



The double tax consequence of the new Double Tax Treaty between South Africa and Mauritius for persons other than individuals

By

Stanley Andrew Broun

Student Number: BRWSTA004

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Supervisor: Prof. Jennifer Roeleveld, Department of Finance and Tax

University of Cape Town

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ABSTRACT

Mauritius continues to be among the most competitive, stable, and successful economies in Africa. Mauritius actively seeks foreign investment and prides itself on being open to foreign investment. Mauritius amongst other countries is one of the recipients of high volume foreign direct investment (FDI) and is well known for its favourable tax regime. This favourable tax regime remains one of the key reasons why South Africans use Mauritius as a preferred jurisdiction, well suited for passive investments as well as being an investment hub to establish and grow their foreign business activities.

In 1996 SA concluded a double tax treaty ('DTT') with Mauritius to guard against potential double taxation. This could occur when a person is considered a tax resident in both South Africa and Mauritius by virtue of the application of the respective tax laws of these countries. The application of the DTT will however result in such a person being deemed to be resident in only one of the countries party to the DTT. On the 17 March 2013 SA signed a new DTT with Mauritius, which will bring about some significant changes for South Africans who have FDI in Mauritius. Of significance are the amendments to Article 4 in the DTT. The new tie-breaker rule provides that the Competent Authorities of the two Contracting States will by mutual agreement endeavour to decide which country has taxing rights in the case of persons other than individuals. This significant change has multiple effects on persons other than individuals and this can lead to a person in fact becoming subject to double taxation.

This paper will investigate the effect of the change between Article 4 in the DTT concluded in 1996 (in force from 20 June 1997) and the new Article 4 in the DTT signed on the 17 May 2013 which came into effect from the 1 January 2016 for South Africans who have foreign direct investments in Mauritius. In conclusion the principles outlined in the relevant chapters will be presented through a practical application of determining if a person other than an individual is subject to double taxation. The application of the domestic laws of both SA and Mauritius and the application of the New IN6 will be applied to an offshore trust established in Mauritius. With the application of the principles and procedures one will be able to see the effect of the tie-breaker rule in the new DTT concluded on the 17 March 2013 between SA and Mauritius.

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LIST OF ABBREVIATIONS

Abbreviation	Meaning
CMC	Central Management and Control
DTT	Double Tax Treaty
FDI	Foreign Direct Investment
IN6	Interpretation Note 6
ITA	Income Tax Act 58 of 1962, Income Tax Act 1995
MAP	Mutual Agreement Procedure
MOU	Memorandum of Understanding
OECD	Organisation for Economic Co-operation and Development
PoEM	Place of Effective Management
SA	South Africa
SAICA	South African Institute of Chartered Accountants
SAIT	South African Institute of Tax Practitioners
SARS	South African Revenue Service

CHAPTER 1: Introduction

1.1 Introduction

Mauritius continues to be among the most competitive, stable, and successful economies in Africa. Mauritius actively seeks foreign investment and prides itself on being open to foreign investment. Mauritius amongst other countries is one of the recipients of high volume foreign direct investment (FDI) and is well known for its favourable tax regime.¹ This favourable tax regime remains one of the key reasons why South Africans use Mauritius as a preferred jurisdiction, well suited for passive investments as well as being an investment hub to establish and grow their foreign business activities.

In 1996 SA concluded a double tax treaty ('DTT') with Mauritius to guard against potential double taxation. This could occur when a person is considered a tax resident in both South Africa and Mauritius by virtue of the application of the respective tax laws of these countries. The application of the DTT will however result in such a person being deemed to be resident in only one of the countries party to the DTT. Article 1 of the DTT requires a person to be a resident of one or both of the Contracting States to benefit under the treaty. Article 4 then further defines the term resident, commonly known as the tie-breaker rule. Article 4 in the old DTT between SA and Mauritius states: "*Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.*" (Double Tax Treaty South Africa – Mauritius, GG 18111, 1997).

On the 17 March 2013 SA signed a new DTT with Mauritius, which will bring about some significant changes for South Africans who have FDI in Mauritius. Of significance are the amendments to Article 4 in the DTT. The new Article 4 states: "*Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall by mutual agreement endeavour to settle the question and determine the mode of application of the Agreement to such person. In the absence of such agreement such person shall be considered to be outside the scope of the Agreement except for the provisions of Article 25.*" (Double Tax Treaty SA – Mauritius, GG 38862, 2015).

The new tie-breaker rule provides that the Competent Authorities of the two Contracting States will by mutual agreement endeavour to decide which country has taxing rights in the case of persons other than individuals. This significant change has multiple effects on persons other than individuals and this can lead to a person in fact becoming subject to double taxation. As

¹ <http://www.investmauritius.com/newsletter/2014/march/article4.html>.

can be imagined, this revision caused quite a stir amongst South African investors with FDI in Mauritius.

This paper will investigate the effect of the change between Article 4 in the DTT concluded in 1996 (in force from 20 June 1997) and the new Article 4 in the DTT signed on the 17 May 2013 which came into effect from the 1 January 2016 for South Africans who have foreign direct investments in Mauritius.

1.2 Purpose of the study

The purpose of this paper will be to determine the effect of the change in Article 4 for persons² other than individuals, with a specific focus on Mauritian discretionary trust companies established by South African (SA) residents and companies incorporated by SA residents and how these changes compare to the 2014 OECD Model Tax Convention on Income and on Capital ('OECD Model Tax Convention') and its commentary. In order to achieve the research objective a few questions will be asked, namely:

- What are the current implications for such persons under the current Article 4 in the DTT which was concluded in 1996?
- What changes were made to Article 4 and what will the effect of the changes be for such persons as from 1 January 2016?
- How do these changes compare to the recommendations and commentaries on Article 4 in the OECD Model Tax Convention?
- What recommendations can be made to South Africans, who have such trusts, in light of the changes to Article 4 in the DTT which will be effective from 1 January 2016?

1.3 Limitation of Scope

A number of changes were made in the new DTT between SA and Mauritius, but the research questions above are specifically focused around the changes to Article 4 for persons other than individuals. This paper will further, only focus specifically on discretionary trusts or companies created and incorporated by SA residents in Mauritius.

- The most significant change in Article 4 is to the concept place of effective management ('PoEM'), and therefore the research emphasis and focus will be on the PoEM of trust companies and companies created and incorporated by SA residents in Mauritius.

² The word person used throughout this dissertation, will represent a trust company or company as opposed to an individual.

1.4 Method

In order to address the research questions identified, the research paper will comprise of:

- i. An analysis of Article 4 in the DTT concluded between SA and Mauritius in 1996.
- ii. An analysis of the Memorandum of Understanding ('MOU') which was released when the new DTT between SA and Mauritius was signed on the 17 March 2013.
- iii. Analysis of Article 4 in the new DTT concluded between SA and Mauritius on the 17 March 2013.
- iv. Analysis and comparison between the OECD Model Article 4 and Commentary on the Article and Article 4 in the DTT concluded on the 17 March 2013.
- v. Discussion of relevant SA and international court cases and judgements on the concepts PoEM and Central Management and Control ('CMC').
- vi. A discussion on SARS old Interpretation Note 6 ('Old IN6'), 2002 on PoEM.
- vii. An evaluation of the terms residence, dual residence and PoEM in SA and other countries.
- viii. Review of the new Interpretation Note 6 ('New IN6') which was released on the 03 November 2015.
- ix. Evaluation of the definition of resident in the SA Income Tax Act.
- x. Evaluation of the definition of resident in the Mauritius Income Tax Act and relevant case law.
- xi. Consideration of the possibility of having access to the Mauritius Courts if the decision reached by mutual agreement by the authorities were to be challenged.

1.5 Structure of dissertation

The paper will be structured into four chapters namely:

Chapter 2: Residence and dual residence from a SA and Mauritian perspective. In this chapter the definition of resident in the context of the domestic law of SA and Mauritius will be examined. This will be done by looking at section 1 of the Income Tax Act 58 of 1962 of South Africa ('South African ITA') and section 73 of the Income Tax Act 1995 of Mauritius ('Mauritian ITA'). The term dual residence is not defined by either Act, but if a trust company or company falls within the definition of residence of the domestic laws of both countries, the possibility of double taxation exists. In order to better understand the meaning of dual residence and how to resolve the dual residence conundrum a discussion of the tiebreaker rule in Article 4 of the OECD Model Tax Convention will be presented. Gathering information from these sources will assist in understanding the extent of the impact of the new Article 4 of the DTT between SA

and Mauritius for a trust company or company which may be considered to be resident in both SA and Mauritius.

Chapter 3: The international interpretation of the concepts PoEM and CMC. This chapter will focus on the international interpretation of the concepts PoEM and CMC. In order to obtain an understanding this chapter will make reference to the OECD Model Tax Convention and their understanding and interpretation of these concepts. This chapter will discuss the definition of the concepts PoEM and CMC as well as the Mutual Agreement Procedure ('MAP') which was provided as a guideline by the OECD Model Tax Convention. The definition for the two concepts PoEM and CMC will be further discussed with supporting court cases in chapter 4.

