



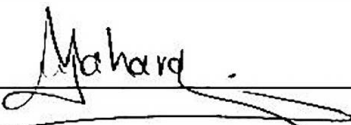
The taxation of income and expenditure of Trusts in South Africa. Are they  
still viable estate planning tools?

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This Research Project is submitted in partial fulfilment of the regulations for the  
LLM Degree at the College of Law and Management Studies, School of Law at the  
University of KwaZulu-Natal.

This project is an original piece of work which is made available for photocopying  
and for inter-library loan.

  
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## **ACKNOWLEDGEMENT**

- I would like to thank God for giving me the determination, strength and guidance to complete my dissertation.
- I would like to thank my colleague and friend, Suvania Naik, who has supported me throughout my undergraduate and postgraduate studies, without her patience and encouragement this dissertation would not have been completed.
- I would like to express my sincere gratitude to my parents, Radhika Maharaj and Navin Maharaj who have continued to encourage and support me during my postgraduate studies.
- I would also like to express my gratitude to my supervisor Mr Christopher Schembri for his encouragement, patience and the knowledge that he has imparted to me throughout my postgraduate studies.
- I would lastly like to thank Professor Shannon Bosch for her patience and guidance that has helped me complete my dissertation.

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## 1. CHAPTER ONE: BACKGROUND AND INTRODUCTION OF TRUSTS

### 1.1.Introduction:

The uses of trusts has remained a popular practice in South Africa. Trusts are usually perceived to be the solution to all problems relating to estate planning. The forming of trusts has been popular for many years as they are considered viable financial planning tools.<sup>1</sup> However, SARS has begun clamping down on the use of trusts as a tax planning tool in many ways.

Despite the development of provisions<sup>2</sup> relating to trusts in the Income Tax Act<sup>3</sup> which has caused a great deal of uncertainty in respect of how trusts would be taxed in South Africa in the future, trusts may very well still remain a reasonably useful estate planning tool. However, a trust has to be formed within the requirements of the Trust Property Control Act.<sup>4</sup> This creates nightmare of an extended process which would act against swift creation. Anyone who wishes to create a trust should embark on a journey of understanding the key elements of a trust. This involves making sure that an effective legal structure is created, but also to recognize and appreciate the duties of trustees, the nature of the trust and the rights of beneficiaries.<sup>5</sup> Some of the important aspects one must be acquainted with are the definitions, types of trusts, parties to a trust, requirements for valid trusts and the legal nature of a trust.

This dissertation will critically consider the taxation of the income and expenditure of trusts in order to assess whether trusts still remain viable estate planning tools. Chapter one of this dissertation will investigate the background of trusts, providing a foundation for the consideration of the development of trusts over the years. Chapter two attempts to provide a clear understanding of what a trust really is. Chapter three contains the true essence of this dissertation, providing an in-depth view of how the income in a trust is taxed. Chapter four will attempt to provide insight

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<sup>1</sup> M Honiball, L Olivier, *The Taxation of Trusts in South Africa*, (2009) 23.

<sup>2</sup> The Income Tax Act 58 of 1962, s7, s25B.

<sup>3</sup> The Income Tax Act 58 of 1962, (Hereinafter referred to as "The Income Tax Act").

<sup>4</sup> The Trust Property Control Act 57 of 1988.

<sup>5</sup> BDO Wealth Advsiors, *Trusts, All You Need to Know*, (unpublished Guide, 2015), 2.

into the taxation of a trust's expenditure. All of the aspects explored in this dissertation will be ultimately tied up in the final chapter, Chapter five.

## 1.2. Background of trusts:

In order to fully grasp the true history of trusts, it is of great significance to travel back in time nearly a thousand years, to the days of the first Crusaders,<sup>6</sup> in order to ascertain the historical roots of our modern conception of a trust. It all started with crusaders embarking on a journey to Jerusalem on horseback. They were usually gone for a long time.<sup>7</sup> This gave rise to the need for someone to hold and exercise oversight of their assets for them while they embarked on their travels. As a result an 'office of trustee' was created, in whose name these assets were registered.<sup>8</sup>

The 'office of trustee' concept was expanded in Roman law to include a person who held a trust asset in his personal capacity, irrespective of the true owner of the asset.<sup>9</sup> English common law attempted to expand this concept, but did not achieve much headway.<sup>10</sup> There were no rules in English common law to aid in the protection of trust property and as a result it was left to the various churches to establish guidelines for trustees to follow. By the fifteenth century the chancellors, being great officers of state in the United Kingdom began developing rules and guidelines for trustees which filled in the gaps in the English common law.<sup>11</sup>

Modern South African trusts appeared in South African law by way of the British that occupied the Cape in the early nineteenth century.<sup>12</sup> As part of the peace treaty which was established then, the Roman-Dutch law was recognized as South Africa's official set of legal principles that codified the legal system. Despite the adoption of Roman-Dutch law, English legal principles were gradually absorbed in the country's legal system and as a result a close relationship with English

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<sup>6</sup> Sean Gaskell , *Do you trust your trust?* (unpublished article , 2016) , 1.

<sup>7</sup> Ibid.

<sup>8</sup> F. du Toit *South African Law of Trusts Principles and Practice* , 2006.

<sup>9</sup> Historical Developments of Trusts , available at

[https://trustguru.co.za/Trust\\_Historical\\_development.html](https://trustguru.co.za/Trust_Historical_development.html) , accessed on 16 July 2017.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> F. du Toit *South African Law of Trusts Principles and Practice* , 2006.

legal institutions was born.<sup>13</sup> The exact date and place of the first English law trust used in South Africa remains a mystery but an indication would be one of the first reported judgments in which a trust was mentioned took place in 1833.<sup>14</sup>

The historical development of trusts in general in South Africa, as well as its gradual growth and popularity has caused trustees and practitioners to consider the obvious prospect of its utilization for various purposes, especially as a trading entity. The considerations slowly became implementations and this practice led to the development of many trade usages, which in turn played and continue to play a role in the development of trust laws.<sup>15</sup>

More than sixty years have elapsed and there still exist many issues regarding the development of trusts.<sup>16</sup> Some of these issues include whether a testamentary trust, in particular an *inter vivos* trust, where there seems to be a collision between application of succession law and trust law regarding the inheritance of a testator;<sup>17</sup> what the true legal nature of an *inter vivos* trust is;<sup>18</sup> how is income in a trust to be taxed;<sup>19</sup> how will income be taxed in future and the all-important question of what would the legal personality of the trust be,<sup>20</sup> to mention only a few. The answers to most of these questions will be attempted and discussed later in this dissertation.

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<sup>13</sup> Historical Developments of Trusts , available at [https://trustguru.co.za/Trust\\_Historical\\_development.html](https://trustguru.co.za/Trust_Historical_development.html), accessed on 16 July 2017.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Historical Developments of Trusts , available at [https://trustguru.co.za/Trust\\_Historical\\_development.html](https://trustguru.co.za/Trust_Historical_development.html), accessed on 16 July 2017.

<sup>17</sup> Ibid.

<sup>18</sup> *Magnum Financial Holdings v Summerly* NO 1984 1 SA 160 (W) 163.

<sup>19</sup> Trust Guide 2018-2019 , available at <https://southafrica.moorestephens.com/MediaLibsAndFiles/media/southafricaweb.moorestephens.com/Guides/Moore-Stephens-Trust-Guide-Digital.pdf>, accessed on 12 June 2018, 28.

<sup>20</sup> Edwin Cameron et al *Honore's South African law of Trusts* 5ed (2002) , 70.

## 2. CHAPTER 2: MECHANICS OF A TRUST

This Chapter will provide an overview of the details and mechanics of a trust which are vital to know before forming a trust. It will focus on definitions of certain terms; discuss the different types of trusts, its essentials, the parties to a trust and most importantly the legal nature of a trust.

### 2.1. Definitions

During the late eighties, the legislature introduced the Trust Property Control Act 57 of 1988. In this act a trust is defined as:

‘the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeaths –

(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

(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, 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 66 of 1965.’<sup>21</sup>

The Trust Property Control Act further goes on to state that a trust instrument ‘is a written agreement or a testamentary writing or a Court order to which a trust was created and that “trust property” or “property” means movable or immovable property, and includes contingent interests

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<sup>21</sup> Trust Property Control Act 57 of 1988 (Hereinafter referred to as “The Trust Property Control Act”), s1.



in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.’<sup>22</sup>

The Income Tax Act defines ‘person’ as ‘including an insolvent estate, the estate of a deceased person and any trust and 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 trust deed of a trust or by agreement or under the will of a deceased person.’<sup>23</sup>

The Income Tax Act defines ‘trustee’ as including:

‘any person appointed or constituted as such by act of parties, by will, by order of declaration of court or by operation of law, includes an executor or administrator, tutor or curator, and any person having the administration or control of any property subject to a trust, *usufruct*, *fideicommissum* or other limited interests or acting in any fiduciary capacity or having, either in a private or in an official capacity, the possession, direction, control or management of any property of any person under legal disability.’<sup>24</sup>

## 2.2.Types of Trusts:

South Africa has three types of trusts. These are known as *inter vivos* trusts, testamentary trusts and bewind trusts.<sup>25</sup> An *inter vivos* trust is created by an individual during their lifetime with the objective of managing assets or investments and supporting beneficiaries.<sup>26</sup> Testamentary trusts are the opposite of *inter vivos* trusts as they are created at the time of the winding up of a deceased estate by virtue of clauses in the deceased’s last will and testament which endorses the setting up of a trust upon his/her death. Testamentary trusts are often created ‘to hold assets on behalf of minor children,’<sup>27</sup> due to the fact that minor children are able to inherit and legally own assets but

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<sup>22</sup> Ibid.

<sup>23</sup> The Income Tax Act No 58 of 1962, s1.

<sup>24</sup> Ibid.

<sup>25</sup> Des Kruger et al, *Broomberg on tax strategy*, 5th Ed, (2012), 237-238.

<sup>26</sup> M Stiglingh et al, *SILKE: South African Income Tax*, (2014), 837.

<sup>27</sup> Basics of a Trust Instrument, available at, [www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf](http://www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf), accessed on 16 July 2017.

cannot administer their own affairs in terms of South African law.<sup>28</sup> *Inter vivos* trusts and testamentary trusts can either be vested or discretionary trusts. In a vested trust, the benefits that will accrue to beneficiaries are specifically accounted for in the trust deed.<sup>29</sup> In a discretionary trust, assets and income are not specifically allocated to beneficiaries in the trust deed as trustee's exercise discretion in respect of what each beneficiary is to benefit from the trust.<sup>1</sup>

Bewind Trusts are created as trading mediums which provide trustees with tax advantages such as limited liability.<sup>30</sup> A bewind trust is 'a trust which the founder or settlor transfers ownership of assets or property to beneficiaries of the trust, but control over the assets or property is given to the trustees.'<sup>31</sup>

A special trust is a type of trust that is created for individuals that have mental or physical disabilities. The Income Tax Act defines a special trust as 'either an *inter vivos* or testamentary trust set up solely for individuals with serious mental or physical disability who are incapable of managing their own affairs.'<sup>32</sup> A primary example of a special trust is a trust that has been created solely to hold assets on behalf of a beneficiary who is a minor and relative to the testator and is physically disable.<sup>33</sup>

A business or trading trust as discussed above is yet to be defined by the legislature. However there is indeed growing tendency<sup>34</sup> to use a trust as a business medium. The main reason for the popularity of business or trading trusts are that trusts have many of the advantages that companies

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> South African Revenue Services , Types of Trusts , available at <http://www.sars.gov.za/ClientSegments/Businesses/Trusts/Pages/Types-of-Trust.aspx>, accessed on 16 July 2017.

<sup>32</sup> Income Tax Act 58 of 1962, s1.

<sup>33</sup> M Honiball , L Olivier, *The Taxation of Trusts in South Africa* , (2009) , 233.

<sup>34</sup> What are the various types of trusts , available and how do I go about registration" available at <https://www.entrepreneurmag.co.za/ask-entrepreneur/doing-business-in-sa-ask-entrepreneur/what-are-the-various-types-of-trusts-available-and-how-do-i-go-about-registration/> , accessed on 16 July 2017.

and close corporations have, in particular perpetual succession and limited liability. These advantages are enjoyed without having to deal with compliance with the Companies Act<sup>35</sup> or Close Corporations Act.<sup>36</sup>

An offshore trust is a trust set up by a party or parties, usually in a jurisdiction that is classified as a tax haven.<sup>37</sup> This type of trust is usually set up in these tax haven countries to avoid its activities being subjected to taxation in terms of South African Law. In most cases offshore trusts are established in the form of a discretionary trust; this is due to the benefits derived from these types of trusts, which suits the activities of the trust.<sup>38</sup> One of the main benefits of the discretionary trust is that trustees have complete discretion regarding the distribution of assets and income to beneficiaries.<sup>39</sup> This discretion exercised by the trustees are done so in their representative capacities as trustees of the trust.<sup>40</sup> Offshore trusts come with both tax advantages and disadvantages. Residency is an important aspect when dealing with offshore trusts and offshore based trustees.<sup>41</sup> These types of trusts and trustees are not subjected to tax in the jurisdiction of which the founder or beneficiaries reside, unless anti-avoidance provisions<sup>42</sup> apply.<sup>43</sup> In South Africa the legislature has embarked on enforcing both general and specific anti-avoidance provisions<sup>44</sup> that will reduce the value of an offshore trust circumventing South African tax laws.<sup>45</sup> The establishment of the Davis Tax Committee was one of the foremost efforts to develop anti-avoidance techniques that South Africa has used. A further discussion on the Davis Tax Committee and its recommendations will follow in Chapter three.

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<sup>35</sup> The Companies Act 71 of 2008.

<sup>36</sup> The Close Corporations Act 69 of 1984.

<sup>37</sup> Des Kruger et al, *Broomberg on tax strategy*, 5th Ed, 2012, 244-245.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> M Honiball, L Olivier, *The Taxation of Trusts in South Africa*, (2009), 53.

<sup>42</sup> Income Tax Act 58 of 1962, s7.

