

USE OF FOREIGN CASE LAW : SOUTH AFRICA

Dennis Davis Cape High Court

▶ **Background**
considerations the use of
Foreign Case Law in
South Africa – History –
The Constitution



▶ Prior to the Union of South Africa in 1910 the 1904 Cape Income tax Act was modelled on the 1895 New South Wales Act



▶ Income Tax in South Africa
was first introduced in 1914:
The Income Tax Act 28 of
1914 modelled on the New
South Wales Act of 1895
together with English
Legislation



EARLY BORROWINGS

- ▶ In *CIR v Stott* 1928 AD 252 dealing with the distinction in capital and revenue - early English authority is quoted:
- ▶ *Smith v Anderson* 15 ChD 247; *The Hudson Bay Company Ltd v Stevens* 5 TC 424
- ▶ In dealing with the concept 'in the production of income' in *Port Elizabeth Electric Tramway Company Ltd v CIR* 1936 CPD 241, much emphasis was played on *Usher's Wiltshire Brewery v Bruce* 1915 AC 433



TAX AVOIDANCE

- ▶ Fundamental propositions gleaned from *IRC v Duke of Westminster* [1936] AC 1 at 19
- ▶ See also *Newton and others v Commissioner of Taxation of the Commonwealth of Australia* (1958) 2 All ER 759



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- ▶ The other source for foreign law is that which is now enshrined in the Constitution of the Republic of South Africa 108 of 1996.
 - ▶ Section 39 (1), when interpreting the Bill of Rights a Court, Tribunal or Forum must consider international law and may consider foreign law.
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THE CONCEPT OF BENEFICIAL OWNERSHIP IN PLACE OF EFFECTIVE MANAGEMENT

- ▶ The term beneficial ownership is defined in the Income Tax Act in the context of the dividends tax provisions as the person entitled to the benefit of dividend attaching to a share.
- ▶ In terms of South African domestic law a non resident company which borrows funds, on lends such funds to a South African resident, and receives interest thereon receives the interest as a principle and not as agent. The lender qualifies as 'a beneficial owner' under South African law.
- ▶ In *CSARS v Tradehold* 74 SATC 263 the Court was required to deal with the concept of beneficial ownership as contained in double tax treaties. The Court confirmed that the meaning had to accord with South African domestic law.
- ▶ It borrowed extensively from *Prevost Car Inc. v Her Majesty the Queen* 2008 TCC 231 (Tax Court of Canada 2008)



THE CONCEPT OF PERMANENT ESTABLISHMENT

- ▶ Dealt with extensively in ITC 13276.
- ▶ Considerable reference by the Court to *The Queen v Dudley* (2000) DTC 6169



VAT

- ▶ Value Added Taxes are often subject to comparative examination
- ▶ See in particular *CSARS v De Beers Consolidated Mines* 2012 (5) SA 344 (SCA)
- ▶ The meaning of ‘purpose of making taxable supplies’ for purposes of VAT
- ▶ Crucial cases which were distinguished *FCT v The Swan Brewery Co Ltd* (1991) 22 ATR 295 (SCA)
- ▶ *BJ Services Company Canada v The Queen* 2003 (TCC) 900

