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Can a trust be regarded as a person for purposes of a double-taxation agreement to which South Africa is a party?

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Abstract

Like so many other entities, trusts often do not function only in one jurisdiction. They may be employed in international transactions, and therefore the trust runs the risk of international double taxation, as do the parties to the trust. South Africa has developed a law of trusts that is unique to this country. It therefore has to be determined how a court would interpret and apply the provisions of a double-taxation agreement, patterned on the OECD Model Tax Convention and to which South Africa is a party, to such a trust. This article explores whether a trust may be regarded as a person for purposes of such a double-taxation agreement. If a trust cannot show that it is a person in terms of the relevant double-taxation agreement, it will not be able to claim the benefits of the agreement. Although it is concluded that a trust will be regarded as a person from a South African perspective, recommendations are made which will put the matter beyond doubt.

I Introduction

Like so many other entities, trusts often do not function only in one jurisdiction. They may be employed in international transactions. Consequently, the trust runs the risk of international double taxation, as do the parties to the trust.

South Africa has developed a law of trusts that is unique to this country. It therefore has to be determined how a court would interpret and apply the provisions of a double-taxation agreement ('DTA'), patterned on the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital ('OECD MTC') [1] and to which South Africa is a party, to a trust governed by South African law. There are many challenges and uncertainties which should be addressed when examining this question. However, the only aspect this article aims to deal with is whether a trust may be regarded as a person for purposes of a DTA based on the OECD MTC.

In order to address this question, aspects relating to the definition, nature and some key features of a trust governed by South African law will be highlighted. Furthermore, relevant points regarding the current taxation regime applying to trusts will be outlined briefly. The major part of this article will, though, be devoted to a discussion of the provisions of the OECD MTC and the Commentary on it. Although it is concluded that a trust will, from a South African perspective, be a person for purposes of the

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OECD MTC, recommendations are made regarding the way in which this conclusion can be fortified.

II Brief comments regarding the definition, nature and some key features of a trust in South Africa

Numerous definitions of a trust exist. Cameron et al define a trust as 'a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purpose'. 2 The Trust Property Control Act 3 defines a trust as follows:

> ' "trust" means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed —
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> *(a)* to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
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> *(b)* to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,
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> but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No 66 of 1965).'

In *Land and Agricultural Bank of South Africa v Parker*, 4 Cameron JA described a trust as

> 'an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them — and it is only through the trustees, specified as in the trust instrument, that the trust can act.'

Some authors draw a distinction between trusts in the wide sense and trusts in the strict or narrow sense. A trust in the wide sense exists 'whenever someone is bound to hold or administer property on behalf of another or for some impersonal object and not for his or her own benefit'. 5 Curators of

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persons suffering from intellectual incapacity and agents are examples of trusts in the wide sense. By contrast, a trust in the narrow sense exists

> 'when the creator or founder of the trust has handed over or is bound to hand over to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object'. 6

The Income Tax Act 7 defines a trust as 'any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person'. 8

Clearly the definition of 'trust' in the Income Tax Act is much wider than any of the definitions offered in the sources on trust law cited above. 9 For the purposes of the Income Tax Act a 'trust' would include, for example, any trust fund administered by a person in a fiduciary capacity where such person was appointed by agreement. Thus, certain agency relationships would, for example, be covered by the definition of 'trust' in the Income Tax Act. These agency relationships may be regarded as trusts in the wide sense, but would not be regarded as trusts in the narrow sense. 10 It is submitted that a trust fund which falls within the definition of 'trust' in the Income Tax Act will be taxed as such, even though it will not be classified as a trust in the narrow sense for purposes of trust law. 11 This article will be limited to a discussion of whether

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trusts in the narrow sense may be regarded as 'persons' for purposes of the OECD MTC.

Regarding the nature of a trust, the majority of the court in *Crookes NO v Watson* held that an inter vivos trust is created by means of a stipulatio alteri. In other words, a contract is entered into between the trust founder (the stipulans) and the trustee (the promittens) for the benefit of the trust beneficiary (the third party). 13 The decision in *Crookes NO v Watson* was followed in *Hofer v Kevitt NO*. 14 Cameron et al make the point that an inter vivos trust is usually *created* by way of a contract that contains a stipulation in favour of the beneficiary, and that the creation and revocation of trusts are therefore regulated by the law of contract. However, trusts are not merely contracts. Other aspects regarding trusts, such as the fact that a trustee holds office, and the fiduciary relationship between the trustees and beneficiaries, are not covered by the law of contract. 15 According to Du Toit, a distinction must therefore be drawn between the creation of an inter vivos trust, which is governed by principles of contract law, and the trust itself, which is not necessarily itself a contract. 16 A testamentary trust is created in the will of the testator. South African courts have held that both testamentary and inter vivos trusts should be regarded as sui generis institutions. 17

No trust can exist without the founder handing over control of the trust property or having bound himself or herself to hand over control of the trust property. 18 In respect of the vast majority of trusts, the courts in South Africa have held that legal ownership of the trust property is in the hands of the

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trustees, who have no beneficial interest in the property. They are, however, bound to hold and apply the trust property for the benefit of a person (or persons) or for some other purpose. 19 The trustee is the owner of the trust assets and the beneficiaries merely have personal rights against the trustee. 20 A feature of trust law that was emphasised by the court in *Parker* is the importance of separating ownership (or control) and enjoyment. The court highlighted the principle that the trustees exercise control over the trust assets, not for their own benefit, but for the benefit of others, namely the beneficiaries.

An important aspect regarding trusts in South Africa is that a trust is not a juristic person and does not have juristic personality, except as provided for by statute. 22 There are, nevertheless, many instances where trusts are treated as juristic persons. 23 For example, for income-tax purposes a trust is treated as though it were a juristic person. 24

As the trustees are in a fiduciary relationship with the beneficiaries, they have a number of duties towards the beneficiaries. One of these duties is to give effect to the trust instrument. 25 The corollary for beneficiaries is a personal right against the trustees for the proper fulfilment of the terms of the trust instrument, which includes the right to claim income or capital due to the beneficiary in terms of the trust instrument. 26

In this regard, beneficiaries may have either vested or contingent rights. 27 A beneficiary is said to have a vested right if he or she has an unconditional personal right against the trustees for the delivery of income or capital to

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which he or she is entitled. 28 If a beneficiary has a vested right, this does not mean that the beneficiary owns the trust assets; 29 the trustees remain the owners of the assets. Nor does it necessarily mean that trust income or capital will immediately be distributed to the beneficiaries. Income could be accumulated or capitalised for the future enjoyment of beneficiaries, whilst already vesting in them. 30 A trust in which the beneficiaries have vested rights is known as a vested or vesting trust. 31 A discretionary trust, in contrast, is a trust in which the beneficiaries' rights are conditional and uncertain. The condition to which the beneficiaries' rights are subject, is the exercise by the trustees of their discretion. 32 In such a case, the trustees

typically have the discretion to determine not only which beneficiaries (if any) are to receive an amount from the trust, but also the amount of the distribution. 33