<sup>43</sup> M Honiball, L Olivier, *The Taxation of Trusts in South Africa*, (2009), 53.

<sup>44</sup> Income Tax Act 58 of 1962, s7.

<sup>45</sup> M Honiball, L Olivier, *The Taxation of Trusts in South Africa*, (2009), 54.

A charitable trust is one created with a benevolent object in mind.<sup>46</sup> The founder need not therefore appoint ascertained or ascertainable beneficiaries under the trust. An indication of the impersonal charitable object is sufficient. While in the end benefits will indeed be bestowed on some person or institution, the object for which a charitable trust is created relates principally to general public benefit or the benefit of a defined section of the community. The object of charitable trusts is to dispense charity, not to benefit individual beneficiaries.

A disposition for charitable purposes must be for some sort of public benefit in order to qualify as such. In *Ex Parte Henderson NO*,<sup>47</sup> it was held that a disposition for charitable purposes does not necessarily mean the passing of a benefit to the community at large. The court held that the 'requisite element of public benefit is present in a bequest aimed at the advancement of the interests of a section of or group in the community,<sup>48</sup> provided that section or group is sufficiently large or representative.'<sup>49</sup>

### 2.3. Parties to a Trust

From the definition of a trust it is evident that there are three main parties to a trust, namely, the founder, the trustees<sup>50</sup> and the beneficiaries.<sup>51</sup> Each will be discussed in turn.

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<sup>46</sup> Council of Foundations , available at <https://www.cof.org/content/south-africa> , accessed on 18 July 2017.

<sup>47</sup> *Ex parte Henderson NO*1971 (4) SA 549 (D) 554A–B.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Income Tax Act 58 of 1962 , s1.

<sup>51</sup> Ibid.

A donor / founder is a person who is setting up or has already established a trust.<sup>52</sup> In both *inter vivos* trusts and testamentary trusts, the founders must possess contractual capacity.<sup>53</sup> In a testamentary trust, the founder must, while he is still alive, have the capacity to make a will.<sup>54</sup>

The trustees of trusts are considered to be custodians of the assets and cash within the trust. This means that the trustees exercise discretion and control over the assets of the trust.<sup>55</sup> Trustees are required to act in good faith with the objective of the trust as their true intention. Trustees may be held personally liable for losses suffered by the trust.<sup>56</sup> However it must be proven that they did not act with 'care, diligence and skill'<sup>57</sup> as required by section 9 of the Trust Property Control Act.<sup>58</sup>

It is important to note that trustees must encompass skills of more than just acting in good faith. Trustees may be regarded as acting negligently if they invested in risky investments.<sup>59</sup> By contrast, if they invested capital too conservatively with not enough risk, causing the insufficient growth of capital, they may also be regarded as negligent.<sup>60</sup> Trustees that have not signed any documents can also be held liable even if only one trustee from the trust, who has signing power on behalf of the trust, makes a bad decision.<sup>61</sup> If the acts of that trustee amount to negligence, then all the trustees will be liable for his negligence, irrespective of whether they were directly involved in the transaction.<sup>62</sup>

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<sup>52</sup> M Botha et al , *The South African Financial Planning Handbook* , (2013) , 812.

<sup>53</sup> WD Geach , J Yeats , *Trusts Law and Practice* , (2007) , 38.

<sup>54</sup> Ibid.

<sup>55</sup> M Botha et al , *The South African Financial Planning Handbook* , (2013) , 812.

<sup>56</sup> Trust Property Control Act 57 of 1988 , s9.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Lee Attorneys 'Basics of a Trust Instrument' available at , [www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf](http://www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf) , accessed on 16 July 2017.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

Beneficiaries<sup>63</sup> are the individuals/entities legally entitled to certain benefits from assets or income from the trust.<sup>64</sup> The identity of the beneficiaries in the trust must be made available from the onset of registration of the trust. In order for a trust to validly exist, it must have an objective and a beneficiary.<sup>65</sup> The existence of trust beneficiaries may be specifically noted in a trust deed at the time a trust is formed or they can exist at a later stage after a trust is formed, for example, a beneficiary can be born after a trust is formed.<sup>66</sup> In the case of a beneficiary who is to be born after the creation of a trust, clear provision and indication must be made for such beneficiary in the terms of the trust deed.<sup>67</sup> However this may be difficult with testamentary trusts as the insertion of new beneficiaries by trustees may be construed as being contrary to the intention of the testator and the trust deed which may amount to abuse of testamentary power which South African Law may consider to be invalid.<sup>68</sup> The beneficiaries are usually defined as either income beneficiaries or 'capital beneficiaries.'<sup>69</sup>

"Income beneficiaries"<sup>70</sup> are usually those persons who receive benefits in the form of income that is generated by the trust or by the use of assets awarded to them by virtue of a trust deed or discretion of the trustees.<sup>71</sup> This class of beneficiaries are usually found in discretionary trusts as the terms of distribution are broadly defined which grants trustees the power to exercise their discretion in respect of distributing assets and income benefits in the trust.<sup>72</sup> Capital beneficiaries are usually persons who are only selected by the discretion of trustees to benefit from the capital

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<sup>63</sup> Income Tax Act 58 of 1962 , s1.

<sup>64</sup> Lee Attorneys 'Basics of a Trust Instrument' available at , [www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf](http://www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf) , accessed on 16 July 2017.

<sup>65</sup> WD Geach, J Yeats , *Trusts Law and Practice* , (2007) , 44.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Lee Attorneys 'Basics of a Trust Instrument' available at , [www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf](http://www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf) , accessed on 22 July 2017.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

assets of the Trust.<sup>73</sup> Contingent beneficiaries are sometimes identified in the trust deed to safeguard the trust from failing, in the event that the trustees fail to ascertain any income or capital beneficiaries.<sup>74</sup>

#### 2.4. Essentials for a valid trust

It is vital that the essentials for a trust are present. If not, what is thought to be a trust could be construed as a partnership or, worse still, of no effect at all. These essentials will now be discussed in turn.

The founder must intend to create a trust. In this regard it must be noted that the courts look at the 'substance of a transaction'<sup>75</sup> and not 'its form.'<sup>76</sup> The intention must be articulated in a form creating an obligation. In the case of a trust used for estate planning purposes, such form would be a will or a contract (the contract will take the form of a *stipulatio alteri*). The Supreme Court of Appeal has ruled in this respect in *C: SARS v NWK Ltd*<sup>77</sup> and stated:-

'the test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.'<sup>78</sup>

The intention must be accompanied by an obligation. The intention of creating a trust irrespective of it being clearly expressed is not enough unless it is supplemented by aspects such as 'a will, contract, transfer, statute, treaty or judicial order,'<sup>79</sup> all of which create the required legal

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<sup>73</sup> Ibid.

<sup>74</sup> Lee Attorneys, 'Basics of a Trust Instrument' available at, [www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf](http://www.leelegal.co.za/wp-content/uploads/2015/01/trust.pdf), accessed on 24 July 2017.

<sup>75</sup> *C: SARS v NWK Ltd* (2010) 73 SATC 55.

<sup>76</sup> Ibid.

<sup>77</sup> *C: SARS v NWK Ltd* (2010) 73 SATC 55.

<sup>78</sup> Ibid.

<sup>79</sup> Edwin Cameron et al *Honore's South African law of Trusts* 5ed (2002), 117 – 118.

obligation. The obligation envisages two basic aspects. One of these aspects are for the trustee to administer the property in accordance with the objective of the trust and the second being that the founder has to exercise an oversight function by taking necessary steps to ensure that the trustees administer the property in the trust in accordance with the trust objective.<sup>80</sup> The second aspect will apply in instances where a trustee is yet to be appointed, has not yet accepted office or the property of the trust has not yet been transferred into the control of the trustee.<sup>81</sup>

The third aspect is the property in the trust. The trust property must be put in the trust deed with sufficient certainty. Trust property may consist of a single asset or a group of assets<sup>82</sup> such as movable<sup>83</sup> or immovable,<sup>84</sup> corporeal<sup>85</sup> or incorporeal.<sup>86</sup> The Trust Property Control Act<sup>87</sup> states that 'a trustee shall clearly indicate in his records all of the property which he holds in his capacity as trustee and if applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property.'<sup>88</sup> If the property description is unclear, the ambiguity shall be resolved in the same manner as any other in a will or contract dispute, being that evidence shall be lead in determining the property. In these types of matters the intention of the founder is of utmost importance as it is a decisive factor. A mistake in the trust property description is not always material if it can be swiftly corrected without any party being prejudiced.<sup>89</sup>

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Mostert H et al *The Principles of the Law of Property in South Africa* (2010) , 33.

<sup>84</sup> Ibid.

<sup>85</sup> Badenhorst PJ et al *Silberberg and Schoeman's Law of Property* (2006) , 14.

<sup>86</sup> Van de Walt *Constitutional Property Law* (2005) , 65-66.

<sup>87</sup> Trust Property Control Act 57 of 1988.

<sup>88</sup> Trust Property Control Act , Act 57 of 1988 , s11.

<sup>89</sup> Edwin Cameron et al *Honore's South African law of Trusts* 5ed (2002) , 147- 148 , 268- 269.



It was stated in the case of *Peterson and Another NO v Claassen and Others*<sup>90</sup> that ‘the trust object must be defined with reasonable certainty and it must be lawful.’<sup>91</sup> The court in *Peterson and Another NO v Claassen and Others*<sup>92</sup> highlighted the distinction between the objective and the purpose of a trust,<sup>93</sup> as follows:

‘Whilst it is correct that one of the essentials for the creation of a valid trust is that the trust object must be lawful, it does not follow, however, in my view, that a trust is void if it is created with a fraudulent, illegal or immoral purpose . . . There is, in my view, a material difference between the object of a trust and the purpose thereof.’<sup>94</sup>

The objective of a trust may ‘be personal or unbiased and may consist of any specific benefit to one or more stipulated or ascertainable persons or classes of persons, including but not limited to juristic persons and trustees on behalf of other trusts, for one or more unbiased objects or the development of the community at large.’<sup>95</sup> A trust will fall away as void if a person for whose benefit the trust is created is not named or determinable, due to the fact that the objective is not decisive and certain.<sup>96</sup> Even in the case of a business trust, the objective of the trust must be certain and it has to be created for purpose of beneficiaries to benefit from trust assets and income and not, for example, just the acquisition of a piece of land. The latter as stated above, can, for the purposes of the business trust only form a secondary objective or could be achieved by conferring specific powers on the trustees.<sup>97</sup> Accordingly, if the trust object fails, as stated above, the trust itself falls away. However, this is not the case if the trust object is separable.<sup>98</sup> This means that if part of the trust object fails and the remaining part is separable from the part that has failed, the

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<sup>90</sup> *Peterson and Another NO v Claassen and Others* 2006 5 SA 191 (CPD) 196G.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Note 61 above , 197B

<sup>95</sup> *Deedat v The Master* 1995 2 SA 377 (A) 383E - 384B.

<sup>96</sup> Ibid.

<sup>97</sup> Edwin Cameron et al *Honore’s South African law of Trusts* 5ed (2002) , 151.

<sup>98</sup> Ibid 161-177.

trust object would remain valid. A trust created for an impersonal objective will only be valid if it is charitable purpose or for the ordinary public benefit.<sup>99</sup>

## 2.5. Formation of a trust

A testamentary trust is formed simply by the embodiment of the terms of the trust in the testator's will which must, of course, meet the requirements of a valid will. The act of creation, namely, the execution of the will, takes place *inter vivos* but the trust is only established once the testator dies. The testator will bequeath his property to a trustee on specific terms such as requiring him to accept control of the property and to administer it for the benefit of the beneficiaries stated in the will. A testamentary trust exists as at date of the testator's death and it is not essential for the transfer of the property at this stage to render a trust existent.<sup>100</sup> It is better to draw the entire testamentary trust deed separately from the will and then incorporate it by reference into the will.<sup>101</sup> This assists in showing the intention to create a trust and facilitates up-dating by the testator up to death.

Section 40 of The Administration of Estates Act<sup>102</sup> deals specifically with the relationship between a trust and the deceased estate, more specifically, the divesting of property from the estate to the trustee. It provides:

'40 (1) If a trustee has been appointed to administer any property of a deceased person under his will (including in the case of a massed estate any property forming part of the share of the survivor or survivors of that estate which, according to a distribution account, is to be administered by such trustee), the executor shall—

- a) deliver to the trustee such of the movable property as should, according to the distribution account, be delivered to him;
- b) cause the terms of the will, or a reference thereto, in so far as they relate to the administration, to be endorsed against the title deeds of such of the property as is immovable, and against any

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<sup>99</sup> Ibid 161-177.

<sup>100</sup> Edwin Cameron et al *Honore's South African law of Trusts* Sed (2002) , 143.

<sup>101</sup> Jaffe CA and Wunsch B "Incorporation by reference in a will" November 1982 *De Rebus* 529.

<sup>102</sup> Administration of Estates Act 66 of 1965 (hereinafter referred to as "The Administration of Estates Act").

mortgage or notarial bond forming part of the property and deliver the title deeds and any such bond, subject to the provisions of section 41(2), to the trustee; and

- c) lodge with the Master the trustee's acquittance for any such movable property, deeds or bond, and a certificate by the registration officer concerned or a conveyancer that such deeds or bond have been endorsed as aforesaid.<sup>103</sup>

It is to be noted that the definition of a trustee<sup>104</sup> as referred to in the Administration of Estates Act<sup>105</sup> is the same in the Trust Property Control Act.<sup>106</sup> A trustee in terms of the Trust Property Control Act means 'any person (including the founder of a trust) who acts as trustee by virtue of an authorisation under section 6 and includes any person whose appointment as trustee is already of force and effect at the commencement of this Act.'<sup>107</sup> Accordingly an executor who transfers property from the estate to the 'trustee' of the testamentary trust must ensure that the "trustee" has been legally appointed and has derived his authority to act in terms of section 6 of the Trust Property Control Act.<sup>108</sup> It is also to be noted that section 6 and section 1 of the Trust Property Control Act<sup>109</sup> envisages that the executor must be satisfied that the trust is validly considered a trust in terms of section 1 of the Act.<sup>110</sup>

'An *inter vivos* trust is formed by an agreement between the founder and the trustee for the benefit of the named beneficiaries.'<sup>111</sup> The existence of this trust is established the very moment the agreement is concluded. The position has yet to be clarified as to whether a founder can create a valid trust if the founder is the sole trustee on formation of the trust.<sup>112</sup> The fact that the agreement

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<sup>103</sup> Administration of Estates Act 66 of 1965, s40.

