Tax Guide
Estate Duty Guide

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1. INTRODUCTION

In November 1789, Benjamin Franklin wrote to the French scientist Jean-Baptiste Le Roy, and made the following comment:

> *"Our new Constitution is now established, everything seems to promise it will be durable; but, in this world, nothing is certain except death and taxes,"* https://constitutioncenter.org/blog/benjamin-franklins-last-great-quote-and-the-constitution

In South Africa death is also a tax event and there are a number of taxes that may be levied. The first tax is the normal tax, or also known as the income, tax arising from the deemed disposal of assets of the deceased (and the resulting taxable capital gain following from that), and from withdrawals of retirement interests (in retirement funds). Then of course there is the tax on death, as it is colloquially referred to. In South Africa this tax is known as the "estate duty" (see section 2 of the Estate Duty Act). In this guide estate duty will be covered.

2. THE LEVYING OF ESTATE DUTY AND THE RATE OF THE TAX

In terms of section 2(1) of the Estate Duty Act, estate duty is charged, levied and collected in respect of the estate of every person who dies. This applies to all persons who died on or after 1 of April 1955, the day the Estate Duty Act took effect.

In terms section 2(2) of the Act, estate duty is *"charged upon the dutiable amount of the estate calculated in accordance with the provisions of"* the Estate Duty Act, *and is "levied at the rate set out in the First Schedule to the Act"*.

In terms of paragraph 1 of the First Schedule to the Estate Duty Act, the *"rate of estate duty shall be—*

(a) (i) 20 per cent of the dutiable amount of the estate as does not exceed R30 million; and
(ii) 25 per cent of the dutiable amount of the estate as exceeds R30 million;

(b) a percentage of the dutiable amount of the estate as the Minister of Finance may announce in the national annual budget contemplated in section 27(1) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with effect from a date mentioned in that announcement."

The rates, as listed above, apply in respect of the estate of every person who died (or dies) on or after 1 March 2018. Before that there was only a single flat rate. The rate of tax applicable to donations made by a person was also changed at the same time and is the same as the rate of estate duty listed above.

The estate duty is therefore charged upon the dutiable amount of the estate of every person who died and who held property in the RSA at the time of death.

What then is the 'dutiable amount' or how is it calculated?

3. THE "DUTIABLE AMOUNT OF THE ESTATE"

Section 4A, of the Estate Duty Act (herein after "the Act" or "Estate Duty Act"), describes what the "dutiable amount" of an estate is.

In terms of section 4A(1) of the Act, the dutiable amount of the estate of any person is determined by deducting from the net value of that estate a fixed amount (of at least R3,5 million, but not more than R7,0 million). The net value of an estate is determined in accordance with section 4 of the Act and is the amount that remains after the deductions, as provided for in section 4, were made from the total value of the property in the estate. And the total value of the estate of any person consists of all property of that person as at the date of his or her death and of all property which is deemed to be property of that person at that date (in terms of section 3(1)).

Judge Fritz Brand, for the minority in Commissioner, SA Revenue Service v Executor, Estate Late Frith 2001 (3) JTLR 82 (SCA), explained the above as follows:

> *The calculation of the dutiable amount involves a series of steps. The starting point is to establish the gross value of the estate, i.e. the aggregate of the values of all the property of the deceased. Section 3 lays down what constitutes the property of the deceased whereas s 5 stipulates how such property is to be valued. The next step is to determine the net value of the estate by subtracting the amounts allowed as deductions under s 4. The final step is to deduct from the net value, the abatement of R1 million provided for in s 4A. The balance then constitutes the dutiable amount upon which estate duty is calculated …*

See paragraph 2 in Judge Brands's judgement in Commissioner, SA Revenue Service v Executor, Estate Late Frith 2001 (3) 82 (SCA). The majority agreed with this.

From the above we can see that the format for calculating the dutiable amount of an estate and the estate duty itself, is as follows:

	Relevant section in the Estate Duty Act	Notes
Start with the value of all property of that person as at the date of his or her death.	Section 3(2)	Section 5 of the Act Paragraph #
Add the value of all property which is deemed to be property of that person as at the date of his or her death.	Section 3(3) and 3(5)	Paragraph #
Equals the total value of the estate	Section 3(1)	Paragraph #
Make the allowable deductions from the total value of all property included in the estate.	Section 4	Section 5 Paragraph #
Equals the net value of that estate		
Deduct an amount of R3,5 million	Section 4A(1)	Paragraph #
Deduct an additional amount of up to R3,5 million where the person was a spouse or one of the spouses at the time of death of a previously deceased person	Section 4A(2) – (4)	
Equals the dutiable amount of the estate of the person (who died)	Section 4A(1)	
Apply the rate of estate duty	First Schedule (paragraph 1)	
Quick succession	Proviso to paragraph 1 of the First Schedule	Paragraph #

	Relevant section in the Estate Duty Act	Notes
Deduct the amount of any death duties paid to any other State in respect of any property situate outside the RSA and included in the estate of any person who at the date of his death was ordinarily resident in the RSA	Section 16(c)	Section 16(a) allows for transfer duty to be deducted
Equals the duty payable by executor	Section 12	Irrespective of section 11

It is clear that the starting point, in order to determine the estate duty payable, is property of the deceased at the date of his or her death.

What then is property of the deceased?

4. PROPERTY IN AN ESTATE

The starting point, when estate duty is calculated, is to obtain the value of all property of the individual who died, as at the date of his or her death. This implies that one must start by identifying, or determining, the property of the deceased at date of death. In the first place it would be listed in the inventory, but it really is the duty of the executor to obtain detail of all property of the deceased at the date of his or her death, obviously after being appointed as executor and then to have them valued.

4.1 Property defined

For estate duty purposes, section 3(2) of the Estate Duty Act is relevant, andreads as follows:

> *"**Property**" means any right in or to property, movable or immovable, corporeal or incorporeal, and includes -*
> *(a) any fiduciary, usufructuary or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death;*
> *(b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased,*
> *but does not include -*
> *(c) in the case of a deceased who was not ordinarily resident in the Republic at the date of his death, any right in immovable property situate outside the Republic;*
> *(d) any right in movable property physically situate outside the Republic if the deceased was not ordinarily resident in the Republic at the date of his death;*
> *(e) any debt not recoverable or right of action not enforceable in the Courts of the Republic if the deceased was not ordinarily resident in the Republic at the date of his death;*
> *(f) any goodwill, licence, patent, design, trade mark, copyright or other similar right not registered or enforceable in the Republic or attaching to any trade, business or profession in the Republic if the deceased was not ordinarily resident in the Republic at the date of his death;*
> *(g) in the case of a deceased who was not ordinarily resident in the Republic at the date of his death (i) any stocks or shares held by him in a body corporate which is not a (ii) company; and any stocks or shares held by him in a company, provided any transfer whereby any*

change of ownership in such stocks or shares is recorded is not required to be registered in the Republic;

(h) any rights to any income produced by or proceeds derived from any property referred to in paragraph (e), (f) or (g);

(i) so much of any benefit which is due and payable by, or in consequence of membership or past membership of, any pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund as defined in the Income Tax Act, 1962 (Act No. 58 of 1962), on or as a result of the death of the deceased."

Section 3(2) therefore comprehensively defines 'property' and the definition consists of three parts:

- A general or wide definition, namely that it is any right in property; (1)
- Specific rights which
  - are to be included in property; and (2)
  - which are to be excluded from property (3).

Let us start with the phrase *"any right in or to property"* as is used in the phrase *"any right in or to property, movable or immovable, corporeal or incorporeal"*.

4.2 Any right in or to property

The word property, in the phrase *"any right in or to property"*, is qualified by adding that the property can be movable, immovable, corporeal or incorporeal. What is important to note is that it is not further qualified with respect to where the property is situated (at date of death). It is only in the exclusions, where reference is made to property situated outside the RSA. In other words, property for estate duty purposes, includes all the property of the deceased of wherever it is situated.

In Commissioner for Inland Revenue v Estate Crewe and Another (1943 AD 656), the meaning of the word "property" was considered (albeit for purposes of different Acts, but also in relation to the determination of estate duties).

Chief Justice Watermeyer said the following:

> *"One would expect that when the estate of a person is described as consisting of property, what is meant by property is all rights vested in him which have a pecuniary or economic value. Such rights can conveniently be referred to as proprietary rights and they include jura in rem, real rights such as rights of ownership in both immovable and movable property, and also jura in personam such as debts and rights of action."*

The definition contained in section 3 (2) of the Act seems to include, within the meaning of the word "property", both material things (corporeal property) and rights (incorporeal property) …

SARS, in their Comprehensive Guide to Capital Gains Tax, comments as follows on the above:

> *"It is therefore submitted that the word 'property' refers to anything that can be disposed of and turned into money. Things that are incapable of private ownership are excluded, that is, res extra commercium, which include res communes (things common to all inhabitants such as the sea and air) and res publicae (state property held for the benefit of inhabitants). Furthermore, according to LAWSA,*

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'under Roman law, rights arising in the sphere of the law of persons, such as personal liberty, parental authority and rights flowing from the marital relationship, were considered of such a personal nature that they were incapable of pecuniary evaluation and thus not things.'"

Such rights would therefore not constitute property" for CGT purposes.

In conclusion, it can be said that the meaning of the word "property" (for purposes of estate duty) is extremely wide and would include anything that can be disposed of and turned into money. And that it is irrelevant whether it is movable or corporeal or not.

This general meaning is then expanded by two specific inclusions, namely limited interests in property and annuities.

Common to the two specific inclusions are that they represent rights that ceased to exist on the date of death of the person and may in fact have no value at the date of death.

4.3 Limited interests

The first inclusion is a fiduciary, usufructuary or other like interest in property as well as a right to an annuity charged upon property. The only requirement for this to be included, is that the right was *"held by the deceased immediately prior to his (or her) death".*

The reason for its inclusion stems from the old Succession Act and the value is determined, not with reference to the deceased's life expectancy (which of course is nothing), but with reference to the bare dominium holder's life expectancy. If a trust is the bare dominium holder the period is 50 years.

Chief Justice Innes, in Union Government v De Kock NO (1918 AD 22 at 32) stated the following:

> *"For a life usufruct in favour of a single individual does not "pass" to anyone upon the death of the holder. It is terminated by that event. It is a personal servitude which ceases to exist at the death of the usufructuary. The benefit which accrues to the dominus arises not because the right of user has passed to him but because his property has been released from the burdens of the servitude."*

4.3.1 A right to an annuity

The second specific inclusion is any right to an annuity enjoyed by the deceased immediately prior to his or her death. It is included when the right to the annuity accrues to some other person on the death of the deceased. A right to an annuity charged upon any property is excluded here as it is included under paragraph (a) of section 3(2) – see above.

Let's now see which property is excluded.

4.4 Property

The property, for ease of reference, can be grouped together into two categories – the first category fers to foreign property, and the second, to retirement interests.

A number of requirements must be met before the foreign property will be excluded.

4.4.1 Foreign property

Section 3(2)(c) – (h) of the Estate Duty Act lists the foreign property that is to be excluded. The first requirement, or the requirement for each of section 3(2)(c) – (h) is that the deceased must be someone who was not ordinarily resident in the RSA at the date of his or her death.

4.4.1.1 Ordinarily resident

The Estate Duty Act does not define the term "ordinarily resident". Judge Schreiner, in Cohen v CIR, in the course of an *obiter dictum* gave the following meaning to the words "ordinary residence":

> *"... ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home."*

Judge Goldstone, in CIR v Kuttel, adopted Judge Schreiner's formulation of the issue and held *"that a person is "ordinarily resident" where he has his usual or principal residence, i.e. what may be described as his real home."*

The SARS "practice generally prevailing" in Interpretation Note 3 with respect to the term "ordinarily resident", also refers to the real home and reads as follows:

Briefly, ordinary residence is the place where a natural person has his or her usual or principal residence, what may be described as his or her real home. Whether a natural person is ordinarily resident in the Republic is determined based on that person's particular facts.

