



Synopsis of presentations at the 5th Annual FISA Conference at the Sandton Convention Centre, Johannesburg, on 10 September 2015

Seven speakers participated in this conference with the theme: “Integrity and Diligence: Pillars of success”

Judge Dennis Davis, convener of the Davis Tax Committee, spoke about the First Interim Report on Estate Duty. He explained the framework within which the committee’s report was considered. Fiscal policy fundamentally has to achieve a balance between the lower financial end of the population by way of an effective tax and transfer system, and the higher end to allow the rich to invest and to have some certainty. Judge Davis explained that, although an amended estate duty scheme was unlikely to add vast amounts of money to government coffers, it would bring added legitimacy to the system. He conceded that there are some areas in the report that would require rectification in the committee’s second report, but said the committee’s fundamental starting point is that capital appreciation should attract some tax at some level. He also referred to significant problems with offshore trusts and mentioned that the general feeling was that the 2003 tax and exchange control amnesty probably just “scratched the surface” on unauthorised foreign wealth and concluded that steps had to be taken to address this.

Ms Hanneke Farrand, a director at ENSAfrica, reflected on the practical implications of the Davis Tax Committee (DTC) report. She cautioned that, if the conduit principle is to be removed, careful consideration has to be given to the interaction with the jurisdiction where the beneficiary resides, as it could lead to double taxation. She illustrated this point by using Israel as example. The beneficiary residing in Israel would be taxed on the distribution from the trust, but would not be able to claim any relief under the double taxation agreement between SA and Israel as the tax levied in SA would be on the trust and not on the beneficiary. She concluded that there was insufficient detail in the DTC report to take action at this stage, but reiterated the importance of adhering to proper governance and to ensure that correct disclosures made to all revenue authorities.

Prof François du Toit of the Law Faculty of the University of the Western Cape discussed the alter ego trust with specific reference to the application thereof in matrimonial disputes. He indicated that it is common practice that alter ego trust assets (or their value) could be used to determine the making of redistribution orders under the Divorce Act where marriages were concluded subject to a complete separation of property. He posed the question whether this application could be extended to marriages in community of property and marriages out of community of property with the accrual system. He referred to a few recent court cases that dealt with divorce and concluded that, despite some conflicting judgments on marriages subject to the accrual system, it appears that the use of the alter ego trust assets or its value is still limited to the making of redistribution orders. He also briefly discussed the difference between a sham trust and an alter ego trust.

Prof Willie van der Westhuizen, a director at Millers Inc. and extraordinary professor in the Law faculty of the Free State University, discussed the essential requirements for a valid trust and the role played by the trustees to make sure the trust could not be regarded as an alter ego

of the founder or a trustee. He specifically referred to the requirement that the founder must relinquish control of the trust assets once it is transferred to the trust. When checking whether any individual has control of the trust assets, the first step is to look at the trust deed to determine if there is *de iure* control. Even in the absence of such control, there may be *de facto* control which is determined by considering the conduct of the parties. A finding of an alter ego trust could have consequences in divorce proceedings and potentially in the calculation of estate duty on death.

Ms Di Seccombe, the national head of Tax training and presentations at Mazars, spoke on the taxes that apply on the death of a person. Section 25 of the Income Tax Act provides that any income received by or accruing to the executor, which would have been income in the hands of the deceased (had it been received or accrued to the deceased during their lifetime) shall be deemed to be income of the deceased estate, unless it had been derived for the immediate or future benefit of any ascertained heir or legatee, in which case it would be deemed to be income of such heir or legatee. The Draft Taxation Laws Amendment Bill, 2015 however includes a new section 9HA, which provides that income received by or accrued to the deceased estate will be taxed in the hands of the deceased estate and roll-over relief will be provided in respect of transfers from the deceased estate to any heir or legatee. These changes are set to come into operation on 1 January 2016 and will apply in respect of a person who dies on or after that date. She also discussed the incidence of VAT in deceased estates and cautioned that executors must take particular care where the deceased was a sole proprietor, as the executor becomes the representative vendor whilst the estate is being administered and extra care had to be taken when distributing assets of the deceased's enterprise to an heir or legatee as this has significant VAT consequences.

Mr Francois van Gijzen from Finlac Risk & Legal Management (Pty) Ltd, discussed the view held by some that buy-and-sell agreements constitute a *pactum successorium*. He looked at the defining characteristics for a *pactum successorium* and applied it to a buy-and-sell agreement. He concluded that a buy-and-sell agreement could not be regarded as a *pactum successorium*.

Dr Janette Minnaar-Van Veijeren from ProEthics spoke about ethical behaviour as an essential requirement for success. She explained that ethics means going beyond the demands of laws and rules by doing the right thing and treating others the way we would like to be treated. The two key requirements for success is to build trust and uphold professional standards. Trust is built when we are intellectually honest, which means that we demonstrate a high level of care, skill, diligence and good faith in the performance of our duties. Acting professionally means that we need to adhere to three main imperatives, namely compliance with all legal requirements, upholding any other relevant rule, code or policy, and being ethical at all times.

The Chief Master of the High Court, Adv. Lester Basson, spoke about trends in the number of deceased estates reported and trusts registered per annum. He also reported on progress with the process to move to a paperless regulatory and compliance process in the offices of the Master across the country. The figures quoted by him indicate that significant progress has been made with the registration of trusts on the new paperless system. He reiterated that the Master's office is moving towards a paperless environment, with the exception of the documents which are by law required to be in hard copy.

The day was concluded with an hour long panel discussion in which all speakers took part and the audience could ask questions.

Ronel Williams, FISA Chairperson

13 September 2015