<sup>104</sup> Trust Property Control Act, Act 57 of 1988, s1.

<sup>105</sup> Administration of Estates Act 66 of 1965.

<sup>106</sup> Trust Property Control Act, Act 57 of 1988.

<sup>107</sup> Trust Property Control Act, Act 57 of 1988, s1.

<sup>108</sup> Trust Property Control Act, Act 57 of 1988, s6.

<sup>109</sup> Trust Property Control Act, Act 57 of 1988, s1 and s6.

<sup>110</sup> Trust Property Control Act, Act 57 of 1988, s1.

<sup>111</sup> Edwin Cameron et al *Honore's South African law of Trusts* 5ed (2002), 11, 112 and 143.

<sup>112</sup> *Van der Merwe v Nedcor Bank Bpk* 2003 (1) SA 169 (SCA).

is creating a trust does not in itself call for compliance with any formalities. An executory contract of donation must, however, comply with the General Law Amendment Act.<sup>113</sup> It is lastly important to note that local trusts are subject to the jurisdiction and scrutiny of the Master of the High Court, whereas an offshore trust is not subject to the jurisdiction of the office of the Master of the High Court unless it owns assets in South Africa. The office of the Master of the High Court is an oversight tool. In terms of section 6(1)<sup>114</sup> of the Trust Property Control Act,<sup>115</sup> 'a trustee can only act on behalf of a trust if he or she has been duly authorised by the Master of the High Court to do so.'<sup>116</sup> This statutory provision allows for external oversight during the formation of a trust.

## 2.6. Legal nature of a trust

The exact legal nature of the trusts have, for many years been the topic of heated debates. *Inter vivos* and testamentary trust do not have legal personality, however they are considered a separate legal entity.<sup>117</sup> The common law of South African does not provide for the recognition of a trust as a legal person but it does recognise the trustee as a separate entity in his official capacity.<sup>118</sup> For the purpose of insolvency, the trust estate is a 'debtor' but not a 'body corporate.'<sup>119</sup> This suggests that a trust must be sequestrated and not liquidated, like a company would. Section 12<sup>120</sup> stipulates that 'trust property shall not form part of the personal estate of the trustee, except in so far as he is entitled to it as a trust beneficiary.'<sup>121</sup>

It is clear that trusts are, in general not regarded as a legal person; however this standing changes when dealing with certain statutes – for example, a trust is defined as a person in the Income Tax

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<sup>113</sup> General Law Amendment Act 50 of 1956.

<sup>114</sup> Trust Property Control Act , Act 57 of 1988 , s6(1).

<sup>115</sup> Trust Property Control Act , Act 57 of 1988.

<sup>116</sup> Ibid.

<sup>117</sup> *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) , 83F–83I.

<sup>118</sup> Edwin Cameron et al *Honore's South African law of Trusts* Sed (2002) , 70.

<sup>119</sup> *Magnum Financial Holdings v Summerly* NO 1984 1 SA 160 (W) 163.

<sup>120</sup> Trust Property Control Act, Act 57 of 1988 , s12.

<sup>121</sup> Ibid.

Act.<sup>122</sup> A trust does not have *locus standi* without legal personality and therefore cannot sue or be sued.<sup>123</sup> The trustees therefore act on behalf of the trust in their capacity as trustees in order to bring and defend actions concerning the trust.

## 2.7. Advantages and disadvantages to a trust

### 2.7.1. Advantages:

As none of the potential beneficiaries acquire any vested rights to property, no future estate duty problem is created in their hands. Furthermore, the trust may be used as a generation-skipping device, in that only the children of a testator/founder can benefit from income and capital gains in their lifetime, with ownership of the assets only passing in due course to the grandchildren. Thus the trust, if properly structured, may assist the children with their own estate planning. It must be borne in mind that if the trust, instead of making distributions to the beneficiaries, makes loans to them, this will assist them in not building up their dutiable estates. The loans would of course be trust assets. Sight must, however, not be lost of the fact that if income<sup>124</sup> or capital gains<sup>125</sup> made by a trust are not vested in beneficiaries, the trust will pay tax at the higher rate. Furthermore the loans may be deemed to be distributions on the 'substance over form' principle.<sup>126</sup>

The trustees have the flexibility of awarding assets in future to specific beneficiaries as and when their personal circumstances require it, or as and when it may be appropriate from a fiscal standpoint. In the meantime, the assets of the planner may be administered as one pool of assets. Income or capital gains of the trust may be distributed before income tax to, for example, aged parents dependent for support on the planner, grandchildren or charities. Although the recipients

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<sup>122</sup> Income Tax Act No 58 of 1962, s1.

<sup>123</sup> BDO Wealth Advisors 'Trusts, All You Need to Know' (unpublished Guide, 2015), 2.

<sup>124</sup> Income Tax Act No 58 of 1962, s1.

<sup>125</sup> Ibid.

<sup>126</sup> Davis Tax Committee Second Interim Report on Estate Duty, 24 August 2016.

will be liable for tax thereon, the tax they pay is likely to be less than the tax the planner would pay thereon.

The planner is able to potentially access income or capital of the trust without creating any additional estate duty problem in his hands. The trustees can act as independent administrators of the assets, particularly once the planner has passed away.<sup>127</sup> By contrast, in the company structure, should differences of opinion arise between the beneficiaries after the planner's death, it can lead to a power struggle amongst them for ultimate control of the company. This may be in no one's long-term interests.

One of the more general and common traits of a trust is that the founder of a trust is able to indemnify himself from creditors and certain taxes, as mentioned above. He is simply required to transfer and/or donate assets to the trust and allow the trustees to manage those assets. However a huge short fall of this advantage is that the founder relinquishes all control and ownership of the assets.

#### 2.7.2. Disadvantages

If the loan to the trust attracts the operation of section 7C there could be severe donations tax consequences. Section 7C<sup>128</sup> of the Income Tax Act<sup>129</sup> deals with this aspect and will be dealt with in detail in chapter three. Section 7<sup>130</sup> of the Income Tax Act and paragraph 70 of the Eighth Schedule<sup>131</sup> to the Act may be invoked by the Revenue authority to tax income<sup>132</sup> or capital gains<sup>133</sup> retained in the trust, in the hands of the planner as a result of the planner advancing a loan to the trust, on which loan the planner charges little or no interest to the trust. The provisions of this

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<sup>127</sup> Davis Tax Committee Second Interim Report on Estate Duty , 24 August 2016.

<sup>128</sup> Income Tax Act 58 of 1962 , s7C.

<sup>129</sup> Income Tax Act 58 of 1962.

<sup>130</sup> Income Tax Act 58 of 1962 , s7.

<sup>131</sup> Income Tax Act 58 of 1962 , Eighth Schedule (Hereinafter referred to as "The Eight Schedule") , 70.

<sup>132</sup> Income Tax Act 58 of 1962 , s1.

<sup>133</sup> Ibid.

section are generally not available to the Revenue authority in the case of income retained in a company financed by an interest-free loan to a company. It is to be noted that it may of course be to the advantage of the founder of a trust if section 7<sup>134</sup> and paragraph 70 of the Eighth Schedule<sup>135</sup> to the Act are applicable. This is so because the founder, by paying the tax, can further reduce his estate and increase that of the trust. A detailed analysis of section 7C<sup>136</sup> will be done in Chapter three.

Capital gains<sup>137</sup> attract capital gains tax<sup>138</sup> at a higher rate in the hands of a trust than in the hands of a natural person though many founders avoid this by vesting the capital gains in the beneficiaries. In the event of there being fixed property in the trust, transferring it out will generally attract transfer duty unless the property is used in an enterprise for VAT purposes.<sup>139</sup> There is no option of merely transferring shares in a property-owning company to the acquirer or the 'sale' of a property-owning trust. Both will attract transfer duty.

From the above it can be concluded that it is evident that if proper procedure is followed and due regard is given to the relevant requirements a trust can easily be set up to protect one's assets. Trusts clearly have benefits and shortfalls. When dealing with the tax consequences of the transactions of a trust, it is trite that the South African legislation must be analyzed. The analysis of the legislation will be explored in the next chapter of this dissertation.

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<sup>134</sup> Income Tax Act 58 of 1962 , s7.

<sup>135</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 70.

<sup>136</sup> Income Tax Act 58 of 1962 , s7C.

<sup>137</sup> Income Tax Act 58 of 1962 , s7.

<sup>138</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>139</sup> Transfer Duty Act 40 of 1949 , s9(17).

### 3. CHAPTER 3: TAXATION OF TRUST INCOME

This chapter will examine the various statutes in South African law and how these statutes affect the tax consequences of income in a trust in order to help ascertain whether trusts remain viable estate planning tools. The well-known South African common law principle known as the conduit-pipe principle will be discussed first, thereafter income tax,<sup>140</sup> capital gains<sup>141</sup> tax, donations tax<sup>142</sup> and transfer duty in the context of trusts will be discussed.

Finally, this chapter will touch on the Davis Tax Committee's<sup>143</sup> involvement in the levying of tax on trusts and the parties to a trust. A brief overview of the recommendations of the Committee will be provided in order to establish whether the tax consequences of trusts are being re-examined to clamp down on the tax levied on trusts.

#### 3.1. Conduit-pipe Principle

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<sup>140</sup> Tax Administration Act 28 of 2011, s1.

<sup>141</sup> Income Tax Act 58 of 1962, s7.

<sup>142</sup> Income Tax Act 58 of 1962, Eighth Schedule, 80(3).

<sup>143</sup> Davis Tax Committee, July 2013 (Hereinafter referred to as "The Committee").



The conduit-pipe principle is a well-known and established common law principle in South Africa. In terms of this principle the trustee of a trust is considered the conduit in certain scenarios.<sup>144</sup> This means that 'if income accrues to the trust and the trustees award the income to beneficiaries in the same tax year, that income would retain its nature in the hands of the beneficiaries.'<sup>145</sup>

It is evident that income which is derived by a trust will retain its identity, subject to the South African tax law statutory provisions, as the income passes through the trust to the vested beneficiaries.<sup>146</sup> As a result income will remain income as will capital remain capital and interest remains interest.<sup>147</sup> In terms of this principle, a beneficiary will be able to claim exemptions to amounts that accrue to him.

The logical applicability would be for the conduit-pipe principle to apply to a trust that acquires assets and income and distributes those assets and income in the same year. *SIR v Rosen*<sup>148</sup> states that 'trust income may lose its character or identity if it is accumulated by a trust and distributed in a later year.'<sup>149</sup> A few years later the court in *Estate Dempers v SIR*<sup>150</sup> took a different view in respect of the identity of income and stated that income which a trust accumulates does not change its identity and character as income.<sup>151</sup>

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<sup>144</sup> Capital Gains Tax: Trusts conduit pipe principle available at , [https://www.saica.co.za/integritax/2011/1951\\_Trusts\\_conduit\\_pipe\\_principle.htm](https://www.saica.co.za/integritax/2011/1951_Trusts_conduit_pipe_principle.htm) , accessed on 20 February 2018 .

<sup>145</sup> R C Williams *Income Tax in South Africa: Law and Practice* , 4 Ed (2006) , 521.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> *SIR v Rosen* 1971 (1) SA , 32 SATC 249 , 269-270.

<sup>149</sup> Ibid .

<sup>150</sup> *Estate Dempers v SIR* (3) SA 410 (A) , 39 SATC.

<sup>151</sup> Ibid.

It is impossible not wonder about possibilities of different issues arising out of this principle. This principle has since been statutorily accepted<sup>152</sup> by section 25B of the Income Tax Act<sup>153</sup> in relation to income tax.

### 3.2.Income Tax

This subsection of the paper will prioritize section 25B and section 7 of the Income Tax Act. These sections of the Income Tax Act<sup>154</sup> deal with the levying of normal or income<sup>155</sup> tax on a trust. An understanding of these sections will help tax planners provide well-structured estate plans to their clientele. In this chapter, only the tax levying sub sections of section 25B<sup>156</sup> and section 7<sup>157</sup> will be dealt with.

Section 25B<sup>158</sup> deals largely with the crux of this paper as it contains the taxing provisions applicable trusts that provide a starting point as to when an amount should be recognized and in whose hands it should be recognized. For the purposes of this chapter, I shall look at section 25B (1) and (2) together with the relevant subsections of section 7 of the Income Tax Act.<sup>159</sup>

Section 25B (1)<sup>160</sup> regulates ‘amounts received or accrued to a person such as a trustee or beneficiary in a year of assessment.’<sup>161</sup> Section 25B (1) provides:

‘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

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<sup>152</sup> R C Williams *Income Tax in South Africa: Law and Practice*, 4 Ed (2006), 521.

<sup>153</sup> Income Tax Act 58 of 1962.

<sup>154</sup> Income Tax Act 58 of 1962.

<sup>155</sup> Income Tax Act 58 of 1962, s 1.

<sup>156</sup> Income Tax Act 58 of 1962, s 25B.

<sup>157</sup> Income Tax Act 58 of 1962, s 7.

<sup>158</sup> Income Tax Act 58 of 1962, s 25B.

<sup>159</sup> Income Tax Act 58 of 1962, s 25B, 7.

<sup>160</sup> Income Tax Act 58 of 1962, s 25B(1).

