



DAVEY'S Locker



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Discretionary trusts

Changing the beneficiaries

by Tony Davey

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Existing trust structures being revisited

Given the advent of s 7C of the Income Tax Act, which subjects to annual donations tax an interest-free or soft-interest credit loan claim by a funder (whether a settlor, beneficiary or connected person, including a company), many taxpayers are revisiting their trust structures, including the possibility of the addition, deletion or substitution of beneficiaries.

CGT and removal of discretionary beneficiaries

The crisp issue is whether the removal of a beneficiary by resolution of the trustees (with the consent of beneficiaries, which may be required in the circumstances described in the Chief Master's Directive 2 of 2017 of 6 March 2017) of a discretionary trust, for no consideration, constitutes a disposal for CGT purposes.

My sense is No, since a discretionary beneficiary has no real rights to the trust fund but only a spes. This is in accordance with the judgment in *CIR v Sive's Estate* 1955 (1) SA 249 (A), which is authority for the view that, under a trust, a discretionary beneficiary has no rights as such, but merely a contingent right, or spes.

Consequently such a beneficiary has no 'right or interest of whatever nature to or in such property' of the kind contemplated in the definition of 'asset' in para 1 of the Eighth Schedule to the Income Tax Act, save if it is specifically allocated to him by the trustees of the trust.

Nor is there any 'value-shifting', since the value of a discretionary interest is as per para 81 of the Eighth Schedule deemed to be nil and will remain at nil for the new beneficiary.

This view extends only to true discretionary trusts, as distinct from a situation in which beneficiaries enjoy vested rights, when there will be a disposal for CGT purposes.

[The Chief Master's Directive 2 of 2017 was a pile of old codswallop; see 169 *TSH* 2017. A contingent interest of this type is property, and thus a CGT 'asset', but, being nontransferable, has a value of nil; see 72, 80 *TSH* 2009; 90, 93 *TSH* 2010; 105 *TSH* 2011; 116 *TSH* 2012; 135, 138, 140 *TSH* 2014; 143, 146, 150 *TSH* 2015; 161, 162, 163 *TSH* 2016; 170, 173, 176 *TSH* 2017.]

