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2015 – 2

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It can be found under the category "Tax Collection" (with free access).
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Direct access via this link: https://circabc.europa.eu/w/browse/96117957-aa29-4714-8bca-c45c9ba719a9

Reference recommendation: *EU & Int. Tax Coll. News*

ACTIVITIES

CIAT

In March 2015, CIAT published a working paper, dealing with "Cooperative tax relationship or compliance: current situation in the CIAT member countries of Latin America, the Caribbean, Africa and Asia".

For more information:
http://www.ciat.org/index.php/en/news/archived-news/news/3880-publicacion-dt-02-2015-relacion-o-cumplimiento-cooperativo-tributario-su-realidad-actual-en-paises-miembros-del-ciat-de-america-latina-caribe-africa-y-asia.html

UNITED KINGDOM

Direct recovery of debts

The UK tax authorities (HM Revenue & Customs) have published a briefing explaining how they will recover tax or tax credit debt directly from bank and building society accounts.

This measure will apply to debtors who owe £1,000 or more, subject to specific safeguards. These safeguards should ensure that debtors do not suffer undue hardship once money is taken directly from their accounts and that adequate protection is in place for vulnerable customers. It includes:
- only taking action against those who have established debts, have passed the timetable for appeals, and have repeatedly ignored the authorities' attempts to make contact;
- guaranteeing that every debtor will receive a face-to-face visit from HMRC agents before their debts are considered for recovery through direct recovery;
- always leaving a minimum of £5,000 in the debtor's accounts, so that the authorities do not put a hold on money needed to pay wages, mortgages or essential business or household expenses.

This briefing was published on 5 August 2015:
https://www.gov.uk/government/publications/issue-briefing-direct-recovery-of-debts--2

SPAIN

Greater support for paying tax debts - Payment deferment without guarantees

Taxpayers who present payment deferment or fractionation applications of tax debts up to 30.000 euros will be exempt from providing guarantees for these deferments to be granted, in accordance with a ministerial order that will regulate the new limit for the exemption, situated until now at 18.000 euros.

Thus, a greater number of taxpayers will be able to fulfil their tax obligations more easily.

In recent years the Tax Agency has received, on average, more than 25,000 annual debt deferment or fractionation applications situated between 18.000 euros (the previous limit for the exemption of guarantees) and 30,000 euros (the new limit). Between 2011 and 2014, the amount of deferment applications that are now exempt from providing guarantees in order to be granted totalled more than 2.5 billion euros. The total number of deferments granted from 2011 stand at more than 30.8 billion euros, and of this amount almost 70% has benefited SMEs and self-employed workers.

This improvement in debt payment support will affect all the deferment and fractionation applications that are presented to the Tax Agency, except for the debts generated for the failure to deposit Personal Income Tax withholdings, that still cannot be postponed, except for the confluence of the exceptional causes taxed by law, and for debts for which the Community Customs Code establishes an independent regulation.

The exemption of guarantees in deferments and fractionation applications implies a clear reduction of indirect charges for the taxpayer, given that the deferment application can be processed more simply and quickly, and the applicant does not have to assume the costs derived from applying for warranties, mortgages or other guarantees.

For more information:

http://www.agenciatributaria.es/AEAT.internet/en_gb/Inicio/La_Agenca_Tributaria/Sala_de_prensa/Notas_de_prensa/Los_contribuyentes_con_deudas_hasta_30_000_euros_podran_solicitar_aplazamientos_de_pago_sin_necesidad_de_aportar_garantias.shtml

CASE LAW

EU COURT OF JUSTICE

C-255/14, Chmielewski

16 July 2015

Deterrent measures – Regulation (EC) No 1889/2005 – Controls of cash entering or leaving the European Union – Obligation to declare – Infringement – Penalties – Proportionality

Article 3(1) of Regulation (EC) No 1889/2005 lays down an obligation, for any natural person entering or leaving the European Union and carrying an amount of cash equal to or more than EUR 10 000, to declare that amount (point 19)

Under Article 9(1) of that regulation, each Member State is to introduce penalties to apply in the event of failure to comply with the obligation to declare. According to that provision, the penalties are to be effective, proportionate and dissuasive (point 20)

A system under which the amount of the penalties imposed in Article 9 of that regulation varies in accordance with the amount of undeclared cash does not seem, in principle, to be disproportionate in itself (point 26).

The requirement that the penalties must be proportionate does not mean the competent authorities must take account of the specific individual circumstances of each case, such as intention or recidivism (point 28-29).

However, a fine equivalent to 60% of the amount of undeclared cash, where that amount is more than EUR 50 000, does not seem to be proportionate (point 30).

It should also be noted that Article 4(2) of the regulation provides for the possibility to detain cash which has not been declared, in order, inter alia, to allow the competent authorities to carry out the necessary controls and checks relating to the provenance of that cash, its intended use and destination. Therefore, a penalty which consists of a fine of a lower amount, together with a measure to detain cash that has not been declared, is capable of attaining the objectives pursued by that regulation without going beyond what is necessary for that purpose (point 33).

In Case C-255/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kecskeméti Közigazgatási és Munkaügyi Bíróság (Hungary), made by decision of 19 May 2014, received at the Court on 27 May 2014, in the proceedings

Robert Michal Chmielewski

v

Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága,

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 65 TFEU and Article 9 of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community (OJ 2005 L 309, p. 9).

2 The request has been made in proceedings between Mr Chmielewski and the Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága (customs and finance directorate-general for the region of Dél-Alföld of the National Tax and Customs Office) concerning the fine which was imposed on Mr Chmielewski by the latter for having failed to declare the amount of cash he was carrying at the time of his entry into the territory of the European Union.

Legal context

EU law

Recitals 1 to 3, 5, 6 and 13 in the preamble to Regulation No 1889/2005 are worded as follows:

> *'(1) One of the Community's tasks is to promote harmonious, balanced and sustainable development of economic activities throughout the Community by establishing a common market and an economic and monetary union. To that end the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.*
>
> *(2) The introduction of the proceeds of illegal activities into the financial system and their investment after laundering are detrimental to sound and sustainable economic development. Accordingly, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [OJ 1991 L 166, p. 77] introduced a Community mechanism to prevent money laundering by monitoring transactions through credit and financial institutions and certain types of professions. As there is a risk that the application of that mechanism will lead to an increase in cash movements for illicit purposes, Directive 91/308 … should be supplemented by a control system on cash entering or leaving the Community.*

(3) At present such control systems are applied by only a few Member States, acting under national legislation. The disparities in legislation are detrimental to the proper functioning of the internal market. The basic elements should therefore be harmonised at Community level to ensure an equivalent level of control on movements of cash crossing the borders of the Community. Such harmonisation should not, however, affect the possibility for Member States to apply, in accordance with the existing provisions of the Treaty, national controls on movements of cash within the Community.

…

(5) Accordingly, cash carried by any natural person entering or leaving the Community should be subject to the principle of obligatory declaration. This principle would enable the customs authorities to gather information on such cash movements and, where appropriate, transmit that information to other authorities. …

(6) In view of its preventive purpose and deterrent character, the obligation to declare should be fulfilled upon entering or leaving the Community. However, in order to focus the authorities' action on significant movements of cash, only those movements of EUR 10 000 or more should be subject to such an obligation. Also, it should be specified that the obligation to declare applies to the natural person carrying the cash, regardless of whether that person is the owner.

…

(13) The powers of the competent authorities should be supplemented by an obligation on the Member States to lay down penalties. However, penalties should be imposed only for failure to make a declaration in accordance with this Regulation.'

4 Under Article 1(1) of that regulation:

'This Regulation complements the provisions of Directive 91/308 … concerning transactions through financial and credit institutions and certain professions by laying down harmonised rules for the control, by the competent authorities, of cash entering or leaving the Community.'

5 Article 3 of that regulation provides:

'1. Any natural person entering or leaving the Community and carrying cash of a value of EUR 10 000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation. The obligation to declare shall not have been fulfilled if the information provided is incorrect or incomplete.
2. The declaration referred to in paragraph 1 shall contain details of:
…
(e) the provenance and intended use of the cash;
… '

6 Article 4(2) of that regulation provides:

'In the event of failure to comply with the obligation to declare laid down in Article 3, cash may be detained by administrative decision in accordance with the conditions laid down under national legislation.'

7 Article 9(1) of Regulation No 1889/2005 provides:

'Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Such penalties shall be effective, proportionate and dissuasive.'

Hungarian law

8 Under Paragraph 1 of Law No XLVIII of 2007, implementing Regulation No 1889/2005, in the version applicable to the main proceedings ('Law No XLVIII'), the customs authorities are to have authority to implement Regulation No 1889/2005.

9 Paragraph 3 of Law No XLVIII provides that, for the purposes of monitoring the movement of cash and in order to check compliance with the obligation to declare laid down in Article 3, the customs authorities are to be entitled, in the exercise of their powers as customs authorities, to carry out controls on natural persons, their baggage and their means of transport.

10 Paragraph 5/A(1) of Law No XLVIII provides:

'Any natural person entering or leaving the territory of the European Union who does not fulfil correctly and fully the obligation to declare laid down by Article 3(1) of Regulation [No 1889/2005] in respect of the cash he is carrying as defined in Article 2(2) of [that] Regulation, or who does not fulfil that obligation at all shall, as required by Article 9 of [that] Regulation, pay an on-the-spot fine in [Hungarian forints (HUF)], amounting to:

(a) 10% of the amount held, where the cash sum is EUR 10 000 or more, provided that it is no more than EUR 20 000,

(b) 40% of the amount held, where the cash sum is EUR 20 000 or more, provided that it is no more than EUR 50 000,

(c) 60% of the amount held, where the cash sum is more than EUR 50 000.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 On 9 August 2012, Mr Chmielewski entered the territory of Hungary from Serbia, without declaring the amount of cash he was carrying, namely a total amount of EUR 147 492, consisting of 249 150 Bulgarian leva (BGN), 30 000 Turkish lira (TRY) and 29 394 Romanian lei (RON).

12 By decision of 4 October 2013, the Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága ordered Mr Chmielewski to pay an administrative fine of HUF 24 532 000 on

the ground that he had failed to comply with the obligation imposed on him under Regulation No 1889/2005 and Law No XLVIII, since he had failed to declare that sum at the time of his entry into the territory of the European Union.

13 Mr Chmielewski brought an action against that decision before the referring court, claiming, inter alia, that the provisions of Law No XLVIII were not compatible with EU law.

14 In those circumstances, the Kecskeméti Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Kecskemét) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the amount of the fine imposed by Paragraph 5/A of Law No XLVIII … implementing Regulation … No 1889/2005 … commensurate with the requirement laid down in Article 9(1) of that Regulation, according to which the penalties imposed by national law must be effective, dissuasive and, at the same time proportionate to the infringement and to the objective pursued?

(2) Does Paragraph 5/A of Law No XLVIII not infringe, as a result of the amount of the fines it provides for, the prohibition on disguised restrictions on the free movement of capital in the [EU] Treaty and in Article 65(3) [TFEU]?'

Consideration of the questions referred

15 By its questions, which should be examined together, the referring court asks, in essence, whether Article 65(3) TFEU and Article 9(1) of Regulation No 1889/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to penalise a breach of the obligation to declare laid down in Article 3 of that regulation, imposes payment of an administrative fine, the amount of which corresponds to 60% of the amount of undeclared cash, where that sum is more than EUR 50 000.

16 As Regulation No 1889/2005 lays down harmonised rules for the control of movements of cash entering or leaving the European Union, it is necessary to examine the legislation at issue in the main proceedings first of all in the light of the provisions of that regulation.

17 As is apparent from Article 1(1) of Regulation No 1889/2005, read in conjunction with recitals 1 to 3 in the preamble thereto, in the context of promoting harmonious, balanced and sustainable economic development throughout the European Union, that regulation seeks to supplement the provisions of Directive 91/308 by laying down harmonised rules for the control of cash entering or leaving the European Union.

18 In accordance with recitals 2, 5 and 6 in the preamble to Regulation No 1889/2005, the regulation seeks to prevent, discourage and avoid the introduction of the proceeds of illegal activities into the financial system and their investment after laundering by the establishment, inter alia, of a principle of obligatory declaration of such movements allowing information to be gathered concerning them.

19 To that end, Article 3(1) of that regulation lays down an obligation, for any natural person entering or leaving the European Union and carrying an amount of cash equal to or more than EUR 10 000, to declare that amount.

20 Under Article 9(1) of that regulation, each Member State is to introduce penalties to apply in the event of failure to comply with the obligation to declare. According to that provision, the penalties are to be effective, proportionate and dissuasive.

21 In that regard, it should be noted that, according to the Court's settled case-law, in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by arrangements under such legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality (see judgments in *Ntionik and Pikoulas*, C-430/05, EU:C:2007:410, paragraph 53, and *Urbán*, C-210/10, EU:C:2012:64, paragraph 23).

22 In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation (see judgments in *Ntionik and Pikoulas*, C-430/05, EU:C:2007:410, paragraph 54, and *Urbán*, C-210/10, EU:C:2012:64, paragraphs 24 and 53).

23 In that context, the Court has stated that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality (see judgments in *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 63, and *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paragraph 45).

24 In respect of the dispute in the main proceedings, it should be noted that the effectiveness and dissuasiveness of the penalties provided for in Paragraph 5/A of Law No XLVIII have been contested neither before the referring court nor before this Court.

25 In that context, it suffices to note that penalties such as those at issue in the main proceedings seem to be an appropriate means of attaining the objectives pursued by Regulation No 1889/2005 and of ensuring effective enforcement of the obligation to declare laid down in Article 3 of that regulation, since they are likely to dissuade the persons concerned from breaching that obligation.

26 Moreover, a system under which the amount of the penalties imposed in Article 9 of that regulation varies in accordance with the amount of undeclared cash does not seem, in principle, to be disproportionate in itself.

27 As regards the proportionality of penalties imposed by the legislation at issue in the main proceedings, it should be noted that the amount of the fines is graduated according to the amount of undeclared cash.

28 In contrast to what is maintained by the European Commission, the requirement that the penalties introduced by the Member States under Article 9 of Regulation No 1889/2005 must be proportionate does not mean the competent authorities must take account of the specific individual circumstances of each case.

29 As noted by the Advocate General in points 79 to 81 of his Opinion, under Article 9(1) of that regulation, Member States enjoy a margin of discretion concerning the choice of penalties which they adopt in order to ensure compliance with the obligation to declare laid down in Article 3 of that regulation, provided that a breach of that obligation can be penalised in a simple, effective and efficient way, and without the competent authorities necessarily having to take account of other circumstances, such as intention or recidivism.

30 However, in the light of the nature of the infringement concerned, namely a breach of the obligation to declare laid down in Article 3 of Regulation No 1889/2005, a fine equivalent to 60% of the amount of undeclared cash, where that amount is more than EUR 50 000, does not seem to be proportionate. Such a fine goes beyond what is necessary in order to ensure compliance with that obligation and the fulfilment of the objectives pursued by that regulation.

31 In that regard, it must be noted that the penalty provided for in Article 9 of Regulation No 1889/2005 does not seek to penalise possible fraudulent or unlawful activities, but solely a breach of that obligation.

32 In that context, it should be noted that, as stated in recitals 3 and 15 in the preamble to that regulation, the latter seeks to ensure more effective control of movements of cash entering or leaving the European Union, in order to prevent the introduction of the proceeds of unlawful activities in the financial system, whilst respecting the principles recognised by the Charter of Fundamental Rights of the European Union.

33 It should also be noted that Article 4(2) of Regulation No 1889/2005 provides for the possibility to detain, by administrative decision in accordance with the conditions laid down under national legislation, cash which has not been declared in accordance with Article 3 of that regulation, in order, inter alia, to allow the competent authorities to carry out the necessary controls and checks relating to the provenance of that cash, its intended use and destination. Therefore, a penalty which consists of a fine of a lower amount, together with a measure to detain cash that has not been declared in accordance with Article 3 thereof, is capable of attaining the objectives pursued by that regulation without going beyond what is necessary for that purpose. In this case, it is apparent from the file submitted to the Court that the legislation at issue in the main proceedings does not make provision for such a possibility.

34 In light of the foregoing considerations, it is not necessary to examine whether there exists a restriction within the meaning of Article 65(3) TFEU.

35 In those circumstances, the answer to the questions referred is that Article 9(1) of Regulation No 1889/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to penalise a failure to comply with the obligation to declare laid down in Article 3 of that regulation, imposes payment of an administrative fine, the amount of which corresponds to 60% of the amount of undeclared cash, where that sum is more than EUR 50 000.

(…)

On those grounds, the Court (Second Chamber) hereby rules:

Article 9(1) of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to penalise a failure to comply with the obligation to declare laid down in Article 3 of that regulation, imposes payment of an administrative fine, the amount of which corresponds to 60% of the amount of undeclared cash, where that sum is more than EUR 50 000.

EU COURT OF JUSTICE

C-201/14, Smaranda Bara

1 October 2015

Exchange of information - Directive 95/46/EC – Processing and transfer of personal data – Exceptions and limitations – Transfer by a public administrative body of a Member State of personal tax data for processing by another public administrative body

Directive 95/46 requires a public administrative body to inform the data subjects of the transfer of personal data to another public administrative body for the purpose of their processing by the latter in its capacity as recipient of those data. Article 13(1)(e) and (f) of this Directive allows Member States to restrict the scope of the obligations and rights provided for in Articles 10 and 11 of the same directive when such a restriction constitutes a necessary measure to safeguard 'an important economic or financial interest of a Member State […], including monetary, budgetary and taxation matters' or 'a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e)'. Nevertheless, Article 13 expressly requires that such restrictions are imposed by legislative measures (point 39).

A Romanian law merely envisaged the principle of the transfer of personal data relating to income held by authorities, public institutions and other institutions. The definition of transferable information and the detailed arrangements for transferring that information were laid down not in a legislative measure but in a Protocol agreed between the National Tax Administration Agency (ANAF) and the National Health Insurance Fund (CNAS), which was not the subject of an official publication. In those circumstances, the Court concluded that the conditions laid down in Article 13 of Directive 95/46 permitting a Member State to derogate from the rights and obligations flowing from Article 10 and 11 of the directive were not complied with (points 40, 41, 45).

In Case C-201/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Romania), made by decision of 31 March 2014, received at the Court on 22 April 2014, in the proceedings

Smaranda Bara and Others

v

Președintele Casei Naționale de Asigurări de Sănătate,

Casa Naţională de Asigurări de Sănătate,

Agenţia Naţională de Administrare Fiscală (ANAF),

THE COURT (Third Chamber),

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 124 TFEU and Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p.31).

2 The request has been made in proceedings between, on the one hand, Smaranda Bara and others, the applicants in the main proceedings, and, on the other hand, the Președintele Casei Naționale de Asigurări de Sănătate (Director of the National Health Insurance Fund), the Casa Naționale de Asigurări de Sănătate (the National Health Insurance Fund, 'the CNAS'), and the Agenția Națională de Administrare Fiscală (National Tax Administration Agency, 'the ANAF') concerning the processing of certain data.

Legal context

EU law

3 Article 2 of Directive 95/46, headed 'Definitions', provides:

'For the purpose of this Directive:

(a) personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) personal data filing system" ("filing system") shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(d) controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for

his nomination may be designated by national or Community law;

…'

4 Article 3 of that directive, entitled 'Scope', is worded as follows:

'1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

2. This Directive shall not apply to the processing of personal data:

– in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,

– by a natural person in the course of a purely personal or household activity.'

5 Article 6 of that directive, which concerns the principles relating to data quality, provides:

'1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.'

6 Article 7 of that directive, which concerns the criteria for making data processing legitimate, states:

'Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).'

7 Article 10 of Directive 95/46, entitled 'Information in cases of collection of data from the data subject', provides:

'Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing for which the data are intended;

(c) any further information such as:

– the recipients or categories of recipients of the data,

– whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,

– the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.'

8 Article 11 of the directive, entitled 'Information where the data have not been obtained from the data subject', is worded as follows:

'1. Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the

data subject with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing;

(c) any further information such as:
– the categories of data concerned,
– the recipients or categories of recipients,
– the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards.'

9 Under Article 13 of the directive, entitled 'Exemptions and restrictions':

'1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard:

(a) national security;

(b) defence;

(c) public security;

(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;

(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;

(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.

2. Subject to adequate legal safeguards, in particular that the data are not used for taking measures or decisions regarding any particular individual, Member States may, where there is clearly no risk of breaching the privacy of the data subject, restrict by a legislative measure the rights provided for in Article 12 when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics.'

Romanian law

Law No 95/2006

10 It is apparent from the order for reference, Article 215 of Law No 95/2006 concerning reform in the field of health (Legea nr. 95/2006 privind reforma în domeniul sănătății), of 14 April 2006 (*Monitorul Oficial al României*, Part I, No 372 of 28 April 2006), provides:

'(1) the requirement to pay health insurance contributions is incumbent on any natural or legal person who engages persons under an individual contract of employment or by virtue of special rules provided for by statute and, as the case may be, on natural persons.

(2) The natural or legal persons for whom the insured persons carry out their activities shall be required to submit on a monthly basis to the health insurance fund freely chosen by the insured person statements, identifying the insured persons by name, as to the natural or legal person's obligations to the fund and proof that contributions have been paid.

...'

11 Article 315 of that law states:

'the data necessary to certify that the person concerned qualifies as an insured person are to be communicated free of charge to the health insurance funds by the authorities, public institutions or other institutions in accordance with a protocol.'

Order No 617/2007 of the Director of the CNAS

12 Article 35 of Order No 617/2007 of the Director of the CNAS, of 13 August 2007, approving the implementing measures relating to identifying documentary evidence required for the purpose of qualifying as an insured person, or an insured person who is not required to make contributions, and applying measures for the recovery of sums owing to the Joint National Health Insurance Fund (*Monitorul Oficial al României*, Part I, No 649 of 24 September 2007), provides:

'[...] with regard to the requirement to make payments to the fund on the part of natural persons who obtain insurance cover by means of insurance contracts, other than such persons from whom tax is collected by the ANAF, the following shall constitute evidence of liability, depending on the circumstances: the declaration ..., in the notification of tax liability issued by the competent body of the CAS [Health Insurance Fund] and judicial decisions concerning sums owing to the fund. The notification of tax liability may be issued by the competent body of the CAS also on the basis of information received from the ANAF in accordance with a protocol.'

The 2007 Protocol

13 Article 4 of Protocol No P 5282/26.10.2007/95896/30.10.2007 concluded between the CNAS and the ANAF ('the 2007 Protocol'), provides:

'after the entry into force of this Protocol, the [ANAF] shall provide in electronic format, by means of its

specialised supporting units, the original database concerning:

a. the income of persons forming part of the categories identified in Article 1(1) of this Protocol and, on a three-monthly basis, the updated version of that database, to the [CNAS], in a form compatible with automated processing, in accordance with Annex I to this Protocol ……'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 The applicants in the main proceedings earn income from self-employment. The ANAF transferred data relating to their declared income to the CNAS. On the basis of that data, the CNAS required the payment of arrears of contributions to the health insurance regime.

15 The applicants in the main proceedings brought an appeal before the Curtea de Apel Cluj (Court of Appeal, Cluj), in which they challenged the lawfulness of the transfer of tax data relating to their income in the light of Directive 95/46. They submit that the personal data were, on the basis of a single internal protocol, transferred and used for purposes other than those for which it had initially been communicated to the ANAF, without their prior explicit consent and without their having previously been informed.

16 According to the order for reference, public bodies are empowered, under Law No 95/2006, to transfer personal data to the health insurance funds so that the latter may determine whether an individual qualifies as an insured person. The data concern the identification of persons (surname, first name, personal identity card number, address) but does not include data relating to income received.

17 The referring court wishes to determine whether the processing of the data by the CNAS required prior information to be given to the data subjects as to the identity of the data controller and the purpose for which the data was transferred. That court is also asked to determine whether the transfer of the data on the basis of the 2007 Protocol is contrary to Directive 95/46 which requires that all restrictions on the rights of data subjects are laid down by law and accompanied by safeguards, in particular when the data is used against those persons.

18 In those circumstances, the Curtea de Apel Cluj decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is a national tax authority, as the body representing the competent ministry of a Member State, a financial institution within the meaning of Article 124 TFEU?

(2) Is it possible to make provision, by means of a measure akin to an administrative measure, namely a protocol concluded between the national tax authority and another State institution, for the transfer of the database relating to the income earned by the citizens of a Member State from the national tax authority to another institution of the Member State, without giving rise to a measure establishing privileged access, as defined in Article 124 TFEU?

(3) Is the transfer of the database, the purpose of which is to impose an obligation on the citizens of the Member State to pay social security contributions to the Member State institution for whose benefit the transfer is made, covered by the concept of prudential considerations within the meaning of Article 124 TFEU?

(4) May personal data be processed by authorities for which such data were not intended where such an operation gives rise, retroactively, to financial loss?'

The questions referred

Admissibility

Admissibility of the first to third questions

19 According to settled case-law, the Court may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see judgment in *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 39 and the case-law cited).

20 All of the observations presented to the Court submit that the first to third questions referred concerning the interpretation of Article 124 TFEU are inadmissible on the ground that they bear no relation to the object of the dispute in the main proceedings.

21 In that regard, it must be recalled that Article 124 TFEU falls within Part Three of the TFEU, under Title VIII on economic and monetary policy. That article prohibits any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions.

22 The origin of that prohibition is to be found in Article 104 A of the EC Treaty (which became Article 102 EC), which was inserted in the EC Treaty by the Treaty of Maastricht. It was one of the provisions of the TFEU relating to the economic policy that intended to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits (see, to that effect, judgment in

Gauweiler and Others, C-62/14, EU:C:2015:400, paragraph 100).

23 It is, therefore, quite obvious that the interpretation of Article 124 TFEU requested bears no relation to the actual facts or object of the dispute in the main proceedings, which concerns the protection of personal data.

24 It follows that it is not necessary to reply to the first to third questions.

Admissibility of the fourth question

25 The CNAS and the Romanian Government submit that the fourth question is inadmissible. That government submits that there is no link between the damage relied on by the applicants in the main proceedings and the annulment of the administrative acts contested within those proceedings.

26 In that regard, it must be borne in mind that, according to the settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 30 and the case-law cited).

27 It must be observed that the main proceedings concern the lawfulness of processing of tax data collected by the ANAF. The referring court is uncertain as to the interpretation of Directive 95/46, in the context of reviewing the lawfulness of the transfer of those data to the CNAS and their subsequent processing. The fourth question referred is therefore relevant and sufficiently precise to enable the Court to give a useful answer. Accordingly, the request for a preliminary ruling must be held to be admissible as regards the fourth question.

Substance

28 By its fourth question, the referring court asks, in essence, whether Articles 10, 11 and 13 of Directive 95/46 must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body in a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects being informed of that transfer and processing.

29 In that regard, it must be held, on the basis of the information provided by the referring court, that the tax data transferred to the CNAS by the ANAF are personal data within the meaning of Article 2(a) of the directive, since they are 'information relating to an identified or identifiable natural person' (judgment in *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 35). Both the transfer of the data by the ANAF, the body responsible for the management of the database in which they are held, and their subsequent processing by the CNAS therefore constitute 'processing of personal data' within the meaning of Article 2(b) of the directive (see, to that effect, inter alia, judgments in *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 64, and *Huber*, C-524/06, EU:C:2008:724, paragraph 43).

30 In accordance with the provisions of Chapter II of Directive 95/46, entitled 'General rules on the lawfulness of the processing of personal data', subject to the exceptions permitted under Article 13 of that directive, all processing of personal data must comply, first, with the principles relating to data quality set out in Article 6 of the directive and, secondly, with one of the criteria for making data processing legitimate listed in Article 7 of the directive (judgments in *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 65; *Huber*, C-524/06, EU:C:2008:724, paragraph 48; and *ASNEF and FECEMD*, C-468/10 and C-469/10, EU:C:2011:777, paragraph 26).

31 Furthermore, the data controller or his representative is obliged to provide information in accordance with the requirements laid down in Articles 10 and 11 of Directive 95/46, which vary depending on what data are, or are not, collected from the data subject, and subject to the exceptions permitted under Article 13 of the directive.

32 As regards, first, Article 10 of the directive, that article provides that the data controller must provide a data subject, from whom data relating to himself are collected, with the information listed in subparagraphs (a) to (c), except where he already has that information. That information concerns the identity of the data controller, the purposes of the processing and any further information necessary to guarantee fair processing of the data. Amongst the additional information necessary to guarantee fair processing of the data, Article 10(c) of the directive expressly refers to 'recipients or categories of recipients of the data' and 'the existence of a right of access to and the right to rectify the data concerning [that person]'.

33 As the Advocate General observed in point 74 of his Opinion, the requirement to inform the data subjects about the processing of their personal data is all the more important since it affects the exercise by the data subjects of their right of access to, and right to rectify, the data being processed, set out in Article 12 of Directive 95/46, and their right to object to the processing of those data, set out in Article 14 of that directive.

34 It follows that the requirement of fair processing of personal data laid down in Article 6 of Directive 95/46 requires a public administrative body to inform the data subjects of the transfer of those data to another public administrative body for the purpose of their processing by the latter in its capacity as recipient of those data.

35 It is clear from the information provided by the referring court that the applicants in the main proceedings were not informed by the ANAF of the transfer to the CNAS of personal data relating to them.

36 The Romanian Government submits, however, that the ANAF is required, in particular under Article 315 of Law No 95/2006, to transfer to the regional health insurance funds the information necessary for the determination by the CNAS as to whether persons earning income through self-employment qualify as insured persons.

37 It is true that Article 315 of Law No 95/2006 expressly provides that 'the data necessary to certify that the person concerned qualifies as an insured person are to be communicated free of charge to the health insurance funds by the authorities, public institutions or other institutions in accordance with a protocol'. However, it is clear from the explanations provided by the referring court that the data necessary for determining whether a person qualifies as an insured person, within the meaning of the abovementioned provision, do not include those relating to income, since the law also recognises persons without a taxable income as qualifying as insured.