A person is ordinarily resident in the RSA, for purposes of the Estate Duty Act, if the person did not cease being a resident of the RSA by formally emigrating. SARS states as follows in their practice generally prevailing:

> *"Generally, if a natural person emigrates from the Republic to another country, that person ceases to be a resident of the Republic from the date that person emigrates."*

The process of formal emigration in South Africa was abolished with effect 1 March 2021, but Interpretation Note 3 has not been updated because formal emigration did not break your tax residency status.

In summary, a person who was born in the RSA and has his or her real home in the RSA is therefore ordinarily resident in the RSA, at date of death, if the person did not formally emigrate from the RSA before date of death or ceased being a resident of the RSA (for tax purposes) other than in terms of double tax agreement. Of course, a foreign person will then be ordinarily resident in the RSA, if the foreigner immigrated to the RSA before date of death and ceased being ordinarily resident in the country of birth or where the person was resident in.

The next requirement relates to the place where the property is situated.

4.4.1.2 Where the property is situated

It was stated earlier that the property of a deceased person includes all property of the deceased, wherever it is situated. This would then mean, if a person not ordinarily resident in the RSA, dies in the RSA and also has property here, the non-resident person may potentially be taxed, in the RSA, on his or her foreign property as well. The exclusions in section 3(2)(c) – (h) of the Estate Duty Act ensure that it is just the RSA property of a person not ordinarily resident in the RSA, that is included (and may potentially be subject to estate duty).

The requirement relevant to where the property is situated, and the specific property items, can be summarised as follows:

The deceased was not ordinarily resident in the RSA at the date of his or her death.		
The property	**The requirement / qualification**	**Income**
	Note: the above excludes not only full ownership in property, but also limited interests in immovable property. The only requirement is that the immovable property is situtated outside the RSA	
any right in immovable property	situate outside the RSA	
	Note: the movable property referred to here would be corporeal property as the incorporeal properties to be exlucded are covered below. Again, it is not only the full ownership thereof that is excluded, but also limited interests	
any right in movable property physically	situate outside the RSA	
any debt any right of action	not recoverable the Courts of the RSA not enforceable in the Courts of the RSA	any rights to any income produced by or proceeds derived from any property referred to in paragraph (e), (f) or (g) of section 3(2). They are the ones listed in the blocks to the left of this block;
any goodwill, licence, patent, design, trade mark, copyright or other similar right	not registered or enforceable in the RSA or attaching to any trade, business or profession in the RSA	
any stocks or shares held by him in a body corporate which is not a (ii) company; and any stocks or shares held by him in a company,	provided any transfer whereby any change of ownership in such stocks or shares is recorded is not required to be registered in the Republic;	

According to the late Meyerowitz, see paragraph 27.13, the "test as to whether a debt or right of action is not recoverable or enforceable in a Republic court is whether a Republic court has no jurisdiction to entertain an action in respect of, or to enforce, the debt or right of action." It is not appropriate to discuss the subject of jurisdiction of courts, or the grounds upon which our courts exercise jurisdiction, in a guide dealing with a tax Act.

The following is an example of where the *situs* of property was considered in an estate duty case (the taxpayer died before the current Estate Duty Act was promulgated). Judge Schreiner, in Estate

Brownstein v Commissioner for Inland Revenue, 1957(3) S.A. 512 (A.D.), said the following with respect to debts recoverable in the courts of the RSA:

> *"Although the situs of the shares from the beginning of 1951 may have been in Northern Rhodesia and although the dividend was declared in that country, the right of the deceased against the company to be paid any dividends that might be declared arose out of the registration of his shares in the dominion register and the local committee was responsible for making payment to him. When the dividend was declared a debt came into existence which the deceased could have recovered in the courts of the Union and which accordingly on his death was property which attracted duty".*

The second category of excluded property can be referred to as retirement interests.

4.4.2 Retirement interests

General

The Estate Duty Act excludes from property, essentially, a retirement interest, but it goes a bit further than that.

The term "retirement interest" is defined in section 1(1) of the Income Tax Act, No. 58 of 1962 ("the Income Tax Act") and that definition reads as follows:

> *"**retirement interest**" means a member's share of the value of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund as determined in terms of the rules of the fund on the date on which he or she elects to retire or transfer to a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund;"*

In this guide, whenever the term retirement interest is used, it will have the meaning as defined in the Income Tax Act (see above).

For estate duty purposes, in terms of section 3(2)(i) of the Act,

> *"**Property**" means any right in or to property, movable or immovable, corporeal or incorporeal, and includes …*
> *but does not include … so much of any benefit which is due and payable by, or in consequence of membership or past membership of, any pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund as defined in the Income Tax Act, 1962 (Act No. 58 of 1962), on or as a result of the death of the deceased."*

From the above it is clear that the amount (or value) of a "retirement interest" (at date of death) is not property in the estate of the deceased. This is true, unless there was a paragraph 5 of the Second Schedule to the Income tax Act deduction, but then it is deemed to be property in the estate (and not "actual" property - see the discussion later in this guide).

Section 37C(1), of the Pension Funds Act, 1956, deals with the disposition of pension benefits upon the death of a member of a registered fund. It creates the following general rule (in subsection 1):

> *"Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit … payable by such a fund upon the death of a member, shall … not form part of the assets in the estate of such a member."*

The important principle that follows from this is that the benefit payable (or the retirement interest) by the fund upon the death of the member is not an asset in the estate of the member. Section 37C(1) of this Act then prescribes how this benefit must be dealt with. It will essentially be paid to a dependant or dependants of the member or to a designated nominee (nominated by the deceased). Amounts not paid to a dependent or nominee will be paid to the estate of the deceased, unless it must be transferred to a benefit fund.

Section 37C(1) then prescribes how this benefit must be dealt with.

The Estate Duty Act does not treat the retirement interest at date of death differently to and effectively is in line with the Pension Funds Act principle. It excludes (in section 3(2)(1)) the following from property of the deceased:

> *"… any benefit which is due and payable by, or in consequence of membership or past membership of, any pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund … on or as a result of the death of the deceased …"*

But this was not always so. Prior to the amendment of section 3(2), of the Estate Duty Act which included the above subparagraph in the Act estate duty was levied on lump sum amounts payable in terms of a pension benefit on the basis that the benefit is deemed to be property of the deceased's estate. Pension annuities were exempt from Estate Duty.

It then only was pension annuities that were exempt from Estate Duty. The reason given for the amendment to the Act, as given at the time of the amendment, was that it was not *"in line with Government's social objectives to penalise the beneficiaries by reducing the value of the benefit, especially if the family's overall economic circumstances have declined."* The amendment was explained as follows:

> *"In order to alleviate financial difficulties that a family may face upon the death of the family's income provider, it is proposed that any lump sum benefit from a retirement fund (i.e. pension fund, pension preservation fund, provident fund, provident preservation fund and retirement annuity fund) be exempt from Estate Duty. In addition to the proposed exclusion from "deemed property", retirement lump sums will be specifically excluded from property of the estate, to ensure that certain forms of retirement lump sums do not inadvertently remain within the Estate Duty net. This change is in line with Government's efforts to promote long-term retirement savings."*

A normal tax on lump sum benefits was also introduced at the time

From a normal income tax point of view, where the full amount of the retirement interest of the deceased (at date of death), is withdrawn by way of lump sum (by the nominees of the deceased), the deceased is taxed. The tax is in accordance with the cumulative tax table that apply to a retirement lump sum and is withheld by the fund from the payment made to the nominee. The tax on lump sum benefits, whilst there are three different tax tables, is part of the normal tax.

It is important to note that the amount of this normal tax (or income tax), whilst it is levied on the deceased, is not a debt due by the deceased and no deduction is allowed in respect thereof (see later).

Due to some tax avoidance schemes, amendments were subsequently made and a portion of the retirement was deemed to be property in the estate.

4.4.3 The deemed inclusion

In terms of section 3(3)(e) of the Act *"property which is deemed to be property of the deceased includes so much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was allowed as a deduction in terms of paragraph 5 of the Second Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), to determine the taxable portion of the lump sum benefit that is deemed to have accrued to the deceased immediately prior to his or her death."*

This is best explained with an example:

The facts for purposes of the example are as follows:
The amount of contributions made, on or after 1 March 2015, by the deceased in consequence of membership of a retirement annuity fund, as was not allowed as a deduction in terms of paragraph 5 of the Second Schedule to the Income Tax Act, is R700 000.

The value of the deceased's retirement interest, at date of death is R4 500 000.

The surviving spouse, 13 months after the date of death of the member, elected that R1 390 000 of the total value of the retirement interest be commuted for a single payment, and that the remainder be paid in the form of an annuity.

To determine the amount of the deemed property to be included, one must first determine the normal tax (income tax) consequences of the retirement interest at date of death.

	Amount R
The value of the deceased's retirement interest, at date of death	4 500 000
Deduct the amount thereof not commuted for a single payment (will be paid in the form of an annuity or living annuity)	3 110 000
The amount commuted to a single payment	1 390 000
The deduction - paragraph 5(1)(a) of the Second Schedule to the Income Tax Act Note: this is colloquially referred to as "excess contributions"	700 000
The amount included in gross income, or actually the taxable income of the deceased resulting from the election made by the surviving spouse.	690 000
The tax levied on this amount is R34 200	34 200
This lumps sum received by the surviving spouse is deemed to be an amount that accrued to the deceased (immediately prior to death). The	

amount of the tax is as above because the individual did not receive any previous retirement lump sums or severance benefits. The surviving spouse will receive the net amount. Note: the tax suffered by the deceased does not qualify for a deduction in the estate.	

The amount that will then have to be included, as deemed property for estate duty purposes, in respect of the retirement interest of the deceased, is R700 000. The tax, the R34 200 in this instance, will also not qualify for a deduction in the estate.

What other property is deemed to be property of the deceased?

4.5 Deemed property

Other than the inclusion of the excess contributions to a retirement fund (as discussed above), there are four other items of property which are deemed to be property of the deceased. They are the following:

- domestic policies;
- property donated by the deceased;
- accrual claims; and
- property of which the deceased was competent to dispose of for his or her benefit.

4.5.1 A policy of insurance which is a "domestic policy"

4.5.1.1 General comments

Judge Mbha, in Naidoo v Discovery Life Limited & others (202/2017) ZASCA 88 (31 May 2018), in considering whether policy is an asset of the policyholder during his lifetime, said the following:

> *"This court has authoritatively determined that a contract in favour of a third party underlies the legal concept of a beneficiary clause in a life insurance policy. The policyholder (stipulans) contracts with the assurer (promittens) that an agreed offer will be made by the assurer to a third party (the beneficiary), with the intention that on acceptance of that offer by the beneficiary, a contract will be established between the beneficiary and the assurer. The offer involved is that the insurer will pay the proceeds of the policy to the beneficiary".*

The beneficiary clause is currently widely used in assurance contracts, and this can be attributed to two main factors. First, the policy proceeds are immediately made available to the beneficiary on the death of the policyholder, without the beneficiary having to wait until the deceased's estate is wound up before he or she can claim and receive the policy proceeds. Secondly, the policy proceeds do not form part of the deceased estate for purpose of the calculation of the executor's remuneration. Clearly, at the heart of those two main advantages is the avoidance or bypassing of the deceased estate.

