A Case for the Need to Improve the Unilateral Double Taxation Relief for Estate Duty in South Africa

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Abstract

This article aims to address a specific problem statement, namely how the unilateral relief under the *Estate Duty Act* can be enhanced to alleviate the potential hardship of double estate taxation on cross-border estates. Double taxation is a common occurrence when a person owns properties in more than one country, which properties become part of their estate at the time of death and are liable for estate tax. The limited estate tax treaty network causes countries to reconsider their unilateral relief provisions under their domestic legislation. South Africa faces the same challenge under the *Estate Duty Act*. This article highlights the areas where clarity is needed in relation to the type of foreign death duty that may qualify for tax relief, such as the scope of qualifying foreign property, the exchange rate applicable and the date on which the conversion should be done, as well as the limitations and conditions of the unilateral relief available under the *Estate Duty Act*. Insights are provided that could be considered for possible amendments to the *Estate Duty Act* to provide greater clarity and certainty in calculating the estate duty liability payable in South Africa.

Keywords

Estate duty; wealth transfer tax; double taxation relief; deceased estate.

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1 Introduction

Adam Smith, a Scottish economist, in his 1776 treatise, *An Inquiry into the Nature and Causes of the Wealth of Nations*, defined four criteria of a good tax system that are commonly referred to as the "canons of taxation".[1] The four canons are equity, certainty, convenience and cost efficiency.[2] In 2015 the Davis Tax Committee (the DTC)[3] in its review of the South African estate duty system was of the view that the *Estate Duty Act* 45 of 1955 (the *Estate Duty Act*) lacks adherence to the canons of taxation because it is considered, among other things, inefficient in administering estate duty, lacking certainty in calculating the estate duty liability, and highly complex and time-consuming in applying the legislation. The DTC called for a review of the *Estate Duty Act* to establish an effective and equitable package which is similar to the recommendation by the OECD in its report, *Inheritance Taxation in OECD Countries, 2021* for countries to consider reforms of their existing wealth transfer taxes to make it easier to understand and apply with certainty.[4]

One such consideration for reform under the *Estate Duty Act* relates to handling double taxation in respect of cross-border estates.[5]

The reality of double taxation arises in a cross-border estate, for example, where the deceased owns property in one country and is a tax resident in another country, and both countries may exercise the right to tax such property. South Africans are not excluded from double taxation where a deceased is "ordinarily resident" in South Africa and owns property outside South Africa which may be subject to estate duty in South Africa as well as

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1 Butler *Condensed Wealth of Nations* 70.

2 Lambert 1992 https://cooperative-individualism.org/lambert-ian_some-modern-principles-of-taxation-adam-smith-revisited-1992-jan.htm; Haupt *Notes on South African Income Tax* 2; Stiglingh *et al Silke: South African Income Tax* 5; Williams *Income Tax in South Africa* 6, Katz Commission 1997 http://www.treasury.gov.za/publications/other/katz/4.pdf 1.4-1.8; Margo Commission *Report of the Commission of Inquiry into the Tax Structure* 4.42-4.50; Croome *Taxpayers' Rights in South Africa* 6; Meade *Structure and Reform of Direct Taxation* 7.

3 DTC 2015 https://www.taxcom.org.za/docs/20150723%20DTC%20First%20Interim%20Report%20on%20Estate%20Duty%20-%20website.pdf 32.

4 OECD *Inheritance Taxation* 53.

5 A cross-border estate exists when a person owns property in more than one country.

to an estate[6] or inheritance tax[7] in the foreign country.[8] This situation, where different countries impose an identical or similar tax on the same taxpayer in respect of the same taxing event or object at the same time, is also referred to as international juridical double taxation.[9]

The impact of double taxation is minimised through unilateral relief embodied in a country's domestic legislation or through the bilateral provisions of a double taxation agreement (hereafter referred to as an estate tax treaty).[10]

Section 16(c) of the *Estate Duty Act*[11] provides the existing unilateral relief in South Africa in respect of foreign death duties paid on foreign property if the deceased was ordinarily resident in South Africa at the date of death. The relief consists of a credit against the estate duty payable in South Africa but limited to the amount payable in South Africa on the specific property.[12]

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6 An estate tax is a transferor-based wealth transfer tax levied on the deceased estate based on the dutiable value of assets in an estate and payable by the executor. This type of taxation is often referred to as an "estate tax" or in the context of South Africa, an "estate duty". The United Kingdom also has a transferor-based wealth transfer tax but is called an "inheritance tax". See Rudnick and Gordon "Taxation of Wealth" 292; Jestle 2018 https://wiiw.ac.at/inheritance-tax-regimes-a-comparison-dlp-4690.pdf 2; Weber-Frisch and Duquennois-Djoua 2014 *ERA Forum* 410; OECD *Inheritance Taxation* 62-64.

7 An inheritance tax is levied on the beneficiaries of the estate in respect of the transfers received from the estate and is often called an "inheritance tax" or a "succession duty". See Jestle 2018 https://wiiw.ac.at/inheritance-tax-regimes-a-comparison-dlp-4690.pdf 2; Rudnick and Gordon "Taxation of Wealth" 293; Muller *Wealth Transfer Taxation* 1; Roeleveld 2015 *SAJAR* 147; OECD *Inheritance Taxation* 62-64.

8 Such taxation will be subject to the requirement that the exempt thresholds for inheritance related taxes upon death are exceeded in both countries. See Davis, Jooste and Beneke *Estate Planning* 12.3; Meyerowitz *Administration of Estates* 31.1.

