INTERPRETATION OF THE TERM 'EMPLOYER' IN A DOUBLE TAXATION AGREEMENT: A SOUTH AFRICAN PERSPECTIVE

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Abstract and keywords

South Africa has many foreign nationals working within its borders as well as many residents working in other countries. Both classes of individuals may find themselves in a position of double taxation where they are tax-resident in the one state, but working in another, and both states seek to tax the individuals' income from employment. Relief from double taxation on employment income can be found in the 'income from employment'/'dependent services' article of a double tax agreement, typically contained in Article 15(2). However, whether this relief is available depends on the interpretation of the Article and the terms contained therein. The term 'employer' is one of the most debated terms that often leads to interpretational differences in the application of Article 15(2).

The objective of this research was to analyse the concept of the term 'employer' for the purposes of applying Article 15(2)(b) and (c) of the OECD MTC and UN MTC from a South African perspective.

A doctrinal research methodology was used in this study. This method involved reviewing literature on the subject, identifying the appropriate guidelines to interpretation in line with the established rules of statutory interpretation, and formulating a view on how to interpret the term 'employer' in a South African context.

The following conclusions were reached:

1 There are two approaches in determining who the employer is, namely, the formal approach, based on the contractual relationship, and the economic approach, based on the entity that receives the benefit of the employee's services.
2 As stated in the Constitution of South Africa and the Vienna Convention, the most important consideration should be given to the intention of the legislation when interpreting the term 'employer'.
3 There is a strong causal link between the 'employer' and the person paying remuneration.

In analysing the concept of 'employer', the conclusion can be made that there is no set definition of the term; instead, there are two approaches to interpreting the term. Furthermore, it was identified that there is a strong link between the employer and the person paying the remuneration.

It is therefore difficult to formulate a fixed approach to the interpretation of the term 'employer' within the international tax community. Guidelines and principles were identified in the research to assist with a consistent application of the term 'employer'. It is recommended that these guidelines be clarified by the South African Revenue Service in an interpretation note.

Keywords: employer, Double Tax Agreement, Article 15, formal employer, economic employer, interpretation note, interpretation of statutes.

Abbreviations and Acronyms

Commentary to the Model Tax Convention	the Commentary
Constitution of the Republic of South Africa, 1996	the Constitution
Double Tax Agreement	DTA
Income Tax Act No. 58 of 1962	ITA
Model Tax Convention	MTC
Mutual Agreement Procedure	MAP
Organisation of European Economic Cooperation	OEEC
Organisation for Economic Cooperation and Development	OECD
Permanent Establishment	PE
South African Revenue Service	SARS
Tax Administration Act No. 28 of 2011	TAA
United Nations	UN
Vienna Convention on the Law of Treaties 1969	Vienna Convention

Chapter One: Background to the study

1.1. Introduction

South Africa is a country that is popular among foreign national companies for investment purposes. South Africa is ranked thirteenth on the list of countries where corporate executives are most likely to direct foreign investment (A.T. Kearney, 2014). Given that South Africa is so highly ranked in terms of foreign investment, it stands to reason that many foreign nationals are likely to come to work temporarily in South Africa.

It appears from a review of the literature that the demand for highly skilled expatriates, in Africa in particular, is ever increasing. For example, according to Blackbeard and White (2014:1), companies are "flocking into Africa to tap into new developments". South African national strategy and policy has been designed around South Africa being a "gateway into Africa" (Scholvin & Draper, 2012:5). Consequently, many South Africans also have the opportunity to work temporarily in other countries.

With expatriates in high demand, a situation may arise where an expatriate is tax-resident in the one state ('home state'), but working in another state ('host state'). Both the home and host state attempt to tax the same income from such employment (Olivier & Honiball, 2011). In such a situation, the expatriate is subject to a form of juridical double taxation, i.e. two taxes on the same income (Vogel, 1986).

Two fictional scenarios are discussed below to illustrate juridical double taxation.

1.1.1. Scenario 1

In Scenario 1, if a foreign national is sent to work in South Africa, that foreign national may be required by law to pay income tax on the income earned from employment in South Africa (De Koker & Williams, 2014). The foreign national may also be required by law to pay tax on the income from employment in the state in which he or she is tax-resident (De Koker & Williams, 2014). The foreign national is being taxed in both the home and the host state, i.e. subject to juridical double taxation.

In order to prevent juridical double taxation, certain states have elected to conclude double tax agreements (DTAs), agreements for the avoidance of double taxation and fiscal evasion between the two contracting states (Olivier & Honiball, 2011). If South Africa has concluded a DTA with the foreign national's state of tax residence, the foreign national may qualify for relief from double tax under this DTA (Organisation for Economic Cooperation and Development, 2010). The requirements of this relief are explained in more detail in Chapter Two.

1.1.2. Scenario 2

In Scenario 2, if a South African tax resident went on assignment to a foreign state, South Africa would tax the income from employment in that foreign state. This is due to the fact that South Africa operates on a residence basis of taxation whereby tax residents are taxed on their worldwide income (De Koker & Williams, 2014). The residence basis of taxation will be explained in later chapters. If, however, the state in which the South African tax resident is working also claims a taxing right on the basis that the income is sourced in that state, and South Africa had concluded a DTA with that other state that tax resident may qualify for relief from double taxation (Clegg, 2010).

The two scenarios discussed above illustrate examples of when an individual can be subject to tax on the same employment income in two jurisdictions. The scenarios also briefly highlight that relief is available under a DTA. This relief is discussed in more detail below.

1.2. Relief from double taxation

Relief from double taxation on employment income is most typically provided for in a special article in the DTA which, in most instances, originates from model tax conventions such as the Model Tax Convention (MTC) drafted by, *inter alia,* the Organisation for Economic Cooperation and Development (OECD) in 2010 and the MTC drafted by the United Nations (UN) in 2011. In both of these MTCs, the relief from double taxation on income from employment is found in Article 15. Article 15 may have different titles such as "income from employment" (as per the OECD MTC, 2010) or "dependent services" (as per the UN MTC, 2011). In addition, although the article in question is number 15 in both the OECD and UN MTCs, it may have a different number in the DTA itself, depending on how the other articles in the DTA

have been structured. For the purposes of this study, the "income from employment"/"dependent services" article is referred to as Article 15 throughout this paper, whether in the context of an MTC or a DTA.

An understanding of Article 15, including its interpretation and problems that are associated with it, is central to the research problem and objectives.

1.3. Overview of Article 15

Article 15 contains three sub-sections. Article 15(1) provides for a general rule that salaries, wages and other similar remuneration earned by an individual are taxable in the state of tax residence, unless the employment is exercised in another state. In such cases, Article 15(1) also allows the other state to tax such income. Article 15(1) is beyond the scope of this research and is therefore not discussed further.

Article 15(3) deals with income from employment exercised aboard a ship or aircraft operated in international traffic or aboard a boat engaged in inland waterways transport. Article 15(3) is mentioned for sake of completeness, but is also beyond the scope of this research and is therefore not discussed further.

Article 15(2) of the MTC contains potential relief from a tax liability for employment income in the contracting state where the individual exercises his employment (the source state). In brief, Article 15(2) provides that salaries, wages and other remuneration earned by a resident of a contracting state as a result of services rendered in the other contracting state may not be taxed in that other state where the employee in question meets specific criteria. One of the criteria relies, in part, on which party is considered to be the 'employer' and whether that employer is a resident of the contracting state in which the employee is exercising employment. The entity that is the 'employer', for purposes of the above criteria, has to be determined through interpretation (Clegg, 2010). How the employer is determined by statutory interpretation are discussed in detail in later chapters.

The correct legal interpretation and consistent application of the Article by all the contracting states to the DTA are paramount for the correct and appropriate application of Article 15(2) (De Broe, Jones, Ellis, van Raad, Le Gall, Torrione, Vann, Miyatake, Roberts, Goldberg, Strobl, Killius, Maisto, Giuliani, Ward, & Wiman, 2002). Problems with the interpretation of Article 15(2) occur when the two states that are

party to the DTA have different interpretations of Article 15(2). This is discussed in the following paragraph.

1.4. Conflicting interpretations

Typically, if the two contracting states interpret Article 15(2) differently, one state (usually the source state) may not grant the appropriate relief. This leaves the employee in the same situation of double tax as if Article 15(2) had not been applied. The interpretation of Article 15(2) is therefore an important issue that warrants further discussion. The international community acknowledges that this can be problematic (Baker, 2012).

1.5. Cases illustrating problems of interpretation of the term 'employer'

The Commentary to Article 15 of the OECD MTC (2010) discusses various problems associated with the Article's interpretation. It distinguishes two cases.

1. The first is where the employee leaves his employer in the residence state for a temporary period and goes to work for an enterprise (host enterprise) in the source state and concludes a new contract of employment with that enterprise.
2. The second is where the services are rendered under an existing employment contract between the employee and his original employer and a temporary secondment agreement is concluded between the original employer (home enterprise) and the host enterprise.

The question then arises as to who the employer is while the employee is working for the host enterprise (Chartered Institute of Taxation, 2007). Does the employee remain in the employment of the original employer in his or her home country or is that employee actually now employed by the entity in the host country, where he or she is working? Is the employee merely an agent for the entity in his or her home entity, rendering services under their instruction, or is the employee temporarily rendering services under the instruction of the entity in the host country?

In the first case, where a new contract of employment has been concluded with the host enterprise, the employee would be rendering services to the host enterprise. In the second case, where a secondment agreement has been entered into with the host enterprise, it is not as straightforward to determine who the true employer is.

Given the uncertainties listed above, it is clear that the correct interpretation of the term 'employer' is a critical part of the appropriate application of the exemption of Article 15(2). This is discussed below.

1.6. Interpretation of the term 'employer' in a South African context

The term 'employer' is not defined in the DTA (De Broe *et al.*, 2002) – this is discussed further in Chapter Three. Interpretation of a term that is not defined in a DTA is achieved by referring to the domestic law of the country that is relinquishing its right to tax (Article 3(2) of the OECD MTC). Therefore, from a South African perspective, if South Africa were giving up a right to tax, one would look to the South African domestic legislation to interpret the term 'employer.'

In South Africa, one can find a number of definitions of the term 'employer' in various statutes, including the Income Tax Act No. 58 of 1962 (ITA). The present research focuses on the applicability of these definitions and other guidelines to interpretation of the term 'employer' in a South African context and seeks to determine whether the definitions of the term 'employer' can be used in the context of a DTA.

There are also other guidelines that can assist with the interpretation of the term 'employer' apart from the definitions contained in statutes. These guidelines to interpretation can be found in a variety of sources, including South African case law, Commentary to the OECD MTC and interpretation notes. These guidelines are discussed in detail in Chapter Three, and then applied in Chapters Four and Five.

1.7. Problem statement and objective of the research

Given that there are difficulties with the interpretation of the term 'employer', which is not defined in a DTA, and that various guidelines exist which can be used to interpret this term (as discussed above), it would be suitable to discuss and evaluate each of these guidelines of interpretation to determine which guidelines provide more value and clarity on how to interpret the term 'employer' in a South African context.

As mentioned above in Section 1.4, Conflicting interpretations, it is necessary to ensure that a consistent approach can be followed by all states so as to ensure coherent application of Article 15(2).

