South African legal system has followed a dualist approach to international law. For this reason, s231(2) of the Constitution provides that an international agreement binds the Republic only after it has been approved by a resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3), being an agreement of a technical, administrative or executive nature or an agreement which does not require ratification or accession.

[15] Section 231(4) of the Constitution provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Accordingly, the majority of the Constitutional Court in **Glenister v President of the Republic of South Africa** 2011 (3) SA 347 (CC) at para 181 noted:

“The fact that s 231(4) expressly creates a path for the domestication of international agreements may be an indication that s 231(2) cannot without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.”

[16] The effect of s 108 is thus to ensure that domestic statutory obligations are created. These obligations, within the context of this dispute, are set out in Article 25 of the DTA, headed ‘Exchange of Information’. The clause provides as follows:

“(1) The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement or of the domestic law of the Contracting States concerning taxes to which the Agreement applies insofar as taxation under that law is not contrary to the Agreement. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which the Agreement applies. Those persons or authorities shall use the information only for those purposes. They may

disclose the information in public court proceedings or in judicial decisions.

(2) *In no case shall the provisions of paragraph (1) be construed so as to impose on a Contracting State the obligation:*

- (a) *to carry out administrative measures at variance with the law or the administrative practice of that or of the other Contracting State; or*
- (b) *to supply information which is not obtainable under the law or in the normal course of the administration of that or of the other Contracting State; or*
- (c) *to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or to supply information the disclosure of which would be contrary to public policy.”*

[17] The article was altered as a result of the Protocol. It now reads as follows:

“(1) *The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic law concerning taxes referred to in Article 2, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.*

- (2) *Any information received under paragraph (1) by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to, the taxes referred to in paragraph 4 of Article 2, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.*
- (3) *In no case the provisions of paragraphs (1) and (2) be construed so as to impose on a Contracting State the obligation:*
- (a) *to carry out administrative measures at variance with the law and the administrative practices of that or of the other Contracting State; or*
 - (b) *to supply information which is not obtainable by the competent authority under the law or in the normal course of the administration of that other Contracting State; or*
 - (c) *to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.*
4. *If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though*

that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph (3), but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. *In no case shall the provisions of paragraph (3) be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interest in a person."*

[18] The key question for determination thus turns on the legal status that must be given to this amended clause of the DTA; that is what is the reach of these obligations and how do they fit with domestic law, in particular the relevant provisions of the Act. On the basis of the provisions of s 231 and, as is apparent from the analysis provided by the Constitutional Court in **Glenister**, *supra*, the Act has chosen one of the three principal methods to transform treaties into municipal law; in this case an enabling Act of Parliament which gives the executive the power to bring a treaty into effect in municipal law by means of a proclamation or notice in the Government Gazette. See also CJR Dugard International Law: A South African perspective (3ed) at 61.

[19] The question therefore for decision can be refined to the following: whether the provisions of Article 25, which provides that 'the competent authorities of the Contractual States shall exchange such information as is foreseeably relevant for carrying out the provisions of the Agreement or to the administration and enforcement to the domestic law' can be enforced in terms of South African law. In other words, as the applicant submits, absent the provisions of s 74A and 74B there would be no legal basis by which applicant would have the legal means to acquire the information which is 'foreseeably relevant' for the administration or enforcement of Australian domestic tax law.

[20] Mr Emslie, who appeared on behalf of the respondent, submitted that ss 74A and 74B can only relate to a taxpayer who is charged with any tax which is leviable under the Act. Thus, the arrangement referred to in Article 25 expressly makes itself subject to the Commissioner's power under the Act which would include s 74A and s 74B read together with the definition of taxpayer in s 1. In Mr Emslie view, s 108(2) of the Act does not import the wording of the DTA into the Act but merely 'arrangements' which would be subject to the express wording of the Act.

[21] In other words, the respondent's argument is that this court must decide what is permitted in terms of s 74A and s 74B, absent any provision of the DTA. As the DTA expressly makes itself subject to what is permitted in terms of s 74A and s 74B, applicant can only supply information which it may obtain under these sections, the scope of which is set in the express language chosen by the legislature.

[22] Accordingly, the information which the ATO requested from applicant cannot be procured, notwithstanding a request in terms of the DTA, as it is impermissible for the applicant to employ s 74A and s 74B, which are the source of the only powers available to respondent, to obtain this information and pass it on to the ATO.

[23] The essential dispute therefore hones down further to whether the provisions of the DTA in general and Article 25 thereof in particular broaden the scope of s 74A and s 74B beyond the strict meaning of the definition of taxpayer in s 1.

[24] Olivier and Honiball International Tax, A South African Perspective (2011) at 305 make the following pertinent observations regarding DTA's:

"It must be argued that, as the main object of a treaty in general is to avoid the same income being taxed twice (see discussion below and in Chapter 9), any domestic legislation (including legislation promulgated after the treaty took effect) which has the effect that the same income is taxed twice, will be subordinate to the treaty provisions. As a result specific legislation to this effect is unnecessary. The first support for this view is found in the following phrase within s 108:

'... with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Republic and of such other country, of tax in respect of the same income, profits or gains'

The wording of the section makes it clear that the aim of tax treaties is to prevent economic and juridical double taxation, although tax treaties generally only eliminate juridical double taxation.