When a policy is a risk-only policy, as in this case, payment of the policy proceeds occurs only upon the death of the insured life. It follows that by definition the policy proceeds can never be paid to the policyholder or the beneficiary during the lifetime of the insured life. The only rights that the policyholder has during his or her lifetime emanate from the policy itself. Typically, these are the contractual rights to nominate a beneficiary and to change the beneficiary nomination, the right to cede the policy and the right to terminate the policy.

This court has determined that the policy itself is not an asset in the estate of the policyholder. As Rabie JA described it in Borman en De Vos NNO (above at 507A): *"where a person has paid the premiums but has no corresponding claim during his or her lifetime, it can be said that an asset has been separated or withdrawn from his estate"* (my translation). This court affirmed that approach in Pieterse v Shrosbree NO & others and said that in the ordinary course the proceeds of an insurance policy will go directly to a nominated beneficiary.

If the estate of the deceased is entitled to the amount recoverable under a policy of insurance, this amount will be property in the estate of the deceased (and the amount will be the amount recoverable). But, where someone else is entitled to the amount recoverable, the insurer will pay the amount to the person named in the beneficiary clause of the policy. It then bypasses the estate, as judge Mbha said above, and it is the value of these policies that will be deemed to be property in the estate. This of course is so, unless one of the exclusions applies.

When is an amount recoverable under policy of insurance deemed to be property in the estate of a deceased person? It must, in the first instance, be amounts recoverable from domestic policies. So, when is a policy a domestic policy?

4.5.1.2 Domestic policy

It is clear, as was already indicated above, that section 3(3)(a) envisages that some person, other than the deceased or the estate of the deceased (that is), is entitled to the amounts due and recoverable under a policy of insurance.

The relevant legislation:

It is section 3(3)(a), of the Act, that includes certain policies of insurance and it reads as follows:

> *"Property which is deemed to be property of the deceased includes so much of any amount due and recoverable under any policy of insurance which is a "domestic policy", upon the life of the deceased as exceeds the aggregate amount of any premiums or consideration proved to the satisfaction of the Commissioner to have been paid by any person who is entitled to the amount due under the policy, together with interest at six per cent per annum calculated upon such premiums or consideration from the date of payment to the date of death."*

In terms of section 3(3)(a) of the Act, any amount due and recoverable under any policy of insurance which is a "domestic policy" (as defined in section 1 of the Act) upon the life of the deceased, is deemed to be property of the deceased. The requirement for inclusion in the estate of the deceased as deemed property, for estate duty purposes, is not based on whether the deceased was the owner of the policy, but rather on whether it was his / her life which was insured.

This amount due and recoverable under a policy of insurance would then be deemed to be property in the estate of the deceased if it is:

- a domestic policy;
- on the life of the deceased; and

- the amount recoverable exceeds the premiums or contributions paid by the person entitled to the policy (plus interest at 6%).

4.5.1.3 The relevant legislation:

The term "domestic policy" is defined in section 1 of the Estate Duty Act as follows:

> "***domestic policy***" *means any life policy as defined in section 1 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), issued anywhere upon an application made or presented to a representative of an insurer (or to any person on behalf of such a representative) at any place in the Republic, excluding a life policy which has been made payable at a place outside the Republic at the request of the owner, but including any life policy issued outside the Republic which has subsequently been made payable in the Republic at the request of the owner*;

In the Long-Term Insurance Act, *"unless the context indicates otherwise "**life policy**" means a contract in terms of which a person, in return for a premium, undertakes to—*

> *(a) provide policy benefits upon, and exclusively as a result of, a life event; or*
> *(b) pay an annuity for a period;*
> *and includes a reinsurance policy in respect of such a contract; and*
>
> *"**life event**" means the event of the life of a person or an unborn—*
> *(a) having begun;*
> *(b) continuing;*
> *(c) having continued for a period; or*
> *(d) having ended; …"*

With regard to the aggregate of the premiums paid, and the interest to be added thereto, it is this other person, namely the person entitled to the proceeds of the policy, who should have paid the premiums. If the deceased paid the premiums, no deduction can be made. This is really old legislation and we do not have the explanatory memorandum issued at the time, but one can safely accept that the granting of the deduction recognised that the deceased didn't reduce his or her estate by paying premiums. Adding interest to the amount of the premiums, recognises that some of the final amount recoverable, is attributed to growth in the policy and this growth results from the contributions made by the other person.

Why the percentage was fixed at 6%, and not ever adjusted is not clear. In practice it is accepted that the calculation is done on the basis of compound, rather than simple, interest. Suffice it to say that the amount included in property of the deceased, is the amount that accrued to the other person and this amount then reduced by the amount incurred by the person who benefits from the policy and adjustment by adding of the 6% interest.

There are some exclusions, or put differently, the amount recoverable under certain domestic policies are in certain defined instances not deemed to be property of the deceased. The exclusion can be categorised into three kinds of policies.

4.6 Domestic policies not deemed to be property in the estate

The three kinds of policies not deemed to be property in the estate, are a:
- policy in terms of which the amount is recoverable to the surviving spouse or child;
- policy taken out or acquired by a partner of co-shareholder;
- key-person policy.

4.6.1 Recoverable by a surviving spouse or child

In terms of proviso (i) of section 3(3)(a), an amount recoverable under a policy of insurance is not deemed to be property in the estate of the deceased, *"if the amount due under such policy is recoverable by the surviving spouse or child of the deceased under a duly registered ante-nuptial or post-nuptial contract."*

The Act has two persons, as the recipients of the proceeds under such policy, in mind here. They are a spouse and a child. The meaning of deceased. The meaning of the word spouse is defined in section 1 of the Act and is discussed in the paragraph dealing with marriages under the accrual system.

> *"unless the context otherwise indicates - "**child**", in relation to any person, includes any person adopted by him* (or her) *under any law of the* RSA; or *under the law of any country other than the* RSA, *provided the adopted person is under such law accorded the status of a legitimate child of the adoptive parent and the adoption was made at a time when the adoptive parent was ordinarily resident in such country …"*

This definition was inserted into the Act in 1964 to ensure that persons adopted under the provisions of various laws of the RSA or, in the circumstances described above, under the law of a country other than the RSA, will be regarded as children of a deceased person for estate duty purposes.

Relevant to the exclusion the only requirement is that the amount due under this policy is recoverable by the surviving spouse or child of the deceased under a duly registered ante-nuptial or post-nuptial contract. It is important to note that the requirement is that the contract was duly registered.

The Deeds Registries Act, No. 47 of 1937 ("the Deeds Registry Act"), refers to both ante, and post, contracts and also deals with antenuptial contracts executed outside the RSA. In terms of section 87(1) of the Deeds Registry Act, an antenuptial contract executed in the RSA must be attested to by a notary and must be registered in a deeds registry within three months after the date of its execution. With respect to the registration of postnuptial contracts, in terms of section 89(1), the provisions of section 87 *"shall mutatis mutandis apply in respect of -*
> *(a) an order under section 20 of the Matrimonial Property Act, 1984, as if that order were a notarial deed; and*
> *(b) a contract in terms of section 21 of the Matrimonial Property Act, 1984."*

It is also required that the contract must also be registered within three months of execution (signing) thereof in one of the Deeds Offices in the RSA.

If all of the above requirements were met, the proceeds recoverable by the spouse or child in terms of the policy, is excluded from property in the estate of the deceased.

Incidentally, under paragraph 55(1)(a) of the Eighth Schedule to the Income Tax Act, if the amount recoverable under the policy is received by or accrues to the spouse, or a dependant (which includes

a child) of the original owner of the policy, then the capital gain can be disregarded. It also applies where the deceased estate is the recipient, but does not apply if an amount was paid in respect of the cession of that policy – see paragraph 55 of the Eighth Schedule.

Importantly to note is that paragraph 55 does not share the requirement, in the Estate Duty Act (and mentioned above) that there must be a duly registered contract policy. One can therefore not merely accept that because the capital gain in respect of a policy receipt by a spouse or child can be disregarded, that it is also to be excluded from property in the estate of the deceased.

The second category of policies relates to an interest of a deceased held in a partnership, or shares held by the deceased in a private company.

4.6.2 Taken out or acquired by a partner of a co-shareholder

Proviso (iA) of section 3(3) of the Act deals with what is colloquially referred to as policies that are used in *"buy and sell agreements"*.

> *"In terms of proviso (iA) of section 3(3)(a), an amount recoverable due and under a policy of insurance is not deemed to be property in the estate of the deceased, if the Commissioner is satisfied that the policy was taken out or acquired by a person who on the date of death of the deceased was a partner of the deceased, or held any share or like interest in a company in which the deceased on that date held any share or like interest, for the purpose of enabling that person to acquire the whole or part of-*
> *(aa) the deceased's interest in the partnership concerned; or*
> *(bb) the deceased's share or like interest in that company and any claim by the deceased against that company,*
> *and that no premium on the policy was paid or borne by the deceased."*

Proviso (iA) was added the Estate Duty Act in 1983, as proviso (ii) (see below) to section 3(3)(a) of the Act provided a measure of relief, but that *"limited relief does not, however, cover the case frequently met with, namely, where partner A, on his own initiative and at his own expense, takes out a policy on the life of his partner, B, so that should B die he (A) will have the necessary funds with which to acquire B's interest in the partnership"* – see the Explanatory Memorandum on the Revenue Laws Amendment Bill, 1983. The Explanatory Memorandum continued by saying that *"similar situations arise where private companies are involved and the shareholders, also on their own initiative and at their own expense, take out policies on the lives of one another so that, should one shareholder die, the remaining shareholder or shareholders will have funds with which to acquire the shares and loan account of the deceased shareholder."*

The Eighth Schedule to Income Tax Act, deals with the capital gain consequences of these policies and has the same requirements as the proviso above. SARS, in paragraph 16.2.11 of their Comprehensive Guide to Capital Gains, provides the following nice explanation of a buy-and-sell agreement:

> *"Partners in a business or shareholders in private companies frequently enter into buy-and-sell agreements. Under such an arrangement the partners or shareholders take out life policies ON each other's lives. Should a partner or shareholder die, the owner of the policy will receive the policy proceeds CGT free under para 55(1)(c) provided none of the premiums were paid by the*

> *deceased person ... Those proceeds can then be used by the policyholder to purchase the deceased person's interest in the partnership or company."*

From an estate duty, and capital gai for normal taxs, point of view, the proceeds that accrue to the surviving partner or co-shareholder, and the amount agreed on as the consideration for the acquisition of the interest or shares, are ignored (in a sense). In other words, the policy is not deemed to be property in the estate of the deceased, and the amount of the proceeds thereof is irrelevant. It is only the interest of the deceased in the assets of the partnership, or the shares, that are included as property and section 5 of the Estate Duty Act, and paragraph 31 of the Eighth Schedule to the Income Tax Act contain specific rules to determine the value thereof (for capital gains purposes).

4.6.3 Key-person policies

SARS, in their External Guide Estate Duty Implications on Key Man Policies, explains that *"policies which fall within the ambit of section 3(3)(a)(ii) are commonly referred to as "key-man" policies."* And that *"liability for income tax with regard to these types of policies is provided for in the definition of "gross income" (section 1(1)) and section 11(w) of the Income Tax Act …"*. It can be added that paragraph 55(1)(b), of the Eighth Schedule to the Income Tax Act, deals with the capital gain consequences of these policies and will allow for the capital gain to be disregarded. Paragraph 55(1)(b) contains substantially the same requirements as the ones found in the Estate Duty Act in respect of these policies and will allow for any capital gain that may arise from this policy to be disregarded.