The purpose of this study is therefore to analyse the concept of the term 'employer' for the purposes of applying Article 15(2)(b) and (c) of the OECD MTC and UN MTC from a South African perspective. This is achieved by reviewing literature on the subject, identifying the appropriate guidelines to interpretation in line with the established rules of statutory interpretation, focusing on South African and, where applicable, foreign and international law, and forming an approach or process to be used to interpret the term 'employer'.

In the study, the following steps are taken:

1 Possible guidelines to interpretation in local and international legislation and Commentary are identified.
2 Those guidelines to interpretation with the most influence and value in interpreting the term 'employer' are determined.
3 The best approach/process to interpreting the term 'employer' is determined using the guidelines to interpretation available in South African jurisprudence.

1.8. Scope and limitations of the research

The interpretation of the term 'employer' for the purpose of its application in Article 15(2) forms part of the scope of this study. In order to achieve the research objectives, various legal precedents and other literature are examined.

The term 'employer' is not the only term that requires interpretation. There are many other terms contained in Article 15, and in the wider MTC which are not specifically defined within the DTA. However, since these terms are not relevant to the research question or focus of this research, they are not discussed further in this study.

The scope of this research is to look at interpretational issues around the term 'employer'. This research does not, therefore, discuss the other requirements of Article 15(2) in detail, namely the 183 day test or whether the employer has a permanent establishment (PE) in the source state. The first reason for this limitation is that this is a dissertation of limited scope and by examining the other requirements to meet the exemption under Article 15(2), the scope would become too broad. The second reason for this limitation is that the focus of the research is to determine how

a term not defined in a DTA, in this case the term 'employer', would be interpreted in a South African context.

It is noted that not all DTAs concluded between South Africa and other states are based on either the OECD or UN MTCs. Therefore, the article on salaries, wages and other remuneration may differ in wording and numbering in DTAs that are not based on the OECD or UN MTCs. Those deviations are complex and are not considered as part of this research. Since it is understood that the majority of DTAs are based on either the OECD or the UN MTC (De Koker, 2010), other MTCs are not examined in detail. The outcome of this research is limited to the findings of an analysis of the above documentation.

This research does not consider situations where transactions are simulated for the purposes of obtaining a tax benefit, the general anti-avoidance rules contained in sections 80A-80L of the ITA or the limitation on benefits article in an MTC.

The concept of an individual being tax-resident in both staes and party to a DTA is not considered as it is not relevant to the research question.

It is conceivable that, should other sources of literature such as other MTCs and other guidelines to interpretation in other countries be investigated, a different conclusion could be reached. The limitation of doctrinal research is that the outcome would depend very much on the literature reviewed and a review of different literature may yield a different result.

The literature used in this study has been carefully selected on the basis of relevance in both a South African and international tax context, rather than in a foreign context. However, the authors of the sources of literature consulted in this research provide insight into the issues not only in relation to South Africa but also in a broader context linked to other countries and international tax as a whole.

1.9. Previous research conducted on the topic

In her Master's dissertation, Gratte (2009) provides a detailed review of Article 15(2)(b) of the OECD MTC and the conflicting interpretation of the term 'employer'. Her scope is, however, limited to a Swedish perspective. This research looks at the same topic from a South African perspective. The goal is to consider the implications

for South Africa which has a number of domestic definitions of the term 'employer' as well as a wealth of case law on the subject.

A review of the literature on the interpretation of the term 'employer' published by the OECD and authors such as Klaus Vogel, Avery Jones and a list of experts in international tax from various countries (De Broe *et al.*, 2002), (all of whom are analysed in detail in this research) reveals that the issue of interpretation has been debated at length in the international tax arena. As discussed above, this issue is of particular interest in a South African context where one can find a number of definitions of the term 'employer' in various statutes, including the ITA. A literature review is presented in Chapter Three.

A review of the literature shows that there are several difficulties with interpreting terms in a treaty. Different approaches by countries can cause conflicting interpretations, thereby resulting in juridical double taxation. Olivier and Honiball (2011) discuss these conflicting interpretations in detail, citing the example of the case of *Boulez v Commissioner (1984)*. In short, this case dealt with two countries which interpreted a term in the DTA differently, resulting in each country applying different articles of the DTA and not resolving the situation of double tax for the taxpayer.

1.10. Research method and design

An interpretative research approach is adopted in this study as it seeks to understand and describe (Babbie & Mouton, 2009). Such an approach requires understanding differences between humans and how they interact and interpret the world (Saunders, Lewis & Thornhill, 2012).

The research methodology to be applied can be described as a doctrinal research methodology. This methodology provides a systematic exposition of the rules governing a particular legal category (in the present case, the legal rules relating to the term 'employer'), analyses the relationships between the rules, explains areas of difficulty and is based purely on documentary data (McKerchar, 2008).

The literature that is discussed includes an analysis of the OECD and the UN MTCs as well as the Commentary to these documents. It includes a review of the draft

documents published by the OECD and the work of various authors on the interpretation of the term 'employer'.

The rules and regulations on interpretation of tax treaties are examined. There are many papers and chapters of textbooks on the interpretation of tax treaties which have been published by authors in the field of international tax. The views of these authors are discussed in Chapter Three and used to assist with a discussion of the interpretation of the term 'employer' in Chapter Four.

Since the rules of the interpretation of treaties rely largely on the rules of domestic interpretation (the reasons for this are discussed in Chapter Three), it is important that the statutory rules for interpretation and South African jurisprudence be considered. This research analyses the rules for interpretation of domestic legislation that have been laid down through case law and practice as well as guidelines published by various authors. These rules are then applied to interpret the term 'employer'.

Figure 1 below explains the process that is followed and provides a high-level overview of the literature examined.

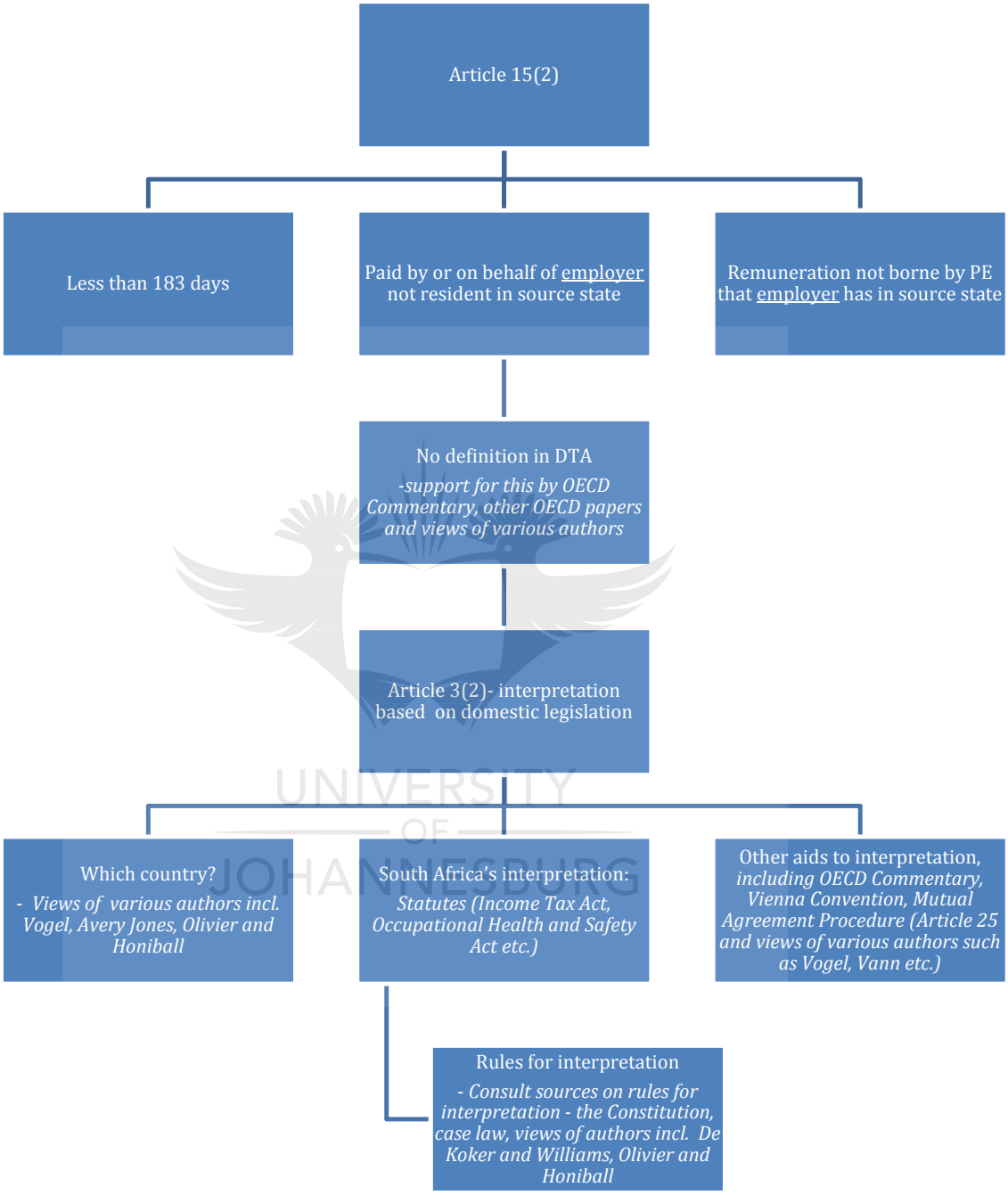

Figure 1: overview of methodology and literature

Source: Author's own

Article 15(2) contains three criteria for relief from tax on employment income in the source state. The term 'employer' appears in two of them (as illustrated above). Since the term is not defined in the treaty, it is necessary to proceed to the next step

which is to follow the principles in Article 3(2). This Article indicates that any term not defined should be interpreted in terms of domestic law. This leads to a discussion on which domestic law is to be used and what rules of interpretation and guidelines are used in South Africa, in other countries and internationally.

1.11. Rationale for the research and proposed contribution of this study

This research provides both South Africa, and other countries with an investment interest in South Africa and who employ people in South Africa, another perspective to consider when interpreting the term 'employer' for purposes of applying a DTA.

It would also be valuable to determine how the South African Revenue Service (SARS) would review and interpret the term 'employer' using the guidelines to interpretation available in South African jurisprudence. In addition, it would be helpful to compare the recommended interpretations of the term 'employer' by the OECD and the UN to the South African legal and tax principles and interpretations, particularly with regard to the intention of the OECD and UN when drafting the MTC and the intention of the countries which have adopted such conventions in their DTAs.

Based on an interpretive paradigm (Babbie & Mouton, 2009), one must consider how to interpret the term 'employer' when applying a DTA between the state where the individual is tax-resident and the country where the individual is physically working. As the starting point for understanding how to interpret the term 'employer', the available literature discussing this interpretation must be considered and analysed in detail (this is discussed in Chapter Three). This literature includes domestic and international legislation such as statutes and case law as well as a variety of guidelines to interpretation, and textbooks and articles on the subject.

1.12. Conclusion and overview of the remaining chapters

In conclusion, the interpretation of the term 'employer' requires careful analysis. The aim is to suggest an approach that can be used to interpret 'employer'. The analysis of the term 'employer', based on a doctrinal research methodology, requires a detailed analysis of the literature on this topic. Accordingly, since the data to be analysed is a sample of literature, the remaining chapters provide a review of the

legislation, models and literature in order to arrive at a conclusion to the research problem.