III Pertinent aspects relating to the taxation of trusts in South Africa

At this point, an overview of certain aspects relating to the taxation of trusts in South Africa has to be provided, since the way in which a trust (and the other parties involved in the trust relationship) is taxed, influences the

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question whether a trust should be regarded as a person for purposes of the DTA. 34

Once an entity has been brought within the ambit of the definition of a 'trust' in the Income Tax Act, it will be regarded as a person for purposes of the Income Tax Act 35 and will, consequently, be liable for tax in terms of this Act. 36 Generally speaking, like all other persons, trusts that are resident in South Africa are taxed on their worldwide receipts and accruals, while trusts that are non-residents are only taxed on income from South African sources. 37 Trusts (other than 'special trusts' 38 and trusts that fall under a specific tax regime 39) are taxed at a flat rate equal to the maximum tax rate for individuals.

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There are a number of persons 40 who could potentially be liable for tax on income derived by the trust, such as (a) the trust itself; (b) the beneficiaries; or (c) the person to whom income is deemed to have accrued. Only the first two possibilities are discussed in this article. 41

Section 25B of the Income Tax Act provides inter alia:

> 'Any amount received by or accrued to or in favour of any person during any year of assessment in his or her capacity as the trustee of a trust, shall, subject to the provisions of section 7, to the extent to which that amount has been derived for the immediate or future benefit of any ascertained beneficiary who has a vested right to that amount during that year, be deemed to be an amount which has accrued to that beneficiary, and to the extent to which that amount is not so derived, be deemed to be an amount which has accrued to that trust.' 42

The effect of this provision is that an amount that is received by or accrues to a trust, is deemed to have accrued to a beneficiary 43 if that beneficiary is ascertained, has a vested right to the income, and the amount has been derived for the benefit of that beneficiary. In such a case, the beneficiary is liable for tax on the relevant amount and the trust is not taxed on that amount at all.

Furthermore, an amount that is received by or accrues to a trust is taxed in the hands of the trust if there is no ascertained beneficiary for whose benefit the amount was derived, with a vested right to that income. In such a case, only the trust will be taxed and not the beneficiary.

In the case of a discretionary trust, the exercise by the trustee of his or her discretion in favour of the beneficiary will result in the beneficiary acquiring a vested right to an amount received by or accrued to a trustee during that year of assessment. 44 Therefore, if the trustee of a discretionary trust exercises his or her discretion in favour of a beneficiary during a particular year of assessment, the beneficiary will be regarded as having a vested right to the relevant income and will, consequently, be taxed on that income. The trust

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will, therefore, not be liable for tax in respect of the income distributed to such a beneficiary.

It should further be noted that it is the vesting of the amount in the hands of the beneficiary that results in its accrual to the beneficiary. 45 An amount is vested in a

beneficiary because of the terms of the trust deed (in the case of a vesting trust) or because of the exercise by the trustee of his or her discretion (in the case of a discretionary trust), typically by taking a resolution to distribute an amount to a specific beneficiary. Often, the exercise of the discretion (that is, vesting) takes place at the same time as (or just before) payment to the beneficiary. Payment of the amount to the beneficiary may, however, be delayed and in these circumstances the beneficiary will be regarded as having a vested right to the amount, even though it has not been paid to him or her. 46

Section 25B further regulates who may claim the allowable deductions associated with the relevant trust income. This aspect will not be addressed in detail. It suffices to say that its effect is that deductions are allocated between the trust and the beneficiaries in the same proportion as the income that has been allocated in terms of the section, subject to certain limitations. 47

IV The 'person' requirement in DTAs

Article 1 of the OECD MTC provides that '[t]his Convention shall apply to *persons* who are residents of one or both of the contracting states' (emphasis supplied). Consequently, only 'persons' may rely on the provisions of a DTA modelled on the OECD MTC. 48 Therefore, it is crucial to determine whether a trust is a person for purposes of the OECD MTC. 49 A country applying a DTA (patterned on the OECD MTC) would thus have to determine whether the trust with which it is confronted can be regarded as a person. In this article, it is assumed that South Africa is the source state applying the DTA 50 and, since the entity is a trust in the narrow sense, that

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each state characterises the other state's entity as a trust for domestic tax-law purposes. Hence, the position under South African law is discussed. 51

Very limited case law is available on the question whether a trust may be regarded as a person for purposes of a DTA. In South Africa, the court in *Oceanic Trust Co Ltd NO v Commissioner for the South African Revenue Service* was asked to issue a declaratory order that the trust was not a resident of South Africa and did not carry on trade through a permanent establishment in South Africa. Although the treaty between South Africa and Mauritius was referred to, the question whether the trust was a person under the treaty was never addressed. 53 In the absence of judicial guidance on this point, the provisions of the OECD MTC will be analysed, and the application of these provisions to the trust will be discussed from a South African perspective.

The OECD has provided limited guidance on the question whether a trust is a person for purposes of the OECD MTC. In its report regarding collective investment vehicles, the OECD states:

> 'Under the domestic tax law of most common law countries, the trust, or the trustees, acting collectively in their capacity as such, constitutes a taxpayer. Accordingly, failing to treat such a taxpayer as a person would also prevent it from being treated as a resident despite the fact that, as a policy matter, it seems logical to treat it as a resident when the country in which it is established treats it

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> as a taxpayer and a resident. The fact that the tax law of the country where the trust is established would treat it as a taxpayer would be indicative that the trust is a person for treaty purposes.' 54

The OECD does not provide any reason, based on the wording of the model, for its view. It only seems to suggest that policy and logic indicate that a trust, that is a taxpayer, should be treated as a person.

As part of its Base Erosion and Profit Shifting ('BEPS') project, the OECD drafted a report on hybrid mismatch arrangements. 55 In its final report, the OECD recommended that a new sub-article be included in art 1 of the OECD MTC. The recommended article reads as follows:

> 'For the purposes of this Convention, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.' 56

The proposed Commentary accompanying this recommended sub-article provides inter alia as follows:

> 'Also, the provision does not deal exhaustively with all treaty issues that may arise from the legal nature of certain entities and arrangements and may therefore need to be supplemented by other provisions to address such issues (such as a provision confirming that a trust may qualify as a resident of a Contracting State despite the fact that, under the trust law of many countries, a trust does not constitute a "person").'

Therefore, it is clear from the proposed Commentary that the suggested article will not address the question whether a trust will be regarded as a person for the purposes of a DTA patterned on the OECD MTC. Therefore, it is essential that the current wording (which will be retained as the first sub-article of art 1 in terms of the recommendation) be examined.