The wording of the exclusion, or proviso (ii), in the Estate Duty Act reads as follows:

> *"Provided that the foregoing provisions of this paragraph shall not apply in respect of any amount due and recoverable under a policy of insurance, … except where the provisions of paragraph (i) or (iA) of this proviso apply, if the Commissioner is satisfied and remains satisfied that such policy was not effected by or at the instance of the deceased, that no premium on such policy was paid or borne by the deceased, that no amount due or recoverable under such policy has been or will be paid into the estate of the deceased and that no such amount has been or will be paid to, or utilized for the benefit of, any relative of the deceased or any person who was wholly or partly dependent for his maintenance upon the deceased or any company which was at any time a family company in relation to the deceased."*

From the above wording it is clear that this exclusion for estate duty purposes is available where neither of the two previous exclusions are applicable.

The requirements to qualify for the exclusion are the following:
- the policy was not effected by or at the instance of the deceased;
- the premiums were not paid or borne by him or her; and
- the amount due or recoverable under the policy has not been nor will be paid into the estate and has not been nor will be paid to or utilised for the benefit of a relative or dependant of the deceased or a family company in relation to the deceased.

SARS, states that *"no case law exists with regard to the application of section 3(3)(a)(ii) of the Estate Duty Act, 1955 ..."* and that this *"guide expresses the views of SARS in this regard".*

In the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2014 [B 13–-2014], where an amendment to section 11(w) was explained, the following was said:

> *"A 'key person', in the context of 'key person insurance policies', is an employee who is critical to the success of an organisation. Organisations often insure the life of such persons so that if they should die, the negative effects on business continuity are lessened through a benefit pay-out."*

In scenario 3 of this guide, the following is given as an example:

4.6.3.1 Example

Facts:
A is the Production Manager of a private company, which is not a family company. As A is a highly qualified and skilled person, the company took out a policy on his life to replace him after his death. A died unexpectedly at the age of 52 and the company used the proceeds of the policy to provide for a replacement.

Application of the law:
As all the requirements of section 3(3)(a)(ii) of the Estate Duty Act are met in this scenario, the exclusion applies, subject to the condition that the relevant documentation to prove the facts must be submitted as vouchers upon submission of the L&D Account to the auditor at SARS.

This is an example of the key-person policy in its simplest form. SARS, in their guide, provides a good explanation of the application of section 3(3)(3)(ii), and that explanation is reproduced here:

For the exclusion in terms of section 3(3)(a)(ii) of the Estate Duty Act to be applicable the following circumstances must be considered:

- The Commissioner must be 'satisfied' that all the requirements of the section are met before the exclusion will be allowed. To enable SARS (on behalf of the Commissioner) to consider whether the proceeds of a policy fall within the ambit of the exclusion, all the relevant documentation pertaining to the case:
    - Copies of the resolution taken by company to take out such policy,
    - Application made for the policy and any other documentation to prove that the proceeds of the policy were not applied to benefit either the estate, any relative of the deceased or any person who was dependent upon the deceased for his/her maintenance or a family company of the deceased as envisaged in the relevant section of the Estate Duty Act.
- These documents must be submitted together with the Liquidation and Distribution Account to the estate auditor at SARS who will verify the documentation.
- A policy will have been 'effected by the deceased' if he was the person who contracted with the insurer for the issue of the policy, whether or not he was the beneficiary under the policy.
- 'At the instance' of a person is defined in the dictionaries as 'at the request or suggestion' of a person. A policy will be effected at the instance of the deceased if the proposor (*sic*) would not have effected the policy had he not been requested by the deceased to do so.
- Premiums will have been 'paid or borne' by the deceased where it has been paid by him directly, or indirectly by someone else on his behalf out of funds provided by the deceased. (See the discussion of this requirement below).

- If the company was 'at any time' a family company in relation to the deceased, the condition is not fulfilled and the proceeds will be dutiable even though at the time the policy was effected and, continuously thereafter, the company was not a family company in relation to the deceased.

SARS states that the *"proceeds of the policy, therefore, either qualify for the exclusion or are subject to estate duty. No pro rata share of the proceeds is envisaged by the Estate Duty Act."*

4.6.4 Paid or borne

Another requirement that requires further discussion relates to the payment of the premiums. It is required that the premiums were not paid or borne by the deceased. The "no" in the "no premium on such policy was paid or borne by" part should be read as not one of the premiums.

These premiums are often paid by the company and the accounting for these payments in the books of the company or partnership must be done correctly. SARS, in the part dealing with this specific requirement, gives the following as an example:

If a company paid the premiums of a policy on the life of A and debited A with the amount thereof on loan account, it is submitted that A bore the premiums.

The guide continues to deal with this by stating the following –

> *"The words 'no amount has been' or 'will be paid to the estate,' are capable of meaning that the condition is not fulfilled if there is an actual or future payment of any portion of the proceeds into the estate."*

The absence of some obligation linking the proceeds with the payment to the estate largely removes the basis for connecting any payment to the estate with the proceeds of the policy, a connection which must be present before it can be said that the condition has not been fulfilled.

The connection or link between the proceeds and their payment to the estate applies equally to the payment or utilisation for the benefit of relatives, dependants or family companies.

This condition also includes the use of any of the proceeds not merely paid to the persons falling into the above-mentioned categories, but also includes the utilisation of funds for their benefit flowing from such a policy.

If any person in the above-mentioned categories was released from his/her liability or his/her liability was reduced by the whole or part of the proceeds of such policy, the condition would not be fulfilled, and the proceeds of the policy would form part of the dutiable estate of the insured.

The next requirement relates to the person to whom the payment is made.

If the amount recoverable is paid into the estate, the exclusion doesn't apply. A further requirement that requires more discussion relates to prohibition that the proceeds may not be paid to or utilised for the benefit of a relative or dependant of the deceased or a family company in relation to the deceased.

What is a family company or a relative?

4.6.5 Family company and relative

> *"As defined, in section 1 of the Act, "**family company**", in relation to a deceased person, means any company (other than a company whose shares are quoted on a recognized stock exchange) which at any relevant time was controlled or capable of being controlled directly or indirectly, whether through a majority of the shares thereof or any other interest therein or in any other manner whatsoever, by the deceased or by the deceased and one or more of his relatives*; and
>
> "***relative***"*, in relation to any person, means the spouse of such person or anybody related to him or his spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of 'child' in this sub-section and any other person, such child shall be deemed to be related to its adoptive parent in the first degree of consanguinity* …"

The definition of family company is relatively clear, but the element of control requires further discussion. It is not defined in the legislation, or further explained in the SARS guides.

SARS, in the practice generally prevailing relevant to a connected person, states the following:

> *"Control refers to de facto control and not shareholder control. De facto control is generally but not necessarily held and exercised by the board of directors. However, the facts and circumstances of each case are critical in determining who is controlling a company because the presence and influence of a controlling person or persons can have a significant impact."*

In a footnote to the above, it is stated that de facto means *"in fact, whether by right or not."*

Judge Kroon, in Tax Case 1740, with reference to section 12C(6)(a)(i) in the Income Tax Act, said that

> *"… the Act … contained no statutory definition of 'control', and, in the absence of any other contrary indicators, the above decision is indirect authority for the proposition that the ordinary meaning of 'control', viz de facto control, was the intended meaning."*

It is trite that since it is an artificial legal entity, a company can only function through human agency. The human agency is the company's *"directing mind or minds"*.

The words 'directing', 'controlling' and 'effectively controlling' are interchangeable and refer to de facto control. Again, in the absence of a statutory definition or any other contrary indicators, that is the meaning to be ascribed to the word 'controlled' in s 12C(6)(a)(i).

The above interpretation is in keeping with the purpose of the legislative provisions in question. Sections 12C(4) and (6) are anti-avoidance provisions. They are designed to preclude persons (*in casu* representing companies) from manipulating assets under their control so as to claim additional write-off deductions while the assets continue to remain under their control. The achievement of that purpose would not be frustrated by leaving out of consideration persons who, despite being entitled in law to do so, do not in fact control the assets; conversely, the achievement of the purpose would not be enhanced by taking such persons into consideration.

It is submitted that the same principles will apply in respect of family companies for estate duty purposes.

The next item of property, that is deemed property, relates to certain donations made by the deceased (during his or her lifetime).

4.7 Donations made by the deceased

4.7.1 General

The donations envisaged here are two specific donations or kinds of donations, which were made prior to death by the deceased. The first is a *donatio mortis causa* and the second, a donation in terms of which the donee will not obtain a benefit until the death of the donor.

The donees, of these donations may also have a claim against the estate in respect of these donations, mainly because the property is also property in the estate, but the deduction thereof is not allowed under section 4(b) or 4(f) of the Act.

It is best explained by starting with the facts of a court case (Commissioner for South African Revenue Service v Marx NO (A720/05) [2006] ZAWCHC 9; 2006 (4) SA 195 (C) (9 March 2006) -). The facts are as follows:

- During 2001 the late M W Rush (the donor) concluded a written deed of donation in terms of which he donated, by way of four donations, an amount of five million rand (money) to each of his four children (the donees) as beneficiaries.
- In terms of the deed of donation, the donees were entitled on signature of the *“deed to a vested right in the aforementioned asset but shall not receive any benefit until the death of the donor.”*

The dispute before the court was that SARS issued an assessment for donations tax in respect of these donations and this was disputed by the executor. It also had an estate duty implication, but that was not before the court (and rightly so). At the time of death, the beneficiaries of the donation, would submit (on the basis of the deed of donation) a claim to the executor to the property donated. This had the effect, in a sense, to cancel the inclusion of the property in the estate of the deceased (the R20 million in this instance), as these claims would qualify to be deducted as being debts due by the deceased.

The effect of this was that SARS lost out on the donations tax, because such a donation is exempt from donations tax, and also on the estate duty (because the net effect of the inclusion and deduction was nil – no part thereof included in the dutiable amount of the estate).

SARS reacted to this by amending the Act. The Explanatory Memorandum explained the reason for the amendment as follows:

> *“Certain schemes have been developed in terms of which both estate duty and donations tax are avoided. In terms of one of these schemes a donation is made during the lifetime of the donor, subject to the condition of that the donee does not enjoy any benefit until the death of the donor. The value of the assets so donated still forms part of the property in the estate of the deceased, but the donee claims the donation as a debt against the estate.*
>
> *… it is proposed that donations which are exempt from donations tax as the donees do not receive benefits until the death of the donor (section 56(1)(d)) and property donated under a donatio mortis causa (section 56(1)(c)), be deemed to be property of the deceased if that property is not otherwise included in property of the estate for purposes of this Act.”*

With respect to the deduction, it is proposed that:

> *"… the donations in section 56(1)(c) and (d) of the Income Tax Act … be specifically excluded from the deductions that can be made in terms of section 4 of the Estate Duty Act. … This will ensure that the donations are subject to estate duty."*

4.7.2 Deemed property

Since the amendment took effect, *"property which is deemed to be property of the deceased includes any property donated by the deceased in terms of a donation which was exempt from donations tax under section 56(1)(c) or (d) of the Income Tax Act, 1962 (Act No. 58 of 1962), if that property is not otherwise included as property of the deceased for purposes of this Act."*

It is important to note that there is an inclusion, as deemed property in the estate, only where the property is not otherwise included as property of the deceased. The court case above is an example of where the property, the R20million, would have been property included in the estate of the late Mr Rush.

4.7.3 Deduction denied

The amendment then also dealt with the claim, by the donees, by disallowing the amount of the claim as a deduction.

> *"Therefore, under section 4(b) and 4(f) of the Act, all debts due by the deceased to persons ordinarily resident within, or outside the RSA, excludes "any debt which constitutes a claim by such a person to property donated by the deceased in terms of a donation which was exempt from donations tax under section 56(1)(c) or (d) of the Income Tax Act … which it is proved to the satisfaction of the Commissioner have been discharged from property included in the estate*".

