private ruling' or a 'binding class ruling'.[10] Yet again, this information (being of as much value to the taxpaying public as a 'positive' ruling would be) remains instructive only to the applicant.

As such, the current approach of issuing summarised versions of rulings amounts to a direct contravention of the provisions of section 33 of the Constitution[11] ('Just Administrative Action') and the provisions of the Promotion of Administrative Justice Act ('PAJA')[12] alike. It would be interesting to note SARS's response were reasons to be requested by members of the public for rulings issued in terms of section 5 of PAJA.

Providing for rulings to be requested from SARS in terms of a legislated framework is a laudable development in our fiscal legal framework. Not only is the development in line with international trends,[13] but the Rulings Division within SARS is, from own experience, quite clearly staffed with experienced and qualified personnel. Sadly though, the application of specfically section 87 of the Tax Administration Act has had the inevitable effect of benefitting only the rich and the few which can afford to pay the expensive application fees (which in their own right may be justly labelled a 'tax' if one has regard to this definition in section 1 of the Tax Administration Act). The result is the further manifestation of an exclusive tax system, rather than the creation of an approachable and more inclusive regime which is arguably what is required, given our current fiscal environment.

It would seem that the hope which the broader tax community would have nurtured with the introduction of the rulings regime in 2004 is akin to that harboured by the Trojans when the brave Hector walked outside of the gates of Troy to face Hercules.

The Davis Tax Committee Report On Estate Duty And The Taxation Of Trusts

By Franscois van Gijsen[1]

Introduction

On 13 July 2015 the Davis Tax Committee ('the DTC') released its 'First Interim Report on Estate Duty' for public comment. In view of the announcement in the 2013 budget that the taxation of trusts was to be reviewed and that Treasury specifically intended to prevent discretionary trusts from acting as conduits for tax purposes in the future,[2] it should come as no surprise that a significant portion of the report deals with the taxation of trusts and the conduit principle. This article seeks to explore some aspects of the DTC's report in so far as it relates to the use of trusts as a means of avoiding estate duty.

A brief history of the statutory conduit principle and concomitant deeming provisions

The statutory conduit principle can be ascribed to the 1991 case of *Friedman and Others NNO v Commissioner for Inland Revenue: In re Phillip Frame*

[10] Section 75 of the Tax Administration Act.

[11] 108 of 1996.

[12] 3 of 2000.

[13] Centre for Tax Policy and Administration (OECD), Tax Administration in OECD and selected non-OECD countries: comparative information series 87 (2006), as discussed by Givati J in 'Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings', *Virginia Tax Review* (vol 29) 137.

[1] Director: Finlac Risk and Legal Management.

[2] *Budget Review*, 27 February 2013, Chapter 4: Revenue Trends and Tax Proposals, under the heading 'Protecting the Tax Base'.

Will Trust v Commissioner for Inland Revenue,[3] in which it was held that a trust was not a legal person contemplated in section 1 of the Income Tax Act[4] ('the Act') and as such was not subject to income tax. As a result of this judgment, the definition of 'person' was amended, with retrospective effect to the 1987 tax year, to include 'any trust'. In this way trusts were included in the tax net. Simultaneously with the inclusion of trusts in the definition of 'person', section 25B was enacted to govern the taxation of trust income. Section 25B confirmed the so-called conduit principle whereby, if a trust vested income in a beneficiary in the year that it was received by or accrued to the trust, then such income was taxed in the hands of the beneficiary rather than in the trust. Subsequently, with the enactment of Capital Gains Tax ('CGT'), similar flow-through provisions were included in paragraph 80 of the Eighth Schedule to the Act.

The flow-through provisions contained in section 25B are subject to the deeming provisions contained in section 7 of the Act, while the flow-through provisions of paragraph 80 are subject to the attribution rules contained in paragraphs 69 to 72 of the Eighth Schedule to the Act. In terms of these provisions, income or capital gains received by a trust as a result of a 'donation, settlement or other [gratuitous] disposition' are deemed to be that of the 'donor' in relation to the 'donation, settlement or other disposition' that gave rise to such income or gains.