Chapter 4: The concept of PoEM and CMC in terms of domestic legislation. In this chapter the concept of PoEM and CMC is investigated. In order to achieve this, reference will be made to certain source documents such as the Old IN6 and the New IN6 of the South African Revenue Service ('SARS'). The two documents will be compared to discuss the changes and developments which took place. Reference to relevant case laws will also be discussed to have a clearer understanding of the concepts PoEM and CMC. A discussion of the MOU between SARS and the Mauritian tax authority and the OECD Model Tax Convention and commentary thereto will be discussed. As there is no definitive rule which can be laid down to determine the PoEM of a trust company or company this chapter will also consider the facts and circumstances which must exist to establish PoEM of a trust company and a company established and incorporated in Mauritius.

Chapter 5: Case study. In order to collate the principles and procedures outlined in chapter 3 and 4 a case study will be presented. A practical application of determining if a person is subject to double taxation will be performed in this chapter. The application of the domestic laws of both SA and Mauritius, in addition to the application of the New IN6 will be applied. With the application of the principles and procedures one will be able to see the effect of the tie-breaker rule in the new DTT concluded on the 17 March 2013 between SA and Mauritius.

Chapter 6: Conclusion and recommendations. In conclusion all the information and findings from the previous chapters will be assimilated and recommendations will be proposed.

Chapter 2: Residence and dual residence from a South African and Mauritian perspective.

2.1 Introduction

In this chapter the definition of residence in the context of the domestic law of South Africa and Mauritius will be examined. The term residence is defined in section 1 of the South African ITA and section 73 of the Mauritian ITA. The possibility will be investigated of a person being subject to taxation in both SA and Mauritius, being resident for tax purposes in both countries and regarded as a dual resident. The term dual residence is not defined in the South African ITA or the Mauritian ITA, yet the domestic laws of both countries might lead to a 'residency-residency' conflict for such a person.³ In this dissertation the focus is on a trust company created or company incorporated in Mauritius by a South African resident, and whether the possibility of being dual resident exists for the trust company or company. In an effort to combat double taxation arising as a consequence of a person being dual tax resident, the relevant tie-breaker rule in Article 4 of the DTT between SA and Mauritius would generally be of assistance. The different tests which must be applied to determine in which country such trust company or company are resident will be considered. This chapter will conclude by taking a brief look at the Memorandum of Understanding (MOU) which was signed on the 22 May 2015 between SA and Mauritius. A more detailed discussion on the MOU can be found in section 4.8 of this dissertation.

2.2 Defining the term resident in the South African and Mauritius domestic law.

In terms of paragraph b in section 1 of the South African ITA the term resident for a person other than an individual is defined as,

“person (other than a natural person) which is incorporated, established or formed in the Republic or which has its place of effective management in the Republic,”

There is no formal definition for the resident of a trust as noted in the Mauritian ITA below, but the term trust does form part of the definition of a person as per section 1 of the South African ITA.⁴ One can therefore state that if a trust is incorporated, established or formed in South Africa or has its place of effective management in South Africa then the trust is a resident of SA for tax purposes.

³ Arnold and McIntyre (2002) at 27.

⁴ The term trust is defined in section 1 of the South African ITA.

Section 73(1)(b)(i)(ii) of the Mauritian ITA defines the term resident for a person other than an individual as,

“.....

(b) *a company, means a company which -*

(i) is incorporated in Mauritius; or

(ii) has its central management and control in Mauritius;”

(d) *a trust, means a trust -*

(i) where the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius; or

ii) where the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed;”

The definition of resident in the South African and Mauritian context have common factors. In both countries a person must be incorporated in the country, however in the alternative the place of effective management (PoEM) must be situated in SA or in Mauritius the central management and control (CMC) must be exercised in Mauritius. Although the concepts PoEM and CMC are two different concepts, in *Wood and Another v Holden* it was held that the concept PoEM is similar to the concept CMC.⁵ There are however still different views on these two concepts and these views will be discussed in more detail in sections 4.2 and 4.7. The discussion on the view of these concepts are supported with case law and similarities identified by the courts highlighted.

2.3 Dual residence

When a person is treated as being a resident under the domestic law of both SA and Mauritius that person is considered a dual resident. That person will be liable for tax in both countries as both have taxing rights on that person's income. In the definition of resident above, the test will be to see where the person is incorporated, established or formed and where its' PoEM and CMC is situated.

A South African resident is taxed on its world-wide income and that is income derived within and outside SA. Section 5 of the Mauritius ITA states that derived income will be taxed as follows:

⁵ *Wood and another v Holden* (Inspector of Taxes). Court of Appeal. 26 January 2006. [2006] EWCA Civ 26 [2006] 1 W.L.R. 1393.

“(1) Income shall be deemed to be derived by a person where-

(a) the income was derived from Mauritius, whether the person was resident in Mauritius or elsewhere; or

(b) the income was derived at a time when the person was resident in Mauritius, whether the income was derived from Mauritius or elsewhere.

(2) Subject to the other provisions of this Act, income shall be deemed to be derived by a person when -

(a) it has been earned or has accrued; or

(b) it has been dealt with in his interest or on his behalf, whether or not it has become due or receivable.

(3) Income derived by an individual from outside Mauritius shall be deemed to be derived by the individual when -

(a) it is received in Mauritius by him or on his behalf; or

(b) it is dealt with in Mauritius in his interest or on his behalf.”

It is clear from section 5 in the Mauritian ITA that if a person is resident in Mauritius that person will also be taxed on its world-wide income.

If it transpires that the person is resident in both countries (dual resident) then resort must be made to the DTT between the two countries to establish whether the treaty can assist to establish taxing rights. Article 4 of the DTT between SA and Mauritius defines residence for the purposes of the treaty.

2.4 The tie-breaker rule

In order to determine which country has taxing rights on a person other than an individual reference is made to the tie-breaker clause in the new DTT between SA and Mauritius. Article 4 (3) of the DTT between SA and Mauritius states,⁶

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall by mutual agreement endeavour to settle the question and determine the mode of application of the Agreement to such person. In the absence of such

⁶ The new DTT between South Africa and Mauritius sign on the 17 March 2013.

agreement such person shall be considered to be outside the scope of the Agreement except for the provisions of Article 25.”

South Africa does not consistently have the same tie-breaker rule in its treaties. This is evident in the DTT between the United Kingdom and SA which use the PoEM test whereas a DTT between SA and Canada does not use the PoEM test as the tie-breaker, but the Competent Authorities of SA and Canada will endeavour to settle the question of who has taxing rights over the person. More clarity with regard to the meaning and determining the PoEM and CMC of a trust company and company will be discussed in section 4.2 and 4.7 of this dissertation. This will be accompanied with a more detailed analysis of how the PoEM or CMC will be determined with the guidance of the New IN6 provided by SARS and relevant court cases.

2.5 Memorandum of Understanding (‘MOU’)

When a person is subject to double taxation after not concluding on its residency in terms of PoEM or CMC, the DTT between SA and Mauritius Article 4(3) above is relevant. Article 4(3) states that the Competent Authorities must endeavour to settle who has taxing rights over the person. The MOU is an attempt to offer guidance on how to settle the question of residency for a dual resident person. The MOU, which is a formal agreement between the two Contracting States, will, by mutual agreement between the Competent Authorities endeavour to settle the question and determine how the new DTT will apply to persons other than an individual. The new tie-breaker between SA and Mauritius has created much uncertainty for persons faced with the challenge of dual-residency. Persons will now have to rely on the Competent Authorities to decide who has the taxing rights.⁷ This is different to the old tie-breaker rule as set out in Chapter 1 of this dissertation. More detail and concerns with regards to the new tie-breaker rule will be discussed in section 4.8 of this dissertation.

The MOU which was released when the new DTT between SA and Mauritius was made available, notes that the Competent Authorities of the Contracting States will endeavour to settle the question by taking into account the following factors namely,⁸ ‘

- (a) *Where the meetings of the person’s board of directors or equivalent body are usually held;*
- (b) *Where the Chief Executive Officer and the other senior executives usually carry on their activities;*

⁷ As set out in the Memorandum of Understanding between The South African Revenue Service and the Mauritius Revenue Authority, signed 22 May 2015, p2.

⁸ *Ibid.*

- (c) *Where the senior day to day management of the person is carried on;*
- (d) *Where the person's headquarters are located;*
- (e) *Which country's laws govern the legal status of the person*
- (f) *Where its accounting records are kept;*
- (g) *Any other factors listed in paragraph 24.1 of the OECD Commentary (Article 4, paragraph 3), as may be amended by the OECD/BEPS Action 6 final report; and*
- (h) *Any such factors that may be identified and agreed upon by the Competent Authorities in determining the residency of the person.'*

Apart from the above factors, there are other concerns around the MOU for persons. These concerns include the time it will take for the Competent Authorities to resolve who has taxing rights and if the two authorities do not reach an agreement, where does it leave the taxpayer. These concerns are discussed in more detailed in chapter 4.

2.6 Conclusion

Chapter 2 provided an overview of the domestic law definition of resident for both SA and Mauritius. This definition was tested against the new DTT between SA and Mauritius, and this test revealed that a person can be resident of both Contracting States which will lead to dual-residency. An overview of the relief for taxpayers was briefly commented on in section 2.4 through the tie-breaker rule and the MOU which was released with the new DTT between SA and Mauritius. A brief discussion on the MOU and the factors which will assist in deciding the residency of the person other than an individual was conducted. Highlighting these issues in Chapter 2 sets the platform for a more detailed discussion in Chapter 3 and Chapter 4, accompanied with a practical case study in Chapter 5 to determine the residency of a person.