38 In those circumstances, Article 315 of Law No 95/2006 cannot constitute, within the meaning of Article 10 of Directive 95/46, prior information enabling the data controller to dispense with his obligation to inform the persons from whom data relating to their income are collected as to the recipients of those data. Therefore, it cannot be held that the transfer at issue was carried out in compliance with Article 10 of Directive 95/46.

39 It is necessary to examine whether Article 13 of the directive applies to that failure to inform the data subjects. It is apparent from Article 13(1)(e) and (f) that Member States may restrict the scope of the obligations and rights provided for in Article 10 of the same directive when such a restriction constitutes a necessary measure to safeguard 'an important economic or financial interest of a Member State […], including monetary, budgetary and taxation matters' or 'a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e)'. Nevertheless, Article 13 expressly requires that such restrictions are imposed by legislative measures.

40 Apart from the fact, noted by the referring court, that data relating to income are not part of the personal data necessary for the determination of whether a person is insured, it must be observed that Article 315 of Law No 95/2006 merely envisages the principle of the transfer of personal data relating to income held by authorities, public institutions and other institutions. It is also apparent from the order for reference that the definition of transferable information and the detailed arrangements for transferring that information were laid down not in a legislative measure but in the 2007 Protocol agreed between the ANAF and the CNAS, which was not the subject of an official publication.

41 In those circumstances, it cannot be concluded that the conditions laid down in Article 13 of Directive 95/46 permitting a Member State to derogate from the rights and obligations flowing from Article 10 of the directive are complied with.

42 As regards, in the second place, Article 11 of the directive, paragraph 1 of that article provides that a controller of data which were not obtained from the data subject must provide the latter with the information listed in subparagraphs (a) to (c). That information concerns the identity of the data controller, the purposes of the processing, and any further information necessary to ensure the fair processing of the data. Amongst that further information, Article 11(1)(c) of the directive refers expressly to 'the categories of data concerned' and 'the existence of the right of access to and the right to rectify the data concerning him'.

43 It follows that, in accordance with Article 11(1)(b) and (c) of Directive 95/46, in the circumstances of the case in the main proceedings, the processing by the CNAS of the data transferred by the ANAF required that the subjects of the data be informed of the purposes of that processing and the categories of data concerned.

44 It is apparent from the information given by the referring court, however, that the CNAS did not provide the applicants in the main proceedings with the information listed in Article 11(1)(a) to (c) of the directive.

45 It is appropriate to add that, in accordance with Article 11(2) of Directive 95/46, the provisions of Article 11(1) of the directive do not apply when, in particular, the registration or communication of the data are laid down by law, Member States being required to provide appropriate safeguards in those cases. For the reasons set out in paragraphs 40 and 41 of this judgment, the provisions of Law No 95/2006 relied on by the Romanian Government and the 2007 Protocol do not establish a basis for applying either the derogation under Article 11(2) or that provided for under Article 13 of the directive.

46 Having regard to all the foregoing considerations, the answer to the question referred is that Articles 10, 11 and 13 of Directive 95/46 must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a

public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing.

(…)

On those grounds, the Court (Third Chamber) hereby rules:

Articles 10, 11 and 13 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, must be interpreted as precluding national measures, such as those at issue in the main proceedings, which allow a public administrative body of a Member State to transfer personal data to another public administrative body and their subsequent processing, without the data subjects having been informed of that transfer or processing.

Comments

The Court of Justice of the EU published a press release on this case (No 110/15 of 1 October 2015), stating:

"(…) In today's judgment, the Court of Justice holds that the requirement of fair processing of personal data requires a public administrative body to inform the data subjects of the fact that their data will be transferred to another public administrative body for the purpose of their processing by the latter in its capacity as recipient of those data. The directive expressly requires that any restrictions on the requirement to provide information are imposed by legislative measures.

The Romanian law that provides for the free transfer of personal data to the National Health Insurance Fund does not constitute prior information that would allow the data controller to dispense with his obligation to provide prior information to the persons from whom data are collected. That law does not define either the transferable data or the detailed arrangements for transferring those data, which are to be found only in a bilateral protocol agreed between the tax authority and the Health Insurance Fund.

As regards the subsequent processing of the data transferred, the directive provides that a controller of data must inform the data subjects as to his own identity, the purpose of the processing, and any further information necessary to ensure the fair processing of the data. That further information includes the categories of data concerned and the existence of the right of access to and the right to rectify the data concerning him.

The Court observes that the National Health Insurance Fund's processing of data transferred by the tax authority required informing the data subjects of the purposes of that processing and the categories of data concerned. In this case, the Health Insurance Fund had not provided that information.

The Court holds that EU law precludes the transfer and processing of personal data between two public administrative bodies without the persons concerned (data subjects) having been informed in advance."

United Kingdom

Court of Appeal of England and Wales (Civil Division)

Ben Nevis (Holdings) Ltd and Metlika Trading Ltd

23 May 2013

International recovery assistance – Entry into force of the Protocol providing for tax recovery assistance – Assistance for already existing claims – No question of retrospectivity – No unfairness

FACTS

The 2002 Double Taxation Convention between the United Kingdom and the Republic of South Africa entered into force on 17 December 2002 in accordance with Art. 27 of this convention. Article 27 also made detailed provision as to the temporal effect of the treaty once it came into force. It defineds, by reference to various dates, the tax liabilities in South Africa and the United Kingdom in relation to which it was to have effect. As a result it became effective in the United Kingdom from 1 April 2003 for corporation tax and from 6 April 2003 for income tax and capital gains tax and it became effective in South Africa from 1 January 2003.

On 8 November 2010, the United Kingdom and the Republic of South Africa signed a protocol which amended their double taxation convention, by introducing a provision for assistance in collection of taxes (new Article25A). The 2010 Protocol came into force on 13 October 2011.

The South African Revenue Service (SARS) requested the UK authorities to provide recovery assistance with regard to tax deebts accrued in 1998, 1999 and 2000. The appellants argued that the Protocol did not apply to these tax debts.

JUDGEMENT

1) Article 27 of the Convention does not limit the temporal application of the Protocol and Article 25A.

2) Article 25A applies to requests for assistance in the enforcement of tax liabilities arising before the coming into force of the Protocol.

3) The application of Article 25A to requests for assistance in the enforcement of tax liabilities arising before the coming into force of the Protocol is not a true case of retrospective application. Nor is there any unfairness in the application of the Protocol to such liabilities.

[2013] EWCA Civ 578

Before:
Lord Justice Jackson
Lord Justice Lloyd Jones
And
Lord Justice Floyd

Between
(1) Ben Nevis (Holdings) Limited
(2) Metlika Trading Limited
Appellants
And
Commissioners for HM Revenue & Customs, respondent

Lord Justice Lloyd Jones :

1. The first Appellant ("Ben Nevis") is a company incorporated in the British Virgin Islands. It is owned and controlled by a South African based businessman, Mr. David King, and/or his trustees. Ben Nevis is liable to the Commissioner for the South African Revenue Service ("SARS") for taxes for the 1998, 1999 and 2000 years of assessment in the total sum (including various penalties and interest) of Rand 2.6 billion (approximately £222 million), following the final determination of a tax appeal in October 2010. On the 4 March 2011 judgment was entered against Ben Nevis in proceedings in the Republic of South Africa for these sums.

2. SARS maintains that when Mr. King learned that SARS was investigating Ben Nevis's tax affairs he procured the transfer of Ben Nevis' assets to the second Appellant ("MTL"), a company incorporated in the British Virgin Islands. SARS became aware that as a result of these activities a fund of approximately £7.8 million had been credited to a bank account in London in the name of MTL.

3. Following the coming into force on 13 October 2011 of a Protocol amending an existing double taxation treaty between the United Kingdom and the Republic of South Africa which made provision for mutual assistance in the collection of taxes, SARS made a request to the Respondent ("HMRC") that it assist in the collection of the tax debt.

4. The present proceedings were issued in the Chancery Division of the High Court pursuant to that request and comprised claims by HMRC for (1) judgment against Ben Nevis in respect of the tax debt and (2) relief against Ben Nevis and MTL under Sections 423-425 Insolvency Act 1986 (transactions defrauding creditors), with a view to making the deposit available for satisfying the tax debt. At the outset of the proceedings HMRC sought and obtained, on an application made without notice to Ben Nevis or MTL, an order granting permission to serve the proceedings out of the jurisdiction and freezing the deposit pending trial of the claims. Ben Nevis and MTL subsequently applied to set aside that order and to strike out the proceedings on a wide range of grounds.

On 20 July 2012, HHJ Pelling QC (sitting as a Judge of the High Court in Manchester), handed down his judgment dismissing the application.

5. The Appellants now appeal against that dismissal. However, their appeal is limited to two of the grounds relied upon below, both of which relate to the temporal scope of the relevant mutual assistance provisions between the United Kingdom and the Republic of South Africa.

6. For centuries, courts in this jurisdiction have refused to entertain claims for the enforcement of revenue or other public laws of a foreign State (See, for example, ***Government of India v Taylor*** [1955] AC 491). The editors of Dicey, Morris & Collins, The Conflict of Laws (15th Ed.) state that this reflects a well-established and almost universal principle that the courts of one country will not enforce the penal and revenue laws of another country. The principle is, however, subject to contrary agreement by treaty and in recent years very substantial inroads have been made into the principle by international agreements. In 1988 the Council of Europe and OECD adopted a Joint Convention on Mutual Administrative Assistance in Tax Matters which included provision for assistance in recovery of taxes. Furthermore, since 2003 the OECD Model Conventions on Double Taxation have included provisions for mutual assistance in the collection of taxes.

7. There have been Double Taxation Agreements in force between the United Kingdom and South Africa since 1939. At the hearing of this appeal we have examined the text of Double Taxation Agreements between those States concluded in 1939, 1946, 1962, 1968 and 2002. The 2002 Convention was signed on 4 July 2002 and entered into force on 17 December 2002. In its original form it did not include any provisions for mutual assistance in the collection of taxes. Article 2 defines the categories of tax to which it applies. Articles 6-23 set out provisions which have the effect of modifying tax liabilities in one State in the light of tax liability in the other. Article 25 makes provision for the exchange of information and provides in relevant part:

> *"(1) The competent authorities of the contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to this Convention, in particular, to prevent fraud and to facilitate the administration of statutory provisions against legal avoidance. The exchange of information is not restricted by Article 1 of this Convention. Any information received by a Contracting State shall be treated as secret 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 covered by this Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decision."*

Article 27 is headed "Entry into Force" and provides:

> *"(1) Each of the Contracting States shall notify to the other, through the diplomatic channel, the completion of the procedures required by its law for the bringing into force of this Convention. This Convention shall enter into force on the date of receipt of the later of these notifications and shall thereupon have effect:*
>
> *(a) in South Africa:*
>
> *(i) with regards to taxes withheld at source, in respect of amounts paid or credited on or after 1st January next following the date upon which this Convention enters into force; and*
>
> *(ii) with regard to other taxes, in respect of taxable years beginning on or after 1st January next following the date upon which this Convention enters into force;*
>
> *(b) in the United Kingdom:*
>
> *(i) in respect of income tax and capital gains tax, for any year of assessment beginning on or after 6th April in the calendar year next following that in which this Convention enters into force;*
>
> *(ii) in respect of corporation tax, for any financial year beginning on or after 1st April in the calendar year next following that in which this Convention enters into force.*
>
> *(2) The Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland signed at London on 21st November, 1968, shall be terminated and shall cease to have effect in respect of the taxes to which this Convention applies in accordance with the provisions of paragraph (1) of this Article."*

8. On 8 November 2010, the United Kingdom and the Republic of South Africa signed a protocol ("the 2010 Protocol") which amended the 2002 Convention. The 2010 Protocol came into force on 13 October 2011. It introduces for the first time into a treaty between the United Kingdom and the Republic of South Africa a provision for assistance in collection of taxes. Article IV provides in relevant part:

> *"Article IV*
>
> *The following new Article shall be inserted immediately after Article 25 of the Convention:*
>
> *"Article 25A*
>
> *Assistance in the Collection Taxes*
>
> *1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2 of this Convention. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.*

2. The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

…

6. Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

7. Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 of this Article and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be:

(a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or

(b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection

the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.""

9. Article III of the 2010 Protocol amends Article 25 of the 2002 Convention. Article 25 as amended reads as follows:

"Article III

Article 25 of the Convention shall be deleted and replaced by the following:

"Article 25

Exchange of information.

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions, insofar as the taxation thereunder is not contrary to the convention. The exchange of information is not restricted by Articles 1 and 2 of the Convention.

2. …""

10. Article VI of the 2010 Protocol provides:

"Article VI

Each of the Contracting States shall notify to the other, through the diplomatic channel, the completion of the procedures required by its law for the bringing into force of this Protocol. This Protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect in both Contracting States:

(a) in relation to Article II of this Protocol, in respect of amounts paid or credited on or after the date of the introduction in South Africa of the system of taxation at shareholder level of dividends declared;

(b) in relation to the information referred to in Article III of this Protocol, in respect of such information that is requested or exchanged on or after the date of entry into force of this Protocol;

(c) in relation to revenue claims referred to in Article IV of this Protocol, in respect of requests for assistance made on or after the date of entry into force of this Protocol."

11. Section 173, Finance Act 2006, makes provision for implementation into domestic law of international tax enforcement agreements. It provides in relevant part:

"173 International tax enforcement arrangements

(1) If Her Majesty by Order in Council declares that–

(a) arrangements relating to international tax enforcement which are specified in the Order have been made in relation to any territory or territories outside the United Kingdom, and

(b) it is expedient that those arrangements have effect,

those arrangements have effect (and do so in spite of anything in any enactment or instrument).

(2) For the purposes of subsection (1) arrangements relate to international tax enforcement if they relate to any or all of the following–

(a) the exchange of information foreseeably relevant to the administration, enforcement or recovery of any UK tax or foreign tax;

(b) the recovery of debts relating to any UK tax or foreign tax;

(c) the service of documents relating to any UK tax or foreign tax.

(3) In this section–

"UK tax" means any tax or duty imposed under the domestic law of the United Kingdom, and

"foreign tax" means any tax or duty imposed under the law of the territory, or any of the territories, in relation to which the arrangements have been made."

12. The Double Taxation Relief and International Tax Enforcement (South Africa) Order 2011 (2011 No. 2441) made on the 12 October 2011 provides that the arrangements contained in the 2010 Protocol, which is set out in the Schedule, shall have effect.

13. The Appellants' grounds of appeal may be summarised as follows:

(1) The judge erred in holding that Article 25A and Article 27 of the 2002 Convention together permitted cross-border collection of the tax debts notwithstanding that the tax debts are due in respect of years of assessment commencing prior to coming into force of the 2002 Conventions.

(2) The judge erred in holding that the powers conferred by section 173, Finance Act 2006 to give effect to "arrangements relating to international tax enforcement" extended to such "arrangements" insofar as they purported to apply retrospectively prior to 19 July 2006 (being the date on which section 173, Finance Act 2006 itself came into force) and that the 2011 Order was effective insofar as it purported to give effect to Article 25A in respect of foreign taxes arising prior to that date.

Ground 1: The judge erred in holding that Article 25A and Article 27 of the 2002 Convention together permitted cross-border collection of the tax debts notwithstanding that the tax debts are due in respect of years of assessment commencing prior to coming into force of the 2002 Conventions.

14. The Appellants' case, as originally formulated, was that Article 25A did not apply to tax debts arising prior to the coming into force of the 2010 Protocol, alternatively that the effect of Article 27 was to limit the temporal scope of Article 25A to tax debts arising on or after 1 January 2003. However, shortly before the hearing below, the Appellants abandoned the former argument, leaving their case as now reflected in the grounds of appeal. Within this first ground the Appellants submit that Article 25A does not permit collection of the tax debt because, on the proper construction of the 2010 Protocol and the 2002 Convention, Article 27 applies to Article 25A and has the effect (by virtue of Article 27(1)(a)(ii)) of precluding mutual assistance in the collection of tax debts which relate to periods prior to 1 January 2003.

15. The judge's reason for rejecting the Appellants' submissions on this ground may be summarised as follows:

(1) The purpose of the 2010 Protocol was to assist international tax enforcement. This did not suggest any logical or policy reason for imposing a temporal limitation on the scope of Article 25A which gave it retrospective effect but excluded tax years arising earlier than the coming into effect of the 2002 Convention. This suggested a probable intention that the only relevant qualification to the applicability of Article 25A should be that concerning bars to collectability imposed by the law of the assessing State.

(2) If Article 27 had effect in relation to Article 25A then Article 25A would be of no effect since the only force given to the 2002 Convention in relation to the United Kingdom would be in respect of the identified UK taxes referred to in Article 27(1)(b).

(3) Even if that difficulty could be avoided, the effect of Article 27 on Article 25A would be that it would take effect in the United Kingdom by reference to the date on which United Kingdom not South African tax years commenced. This was illogical because if recovery for the years in question was objectionable it could only be by reference to the position of Ben Nevis as a tax payer in South Africa.

(4) By contrast, these difficulties would be avoided if Article 27 was confined in its effect to the provisions of the 2002 Convention as originally drafted (including the information sharing provisions).

(5) The difficulties which he had identified suggested that to construe Article 25A as subject to Article 27 gave rise to obvious absurdity or was manifestly unreasonable.

(6) The true intention of the parties is apparent from Article VI which is an entry into force provision.

(7) Article VI provided that the Protocol was to have effect "in relation to revenue claims referred to in Article IV of this Protocol". That meant that it had effect in relation to any revenue claim as defined in Article 25A(2) that is enforceable under the laws of the State requesting assistance and is owed by a person who cannot prevent collection according to the laws of the requesting State at the date when the request for assistance was made, subject to the proviso that Article IV is of no effect other than in respect of "requests for assistance made on or after the date of entry into force of this Protocol". That proviso was satisfied in the present case.

(8) Therefore, the true effect of Article 25A, when construed in context and in light of its purpose, was that once the 2010 Protocol entered into force, Article 25A thereupon applied to all revenue claims as defined, subject only to the qualifications referred to within Article 25A itself and to the proviso that the request for assistance was made on or after the date when the 2010 Protocol entered into force.

The interpretation of treaties – applicable principles

16. The judge relied on the summary of principles applicable to the interpretation of treaties contained

in the judgment of Mummery J. in ***IRC v Commerzbank AG*** [1990] STC 285, a case concerned with double taxation treaties. That particularly helpful summary is derived in part from the earlier decision of the House of Lords in ***Fothergill v Monarch Airlines Limited*** [1981] AC 251 and the formulation by Mummery J. was subsequently approved by this court in ***Memec v IRC*** [1998] STC 754.

> *"(1) It is necessary to look first for a clear meaning of the words used in the relevant article of the convention, bearing in mind that consideration of the purpose of an enactment is always a legitimate part of the process of interpretation': per Lord Wilberforce (at 272) and Lord Scarman (at 294). A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty: per Lord Fraser (at 285) and Lord Scarman (at 290). A literal interpretation may be obviously inconsistent with the purposes of the particular article or of the treaty as a whole. If the provisions of a particular article are ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the convention looking at it as a whole by reference to its language as set out in the relevant United Kingdom legislative instrument: per Lord Diplock (at 279).*
>
> *(2) The process of interpretation should take account of the fact that—*
>
> *'The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in* ***James Buchanan & Co. Ltd v. Babco Forwarding & Shipping (UK) Limited,*** *[1987] AC 141 at 152, "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation': per Lord Diplock (at 281–282) and Lord Scarman (at 293).'*
>
> *(3) Among those principles is the general principle of international law, now embodied in article 31(1) of the Vienna Convention on the Law of Treaties , that 'a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. A similar principle is expressed in slightly different terms in McNair's The Law of Treaties (1961) p 365 , where it is stated that the task of applying or construing or interpreting a treaty is 'the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances'. It is also stated in that work (p 366) that references to the primary necessity of giving effect to 'the plain terms' of a treaty or construing words according to their 'general and ordinary meaning' or their 'natural signification' are to be a starting point or prima facie guide and 'cannot be allowed to obstruct the essential quest in the application of treaties, namely the search for the real intention of the contracting parties in using the language employed by them'.*
>
> *(4) If the adoption of this approach to the article leaves the meaning of the relevant provision unclear or ambiguous or leads to a result which is manifestly absurd or unreasonable recourse may be had to 'supplementary means of interpretation' including travaux préparatoires: per Lord Diplock (at 282) referring to article 32 of the Vienna Convention, which came into force after the conclusion of this double taxation convention, but codified an already existing principle of public international law. See also Lord Fraser (at 287) and Lord Scarman (at 294).*
>
> *(5) Subsequent commentaries on a convention or treaty have persuasive value only, depending on the cogency of their reasoning. Similarly, decisions of foreign courts on the interpretation of a convention or treaty text depend for their authority on the reputation and status of the court in question: per Lord Diplock (at 283–284) and per Lord Scarman (at 295).*
>
> *(6) Aids to the interpretation of a treaty such as travaux préparatoires, international case law and the writings of jurists are not a substitute for study of the terms of the convention. Their use is discretionary, not mandatory, depending, for example, on the relevance of such material and the weight to be attached to it: per Lord Scarman (at 294)."*

17. Before this court, both parties agreed that this was an accurate statement of principle. However, they both took issue with the conclusion of Judge Pelling that the rules of interpretation of treaties set out in the Vienna Convention on the Law of Treaties have no application to the present case because the Republic of South Africa is not a party to that Convention. The rules of interpretation set out in Articles 31 and 32 of the Vienna Convention are rules of customary international law and therefore binding on all States regardless of whether or not they are parties to that Convention. (See ***Fothergill*** [1981] AC 251 per Lord Diplock at p. 82.) Furthermore, the principles stated by Mummery J. are largely derived from the Vienna Convention to which he refers in the passage cited above. Accordingly, it is appropriate to have regard to Articles 31 and 32 of the Vienna Convention in this appeal. There is no conflict between these principles and the formulation by Mummery J. However, that formulation was in the nature of a summary and the corresponding Articles of the Convention deal with certain matters which are not included in the ***Commerzbank*** formulation.

18. It is convenient to set out at this point Articles 31 and 32 of the Vienna Convention on Treaties.

"Section 3. Interpretation of Treaties

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

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

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable"

The interpretation of the 2010 Protocol.

19. The 2010 Protocol effects certain important amendments to the 2002 Convention. In particular it inserts a new Article 25A and substitutes a new version of Article 25. I consider that in interpreting the Protocol and the provisions it inserts into the Convention it is necessary to consider them within the context of the Convention as amended of which they form part. However, it is also necessary to bear in mind that the clear purpose of the Protocol is to amend the effect of the Convention as originally concluded.

20. A crucial issue is whether the new Article 25A must be read subject to Article 27 of the Convention. Article 27 is entitled "Entry into Force" and it prescribes the time at which the Convention is to enter into force. It provides that each Contracting State is to notify the other of the completion of the procedures required by its law for the bringing into force of the Convention and that the Convention shall enter into force on the date of receipt of the later of these notifications. The 2002 Convention entered into force on 17 December 2002 in accordance with this provision. However, Article 27 goes further and makes detailed provision as to the temporal effect of the treaty once it comes into force. It defines, by reference to various dates, the tax liabilities in South Africa and the United Kingdom in relation to which it is to have effect. As a result it became effective in the United Kingdom from 1 April 2003 for corporation tax and from 6 April 2003 for income tax and capital gains tax and it became effective in South Africa from 1 January 2003. Furthermore, Article 27(2) provides that the previous Double Taxation Convention between the United Kingdom and South Africa (the 1968 Convention) shall be terminated and shall cease to have effect in respect of the taxes to which the 2002 Convention applies in accordance with Article 27(1).

21. The Protocol includes its own provision in Article VI for the entry into force of the Protocol. It entered into force on 13 October 2011. Moreover, following the pattern of Article 27, Article VI of the Protocol goes on to make provision as to the effect of the Protocol. The wording introducing this element in each case is identical: "…and shall thereupon have effect…". In particular Article VI(b) provides that the substituted Article 25 shall have effect in respect of such information that is requested or exchanged on or after the date of entry into force of the Protocol. Article VI(c) provides that the new Article 25A shall have effect in respect of requests for assistance made on or after the date of entry into force of the Protocol. On the face of it the Protocol contains its own provisions as to its entry into force and makes specific provision for its effect when it comes into force. It is difficult to see therefore why it is necessary to read Article 25A as subject to Article 27.

22. The Appellants accept that the part of Article 27 concerned with entry into force of the Convention cannot apply to the Protocol. However, they submit that the remainder of Article 27, which is concerned with the temporal effect of the Convention, does apply to the provisions introduced by the Protocol. They submit that although some provision is made by Article VI for the temporal scope of Article 25A i.e. it applies only to requests made after entry into force of the Protocol, this is an incomplete provision and that it is necessary to limit its application further by reference to the dates of accrual of tax liabilities as set out in the remainder of Article 27. It is on this basis that it is said that the Protocol has no application to the tax debts which accrued in the 1998, 1999 and

2000 years of assessment which it is sought to recover in these proceedings. Furthermore, they draw attention to the fact that Article 25A(1) expressly provides that assistance in the collection of taxes for which it provides is not restricted by Articles 1 and 2 of the Conventions. On this basis, they submit that if it had been intended that Article VI should make comprehensive provision for the temporal effect of the provision on assistance in the collection of taxes and that Article 25A should not be subject to Article 27, there would have been an express provision in the Protocol to this effect.

23. To my mind, the Protocol in Article IV (introducing the new Article 25A) and Article VI makes entirely sensible and workable provision for assistance in the collection of taxes and it is not necessary to resort to Article 27 to supplement it. Its provisions apply only to requests for assistance made after the entry into force of the Protocol. The Convention in its original form was principally concerned in Articles 6-23 inclusive with substantive issues of double taxation. These provisions, when brought into effect and implemented, modified liability to taxation in both the United Kingdom and South Africa. There was therefore a compelling reason why it was necessary to define with precision the scope of their effect by reference to both the categories of taxes and the time of accrual of liability to which they applied. This need was intensified by the fact that the 2002 Convention was merely the latest in a line of treaties between the United Kingdom and South Africa on double taxation and it was necessary to define the precise temporal limitations of the successive regimes which they introduced. Article 27 has a vital role to perform in this context. However, while the parties may choose to limit the temporal application of provisions relating to mutual assistance in this way, I can see no corresponding necessity for defining the years of accrual of liability to which such provisions for mutual assistance may apply. "Taxes" in Article 25A(2) does not need to be limited by reference to the date of their accrual. Article 25A has no bearing on liability to tax and is merely concerned with proceedings for enforcement. Whereas provisions which modify tax changes need to be linked to the relevant tax period so as to ensure a smooth transition from the existing rules to the new rules, there is no need to make similar provision for administrative provisions such as Article 25A which may, without difficulty, be brought into effect as soon as the Protocol comes into effect.

24. This reading of the provisions is also consistent with the objective of the Protocol which, as the judge correctly identified, is to assist international tax enforcement. (See the 2011 Order in Council at para. 2). This purpose would be obstructed by limiting Article 25A in the manner proposed by the Appellants. By contrast, it is difficult to see what purpose might be served by reading Article 25A subject to Article 27. The Appellants no longer contend that Article 25A does not permit enforcement of liabilities arising before the coming into force of the Protocol, so this reasoning does not prevent what the Appellants describe as "retroactivity". Rather, the effect of reading Article 25A subject to Article 27 would be to introduce a backstop; it would prevent enforcement of liabilities arising before the entry into effect of the 2002 Convention. However this would lead to an entirely arbitrary result, there being no sound reason in principle or in practice why the new enforcement machinery should be limited by reference to the date of commencement of the 2002 Convention.

25. A further difficulty in the path of the Appellants' submission is that to subject Article 25A to Article 27 would create a major anomaly in the application of Article 25A to different taxes. Article 25A is not limited in its application to the specific taxes listed in Article 2; Article 25A(1) provides that the assistance is not restricted by Article 1 and 2 and Article 25(2) provides that a "revenue claim" extends to "taxes of every kind and description". Article 27, by contrast, limits the application of the provisions to which it applies to the taxes identified in Article 27. As a result, on a literal interpretation of the provisions, the temporal limitation for which the Appellants contend would apply, for example, to the collection of income tax but not to inheritance tax or VAT. The Appellants seek to circumvent this difficulty in two ways.

(1) First they submit that Article 27 is not limited to the taxes listed in Article 2 but extends to all types of taxes. They point to Article 27(1)(a), which relates to South African taxes and which refers in Article 27(1)(a)(ii) to "other taxes", and submit that this broadens the scope of Article 27 to include all South African taxes, not merely those listed in Article 2. This submission is, in my view, untenable. The reference in Article 27(1)(a)(ii) to "other taxes" is clearly a reference to taxes within Article 2 other than those referred to in Article 27(1)(a)(i). The Appellants have not proposed any reason why, at the date of the original making of the 2002 Convention, it should have applied to any taxes other than those identified in Article 2. Moreover, the submission ignores Article 27(1)(b) which deals with United Kingdom taxes and which includes no provision corresponding to the reference in Article 27(1)(a)(ii) to "other taxes". The parties cannot have intended that a different regime should apply to each State.