9 OECD *Model Tax Convention on Income and on Capital 2017* 9; Ostaszweska and Obuoforibo *Roy Rohatgi on International Taxation* 21; Beckmann *Estate Duty on Deceased Estates* 9.

10 The OECD encourages unilateral relief to alleviate double taxation due to the limited network of estate tax treaties (see OECD *Inheritance Taxation* 128). Also see Beckmann *Estate Duty on Deceased Estates* 22.

11 Section 16(c) of the *Estate Duty Act* 45 of 1955 (the *Estate Duty Act*) states that a deduction against estate duty is allowed "without in any way modifying or adding to the rights of any person under an agreement entered into by the Government of the Republic with the Government of any other country or territory relating to the prevention of or relief from double taxation in respect of estate duty, any amount of any death duties proved to the satisfaction of the Commissioner to have been paid to any other State in respect of any property situate outside the Republic and included in the estate of any person who at the date of his death was ordinarily resident in the Republic: Provided that the deduction under this paragraph shall not exceed the duty imposed on such property by this Act."

12 Proviso to s 16(c) of the *Estate Duty Act*. Also see Meyerowitz *Administration of Estates* 30.8; Stiglingh *et al Silke: South African Income Tax* 1017; Haupt *Notes on South African Income Tax* 882; Beckmann *Estate Duty on Deceased Estates* 111; *De Ferm v Von Lieres und Wilkau* (WCHC) (unreported) case number 10805/2023 of 11 October 2023 para 26.

If an estate tax treaty exists, the relief under the estate tax treaty applies and section 16(c) is not available.[13] Relief cannot be sought under both the unilateral and bilateral provisions as only one mechanism can be used to apply for the relief.[14]

For example, person A (who is ordinarily resident in South Africa and owns UK-sourced immovable property) dies. The dutiable amount of person A's estate is less than R30 million and the estate duty rate applicable in South Africa (as the country of residence) is 20%. The UK (as the country of source) imposes an inheritance tax of 40%. According to the estate tax treaty between the UK and South Africa, relief from double taxation should be granted by South Africa as the country of residence. The relief will be limited to the estate duty liability in South Africa, which is 20%. The remaining 20% inheritance tax liability will remain payable in the UK.

South Africa has entered into an estate tax treaty with the UK, the USA and Zimbabwe, as well as a combined treaty with Botswana, Lesotho and eSwatini.[15] The relief for double taxation in respect of estate duty through estate tax treaties is accordingly very limited.[16]

13 Section 16(c) read with s 26 of the *Estate Duty Act*; Meyerowitz *Administration of Estates* 30.8, 31.1; Davis, Jooste and Beneke *Estate Planning* 2.8H; Stiglingh *et al Silke: South African Income Tax* 1017-1018; Beckmann *Estate Duty on Deceased Estates* 112. This conclusion is based on the wording of s 16(c) of the *Estate Duty Act,* that grants a credit without any modification or addition to the rights of any person under an estate tax treaty. This implies that where an estate tax treaty exists, the relief in respect of the foreign death duty is limited to the application of the estate tax treaty and the unilateral relief under s 16(c) of the *Estate Duty Act* is unavailable.

14 Bornman *Impact of Estate Duty and Capital Gains Tax on Offshore Assets* 64; Whitfield *Taxation Implications* 119; Wilson *Potential Cross-Border Double Taxation on Death* 29; Meyerowitz *Administration of Estates* 30.8, 31.1; Davis, Jooste and Beneke *Estate Planning* 2.8H; Stiglingh *et al Silke: South African Income Tax* 1017-1018.

15 Swaziland's name changed to eSwatini with effect from 19 April 2018. This change resulted from the official declaration by King Mswati III that the Kingdom of Swaziland was now to be known as the Kingdom of eSwatini in honour of the country's independence (see Legal Notice 80 of 2018 (The Declaration of Change of Swaziland Name Notice, 2018) published in the Gazette of 11 May 2018 but deemed to have come into effect on 19 April 2018). Also see Adams & Adams 2018 https://www.lexology.com/library/detail.aspx?g=278eafa1-d6c5-4be5-9524-10f1900fbe0c. The estate tax treaties with Botswana, Lesotho and eSwatini (previously referred to as the BLS countries), Zimbabwe and the USA were concluded under the provisions of the *Death Duties Act* 29 of 1922 but are still in force as the treaties continue to apply in respect of any similar taxes subsequently enacted by the contracting states. The treaty with the UK was entered into under s 26 of the *Estate Duty Act* and is also the only estate tax treaty that South Africa entered into that can be compared with the *Estate Tax Model* (see Beckmann *Estate Duty on Deceased Estates* 23 and SARS date unknown https://www.sars.gov.za/legal-counsel/international-treaties-agreements/estate-duty-agreements/).

16 Rudnick and Gordon "Taxation of Wealth" 324; Wilson *Potential Cross-Border Double Taxation on Death* 22-25; Ger 2012 *De Rebus* 59; Ostler *Impact of Estate Planning* 53-54.

From an international perspective the Organisation for Economic Co-operation and Development (OECD), which designs tax policies to align the tax treatment across countries in various fields, supports the enhancement of unilateral provisions due to the limited estate tax treaty network.[17] Aspects that have been identified for clarity in the context of unilateral relief include the meaning of the term "qualifying tax", the scope of the term "foreign property",[18] appropriate exchange rate conversion rules and a limitation rule.[19]

The following section will attempt to establish clarity in regard to these various issues in respect of unilateral relief under section 16(c) of the *Estate Duty Act*.