Chapter 3: The international interpretation of the concept PoEM

3.1 Introduction

The mission of the OECD is to promote policies that will improve the economic and social well-being of people around the world. This unique forum allows member countries and non-member countries to work with each other. This forum has provided international guidance and proposed structures for member and non-member countries to use in order to develop sound policies within their own countries. This chapter will focus on the international interpretation of Article 4 according to the OECD Model Tax Convention. The focus will include a review of the OECD interpretation of the concept PoEM and the commentaries of the OECD with regards to Article 4. A review will also be performed on the alternative provision for dual residents provided in Article 4. In conclusion an overview of the Mutual Agreement Procedure ('MAP') guidelines provided by the OECD Model Tax Convention will be discussed as a detailed study of the MAP guidelines is beyond the scope of this paper.

3.2 Influence of the OECD Model Tax Convention

Since 1957 a number of OECD and non-OECD Member countries have conformed to the Model Tax Convention provided by the Council of the OECD. This conformity by countries can be measured by the number of DTT's concluded between countries and can be measured by the patterned provisions which these member and non-member countries have followed and adopted. This has brought a desirable harmonisation and benefits for both the taxpayer and national administrators. The model tax convention has been used as an international reference document between member and non-member countries. Michael Lang and Florida Brugger stated that, the OECD Model Convention and the OECD Commentary carry significant weight in the interpretation process if the contracting states chose to follow the wording of the OECD Model in drafting a certain provision. It is then only reasonable to assume that they intended such a provision to have the meaning it has in the OECD Model Tax Convention.⁹

3.3 Defining the term 'resident of a Contracting State'

Article 4(1) of the OECD Model Tax Convention states that,

"For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also

⁹ Lang M, Brugger F. The Role of the OECD Commentary in Tax Treaty Interpretation (2008), 23 Australian Tax Forum, at p.100.

includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.”

In terms of the commentaries (paragraph 1 to Article 4) of the OECD Model Tax Convention, the intention of article 1 is to define the meaning of the term "resident of a Contracting State" and to solve cases of dual residence. The domestic laws of the various states impose a "full tax liability" on a person. This comprehensive liability to tax is not only levied on persons domiciled in the state, but also levied on taxpayers who have a personal attachment to the state. In terms of the commentaries (paragraph 8 to Article 4) the wording "liable to tax" in article 4(1), means that the person will be liable for tax in the Contracting State based on the Contracting State's domestic law. These persons would be viewed as resident for the purpose of the Contracting State. The definition for resident of a Contracting State is broad and covers countries which levy tax on a resident and a source basis.

Article 4(1) in the DTT between Mauritius and SA reads as follows:¹⁰

“For the purposes of this Agreement, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of that person’s domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.”

Although a detailed comparison between Article 4(1) of the DTT between Mauritius and SA to Article 4(1) of the OECD Model Tax Convention is beyond the scope of this dissertation, the two countries have followed the guidelines set out by the OECD Model. This confirms what was noted in section 3.2 above by Michael Lang and Florida Brugger, that the OECD Model carries significant weight internationally and is a valuable source and guideline for the drafting of DTT's on an international basis.¹¹ A more detailed discussion on the DTT between Mauritius and SA will be discussed in Chapter 4.

3.4 Defining the concept PoEM

There is no formal definition for the concept PoEM internationally. In order to understand the meaning of the concept POEM, reference is made to the OECD Model Tax Convention and

¹⁰ Agreement between the government of the Republic of South Africa and the government of the Republic of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in respect of Taxes on Income, 17 May 2003, at p. 2.

¹¹ *Ibid.*

the commentary on the meaning of PoEM.¹² The definition provided by the OECD was to provide more clarity on the concept PoEM and the use of PoEM as a tie-breaker.¹³ Paragraph 24 of the OECD Commentary on Article 4 provided more clarity on the concept PoEM by stating that:¹⁴

“As a result of these considerations, the “PoEM” has been adopted as the preference criterion for persons other than individuals. The PoEM is the place where key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the PoEM. An entity might have more than one place of management, but it can only have one PoEM at any one time.”

Article 4(1) of the OECD Model Tax Convention is applicable to any person. With a definition which makes provision for both source and resident base taxes, the possibility exists that a person will be resident of more than one Contracting State. In order to resolve this dual-residence conundrum the OECD Model Tax Convention has included Article 4(3) which specifically focuses on persons other than individuals.

Article 4(3) states that,

“Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated. In case of doubt the competent authorities of the Contracting States shall settle the question by mutual agreement.”

In terms of the commentaries (paragraph 23 to Article 4) Article 4(3) is the preference criterion for persons other than individuals. Previously it was uncommon for a person to be subject to tax in more than one country. In chapter 4 one of the focus areas is the development in technology and how companies have become global operators and this development has added to the complexity of determining the PoEM. This in effect will most probably place a person in a position to be subject to double taxation. The commentaries (paragraph 22 to Article 4) of OECD Model Tax Convention state that it is not only important to look at one criterion (e.g. place of incorporation), but one must also look at where the company is being managed.

¹² 2014 OECD Model Tax Convention on Income and Capital, 15 July 2014.

¹³ *Ibid.*

¹⁴ 2014 OECD Model Tax Convention Commentary, at p123.

The PoEM is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole in substance are made. This is completely in line with the New IN6 which will be discussed in detail in Chapter 4. The commentary (paragraph 24 to Article 4) continues by stating that all relevant facts and circumstances must be examined to determine the PoEM. A person may have more than one place of management, but it can have only one PoEM at any one point in time.

The OECD Model Tax Convention in its commentary (paragraph 24.1 to Article 4) on Article 4(3) notes that to determine the PoEM for a person, one must determine the status of the person on a case-by-case basis. The commentary further states that countries are free to leave the question of residence of these persons to be settled by the Competent Authorities. In addition, the commentary notes that different factors must be taken into consideration. Detailed description of the different factors will be discussed in section 4.6. The factors used in New IN6 corresponds to the factors provided in the commentary by the OECD.

3.5 Defining the concept CMC

The CMC location is a test for establishing the place of residence of a company. Broadly speaking, it refers to the highest level of control of the business of a company. One would need to focus on the management and control decisions that guide and control the company's business activities. CMC must not be confused with the legal right a person possesses to exercise CMC of a particular company.

In *De Beers* the judge stated that,¹⁵

"In applying the concept of residence to a company, we ought, I think, to proceed as nearly as we can upon an analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in the Calcutta Jute Mills and Cesna Sulphur cases, involved the principle that a company resides for purposes of income tax where its real business is carried on. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

¹⁵ *De Beers Consolidated Mines Ltd v Howe* [2006] STC 443.

Two of the key factors in defining CMC which came from the De Beers case was where the person is carrying on a trade and where the central management and control is exercised. These factors sets a foundation for what will be discussed in section 4.7.

3.6 Mutual Agreement Procedure ('MAP')

One of the key articles included in many DTTs is an article on MAP. This procedure ties in with Article 4(3) which was discussed above. The provision of this article is to provide guidance and to promote greater consistency as to how MAP issues must be dealt with by taxpayers and the Competent Authorities of the Contracting States. The MAP provided by the OECD Model Tax Convention (Article 25) is not, however, a set of binding rules upon tax authorities and taxpayers. The Mutual Agreement article in the OECD Model Tax Convention, institutes a MAP to find a solution or settle difficulties arising out of the application of the Convention in the broader sense of the term.

Article 25 in the OECD Model Tax Convention provides the following procedure:

“

1. *Where a person considers that the actions of one or both of the Contracting States result or will result for that person in taxation not in accordance with this Agreement, that person may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of the Contracting State of which the person is a resident or, if the case comes under paragraph 1 of Article 24, to that of the Contracting State of which the person is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.*
2. *The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.*
3. *The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.*

4. *The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a commission consisting of representatives of the competent authorities of the Contracting States.”*

Although a detailed discussion on Article 25 and the commentaries is beyond the scope of this dissertation, it is worth noting that mechanisms and tools are provided for Competent Authorities to communicate with each other and resolve double taxation issues. The OECD in its commentaries (paragraph 64 to Article 25) states that the arbitration process is an integral part of the MAP and does not constitute an alternative route to solving disputes concerning the application of the Convention. Article 25 lays down general rules concerning the MAP. The comments provided in Article 25 were intended to clarify the purpose of such rules and also to strengthen the rules if necessary.

In terms of the OECD commentaries (paragraph 7 to Article 25) mutual agreement can be set in motion by a taxpayer without having been notified or charged with the taxation considered by him to be not in accordance with the Convention. If the taxpayer has sufficiently established that the actions of one or both of the Contracting States will result in double taxation and that the double taxation appears as a risk which is not possible but probable then the taxpayer can set the process in motion. This risk must be identified by the taxpayer in terms of Article 25(1) and must be based on facts that can be established. In order for this process to be placed in motion, the taxpayer must,

- represent his/her objections to the competent authorities of the taxpayer's State of which he is a national, and
- the objections must be presented within 3 years of the first notification of the action which gives rise to taxation which is not in accordance with the Convention.

In terms of the commentaries (paragraph 8 to Article 25) of the OECD the Competent Authorities may prescribe special procedures which they feel to be appropriate. An overview of the MAP provided by SARS will be discussed in section 4.9.

