

Transfer duty and discretionary trusts

30 June 2005

In December 2002, the Transfer Duty Act was amended to put a stop to avoidance schemes involving residential properties held in companies, close corporations and trusts. Prior to this, SARS issued assessments on transactions involving some 1600 discretionary trusts. The duty and interest involved is about R130 million. Initially SARS was challenged, but these cases have been withdrawn and the trustees have paid their assessments.

Because many parties want to settle their disputes with SARS at rates applicable to natural persons, SARS has proposed the following:

- If the trustees are prepared to register the properties in their own names, transfer duty at the rate applicable to natural persons will be applicable. The registrations must be in the name(s) of the person(s) who effectively acquired the interest in the trust and financed the purchase of the residence. Registering the properties in the names of children (who may be beneficiaries in the trusts) could have serious donations tax implications and for that reason cannot be permitted.
- As SARS is applying the principle that the purchaser(s) were in fact natural person(s), a registration of the residence in the names of the natural person(s) must be effected. Once the transfer duty and interest (at 10 % per annum) in respect of the original acquisition have been paid, the properties must be transferred from the trust to the natural person(s). The transfer must be effected by 31 December 2005. The transfer duty declaration(s) by the seller(s) should be completed by the present trustees and the value of the properties for transfer duty purposes will be the consideration given for the "purchase" of the interest in the trusts. If the name of a trust has been changed, the new name should be used.
- Authority for this procedure is contained in Part IIIA of Chapter III of the Income Tax Act, 1962, which applies mutatis mutandis to the Transfer Duty Act. It should be noted that, if these proposals are accepted, the parties will enter into a settlement with SARS.
- Should the trustee(s) wish the registration to remain in a trust, the 10% rate (with interest) will be payable. SARS has demanded payment of the duty and penalty and is proceeding with action to recover the amounts due.