<sup>161</sup> *Ibid.*

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.’<sup>162</sup>

The above section in essence states that subject to the provisions of section 7<sup>163</sup> any income ‘received by’ a trustee will result in the trust being liable for the tax consequences thereon unless any ‘beneficiary of the trust has acquired a vested right to the amount.’<sup>164</sup> In such cases, the amount received shall be ‘deemed to have been received or accrued to the beneficiary’<sup>165</sup> and taxed in his or her hands.<sup>166</sup>

In *ITC 1328*<sup>167</sup> the court looked at how a beneficiary obtains a vested right in an amount. The court concluded that ‘it is not a necessary legal consequence that the beneficiary has a legal right to claim payment of the income received by the trust.’<sup>168</sup> The court went on to state that vested legal right of the beneficiary to the income received by the trust can be postponed due to the fulfilment of a condition contained in the trust deed itself known as a suspensive condition.<sup>169</sup>

One may raise the question as to income received in one year of assessment and distributed in the next year of assessment - will such income be taxed twice? Section 25B in itself suggests no definitive answer. However *Estate Dempers v SIR*<sup>170</sup> dealt with this issue of potential double taxation where the court concluded that:

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<sup>162</sup> Ibid.

<sup>163</sup> Income Tax Act 58 of 1962 , s 7.

<sup>164</sup> Income Tax Act 58 of 1962 , s 25B(2).

<sup>165</sup> Income Tax Act 58 of 1962 , s 25B(1).

<sup>166</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 842.

<sup>167</sup> *ITC 1328* (1980) 43 SATC 56.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> *Estate Dempers v Sir* 1977 (3) SA 410 (A) , 39 SATC 93.

‘the answer to this contention is that once income has been deemed in terms of section 9(5)(now section 7(5)) to be that of the donor, it is so deemed for all time and there is no room for finding that subsequently it accrued to the donee as income.’<sup>171</sup>

It would seem that the courts have dealt with what the true intention of the legislature had been when drafting the Income Tax Act,<sup>172</sup> which was the avoidance of potential double taxation.<sup>173</sup>

Section 25B (2)<sup>174</sup> reiterates the explanation provided in section 25B (1).<sup>175</sup> Section 25B(2) states that when a trustee exercises his/her discretion when making an award to the beneficiary in respect of the income received by the trust, the beneficiary’s right to the income becomes a vested right.<sup>176</sup>

Section 7<sup>177</sup> contains ‘deeming provisions.’<sup>178</sup> Section 7(1)<sup>179</sup> reiterates that ‘when an amount is deemed to have been accrued to a person, such person holds a vested right to that amount.’<sup>180</sup> Sections 7(2)<sup>181</sup> to 7(8)<sup>182</sup> establishes that persons who make a donation to a trust may be liable for tax on those donations if certain triggers are met. This is the reason section 7<sup>183</sup> is known as the ‘tax back’ provision. It is important to note that these ‘deeming provisions’ have their own individual triggers and requirements that have to be met in order to tax amounts in the hands of the donors.

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<sup>171</sup> Ibid.

<sup>172</sup> Income Tax Act 58 of 1962.

<sup>173</sup> *Estate Dempers v Sir* 1977 (3) SA 410 (A) , 39 SATC 93.

<sup>174</sup> Income Tax Act 58 of 1962 , s 25B(2).

<sup>175</sup> Income Tax Act 58 of 1962 , s 25B(1).

<sup>176</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 843.

<sup>177</sup> Income Tax Act 58 of 1962 , s 7.

<sup>178</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 843.

<sup>179</sup> Income Tax Act 58 of 1962 , s 7(1).

<sup>180</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 843.

<sup>181</sup> Income Tax Act 58 of 1962 , s 7(2).

<sup>182</sup> Income Tax Act 58 of 1962 , s 7(8).

<sup>183</sup> Income Tax Act 58 of 1962 , s 7.

Sections 7(2)<sup>184</sup> deals with the anti-avoidance provision relating to spouses. This section provides that spouses cannot reduce their liabilities for income tax by splitting their taxable income between themselves. When parties are married in community of property, a joint estate is formed whereby each party holds 50% of the assets and liabilities to the joint estate. However in certain instances this general rule will not apply.<sup>185</sup> Section 7(2) A and (2) C<sup>186</sup> set out guidelines to determine in whose hands the amounts should be taxed.

Section 7(2)B<sup>187</sup> ensures that any expenditure or allowance matches the income mentioned in section 7(2)A.<sup>188</sup> This means that a spouse receiving the income in terms of Section 7(2)A<sup>189</sup> will also acquire the expenditure and allowances associated with the income received.

Section 7(3) and 7(4) deals with amounts donated to a minor child. These sections will only apply when any income is 'received by' way of a 'donation, settlement or other disposition.'<sup>190</sup> Section 7(3)<sup>191</sup> deals specifically with the parents of a child. It provides that where a parent of a child grants income to such child by way of a 'donation, settlement or other disposition'<sup>192</sup> to that child or stepchild,<sup>193</sup> the income in these circumstances is deemed to have been received by the donor parent<sup>194</sup> if that income has 'been received by, accrued to or in favour of the child.'<sup>195</sup>

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<sup>184</sup> Income Tax Act 58 of 1962 , s 7(2).

<sup>185</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 354.

<sup>186</sup> Income Tax Act 58 of 1962 , s 7(2)A , 7(2)C.

<sup>187</sup> Income Tax Act 58 of 1962 , s 7(2)B.

<sup>188</sup> Income Tax Act 58 of 1962 , s 7(2)A.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Income Tax Act 58 of 1962 , s 7(3).

<sup>192</sup> Income Tax Act 58 of 1962 , s 7(3) , 7(4).

<sup>193</sup> Ibid.

<sup>194</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 354.

<sup>195</sup> Income Tax Act 58 of 1962 , s 7(3) , 7(4).

*Joss v SIR*<sup>196</sup> stated that ‘if a disposition is partly commercial and partly gratuitous, for example a low interest loan rather than an interest free loan then an apportionment is possible.’<sup>197</sup> This is a clear indication of the courts interpreting the legislation to prevent tax avoidance by entities. The main focus of section 7(3)<sup>198</sup> was to avoid and ‘prevent income splitting between a parent and a minor child for the purposes of taking advantage of lower taxing rate.’<sup>199</sup>

Section 7(4)<sup>200</sup> extends the provisions of Section 7(3),<sup>201</sup> in that the provisions now extend to any family member making ‘a donation, settlement or other disposition’<sup>202</sup> in favor of a child. For example, an aunt of a child will be taxed on the revenue generated by an amount she donates to her niece, as it will be deemed to be received by the aunt. *CSARS v Woulidge*<sup>203</sup> established that the *in duplum* rule that prohibits the accrual of interest due exceeding the capital outstanding, does not apply to section 7. The donation is deemed to be interest for the purposes of applying section 7 and is as a result not limited to the capital outstanding.

In *Kohler v CIR*<sup>204</sup> the court had to determine whether ‘income received from a reinvestment was to be taxed in the hands of the parent (donor) of the minor child.’<sup>205</sup> The court stated that only income derived in the first instance from sums donated by a parent to a child would be taxed in the hands of the donor. As a result it is clearly seen that interest income from a reinvestment will not be taxed in the hands of the donor parent, but in the hands of the minor.

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<sup>196</sup> *Joss v SIR* 1980 (1) SA 674 (T) ; [1980] 3 ALL SA 467 (T).

<sup>197</sup> Ibid.

<sup>198</sup> Income Tax Act 58 of 1962 , s 7(3).

<sup>199</sup> M Marais *The taxation of income and expenditure of trusts in South Africa* (unpublished LLM thesis , University of Cape Town, 2014) 25.

<sup>200</sup> Income Tax Act 58 of 1962 , s 7(4).

<sup>201</sup> Income Tax Act 58 of 1962 , s 7(3).

<sup>202</sup> Income Tax Act 58 of 1962 , s 7(4).

<sup>203</sup> *CSARS v Woulidge* 2002 (2) SA 199 (A).

<sup>204</sup> *Kohler v CIR* 1949(4) SA 1022 (T).

<sup>205</sup> Ibid.

*Joss v SIR*<sup>206</sup> held that the creation of interest free loans constituted a disposition in terms of section 7(3)<sup>207</sup> and ordered that it must be included in the donor's income.

In *Ovenstone v SIR*<sup>208</sup> a parent lent a minor child money to buy shares. This money was lent to the minor child at the prime interest rate of banks at the time. The parent did not request security or set out terms of repayment of the loan. The court held that the loans were partly gratuitous and as a result fell into the ambit of 'donation settlement or other disposition'<sup>209</sup> in terms of section 7(3).<sup>210</sup>

Section 7(5)<sup>211</sup> relates to income that is retained in a trust but not vested as a result of a condition contained in the trust deed in most cases. This section is a key anti-avoidance provision applicable to trusts. This section states that 'if a person has made a donation, settlement or other disposition that is subject to a stipulation or condition, whether imposed by that person making the donation or anyone else, to the effect that some or all beneficiaries may not receive benefit from the donation or receive benefit in part until the happening of some event whether fixed or contingent, so much of any income as would, but for such stipulation or condition, in consequence of the donation, settlement or other disposition be received by or accrue to or in favour of the beneficiaries, shall, until the happening of that event or the death of that person, whichever first takes place, be deemed to be the income of that person.'<sup>212</sup> This section is only applicable when there is an asset that is donated however there is the pending fulfillment of a condition in place that does not allow for immediate enjoyment of the asset by the recipient and as a result, the income generated by such donated asset remains in the trust. The tax levying consequence of this section is dependent on the reason behind the retention of the income.<sup>213</sup> If there is a delay in payment of the retained income

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<sup>206</sup> *Joss v SIR* 1980 (1) SA 674 (T); [1980] 3 ALL SA 467 (T).

<sup>207</sup> Income Tax Act 58 of 1962, s 7(3).

<sup>208</sup> *Ovenstone v SIR* 1980 2 ALL SA 25 (A).

<sup>209</sup> Income Tax Act 58 of 1962, s 7(3).

<sup>210</sup> Ibid.

<sup>211</sup> Income Tax Act 58 of 1962, s 7(5).

<sup>212</sup> Income Tax Act 58 of 1962, s 7(5).

<sup>213</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014), 844.

to a beneficiary who holds a vested right in that income, section 7(5)<sup>214</sup> will not be applicable.<sup>215</sup> In such circumstances the beneficiary may be liable for tax on the retained income<sup>216</sup> in terms of section 25B.<sup>217</sup> If the delay in the payment of the retained income is due to a condition, the donor will be liable for tax on the retained income.<sup>218</sup>

The above section requires two triggers; one, is for a 'donation, settlement or disposition'<sup>219</sup> to take place and two, the 'donation, settlement or disposition'<sup>220</sup> must be subject to a condition. Collectively this section provides that a trust will be taxed on revenue it produces until such time as the amount accrues to a beneficiary and that beneficiary.

In *Estate Dempers v SIR*<sup>221</sup> the court stated that 'the question which most courts face when applying the provisions of section 7(5) is whether in the absence of the condition withholding trust benefit, the benefit would have been received by or accrued to the beneficiary.'<sup>222</sup> In other words if a beneficiary has a vested right to the income/ benefit, section 7(5) would not apply.<sup>223</sup>

Section 7(6) of the Income Tax Act<sup>224</sup> applies when a donor has the authority or right to cancel the right of a beneficiary to receive or accrue a benefit from the trust.<sup>225</sup> In this instance, the donor will always be liable for tax regardless of whether the benefit has been 'received by or accrued to the beneficiary.'<sup>226</sup> An important point to note is that this section requires any portion of the income

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<sup>214</sup> Income Tax Act 58 of 1962 , s 7(5).

<sup>215</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 844.

<sup>216</sup> Ibid.

<sup>217</sup> Income Tax Act 58 of 1962 , s 25B.

<sup>218</sup> Ibid.

<sup>219</sup> Income Tax Act 58 of 1962 , s 7(5).

<sup>220</sup> Ibid.

<sup>221</sup> *Estate Dempers v Sir* 1977 (3) SA 410 (A) , 39 SATC 93.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Income Tax Act 58 of 1962 , s 7(6).

<sup>225</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 844.

<sup>226</sup> Ibid.



to be 'received by or accrued to'<sup>227</sup> a person. This means that this section is not applicable if a beneficiary does not enjoy a contingent right to that income.<sup>228</sup> In *ITC 673*<sup>229</sup> the court held that this section shall only apply where the 'right to revoke is expressly retained and not when it is retained by implication.'<sup>230</sup>

Section 7(7)<sup>231</sup> applies in instances where a donation, settlement or disposition<sup>232</sup> has been made and investment income which is derived from same is by virtue of a donor ceding such benefit to someone else. In such a case, if the donor has a right to regain ownership of the property at a later stage, the investment income derived from that property will be taxed in the hands of the donor.<sup>233</sup> This section was brought about to counteract practices whereby taxpayers ceded their rights to income before it was accrued to them, in an attempt to decrease their taxable income.

Section 7(8)<sup>234</sup> became effective for years of assessment commencing on or after 01 January 2001. This was done mainly to prevent any foreign source of income from being donated to a non-resident of South Africa who would not include the income as part of his gross income. This section deems such income to be that of the resident and it is therefore taxed in the hands of that resident.

Section 7(8)<sup>235</sup> does not however apply to any donations made by the resident to a non-resident public benefit organization.<sup>236</sup> The triggers for this section are that a 'donation, settlement or

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<sup>227</sup> Income Tax Act 58 of 1962 , s 7(6).

<sup>228</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 846.

<sup>229</sup> *ITC 673* 16 SATC 230.

<sup>230</sup> *Ibid.*

<sup>231</sup> Income Tax Act 58 of 1962 , s 7(7).

<sup>232</sup> *Ibid.*

<sup>233</sup> M Botha et al , *The South African Financial Planning Handbook* (South Africa: Lexis Nexis, 2013) 834.

<sup>234</sup> Income Tax Act 58 of 1962 , s 7(8).

<sup>235</sup> Income Tax Act 58 of 1962 , s 7(8).

<sup>236</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 848.

disposition'<sup>237</sup> must be made, and this 'donation, settlement or disposition'<sup>238</sup> must be 'made by a resident to a non-resident.'<sup>239</sup> A full and clear definition of 'resident' is set out in section 1 of the Income Tax Act.<sup>240</sup>

The provisions of section 7(9)<sup>241</sup> state that 'where an asset has been disposed of for an amount less than its market value at the time of disposition, the amount that shall be deemed to be a donation will be the difference between the amount for which the asset was disposed of and the market value of the asset.'<sup>242</sup> The treatment of this deemed donation amount will depend as to which triggers are satisfied in section 7<sup>243</sup> of the Income Tax Act.