2 Unilateral relief under section 16(c) of the *Estate Duty Act*

2.1 Qualifying foreign taxes

Section 16(c) does not define what would constitute qualifying foreign death duties. Whitfield[20] also confirms that it is not clear what type of "foreign tax" will qualify for the relief, and statutory clarity is required. Michaelides[21] agrees and Roeleveld[22] points out a further need for clarity about whether the relief will apply if the foreign tax is paid by a different taxpayer, for example where inheritance tax was paid offshore by a beneficiary, whereas in South Africa the estate duty is payable by the executor. This first issue raised by Whitfield relates to the "type" of qualifying foreign tax and the second issue deals with the person paying the tax.

As mentioned above, double international juridical taxation arises where the same or a similar tax is imposed by different countries on the same taxpayer on the same property at the same time. In the case of inheritance tax payable by the beneficiary, the requirement of a tax imposed on the same

17 OECD *Inheritance Taxation* 74; Rudnick and Gordon "Taxation of Wealth" 325.

18 Section 16(c) does not currently provide for a detailed list of qualifying foreign property and would therefore include the meaning of "property" under s 3 of the *Estate Duty Act*. The OECD states that unilateral relief is usually provided for immovable property situated abroad, but it is often incomplete as the relief may be limited to certain types of property or to possible mismatches in the inheritance and estate tax rules of different countries (OECD *Inheritance Taxation* 74). Also see Michaelides *International Tax Consequences* 51; Wilson *Potential Cross-Border Double Taxation on Death* 33; Thorpe *Is It Time to Abolish Estate Duty in South Africa?* 39; Roeleveld 2015 *SAJAR* 159.

19 The *Estate Duty Act* does not contain any limitation rule but in practice the same approach is followed as when the estate duty liability must be apportioned for the purposes of the rapid succession rebate under the First Schedule to the *Estate Duty Act*. See Meyerowitz *Administration of Estates* 30.8; Meyerowitz 1987 *The Taxpayer* 117.

20 Whitfield *Taxation Implications* 161, 182.

21 Michaelides *International Tax Consequences* 65.

22 Roeleveld 2015 *SAJAR* 159.

taxpayer is not met. However, it is accepted that it is still a similar tax imposed on the same asset by different countries at the same time (death). Roeleveld[23] supports the view that even though the tax is paid by a different taxpayer, it should fall within section 16(c) on the basis that it relates to the same assets of the deceased estate levied upon death. Michaelides[24] agrees but also states that, based on the wide wording of section 16(c), it could be argued that the credit is still available even if the foreign death duty was paid by a beneficiary and not the estate, as section 16(c) is not prescriptive in that regard.

Beckmann[25] seeks to provide guidance in considering whether a foreign death duty is deductible under section 16(c) by stating that it should be a comparable tax levied directly in connection with and upon death, irrespective of what it is called, and agrees that an "inheritance tax" paid by a beneficiary should qualify as a deduction under section 16(c).

Since the inclusion of section 16(c) in 1960 the wording has remained the same.[26] The provision does not define the identity of the payer but merely provides that the foreign death duty must be paid in respect of any foreign property that was also included in South Africa for estate duty purposes.[27] It is therefore accepted that the intention of the policy makers at the time was not to focus on the "person" who suffered double taxation but rather on the property being subject to double taxation, irrespective of who paid the tax. It is worth noting that the *Estate Duty Act* does not provide a meaning to the words "death duties" and the ordinary meaning of the words must be considered. The meaning of "death duties" for the purposes of section 16(c) may be clarified with reference to the meaning of such phrases in foreign jurisdictions and the taxes that are paid in respect of foreign property and included in the deceased estate for South African estate duty purposes. Generally, "death duties" are defined as "taxes levied on a person's estate at the time of death."[28] Terms often related to death duties include estate tax, inheritance tax, and death tax.[29] Nevil[30] refers to "death taxes" as taxes imposed on a person's estate upon the person’s death that are levied either on the beneficiary who receives the property or on the estate and says that they are commonly referred to as death duties, estate taxes or inheritance

23 Roeleveld 2015 *SAJAR* 159.
24 Michaelides *International Tax Consequences* 66.
25 Beckmann *Estate Duty on Deceased Estates* 200, 225.
26 Section 16(c) of the *Estate Duty Act* was added by s 5(c) of the *Estate Duty Amendment Act* 65 of 1960.
27 Michaelides *International Tax Consequences* 66.
28 Oxford Reference 2023 https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095704769. The Merriam-Webster dictionary defines it as a death tax; see Merriam-Webster Dictionary 2023 https://www.merriam-webster.com/dictionary/death%20duty.
29 Dictionary.com 2023 https://www.dictionary.com/browse/death-duty. Also see Nevil 2023 https://www.investopedia.com/terms/d/death-taxes.asp.
30 Nevil 2023 https://www.investopedia.com/terms/d/death-taxes.asp.

taxes. The OECD[31] also defines death duties as "taxes imposed on the transfer of property on account of a person's death."

Based on the above, it is clear that the term "death duties" is interchangeably used with "estate tax" and "inheritance tax" and means a tax levied upon death in respect of a deceased person's estate and specifically the property of an estate and not the income of the estate. In the context of estate duty, a transferor-based estate tax payable by the foreign estate clearly fits within the words "estate duty". According to the OECD,[32] similar types of wealth transfer taxes from an international perspective that are payable upon death include estate taxes, inheritance taxes,[33] and gift taxes paid in the foreign country on the same property.[34] The emphasis is not placed on the person who paid the taxes, but on whether a similar tax was paid upon death on the same property. Furthermore, although gift taxes or donations taxes are considered similar taxes for the purposes of the credit that is payable on the transfer of wealth at death,[35] Roeleveld[36] and Wilson[37] concur that a capital gains tax (CGT) is not considered to be a type of tax similar to estate duty, as it is not a tax on the transfer of wealth but a tax on the appreciation thereof.[38] The same position is supported by the OECD.[39] Estate tax treaties also similarly often include gift taxes for consideration of relief from double taxation, but not a CGT.

