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FIDUCIARY MATTERS

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Proposed changes to retirement fund contributions

The Estate Duty Act 45 of 1955 provides in section 3 that "so much of any benefit which is due and payable by, or in consequence of membership or past membership of, any pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund as defined in the Income Tax Act, 1962 (Act No. 58 of 1962), on or as a result of the death of the deceased" is not included in the definition of "property".

This means that, although the lump sums paid to the estate on the death of a person would be subject to the lump sum retirement tax table in the calculation of his/her tax, the lump sums above the allowable deduction would not be subject to estate duty.

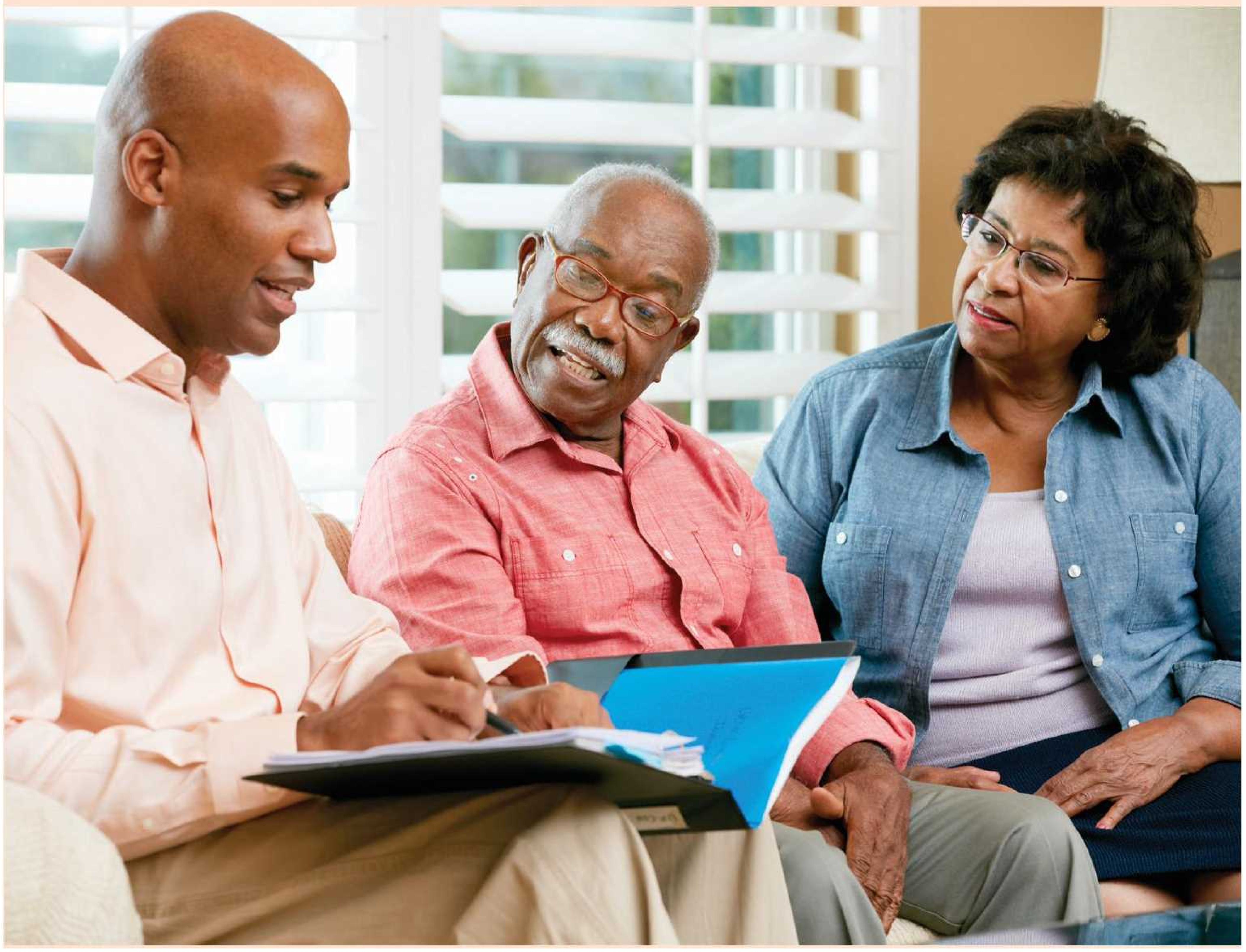
This was regarded as a potential way to avoid estate duty and the Minister of Finance mentioned in the Budget speech in February 2015 that government proposed that an amount equal to the non-deductible contributions to retirement funds be included in the dutiable estate when a retirement fund member passes away. This proposal was echoed in the Davis Tax Committee Report, which recommended that all retirement fund contributions made on or after 1 March 2015, and disallowed in the determination of taxable income, should be included as an asset in the estate duty computation of the contributor. *The report was supposed to have been issued at the end of 2014, but was delayed, and the reference to 1 March 2015 was therefore outdated by the time the report was finally issued. It is generally accepted that it should be read as referring to 1 March 2016.*