Section 7(10)<sup>244</sup> creates a legal obligation on the part of a donor. The donor is obligated to disclose in writing to the Commissioner for SARS<sup>245</sup> all 'donations, settlements and other dispositions'<sup>246</sup> when submitting his tax return. Failure to comply with this section may ultimately result in criminal charges.<sup>247</sup>

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<sup>237</sup> Income Tax Act 58 of 1962 , s 7(8).

<sup>238</sup> Ibid.

<sup>239</sup> Income Tax Act 58 of 1962 , s 7(8).

<sup>240</sup> Income Tax Act 58 of 1962 , s1.

<sup>241</sup> Income Tax Act 58 of 1962 , s 7(9).

<sup>242</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 844.

<sup>243</sup> Income Tax Act 58 of 1962 , s 7.

<sup>244</sup> Income Tax Act 58 of 1962 , s 7(10).

<sup>245</sup> South African Revenue Services (Hereinafter referred to as "SARS").

<sup>246</sup> Income Tax Act 58 of 1962 , s 7(10).

<sup>247</sup> Tax administration criminal offences April 2013 issue 163 , available at

[https://www.saica.co.za/integritax/2013/2193.\\_Criminal\\_offences.htm](https://www.saica.co.za/integritax/2013/2193._Criminal_offences.htm) , accessed on 02 July 2018.

Section 7C<sup>248</sup> has been effective since March 2017 and affects all loans to trusts irrespective of whether they were advanced before or after such date.<sup>249</sup> This section deals specifically with ‘low interest or interest free loans’<sup>250</sup> that are advanced to trusts. The operation of section 7C<sup>251</sup> is triggered when a ‘loan must have been made by a natural person (or, at the instance of a natural person, by a company that is a connected person in relation to the natural person) to a trust.’<sup>252</sup> In the event of a natural person advancing a ‘low interest or interest free loan’<sup>253</sup> to a trust, then the ‘difference between the interest rate charged and the official interest rate’<sup>254</sup> is deemed to be a donation on the last day of that specific tax year for a loan which has been outstanding during the previous tax year.<sup>255</sup> The official interest rate is set out in the Seventh Schedule.<sup>256</sup>

Taxpayers may search for methods to avoid the operation of 7C,<sup>257</sup> for example by advancing a loan to a company whereby the shares of that company is owned by a trust.<sup>258</sup> This scenario has

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<sup>248</sup> Income Tax Act 58 of 1962 , s 7C.

<sup>249</sup> Heads up Trusts: Section 7C has arrived , available at <https://southafrica.moorestephens.com/news/march-2017/section-7c-has-arrived!> , accessed on 27 August 2018.

<sup>250</sup> Ibid.

<sup>251</sup> Income Tax Act 58 of 1962 , s 7C.

<sup>252</sup> Ibid.

<sup>253</sup> Heads up Trusts: Section 7C has arrived , available at <https://southafrica.moorestephens.com/news/march-2017/section-7c-has-arrived!> , accessed on 27 August 2018.

<sup>254</sup> Concern about practical challenges with new trust legislation , available at <https://www.moneyweb.co.za/in-depth/fisa/concern-about-practical-challenges-with-new-trust-legislation/> , accessed on 27 August 2018.

<sup>255</sup> Ibid.

<sup>256</sup> Income Tax Act 58 of 1962 , Seventh Schedule.

<sup>257</sup> Income Tax Act 58 of 1962 , s 7C.

<sup>258</sup> Heads up Trusts: Section 7C has arrived , available at <https://southafrica.moorestephens.com/news/march-2017/section-7c-has-arrived!> , accessed on 27 August 2018.

been taken care of in section 7C.<sup>259</sup> In such a case section 7C<sup>260</sup> will deem the difference between the interest rate charged and the official interest rate, a donation by the shareholders of that company.<sup>261</sup> In essence this section serves as more than just a guideline but rather an anti-avoidance mechanism.

### 3.3.Capital Gains Tax

A Capital gain is described in paragraph 3 of the Eighth Schedule<sup>262</sup> as:-

‘A person's capital gain for a year of assessment, in respect of the disposal of an asset-

(a) during that year, is equal to the amount by which the proceeds received or accrued in respect of that disposal exceed the base cost of that asset; or

(b) in a previous year of assessment, is equal to-

(i) so much of any amount received by or accrued to that person during the current year of assessment, as constitutes part of the proceeds of that disposal which has not been taken into account-

(aa) during any year in determining the capital gain or capital loss in respect of that disposal; or

(bb) in the redetermination of the capital gain or capital loss in terms of paragraph 25 (2); or

(ii) so much of the base cost of that asset that has been taken into account in determining the capital gain or capital loss in respect of that disposal as has been recovered or recouped during the current year of assessment and which has not been taken into account in the redetermination of the capital gain or capital loss in terms of paragraph 25 (2); or

(iii) the sum of:

(aa) any capital gain re-determined in terms of paragraph 25 (2) in the current year of assessment in respect of that disposal; and

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<sup>259</sup> Income Tax Act 58 of 1962 , s 7C.

<sup>260</sup> Ibid.

<sup>261</sup> Heads up Trusts: Section 7C has arrived , available at <https://southafrica.moorestephens.com/news/march-2017/section-7c-has-arrived!> , accessed on 27 August 2018.

<sup>262</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

(bb) any capital loss (if any) determined in respect of that disposal in terms of paragraph 25 for the last year of assessment during which that paragraph applied in respect of that disposal.<sup>263</sup>

It is clear from the Eighth Schedule<sup>264</sup> that in order for an entity to incur a capital gain, a trust must either conclude a transaction whereby an asset of the trust is sold to a third party for a selling price more than the base cost<sup>265</sup> or it must vest a trust asset in a beneficiary.<sup>266</sup>

### 3.3.1. Disposal to third party

When a trust asset is disposed of to a third party and the selling price is more than the base cost, the capital gain is the 'difference between the base cost and selling price.'<sup>267</sup> 'The base cost of the asset to the trust is the market value of the asset at the time the trust acquired the asset.'<sup>268</sup> The trust need not only purchase the asset in an arms-length transaction, the trust may also acquire the asset by means of "donation, expropriation, conversion, grant, cession, exchange or any other alienation or transfer of ownership of an asset.'<sup>269</sup>

### 3.3.2. Vesting of an interest in an asset of a trust in a beneficiary

Vesting means that a beneficiary of a trust has an unconditional entitlement to an asset notwithstanding that the date of enjoyment of the entitlement may be postponed by a condition.<sup>270</sup> In terms of paragraph 38 of the Eighth Schedule,<sup>271</sup> 'a trust and a beneficiary are deemed to be

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<sup>263</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>264</sup> Income Tax Act 58 of 1962 , Eighth Schedule.

<sup>265</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 853.

<sup>266</sup> Income Tax Act 58 of 1962, Eighth Schedule , 11(1)(d).

<sup>267</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 853.

<sup>268</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 853.

<sup>269</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 11(1)(a).

<sup>270</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 853.

<sup>271</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 38.

connected persons.’<sup>272</sup> When an asset is disposed of by means of ‘donation, settlement of other disposition’<sup>273</sup> or ‘to a person who is a connected person’<sup>274</sup> for an amount that ‘does not reflect and arm’s length’<sup>275</sup> transaction, the ‘person who disposed of the asset’<sup>276</sup> will be deemed to have disposed of that asset for an amount ‘received or accrued equal to market value as at date of disposal’<sup>277</sup> and the person who received the asset will be deemed to have received the asset at an amount equal to market value.<sup>278</sup> ‘This amount is therefore treated as expenditure actually incurred and paid for in terms of paragraph 20(1) (a).’<sup>279</sup> The ‘base cost’<sup>280</sup> of the asset to the trust will be the value to the trust at the time/ date which the trust acquired the asset as set out in paragraph 11.<sup>281</sup>

The next question which arises is when does the ‘disposal’ of the asset take place? In terms of paragraph 13(1) (a) (iiA),<sup>282</sup> the date of disposal of the trust asset is deemed to be the date when the interest vested in the beneficiary.<sup>283</sup> It is important to note that vesting may come into effect by stipulation in a trust deed or by way of the trustee’s discretion.<sup>284</sup> However this does not necessarily mean that the interest of that trust asset vests in the beneficiary as the trust may dispose of the asset to a third party.<sup>285</sup> The important aspect herein is whether there had been a distribution of the proceeds of the sale to the beneficiary.

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<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

<sup>274</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 38.

<sup>275</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 38.

<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 20.

<sup>281</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 11.

<sup>282</sup> Income Tax Act 58 of 1962 , Eighth Schedule, 13(1)(a)(iiA).

<sup>283</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 13(1)(a)(iiA).

<sup>284</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 853.

<sup>285</sup> Ibid.

### 3.3.3. Treatment of capital gains from disposals in a trust

Paragraph 80<sup>286</sup> of the Eighth Schedule deals with the treatment of capital gains as a result of the trust disposing of a trust asset. Paragraph 80<sup>287</sup> is subject to paragraphs 68,<sup>288</sup> 69,<sup>289</sup> 71<sup>290</sup> and 72<sup>291</sup> which are known as anti-avoidance provisions. Paragraph 80<sup>292</sup> states that ‘if a trust distributes a trust asset to a beneficiary, who is a resident in this country, the “gain” that the trust makes from the disposal of that asset is not taxable in the hands of the trust itself but rather in the hands of the beneficiary.’<sup>293</sup>

Paragraphs 80(1)<sup>294</sup> and 80(2)<sup>295</sup> of the Eighth Schedule provides for special rules that determine that a capital gain<sup>296</sup> must be taxed in the hands of a resident.<sup>297</sup> Paragraph 80(1)<sup>298</sup> deals with the acquisition of an interest in an asset to a resident beneficiary whilst paragraph 80(2)<sup>299</sup> applies when a beneficiary receives the gain itself and not an asset. It is important to note that since

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<sup>286</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80.

<sup>287</sup> Ibid.

<sup>288</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 68

<sup>289</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 69.

<sup>290</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 71.

<sup>291</sup> Income Tax Act 58 of 1962, Eighth Schedule , 72.

<sup>292</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80.

<sup>293</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80

<sup>294</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80(1) , 80(2).

<sup>295</sup> Ibid.

<sup>296</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>297</sup> Ibid.

<sup>298</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80(1).

<sup>299</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80(2).

paragraphs 80(1)<sup>300</sup> and 80(2)<sup>301</sup> are subject to paragraphs 68,<sup>302</sup> 69,<sup>303</sup> 71<sup>304</sup> and 72,<sup>305</sup> the liability for capital gains tax in terms of paragraphs 80(1) and 80(2) will shift to the entity/party stipulated in paragraphs 68, 69, 71 and 72 if the requirements/triggers of these paragraphs are met.<sup>306</sup>

Paragraph 62 of the Eighth Schedule deals with donations and bequests to certain exempt persons.<sup>307</sup> This paragraph stipulates that a taxpayer (trust) 'must disregard a capital gain or loss as a result of the disposal to a public benefit organization.'<sup>308</sup> In this instance, paragraph 80<sup>309</sup> does not apply to the capital gain. The effect of the exclusion of paragraph 80<sup>310</sup> is that the trust is free to decide whether to 'disregard the capital gain or loss'<sup>311</sup> incurred in terms of paragraph 62.<sup>312</sup>

Paragraph 73 of the Eighth Schedule<sup>313</sup> is a limiting provision. This provision limits the total income that a donor can accrue in terms of section 7<sup>314</sup> and the 'capital gain'<sup>315</sup> he accrues in terms of paragraphs 68 and 72.<sup>316</sup> It is noteworthy that the amount of the gain as a result of the operation

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<sup>300</sup> Income Tax Act 58 of 1962, Eighth Schedule, 80(1).

<sup>301</sup> Income Tax Act 58 of 1962, Eighth Schedule, 80(2).

<sup>302</sup> Income Tax Act 58 of 1962, Eighth Schedule, 68.

<sup>303</sup> Income Tax Act 58 of 1962, Eighth Schedule, 69.

<sup>304</sup> Income Tax Act 58 of 1962, Eighth Schedule, 71.

<sup>305</sup> Income Tax Act 58 of 1962, Eighth Schedule, 72.

<sup>306</sup> Income Tax Act 58 of 1962, Eighth Schedule, 68, 69, 71, 72.

<sup>307</sup> Income Tax Act 58 of 1962, Eighth Schedule, 62.

<sup>308</sup> Ibid.

<sup>309</sup> Income Tax Act 58 of 1962, Eighth Schedule, 80.

<sup>310</sup> Ibid.

<sup>311</sup> Income Tax Act 58 of 1962, Eighth Schedule, 62.

<sup>312</sup> Income Tax Act 58 of 1962, Eighth Schedule, 62.

<sup>313</sup> Income Tax Act 58 of 1962, Eighth Schedule, 73.

<sup>314</sup> Income Tax Act 58 of 1962, s7.

<sup>315</sup> Income Tax Act 58 of 1962, Eighth Schedule, 3.

<sup>316</sup> Income Tax Act 58 of 1962, Eighth Schedule, 68, 73.



of paragraphs 68 and 72 may only be accrued to the donor as a result of ‘a donation, settlement or disposition.’<sup>317</sup>

An important side note is that the exemption sections 10(1)(b), (cA), (cE), (d) or (e) of the Income Tax Act<sup>318</sup> allows a trust to be taxed if a capital gain is vested in an entity that is exempt from tax in terms of these sections.