3.7 Conclusion

In order to understand the concept and the definition of PoEM from an international perspective the view of the OECD Model Tax Convention was presented. As stated in the introduction the OECD has promoted policies and gives guidance on certain international issues, like determining the PoEM of a person. It is difficult to obtain a universal meaning of

the concept PoEM and this chapter presented how the OECD defines the concept. There are over 34 member countries and more than 70 non-member countries of the OECD. Many non-member countries, such as SA, follow and apply the OECD Model as a proxy for their treaties and this highlights the importance of the OECD Model and its Commentaries when interpreting certain concepts.

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Chapter 4: The concept of PoEM in terms of domestic legislation.

4.1 Introduction

In this chapter the concept of PoEM will be discussed in terms of the domestic law of SA and Mauritius. An analysis will be done on the ordinary and grammatical definition of the meaning of PoEM and CMC. A further analysis will be performed by reviewing the following interpretation notes:

- South African Revenue Service ('SARS') Old IN6 of 26 March 2002
- A brief overview of the SARS Draft IN6 (Issue 2)
- SARS New IN6 of 03 November 2015

Differing views exist between the concept PoEM and CMC. A discussion on the differing views on the two concepts will also be discussed by looking at relevant case law. The MOU between SARS and the Mauritius Revenue Service will be examined and a brief comparison of the facts and circumstances between the MOU and the New IN6 will be performed. As there is no definitive rule which can be laid down to determine the PoEM of a person other than an individual, this chapter will conclude by reviewing the MAP a taxpayer must follow in order to adjudicate any problem which might arise under a treaty.¹⁶

4.2 Defining the concept PoEM in the domestic law of SA

There is no formal definition of the concept PoEM in the South African ITA. The OECD Model Tax Convention and its commentary as discussed in section 3.4, has provided some degree of clarity on how the PoEM should be determined.

As there is no specific definition of the concept PoEM in the South African ITA, reference must be made to the domestic interpretation of the term. The first domestic rule is to interpret the actual words of PoEM in its context. As stated by Steyn in *Die Uitleg van Wette*,¹⁷ it is self-evident from South African common law that the legislature's purpose in the first instance must be sought in the words which the legislature has used in the domestic statute.¹⁸ In *Land and Landbou Bank van Suid Afrika v Rousseau* [1993] (1) SA 513 (A) it was held that,

"The general rule is that the words of a statute must be given their ordinary, grammatical meaning unless to do so would lead to absurdity so glaring that it would never have been contemplated by the legislator, or where it would lead to a result

¹⁶ Olivier, Lynette & Honiball, Michael, (2011) *International Tax A South African Perspective* at p.472.

¹⁷ Steyn L. C., *Die Uitleg van Wette* 5de Uitgawe Juta (1981) 82 pp. 84- 85.

¹⁸ *Ibid.*

contrary to the intention of the legislator, as shown by the context or by such other considerations that the court is justified in taking into account. In that event that the court may depart from the ordinary effect of the words to the extent necessary to remove absurdity and to give effect to the true intention of the legislator.”

Ordinary and Grammatical meaning of the words place of effective management

According to the Oxford Dictionary the word ‘**place**’ is a noun defined as,¹⁹

- A particular position, point, or area in space, a location
- A particular area on a larger surface
- A building or area used for a specified purpose or activity

From the above meaning of the word ‘place’ one can deduce from the dictionary meaning that a place in the context of a person means that the organisation is in a specific area or location or at a point.

The Oxford Dictionary defines ‘**effective**’ as,²⁰

- Successful in producing a desired or intended result
- Producing or capable of producing a result
- Assessed according to actual rather than face value

One of the key meanings of ‘effective’ is the words successful in producing a desired or intended result. In addition to the dictionary meaning of ‘effective’ in *Wenseleydale’s Settlement Trustees v Inland Revenue Commissioner* [1996] STC (SCD) 241 and 252 the Special Commissioner David Shirley stated,

“I emphasise the adjective ‘effective’. In my opinion it is not sufficient that some sort of management was carried on in the Republic of Ireland such as operating a bank account in the name of the trustees. ‘Effective’ implies realistic, positive management. The PoEM is where the shots are called, to adopt a vivid transatlantic colloquialism.”

The word effective therefore shows actual and official management where results and implementation can be measured rather than theoretical management.

The Oxford Dictionary defines ‘**management**’ as,²¹

- The people managing a company or organization, regarded collectively
- The responsibility for and control of a company or organization

¹⁹ The Oxford Dictionary, Hawkins Joyce 1991, at p.388.

²⁰ The Oxford Dictionary, Hawkins Joyce 1991 at p.160.

²¹ The Oxford Dictionary, Hawkins Joyce 1991 at p.310.

- The process of dealing with or controlling things or people

The ordinary and grammatical meaning of 'management' in the Oxford Dictionary refers to people managing a company which can be directors or senior management exercising their control in order to get a desired outcome from systems and people. Given the definition above, the concept PoEM refers to the specific place or location where positive and realistic management has been effectively exercised. Having looked at court cases and the ordinary and grammatical meaning of the concept PoEM, domestic guidance in the form of the Old IN6 and New IN6 has been published by SARS to determine the PoEM of a person from a South African perspective.

4.3 SARS Guidance on the interpretation of the PoEM

In order to determine the PoEM of a person it is important to establish the residence status of that person.²² The Old IN6 tried to achieve this objective by applying principles and guidelines.²³ The residency of a person is important and the Old IN6 begins with the definition of residence.²⁴

The first test is a formal factual test, 'incorporation, established or formed in the Republic'. The South African ITA does not define the term incorporation, established or formed.²⁵ Although there is no formal definition, if the person has been incorporated in SA then the person will be a resident in SA. A person is incorporated in SA if the person has followed the formal processes and procedures set out in the Companies Act.²⁶ If a person has been incorporated, formed or established outside of SA the residency of the person can change from time to time depending on where the PoEM of the person is.

The second test is determining the PoEM. The Old IN6 states that,²⁷

"The term "PoEM" is not defined in the Act and the ordinary meaning of the words, taking into account international precedent and interpretation, will assist in ascribing a meaning to it."

SARS in the Old IN6 makes it clear, in order to determine the meaning of PoEM a person must separate between,²⁸

²² As defined in section 1 of the Income Tax Act 58 of 1962.

²³ SARS Interpretation Note 6, Dated 26 March 2002.

²⁴ As defined in section 2.2, page 5 of this dissertation.

²⁵ *Ibid.*

²⁶ Companies Act 71 of 2008.

²⁷ SARS Interpretation Note 6 Dated 26 March 2002 at p2.

²⁸ SARS Interpretation Note 6 dated 26 March 2002 at p3.

- the place where central management and control is carried out by a board of directors;
- the place where executive directors or senior management execute and implement the policy and strategic decisions made by the board of directors and make and implement day-to-day/regular/operational management and business activities;
- the place where the day-to-day business activities are carried out/conducted.

SARS took a general approach in the Old IN6. The approach was sensitive towards the structure of each company as the management structure will be different from company to company depending on the requirements of the company. SARS' Old IN6 (section 3.2 to Old IN6) stated that, the PoEM is the place where the directors and senior managers of the entity manage the entity on a day-to-day basis. The place where the day-to-day decisions are made is also the place where the senior management and directors implement and execute the policy and strategy decisions made by the board of directors. It is safe to deduce from this that SARS' view in the Old IN6 of management does not include the place where the board of directors are seated when making policy and strategic decisions but rather the place where the operational implementation of the board of directors' policy and decisions take place.

In a Western Cape High Court decision, *The Oceanic Trust Co. Ltd N.O v C:SARS* more clarity was given to the meaning of PoEM.²⁹ The Oceanic Trust was a Mauritian registered and incorporated company which was the sole trustee of a trust in Mauritius ("SISM"). SISM was a reinsurer business to MCubed Life Ltd. SISM had assets invested in SA by the transfer of the premiums of the reinsurance policies to an asset manager incorporated in SA. On this basis SARS stated that SISM had a PoEM in SA. The following key factor was laid down by SISM namely,

- The Trust Company Oceanic Trust which was incorporated in Mauritius was the sole trustee and its management decision was made by this company in Mauritius.

SISM placed reliance on *HMRS v Smallwood*.³⁰ The following relevant key facts of the Smallwood case was highlighted by the High Court relating to the PoEM namely,

- The PoEM is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made;
- The PoEM will ordinarily be the place where the most senior group of persons (e.g. a board of directors) makes its decision, where the actions to be taken by the entity as a whole are determined;

²⁹ *The Oceanic Trust Co. Ltd N.O. v C:SARS* Western Cape High Court Case No. 22556/09 (13 June 2011).

³⁰ *Commissioner for Her Majesty's Revenue and Customs v Smallwood and Anor* [2010] EWCA Civ 778.

- No definite rule can be given and all relevant facts and circumstances must be considered to determine the PoEM of an entity; and
- Although there may be more than one place of management, there may only be one PoEM at any one time.

In order to factually establish the reliance placed on the Smallwood case SISM needed to provide supporting documentation to SARS to substantiate the fact that the management decisions were in substance made by the Oceanic Trust Company in Mauritius and not in SA. Due to the fact that SISM could not provide clear and relevant supporting documentation the High Court found that,

"...even if the facts are sufficiently clear to make a decision, the place where key management and commercial decisions that were necessary for the conduct of SISM's business, were in substance made, has in my view not been established to be outside South Africa. ... Therefore, applying the Smallwood test, the facts to the extent that they have been established, do not, in my view, establish that the PoEM of SISM was in Mauritius, and not in South Africa."