The debasement of the trust form and the 'newer type of trust'

At the heart of the idea of a trust is the requirement that there should be a functional separation of the control of the trust assets from the enjoyment thereof. And, although a trustee can also be a beneficiary, the central notion is that the person entrusted with the control of trust assets exercises that control on behalf of, and in the interests of, another.[5] In South Africa, however, where trustees are frequently also beneficiaries and sometimes also the donor of the trust, this core principle is often forgotten.

The separation of control and enjoyment that underlies the trust concept has in the past ensured propriety and rigour as well as accountability in trust administration, quite simply as a result of the self-interest of the parties involved. On the part of trustees, because they wish to avoid personal liability, and on the part of the beneficiaries, because they wish to ensure the maximum benefit to themselves from the trust fund allocated for that purpose. As such, the courts and legislature have been willing to allow trusts to develop relatively autonomously.[6]

But the trust landscape is changing. Harms JA, in *Nieuwoudt v Vrystaat Mielies (Edms) Bpk*, refers to 'a newer type of trust where someone, probably for estate planning purposes or to escape the constraints imposed by corporate law, forms a trust while everything else remains as before.'[7] This is because trusts have arisen where the functional separation between control and enjoyment is entirely lacking, particularly in the case of family trusts that are designed to secure the interests and protect the property of a group of family members. As trustees, control of the assets remains with the family while they, as beneficiaries of the trust, also enjoy the benefit thereof.[8]

This self-centred use of trusts, in contrast with their altruistic origins, has given rise to a new type of trust case coming before our courts. Historically our courts had to consider aspects dealing with the extent of the fiduciary duties of trustees and whether

[3] 1991 (2) SA 340 (W). The decision in this case was confirmed on appeal.

[4] Section 1 Income Tax Act, 58 of 1962.

[5] *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para [19].

[6] *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para [23].

[7] *Nieuwoudt NO and another v Vrystaat Mielies (Edms) Bpk* [2004] 1 All SA 396 (SCA) at para [17].

[8] *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para [25].

or not they have met their fiduciary obligations of care and diligence,[9] or whether or not our law allowed for the conferment of discretionary powers of appointment on trustees.[10] However, a significant number of trust cases over the past twenty years have had a cynical, almost fraudulent, taint to them. In these cases trustees, purporting to act on behalf of a trust, entered into contracts on behalf of the trust only to later, when it suited their purposes, use their own failure to comply with the trust's formality requirements for the signing of documents as a reason for declaring the contracts void.[11]

Cameron JA, in *Land and Agricultural Bank v Parker*,[12] stated that this 'new' type of trust had arisen over the past two decades. The question, of course, arises: what caused this relatively sudden abuse of the trust form?

The abuse of trusts in tax and estate planning

Trusts have long offered eager estate planners (owners) an opportunity to benefit themselves and their beneficiary heirs. From an estate duty perspective this was done by having the estate owner transfer growth assets to the trust, thereby removing them from his estate for estate duty purposes. In order to avoid an immediate donations tax liability from being incurred, such a transfer would usually be done by way of a sale from the estate owner to the trust, with the trust owing the purchase price to the estate owner. These loans are typically interest-free.[13] (An interest-free loan of investment capital works as well.) In this way, a saving of estate duty is created in respect of the (potential) increase in value of the assets that have been placed in trust from the time that they were transferred to the trust until such time as the estate owner dies – so-called estate pegging. As such, it saves estate duty payable while still keeping the assets available for the various beneficiaries' benefit. As a way of saving estate duty, it has been available to estate planners for as long as some form of estate or death duty has been payable in respect of a deceased person's assets. And yet, it has not of itself given rise to the debasement of the trust form as discussed above.

From an income tax and CGT perspective, the flow-through principle provides a means by which an estate owner can procure an immediate personal benefit, namely income-splitting. Income-splitting occurs when the trustees vest the trust's income or gains in one or more beneficiaries with lower marginal rates of tax while not distributing, or restricting distributions, to those beneficiaries with a higher marginal rate of tax, thereby reducing the overall tax liability in respect of the income or gains made. Another version of the practice would be for the trustees to distribute to each beneficiary only so much income as would keep the beneficiary in a tax bracket lower than that of the trust. However, in order to apply the flow-through provisions, it is necessary that the relevant income or gain has to be vested in the beneficiary in the year that it accrued to or was received by the trust. The trustees must make a decision regarding the distribution or allocation of the relevant funds prior to the end of the tax year, as a failure to do so will result in the income or gains being taxable in the hands of the trust.

