

25 November 2024

To: The National Treasury

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The South African Revenue Service

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Via email: **National Treasury** (2025AnnexCProp@treasury.gov.za); and
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**RE: ANNEXURE C PROPOSALS: SAIT WEALTH AND FAMILY BUSINESS TAX
TECHNICAL WORK GROUP**

We attach the Annexure C proposals from the SAIT Wealth and Family Business Tax Technical Work Group (the WG), as it pertains to technical proposals for possible inclusion in Annexure C of the 2025 Budget Review.

We value the opportunity to participate in the legislative process and would welcome further engagement where appropriate. Please do not hesitate to contact us should you need further information.

Yours sincerely

SAIT Wealth and Family Business Tax Technical Work Group

Disclaimer

This document has been prepared within a limited factual and contextual framework, in order to provide technical guidance regarding a specific query relating to tax practice. This document does not purport to be a comprehensive review in respect of the subject matter, nor does it constitute legal advice or legal opinion. No reliance may be placed on this document by any party other than the initial intended recipient, nor may this document be distributed in any manner or form without the prior, written consent of the South African Institute of Taxation NPC having been obtained. The South African Institute of Taxation NPC does not accept any responsibility and/or liability, of whatsoever nature and however arising, in respect of any reliance and/or action taken on, or in respect of, this document. Copyright in respect of this document and its contents remain vested in the South African Institute of Taxation NPC.

Unless otherwise indicated, all references to sections of the Income Tax Act, No. 58 of 1962 (the Act)

1. Mismatch between estate duty on spousal trusts and capital gains tax

1.1. Background

- 1.1.1. With medical technology and healthcare advances, global life expectancy has significantly increased, including in South Africa.
- 1.1.2. While this has enhanced human longevity, it has also led to a rise in **age-related conditions**. These include neurodegenerative disorders like Alzheimer's disease, Parkinson's disease dementia, and vascular dementia, as well as mental health issues such as depression, anxiety, and late-onset bipolar disorder. Cognitive impairments, including mild cognitive impairment (MCI) and delirium, are also increasingly common. These conditions underscore the need for financial strategies that ensure long-term care and security.
- 1.1.3. In addition to addressing the potential management of neurodegenerative conditions, the elderly population is **inherently vulnerable to various risks, particularly financial exploitation**.
- 1.1.4. Establishing a Trust to safeguard inheritance provides an essential layer of security against a broad spectrum of threats, including opportunistic or unscrupulous individuals seeking to exploit the aged, especially in the aftermath of a partner's passing.
- 1.1.5. Elderly individuals are often targeted by:
 - **Scammers and Fraudsters:** Persons attempting to defraud them through deceitful schemes.
 - **Predatory Relationships:** Individuals forming relationships with the intention of accessing financial assets.
 - **Heirs or Relatives with Malicious Intent:** Family members exploiting the elderly to gain early access to inheritance.
 - **Unsolicited Advisors:** Dubious financial advisors preying on vulnerabilities under the guise of offering assistance.
- 1.1.6. These risks are heightened when a spouse's death is publicly disclosed via a **death notice**, as it signals the potential reorganisation of assets or availability of funds.
- 1.1.7. A Trust, structured with appropriate legal and financial safeguards, ensures that assets and/or inheritance remain protected and is only accessible under the terms outlined for the beneficiary. It can:
 - Shield assets from undue influence or coercion.
 - Provide long-term financial stability and regulated disbursements for the elderly beneficiary.
 - Serve as a legal barrier to opportunistic claims or manipulative schemes.
 - Incorporating Trusts for the benefit of a spouse both during life and on death can secure not only the financial future of the surviving spouse but also protect them from potential exploitation during a particularly vulnerable time.

1.2. The legal nature of the problem

- 1.2.1. Upon the **death of a spouse**, the **Estate Duty Act** provides specific relief mechanisms concerning Trust.
- 1.2.2. Assets transferred to the surviving spouse, either directly or through a Trust, enjoy an estate duty deferral.
- 1.2.3. To qualify, the Trust must stipulate that the deceased establish the trust for his surviving spouse and that the surviving spouse is the only person entitled to access the Trust's funds for the remainder of their lifetime.
- 1.2.4. This provision enables a deferral of estate duty, reducing the immediate liability by approximately 20-25%, thereby easing the financial strain on the surviving spouse.
- 1.2.5. However, the Capital Gains Tax (CGT) legislation imposes a narrower scope for relief. It allows the deferral of CGT only on assets transferred directly to a spouse who is a South African resident at the time of the transfer.
- 1.2.6. This relief does not extend to transfers made to a Trust, even when the Trust is structured for the surviving spouse's benefit.
- 1.2.7. Consequently, upon transferring assets to the Trust, a CGT liability of up to 18% may arise.
- 1.2.8. This discrepancy between estate duty and CGT relief creates potential cash flow challenges for the surviving spouse.

