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# FUTURE TAXATION OF TRUSTS

IN the National Budget, tabled in Parliament on February 27, 2013, the Minister of Finance indicated that government was proposing several legislative measures during 2013/14 regarding trusts to curtail perceived tax avoidance associated with trusts. The Treasury also indicated its concern regarding the use of trusts to avoid estate duty, which it intended to review.

It was pointed out that the proposals in the Budget would not apply to those trusts established to cater for the needs of minor children and people with disabilities, that is, so-called special trusts.

Originally, Treasury indicated that discretionary trusts should no longer act as flow-through vehicles, with the result that a trust should be taxed as a separate and distinct entity. It was expected that legislation would be introduced whereby trusts would be liable to pay tax in their own right without the possibility of passing income and capital gains through to beneficiaries. However, the Budget documentation was somewhat unclear in that it indicated that, to the extent that a trust derives taxable income and distributes that to a beneficiary, such amount would be deductible for the trust, and the beneficiary would then be taxed thereon as having received ordinary revenue.

The Minister of Finance indicated that trading trusts would similarly be taxable at the entity level, with distributions being treated as deductible payments to the extent of the trust's taxable income. It was pointed out that trusts would be regarded as trading trusts where they either conducted a trade or where the beneficial ownership interests in the trust were freely transferrable. Some years ago, government attempted to define trading trusts in order to regulate the manner in which such trusts should be taxed, but eventually abandoned the idea because it was unable to comprehensively define what should constitute a trading trust.

Finally, the Budget indicated that distributions received from offshore foundations will always be treated as ordinary revenue in the future.

To date, no draft legislation has been released setting out the manner in which government intends to deal with the taxation of trusts in the future.

On June 14, 2013 a meeting was held by representatives of the National Treasury and the Commissioner: South African Revenue Service with representatives of the Fiduciary Institute of Southern Africa, Financial Planning Institute, Law Society of South Africa, South African Institute of Chartered Accountants, South African Institute of Tax Practitioners and the Society of Trust and Estate Practitioners to discuss the taxation of trusts in the future.

It would appear that National

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Treasury is concerned that trusts are being used for tax avoidance purposes, and it appears that National Treasury wishes to understand the position better.

The delegates of the meeting were also asked how frequently foundations are used and the reasons therefore. It was indicated that foundations are not widely used, and this aspect will probably be investigated further.

In addition, the meeting discussed interaction between the Master's Office and the Commissioner: Sars. It is more than likely that the tax returns submitted by trusts will become more onerous so that greater disclosure regarding the activities conducted by trusts are fully disclosed to Sars.

The National Budget estimated that estate duty would contribute some R900 million in the 2013/14 fiscal year, which represents a small part of budgeted state revenue. It remains unclear why estate duty continues to exist. Ideally, the taxation of trusts, capital gains tax and estate duty should be reviewed holistically to formulate a sound fiscal policy. The Minister of Finance announced on February 27, 2013 that Judge D Davis of the High Court would chair a commission of enquiry into the tax structure of South Africa. It is hoped that that commission will review the taxation of trusts in South Africa, taking account of the capital gains tax and estate duty implications relating thereto.

National Treasury indicated in that the meeting held on June 14, 2013 that no tax changes regarding trusts have been finalised, and that any amendments proposed to the taxation of trusts will be discussed in depth and a discussion paper released for comment, but this is not likely to happen in the short term.

The 2013 Taxation laws Amendment Bill is due to be released shortly, which will contain most of the amendments required to give effect to the tax policy decisions contained in the 2013 Budget.

Taking account of the meeting held on June 14, 2013 it would appear that no amendments to the taxation of trusts will be contained in the 2013 Taxation laws Amendment Bill, but that the matter will be properly reviewed and considered before amendments are made. This move should be supported, as it is far better that the taxation of trusts is reviewed holistically as opposed to introducing ad-hoc amendments to address perceived tax avoidance.

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