#### 3.3.4. Treatment of Capital Gains in a discretionary trust

Paragraph 81<sup>319</sup> states that ‘a person’s interest in a discretionary trust at the onset is R0.’<sup>320</sup> This seems to imply that the interest has no value until an asset is vested in the beneficiary. The asset’s market value will be used as the base cost if or when the beneficiary disposes of the asset in the future.<sup>321</sup>

#### 3.3.5. Treatment of Capital Losses

Although it is important to look at the treatment of a capital gain in a trust, it is equally important to assess the treatment of capital losses. As stated above, it is clear that paragraph 80<sup>322</sup> allows for a ‘capital gain’<sup>323</sup> to be taxed in the hands of a resident beneficiary.<sup>324</sup> The question that arises is what happens to a capital loss? If paragraphs 68 and 72<sup>325</sup> are not applicable to a transaction, one

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<sup>317</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 73.

<sup>318</sup> Income Tax Act 58 of 1962 , s10(1)(b) , (cA) , (cE) , (d) & (e).

<sup>319</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 81.

<sup>320</sup> Ibid.

<sup>321</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 855.

<sup>322</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80.

<sup>323</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>324</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 855.

<sup>325</sup> Income Tax Act 58 of 1962, Eighth Schedule , 68 , 72.

can draw the conclusion that there are two possible ways for a capital gain to be held in a trust in order to utilise a 'trapped loss' namely distributing the gain to a non-resident or delay a gain vesting in a beneficiary to a different tax year.<sup>326</sup> Paragraph 39<sup>327</sup> introduces a 'connected persons rule.' A 'trust and its beneficiaries are connected persons'<sup>328</sup> in terms of section one.<sup>329</sup> Capital losses resulting from transactions between connected parties are 'ring-fenced' in terms of paragraph 39.<sup>330</sup> Losses such as these can only be set-off against the relevant gains made in that tax year if the connected persons are still regarded as connected persons when the gain is made.

### 3.3.6. Non-resident trusts

It is now clear that income flowing within a trust retains its nature and is most likely that the tax liability will be borne by a donor or beneficiary.<sup>331</sup> Residency however becomes crucial when a trust itself is liable for tax. Non-resident trusts are liable for tax only from 'income from a South African source or income deemed to be from a South African source.'<sup>332</sup> *SIR v Rosen*<sup>333</sup> stated 'that income retains its nature in a trust only if it accrues to the beneficiaries in the same year of assessment as it accrued to the trust.'<sup>334</sup> It is thus understood that any income accumulated and retained in a trust loses the nature mentioned above.

Section 25B(2A)<sup>335</sup> is an anti-avoidance provision introduced by the legislature to prevent non-South African sourced income from being retained in a trust that is not a South African resident only to be distributed in subsequent years of taxation to a resident who would be taxed on the

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<sup>326</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 855.

<sup>327</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 39.

<sup>328</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 39(b)(ii).

<sup>329</sup> Income Tax Act 58 of 1962 , s1.

<sup>330</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 39.

<sup>331</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 855.

<sup>332</sup> Ibid.

<sup>333</sup> *Sir v Rosen* 1971 (1) SA 172 (AD).

<sup>334</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 855.

<sup>335</sup> Income Tax Act 58 of 1962 , s25B(2A).

world-wide income had it been distributed in the first tax year.<sup>336</sup> Section 25B (2A)<sup>337</sup> essentially provides that ‘any resident that acquires a vested right’<sup>338</sup> in capital of a non-resident trust during a particular ‘year of assessment’<sup>339</sup> must include that capital amount in its income for that particular year. Section 25B (2A) includes this amount to be ‘that capital arose from any receipts and accruals of such trust which would have constituted income if such trust had been a resident, in any previous year of assessment during which that resident had a contingent right to that amount; and that amount has not been subject to tax in the Republic in terms of this Act.’<sup>340</sup>

Paragraph 80(3)<sup>341</sup> is similar to section 25B(2A)<sup>342</sup> in its operation, however paragraph 80(3) is applicable only if there has been a capital gain that has not been subjected to tax in terms of any provisions of the Act.<sup>343</sup>

### 3.4. Donations Tax

Donations tax is the tax levied on amounts transferred from one person or entity to another by means of a gratuitous disposal.<sup>344</sup> In the *CSARS v Welch’s Estate*,<sup>345</sup> the court held that a transaction will only constitute a donation if the transaction was motivated by ‘pure liberality’<sup>346</sup> or “disinterested benevolence.”<sup>347</sup> In terms of section 59,<sup>348</sup> ‘the person liable for donations tax is the donor; however, if the donor fails to pay the tax within a prescribed period of three months from

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<sup>336</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 855.

<sup>337</sup> Income Tax Act 58 of 1962 , s25B(2A).

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Income Tax Act 58 of 1962 , s25B(2A)(a) , (b).

<sup>341</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80(3).

<sup>342</sup> Income Tax Act 58 of 1962 , s25B(2A).

<sup>343</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 80(3).

<sup>344</sup> Income Tax Act 58 of 1962 , s54.

<sup>345</sup> *CSARS v Welch’s Estate* 66 SATC 303.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

<sup>348</sup> Income Tax Act 58 of 1962 , s59.

date of donation, both the donor and donee shall be jointly liable for donations tax.<sup>349</sup> Donations tax is a type of tax levied on the transfer of wealth and as a result does not constitute an income tax.<sup>350</sup> This type of tax has an anti-avoidance perspective as it prevents entities from donating their assets to other entities in order to evade income tax and estate duty in respect of their estates. Donations tax is imposed at the rate of 20% of the value of the asset<sup>351</sup> which has been 'disposed of by a resident'<sup>352</sup> (the donor), directly or indirectly.<sup>353</sup> It is important to note that the provisions of donations tax apply to trusts as well.<sup>354</sup> It is particularly noted that section 56(1)(l)<sup>355</sup> of the Income Tax Act provides that if property is disposed of by a trust by way of donation to the beneficiaries of a trust, no donations tax is payable by the trust on the value of the asset donated.<sup>356</sup>

A donation 'takes effect on the date on which all legal formalities of a donation have been complied with and completed.'<sup>357</sup> An oral donation may take effect on date of delivery of the asset.<sup>358</sup>

Some transactions may be deemed to be donations by virtue of section 58.<sup>359</sup> Section 58(1) states that:

'Where any property has been disposed of for a consideration which, in the opinion of the Commissioner, is not an adequate consideration that property shall for the purposes of this Part be deemed to have been disposed of under a donation: Provided that in the determination of the value of such property a reduction shall be made of an amount equal to the value of the said consideration.'<sup>360</sup>

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<sup>349</sup> Ibid.

<sup>350</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 820.

<sup>351</sup> Income Tax Act 58 of 1962 , s64.

<sup>352</sup> Income Tax Act 58 of 1962 , s54.

<sup>353</sup> Income Tax Act 58 of 1962 , s54.

<sup>354</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 820.

<sup>355</sup> Income Tax Act 58 of 1962 , s56(1)(l).

<sup>356</sup> Ibid.

<sup>357</sup> Income Tax Act 58 of 1962 , s55(3).

<sup>358</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 822.

<sup>359</sup> Income Tax Act 58 of 1962 , s58.

<sup>360</sup> Income Tax Act 58 of 1962 , s58(1).

This means that if a trust disposes of an asset at a value considerably lower than the actual market value, that transaction might be deemed to be a donation. The amount of the deemed donation shall be the difference between the market value of the property less the amount paid by the receiving party.<sup>361</sup>

Section 58<sup>362</sup> also creates a deemed donation in terms of 8C.<sup>363</sup> Section 8C<sup>364</sup> defers the taxation of a restricted equity instrument until a later date so as to enable the full gain of the instrument to be taxed at ordinary tax rates.<sup>365</sup> Essentially, this imposes a reason on the taxpayer such as a trust to trigger a fiction of the imposition of ordinary tax at a stage earlier than where the full benefit of the instrument is enjoyed.<sup>366</sup> This fiction created would result in entities engaging in transactions that are not at arm's length. At this point section 58(2)<sup>367</sup> kicks in and prevents these avoidance schemes from materializing by deeming the instrument to be donated at the time which it was deemed to be vested for the purposes of section 8C.

#### 3.4.1. Exemptions

Although donations tax is levied on any gratuitous disposal of property, wavier or renunciation,<sup>368</sup> there are certain exemptions to the levying of donations tax. These exemptions are important to look at when aiming to successfully adopt an estate plan for a taxpayer. Below, I shall discuss specific exemptions that relate to trusts.

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<sup>361</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 820.

<sup>362</sup> Income Tax Act 58 of 1962 , s58.

<sup>363</sup> Income Tax Act 58 of 1962 , s8C.

<sup>364</sup> Ibid.

<sup>365</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 822.

<sup>366</sup> Ibid.

<sup>367</sup> Income Tax Act 58 of 1962 , s58(2).

<sup>368</sup> Income Tax Act 58 of 1962 , s55(1).

Section 56(1) (c) provides for a '*donatio mortis causa*.'<sup>369</sup> This is a donation that has been made in contemplation of death.<sup>370</sup> For estate duty purposes, the capital amount of an asset will be included in the deceased's estate; however no donations tax will be attracted by donation. It is clear that this type of exemption will only apply to an *inter vivos* trust as the donation will only come into effect upon the death of a person.

Section 56(1) (d) of the Income Tax Act<sup>371</sup> provides that donations tax cannot be imposed on a donation which is made by the donor and the donee receives no benefit until the death of the donor. In *ITC 11372*,<sup>372</sup> the court made it clear that section 56(1) (d)<sup>373</sup> does not apply to the donation of an asset in terms of which the asset is donated to a trustee of a trust for the benefit of a beneficiary and the entire donation is suspended pending the death of the donor. The court reached this decision by interpreting the terminology of the section. Section 56(1) (d) uses the word 'donee' and not 'beneficiary.'

Section 56(1) (l) of the Income Tax Act<sup>374</sup> ensures that there is no double taxation on the part of trusts. Any amount allocated or distributed to a beneficiary cannot be subjected to donations tax twice. This section endorses that a distribution to a trustee cannot attract donations tax if the distribution has been made by the trustees in terms of the provisions of the trust deed.

Section 56(2)(a) of the Income Tax Act<sup>375</sup> provides that donations tax will not be payable by trust in respect of casual gifts, where a trust has donated a casual gift outside of the parameters of the trust deed and the amount does not exceed R10 000,00 per year.

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<sup>369</sup> Ibid.

<sup>370</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 823.

<sup>371</sup> Income Tax Act 58 of 1962 , s56(1)(d).

<sup>372</sup> Unreported judgement of the Cape Income Tax Special Court 23 August 2004.

<sup>373</sup> Income Tax Act 58 of 1962 , s56(1)(d).

<sup>374</sup> Income Tax Act 58 of 1962 , s56(1)(l).

<sup>375</sup> Income Tax Act 58 of 1962 , s56(2)(a).

Section 56(2) (c) of the Income Tax Act<sup>376</sup> states that donations tax cannot be levied on an amount that is a '*bona fide* contribution made by the donor towards the maintenance of a person which the Commissioner deems to be reasonable.'<sup>377</sup> A trust can be a donor of maintenance therefore this exemption is not limited to natural persons.<sup>378</sup>

### 3.5. Transfer Duty

Transfer duty is a type of tax that is imposed on immovable property that has been registered or transferred. This duty is levied in terms of the Transfer Duty Act.<sup>379</sup>

Section 2(1) of the Transfer Duty Act<sup>380</sup> states that transfer duty is 'levied on the value of a property acquired by a person by way of a transaction or in any other manner.'<sup>381</sup> Transfer duty is also 'levied on the value of any property that is enhanced by the renunciation of any interest or restriction upon use or disposal of such property.'<sup>382</sup>

With effect from 23 February 2011, section 1 of the Transfer Duty Act,<sup>383</sup> defines a 'person' as the 'estate of a deceased or insolvent person and any trust.'<sup>384</sup> As a result the provisions of the Transfer Duty Act<sup>385</sup> will apply to a trust.

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<sup>376</sup> Income Tax Act 58 of 1962 , s56(2)(c).

<sup>377</sup> Income Tax Act 58 of 1962 , s56(2)(c).

<sup>378</sup> M Stiglingh et al *SILKE: South African Income Tax* (2014) , 824.

<sup>379</sup> Transfer Duty Act 40 of 1949 (Hereinafter referred to as "The Transfer Duty Act").

<sup>380</sup> Transfer Duty Act 40 of 1949 , s2(1).

<sup>381</sup> Ibid.

<sup>382</sup> Ibid.

<sup>383</sup> Transfer Duty Act 40 of 1949 , s1.

<sup>384</sup> Ibid.

<sup>385</sup> Transfer Duty Act 40 of 1949.

The purchaser of a property will always pay transfer duty and the determinable amount has to be paid 'within six months of the date of acquisition of the property.'<sup>386</sup> Section 2(1) (b)<sup>387</sup> sets out the rates of transfer duty payable. The rates payable vary from 0 per cent to 13 per cent of the purchase price of the immovable property.<sup>388</sup>

Since transfer duty is payable by a trust which acquires immovable property, irrespective of the nature of a trust and whether the trust is a resident or not, one must look at the important exemptions relating to trusts and the levying of transfer duty. Section 9(4) of the Transfer Duty Act<sup>389</sup> provides for these exemptions.

Section 9(4)(a)<sup>390</sup> states that 'no transfer duty is payable by a trust in respect of a change in the registration of property that is required as a result of the termination of the administrator of a trust under circumstances such as under a will, or trustee of an insolvent estate.'<sup>391</sup> This exemption applies to both testamentary and *inter vivos* trusts.

Section 9(4)(b)<sup>392</sup> of the Transfer Duty Act provides that 'no transfer duty shall be payable where trust property is transferred by the administrator of a trust in pursuance of the will or other written instrument in terms of which the administrator was appointed, to persons entitled thereto under such will, or to a relative as contemplated in the definition of "relative" in section 1 of the Estate Duty Act or where the trust was founded in terms of such other written instrument by a natural person for the benefit of such relative, provided that no consideration is paid directly or indirectly by such relative in respect of the acquisition of such trust property.'<sup>393</sup> This section provides that transfer duty cannot be imposed on the transfer of immovable property, if the transfer was done in

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<sup>386</sup> Transfer Duty Act 40 of 1949 , s3.

<sup>387</sup> Transfer Duty Act 40 of 1949 , s2(1)(b).