It is therefore concluded that to eliminate the double taxation in respect of the same property upon death, a qualifying foreign tax for the purposes of section 16(c) could include an inheritance tax, a gift tax or an estate tax levied upon death but could exclude any foreign income taxes (including CGT).[40]

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31 OECD date unknown https://www.oecd.org/ctp/glossaryoftaxterms.htm.

32 OECD *Model Double Taxation Convention on Estates and Inheritances and on Gifts* (OECD *Estate Tax Model*) 102; OECD *Inheritance Taxation* 63-64.

33 Also see OECD *Inheritance Taxation* 64, specifically for Portugal, where stamp duty on inheritances is levied upon death on the transfer of property. It is levied at a flat rate of ten per cent on the net value of the estate. The stamp duty replaced the previous progressive inheritance tax system to cater for a simpler form of tax. Also see Michaelides *International Tax Consequences* 26-27; European Commission Expert Group 2015 https://www.kessler.co.uk/wp-content/uploads/2016/05/Ways-to-tackle-inheritance-cross-border-tax-obstacles.pdf 8.

34 In some instances, stamp duty is also levied upon death. This may be considered as a tax on the property of the deceased person. See OECD *Inheritance Taxation* 64.

35 OECD *Estate Tax Model* 90.

36 Roeleveld 2015 *SAJAR* 159.

37 Wilson *Potential Cross-Border Double Taxation on Death* 23.

38 Wilson *Potential Cross-Border Double Taxation on Death* 23; Roeleveld 2015 *SAJAR* 159. This view is aligned with the OECD's view (see OECD *Estate Tax Model* 2). Also see OECD *Inheritance Taxation* 63-64, where a list is provided of the death duties that are levied worldwide upon the estate at the death of a taxpayer.

39 OECD *Inheritance Taxation* 63-64, 111.

40 Most foreign countries do not levy CGT upon death and, therefore, the incidence of having to pay CGT in a foreign country and estate duty in South Africa at the same

The following section will consider the scope of foreign property that may qualify for unilateral relief under section 16(c) of the *Estate Duty Act*.

2.2 Qualifying property

Section 16(c) does not provide for a detailed list of qualifying foreign property and would therefore include the meaning of "property" under sections 3(1)[41] and (2)(a) and (b) of the *Estate Duty Act*.[42] For an ordinary resident, "property" includes any right in or to property, movable or immovable, corporeal or incorporeal situated inside and outside South Africa.[43] Sections 3(2)(a) and (b) also specifically include any fiduciary, usufructuary or other like interest (on South African or foreign property) as well as a right to an annuity charged upon South African or foreign property that was held by the deceased immediately prior to death.[44] A further inclusion is any right to a South African or foreign annuity (other than a right to an annuity held upon South African or foreign property) that was enjoyed by the deceased immediately prior to death and that accrued to another person upon the death of the deceased.[45]

The *Estate Duty Act* does not provide a detailed definition of what would constitute "foreign property" in the estate of a person who is ordinarily resident in South Africa. Also, no such list is found in any leading work in relation to estate duty and international deceased estates. However, even though the *Estate Duty Act* does not specifically state what would constitute "foreign property", it is generally understood and explained that the worldwide property of an ordinary resident is included in the estate for estate duty purposes.[46] Foreign property is, therefore, widely and comprehensively

time is minimal. For relief in respect of double taxation in respect of CGT, s 6*quat* of the *Income Tax Act* 58 of 1962 (the *Income Tax Act*) should be relied upon. See Roeleveld 2015 *SAJAR* 152; Wilson *Potential Cross-Border Double Taxation on Death* 32, Ostler *Impact of Estate Planning* 52; Thorpe *Is It Time to Abolish Estate Duty in South Africa?* 81; OECD *Inheritance Taxation* 63-64. Also see Michaelides *International Tax Consequences* 66, where it is submitted the ordinary meaning of "death duties" includes all foreign estate-related taxes, excluding income-related taxes.

41 Section 3(1) of the *Estate Duty Act* states "For the purposes of this Act the estate of any person shall consist of all property of that person as at the date of his death and of all property which in accordance with this Act is deemed to be property of that person at that date."

42 Also see Meyerowitz *Administration of Estates* 27.2; Davis, Jooste and Beneke *Estate Planning* 2.3.2.

43 Section 3(2) of the *Estate Duty Act*.

44 Section 3(2)(a) of the *Estate Duty Act*. Also see Beckmann *Estate Duty on Deceased Estates* 68-69; Davis, Jooste and Beneke *Estate Planning* 2.3.2; Meyerowitz *Administration of Estates* 27.2.

45 Section 3(2)(b) of the *Estate Duty Act*. Beckmann *Estate Duty on Deceased Estates* 68-69; Davis, Jooste and Beneke *Estate Planning* 2.3.2; Meyerowitz *Administration of Estates* 27.2.

46 Haupt *Notes on South African Income Tax* 863; Stiglingh *et al Silke: South African Income Tax* 1000; Meyerowitz *Administration of Estates* 27.2; Davis, Jooste and Beneke *Estate Planning* 2.2.

interpreted to include the foreign counterpart of any property listed in sections 3(1), (2)(a) and (b) of the *Estate Duty Act*.