Chapter Two provides an analysis of the role of the OECD and the UN MTCs, their intended purpose and explains how the models have been incorporated into existing tax treaties. Chapter Two then goes on to explain Article 15(2), specifically the criteria that one needs to meet to obtain a tax exemption on income from employment. The chapter continues with a discussion on why the Article was drafted and introduces the difficulties in interpreting Article 15. This introduces the interpretational issues that are elaborated on in Chapter Three.

Chapter Three summarises and discusses the rules of the interpretation of treaties and explains how terms not defined in DTAs should be interpreted based on domestic law. The details of which contracting state's domestic law should be used are also discussed. This is followed by an examination of domestic rules of interpretation in South African domestic law which have been introduced over the years by various local case law. Chapter Three provides the framework for the interpretation of the term 'employer'.

Chapter Four applies the interpretation rules of Chapter Three to the term 'employer'. It continues with an in-depth analysis of the term 'employer' and explains which guidelines to interpretation have more influence than others. The analysis begins with international rules of treaty interpretation and then examines domestic law, as suggested would be appropriate by the abovementioned international rules. This discussion should provide clear guidance on how one would interpret the term 'employer' from a domestic perspective.

Chapter Five provides an overall conclusion on the interpretation of the term 'employer' in terms of the objectives of this study and highlights whether a formalistic approach would be preferred over an economic substance approach. It discusses arguments raised by authors such as David Clegg as to the approach that would be adopted by SARS. Chapter Five highlights potential problems with the approach taken and makes recommendations for the most correct interpretation. Lastly, Chapter Five provides suggestions for further research.

2. Chapter Two: The role and purpose of the OECD and UN Model Tax Conventions

2.1. Introduction

As discussed in Chapter One, the purpose of this research is to interpret the term 'employer', as used in the exemption from taxation on salaries, wages and similar remuneration contained in Article 15(2)(b) and (c) of the OECD and UN MTCs, from a South African perspective. In order to understand the technicalities of the Article 15(2) exemption contained in the OECD and UN MTCs, an overall understanding of the purpose of an MTC and how it is used in a DTA is required. This chapter describes the purpose of a DTA by means of a short explanation of the residence versus source basis of taxation and a detailed explanation of double taxation. The chapter continues with a discussion of the history of the MTC and how it came to exist as a way of explaining its role and purpose, and then goes into a detailed discussion of Article 15. The chapter concludes with a number of examples of the practical difficulties that arise when interpreting Article 15.

2.2. Residence versus source basis of taxation

Avi-Yonah (2005) explains the difference between a residence basis of taxation and a source basis of taxation. Residence taxation of income is based on the idea that taxpayers (individuals, companies and others) should contribute an amount of tax to the country where they live (or where they are resident), regardless of where in the world that income is earned. South Africa is an example of a country that operates on a residence basis of taxation (De Koker, 2010). Source taxation of income is based on the idea that a taxpayer should contribute an amount of tax to the country where such income is generated (Avi-Yonah, 2005). South Africa is an example of a country that taxes non-residents on the basis of source (De Koker & Williams, 2014). This can lead to an overlap, where income is derived by a resident of one state from a source in another state. The resident state and the source state may both lay a claim to tax that income, leading to a situation of juridical double taxation.

2.3. Juridical double taxation and the role of a double tax agreement

A situation of double tax may arise in the following situations:

1 An individual taxpayer is tax-resident in one state.
2 That state operates on a residence basis of taxation, so the individual is liable for tax in that state on worldwide income.
3 The individual works and lives (usually temporarily) in another state.
4 The individual is liable for tax in the other state as well since that state taxes the income on a source basis.

In such a situation, the individual is subject to a form of juridical double tax, i.e. two taxes on the same income (Olivier & Honiball, 2011). Vogel (1986:6) explains this form of double tax as follows:

> Double taxation may also arise when a person is deemed to be a resident simultaneously by two (or more) states, or when source rules overlap because two (or more) states find the same economic transaction or asset to be within their territory.

It is clear that this creates a conflict, since two states are attempting to tax the individual on the same income.

2.3.1. Double tax agreements and other double tax relief

In order to prevent a situation of double tax such as the one described above, certain states have elected to conclude DTAs, agreements between each other for the avoidance of double tax and fiscal evasion between those two states (Vogel, 1986). Each DTA contains certain provisions regarding double tax relief. One of the states that is party to that DTA will typically either relinquish taxing rights in full or provide a deduction or rebate from tax on the particular income in question (Organisation for Economic Cooperation and Development, 2010).

If a taxpayer is in a situation of juridical double taxation and the two states in question have not concluded an agreement for the avoidance of double taxation, there may still be relief in terms of the domestic laws of either one or both states. In South Africa, for example, section 6*quat* of the ITA provides for a credit against normal income tax for taxes paid on foreign income in another state, subject to certain limits. This type of unilateral relief is beyond the scope of this research and is therefore not discussed further.

For the purposes of this study, which examines the taxation implications relating to expatriates with temporary employment abroad, the DTA provision relevant to

employment income is known as Article 15. In order to understand the role and purpose of Article 15 of a DTA, it is first necessary to understand how treaties are drafted, the basis on which they are drafted and the purpose and intention of Article 15. This is explained in detail in the paragraphs that follow.

2.4. The role and purpose of Model Tax Conventions

Before explaining the role and purpose of Article 15, a brief history of MTCs and the purpose of Article 15 is discussed. This is followed by an explanation of cases where deviations from the model are appropriate and a discussion of why there is more than one model for different nations.

2.4.1. The history and development of Model Tax Conventions

In his paper on Double Tax Treaties and their interpretation, Vogel (1986) describes the history and development of a MTC to form the basis of DTAs, which is summarised here. The development of a uniform method or model for bilateral treaties was first worked on by the League of Nations. The preparatory research of the League of Nations was continued by the Organisation of European Economic Cooperation (OEEC) and its successor organisation, the Organisation for Economic Cooperation and Development (OECD). In 1963, a complete MTC and Commentary to interpret the MTC had been developed. The MTC was designed as a model while the Commentary acted as an aid to interpret the model (OECD, 2010). Nevertheless, it is important to bear in mind that the MTC is merely a blueprint or a starting point to any treaty negotiation (Vogel, 1986). According to Mazansky (2009), even South Africa has its own Model Tax Convention, as should all countries, as a starting point from which to begin when negotiating a DTA.

2.4.2. Deviations from Model Tax Conventions

Countries are free to deviate from the MTC when drafting DTAs as these are bilateral agreements between two countries (Olivier & Honiball, 2011) and could be drafted in any manner seen fit. However, MTCs are intended to be a starting point, based on the research conducted, initially by the League of Nations and later by the OEEC and OECD.

In addition, the Commentary to the OECD MTC was simply an aid to interpreting the MTC itself and countries were free to express reservations to the Commentary where

they did not agree with its interpretation (Vogel, 1986). Countries would conceivably be able to disagree with the interpretation in the Commentary since the Rules of Interpretation in Article 31 of the Vienna Convention on the Law of Treaties (1969)(the Vienna Convention) and Article 3(2) of the MTC allow countries to use domestic law to interpret treaties.

2.4.3. Different Model Tax Conventions for different nations

According to Vogel (1986), in 1971, a different model was designed to address the interests of developing countries (Latin America at that time) which placed special emphasis on giving taxing preference to the state in which the income was sourced. A similar model treaty was published by the United Nations in 1980 which had a comparable structure to the OECD MTC (Vogel, 1986). The introduction to the United Nations MTC (2011) emphasises that the purpose of the MTC is to favour developing nations, and in particular, to favour the source state when allocating taxing rights. It is important to remember that the purpose of a DTA (and consequently the MTC used to compose the DTA) is to allocate taxing rights between two states, not to impose tax in itself (Olivier & Honiball, 2011). Therefore, it would appear that where income arises in a developing country (the source country), the preference under the UN MTC would be to allocate taxing rights to the source state, i.e. the developing nation.

2.4.4. The role of the UN Model Tax Convention, compared to the OECD Model Tax Convention

According to the UN MTC (United Nations, 2011), the MTC favours the taxing rights at source, in accordance with the principle that income is taxed in a state if it can be seen as sourced in that state, based on domestic tax legislation in that state (Olivier & Honiball, 2011). The UN MTC suggests that favouring taxing rights at source is of special significance in developing nations (*ibid*). One can therefore deduce that the UN MTC is designed with developing nations in mind and may be preferred over the OECD MTC when developing nations are entering into DTAs with other states.

2.5. Article 15

Within each Convention is an article dealing with income from employment or dependent services. This article, and the issues relating to its interpretation (specifically Article 15(2)), are the focus of this research. Article 15, including sub-paragraphs (1) and (2), are discussed below.

The OECD MTC's Article 15 on "Income from Employment" (2010) and the UN MTC's Article 15 on "Dependent Personal Services" (2011), collectively referred to hereafter as Article 15, contain analogous provisions.

In its Commentary to Article 15, the UN states that this Article reproduces Article 15 of the OECD Model Convention. The main difference appears to be that the UN MTC refers to the term 'fixed base' rather than 'PE'. This difference is not considered relevant since neither of these terms affect the interpretation of the term 'employer'.

Due to the MTCs and Commentaries being the same (other than a difference in terminology, as discussed above), for the sake of simplicity, all subsequent references to the MTC and Commentary are to the OECD MTC. The sub-sections of Article 15 are dealt with below.

2.5.1. Introduction: Article 15(1)

Article 15(1) states that income "salaries, wages and other similar remuneration" is taxable in the state where such person deriving that income is resident unless he or she worked in another state. If so, the other state may also tax that income. This is subject to the provisions of Article 15(2).

2.5.2. Article 15(2)

According to Article 15(2), the income from salaries, wages and other similar remuneration is only taxable in the state where the recipient of such income is resident if all the criteria below are met:

1 The recipient was not physically present in that other state where the services were rendered for more than 183 days in any 12-month period;
2 The remuneration was paid by, or on behalf of, an employer who was not resident of that other state; and
3 The remuneration paid for such services was not borne by an employer who has a PE in the other state.

In other words, if an individual is tax-resident in one state and comes to work in another state for a short period of time (less than 183 days) and if the remuneration is paid in the individual's country of residence and is not borne by an employer with

a PE in the other state, the individual is exempt from tax in the state where the services are rendered.

Now that the provisions of Article 15 have been explained, it is necessary to understand the reason why such relief is available in the first place in order to understand how to interpret the provisions of the article correctly. This is discussed below by way of two examples.

2.6. Purpose of Article 15: Deductibility of remuneration in the hands of the employer

The Commentary to the OECD MTC on Article 15(2) states that the object of paragraphs (b) and (c) is to avoid source taxation for short-term employment where the remuneration for such employment is not deductible for tax purposes in the source state because the employer is not taxable there as a resident, nor does it have a PE in the source state. The Commentary also explains that imposing source deduction requirements on short-term employment in a state will create an administrative burden if the employer does not reside in the source state or have a PE there. The purpose of Article 15 is best explained by way of Example 1 below.

Example 1

Clegg (2010) uses an example of a tax non-resident employer sending an employee to South Africa to work under the instructions of the local management of its South African subsidiary. Clegg's view is that the individual will, on the face of things, remain employed by the non-resident employer. Therefore, assuming all the other criteria for Article 15(2) are met, the employee should, in principle, be able to access the benefits of Article 15(2) of the DTA.