The deeming and attribution provisions contained in section 7 and paragraphs 69 to 72 were

[9] *Sackville West v Nourse and Another* 1925 AD 516; *Administrator Estate Richards v Nichols* 1999 (1) 551 (SCA).

[10] *Braun v Blann and Botha NNO and Another* [1984] 2 All SA 197 (D).

[11] *Van der Merwe NO & Others v Hydraberg Hydraulics CC & Others* 2010(5) SA 555 (WC); *Thorpe v Trittenwein* 2006 (3) SA 427 (SCA); *Land and Agricultural Bank of South Africa v Parker and Others supra*; *Nieuwoudt NO and another v Vrystaat Mielies (Edms) Bpk supra*.

[12] *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para [24].

[13] See 'The Tax implications of interest free loan account claims against trusts and the new income tax return for trusts', for a discussion on the difference between loans and vested trust capital and why this distinction is important. 2015 *Taxpayer* 62.

intended to prevent the mischief of income-splitting. Unfortunately, they fail in this objective. Over time, the tax rates for individuals and trusts have been amended to such an extent that the tax rates for trusts are higher than those for individuals, and the deterrent effect of the deeming provision, resulting in a higher tax rate, is thus lost.[14] To summarise, then, according to the DTC report, the use of trusts costs the *fiscus* money in the following manner:

1. From an income tax and CGT perspective, as a result the practice of income-splitting, whereby income and/or gains in the trust are vested in beneficiaries with lower rates of tax and, as a result of the flow-through principle, are taxed in the hands of the beneficiaries at their lower rates of tax.[15]
2. From an estate duty perspective, the transfer of assets into trusts removes the assets from the donor's estate, thereby pegging the value of the assets in his estate and depriving the *fiscus* of the duty on the increase in the value of the assets that have been transferred to the trust. The estate pegging effect lasts for as long as the assets remain in the trust.[16]

What is not clear from the DTC report is that in order for the flow-through provisions of the Act to be applicable, a beneficiary needs to be unconditionally entitled to the money that is to be taxed in his hands. For this to happen, the trustees have to award to the beneficiary a vested right to the specific income or gain that was received by the trust and which is now to be taxed in the hands of the beneficiary. This can be done even though the trustees may postpone enjoyment of the amount by holding onto the actual asset or funds and continuing to administer it on behalf of the specific beneficiary in whom it is vested. While trustees have a duty of care towards all beneficiaries of the trust,[17] it is important to remember that once an amount has vested in a specific beneficiary, the trustees have a separate and specific fiduciary duty of care towards that beneficiary with regard to that amount, and they have an obligation to act in the beneficiary's best interests with regard to the administration of that amount. As such, the trustees are obligated to invest and manage the money held on the beneficiary's behalf in order to hedge against inflation and ensure capital growth.[18] All interest and/or growth in respect thereof belongs to the specific beneficiary. It is important to remember that such income or gains, once vested, belong to the beneficiary and as such is 'property'[19] in his estate for estate duty purposes, and all income or growth thereon is likewise property in his estate.

A trust can fulfil its estate-pegging purpose (if that is indeed its purpose) only in regards to those assets that do not vest in any of the beneficiaries. In other words, when the trustees avail themselves of income-splitting, the split income becomes an asset in the estate of the recipient beneficiary, while, should they not have distributed the income, the income would have been taxable in the hands of the trust at the trust's rate of tax.

I believe it is the flow-through principle and the possibility of income-splitting, combined with the perception that this can be done with impunity, that provides zealous estate owners with a benefit that is sufficiently personal that persons who would otherwise have sought to retain control over their assets are moved to transfer their assets to a family trust, even if such transfer is made in the belief (or with the intention) that all else will remain the same. In this way, this is the cause of the proliferation of

[14] DTC Report Chapter 4: Trusts, pp 37 and 38.