Beckmann[47] points out that a problem may arise when such foreign rights, for example, limited rights, are included in terms of South African law.[48] However, the foreign rights do not follow the South African rules and are not expressly covered under the *Estate Duty Act*. Such foreign property and rights thereto are rooted in foreign legal systems that often differ from the South African system and may result in conflicting outcomes when applying South African rules to foreign property where there are no express provisions under the *Estate Duty Act*. Beckmann[49] analyses the problem and concludes that, without having specific provisions in respect of foreign property, the *Estate Duty Act* cannot always be applied directly and the foreign rules governing a specific type of property should be compared to the "property" provisions under the *Estate Duty Act*. If the foreign rules are comparable to the South African provisions, sections 3(1), (2)(a) and (b) of the *Estate Duty Act* will apply to the foreign property for estate duty purposes.[50]

It is submitted that it may not be feasible to provide a detailed list of foreign property in the *Estate Duty Act* as each foreign country involved may have its own rules regarding the different types of property. However, the generally accepted approach of including worldwide assets seems to be aligned internationally and, to the extent that a conflict in rules occurs, the approach discussed by Beckmann is supported where it will be included only if it aligns with South African rules. A possible clarification that could be considered for the purposes of section 16(c) would be to refer to foreign property that is defined or treated in a manner similar to that in which it is defined or treated in South Africa.

The next section discusses the guidance that is required regarding the exchange rate that should be applied in converting (to South African Rands), a foreign death duty paid in a foreign currency, to calculate the available relief.

2.3 Conversion of a foreign death duty liability

For the purposes of calculating the unilateral relief under the *Estate Duty Act*, it is important that the value of the foreign death duty paid be converted to South African currency to determine the allowable credit. The *Estate Duty Act* makes no provision for the exchange rate that must be used for the

47 Beckmann *Estate Duty on Deceased Estates* 73.
48 Law of Property and Law of Succession.
49 Beckmann *Estate Duty on Deceased Estates* 77.
50 Beckmann *Estate Duty on Deceased Estates* 77.

purposes of section 16(c).[51] Michaelides[52] submits that since it is payable at a single point in time and not in respect of a period, the spot rate must be used. The question, however, is whether it is the spot rate[53] on the date of payment, the date of death, or the date of assessment.

The provision equivalent for income tax purposes to section 16(c) of the *Estate Duty Act* is section 6*quat* of the *Income Tax Act* 58 of 1962 (the *Income Tax Act*), which similarly allows for a credit against the South African income tax liability for any foreign income tax payable in respect of foreign income that is also included in the South African taxable income.[54] Section 6*quat*(4) specifically makes provision for a rule regarding the conversion of the value of the foreign income taxes payable to South African Rands. Section 6*quat*(4) states that the conversion must be done using the average exchange rate[55] for the South African year of assessment in which the income to which it relates is included in taxable income.[56] The principle behind section 6*quat*(4) is that even though the foreign tax liability arose on a fixed date, the average exchange rate for the year of assessment should be used to convert the foreign taxes payable and not the spot rate.[57]

If the provision of section 6*quat*(1) is compared to that of section 16(c), it is noted that for the credit to apply, the foreign death duty must be paid, whereas for section 6*quat* purposes the foreign taxes must be proved to be payable and not necessarily actually paid. Estate duty is a once-off tax in comparison to income tax, which is levied on an annual basis.

In the context of section 16(c), an average rate over a period may minimise the effect of exchange rate differences over the different liability dates and payment dates as those differences are evened out. However, a more accurate amount is obtained by applying the spot rate, based on the actual payment made on a specific date. That will further provide certainty as to the amount that can be claimed as a credit. Goodwin[58] is of the view that

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51 Michaelides *International Tax Consequences* 67; Meyerowitz 1987 *The Taxpayer* 117.

52 Michaelides *International Tax Consequences* 67.

53 Defined in s 1 of the *Income Tax Act* as "[T]he appropriate quoted exchange rate at a specific time by any authorised dealer in foreign exchange for the delivery of the currency."

54 Section 6*quat*(1) of the *Income Tax Act*. Also see SARS 2022 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/Legal-IN-18-Rebate-and-deduction-for-foreign-taxes-on-income.pdf (SARS *Interpretation Note No 18*) 85.

55 Defined in s 1 of the *Income Tax Act* as "[T]he average determined by using the closing spot rates at the end of daily or monthly intervals during that year of assessment which must be consistently applied within that year of assessment."

56 See Haupt *Notes on South African Income Tax* 574; Stiglingh *et al Silke: South African Income Tax* 510; Michaelides *International Tax Consequences* 57; SARS *Interpretation Note No 18* 85.

57 Michaelides *International Tax Consequences* 57-58.

58 Goodwin 2019 https://www.lawskills.co.uk/articles/2019/10/the-impact-of-exchange-rates-when-administering-estates/.

although a fixed exchange rate will most likely remove the risk involved, the difficulty lies in what the right time is to set the rate. He further states that the volatility of the currency markets is a challenge as it may result in short-term spikes in rates or sudden drops.[59] Such changes can, therefore, either apply in favour of or against a person when applying an exchange rate on a specific date.

Michaelides[60] argues that the spot rate on the date of payment should be applied. He does so on the basis that section 16(c) refers to the foreign tax being paid and not merely being payable. Beckmann[61] supports the application of the spot rate but provides an alternative by referring to the rate on the date the foreign death duty liability arises. This may again differ from one country to another. For example, the application of the date of death may give rise to the liability, or the date the assessment is issued, or specific rules that may apply as in South Africa[62] where the estate duty must be paid within 12 months from the date of death or within thirty days from the payment date on the assessment if the assessment was issued within the twelve months after death. It is accepted that the date of liability may provide various challenges which would have to be determined in each case based on the different rules that may apply in foreign countries. Considering that the wording of section 16(c) is conditional upon the foreign death duty being paid, it is submitted that use of the date of payment would provide certainty in determining a tax liability and claiming the necessary credits.

