Ref: #770476

Submission File

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South African Revenue Service
Private Bag X923
Pretoria
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BY E-MAIL: policycomments@sars.gov.za

Dear SARS

COMMENTS ON THE DRAFT INTERPRETATION NOTE ON THE DISPOAL OF ASSETS BY DECEASED PERSON, DECEASED ESTATE AND TRANSFER OF ASSETS BETWEEN SPOUSES

1. We herewith take an opportunity to present our comments on behalf of the South African Institute of Chartered Accountants (SAICA) on the draft Interpretation Note (IN) that provides guidance on the application of the deemed disposal of assets by the deceased, a deceased estate and the transfer of assets between spouses.

2. We set out below our comments in this regard.

COMMENTS

Section 2: Background

3. It is stated in the first paragraph of the draft IN that "*Section 9HA provides for the tax treatment of the assets of a person upon death, including the value that such assets are disposed at to the deceased's surviving spouse, heirs and legatees*".

4. Section 9HA does not provide for the value that the assets are disposed of to the heirs and legatees, unless the asset in question is transferred directly to the heir or legatee (as envisaged in section 9HA(3)). It is section 25 that provides for the values that the assets pass through to the heirs and legatees (and the surviving spouse) – as is explained in the second paragraph of this section.

5. Submission: It should be made clear in the draft IN that the purpose of section 9HA is to provide for the value at which an asset is deemed to have been disposed of by the deceased to the estate of the deceased person.

6. It is stated in the draft IN that: "*The implications of donations made by a deceased estate and between spouses are not covered in this Note*".

7. We don't agree that a deceased estate can make donations.

8. Submission: It should be made clear that the transfer of assets between spouses other than on death, such as transfer by way of a donation, are not dealt with in the draft IN.

Section 4: Application of the Law

9. In section 4.1.1 - Year of assessment of the deceased, It is stated in the draft IN that: "*Under section 6(4) the primary, secondary and tertiary rebates must be apportioned for a period of assessment of less than 12 months, which will usually apply to the deceased in the year of death"*.

10. We agree that section 6(4) requires the primary, secondary and tertiary rebates to be apportioned 'in the same ratio as the period assessed bears to 12 months.

11. Submission: It is suggested that the draft IN provides guidance with respect to how the apportionment is done by the SARS system. In practice it appears to be done on a day (not month) basis – which makes sense.

12. In section 4.1.2 - Deemed disposal of assets by the deceased to heirs or legatees other than a resident surviving spouse [section 9HA(1)], explanations of what a spouse is and what the implications are if the spouse is a non-resident are dealt with.

13. Submission: It is suggested that this section is split into two separate sections - one dealing with the disposal to the surviving spouse and the other one with long-term policies and retirement interests.

14. The draft IN refers to: "*Assets transferred to the surviving spouse if the surviving spouse is a resident …*"

15. Submission: It is suggested that the words "transferred to" be replaced by the words "disposed of to". The exception to the general rule, disposal at market value, is that there is a disposal to the surviving spouse, but this disposal is not at market value - unless the surviving spouse is not a resident of the RSA.

16. With regards to a long-term insurance policy, the general rule is that there is a disposal at market value. However, if the proceeds of that policy accrue to the deceased, there is actually no disposal of the policy.

17. Submission: It should be clarified that the position is that there is no disposal if receipts from the policy was paid to a beneficiary as set out in paragraph 55 of the Eighth Schedule and not to the deceased estate.

18. With regard to "second-hand policies", we agree that these are not included in the paragraph (b), of section 9HA(1), exclusion.

19. Submission: It is suggested that the draft IN deals in more detail with "second-hand policies" or that reference is made to paragraph 12.4.4 of the SARS Comprehensive Guide on Capital Gains in this regard.

20. It should specifically include that, in accordance with paragraph 31(1)(b), the market value of a policy is the higher of the surrender value, and the fair market value determined by the insurer assuming that the policy runs to maturity.

21. It is further suggested that the draft IN deals with foreign policies or again refer to paragraph 12.4.4.5 of the SARS Comprehensive Guide on Capital Gains.

22. With regard to retirement interests, the general rule is that there is a disposal at market value, but with respect to a retirement interest (at date of death), the deceased is actually treated as not having the disposed of the interest at all (and the position is not only, that it is not disposed of at market value or the amount of the retirement interest). In other words, the person is not deemed to retire (the disposal event in the Second Schedule) purely by having died.