(2) Secondly, the Appellants submit that Article 27 should be given a purposive interpretation so as to extend its application to taxes not expressly referred to in it. Here they seek to derive support from an article by M. Jacques Sasseville, Head of the Tax Treaty Unit, OECD Centre for Tax Policy and Administration. The article is entitled "Temporal Aspects of Tax Treaties" and it was published in 2010 in a Festschrift to Dr. Avery Jones entitled "Tax Polymath". Referring to the OECD Model Convention, M. Sasseville states:

"One minor difficulty, however, may arise with respect to some Articles (such as Article 24) [concerning non-discrimination] which also covers taxes that are not referred to in Article 2 since the effective date of these Articles in relation to these other taxes may be unclear. Article 24(6) provides that the provisions of the Article, "notwithstanding the provisions of Article 2, apply to taxes of every kind and description". Assume, for instance that a State introduces a change to its value added tax legislation that discriminates on the basis of nationality of the taxpayer. When trying to determine the date from which the Article on non-discrimination has had effect, one may find that the entry into force Article of the relevant Convention includes a provision drafted by reference to taxes levied from a certain date. Since, however, it can be argued that the "taxes" to which that provision refers are those covered by Article 2 (which do not include value added taxes), a technical argument could be made that the coming-into-effect provision does not apply in relation to the value added tax. Surely, in that case, the reasonable conclusion is to consider that an implicit coming-into-effect provision applies to the value added tax from the same date as the taxes covered by Article 2 or, failing that, from the date of entry into force of the treaty". (at pp.58-8)

I note that a reading over of the kind for which the Appellants contend is only one of two possible solutions proposed by Mr. Sasseville. Furthermore, it seems to me that there is great force in the submission of Mr. Ayliffe QC on behalf of the Respondent that there would be huge practical difficulties in reading over a provision such as Article 27(1) to apply to different types of taxes. The Appellants' submission that if Article 27 were extended by interpretation in this way to UK stamp duty, VAT and inheritance tax "in reality there would be no difficulty in such cases of determining whether the particular sale, supply or death which give rise to the relevant tax liability took place in time before or after the 2002 Tax Convention came into force" is, to my mind, unrealistic. Moreover, it is inconsistent with their case that the effect of Article 27 is to impose a backstop by reference to the entry into effect of the Convention and not its entry into force. In any event, I do not understand Mr. Sasseville to be addressing a situation, such as the present case, where the mutual assistance provision is introduced by amendment in a Protocol which includes express provision for entry into effect and temporal scope and which makes entirely appropriate provision in that regard. In these circumstances there is no purpose to be served by such a bold extension of treaty provisions under the colour of interpretation.

26. The Appellants submit that it is necessary to read Article 25A subject to Article 27 in order to avoid the absurdity that ancient tax liabilities will be recoverable under the procedure introduced by Article 25. They contend that, on the judge's interpretation of the provisions, the only temporal limitation on cross-border collection would be the limitation periods, if any, applicable in the United Kingdom and South Africa, which would apply by virtue of the requirement in Article 25A(3) that the claim is owed by a person who at the relevant time cannot under the laws of the States to which the liability is owed prevent its collection. The Appellants submit that there is no limitation period for collection of taxes in the United Kingdom and that the limitation period in South Africa is thirty years to bring a claim followed by another thirty years to enforce a judgment. As a result, they say, the judge's interpretation would expose taxpayers to potential claims for cross-border collection up to sixty years after liability arose in the case of enforcement in the United Kingdom and indefinitely in the case of enforcement in South Africa. They submit that such a result cannot have been intended. However, the reading for which the Appellants contend would not avoid such a result because the enforcement of old and stale claims would not be ruled out by the backstop of 1 January 2003 for which they contend. Even on the Appellants' reading, the Convention could be used in future in relation to very old tax debts which arose after 1 January 2003 but long before enforcement. In any event, separate provision has been made to avoid the possible consequences identified by the Appellants. A Memorandum of Understanding between the competent authorities of the United Kingdom and South Africa provides that the requested State is not obliged to comply with the request for assistance if the revenue claim is more than five years old.

27. At the hearing before us a great deal of time was devoted to the question whether Article 27 governs the provisions of the 2002 Convention relating to the exchange of information. It will be recalled that exchange of information was dealt with in Article 25 of the 2002 Convention in its original form but that a new Article 25 was substituted by Article III of the Protocol. The Appellants point to the judge's conclusion (at paragraph 33 of his judgment) that the original Article 25 must be read subject to Article 27. The judge dealt with this point very briefly, merely stating that he came to this conclusion "both because of the nature of that provision and because the earlier Conventions contained information sharing provisions". The Appellants then construct the following argument on this foundation. They submit that provisions for exchange of information and assistance in cross-border collection are closely analogous in that both involve one State requesting the assistance of the other State in relation to the enforcement of its revenue laws. Further, they submit that, although the judge did not address the point, he would have reached the same conclusion in relation to the amended Article 25 substituted by the Protocol. (Here they submit that otherwise Article 25 as amended would overlap with Article 25 of the 1968 Convention which remains in force in relation to South African taxes due in respect of taxable years prior to 1

January 2003 and the effect of the amendment of Article 25 would have been, without making any express provision to that effect, to make the provision for exchange of information retrospective rather than merely prospective for the first time.). They submit that that conclusion would be inconsistent with the judge's determination as to the effect of Article VI of the Protocol in relation to Article 25A since the relevant part of Article VI which provides for requests for exchange of information under the new Article 25 is in materially identical terms.

28. To my mind, this argument of the Appellants is constructed on a shaky foundation. First, so far as the original Article 25 is concerned, I do not agree with the judge's conclusion that it has to be read subject to Article 27. The original Article 25 provides for the exchange of "such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by this Convention". As Mr Ayliffe accepts, Article 27 may have some temporal significance for the operation of the first limb of this provision. If information is sought for the purpose of carrying out the provisions of the Convention relating to the modification of tax liabilities (to which Article 27 undoubtedly applies) the indirect effect may well be that the information exchanged will relate to these tax liabilities. To this extent there may be a temporal limitation on Article 25. However that is a very different matter from subjecting the original Article 25 to Article 27. Moreover, when one considers the other limb of the original Article 25 "such information as is necessary for carrying out … the domestic laws of the Contracting States concerning taxes covered by this Convention" there is, to my mind no justification for reading it as subject to Article 27. The Appellants submit that these words refer not only to the categories of tax described in Article 2 but also to the temporal limitations provided for in Article 27. I am unable to accept this submission. The words "concerning taxes covered by this Convention" are apt to describe the categories of taxes to which the Convention applies. In this regard I note that Article 2, which sets out the relevant categories of tax, is headed "Taxes Covered". To my mind, Article 27 is not concerned with what taxes are "covered" by the Convention.

29. Moreover, I consider that that part of Article 27(1) which is concerned with temporal effect (i.e. sub-paragraphs (a) and (b)) is clearly intended to apply to the provisions of the Convention which are concerned with the modification of liability to tax. The substantive provisions of the Convention which address issues of double taxation and which modify liabilities clearly need to be related to the relevant tax periods for the system to be workable. By contrast, there is no particular reason why exchange of information provisions such as Article 25, which are not concerned with the modification of tax charges, require to be limited temporally in their application to particular years of assessment. Information can be effectively exchanged without the process being related to defined periods of liability to taxation.

30. The judge, in coming to his conclusion that Article 25 was subject to Article 27 in respect of its temporal application was clearly influenced by his view that earlier Double Taxation Agreements between the United Kingdom and South Africa included similar provisions. This, it may be suggested, makes it necessary to define the temporal scope of corresponding provisions in later treaties between the same parties. However, an examination of the 1946, 1962 and 1968 Conventions (Articles XIV, XVI and XVII, Articles XXI, XXV and Articles 25 and 27 respectively) shows that they include exchange of information and commencement and effect provisions similar to those in the 2002 Convention and so, by the same token, I consider that the force and effect clauses did not limit temporally the operation of the exchange of information clauses. Moreover, in my view the provision in each of those treaties which provided that it superseded its predecessor was sufficient to define under which treaty the co-operation was taking place.

31. Secondly, in any event, when we come to the amended Article 25 there are further reasons why it cannot have been intended to be read subject to Article 27. These reasons closely reflect those in relation to Article 25A set out earlier in this judgment. Whereas the original Article 25 was limited to the taxes listed in Article 2, the amended Article 25 extends the operation of the exchange of information provision to "taxes of every kind and description". The Appellants maintain that the amended Article 25 is subject to Article 27 notwithstanding the fact that Article 27 deals expressly only with certain specified taxes. The Appellants submit that, as in their submissions on the effect of Article 25A, it is necessary to extend by purposive interpretation the effect of Article 27 so that it applies to all taxes. For reasons given earlier in this judgment, I consider that such an extension by interpretation is too big a step. Here, once again, there is no clear purpose to be achieved. There is no good reason why the amended Article 25 requires to be limited in its application by reference to specific tax years. On the contrary, Article VI is all that is needed by way of provision for commencement and effect. It gives effect to what I consider to be the clear intention of the parties and avoids all of the difficulties which arise from the mismatch of the amended Article 25 and Article 27 in relation to their subject matter. Consequently, even if, contrary to my view, the original Article 25 was subject to Article 27, the amended Article 25 cannot be.

32. The Appellants draw attention to the fact that the 1968 Convention continues to have some relevance to double tax relief for years of assessment prior to those to which the 2002 Convention applies by operation of Article 27. They submit that the fact that the 2010 Protocol amended the 2002 Convention but did not amend the 1968 Convention supports the

view that the parties to the Protocol did not intend Article 25A to have any application other than in relation to tax assessed in the years of assessment to which the 2002 Convention applies. However, I agree with the judge that this point does not assist the Appellants. The submission is circular in that it assumes as correct the conclusion for which the Appellants contend. As the judge observed, the fact that there was no amendment to the 1968 Convention is at least equally explicable by an intention that Article 25A should apply irrespective of the years of assessment applicable to the tax in respect of which reciprocal collection was sought. (Judgment para. 27).

33. Article 25A is based on a provision relating to assistance in the collection of taxes in the OECD Model Convention with respect to Taxes on Income and on Capital (Article 27 of the Model Convention). During the course of submissions we were referred to the official commentary on that draft Article. It includes the following passage:

> *"14. Nothing in the Convention prevents the application of the provisions of the Article to revenue claims that arise before the Convention enters into force, as long as assistance with respect to these claims is provided after the treaty has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such revenue claims, in particular when the provisions concerning the entry into force of their Convention provide that the provisions of that Convention will have effect with respect to taxes arising or levied from a certain time. States wishing to restrict the application of the Article to claims arising after the Convention enters into force are also free to do so in the course of bilateral negotiations."*

Both parties before us claimed that this passage supported their interpretation of the 2002 Convention as amended, not surprisingly placing emphasis on different parts of the passage. To my mind, the passage does not advance the case of either party. It makes clear that it is open to the parties to apply the provision on assistance in the collection of taxes to revenue claims arising before the Convention enters into force. The question is whether the parties intended that the Protocol should have that effect. Similarly, an express provision addressing this issue would have been helpful but is certainly not essential.

34. The Appellants sought to rely on the expert evidence of Professor Dr. Maria Grau Ruiz and Dr. Avery Jones in relation to the interpretation of the provisions of the Convention and Protocol. The judge rejected this evidence as inadmissible. I consider that he was clearly correct to do so. Questions of interpretation are for the court. At the hearing before us we refused an application on behalf of the Appellants to consider this material. However we did allow the Appellants to refer us to published writings on the subject of Double Taxation Agreements.

35. As a result we were referred by the Appellants to Professor Dr. Grau Ruiz's book "Mutual Assistance for the Recovery of Tax Claims". Paragraph 2.1-2.3 includes the bold statement that:

> *"Mutual Assistance is only applicable to tax claims arising at a later date than the agreement or directive concerned".*

However, this statement is contradicted in the following passages where the author states that it is not usual for the regulation establishing assistance to be applied to tax claims originating at an earlier date but that there are exceptions to this general rule. She states that this is an issue that needs to be addressed and that she does not favour such a measure. Moreover, any suggestion that assistance in recovery may apply only to tax claims arising after the entry into force of the relevant treaty is contradicted by the commentary to the OECD Model Convention considered above. As a result I am unable to derive any assistance from Professor Doctor Grau Ruiz.

36. The Appellants also referred us to M. Jacques Sasseville's article "Temporal Aspects of Tax Treaties" published in "Tax Polymath" (2010). Having considered exchange of information provisions, M. Sasseville continues:

> *"The application of typical coming-into-effect provision of tax treaties to Article 27 (Assistance in the collection of taxes) is clearer as that Article deals directly with tax claims. Thus, as regards most bilateral conventions, the provisions of Article 27 only have effect as regards taxes in respect of amounts paid after a certain date or for taxes levied for periods beginning after a certain date (that date corresponding or being subsequent to the entry into force of the convention). That conclusion does not result from the article itself but from the drafting of the coming-into-effect provision which limits the application of the provisions of the convention to such subsequent taxes." (At p. 61)*

M. Sasseville then states that this is recognised by paragraph 14 of the Commentary on Article 27 of the OECD Model Convention, a paragraph which is set out earlier in this judgment. I understand M. Sasseville to be saying that the temporal scope of a provision governing assistance in the recovery of taxes is a matter for agreement between the parties as expressed in the coming into effect provision. The intention of the parties as reflected in Article VI of the Protocol and Article 27 of the Convention is the very question to be decided in these proceedings.

37. The Appellants draw attention to the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, 1988 which deals, inter alia, with cross-border collection of tax. Article 28(6) provides that the provisions of the Convention, as amended by a Protocol in 2010, shall have effect for administrative assistance with prospective effect i.e. in relation to taxable periods or tax liabilities after its entry into force. I note that the

Joint Convention as originally promulgated in 1988 did not include any such provision. Moreover Article 30, which provides that a State may by reservation reserve the right not to provide assistance in respect of tax claims in existence at the date of entry into force of the Convention, indicates that the Convention in its original form did apply to pre-existing tax liabilities unless there was an applicable reservation. Article 28(6) was introduced by a Protocol in 2010. However it also includes an express provision that any two or more parties may mutually agree that the Convention as amended by the Protocol shall have effect for administrating the assistance relating to earlier taxable periods or charges to tax. Accordingly, I do not consider that this provision assists the Appellants.

38. Both parties relied on a US decision, ***Stuart v United States*** 813 F.2d 243 (9th Cir. 1987), as supporting their case. ***Stuart*** concerned successive Double Taxation Agreements between the United States of America and Canada. The 1980 Convention included a provision (Article XXX) resembling Article 27 of the 2002 Convention with which we are concerned. The taxpayers argued on the basis of that provision that the 1980 Convention and not the 1942 Convention applied to a request for information. The US Government offered two arguments for the application of the 1942 Convention. The first was that Article XXX controlled the exchange of information provision. That argument resembled that of the Appellants in the present case. Alternatively, it argued that all of the relevant acts of request preceded the coming into force of the 1980 Convention. The court did not need to rule on the first argument because it accepted the second. Accordingly, I consider that the decision does not assist the parties to the present proceedings.

39. The Respondent sought to rely, in support of the judge's interpretation of the Protocol, upon a Memorandum of Understanding between the United Kingdom and South Africa concerning assistance in the collection of taxes under Article 25A of the 2002 Convention. This Memorandum of Understanding was concluded between the representatives of the competent authorities of the United Kingdom and South Africa on 24 February 2011, although Miss Louise Kollmer explains in her evidence that it was negotiated and agreed during the course of negotiating the 2010 Protocol. Indeed, the Protocol itself expressly provides in Article 25A(1) that the competent authorities in the United Kingdom and South Africa may enter into one or more Memoranda of Understanding to settle the mode of application of the Convention. The Appellants contended that the Memorandum of Understanding is inadmissible as an aid to the interpretation of the Protocol or the 2002 Convention, in particular because it is not an agreement between the States party to those instruments but between their respective competent authorities (i.e. their tax authorities). In this regard they also drew attention to the refusal of Mummery J. in ***IRC v Commerzbank*** at pp. 301-2 to have regard to a joint statement of the UK and US tax authorities. Notwithstanding the fact that the Memorandum of Understanding in the present case was concluded between the tax authorities of the Contracting States, I consider that it is admissible on the construction of the 2010 Protocol and the 2002 Convention pursuant to Article 31(2) and/or 31(3), Vienna Convention on the Law of Treaties, as an agreement relating to the treaty, which was made between all the parties in connection with the conclusion of the treaty (Article 31(2)(a)) or a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (Article 31(3)(a)) or subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31(3)(b)). The Memorandum of Understanding was concluded between the appropriate organs of the Contracting States for this particular purpose. Moreover, I note that in ***Commerzbank*** Mummery J. was not addressing the status of the joint statement in the context of the Vienna Convention on the Law of Treaties.

40. The Memorandum of Understanding provides that requests for assistance are not restricted to claims that were finally determined after the entry into force of Article 25A. The Respondent submits that this provision is consistent only with an understanding that there was no backstop. This provision makes clear, as the Appellants now accept, that the enforcement procedure can apply to tax liabilities which accrued before the Protocol came into force. However, I agree with the judge that this does not cast any light on the issue whether Article 25A applies beyond the period identified in Article 27.

41. Before leaving this topic I should record that we were told by Mr. Ayliffe on behalf of the Respondent that Memoranda of Understanding of this kind relating to Double Taxation Agreements to which the United Kingdom is a party are not published by the Respondent and that the only way in which taxpayers can obtain a copy of the text is by making a Freedom of Information Act request. This is a surprising state of affairs. It seems that Memoranda of Understanding are now frequently used in this context. The OECD Model Tax Convention on Income and Capital produced in 2010 clearly contemplates that Contracting States may enter into Memoranda of Understanding to settle the mode by which agreements for mutual assistance may be applied and the OECD has also published a model form of Memorandum of Understanding. Such Memoranda of Understanding may have an important bearing on the position of taxpayers. I consider that in the interests of fairness to taxpayers such Memoranda of Understanding should be readily available to the public.

42. For these reasons, I agree with the judge's conclusion that Article 27 does not limit the temporal application of the Protocol and Article 25A.

43. For the reasons set out below, I consider that Article 25A, when read free of the fetters of Article 27 with which the Applicants have sought to confine it, applies to requests for assistance in the enforcement of tax liabilities arising before the coming into force of the Protocol.

(1) Article 28, Vienna Convention on the Law of Treaties provides:

> *"Non-retroactivity of treaties*
>
> *Unless a different intention appears from the treaty or as otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry-into-force of the treaty with respect to that party."*

Although the Vienna Convention is not in force between the United Kingdom and South Africa, the basic rule on non-retroactivity reflected in Article 28 may be taken to be declaratory of existing rules of customary international law binding on all States (***Ambatielos case (Preliminary Objections***) ICJ Rep. (1952) 40; Sinclair, The Vienna Convention on the Law of Treaties, 2nd Ed. (1984) p. 85). However, the principle of non-retroactivity is not a peremptory norm of international law and, as Article 28 makes clear, it is open to the parties to agree to the contrary. Therefore everything depends on the intention of the parties. (***Mavrommatis Palestine Concessions*** (1924) PCIJ Ser. A, No. 2, 34; Sinclair, p.85).

(2) For reasons developed later in this judgment in relation to the Appellants' second ground of appeal, I do not consider that the application of Article 25A to requests for assistance in the enforcement of tax liabilities arising before the coming into force of the Protocol is a true case of retrospective application. Nor do I consider that there is any unfairness in the application of the Protocol to such liabilities.

(3) The parties have made clear in Article VI of the Protocol their intention that Article 25A should apply to all requests for assistance in the enforcement of tax claims which comply with Article 25A provided that the request is made on or after the date of entry into force of the Protocol. I can see no good reason or any legal basis for seeking to introduce any further temporal limitation on the scope of Article 25A when the parties have chosen not to do so.

(4) The Appellants themselves have, in fact, accepted that Article 25A is capable of applying to requests for assistance in the enforcement of tax liabilities arising before the coming into force of Protocol. Both below and before this court their position has not been to deny any application of Article 25A to pre-existing tax liabilities, but to limit it by reference to a backstop derived from Article 27.

44. For these reasons, I consider that the tax claims which the Respondents seek to enforce in these proceedings fall within Article 25A of the 2002 Convention.

Ground 2: The judge erred in holding that the powers conferred by section 173, Finance Act 2006 to give effect to "arrangements relating to international tax enforcement" extended to such "arrangements" insofar as they purported to apply retrospectively prior to 19 July 2006 (being the date on which section 173, Finance Act 2006 itself came into force) and that the 2011 Order was effective insofar as it purported to give effect to Article 25A in respect of foreign taxes arising prior to that date.

45. Section 173, Finance Act 2006, came into force on 19 July 2006. The Appellants submit that it provides no express statutory authority for the making of arrangements relating to international tax collection that have retrospective effect i.e. which purport to apply to tax debts arising prior to 19 July 2006, and accordingly they contend that any Order in Council purporting to give effect to such arrangements as a matter of domestic law would be ineffective in relation to the period prior to 19 July 2006. Accordingly, this would mean that even if the judge were correct in rejecting their primary case that Article 25A of the 2002 Convention does not apply to tax debts in respect of taxable years commencing prior to 1 January 2003, the 2011 Order does not validly give effect to Article 25A as a matter of domestic law insofar as it purports to apply to tax debts arising before 19 July 2006. In this regard the Appellants rely on the statement of Willes J. in ***Phillips v Eyre*** (1870) LR 6 QB 1 at p. 23 that retrospective legislation is

"Contrary to the general principle that legislation by which the conduct of mankind is regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

46. The judge dealt with this part of the case in a very clear and succinct manner, stating his conclusions as follow:

> *"Against that background, I turn to the Defendants' secondary case which I reject for the following reasons. As I have explained already the Revenue Rule precludes the enforcement in England of taxes assessed by a foreign Tax Authority. Thus as long as that rule applies, persons in the position of Ben Nevis are entitled to resist any attempt by a foreign Tax Authority such as SARS to collect tax from it in England. However, an entitlement to resist collection as long as that rule applies does not give rise to an expectation that in relation to such liabilities the law that presently precludes collection in England will never be changed. If the rule is changed then ... it bites only as to the future enforcement of the existing debt. The fact that the debt was incurred prior to the change in the law is immaterial so long as the taxpayer cannot under the laws of the assessing*

State prevent its collection. The presumption against retrospectivity would preclude the rearrangements of tax liabilities for prior years of assessment (which is no doubt the, or a, reason why Article 27 is formulated in the terms it was and included in the original rule 2002 Convention) but I see no reason for concluding that it precludes the collection in the future of debts that happen to have fallen due prior to the coming into effect of [the Finance Act 2006]. Such a conclusion does not in any relevant sense involve changing "...the character of past transactions carried on upon the faith of the then existing law..." or the retrospective alteration of the legal effect of an act or omission by a later change in the law." (Judgment at para 45.)

47. The Appellants criticise this passage as a mischaracterisation of the nature and effect of provisions like Article 25A which, they submit, purports to reverse the effect of a widely known and long established rule of private international law. At the time the liability to tax arose in South Africa there was, as a result of the Revenue Rule, no basis on which it could be pursued in this jurisdiction. The Appellants submit that the effect of the implementation of Article 25A is the creation of a new cause of action vested in the Respondent in respect of tax debts where previously no such cause of action existed and/or the abolition of an absolute defence that Ben Nevis would otherwise have had to any such claim. This, they submit, cannot plausibly be described as merely a procedural change that does not alter the legal incidents of prior transactions. They submit that the alleged effect of the 2011 Order engages the presumption against retrospectivity and other linked presumptions.

48. It was common ground before us and below that, as the judge expressed it in paragraph 44 of his judgment, absent express wording to the contrary it is to be presumed that a statute was not intended by the legislator to "have retrospective effect or, where it would appear that some retrospective effect was intended, that such effect was intended to be limited to the minimum necessary to achieve the relative legislative purpose". However, it is necessary to examine with care the precise sense in which an enactment is said to have retrospective effect. In particular, it is important to have in mind the distinction drawn by Lord Rodger in ***Wilson v First County Trust (No. 2)*** [2004] 1 AC 816 at paras. 186 et seq., between retroactive operation of legislation and statutes making prospective changes to existing rights. In the present case the judge found that an enactment is not retrospective in any objectionable sense where the enactment is simply applied at a time after its commencement to a state of affairs existing at that time, even though that state of affairs came in to existence before the commencement. In this regard he relied on the following statement by Mr. Francis Bennion in Bennion on Statutory Interpretation (5th Ed.) at p. 317 which was approved by Ward J. as he then was, in ***Hager v Osborne*** [1992] Fam. 94 at p. 99.

> *"It is important to grasp the true nature of objectionable retrospectivity, which is that the legal effect of an act or omission is retroactively altered by a later change in the law. However, the mere fact that a change is operated with regard to past events does not mean that it is objectively retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened and bases new legal consequences upon it."*

49. There is an abundance of authority to support the approach taken by the judge. In ***West v Gwynne*** [1911] 2 Ch 1 the Appellant argued that section 3, Conveyancing and Law of Property Act 1892 should not be applied "retrospectively" to leases executed before the Act commenced. The Court of Appeal rejected the submission, Cozens-Hardy MR observing:

> *"Almost every statute affects rights which would have been in existence but for the statute" (at p.11)*

Buckley LJ stated:

> *"During the argument the words "retrospective" and "retroactive" have been repeatedly used, and the question has been stated to be whether s.3 of the Conveyancing Act 1892, is retrospective. To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with the existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law." (pp.11-12)*

50. Similarly in the Canadian decision ***Gustavson Drilling (1964) Limited v Minister of National Revenue*** [1977] 1 RCS 271, which was cited with approval by Lord Rodger in ***Wilson*** at paras 191, 193, the issue was whether the taxpayer could deduct against its liability to income tax certain expenses incurred prior to 1960 when legislation passed in 1962 had repealed the availability of such deductions for tax years following 1962. A majority of the Supreme Court of Canada rejected the taxpayer's argument that the repealing legislation was retrospective. Dickson J. observed:

> *"It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception... No one has a vested right to the continuance of the law as it stood in the past; in tax*

law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed." (at p.282)

51. I agree with the judge that the presumption against retrospective effect has no application in the present case because the application of Article 25A to taxes arising prior to 19 July 2006 or 1 January 2003 does not involve any objectionable retrospective effect.

(1) It was common ground that Article 25A does not change the relevant law with effect from a time earlier than the commencement of the 2011 Order in Council, the 2010 Protocol or the 2002 Tax Convention.

(2) Article 25A does not confer on any person a power to act with retrospective effect. On the contrary, Article VI of the Protocol stipulates that a request for assistance must be received and acted on after Article 25A has come into force.

(3) Article 25A does not alter the legal incidents of a transaction or other conduct effected before its commencement. The first Appellant became subject to a liability in the law of South Africa to pay taxes. That liability has not been changed by Article 25A. In particular, I consider the Appellants' submission that Article 25A created a new cause of action untenable. The true position is made abundantly clear by Article 25A(3) which provides that where a revenue claim arises in one Contracting State "that revenue claim shall be collected" by the other State "as if the revenue claim were a revenue claim of that other State". The provision does not create a new right or liability to tax in the law of the collecting State. On the contrary, the words "as if" import a legal fiction which permits the South African claim to be enforced as if it were a UK claim. In this regard I would also draw attention to Article 25A(6) which provides that proceedings with regard to the existence, validity or amount of a revenue claim of the requesting State shall not be brought before the courts of the other Contracting State. Furthermore, I note that Article 25A(7) provides that where the relevant revenue claim ceases to be enforceable in the laws of the requesting State, the competent authority of the requesting State has a duty to notify the collecting State promptly of that fact and, at the option of the collecting State, the requesting State shall either suspend or withdraw its request. Furthermore, the abrogation of the Revenue Rule does not deprive Ben Nevis of an absolute defence to liability. The Revenue Rule merely prevents the enforcement of the debt in another jurisdiction; the abrogation of the rule by Article 25A merely allows the debt to be collected in the United Kingdom.

52. That is not the end of the matter, however. As Lord Rodger explained in ***Wilson*** at para. 193,

"Often a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect".

Lord Rodger then went on to cite with approval a further passage from the judgment of Dickson J. in ***Gustavson Drilling***.

"The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction ... The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions." (at p.282)

Lord Rodger then observed that the presumption more often falls to be considered in relation to legislation which alters rights only for the future and that since it is more likely that Parliament intended to alter vested rights in this way than that it intended to make a retroactive change, in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive effect (at para. 195). It is far from clear on the authorities what constitutes a "vested right" for this purpose, Lord Rodger in ***Wilson*** observing that "the courts have tended to attach the somewhat woolly label "vested" to those rights which they conclude should be protected from the effect of the new legislation." (para 196). What is clear, however, is that the basis of any presumption in this area is that of simple fairness. Thus in ***Wilson*** Lord Nicholls (at para. 19) approved the following statement by Staughton LJ in ***Secretary of State for Social Security v Tunnicliffe*** [1991] 2 All ER 712, 724, as stating the underlying rationale of the principle:

"The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

(See also ***L'Office Cherifien des Phosphates v Yamashita–Shinnihon Steamship Co. Ltd***. [1994] 1 AC 486 per Lord Mustill at p.525A; ***Wilson*** per Lord Rodger at para. 196.)

53. To my mind there is no unfairness in Article 25A permitting the enforcement of pre-existing tax liabilities. Prior to the amendment of the 2002 Convention and its implementation in this jurisdiction the Revenue Rule prohibited the enforcement of South African tax liabilities in the United Kingdom. However, that Rule was always liable to be abrogated by treaty

and the taxpayer could have no legitimate expectation that the Rule would not be abrogated in the future. Moreover, the Revenue Rule did not exist for the benefit or protection of taxpayers. Its precise basis has long been debated (see F.A. Mann, Studies in International Law, (1973), pp. 495-9.) The editors of Dicey, Morris and Collins, The Conflict of Laws, (15th Ed.), para. 5-020) suggest that the best explanation is that provided by Lord Keith of Avonholm in ***Government of India v Taylor*** [1955] AC 491 at p. 511, that enforcement of such claims is an extension of the sovereign power which imposed the taxes, and an "assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties." (See also ***Re State of Norway's Application (Nos. 1 and 2)*** [1990] 1 AC 723 per Lord Goff of Chieveley at p. 808.) However, whatever its precise basis, it seems clear that it lies in relationships between sovereign States and that its abrogation, therefore, cannot be regarded as an injustice to a party seeking to resist enforcement of a tax liability. From a taxpayer's point of view, the Revenue Rule is a collateral benefit and he cannot complain of injustice if he is deprived of it.