<sup>388</sup> Ibid.

<sup>389</sup> Transfer Duty Act 40 of 1949 , s9(4).

<sup>390</sup> Transfer Duty Act 40 of 1949, s9(4)(a).

<sup>391</sup> Ibid.

<sup>392</sup> Transfer Duty Act 40 of 1949 , s9(4)(b).

<sup>393</sup> Transfer Duty Act 40 of 1949 , s9(4)(b).



pursuance to the provisions of a written will. This means that this section will only apply to *inter vivos* trusts.

Section 9(4)(c)<sup>394</sup> of the Transfer Duty Act states that no transfer duty is payable where immovable property is restored by a trustee of an insolvent estate or insolvent.<sup>395</sup>

Section 9(4)(d)<sup>396</sup> of the Transfer Duty Act states that, 'no transfer duty is payable in respect of the registration of trust property in the name of a trustee in his capacity as trustee, if such property is held by such trustee as a trust property at the date of commencement of the Trust Property Control Act<sup>397</sup> and such registration is required in terms of section 11(2) of the said Act.'<sup>398</sup> This means that if a donor sells property to a trust, a trustee, in whose name the property is registered in a representative capacity, will not be liable to pay transfer duty as the property is a trust asset.

An understanding of statutes and South African common law principles relating to the levying of tax on trusts is imperative to the trade of estate planners. Most founders/donors have the objective of limiting their tax liability. One of the two key aspects of this dissertation has been discussed above. It is evident from the discussion above that different transactions relating to a trust attract different tax consequences. The key to establishing what tax liability accrues to a transaction is filtering through the various acts mentioned above which satisfies the triggers of the sections of the acts.

Notwithstanding the above, the tax laws of South Africa head the table of heated debate. Over the years individuals have developed schemes which allow them to limit tax consequences. As a result of these schemes, the Davis Tax Committee<sup>399</sup> was established to research these plans in order to provide recommendations to the legislature to combat such tax avoidance schemes. Before

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<sup>394</sup> Transfer Duty Act 40 of 1949 , s9(4)(c).

<sup>395</sup> Ibid.

<sup>396</sup> Transfer Duty Act 40 of 1949 , s9(4)(d).

<sup>397</sup> Trust Property Control Act 57 of 1988.

<sup>398</sup> Ibid.

<sup>399</sup> Davis Tax Committee , July 2013.

looking at the Committee's recommendations relating to trusts, one must understand how trusts are currently subjected to different types of taxes. This has been discussed earlier on in this chapter. After assessing how trusts are currently taxed in South Africa, it is imperative to look at proposed changes to the taxation of a trust recommended by the Committee. The first interim report<sup>400</sup> and second interim<sup>401</sup> report of the Committee will be discussed in turn.

### 3.6.Davis Tax Committee and its Recommendations

The Davis Tax Committee<sup>402</sup> was formed in July 2013. The formation of this Committee came about when Mr. Pravin Gordhan, the previous Minister of Finance, announced the members of a Tax Review Committee. The name of the Tax Review Committee was thereafter changed at an introductory meeting of the Committee on 25 July 2013, to the Davis Tax Committee.<sup>403</sup> The Committee is chaired by Judge Dennis Davis. The Committee also consists of eight other academics, who form the members of the Committee. Representatives from the National Treasury and from the South African Revenue Service also form members of the Committee, however they are ex-officio members who provide advice and technical support to the Committee.

The role of the Committee was to operate various sub-committees that dealt with specific targets mentioned in its Terms of Reference. It was the objective of the sub-committees to stipulate deadlines and due dates by which submissions were to be received by the stakeholders. The sub-committees would, after receipt of the submissions, prepare various interim reports that would be considered by the Committee as a whole, for approval. The interim reports would thereafter be submitted to the Minister of Finance for the final approval and for any further steps if any, to be taken.

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<sup>400</sup> Davis Tax Committee First Interim Report on Estate Duty , 13 July 2015.

<sup>401</sup> Davis Tax Committee Second Interim Report on Estate Duty , 24 August 2016.

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.

The above is done with the purpose of assessing South Africa's tax policy framework and the policy's role in supporting economic growth and development, increase in employment and fiscal sustainability.<sup>404</sup>

### 3.6.1. Committee's Recommendations

#### 3.6.1.1. First Interim Report

The first interim report on estate duty<sup>405</sup> which was released to the public on 13 July 2015 dealt extensively with trusts. This report was long anticipated and expected due to trusts having been used for some time as mechanisms for the wealthy to protect their wealth and to avoid paying taxes. Whilst the Committee did not propose the abolition of trusts, one of the main views held by the Committee was that large amounts of taxable income was lost due to the distribution of income and other gains to beneficiaries who were taxed at lower rates.

The Committee, as a result of the above, made recommendations to combat the misuse of trusts.

One of the first recommendations made by the Committee was that section 25B and section 7 of the Income Tax Act<sup>406</sup> be eliminated. Since section 25B essentially allows for the income in a trust to be split, an amount is most often taxed at individual tax rates rather than at the higher rate applicable to the trust. This causes an ongoing grave loss to the fiscus. Section 25B<sup>407</sup> read with

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<sup>404</sup> The Davis Tax Committee's interim report on estate duty, available at <http://www.sataxguide.co.za/the-davis-tax-committees-interim-report-on-estate-duty/>, accessed on 17 October 2017.

<sup>405</sup> Davis Tax Committee First Interim Report on Estate Duty, 13 July 2015.

<sup>406</sup> Income Tax Act 58 of 1962, s25B, s7.

<sup>407</sup> Income Tax Act 58 of 1962, s25B.

section 7<sup>408</sup> essentially codified the conduit principle, as discussed earlier in this chapter.<sup>409</sup> Notwithstanding the above, the Committee was of the view that the abolition of these two sections would result in substantial amounts of tax being collected by the South African Revenue Service and it would result in a decrease of the existence of trusts which were created with the purpose of saving on taxes by utilizing these sections.<sup>410</sup>

The second recommendation from the Committee was that the rate at which trusts are taxed should be amended. The Committee proposed that a single flat rate of tax be levied on trusts as opposed to the current rate of 45% (exclusive of rebates) and the marginal rate of 18% to 45% (including rebates and exemptions) on individuals.

A further recommendation by the Committee was that a trust should be considered a separate tax payer.<sup>411</sup> This was a proposed logical extension to the explanation of the abolition of section 25B<sup>412</sup> and section 7.<sup>413</sup> The effect of this suggestion is that a trust will be the primary tax payer and not the secondary taxpayer as envisaged in section 25B<sup>414</sup> and section 7.<sup>415</sup> It is important to note that the fact that if section 7(10)<sup>416</sup> is abolished SARS will now have to call upon greater disclosure from tax payers.

Some of the final recommendations are that interest free loans continue to operate and that the special trust definition be retained in section 1 of the Income Tax Act.<sup>417</sup> It is quite surprising that

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<sup>408</sup> Income Tax Act 58 of 1962 , s7.

<sup>409</sup> Taxation of trusts revisited , available at <http://www.thesait.org.za/news/news.asp?id=243570> , accessed on 20 February 2018 .

<sup>410</sup> Davis Tax Committee First Interim Report on Estate Duty , 13 July 2015.

<sup>411</sup> Davis Tax Committee First Interim Report on Estate Duty , 13 July 2015.

<sup>412</sup> Income Tax Act 58 of 1962 , s25B.

<sup>413</sup> Income Tax Act 58 of 1962 , s7.

<sup>414</sup> Income Tax Act 58 of 1962 , s25B.

<sup>415</sup> Income Tax Act 58 of 1962 , s7.

<sup>416</sup> Income Tax Act 58 of 1962 , s7(10).

<sup>417</sup> Income Tax Act 58 of 1962 , s1.

the Committee has chosen to touch on the interest free loans aspect as this would continue to enable estate planners to protect and enhance their wealth.<sup>418</sup>

### 3.6.1.2. Second Interim Report

The Committee released its second interim report on Estate Duty on 24 August 2016.<sup>419</sup> This report was published after the Committee had taken into account the various recommendations and comments from the public.<sup>420</sup> Two of the most significant proposals dealt with estate duty and 'capital gains tax.'<sup>421</sup>

In this report, the Committee dealt with the recommendations more specifically the recommendations dealing with estate duty<sup>422</sup> and 'capital gains tax.'

The Committee recommended that the primary abatement in respect of the calculation of estate duty, should increase from the now R 3,5 million to R 15 million and that this abatement amount should be applicable to all taxpayers notwithstanding their relationship status.<sup>423</sup> It also suggested that the spousal abatement envisaged in section 4(q)<sup>424</sup> should be abolished.<sup>425</sup> A further recommendation was that estate duty should increase to 25% of the dutiable amount of an estate which exceeds R 30 million.<sup>426</sup> These however will not apply to trust assets because trust assets (other than Life Assurances) are not subject to estate duty. However a trust asset may fall victim

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<sup>418</sup> Davis Tax Committee First Interim Report on Estate Duty , 13 July 2015.

<sup>419</sup> Davis Tax Committee Second Interim Report on Estate Duty , 24 August 2016.

<sup>420</sup> The Davis Tax Committee issues its second report on estate duty , available at <https://www.ensafrica.com/news/the-Davis-Tax-Committee-issues-its-second-report-on-estate-duty?Id=2351&STitle=tax%20ENSight> , accessed on 17 October 2017.

<sup>421</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>422</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>423</sup> Davis Tax Committee Second Interim Report on Estate Duty , 24 August 2016.

<sup>424</sup> Estate Duty Act 45 of 1955, s4(q).

<sup>425</sup> Davis Tax Committee Second Interim Report on Estate Duty , 24 August 2016.

<sup>426</sup> Ibid.

to the deeming provisions<sup>427</sup> mentioned earlier in this chapter. The assets will then be deemed to be that of the donor or beneficiary in their personal capacity.<sup>428</sup>

In respect of capital gains tax,<sup>429</sup> the Committee suggested that the capital gains tax rollover provisions which are applicable to spouses be abolished and that an amount of R1 million should be implemented as the exemption.<sup>430</sup>

The Committee further suggested that since there is a proposal to remove the spousal abatement and exemptions for the purposes of estate duty and capital gains tax,<sup>431</sup> the same should apply to donations tax with the exemption of maintenance for the taxpayer's family.<sup>432</sup> The Committee proposed that the abolition of the above will mean that the spousal abatement will not apply to the transferring of assets that are subject to capital gains tax.<sup>433</sup> Further, the Committee recommended that the monetary threshold which limits 'tax-free' cash transfers between spouses "should be limited to cash donations that do not create an enduring benefit on the part of the recipient spouse."<sup>434</sup>

It is undoubtedly clear that the Committee has tried to deal with many avoidance schemes in the first and second interim reports. The first report focused mainly on trusts as an estate planning tool whilst the second report focused on individual estate planning. This could be due to the Committee and legislature working together to attempt to provide a well- rounded report in respect of estate planning and provide plans and recommendations to prevent tax avoidance within South Africa. It is important to note that all of the recommendations made by the Committee are advisory in nature and are subject to the legislature's amendments and parliamentary oversight.

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<sup>427</sup> Income Tax Act 58 of 1962 , s7.

<sup>428</sup> Davis Tax Committee Second Interim Report on Estate Duty , 24 August 2016.

<sup>429</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>430</sup> Ibid .

<sup>431</sup> Income Tax Act 58 of 1962 , Eighth Schedule , 3.

<sup>432</sup> Ibid.

<sup>433</sup> Davis Tax Committee Second Interim Report on Estate Duty , 24 August 2016.

<sup>434</sup> Ibid.

### 3.6.1.3. Final Report

On 12 April 2018, the Committee released its final reports. These final reports comprised of reports on VAT; the efficiency of South Africa's corporate tax system; public benefit organization and tax system; and the feasibility of wealth tax in South Africa. The report on the feasibility of wealth tax dealt with current forms of taxes such as Transfer duty, Estate duty and Donations tax. The main objectives that the Committee focused on were to provide 'an empirical review of global literature on wealth tax;<sup>435</sup> focus on the state of wealth inequality currently in South Africa;<sup>436</sup> evaluating the feasibility of the wealth tax in a way that will help minimize the wealth inequality in South Africa in an economical and administratively efficient and lastly to 'examine potential contribution of wealth taxes in South Africa's revenue stream.'<sup>437</sup>

During the Committee's investigations, it determined a useful criterion for the evaluation of wealth tax and an efficient functioning wealth tax system.<sup>438</sup> Some checkpoints of the criteria were the administration costs of designing a system that taxes wealth and tax reform and its implementation and acceptability by taxpayers.<sup>439</sup> In order to design a wealth tax system that functioned with efficiency, the Committee looked at the wealth tax systems in foreign countries such as France, Germany, Netherlands and India.<sup>440</sup>

The Davis Tax Committee recognized that inequality in South Africa was on the rise and that unequal wealth can be used to influence 'economic and democratic values.'<sup>441</sup> The Committee argued that 'Transfer Duty was merely second best to properly functioning property tax.'<sup>442</sup> This

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<sup>435</sup> Davis Tax Committee Report on feasibility of wealth tax in South Africa , 12 April 2018.

<sup>436</sup> Ibid.

<sup>437</sup> Davis Tax Committee Report on feasibility of wealth tax in South Africa , 12 April 2018.

<sup>438</sup> Ibid.

<sup>439</sup> Ibid.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

<sup>442</sup> Ibid.

is because South Africa's municipal valuation rolls are not updated regularly.<sup>443</sup> This demonstrates that it would be rational to accept that Transfer Duty will not be repealed and it generates substantial revenue.<sup>444</sup>

It is clear that the Committee has recognized some of the issues the South African tax system faces and has made recommendations to rid the tax system of its flaws, but what has been made clear is that in order for South Africa to have a well-functioning wealth tax system, more work must be done.<sup>445</sup> The Committee has proposed that from the 2020 tax year, all personal income tax payers above the filing threshold must submit a statement of one's assets and liabilities. The objective behind this is to provide information to SARS and the National Treasury that will allow them to make an informed decision about the future implementation of wealth tax. This is a proactive step that may help alleviate any potential issues with wealth tax before its implementation.<sup>446</sup> Although the implementation of wealth tax will take much time, the Committee has reserved its position and has recommended that the government heed the recommendations of the First<sup>447</sup> and Second Reports on Estate Duty.<sup>448</sup>

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<sup>443</sup> Ibid.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> Davis Tax Committee Report on feasibility of wealth tax in South Africa, 12 April 2018.