This proposal has been included in the draft Taxation Laws Amendment Bill 2015, which was issued in July. The Bill includes an amendment to Section 3 of the Estate Duty Act which provides that the following shall be included in "property":

So much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was not taken into account in terms of section 11(k) or (n) or section 10C of the Income Tax Act or paragraph 2 of the Second Schedule to that Act in determining taxable income, as defined in Section 1 of that Act, of the deceased".

The Explanatory Memorandum explains that the change is necessary because the provision that individuals with a retirement annuity fund would be required to retire before they reached the age of 70, was removed in the 2008 Taxation Laws Amendment Act. In the same year the Estate Duty Act was amended to exclude lump sum retirement assets from the dutiable portion of the estate upon death.

It is proposed that contributions to a retirement fund that did not receive a deduction are included in the dutiable part of the estate for estate duty purposes



These two amendments provided an opportunity for individuals to use retirement annuity contributions to avoid estate duty as contributions to retirement annuity funds that did not receive a deduction could pass to the estate on death without being subject to the retirement lump sum tax tables or estate duty.

It is therefore proposed that contributions to a retirement fund that did not receive a deduction are included in the dutiable part of the estate for estate duty purposes. (To avoid any potential double taxation, contributions that did not receive a deduction that have been included as part of any lump sums payout to the retirement fund member, or that has been used to offset the tax liability for annuity payments to the retirement fund member, will not be included in the dutiable value of the estate).

It is proposed that the amendments will come into operation on 1 January 2016 and apply in respect of the estate of the person who dies on or after that date.

Whilst the proposed change to the Estate Duty Act has been anticipated since the time of the Budget speech, the provision that it will apply to all deaths on or after 1 March 2016 has taken the industry by surprise.

It is expected that many individuals may have made contributions to retirement funds in the "window period" before 1 March 2016, but this proposed change in the Bill effectively means that the date of the contribution is not relevant (as was suggested in the proposal) and the date of death is the only determining factor. If a person had therefore at any time made contributions for which deductions had not been granted, and the client dies on or after 1 January 2016, the part of the contributions for which no deduction was granted will form part of the assets in his estate for estate duty purposes. As expected, this proposed amendment prompted public comment and we are relieved to see that the Draft Response Document from National Treasury and SARS issued on 15 October 2015 indicate that they've heeded the comments. The result is that this proposal will be amended to apply only to contributions not eligible for deductions that were made on or after 1 March 2015.

The Fiduciary Institute of Southern Africa (FISA) is a non-profit organisation that represents fiduciary practitioners and sets high minimum standards for the industry to protect the public's interests. FISA is the only professional body focusing solely on fiduciary practitioners in Southern Africa.