23. Submission: It should be made clear in the draft IN that the tax consequences follow from the election by the nominees to take a lump sum or convert the retirement interest into a living annuity. And if a lump sum is taken, the rates of tax applicable to retirement lump sums apply.

24. The draft IN refers to: "*If the deceased's spouse is a non-resident, the assets will be deemed to be disposed of to the non-resident spouse at market value under section 9HA(1)*".

25. It is submitted that the fact that the surviving spouse, is not a resident is irrelevant as far as a retirement interest in a retirement fund approved by SARS is concerned. Retirement interests are not acquired by the surviving spouse as envisaged in section 9HA(2).

26. The same is not true where the deceased had an interest in a foreign fund, a fund not approved by SARS that is.

27. Submission: The draft IN should deal with interests held by the deceased at date of death in a foreign retirement fund.

28. The draft IN states that: "*The term "assets" is not defined in section 1(1) or 9HA but since section 9HA contains the rules relevant to CGT that were previously contained in the Eighth Schedule, the definition of "assets" under the Eighth Schedule should be applied. The definition of "assets"* … "

29. Whilst section 9HA refers to "assets", The Eighth Schedule does not – it defines an "asset".

30. The draft IN refers to: "*Assets for puposes of section 9HA can include assets held on capital or revenue account. In determining whether an asset was held on capital or revenue account, considering the intention of the taxpayer upon acquisition of the asset is the most important test. Any change in a taxpayer's intention with an asset after acquisition should also be considered*.

31. *The term "gross income" is defined in section 1(1) in the case of a resident to mean the total amount in cash or otherwise received by or accrued to or in favour of the resident but excludes amounts of a capital nature unless specifically included under paragraphs (a) to (n) of the definition.*"

32. Submission: Spelling mistake – the "puposes" above should be changed to "purposes".

33. For purposes of section 9HA it matters not whether an amount will be included in gross income or will be used for purposes of proceeds (capital gain).

34. It is submitted that it is not necessary to say more – in other words, the part "*In determining whether an asset* ..." and what follows thereafter, can be dropped. In its place reference can be made to other material, such as SARS's comprehensive guide on capital gains.

35. The draft IN mentions that: "*The market value of assets of revenue nature, for example trading stock, livestock and produce, must be included in the gross income of the deceased on the date of death under section 9HA(1), except if such assets have been bequeathed to a surviving spouse*".

36. Submission: It should be mentioned that if the trading stock or First Schedule stock is disposed of to the surviving spouse, the amount to be included in gross income is the 'cost'.

Paragraph 4.1.3 - Deemed disposal of assets to a resident surviving spouse [section 9HA(2)]

37. The draft IN mentions "… *the deceased is deemed to have disposed of an asset for the benefit of a resident surviving spouse if that asset is acquired by that surviving spouse*".

38. Submission: The underlined phrase warrants further discussion or the discussion, in the capital gains guide, should be referred to here.

39. It is also suggested that footnote 14 be moved to the main text.

40. The disposal at date of death, in terms of the Matrimonial Property Act, is either by the deceased, or by the surviving spouse. It is partly dealt with in section 4.5.2.

41. Submission: It is suggested that information in footnote 14 be extended to also include what was dealt with in paragraph 4.5.2 (paragraph (a) – deceased spouse). The part then doesn't need to be repeated in paragraph 4.5.2 and can be referred to this paragraph.

42. At the top of page 6, the draft IN deals with the "resident issue" as follows: "*In the context of a natural person, "resident" is defined in section 1(1) as a natural person who is ordinarily resident in South Africa or a person who meets the requirements of being physically present in South Africa for a certain prescribed number of days*."

43. Submission: The fact that there may be a treaty override in respect of the physical presence test (as per certain DTA's) has not been included in this paragraph. Where there is no DTA override, the physical presence of a person not ordinarily resident in the RSA will only create dual residency and then the tie-breaker would need to be considered.

44. The physical presence in the RSA, of a person not ordinarily resident in the RSA, may not be relevant where the spouse concerned is a resident of a treaty country.

45. It would in most cases only create a dual residency and one would have to apply the tie-breaker clause.

46. Submission: It is suggested this part be expanded and reference be made to the two other Interpretation Notes where the issues are dealt with.

47. The draft IN states in the paragraph before section 4.2 that: "… *trading stock, livestock or produce, the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income* … "

48. Submission: This may require further interpretation or explanation.

49. In principle, the amount included in the income of the deceased, is principally the amount treated as having been incurred by the surviving spouse. This amount would be the cost of acquisition of the trading stock, livestock or produce, unless it was on hand at the beginning of the year of assessment, when it will be the cost envisaged in section 22 or paragraph 2 of the First Schedule.