54. Accordingly, I conclude that section 173, Finance Act 2006 does authorise the making of international tax enforcement arrangements in relation to tax liabilities which arose before that section came into force on 19 July 2006.

Conclusion.

55. For these reasons, I would dismiss this appeal. I should add that I agree with the observations of Jackson LJ in relation to the publication by the Respondent of Memoranda of Understanding and in relation to skeleton arguments.

Lord Justice Jackson :

56. I agree that this appeal should be dismissed for the reasons stated by Lloyd Jones LJ. I only wish to add comments on two matters namely, Memoranda of Understanding and skeleton arguments.

1. Memoranda of Understanding

57. The OECD Model Tax Convention in Income and Capital (22nd July 2010) specifically envisages that contracting states may enter into Memoranda of Understanding ("MOUs") to settle the mode by which agreements for mutual assistance may be applied. The OECD has published a model form of MOU. This deals with matters such as how far back in time the provisions for collecting unpaid tax may extend.

58. Under Article 31 of the Vienna Convention such an MOU may be taken into account as an aid to interpreting the primary instrument which the MOU supplements.

59. Paragraph 1 of Article 25A of the 2002 Convention (as amended) specifically envisages that the competent authorities in the UK and South Africa may enter into one or more MOUs to settle the mode of application of the Convention.

60. It follows from the foregoing that any taxpayer who does or did business in both South Africa and the UK has a legitimate interest in those MOUs. I was concerned to learn during argument that such MOUs are not made publicly available. The only means by which the taxpayers can ascertain what they say is by making Freedom of Information Act requests.

61. In my view such MOUs should be placed in the public domain. This may either be done by putting them on the HMRC website or by some other means.

2. Skeleton Arguments

62. The appellants have furnished two replacement skeleton arguments. Together they run to 40 pages and contain 113 footnotes. They are discursive in style and contain much material which was not pursued in oral submissions. When the appellants' leading counsel got to their feet, they proceeded to argue the case as if the skeleton arguments did not exist – at least until the court objected. Thereafter counsel did their best to direct us to disparate sections of the skeletons which were relevant to what they were saying at any particular time. Quite often there were no relevant sections of the skeletons. Counsel simply read out at dictation speed various sets of legal propositions for the court to write down and ponder. At one point counsel dictated a list of relevant dates, since they had not troubled to provide a chronology. All this is a far cry from what the rules require.

63. The practice directions which now supplement CPR Part 52 reflect what was good practice under the former practice direction PD52. Section 5 of Practice Direction 52A provides:

> *"5.1 (1) The purpose of a skeleton argument is to assist the court by setting out as concisely as practicable the arguments upon which a party intends to rely.*
>
> *(2) A skeleton argument must –*
>
> *• be concise;*
>
> *• both define and confine the areas of controversy;*
>
> *• be set out in numbered paragraphs;*
>
> *• be cross-referenced to any relevant document in the bundle;*
>
> *• be self-contained and not incorporate by reference material from previous skeleton arguments;*
>
> *• not include extensive quotations from documents or authorities.*
>
> *(3) Documents to be relied on must be identified.*
>
> *(4) Where it is necessary to refer to an authority, a skeleton argument must –*
>
> *(a) state the proposition of law the authority demonstrates; and*

(b) identify the parts of the authority that support the proposition.

If more than one authority is cited in support of a given proposition, the skeleton argument must briefly state why.

(5) The cost of preparing a skeleton argument which –

(a) does not comply with the requirements set out in this paragraph; or

(b) was not filed within the time limits provided by this Practice Direction (or any further time granted by the court),

will not be allowed on assessment except as directed by the court.

5.2 The appellant should consider what other information the appeal court will need. This may include a list of persons who feature in the case or glossaries of technical terms. A chronology of relevant events will be necessary in most appeals.

5.3 Any statement of costs must show the amount claimed for the skeleton argument separately."

64. In relation to appeals to the Court of Appeal, paragraph 31 (1) of Practice Direction 52C provides:

"31 (1) Any skeleton argument must comply with the provisions of Section 5 of Practice Direction 52A and must–

(a) not normally exceed 25 pages (excluding front sheets and back sheets);

(b) be printed on A4 paper in not less than 12 point font and 1.5 line spacing.

(2) Where an appellant has filed a skeleton argument in support of an application for permission to appeal, the same skeleton argument may be relied upon in the appeal or the appellant may file an appeal skeleton argument (Timetable Section 5, Part 1).

(3) At the hearing the court may refuse to hear argument on a point not included in a skeleton argument filed within the prescribed time.

(4) The court may disallow the cost of preparing an appeal skeleton argument which does not comply with these requirements or was not filed within the prescribed time."

65. These provisions mean what they say and they serve a serious purpose. The civil division of the Court of Appeal works under considerable pressure of time and does its utmost not only to decide cases justly and in accordance with the law, but also to deliver an efficient service to court users. To this end what the court needs from each party is a concise skeleton argument, setting out clearly the points which will be argued and providing *relevant* references.

66. The sum at issue in this appeal is approximately £7.8 million and a galaxy of experienced and expensive lawyers have been instructed. One might therefore have expected the rules to be complied with. If the appellants had succeeded in this appeal, the court would have disallowed at least some and possibly all of the costs of the appellants' skeleton arguments.

67. Out of fairness, I should add that the respondents' skeleton argument was longer than necessary and longer than permitted by the current practice direction. On the other hand, it was well structured and the respondents had a great deal of material to respond to. Also, and more importantly, the respondents' skeleton argument identified the arguments which counsel was planning to deploy orally. It thus avoided the need for a dictation exercise. In oral submissions the respondents' counsel used his skeleton argument as the note from which he spoke, amplifying points where necessary and debating with the court the written propositions of law which were in front of us all.

68. The consequences of the parties' differing approaches to skeleton arguments were graphically illustrated during the course of the hearing. The respondents' oral submissions were completed in half a day. The appellants' oral submissions occupied almost one and a half days.

69. The purpose of this judgment is not to pick on particular counsel as egregious offenders. The present malaise is too widespread for that. I simply take this case as an exemplifying a practice which must now stop.

70. Any advocates who have cases pending in the Court of Appeal may care to review their skeleton arguments in the light of this judgment, bearing in mind the costs sanctions which are available to the court.

71. The Master of the Rolls has read paragraphs 62 to 70 of this judgment in draft and asks me to say that he agrees with the general observations about the use of skeleton arguments in the Court of Appeal.

Lord Justice Floyd :

72. I agree with both judgments.

Canada

Federal Court

Hillis v. Canada (Attorney General)

16 September 2015

1) International exchange of information – Information that may be "relevant" for tax purposes – Purpose of the Treaty providing for this information exchange – No opportunity for the requested State to object to the other State's tax policy choices

2) International recovery assistance – Not covering the exchange of information for the verification of taxpayer compliance or related exchanges of information

FACTS

This dispute concerned the legality of the disclosure to the US tax authorities of the personal information of US persons, collected by Canadian financial institutions for the Canada Revenue Agency. The plaintiffs argued that the collection and disclosure of taxpayer information to the US was illegal, where:

- the taxpayer information related to a taxable period in which the taxpayer was a citizen of Canada;
- the taxpayer information was not shown to be relevant for carrying out the provisions of the Double Taxation Convention between Canada and the US or the domestic laws of Canada or the US; or
- the collection and disclosure of the taxpayer information subjected US nationals resident in Canada to taxation and requirements connected therewith that were more burdensome than the taxation and requirements connected therewith to which Canadian citizens resident in Canada were subjected.

JUDGMENT

1) Article XXVII of the Canada – US Tax Treaty provides that the competent authorities of the contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the contracting States concerning taxes to which the Convention applies. The automatic collection and disclosure of the account holder information covered by the Intergovernmental Agreement (IGA) meets the standard of "may be relevant" under Article XXVII of the Canada-US Tax Treaty. Article XXVII does not provide Canada with an opportunity to object to US tax policy choices (point 68).

2) Article XXVI A of the Treaty clearly prevents Canada from providing the US with assistance in the collection of revenue claims to the extent that the taxpayer in question was a citizen of Canada at the time the revenue claim arose. This Article XXVI A applies only to cases in which tax liability has been determined and is enforceable, and does not apply to the assessment of tax payable, the verification of taxpayer compliance, or related exchanges of information. Accordingly, the automatic exchange of information allowed by the IGA does not amount at the present time to providing assistance in collection, and is thus not captured under this Article (point 72).

2015 FC 1082

Between:
Virginia Hillis and Gwendolyn Louise Deegan
v.
The Attorney General of Canada
And
The Minister of National Revenue

<u>JUDGMENT AND REASONS</u>

[1] On August 11, 2014, the plaintiffs filed a statement of claim seeking a declaration that the *Canada-United States Enhanced Tax Information Exchange Agreement Implementation Act*, being section 99 and Schedule 3 of the *Economic Action Plan 2014 Act, No. 1*, SC 2014, c 20 [IGA Implementation Act], and sections 263 to 269 of the *Income Tax Act*, RSC 1985, c 1 (5th Suppl) [ITA] – collectively, the "impugned provisions" – are *ultra vires* or inoperative because the impugned provisions are unconstitutional or otherwise unjustifiably infringe *Charter* rights [the constitutional issues].

[2] By the effect of section 3 of the IGA Implementation Act, the Agreement between the Government of Canada and the Government of the United States of America [US] set out in the schedule [Intergovernmental Agreement or IGA] of the IGA Implementation Act is approved and has the force of law in Canada during the period that the Intergovernmental Agreement, by its terms, is in force.

[3] On October 9, 2014, the plaintiffs filed an amended statement of claim adding non-constitutional arguments, which are examined and disposed of in the present judgment. This summary trial concerns the legality of the disclosure of the personal information of US persons (see paragraphs 17 and 27 below) collected for the year 2014 by Canadian financial institutions for the Canada Revenue Agency [CRA]. This information is scheduled to be disclosed on or around September 30, 2015 by the Minister of National Revenue [Minister] to the US tax authorities.

[4] In this respect, the plaintiffs seek a general declaration and a permanent prohibitive injunction

preventing the collection and disclosure of taxpayer information to the US by the Minister where:

(a) the taxpayer information relates to a taxable period in which the taxpayer was a citizen of Canada;

(b) the taxpayer information is not shown to be relevant for carrying out the provisions of the Convention or the domestic tax laws of Canada or the US; or

(c) the collection and disclosure of the taxpayer information subjects US nationals resident in Canada to taxation and requirements connected therewith that are more burdensome than the taxation and requirements connected therewith to which Canadian citizens resident in Canada are subjected.

[5] The plaintiffs generally assert that the automatic collection and disclosure of any such taxpayer information to the US as required by the impugned provisions would be contrary to the provisions of the *Convention between the United States and Canada with Respect to Taxes on Income and Capital* [Canada-US Tax Treaty] and/or to section 241 of the ITA. The Canada-US Tax Treaty has been approved by Parliament and has the force of law in Canada by the effect of the *Canada-United States Tax Convention Act, 1984*, SC 1984, c 20 [Tax Convention Act]. The plaintiffs have urged the Court to render its final decision and issue a permanent injunction before the taxpayer information is sent by the CRA to the Internal Revenue Service [IRS], otherwise the present action will become academic and the plaintiffs will suffer irreparable harm. Indeed, it is for this reason that the present motion for summary trial was specially scheduled by the Case Management Judge to be heard at a special sitting in Vancouver on August 4 and 5, 2015.

[6] On the contrary, the defendants submit that the collection of such relevant information is authorized by the IGA, and that its disclosure to the IRS is not inconsistent with the Canada-US Tax Treaty or in violation of section 241 of the ITA. Canada is required to transmit taxpayer information collected under the impugned provisions to the US for the year 2014 by September 30, 2015, and counsel for the defendants have indicated to the Court that to comply with this legal requirement, the CRA will in fact start to send such information to the IRS on or around September 23, 2015. Moreover, defendants' learned counsel indicated to the Court at the hearing of the present motion for summary trial that he had no instructions from the defendants to consent on a suspension of the contemplated exchange of information pending the time that the matter was in deliberation or that an appeal was pending (in case the Court would refuse the declaratory and injunctive relief requested by the plaintiffs in their motion for summary trial).

[7] I have read the motion records and supplementary motion records filed by the parties, and have considered all relevant and admissible evidence, and all the representations made at the hearing and in the written pleadings, including the relevant legal provisions and case law referred to by counsel. Parties agree that the issues raised by the plaintiffs in their motion are suitable for determination by summary trial and that the constitutional issues raised by the plaintiffs should be decided by the Court at a later date. In view of the urgency of the matter, the Court has accepted to render its final decision prior to September 23, 2015. That being said, measures are taken by the Court to have the present judgment translated in French on an urgent basis as well.

[8] In the event of any inconsistency between the provisions of the Tax Convention Act, or the Canada-US Tax Treaty, and the provisions of any other law, subsection 3(2) of the Tax Convention Act provides that the provisions of the Tax Convention Act and the Canada-US Tax Treaty prevail to the extent of the inconsistency. Moreover, in the event of any inconsistency between the provisions of the IGA Implementation Act or the IGA and the provisions of any other law (other than Part XVIII of the ITA), subsection 4(1) of the IGA Implementation Act provides that the provisions of the IGA Implementation Act and the IGA prevail to the extent of the inconsistency.

[9] I have concluded that the collection and automatic disclosure of account holder information about US reportable accounts (see paragraphs 28 to 34 below) contemplated by Articles 2 and 3 of the IGA is legally authorized in Canada by the provisions of the IGA Implementation Act and Part XVIII of the ITA. Moreover, contrary to the assertions made by the plaintiffs, I find that the collection and automatic disclosure of any such information is not inconsistent with the provisions of the Canada-US Tax Treaty, and does not otherwise violate section 241 of the ITA. Basically, I endorse the general reasoning and the legal arguments submitted by the defendants in their written submissions and reasserted at the hearing by counsel.

Tax compliance and tax liability

[10] In every country and for every state, taxation fulfills its utilitarian and distributive purposes: to transfer money from the taxpayer's pocket to the public treasury, which will in turn satisfy the budgetary needs of the nation. Whether you see yourself as a conservative, a liberal or a libertarian, all taxpayers – natural or legal – must annually compute their income and declare it to the tax authorities. This is the law of the land: inescapable, inevitable and obligatory. But what is the scope of one's fiscal liability, legally and practically speaking? Suppose no income is received during a particular year: is the taxpayer relieved of any statutory obligation to produce a declaration? What about persons having dual citizenship or multiple residences in different countries?

[11] The list of questions is endless as the particular situation of each taxpayer is infinitely variable. Not surprisingly, the answers will vary from one jurisdiction to another. It is all a matter of statutory construction and application. In a globalized world, practical reality, as well as political and economic considerations, will encourage countries to sign tax treaties.

[12] For example, whether a taxpayer can avail itself of a double taxation exception is a matter to be settled between the countries that have entered into a tax treaty. Indeed, Article XXIV of the Canada-US Tax Treaty exists for this specific purpose. At the time the Canada-US Tax Treaty was negotiated by the parties, it was deemed important to spare from double taxation a number of Canadian individuals working in the US (or vice versa), and Canadian companies operating in the US (or vice versa). As noted in 1995 by the Supreme Court of Canada (citing the US Senate (Foreign Relations Committee), Tax Convention and Proposed Protocols with Canada, at page 2): "The principal purposes of the proposed income tax treaty between the United States and Canada are to reduce or eliminate double taxation of income earned by citizens and residents of either country from sources within the other country, and to prevent avoidance or evasion of income taxes in the two countries". See *Crown Forest Industries v Canada*, [1995] 2 SCR 802 at page 823 [*Crown Forest Industries*].

[13] The Christians expert report provides examples of "Tax Treaty Gaps" with respect to the differential treatment accorded in Canada and in the US to the sale of a principal residence, lottery winnings or strike pay, passive income losses, non-US corporations, and non-US trusts, which can lead to "timing issues", as well as certain other taxes that may not be eligible for offset by foreign taxes via credit (Christians expert report, pages 7-10). Be that as it may, while gaps or differences in the treatment of certain situations by the US and Canadian tax authorities have been raised by the parties, it is not a matter that needs to be addressed in this summary trial. In exercising its competent authority power to exchange taxpayer information with a treaty partner, the Minister – in practice the CRA – does not consider whether a Canadian taxpayer whose information is subject to exchange (whether automatic or otherwise) would have an impact on a tax liability in the receiving state (Murray affidavit, paragraph 18).

[14] The issue to be considered in this summary trial is notably whether the information exchanged under the IGA is "foreseeably relevant". Under paragraph 1 of Article XXVII of the Canada-US Tax Treaty, "information may be exchanged for use in all phases of the taxation process including assessment, collection, enforcement or the determination of appeals". See the technical explanation to the Fifth Protocol, dated September 21, 2007, article 23, page 47. According to the evidence submitted by the defendants, financial information from a foreign jurisdiction about individuals who are, or who display indicia of being, tax residents is useful to a tax administrator even if the information does not lead to increased tax liabilities in the receiving State for all taxpayers identified. Information that the CRA receives from treaty partners assists the CRA with its offshore compliance work, risk assessment, workload development, trend analysis and other matters relevant to ensuring compliance with Canada's tax laws (Murray affidavit, paragraph 21).

[15] Determining the relevance of information exchanged under the Canada-US Tax Treaty is an administrative matter usually left to the discretion of the tax authorities themselves. From a practical point of view, relevance is mostly related to the identification of various "income sources" in the competent jurisdiction. Residency indicia (which may include citizenship status in the US) will be searched by the tax authorities (cross-examination of Sue Murray at pages 191 and following). The automatic exchange of information is valuable because of its usefulness in conducting risk assessment and in identifying taxpayers with potential compliance issues, and it is increasingly being used worldwide, as illustrated by the evidence submitted with the Smith affidavit. In the present case, the Court has been advised that IRS officials have communicated to CRA officials that the information that Canada will exchange with the US pursuant to the IGA will be highly relevant to the administration of US domestic tax laws for similar reasons (Murray affidavit, paragraph 22). Given the CRA's experience exchanging information with treaty partners, the Director of the Competent Authority Services Division of the CRA has sworn that she has no reason to doubt this IRS Assertion (Murray affidavit, paragraph 22).

Taxpayers' obligations under Canada and US Tax laws

[16] Under the ITA, an income tax shall be paid, as required by that Act, on the taxable income for each taxation year of *every person resident in Canada* at any time of year (subsection 2(1) of the ITA). Moreover, *a non-resident person in Canada* who was employed in Canada, carried on a business in Canada, or disposed of a taxable Canadian property at any time in the year or a previous year, will pay tax on the taxable income determined in accordance with the particular rules found in Division D of the ITA. That being said, notwithstanding any provision of the ITA, where the Minister and another person have, under a provision contained in a tax convention or agreement with another country that has the force of law in Canada, entered into an agreement with respect to the taxation of that other person, all determinations made in accordance with the terms and conditions of the agreement shall be deemed in accordance with the ITA (subsection 115.1(1) of the ITA).

[17] On the other hand, under US domestic law, **all US citizens are deemed to be permanent tax residents in the US for federal income tax**

purposes – regardless of whether or not they actually reside in the US. "US persons" who are subject to US tax laws also include other categories of persons who reside in the US such as green card holders. Accordingly, every Canadian resident who is a US citizen, even if he or she is also a Canadian citizen, is subject to US federal taxation on all of their income from all sources, wherever derived. US persons are also subject to various tax reporting obligations, which include registering for a taxpayer identification number [TIN], filing annual tax returns, reporting income and computing US tax payable. Under US tax laws, the obligation to file income tax returns and to comply with reporting requirements is not always dependent on the existence of an actual tax liability for a particular year.

[18] The IRS uses offshore voluntary disclosure programs targeting presumed hidden offshore wealth held by US residents as a soft administrative approach to combat tax evasion, but such programs may be ineffective in many cases. Should some type of "dragnet" approach be taken to combat tax evasion instead? Obviously, the US Congress has investigated this direction in recent years. The *Foreign Account Tax Compliance Act* [FATCA], passed in 2010 as part of the *Hiring Incentives to Restore Employment Act*, Pub. L. No. 111-147, 124 Stat. 71, and codified in pertinent part as I.R.C. §6038D, imposes reporting obligations both on US persons directly, and on foreign financial institutions at which US persons hold certain types of accounts. More particularly, FATCA imposes a thirty percent withholding tax on foreign financial institutions that do not meet the reporting requirements.

[19] US citizens are required to report information regarding foreign bank and financial institution accounts in various forms. According to the expert report of John P. Steines, US persons are required to file an annual income tax return (Form 1040, as well as supporting schedules and forms), which includes the taxpayer's name, address, taxpayer identification number, items of income, deduction and credit, and resulting tax liability (Steines expert report, page 5). Schedule B of Form 1040 also requires the disclosure of information pertaining to foreign bank accounts, including: whether the taxpayer has a financial interest or signature authority over a financial account located in a foreign country; whether a taxpayer is required to file a *Report of Foreign Bank and Financial Accounts* – or Form 114 [FBAR]; the name of the country in which the foreign account is located; and other information related to foreign trusts. Schedule B of Form 1040 is an obligation that pre-dates FATCA (Steines expert report, pages 5-6).

[20] The Steines report also details the requirement for US persons who meet certain reporting thresholds to file Form 8938, created pursuant to FATCA, which also relates to foreign bank account information and must accompany Form 1040 (page 6). This information includes:

- The name, mailing address and identification number of the foreign financial institution;
- The name, address and US taxpayer identification number of the owner of the account;
- The account type and number or other designation;
- Whether the account was opened or closed during the year;
- Whether the account is held jointly with a spouse;
- The maximum account value during the year; and
- Whether a foreign exchange rate was used to convert the account value into US dollars (along with the rate and source of the rate).

[21] The failure to file Form 8938 in a timely manner can result in a financial penalty of $10,000, which is increased by $10,000 for each month the failure to file remains uncured after a 90-day written notice period (up to a maximum of $50,000) (*Internal Revenue Code* §6038D(d)-(e)).

[22] In addition to the requirement to file annual income tax returns, the Steines report notes that US citizens who hold or have signatory power over a financial account in excess of $10,000 at any time during the year are required to file an FBAR. The FBAR also pre-dates FATCA. The FBAR must be filed to the Financial Crimes Enforcement Network of the US Treasury Department. It must disclose (Steines expert report, page 7):

- The name, mailing address, and identification number of the foreign financial institution;
- The type of filer, name, mailing address, US taxpayer identification number, birthdate, and whether the account is jointly owned;
- Whether the filer has a financial interest in 25 or more financial accounts;
- Whether the filer has signatory power but no financial interest in 25 or more financial accounts;
- The account number or other designation;
- The type of account; and
- The maximum value of the account during the calendar year.

[23] If failure to file an FBAR is willful, the maximum penalty will be the greater of $100,000 or 50% of the account balance that was not disclosed (31 U.S. Code §5321(a)(5)(C)-(D); Steines expert report, footnote 22). In addition, penalties are for each violation, and multiple violations can occur if they involve multiple offices, branches or places of business (31 U.S. Code §5321(a)(1); Steines expert report, footnote 22).

[24] As Professor Christians notes in her expert report, Canadian residents who have US person status and who contribute to or are beneficiaries of certain savings vehicles (including some RESPs, RDSPs and TFSAs) may also be required to file an "Annual Information Return of Foreign Trust with a US Owner" (Form 3520A) or an "Annual Return to Report Transactions with Foreign Trusts and Receipt of

Certain Foreign Gifts" (Form 3520), or both (Christians expert report, para 13). Failure to file these forms attracts financial penalties, whether or not any tax is due (IRC §6048(b)(1) and IRC §6677; (Christians expert report, paragraph 13).

[25] Canadian residents who have US person status and who invest in certain Canadian mutual fund companies or who are directly or indirectly controlling shareholders of Canadian corporations (including small business corporations) may also be required to file Form 5471 (IRC §6038, 6046 and regulations thereunder; Christians expert report, paragraph 13). Canadian residents who have US person status and who own interests in certain Canadian mutual funds and other investment vehicles may be required to annually file Form 8621 (IRC §1298(f); Christians expert report, paragraph 13). Finally, Canadian residents with US person status and who own interests in, make transfers to, or receive income, dispose of, or change their interests in certain Canadian partnerships may be required to file Form 8865. Failure to file in each of these cases may lead to financial penalties (IRC §6038; 6038B; 6046A; Christians expert report, paragraph 13).

[26] As can be seen, under US laws, a failure to comply with reporting obligations exposes a US person to penalties. Nor do the filing obligations mentioned above constitute an exhaustive list. Indeed, "[r]egardless of whether any tax is due, the US requires extensive tax and asset reporting documentation, for which noncompliance attracts extensive penalties" (Christians expert report, paragraph 10). The US Government is not a party to the present proceeding. The Court is not in a position at the present time to determine whether the US tax authorities will in fact take action against the plaintiffs or other US persons having dual citizenship or residing in Canada if the taxpayer information mentioned in the IGA is disclosed by the CRA to the IRS. Furthermore, before any collection step is taken, the amount of income tax, penalties or interest due must be first assessed (possibly leading to a particular request for information under the Canada-US Tax Treaty). Accordingly, in the absence of concrete evidence, it is speculative to suggest that the automatic collection and disclosure of taxpayer information mentioned in the IGA is tantamount to providing help to the US authorities in the collection of taxes.

Scope and effect of the impugned provisions

[27] Under the Intergovernmental Agreement concluded in 2014 by the governments of Canada and the US, for the purpose of implementing the obligations to obtain and exchange information with respect to reportable accounts, as specified in Article 1 (subparagraph 1(ee)) of the IGA, the term "US person" means:

"The term "U.S. Person" means:

(1) a U.S. citizen or resident individual.

(2) a partnership or corporation organized in the United States or under the laws of the United States or any State thereof,

(3) a trust if

(A) a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust, and

(B) one or more U.S. persons have the authority to control all substantial decisions of the trust, or

(4) an estate of a decedent that is a citizen or resident of the United States.

This subparagraph 1(ee) shall be interpreted in accordance with the U.S. Internal Revenue Code.

Le terme « personne des États-Unis» désigne:

(1) une personne physique qui est un citoyen ou un résident des États-Unis;

(2) une société de personnes ou une société constituée aux États-Unis ou selon la législation de ce pays ou d'un de ses États;

(3) une fiducie si, à la fois:

(A) un tribunal des États-Unis aurait la compétence, selon le droit applicable, de rendre des ordonnances ou des jugements concernant la presque totalité des questions liées à l'administration de la fiducie,

(B) une ou plusieurs personnes des États-Unis jouissent d'un droit de contrôle sur toutes les décisions importantes de la fiducie;

(4) la succession d'un défunt qui est citoyen ou résident des États-Unis.

Le présent alinéa ee) est interprété conformément à l'Internal Revenue Code des États-Unis.

[28] Article 2 of the IGA imposes reciprocal obligations on each party, requiring the governments of Canada and the US to collect account holder information about reportable accounts at both Canadian and US reporting financial institutions. On the Canadian side, Part XVIII of the ITA – sections 263 through 269 – imposes obligations on certain Canadian financial institutions [reporting institutions] to implement the due diligence procedures outlined in Annex I of the IGA in order to identify US reportable accounts for the purposes of the IGA. The due diligence procedures followed by Canadian financial institutions require them to search their account records for indications that the account holder is a US person [US person indicia]. US person indicia include a US place of birth or a current US mailing or residential address.

[29] The list of Canadian financial institutions is comprehensive and is defined in Article 1 (paragraph l)) of the IGA as meaning:

(1) any Financial Institution that is resident in Canada, but excluding any branch of such Financial Institution that is located outside Canada, and

(2) any branch of a Financial Institution that is not resident in Canada, if such branch is located in Canada.

(1) toute institution financière qui réside au Canada, à l'exclusion de ses succursales situées à l'extérieur du Canada;

(2) toute succursale, située au Canada, d'une institution financière qui ne réside pas au Canada.

[30] In practice, the due diligence and reporting requirements found in the IGA (and correlatively in Part XVIII of the ITA) affect provincially and federally regulated financial institutions. Paragraph 263(1) of the ITA defines a "listed financial institution" as meaning:

"listed financial institution" means a financial institution that is

(a) an authorized foreign bank within the meaning of section 2 of the Bank Act in respect of its business in Canada, or a bank to which that Act applies;

(b) a cooperative credit society, a savings and credit union or a caisse populaire regulated by a provincial Act;

(c) an association regulated by the Cooperative Credit Associations Act;

(d) a central cooperative credit society, as defined in section 2 of the Cooperative Credit Associations Act, or a credit union central or a federation of credit unions or caisses populaires that is regulated by a provincial Act other than one enacted by the legislature of Quebec;

(e) a financial services cooperative regulated by An Act respecting financial services cooperatives, R.S.Q., c. C-67.3, or An Act respecting the Mouvement Desjardins, S.Q. 2000, c. 77;

(f) a life company or a foreign life company to which the Insurance Companies Act applies or a life insurance company regulated by a provincial Act;

(g) a company to which the Trust and Loan Companies Act applies;

(h) a trust company regulated by a provincial Act;

(i) a loan company regulated by a provincial Act;

(j) an entity authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments, or to provide portfolio management, investment advising, fund administration, or fund management, services;

(k) an entity that is represented or promoted to the public as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund or similar investment vehicle that is established to invest or trade in financial assets and that is managed by an entity referred to in paragraph (j);

(l) an entity that is a clearing house or clearing agency; or

(m) a department or an agent of Her Majesty in right of Canada or of a province that is engaged in the business of accepting deposit liabilities.