The Commentary to the OECD MTC explains that, in some states, a formal employment contract would be sufficient evidence of who the employer was and would only ever be questioned if there was a case of manipulation. Therefore, it would be sufficient to say that the non-resident employer remained the 'employer' for purposes of Article 15(2) if there was a valid and enforceable contract of employment between the non-resident employer and the employee.

Example 1 above attempts to explain how Article 15(2) could be applied in practice. It is evident that the practical application may raise certain technical ambiguities or issues which are discussed in detail below.

Issue 1

One problem that could arise is the application of sub-paragraph (b) of Article 15(2) which states that the remuneration must be "paid by, or on behalf of an employer who was not resident of that other State" (own emphasis).

In this example, the non-resident employer has the contract of employment with the employee, so will likely be regarded as the formal employer. However, whilst the employee is working under the instructions of local management in South Africa, it is not clear whether the non-resident employer remains the 'employer' for purposes of Article 15(2) during the time the employee works in South Africa. If the employee was working in the South African subsidiary temporarily, the South African firm may be seen to become the employer of the tax consultant temporarily. This concept is very relevant to the objective of this dissertation, which is to interpret the term 'employer', and is expanded upon in later chapters.

Issue 2

If it could be argued that the South African subsidiary becomes the employer during the time that the employee works for it, but the non-resident employer continues to pay the remuneration, the question is whether the remuneration is paid by or on behalf of an employer who is not resident in South Africa? If the employer is no longer the non-resident employer, but rather the South African subsidiary, and the South African subsidiary is not paying remuneration, one may conclude that Article 15(2) would not apply in such a case.

In the above example, the individual may in substance be seen to be an employee of the South African subsidiary where the individual is working, especially if the non-resident employer charges the South African subsidiary for the individual's remuneration. The benefits of the DTA may not be available to the individual (Clegg, 2010). Although he does not specifically make the link, one can infer that the reasons Clegg (2010) is of the view that the benefits of the DTA will not be available to the individual are as follows:

1 If the individual is seen as an employee of the South African subsidiary, the South African subsidiary would be seen as the employer.
2 If the remuneration costs are recovered from the South African subsidiary, the remuneration could be seen as being paid by, or on behalf of, the South African subsidiary.

It appears that the interpretation of the term 'employer' is a matter of domestic interpretation. Local laws of a state may ignore the formal contract concluded between the parties, and look at "the nature of the services rendered by the individual and their integration into the business carried on by the enterprise that acquires the services to conclude that there is an employment relationship between the individual and that enterprise" (OECD 2010:256). In other words, the local laws of the country may take a 'substance over form' approach and look to whether there is an economic employment relationship between the employee and the host enterprise, rather than a formal employment relationship (Rao & Derkson, 2008).

The OECD (2010) distinguishes methods of interpretation from abuse cases. In other words, it explains that even if a state chooses to look strictly at who the formal relationship is with, rather than which entity receives the economic benefit of the services (economic employer), in cases of abuse, they could deny the benefits of the DTA.

Issue 3

The question then arises as to how one determines whether the local laws of a state in question ignore the formal contract, and under what circumstances. In addition, one may ask whether domestic law comes into play at all. If the domestic law is taken into consideration, which state's law are taken into account, considering that a DTA is an agreement between two states? In order to address these issues, it is necessary to understand the legal rules of statutory interpretation, and in particular, the international rules for interpreting a DTA, which is addressed in Chapter Three.

2.7. Chapter summary and overview of remaining chapters

This chapter explained that Article 15(2) contains an important exemption from tax in the hands of the source state where the employee is working on a temporary basis. It has been designed to cater for situations where the employee is subject to tax in

the source state, but the employer cannot claim a tax deduction in the source state because it is not tax-resident there and does not have a PE in the source state.

Based on the example above, it is clear that there are various practical issues regarding the interpretation of the term 'employer'. These are described below:

1 The first issue relates to who the employer is. It is important to determine whether one looks at the formal contract of employment, or rather by whom the employee is supervised and controlled when on assignment.
2 The second issue is who is actually paying the remuneration. In other words, whether the employer who is paying the remuneration is the same employer who is not tax-resident and does not have a PE in the source state.

The last issue is the different approach taken by different states. All states have different ways of interpreting a DTA. In South Africa, there are complex rules of statutory interpretation that need to be followed when applying a DTA. These rules may differ between other countries and it is important to be aware of these approaches. As was evident in the case of *Boulez v Commissioner (1984),* serious practical problems arise when different countries interpret DTAs differently. Since the interpretation of statutes over many countries is complex, this study focuses on the approach that South Africa would take when determining who the employer is for the purposes of Article 15(2).

The next chapter provides a detailed discussion on the interpretation of DTAs in general from a South African perspective. Since a DTA is an agreement between two countries, its standing in South African jursiprudence would need to be analysed. The study then goes into the South African rules of statutory interpretation, followed by an analysis of the literature on international law relating to interpretation of DTAs.

Chapter Four uses the rules discussed in Chapter Three and examines the application of these rules to the issues explored above. This application provides insight into the interpretation of the term 'employer' for the purposes of applying Article 15(2) from a South African perspective. As discussed in Chapter One, the overall objective of the review of the literature is to recommend an appropriate and technically correct interpretation of the term 'employer' in a South African context. Chapter Five then

concludes on the issues discussed in Chapters Three and Four and provides recommendations and suggestions for further research.

3. Chapter Three: A summary on the interpretation of treaties

3.1. Introduction

Chapter Two discussed the role and purpose of an MTC, examined the provisions of Article 15(2) and explained that the term 'employer' is not defined therein. It was emphasised that the absence of a definition could create inconsistent interpretations in practice.

Since the term 'employer' is not defined in the MTC, Article 3(2) dictates that the term should be interpreted using domestic law (this is explained in more detail below). The next step is therefore to discuss how to interpret the term 'employer' correctly in a South African context. South Africa has specific rules for interpreting statutes, which are analysed and discussed in the sections that follow. In addition, there are other guidelines in South African law that, while not rules, can add value to a case. In other words, these guidelines are persuasive in their nature.

Since a DTA is an agreement between two states, it would be necessary to consider international rules for statutory interpretation as well. The literature on international law relating to interpretation of DTAs is analysed and its interpretation in a South African context is also discussed.

Overall, the objective of this chapter is to summarise the rules of interpretation as well as additional guidelines. Those same rules and guidelines are consolidated to create a process for the approach of interpreting the term 'employer' and are then applied in Chapter Four.

3.2. Interpretation of a term not defined in a treaty

The OECD MTC (2010) contains a specific article, Article 3, which lists definitions of terms that are used throughout the various articles. Article 3(1) contains the definitions themselves, while Article 3(2) provides guidance on how to interpret terms that are not specifically defined.

Article 3(2) of the OECD MTC states that:

> … unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

According to Olivier and Honiball (2011:299), this rule is referred to as the 'Renvoi clause'. This clause essentially states that, unless indicated otherwise, when interpreting a term that is not defined in the DTA, the meaning of the domestic law of a contracting state must be followed.

Two issues may arise when reading the Renvoi clause, namely:

1 Whether only tax laws should be considered, or whether all domestic law, such as labour law, can be considered; and
2 Which state's domestic law should be used.

These two questions are answered below.

3.3. Should only tax laws be considered?

De Broe *et al*. (2002) point out that the wording of Article 3(2) is wide enough to cover the meaning under any law of that state and is not restricted to a tax law interpretation. Therefore, one must consider all domestic statutes and relevant guidelines.

3.4. Which state's domestic law is used?

In cases where a term is not defined in a DTA, it is not clear which contracting state's laws (tax or other) should be referred to when searching for the meaning of a term. This was the case in *Boulez v Commissioner (1984),* where the German tax authorities were of the view that amounts earned were royalties, based on their domestic law, while the United States of America were of the view that the income was derived from personal services, based on their domestic law. Consequently, each country applied different articles of the relevant DTA and the case had to be decided in court. Jones (1993) suggests that the case would not have been a problem if the 'correct' application of Article 3(2) had been used, namely, that the state in which the income is sourced has the first right to classify the income, in accordance with its domestic law.

Vogel (1986) is of a different view. He argues that if a term is not defined in the actual DTA, one would need to look to *inter alia* international law, the domestic laws of the states concerned or the Vienna Convention to assist in the interpretation of the term. Therefore, he seems to disagree with Jones' view that the domestic law of

the source country should be considered. Instead, his approach takes into account the domestic laws of both states, the Vienna Convention and international law.

Vogel's view is consistent with South African law, since Section 233 of the Constitution of the Republic of South Africa (the Constitution) (1996) states that courts are bound to follow an interpretation that is consistent with international law. In addition, section 108 of the ITA, read with section 231 to 233 of the Constitution, legislates that a DTA becomes part of South African domestic law. It is therefore critical to examine not only South African rules of interpretation, but also international law.

This document therefore follows Vogel's view and considers South African, foreign and international law. This covers a number of different statues and rules of interpretation. In order to simplify the discussion, South African domestic law is examined first in the section that follows. This is followed by a discussion of international and foreign law. The objective of these discussions is to attempt to outline an approach that can be followed to interpret the term 'employer'.

3.5. South African domestic rules of interpretation and conflicting arrangements

Under the South African legal system there are rules used to interpret legislation, making use of case law and common law principles (Honiball, 2013). The first point would naturally be to see if a term is defined in the context in which it is to be interpreted (De Koker & Williams, 2014). If there is no definition or the definition is not applicable to the section of the statute being interpreted, one would look to other rules of interpretation (*ibid*). Each of these is discussed below.

Under the tax system, there are also various additional guidelines available to assist in interpreting the various statutes governing the tax system. These include publications by SARS such as guides and interpretation notes.

3.5.1. Definitions contained in statutes

Definitions can be found in various sections in any statute. It is important to note that these definitions are typically subject to the proviso "unless the context otherwise indicates". In other words, one needs to apply a definition in its context within a statute.

The case of *CIR v Simpson (1949)* echoed this principle. Watermeyer C.J. stated (at 692) that:

> it seems to me that effect should be given to the rule laid down by Halsbury, *Laws of England*, in para. 591 of Vol. 31 (Hailsham ed.), viz.:
> "A definition section does not necessarily apply in all the possible contexts in which a word may be found in the statute. If a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning".

For example, the Fourth Schedule to the ITA contains various definitions, including a definition for 'employer'. However, the preamble refers to the definitions as "for purposes of this schedule". One can infer that the definition is not intended to be used throughout the ITA.

If a term is not defined or the definition cannot be used in the specific context, one would need to look to the ordinary English meaning of the word which is described in law as the 'ordinary meaning rule' (Honiball, 2013).

3.5.2. The ordinary meaning rule

In *Coopers & Lybrand v Bryant (1995)*, the Appellate Division stated that the language in the document should be given its "grammatical and ordinary meaning". The Appellate Division referred to the ordinary meaning rule as the "golden rule" of interpretation, demonstrating its high importance in interpreting legislation. This rule is also referred to by some as the "literal rule" (De Koker & Williams 2014: 2). This literal interpretation is the starting point in interpreting a term (Haupt, 2015).