1.3. A detailed factual description

- 1.3.1. The Applicable legislation reads:

1.3.2. **Estate Duty Act 45 of 1955 (EDA)**:

"4(g) so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section, as accrues to the surviving spouse of the deceased: Provided that:

- (i) the deduction allowable under the provisions of this paragraph shall be reduced by so much of any amount as the surviving spouse is required in terms of the will of the deceased to dispose of to any other person or trust;
- (ii) no deduction shall be allowed under the provisions of this paragraph in respect of any property which accrues to a trust established by the deceased for the benefit of the surviving spouse, if the trustee of such trust has a discretion to allocate such property or any income therefrom to any person other than the surviving spouse"

Section 1 of the EDA defines a "spouse as":

- "spouse", in relation to any deceased person, includes a person who at the time of death of such deceased person was the partner of such person—
- (a) in a marriage or customary union recognised in terms of the laws of the Republic;
 - (b) in a union recognised as a marriage in accordance with the tenets of any religion; or
 - (c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent:

Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property.

1.3.3. Capital Gains Tax

1.3.4. DEATH

Section 9HA of the Act

9HA. Disposal by deceased person.:

- (1) "A deceased person must be treated as having disposed of his or her assets, other than—
 - (a) assets disposed of for the benefit of his or her surviving spouse as contemplated in [subsection \(2\)](#);"
 - (2) "A deceased person must, if his or her **surviving spouse is a resident**, be treated:
 - (a) as having disposed of an asset for the benefit of that surviving spouse if that asset is acquired by that surviving spouse—
 - (i) by *ab intestato* or testamentary succession;
 - (ii) as a result of a redistribution agreement between the heirs and legatees of that person in the course of liquidation or distribution of the deceased estate of that person; or
 - (iii) in settlement of a claim arising under section 3 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984); and "

1.3.5. Spouse is defined in section 1 of the Act as:

- "spouse", in relation to any person, means a person who is the partner of such person:
- (a) in a marriage or customary union recognised in terms of the laws of the Republic;
 - (b) in a union recognised as a marriage in accordance with the tenets of any religion; or
 - (c) in a same-sex or heterosexual union which is intended to be permanent.

1.3.6. DURING SUBSISTENCE OF MARRIAGE – CGT

Section 9HB of the Act

9HB. Transfer of asset between spouses.—

- (1) (a) A person (hereinafter referred to as "the transferor") must disregard any capital gain or capital loss determined in respect of the disposal of an asset to his or her spouse (hereinafter referred to as "the transferee").
- (b) The transferee must be treated as having—
 - (i) acquired the asset on the same date that such asset was acquired by the transferor;
 - (ii) incurred an amount of expenditure equal to the expenditure contemplated in paragraph 20 of the Eighth Schedule that was incurred by that transferor in respect of that asset;
 - (iii) incurred that expenditure on the same date and in the same currency that it was incurred by the transferor;
 - (iv) used that asset in the same manner that it was used by the transferor; and
 - (v) received an amount equal to any amount received by or accrued to that transferor in respect of that asset that would have constituted proceeds on disposal of that asset had that transferor disposed of it to a person other than the transferee.

- (2) For the purposes of [subsection \(1\)](#)—
- (a) a person whose spouse dies must be treated as having disposed of an asset to that spouse immediately before the date of death of that spouse, if ownership of that asset is acquired by the deceased estate of that spouse in settlement of a claim arising under section 3 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984); or
- (b) a person must be treated as having disposed of an asset to his or her spouse, if that asset is transferred to that spouse in consequence of a divorce order or, in the case of a union contemplated in paragraph (b) or (c) of the definition of “spouse” in section 1, an agreement of division of assets which has been made an order of court.
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- (5) This section must not apply in respect of the disposal of an asset by a person to his or her spouse who is not a resident, unless the asset disposed of is an asset contemplated in section 9J or in paragraph 2 (1) (b) of the Eighth Schedule.

1.3.7. DONATION TAX

56. Exemptions.—(1) Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation—
- (a) to or for the benefit of the spouse of the donor under a duly registered antenuptial or post-nuptial contract or under a notarial contract entered into as contemplated in section 21 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
- (b) to or for the benefit of the spouse of the donor who is not separated from him under a judicial order or notarial deed of separation;

1.4. Proposal

- 1.4.1. Request for Alignment of **CGT Legislation with Estate Duty Provisions** on the death of a spouse to provide for tax relief where assets are transferred to a Trust for the benefit of a spouse.
- 1.4.2. Request for Alignment of **CGT Legislation with Donation Tax Provisions** during the subsistence of a marriage where assets are transferred to a Trust to provide for a for the benefit of a spouse.
- 1.4.3. In view of the substantial human challenges posed by the increasing prevalence of mental health conditions and neurodegenerative diseases among the elderly, coupled with their inherent vulnerability to financial exploitation, it is both logical and necessary to address the disparity between the CGT legislation and the South African Estate Duty legislation.
- 1.4.4. Currently, the CGT and donation Tax framework does not provide roll-over relief for assets transferred into a Trust, even when such a Trust is established for the direct benefit of a surviving spouse. This limitation places undue financial strain on surviving spouses, particularly those relying on Trust structures for long-term financial security, protection from exploitation, and coverage of care costs associated with mental and cognitive health conditions.
- 1.4.5. To address these challenges effectively and ensure equitable treatment under the law, it is respectfully requested that the CGT and Donation Tax legislation be amended to align with the Estate Duty Act. Specifically, rollover relief should be extended to include:
- Trusts Created During Marriage: Trusts established for the benefit of a spouse during the marriage to ensure asset security and management in cases of incapacity or mental health decline.
 - In this instance, the Donation Tax relief as it applies to spouses shop