The term 'person' is defined as follows in the OECD MTC: 'The term "person" includes an individual, a company and any other body of persons.' 57 The OECD Commentary on this definition makes it clear that the definition of 'person' is not exhaustive and is used in a very wide sense. 58 In turn, the term 'company', which is used in the definition of the term 'person', is

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defined as follows: 'The term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes.' 59

According to the OECD Commentary, the tax laws of the country where the entity is organised should be used to determine whether the entity is treated as a body corporate. 60

If the above two definitions are read together, it is clear that a trust may qualify as a person if it is any one of the following:

(1) an individual;

(2) any other body of persons;

(3) a body corporate;

(4) any entity that is treated as a body corporate for tax purposes.

In addition, a trust may qualify as a person if it falls within the domestic law meaning of the term 'person'.

Regarding item (1) above: a trust is not regarded as an individual in terms of South African trust law or the Income Tax Act. 61 Furthermore, a trust is not a juristic person in terms of South African law and will therefore not qualify as a person in terms of item (3) above. A trust will therefore only be regarded as a person for purposes of the convention if it is:

(a) 'any other body of persons', as set out in the definition of the term 'person' (item (2) above);

(b) an 'entity that is treated as a body corporate for tax purposes', as set out in the definition of company, in the country where it is organised (item (4) above); or

(c) a 'person' in terms of the domestic law meaning of that term.

The meaning of each of these possibilities will be considered next. 62

(a) Any other body of persons

The words used in the definition of 'person' are 'any *other* body of persons' (emphasis supplied). Therefore, an entity which is either an individual or a company (as defined) cannot be a body of persons. Since the OECD MTC's definition of 'company' signifies any body corporate or any entity that is treated as a body corporate for tax purposes, the term 'any other body of persons' must surely exclude body corporates and entities

treated as body corporates for tax purposes. Therefore, an entity which is a juristic person or an entity treated as a juristic person for tax purposes, will not be a 'body of

persons'. As trusts do not have juristic personality in South Africa, they cannot be excluded on the ground that they are bodies of persons. The meaning of the term 'entity treated as a body corporate for tax purposes' is discussed below, but if a trust is regarded as such an entity, it will not be a body of persons.

The term [63] 'body of persons' is not defined in the OECD MTC. Thus, art 3(2) of the OECD MTC [64] becomes relevant. This provision states:

> 'As regards the application of the convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at the time under the law of that State for the purpose of the taxes to which the convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.'

Thus, 'unless the context otherwise requires', it is the laws of the relevant states that determine the meaning of the term 'body of persons'. The article suggests that not only the tax-law meaning of the term should be taken into account, but also any other domestic-law meaning(s) of the term. However, where different meanings are attached to a term, the meaning under the tax laws, to which the treaty applies, should, arguably, prevail. [65] A description of the meaning of the term 'body of persons' in South African domestic law is given below. Whether the 'context ... requires' that a meaning other than the domestic-law meaning is used, is discussed below.

In South Africa, the term 'body of persons' is not defined in the Income Tax Act, [66] but the term has been dealt with in numerous tax cases. For example, in *ITC 227* the court had to decide whether a club could be regarded as a separate taxable entity. At that stage the definition of the term 'person' in the relevant legislation included 'any *body of persons* corporated or unincorporated' (emphasis supplied). The court held the club to be a body of persons, stating that

> '[i]t consists of a number of persons partly described as proprietary and partly as non-proprietary members, associated together for certain purposes. These persons have common interests and act in common, asserting their voice by means of meetings and a majority vote of members, being represented for administrative purposes by the Stewards. In this respect they constitute an association, that is to say, a body of persons associated together for some common object or purpose. They accordingly fall within the definition of "person"... .' [68]

In *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* it was argued that the relevant association was not a taxable entity. The applicable income tax legislation contained no definition of the term 'person' but, in terms of the then applicable Interpretation Act 5 of 1910, a 'person' included, inter alia, 'any body of persons corporate or unincorporated'. The issue before the court was whether the relevant association was a body of persons unincorporated. In this regard the court held that a body of persons unincorporated means 'an association of persons which does not have a legal *persona* separate from its constituent members'. [70]

However, in *Commissioner for Inland Revenue v Friedman NNO* it was specifically held that a trust does not constitute a body of persons unincorporated whose common funds are the collective property of all its members, as referred to in the current Interpretation Act 33 of 1957. [72] Hence, a trust was not a person for purposes of the Income Tax Act. [73] Even though the word 'unincorporated' formed part of the term interpreted by the court (that is, 'body of persons unincorporated'), it is submitted that the addition of that word is not decisive. Thus it is clear that, for South African tax-law purposes, a trust is not a 'body of persons'. Hence, if South African law applies, a trust would not be regarded as a body of persons in terms of art 3(2) of the OECD MTC.

However, art 3(2) of the OECD MTC provides that if the context requires otherwise, South African law will not apply. Thus, the question that should be answered is whether the context requires otherwise. In determining this question, one should

establish what is meant by the term 'context'. Avery Jones has written extensively on this subject, concluding that there are two approaches to the meaning of context. The first is that

> 'one starts with the narrow meaning of context, essentially the internal context, which is used to interpret a treaty in conjunction with other factors, such as the object and purpose of the treaty, subsequent agreement and practice, supplementary

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> means of interpretation, and in some cases the text in the other official language.' 74

The second is that any type of material which can properly be described as context may be considered. Avery Jones et al concede that in practice there may be very little difference in the results of these approaches. 75

Other authors agree that the term 'context' should be given a wide interpretation and not be limited to the narrow definition of context in the Vienna Convention 76 (in other words, the text of the treaty, its preamble and annexes and agreements in connection with the treaty). 77

The OECD's Commentary provides as follows regarding the meaning of 'context':

> 'The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based).' 78

According to Avery Jones et al, the indications from the context must be reasonably strong for the domestic law meaning to be disregarded. 79 Sada Garibay is of the view that courts, internationally, will conclude that the context requires that a meaning other than the domestic-law meaning be used in the following circumstances:

(1) If the result of applying the domestic meaning would be contrary to the intention of the parties to the treaty. The intention of the parties may be established by referring to the treaty text, the opinion of an expert who participated in the treaty negotiation, extrinsic materials (without a clarification of the meaning of this term), travaux préparatoires, domestic law, the Commentary on the OECD Model, the non-inclusion of a specific alternative provision established in the Commentary and records relating to the discussions between the treaty parties, as well as the speeches of the relevant Ministers, the preamble to the DTA, press releases and even the interpretation of the treaty partner.

(2) If the literal meaning clashes with the object or purpose of the DTA.

(3) If the existing Commentary on the OECD Model contained a definition at the time that the DTA was signed and the parties did not provide differently.