In the above the words *"such a person"* refers to the donee (and it matters not if the donee is ordinarily resident in the RSA at the date of death).

If we use the facts of the court case as an example, the property included in the estate would the investment of R20 million and the claims by the beneficiaries of the donation would be a total of R20 million (and it is this claim that is not allowed as a deduction). The effect then is that, included in the net value of the estate would be an amount of R20 million. The donation, when it was made, would have qualified for an exemption from donations tax and the position now is that the estate duty would be levied on the R20million.

The next item of property that is deemed property follows from a marriage or applies where the deceased was married at time of death. It relates to what is known as an accrual claim.

4.8 Accrual claim

Amendments were made in 1985 that dealt with the accrual claim for purposes of estate duty. The Explanatory Memorandum explained this as follows:

> *"Broadly, what the amendments seek to achieve is to include in the estate of a deceased spouse the amount of any accrual, in terms of the Matrimonial Property Act, from the surviving spouse and to allow as deductions in determining the net value of an estate -*

(a) *the amount of any accrual acquired by a surviving spouse from the estate of the deceased in terms of the Matrimonial Property Act; and*
(b) *the value of any bequests made by the deceased to the surviving spouse."*

The effect of this new paragraph is to include in the property deemed to be property of a deceased the amount of any accrual acquired by him in terms of section 3 of the Matrimonial Property Act, No. 88 1984 ("the Matrimonial Property Act"), from his spouse.

Section 4(q) was added to the Estate Duty Act to deal with bequests to the surviving spouse and is dealt with under deductions in this guide. Section (3)(3)(cA) deals with the deemed inclusion in property of the deceased, and section 4(IA) with the deduction.

Section 3(3)(cA) of the Act deems the following to be property in the estate of the deceased:

> *"the amount of any claim acquired by the estate of the deceased under section 3 of the Matrimonial Property Act, 1984, against the deceased's spouse or the estate of his deceased spouse, in respect of any accrual contemplated in that section"*

As was explained in the Explanatory Memorandum, *"the effect of that … is to include in the property deemed to be property of a deceased the amount of any accrual acquired by him in terms of section 3 of the Matrimonial Property Act, 1984, from his spouse."*

> *"In terms of the Matrimonial Property Act* "*every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after*" 1 November 1984, "*is subject to the accrual system … except in so far as that system is expressly excluded by the antenuptial contract*."

Judge Gorven, in B v B (700/2013) [2014] ZASCA 137 (25 September 2014), explained the position where persons were married to each other out of community of property with the application of the accrual system. The judge said that the Matrimonial Property Act introduced into South African Law the system of accrual. The Judge said that

> *"in addition to excluding community of property and of profit and loss, under this regime a claim (an accrual claim) arises at the dissolution of the marriage 'for an amount equal to half of the difference between the accrual of the respective estates of the spouses'." The dissolution of the marriage may be by way of death or divorce".* See section 3 of the Matrimonial Property Act

It is outside the scope of this guide to deal with the calculation of the amount of the accrual claim. Suffice it to say that, in terms of section 4(1) of the Matrimonial Property Act, the accrual of the estate of a spouse is the amount by which the net value of his (or her) estate at the dissolution his (or her) marriage exceeds the net value of his (or her) estate at the commencement of that marriage.

Section 4(2) then provides that, in the determination of the accrual of the estate of a spouse –
(i) *any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;*
(ii) *an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his*

possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;

(iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money."

The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation *mortis causa* or succession out of that estate in terms of the law of intestate succession.

It must be remembered that an inheritance, a legacy or a donation which accrued to a spouse during the subsistence of his (or her) marriage, as well as any other asset which he (or she) acquired by virtue of his (or her) possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his or her estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise. A donation between spouses, other than a donation *mortis causa*, is not taken into account either as part of the estate of the donor or as part of the estate of the donee.

And that in the determination of the accrual of the estate of a spouse a donation between spouses, other than a donation mortis causa, is not taken into account either as part of the estate of the donor or as part of the estate of the donee.

"In terms of section 3(1) of the Matrimonial Property Act, at the dissolution of a marriage subject to the accrual system, by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses."

In other words, where the value of the estate of the deceased spouse, is less than the value of the surviving spouse (it showed a smaller accrual), the half of the difference between the values of the accruals in both spouses' estates will be deemed to be property of the deceased.

Of course, where the estate of the first dying showed a bigger accrual, there would be no deemed property. Rather, the surviving spouse will then have acquired a claim against the estate of the deceased. This will rank as a deduction – see discussion thereof later in this guide.

The last deemed property inclusion follows from the application of section 3(3)(d) of the Estate Duty Act. It again is property owned by someone other than the deceased (at date of death), which will be included in property of the deceased. This deeming provision applies where the deceased was competent to dispose of the property.

4.9 Property of which the deceased was competent to dispose of

"In terms of section 3(3)(d), property which is deemed to be property of the deceased includes property (being property not otherwise chargeable under this Act or the full value of which is not otherwise required to be taken into account in the determination of the dutiable amount of the

estate) of which the deceased was immediately prior to his death competent to dispose for his own benefit or for the benefit of his estate."

In the Estate Duty Act:

In terms of section 3(5), and for purposes of section 3(3)(d),

- *(a) the term '**property**' shall be deemed to include the profits of any property;*
- *(b) a person shall be deemed to have been competent to dispose of any property –*
  - *(i) if he had such power as would have enabled him, if he were sui iuris, to appropriate or dispose of such property as he saw fit whether exercisable by will, power of appointment or in any other manner;*
  - *(ii) if under any deed of donation, settlement, trust or other disposition made by him he retained the power to revoke or vary the provisions thereof relating to such property;*
- *(c) the power to appropriate, dispose, revoke or vary contemplated in paragraph (b) shall be deemed to exist if the deceased could have obtained such power directly or indirectly by the exercise, either with or without notice, of power exercisable by him or with his consent;*
- *(d) the expression 'property of which the deceased was immediately prior to his death competent to dispose' shall not include the share of a spouse of a deceased in any property held in community of property between the deceased and such spouse immediately prior to his death."*

When will a person be competent to dispose of property (for purposes of section 3(3)(d))?

4.9.1 Deemed to have been competent to dispose of

The Act defines, in a sense, when a person will be deemed to have been competent to dispose of property (in section 5(b) of the Act quoted above).

Judge Steyn, Commissioner for Inland Revenue & Another v Isaacs No & Others, 1960 (1) SA 126(A), dealt with a company, the shares of which were held by a person other than the deceased. The Act in force at the time, the Death Duties Act, 1922, contained a provision similar to section 3(3)(d) of the Estate Duty Act, but did not use term *"competent to dispose of"*, but provided that *"property shall be deemed to be property passing on the death of any person if such person notwithstanding that at the date of his death such property may have been held by or registered in the name of some other person (whether in the name of an individual or a body corporate or incorporate), directly or indirectly and for his own benefit had the control, order or disposition of the property, or of the profits derivable therefrom"*.

Judge Steyn made the following remarks:

The Ginoc company is a one-man company. The deceased had complete control of it. It may be said, therefore, with some reason, that he had the control and disposition of its property as well as the income derived from this property, for his own benefit, within the meaning of this provision.

These results seem to point to the correctness of the conclusion that the holding of property by a one-man company is not the kind of holding contemplated by the subsection.
If the deceased was immediately prior to his death competent to dispose of property for his own benefit or for the benefit of his estate, and the property is not otherwise taken into account in the determination

of the dutiable amount of the estate, the property will be deemed to be property in the estate and will be included as such.

This now concludes what constitutes the property in the estate of the deceased and the next step is to make the deductions from the total value of property.

5. DEDUCTIONS

The Estate Duty Act allows for certain deductions to be made from the total value of all property included in the estate. The resultant amount is the "net value" of the estate.

The REV267 requires the *"total amount of liabilities disclosed in the L&D account (where no L&D account is required to be rendered to any Master of the High Court a separate statement of liabilities should be submitted with this return)"* to be captured on the return (part A of the REV 267).

The allowable deductions are the following:

5.1 Funeral, tombstone and death-bed expenses of the deceased

Initially the Estate Duty Act didn't allow expenses related to the erection of a tombstone to be deducted for estate duty purposes. Following an amendment, in 1993, the Act was amended to authorise SARS to allow as a deduction of so much of tombstone expenses as SARS considers to be fair and reasonable. The Estate Duty Act now allows for any person, who has property of the deceased in his or her possession, to use that to ensure a proper funeral.

Expenses relating to the funeral, tombstone and deathbed of the deceased are allowed to be deducted (under section 4(a) of the Act). The requirement is that it these must "*expenses of the deceased which the Commissioner considers to be fair and reasonable*".

The amount of these expenses, that will be allowed, are therefore still under the discretion of the Commissioner and there is no guidance that was given by SARS with respect to when these expenses, the amount thereof, will be considered to be fair and reasonable by SARS.

The REV267 merely requires the total amount of "funeral costs" to be captured and then, requires a calculation to be done where the deceased was married in community of property. The SARS Frequently Asked Questions for Deceased Estates, provides the following explanation:

> *"Although the whole amount of funeral costs is taken into consideration for administration of the joint estate, that amount is added back to establish the one-half share of the joint estate belonging to the surviving spouse and which is not subject to estate duty. The whole amount of funeral costs is then subtracted from the deceased's one-half share of the joint estate."*

With respect to funeral, tombstone and death-bed expenses of the deceased, the executor will have to ensure that a deduction is made of reasonable expenses only.

What about the expenditure incurred in winding up the estate?

5.2 Cost of winding up the estate

The Act deals with costs related to the winding up process in two instances section 4(c) and 4(d) of the Act.

5.2.1.1 Section 4(c) expenditure

The first one includes all costs which have been allowed by the Master in the administration and liquidation of the estate.

The expenses typically include the following:

- Advertising for creditors and that the accounts lay for inspection at the Master;
- Costs of security furnished by the executor;
- Costs of valuating property in the estate;
- Costs of realising assets;
- Costs of transfer of assets;
- Executor's fees – see discussion below.
- Legal and accounting fees;
- Master's fees;

With respect to the Master's fee, the following is relevant:
- The Master's fee is payable on the gross value of all estates of deceased persons. Where the gross value of the estate according to the executor's account—
  (a) is R250 000 or more but less than R400 000: R600;
  is R400 000 or more for each complete further R100 000 with which the gross value exceeds R400 000, a further R200; subject to a maximum fee of R7 000.
  (b) Where the deceased was married in community of property, the Master's fee is calculated on the full value of property in the estate (and not on one half thereof)

5.2.1.2 Post death expenses relating to income accruing to the estate.

It is important to note that the administration and liquidation of the estate specifically **excludes** expenses incurred in the management and control of any income accruing to the estate after the date of death. These expenses will reduce post death income, but cannot be deducted in arriving at the net value of the estate of the deceased.

5.2.1.3 Executor's fees

In terms of section 51 of the Administration of Estates Act, No. 66 of 1965, every executor, is *"entitled to receive out of the assets of the estate -*
(a) such remuneration as may have been fixed by the deceased by will; or
(b) if no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master."

Whilst it is typical for the fee of the executor to be determined at 3,5%, or 4,025% (VAT inclusive if the executor is a registered VAT vendor) of the gross value of property in the estate, it is the actual amount, whether fixed in the last will and testament of the deceased, or calculated under the tariff, that can be deducted. It is an amount incurred in the administration and liquidation of the estate.