« institution financière particulière » Institution financière qui est, selon le cas :

a) une banque régie par la Loi sur les banques ou une banque étrangère autorisée, au sens de l'article 2 de cette loi, dans le cadre des activités que cette dernière exerce au Canada;

b) une coopérative de crédit, une caisse d'épargne et de crédit ou une caisse populaire régie par une loi provinciale;

c) une association régie par la Loi sur les associations coopératives de crédit;

d) une coopérative de crédit centrale, au sens de l'article 2 de la Loi sur les associations coopératives de crédit, ou une centrale de caisses de crédit ou une fédération de caisses de crédit ou de caisses populaires régie par une loi provinciale autre qu'une loi édictée par la législature du Québec;

e) une coopérative de services financiers régie par la Loi sur les coopératives de services financiers, L.R.Q., ch. C-67.3, ou la Loi sur le Mouvement Desjardins, L.Q. 2000, ch. 77;

f) une société d'assurance-vie ou une société d'assurance-vie étrangère régie par la Loi sur les sociétés d'assurances ou une société d'assurance-vie régie par une loi provinciale;

g) une société régie par la Loi sur les sociétés de fiducie et de prêt;

h) une société de fiducie régie par une loi provinciale;

i) une société de prêt régie par une loi provinciale;

j) une entité autorisée en vertu de la législation provinciale à se livrer au commerce des valeurs mobilières ou d'autres instruments financiers ou à fournir des services de gestion de portefeuille, de conseils en placement, d'administration de fonds ou de gestion de fonds;

k) une entité qui est présentée au public comme étant un mécanisme de placement collectif, un fonds commun de placement, un fonds négocié en bourse, un fonds de capital-investissement, un fonds spéculatif, un fonds de capital-risque, un fonds de rachat d'entreprise par effet de levier ou un mécanisme de placement similaire qui est établi pour faire des investissements dans des actifs financiers, ou le commerce de tels actifs, et qui est géré par une entité visée à l'alinéa j);

l) une entité qui est une chambre ou une agence de compensation;

m) un ministère ou un mandataire de Sa Majesté du chef du Canada ou d'une province qui se livre à l'acceptation de dépôts.

[31] However, some categories of financial institutions have reduced requirements (such as small

deposit-taking institutions and those that only serve local clients or only issue credit cards). In addition, very small deposit taking institutions with assets of less than $175 million may be exempted from reporting. See the definition of "non-reporting Canadian financial institution", paragraph 263(1) of the ITA and Annex II of the IGA.

[32] An account is not reportable if it falls within an exempt category (such as certain government registered plans) or if its value is below certain thresholds. With respect to each US reportable account, the information that Canada must collect under the IGA from Canadian financial institutions includes:

(a) The name and address of each US person or person associated with a US person indicia that is an account holder;

(b) The TIN of each US person or person associated with a US person indicia that is an account holder, or if a TIN is not in the records of the Canadian financial institution, the account holder's birthdate;

(c) The name and identifying number of the Canadian financial institution;

(d) The account number and balance of the account; and

(e) The gross amount of interest, dividends and other income generated by the account or the assets held in the account, including the gross proceeds from the sale or redemption of any property held in the accounts.

[33] Every reporting Canadian financial institution is compelled by law to submit itself to the due diligence procedures set out in subsections 265(2) and (3) of the ITA which apply in respect of pre-existing and new individual accounts, and to designate any US reportable account (see sections 264 and 265 of the ITA). Financial institutions already have a legal responsibility to determine where an account holder resides for tax purposes. If a customer has an existing account and there is an indication that they may be a US person, or if they are opening new bank accounts, their financial institution may ask them to provide additional information or documentation to demonstrate that they are not a US person (or to self-certify that they are or are not a US person for tax purposes). Indeed, every reporting Canadian financial institution shall keep, at the institution's place of business (or at such other place as may be designated by the Minister), records that the institution obtains or creates for the purpose of complying with Part XVIII of the ITA, including self-certifications and records of documentary evidence.

[34] The reporting institutions must annually file with the Minister – that is, with the CRA – prescribed information about each reportable account maintained by the financial institution, as well as prescribed information relating to payments made to non-participating financial institutions that held accounts at the financial institution in the calendar year (for 2015 and 2016 only). The information must be reported in an information return filed for each calendar year by May 2 of the following year (section 266 of the ITA). Apparently, the CRA has not issued a particular form for Canadian financial institutions to use (no such form was produced by the CRA affiants in this proceeding). The CRA will then annually turn the information it collects over to the IRS in bulk "on an automatic basis pursuant to the provisions of Article XXVII of the [US-Canada Tax Convention]" (Article 2, paragraph 1, of the IGA).

Facts directly leading to the present litigation

[35] The conclusion of the IGA between the Government of Canada and the US was announced to the public on February 5, 2014, along with a call for comments on the detailed draft legislative proposals and accompanying explanatory notes in respect of changes to the *Income Tax Act* to implement the IGA. The deadline for comments was March 10, 2014. The IGA Implementation Act was included as part of Bill C-31 (publicly announced by the Government of Canada as the "Harper Government Creating Jobs & Growth While Returning to Balanced Budgets With *Economic Action Plan 2014 Act, No. 1*") – an omnibus budget bill of some 360 pages. The first reading of Bill C-31 in the House of Commons occurred on March 28, 2014, and the bill received royal assent on June 19, 2014.

[36] The wisdom of the impugned provisions was questioned by the opposition and a number of players – including citizen groups, prominent legal scholars, and affected individuals – who made their objections or reservations public at the time Bill C-31 was debated in Parliament. Many expressed concern that the impugned provisions would unduly harm the privacy rights and interests of all Canadians; unduly raise compliance costs to all Canadian financial institutions and Canadian taxpayers; impede Canada's efforts to enforce its own tax laws; and violate the spirit and potentially the letter of a number of Canadian laws and international treaties. Opposition party members also called for the IGA Implementation Act to be removed from the omnibus budget bill to allow for greater scrutiny.

[37] On the other hand, the Canadian Bankers Association – who acts on behalf of 60 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada – supported the policy choice made by the Government of Canada to sign the IGA and pass federal implementing legislation allowing financial institutions to legally collect taxpayer information in Canada to comply with FATCA requirements. Their motivation was simple. Many Canadian financial institutions (not only federal banks but also credit unions and other provincial institutions) were potentially facing various legal impediments in Canada to disclosing their client information to the IRS. Accordingly, those institutions were at risk of breaching Canadian domestic law in order to comply with FATCA and avoid the thirty

percent withholding tax on any US source income and the sale of any US source investments (including Canadian source income due to so-called "foreign pass-through payments" provisions).

[38] The following excerpts from the Proceedings of the Standing Senate Committee on National Finance illustrate how the IGA was framed by Mr. Ernewein, the General Director, Tax Policy Branch, Department of Finance:

(Issue 10 - Evidence - April 29, 2014)

[Regarding the IGA]

Senator Bellemare: Did financial institutions have a positive reaction to that?

Senator Hervieux-Payette: No.

Senator Bellemare: Were they consulted?

Mr. Ernewein: Yes. I guess the answer is yes, but the reason for my hesitation is that I don't think they love it. I think they like it better than the alternative, that FATCA itself, as I described, would have put them in a difficult if not impossible situation with being required by U.S. law to provide information directly to the IRS that might have been in direct conflict with Canadian privacy laws, if not other laws.

If they were being direct, I think they would probably say they would rather not do this at all, but as between this and the FATCA itself, I think they consider it a much better setup in the sense that it carves out all the registered plans, it excludes the application of the rules to smaller financial institutions, and by virtue of the collection of information by our own Canadian revenue authorities and transmission to the U.S., it overcomes, in our view, some of the legal conflict concerns that would have otherwise existed.

(Issue 10 - Evidence - April 30, 2014)

[Regarding the withholding tax]

Senator Buth: Is it because Canadian banks have U.S. operations that they can do this? I guess I'm having a hard time understanding how a foreign country can regulate what a Canadian bank does.

Mr. Ernewein: As a policy matter, we very much share that question, and certainly former Finance Minister Flaherty was very public about criticizing it on that basis. I guess the second part of that answer is that what we were seeking to do with the intergovernmental agreement was to work around that approach and come at it a different way on exchange of information and not the threat of withholding. The U.S. has always maintained that this is about information exchange and not about trying to collect tax, at least through the withholding tax mechanism. It's an exchange of information and taxpayer compliance, and I think what we've got in this intergovernmental agreement is more consistent with that stated purpose than FATCA itself or the approach FATCA put forward.

Senator Buth: What would have happened if we had not done this agreement, then? Let me ask another question. Are the banks supportive of this legislation?

Mr. Ernewein: Yes. That's my summary answer, and I'll give the same sort of elaboration as I did yesterday, which is that I don't think they're tickled by any of this. I think they believe, even in what we've done, that it will introduce compliance burdens for them and extra obligations for their clientele, but I think they are much more at peace, if I may put it that way, with this intergovernmental agreement and the approach it takes than with FATCA. Again, I'm hesitant to speak for them, but I have some confidence saying that I think they found FATCA essentially unworkable, and this was workable, although perhaps not what they would have designed for themselves.

[39] But what about Canadian taxpayers? How many have been or will be affected by the impugned provisions? An official figure has not been provided by the defendants and much depends on the extent of information being collected by Canadian financial institutions. How will Canadian financial institutions verify in practice if an individual account holder is a US citizen? Will they ask for proof of birth (showing birthplace), in addition to asking for proof of actual residency (like a driver's licence or other reliable evidence of permanent residence)? Under the IGA and Part XVIII of the ITA, there is no express requirement for a Canadian financial institution to provide notice to its consumers that this information is being collected on US persons for eventual sharing by the CRA with US tax authorities. Each Canadian financial institution has its own policies and procedures with respect to the collection and disclosure of personal information. Will they allow account holders to have access to the personal information that has been reported under the due diligence procedure outlined in the IGA? While we have no answers to these questions, Canadians will have a better idea of the impact of the impugned provisions after September 30, 2015. Before the Senate, a figure of 1 million potentially-impacted individuals was invoked in 2014. According to the cross-examination of Professor Christians (July 23, 2015), there are between 750,000 and 2 million individuals falling within the definition of "US persons" currently present in Canada who could be affected by the impugned provisions. As the plaintiffs note, the impugned provisions also capture those persons who are "accidental Americans", "snowbirds", "green card holders", and those who hold joint accounts with their US spouses.

The plaintiffs' perspective and how the Court must approach the present case

[40] The present plaintiffs, Gwendolyn Deegan [Gwen] and Virginia Hillis [Ginny], possess dual citizenship. Gwen was born in Washington State in 1962 to an American citizen and a Canadian citizen; she has not resided in the US since she was five years old. Ginny was born in Michigan in 1946 to two Canadian citizens; she has not resided in the US since she was six years old. They have never held a US passport and have never applied for one. When they

travel to the US, they use the only passport they possess, which is Canadian. Neither one of them has ever worked in the US; all their employment has been in Canada where they have paid income tax every year. They do not hold a TIN and they have never declared or paid any taxes in the US. As far as they know, they do not owe any US taxes.

[41] The plaintiffs readily recognize that they are US persons. But they consider that they have "no real connection" with the US and that their US citizenship is "an accident of birth and of little significance". However, they are not ready to apply for a certificate of loss of nationality in order to relinquish their US citizenship – firstly, because it would allegedly be extremely expensive, and secondly, because it would require them to complete years' worth of disclosure statements and tax returns, and possibly be subject to various penalties for not having filed these statements and returns over the years.

[42] The plaintiffs do not challenge the fact that they hold US reportable accounts, but object to having their account holder information communicated by the CRA to the IRS. Instead of seeking a personal exemption directly from the CRA or the IRS, the plaintiffs have instituted the present action seeking some sort of general declaration for the benefit of all Canadian citizens or residents who are considered US persons under US domestic law, as well as a permanent prohibitive injunction to prevent the disclosure of any such account holder information. I doubt that such kind of judicial relief can be granted generally by the Court, but it is not necessary for me to deal specifically with this issue since the plaintiffs have not convinced me that the proposed disclosure of taxpayer information mentioned in the IGA is contrary to the provisions of the Canada-US Tax Treaty or in violation of section 241 of the ITA.

[43] The plaintiffs submit that the impugned provisions are unprecedented in Canadian history and represent a significant departure from long-standing tax treaties in the past. The plaintiffs consider that US citizens who are *bona fide* residents of Canada should bear no fiscal obligations to the US: there should be no taxation without representation. The plaintiffs stress that the US is apparently the only country in the world, and certainly the only country with a robust tax system such as Canada's, that comprehensively treats individuals as residents for tax purposes by virtue of their status as citizens or legal permanent residents. Eritrea – a country in the Horn of Africa that has been governed by an autocratic government since its independence in 1993 – is the only other country known for attempting to impose taxes on citizens who live permanently outside the country, although the US, Canada and other countries have rejected the right of Eritrea to collect this tax. During oral pleadings in this summary trial proceeding, counsel for the plaintiffs suggested that there may have been a historical justification for the US Government to tax its citizens during the American Civil War, but argued that it is highly unjust to continue to do so today.

[44] According to the evidence on record, it is not true that under US domestic law US citizens who are *bona fide* residents of Canada bear no fiscal obligations to the US. Being a citizen of any state normally carries benefits (e.g. the right to enter or exit the country freely, diplomatic assistance, etc.). There are also obligations, some of which may be obvious and others less obvious, especially in the case of dual citizenship where an individual has never held a passport, worked, or declared revenues in their birth country. At this point in time, the Court is not in a position to make a general declaration having the legal effect of exempting all Canadian citizens from the application of US tax laws on the basis of the double taxation exception. That said, I fully appreciate the difficult situation that the plaintiffs – along with hundreds of thousands of dual citizens and permanent residents of Canada – may face after September 30, 2015.

[45] The plaintiffs may see themselves as "accidental Americans" but the application of fiscal law is not concerned with rhetoric: it focuses on the actual reality of each taxpayer and his or her taxable income. There cannot be a proper assessment of the situation if "relevant information" needed to decide whether an income is taxable or not is voluntarily withheld by taxpayers who have not produced their declaration or who have failed to declare all their sources of income worldwide, assuming that reporting obligations ensure compliance with fiscal laws. The environment created in Canada and the US by their respective domestic tax laws, including FATCA and the impugned provisions with all their reporting obligations, is certainly harsh, but it is now the law of the land. Perhaps US persons will seriously consider abandoning or relinquishing their Canadian or US citizenship. This will be a voluntary choice. Still, the Court must apply the laws enacted by Parliament. The characteristics of these laws – whether wise or unjust – are a matter for political debate, not judicial scrutiny. Parliament is sovereign; the will of people in a democracy is also sovereign.

[46] Whether or not Canada is a destination for persons evading US taxes is not pertinent. Generally, FATCA imposes penalties on US persons, as well as a thirty percent withholding tax on foreign financial institutions, who do not comply with the reporting requirements. More particularly, FATCA requires US persons holding reportable accounts at foreign financial institutions to report information on Form 8938 attached to their annual tax return. The information includes details such as the name, address and TIN of the owner of the account, details as to whether the account is held jointly with a spouse, whether the account was opened or closed during the year, and the maximum account value during the year.

[47] For the time being, the US Government has not been willing to conclude bilateral agreements with

other states exempting FATCA compliance based on the same country exception, which would have the effect of excluding financial accounts maintained by a financial institution in the country in which the US person is a *bona fide* resident. On the other hand, any private banking information respecting US persons covered by FATCA living in Canada (or elsewhere outside the US) could hardly be provided to the IRS legally in the absence of an agreement and domestic legislation allowing for its collection and automatic disclosure to a foreign authority.

[48] The threat of imposing a thirty percent withholding tax on US source income for financial institutions that do not comply with FATCA reporting obligations has certainly constituted an important instrument of persuasion in the international community. Not surprisingly, the financial implications of FATCA have incited sovereign states to conclude with the US agreements similar to the IGA. Indeed, intergovernmental agreements have apparently been reached with nearly 115 different states in order to facilitate FATCA compliance.

[49] I am ready to assume that the Canadian and OECD common reporting standards differ in two significant ways from the FATCA requirements: one, they are triggered by residency (versus citizenship); and two, they do not entail the same sanctions (i.e. withholding tax) in case of non-compliance. That said, automatic exchanges of information are not prohibited or unprecedented (see the examples cited in the Smith affidavit). In 2014, the Government of Canada made the political decision to participate in an automatic exchange of information scheme with the US Treasury Department, which imposes obligations for the reporting and exchange of relevant information largely based on the architecture of FATCA. These obligations have not been reciprocated in Canadian law, which continues to tax on the principles set out in section 2 of the ITA. For this reason, as suggested by professor Christians, the expression “asymmetrical exchange of information” would appear more adequate.

[50] Be that as it may, the stated purpose of FATCA is to improve US tax compliance by obtaining information from foreign financial institutions about accounts maintained by US taxpayers, directly or through intermediary entities. The American authorities were particularly concerned in 2010 with the issue of tax evasion. Nevertheless, a statute should not be interpreted by politicians’ statements used to rally public opinion, but rather by its object and the words used by the legislator. Legally speaking, it is apparent that FATCA has overreaching effects in practice. The CRA officials have the same understanding with respect to the collection and reporting requirements created by the IGA and Part XVIII of the IGA, which only mirror FATCA requirements. And so does this Court, after having examined the impugned provisions in light of US domestic laws referred to by the experts in their various reports and answers to questions by counsel during cross-examinations.

[51] Nor is it necessary to decide whether the IGA is a “treaty” under US law. While the status of the IGA as law in the US may be ambiguous – the US Treasury has decided to treat these types of intergovernmental agreements not as treaties but merely as interpretations of treaty terms – as far as Canada is concerned, by the effect of section 3 of the IGA, the IGA is approved by Parliament and has the force of law in Canada during all the period it is in force. In Canadian domestic law at least, the IGA constitutes a tax treaty or a listed agreement within the meaning of subsection 241(4) of the ITA. Detractors of the IGA may wish to question the legal application in the US of the IGA on the grounds that it has not been ratified by Congress – a point that the Court is not called upon to decide today. The IGA is certainly a treaty from the Canadian perspective. At worst, the IGA is still a binding agreement between the US and Canada respecting the interpretation or application of the Canada-US Tax Treaty, and as such may be considered in interpreting the latter, which is a treaty pursuant to the *Vienna Convention on the Law of Treaties*, Can. TS 1980 No. 37.

[52] Much has been said by Plaintiffs’ learned counsel about the extraterritorial nature of US laws. It is also well settled “that in no circumstances will the Court directly or indirectly enforce the revenue laws of another country”, unless expressly allowed to do so in the home country of the person in question (*United States of America v Harden*, [1963] SCR 366 at p 370, citing the relevant case law in this regard). It is true that through FATCA, Congress has attempted to make extraterritorial claims over individuals having the status of US persons. It is true that the IGA requires Canada’s explicit assistance with a foreign sovereign’s extraterritorial jurisdiction. And it is true that the threat of economic sanctions is a serious matter that deserves international scrutiny where it is exercised.

[53] In this respect, the parties to the Canada-US Tax Treaty are cognisant that Canada and the US are sovereign countries. Indeed, Part XVIII of the ITA has been enacted by Parliament and has been legally in force in Canada since June 19, 2014, the day on which the IGA Implementation Act came into force. Sections 266 to 269 of the ITA must be respected and the obligations contracted by Canada under Article 2 of the IGA must be carried out and enforced domestically. In the case of non-compliance, if the matter is not resolved in the 18 month delay mentioned in the IGA, the US shall treat the reporting Canadian financial institution as a non-participating financial institution (Article 5, subparagraph 2(b) of the IGA).

[54] The Government of Canada purports to legally authorize, under subsection 241(4)(e)(xii) of the ITA, the disclosure by the CRA to the IRS of all taxpayer information collected by financial institutions

pursuant to Part XVIII of the ITA. The latter provision allows an official of the CRA – as defined in subsection 241(10) – to disclose information, allow access to information, or allow the inspection of information pursuant to a provision "for the purposes of […] a provision contained in a tax treaty with another country or in a listed international agreement" (ITA subsection 241(4)(e)(xii)). Is this exchange scheme legal?

The interpretation issue raised by the plaintiffs

[55] In exercising its competent authority power to exchange taxpayer information with a treaty partner, the CRA does not consider whether a Canadian taxpayer whose information is subject to exchange – whether automatic or otherwise – would have an impact on a tax liability in the receiving state. That being said, the defendants assured the Court that Canadian citizens or persons residing permanently in Canada will continue to enjoy the protections mentioned in the Canada-US Tax Treaty. Although this treaty does not prevent the collection and the automatic disclosure of taxpayer information mentioned in Article 2 of the IGA with respect to US reportable accounts mentioned in section 264 of the ITA, the defendants take the position that the IRS cannot use such information to administer non-tax laws (such as the *US Bank Secrecy Act*) or in its dealings with federal entities (such as the Financial Crimes Enforcement Network of the US Treasury Department) who are involved in money laundering repression. Indeed, the CRA will not assist the US in collecting non-tax related penalties such as penalties for failing to file the FBAR. Moreover, while the Canada-US treaty says that Canada may assist the US in collecting certain taxes, it also says that the Canadian authorities will not assist the US authorities in collecting a US tax liability if the person was a Canadian citizen when the liability arose.

[56] The plaintiffs respectfully disagree with the defendant's broad interpretation of the impugned provisions. Indeed, they consider that under the terms of the Canada-US Tax Treaty, the exceptions to the confidentiality rule found in section 241 of the ITA do not apply to the exchange of the information collected by Canadian financial institutions under Part XVIII of the ITA (sections 263 to 269). The plaintiffs' fundamental proposition is that the Canada-US Tax Treaty limits the collection and automatic disclosure of account holder information relating to a taxable period in which the taxpayer was a citizen of Canada. Overall, the plaintiffs submit that the terms of the IGA and the Canada-US Tax Treaty can be read in harmony. Thus, the paramountcy clauses contained in both the IGA Implementation Act and the Tax Treaty Act are not engaged because there is no conflict. The plaintiffs underline that the express terms of the IGA indicate that it is subject to the provisions of the Canada-US Tax Treaty. Accordingly, Canada can comply with both the impugned provisions and the Canada-US Tax Treaty by collecting account holder information pursuant to the IGA, and disclosing it pursuant to the terms of the Canada-US Tax Treaty. I have closely examined the plaintiffs' submissions in this regard, and, in final analysis, find them unfounded in law or in fact. For the sake of clarity, they can be briefly summarized as follows.

[57] First, the plaintiffs rely on Article XXVI A of the Canada-US Tax Treaty which states that Canada may not provide the US with assistance in the collection of revenue claims to the extent that the taxpayer in question was a citizen of Canada at the time the revenue claim arose. More particularly, they refer to paragraphs 1 and 8 which read as follows:

> *1. The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in paragraph 9, together with interest, costs, additions to such taxes and civil penalties, referred to in this Article as a "revenue claim".*
>
> *[…]*
>
> *8. No assistance shall be provided under this Article for a revenue claim in respect of a taxpayer to the extent that the taxpayer can demonstrate that*
>
> *(a) where the taxpayer is an individual, the revenue claim relates either to a taxable period in which the taxpayer was a citizen of the requested State or, if the taxpayer became a citizen of the requested State at any time before November 9, 1995 and is such a citizen at the time the applicant State applies for collection of the claim, to a taxable period that ended before November 9, 1995; and*
>
> *[…]*
>
> *[Emphasis added.]*
>
> *Les États contractants s'engagent à se prêter mutuellement assistance pour percevoir les impôts visés au paragraphe 9, ainsi que les intérêts, frais, impôts supplémentaires et pénalités civiles, dénommés, « créances fiscales » dans le présent article.*
>
> *[…]*
>
> *8. L'assistance prévue par le présent article n'est pas fournie à l'égard d'une créance fiscale concernant un contribuable si celui-ci peut établir que,*
>
> *a) lorsque le contribuable est une personne physique, la créance fiscale concerne soit une période imposable au cours de laquelle le contribuable était un citoyen de l'État requis ou, si le contribuable est devenu citoyen de l'État requis avant le 9 novembre 1995 et est citoyen au moment où l'État requérant demande la perception de la créance, soit une période imposable qui a pris fin avant le 9 novembre 1995,*
>
> *[…]*
>
> *[Je souligne.]*

[58] The plaintiffs therefore argue that to the extent that Canada's disclosure of account holder information to the US constitutes "assistance in collection", Canada is prohibited from disclosing such information as it

relates to Canadian citizens. The plaintiffs submit that “lending assistance” should be construed as being broader than simply engaging in the mechanics of actually collecting an amount owing; rather, the collection of information is a key component of the tax collection process. As a result, account holder information should not be disclosed in cases in which the taxpayer was a Canadian citizen at the time the revenue claim arose.

[59] Second, the plaintiffs further submit that it is not sufficient that the CRA be satisfied that the account holder information collected by the reporting institutions on US persons is authorized by the terms by the IGA. The plaintiffs submit that this information must also be shown to “be relevant” for carrying out the provisions of the Canada-US Tax Treaty or the domestic laws of Canada or the US. The “may be relevant” test mentioned in Article XXVII of the Canada-US Tax Treaty must be satisfied on a case by case basis; there may be no “fishing expeditions”. Thus, the automatic disclosure of taxpayer information in cases of *bona fide* residents of Canada who are US citizens is simply not authorized by Article XXVII as it has been interpreted in the past (or according to OECD interpretative instruments or extrinsic aids cited by counsel at the hearing). In its relevant portion, paragraph 1 of Article XXVII of the Canada-US Tax Treaty stipulates:

> *1. The competent authorities of the Contracting States shall exchange <u>such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which this Convention applies</u> insofar as the taxation thereunder is not contrary to this Convention.*
>
> *[…]*
>
> *[Emphasis added.]*
>
> *1. Les autorités compétentes des États contractants échangent <u>les renseignements pertinents à l'application des dispositions de la présente Convention ou à celles de la législation interne des États contractants relatives aux impôts auxquels s'applique la présente Convention</u> dans la mesure où l'imposition qu'elle prévoit n'est pas contraire à la présente Convention.*
>
> *[…]*
>
> *[Je souligne.]*

[60] Since paragraph 1 of Article XXVII limits the disclosure of information to circumstances in which the information “may be relevant” for carrying out the provisions of the Canada-US Tax Treaty, or of the domestic laws of Canada or the US, the plaintiffs claim that this provision would make the disclosure of taxpayer information mentioned in the IGA unlawful in relation to a vast majority of US persons resident in Canada, regardless of whether or not they are Canadian citizens. Since most US persons resident in Canada do not owe taxes to the US, the plaintiffs argue that their account holder information is of no relevance to the US in imposing its income tax, and therefore does not fall within the scope of information that may be disclosed pursuant to Article XXVII. In cases in which such information may be relevant, however, the plaintiffs argue that Canada has the ability to disclose such account holder information in a more selective manner. Such would be the case where there are Tax Treaty Gaps – that is, in cases where a Canadian citizen with US person status may be subject to US taxation on their Canadian-source income (Christians expert report, paragraph 10). In addition, the information that would be relevant to a US tax assessment of a collectible tax debt in Canada would generally be reported or disclosed to the CRA by the taxpayer or a third party charged with such reporting.

[61] Subject to the objection made by the defendants that expert evidence must be limited to the state of US domestic tax laws, Professor Christians goes on to state:

> *Accordingly, the type of information that <u>may be relevant</u> to the assessment of a US tax debt is already disclosed to the CRA in most cases by the taxpayer or by a third party <u>with the exception of the sale of a personal residence</u>. Canada and the United States are aware of the Tax Treaty Gaps. In cases involving such Gaps, the necessary tax reporting is required or if need be compelled by the CRA. In virtually all cases in which US taxation would actually apply, information compiled by the CRA that identifies Canadian residents who have US Person status could be cross-referenced with the information received by the CRA that is relevant to the Tax Treaty Gaps. (paragraph 23)*
>
> *[Emphasis added.]*

In this way, the plaintiffs submit that Canada can satisfy the terms of the IGA while also acting within the bounds of Article XXVII of the Canada-US Tax Treaty.

[62] Third, the plaintiffs submit that the collection and disclosure of the taxpayer information contemplated by the IGA subjects US nationals resident in Canada to taxation and requirements connected therewith that are more burdensome than the taxation and requirements connected therewith to which Canadian citizens resident in Canada are subjected. The plaintiffs rely on Article XXV of the Canada-US Tax Treaty, notably paragraph 1, which reads as follows:

> *1. <u>Nationals</u> of a Contracting State shall not be subjected in the other Contracting State <u>to any taxation or any requirement connected therewith that is more burdensome than the taxation</u> and <u>connected requirements</u> to which nationals of that other State <u>in the same circumstances</u>, particularly with respect to taxation on worldwide income, are or may be subjected. This provision shall also apply to individuals who are not residents of one or both of the Contracting States.*

[...]

[Emphasis added.]

1. Les nationaux d'un État contractant ne sont soumis dans l'autre État contractant à aucune imposition ou obligation y relative, qui est plus lourde que celles auxquelles sont ou pourront être assujettis les nationaux de cet autre État qui se trouvent dans la même situation, surtout à l'égard de l'impôt sur le revenu mondial. La présente disposition s'applique également aux personnes physiques qui ne sont pas des résidents d'un État contractant ou des deux États contractants.

[...]

[Je souligne.]