The *Income Tax Act* also contains other exchange rate provisions applicable in different contexts,[63] but section 25D(1) provides a general rule on the conversion of foreign income and expenses to South African Rands where an individual has the option to elect either the spot rate on the date the foreign income accrued or was received or the expense or loss was incurred, or the average exchange rate for the relevant year of assessment.[64] The election option may provide more leniency in converting the foreign death duty to South African Rands, in that the most beneficial

59 Goodwin 2019 https://www.lawskills.co.uk/articles/2019/10/the-impact-of-exchange-rates-when-administering-estates/.

60 Michaelides *International Tax Consequences* 67.

61 Beckmann *Estate Duty on Deceased Estates* 202. Beckmann refers to the same issue under the German inheritance tax law, where no legislative guidance is provided regarding the exchange rate to be used, but in practice the date when the liability comes into existence is used.

62 Section 9C read with s 10(1) of the *Estate Duty Act*.

63 Section 24I(1)(b) of the *Income Tax Act*; SARS 2023 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/Legal-IntR-IN-101-Gains-or-losses-on-foreign-exchange-transactions.pdf 6-7. Also see Haupt *Notes on South African Income Tax* 571; Stiglingh *et al Silke: South African Income Tax* 516; SARS *Interpretation Note No 18* 86.

64 SARS 2015 https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-63-Rules-Translation-Amounts-Foreign-Currencies.pdf 9-10.

outcome can be chosen when claiming the section 16(c) credit and the impact of the volatility of the markets can be minimised.

When considering an average exchange rate, the period over which the average should be applied becomes relevant. Estate duty is not determined in respect of a year of assessment but as a once-off tax on the value of the deceased estate as at the date of death. In the context of an inheritance tax, the liability is calculated in respect of the value of the inheritance due to the beneficiary.

A possible period over which the rate could be determined is the period from the date of death to the date of payment. As stated above, the average rate approach may provide greater flexibility in determining the converted value and may mitigate the impact of the volatility of the markets. An alternative could even include an election between a spot rate and an average rate over a qualified period, as under section 25D of the *Income Tax Act*. However, as death duty-related taxes are not intended to be a continuous liability, it is submitted that the spot rate on the date of payment of the foreign death duties should be considered.[65] The credit to be allowed would be in respect of the actual foreign taxes paid and the date to be used would be clear and easily determinable without confusion.

The next section discusses various elements regarding a limitation rule for the purpose of the application of section 16(c) of the *Estate Duty Act*.

2.4 Limitation rule

2.4.1 General

The deduction in respect of foreign death duties is limited to the amount of estate duty payable in respect of the property in South Africa. This implies that the allowable deduction is the lesser of the estate duty payable and the foreign death duty paid on the property.[66] Apart from the general rule implied under section 16(c), no specific rules or guidance are provided in calculating the limitation. The following sections will consider various aspects for the purposes of designing specific provisions in this regard.

2.4.2 Method to calculate the attribution of the foreign death duty liability

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65 Seade "Tax Revenue Implications of Exchange Rate Adjustment" 54. Seade comments that the impact of exchange rates and their relevance and application in tax legislation have hardly ever been addressed.

66 Meyerowitz *Administration of Estates* 30.8; Meyerowitz 1987 *The Taxpayer* 117.

The *Estate Duty Act* does not provide for a method on how the foreign death duty or the estate duty attributable to the foreign property should be calculated. However, the following method is used in practice:[67]

x = a/b x c,
where
x = estate duty attributable to the foreign property
a = value of the foreign property included in the net value of the estate
b = net value of the estate in South Africa[68]
c = estate duty payable on the dutiable amount
The value of "**x**" is then reduced by the foreign death duty payable that cannot exceed the value of the estate duty payable in South Africa.[69]

Meyerowitz[70] states that, if a specific amount of foreign death duties is attributable to a specific asset, that amount will be used for the purposes of section 16(c). In support of the desire for clarity, the method can be stipulated in the *Estate Duty Act* together with an additional limitation rule that the deduction in respect of the foreign death duties be limited to the extent that the duty is attributable to the property situated in that country as calculated per the formula.

2.4.3 Time rule

The *Estate Duty Act* does not under section 16(c) provide any limitation in respect of the period during which the credit may be claimed. This effectively means that the period is open-ended, which is contradictory to administering an estate in an efficient and speedy manner. Similarly, rules of prescription apply to ensure that tax is administered in an effective manner to prevent claims from being submitted years after the deceased's tax affairs have been concluded. In the context of an estate, a time rule would also minimise unnecessary delays and encourage effective administration. The European Commission[71] states in its recommendation to countries as to how they

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67 Meyerowitz *Administration of Estates* 30.8; Meyerowitz 1987 *The Taxpayer* 117. Also see OECD *Estate Tax Model* 180, where the same method is recommended in determining the foreign duties attributable for the purpose of calculating a credit.

68 The net value according to s 4 of the *Estate Duty Act* is calculated based on the total property and deemed property, less all available deductions, before taking into account the s 4A rebate of R3.5 million.

69 Section 16(c) of the *Estate Duty Act*.

70 Meyerowitz *Administration of Estates* 30.8. Also see Beckmann *Estate Duty on Deceased Estates* 111; *De Ferm v Von Lieres und Wilkau* (WCHC) (unreported) case number 10805 / 2023 of 11 October 2023 para 30, where it is stated that a foreign inheritance tax is often calculated on the receipt by the legatee in comparison to the value of the property stipulated in a will.