[15] DTC Report p 37.

[16] DTC Report Chapter 4: Trusts p 38.

[17] *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) 284G-285A.

[18] *Administrator Estate Richards v Nichols* 1999 (1) SA 551 (SCA) at 556F; *Tijmstra v Blunt-Mackenzie* 2002 (1) SA 459 (T).

[19] Section 3(2), Estate Duty Act, 45 of 1955.

the new type of trust described earlier.

The DTC Interim Report

The DTC in its report is of the opinion that the use of trusts, and especially the practice of income-splitting, causes a significant loss of revenue to the *fiscus*. This, it is suggested, can be rectified by repealing the deeming provisions of section 7 and section 25B insofar as they apply to resident trust arrangements, and by ensuring that the 'special trust definition' contained in section 1 of the Act – which allows a trust to be taxed at personal income tax rates in limited special circumstances – is the only relief to the aforementioned rule. The DTC further states that:[20]

> 'Taxpayers must be allowed to make use of trusts when it makes sound sense to do so in the pursuit of a commercial justification or benefit, as opposed to an estate duty benefit. However, as is the case with present company tax rates today, the taxpayer must accept any potential adverse tax consequences.'

However, with respect, the aforementioned and the discussion in the DTC report regarding the use of trusts in estate planning and the practice of income-splitting provides the reader with only half the picture. I am not convinced of the correctness of the DTC's conclusion, at least not as far as the negative impact on receipts from estate duty are concerned. I agree that the *fiscus* could conceivably make more in respect of income tax and CGT if receipts by the trust were taxed in the trust and not allowed to flow through to the beneficiary. However, I do not believe that these additional receipts would be the result of preventing revenue from escaping the tax net.

Consider that the assets placed in trust would, prior to being placed there, have been taxed in the hands of the individual who owned them at his or her marginal rate of tax. If, then, as a result of the flow-through principle, these assets, after being placed in trust, end up once more being taxed at that individual's rates, then, from the *fiscus*'s point of view, the tax collection has remained the same. But, as a result of income-splitting, the *fiscus* is now collecting tax at a lower rate than it would have done had these revenues and gains been taxed in the hands of the original estate owner.

The DTC report states that the:

> 'use of trust structures in their various forms causes the growth of the underlying investments to fall outside of the donor, settlor or beneficiary's estate for purposes of the estate duty computation.'

In other words, the complaint is that the *fiscus* has to settle for less income tax and CGT during the existence of the trust, and that it then still loses out on the estate duty, in the estates of the donor and the beneficiaries, on the increase in value of the assets that have been transferred into trust.

The DTC report seems, however, to disregard the fact that for as long as no income-splitting occurs, any income or gains that occur in respect thereof are taxed at the trust's higher rate of tax, and when income-splitting does occur, the income that has been split forms an asset in the beneficiary's estate and is subject to estate duty on his death.

This can be illustrated as follows:

> Taxpayer A has a property in Bloubergstrand which he purchased in 2002 for R1.5 million. The property is worth R2.5 million at present. In 2015 he transfers it to a family trust 'to save estate duty'. In the 2016 tax year, the trust makes a profit of R200 000 as rental income from the property.
>
> If the income were to be taxed in the trust, the income tax would be R80 000. However if, in terms of the flow-through principle, it were to be taxed in the hands of a beneficiary (with no other income for that year), the income tax received for the 2016 year would have been R37 781. The fiscus seems to have lost revenue of R42 219. But when it is borne in mind that the beneficiary will upon his death pay estate duty of 20 per cent on the remaining amount of R162 219, ie R32 443 (ignoring any estate duty rebate), the total tax received by the *fiscus* comes to R70 224. Seen in this way, the loss is much less significant.