[63] According to Article XXV, Canada may not subject US nationals to "any taxation or requirement" therewith that is more burdensome than "the taxation and connected requirements" to which Canadian nationals are or may be subjected in the same circumstances. The plaintiffs note that the impugned provisions contemplate the provision by Canada of the account holder information of US persons to the US. Considering that such information would not be provided in relation to accounts held by Canadian nationals who are not considered US persons, the plaintiffs assert that the impugned provisions fall afoul of this Article. The plaintiffs submit that the differential impact of the impugned provisions on Canadian citizens who are US persons will include a loss of privacy under the provisions of the Canada-US Tax Treaty and the ITA with respect to the disclosed information (in this summary trial we are not dealing with privacy rights asserted by the plaintiffs on the basis of quasi-constitutional laws or the *Charter*). It will also include the increased financial burden of individuals having to file many tax related forms, or of having to provide financial institutions with additional documentation (for example, a "certificate of loss of citizenship"), as well as the legal and accounting costs associated with such documentation if individuals do not wish their accounts to be treated as US Reportable Accounts.

[64] The plaintiffs further submit that under section 241 of the ITA, Crown servants and other officials or representatives of government agencies are generally prohibited from knowingly providing or allowing to be provided any taxpayer information to any person. While subsection 241(4) creates exceptions to this rule, on the basis of which it would be lawful to provide or allow access to such information, the plaintiffs argue that the impugned provisions and the IGA are not a tax treaty or listed agreement within the definition of subsection 241(4), and therefore do not fall within these exceptions. Alternatively, even if the IGA did fall within the exception provided by section 241, the exchange of account holder information cannot occur pursuant to Article XXVII of the Canada-US Tax Treaty because such taxpayer information does not meet the "may be relevant" standard. As a result, such an exchange would still violate section 241 of the ITA.

[65] All these arguments are unfounded in law or otherwise unconvincing in light of the evidence on record. I agree with the defendants that the plaintiffs misread the IGA and the Canada-US Tax Treaty in a way that frustrates the intention of the parties. It is manifest that the authority to exchange automatically on an annual basis the information obtained by Canada pursuant to the terms of the IGA indeed derives from Article XXVII of the Canada-US Tax Treaty, which does not expressly prohibit such disclosure. The provisions of the IGA are clear. The IGA has force of law in Canada. Sections 266 to 269 of the ITA are compulsory. While all information exchanged is protected by the confidentiality provisions of the Canada-Tax Convention and the ITA, the exceptions created under subsection 241(4) of the ITA are applicable to the impugned provisions and the IGA.

[66] The Canada-US Tax Treaty cannot be interpreted in a vacuum: the fact is that Canada and the US entered into an Intergovernmental Agreement in 2014, purportedly under the authority of the Canada-US Tax Treaty. "In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This involves looking at the language used and the intentions of the parties" (*Crown Forest Industries*, above at page 814). In the present case, the words used by the parties to the IGA are explicit and the intention of the contracting governments is clear: they agree to obtain and exchange annually on an automatic basis all relevant information respecting reportable accounts subject to the confidentiality and other provisions of the Canada-US Tax Treaty.

[67] This intention is apparent from Articles 2 and 3(7) of the IGA, which provide that:

[E]ach Party shall obtain the information specified in paragraph 2 of this Article with respect to all Reportable Accounts and shall annually exchange this information with the other Party on an automatic basis pursuant to the provisions of Article XXVII of the Convention.

[...]

All information exchanged shall be subject to the confidentiality and other provisions provided for the in Convention, including the provisions limited the use of the information exchanged.

[Emphasis added.]

[C]haque partie obtient les renseignements visés au paragraphe 2 du présent article pour tous les comptes déclarables et elle échange ces renseignements chaque année avec l'autre partie de manière automatique conformément aux dispositions de l'article XXVII de la Convention.

[...]

Tous les renseignements échangés sont assujettis aux obligations de confidentialité et autres garanties prévues par la Convention, y compris les dispositions qui en limitent l'utilisation.

[Je souligne.]

[68] The interpretation proposed by the defendants is also consistent with the goals and purposes of the Canada-US Tax Treaty and the intent expressed by the parties to the IGA. Compliance under the Canada-US Tax Treaty supposes that all US persons will file the required tax reports and declare their taxable income. Under US domestic tax laws, this includes the plaintiffs and other Canadian residents having dual citizenship. Overall, I am satisfied that the automatic collection and disclosure of the account holder information covered by the IGA meets the standard of "may be relevant" under Article XXVII, having regard to the purposes of the Canada-US Tax Treaty, the language of Article XXVII, and the overall legal and factual context. The plaintiffs' reading of the "may be relevant" standard is erroneous because it rests on fundamental misconceptions about the purpose of the Canada-US Tax Treaty, the purpose of FATCA, and the correct approach to treaty interpretation. Article XXVII does not provide Canada with an opportunity to object to US tax policy choices.

[69] At the risk of repeating myself, FATCA is about US tax compliance. In 2014, the US and Canadian governments, being both "supportive of applying the underlying policy goal of FATCA on a reciprocal basis to improve tax compliance", signed the IGA. The IGA creates a framework whereby certain Canadian financial institutions obtain FATCA-compliant status, while others are exempted from FATCA disclosure requirements altogether (see Article 4 of the IGA). In addition, the IGA allows for the US to engage in reciprocal tax information exchange with Canada concerning financial accounts held by Canadian residents at US institutions (see Article 2, paragraph 2(b) of the IGA). According to the terms of the IGA, Canadian financial institutions are not permitted to opt out of these information-sharing requirements. If financial institutions do not or cannot agree to disclose US account holder information to the US, they may be subject to the thirty percent withholding tax described above. Indeed, the Canadian and US Governments are obliged to "implement as necessary requirements to prevent financial institutions from adopting practices intended to circumvent the reporting required under [the IGA]" (Article 5, section 4 of the IGA).

[70] The IGA establishes a special regime for information collection and reporting that the US government considers necessary to administer its income tax or tax liability system. The argument that relevance under Article XXVII of the Canada-US Tax Treaty is limited to situations in which a Canadian resident would owe tax in the US is wrong. It is impossible in practice to administer Article XXVII as the plaintiffs argue. It is also unreasonable to conclude that the governments of Canada and the US entered into an Intergovernmental Agreement which should be interpreted in a way that renders it practically impossible to perform. According to section 269 of the ITA, if a Canadian financial institution makes a reasonable determination that it is to be treated as a "deemed-compliant FFI" under Annex II of the IGA, Part XVIII applies to the institution, with such modifications as the circumstances require, to the extent that the IGA imposes due diligence and reporting obligations on the institution (section 269 of the ITA).

[71] I also accept that by analogy, the FATCA reporting requirements are similar in principle to certain Canadian reporting requirements under the ITA that also do not require information indicating income tax or tax liability. For example, section 233.3 of the ITA requires certain Canadian taxpayers to report holdings of a wide range of foreign property with a cost of more than $100,000 – including funds deposited in foreign accounts – regardless of whether or not that property generates income that is taxable in Canada. These reporting requirements exist to assist the CRA in administering the Canadian tax system. It cannot reasonably be argued that similar kinds of information about US taxpayers is not relevant to carrying out the provisions of US tax laws in respect of Canadian residents who are US persons.

[72] I also fail to see the application of Article XXVI A of the Canada-US Tax Treaty at this point in time. It is not challenged by the defendants that Article XXVI A clearly prevents Canada from providing the US with assistance in the collection of revenue claims to the extent that the taxpayer in question was a citizen of Canada at the time the revenue claim arose. I agree with the defendant that Article XXVI A applies only to cases in which tax liability has been determined and is enforceable, and does not apply to the assessment of tax payable, the verification of taxpayer compliance, or related exchanges of information. Accordingly, I find that the automatic exchange of information allowed by the IGA does not amount at the present time to providing assistance in collection, and is thus not captured under this Article. The plaintiffs have conflated the assessment of taxes, verification of compliance, and collection of penalties possibly due by US persons for non-reporting. The arguments made in this respect are not relevant and are premature in any event.

[73] I also find that the non-discrimination provision of Article XXV is not applicable in the present case. The IGA and Part XVIII of the ITA do not impose more burdensome requirements connected with taxation on the plaintiffs; the burden of disclosing banking information is imposed by Part XVIII on financial institutions, who are resident in Canada, and on Canadian branches of non-resident financial institutions; and to the extent that the IGA and Part XVIII of the ITA impose burdensome requirements

connected to taxation of US nationals resident in Canada, such burden is equally imposed on Canadian nationals in similar circumstances. Accordingly, this argument must also be dismissed.

[74] Finally, it is not challenged that according to Article 3(7) of the IGA, all information exchanged under the IGA is subject to safeguards provided for in the Canada-US Tax Treaty "including the provisions limiting the use of the information exchanged". That being said, the CRA does not possess the necessary facts, nor the required expertise in US tax law, to determine the potential US tax liability of US persons residing in Canada – even less so this Court. Before the double taxation provisions of a tax treaty apply (see Article XXIV of the Canada-US Treaty, as well as tax treaties based on the OECD model), a contracting state must first be able to determine an initial tax liability against which relief from double taxation will ultimately be available.

[75] Perhaps, as suggested by the plaintiffs, there is little reason to view "accidental Americans" such as the plaintiffs as anything other than a largely law-abiding group who stand at risk of being punished by US authorities not for evading taxes, but for having failed to carefully study their form-filing obligations under what to them is the law of a foreign jurisdiction. The plaintiffs assert that this would be highly unjust on the part of the US authorities. The defendants' learned counsel generally addressed this question in their oral arguments, stating:

> *Those are all policy issues for the U.S. government and the U.S. Congress. They've made their decision as to what their laws will be. We have committed to live with that within the treaty. The treaty does not give us an opportunity to say to them, we disagree with your policies, and we will not assist you to implement them. We have agreed to assist them to the extent that information is relevant to their laws, and that's their realm. (Transcript, August 5, 2015 at page 133).*

[76] True, a great number of Canadian taxpayers holding US reportable accounts are likely to be affected by a reporting system that in many quarters is considered unjust, costly and ineffective, considering that at the end of the day they are not likely to owe taxes to the US. In the absence of legislative provisions requiring all Canadian financial institutions (provincially and federally regulated) to automatically notify their account holders about reporting to the CRA under the IGA and Part XVIII of the ITA, these taxpayers may also be taken by surprise by any consequences that flow from such disclosure. The plaintiffs may find this deplorable, but apart from a constitutional invalidation of the impugned provisions or a change of heart by Parliament or Congress, or the governments of Canada or the US, there is nothing that this Court can judicially do today to change the situation. The impugned provisions have not been held to be *ultra vires* or inoperative. Judicial courage requires that judges uphold the Rule of Law.

Conclusion

[77] For all these reasons, the declaratory and injunctive relief requested by the plaintiffs in their motion for summary judgment shall be denied by the Court, without prejudice to the plaintiffs' right to pursue their claim that the impugned provisions are *ultra vires* or inoperative because they are unconstitutional or otherwise unjustifiably infringe *Charter* rights. There shall be no costs. This is a case where, in view of the nature of the issues and the public interest involved in clarifying the scope of novel provisions affecting hundreds of thousands of Canadian citizens, no costs should be ordered against the losing parties.

<u>JUDGMENT</u>

THIS COURT ORDERS AND ADJUDGES THAT:

1. The declaratory and injunctive relief requested by the plaintiffs in their motion for summary judgment is denied, without prejudice to the plaintiffs' right to pursue their claim that the impugned provisions are *ultra vires* or inoperative because they are unconstitutional or otherwise unjustifiably infringe *Charter* rights;

2. The present motion is dismissed without costs.

South Africa

North Gauteng High Court

Case 1319/13
South African Revenue Service v. Mark Krok and Jucool Enterprises Inc

31 January 2014

1) International recovery assistance – Request for precautionary measures – Assessment of risk of dissipation or concealment – To be done in the light of the context, the purpose, and the material known to the authorities responsible for the certificate requesting assistance

2) Precautionary measures – Objection by a third party claiming a transfer of rights on the relevant assets – No proof of a valid transfer of rights

3) International recovery assistance – Entry into force of the Protocol providing for tax recovery assistance - Future assistance for already existing claims – No question of retrospectivity

1) The Australian tax Office (ATO) requested the South African Revenue Service (SARS) to take precautionary measures in order to safeguard the collection of tax owed in Australia by Mr Krok.

SARS, acting within the scope of section 185 of the Tax Administration Act, obtained a provisional preservation order and a curator was appointed to take control of Krok's South African assets. In order to have the preservation order made final, the Court had to assess whether SARS had shown that there was prima facie proof of risk of dissipation or concealment of assets by Mr Krok.

This assessment had to be done in the light of the formal certificate requesting assistance, taking into account the context, the apparent purpose to which it was directed, and the material known to those responsible for the production of the certificate (point 18).

2) Jucool, a company incorporated in the British Virgin Islands, which had a clear link with Mr Krok (point 14), claimed that it was the 'beneficial owner' of the relevant assets. However, the alleged transfer of rights was not accepted, as it was contradicted by Mr Krok's own actions. Moreover, there was no transfer in accordance with the laws of South Africa (points 22-23).

3) The Protocol providing for tax recovery assistance does not contain a specification in regard to the period for which the taxes are owing. It means that assistance would be granted in future for already existing obligations. This is not a question of retrospectivity (point 21).

1. On 18 February 2013, this Court granted a provisional Preservation Order in terms of the provisions of **s. 163 of The Tax Administration Act, no. 28 of 2011** ("The Tax Administration Act"), with all the provisions of the order having immediate effect. A return day was stipulated, which was extended on a number of occasions, and the application before me is to confirm this provisional order. In terms of the order a curator bonis was appointed in whom the rights, title and interest in all the assets of the Respondent would vest. This included certain specified assets whether or not they were registered or held in the name of the Respondent. These assets included a large portfolio of shares on the Johannesburg Stock Exchange, certain funds in a nonresident account at a bank, a current account, two erwen in the Cape and a motor vehicle. According to the Court Order no one, except with the prior written consent of the Applicant, which would not unreasonably refused, could deal with the assets except the curator bonis. It was also ordered that the Respondent disclose to the curator bonis all his assets held in South Africa and all of his sources of income in South Africa, and to identify where such assets could be found and to co-operate in order to ensure that all his assets were placed at the disposal of the curator bonis. The curator bonis would continue to function for as long as the Applicant was collecting taxes for the Australian Tax Office from the Respondent, or until the Applicant was satisfied that a proper arrangement had been made in order to secure such assets belonging to the Respondent, and all the assets mentioned in the Court Order for purposes of such tax collection.

2. On 15 March 2013, an opposing affidavit was filed on behalf of Respondent. This affidavit was deposed to by his Attorney, and deals in the main with legal argument setting out the Respondent's defences to the application. Only a few paragraphs contained in the founding affidavit, where answered directly. The affidavit contained a number of annexures as well.

3. On 22 April 2013, Applicant filed a replying affidavit which also contains a number of annexures. Second Respondent herein was granted leave to intervene in these proceedings on 30 July 2013, and accordingly filed an answering affidavit; this affidavit in turn relies largely on what was stated in the affidavit in support of an application for leave to intervene. The Applicant then filed a replying affidavit to the second Respondent's answering affidavit.

4. **BACKGROUND:**

The Applicant in this case is acting as a result of a request received from the Australian Tax Office ("ATO") in terms of art. 25 A of the agreement between the Government of Australia and the Government of the Republic of South Africa. The purpose of this agreement was for the avoidance of double taxation, and the prevention of fiscal evasion in respect of taxes. The agreement was entered into on 1 July 1999, and amended by a Protocol signed on 31 March 2008 ("The Protocol"). The agreement and the Protocol were entered into by the South African

Government in terms of ***s. 108 (2) of the Income Tax Act, no. 58 of 1962 ("The Income Tax Act"), read with s. 231 (4) of the Constitution 108 of 1996***. The agreement and the Protocol became part of the South African Law in terms of the Constitution of the Republic, as they were approved by Parliament in terms of ***s. 231 (2) of the Constitution*** and the arrangements were duly published in the Government Gazette of 23 December 2008.

5. The founding affidavit then states that during January 2012, SARS received a request from the Australian Commissioner for assistance with tax collection and conservancy of the assets of the Respondent in South Africa, pending collection of the amount alleged to be due by the Respondent under the tax laws of Australia. This request was renewed during February 2013. The request was accompanied by a formal certificate issued by the Australian Commissioner stating that:

5.1. Respondent was liable to the Commissioner for taxes in a total amount of Australian $25,361,875,799 plus interest (which, during April 2013, (according to Applicant's heads of argument) was R235, 705,169.19.

5.2. The liabilities arose as a result of the Australian Commissioner issuing a Notice of Assessment of Tax and Penalties under Australian Law;

5.3. The Respondent has lodged an objection to the Notices of Assessment of Tax and Penalties under the procedures provided for by the Australian Tax Law;

5.4. The objection has been disallowed in full and a notice was sent to the taxpayer on 6 February 2012;

5.5. There is a risk of dissipation or concealment of the assets by the First Respondent.

6. SARS agreed to lend assistance to the Australian Commissioner in terms of the Protocol in the collection of the said revenue claim in accordance with art. 25 A of the Agreement. In the founding affidavit it is stated that at the time when the initial request was received, there was no special provision in the South African Tax Acts which entitled SARS to apply for orders to preserve assets and SARS therefore was, at that stage, dependant on the provisions of the common law in that regard. At common law, an Applicant for a presentation order (interdict) had to prove on a balance of probabilities that assets would be diminished and that this would be done with the specific intent of frustrating a claim.

See: ***Knox D'Arcy Ltd vs Jamieson and Others*** [1996] ZASCA 58***;*** 1996 (4) SA 348 ***A at 372 F - G and Janse van Rensburg N. O. and Another vs Minister of Trade and Industry and Another*** [2000] ZACC 18***;*** 2001 (1) SA 29 ***CC at par. 33***

7. There after however, the Tax Administration Act no. 28 of 2011, assented to on 2 July 2012 by the President, came into force on 1 October 2012. In terms of s. 185 of this Act, the deponent to the Applicant's founding affidavit stated that he was authorised to apply on behalf of SARS for an order for the preservation of the Respondent's assets in terms of s. 163. Such an order to preserve assets may be applied for if such order is required to secure the payment of taxes. It was also stated that in terms of ***s. 185 (3)*** the certificate received from ATO, was conclusive proof of the existence of the tax debt, and prima facie proof of the other statements contained therein. Accordingly, the allegation was made that the certificate amounted to *inter alia, prima facie* proof of a danger that the South African assets of the Respondent would be dissipated. Accordingly it was contended that as a result of the status of the certificate, a *prima facie* case for the preservation order in terms of the Notice of Motion had been established, especially in the absence of an answering affidavit by the First Respondent himself. In essence it is Applicant's case that in terms of s. 163 ***of the*** Tax Administration Act, an intention to dissipate assets is not necessary anymore. Preservation must merely be "required" in order to "secure" tax collection. I may add at this stage that "Prima facie evidence" in its customary sense is not merely "some evidence". It must be of such a character that if unanswered it would justify men of ordinary reasons and fairness in affirming the question which the party upon whom the onus lies is bound to maintain.

See: ***Alli vs de Lira*** **1973 (4) SA 635** ***T at 638 per Nestadt, J (as he then was)***

8. Despite these allegations, SARS dealt with various defences of the Respondent raised in his mentioned objection to the ATO and submitted that the absence of an affidavit from the Respondent, viewed together with the glaring absence of any undertakings not to dissipate assets, was significant.

9. The memorandum of understanding between the two competent authorities of the Republic of South Africa and Australia, concerning assistance in the collection of taxes under art. 25 A of the Protocol amending the agreement between South Africa and Australia, for the avoidance of double taxation and the prevention of fiscal evasion, with respect to taxes on income, states that its purpose is to outline the shared understanding between the competent authorities of the procedural issues involved, in providing mutual assistance to each other in their collection of revenue claims. It refers to the appropriate form that must be used for a request for assistance in collection. The form, after making provision for the identity of the debtor and the amount owing, states that the request be accepted for collection by the Government of South Africa and the "conserving of assets for the purposes of such collection." Under the heading "Revenue Claim", details are given as to what documentation or evidence would be required for that purpose, and it is stated that a request for assistance in tax collection or conservancy, requires sufficient information to be provided to the requested authority to enable collection or conservancy action to be taken. Amongst others, this would include the providing of "evidence

reflecting on the likelihood that the debtor's assets without conservancy action will be dissipated."

10. The relevant request for assistance in collection and/or conservancy, gives the necessary information and detail pertaining to the amount due, and the background to some extent relating to the taxes owed by Respondent to the Australian Government. It states that what amount is due to it, and that such a revenue claim is enforceable under the Tax Laws of Australia. It states that Respondent lodged an objection against the tax assessments and administrative penalties, but that this objection has been disallowed in full. As a result of the determination of the objection, the debt is not currently in dispute, so it was said. It was also stated that it was not believed that the objection was entered into solely to delay or frustrate collection of the amount alleged. In par. (g), the following is stated "it is believed that there is a risk of asset dissipation or concealment of assets by Mr. Mark Krok..."

11. The provisions of s. 163 ***of the*** Tax Administration Act of 2011, deal with a preservation order. Such an order may be made if required to secure the collection of tax in respect of assets mentioned in s. 163 ***(3)***. It also provides for the appointment of a curator bonis, provides for certain reasonable living expenses and the duration of such an order, ***s. 185*** of the Act, in turn, deals with tax recovery on behalf of foreign governments.

s. 185, for present purposes reads as follows:

> ***185 (1):*** *If SARS has, in accordance with an international tax agreement received -*
>
> *a. A request for conservancy of an amount alleged to be due by a person under the tax laws of the country where there is a risk of dissipation or concealment of assets by the person, a senior SARS Official may apply for a preservation order under Section 163 as if the amount were a tax payable by the person under a Tax Act; or*
>
> *b. A request for the collection from a person of an amount alleged to be due by the person under the tax laws of the other country, a senior SARS Official may, by notice, call upon the person to state, within the period specified in the notice, whether or not the person admits liability for the amount or for a lesser amount.*
>
> ***185 (2):*** *A request described in* ***subsection (1)*** *must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating -*
>
> *a. The amount of the tax due;*
>
> *b. Whether the liability for the amount is disputed in terms of the laws of the other country;*
>
> *c. If a liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate collection of the amount alleged to be due; and*
>
> *d. Whether there is a risk of dissipation or concealment of assets by the person.*
>
> ***185 (3)****: In any proceedings, a certificate referred to in subsection (2) is -*
>
> *a. Conclusive proof of the existence of the liability alleged; and*
>
> *b. Prima facie proof of the other statements contained therein."*

In this context, the answering affidavit on behalf of the first Respondent stated that there were no suggestions in Applicant's founding affidavit, of any objective events which might have transpired since January 2012 (when the first certification was made) and the date of the Notice of Motion, which would justify the position now contended for, that there was a risk of asset dissipation or concealment of assets by Respondent. In addition, no objective evidence had been tendered on behalf of the ATO that to support such a conclusion. There was therefore no need for these proceedings, and there was no objectively sustainable argument to be advanced on behalf of the ATO justifying the "belief" that there is a risk of asset dissipation or concealment.

12. <u>The issues before me:</u>

Obviously, the first issue before me is whether or not SARS has proven its case on a prima facie basis for the purposes of s. 185 ***of the*** Tax Administration Act in the context of the mentioned Protocol between the South African and Australian Authorities.

13. <u>First Respondent's Argument:</u>

Mr. Ginsberg SC on behalf of the first Respondent submitted that three issues arose in this case for decision, namely whether or not Applicant had discharged the onus that rested on it in the context of the relevant legislation and the Protocol, whether or not the facts would justify a reasonable apprehension of dissipation, and whether the introduction of art. 25 A into the DTA (by the Protocol) applied to taxes claimed by the ATO from the Respondent for the income years ending 30 June 2004 to 30 June 2009. He said that upon a proper interpretation of all the relevant legislation and the Protocol, art. 25 A can only be invoked by the tax authorities if the taxes owing to the ATO arose during the income years commencing from 1 July 2009. The second Respondent's Counsel, Mr. A. Franklin SC associated himself with the defence of the First Respondent, except in stating that if those grounds of opposition were not successful, then Second Respondent's case would be that it was the beneficial owner of the assets that formed the subject matter of the application, and that those assets therefore should not form part of any provisional or final preservation order.

14. **<u>SECTION 183 (3) OF THE TAX ADMINISTRATION ACT AND THE CERTIFICATE IN TERMS OF SECTION 183 (2) (d):</u>**

The question in this context is whether or not the Applicant has shown that there is prima facie proof of risk of dissipation or concealment of assets by first

Respondent? Before I deal with the presence or otherwise of objective facts in this context, it is necessary that I briefly refer to other contextual considerations relating both to the first and second Respondents. These appear in an affidavit in support of an application by second Respondent for leave to intervene in these proceedings;

Jucool is a company incorporated in the British Virgin Islands on 23 December 2008. The sole shareholder of Jucool is Nova Trust Ltd, in its capacity as a Trustee of the Jucool Trust. Jucool Trust was established on 22 December 2008 by way of a Declaration of Trust executed by Nova Trust Ldt. It is a discressionary Trust governed by Jersey Law, and its sole material assets are shares in Jucool and a loan receivable from Jucool. The beneficiaries of the Jucool Trust are the first Respondent, his children, and the Jersey Blind Society. The first Respondent is not, nor has ever been, a Director of Jucool or a Trustee of the Jucool Trust. Nova Trust Ltd is a company incorporated under Jersey Law and carrying on business in Jersey. It is licensed and regulated for the conduct of fiduciary business by the Jersey Financial Services Commission. It is a professional Trustee which acts as a Trustee of several hundred trusts which, between them, hold substantial assets. It appears therefore that during 2002, the Respondent had "relocated" from South Africa to Australia where he had become a resident and had ceased to be a resident of South Africa for tax, exchange control or any other purpose. At that time, and as required by Law (including The Exchange Control Regulations as promulgated by Government Notice R.1111 of 1 December 1961 and amended up to the Government Notice no. R.445 in Government Gazette no. 35430 of 8 2012) certain assets were placed under the control of an authorised dealer in foreign exchange, in this instance Investec Bank. In 2008, first Respondent decided to re-locate from Australia to the United Kingdom. As part of his planning to take up residence in the United Kingdom, on 29 December 2008, the first Respondent and Jucool entered into the following agreements:

14.1. An Income Sale Agreement, in terms of which Jucool purchased from the Respondent certain specified rights and interests in the assets listed in that agreement, for a purchase price of R 72 500 000.00. The purchase price payable in terms of the Income Sale Agreement was left outstanding as an interest-free loan owed by Jucool to the Respondent;

14.2. An Asset Sale Agreement, in terms of which Jucool purchased from the Respondent those rights and interests in the assets, which had not been sold by the Respondent to Jucool in terms of the Income Sale Agreement. The purchase price was R 217 500 000.00. The purchase price in terms of the Asset Sale Agreement was also left outstanding as an interest-free loan owed by Jucool to the Respondent.

15. In consequence of those agreements, Jucool had a debt owing to the Respondent in the amount of R 290 000 000. Also, on 29 December 2008, and immediately after the conclusion of the Income Sale Agreement and the Asset Sale Agreement, the Respondent entered into a Deed of Assignment pursuant to which he assigned absolutely all his right, title and interest in and to the debt to Nova Trust Ltd as Trustee of the Jucool Trust, free of consideration. The deponent to this affidavit continues to state that the directors of Jucool were aware that the assets of persons emigrating from South Africa could not be freely transported from that country, but were subject to certain rules and procedures and were accordingly aware that the assets were "blocked" in South Africa under South African Exchange Control Regulations as is generally the case with all emigrants from South Africa (at that time). Transactions of this sort entered into by the Respondent were therefore common under similar circumstances. In terms of the agreements (specifically Clause 7.2 of the Income Sale Agreement and Clause 6.3 of the Asset Sale Agreement), as and when the assets become transferrable, the Respondent is required to transfer registered title to the assets into Jucool's name at such time as Jucool deems appropriate. There is also a requirement (Clause 6.2 of the Asset Sale Agreement) that the Exchange Control Regulations be adhered to by proper applications for consent to remit the assets from South Africa as and when that becomes legally possible. The agreements referred to were subject to the law of the British Virgin Islands and, according to an opinion furnished by a QC, an expert on the law of the British Virgin Islands, the agreements were valid and binding agreements under the laws of the British Virgin Islands. The conclusion therefore was that Jucool was the "beneficial" owner of the relevant assets which are held by the first Respondent upon Trust for Jucool. Furthermore, in terms of the relevant Exchange Control Regulations at the time, the income derived from the assets is, and always has been, remittable from South Africa. There is no prohibition whatsoever on a non-resident to whom income may be remitted, on assigning his right to that income to another non-resident. Both the spirit and the letter of the Exchange Control Regulations were respected, since such a transaction would in no way result in more flowing out of South Africa than would have been the case had the emigrant retained the right to income, in his own name. Both agreements recognise that the capital of the assets themselves cannot be remitted from South Africa, and that the transfer of the assets is subject to the consent of the Exchange Control Department of the South African Reserve Bank (now the Financial Surveillance Department). In particular, it is expressly a term of both agreements that the assets are sold subject to the restrictions arising from the Exchange Control Regulations (in particular Clauses 1.2, 1.3, 1.5 and 2.1.2 of the Asset Sale Agreement) and that delivery of the assets would require permissions and consents, for example, with reference to Clause 6.2 of the Asset Sale Agreement. As required by the regulations therefore, the assets have throughout been held under the control of an authorised dealer in foreign exchange in an account

which is recognised by all concerned as being subject to the provisions of Regulation 4 (2) of the relevant Exchange Control Regulations.