It can be deduced from this decision that the interpretation of PoEM by the courts corresponds to that of the OECD. In this case the High Court acknowledged that the PoEM of a person other than an individual is the place where key management and commercial decisions that are necessary for the conduct of a person's business are in substance made. The Smallwood case has also placed focus on the meaning of effective management of which primary focus was placed on the day-to-day management of a person. This Oceanic Trust Company case was welcomed by the industry as it brought more clarity and guidance to the concept PoEM.

4.4 Relevant facts and circumstances to determine the PoEM of an entity

Over the past few years the OECD has made a number of alternative proposals for a hierarchy test which is similar to the residency test applicable for individuals. There is unfortunately no hard and fast rule which can be applied to determine the place of effective management of a person. In this section the facts and circumstances provided by the Old IN6, which were applied on a case-by-case basis, will be considered. SARS cautioned taxpayers in the Old IN6 by stating that the list is not exhaustive or specific but it serves merely as a guideline.³¹ Section 3.4 of the Old IN6 provided the following facts and circumstances to be examined,

- ***Where the centre of top level management is located;***

³¹ South African Revenue Service Interpretation Note 6, 26 March 2002 at p.4.

In section 3.2 of the Old IN6, it stated that the PoEM is the place where the management of the company make day-to-day decisions. These decisions refer to operational decisions which must take place on a daily basis. Top level management are considered the senior management or directors of an entity. In terms of the interpretation note the facts and circumstances was only complimentary and would be given some weight in cases where other factors were inconclusive.

- **Location of and functions performed at the headquarters;**

The place where the functions are performed is the place where management executes its day-to-day operations. These day-to-day functions might not be executed at the headquarters, but at a branch in a different location. The practical application of the Old IN6 stated that the PoEM will be at the place where the day-to-day operational management or commercial decisions are actually implemented.

- **Where the business operations are actually conducted;**

Depending on the structure of the company it is not uncommon that business operations can take place at the headquarters of the group. It is also not uncommon for the headquarters to be located in a different place than the place where the business operations are actually conducted. If business operations are conducted in more than one city or state it becomes more cumbersome to determine the PoEM of a company. No specific guidance was given in the Old IN6, should business operations be conducted in more than one location.

- **Where controlling shareholders make key management and commercial decisions in relation to the company;**

It's important to understand what is meant by key management and commercial decisions. Key management is management which does not operate on mid-level management or operational level management, but are senior and top level management who have the authority and influence to make critical decisions in a company. Senior or top level management make decisions that has an effect and bearing on a company as a whole and not just a specific department or division of an entity. This fact and circumstance was classified as complimentary as SARS Old IN6 focused on where the day-to-day operational decisions are implemented and executed. This facts and circumstances must be looked at on a case-by-case basis as companies have different structures.

4.5 The Draft IN6 (Issue 2)

SA is Africa's largest economy and it is usually the "prime mover" for OECD activities supporting the objectives of the New Partnership for Africa's Development ('NEPAD'), especially in Southern Africa, on taxation, investment, competition policy and governance. As the OECD and SA deepen their coordination, South African policy makers gain access to OECD expertise and good policy practices. The OECD in turn benefits from exposure to South African policy perspectives, to enhance mutual learning.

The Draft IN6 was one indication that SA is following the policy practises and the guidelines of the OECD.³² The first Draft IN6 was issued on the 26 March 2002. Over the years this Draft IN6 has changed and it was closely aligned to the guidance given by the OECD. Part of the key factors which influenced the changes in the Draft IN6 was the feedback from the public but also key court cases which shaped the understanding and interpretation of the concept PoEM for persons. The court cases played a crucial role in helping to define the PoEM and also the key facts and circumstances which needed to be investigated and reviewed to determine the PoEM for a person other than an individual. The Draft IN6 was a more comprehensive document than the Old IN6.

4.6 The New IN6

Background

On the 3 November 2015 the New IN6 was released by SARS. In both the Old IN6 and the New IN6 the resident definition is important as this is key to establish the PoEM for a person.³³ In the Old IN6, mention is made of the concept managed and controlled whereas in the New IN6 no real mention of this concept is made. The purpose of the New IN6 is to provide clear guidelines to determine the PoEM of a person. The New IN6 makes it clear that the underlying principles can be applied to other entities such as a trust. This application of the principles in the New IN6 was also clearly stated in *Trevor Smallwood Trust v Revenue and Customs*.³⁴

The Law

Although it might not have been the intention of SARS to exclude the below 3 factors from the definition of residence in the Old IN6, one can deduce that the Old IN6 was poorly drafted.

³² Draft IN6 (Issue 2), Dated 26 March 2002.

³³ *Ibid.*

³⁴ *Trustees of The Trevor Smallwood Trust v HM Revenue and Customs* [2008] UKSPC 669.

The definition of residence in the New IN6 (section 3 to New IN6) is comprehensively drafted and includes the 3 factors below which were excluded from the Old IN6.³⁵

- persons who are deemed to be exclusively resident of another country and
- excludes a foreign investment entity such as a financial services entity defined in section 1 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) or
- an incidental service of a financial product that is exempted as contemplated in section 1(2) of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002).

Application of the law

Paragraph 24 of the Commentary on Article 4 of the OECD Model Tax Convention states that,³⁶

“As a result of these considerations, the “PoEM” has been adopted as the preference criterion for persons other than individuals. The PoEM is the place where key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the PoEM. An entity may have more than one place of management, but it can have only one PoEM at any one time.”

It is not uncommon for companies to have offices located across more than one country. With the advance in information systems business has become more seamless, but this has caused increased levels of complexity when it comes to determining the PoEM. The New IN6 takes potential complications into account when determining the PoEM, which involves the application of core principles. The principles outlined in the Old IN6 contains a general approach, practical application and relevant facts and circumstances. The New IN6 is more comprehensive and has an increased number of facts and circumstances to consider in determining the PoEM.

Key facts and circumstances

There is no set of definite rules that can be laid down in order to determine the PoEM. With the growth and expansion of technology used by companies one must take multiple factors and circumstances into consideration. The New IN6 provides a list of facts and circumstances a person must take into consideration. This list is not exhaustive, but it provides some key

³⁵ In determining whether a person that is a foreign investment entity has its place of effective management in the Republic, no regard must be had for the 3 factors.

³⁶ *Ibid.*

factors which must be considered in determining the PoEM of a company. The New IN6 states that the PoEM test is one of substance over form. The New IN6 looks at what and where the management of the entity exercise realistic positive management and where the key management and commercial decisions are being made in substance.

a) Head Office

The New IN6 states (section 4.2.1 to New IN6) that the head office is one of the places where senior management and the support staff are located. This is one of the major factors in the determination of the PoEM. The head office is often the place where the Chief Executive Officer and his senior team are located and where most of the meetings are held which affect the company as a whole. This is also the place where frequent key management and commercial decisions are being made which might in substance affect the company. Although it is predominantly still the practice, in some cases it does not mean the key management and commercial decisions are being made at the head office. These type of decisions can be made outside of the head office and therefore the New IN6 highlights that all facts and circumstances must be taken into account.

The New IN6 notes that the following apply in relation to the head office:³⁷

- *“A company’s head office is easy to determine when all the company’s senior management and their support staff are based in a single location and that location is held out to the public as the company’s principal place of business or headquarters.*
- *A company may be more decentralised. For example, various members of senior management may operate, from time to time, at offices located in the various countries where the company operates. In these situations, the company’s head office would be the location where those senior managers are primarily or predominantly based or where they normally return to following travel to other locations or meet when formulating or deciding key strategies and policies for the company as a whole.*
- *Members of senior management may operate from different locations on a more or less permanent basis. In these situations, the members may participate in meetings via telephone or video conferencing rather than by being physically present at meetings in a principal location. In these situations, the head office would normally be*

³⁷ Draft IN6 (Issue 2), p7.

the location, if any, where the highest level of management (for example, the Managing Director and Financial Director) and their direct support staff are located.

- *Finally, there may be some situations in which senior management is so decentralised that determining the company's head office with a reasonable degree of certainty is not possible. Consequently, in these situations, the location of a company's head office would be of less relevance in determining that company's PoEM".*

b) Delegation of authority

Depending on the structure of the company, it is not uncommon that an entity will delegate some of the responsibilities to a committee which consist of key members. In certain entities the board of directors formally approve decisions which are presented to them by these type of committees. In terms of the New IN6 (section 4.2.2 to New IN6) it is important to distinguish between where decisions have been approved by the board of directors and where key decisions have been made in substance. These type of committees develop and formulate key strategies and policies for the company for formal approval by the board of directors. These decisions made by the committees may affect the company as a whole and as the New IN6 looks at substance over form this is consistent with the OECD's Commentary on the PoEM.

c) Board

In certain companies where the board has its meetings, is key in determining the PoEM, but just having a board meeting is not enough to draw such a conclusion. In terms of the New IN6 (section 4.2.3 to New IN6), although the board regularly meets to make decisions it is important that the board exercise their authority to govern the company and in substance make key management and commercial decisions for the company as a whole. With the current technology available the board members often make use of technology (e.g. video conferencing) to conduct meetings in order to make key management and commercial decisions. The use of technology impacts the decision of where the PoEM is and is another factor which must be considered.