<sup>447</sup> Davis Tax Committee First Interim Report on Estate Duty, 13 July 2015.

<sup>448</sup> Davis Tax Committee Second Interim Report on Estate Duty, 24 August 2016.



#### 4. CHAPTER FOUR: TAXATION OF TRUST EXPENDITURE

This chapter will assess how the expenses of a trust are taxed. Due to the limited academic resources for the particular sections of the Income Tax Act that will be stated below, much of this chapter will encompass opinion of the commentary of these sections.

Before turning to the Income Tax Act,<sup>449</sup> one must ask what expenses does a trust incur, how these expenses are incurred and thereafter, how are these expenses treated by the Income Tax Act?<sup>450</sup>

Section 25B (3) of the Income Tax Act<sup>451</sup> provides for 'allowances and deductions of any amount in a trust that is incurred in respect of an amount that was distributed to a beneficiary. This subsection makes mention of the word 'amounts referred to in subsection 1,'<sup>452</sup> therefore one establishes that only beneficiaries that hold a vested right will be entitled to claim allowances and

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<sup>449</sup> Income Tax Act 58 of 1962.

<sup>450</sup> Income Tax Act 58 of 1962.

<sup>451</sup> Income Tax Act 58 of 1962 , s25B(3).

<sup>452</sup> Ibid.

expenditure.<sup>453</sup> When examining this sub section, it is important to note that this section makes reference to both deductions and allowances. Since both are dealt with in this section, it is quite easy for a trust to be left with a taxable loss in a given tax year.

In the case of *ITC 10883*,<sup>454</sup> the court stated that a trust cannot distribute losses to beneficiaries in a trust.<sup>455</sup> The court further stated that assessed losses are not deducted, but set off against income received.<sup>456</sup> Section 25B (3)<sup>457</sup> further provides that 'to the extent to which that amount is under that subsection deemed to be an amount which has accrued to a beneficiary.'<sup>458</sup> These words can be perceived to mean that if a trust has no income to distribute amongst beneficiaries, no assessed losses can be used by those beneficiaries.<sup>459</sup> Essentially, this part of the sub section creates a pro rata division of the deductions and allowances to the income between the beneficiaries in the trust, in the relevant proportions to which the income accrues.<sup>460</sup>

'Be deemed to be a deduction or allowance which may be made in the determination of the taxable income derived by that trust,'<sup>461</sup> are the words contained in section 25B (3) (b).<sup>462</sup> In the past, the legislation used deal with taxable losses by looking at the provisions of Practice Note 23; however this Practice Note has since been withdrawn. This Practice Note allowed for any deduction and

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<sup>453</sup> 25B Income of trusts and trust beneficiaries of trusts , Commentary available at <http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publ ish:10.1048/Enu>, accessed on 11 December 2017.

<sup>454</sup> *ITC 10883*, Unreported Judgement by the Cape Tax Court , 15 October 2002.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid.

<sup>457</sup> Income Tax Act 58 of 1962 , s25B(3).

<sup>458</sup> Ibid.

<sup>459</sup> 25B Income of trusts and trust beneficiaries of trusts, Commentary available at <http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publ ish:10.1048/Enu>, accessed on 11 December 2017.

<sup>460</sup> Ibid.

<sup>461</sup> Income Tax Act 58 of 1962 , s25B(3)(b).

<sup>462</sup> Ibid.

allowance available to a beneficiary in terms of section 25B<sup>463</sup> and derived from trust income would have been fully deductible in the hands of the beneficiary. This is no longer the case as sub section (3) is now subject to sub sections (4), (5) and (6).<sup>464</sup>

Prior to the introduction of sub sections (4), (5) and (6),<sup>465</sup> there had been no hard and fast correct way of treating a taxable loss incurred by a trust in the hands of the trust beneficiary. Beneficiaries were allowed to enjoy a taxable loss and set it off against taxable income.<sup>466</sup> It is now provided for in the subsequent sub sections of this provision that unless a beneficiary could show he was obliged to set off the loss or that his vested interest in the trust capital had been reduced, he would not be able to claim the tax loss as trustees cannot merely pass on a loss.<sup>467</sup>

Section 25B (4)<sup>468</sup> places limitations on the deductions and allowances in the beneficiary's hands.<sup>469</sup> This sub section essentially ring-fences the passing of assessed losses from the trust.<sup>470</sup> As stated above, in the past, 'deductions and allowances'<sup>471</sup> were passed on to the beneficiaries of a trust. Section 25B (4)<sup>472</sup> now ring fences the "deductions and allowances"<sup>473</sup> to the extent of income that is deemed to be that of the beneficiary of the trust by virtue of his vested right to that

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<sup>463</sup> Income Tax Act 58 of 1962 , s25B.

<sup>464</sup> Income Tax Act 58 of 1962 , s25B(3) , s25B(4) , s25B(5) , s25B(6).

<sup>465</sup> Income Tax Act 58 of 1962 , s25B(4) , s25B(5) , s25B(6).

<sup>466</sup> 25B Income of trusts and trust beneficiaries of trusts , Commentary available at <http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publ ish:10.1048/Enu> , accessed on 11 December 2017.

<sup>467</sup> Ibid.

<sup>468</sup> Income Tax Act 58 of 1962 , s25B(4).

<sup>469</sup> 25B Income of trusts and trust beneficiaries of trusts , Commentary available at <http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publ ish:10.1048/Enu> , accessed on 11 December 2017.

<sup>470</sup> Ibid.

<sup>471</sup> Income Tax Act 58 of 1962 , s25B(4).

<sup>472</sup> Ibid.

<sup>473</sup> Ibid.

income.<sup>474</sup> In essence, this sub section prevents deductions and allowances of the trust giving rise to assessed losses in the hands of the trust beneficiary.

One now wonders as to what happens to the excess allowances and deductions? These are accounted for in section 25B (5).<sup>475</sup> This sub section allows for the excess deductions and allowances to remain the trust itself.<sup>476</sup> This is done by a limitation aspect in the provision. A limitation is placed on the total taxable income of the trust itself and is in no way linked to the deemed income of the beneficiaries.<sup>477</sup> Section 25B (5) (b)<sup>478</sup> creates a safeguard for the beneficiaries by carrying forward the excess deductions to a succeeding year in which it may be used.

The true 'carrying over' provision is section 25B (6).<sup>479</sup> In terms of this section, the excess deductions may be deducted by 'such beneficiary' in a succeeding year of assessment.<sup>480</sup> Thus only the beneficiary that has incurred this excess deduction, which has been ring-fenced<sup>481</sup> in terms of section 25B (5),<sup>482</sup> will be able to use that excess in the 'succeeding year of assessment.'<sup>483</sup> It is clear that this excess can never be transferred to another beneficiary or the trust itself. A further

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<sup>474</sup> Ibid.

<sup>475</sup> Income Tax Act 58 of 1962 , s25B(5).

<sup>476</sup> 25B Income of trusts and trust beneficiaries of trusts , Commentary available at <http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publ ish:10.1048/Enu>, accessed on 11 December 2017.

<sup>477</sup> Ibid.

<sup>478</sup> Income Tax Act 58 of 1962 , s25B(5)(b).

<sup>479</sup> Income Tax Act 58 of 1962 , s25B(6).

<sup>480</sup> 25B Income of trusts and trust beneficiaries of trusts , Commentary available at <http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publ ish:10.1048/Enu>, accessed on 11 December 2017.

<sup>481</sup> 25B Income of trusts and trust beneficiaries of trusts , Commentary available at <http://ipproducts.jutalaw.co.za.ukzn.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publ ish:10.1048/Enu>, accessed on 11 December 2017.

<sup>482</sup> Income Tax Act 58 of 1962 , s25B(5).

<sup>483</sup> Ibid.

stipulation of this sub section is the words, 'immediately succeeding year of assessment',<sup>484</sup> this phrase proposes that if there is a break in the receipt or accrual of income, the excess will essentially be lost.<sup>485</sup>

From the above it may be concluded that sections 25B(3)<sup>486</sup> to section 25B(6)<sup>487</sup> essentially determines allowable deductions and allowances on the part of the trust and trust beneficiaries will only follow amounts to which they relate. The introduction of the above sub sections have created a degree of certainty when dealing with taxable losses of a trust or trust beneficiary.

## 5. CHAPTER FIVE: CONCLUSION

Estate planning remains an important 'go to' exercise of which the main aim of the practice is to protect assets of a person during their lifetime and to provide for disposition of same after the person's death. The main objective of estate planning would be not only to minimize the amount of taxes which the person is subjected to throughout his life but also to minimize the taxes of the estate of that person after his death. Estate duty is one of the expenses which planners attempt to minimize. The minimization of estate duty is usually done by applying the different sections of the Income Tax Act,<sup>488</sup> most of which have been addressed in chapter four above. It is clear that once a trust is in existence, it becomes a popular estate planning tool for trustees to provide interest free loans to beneficiaries rather than making distributions to the beneficiaries and by doing so the amounts advanced to the beneficiaries remain assets of the trust and do not form part of any taxable amount in respect of the beneficiary.<sup>489</sup> By reducing estate duty by implementing the use of trusts, the South African Revenue Service has scrutinized trusts much more over the past few years which led to scrutiny of trusts by the courts.

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<sup>484</sup> Ibid.

<sup>485</sup> Ibid.

<sup>486</sup> Income Tax Act 58 of 1962, s25B(3).

<sup>487</sup> Income Tax Act 58 of 1962, s25B(6).

<sup>488</sup> Income Tax Act 58 of 1962.

<sup>489</sup> M Honiball, L Olivier, *The Taxation of Trusts in South Africa*, 2009, 198, 201.

The current taxing provisions and the recommendations from the Davis Tax Committee notwithstanding the question that remains is whether trusts are still viable estate planning tools?

In the National Budget Speech read in Parliament on 24 February 2016, the Minister of Finance, Pravin Gordhan indicated that the government would be proposing several measures and methods to curtail tax avoidance in South Africa.<sup>490</sup> The Minister advised during this speech that projected income tax revenue would be R1, 9 billion down since this previous financial year.<sup>491</sup> The Minister proposed a gross revenue collection target of R18, 1 billion in the financial year 2016/2017 and an increase of R15 billion over the baseline revenue collection target over the next two financial years.<sup>492</sup> It was proposed that these measures would narrow the budget deficit in years to come.<sup>493</sup>

The Minister highlighted trusts as an area that would receive special attention. He stated that measures have been put into place to improve the quality and truthfulness of information that taxpayers supply to the South African Revenue Service ('SARS') to enable SARS to identify taxpayers who abuse tax planning and partake in tax avoidance.<sup>494</sup>

In respect of trusts and indirect taxes such as transfer duties, the Budget proposed that assets acquired by a trust by virtue of a loan are to be included in the founder's estate as at the date of his death. It further proposed that interest free loans granted by trusts to beneficiaries will now be taxed as donations and the relevant donations tax provisions and rates shall apply, the inclusion rate for capital gains were increased from 66.6% to 80% and as a result the effective rate increased

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<sup>490</sup> The Tax Department of ENS Africa, '2016 South African budget speech summary,' available at <https://www.ensafrica.com/news/2016-South-African-budget-speech-summary-tax-proposals?Id=2124&STitle=ENSafrica%20newsflash> accessed on 10 November 2017.

<sup>491</sup> Ibid.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid.

<sup>494</sup> The Tax Department of ENS Africa, '2016 South African budget speech summary,' available at <https://www.ensafrica.com/news/2016-South-African-budget-speech-summary-tax-proposals?Id=2124&STitle=ENSafrica%20newsflash>, accessed on 10 November 2017.

from 27.3% to 32.8%.<sup>495</sup> These proposed rates were effective as at 01 March 2016.<sup>496</sup> The rate of transfer duty on sales of properties over R10 million was increased from 11% to 13% on any and all property acquired on or after 01 March 2016.<sup>497</sup>

It is clear that the recommendations of the Davis Tax Committee in both the first and second interim reports were not only taken into consideration but admired and used by government and the Minister of finance in the financial year 2016/2017.

There is no doubt that the leash on trusts has been tightened. It can only be said that the government have done so in order to increase the country's revenue by curtailing tax avoidance by taxpayers. This effectively means that the government will slowly lean in the direction of preventing the application of the conduit principle.

Although the taxing provisions which trusts are subjected to may be significantly stricter, resulting in the trust being less effective as a tax avoidance mechanism, trust still remain great tools to offer protection for assets of taxpayers in the event the trust is used for its initial intended purpose that being for charitable purpose and as a protection mechanism for an estate planner to preserve their assets. Trusts continue to offer taxpayers i.e. the planner a means of advancing capital and assets to designated beneficiaries, whilst the administration of the assets rests in the hands of the trustees.

It is apparent that when considering whether a trust is a viable estate planning tool, it is of utmost importance to ensure that the best advice is given to the taxpayer (planner) and the best approach must be followed. This means that the advisor must ensure that the trust is valid and complies with all requirements and have the primary purpose of ensuring certainty for the protection and succession of assets of the taxpayer.

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<sup>495</sup> Ibid.

<sup>496</sup> Ibid.

<sup>497</sup> Ibid.

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29 June 2017

Ms Yuleesha Mahara] (212512400)

School of Law

Howard College Campus

Dear Ms Mahara],

Protocol reference number: HSS/0927/017M

Project title: The taxation of income and expenditure of Trusts in South Africa. Are they still viable estate planning tools?

**Approval Notification – No Risk / Exempt Application**

In response to your application received on 29 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number,

**PLEASE NOTE:** Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Mr Christopher Schembri and Professor Shannon Bosch

Cc Academic Leader Research: Dr Shannon Bosch

Cc School Administrator: Ms Robynne Louw

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