16. It appears from first Respondent's own submissions to the ATO and the reasoning of the ATO in reply thereto, that the ATO based its assessments on the fact that contrary to first Respondent's contentions, he retained legal and beneficial interests in the assets held in South Africa. In this context, the following appears from the "Executive Summary" provided by the ATO: "You became an Australian resident in April 2002, after your emigration from South Africa, and continued your residence here until December 2008 when you immigrated to the United Kingdom. As an Australian resident you were required to declare all income derived from all sources, in or out of Australia. The ATO's position is that you have omitted assessable income from your Income Tax Returns, that was derived on assets you held in South Africa, whilst you were an Australian resident. This income includes ordinary foreign source income you derived on your South African accounts and assets administered on your behalf by Investec for South African exchange control purposes. In addition, you have also omitted capital gains on disposals of those assets and when you ceased to be an Australian resident.

You have provided a submission to the Commissioner in which you contend that upon your immigration to Australia, you assigned your rights and interests to the income and capital of the assets held in South Africa to a BVI company. The ATO's position is that you retained legal and beneficial interests in the assets held in South Africa. Additionally, we consider that the purported assignment "arrangement" is prohibited by the South African Exchange Control Regulations and is not legally effective and/or is a sham."

17. From the documentation supplied by the ATO to the South African authorities for purposes of the present application ('SARS 6'), it appears clearly that the first Respondent repeatedly applied through Investec to the relevant South African Reserve Bank Department for the release of "blocked" funds in substantial amounts, amounting to many millions of rands. It also appears from the same document that first Respondent's legal representatives held a meeting with the ATO offices on 19 July 2010. It appears from par. 147 and 148 of this document that the ATO was told that he had formalised his emigration facilities with the South African Reserve Bank EXCON Department on the basis that he was legally and beneficially the holder of the rights and interests to the South African assets, and that he remitted income and capital thereon in accordance with the formalised emigration facilities. The South African Reserve Bank did not grant exemption or approval to remit any income or capital to the BVI Company under their purported assignment agreement that was described, and the rights and interests of the South African assets were at all times regarded by the SARB as belonging to him, the first Respondent. It was also stated that in his dealings with the South African Reserve Bank Department, first Respondent had maintained that those South African assets were legally and beneficially held by him solely, and that income accruing thereon was his. The following was said in par. 170: "You have made numerous applications to the SARB EXCON Department commencing in 2004, to release and use your South African blocked funds in South Africa, including to support your mother and father, pay monthly steepens to former servants, pay holiday travel, accommodation and living expenses, purchase sporting tickets and to purchase land so that you may build and furnish a house. These applications further demonstrate that you regard it as South African assets and funds as belonging to you, that you maintain your beneficial and legal ownership of those assets for the period in which you were a resident in Australia. In addition, the SARB applications reveal your control over the assets, which conflicts with the purported assignment arrangement".

It was then stated that during the period from January 2004 through to April 2010 he had made, through Investec, no less than 24 applications to the SARB EXCON Department to use his South African blocked assets to fund his expenditure in South Africa. With reference to a loan application to a St. George's Bank, details were then given of amounts remitted from South Africa which demonstrated his control thereof. In the loan application to St. George's Bank, statements were made, which conflicted with submissions made to the ATO. The Commissioner then stated that he considered that his use of entities established in banking secrecy jurisdictions, such as the BVI and Lichtenstein, was an attempt to preclude the operation of the attribution regime under Australian Tax Law, and supported the Commissioner's view that he intended to avoid his tax obligations in Australia, particularly given the timing of his permanent departure from South Africa, and settlement in Australia. It was also stated that in the period subsequent to 15 December 2008, when he departed Australia to reside in the UK, through to 30 June 2010, he continued to remit funds abroad from the Investec Bank accounts in South Africa. It was noted however that none of these funds were remitted to the ostensible assignee which would have been expected if the assignment arrangement was intended to take effect according to its tenor. Instead, he remitted amounts from his South African accounts directly to his own personal accounts abroad (including his St. George Bank account in Australia) or to another offshore account held in the name of Jucool Enterprises Incorporated.

18. As I have said, ss. 163 ***and*** 185 ***of the*** Tax Administration Act, need to be interpreted in the light of the formal certificate requiring assistance. Such interpretation must be done in the light of its context,

the apparent purpose to which it is directed, and the material known to those responsible for its production (the production of the certificate referred to in s. 183 ***(2)).***

See: ***KPMG Chartered Accountants (SA) vs Securefin Ltd and Another*** 2009 (4) SA 399 ***(SCA) par. 39 and 40; Natal Joint Municipal PensionFund vs Endumeni Municipality*** 2012 (4) SA 593 ***(SCA) par. 18 and 19 and Ex Group (Pty) Ltd vs Trustco Group International (Pty) Ltd and Others*** **[2013] ZASCA 120** ***a***, judgment delivered on 20 September 2013, at par. 16. It is clear that the documentation drawn by the ATO, parts of which I have referred to, was in their mind when the relevant certificate was drafted. This was then considered by the South African authorities who in the founding affidavit then say that the certificate, as per the wording of ***s. 185 (3) of the Act*** amounts to prima facie proof of a danger that the South African assets of the Respondent will be dissipated. What "prima facie proof means, is discussed in some detail in the ***South African Law of Evidence, Zeffert, Paizes and St Q Skeen, 5th Edition, Lexis Nexis Butterworth, at 124.*** In this context, it was stated on behalf of Applicant, in the founding affidavit and during argument that I should have regard to the following considerations:

18.1. The wording of s. 183 (2) of the Tax Administration Act,

18.2. The contents of the certificate referred to in s. 183 ***(2) (d),***

18.3. The wording of s. 183 ***(3) (b)*** which meant that the statement in the certificate that there was a risk of dissipation or concealment amounted to prima facie proof of that allegation;

18.4. The fact that second Respondent made no affidavit at all dealing with the allegations in the founding affidavit, such as one would normally expect and/or require;

18.5. The information that was available to the ATO at the time that they made the relevant certificate;

18.6. That information available to him by and large emanated from representations made to the ATO and/or objective facts relating to the two dozen requests by first Respondent for the release of funds;

18.7. The fact that conflicting and/or untrue representations were made to St George Bank;

18.8. The fact that proper consideration should be given to the purpose of the Protocol between the two countries and the ostensible reasons for establishing the tax structure that I have referred to when first Respondent left Australia;

18.9. The fact that the relevant assets are merely preserved, pending further procedures and rights which the first Respondent may exercise in Australia, the conclusion being that the confirmation of the Preservation Order will not prejudice the legitimate interests of the first Respondent or anyone else who may have a valid interest in the particular South African assets.

19. Having regard to the objective facts that were placed before me, the purpose of the relevant legislation and the purpose of the Protocol, and the proper context, I am of the view that ss. 163 ***and*** 185 ***of the*** Tax Administration Act, in the context of the relevant Protocol, justify the confirmation of the Preservation Order that was provisionally made.

20. **THE PROTOCOL:**

As said, the purpose of the 1999 Agreement between the two governments was for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. It contained no provision for mutual assistance with regard to the latter stated purpose. All relevant provisions were aimed at the avoidance of double taxation. It provided in art. 27 when these provisions would come into force both in the case of Australia and in the case of South Africa. The 2008 Protocol amended this Agreement. Art. 1 introduced a new art. 2. Art. 2.3 is a new provision and provides for the purposes of art. 23 A, the taxes to which the Agreement shall apply are taxes of every kind and description. Art. 2.4 is also new and provides that for purposes of art. 25 and 25 A taxes to which the Agreement shall apply are taxes of every kind and description imposed under laws administered by the Commissioner of either Australia or South Africa. Mr. N. Maritz SC on behalf of Applicant submitted that in interpreting the new art. 2, Art. 2.1, 2.3 and 2.4 must be reconciled to avoid conflict. This would be achieved simply by reading art. 2.1 as providing that "the existing taxes to which this Agreement, save for art. 23 (a), 25 and 25 A shall apply, are:...". Art. 2.4 therefore states that taxes for purposes of art 25 and 25 A (in respect of Australia) are taxes of every kind and description imposed under Federal Tax Laws. Art. 2.1 is therefore not applicable to art. 25 and 25 A, and does not serve to identify the tax for purposes of those two articles. Therefore, when one turns to art. 13, the time periods referred to there in have no application. Art. 11 of the Protocol inserts a new art. 25 A after art. 25 of the Agreement. This art. provides for the assistance in the collection of taxes. Art. 25 A must be read together with art. 2.4 and it was submitted that art. 13 was not a clause in the Agreement, but deals only with the dates when the Protocol would come into force. It does not deal with the taxes to which the Agreement relates nor does it define such taxes. Art. 13 does not replace art. 27 of the Agreement, nor is art. 27 of the Agreement deleted in terms of the 2008 Protocol. Art. 13.2 stipulates that the Protocol, which amends the Agreement, shall come into force on the date of the last notification referred to in art. 13.1. This means that the effective date on which the Agreement of 1999 is amended by the Protocol in respect of the matters identified in art. 13.2, and for which the provisions of art. 13.2 are relevant, is the "date of last notification". Art. 13.2 (a) (i) clearly

relates to income tax. Art. 13.2 (a) (ii) refers to "other Australian tax". This clearly means Australian tax other than "withholding tax on income" referred to in art. 13.2 (a) (i). Regard must then be had to the definition of "Australian tax". This means tax imposed by Australia "to which the Agreement applies by virtue of art. 2". Art. 2 states that the "taxes to which this Agreement shall apply are" the Australian Income Tax and the South African Income Tax specified in art. 2.1 (a) and (b). "Other Australian Tax" is therefore not reference to Australian Tax of any kind or description, but a reference to "income tax, including the resource rent tax" but excluding the withholding tax of income referred to in art. 13.2 (a) (i). "The date of last notification" is the date on which art. 2.1 and all other art. relating to income tax, the avoidance of double taxation and the evasion of tax, become effective. Art. 13.2 (c) stipulates that the Protocol shall have effect for purposes of art. 25 from the date on which the "Protocol enters into force". This means that art. 25 is amended on the date on which the Protocol enters into force. Art. 25 contains no temporal limitation. Having regard to art. 2.4 which stipulates, that for purposes of art. 25, the taxes to which the Agreement shall apply are "taxes of every kind and description". Once the new art. 25 comes into operation all information concerning taxes of every kind and description shall be exchanged. As I have said, the Respondents advanced the argument that on the interpretation of art. 2, only information concerning taxes arising after 1 July 2009 may be exchanged. Applicant's Counsel contended however that this could not have been the intention, if regard is had to the fact that under the provisions of the previous art. 25 there was no limitation as to the time period in relation to which information could be exchanged. Art. 13.2 (d) provides that the Protocol shall have effect for purposes of art. 25 A from a date to be agreed between the parties by exchange of Diplomatic notes. This means that art. 25 A is introduced into the Agreement with effect from a future date to be agreed. Once art. 25 A comes into effect, in its terms, has no temporal limitation. It was also contended by Mr. N. Maritz SC on behalf of Applicant that the Government Notice of 23 December 2008, no. 31721 is in fact a notification as contemplated in s. 108 (2) of the Income Tax Act of 1962. It states that the Protocol has been published in Government Gazette no. 31721 dated 23 December 2008, and therefore does no more than to give the dates which do not appear from art. 13 of the Protocol. It adds nothing to the meaning or the content of the Protocol itself. The relevant date for purposes of par. (d), with reference to the coming into operation of art. 25 A, it is common cause that this date was subsequently agreed to as being 1 July 2010.Accordingly, with effect from 12 November 2008 the whole Protocol became effective, with the exclusion of the introduction of art. 25 A. Therefore, so it was contended, all the avoidance of double taxation provisions and art. 23 A and 25 were in operation from 12 November 2008. When art. 25 A came into effect and operation on 1 July 2010 it applied to a revenue claim, being a claim in respect of "taxes of every kind and description", according to the provisions of art. 2.4. Art. 25 A has no retrospective operation.

21. The conclusion is that for art. 25 A and the assistance obligation to apply, at the time assistance is sought or given:

21.1. There must be an amount owed;

21.2. The amount owed must be in respect of taxes of any kind or description;

21.3. There was no specification in regard to the period for which the taxes are owing. It really means that assistance would be granted in future for already existent obligations. I already said that it was contended on behalf of first Respondent (and second Respondent adopted the same approach) that on a proper interpretation of the Agreement and the Protocol, SARS and the ATO are only entitled to invoke the provisions of art. 25 A of the Agreement if the taxes owing to the ATO arose during the income years commencing from 1 July 2009. The taxes claimed by the ATO from the first Respondent therefore fell beyond the scope of art. 25 A of the Agreement. In these circumstances, the provisional order was wrongly sought and should not have been granted. I do not agree with that argument and I do not agree that art. 13 (2) (d) provides the dates from which the provisions of art 25 A can be utilised. The interpretation of it by Applicant's Counsel is in my view the correct and logical one having regard to the mentioned provisions and their purpose. It is in my view not a question of retrospectivity at all, such as Mr. Ginsberg SC on behalf of first Respondent contended. Applicant's Counsel agreed that the co-operation was prospective, but that it related to all taxes, and certainly to all taxes service inception of the agreement, in other words since 1999. I agree with that interpretation for the reasons stated.

22. Second Respondent's Defence:

As I have said, the second Respondent supported the grounds of opposition relied upon by the first Respondent.

Numerous examples abound in the documentation emanating from the ATO and submissions made to it, which indicate that the first Respondent dealt with relevant assets as if he was still the beneficial owner thereof. On numerous occasions he sought release of blocked funds from the South African Reserve Bank without any reference to second Respondent. From the nature of many of these requests it is apparent that it could only have been for release to the first Respondent and his family personally. Also, on 25 July 2013, the First Respondent sought permission to invest funds, which were blocked in terms of Regulation 4 (2), to purchase a property in South Africa. In terms of this request, the first Respondent, without any reference at all to the second Respondent, required some R40 000 000 for the

purchase of a property in Clifton, Cape Town. He then stated what his remaining assets were as at 30 June 2012 which amounted to some R295 000 000. He also required a further R5 000 000 to furnish the property and also purchase a car for his use in South Africa. Those funds would emanate from "his" cash balance with Investec Bank Ltd. It was submitted by Applicant that in the absence of an affidavit from the first Respondent and the persons who allegedly negotiated the 2008 Agreements with him, the 2008 structure was just as unreal as was the previous 2002 structure. Furthermore, the second Respondent failed to show that it was his so-called beneficial owner of the relevant assets. It is clear from the alleged Agreements, that the parties had an overriding intention that the first Respondent was not required to transfer any rights or assets in contravention of the Foreign Exchange Dispensation as applicable to him. There was also no explanation how the second Respondent could in law become the owner of immovable property situated in South Africa, contrary to the laws of South Africa, that require registration in the Deeds Office for the transfer of immovable property from one person to another, including to a Trust. The contention of the second Respondent that Jucool was the "beneficial owner" of the relevant assets, is nowhere to be found in the particular contracts. Furthermore, no effective transfer of rights could have been taken place under circumstances where the authorised dealer was not even consulted. The result really is that it would be impossible to transfer the so-called beneficial ownership of the assets without the consent of Investec Bank and still to comply with Foreign Exchange Regulations, which regulations the parties clearly had in mind. I agree with Applicant's Counsel that the stated reservation would not allow any definitive intent to immediately transfer any rights to the Second Respondent in terms of the Asset Sale Agreement.

23. What is the basis for the transfer of ownership in South African Law? An essential element of the passing of ownership is that there must be an intention at the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property.

See: ***Legator McKenna vs Shea*** 2010 (1) SA 35 ***SCA at 44 par. 22, and the decisions referred to therein***.

In the affidavit of the second Respondent's Deponent it is stated why the "Income Sale Agreement" and the "Asset Sale Agreement" were separately entered into. It was stated that "both Agreements recognise that the capital of the assets themselves cannot be remitted from South Africa and that the transfer of the assets is subject to the consent ...it is expressly a term of both Agreements that the assets are sold subject to the restrictions arising from the Exchange Control Regulations... And that delivery of the assets would require permissions and consents ..." I agree with Mr. Van der Merwe SC on behalf of Applicant that these admissions destroy any notion of an immediate transfer of rights. There was simply no intent to immediately transfer any rights to the second Respondent in my view and there is no merit in that defence. At best it could be said that the Respondents only intended to create personal rights in favour of the second Respondent, pending consent being granted and a transfer taking place thereafter. There is no concept like "ownership" of a "right-to-claim".

See: ***Grobler vs Oosthuizen*** 2009 (5) SA 500 ***(SCA) at par. 18.***

24. In the light of the above it is not necessary to deal with any other contentions advanced by the parties in great detail. I thank Counsel for all parties for their thorough Heads of Argument.

25. **The following order is made:**

1. The Provisional Preservation Order made by this Court on 18 February 2013 is confirmed in respect of par. 3 to 7 thereof;

2. The Respondents are ordered to pay Applicant's costs jointly and severally, including the costs of two Senior Counsel.

South Africa

Supreme Court of Appeal

Case 20230/2014 and 20232/2014
Krok and Jucool Enterprises Inc.

20 August 2015

International recovery assistance – Entry into force of the Protocol providing for tax recovery assistance – Future assistance for already existing claims – No question of retrospectivity

The Protocol of 31 March 2008 amending the double taxation agreement between Australia and South Africa provides for the two States to assist each other in the collection of taxes. The provision concerned applies to tax debts which arose before the Convention entered into force.
The rule against retrospectivity bears no relevance in this case (point 40).

Note: this decision confirms the judgment of the North Gauteng High Court (see p. 94).

MARK KROK and JUCOOL ENTERPRISES INC. v.
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES (CSARS)

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J sitting as a court of first instance): judgment reported *sub nom Commissioner for the South African Revenue Services v Krok* 2014 (3) SA 453; [2014] 2 All SA 66 (GP).

JUDGMENT

[1] This appeal concerns the correctness of the confirmation of a preservation order by the Gauteng Division of the High Court, Pretoria (Fabricius J). The order was obtained on an ex parte basis by the respondent, the South African Revenue Service (SARS), against the first appellant (Mr Krok) to secure assets for purposes of satisfying an alleged tax debt and for the appointment of a curator *bonis* in terms of ss 163 and 185 of the Tax Administration Act 28 of 2011 (the Act). The determination of this question depends on the temporal scope of the provisions of a double taxation agreement between the Republic of South Africa and the Government of Australia – the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income of 1 July 1999 (the DTA) subsequently amended by a protocol signed on 31 March 2008 (the Protocol) – which made provision for mutual assistance in the collection of taxes. The appeal serves before this court with the leave of the court below.[1]

[2] The litigation arose from requests made to SARS, in terms of the DTA, by the Australian Tax Office (the ATO) which represents the Commissioner of Taxation of the Commonwealth of Australia (the Australian Commissioner), in January 2012 and again in February 2013.[2] The ATO sought assistance with the collection of income taxes allegedly due by Mr Krok to the Australian Commissioner, in the sum of Australian $25 361 875.79 plus interest,[3] for the period 30 June 2004 to 30 June 2009 (the income years). The ATO thus sought the conservancy of Mr Krok‟s assets situated in South Africa pending the collection of the tax debt. The request was accompanied by a formal certificate, as envisaged in ss 185(2) and (3)*(a)* and *(b)* of the Act. These provisions deem the allegations contained in the certificate con clusive proof of the existence of the alleged liability and prima facie proof of the allegations it contains; here that Mr Krok‟s South African assets were at risk of dissipation.[4]

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[1] In terms of s 163(10)(*a*) of the Act, the preservation order remains in force pending the outcome of the appeal.

[2] SARS explained the reason for the two requests in respect of the same subject-matter and its failure to act on the ATO‟s initial request for assistance in January 2012 in its founding affidavit as based on the absence of statutory provisions that entitled it to preserve assets at the time. Its remedy lay only in the common law at the time and it would have had to give the respondent notice under s 93 of the Income Tax Act 58 of 1962 before seeking a preservation interdict upon proof, on a balance of probabilities, that the assets would be diminished with the intent to frustrate a claim. SARS stated that it was out of fear that such notice would likely trigger steps to dissipate the assets that the first request was not implemented. The ATO‟s second request was thus pursued on the basis of the dispensation created by the Act, which expressly empowers SARS to render assistance to foreign governments to recover taxes by seeking an order in the high court for the preservation of any assets of a taxpayer.

[3] Equivalent to approximately R235 705 169,19.

[4] Section 185 of the Act provides for „tax recovery on behalf of foreign governments‟ and reads in relevant part:
„(2) A request described in subsection (1) must be in the prescribed form and must include a formal certificate issued by the competent authority of the other country stating–
(a) the amount of the tax due;
(b) whether the liability for the amount is disputed in terms of the laws of the other country;
(c) if the liability for the amount is so disputed, whether such dispute has been entered into solely to delay or frustrate
collection of the amount alleged to be due; and
(d) whether there is a risk of dissipation or concealment of assets by the person.
(3) In any proceedings, a certificate referred to in subsection (2) is–
(a) conclusive proof of the existence of the liability alleged; and

[3] The facts which led to the request may be gleaned from two documents which were attached to SARS‟ founding affidavit. One is a document entitled „Submission on Objections to the Assessments‟ dated 5 April 2012 (the submissions document). It was lodged with the Australian Commissioner on Mr Krok‟s behalf in response to notices of assessment of his taxable income and liability to pay a penalty in respect of the income years and the ATO‟s reasons for its decision. (The answering affidavit filed on Mr Krok‟s behalf which was deposed to by his attorney of record expressly incorporated the contents of this document.) The other document is the ATO‟s „Reasons for Decision‟ dated 7 December 2011, which contains its analysis of the facts, its interpretation of the relevant law as applied to those facts, the issues it identified and its decision on those issues (the reasons document).

[4] The assets in issue originated from the Abraham Krok Trust. This trust was formed out of donations made to its trustees in 1973 by Ms Sarah Krok for the benefit of her son, Mr Abraham Krok‟s six children, of whom Mr Krok was one. In 1994 Mr Krok‟s father created new separate trusts to which the assets of the Abraham Krok Trust were transferred for the benefit of each of these children. One of the new trusts was the Mark Krok 1994 Trust (the trust) in which Mr Krok accumulated considerable capital assets valued at R71 713 807 as at 28 February 2003. These assets at that stage mainly comprised shares in various listed and unlisted South African companies and cash investments.[5]

[5] The saga began with Mr Krok‟s emigration to Australia in April 2002. According to the submissions document, prior to this event he sought professional advice on the implications of keeping the assets in the trust having regard to the South African Exchange Control Regulations, 1961 (the regulations).[6] Consequent upon that advice, the trust distributed the capital assets to him, thus vesting him with the ownership thereof just before he ceased to be resident in South Africa. Accordingly he held these assets in addition to his personal assets arising from income distributions from the trust while he was still resident in South Africa.

[6] The alleged reason for the distribution was that Mr Krok had been advised that the South African Reserve Bank (the SARB) would be more lenient in granting permission for the release of income from South Africa of an emigrant if such assets were owned, not by the trust, but by the emigrant personally. Otherwise the assets would be subject to capital gains tax in South Africa if they remained in the trust whereas gains on assets held by the emigrant would be exempt from capital gains tax except on disposals of interests in South African real estate. Moreover, it was said, Mr Krok could not, in any event, transfer the assets whilst his father, the founder of the trust from whom the assets originated, was still alive.

[7] To prevent the use of trust distribution as a means of externalising capital from South Africa, exchange control consent is not given for the expatriation of capital distributed by trusts less than three years prior to the date of emigration unless the founder of the trust is deceased. Thus, the assets became „blocked‟, ie they had to be placed under the control of an authorised dealer in foreign exchange,[7] Investec Bank Ltd (Investec), although they could be expatriated from South Africa with the consent of the SARB under the Exchange Control Practice. But they would remain in the name of Mr Krok or his local nominee upon Mr Krok‟s emigration.

[8] In furtherance of Mr Krok‟s scheme to avoid the „adverse South African Exchange Control implications‟, as he put it, after he ceased to be a resident of South Africa but before entering Australia, he vested the beneficial interests in both the assets and the income in a British Virgin Islands company, Polperro Enterprises (Polperro) and retained only the legal ownership. The shares in Polperro would be held by a Foundation domiciled in Liechtenstein, of which Mr Krok would be the primary beneficiary, although he would have no rights to the assets or control over the Foundation‟s actions.[8] To that end, he concluded two agreements on 23 April 2002. In terms of the first agreement (The Deed of Sale of Specified Income) he sold his right, title and interest to the income from the assets, to be derived over a 30-year period, to Polperro for a sum of R65 441 554.65. In terms of the second agreement (the Asset Sale Agreement), he sold all his rights in respect of the assets to Polperro for a sum of R3 444 292.35. The debt arising from these agreements was then assigned to the trustees of an Australian Trust for a sum of R68 885 847. The long and short of all this activity, according to Mr Krok, is that he ceded all his South African income and assets to Polperro, save for the bare *dominium* thereof, and had no income or capital gains on which he could be taxed by the ATO under the agreements.

[9] Then, on 29 December 2008, Mr Krok emigrated from Australia to the United Kingdom. The facts germane to this relocation are set out in the affidavits filed on behalf of the second appellant, Jucool

(b) prima facie proof of the other statements contained therein.‟

[5] Mr Krok subsequently acquired two immovable properties in Cape Town in 2008, having applied to the South African Reserve Bank on 16 January 2008 for the release of R15,6 million to him for that purpose (para 14 below).

[6] Regulations made under the Currency and Exchanges Act 9 of 1933 published in GN R1111 of 1 December 1961 as amended up to GN R445, GG 35430 of 8 June 2012.

[7] Regulation 4(1) of the regulations.

[8] According to Mr Krok, the Foundation‟s role was merely to hold the shares in Polperro. The latter‟s director would be GCI Management Limited which would be provided by Insinger de Beaufort, an independent third party responsible for Polperro and remunerated on an arm‟s length basis for its services.

Enterprises Inc. (Jucool), deposed to by Ms Cora Barbara Binchy in her capacity as a director of Chaumont (Directors) Limited alleged to be Jucool‟s sole corporate director.[9] Jucool was granted leave to intervene in the application proceedings on the basis of its allegations that its interests would be prejudiced by the preservation order because it is the beneficial owner of the assets in issue. It is a company incorporated in the British Virgin Islands on 23 December 2008, just before Mr Krok‟s relocation to the United Kingdom. Its sole shareholder is Novatrust Limited (Novatrust), a professional trustee (and trustee of the Jucool Trust) domiciled in Jersey. The Jucool trust is a discretionary trust governed by Jersey law, which was established on 22 December 2008 by way of a declaration of trust executed by Novatrust. Its only material assets are shares in Jucool and a loan receivable from Jucool described below. Its primary beneficiaries are Mr Krok and his children.

[10] In the submissions document and Jucool‟s affidavits it was alleged that as part of Mr Krok‟s planning for the relocation, Polperro was liquidated. Mr Krok was further advised to establish a discretionary trust for UK income, inheritance and capital gains tax purposes and the necessity for asset protection. On that basis he concluded certain agreements with Jucool on 29 December 2008.[10] Incidentally, these agreements were not dissimilar to those Mr Krok had earlier concluded with Polperro, which were terminated at his instance leaving him in control of the assets. One was an „Income Sale Agreement‟ in terms of which Jucool purchased from Mr Krok certain specified rights and interests in the assets listed in that agreement[11]11 for a purchase price of R72 500 000. This debt was left outstanding as an interest-free loan owed by Jucool to Mr Krok. Effectively the purpose of this transaction was to transfer to Jucool the income derived from the assets owned by Mr Krok. The plain objective of this was to separate the right to enjoy the assets from the bare *dominium.* As explained in the affidavit filed on the appellants‟ behalf by Mr Moverley Smith, an expert on the law of the British Virgin Islands, the notion was that the „beneficial ownership‟ of the assets would pass from Mr Krok to Jucool and he would retain only the legal ownership of the assets, which legal ownership he would hold on trust for Jucool.

[11] The other agreement was an „Asset Sale Agreement‟ in terms of which Jucool purchased from Mr Krok those rights and interests in the assets which had not been sold by Mr Krok to Jucool in terms of the Income Sale Agreement. The purchase price in this instance was a sum of R217 500 000 which was also left outstanding as an interest-free loan owed by Jucool to Mr Krok. Immediately after the conclusion of these agreements Mr Krok entered into a „Deed of Assignment‟ with Novatrust. In terms of this agreement he assigned to Novatrust all of his rights, title and interest in the R290 000 000 debt arising from Jucool‟s purchase, free of consideration.

[12] In 2009, the ATO launched an audit of Mr Krok‟s taxation affairs which started with his income tax submission for the income year ended 28 February 2003 and carried through to his application to the SARB in February 2010 for the release of funds to cover his holiday and visiting expenses in the country during 2010. The audit was part of a government initiative investigating participation by Australians in internationally promoted tax arrangements to identify taxpayers involved in significant offshore transactions or large transfers of funds to or from Australia.

[13] Arising from this investigation, the reasons document recorded numerous instances of Mr Krok‟s dealings involving the blocked assets. It commenced with his income tax return (ITR) to SARS for the year ended 28 February 2003. In this document Mr Krok declared, inter alia, considerable South African interest income and capital gains running into millions of rand in respect of a distribution from the trust and income from South African dividends which were all exempt from tax in South Africa because he was a non-resident.[12] He also declared South African assets (which included various listed and unlisted securities and cash reserves of substantial value) and liabilities as at 28 February 2003 totalling R71 713 807 and R777 206, respectively. In the following year, he lodged another ITR to SARS for the year ending on 29 February 2004. Yet again, he declared substantial South African exempt interest income and income from dividends and South African assets totalling R67 644 891.74, with a market value of R98 328 827 according to his personal balance sheet. These returns indicated that whatever the nature of the transactions with Polperro, Mr Krok continued to regard these assets as his personal property and the income derived from them as likewise his income.

[9] The affidavits comprise an answering affidavit which incorporated Jucool‟s affidavit filed in support of its application for leave to intervene.

[10] Curiously, these agreements reflect that they were executed on Jucool‟s behalf by an entity called Montblanc (Directors) Ltd and not the Chaumont (Directors) Ltd referred to in the affidavits deposed to by Ms Binchy and the resolution which empowered her to depose to such affidavits. But nothing turns on this seeming discrepancy.