In terms of this view, even if tax is payable in respect of particular income, profits or gains under South African domestic law, if in terms of the provisions of a treaty the relevant tax is not payable in South Africa, or only part of that tax is payable, then the treaty automatically takes precedence and overrides the relevant domestic law in terms of which the tax is payable. This view holds that s 108(1) presupposes a liability for tax under the laws of South African and provides for the conclusion of a treaty to prevent, mitigate or discontinue that liability. Under this view it would be absurd to interpret s 108 as meaning that a treaty cannot or does not apply where the Income Tax Act, as such an interpretation would have the result that provision in a treaty providing for the prevention, mitigation or discontinuance of a liability for tax would be meaningless and would serve no purpose. This view is substantially based on the Australian court case of Lamesa Holdings BV 1997 35 ATR 239, 97 ATC 4229 in which it was held that tax treaties by their nature are unlikely other international agreements because they also confer rights and obligations on parties other than those to the double tax agreement (ie the taxpayers). When enacted as part of domestic law they therefore automatically override domestic law.”

[25] It would thus appear as if the DTA provisions become part of domestic income tax laws. Given the manner in which the DTA stands to be treated in terms of s231

of the Constitution, its provisions must rank at least, equally with domestic law, including the Act. For this reason, the provisions of the DTA and the Act, should, if at all possible, be reconciled and read as one coherent whole.

[26] It follows that, if ss 74A and 74B stand to be interpreted on the basis of respondent's argument, there would be an inconsistency, to the extent that applicant would not be able to comply with the request from its contracting partner, in this case the ATO. The definition of taxpayer in s 1 would represent an insurmountable obstacle to compliance. However, if the DTA is interpreted as part of domestic tax legislation, then it behoves this court to interpret ss 74A and s 74B so as to render them compatible with this very provisions of the DTA and, in particular, Article 25 thereof.

[27] The express purpose of the DTA is set out in the header to the Australian/South African DTA, namely an agreement between the government of the Republic of South Africa and the government of Australia for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. Article 25 clearly provides that the competent authority of either Contracting State may request information from the other Contracting State in order that it may impose any of the taxes *'to which the agreement applies insofar as the taxation under that law is not contrary to the agreement'*. In other words, Article 2 covers the taxes to which the agreement shall apply, including, in the case of Australia, income tax, the resource

rent tax in respect of offshore projects relating to exploration for or exploitation of petroleum resources, imposed under the federal law of Australia.

[28] The purpose of the exchange of information clause is to ensure, for example, that a resident of Australia does not escape Australian tax which may be imposed in circumstances where income, profits or gains have accrued to that resident but are from a South African source. Absent an exchange of information, the ATO would be unable or find it extremely difficult to impose the legitimate amount of tax on such income, profits or gain. Within this context, the question arises as to whether the exchange of information provision caters for a third party who may have information with regard to income profits or gains of a resident of Australia in circumstances where the income, profit or gain could be sourced anywhere in the world. In this case, the investigation concerns the income tax affairs of Mr Duncan Saville and in particular the accretion of his offshore wealth.

[29] It would appear that Mr Saville is a taxpayer of Australia. In these circumstances, the question arises as to whether respondent, who on his own version has information regarding the tax affairs of a Australian resident, can be compelled to provide such information pursuant to the exercise by appellant of its powers in terms of sections 74A and 74B of the Act. In my view, once the DTA is read together with the Act, this reading would imply that the word 'taxpayer' should include those taxpayers who do fall within the scope of the Act but fall within the scope of the DTA, which would thus include an Australian resident. Once the

Australian resident, in this case Mr Saville, is considered to be a taxpayer, manifestly the respondent would fall within this section because he would be classified as 'any other person' who would be able to furnish information regarding a taxpayer, in this case Mr Saville.

[30] It was precisely on this basis that the request from the ATO has been generated. In my view, when the DTA is read together with the Act so as to render the one congruent with the other, applicant is entitled to act in terms of sections 74A and 74B. Article 4 of the DTA defines a resident of a Contracting State as 'a resident of that State for the purpose of its tax when read together with sections 74A and 74B, respondent possesses information which is relevant to an Australian taxpayer. Thus applicant is entitled to require another person, in this case respondent, to furnish such relevant information in relation to this particular Australian taxpayer. In this manner, the relevant provisions of the DTA and the Act are then reconciled.

[30] Accordingly, the application must succeed and an order is made in the following terms:

1. Declaring that s 74(A) and 74(B) may be invoked by the applicant for purposes of obtaining information from the respondent and any person in the Republic of South Africa for purposes of complying with its obligations under any double taxation agreement, alternatively, treaty concluded for the exchange of information.

2. Declaring the 'taxpayer' as contained in s 74(A) and 74(B) must be interpreted to be consistent with South Africa's obligations under any double tax agreements for the provision of information, alternatively, treaty concluded for the exchange information.
3. Declaring that South African residents are bound by the provisions of the agreement concluded between South Africa and Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income between South Africa and Australia, as amended by the protocol and in terms of which South African residents are bound to furnish information pursuant to any request in terms thereof.
5. Ordering the respondent to disclose the following information to the applicant for onward transmission to the Australian tax authorities:
 - 5.1 The name of the any Trust of which he is aware that holds any direct or indirect interest and/or any beneficial ownership in a Labuan, Malaysia entity known as Republic Life Common Fund (L) Limited (RLCF);
 - 5.2 The name of the trustee of the said Trust;
 - 5.3 The name of the beneficiaries of the said Trust; and
 - 5.4 The address (residency) of the said Trust for tax purposes.
6. Respondent is ordered to pay the costs of this application.



DAVIS J