



10 September 2021

To: The South African Revenue Service

Lehae La SARS
299 Bronkhorst Street
PRETORIA
0181

Via email: SARS policycomments@sars.gov.za

RE: DRAFT INTERPRETATION NOTE: DISPOSAL OF ASSETS BY DECEASED PERSON, DECEASED ESTATE AND TRANSFER OF ASSETS BETWEEN SPOUSES

Dear Colleagues,

The SAIT Wealth & Family Business Tax Technical Work Group appreciated the invitation to comment on the draft interpretation note (**draft IN**) relating to the disposal of assets by a deceased person, deceased estate and the transfer of assets between spouses, as issued by SARS.

We set out herein, our detailed comments.

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1. Structure and approach of the draft IN

The purpose of the draft IN is to provide guidance on the application of the deemed disposal of assets by the deceased, a deceased estate, and the transfer of assets between spouses.

Having discussed the content of the draft IN with members of our Wealth & Family Business Tax Technical Work Group, we are of the view that draft IN is clear in that the concepts outlined therein are understandable and are helpful in providing industry stakeholders with a practical basis of the mechanisms of sections 9HA, 9HB and 25 of the Income Tax Act, No. 58 of 1962 (the Act).

Of particular interest and value, is the integration of the law of succession and the various Legislative instruments that the provisions of the Act interact with. We find that since this area of tax law relies heavily on an understanding of the underlying legal constructs (common and statutory law), the references and explanations are particularly helpful.

That stated, we have made various observations outlined below for your consideration.

2. Background

According to our understanding, the main principles in the case of the taxation of income upon the death of a natural person are that:

- A separate entity (the deceased estate) is created upon the death of a natural person, and the income should be allocated to the deceased person (pre-death), or to their deceased estate post-death; and
- To the extent possible, the deceased estate should be treated as a conduit in respect of post-death income (and relevant expenses) should such income be allocable for the immediate or future benefit of an ascertained heir or legatee.

For the purposes of capital gains tax, the event of death is treated as a deemed disposal. Therefore, the deceased person is treated as having disposed of all their assets (barring some assets such as those bequeathed to a surviving spouse).

All capital gains and losses are therefore recognised in the deceased hands. In turn, the deceased estate is treated as having acquired those assets at that market value and is subsequently subject to tax as a separate entity in respect of gains and losses from any disposals of assets it may thereafter undertake to persons other than the heirs or legatees of the deceased person.

However, under certain circumstances roll-over relief is granted: In particular in respect of assets inherited by a deceased person's spouse, and also in respect of transfers from the deceased estate to any heir or legatee.



Sections 9HA, 9HB and 25 of the Act provides the enabling legislation. Our understanding is that SARS seeks by means of this interpretation note to provide clarity regarding the application and interaction of these tax provisions to the relevant events.

Although the principles are clear, the practical interaction between all the different taxpayers and tax events, as well as the administrative details necessitates a careful analysis.

3. Discussion and recommendations relating to the content

3.1. Specific comments regarding the background section of the draft IN

Upon a reading of the draft IN, our understanding is that the draft IN seeks to largely address the capital gains tax implications of the disposal of assets by the deceased, a deceased estate and the transfer of assets between spouses.

Under the background section of the draft IN, it is stated that although a comprehensive discussion on the taxation of deceased estates under section 25 of the Act is outside of the scope of the draft IN, the principles of section 25 of the Act will be discussed to the extent that it applies to section 9HA.

Considering the import of section 25, our commentators requested that consideration be given to providing an interpretation note discussion section 25 in detail.

3.2. Discussion

We set out below specific comments relating to specific paragraphs in the draft IN.

3.2.1. Deceased Estate (section 25) (paragraph 4.2)

3.2.1.1 Sub-paragraph 2 under this paragraph states that:

"...a deceased state must be treated as if it were a natural person, other than for purposes of the primary, secondary and tertiary rebates under section 6, the medical scheme fees tax credit under section 6A and the additional medical expenses tax credit under section 6B."

We note that the provisions of section 6A & 6B of the Act, relating to income tax provisions (as outlined in the quoted text above) have been addressed. For the sake of completeness, we recommend that the draft IN also address the interest exemption and yearly capital gains exclusion applicable to deceased estates.



3.2.1.2 Sub-paragraph 3 that addresses section 25(5)(b) of the Act states that:

“...if the deceased was tax resident at the time of death, the deceased estate must be treated as if that estate was a resident.”

We believe that it would be beneficial to further mention the opposite, which is applicable in relation to a non-resident deceased tax resident and a non-resident deceased estate. Including this clarification will assist to clarify this issue further.

3.2.2. Cessation of deceased estates (paragraph 4.2.4)

Sub-paragraph 2 clarifies instances when an estate becomes distributable in the event that there is an objection that has been lodged against the Liquidation Account. To this end, sub-paragraph 2 of the draft IN outlines differing time periods.

For example:

- *The estate becomes distributable after the period stipulated in the notice assuming no objection has been lodged against the account, and it is at this point that the account becomes final; or*
- *Should an objection be lodged against the account, the date on which it becomes final will depend on the facts; or*
- *If the Master dismisses the objection and the aggrieved party applies to court to have the Master's decision set aside, the account will become final only when the court process is completed.*

There are differing time periods that are triggered upon the happening of differing events (as indicated and underlined above). We therefore recommend and suggest that further discussions be prompted to explore the possibility of stipulating a “cut-off” or deadline date in the event that an objection against the Liquidation Account is raised rather than keeping it “open ended” and contingent upon the happening of varying events as indicated in the draft IN.

It is impractical to defer the estate finalisation in an instance when an objection has been lodged against the Liquidation Account as either the deceased, deceased estate, or the beneficiaries will still be required to account for the tax liability so as to enable appropriate revenue collection by the fiscus.

3.2.3. Asset transferred directly to heirs or legatees other than a resident surviving spouse

Both “second-hand or foreign endowment policies”, as mentioned in sub-paragraph 1 of this paragraph will trigger a capital gains tax liability upon death.



Practically speaking, the aforementioned policies generally do not form part of the deceased estate, as these policies are not regulated in terms of a will - to the extent that nominees have been appointed in terms of the policies (except if the nominee is the deceased estate itself or if the product is a sinking fund (no life insured)).

The aforementioned policies are legally regulated by the applicable Long Term Insurance Acts of the specific country that regulates the particular policies.

Therefore, to mention these policies as assets that can be transferred to heirs or legatees under the provisions of section 9HA(3) of the Act is illogical. We recommend that this aspect of the draft IN be clarified be provided in this regard.

4. Conclusion

SAIT appreciates the opportunity to comment on this draft IN and we would welcome further engagement.

Yours faithfully,

SAIT Wealth & Family Business Tax Technical Work Group