[11] Set out in clause 6 of the agreement as follows:
„6.1. the right to receive all the Income from and other fruits of, the Assets;
6.2. the right to cause the Seller to sell any of the Assets and to cause the Seller to purchase any Asset or Assets which the Seller may legally purchase from time to time with the proceeds of the Income derived from the Assets;
6.3. the right to exercise or to direct the seller how to exercise the voting Rights with respect to any of the Assets possessing Rights;
6.4. the right to cause the Seller to exercise on behalf of the Buyer any other right which the Seller may have with respect to any of the Assets …‟
during the period of 30 years from the effective date.‟

[12] In terms of the Income Tax Act 58 of 1962.

[14] It was also recorded that for a period in excess of two years, during 2002 to 2004, Mr Krok used his South African credit cards funded from the blocked assets for his personal expenditure which, when identified by the SARB as unauthorised foreign expenditure, was then recouped from his transferable income account. It appears that between January 2004 and April 2010 he repeatedly applied through Investec to the SARB, which had directed Investec to control his assets for his benefit, to use the blocked funds for his and his family‟s expenditure in South Africa. These included such diverse matters as the acquisition and decoration of a home in an exclusive suburb of Cape Town; the building, furnishing and equipping of a holiday home in Hermanus; the acquisition of a motor vehicle; the payment of amounts to support his aged mother and to provide pensions for former employees; and the cost of acquisition of tickets for the 2010 football World Cup.

[15] In a 2005 loan application made to St George Bank for the purchase of residential property in Australia, he furnished details to the bank of his capacity to repay and service the loan from amounts remitted from South Africa. These details demonstrated his control over the funds remitted from South Africa, those held by Polperro and the ultimate application of those funds towards the acquisition of his private property. In addition, a personal balance sheet accompanying the application bore information contrary to his statements to the ATO. In an application to the SARB in 2008, Mr Krok apparently submitted management accounts which reflected that he held the rights and interests in the assets claimed to have been disposed of under the Deed Assignment. According to the reasons document, which detailed many other examples said to prove that Mr Krok held beneficial ownership of the assets including that he remitted funds from the Investec accounts directly to his personal offshore bank accounts, none of these transactions paid any heed to the assignment arrangement, the existence of which was never disclosed to SARS and the ATO.

[16] Consequent upon the investigation, the ATO concluded that Mr Krok had intended to conceal foreign income and avoid income tax in Australia as shown, for example, by the use of entities established in banking secrecy jurisdictions such as the British Virgin Island and Liechtenstein. In the ATO‟s view, Mr Krok had omitted assessable income from his income tax returns that was derived from assets, including those administered on his behalf by Investec, which he held in South Africa whilst an Australian resident and also concealed capital gains on disposals of those assets when he ceased to be an Australian resident. The ATO further determined that Mr Krok retained legal and beneficial interests in the assets and that „the purported assignment arrangement‟ of his rights and interests to the capital and income of these assets to Polperro breached the South African exchange control regulations and was a sham. For these reasons, the ATO accordingly amended his income tax returns for the income years and issued notices of assessment of tax and penalties. Mr Krok‟s objection to the assessments under the procedures provided by Australian law was disallowed in full.

[17] As indicated, upon the ATO‟s request for SARS‟ assistance of 6 February 2013, SARS launched an application in terms of s 163 read with s 185 of the Act for a provisional preservation order which was granted and subsequently confirmed by the court below. The assets specified under the order comprised immovable property, cash investments, a motor vehicle and various listed and unlisted securities of considerable value held in Mr Krok‟s name or on his behalf by nominees. The rights, title and interest in these assets would vest in the curator *bonis*, to whom Mr Krok was obliged to disclose all his assets and sources of income held in South Africa and their location, until the tax debt was satisfied or proper arrangements for purposes of the tax collection were made.

[18] The issues in the court below were characterised as follows: whether – (a) SARS proved its case in the context of s 185 of the Act and the Protocol; (b) the facts justified a reasonable apprehension of dissipation of the assets; and (c) the introduction of article 25A into the DTA applied to the taxes claimed by the ATO for the income years all which arose before 1 July 2009. Among the defences raised on Mr Krok‟s behalf was that the tax claimed by the ATO fell outside the scope of the DTA. This was so, it was argued, because the Protocol came into effect on 12 November 2008,[13] and in terms of article 13(2)(a)(ii) thereof, with regard to Australian tax applies to income, profit or gains accrued on or after 1 July on the calendar year following the date on which it came into force. The Protocol, so it was contended, therefore applies only in respect of income, profits or gains of any year of income beginning on or after 1 July 2009.

[19] Jucool aligned itself with Mr Krok‟s submissions. It further argued that the preservation order should not be confirmed even if these defences failed as it is the beneficial owner of the assets subject to the preservation order. On the basis of Mr Moverley Smith‟s opinion, it was contended on its behalf that (a) the agreements it concluded with Mr Krok and the Deed of Assignment were valid and binding under the laws of the British Virgin Islands; (b) the agreements created trusts of the assets and rights pursuant to which, upon the agreements coming into effect, legal title to the assets and rights was retained by Mr Krok pending transfer and the beneficial ownership of the rights and assets passed to Jucool; and (c) such trusts were enforceable at the instance of Jucool.

[13] In terms of Government Notice No. 31721 dated 23 December 2008 which reads „[I]n terms of paragraph 2 of Article 13 of the Protocol … the date of entry into force is 12 November 2008.‟

[20] As evidence of the validity of the agreements, it was contended that they required Mr Krok to hold the assets, rights and interest Jucool acquired thereunder in trust on its behalf and for its benefit.[14] They further required Mr Krok to transfer the registered title to the assets into Jucool‟s name as and when the assets became transferable, at such time as Jucool deemed appropriate.[15] Clause 8 of these agreements further obliged Mr Krok, if any of the assets were sold or the rights and interests they envisaged were realised, to cause the net proceeds attributable to Jucool to be paid to it promptly. Pending such payment, Mr Krok was required to hold, invest and otherwise deal with such net proceeds as Jucool required or directed so as to give effect to the rights acquired by Jucool pursuant to the agreements. According to Jucool‟s affidavits, its directors were aware that the assets situated in South Africa were blocked under the exchange control regulations and the agreements were concluded in a manner that ensured that these regulations were adhered to. To that end, so it was argued, the agreements, which recognised that the capital of the assets could not be remitted from South Africa, expressly required proper applications for permissions and consents from the Exchange Control Department of the SARB to remit the assets, which were always held by an authorised dealer in foreign exchange in an account subject to regulation 4(2).[16]

[21] The court below was not persuaded by any of these contentions. With regard to Mr Krok‟s arguments, it accepted SARS‟ interpretation of the relevant provisions of the DTA and concluded that „[h]aving regard to the objective facts … the purpose of the relevant legislation and the purpose of the Protocol, and the proper context, I am of the view that ss 163 and 185 of [the Act], in the context of the relevant Protocol, justify the confirmation of the Preservation Order that was provisionally made‟. The court below was similarly unimpressed by Jucool‟s case. It held that examples of the manner in which Mr Krok dealt with the assets as the beneficial owner abounded in the ATO‟s documentation and Mr Krok‟s submissions to it and that no effective transfer of rights, or even an intention to do so, was shown to have taken place.

[22] On appeal before us, the only argument persisted in on Mr Krok‟s behalf was that on a proper interpretation of article 25A of the DTA and article 13(2)(a)(ii) of the Protocol, article 25A can be invoked only if the taxes claimed by the ATO arose on or after 1 July 2009. This was so, it was contended, because in terms of the common law revenue rule, any assistance that can be provided by one State to another under article 25A is limited to the collection of „revenue claims‟ ie amounts owed in respect of taxes referred to in article 2 of the DTA. And, in the case of Australia, in terms of article 13(2)(a)(ii) read with article 3(1)(c), which defines „Australian tax‟ to which the reach of article 25A is confined, the Australian taxes referred to in article 2 only apply to income, profits or gains in relation to years of income commencing on or after 1 July 2009. As the taxes claimed here arose before the latter date, they fell beyond the scope of the DTA and there was thus no basis for the invocation of the conservancy provisions of the Act. So went the argument.

[23] The court below was further criticised for overlooking the general rule of interpretation that in the absence of express provisions to the contrary, statutes should be construed as affecting future matters only. In this regard it was argued that the court erroneously accepted SARS‟ contention that article 25A applies retrospectively to all taxes since the inception of the DTA notwithstanding the express provisions of article 13(2)(a)(ii). Jucool supported these contentions, as it had done in the court below, and again argued against the confirmation of the preservation order even if the defences failed on the further basis that it is the beneficial owner of the assets subject to the order.

[24] The DTA and the Protocol, which came into effect on 12 November 2008, were concluded in terms of s 108(2) of the Income Tax Act 58 of 1962 read with s 231(4) of the Constitution of the Republic of South Africa, 1996 (the Constitution).[17] Thus, they became part of South African law as they were approved by

[14] Clauses 7.3.1 and 6.4.1 of the Income Sale Agreement and the Asset Sale Agreement, respectively.

[15] Clauses 7.2 and 6.2 of the Income Sale Agreement and the Asset Sale Agreement, respectively.

[16] In terms of regulation 4(2), whenever a person in South Africa is under a legal obligation to make a payment to a person outside South Africa but is precluded from effecting the payment as a result of any restrictions imposed by or under the regulations, the Treasury may order such person to make the payment into a blocked account.

[17] Section 108 of the Income Tax Act provides for the prevention of or relief from double taxation and reads in relevant part:
„(1) The National Executive may enter into an agreement with the government of any other country, whereby arrangements are made with such government 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, or tax imposed in respect of the same donation, or to the rendering of reciprocal assistance in the administration of and the collection of taxes under the said laws of the Republic and of such other country.
(2) As soon as may be after the approval by Parliament of any such agreement, as contemplated in section 231 of the Constitution, the arrangements thereby made shall be notified by publication in the Gazette and the arrangements so notified shall thereupon have effect as if enacted in this Act.‟
Section 231(4) of the Constitution makes provision for international agreements and reads: „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‟.

the legislature under these provisions and duly gazetted.[18] In its original form, the DTA made no provision for reciprocal assistance in the collection and enforcement of foreign taxes in the courts of the two States. It merely catered for mitigation of double taxation of taxpayers who would otherwise be liable for tax in two jurisdictions in respect of the same taxable gain or income by allocating taxation rights between convention or treaty parties. Furthermore, it provided for the exchange of any information necessary for the carrying out of its terms or the domestic law of the contracting States concerning the relevant taxes. The Protocol amended the DTA by, inter alia, making provision (in article 11 which inserted article 25A into the DTA) for the two States to assist each other in the collection of taxes and securing preservation orders for purposes of recovering taxes.

[25] The provisions of the Act, which was promulgated after the Protocol came into effect „to ensure the effective and efficient collection of tax‟ not only in respect of taxes imposed by South Africa on its subjects, but also on behalf of foreign governments, are consonant with the Protocol‟s objectives. Section 185 provides in relevant part:

„(1) If SARS has, in accordance with an international tax agreement, received–

(a) a request for conservancy of any amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation or concealment of assets by the person, a senior SARS official may apply for a preservation order under section163 as if the amount were a tax payable by the person under a tax Act‟.

Section 163 in turn provides:

„(1) A senior SARS official may authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates.‟

[26] Before the enactment of these provisions and the introduction of article 25A into the DTA, the revenue rule prevailed. In terms of this international law rule, which forms part of South African law, the courts of one State are precluded, in the absence of a permissive rule to the contrary from entertaining legal proceedings involving the enforcement of the revenue laws of another State – an attribute of sovereignty. This is so, because international comity does not extend to the recognition of tax liabilities imposed by a State on its subjects for its own domestic management and regulation. Thus, a foreign State may not have a claim for taxes payable to its fiscus enforced in another State as this would be tantamount to derogation of the other State‟s territorial supremacy.[19]19 For that reason, South African courts had no power to order the attachment of assets for the purposes of enabling a foreign State to recover taxes owed to it until the rule was abrogated by the introduction of article 25A in the DTA and other double taxation agreements containing similar provisions.

[27] Regarding the approach to be adopted in construing the relevant provisions, consideration must be had to the rules applicable to the interpretation of treaties which are binding on South Africa and all States as rules of customary international law.[20] These rules, which are essentially no different from those generally applied by our courts in construing statutes and agreements,[21] are set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969 which read:

„Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

[18] In Government Notice 1368 published in Government Gazette No 31721 of 23 December 2008.

[19] *Re Delhi Electric Supply & Traction Co. Ltd* [1953] 2 All ER 1452 (CA); *Government of India, Minister of Finance (Revenue Division) v Taylor and another* [1955] AC 491; [1955] 1 All ER 292 (HL)*; Commissioner of Taxes, Federation of Rhodesia v McFarland* 1965 (1) SA 470 at 474A-B; [1965] 1 All SA 389 (W) at 394.

[20] *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 282 C-F; [1980] 2 All ER 696 (HL); *Ben Nevis Holdings Ltd and Metlika Trading Ltd v Commissioners for HM Revenue & Customs* [2013] EWCA Civ 578 paras 17 and 18.

[21] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) 593 (SCA) paras 18 and 19.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

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

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

[28] It was contended for Mr Krok that the revenue rule, which entitled South African taxpayers to arrange their affairs on its assurance that their assets were protected against foreign tax authorities, has an important role in considering the proper interpretation to be given to the applicable provisions of the DTA. This was so, it was argued, because article 25A abrogated the rule only in respect of Australian taxes in respect of income, profits or gains of any year of income beginning on or after 1 July 2009 and had no retrospective effect as found by the court below. I do not agree. It is established, as the parties acknowledged, that the rule, which is concerned with the enforcement of taxes, does not constitute an absolute proscription of the recognition of foreign revenue laws and may be abrogated by convention or treaty.[22] Evidently, the reason for the rule between South Africa and Australia ceased to exist once the two countries agreed to assist each other in the collection of taxes. In that case the rule itself has no relevance whatsoever in the determination of the meaning and scope of the Protocol.[23]

[29] Similarly wrong is Mr Krok"s argument relating to the South African taxpayers" purported expectations based on the revenue rule, were it relevant for present purposes. The argument obviously misconceives the nature of the rule which does not exist for the benefit or protection of taxpayers.[24] As was pointed out in *Government of India v Taylor*,[25] the rule has two likely sources. One is a State"s autonomy as the „enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes and … an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties". The other has to do with the court"s powers. Scrutiny of the public order of another State, to which revenue laws are analogous, involves enquiring into whether they accord with its own public policy. This affects the relations between the foreign States which obviously fall beyond a court"s purview as this is an area entrusted to the executive. A court"s application of the rule or its abrogation is therefore not concerned with any rights of a taxpayer.

[30] Turning to the relevant provisions of the Protocol, article 13.1 thereof makes provision for Australia and South Africa to „notify each other in writing through the diplomatic channel of the completion of their domestic requirements for the entry into force of this Protocol". Article 13.2 provides:

„The Protocol, which shall form an integral part of the [DTA], shall enter into force on the date of the last notification, and thereupon the Protocol shall have effect:

(a) in the case of Australia:

(i) with regard to withholding tax on income that is derived by a non-resident, in respect of income derived on or after the first day of the second month following the date on which the Protocol enters into force;

(ii) with regard to other Australian tax, in respect of income, profits or gains of any year of income beginning on or after 1 July in the calendar year following the date on which the Protocol enters into force".

[31] Article 25A reads:

„1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Article 1. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. The term "revenue claim" as used in this Article means an amount owed in respect of taxes referred to in Article 2, insofar as the taxation thereunder is not contrary to this Agreement or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

4. When a revenue claim of a Contracting State is a claim in respect of which that State may, under its

[22] *Government of India v Taylor*, fn 19 at 299.
[23] *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 578D-F.
[24] *Ben Nevis (Holdings) Ltd*, fn 20.
[25] Above, fn 20.

law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the firstmentioned State or is owed by a person who has a right to prevent its collection.

…".

[32] In turn, article 2 of the Protocol, which substituted the original article 2 of the DTA and to which reference is made in article 25A.2, provides:

„1.The existing taxes to which this Agreement shall apply are:

(a) in the case of Australia:

the income tax, including 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;

(b) in the case of South Africa:

(i) the normal tax;

(ii) the secondary tax on companies; and

(iii) the withholding tax on royalties.

2. The Agreement shall apply also to any identical or substantially similar taxes, including taxes on dividends that are imposed under the federal law of Australia or by the Government of the Republic of South Africa under its domestic law after the date of signature of the Agreement in addition to, or in place of, existing taxes. …

3. For the purpose of Article 23A, the taxes to which the Agreement shall apply are taxes of every kind and description imposed on behalf of the Contracting States, or their political subdivisions or local authorities.

4. For the purposes of Articles 25 and 25A, the taxes to which the Agreement shall apply are:

(a) In the case of Australia, taxes of every kind and description imposed under the federal laws administered by the Commissioner of Taxation; and

(b) In the case of South Africa, taxes of every kind and description imposed under the tax laws administered by the Commissioner for the South African Revenue Service."

[33] The new article 2 amended its predecessor in a number of ways but only slightly with regard to taxes applicable to Mr Krok in Australia.[26] Of real significance was the amending article 2.3 which provided that for purposes of the new article 23A the taxes to which the DTA shall apply are taxes of any kind and description. And more pertinent is the new article 2.4 dealing with the exchange of information and reciprocal assistance in tax recovery provisions: it provided that for the purposes of articles 25 and the new 25A, the taxes to which the DTA applies are taxes of every kind and description imposed under the taxes administered by the Australian Commissioner of Taxation and the Commissioner for SARS.

[34] The express reference in articles 2.3 and 2.4 to „taxes of every kind and description" is obviously deliberate and unambiguous. A plain reading of the wording of article 2, which says nothing whatsoever about any time limitations, makes it clear that for purposes of articles 25 and 25A the taxes to which the DTA applies are not limited by articles 2.1 and 2.2. The reference in article 25A.2 to a revenue claim (in respect of which the contracting States shall assist each other for its collection) as „an amount owed in respect of taxes referred to in article 2" cannot be directed at article 2.1 alone. Neither does it mean that only article 2.1 identifies the taxes to which the DTA applies as contended by the appellants. Such reference must also include article 2.4 which refers back to article 25A and gives the DTA"s scope the widest latitude in this regard. As was correctly argued on SARS" behalf, it is precisely the wide application provided in article 2.4 that gave rise to the need to add the words „in so far as the taxation thereunder is not contrary to [the DTA] or any other instrument to which the Contracting States are parties".

[35] Article 13 on the other hand, quite contrary to the appellants" contentions, does not purport to form part of the DTA. Its plain wording merely pronounces that the Protocol shall form an integral part of the DTA and provides the dates from which the amendments to the DTA provided by the Protocol in respect of the matters specified in article 13 would come into effect, ie on the date of last notification. Article 13(2)(a)(ii), the mainstay of the appellants" argument on how article 25A should be construed, makes reference to „other Australian tax". This can only mean Australian tax other than the withholding tax on income mentioned in article 13(2)(a)(i). The DTA defines „Australian tax" in article 3(c) as tax to which the DTA applies by virtue of its article 2. And as indicated above, such tax

[26] For example, the original articles 2.1 and 2.2 were amended (a) by the replacement in article 2.1(a) of the word „and" between the words „income tax" and „the resource rent tax" in the case of Australia with the word „including"; (b) in the case of South Africa, by the addition in a new subparagraph (iii) of the words „withholding tax on royalties" as a tax to which the DTA applies and (c) by the inclusion in article 2.2 of the words „including taxes on dividends that" and the deletion of the word „which" after the word „taxes" in the first sentence, and the respective replacement of the words „substantial" and „which" with the words „significant" and „that" in the fifth sentence.

would be that specified in articles 2.1(a) of the DTA. It must follow that the „the other Australian tax" referred to in article 13(2)(a)(ii) is „income tax, including the resource rent tax" envisaged in article 2.1 but excluding the withholding tax on income referred to in article 13.2(a)(i). This starkly illustrates the fallacy in the appellants" interpretation of article 2 and in particular the term „revenue claim".

[36] Interestingly, in terms of article 10 of the Protocol, article 25 of the DTA was replaced with the new article 25 mentioned in article 2.4. The amending article included new subparagraphs providing for additional powers in relation to the exchange of information. These provisions expressly expanded the scope of such exchange in light of article 2.4 beyond the taxes previously envisaged in articles 2.1 and 2.2 to taxes of every kind and description. Article 25 provides no temporal limitations relating to exchange of information. In terms of article 13(2)(c) the Protocol would have effect for purposes of article 25 from the date on which the Protocol entered into force. Thus, article 25 would take effect simultaneously with the Protocol, on 12 November 2008, in respect of taxes of every kind and description and without any limitation regarding the time periods in relation to which information would be exchanged. This inevitable result certainly does not accord with what would be produced by the appellants" interpretation of article 2, ie that only information concerning „other Australian tax" in respect of income profits or gains arising after 1 July 2009 may be exchanged.

[37] Mr Krok further relied on the official commentary on the OECD Model Convention on Double Taxation, on which article 25A is based, to bolster his argument.[27] He contended that the commentary"s explanation that States are entitled to restrict the application of article 25A to taxes arising or levied from a certain time, ie that article 25A can be subject to limitation, supports his interpretation of its provisions. But a similar argument was raised and properly dismissed in *Ben Nevis (Holdings) Ltd and Metlika Trading Ltd v Commissioners for HM Revenue & Customs.*[28] There, the court considered the provisions of a tax treaty between South Africa and the United Kingdom in an appeal in which issues similar to those raised here were considered in the context of a similar article 25A in a 2002 convention between the two countries as amended by a 2010 protocol. This was in relation to the collection of income tax by SARS, assisted by the UK Revenue authority, which accrued during the 1998, 1999 and 2000 years of assessment. The taxpayer"s ultimate argument in its resistance to the tax recovery was that on a proper interpretation of the 2010 protocol and the 2002 convention, article 27 of their DTA (similar to article 27 of the DTA) applied to article 25A and precluded mutual assistance in the collection of tax debts which arose before 1 January 2003.

[38] Mr Krok sought to capitalise on the distinguishing features between *Ben Nevis* and the instant appeal. It was argued, inter alia, that this appeal is not concerned with the scope and effect of article 27 but the temporal limitation imposed by article 13(2)(a)(ii) on article 25A as opposed to Article VI of the South African and United Kingdom treaty which does not have any temporal limitation. I am nonetheless persuaded that there is sufficient similarity between the issues raised in both cases and that the findings of the English court on the nature and effect of article 25A are instructive for present purposes.[29] Regarding the submissions relating to the OECD commentary, the court held that the commentary makes clear that it is open to the parties to apply the provision on assistance in the collection of taxes to revenue claims arising before the Convention enters into force and that the question is whether the parties intended that the Protocol should have that effect. All indications are that this is what was intended here.

[39] As to whether assistance could be rendered in terms of Article 25A in respect of taxes that arose prior to the 2002 Convention, the court held:[30]

> *„[T]he Protocol in Article IV (introducing the new Article 25A) … makes entirely sensible and workable provision for assistance in the collection of taxes and it is not necessary to resort to Article 27 to supplement it. Its provisions apply only to requests for assistance made after the entry into force of the*

[27] The commentary reads: „14. Nothing in the [OECD Model] Convention prevents the application of the provisions of the Article to revenue claims that arise before the Convention enters into force, as long as assistance with respect to these claims is provided after the treaty has entered into force and provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such revenue claims, in particular when the provisions concerning the entry into force of their Convention provide that the provisions of that Convention will have effect with respect to taxes arising or levied from a certain time. States wishing to restrict the application of the Article to claims arising after the Convention enters into force are also free to do so in the course of bilateral negotiations."

[28] *Ben Nevis (Holdings) Ltd and Metlika Trading Ltd v Commissioners for HM Revenue & Customs* [2013] EWCA Civ 578 paras 32 and 33.

[29] Article 27(1)(a)(ii) under consideration in *Ben Nevis* bears striking resemblance to article 13(2)(a)(ii). It provides that „[e]ach of the Contracting States shall notify the other, through the diplomatic channel, the completion of the procedures required by its law for the bringing into force of this Convention [which] shall enter into force on the date of receipt of the later of these notifications and shall thereupon have effect … in South Africa … with regard to other taxes, in respect of taxable years beginning on or after the 1st January next following the date upon which this Convention enters into force".

[30] At paras 23 and 24.

> *Protocol. The Convention in its original form was principally concerned ... with substantive issues of double taxation. These provisions, when brought into effect and implemented, modified liability to taxation in both the United Kingdom and South Africa. There was therefore a compelling reason why it was necessary to define with precision the scope of their effect by reference to both the categories of taxes and the time of accrual of liability to which they applied. This need was intensified by the fact that the 2002 Convention was merely the latest in a line of treaties between the United Kingdom and South Africa on double taxation and it was necessary to define the precise temporal limitations of the successive regimes which they introduced. Article 27 has a vital role to perform in this context. However, while parties may choose to limit the temporal application of provisions relating to mutual assistance in this way, I can see no corresponding necessity for defining the years of accrual liability to which such provisions for mutual assistance may apply.* ***"Taxes' in Article 25A(2) does not need to be limited by reference to the date of their accrual. Article 25A has no bearing on liability to tax and is merely concerned with proceedings for enforcement. Whereas provisions which modify tax changes need to be linked to the relevant tax period so as to ensure a smooth transition from the existing rules to the new rules, there is no need to make similar provision for administrative provisions such as Article 25A which may, without difficulty, be brought into effect as soon as the Protocol comes into effect ... This reading of the provisions is also consistent with the objective of the Protocol which ...is to assist international tax enforcement ... This purpose would be obstructed by limiting Article 25A in the manner proposed by the Appellants.'*** (My emphasis.)

These views aptly contextualise the DTA and the meaning and purpose of article 25A. For the same reasons adopted by the English court, there is clearly no basis to construe article 25A as being subject to article 13(2)(a)(ii).

[40] There is equally no merit in the retrospectivity point which the appellants properly conceded during argument. The rule against retrospectivity bears no relevance in this case. The effect of article 25A is plainly prospective as it could only be invoked when the relevant countries so agreed and its provisions came into force. Tax claims which arose in the past in respect of which assistance was sought would also be covered. It is a firmly established principle of our law that a statute is not retrospective merely „because a part of the requisites for its action is drawn from time antecedent to its passing".[31] The appellants" own argument supports this position because they paradoxically accepted that article 25A, which it was common cause came into force on 1 July 2010,[32] may be applied to Australian tax in respect of income profits or gains in any year of income beginning on or after 1 July 2009.

[41] Therefore, when article 25A entered into force on 1 July 2010 in terms of article 13(2)(d), it applied to a revenue claim, ie an amount owed in respect of taxes of every kind and description to which article 13(2)(a)(ii) has no application. Mr Krok"s jurisdictional challenge to the preservation order accordingly fails.

[42] I now turn to Jucool"s claim that the preservation order should nevertheless be discharged because SARS pursued these proceedings in total disregard of its ownership of the beneficial interest in the assets in question, despite having notice thereof. It seems that this issue can safely be decided simply by determining whether or not ownership in the assets passed from Mr Krok to Jucool. I will assume without deciding, in the appellants" favour, that the agreements were binding and valid under the law of the British Virgin Islands. But there is an insuperable difficulty with which Jucool must contend. The assets are situated in South Africa and not in the British Virgin Islands. Their fate must accordingly be decided in terms of the relevant South Africa law.[33] In particular, as we are concerned with the question whether the ownership of assets situated in South Africa passed from Mr Krok to Jucool, the law of South Africa (the *forum rei sitae*) governs. This is also in accordance with English common law, which is the law applicable in the British Virgin Islands.[34]

[43] The Deeds Registries Act 47 of 1937 governs the transfer of real rights in immovable property. Section 16 thereof provides that „ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar". And s 63 of the same Act imposes a strict restriction on such registration. It

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[31] *R v St Mary, Whitechapel (Inhabitants)* 116 E.R. 811 ((1848) 12 QB 127) at 814. See also *R v Grainger* 1958 (2) SA 443 (A) at 446; *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 812A-F, 817I-818A; *Swanepoel v Johannesburg City Council* 1994 (3) SA 789 (A) at 793.

[32] In terms of Diplomatic Note No 10/184 from the Australian Department of Foreign Affairs and Trade dated 23 July 2010 and Diplomatic Note Aus/16/2010 from the Department of International Relations and Cooperation of the Republic of South Africa dated 28 July 2010.

[33] *Estate Kemp v McDonald's Trustee* 1915 AD 491 at 498-499; *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) para 11.

[34] *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 667; *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd (William Lillico & Son Ltd and another, Third Party; Henry Kendall & Sons and another, Fourth Parties)* [1966] 1 All ER 309 (CA) at 338I.

provides that „[n]o deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition … may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed."

[44] As to movable property, whether corporeal or incorporeal, it is trite that ownership thereof cannot pass by virtue of a contract of sale alone: there must in addition, be at least proper delivery of the contract goods to the purchaser.[35] In sum, the transfer of rights in movable property, which is governed by the *lex situs*, requires delivery.

[45] None of these legal requirements appear to have been met in respect of the assets in issue. And this also applies to the lesser rights in the incorporeal movables such as the right to income derived from the shares which would have required transfer by way of cession. Jucool merely contented itself with its reliance on the provisions of the British Virgin Islands law and the opinion of its English expert thereon (who did hint at some recognition of the importance of South African law in this regard). It has not shown that the court below erred in finding that it failed to prove its beneficial ownership in the assets and confirming the preservation order. The appeal must therefore fail.

[46] In the result, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

[35] *Marcard Stein & Co*, fn 34, at 667B; *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola* 1976 (4) SA 464 (A) at 489H-490A.