It can of course be argued that the *fiscus* has to

[20] DTC Report, Chaper 4, Trusts, pp 39-40: Recommendations: Income Tax.

wait to receive the estate duty on the accumulated amounts until the beneficiary's death. While this is true, it should be remembered that in order to place the income-producing asset in trust the *fiscus* already received CGT of R133 200 (assuming a marginal rate of tax of 40 per cent) in respect of that asset, a tax that would otherwise only have been received on the donor's death. The *fiscus* would also have collected transfer duty of R117 000 at the time of transfer to the trust. Had the asset never been transferred to trust in order 'to save estate duty', the *fiscus* would have lost out on this duty too, as the asset would have been transferred to the heirs free of transfer duty in terms of the exclusion contained in section 9(1)(*e*) of the Transfer Duty Act. It must also be borne in mind that the estate owner, by implementing the scheme, has created taxable income for his adviser by reason of the fee that he pays the advisor (on an ongoing basis) to assist him with the administrative tasks (such as compiling financial statements and filing tax returns and returns to the registrar of companies) that flow from implementing their scheme. As such, the scheme has in some small way increased the amount of revenue collected.

I suggest that the only material loss of tax to the *fiscus* from the use of trust structures is in respect of estate duty on anticipated growth in the trust assets after receipt thereof by the trust. The rest of the 'losses', if one takes the interplay and timing of the various taxes into account is, are probably not material.

According to the DTC, the overall contribution of estate duty to the National Revenue approximates only 0.1 per cent of total tax collections. The Katz Commission in its report suggested that an appropriate targeted tax contribution for such taxes would be 1 to 1.5 per cent of tax revenues. It is hoped by the DTC that doing away with the conduit principle will dissuade taxpayers from using trusts as an estate planning tool. If the proposed change should prove successful, assets that would have found their way to trusts will remain in the possession of individuals and be taxed at the lower individual tax rate. The expected increase in taxes collected will then have to come from the increased estate duty collections, which – as shown – will consist mainly of the duty collected on the increase in value of the asset while being held in trust during the donor's lifetime (which it currently misses out on). It is doubtful that doing away with the conduit provisions contained in section 25B will account for the 1 000 to 1 500 per cent increase in revenue from estate duty that would be required to have estate duty contribute 1 to 1.5 per cent of the National Revenue, as envisaged by the Katz Commission and the DTC.

As for the DTC's suggestions in respect of trust structures, I would recommend the following: (*a*) repeal the deeming provisions in section 7 and paragraphs 69 to 72; and (*b*) retain the conduit principle embodied in section 25B and paragraph 80, but prohibit its use in the case of trusts that display certain characteristics.

The DTC report rightly says that there are many legitimate reasons for the use of a trust other than estate duty savings.[21] It is also of the opinion that taxpayers should be allowed to make use of trusts when it makes sound sense to do so in the pursuit of a commercial justification or benefit, as opposed to an estate duty benefit.[22] The main historical reason for the use of trusts is not, however, commercial, but as a means to benefit some or other beneficiary who for some reason or the other the donor felt needed the administrative prowess of trustees to manage assets for their individual or joint benefit.

For example a mother who has a child who is a rehabilitated drug addict may wish to benefit her daughter and her children, but simultaneously to provide a measure of protection of the trust capital should the child ever relapse. It would seem unfair in these circumstances to subject the trust to an annual higher rate of tax in respect of those assets.

One of the problems that the DTC highlights in regards to trust structures is the fact that they cannot

[21] DTC Report, Chapter 4, Trusts, p 37.

[22] DTC Report, Chapter 4, Trusts, p 40.

be dealt with by SARS using the General Anti-Avoidance Rule contained in section 80A of the Act based on the minimisation of estate duty alone. The DTC is of the opinion that the only other avenue open to SARS to challenge an estate duty saving structure would be to treat the structure as a simulated transaction, as envisaged in *Commissioner, South African Revenue Service v NWK*.[23] The DTC is of the opinion that while many estate duty saving structures appear to be based on simulated transactions, and could thus be vulnerable to attack by SARS, each case would have to be assessed on its own merits. It would thus be almost impossible for SARS to create a precedent that would create certainty for both SARS and the taxpayer. Meanwhile, the taxpayer remains able to advance a wide range of other motives in the defence of an estate duty saving structure.[24] This last seems to be the crux of the problem. As Innes J said in *Zandberg v Van Zyl*:[25]

> 'Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature.'