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(4) If the treaty benefits would have been granted in abusive situations. 80

But what meaning should be attached to a term if the domestic law meaning is not used? 81 Some authors suggest that the ordinary or natural meaning 82 should be used, while others suggest that an international fiscal meaning should be applied. 83

In the United Kingdom, case law suggests that the ordinary meaning of the term 'body of persons' should be used in a case where the context requires that the domestic law meaning be disregarded. In *Padmore v Commissioners of Inland Revenue*, 84 the relevant DTA defined the term 'person' as including 'any body of persons, corporate or not corporate'. It was argued that, by virtue of a provision similar to art 3(2), the definition under United Kingdom tax law was applicable since the term 'body of persons' was undefined in the relevant treaty. The court held that the United Kingdom tax-law definition was not applicable, since the words 'corporate or not corporate' in the definition of 'person' would have been unnecessary if the intention was that the United Kingdom tax-law definition, which also contains these words, should apply. Furthermore, having assumed that a partnership (the entity in the case) was not covered by the definition in United Kingdom tax law, the court held that it was highly improbable that the intention was to exclude a partnership from the definition of 'person', since a partnership was a commonly used vehicle for commercial activity.

Applying the ordinary meaning of the term 'body of persons', the court held that a partnership was plainly a body of persons.

As the wording the OECD MTC uses in its definition of 'person' differs from the wording of the applicable treaty in *Padmore*, the first argument will not extend to DTAs patterned on the OECD MTC. 85 However, the second argument, namely that it was unlikely that the intention was to exclude a commonly used vehicle, would apply equally to trusts.

In terms of South African law, if an argument similar to the second one in *Padmore* was followed, one could argue that the domestic-law meaning of the term, as enunciated in the *Friedman* case (which states that a trust is not a body of persons), should be ignored. Consequently, the ordinary meaning of the term should be applied, since it is unlikely that the intention was to exclude a commonly used vehicle such as a trust. Given the nature of a trust, it is submitted that a South African trust will not, in the ordinary meaning of the term, be regarded as a body of persons. The nature of a trust is that it is a sui generis institution in which a trustee holds property for the benefit of another

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or for a specific purpose. It is submitted that such an institution cannot be described as a body of persons. 86 The trustees or the beneficiaries may arguably be a body of persons, but not the trust itself. 87

If an international fiscal meaning of the term 'body of persons' were to be applied, one would have to establish what that meaning is. As Vogel points out, 88 this is a difficult task, and it is with some hesitance that an interpretation is offered below. The term 'body of persons' was first used in the OECD MTC in its 1963 draft, although it was used earlier in some treaties entered into by the United Kingdom. 89 It is not suggested, however, that the term, as it was used the United Kingdom at the time, was incorporated in the OECD MTC. 90

In its deliberations regarding the amendment of the definition of 'person', Working Party 14 of the Fiscal Committee considered that the term 'body of persons' includes:

> '(1) bodies of persons which are not treated as taxable units under the tax laws of any of the contracting states;
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> (2) bodies of persons which are taxable units under the tax laws of any of the contracting states and treated in exactly the same way as juristic persons; and
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> (3) bodies of persons which are taxable units under the tax laws of any of the contracting states, but are not treated in the same way as juristic persons.' 91

The Working Party considered it advisable that the term should include all three of the categories set out above, stating that countries were free in bilateral negotiations to eliminate problems arising from the differences in their tax systems due to the broad definition of 'person', and to exclude entities if they thought it desirable. 92 Thus it may be deduced that the OECD MTC includes all three of the categories listed above in the term 'body of persons'. 93

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However, bearing in mind that the wording of the definition is 'any *other* body of persons' (emphasis supplied), the point raised earlier should be considered, namely that if an entity is an individual or a company (including an entity that is treated as a body corporate for tax purposes), it will not be regarded as a body of persons for purposes of the treaty. Therefore, it is necessary to determine the meaning of the phrase 'entity that is treated as a body corporate for tax purposes'. This will be done in the next paragraph. The view taken there is that the phrase 'entity that is treated as a body corporate for tax purposes' refers only to category (2) above, namely taxable units under the tax laws of any of the contracting states and treated in exactly the same way as juristic persons. Consequently, it is submitted that an international fiscal meaning of 'body of persons' denotes only categories (1) and (3) listed above.

In South African tax law, trusts are, at least sometimes, treated as taxable units — that is, the trust itself is taxed on the relevant income (but not in the same way as juristic persons) and could therefore, potentially, fall within category (3). Even if trusts were treated as transparent (which they are when only the beneficiary and not the trust is taxed on the income), trusts could fall within category (1) above. If the suggested international fiscal meaning of 'body of persons' were used, a trust may potentially qualify as such. However, categories (1) and (3) still refer to 'bodies of persons', and one would therefore have to overcome the argument made above that a trust is not a 'body of persons' within the ordinary meaning of that term. All in all, it cannot confidently be argued that a trust is a person because it falls within the international fiscal meaning of the term, nor can an international fiscal meaning confidently be put forward or it confidently be argued that a trust is indeed covered by that meaning.

(b) Entity that is treated as a body corporate for tax purposes

The OECD's Commentary on the meaning of the phrase 'entity that is treated as a body corporate for tax purposes' is not very illuminating. It merely states that '[i]n addition the term covers any other taxable unit that is treated as a body corporate according to the tax laws of the Contracting State in which it is organised'. 94 What the Commentary does add, is that the tax laws of the contracting state in which the taxable unit is organised should be applied to determine whether the entity is treated as a body corporate. Avery Jones et al criticise the wording of the Commentary, saying that the state in which the entity is organised should be irrelevant and that the tax laws of the state in which the entity is resident should rather be used to determine whether it is treated as a body corporate. These authors call for an amendment of the Commentary to the effect that the tax laws of the

residence state of the taxable unit should be used to determine whether it is treated as a body corporate. 95

Avery Jones et al further state that only entities that are treated like juristic persons under the tax laws of any of the contracting states (that is, category (2) of Working Party 14's list of entities included as a body of persons) are included in the phrase 'entity that is treated as a body corporate for tax purposes'. In other words, entities which are not treated as taxable units and entities which are treated as taxable units but are not treated in the same way as juristic persons under the tax laws of any of the contracting states (that is categories (1) and (3) of Working Party 14's list of entities included as bodies of persons), are not to be regarded as entities that are treated as bodies corporate for tax purposes. 96

In terms of South African tax law, trusts are, generally speaking, taxed in terms of a special tax regime set out in s 25B of the Income Tax Act. Furthermore, trusts are taxed at a rate which differs from that of companies. 97 A trust is therefore not subject to the same tax regime as a juristic person, and will therefore not be regarded as an 'entity that is treated as a body corporate for tax purposes' in terms of South African tax laws.