The ordinary meaning was also referred to in *Cape Brandy Syndicate v. IRC (1921)*. This case took a very strict stance when looking specifically at tax legislation, stating at 71 that "[n]othing is to be read in, nothing is to be implied. One can only look fairly at the language used". This strict literal approach was also taken in *CIR v Simpson (1949)*. The grammatical and ordinary meaning of a term can be found by looking to sources of such meaning, for example, the dictionary definition.

In the *Coopers & Lybrand* case, the court cautioned against this literal rule of interpretation in two instances:

1 When the language of a document could not be interpreted using the ordinary meaning if the outcome would be absurd or inconsistent with the rest of the document; and
2 When the interpretation of a word or phrase in the document could not be interpreted by itself without putting that word or phrase into the context of the document.

In cases where interpreting the Act using the literal rule would give rise to an absurd outcome, it would be necessary for the person interpreting the legislation to look to the intention of drafting the legislation to provide the necessary context. In *Venter v Rex (1907),* the court discussed an interpretation of a statute using the ordinary meaning, which would have led to such an absurd outcome that it could never have been the intended outcome of the legislature. If the interpretative outcome is contrary to the intention of the legislature, then the courts are allowed to depart from the ordinary meaning rule and look to the intention of the legislature for guidance. This is known as the purposive approach (De Koker & Williams, 2014).

3.5.3. The purposive approach

The rules of interpretation discussed above were based on court cases before the Constitution was approved by the Constitutional Court on 4 December 1996. After the Constitution came into force, a new interpretive rule, known as purposive interpretation, emerged. De Koker and Williams (2014:14) explain that "a purposive approach should be followed which will promote the democratic values enshrined in the new Constitution".

To understand what the purposive approach means, *ITC 1384 (1983)* provides a useful guide to interpreting a statute. In this case, in the abovementioned case, Steyn J (1983) outlines the two principles of prime importance in the interpretation of statutes:

1 The legislator's intention must be ascertained.
2 The legislator is presumed not to have intended an unfair or unreasonable outcome and therefore the statute must be interpreted to be as unoppressive as possible.

The intention of the legislator cannot always be easily ascertained. In *ITC 1384 (1983)*, Steyn J states that the intention can be sought from the language that was used which links back to the literal interpretation or ordinary meaning rule. In other words, the rules of interpretation need to work together to provide the correct interpretation under law.

In addition, intention can be determined by looking at the legislature's published documents on the issue such as press releases and interpretation notes issued by SARS (Haupt, 2015). An interpretation note is an interpretation of the law by SARS and is not binding on the taxpayer (Honiball, 2013).

The Constitution is supreme law in South Africa and therefore the purposive approach carries the highest weighting of all rules of interpretation. In the discussion of interpretation of statutes, Haupt (2015) makes reference to the South African Constitution, which must be borne in mind in all cases, due to the importance it carries. It becomes evident in this study that when the term 'employer' is interpreted, the purposive approach will always be the most important consideration.

3.5.4. Local case law

When interpreting statutes it is important to note that decisions of the courts may become part of law. Two parts of a case may be distinguished: the *ratio decidendi* and the *obiter dictum (*De Koker & Williams, 2014). The *ratio decidendi* of a case is the reason or ground for the decision. The ground for that decision is the part of the case that becomes a principle of law and, depending on which court the decision came from, it can be applied in future cases of similar facts. The *obiter dictum* is the opinion or observation of the court on a matter that does not affect the grounds for the decision. An *obiter dictum* can guide a court on a decision but does not become a principle of law like the *ratio decidendi (ibid)*.

Haupt (2015) further explains that the court handing down a decision and all courts subordinate to that court are bound by the decision. This is called the *stare decisis* principle.

3.5.5. Conclusions on domestic law

It is clear from the above discussions that there are various rules to interpret a term in a statute such as a DTA. If there is no definition of a term in the statute itself, the term has its ordinary meaning unless interpreting the term in such a way would lead to an absurd outcome or would be in contradiction of the principles enshrined in the Constitution (the purposive approach). Due consideration should be given to case law that deals with a particular term, although the weighting of the case law depends on whether the interpretation relies on the *ratio decidendi* or the *obiter dictum*. In addition, the ranking of the court in which the decision was made should also be taken into account.

Despite the provisions of Article 3(2), namely that a term should be defined according to domestic law, it is still important to note that a DTA is an international agreement (Olivier & Honiball, 2011). Therefore, Vogel (1986) takes the view that, when interpreting a term contained therein, due regard should be given to international law, interpretation in other countries' domestic laws and the provisions of the Vienna Convention. These are discussed below.

3.6. International law and international tax law

International tax law can, in general terms, be different from international law. International law normally deals will generally applicable rules. However, tax law has a very specific language and specific concepts (De Koker, 2010) Honiball and Olivier (2011) identified several rules of interpretation that can be used to interpret international tax law. These rules, which are discussed in the paragraphs that follow, are:

1 The Vienna Convention on the Law of Treaties;
2 The Model Tax Convention and its Commentary; and
3 Article 25 Mutual Agreement Procedure.

3.6.1. The Vienna Convention on the Law of Treaties

The Vienna Convention is a multilateral agreement, signed by many countries. According to its preamble, the purpose of the Vienna Convention is to provide a codification of international law when negotiating, concluding and interpreting tax treaties. Article 31 of the Vienna Convention (1969) states that, when defining a

term in a treaty, the ordinary meaning of that term should be referred to. This rule of interpretation is the same approach that is followed in South African domestic rules of interpretation. In other words, words used in a treaty must be given their plain, ordinary meaning.

Article 31 of the Vienna Convention (*ibid*) then states that each word must be interpreted in the context in which it is used and not as a stand-alone word. Put differently, terms cannot simply be given a literal meaning without taking into account how the term is used in the context of the treaty. It may then be necessary to interpret the ordinary meaning with reference to the intention with which it was written. This is supported by Article 31 which states that words must be interpreted in context, with consideration of the object and purpose of the treaty.

In order to determine the purpose of a treaty, Article 31(2) of the Vienna Convention (1969:340) makes provision that, to determine the purpose of the treaty, an "instrument which was made by one or more parties in connexion (sic) with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" can be used. In the context of a DTA, that aforementioned instrument would be the MTC. Therefore, in order to gain an understanding of the purpose of the use of a term, one should refer to the MTC itself.

3.6.2. The Model Tax Convention and Commentary

In Chapter Two, it was explained that the OECD publishes an MTC, a blueprint to assist countries with drafting DTAs. Chapter Two also explained that the OECD publishes a Commentary (which is updated fairly regularly) to the MTC, which assists parties who have used whole or portions of the MTC in drafting of tax treaties.

Before analysing the MTC and the Commentary, their standing in international law must be contextualised. It is not the MTC or its Commentary that is a law or a statute (Vogel, 1986). The international law is the DTA itself, which may or may not be based on the MTC. The MTC is merely a model or aid but countries are not bound by it and can deviate from such model when drafting treaties (Olivier & Honiball, 2011).

As the MTC is a blueprint for a DTA (Olivier & Honiball, 2011), if a term is not defined in a DTA, it will not be defined in the MTC if the DTA is based on the MTC. It is the Commentary to the MTC, which explains the intention of each article, which would

be most likely to provide guidance on the intention of the negotiators to the DTA. The Commentary takes into account issues that may have arisen in various countries in interpreting the language of the MTC and provides an interpretation on the language, based on case law from all over the world.

The OECD considers, in its introduction to the MTC (2010), that the Commentary is part of the MTC. Since the MTC is merely a guideline and is not in itself statutorily binding on any state (Olivier & Honiball, 2011), the Commentary serves as a guideline only. However, it is an extremely useful statutory aid as it gives an indication of the intention of the OECD when drafting the Commentary.

Despite this aid, problems may still arise when revenue authorities in various countries interpret the Commentary differently, either in isolation or with all other guidelines to interpretation. Where the views of domestic laws conflict, a solution can potentially be found in another article in the MTC. There is a possibility, under the OECD MTC, for countries to mutually agree as to how a term should be interpreted. This is known as the Mutual Agreement Procedure (MAP).

3.6.3. Article 25: Mutual Agreement Procedure

The United States MTC has drafted a different version of Article 3(2), stating that where a term is not defined in domestic law or such interpretations would conflict between the two states party to the DTA, the issue should be settled by MAP. In addition, under the OECD, UN and SADC MTCs, there is an Article 25 dealing with a MAP, to be used when conflicts arise. In terms of this Article, the competent authorities of each state should resolve any conflicts or problems relating to the interpretation or application of the treaty. The Article authorises the competent authorities to deal directly with each other, thereby eliminating the need to go through diplomatic channels. Therefore, SARS could, for example, contact the Tanzanian Revenue Authority to agree on a definition of the term 'employer'. The obvious problem with this procedure is that, despite the two authorities contacting each other, there is no guarantee that they will reach consensus.

Firstly, it would be very challenging for the competent authorities to even identify a conflicting interpretation. It would be up to the aggrieved taxpayer, who has been subject to tax twice, to notify both authorities that the taxpayer was in a position of

double tax. This would usually only be the case where assessments had been raised on the taxpayer in both countries. To engage with the competent authorities at that stage would be costly and administratively burdensome, especially if a 'pay-now-argue-later' approach is taken in that country, such as in South Africa (section 164 of the Tax Administration Act, 2011 (the TAA)).

In addition, if the competent authorities even attempt to make use of the MAP to come to an agreement, such an agreement may be very difficult to conclude if the parties cannot agree on one definition. There are limited guidelines as to how such agreement would take place and, since each state has a vested interest in protecting its tax base, it is unlikely to easily accept a conflicting interpretation of the term 'employer'.

3.7. Conclusion on treaty interpretation

There are a number of rules and guidelines which can be used to interpret a term that is not defined in a DTA. The difference between Jones' view and Vogel's view on interpretation of such terms was discussed. It was determined that, given the international nature of a DTA, relying on the domestic law of the country where the income is sourced would likely be too narrow an approach. Therefore, when considering the interpretation of the term 'employer', this research has also considered the impact of international law.

The objective of this chapter was to establish an approach that could be used in Chapter Four to interpret the term 'employer'. This approach also serves as a summary of the many rules and guidelines that may be applied in the interpretation of the term 'employer' with reference to the objectives of this study.

The approach is best explained by way of a diagram.

