



Tax Free Transfer of primary residence from a Company or Trust

It seems that the European economy is headed for further problems.

SARS have now amended legislation allowing the transfer of a primary residence that is held in a company or trust to an individual for the third time.

The amendments don't seem to address some very important consequences of a transfer. The intention of the legislation is to allow the occupant to transfer his primary residence held in a trust or company or close corporation to him free of any capital gains tax, transfer duty or STC (secondary tax on companies). There is unfortunately no donations tax exemption.

In terms of the legislation, the residence must be used mainly for domestic purposes for the period from 11 February 2009 to the date of disposal. The property must be disposed of by 31 December 2012. The time of the registration or transfer is not relevant. Where the residence is first disposed of to another trust or company, the residence must be acquired by one or more "qualifying" natural persons by 31 December 2012.

The base cost attributable to the company or trust becomes the base cost to the natural person. Paragraph 51 states that from the date of disposal of the residence by the company or trust, the company must have taken steps set out in section 41(4) to liquidate, wind up or deregister. In the case of a trust disposing of the residence, the founder, trustees and the beneficiaries must have agreed to writing to the revocation of the trust, or application must have been made to court for the revocation of the trust.

The section does not permit the trust to be wound up by utilising the termination clause in the trust deed. It requires the founder to revoke the donation he made to the trust and call back the powers he granted to the trustees.

This is an extremely onerous provision. There are a multitude of tax consequences and costs that may arise if a trust deed is revoked. If the founder is deceased, the court must be approached to revoke the trust deed.

It is imperative that the balance sheet of the trust and particularly any loan accounts are reviewed prior to a taxpayer deciding to utilise the section. If these loan accounts are not dealt with appropriately as part of the disposal of the residence then it is possible that donations tax may be incurred as a result of the application of section 51A. If you are contemplating transferring your primary residence which is held in a trust, company or close corporation, beware of the consequences of the transaction prior to embarking on it.

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