(c) Domestic-law meaning of the term 'person'

The OECD's Commentary on the definition of 'person' states inter alia: 'The definition of the term "person" ... is not exhaustive and should be read as indicating that the term "person" is used in a very wide sense (especially arts 1 and 4).' 98 In addition, the definition of the term 'person' uses the word 'includes', and not 'means'. Avery Jones argues that this wording suggests a partial definition of the term 'person'. Hence, domestic law should be applied to give meaning to the term (subject to the context requiring otherwise), but the words of inclusion contained in art 3(1) should apply in addition to the domestic-law meaning, even if the latter does not include the words of inclusion. 99 Therefore, '[w]hen a treaty partially defines a term by saying that it "includes" certain things, art 3(2) can still be applied to complete the definition of the term'. 100

In South Africa, and directly as a result of the *Friedman* case, 101 which had held that a trust was not a person for income-tax purposes and therefore was not taxable, the definition of the term 'person' in the Income Tax Act was

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amended, and now includes a trust. 102 Hence, a trust is a person for domestic income-tax purposes. Using this domestic-law definition to complete the treaty definition of the term 'person', as suggested by Avery Jones, it is submitted that a trust will be regarded as a person for treaty purposes. 103

It may therefore be concluded that if the Income Tax Act did not define a trust as a person for South African domestic tax purposes, a trust would not have been regarded as a person in terms of the OECD MTC. 104

V Conclusion

By analysing the relevant definitions of the OECD MTC, five alternative criteria were identified by which a trust could qualify as a person for purposes of the treaty. These five criteria are that a trust could:

(1) be regarded as an individual;

(2) be regarded as any other body of persons;

(3) be regarded as a body corporate;

(4) be regarded as any entity that is treated as a body corporate for tax purposes; or

(5) fall within the domestic law meaning of the term 'person'.

From a South African perspective, a trust is neither an individual nor a juristic person. The term 'body of persons' is not defined in the OECD MTC. Above, it was concluded that, based on case law, a trust would not be regarded as a body of persons if the South African tax-law meaning of the term was applied via art 3(2) of the OECD MTC. Consequently, it could be argued that the context requires that the South African domestic law meaning of the term 'body of persons' be disregarded. It is submitted that if the ordinary meaning of the term 'body of persons' is used, a trust will not be regarded as a body of persons. An international fiscal meaning of 'body of persons' might conceivably be used and a trust might possibly fall within the suggested international fiscal meaning of the term. However, due to the uncertainties involved in suggesting an international fiscal meaning and arguing that a trust falls within this meaning, this route cannot be embarked upon with much confidence.

In South Africa, a trust is not subject to the same tax regime as a juristic person. Therefore, it will not be regarded as an entity that is treated as a body corporate for tax purposes in terms of South African tax laws. However, in terms of the domestic-law meaning of the term 'person', a trust will be regarded as a person for purposes of the treaty.

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Consequently, it is submitted that a court will regard a trust as a person for purposes of a DTA. To place the matter beyond doubt, it may be advisable for South Africa specifically to include a trust in the definition of 'person' in the treaties concluded with other countries. In this regard, Canada may serve as a useful example for South Africa. The Canadian Income Tax Act provides that a trust will be deemed to be an individual (barring certain exceptions). 105 Therefore, although a trust is not a person under Canadian common law it is an individual, and therefore a person, in terms of the Canadian Income Tax Act. 106 The term 'individual' is not defined in the OECD MTC. Therefore, art 3(2) of the OECD MTC applies. Generally speaking, this article provides that when a country (Canada, in this case) applies a treaty based on the OECD MTC and a term is not defined in the treaty, the term shall, unless the context requires otherwise, have the Canadian tax-law meaning attached to it. Hence, a trust will (unless the context requires otherwise) be regarded as a person for treaty purposes in Canada. 107 Despite this analysis, Canada generally provides in its treaties that a trust

falls within the definition of 'person'. 108 It is submitted that South Africa should consider following suit by including a trust in its definition of 'person' in DTAs. Such an inclusion would guarantee that a trust will be regarded as a person for purposes of a DTA to which South Africa is a party.

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1 This article is based on the 2014 version of the OECD MTC.

2 Edwin Cameron, Marius de Waal, Basil Wunsh, Peter Solomon & Ellison Kahn *Honoré's South African Law of Trusts* 5 ed (2002) 1. For a discussion of a number of these definitions, see Jacob Petrus Coetzee *'n Kritiese Ondersoek na die Aard en Inhoud van Trustbegunstigdes se Regte ingevolge die Suid-Afrikaanse Reg* (LLD thesis, UNISA, 2006) 127–35.

3 Section 1 of the Trust Property Control Act 57 of 1988.

4 2005 (2) SA 77 (SCA) para 10.

5 Cameron et al op cit note 2 at 4.

6 Ibid.

7 Act 58 of 1962.

8 Section 1. This section also contains a definition of the term 'company'. Some offshore trusts, e g certain collective investment vehicles or charitable trusts, may qualify as companies (as defined). Since these types of trusts fall outside the scope of this article, this point will not be addressed any further. If an offshore trust is a juristic person, it may also qualify as a company (as defined).

9 For a discussion of the interpretational difficulties associated with the definition in the Income Tax Act, see I du Plessis 'The residence of a trust for South African income tax purposes' (2009) 21 *SA Merc LJ* 322 at 324. Furthermore, De Koker & Williams note that the Income Tax Act's definition does not refer to trusts created by statute or court order: A P de Koker & R C Williams *Silke on South African Income Tax* (2015, revision service 54) para 12.18.

10 Cameron et al op cit note 2 at 3.

11 Having reached this conclusion, the question arises how offshore trusts will be treated. In other words, certain offshore trusts will not be regarded as 'trusts' for trust-law purposes in South Africa, but they will constitute trusts for purposes of the Income Tax Act. Will they be taxed as trusts? A further question that is linked to the first is whether a trust, recognised as such under the trust law of the relevant country, will be regarded as a trust in South Africa for tax purposes simply because it is a trust in the other relevant country. It is submitted that the answer in all cases will depend on whether the specific entity meets the criteria of the definition in the Income Tax Act. Even if an entity may be classified as a trust in a certain country, the answer to the question whether it will be taxed as a trust in South Africa will depend on whether it falls within the definition set out in the Income Tax Act. Furthermore, an offshore entity which may not be regarded as a trust for the purposes of South African trust law but falls within the definition of 'trust' in the Income Tax Act, will be taxed as a trust. Support for this view may be found in Michael Honiball & Lynette Olivier *The Taxation of Trusts in South Africa* (2009) 65. Jooste questions whether offshore trusts, which do not have any beneficiaries (but have a particular purpose set out in the trust instrument — a purpose that may bear little resemblance to its true purpose) will qualify as a trust in terms of the definition, as it is not clear whether the trustees of such a trust have fiduciary duties, which is an essential requirement for a trust in terms of the definition in the Income Tax Act: R D Jooste 'Off-shore trusts and foreign income — The specific anti-avoidance provisions' 2002 *Acta Juridica* 186 at 205–6. It is further submitted that a court would consider the trust law of the offshore jurisdiction in order to determine the rights and obligations between the parties and thereafter determine whether these rights fall within the definition of 'trust' in the Income Tax Act: see *Commissioner for Inland Revenue v Estate Greenacre* 1936 NPD 225.