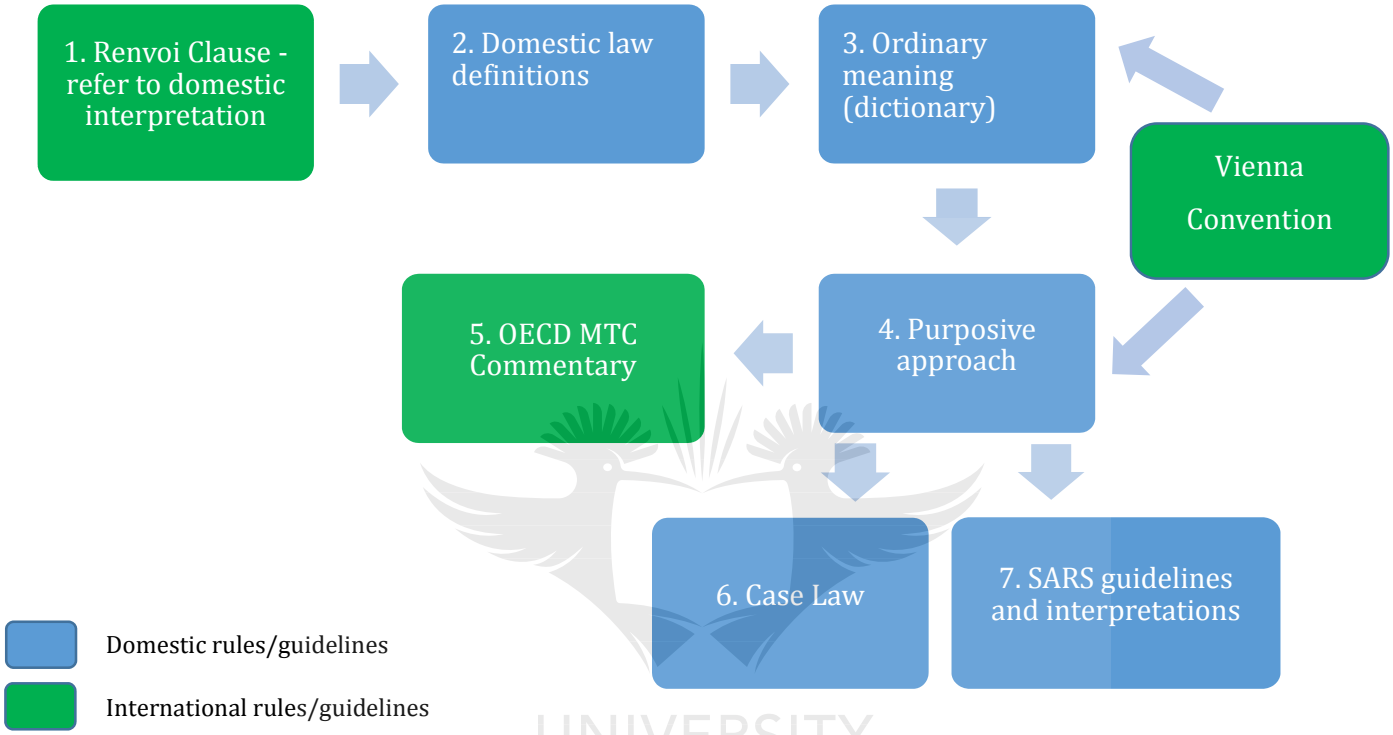

Figure 2: Approach for interpretation of term not defined in DTA

Source: Author's own

The above approach takes into account both domestic and international law. It is challenging to create a process flow, given that all the rules and guidelines to interpretation should be considered together rather than individually. However, this approach highlights the approach by providing a starting point and then the next rule that would logically be considered.

It also shows how both South African and international law need to be considered together; one cannot be considered without the other. The arrows show how South African and international legislation, from a tax perspective, are intertwined. For example, one cannot use the purposive approach without referring to international legislation. The Vienna Convention suggests using the ordinary meaning, which is also used in South African domestic legislation. Therefore, Chapter Four discusses each rule and guideline separately but often cross-refers to another rule or guideline.

The approach illustrated above is applied in Chapter Four to interpret the term 'employer'.

Chapter Four: Analysis of the interpretation of the term 'employer'

4.1 Introduction

In the previous chapter, the rules and guidelines relating to the interpretation of statutes and undefined terms were discussed. The chapter concluded with an approach that could be followed when interpreting a term not defined in a DTA. This chapter applies the approach outlined in Chapter Three to the term 'employer' in order to define this term from a South African perspective. Since the Renvoi clause suggests that the first step in interpreting a term that is not defined in a treaty is to refer to domestic law for such interpretation, as per Article 3(2) of the MTC (OECD, 2012), this will be the starting point. The objective of the chapter is to come up with a suitable interpretation of the term 'employer', taking into account both domestic and international law in order to meet the objective of this study.

Since the objective of this study is to interpret the term 'employer', examining definitions would be the first place to start. If the existing definitions are not applicable, other rules and guidelines to interpretation must be examined.

4.2 Definitions

De Broe *et al.* (2002) are of the view that the wording of Article 3(2) is wide enough to cover all domestic law of a state and is not confined to a tax definition. Therefore, guidance on the definition of the term 'employer' may be sought from any piece of legislation and is not confined to a definition or guidance for tax purposes.

Definitions of the term 'employer' can be found in several statutes in South Africa. Due to the limited scope of this dissertation, the search for a definition is confined to South African tax and labour legislation. There may be other definitions available in other statutes.

4.2.1 Definition of 'employer' in the Fourth Schedule to the Income Tax Act

The term 'employer' is defined in paragraph 1 of the Fourth Schedule to the ITA as:

> …means any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, pension preservation fund, provident fund, provident preservation fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and

> any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council;… (own emphasis added)

The preamble to the Fourth Schedule states that the definitions contained therein are for purposes of that Schedule, unless the context indicates otherwise. The Fourth Schedule contains the legislation regarding amounts to be deducted or withheld by employers and provisional payments in respect of normal tax and provincial taxes. Therefore, it is unlikely that this definition could strictly be applied in a context other than the withholding of employees' tax from remuneration. However, since it is the only such definition in the ITA, it could be argued that some regard should be had to that definition, even if only as support for another argument.

If this definition cannot strictly be used in the context of Article 15(2), one can look to other domestic law for guidance (De Broe *et al.,* 2002).

4.2.2 Definitions of 'employer' in other legislation

Some statutes on labour legislation were consulted to find definitions of the term 'employer'. These are each discussed below.

The following definitions of the term employer were found in statutes presented below in Table 1:

Table 1: Definitions of the term 'employer'

Statute where the term is defined	Definition
Occupational Health and Safety Act No. 58 of 1993	*"employer" means, subject to the provisions of subsection (2), any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him, but excludes a labour broker as defined in section 1(1) of the Labour Relations Act, 1956 (Act No. 28 of 1956);*

Compensation for Occupational Injuries and Diseases Act No. 130 of 1993	*"employer" means any person, including the State, who employs an employee, and includes:* *(a) Any person controlling the business of an employer;* *(b) If the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person;* *(c) A labour broker who against payment provides a person to a client for the rendering of a service of the performance of work, and for which service or work such person is paid by the labour broker;*
Unemployment Insurance Act No. 63 of 2001	*"employer" means any person, including a person acting in a fiduciary capacity, who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds, excluding any person who is not acting as a principal;*
Skills Development Levies Act No. 9 of 1999	**"***employer" includes an employer as defined in the Fourth Schedule to the Income Tax Act.*

Like the Fourth Schedule to the ITA, the preambles to the Acts containing the above definitions state that the definitions are for the purposes of the Act they are found in, unless the context indicates otherwise. Therefore, it is submitted that these definitions cannot be strictly used to assist with the definition of 'employer' for the purposes of Article 15(2). However, they could provide support to an argument. These definitions may also appear in local case law and therefore it is submitted that it would be challenging to argue that they should be disregarded completely.

4.2.3 Conclusions on definitions

An analysis of the above definitions provides two common themes:

1. The employer is the person who receives the labour or productive capacity of another; and
2. The employer is the person who pays remuneration.

In terms of the outlined approach put together in Chapter Three, the ordinary meaning of the word 'employer' is examined in the following section to ascertain whether the themes above can be seen in the ordinary meaning.

4.3 Ordinary meaning

As discussed in Chapter Three, the golden rule of interpretation is to look at the ordinary or plain meaning of a word. The plain meaning can be gauged by looking at the dictionary definition (De Koker & Williams, 2014). This approach to interpretation is supported in international law by the Vienna Convention (1969).

The Oxford English Dictionary (Oxford University Press, 2015) defines the term 'employer' as "[a] person or organization that employs people."

This definition seems to consider that the true employer is the person with whom an individual has a formal employment relationship. It does not discuss whether the employer is the person who obtains the economic benefit of the labours of the employee or the person who remunerates the employee.

Black's Law Dictionary (1968) defines 'employer' as "[o]ne who employs the services of others; one for whom employees work and who pays their wages or salaries. The correlative of employee."

It appears that this definition takes more of an economic approach than the Oxford English definition. In other words, it says the employer is one for whom employees work, i.e. they actually engage their labour (economic approach). This is in line with the definitions that could be found in other statutes. Another useful part of this definition is that the employer is the correlative of 'employee'. Therefore, any guidance on the term employee could be helpful in interpreting 'employer'. There is guidance from SARS on the term employee, which is discussed under 4.5 "Guidance from the South African Revenue Service".

4.4 Purposive approach

In Chapter Three, it was explained that the purposive approach is based on the understanding that the Constitution is supreme to Parliament and that no interpretation can be in conflict with the provisions of the Constitution. In understanding the purpose behind drafting the legislation, one would need to refer

to the intention of the treaty negotiators when drafting the DTA, Commentary to the OECD MTC, SARS guidelines and case law. These items are discussed below.

4.4.1 The drafting of the Double Taxation Agreement

It is important to bear in mind that, when attempting to identify the intention of the legislation, it is the DTA itself that one must consider, and not the MTC. Nevertheless, it is difficult to gauge what the South African treaty negotiators at SARS had in mind when each DTA was negotiated in the absence of any published guidelines or statements on the subject. However, where Article 15 mirrors the wording that has been suggested in the OECD MTC, it can be argued that the intention of the treaty negotiators was the same as the intention of the OECD when they drafted the model Article 15 since, if it had been something different, they would have deviated from the wording of Article 15 in the OECD MTC. Consequently, where a DTA follows the same wording as the OECD MTC, the Commentary can be used to determine the intention behind the drafting of Article 15. Deviations from the OECD MTC are not part of the scope of this research and are therefore not considered further. The Commentary to the OECD MTC provides more guidance on this point below.

4.4.2 The Commentary to the Model Tax Convention

The OECD Commentary to the MTC lists the objectives of sub-paragraphs (b) and (c) of sub-paragraph 2 of Article 15 (Article 15(2)) as follows:

1 Avoiding taxation on short-term assignees where the expense on the entity relating to such income is not deductible for tax purposes in the host country; and
2 To avoid an excess administrative burden to the employer who does not carry on business in the host country, nor has a fixed place of business there.

Therefore, when interpreting the term 'employer' based on the intention of the OECD, one would need to consider, firstly, which party is able to obtain a corporate income tax deduction for the remuneration costs being paid to the employee. Secondly, one would need to consider whether the party that may be considered the employer is carrying on business in the host country or has a fixed place of business there.

In the example of the employee working at the South African subsidiary of a non-resident employer used in Chapter Three, it was the non-resident employer who was

bearing the remuneration costs of the employee. The non-resident employer is not tax-resident in South Africa and does not have a PE in South Africa, therefore it derives no taxable income in South Africa from which to claim a corporate tax deduction. In such a scenario, the intention of the OECD was to provide an exemption from individual income tax in the hands of the individual in South Africa, since the non-resident employer who bears the cost of the remuneration is not able to claim the corporate income tax deduction for the remuneration costs. Therefore, one can see that the purpose of Article 15 is that the non-resident employer should be seen as the 'employer'.

However, assume that, although the non-resident employer bears the remuneration costs on paper, they recover those costs to the South African subsidiary as consideration for the use of the employee's productive capacity in South Africa. The South African office pays the non-resident employer for the costs, and then claims a deduction in their corporate income tax returns for those costs. In such a scenario, the arrangement may be viewed as though the remuneration was being paid by or on behalf of the South African 'employer'. The intention of Article 15(2) is to provide tax relief to an individual working in South Africa only if the South African office cannot claim the corporate income tax deduction for the remuneration costs. Therefore, if the 'employer' is the South African subsidiary, no relief under Article 15(2) should be afforded to that employee. When interpreting the term 'employer', one must have substantial regard to the intention of the legislator.