71 European Commission 2011 *OJ* 84.

should address their unilateral provisions regarding relief of double inheritance taxation that the tax relief should be allowed only for a reasonable period, for example, for a period of ten years from the date of liability. The European Commission Expert Group[72] further suggests that discretion for possible extensions should be provided within the "time rule" for complex cases to acknowledge the complexities often involved in cross-border estates. This is further supported by the fact that the timing for applying inheritance tax credits may differ among the different countries due to their having different tax years and estate administration processes as well as due to delays in resolving cross-border estates.[73]

Estate duty is a SARS-assessed tax,[74] meaning the prescription period is three years.[75] However, certain exceptions apply,[76] in which case it becomes a self-assessed tax[77] and the prescription period is five years.[78] Furthermore, considering that in some international instances, the payment of an estate tax liability could be deferred for up to ten years,[79] too-strict a stipulation of the period may not be reasonable. To stay aligned with the tax administration rules applicable under the South African rules, a time rule of three or five years may be reasonable, depending on the circumstances applicable.

3 International comparison

3.1 United Kingdom

The United Kingdom (the UK) levies a transferor-based inheritance tax that operates like estate duty where the liability is calculated on the value of the estate at death and payable by the executor.

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72 European Commission Expert Group 2015 https://www.kessler.co.uk/wp-content/uploads/2016/05/Ways-to-tackle-inheritance-cross-border-tax-obstacles.pdf 22.

73 European Commission 2011 *OJ* 82.

74 See the definition of assessment in s 1 of the *Tax Administration Act* 28 of 2011 (the *Tax Administration Act*), which means "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS."

75 Section 99(1)(a) of the *Tax Administration Act*.

76 Section 9(4)(a) and (b) read with s 9(5) of the *Estate Duty Act*. These exceptions include the scenario where no SARS assessment was issued in respect of an estate falling within s 18(3) of the *Administration of Estates Act* 66 of 1965 (where the estate has a gross value of less than R250 000) and where additional assets are found within five years after the estate was distributed.

77 Section 1 of the *Tax Administration Act* defines a "self-assessment" as the "determination of the amount of tax payable under a tax Act by a taxpayer and— (a) submitting a return which incorporates the determination of the tax; or (b) if no return is required, making a payment of the tax."

78 Section 99(1)(b) and (c) of the *Tax Administration Act*.

79 The US allows for an estate tax liability to be paid over a period of ten years provided certain requirements are met.

The UK inheritance tax legislation makes provision for double taxation relief in one of two ways, namely through estate tax treaties[80] or through the granting of a tax credit under the *Inheritance Tax Act*, 1984 (the *Inheritance Tax Act*) for the wealth transfer tax paid in respect of property on which inheritance tax is also payable.[81] The requirements to qualify for the unilateral relief are that the foreign tax paid must be of a similar nature to the UK inheritance tax, chargeable on the same event (death or a lifetime gift) and attributable to the value of the same property.[82] Section 159 of the *Inheritance Tax Act* does not provide a specific meaning for "foreign property" and is considered wide in its application, based on the wording that the relief is available to "any property" as long as it is situated outside the UK. The emphasis is placed on the location of the property instead of the type of property. The unilateral credit is limited to the value of the foreign tax paid.

In the case where the property is neither situated in the foreign jurisdiction nor the UK, or if it is situated in both the foreign jurisdiction and the UK, the relief is calculated according to a specific formula.[83]

If an estate tax treaty exists, the relief under the treaty will be applied,[84] but if no treaty exists unilateral relief will be applied under section 159(1) of the *Inheritance Tax Act* to ensure that no double taxation arises in respect of the same asset. If relief is available under the estate tax treaty and unilaterally, whichever method provides the greater relief will be applied.[85]

3.2 United States

The United States (the US) levies a transferor-based estate tax on the value of the estate at death, which is payable by the executor. Double estate taxation arises when a US citizen or resident owns property situated in a foreign country. The US, as the country of residence, taxes the worldwide property of the deceased, and the foreign country where the property is situated may tax the property as the country of source.[86] The US, as the country of residence, is required to provide unilateral or bilateral relief from possible double estate taxation.[87]

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80 The UK has an existing estate tax treaty with South Africa to cover lifetime transfers as well as transfers on death. See Muller *Wealth Transfer Taxation* 276.

81 Sections 158 and 159 of the *Inheritance Tax Act*, 1984 (the *Inheritance Tax Act*).

82 Section 159(2) of the *Inheritance Tax Act.* HMRC 2023 https://www.gov.uk/hmrc-internal-manuals/inheritance-tax-manual/ihtm27185.

83 Section 159(3) of the *Inheritance Tax Act.* The formula is A/(A + B) = C, where A is the amount of inheritance tax payable, B is the amount of tax payable in the foreign jurisdiction and C is the smaller of A and B.