The newer type of trust referred to above, the kind that I argue is used for the purpose of avoiding estate duty, generally has certain characteristics. These are the result of the fact that the parties to these trusts seek to benefit themselves and are not trying to create the trust in accordance with the core principles applicable to trusts. They do not wish to separate control and enjoyment. They wish to call the shots and reap the benefits. As such, these trust deeds tend to contain one or more of the following types of clauses, intended to provide the estate owner with *de facto*, if not *de jure*, control over the trust assets:

1. The estate owner, in the guise of the donor or one of the trustees, retains the right to veto any trustee decision. (This right is sometimes written as a requirement that the donor/trustee has to be part of any majority decision by the trustees.)
2. The estate owner, as donor or trustee, retains the right to unilaterally fire a trustee or to unilaterally appoint additional trustees.
3. The estate owner retains the right to determine how the trust assets should be divided on his death.
4. The estate owner retains the power to unilaterally revoke or vary the trust deed.

The conduit principle contained in section 25B should not be available in the case of any trust containing the aforementioned and other similar provisions. Nor should it be available in instances where it can be shown that one of the trustees, in some or other manner, has or could have *de facto* control of the trust assets. Should the aforementioned suggestions be implemented, it should largely negate the need to attack trust schemes using the General Anti Avoidance Rule.

The DTC mention the use of interest-free loans as a means of gradually dissipating the estate owner's estate. These interest-free loans are also a frequent occurrence in the 'newer' type of trust.

It seems clear that there can be no commercial reason for an interest-free loan. The only significant loss of revenue through the use of trust structures is in respect of duty on the increase in value of assets transferred to trust. It would be illogical for the *fiscus* to continue to allow estate owners to fund this increase in duty-free value by means of the non-charging of interest, especially as these loans are already depriving the *fiscus* of the tax that would ordinarily be payable by the creditor on the interest received thereon.

[23] *Commissioner, South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA).

[24] DTC Report, Chapter 3: Estate Duty Avoidance, p 35.

[25] *Zandberg v Van Zyl* 1910 AD 302 at 309.

For this reason I believe that the conduit principle should also not be available in trusts where there is an outstanding loan which does not bear interest at a market-related interest rate.

While the General Anti-Avoidance Rule may not offer much in the way of relief for the *fiscus* in respect of estate duty, the Estate Duty Act does have its own deeming provisions that could assist the *fiscus* in obtaining additional duty in respect of trusts. In terms of section 3(3)(*d*), SARS can levy estate duty on assets that would not ordinarily be dutiable in the deceased's estate. In this case the assets are deemed to be assets of the deceased on the basis that he was '... immediately prior to his death competent to dispose [thereof] for his own benefit or for the benefit of his estate.' When interpreting section 3(3)(*d*), one should consider also the wide phraseology and the scope of section 3(5), which reads as follows:

'For purposes of paragraph (*d*) of sub-section (3) –

(*a*) the term "property" shall be deemed to include the profits of any property;

(*b*) a person shall be deemed to have been competent to dispose of any property –

(i) if he had such power as would have enabled him, if he were *sui juris*, to appropriate or dispose of such property as he saw fit whether exercisable by will, power of appointment or in any other manner;

(ii) if under any deed of donation, settlement, trust or other disposition made by him he retained the power to revoke or vary the provisions thereof relating to such property;

(*c*) the power to appropriate, dispose, revoke or vary contemplated in paragraph (*b*) shall be deemed to exist if the deceased could have obtained such power directly or indirectly by the exercise, either with or without notice, of power exercisable by him or with his consent;

(*d*) the expression "property of which the deceased was immediately prior to his death competent to dispose" shall not include the share of a spouse of a deceased in any property held in community of property between the deceased and such spouse immediately prior to his death.'

If one accepts that a benefit paid to a wife or any other person to which the estate owner may have a duty of care would benefit the estate owner or his estate (in view of the corresponding reduction of the need to care for the dependent), then these provisions would be applicable to almost all trusts that contain provisions similar to those mentioned in section 3(5)(*b*)(ii) above – especially in view of the wide description of beneficiaries in most trust deeds, which generally include the donor's descendants. This would be the case even where the individual holding such power is not himself a beneficiary of the trust. To the best of my knowledge there are no cases where these provisions have been applied by SARS. Application thereof would likely bring a large portion of the assets presently in trust, and generally considered to be excluded from duty, into the estate duty net.