4.4.3 Suggested solutions by the OECD

The Commentary to the OECD MTC states that the intention of the OECD was to refer to the person "having rights on the work produced and bearing the relative responsibility and risks". It further suggests that a competent authority (for example SARS) should have regard to the economic substance of the arrangement in question, rather than the form in which it is presented.

In 2008 the OECD released a public discussion draft of amendments to the Commentary. Clegg (2010) states that the discussion document proposed substantial elaboration to the paragraphs of the Commentary on Article 15. Despite the release of these proposals, the essentials of the Commentary remain unchanged.

Clegg (2010) suggests that the South African courts would not accept an interpretation of economic substance over the legal form of an arrangement. However, he points out that in Binding Private Ruling (BPR) No. 85, SARS has adopted an economic substance over legal form approach. BPR No. 85 is discussed in more detail under SARS guidelines.

4.5 Guidance from the South African Revenue Service

While SARS offers no published guidance on the meaning of the term 'employer', it has issued two documents that could be of importance and are therefore discussed in detail:

1. BPR No. 85; and
2. Interpretation Note 17, dealing with independent contractors.

4.5.1 Binding Private Ruling No. 85

According to South African Revenue Service (2010), this ruling dealt with the interpretation of governing dependent personal services articles in the respective DTAs to establish whether South Africa has a right to tax the remuneration derived by residents of various foreign countries for employment in South Africa.

Although the BPR makes no analysis of the facts, the outcome was that South Africa had the right to tax remuneration received by foreign residents. It appears that, in order for this to be the case, the South African employer was seen as the 'employer'. Clegg (2010) states that it appears that SARS has followed an economic employer approach.

4.5.2 Interpretation Note 17

This Interpretation Note goes into great detail on the distinction between an independent contractor and an employee. The objective of this research is to determine the meaning of the term 'employer', rather than 'employee'. However, the definition of 'employer' (Black, 1968) stated that the term is the correlative of 'employee'. Similarly, in *Footwear Trading CC v Mdlalose (2005),* it was held that, in the absence of a definition of 'employer', the term is "to be gleaned by reference to the definition of 'employee' – i.e. any person who 'receives services' from another". It therefore stands to reason that Interpretation Note 17 may be consulted for guidance when interpreting the term employer.

The latest version of Interpretation Note 17 was issued by SARS in March 2010. It lays down two tests to distinguish between an employee and an independent contractor.

1 The first is a statutory test laid down in the Fourth Schedule to the ITA.
2 The second is known as the 'common law dominant impression test' (common law test) which looks at case law in South Africa.

These two tests are, according to the Legal and Policy division of SARS, available to determine whether a person is an independent contractor for employees' tax purposes. The statutory test is only relevant to determine whether a person is an employee for purposes of the Fourth Schedule to the Act and is therefore not considered further in this research.

The common law test is based on South African case law and can therefore be used to interpret the term 'employee' more broadly (*Estate Furman & others v CIR, 1962*).

The common law dominant impression test

Interpretation Note 17 (South African Revenue Service, 2010) outlines how the test is applied. Several indicators of different significance or weight are used. The Interpretation Note further explains that no single factor is conclusive and all factors must be determined in the relevant context. An explanation of these factors is long and complex and is not required for purposes of this study. Therefore, an overview of the factors carrying the highest weight is provided here. Annexure B to Interpretation Note 17 contains a grid of 20 relevant factors. A copy of Annexure B may be found in Appendix A of this manuscript.

Interpretation Note 17 categorises these factors into three groups, namely:

1 Near-conclusive factors;
2 Persuasive factors; and
3 Resonant factors.

Only the near-conclusive indicators of the acquisition of productive capacity (i.e. of employee status or non-independent business status) are listed, as examples, to illustrate the link to the employer for purposes of this study. The full list can be found in Appendix A. These indicators are:

1 Control of manner: control over how the work is performed;
2 Payment regime: whether this is with reference to a result or for productive capacity;
3 Person who must render the service: is the person at the 'beck and call' of the employer;
4 Nature of obligation to work: whether this is delineated by time or the results of work;
5 Employer (client) base: an employer typically commoditises an employee's efforts, whereas someone independent may freely seek work from other clients; and
6 Risk, profit and loss: does the person have exposure to the risk and reward of the firm or are they guaranteed a fixed salary regardless of the performance of the business.

Based on the above indicators of an employee/employer relationship, the presence of factors strongly indicating that an individual is an employee could indicate that the person who controls the manner of work, payment regime, carries the risk, profit and loss etc. is the corresponding employer for South African domestic law purposes. This indicates an approach which favours where the economic benefit is being derived, rather than where the formal contract of employment sits.

Although this is how it appears SARS would approach an interpretation of the term 'employer', one must also consider how the South African courts would approach an interpretation.

4.6 Case law

A very formalistic approach to the interpretation of the term 'employer' was taken in the case of *Sterris v Minister of Safety & Security & others (2007).* This case held that the definitions of 'employee' and 'employer' in the Compensation for Occupational Injuries and Diseases Act no 130 of 1993 created two essential factors, namely:

1. A contract of employment; and
2. A stipulation for the payment of remuneration.

It was held that without the above two essential factors, an employment relationship does not exist.

According to the above decision, if there is no formal contract of employment, which also details the payment of remuneration, there is no employment relationship. While this case was referring to Compensation for Occupational Injury and Diseases, rather than to tax, it is interesting to note the strict formalistic approach that the court adopted. However, although the economic substance of the relationship appears not to have been considered as indicative of an employment relationship *per se*, there is mention that the contract should stipulate the payment of remuneration.

An interesting concept raised in *Board of Executors Ltd v McCafferty (1997)* was that there could be more than one employer. The Labour Appeal Court reiterated that the word 'any' in the definition of 'employer' in the previous Act (which has now been repealed) "is suggestive that the legislature did not intend to limit the range of employer to only one such person or entity". Therefore, South African law does envisage that an individual could have more than one employer.

To illustrate the relevance, one must take this back to the example in Chapter Two of the employee employed by the non-resident employer who works temporarily in the South African subsidiary. In applying the above cases, it is not necessary to determine whether the employer is the non-resident employer or the South African subsidiary. It could be argued that, while working in South Africa, the employee has two employers, the primary non-resident employer with whom an employment contract already exists, and the 'temporary' employer in South Africa, under whose supervision or control the employee is carrying out duties (see discussion on supervision and control below).

Article 15(2)(b) states that, in order to make use of the exemption, *inter alia* the remuneration must be "paid by or on behalf of an employer who was not resident of that other State…" (own emphasis). The Article does not, however, specify which employer. If it could be argued that an individual could have more than one employer, it could also be argued that as long as the remuneration is paid by or on behalf of the non-resident employer, the criterion for exemption under Article

15(2)(b) would be met. If the costs were recharged to the South African subsidiary, this argument may be weakened.

The power of termination of the work relationship was held to be among the most definitive indications that a contract of employment exists, as was held in *Board of Executors Ltd v McCafferty (1997).* Under this test, it is then the employer with the power to terminate (and, it is submitted, also appoint) the employment relationship who can be seen as the employer. Therefore, in the example discussed in Chapter Two, the fact that the non-resident employer would, in all likelihood, maintain the power to terminate or alter the relationship, the non-resident employer would be the 'employer' for purposes of Article 15(2).

4.7 Conclusions on interpretation in South Africa

There are many aids and sources of guidance in domestic law and international law regarding the interpretation of the term 'employer'. It is important to consider which of these aids and guidelines carries a higher legal standing. The significance of Interpretation Note 17 is debatable as it is focused on the distinction between an employee and an independent contractor. Nevertheless, consideration must be given to the guidance it can offer.

Despite the wealth of guidelines to interpretation, it is submitted that, to the extent that it is not contrary to the provisions of the Constitution, the intention of the treaty negotiators and, in this case, the OECD, should be given the highest weighting. The domestic law should be interpreted broadly.

The available case law relating to the term 'employer' is extensive. However, according to the *stare decisis* rule discussed in Chapter Three, such case law carries legal standing in courts of the same level and lower standing when applied to other cases where the facts are similar. To date, no case law has been provided directly in the context of the interpretation of 'employer' for the purposes of Article 15 of a DTA. Therefore, such case law would not strictly be binding on the courts. However, it must still be considered as indicative of how the courts would interpret this definition.

The courts appear to take a much more formalistic view of an employment relationship. Clegg (2010) suggests that the South African courts would have regard to the formal contract of employment, except where there are cases of abuse.

This chapter has analysed the interpretation of the term 'employer' in detail. It has been found that there are essentially two approaches that one can take, namely, a formal approach to the interpretation of the term 'employer' and a more economic approach, namely, an approach to interpretation of the term 'employer' based on which entity benefits economically from the individual's productive capacity. SARS appears to prefer the economic approach, whilst the courts generally tend to prefer a more formalistic approach.

Chapter Five provides a conclusion and discussion of the most appropriate interpretation of the term 'employer' for the purposes of the objective of this study. Chapter Five also recaps the study limitations discussed in Chapter One and makes recommendations for further research that can be undertaken in the field.

Chapter Five: Conclusions and recommendations

5.1 Introduction

In Chapter One, the potential problems with the interpretation of the term 'employer' were identified. These problems centred on the fact that the term 'employer' is not defined in a DTA. This then led to defining the objective of this research. The objective was to analyse the concept of the term 'employer' for the purpose of applying Article 15(2)(b) and (c) of the OECD MTC and UN MTC, from a South African perspective. The proposed method of achieving the study objective was as follows:

1 To review literature on the subject, identify the appropriate guidelines to interpretation in line with the established rules of statutory interpretation, focusing on South African and, where applicable, foreign and international law.
2 To discuss and evaluate each of these guidelines to interpretation, to determine which guidelines carry more weight and provide more clarity than others.
3 To formulate an approach/process on how to interpret the term 'employer' in a South African context.

In order to understand the technicalities of the Article 15(2) exemption, the purpose of an MTC and how it is used in a DTA first needed to be explained, which was done in Chapter Two. Chapter Two also contained a detailed discussion of Article 15, namely, its purpose and how the exemption works in principle.

The conclusion reached in Chapter Two was that it is clear that there are various practical issues regarding the interpretation of the term 'employer'.

1 The first issue relates to who the contractual employer is. It is important to determine whether one looks at the formal contract of employment (formal employer) or rather by whom is the employee supervised and controlled when on assignment (economic employer).
2 The second issue is who is actually paying the remuneration. In other words, whether the employer who is paying the remuneration is the same employer who is not tax-resident and does not have a PE in the source state.

This last issue was particularly important because it showed that there is a link between the 'employer' and the person paying the remuneration. This observation is similar to the observation in Chapter Four, namely, that the statutory definition of 'employer' contained in the Fourth Schedule to the ITA is essentially the person who pays remuneration. Therefore, although Chapter Two focused on the role and purpose of an MTC, an important issue was already identified. The interpretation of the term 'employer' in Chapter Four echoes this issue, which has become a common theme throughout the literature review and the outcome of the interpretation of the term 'employer' in Chapter Four. Although the definition in the Fourth Schedule to the ITA is only applicable to that particular statute, the common criteria, namely, that the 'employer' is the person who pays remuneration, is significant.