It is not always the case that the board meets to exercise its authority in making key management and commercial decisions. The meetings held can be unrelated to the activities of the entity or it can be a meeting where approval is granted for decisions which were made by a separate committee. One must take all of these factors into consideration. In terms of the Draft IN6 the roles of directors differ as some directors are involved in decision making and some directors are merely ratifying a decision which was made by other directors or people.

In *Laerstate v Commissioner for Her Majesty's Revenue & Customs*, the court was required to first, consider where the company was managed and controlled for United Kingdom tax purposes and, secondly consider where its PoEM was for tax treaty purposes.³⁸

The court was required to consider whether a director acted on another person's wishes or instruction without truly considering the merit of those wishes or instructions or whether the directors considered the wishes or the instructions but still made the decision while in possession of the minimum information required to make a decision. Some companies may have pre-meetings and in terms of the New IN6 a pre-meeting is exactly what it states. Depending on the reason for the pre-meeting, the circumstances surrounding the pre-meeting, where the pre-meeting takes place, what decisions are made in the pre-meeting and who participates will contribute to the facts in determining the PoEM.

d) Modernisation and global travel

In terms of the New IN6 (section 4.2.4 to New IN6) focus must not solely be placed on the location where board meetings take place as the surrounding facts and circumstances must be taken into consideration. The change in technology and information systems have affected the traditional way of having board meetings. It is not necessary for all board members to be in the same location in order to have a board meeting. The New IN6 highlights the importance of looking at the location where key management and commercial decisions are being made for the company as a whole. One needs to look at the type of decisions which are made and who of the board members have the overriding decision making powers. The use of round robin voting is also of importance.³⁹ In certain cases items of an exceptional nature arise and an urgent decision needs to be made. With modern technology the members involved in the round robin voting can be located in different places and this must be taken into consideration. The New IN6 also states that the frequency and type of decisions being made must also be considered.

e) Shareholders

Shareholders play an important role in an organisation. Company law and regulations reserve the making of important decisions for the shareholders of the company. These type of decisions can fundamentally change and alter the existence of the company and hence it can have an effect on the company as a whole. The New IN6 (section 4.2.5 to New IN6) states that decisions may include the sale of a substantial or all of the company's assets, the dissolution and liquidation or deregistration of the company, the modification of the rights

³⁸ *Laerstate v Commissioner for Her Majesty's Revenue & Customs* [2009] UKFTT 209 (TC).

³⁹ A resolution passed around for signature without the signatories gathering together in a meeting.

attaching to the various classes of shares or the issue of a new class of shares. Some of these decisions made by the shareholders of a company do not affect the business from a management or a commercial perspective as it affects the rights of the shareholders. Caution must be exercised as the involvement of shareholders can cross the line into effective management. In terms of the New IN6 shareholders can cross the line by assuming the power of the directors of the company.

This type of take-over can typically happen when the company is wholly owned by a single person or there are multiple shareholders and the shareholders are connected persons in relation to each other or acting in concert. The New IN6 notes that this is of particular concern in connection with passive holding companies located in low tax jurisdictions. The element of independence between the board of directors and the shareholders is important. A distinction must be drawn between shareholders guidance, influence or usurpation. Excessive influence from the shareholders may constitute effective management whereas influence which is not excessive does not constitute effective management.

For example, if the board considers what the shareholders have recommended and independently makes its own decision this would not constitute usurpation even if the decision made by the board is in line with the shareholders recommendation. What will need to be established is whether the board has independently made its own decision or if the board has merely implemented that which the shareholders have already decided for the company. There is a clear distinction between influence and merely approving the decisions which were made, looking at the facts and circumstances pertaining to that will be important. We can deduce from this section that excessive influence or usurpation of shareholders powers will probably be the exception rather than the norm.

In *Unit Construction v Bullock*, the UK parent company owned subsidiaries incorporated in East Africa and carried on trading activities there.⁴⁰ The managing director of the parent company concluded that 'the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of [the parent company] in London.' The board of directors of the parent company 'decided that ... they were forced to take over management and control', and the representative of the parent company in East Africa took over the functions of the local boards, which still existed but stood aside, and controlled the subsidiaries in accordance with the requirements of the parent. Much of that may have been irregular, or even unconstitutional, but it was what happened. It was held that the African

⁴⁰ *Unit Construction PTY (Ltd) v Bullock* [1960] AC 351, [1959] 3 AR ER 831, [1959] 3 WLR 1022, 38 TC 712, 38 ATC 351, [1959] TR 345, 52 R&IT 828.

subsidiaries had become resident in the United Kingdom. A company can become a resident in a territory even if it does not hold directors' meetings there.

Companies in certain circumstances receive guidance from the shareholders, but the guidance given by shareholders must be reviewed in detail in order to make sure that the shareholder is not making key decisions and that the company although receiving guidance from the shareholders is still making its own key decisions. In terms of the Draft IN6, shareholders sometimes limit the authority of the board and the senior managers of the company. It is not uncommon for a parent entity of a multinational group as in *Unit Construction v Bullock* to set guidelines and policies for the group as a whole in order to direct, coordinate and monitor activities of the group.⁴¹ This does not mean that the subsidiary companies do not have the leverage to make their own decisions, but all facts and circumstances must be taken into consideration. What is important to determine when it comes to multinational group companies is who makes in substance the company's key management and commercial decisions.

f) *Operational management versus broader top level management*

This particular key fact and circumstance takes a different direction from that in the Old IN6.⁴² In the Old IN6 much emphasis was placed on the day-to-day operation decisions which are made by management. In the New IN6 limited relevance is given to the day-to-day operational decisions. Key management and commercial decisions are concerned with and has to do with broader strategic policy decisions. These type of decisions are usually made by a senior management team. An example used in the New IN6 (section 4.2.6 to New IN6) to highlight the difference, is, a decision to open a major new manufacturing facility or to discontinue a major product line would constitute a key commercial decision effecting the company's business as a whole. A decision by the plant manager appointed by senior management to run the facility, concerning for example repairs and maintenance, the implementation of company-wide quality controls and human resource policies, would be examples of operational management.⁴³

In terms of the New IN6 it is critical to distinguish between the two as this can be important in establishing the PoEM. This needs to be done on a case by case basis as each company structure and the nature of each business is different. In one company the conclusion of each and every business contract will be a commercial decision whereas in another company the setting of standard pricing will be a key commercial decision, but not the conclusion of every

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Draft IN6 at p.11.

business contract.⁴⁴ In one company structure the person who makes the day to day operational decisions can also be responsible for key management and commercial decisions. It will therefore still be important to distinguish between the types of decisions and the location of where these decisions are being made in order to determine the PoEM.

g) Legal factors

In the definition of resident as described in section 2.2 of Chapter 2, it includes the company's place of incorporation, formation or establishment.⁴⁵ The New IN6 (section 4.2.7 to New IN6) notes that the place of incorporation, formation, establishment, registered office and location of its public officer are generally not relevant in the determination of a company's PoEM.

h) Economic Nexus

Although the company's economic nexus with a country is not that relevant in determining the PoEM, it is still important to note that if other factors to determine a company's PoEM is inconclusive then this factor will be given some weight.

i) Support functions

In multinational companies the support functions like information technology, human resources, finance, marketing and customer support just to name a few are normally centralised. Some companies centralise these types of support services where there are highly skilled workers with low cost and where there is an existing infrastructure. Some companies have these type of services at the headquarters or in a separate subsidiary company. These type of services are very important to a company and although it is important it is not uncommon that these type of services are managed by operational management rather than the senior management of a company. These services might not be operational from head office and therefore it's important to review in detail who makes the decisions, where the decisions are made and if the decisions made are key management and commercial decisions which will affect the company in substance as a whole.

The location where such support services are located is of little relevance in concluding the PoEM of a company. The New IN6 (section 4.2.9 to New IN6) concludes with a key statement being, that a company may have more than one place of management, but only one PoEM. Although multiple facts and circumstances must be considered as there is no definite rule to determine the PoEM, the Draft IN6 notes that the test for PoEM is one of substance over form.

⁴⁴ Draft IN6 at p.12.

⁴⁵ *Ibid.*

4.7 Defining the concept CMC in the domestic law of Mauritius

To determine the residency of a person under the Mauritian ITA, two facts must be looked at namely,

- Has the person been incorporated in Mauritius
- Is the CMC of the person in Mauritius

In section 2.2 of Chapter 2 of this dissertation it was stated that there are common factors in the definition of resident in the South African and Mauritian context. If a person followed the processes laid out by the Mauritian Companies Act to be incorporated in Mauritius, the person will be a Mauritius resident.⁴⁶ If the person has not been incorporated in Mauritius one must see if the person has its CMC in Mauritius. There is no formal definition of the concept CMC in the Mauritian ITA. The concept CMC is understood and interpreted differently by each country and thus there are differing views about the concept CMC. If no specific definition of the concept CMC in the Mauritian ITA exists, we must look at the grammatical and ordinary meaning of the concept central management and control.⁴⁷

According to the Oxford Dictionary the word 'central' is defined as,

- Accessible from a variety of places
- Of the greatest importance, principal or essential
- Having or denoting supreme power over a country or organization

The ordinary and grammatical meaning of the word 'central' is defined in this context as a principal or essential place. A place of great importance and this is the place where key decisions are made. It's a place where individuals exercise supreme power over an organisation by the decisions they make and the direction the organisation needs to move to. It can be said that central is the essential place where the most primary and predominant decisions are made.