84 Section 158 of the *Inheritance Tax Act.*

85 Section 159(7) of the *Inheritance Tax Act.*

86 IRS 2020 https://www.irs.gov/irm/part4/irm_04-025-004.

87 OECD *Estate Tax Model* 14; Rudnick and Gordon "Taxation of Wealth" 324.

Relief for double estate taxation is provided unilaterally under section 2014 of the *Internal Revenue Code*, 1986 (the *Internal Revenue Code*) or bilaterally through the application of a tax treaty in the form of a tax credit for any death taxes paid to a foreign country by a US citizen or US resident.[88] No specific meaning is provided for "foreign property" as any property may qualify for the relief provided it is situated in a foreign jurisdiction in which a death tax similar to the US estate tax was paid.[89]

Taxes that are considered similar to death taxes include estate tax, inheritance tax, legacy tax, succession tax or a similar transfer tax.[90] In the case that the credit is claimed, a deduction for foreign death taxes paid is not available. However, the executor can, under section 2053(1)(d) of the *Internal Revenue Code,* elect to apply for a deduction instead of a credit.[91]

The available credit is not unlimited and is subject to the following requirements:

(a) The qualifying tax credit in respect of foreign death taxes paid is limited to the total federal estate tax attributable to the property.[92]

(b) The period allowed to submit a claim for a tax credit is four years from the date the estate tax return is filed provided the foreign taxes were paid.[93] If an extension was granted for the payment of federal estate tax, the claim must be submitted within four years or before the expiration of any extension on the payment due date.[94]

(c) If a petition for the redetermination of a deficiency was filed with the Tax Court within the required periods, the claim must be submitted within the four years or before the expiration of 60 days after the decision of the Tax Court becomes final.[95]

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88 Rudnick and Gordon "Taxation of Wealth" 324.

89 Section 2014(a) and (b) of the *Internal Revenue Code*, 1986 (the *Internal Revenue Code*).

90 Sections 2014 and 2053 of the *Internal Revenue Code.* Foreign death taxes paid to a foreign jurisdiction on property not situated in that country or on property not included in the gross estate do not qualify for a credit. The foreign taxes paid are converted to US dollars on the day they are paid by using the rate of exchange on that day. Such clarity, pertaining to issues such as the type of foreign tax to be paid and the date on which the conversion to South African Rand should take place, is lacking under the *Estate Duty Act*.

91 See ss 2014 and 2053(d)(1) of the *Internal Revenue Code*. Also see IRS 2020 https://www.irs.gov/irm/part4/irm_04-025-004. South Africa does not have a similar election and unilateral relief is limited to a credit under s 16(c) of the *Estate Duty Act*.

92 Section 2014(b) of the *Internal Revenue Code.*

93 Section 2014(e) read with s 6018 of the *Internal Revenue Code.* Also see IRS 2020 https://www.irs.gov/irm/part4/irm_04-025-004. Proof of the payment of the foreign death taxes must be provided to the IRS before the credit will be allowed (see s 2014(e)(2) of the *Internal Revenue Code*).

94 Section 2014(e)(2) of the *Internal Revenue Code.*

95 Section 2014(e)(1) of the *Internal Revenue Code.*

If the relief available under a tax treaty is more favourable than the unilateral relief under the *Internal Revenue Code*, the executor can elect for the treaty relief to apply.[96] If a tax credit is applied under a tax treaty, the credit is the greater of the relief available under the tax treaty or the credit available under the statute.[97]

4 Conclusion

The *OECD Estate Tax Model* has not been updated since 1982 and the European Commission has provided useful recommendations for the purposes of updating unilateral relief provisions in respect of double estate taxation. The OECD in its latest report, *Inheritance Taxation in OECD Countries* (2021), aligns its recommendations with those made by the European Commission as a sound basis on which unilateral relief provisions can be reviewed.

The lack of clear statutory guidance to claiming unilateral relief in South Africa in respect of double estate taxation was discussed, and various recommendations are proposed to enhance certainty under section 16(c) of the *Estate Duty Act*.

To address the uncertainty regarding the type of foreign death duty and qualifying foreign assets that may fall within section 16(c), a definition for "death duties" under section 1 of the *Estate Duty Act,*[98] as well as clarity regarding the scope of qualifying foreign property should be considered.[99] Clarity is recommended regarding the exchange rate that should be used to convert the foreign death duties to South African Rands, as well as the date or period over which it should be applied. If the "spot rate" is chosen, a definition thereof must be provided in section 1 of the *Estate Duty Act* and if the averaging approach is chosen, a definition of the "average exchange rate" should be given.[100]

It is further recommended that the existing limitation rule where the relief is limited to the value of the estate duty payable in South Africa in respect of the foreign asset be expanded to provide guidance on the method where an appropriation of foreign duties to an asset is required.[101] An additional limitation that is recommended is a time rule during which the relief can be

96 IRS 2020 https://www.irs.gov/irm/part4/irm_04-025-004. To claim the relevant relief, Form 706 should be submitted, and it must indicate the treaty provision being invoked.

97 IRS 2020 https://www.irs.gov/irm/part4/irm_04-025-004 read with s 2053 of the *Internal Revenue Code.* If death taxes were paid to a political subdivision or possession not covered by the tax treaty, the available credit will be the greater of the treaty relief, the statutory relief of a combination of the treaty relief in addition to the statutory relief.

98 See para 2.1 above.

99 See para 2.2 above.

100 See para 2.3 above.

101 See para 2.4.2 above.

applied for. It is further suggested that a standard rule of, for example, five years from the date the liability arises should apply, and the Commissioner should be provided with the discretion to extend the period up to a maximum of ten years, provided sufficient proof of why the extension is needed can be provided.[102]

In addition to the above, clear conditions on when the relief can apply should be considered. For example, the relief should not be allowed automatically, but only if applied for on death duties paid in respect of the same asset that is also subject to estate duty in South Africa, and if a tax treaty exists the unilateral relief is not available.

It is argued that implementing the above suggestions would promote the canon of certainty by providing clear guidance on how and when relief from double estate taxation can be claimed.

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List of Abbreviations

CGT	Capital gains tax
DTC	Davis Tax Committee
HMRC	HM Revenue & Customs
IRS	Internal Revenue Service
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
SAJAR	South African Journal of Accounting Research
SARS	South African Revenue Service
UK	United Kingdom
US / USA	United States / United States of America