12 1956 (1) SA 277 (A). See also Coetzee op cit note 2 at 99–112 for a discussion of this case.

13 Francois du Toit *South African Trust Law: Principles and Practice* 2 ed (2007) 18.

14 1998 (1) SA 382 (SCA); see too *Potgieter v Potgieter*2012 (1) SA 637 (SCA).

15 Cameron et al op cit note 2 at 35; Du Toit op cit note 13 at 19. For a contrary view, see Coetzee op cit note 2 at 113.

16 Du Toit op cit note 13 at 19.

17 *Braun v Blann & Botha NNO*1984 (2) SA 850 (A) at 859; *Mariola v Kaye-Eddie NO*1995 (2) SA 728 (W) at 731; *Rosner v Lydia Swanepoel Trust*1998 (2) SA 123 (W) at 126; *Cupido v Kings Lodge Hotel*1999 (4) SA 257 (E) at 263; *Scania South Africa (Pty) Ltd v Smit*2003 (1) SA 457 (T) at 464; *Desai-Chilwan NO v Ross*2003 (2) SA 644 (C) at 647; *Badenhorst v Badenhorst*2006 (2) SA 255 (SCA) para 8*; WT v KT* 2015 (3) SA (SCA) para 26.

18 Du Toit op cit note 13 at 9.

19 *Estate Kemp v MacDonald's Trustee* 1915 AD 491 at 508; *Braun v Blann & Botha NNO* supra note 17 at 859. In South African law, it is also possible for a founder to transfer ownership of trust property directly to the beneficiary: see para *(b)* of the definition of 'trust' in s 1 of the Trust Property Control Act. The trustee will then simply administer the property for the benefit of the beneficiary. The trustee therefore controls the trust property which the beneficiary owns: Du Toit op cit note 13 at 4. Such a trust is known as a 'bewind' trust and is rarely used in practice: Cameron et al op cit note 2 at 9; M de Waal 'Uniformity of ownership, numerus clausus and the reception of the trust into South

African law' in J Milo & J Smits (eds) *Trusts in Mixed Legal Systems* (2001) 77; Du Toit op cit note 13 at 4. For this reason a discussion of the 'bewind' trust falls outside the scope of this article.

20 Honiball & Olivier op cit note 11 at 23.

21 *Land and Agricultural Bank of South Africa v Parker* supra note 4 para 19.

22 *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A); *Commissioner for Inland Revenue v Friedman NNO*1993 (1) SA 353 (A); *Land and Agricultural Bank of South Africa v Parker* supra note 4; *Thorpe v Trittenwein*2007 (2) SA 172 (SCA). Judgments to the contrary, e g *Knoop NNO v Birkenstock Properties (Pty) Ltd* [2009] ZAFSHC 67, are clearly wrong and should be rejected.

23 Cameron et al op cit note 2 at 10; Du Toit op cit note 13 at 25; M J de Waal 'Anomalieë in die Suid-Afrikaanse trustreg' (1993) 56 *THRHR* 1 at 8.

24 Definition of 'person' in s 1 of the Income Tax Act.

25 *Land and Agricultural Bank of South Africa v Parker* supra note 4 para 3; Cameron et al op cit note 2 at 262.

26 Cameron et al op cit note 2 at 558.

27 Ibid at 556.

28 The phrase 'vested right' has more than one meaning. In *Jewish Colonial Trust v Estate Nathan* 1940 AD 163 at 175, Watermeyer JA explained the different meanings as follows: 'When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right — that he has all rights of ownership in such right including the right of enjoyment. ... But the word is also used in another sense, to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right.' In *Estate Dempers v Secretary for Inland Revenue*1977 (3) SA 410 (A), the court was called upon to decide whether a provision which was similar to the current s 7(5) of the Income Tax Act applied only in cases where beneficiaries had vested rights. The court referred (at 425) to the latter meaning attached to the phrase in the *Jewish Colonial Trust* case, i e that a vested right is a certain, unconditional and immediately acquired right, which is contrasted to a contingent right which is conditional and uncertain. See also B A van der Merwe 'Meaning and relevance of the phrase "vested right" for income tax' (2000) 12 *SA Merc LJ* 319 at 319 and Annet Wanyana Oguttu *Curbing Offshore Tax Avoidance: The Case of South African Companies and Trusts* (LLD thesis, University of South Africa, 2007) 317.

29 Cameron et al op cit note 2 at 557; L Olivier & M Honiball *International Tax: A South African Perspective* 5 ed (2011) 119.

30 Olivier & Honiball op cit note 29 at 119; Unknown author 'The taxation of trust income: S 25B of the Income Tax Act' (1992) 41 *The Taxpayer* 228 at 228.

31 Some writers prefer the term 'vesting trust' (e g D Clegg & R Stretch *Income Tax in South Africa* (2015) para 5A.7.3.1), while others prefer 'vested trust' (e g D Davis et al *Juta's Commentary on Income Tax* (2015) Commentary on s 25B). Some writers seem to use the terms interchangeably (e g L Olivier 'The treatment of trusts for income and capital gains tax purposes: The screws tighten' 2002 *TSAR* 220 at 222). It is submitted that the two terms are indeed interchangeable.

32 There could, of course, be situations in which there is no discretionary trust, but beneficiaries' rights are conditional, i e where some other condition is imposed.

33 Cameron et al op cit note 2 at 348. See also Oguttu op cit note 28 at 317–19.

34 This article is based on the Income Tax Act as it stood on 29 February 2016 and is limited to a discussion of income tax only. Although capital gains are also included in a taxpayer's taxable income, the provisions of the Eighth Schedule to the Income Tax Act will not be discussed. The manner in which trusts are taxed has been under scrutiny for some time. During his 2013 budget speech, the South African Minister of Finance announced that the taxation of trusts would be reviewed in order to control abuse: Minister of Finance '2013 budget speech' available at *http://www.treasury.gov.za/documents/national%20 budget/2013/speech/speech.pdf*, accessed on 8 February 2017. Although the Budget Review documentation provided some clues as to what the reforms might entail (Minister of Finance 'Budget review 2013', available at *http://www.treasury.gov.za/documents/national%20budget/2013/review/chapter%204.pdf*, accessed on 8 February 2017), it was clear that the review process was still in its early stages and that the reforms were still being shaped. In the 2013 budget speech, the Minister of Finance also announced that the South African tax policy framework would be reviewed. A committee under the chairmanship of Judge Dennis Davis was formed to conduct the review process. In July 2015, the Davis Tax Committee released its First Interim Report on Estate Duty. This report recommends a number of amendments to the way in which trusts will be taxed: Davis Tax Committee *First Interim Report on Estate Duty* (2015), available at *http://www.taxcom.org.za/docs/20150723%20DTC%20First%20Interim%20Report%20on%20Estate%20Duty%20-%20For%20public%20comment%20by%2030%20September%202015.pdf*, accessed on 20 February 2017. The 2016 budget again indicated that certain aspects regarding the taxation of trusts would be considered: Minister of Finance '2016 budget speech' available at *http://www.treasury.gov.za/documents/national%20budget/2016/speech/speech.pdf*, accessed on 20 February 2017. In its final report regarding trusts and estate duty, the Davis Tax Committee again recommended a number of changes regarding the taxation of trusts: Davis Tax Committee *Second Interim Report on Estate Duty* (2016), available at *http://www.taxcom.org.za/docs/20160428%20DTC%20Second%20and%20Final%20Report%20on%20Estate%20Duty.pdf*, accessed on 20 February 2017.