SARS introduced its new 'Modernised Income Tax return for trusts' the ITR12T, with effect from 6 October 2014. This form provides for much fuller reporting on the part of trusts than was previously the case. The new form requires, when completing a return for trusts, various transactional details to be provided in respect of the year of assessment. The form, among other things, requires details of:

(*a*) capital or revenue distributed or vested in beneficiaries;

(*b*) distributions or vesting of non-taxable income;

(*c*) distributions or vesting of capital or assets;

(*d*) loan(s) granted and received;

(*e*) donation(s) or contribution(s) made or received;

(*f*) distributions received from other trusts or foundations;

(*g*) refund(s) received on contribution(s) made to the trust;

(*h*) the right of use of asset(s) granted.

If one considers the above suggestions, it is clear that SARS is already collecting the necessary information in order to implement them. I would, however, suggest that the form be expanded to reflect both actual existing loans and vested trust capital. It should then be easy, upon receiving an estate duty return, to see whether the individual in question has an interest in a trust. The various Master's Offices, too, are already compiling details with regard to trust beneficiaries and trustees, and confirming a deceased person's connection to a trust should in future be a simple matter.

Conclusion

Trusts are by nature conduits in which trustees are to hold and administer assets on behalf of the beneficiaries until such time as the assets are either made over to the beneficiaries or expended on their behalf. A failure to acknowledge this fact in our tax legislation will create problems in other areas of the law. Consider the situation where a trustee is holding assets on behalf of a major beneficiary who has a propensity for spending money. The beneficiary is just aching to get his hands on the trust capital. Doing away with section 25B would mean that the trust will in future pay tax at a rate that is likely higher than that of the beneficiary in question. Trustees could conceivably find themselves open to attack on the basis that retaining capital in trust is no longer in the beneficiary's best interest.

Ultimately trust schemes will, eventually, always fail because of the debasement of the core trust principle that accompanies them. The persons availing themselves of the scheme do so to obtain a personal benefit. They do not wish to lose ownership and control of their assets, but do so in the quest for personal benefit. Given enough time, the constraints of a trust start chafing and their need for a personal benefit causes them to act in a manner that undoes any benefit that they may potentially have received – such as splitting-income to save immediate income tax, and in so doing exposing the recipient beneficiary to estate duty on the amounts so accumulated. Moreover, even if the original owner of the estate does not undo his own scheme, self-interest on the part of his heirs, the beneficiaries, will see to it that the assets, or at least the income and gains therefrom, fall back into the estates of the individuals soon enough. Nevertheless, whether Treasury implements the DTC's suggestions as is, or some variation thereon, in addressing the tax issues Treasury is likely to at least solve the problem of the debasement of the trust form that currently bedevils our law.

Case Law

Income Tax – Failure To Object To Assessments – Assessments Accordingly Final And Conclusive – Taxpayer Not Entitled To Declaratory Order To Have Assessments Set Aside As Being Null And Void

Medox Limited v Commissioner for the South African Revenue Service
Supreme Court of Appeal, 27 May 2015, Case No 20059/201

The taxpayer approached the High Court for an order declaring that all income tax assessments issued by the Commissioner for the South African Revenue Service ('the Commissioner') in respect of its 1998 and subsequent years of assessment were null and void.

The High Court held that it did not have jurisdiction to entertain the dispute and dismissed the application with costs, but granted the taxpayer leave to appeal to the Supreme Court of Appeal ('the SCA'). In essence, the High Court held that the dispute should have been pursued by way of an objection to the assessments and, if necessary, an appeal to the Tax Court as the appropriate forum to deal with such matters.

The taxpayer had commenced trading under the name and style of Drake Personnel during 1976, but in 1995 was provisionally wound-up in terms of an order of the High Court. The taxpayer continued trading while under provisional liquidation, and on 7 June 1996 the winding-up order was set aside by the High Court when it sanctioned a scheme of