5.2.1.4 Section 4(d) expenditure

The second one (paragraph (d) of section 4) includes all expenditure incurred in carrying out the requirements of the Master or the Commissioner (SARS) in pursuance of the provisions of this Act.

These expenses would generally include expenditure in connection with property deemed to be property (under section 3(2) of the Act) in the estate.

Examples would include valuations obtained in respect of deemed property or costs for a security bond.

Under section 20 of the Act, an *"executor who is required to incur any expenditure in respect of any property which falls under paragraph (a) or (b) of sub-section (2) or under sub-section (3) of section three, shall be entitled to recover such expenditure from the person liable, in accordance with section eleven, for the duty payable in respect of such property"*.

That brings us to the end of the discussion on the cost related to the winding up of the estate and the deductions available in respect thereof. In the following parts the other deductions available will be discussed.

6. Debts due by the deceased

The Estate Duty Act allows for certain debts, due by the deceased at date of death, to be deducted in arriving at the net value in the estate. The principle can be explained by using a simple example:

> Example:
>
> If the deceased owned a primary residence at date of death, valued at R1,4 million at the time, the residence would be included as property in the estate and the value thereof would be the R1,4 million. If property was bonded and the deceased still owed R300 000 at date of death, the net value that ended up in the estate will be R1,1 million.

The deduction however doesn't require a direct link, between the debt and the property. Section 4, of the Estate Duty Act, deals with debts due by the deceased in three separate provisions.

They are the following:

- Debts due by the deceased
  - to persons ordinarily resident within the RSA (section 4(b).
  - to persons ordinarily resident outside the RSA (section 4(f)).
  - that are related to certain donations (section 4(b) and 4(f)).

One can say that section 4(b) is the general rule, and it deals with all debts due by the deceased to persons ordinarily resident within the RSA. It specifically excludes any debt which constitutes a claim by such a person to property donated by the deceased in terms of a donation which was exempt from donations tax under section 56 (1) (c) or (d) of the Income Tax Act.

6.1 First: Debts due by the deceased to persons ordinarily resident within the RSA.

The requirements of section 4(b) are the following:

- It must be a debt due by the deceased;
- It must be due to persons ordinarily resident in the RSA; and

- The debt must be proved, to the satisfaction of SARS, to have been discharged from property included in the estate.

6.1.1 Due by the deceased

The debts must be due by the deceased. Debts incurred by the executor cannot be deducted under this paragraph and the deduction thereof can only be made under section 4(c) of the Estate Duty Act.

6.1.2 Debt due

The Act does not define the term "debt due". The dictionary meaning of the word "debt" in English, when used as a noun, is a *"sum of money that is owed or due"*, and of "due", when used as an adjective, is *"(of a payment) required at a certain time."* See https://www.lexico.com/definition/debt and https://www.lexico.com/definition/due?locale=en respectively.

Judge Olivier, in Singh v Commissioner for the South African Revenue Service (500/2001) [2003] ZASCA 31 (31 March 2003), said the following:

> *"The ordinary meaning of 'due' is that '… there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately."*

From the above it follows that, a debt that is not payable immediately, is not a debt due. In practice the debts of the deceased cannot always be paid immediately (after date of death that is), as an executor needs to be appointed first.

> *"In terms of section 34(11), of the Administration of Estates Act, 1965, when an account has been confirmed by the Master, the executor shall forthwith pay the creditors and distribute the estate among the heirs, if any, in accordance with the account … and under section 35 (12) when an account has lain open for inspection as hereinbefore provided and no objection has been lodged … the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account …"*

This seems to anticipate that creditors in a deceased estate does not have to be paid immediately and may only be paid much later in the liquidation process.

In terms of section 28(1) however, an executor may:

- open a savings account in the name of the estate with a bank and may transfer thereto so much of the moneys deposited in the account … as is not immediately required for the payment of any claim against the estate;
- place so much of the moneys deposited in the account … as is not immediately required for the payment of any claim against the estate on interest-bearing deposit with a bank.

Note: *"the account"* is the *"a cheque account in the name of the estate with a bank in the RSA"* that the executor must open to deposit therein all the *"moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate"*.

This of course implies that certain claims may in fact be settled sooner rather than later. But claims may not be debts due and the question is the following:

> Does it mean that a debt that is not due to be paid immediately (on date of death that is), does not qualify for a deduction.

It is possible that the word "due" doesn't qualify debt but should rather be read with the phrase "ordinarily resident" within the RSA requirement. The late Meyerowitz answered this question as follows (in paragraph 28.4 of his book on Administration of Estates and their taxation (the 2010 edition)):

> *"In the narrowest sense a 'debt due' may be said to be a liquidated amount which is due and payable. But it is submitted that the words are used in a wider sense to mean any claim which the deceased was obliged to pay, even though the time for payment may not have arrived at date of death. If it were not so, the estate for estate duty would be inflated beyond its true value by the non-deduction of obligations incurred by the deceased but not yet payable at time of death, eg mortgage bonds …"*

6.1.2.1 Due by the deceased

The debts must be due by the deceased. Debts incurred by the executor cannot be deducted under this paragraph and the deduction thereof can only be made under section 4(c) of the Estate Duty At.

6.1.3 Persons ordinarily resident in the RSA

The next requirement is that the debt must be due by the deceased to persons ordinarily resident within the RSA.

It was already explained, earlier in this guide, what the phrase *"ordinarily resident within"* means. The deduction under section 4(b) can only be made if the debt is due to a person ordinarily resident in the RSA. If the creditor is not ordinarily resident in the RSA, the deduction of the amount thereof must be considered and can be made to the extent allowed by section 4(f).

6.1.4 Discharged from property included in the estate

The next requirement is that the Act requires that it must be proved, to the satisfaction of SARS, that a debt due by the deceased has been discharged from property included in the estate. The property included in the estate would of course be property of the deceased and property which is deemed to be property of the deceased. If the executor has money in the estate banking account, which of course is property in the estate, and paid the debt due by the deceased from this money, the requirement is met. If the executor were to pay a debt out of property which is not included in the estate, the debt (or amount of thereof paid) will not be allowed as a deduction.

An example is a retirement interest. Whilst the deceased is assessed for the tax, on the lump sum withdrawn from a retirement interest of the deceased in a retirement fund, it withheld by the retirement fund from the amount paid and is consequently paid from property that is not included in the estate of the deceased. In other words, the tax payable on the lump sum, is a debt due by the deceased, but because the value of the retirement interest is not property in the estate, the debt doesn't qualify for a deduction under section 4(b).

The requirement that the debt due by the deceased must be paid from property in the estate applies also to debts due by the deceased to persons not resident in the RSA.

Claims by the survivors with respect to their maintenance requires a separate discussion.

6.1.5 Maintenance claims
6.1.5.1 Minor child

There is a continuing obligation on a parent's deceased estate to maintain a minor child who is in need of such maintenance.

6.1.5.2 Surviving spouse

The Maintenance of Surviving Spouses Act, No. 27 of 1990 created and protects a surviving spouse's right to maintenance. Judges Navsa and Saldulker, in Oshry v Feldman (401/09) [2010] ZASCA 95 (19 August 2010), made the following comments about the claim for maintenance:

> *"It is trite that one of the invariable consequences of marriage is a reciprocal duty of support between spouses. That is a primary duty owed by one spouse to another.*
>
> *At common law a surviving spouse had no claim for maintenance against the estate of his or her deceased spouse.*
>
> *The Maintenance of Surviving Spouses Act 27 of 1990 altered the common law.*
>
> *As can be seen, in the event of a marriage being "dissolved by death" the primary obligation by a spouse has now been transferred to his deceased estate, in the event that it has the means to meet that obligation and provided that the surviving spouse is unable to have her maintenance needs met from "own means and earnings". Section 2(3)(b) deals with the order of preference of a maintenance claim in relation to other claims.*
>
> *Section 3 of the Act sets out factors that a court should take into account in determining a surviving spouse's reasonable maintenance needs."*

Claims for both of the above would qualify as a debt due by the deceased and would rank for deduction.

What if the position of the person who the debt is due to is not ordinarily resident in the RSA.

6.2 Second: Debts due by the deceased to persons ordinarily resident outside the RSA.

The law is found in section 4(f) and reads as follows:

> *"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say (f) any debts due by the deceased <u>to persons ordinarily resident outside the Republic</u> (other than any debt which constitutes a claim by such a person to property donated by the deceased in terms of a donation which was exempt from donations tax under section 56(1)(c) or (d) of the Income Tax*

Act, 1962 (Act No. 58 of 1962)), which have been discharged from property included in the estate to the extent that the amount of such debts is proved to the satisfaction of the Commissioner to exceed the value of any assets of the deceased outside the Republic and not so included;*"*

With respect to debts due to persons not ordinarily resident in the RSA, the same requirement, namely that it must be a debt due by the deceased (at date of death), applies here as well. See the discussion above.

6.2.1 Why is it dealt with in a separate provision?

If the person is not ordinarily resident in the RSA the deduction is available in respect of debt (referred to as foreign debt in this guide) may qualify for a deduction under section 4(f) of the Estate Duty Act.

The principle, similar to all other deductions, is that the debt must be discharged from property included in the estate.

The deduction is available in respect of foreign debt *"which have been discharged from property included in the estate"*. The section 4(f) deduction differs from the section 4(b) in that it is only allowed as a deduction *"to the extent that the amount of such debts is proved to the satisfaction of the Commissioner to exceed the value of any assets of the deceased outside the Republic and not so included"*. Section 4(f) doesn't specifically deal with this, but one can say that the intention is that the foreign debt must be discharged by using foreign property that is not included in property of the deceased in the RSA. A deduction is only available, under section 4(f), if the foreign debt is discharged (or paid) from property *included in the estate to the extent that the amount of such debts is proved to the satisfaction of the Commissioner to exceed the value of any assets of the deceased outside the Republic and not so included*.

The late Meyerowitz explained this as follows in his book (see paragraph 28.14):

> *"In determining whether the foreign debts can be discharged from the foreign estate, property which under the Act is included in the deceased's estate must be disregarded. Thus, if the deceased has an estate outside the Republic of R500, of which R400 consists of property liable for duty in the Republic, and has foreign debts of R200, as his liabilities to the extent of R100 can be met from assets not dutiable in the Republic, only R100 will be allowed as a deduction against the Republic estate. On the other hand, if the whole R500 is dutiable in the Republic then the full liability of R200 will be dutiable."*

It was mentioned, regarding both debts due to RSA residents and debts due to foreign persons that a debt that arose from certain donations made by the deceased will not qualify for a deduction.

6.3 Third: Related to donation

Note that debt, both in section 4(b) and section 4(f), excludes any debt which constitutes a claim by such a person to property donated by the deceased in terms of a donation which was exempt from donations tax under section 56 (1) (c) or (d) of the Income Tax Act.

The effect of the exclusion in both section 4(b) and section 4(f), is that no deduction is allowed in respect of the amount of the claim brought by the donees where the donation was exempt form donations tax. The effect of this is that these donations are subject to estate duty.

This was dealt with earlier in this guide – see the paragraph dealing with donations, where the deemed inclusion in property and the denial of the deduction are discussed

The next deduction relates to foreign property of the deceased.

7. FOREIGN PROPERTY

The term "foreign property" is used to refer to property situated outside the RSA.

It was stated earlier that all the property of the deceased, wherever situated, is included in property of the deceased. If the deceased was not ordinarily resident in the RSA, at time of death, the foreign property is specifically excluded, but what about the foreign property of a person ordinarily resident in the RSA at the time of death?

Section 4(e) provides for a deduction of foreign property of a person ordinarily resident in the RSA under certain circumstances.