35 See the definition of 'person' in s 1 of the Income Tax Act.

36 Section 5(1)*(c)* of the Income Tax Act. Article 1 of a DTA patterned on the OECD MTC requires a taxpayer to be not only a person, but also a resident of at least one of the states. A person will only be a 'resident' in accordance with art 4(1) of such a DTA if it is, inter alia, liable for tax in the relevant state by reason of certain criteria. This article will not address the question whether a trust meets the residence criteria in the applicable DTA.

37 See definition of 'gross income' in s 1 of the Income Tax Act.

38 A special trust is defined in s 1 of the Income Tax Act. This type of trust falls outside the scope of this article.

39 For example, the regime for 'personal service providers' or collective investment vehicles. These specific regimes fall outside the scope of this article.

40 A further possibility exists, namely that the trustee (as representative taxpayer) may be held personally liable for taxes due by the trust. However, this possibility will only arise if the taxes are in arrears and the trustee takes certain further actions: s 155 of the Tax Administration Act 28 of 2011. This possibility will not be further examined in this article.

41 The provisions of s 25B are made subject to s 7 of the Income Tax Act, which deems income, under certain circumstances, to be that of a person other than the trust or the beneficiary. The provisions of s 7 are not discussed in this article, since the attribution of income to a person other than the trust or beneficiary will not influence whether a trust is a person.

42 Section 25B(1) of the Income Tax Act.

43 The Income Tax Act defines a beneficiary as 'a person who has a vested or contingent interest in all or a portion of the receipts or accruals or the assets of that trust'. Clearly, both vested and discretionary beneficiaries are covered by the definition. Furthermore, it is irrelevant whether the person is a South African resident or not.

44 Section 25B(2) of the Income Tax Act.

45 De Koker & Williams op cit note 9 para 12.21.

46 De Koker & Williams ibid; D M Davis, C Beneke & R Jooste *Estate Planning* (2013) para 6.2; Davis et al op cit note 31, commentary on s 25B(1).

47 De Koker & Williams ibid.

48 P Baker *Double Taxation Conventions: A Manual on the OECD Model Tax Convention on Income and on Capital* 3 ed (2002) para 1B.01.

49 Of course a person also has to be a resident to qualify for relief in terms of the treaty. As stated above, the question of residence of a trust is not considered in this article.

50 Taken from the viewpoint of the source state, when applying the treaty, it will have to decide whether the trust that is resident in the other state (the residence state) is a person. The source state must therefore decide whether it may impose its taxes in full or at the reduced treaty rate, or refrain from taxing the specific income. If the source state may impose its taxes (either in full or at a reduced rate), the residence state must provide appropriate relief, either by exempting the income or granting a credit. From the residence state's perspective, it will apply the treaty in deciding whether or not to grant the appropriate relief for the taxes paid in the source state and for this purpose it will decide whether or not the trust is a person entitled to relief: A Easson 'Entity entitlement to treaty benefits: A conceptual approach to some practical problems' in B Arnold & J Sasseville (eds) *Special Seminar on Canadian Tax Treaties: Policy and Practice: Text of Seminar Articles* (2001) 12.8–12.10. Even though it is assumed in this article that South Africa is the source state, the trust may still be governed by South African law, e g where the trust is established in South Africa and governed by South African law, but is regarded as a resident of the other state because its place of effective management is in the other state (bearing in mind the provisions of art 4(3) of the OECD MTC and the definition of 'resident' in s 1 of the Income Tax Act).

51 Article 23 of the OECD MTC provides that where a resident of one state derives items of income which, in accordance with the provisions of the DTA, may be taxed in the source state, the residence state shall exempt the relevant income or provide an appropriate credit for the taxes paid in the source state. In terms of the Commentary on art 23, the residence state is, generally speaking, obliged to follow the source state's classification of the income: Commentary on art 23 of the OECD MTC para 32.3. It is assumed for purposes of this article that art 23 applies to the relevant income. For a more detailed discussion on classification of the trust, see I du Plessis *A South African Perspective on Some Critical Issues regarding the OECD Model Tax Convention on Income and on Capital, with Special Emphasis on its Application to Trusts* (LLD thesis, Stellenbosch University, 2014) 142–4.

52 74 SATC 127.

53 The point has not been decided explicitly in any other jurisdiction either. For example, from the United Kingdom case of *Wenslaydale's Settlement Trustees v IRC* [1996] STC (SCD) 241, which concerned the treaty between the United Kingdom and Ireland, the impression is gleaned that the court assumed that the trust was a person: Baker op cit note 48 para 1B.18n5. The residence of a trust was discussed in *Commissioners for Her Majesty's Revenue and Customs v Smallwood* [2010] EWCA Civ 778, but the question whether the trust is a person was never raised and one is again left with the notion that the court assumed the trust to be a person for purposes of the treaty.

54 OECD *R(24). The Granting of Treaty Benefits with respect to the Income of Collective Investment Vehicles* (2012) para 26. Although the report states in para 4 that only trusts that are collective investment vehicles are dealt with in the report, it is submitted that the paragraph quoted above does give an indication of the OECD's view of trusts in general.

55 OECD *Base Erosion and Profit Shifting Project: Neutralising the Effects of Hybrid Mismatch Arrangements* (2015). The BEPS project was initiated by the G20 in co-operation with the OECD to

address revenue losses due to tax planning that moved profits to locations with a more favourable tax treatment, thereby eroding the tax base: OECD *Addressing Base Erosion and Profit Shifting* 14.

56 Ibid at 139.

57 Article 3(1)*(a)* of the OECD MTC.

58 Commentary on art 3 of the OECD MTC para 2.

59 Article 3(1)*(b)* of the OECD MTC.

60 Commentary on art 3 of the OECD MTC para 3.

61 Canada is an example of a state which provides that a trust will be deemed to be an individual (subject to certain exceptions) for income-tax purposes: see ch 1 of the Income Tax Act RSC 1985 (5th supp) s 104(2).

