Then came the judgement in XXX Trust v the Commissioner for the South African Revenue Service where the Kimberley Tax Court (Lacock J) held for the trust in similar circumstances. The marked difference here was that the outstanding loan was not bequeathed to the trust as a legacy, but formed part of the residue of the estate of which the trust was the only heir. This did not prevent counsel for SARS to argue, equally absurdly, that the reason why par 12(5) should apply was that the executor in the deceased estate did not collect the outstanding amount of the loan from the trustees before paying it back to them as part of the residue in the estate, but awarded it to the trust as part of the residue. Quite rightly the court did not fall for this argument.

Now, more than seven years after the ABC case, the 2012 Taxation Laws Amendment Bill proposes the repeal of par 12(5). The Explanatory Memorandum published by SARS explains that "... Debt reductions or cancellations of this nature can be treated as a donation (potentially subject to the donations tax), as part of the bequest from an estate (potentially subject to the estate duty) or as disguised salary."

Finally, the absurdity seems to be coming to an end.

But before all planners start reviving the old will clauses simply bequeathing the outstanding loan account to the trust without a second thought, it would be worthwhile to think about what other options are available in the typical situation where the original owner of the assets is owed an outstanding amount on loan account in the trust representing the whole or portion of the original purchase price of the assets now held in trust.

In our law, interest on a loan is not assumed. If the loan agreement is silent on the issue of interest on the loan, the common law position is that no interest is payable, i.e. an interest-free loan. This has been almost the automatic option in typical estate structuring situations.

However, it may be worthwhile to consider including a term in the loan agreement stating that interest may be charged at a stage and rate agreed by the lender (the original estate owner or his successor/s in rights) and the borrower (the trust, or more correctly, the trustees from time to time).

Instead of just automatically bequeathing the outstanding amount to the trust, it could be bequeathed to the surviving spouse, or any other heir who may develop a need for income, to enable him/her to invoke such a term as an additional source of income in need. Obviously there will have to be an agreement reached with the trustees at the time, but there could be various possibilities to clear the way to such an agreement.

Somebody asked the question recently whether the fact that part of the explanation in the explanatory memorandum is based on the potential estate duty liability caused by such a bequest could be an indication that SARS does not foresee an abolishment of estate duty in the near future. Let us hope not, as estate duty has been a nonsensical tax for some time now as capital gains tax becomes more and more effective upon death of the estate owner.

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[1] [2005] ZATC 3
[2] "Enige bedrag wat die ABC Familie Trust onder leningsrekening aan my verskuldig mag wees, aan gemelde trust."
[3] [2008] ZATC 3
[4] Par 2.9(III)(B)(1) on p 45 of the EXPLANATORY MEMORANDUM ON THE TAXATION LAWS AMENDMENT BILL, 2012 published on 10 December 2012.