Paragraph 4.2 - Deceased estate (section 25)

50. Section 25(5)(b) provides that if the deceased was a resident at the time of death, the deceased estate must be treated as if that estate was a resident. It, however, remains a separate taxpayer in its own right and is not deemed to be the same natural person as the deceased.

51. Questions arise in practice with respect to the requirement, in section 10(1)(h), section 49D(a) and section 50D(1)(c), that the non-resident should not have been physically present in the RSA (for a period exceeding 183 days).

52. Submission: SARS must interpret the "… physical presence …" requirement in the draft IN. It is suggested that, for the "estate of a deceased person" (of a non-resident person) the requirement will be met irrespective of the fact that the executor is physically present in the RSA or the investment or intellectual property is in the RSA.

53. The draft IN mentions that: "*For subsequent years of assessment the executor of a deceased estate must continue to submit returns of income for each year of assessment until the liquidation and distribution account becomes final*."

54. Submission: We note the proposed changes in the 2021 Taxation Laws Amendment Bill in respect of the above and we refer you to SAICA's comments in this regard where we submit that the time of disposal by the estate to the heir should be the date of death and the subsequent distribution by the executor should not be a disposal event.

55. Income after death:

56. The draft IN mentions that: "*Under section 25(1)(b) income includes amounts received or accrued which would have been income in the hands of the deceased had it been received by or accrued to or in favour of the deceased during his or her lifetime*."

57. Section 25 does not deal with the disposal of assets by the executor, (or assets other than assets disposed of the heirs, legatees or surviving spouses) and rightly so.

58. Submission: With respect to trading stock, livestock or produce, it is agreed that it should be dealt with separately (in paragraph 4.2.3 of the draft IN). In this paragraph, the reader must be referred to paragraph 4.2.3. The last paragraph in paragraph 4.2.1, is also relevant here and should also be referenced to paragraph 4.2.3.

59. There is a specific need for the draft IN to clarify what the amount is that was allowed to be deducted if the spouse was carrying on farming operations and the executor continued the farming operations.

Paragraph 4.2.2 - Disposal of assets to heirs or legatees [section 25(3)(a)]

60. There is a proposal, in the draft Bills, that the date of disposal (by the executor to the heirs) be clarified in section 25. The draft IN should deal with that as well.

61. The draft IN states that: "*The purpose of section 25(3)(a) is to ensure that the deceased estate is in a tax-neutral position, so that the amount included in its gross income is equal to the amount of expenditure incurred or deemed to be incurred by it*."

62. Submission: Section 25(3)(a) does not only deal with trading stock, but also with capital assets. The statement should be clarified to deal with that.

Paragraph 4.2.3 - Disposal of assets to third parties by the executor

63. Submission: This paragraph needs to be expanded as mentioned above and as discussed below.

64. The first instance that requires clarification relates to trading stock, livestock or produce. Where the executor is authorised to continue the trading, or farming operations, the executor may be disposing of trading stock, livestock and, particularly, produce. The first point is that, to the extent these items are disposed of in the course of winding up the estate, they will not be disposed of distributed to the heirs, legatees or surviving spouse.

65. Replacement stock (purchased during the normal course of trade by the executor) may well be on hand and will be distributed to the heirs, legatees or surviving spouse. There is no question that the cost, to the estate of the deceased person, will be the market value at date of death (even as far as the surviving spouse is concerned), but the question is at which value these assets pass to the heirs, legatees or the surviving spouse. The draft IN should clarify this.

66. This section must also deal with any further costs incurred after the date of death when the deceased estate acquired it from the deceased. This is currently referred to in the second paragraph of paragraph 4.3.1.

67. The further explanation should specifically include an explanation of what further costs are envisaged here (as it is clear that it does not only have trading stock in mind).

Paragraph 4.2.4 - Cessation of deceased estate

68. What is not clear and what needs to be clarified is when an estate ceases to be a taxpayer. This would require an amendment to section 25(1). In principle, it needs to be determined when the amounts that are received by the executor will no longer be treated as income of the deceased estate.

69. The current SARS practice is that the estate ceases to be a taxpayer on the date the estate falls open (becomes final). This, however, in practice, creates an administrative problem with respect to returns of income to be submitted to SARS.