- Trusts Established Upon Death: Trusts formed at the time of a spouse's death aim to provide financial stability, mitigate the risks of exploitation, and cover long-term care needs for the surviving spouse.
- Aligning these legislative provisions will harmonize tax policy and recognize the real-life challenges faced by aging individuals. It will protect vulnerable spouses from immediate tax liabilities that can deplete necessary resources, ensuring they have the financial support to maintain dignity and security during their lifetime.

2. Tax treatment of distributions from a South African inter-vivos trust to a non-resident beneficiary

[Applicable provisions: Sections 25B of the Act]

2.1. Background

2.1.1. The distribution of an award by a South African Inter-Vivos Trust (the "Trust") to a non-resident beneficiary remains in question. In this case, the beneficiary has no ties to South Africa, having neither been born in the country nor ever been a resident. The key questions raised in this context are whether the non-resident beneficiary is required to register as a South African taxpayer for e-filing purposes, and which party — the Trust or the non-resident beneficiary — should apply for approval to transfer the funds abroad.

2.1.2. Regarding the first question, the non-resident beneficiary is not considered a resident taxpayer in South Africa, and therefore there is no obligation for them to register for e-filing purposes. As for the second question, it is the responsibility of the Trust to apply for approval under the Approval for International Transfers procedure, not the beneficiary. This submission provides further explanation and legal context regarding these matters.

2.2. The legal nature of the problem

2.2.1. A critical consideration in this context is whether the distribution to the non-resident beneficiary is of a capital or income nature, as well as whether the beneficiary has a vested right to the distribution.

2.2.2. The relevant legal framework for this matter is Section 25B of the Act, which governs the accruals and vesting rights of trust beneficiaries, as well as the amendments to the provisions concerning non-resident beneficiaries that will come into effect on 1 March 2024. The Explanatory Note for the amendments speaks to the alignment of Section 25B with paragraph 80 of the 8th Schedule of the Act, which deals with capital distributions from trusts.

2.3. A detailed factual description

2.3.1. In the case of a discretionary trust, one must first determine whether the non-resident beneficiary has a vested right to the award. If the Trust deed does not confer a vested right, the distribution will only be declared once the trustees exercise their discretion.

2.3.2. Next, it is necessary to classify the nature of the distribution — whether it is a capital distribution (subject to paragraph 80 of the 8th Schedule) or an income distribution (governed by Section 25B).

2.3.3. If the distribution is classified as capital, it will not be attributed to the non-resident beneficiary. Instead, it will be attributed to the Trust itself, and the Trust will be subject to tax on that distribution. The non-resident beneficiary would not be

entitled to any foreign tax credit (FTC) in this case, as the income remains within the Trust, not in the hands of the beneficiary. This provision has been in place for the last ten years.

2.3.4. However, if the distribution is classified as income, the general flow-through principle for income from trusts will apply. This means that income from a discretionary trust, once vested in the beneficiary, will normally be taxable in the hands of that beneficiary.

2.3.5. With the amendments to the Income Tax Act that come into effect on 1 March 2024, the flow-through of income from a Trust to a non-resident beneficiary will no longer apply in the same way. Section 25(1) and 25(2) restrict this **flow-through** principle to South African residents only. As a result, income vested in a non-resident beneficiary will be taxed in the Trust at a flat rate of 45% (the trust rate), with no further tax consequences for the non-resident in South Africa.

2.3.6. This change aligns the taxation of income with the provisions governing capital distributions (paragraph 80 of the 8th Schedule). However, this may have unintended tax consequences for the non-resident beneficiary, who could be subject to taxation on their worldwide income in their country of residence, depending on the local domestic tax laws in force there.

2.4. The nature of the business /persons impacted

2.4.1. The following parties are impacted:

- The **Trust**: As the distributing entity, it must ensure that it complies with the new tax provisions and determines the appropriate tax treatment of the distribution.
- The **non-resident beneficiary**: Although not required to register as a taxpayer in South Africa, the beneficiary could face tax consequences in their country of residence, especially if they are taxed on worldwide income. SA has applied the first right to tax in terms of the DTA, but the trust being a separate juristic party, places the non-resident beneficiary at a disadvantage since he will not be in a position to claim the foreign tax credit.
- **National Treasury** and **SARS**: The amended tax provisions could lead to administrative and practical challenges, particularly in terms of how non-resident beneficiaries are treated in terms of the stipulations of the DTA creating a now unequitable position. The aim of a DTA is to minimise double taxation.

End.