Chapter Three provided a detailed discussion on the South African rules of statutory interpretation, including an interpretation of DTAs in general from a South African perspective. The Constitution is supreme in South African law and therefore, the purposive approach is of the highest weighting of all rules of interpretation. In the discussion of interpretation of statutes, Haupt (2015) makes reference to the South African Constitution, which must be borne in mind in all cases, due to the importance it carries. In addition, the Vienna Convention refers back to the ordinary meaning of the term, having due regard for the intention with which the term was used (the purposive approach). Therefore, the common theme when looking at South African and international law is that a term not defined should ideally be given its ordinary meaning. However, it is essential to look to the underlying purpose for which the term was used. Chapter Three summarised an approach to follow when interpreting the term 'employer'.

Chapter Four then used the rules and approach discussed and developed in Chapter Three, to interpret the term 'employer' for the purposes of applying Article 15(2) from a South African perspective. In Chapter Four, it was concluded that, after looking at all the rules and guidelines to interpretation, there are two approaches that can be used, namely:

1. A formalistic approach, which involves the examination of the underlying employment relationship, employment contracts, etc.; and

2. An economic approach, which takes into consideration the person who economically benefits from the individual's productive capacity.

These issues were also identified throughout the review of the literature. On the review of the conclusions of each chapter, common themes arise.

5.2 Common themes

A summary of the conclusions in each chapter suggests that, on a review of the guidelines to interpretation available, there are three common themes that emerge from the literature on the interpretation of the term 'employer' that was consulted for purposes of this study, namely:

1 There are two popular approaches to determine who the employer is, namely the formalistic approach and the economic approach.
2 The intention of the legislation is the most important consideration when interpreting the term 'employer'. This is stated in the Constitution and the Vienna Convention.
3 There is a strong causal link between the 'employer' and the person paying remuneration.

5.3 Likely approach by SARS and the South African courts

As outlined above, one can categorise the approaches in determining the employer into two – the formal and the economic approach.

An analysis of the rules of interpretation suggests that the South African courts may follow a more formalistic approach to interpreting the term 'employer', based on the formal employment relationship. This is supported by a few interpretations of the ordinary meaning of the term 'employer', which focus on the person employing the productive capacity of another.

Clegg (2010) is of the view that SARS may prefer a substance-based approach to the interpretation of the term 'employer' over a more formalistic approach. This view is supported by SARS publications in BPR 85 and Interpretation Note 17. In addition to this, it is understood that the treaty negotiators from South Africa come from within SARS (Honiball, 2013). Therefore, if one looks at the intention of the legislators, it seems reasonable to consider SARS's intentions.

5.4 Intention of the legislation

According to the Commentary of Article 15, the OECD's intention when drafting the article was to alleviate an administrative burden where the person paying the remuneration could not benefit from the corporate tax deduction in the source state. Although the OECD does not draft the DTA itself, it does draft the MTC on which the DTA is based, and therefore the OECD's intentions must also be taken into consideration for purposes of the objective of this study which aims to identify the most suitable approach for the interpretation of the term 'employer'.

A reading of the Commentary to the OECD MTC suggests that the OECD's intention in drafting Article 15(2) appears to be to create a clear causal link between the employer and the person who pays remuneration (and will be able to claim a tax deduction).

5.5 Causal link between the employer and the person paying the remuneration

The Commentary to the OECD MTC creates a causal link between the employer and the person paying the remuneration (salary and benefits) of the individual working short-term (i.e. less than 183 days – Article 15(2)(a) in the source state). The person who pays the remuneration for a short-term assignment should be able to make use of a corporate tax deduction in their country of residence. If the country of residence is not South Africa and there is no PE in South Africa, the person cannot claim that deduction in South Africa. Therefore, South Africa should apply the relief under Article 15 and not tax the individual on that remuneration.

The definition of the term 'employer' contained in paragraph 1 of the Fourth Schedule to the Act also makes a link between who the employer is and who pays remuneration. To summarise, the person paying the remuneration is the employer. This definition definitely supports an interpretation of the term 'employer' which is in line with the intention of the OECD when drafting Article 15. The employer is the person by whom, or on behalf of whom, such remuneration is paid. The employer will be claiming a tax deduction on the payment of that remuneration. Therefore, if the employer is unable to claim a tax deduction on the said remuneration in the source state in cases where an individual goes on a short-term assignment, the state where that individual goes to work should give up its right to tax the remuneration

in the hands of the individual (Organisation for Economic Cooperation and Development, 2010).

5.6 Practical problems

As mentioned above, the definition of the term 'employer' contained in the Fourth Schedule to the Act is, paraphrased in short, anyone who pays or is liable to pay to any person any amount by way of remuneration. If the definition of 'employer' as contained in the Fourth Schedule to the Act can be applied as such in practice, it can be argued that the need for a definition of the term 'employer' falls away in the context of applying a DTA from a South African perspective. Consequently, whoever pays or is liable to pay the remuneration becomes the employer for domestic law purposes. There is no need to go into an analysis of who the formal or economic employer is.

However, taking such a narrow approach to the interpretation of the term 'employer' may mean it would be very simple for employees on short term assignments to South Africa to structure their affairs to take advantage of Article 15 of a DTA. If the basic definition of the term 'employer' was the only one considered for the application of Article 15(2), employees would be in a position to manipulate the structure of their short-term assignment to South Africa by ensuring that they are paid by a non-resident. It is therefore important that both the formal and underlying economic employer be considered in cases of abuse.

It may then be prudent for a body such as the SARS to take a wider view on the term 'employer'. Even if an employee were to structure his or her affairs in a manner where an entity that is not a South African tax resident were to pay the remuneration, if that employee is working for a South African entity which meets the common law definition of 'employer', he or she should not benefit from the exemption.

5.7 Overall conclusions and recommendations

Overall, it is clear that a consistent approach to the interpretation of the term 'employer' in the international tax community cannot be achieved unless more comprehensive guidance is published on the subject. It is submitted that both the formal and economic approach to interpreting the term 'employer' should be considered, but that the person who is paying remuneration should be presumed to

be the employer, since this approach is more closely aligned with the purpose intended in drafting Article 15(2). In other words, the 'employer' is the person who bears the cost of remuneration, unless it can be proven that this cost is merely a sham to take advantage of Article 15(2).

The OECD has examined this issue in detail in the past in various papers but has not been able to propose a solution for all countries. This is to be expected, as every country party to a DTA has its own jurisprudence on which it would rely to interpret terms such as 'employer'. A "one size fits all" approach cannot be forthcoming from the OECD. It is up to each contracting state to look at the issue in detail and publish guidance to taxpayers as to how that country would approach an interpretation of the term 'employer'.

It appears that SARS would not necessarily always take the lead from the courts and would appear to prefer an interpretation of the term 'employer' from a substance perspective. It is therefore recommended that SARS provide clarity on how it would interpret this term by issuing an interpretation note. Under the TAA, such an interpretation would be binding on SARS but not on the taxpayer in question. Therefore, to an extent, a commitment is necessary from SARS to be bound by the interpretation that would be outlined in the Interpretation Note. It may provide taxpayers and tax practitioners who need to apply Article 15 in their everyday practice with useful guidance on the considerations.

5.8 Suggestions for further research

It is submitted that the research has been based on a very limited scope, since only an interpretation from a South African perspective has been considered. The aim of the research was to look mainly at the how South Africa would interpret the term 'employer' under Article 15(2)(b) and (c). The interpretation of the term 'employer' in the context of other countries may yield a completely different finding.

The opportunity to expand on this scope is very broad. Further comparative studies across countries may be conducted which could offer additional guidance and clarity on the interpretation of the term 'employer' and its application in Article 15(2)(b) and (c).

In addition, the present research is limited to an analysis of the term 'employer' for the purposes of Article 15(2)(b) and (c) only. Further research could analyse other terms contained in Article 15(2)(b) and (c) or any other sub-section of Article 15. There is also an opportunity to analyse the requirements of Article 15(2)(a) i.e. the requirement to spend less than 183 days in the host country.

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Appendix A: Annexure B to SARS Interpretation Note 17

Common Law Dominant Impression Test grid

NEAR-CONCLUSIVE Control Manner/Exclusive Acquisition.	Control of manner of working	Employer instructs (has right to) which tools/equipment, or staff, or raw materials, or routines, patents, technology	Person chooses which tools/equipment, or staff, or raw materials, or routines, patents, technology
	Payment regime	Payment by a rate x time-period, **but regardless of output or results**	Payment by a rate x time-period but **with reference to results**, or payment by output or "results in a time period"
	Person who must render the service	Person obliged to render service personally, hires & fires only with approval	Person, as employer, can delegate to, hire & fire own employees, or can subcontract
	Nature of obligation to work	Person obliged to be present, even if there is no work to be done	Person only present and performing work if actually required, and chooses to
	Employer (client) base	Person bound to an exclusive relationship with one employer (particularly for independent business test)	Person free to build a multiple concurrent client base (esp. if tries to build client base – advertises etc)
	Risk/Profit & loss	Employer bears risk (pays despite poor performance/slow markets) (particularly for independent business test)	Person bears risk (bad workmanship, price hikes, time over-runs)
PERSUASIVE Extent of Control	Instructions/Supervision	Employer instructs on location, what work, sequence of work etc or has the right to do so	Person determines own work, sequence of work etc. Bound by contract terms, not orders as to what work, where etc
	Reports	Control through oral/written reports	Person not obliged to make reports
	Training	Employer controls by training the person in the employer's methods	Worker uses/trains in own methods
	Productive time (work hours, work week)	Controlled or set by employer/person works full time or substantially so	At person's discretion
RELEVANT Labels, clauses, compliance, economic circumstances, "resonant" of	Tools, materials, stationery etc	Provided by employer, no contractual requirement that person provides	Contractually/necessarily provided by person
	Office/ workshop, admin/ secretarial etc	Provided by employer, no contractual requirement that person provides	Contractually/necessarily provided by person
	Integration/Usual premises	Employer's usual business premises	Person's own/leased premises
	Integration/Usual business operations	Person's service critical/integral part of employer's operations	Person's services are incidental to the employer's operations or success
	Integration/Hierarchy & organogram	Person has a job designation, a position in the employer's hierarchy	Person designated by profession or trade, no position in the hierarchy
	Duration of relationship	Open ended/fixed term & renewable, ends on death of worker	Limited with regard to result, binds business despite worker's death
	Threat of termination/ Breach of contract	Employer may dismiss on notice (LRA equity aside), worker may resign at will (BCEA aside)	Employer in breach if it terminates prematurely. Person in breach if fails to deliver product/service
	Significant investment	Employer finances premises, tools, raw materials, training etc	Person finances premises, tools, raw materials, training etc
	Employee benefits	Especially if designed to reward loyalty	Person not eligible for benefits
	Bona fide expenses or statutory compliance	No business expenses, travel expenses and/or reimbursed by employer. Registered with trade/professional association	Over-heads built into contract prices. Registered under tax/labour statutes & with trade/professional association

	Viability on termination	Obliged to approach an employment agency or labour broker to obtain new work (particularly for independent business test).	Has other clients, continues trading. Was a labour broker or independent contractor before this contract
	Industry norms, customs	Militate against independent viability Make it likely person is an employee	Will promote independent viability Make it likely person is an independent contractor or labour broker