DAVEY'S Locker

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Foreign insurance policy wrappers—II

BPR 105 (née BPR 038): Legal v beneficial ownership

by Tony Davey

In this final article on this topic (97 *TSH* 2011; 101 *TSH* 2011), I consider the merits of the vexed issue of ownership.

In essence, SARS ruled (BPR 105), on the facts, that the policy considered was effectively an 'asset management' arrangement, in which beneficial ownership remained with the taxpayer (and thus tax on the portfolio build-up is attributable to the taxpayer), as distinct from an insurance investment contract, in which the insurer owns the underlying portfolio assets.

In my contrary opinion, the insurer owns the assets (that is, the invested premium) and has a concomitant contractual obligation to provide policy benefits to the policyholder, who merely enjoys a personal contractual claim, as distinct from a real right to the invested premium, namely, the underlying portfolio.

The fact that the policy is a linked policy merely means that the risk of changes in its economic value (that is, the policy investment risk) is borne by the policyholder. The bearing of this risk does not equate to ownership of the policy assets, which are held by the insurer and may not be encumbered to the benefit of a third party, including the policyholder.

From a tax perspective, it follows that no amounts are received by or accrued to the policyholder for purposes of the definition of the term 'gross income' in s 1 of the Income Tax Act before redemption of the insurance policy.

The reasons were expounded in *Geldenhuys v CIR* 1947 (3) SA 256 (C), 14 SATC 419, where it was held that the words in the definition of the term 'gross income'

> received by or accrued to or in favour of any person

mean received by the taxpayer on his own behalf for his own benefit.

Given that ownership of the assets comprising the investment portfolio vests with the insurer, there is in my view no beneficial entitlement received by or accrued to the applicant until redemption of the policy as provided by the contractual insurance policy agreement.

The transaction, being the investment in the offshore insurance policy investment, is not an impermissible tax-avoidance arrangement for purposes of s 80A, since, in terms of *CIR v Conhage (Pty) Ltd* 1999 (4) SA 149 SCA, a person is free to structure his investments in the most tax-efficient manner without invoking the anti-avoidance tax legislation (previously s 103(1)).

Upon redemption of the policy, I submit, the provisions of the Eighth Schedule should solely apply, given the capital intention of the applicant. Thus the only tax consequence to the applicant upon redemption is a capital gain or loss.

SARS holds the view that, although the legal owner of the portfolio assets is the insurance company concerned, the beneficial owner could be said to be the policyholder.

This is said in the face of the international meaning of the term 'beneficial ownership', in relation to which SARS cited with approval *Klaus Vogel on Double Taxation Conventions.*

This work states that beneficial ownership is

> an ownership which is not merely the legal ownership by the mere fact of being on the Register, but the right at least to some extent to deal with the property as your own. A shareholder who does not have the rights of selling or disposing or enjoying the fruits of shares cannot be called the beneficial owner of the shares.

It further states:

> Hence the 'beneficial owner' is he who decides:
> i whether or not the capital or other assets should be used or made available for use by others; or
> ii on how the yield therefrom should be used; or
> iii both.

My sense is that this concept of beneficial ownership was taken too far in this investment context, but unless the issue is resolved in the courts, BPR stands as being indicative of SARS approach.

[As recorded in the Monthly Listing, SARS has amended BPR 105 so as to add this note:

> **8. General note**
> SARS is in agreement with the fundamental principle of insurance investment that the assets concerned are held by the insurer, not the policyholder. This BPR only relates to the specific set of facts set out herein.

Personally, I don't necessarily buy into the idea that these single-premium offshore policies constitute assets of a capital nature, even though I was involved in the (successful) defence of two famous Krugerrand cases before the Special Court.—Ed].