The Oxford Dictionary defines 'management' as,⁴⁸

- The people managing a company or organization, regarded collectively
- The responsibility for and control of a company or organization
- The process of dealing with or controlling things or people

⁴⁶ Mauritius Companies Act No.15 of 2001.

⁴⁷ As noted in section 4.1 above.

⁴⁸ *Ibid.*

The word 'management' is very wide, it can denote shareholders, directors, senior management, middle management or lower management. On each level a certain amount of power and influence is used to make, control and execute decisions. These decisions can be operational decisions made by middle management or strategic decisions made by senior management and directors. The responsibility and control exercised by management will depend on the level of management and the structure of the company.

The Oxford Dictionary defines 'control' as,⁴⁹

- The power to influence or direct people's behaviour or the course of events
- A means of limiting or regulating something
- Maintain influence or authority over

Different levels of management can exercise different levels of 'control'. The word control speaks about the power which management in this context possess to influence decisions for future events within a company. The control exercised can also be regulated by the level of management, but the more key the decision to be made the higher the level of management and the higher the level of authority and influence. Each company structure has a different meaning, in one company the shareholder exercises complete control whereas in a multinational corporation different levels of management can exercise different levels of control. As stated in section 3.5 in this dissertation, a review will need to be done of who, when and where strategic decisions are made in respect of a person.

From the ordinary and grammatical definitions one can deduce that CMC is the principle place or place of great importance where management who has responsibility and control of a company influence decisions and behaviours in the company. No clear conclusion has been made of the similarities of the concepts CMC and PoEM. Some courts concluded that the two are completely independent and in other court cases it has been concluded that the two terms are similar. In *Laerstate v The Commissioner for Her Majesty's Revenue and Customs* [2009] UKFTT 2009 (TC), it was made clear that although the central management and control of a company is usually situated where the board of directors meet, this is not always the case. Control will be situated where the most important decisions are taken by a managing director or central management.

In the case of *Laerstate BC v Commissioners* the principle stated in *Wood v Holden*⁵⁰ that the concept PoEM was taken and it is similar to that of the concept CMC.⁵¹ It is clear that differing

⁴⁹ Hawkins Joyce, The Oxford Dictionary, 1991 at p.106.

⁵⁰ *Wood v Holden* [2006] EWCA Civ 26.

⁵¹ *Laerstate BC v Commissioners* [2009] [UKFIT] 2009 (TC).

views on the two tests still exist. The interpretation of effective management by SARS deviates from the interpretation adopted in the United Kingdom and the European Union. In *Trevor Smallwood and Mary Caroline Smallwood*, there was an argument in court as to the difference, in the context of a company, between CMC and PoEM.⁵² The Special Commissioner leaned toward the view that, although these two criteria's are used in different contexts, there is no essential difference between them. The Commissioners then referred to the OECD Commentary, and observed that currently the Commentary, in an amendment made in 2000, says:

"The PoEM is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made. The PoEM will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined ... We see no reason why this approach should not be adopted"

In order to resolve the differing views on the concept PoEM and CMC we must look at the domestic rules in SA. This does not mean that international interpretation rules will be irrelevant. Section 233 of the Constitution of the Republic of SA, 1996 states that, "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

The ordinary dictionary meaning of the concept PoEM and CMC form the start of the domestic interpretation. The international rules will also play a key role in the interpretation of the concepts as the domestic rules of interpretation from state to state will differ. If it is decided that the ordinary meaning of the concepts are clear then there will be no need to look at other international interpretative aids.

The tie-breaker rule

The residency status of a person in the case of dual residence must be determined on a case by case basis. The Mauritian ITA and South African ITA defines residency.⁵³ If a person has been incorporated in any of the two Contracting States then the person will be tax resident in that Contracting State. The person will then be liable for tax in the Contracting State where it has been incorporated. In addition to this if the person has been incorporated in one Contracting State and has its PoEM or CMC in the other Contracting State, the person will be subject to double taxation. In order to determine the PoEM or CMC of a person we refer to the

⁵² *Ibid.*

⁵³ *Ibid.*

New IN6 provided by SARS as set out in 4.6 above. If the conclusion of this assessment results in the person being subject to tax in both Contracting States we must refer to the tie-breaker rule as set out in the DTT between SA and Mauritius.

4.8 Memorandum of Understanding ('MOU')

In the DTT signed in 1996 section 4(3) states, "*Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its PoEM is situated.*" (Double Tax Treaty SA – Mauritius, GG18111, 1997).

In the DTT signed on the 17 March 2013 between SA and Mauritius the new section 4(3) states, "*Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the Competent Authorities of the Contracting States shall by mutual agreement endeavour to settle the question and determine the mode of application of the Agreement to such person. In the absence of such agreement such person shall be considered to be outside the scope of the Agreement except for the provisions of Article 25.*" (Double Tax Treaty SA – Mauritius, GG 38862, 2015).

The new tie-breaker rule provides that the Competent Authorities of the two contracting states will by mutual agreement endeavour to decide which country has taxing rights in the case of persons other than individuals. This significant change has multiple effects on persons other than individuals and this can lead to a person becoming subject to double taxation. In order to determine which country has taxing rights over a company the MOU between SA and Mauritius notes that the Competent Authorities shall take a few factors into consideration. In this section the few factors which must be taken into consideration will be reviewed and compared to the New IN6.

According to the MOU between SA and Mauritius the following factors must be taken into consideration namely,⁵⁴

- (a) Where the meetings of the person's board of directors or equivalent body are usually held;
- (b) Where the Chief Executive Officer and the other senior executives usually carry on their activities;
- (c) Where the senior day to day management of the person is carried on;
- (d) Where the person's headquarters are located;
- (e) Which country's laws govern the legal status of the person

⁵⁴ *Ibid.*

- (f) Where its accounting records are kept;
- (g) Any other factors listed in paragraph 24.1 of the OECD Commentary (Article 4, paragraph 3), as may be amended by the OECD/BEPS Action 6 final report; and
- (h) Any such factors that may be identified and agreed upon by the Competent Authorities in determining the residency of the person.

When taking the above factors into account the key objective is to determine where the key management and commercial decisions are made in substance which affects the company as a whole. Factors (a) to (h) of the MOU between SA and Mauritius outlined above are closely aligned to the New IN6 of SA with exception to one factor (f) above which is not aligned to the New IN6.

The Competent Authorities identified in the MOU to determine who has taxing rights are the Chief Officer: Legal and Policy, SARS duly representing the SARS and the Financial Secretary and the Ministry of Finance and Economic Development, duly representing the Mauritius Revenue Authority. One of the issues amongst others which still remains is the time it will take for the Competent Authorities to reach agreement. No time frame has been provided in the MOU meaning that the Competent Authorities can take months or years to come to an agreement. This leaves the company in a very difficult position as the company will now be subject to double taxation and pay tax in both South Africa and Mauritius and will have to wait until the Competent Authorities make a decision. In SA SARS has the pay now argue later principle. The Tax Administration Act No. 28 of 2011 requires taxpayers to first make payment to SARS on assessment and then to pursue their various remedies against SARS.

The Competent Authorities are not compelled to reach an agreement and resolve tax disputes. The Competent Authorities are only obliged to use their best endeavours to reach an agreement. On occasions Competent Authorities are unable to come to an agreement, due to restrictions imposed by the domestic laws of the countries.

4.9 The Mutual Agreement Procedure ('MAP')

SA does not have an international tax court in order to adjudicate any problems arising in one of the Contracting States. The taxpayer will therefore be able to make use of the avenue called the Mutual Agreement Procedure in order to adjudicate any problems. In section 3.6 of Chapter 3 in this dissertation the MAP process was discussed.

The Mutual Agreement Procedure is initiated through the taxpayer who requests the assistance of the Competent Authority. A person can refer to the SARS website to find the process which must be followed in order to notify the Competent Authorities. A detailed comparison and analysis of the MAP process between SARS and the OECD is beyond the

scope of this chapter. The detail to the process can be found on the SARS website.⁵⁵ An overview will be provided of the process SARS states to be followed by the taxpayer,

Step 1:

In cases where the taxation which is not in accordance with the DTT has been imposed, the taxpayer must first raise the issue with the relevant State as agreement by the other State will negate the need for a MAP. The detail to the below procedure is discussed in detail on the SARS website.⁵⁶

- Request for Correction
- Objections
- Appeals

Step 2:

If unsuccessful, the taxpayer may then approach the Competent Authority of his/her country of residence to request a MAP under the relevant DTT. If the Competent Authority in the country of residence cannot itself resolve the matter, but is in agreement with the taxpayer's request for a MAP, the Competent Authority will take up the matter with the Competent Authority of the other Contracting State/Party under the specific DTT. SARS, as the Competent Authority, requires certain minimum information to be included in a MAP Request, whether it is for a Double Taxation MAP, Transfer Pricing MAP Request or an Interpretation MAP Request. The detail to what the minimum information required is provided on the SARS website.⁵⁷

4.10 Conclusion

The New IN6 released is more comprehensive in comparison to the Old IN6. The key principle in determining the PoEM of a company is to determine where the key management and commercial decisions in substance for a company as a whole are made. The facts and circumstances test is more closely aligned to the OECD Model Tax Convention and its Commentary. The MOU still holds some challenges for persons who are faced with the dual residence conundrum. More attention and a specific timeframe will need to come from the OECD in which Competent Authorities must resolve disputes of taxpayers. The New IN6 is a big step in the right direction and now has brought more clarity to the concept PoEM.