70. The executor accounts for the income earned after death in the 'income and expense' account. Incidentally, the executor also deals with the capital gains arising after death, from disposals of assets (to persons other than the surviving spouse, heirs or legatees) in the period after date of death until the estate falls open. Any income that accrued to the executor, derived from assets in the estate or cash in the estate (carried from date of death) or on the cash from assets realised, will need to be included in the deceased estate's tax calculation.

71. In this regard, the "Income and Expenditure Account", as required by paragraph 5(f) of the regulations in terms of section 103 of the Administration of Estates Act, 1965, must contain:

    a. any income collected which has accrued subsequent to the death of the deceased to the date of the account;

    b. any expenses paid from such income;

    c. in parenthesis next to the money column of the account, a consecutive number in respect of each entry;

    d. the balance available for distribution and to whom it was awarded; …

72. The income and expenditure account, and therefore the 'liquidation and distribution account', will only account for income until the date of the accounts. It does not require, with respect to income derived during the 21 business days during which objections can be lodged against the Liquidation and Distribution account, that the liquidation and distribution account be adjusted to include this income and the related tax due to SARS on the income earned during this period.

73. Question 24 in SARS's Frequently Asked Questions: Deceased Estates, is copied below:

74. "Question 24: Who is responsible for the tax liability that arises in respect of the income and expenditure that arises during the advertisement period up to the date the Master approves the L&D account?"

75. SARS answer: *"The deceased estate is liable for any tax applicable to income earned during the advertisement period up to approval."*

76. Any income earned during the advertisement period up to approval must be declared in the deceased estate's final income tax return although not reflected in the income and expenditure account of L&D account.

77. Submission: The amount of income, that accrues after the period starting on the date of the accounts, actually accrues to the surviving spouse, heirs or legatees and not to the executor. Section 25(1) of the Act should be amended to clarify that it would apply to income that accrues until the date of the liquidation and distribution account.

Paragraph 4.3.1 - Acquisition of assets by heirs or legatees (other than a resident surviving spouse) from the deceased estate [section 25(3)(b)]

78. In terms of the draft IN "*any further costs incurred after the date of death when the deceased estate acquired it from the deceased"* must be added to the market value (at date of death)."

79. The draft IN adds that an heir, other than a resident surviving spouse, would acquire assets from the deceased estate at the "*cost price to the deceased estate if it was acquired by purchase by the executor*".

80. The principle is that an heir, other than a resident surviving spouse, would acquire assets from the deceased estate at an expenditure equal to its market value on the date of death.

81. It is not clear what assets an executor can acquire and it appears from the draft IN that it is not only trading stock that is envisaged here. It is accepted that, where the executor is authorised to continue trading, or farming operations that were carried on by deceased, the executor may have to acquire further trading stock. But, it is unlikely that the executor will be authorised, in terms of the last will and testament, to acquire fixed assets.

82. Section 25 deals only with assets acquired by the deceased estate from the deceased. Therefore section 25 does not deal with these assets, trading stock or otherwise, when they are disposed of (distributed by) the executor to the heirs. It is, however, agreed that where trading stock is still on hand when the estate falls open, it should pass to the heirs. The same would apply to assets acquired by the executor during the liquidation and distribution process, but only where the last will and testament dealt with this.

83. Submission: The draft IN must provide an explanation of what "further costs" are envisaged in this regard.

84. With respect to trading stock, it may well be the "*further costs*" envisaged in section 22(3), that the draft IN has in mind.

85. With respect to other assets, it probably refers to expenditure envisaged in paragraph 20 of the Eighth Schedule.

86. With respect to assets acquired after date of death, ideally section 25 should be amended to deal with those assets. It is submitted that the draft IN cannot deal with it if the Act doesn't deal with it.

87. Footnote 25:

88. The figure of naturally increased livestock will typically be determined by calculating the difference between the number of livestock at the time of acquisition by the deceased estate and the number of stock at the time of acquisition by the heir or legatee excluding stock purchased by the deceased estate.

89. Submission: We don't agree with this footnote as it does not take into account the sale of livestock by the executor. It is suggested that the livestock will have to be specifically identified.

Example 1 – Inheritance of an asset subject to acceptance of liability

90. Whilst relevant to the assets dealt with in paragraph 4.3.1, it is not clear why the example is provided here.

91. Submission: It is suggested that this issue be dealt with in a separate paragraph and that the example be moved there as well.

92. It should start with an explanation of the principle involved where heirs enter into an arrangement with the executor with respect to the taking over liabilities in order that the assets are not to be realised in the course of winding up the estate.

93. The example should clarify that the property was bequeathed to Y (in other words, that Y is an heir in the estate).

94. The taking over of debt, colloquially speaking, by an heir or legatee does not constitute expenditure incurred by the executor (or by the heir).

