

THE INCORPORATION OF DOUBLE TAXATION AGREEMENTS INTO SOUTH AFRICAN DOMESTIC LAW

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SUMMARY

There are different opinions as to the process whereby double taxation agreements (DTAs) are incorporated into South African law. This contribution aims to discuss some of the existing opinions and to offer a further perspective on the matter. At the heart of the debate lies the interpretation of two provisions, namely section 231 of the *Constitution of the Republic of South Africa* and section 108 of the *Income Tax Act* and the interaction between the two. This contribution argues that South Africa's DTAs are not self-executing (a term referred to in section 231(4) of the *Constitution*) and should therefore be enacted into law by national legislation. It is furthermore argued that section 108(2) of the *Income Tax Act* enables a DTA to be incorporated into South African domestic law, by means of publication in the Government Gazette. An analysis of the case law supports this argument. Whether or not DTAs are regarded as self-executing, the status of a DTA in relation to the *Income Tax Act* still has to be determined. In other words, once the DTA forms part of South African domestic law, does it rank higher, lower or on a par with the *Income Tax Act*? It is submitted that the status of DTAs in South Africa is determined by the *Constitution*. It is furthermore submitted that South Africa's DTAs do not attain a status on the same level as the *Constitution* and that the *Constitution* allows for the possibility that South Africa's DTAs may be overridden by subsequent legislation (for example, by amendments to the *Income Tax Act*). Whether or not an override will take place in a specific case should, it is submitted, be determined by the application of the principles of statutory interpretation which apply in the case of conflict. Although this latter submission finds support in the minority judgement in *Glenister*, both the *AM Moolla* and *Tradehold* decisions express contrary views. The hope is expressed that the South African courts will provide clarity on this matter in due course.

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