> *"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say the amount included in the total value of all property of the deceased as representing the value of any right in or to property situate outside the Republic acquired by the deceased –*
> *(i) before he became ordinarily resident in the Republic for the first time; or*
> *(ii) after he became ordinarily resident in the Republic for the first time, by –*
> *(aa) a donation if at the date of the donation the donor was a person (other than a company) not ordinarily resident in the Republic; or*
> *(bb) inheritance from a person who at the date of his death was not ordinarily resident in the Republic; or*
> *(iii) out of the profits and proceeds of any such property proved to the satisfaction of the Commissioner to have been acquired out of such profits or proceeds;"*

The first important principle, that is rather obvious, is that the deduction can only be made if the value of the foreign property was included in the total value of property of the deceased. The amount of the deduction will be equal to the amount included and the result of this is that there is then no inclusion of the foreign property, as envisaged in section 4(e),in the dutiable amount of or it is tax neutral. This follows from section 5, which provides that the value of any property for the purposes of the inclusion thereof in the estate of any person in terms of section 3 or the deduction thereof in terms of section 4 as determined, must be the same.

The next principle is that the deduction is only available in respect of *"the value of any right in or to property situate outside the"* RSA if acquired by the deceased as described in section 4(e). That essentially looks at the time when acquired, but also at how the property was acquired, or from what, it was acquired.

7.1 Acquired by the deceased

7.1.1 Before the deceased became ordinarily resident in the RSA

The requirement is that the deceased must have acquired the foreign property in question, before he or she became ordinarily resident in the RSA for the first time.

This means that a person who was born in the RSA (and ordinarily resident in the RSA), and who ceased being a resident by formal emigration, but subsequently returned to South Africa and then became ordinarily resident in the RSA again, will not qualify for this deduction in respect of property acquired whilst outside the RSA.

In other words, this is only available to a person who never was ordinarily resident in the RSA but became so resident in the RSA before his or her death. What about foreign property acquired after having become ordinarily resident in the RSA?

7.1.2 After the deceased became ordinarily resident in the RSA

The Act provides for a deduction in respect of foreign property acquired in one of two ways.

The deceased is someone who became ordinarily resident in the RSA prior to his or her death.	
How was the foreign property acquired?	From whom acquired?
By way of a donation	The donor must not be a company. At the date of the donation the donor must have been a person not ordinarily resident in the RSA.
By inheritance	From a person who at the date of his (or her) death was not ordinarily resident in the RSA.

Foreign property acquired, after a person became ordinarily resident in the RSA, from a person who is ordinarily resident in the RSA, will not qualify for the deduction.

Generally, no deduction can be made of any bequest by the deceased. The Act however allows for some bequests to be deducted.

8. BEQUESTS THAT MAY BE DEDUCTED

The Act allows for two deductions to be made, the first, in respect of bequests to certain tax-exempt entities, and the second, in respect of property that accrues to a surviving spouse.

8.1 Bequests to tax exempt entities

Section 4(h) of the Estate Duty Act provides for the deduction in this respect and reads as follows.
Section 4(h)

> *"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is … the value of any property included in the estate which has not been allowed as a deduction under any other provision of this section which accrues or accrued to -*

(i) *any public benefit organisation which is exempt from tax in terms of section 10 (1) (cN) of the Income Tax Act, 1962 (Act 58 of 1962); or*

(ii) *any institution, board or body, which is exempt from tax in terms of section 10 (1) (cA) (i) of the Income Tax Act, 1962 (Act 58 of 1962), which has as its sole or principal object the carrying on of any public benefit activity contemplated in section 30 of that Act; or*

(iii) *the State or any 'municipality' as defined in section 1 of the Income Tax Act, 1962 (Act 58 of 1962);"*

So, if a person, for whatever reason, bequeathed some property to the State, the person's estate will be reduced and no estate duty will be paid on that property. But if the person bequeathed property to his or her local golf or soccer club, the value of the property will be taxed (put differently, there is no deduction then).

No section 18A receipt is necessary to make the deduction for estate duty purposes.

The executor must obtain confirmation that the entity is approved by SARS and that is normally done by requesting the organisation, or institution, etc. to provide proof of the approval by SARS.

The next category of deductions available relates to property that accrues to the surviving spouse.

8.2 Accrual claims and property bequeathed to the surviving spouse

There are principally two subsections of section 4 that are relevant here. They are:

- Section 4(IA) - the accrual claim of the surviving spouse
- Section 4(q) – amounts that accrue to the surviving spouse

It is important to understand who will be a spouse for purposes of estate duty.

8.2.1 Spouse

The word 'spouse' is defined in section 1 of the Estate Duty Act.

In the Estate Duty Act *"and in any regulations made thereunder, unless the context otherwise indicates "**spouse**", in relation to any deceased person, includes a person who at the time of death of such deceased person was the partner of such person-*

(a) *in a marriage or customary union recognised in terms of the laws of the Republic;*

(b) *in a union recognised as a marriage in accordance with the tenets of any religion; or*

(c) *in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent:*

Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property."

This definition is the same as the definition of spouse in the Income Tax Act.

There are a quite a number of instances, particularly after death of the one partner, where our courts are called on to rule on whether persons were in a permanent union, or when a person will be a spouse

(or one of the spouses) of the deceased for purposes of the intestate succession. It is outside the scope of this guide to deal with this issue.

The definition of spouse in the Act makes reference to a marriage in community of property.

8.2.1.1 In community of property

Judge Nugent, in Du Plessis and others v Pienaar NO and others, said that *"one of the ordinary consequences of marriage in community of property is that the property of the spouses is brought together in a joint estate that is owned by them in equal undivided shares."* The judge also said that *"it is well recognised, however, that either spouse might also own separate property that is excluded from the joint estate …"*

From an estate duty point of view, this means that it is only the half-share of the deceased spouse in the property in the joint estate, and of course property owned by the deceased that were excluded from the joint estate, that will be included as property in the estate. The same applies to debts due by the joint estate – only a half-share thereof can be deducted.

In the liquidation and distribution accounts however, the full value of the property are shown. The REV267 allows for a deduction to be made of the *"survivor's share thereof if the marriage was in community of property".* This is not a deduction allowed in terms of the Estate Duty Act, but this ensures that only 50% of the property is included in the estate.

A marriage out of community of property can be subject to the accrual system and that has estate duty implications.

8.2.2 Accrual (marriages subject to accrual system)

The accrual system was introduced into South African law by section 2, of the Matrimonial Property Act. It reads as follows:

> *"Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, <u>except</u> in so far as that system is expressly excluded by the antenuptial contract."*

This Act applies the dissolution of a marriage subject to the accrual system, by the death of one or both of the spouses. It of course also applies on the dissolution of the marriage by divorce.

It was mentioned, earlier in this guide, that a deduction is available to the deceased in respect of the accrual claim of the surviving spouse. The 1985 Explanatory Memorandum, dealing with the Bill introducing the deduction, stated the following:

> *"In terms of the new paragraph (IA) the amount of any accrual acquired by a surviving spouse under section 3 of the Matrimonial Property Act, 1984, will be allowed as a deduction in determining the net value of the estate of a person who died or dies on or after 1 November 1984."*

As was said earlier, it is outside the scope of this guide to deal with the calculation of the amount of the accrual - refer to the earlier explanation of the amount to be included in property of the deceased. That applied where the estate of the deceased spouse showed the smaller increase.

Judge Binns-Ward, in N v G and Others (18159/2013) [2018] ZAWCHC 29; 2018 (4) SA 316 (WCC) (12 March 2018), explained the accrual system as follows:

> *"The accrual system as provided for in terms of the chapter works on the basis set out in ss 2-5 of the Act. Section 4 provides in general terms that '[t]he accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage'. Its more specific provisions provide for what is ordinarily to be included in or left out for the purposes of determining the accrual and how the effect of inflation is to be accommodated in calculating the accrual. The respective net values at the commencement and dissolution of the marriage are matters of objective fact, not matters to be determined by agreement. It is not open to the parties by means of a declaration to invent the objectively determinable facts by declaring or stating fictitious values. The way in which they are entitled by agreement to alter the ordinary operation of the accrual system is by excluding or including specified types of assets that ordinarily would be included or excluded in terms of the statute for the purpose of determining the respective accruals; not by misrepresenting or misstating the objectively determinable commencement values."*

Where the estate of the deceased spouse showed a greater increase, the surviving spouse has a claim against the estate, and it is the amount of that claim that qualifies for a deduction against property in the estate.

8.2.2.1 The deduction

In terms of section 4(IA), of the Estate Duty Act, the "*net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … the amount of any claim against the estate acquired under section 3 of the Matrimonial Property Act, 1984 (Act 88 of 1984), by the surviving spouse of the deceased or by the estate of his deceased spouse, in respect of an accrual contemplated in that section*; …"

The deduction is the amount of the property, included as property of the deceased, and the amount of the deduction is the same amount that was included as property of the deceased.

The second deduction, relevant to the surviving spouse, is in respect of property that accrues to the surviving spouse. This is the most common deduction and results in a tax free roll-over, so to speak, of property of the first-dying spouse to the survivor. The deduction is granted in terms of section 4(q) of the Estate Duty Act.

8.2.3 Surviving spouse

Section 4(q) was introduced into the Estate Duty Act and the 1985 Explanatory explained it as follows:

> *"The new paragraph provides that, except to the extent that a deduction has been allowed under some other portion of section 4, so much of the amount of any property or deemed property included in the estate of a deceased person as accrues to his surviving spouse, is allowable as a*

deduction in the determination of the net value of the estate. The accruals in mind include bequests and amounts passing to the surviving spouse according to the law of intestate succession."

8.2.3.1 The deduction

In terms of section 4(q), of the Estate Duty Act, the *"net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section, as accrues to the surviving spouse of the deceased …"*

The following important requirements that follow from the above (there is a proviso to the above, but it will be discussed later on) are discussed as follows:

- the deduction is in respect of property included, or deemed to be included, in the estate of the deceased;
- that property accrues to the surviving spouse of the deceased;
- the deduction is then so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of section 4.

Where property of the deceased is used to meet a claim for maintenance of the surviving spouse of the deceased, there would already be a deduction of the property, and it can't be deducted again under section 4(q). Similarly, property used to settle the accrual claim, so to speak, qualifies under section 4(lA) – see above, and it can also not be deducted under section 4(q). The same applies to the deduction available under section 4(m) – see below.

It is important to note that the property must accrue to the surviving spouse When does property accrue to the surviving spouse?

8.2.3.2 Accrue to the surviving spouse

The general principle:
It was stated, in the Explanatory Memorandum mentioned above, that *"the accruals in mind include bequests and amounts passing to the surviving spouse according to the law of intestate succession."*

The meaning of the word "accrue" was considered in the Supreme Court of Appeal in Commissioner for the South African Revenue Service v Executor of the Estate of the Late Waldo Earl Frith (404/99) [2000] ZASCA 94 (29 November 2000) by Judge Plewman for the majority:

> *"the primary meaning of the word accrue would thus seem to me to involve a nuance which contrasts it with a meaning such as "has been received" or "will be actually received"." The judge continued to say that there is "nothing in section (4)(q) to suggest that it is concerned with what the surviving spouse will ultimately receive from the executor. What it is concerned with is the determination of a charge which must be made against the estate and therefore included as a charge in the account, which account will establish the sum (if it is a monetary amount) which the surviving spouse will receive. The focus is on what the surviving spouse is entitled to from the will, not her ultimate cash receipt. That this is so is in my view supported by the wording of the*

section which concerns itself with 'the value of any property included in the estate' (and not with the surviving spouse)."