⁵⁵ <http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTT-Protocols/Pages/Mutual-Agreement-Procedure.aspx>.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

Chapter 5: Case Study

5.1 Facts and circumstances of the case study

In this chapter a case study on a trust company will be performed. The primary focus of the case study will be to test how the New IN6 will work in practise. The case studies will not be extensive as an extensive application of all the facts and circumstances is beyond the scope of this dissertation. Some key facts and circumstances will be highlighted in the case study.

In March 2014 a wealthy South African business man held offshore assets in the form of listed shares and foreign currency offshore. He and his wife are currently in their early 50's and due to South African Reserve Exchange Control Regulations the husband and wife cannot transfer their offshore assets into their current South African *Inter vivos* trust. With Mauritius being a favourable tax regime the husband and wife decided to establish a Mauritius offshore trust whereby the husband is the settlor and the husband, wife and their 4 children are the discretionary beneficiaries of the offshore trust. The sole trustee of the trust is a Mauritius Trust Company and is resident in Mauritius. After the setting up of the trust in Mauritius the following events took place namely,

- 90% of the trust assets consisted of shares listed on foreign exchanges situated outside Mauritius and South Africa and other CMA countries.
- The portfolio manager who manages the listed shares is resident in SA.
- The portfolio manager has full discretion on the portfolio and gives instruction to buy and sell.
- The portfolio manager also has a long standing relationship with the settlor of the trust.
- During the 2015 year of assessment the settlor requested the trustees to make cash available to him from the portfolio after he has already instructed the portfolio manager to sell some listed shares which he informed them are earmarked for the purchase of a,
 - o Yacht, and
 - o cash for the purchase of personal goods for him and his wife,
 - o And cash to finance the business for certain projects,
- The investment manager realised the shares and paid the funds to the trustees notwithstanding that they did not receive any direction from the trustees to do so.
- Once the trustees received the cash proceeds in their bank account the trustees went ahead and distributed the funds to the settlor.

- The Trustees compile financial statements and have trustees' meetings at least once per annum.

5.2 Application of the new IN6

Mauritius

With reference to Chapter 2, if a company has been incorporated in Mauritius the trust company will be resident in that country. The trust company has been incorporated in Mauritius and therefore its residence will be in Mauritius. There will be no need at this stage to look at the second resident test, that is, to establish where the CMC of the trust company is being exercised.

South Africa

After establishing that the company is incorporated in Mauritius and not in SA, the second test from the domestic law of SA perspective will be applied. The second test will assess if the trust company's PoEM is situated in SA. In order to establish the PoEM of the trust company reference is made to the new IN6 as outlined in section 4.6 of Chapter 4. A checklist template has been created to assist in establishing the PoEM of the trust company.

Table 5.1

<u>Facts and Circumstances</u>		Yes / No
1	Head office	Yes
2	Delegation of authority	No
3	Board	Yes
4	Modernisation and global travel	No
5	Shareholders	Yes
6	Operational management versus broader top level management	No
7	Legal factors	Yes
8	Economic nexus	No
9	Support function	No

Head office

The head office of the company is situated in Mauritius. This is the place where the Mauritius Trust company is resident and the trustees of the trust have trustee meetings and make decisions.

Board

The board regularly meets in Mauritius where they make decisions. The location which is Mauritius is the place where the board exercises their authority and in substance make key management and commercial decisions.

Shareholders

Sanlam is the shareholder of the Mauritian Trust company. Although the board exercises their authority in Mauritius, it is known from the facts provided that the settlor still controls the assets which were placed in the trust company located in Mauritius. Instructions given by the settlor to the portfolio manager to make funds available for personal goods and for his business ventures reflects a degree of control the settlor has over the assets in the trust and equally that the trustees sanctioned such as an instruction without questioning the portfolio manager on whose instruction they realised the assets. This decision reflects that the settlor of the trust has made a decision in substance which effected the trust as a whole. Based on the facts the question asked is, whether the trustees are acting in their fiduciary capacity and thus managing the trust assets to the benefit of the beneficiaries.

The amount of control which the settlor exercised can be seen as the trust being the settlor's alter ego.⁵⁸ There is no doubt based on the facts provided that the settlor of the trust has placed the PoEM of the trust in SA. The settlor has crossed the line into that of effective management and from the facts it is clear that the trustees did not exercise effective control over the trust assets. The settlor has also exercised an undue amount of influence over the portfolio manager and the trustees of the trust company and the portfolio manager and trustees have merely implemented what the settlor has already decided.

Legal Factors

The legal status of the trust company has been established. The trust company has been incorporated in Mauritius and therefore resident in Mauritius.

⁵⁸ *Greune Vn Greune v Vaan Greune and Others* (57674/2012) [2013] ZAGPPHC 291 (14 October 2013).

5.3 Conclusion

In application of section 4.6 of chapter 4 we have established that the trust company has been incorporated in Mauritius. We determined that the trust company has its PoEM in SA as per section 4.3 of chapter 4 and relevant court decisions which reflect that the settlor of the trust acts as if the assets are his own. The tie-breaker rule in section 4(3) of the DTT between SA and Mauritius states that the Competent Authorities of the two Contracting States will endeavour to settle the question and determine who has taxing rights. According to the MOU between SA and Mauritius the factors as outlined in section 4.8 will be taken into consideration in determining who has taxing rights to the income of the trust. Thus in these situations the Competent Authorities have the final say and unfortunately there are no rules about having to reach a satisfactory outcome timeously.

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Chapter 6: Conclusion and recommendations

This final chapter will be an assimilation of the key facts and principles which were discussed in the previous chapters. It is important for industry to endeavour to understand what the consequences of the change in the new DTT between SA and Mauritius will be. The new DTT between SA and Mauritius has brought relief in the determination of the PoEM of a person, but it has also brought new challenges with the new tie-breaker rule.

In the old DTT between SA and Mauritius the residency of a person was determined by the PoEM of the person. Determining the PoEM under the Old IN6 was complex as the world of business and technology has advanced beyond what was envisaged in the interpretation note. Little guidance was provided in determining the PoEM under the old DTT between SA and Mauritius as well as the Old IN6. In addition the Old IN6 focused on where the day-to-day operations of a company took place rather than determining where key management and commercial decisions are made in substance. The Old IN6 was not in line with the guidelines provided by the OECD Model Tax Convention. With the signing of the new DTT between SA two things arose namely a New IN6 and the possibility of dual residence for a person.

The New IN6, as discussed in chapter 4 of this dissertation, is a more comprehensive guidance on how to determine the PoEM of a person. This New IN6, as noted in chapter 4, is more closely aligned with the OECD Model Tax Convention and its commentary. Although the New IN6 was welcomed by industry a challenge still exists. This challenge is the new tie-breaker rule in the DTT between SA and Mauritius. The new tie-breaker rule has caused concerns within the industry. According to an article written by Cliffe Dekker Hofmeyer, they state that, the treaty does not mention what principles will be applied by the two countries in coming to any such agreement. There is also no indication as to the administrative process involved in reaching such agreement and whether the company will be entitled to make representations. Should no agreement be reached between Mauritius and SA, the treaty will simply not apply, and the company, as a dual resident, will be subject to tax in both SA and Mauritius. Even though the company could potentially claim relief in terms of section 6 *quat* of the Act, it would probably end up paying more tax than it would have otherwise. Effectively, if the SARS believes that a Mauritian company is effectively managed in SA and therefore a resident in terms of domestic law, SARS will tax that company in SA, whether Mauritius agrees that the company is resident in SA or not.⁵⁹

In another article written by Moore Stephens for SAIT, the same concerns are raised.⁶⁰ The new DTT has the potential for a person being subject to double taxation. With the new DTT

⁵⁹ <https://www.saica.co.za/integritax/2013/2234. New Mauritian Treaty.htm>.

⁶⁰ <http://www.thesait.org.za/news/news.asp?id=142521>.

between SA and Mauritius a MOU was also signed between SA and Mauritius. The detail to the MOU as set out in chapter 4 of this dissertation contains certain factors which the Competent Authorities will be looking at when determining which of the Contracting States has taxing rights. If the two Contracting States do not come to an agreement the person will be subject to double taxation. No specific period in this regard has been prescribed for the Competent Authorities of the Contracting States to come to an agreement.

It is concluded from the above that the new DTT between SA and Mauritius can cause potential double taxation issues for a person. Reliance will be placed on relevant court cases in order to assist in determining the PoEM of a person. Although the New IN6 has been welcomed by the industry a lot of reliance will be placed on current court decisions and court cases in the future to more specifically identify the PoEM of a person in more complex situations. It will also be important for the OECD Model Tax Convention to recommend a potential time period for the Competent Authorities to reach a conclusion. There is no hard or fast rule to apply in determining the PoEM of a person but as mentioned by court decisions in chapter 4 and in the New IN6, establishing a PoEM of a person must be done on a case by case basis.

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