95. Paragraph 41, of the Eighth Schedule, which allowed heirs to take over the tax debt related to capital gains in the estate, was repealed with effect 1 March 2016.

96. There is nothing in the Income Tax Act that allows for the market value at date of death to be adjusted, not by taking over debt or otherwise, when the assets pass through the estate to heirs or legatees.

97. What is more relevant and should be included and be dealt with in this paragraph is the payment, by an heir, of a bequest price.

Paragraph 4.3.2 - Acquisition of assets by a resident surviving spouse

(a) Assets acquired from the deceased [section 25(4)]

98. The draft IN states the following: "*The expenditure to be taken over by the resident surviving spouse is equal to the amount that was allowed as a deduction in respect of the asset for purposes of determining the deceased's taxable income, before the inclusion of any taxable capital gain, for the year of assessment ending on the date of that person's death*."

99. Submission: As was suggested earlier, with respect to "trading stock, or livestock or produce contemplated in the First Schedule", the phrase "*the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income*" should be further explained.

Example 2 – Assets disposed of by deceased

100. In the facts it is stated that the "remainder of his assets which … were acquired after valuation date", but it appears that the holiday home was also acquired after 1 October 2001.

101. Submission: The example should also clarify that the other assets (remainder of his assets) will not be acquired by the surviving spouse as required by section 9HA(2). It seems to be the intention as the result refers to "*the assets not left to Mrs X*".

(b) Assets acquired from the deceased estate [section 25(3)(b)]

102. The draft IN states that: "T*he executor may acquire more assets after the date of death of the deceased through purchase or by natural increase*."

103. It is agreed that this is true with respect to natural increase in livestock but it is submit that it is unlikely that it would apply to other assets, other than trading stock acquired where the executor is authorised to continue the trading activities carried on by the deceased.

104. We agree that, with respect to these assets, it "*is not governed by section 25(4)*" and it is also true with respect to assets acquired by the heirs, or legatees, other than the surviving spouse.

105. The draft IN then creates the following practice generally prevailing - The resident surviving spouse is treated in the same manner as any other heir or legatee and acquires

such asset under section 25(3)(b) for an amount equal to the expenditure incurred by the deceased estate.

106. Submission: It is incorrect to say that section 25(3)(b) applies here. Section 25(3)(b) refers to the market value at date of death. It does not include expenditure incurred after date of death in the acquisition of assets.

Paragraph 4.3.3 - Asset transferred directly to heirs or legatees other than a resident surviving spouse [section 9HA(3)]

107. The explanation of the difference between an heir and legatee, is very useful, and it may be appropriate to move it to the beginning of the Note.

Paragraph 4.4 - Capital or revenue nature of assets and capital gains tax

108. The draft IN states: "*For CGT purposes, the proceeds [deemed to be the market value under section 9HA(1)] must be reduced by the amount included in gross income [paragraph 35(3)(a)] resulting in no caital gain or loss to the deceased*."

109. Submission: It is accepted that the typing error, "caital", will be corrected.

110. It is technically not correct to say that the proceeds is deemed to be the market value. Section 9HA(1) is clear, it treats the deceased to have disposed of assets "for an amount received or accrued equal to the market value". In terms of paragraph 35(1) of the Eighth Schedule, "*the proceeds from the disposal of an asset by a person are equal to the amount received by or accrued to, or which is treated as having been received by, or accrued to or in favour of, that person in respect of that disposal* …"

111. And it then is paragraph 35(3), of the Eighth Schedule, that provides the amount "*which is treated as having been received by, or accrued to*" the deceased is reduced by any amount of the proceeds that must be or was included in the gross income of that person or that must be or was taken into account when determining the taxable income of that person before the inclusion of any taxable capital gain.

112. This is dealt with later in the draft IN as follows: "*The Eighth Schedule eliminates receipts and accruals of a revenue nature on disposal from proceeds under paragraph 35(3)(a).*"

113. Submission: It is suggested that this paragraph be moved up in, or dealt with earlier, in this paragraph.

114. The draft IN states: "*Any amount that would have constituted income in the hands of the deceased will constitute income of the deceased estate under section 25(1)(b). Thus the disposal of assets by the deceased estate will also be on revenue account*."

115. This clearly refers to trading stock, livestock or produce, held by the deceased and realised by the executor. Whilst there is a gross income inclusion, there will also be a deduction of the cost of the trading stock.