62 The conclusion reached in this article is that it is highly unlikely that a trust will be regarded as 'any other body of persons' and that it is not 'an entity that is treated as a body corporate for tax purposes'. Some readers may regard a discussion of these criteria as irrelevant, because of the conclusion reached. However, it is the author's view that it is crucial to show why all but the last of these criteria are not met.

63 In this article, the word 'term' is used in preference to other possibilities such as 'phrase' or 'concept' in respect of 'body of persons', since it is the word used in art 3(2) of the OECD MTC. Avery Jones argues that 'term' should be given a wide meaning and that art 3(2) can, indeed, be applied to a concept or a phrase: J Avery Jones 'Treaty interpretation' in R Vann (eds) *Global Tax Treaty Commentaries* (2015) IBFD para 7.2.1.

64 Even though the term 'body of persons' forms part of a definition, it is still an undefined term and therefore art 3(2) applies to it: ibid para 7.2.2. Other issues that may be relevant in the interpretation of art 3(2) of the OECD MTC, e g whether the statutory or ambulatory approach should be followed and which state's laws are to be applied, will not be addressed in this article.

65 Commentary on art 3 of the OECD MTC para 13.1; Baker op cit note 48 para E.22.

66 The term 'body of persons' is used in a number of places in the Income Tax Act (see e g the definitions of 'agent' in s 1, 'date of grant' in s 8B and 'date of distribution' in sch 8, para 74), but it is never defined.

67 (1931) 6 SATC 234 (U).

68 Ibid at 238–9.

69 1960 (3) SA 291 (A).

70 Ibid at 302.

71 *Friedman* supra note 22.

72 The wording of this Act is exactly the same as that of the Interpretation Act 5 of 1910.

73 *Friedman* supra note 22 at 370. As a result of the *Friedman* case, the Income Tax Act was amended to include a trust in the definition of 'person' in s 1 of the Income Tax Act.

74 Avery Jones op cit note 63 para 8.1.

75 J Avery Jones et al 'The interpretation of tax treaties with particular reference to article 3(2) of the OECD model — I' (1984) part 1 *British Tax Review* 90 at 104.

76 Article 31(2) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331.

77 Ekkehart Reimer & Alexander Rust (eds) *Klaus Vogel on Double Taxation Conventions* 4 ed (2015) 212; Baker op cit note 48 para E.20; M Sada Garibay 'An analysis of the case law on article 3 (2) of the OECD model (2010)' (2011) 65 *Bulletin for International Taxation* para 9.

78 Commentary on art 3 para 12.

79 Avery Jones et al op cit note 75 at 108; see also Reimer & Rust (eds) et al op cit note 77 at 212.

80 Sada Garibay op cit note 77 para 7.

81 Baker op cit note 48 para E.20.

82 Baker ibid; E Brincker 'The conclusion and force of double-taxation agreements' in A de Koker & E Brincker (eds) *Silke on International Tax* (2010) para 16.12; Sada Garibay op cit note 77 at 8.

83 Baker ibid.

84 *Padmore v The Commissioners of Inland Revenue* [1989] STC 493.

85 J Avery Jones 'Bodies of persons' [1991] *BTR* 453 at 464.

86 Cf Easson op cit note 50 at 12.9.

87 Honiball & Olivier op cit note 11 at 285 state that '[i]n South Africa and offshore, the trust is a relationship, contractual or otherwise, between the donor/settlor, the trustees, and the beneficiaries... . Consequently, a South African court may well come to the conclusion that a trust may be described as an "other body of persons".' However, these authors eventually reach the conclusion (at 286) that it 'is more likely that a South African court will find that a trust is a person for purposes of the application of South Africa's tax treaties based on the fact that a trust is a person for domestic tax law purposes', a conclusion with which this author agrees.

88 Reimer & Rust (eds) op cit note 77 at 58.

89 J F Avery Jones et al 'The origins of concepts and expressions used in the OECD model and their adoption by states' (2006) 60 *Bulletin for International Taxation* 220 at 223.

90 Ibid at 222.

91 Organisation for European Economic Co-operation *Working Party No 14 of the Fiscal Committee Second Report on the Article on Definitions* (1962) 2–3. The OEEC is the predecessor to the OECD.

92 Ibid at 5.

93 This argument is based on the premise that a court will, in interpreting an actual treaty, consider the meaning of the provisions of the OECD MTC and that the deliberations of the Working Party will be considered relevant and authoritative in this regard.

94 Commentary on art 3 of the OECD MTC para 3.

95 J Avery Jones et al 'The definitions of dividends and interest in the OECD Model: Something lost in translation?' (2009) part 4 *British Tax Review* 406 at 413.

96 Ibid at 412.

97 Section 25B of the Income Tax Act. Trusts other than special trusts are taxed at a rate equal to the maximum rate for individuals, while companies are, generally speaking, taxed at a rate of 28 per cent. Even though there are special regimes or tax rates for certain companies, trusts are not taxed in the same way as any of these companies.

98 Commentary on art 3 of the OECD MTC para 2.

99 Avery Jones op cit note 63 para 7.2.2.

100 Avery Jones et al op cit note 75 at 14 and 21.

101 Supra note 22.

102 Section 1 of the Income Tax Act.

103 See also Honiball & Olivier op cit note 11 at 285; Avery Jones op cit note 63 para 7.2.2.

104 It is interesting to note that the OECD has recommended that states amend their domestic laws in such a fashion that the definition of the term 'person' includes a trust: OECD op cit note 55 at 123. The implication is that if a particular state follows this recommendation, a trust will be regarded as a person, based on the argument outlined above by that state.

105 Income Tax Act ch 1 s 104(2).

106 *Fundy Settlement v Canada* 2012 SCC 14, [2012] 1 SCR 520 paras 10 and 13.

107 J F Avery Jones 'The treatment of trusts under the OECD Model Convention: Part 2' (1989) part 3 *British Tax Review* 65n93; C Brown 'Canada' in T Lyons, V Chew & I Kireta (eds) *Topical Analysis* (2013) IBFD para 8.1; R Tremblay & K Wharram 'Partnerships, trusts and other entities: Treaty benefits' in B Arnold & J Sasseville (eds) *Special Seminar on Canadian Tax Treaties: Policy and Practice: Text of Seminar Articles* (2001) International Fiscal Association (Canadian Branch) Canadian Tax Foundation 14:1 para 14.49.

108 Avery Jones op cit note 107 at 65n93; Brown op cit note 107 para 8.1; Tremblay & Wharram op cit note 107 para 14:49; Easson op cit note 50 para 12.9; Baker op cit note 48 para 1B.17. The question whether a trust is a person for treaty purposes was not discussed in *Fundy Settlement v Canada* supra note 106, as the definition of 'person' in the relevant treaty included a trust.

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