116. Submission: It may be useful to refer to paragraph 16.2.4 of the SARS Comprehensive Guide to Capital Gains Tax in this paragraph. The part dealing with growing crops, and plantations should, however, be duplicated in the draft IN, particularly the part "*the value of the standing crops will simply be included in the market value of the farmland and will form part of the proceeds on disposal of the farmland on date of death*".

117. Section 25(1) refers to an amount "*which would have been income in the hands of the deceased person had that amount been received by or accrued to*". That is only relevant to trading stock, livestock or produce. Whilst section 25(4)(b)(iv) deals with a resident surviving spouse and treats the spouse "*as having used that asset in the same manner that it was used by the deceased and the deceased estate*."

118. The intention is that the same principle, as provided for in paragraph 40(3), applies to disposals of trading stock and recoupments.

119. Submission: It is suggested that paragraph 40(3), of the Eighth Schedule, should be dealt with here. It reads as follows:

120. "*(3) For the purposes of this Schedule, the disposal of an asset by the deceased estate of a natural person shall be treated in the same manner as if that asset had been disposed of by that natural person*."

121. It should be explained that where assets were held by the deceased as capital assets, the disposal by the executor of those will result in a capital gain (or loss). There is no change in intention when an asset passes from the deceased to the deceased estate. The amount received (or that accrues) on the disposal of the asset by the executor will not be included in income, unless of course there is a recoupment.

122. The draft IN states: "*Thus the disposal of assets by the deceased estate will also be on revenue account*."

123. Submission: This should be clarified that the assets envisaged here are trading stock, livestock or produce and not all assets.

Assets acquired and disposed of by heirs or legatees

124. Submission: This is covered in the last three paragraphs of paragraph 4.4. It was suggested earlier that the second last paragraph of paragraph 4.4, dealing with paragraph 35(3)(a) and paragraph 20(3)(a), should be moved up.

125. It is then suggested that the two remaining paragraphs, be dealt with under a separate heading. They are the paragraph starting with "*The amount received by or accrued to an heir or legatee* …" and the last paragraph starting with "*It remains then to determine the capital gain* …"

126. The draft IN states that an amount that accrues (or is received) from a disposal in respect of "*an asset acquired by inheritance will generally be of a capital nature provided that it was disposed of at the earliest opportunity and not made part of the carrying on of a trade*."

127. Submission: The part "*at the earliest opportunity*" is not based on any case law and should not be included in the practice generally prevailing. In principle, the heir (certainly with respect to assets other than trading stock) needs to have a change in intention for the amount received to be not capital in nature.

128. At most, the draft IN should say that "an asset acquired by inheritance will generally be acquired by the heir or legatee not with the intention to dispose of it in the course of a profitmaking scheme – it is, as is colloquially said, acquired on capital account.

129. In this respect it is the same as an asset acquired by way of donation. The amount that accrues on the subsequent disposal of the asset (by the heir or legatee) will not be 'income', unless there was a change in intention by the heir or legatee.

Paragraph 4.5.1 - Application of section 9HB(1)

130. Submission: It is suggested that the following sentence be duplicated in paragraph 4.1.3:

131. "*The roll-over is mandatory and spouses do not have the option to elect out of it*."

132. It is suggested that footnote 32 and footnote 33, taken from the capital gains tax guide, be moved to the main body of the paragraph and not be dealt with by way of footnotes.

133. It is suggested that the following point, made in the capital gains tax guide, be included in the draft IN: "*It follows that any amounts paid by the acquiring spouse to the disposing spouse for an asset must be disregarded."*

134. It is also suggested that this paragraph, or a separate subparagraph (and potentially in paragraph 4.5.2), deals with the disposal by spouses married, or to be married, in community of property. Reference is made to this in paragraph (b) of paragraph 4.5.2.

Paragraph 4.5.2 - Events treated as transfers between spouses [section 9HB(2)]

135. Maintenance claims

136. The draft IN does not deal with assets used to settle claims brought in terms of the Maintenance Act, or the Maintenance of the Surviving Spouses Act.

137. Submission: It is accepted that these claims are normally settled in cash, but it is suggested that the draft IN deals with instances where the claim is met with the transfer of assets. This may well be common to the first-dying spouse.

Paragraph 4.5.3 - Transfer of trading stock, livestock or produce between spouses [section 9HB(3) and (4)]

138. Submission: As was suggested earlier, with respect to "*trading stock, or livestock or produce contemplated in the First Schedule*", the phrase "*the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income*" should be further explained.

Should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

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The South African Institute of Chartered Accountants