The above decision put an end to a practice of SARS at the time, in terms of which they reduced the amount of the accrual to the surviving spouse by the amount of estate duty payable by the estate. This involved a method of circularity and had the practical effect of an increase in the amount of estate duty payable.

In summary, property would accrue to the surviving spouse if he or she is entitled to the property in terms of the last will and testament of the deceased, or in terms of the Intestate Succession Act, No. 81 of 1987. It is also possible that the property accrues to the spouse in terms of a redistribution agreement.

The amount of the deduction is the same as the amount of the property included in the estate. It is not reduced at all, not by estate duty payable on the asset or for any other reason.

8.3 Anti-avoidance

Section 4(q) contains another requirement which is found in the proviso to section 4(q) and reads as follows:

"Provided that-
(i) the deduction allowable under the provisions of this paragraph shall be reduced by so much of any amount as the surviving spouse is required in terms of the will of the deceased to dispose of to any other person or trust;
(ii) no deduction shall be allowed under the provisions of this paragraph in respect of any property which accrues to a trust established by the deceased for the benefit of the surviving spouse, if the trustee of such trust has a discretion to allocate such property or any income therefrom to any person other than the surving [sic] spouse."

The purpose of the proviso , as was explained in the Explanatory Memorandum, is *"to prevent estate duty avoidance"*.

A requirement, in terms of a will, to pay an amount is referred to as a bequest price. It is best explained by way of an example.

In Webb v Davis NO and Others (311/96) [1998] ZASCA 10; 1998 (2) SA 975 (SCA); [1998] 2 All SA 584 (A) (17 March 1998), the last will and testament of the deceased also provided, as stated by Judge Melunsky, in essence, for Rodney (one of the two sons of the deceased) *"to inherit the whole estate and to pay his brother a bequest price of R70 000."*

The specific wording in the last will and testament read as follows:

I give and bequeath to my son, RODNEY ERNEST WEBB, my Trading Station known as TAFALEHASHI, which is situate in the district of ELLIOTDALE, together with all my Estate and Effects, both movable and immovable, and wherever situate, nothing excepted, <u>but subject to the condition</u> as he is inheriting all my Estate and Effects, <u>that he shall effect payment</u> to my son, GARY RUPERT WEBB, of the sum of SEVENTY THOUSAND RAND (R70 000,00) and which bequest shall be subject to the following terms and conditions …

One of the conditions read as follows:
… to effect payment of the said sum of SEVENTY THOUSAND RAND (R70 000,00) to his brother, GARY RUPERT WEBB, then I direct that the aforesaid bequest shall fall away, and I then hereby nominate, constitute and appoint my sons, RODNEY ERNEST WEBB and GARY RUPERT WEBB, to be the sole and universal heirs, in equal shares, of all my Estate and Effects, …

The question before the court was whether the requirement to pay a bequest price was a suspensive condition. Judge Melunsky held that it was not and was *"of the view that a resolutive condition does not affect the time when vesting occurs."* Relevant to section 4(q): this means that where property is bequeathed to a surviving spouse, and the surviving spouse is required to pay a bequest price in order to receive the inheritance, the property in question actually accrued to the surviving spouse (as required by section 4(q)). It follows from the principle that when property vested in someone, that person is entitled to it, and that consequently, that property accrued to that person.

In Commissioner South African Revenue Services v Estate Late Streicher (194/03) [2004] ZASCA 126 (31 May 2004) we have an example of a bequest price in an estate duty related case. Judge Howie stated the facts relevant to the bequest price as follows:

"In her Will the deceased bequeathed the land she owned outright to their son, Johannes Jacobus Streicher and her undivided half share of the jointly-owned land she bequeathed to their son, Fransie Naude Streicher. In both instances she bequeathed a usufruct to the respondent. In return for their inheritances the sons referred to each had to pay a third son, Daniël Myburgh Streicher, a specified bequest price."

For purposes of an example and relevant to the requirement that the surviving spouse had to make a payment in terms of a will. The facts are changed as follows:

8.3.1 Example

In the last will and testament of a deceased spouse, land the deceased owned, was bequeathed outright to the other (or surviving spouse). In return for this inheritance, the surviving spouse had to pay to the couple's son a specified bequest price.

The effect of the proviso to section 4(q) was explained (in the Explanatory Memorandum) as follows:

"It is possible to provide in terms of a will that Rx is bequeathed to the surviving spouse but subject to the condition that she pays, for example, the son a bequest price of Ry, thereby avoiding estate duty on what is in effect a bequest to the son of Ry."

This is the possibility created in the example above.

"It was explained in the Explanatory Memorandum that "it is possible to escape estate duty" in this instance. Ostensibly, because the surviving spouse will only actually receive the net amount of property (the value of the property itself, reduced by the amount of the property used to settle the bequest price). And the person entitled to the bequest price, will in actual fact indirectly receive property from the estate. Were the property to accrue to this person directly, no deduction would have been available. The amount would potentially have been subject to estate duty, if the

property, used for the bequest price, were bequeathed to this person. This was the tax avoidance that the tax authority had in mind.”

By reducing the value of the property by the bequest price (or with the amount of property the surviving spouse was required in terms of the will to dispose of to someone else), the balance remains in the dutiable amount of the estate (and potentially, is subject to the tax). This of course is in terms of proviso (i). Put differently, the difference between the full value of the property and the amount of the bequest price, qualifies for the section 4(q) deduction.

The proviso to section 4(q) also provides for another scenario, which was also seen as tax avoidance and proviso (ii) deals with that. The following example was provided in the Explanatory Memorandum in this regard:

> *“It is possible to provide in terms of a will that Rx is bequeathed to the surviving spouse but … the will may provide that property is to be held in trust for the ostensible benefit of the surviving spouse, but the trustee has the discretion to dispose of the property or income from the trust as he deems best, that is, to persons other than the surviving spouse.*
>
> *Thus, as in the first-mentioned scenario, it is possible to escape estate duty by bequeathing property to the surviving spouse in circumstances where the surviving spouse does not have a vested right to the benefit.”*

It differs from the bequest price scenario above, in that the surviving spouse is now under no obligation to dispose of any of the property inherited to someone else. In this instance the property accrues to a trust, and the trust is (or was) established by the deceased for the benefit of beneficiaries including the surviving spouse. The deduction is then denied if the trustee of such trust has a discretion to allocate such property or any income therefrom to any person other than the surviving spouse.

A simple example of this is as follows:
A deceased spouse established a trust during his or her life-time (or the trust is created in the will of this first dying spouse). In terms of the Trust Deed the surviving spouse is a beneficiary of this trust, but there are also other beneficiaries in the trust. In terms of the trust deed, the trustees of this trust have a discretion to vest and distribute income or capital to the beneficiaries of the trust.

The property bequeathed to this trust will form part of the capital of the trust. Applying proviso (ii) to these facts, it would mean that the property accrued to a trust, which was established for the benefit of the surviving spouse, but also for the benefit of persons other than the surviving spouse. As the trustees have a discretion to vest, or allocate in the words of the proviso, the capital (the property) or any income from this property, the section 4(q) deduction will not be available.

The simplest form of where the section 4(q) deduction is available would be where the bequest is to a trust where the surviving spouse is the only beneficiary of both the capital and the income of the property bequeathed to the trust.

There is another section that also provides for a deduction in respect of the value of property included in the estate of the deceased. It relates to certain limited interests and annuities.

8.4 A usufructuary or other like interest in or a right to an annuity charged upon property

The deduction is allowed under section 4(m) of the Act and reads as follows:

> *"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … the value of any usufructuary or other like interest in property and of any right to an annuity charged upon property, included as property of the deceased under section 3(2)(a), if such interest or right was created by a predeceased spouse of the deceased and -*
> *(i) the property over which the deceased enjoyed such interest or right formed part of the estate of such predeceased spouse; and*
> *(ii) no deduction in respect of the value of such interest or right was allowable in the determination of the net value of the estate of the predeceased spouse under the provisions of paragraph (q) of this section;"*

The 1987 Explanatory Memorandum explained it as follows:

> *"Section 4 (m) of the Estate Duty Act provides for a deduction in the determination of the net value of an estate of the value of any usufructuary or other like interest in property and of any right to an annuity charged upon property which has been included in the estate of the deceased, if such interest or right was created by the predeceased spouse of the deceased and the property over which the deceased enjoyed such interest or right formed part of the estate of such predeceased spouse. This provision ensures that such interest or right is subject to duty only once, but at least once.*
>
> *With the introduction of section 4 (q) in the Estate Duty Act in 1985, however, so much of the value of any property or deemed property included in the estate of the deceased as accrues to his surviving spouse is allowable as a deduction in the determination of the net value of his estate. It will be observed that any interest or right referred to in section 4 (m) could, as a result of the introduction of section 4 (q), escape liability for estate duty completely as such interest or right will be exempt in both the estate of the predeceased spouse (section 4 (q) and the estate of the surviving spouse (section 4 (m). The amendment effected by subcluase 1 (b) (sic) provides that the deduction under section 4 (m) will only be allowed if the value of the interest or right enjoyed by the surviving spouse was not previously deducted in the determintion (sic) of the net value of the predeceased spouse's estate under section 4 (q)."*

If the deceased enjoyed a limited interest in, or a right to an annuity charged upon property. The property was included in the property of the deceased spouse, the deduction under section 4(m) is avilable and no deduction was allowed in respect thereof under section 4(q).

9. BOOKS, PICTURES, STATUARY OR OTHER OBJECTS OF ART

This deduction is often misunderstood. It is thought that a bequest, for a period of 30 years, of the above-mentioned items, qualifies for a deduction under this section. That is not true – it may qualify under section 4(h). What section 4(o) achieves is to reduce the value of these items in the estate of the deceased by recognising that the deceased had a limited ownership, or use, of the item in question.

Section 4(o) reads as follows:

"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … any amount included in the estate in respect of-
(i) the value of books, pictures, statuary or other objects of art; or
(ii) so much of the value of any shares in a body corporate as is attributable to such body's ownership of books, pictures, statuary or other objects of art;
if such books, pictures, statuary or other objects of art have been lent under a notarial deed to the government of the Republic in the national, provincial or local sphere for a period of not less than thirty years, and the deceased died during such period;"

Section 4(o) originally required the books, pictures, statuary or other objects of art to have been loaned under a notarial deed to the State, any local authority and certain defined institutions for a period of not less than 50 years. Following a recommendation by the Margo Commission, a proposal relating to a *"reduction in the qualifying loan period to 30 years … has been accepted by Government …"* – see the Explanatory Memorandum on the Taxation Laws Amendment Bill, 1988.

9.1 Example
9.1.1 Facts

A person loaned, under a notarial deed, an object of art to the Government of the RSA, for a period of 35 years. The person dies before the end of this period of 35 years.

9.1.2 Application

The object of art is property in the estate of the deceased. It is included at its market value at date of death.

Under section 4(o) of the Act, a deduction is allowed, and the amount of the deduction is the amount of the property (the object of art) that was included in property of the deceased.

The result is that the net value of property in the estate will not include the value of the object of art or a part thereof. In other words, the deduction does not take into account the remaining period of use granted to the Government.

10. AN INTEREST IN PROPERTY ACQUIRED BY VIRTUE OF A DONATION

Section 4(g)

"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … the value of any interest included as property of the deceased under paragraph (a) of subsection (2) of section three where such interest was held by the deceased by virtue of a donation to him by the person to whom the right of enjoyment of the property in which the deceased held the interest, accrues or, where the interest consists of a right to an annuity charged upon property, by the person who is the owner of that property;"

Section 3(2) includes in property of the deceased any fiduciary, usufructuary or other like interest in, as well as a right to an annuity charged upon property, if that right was held by the deceased immediately prior to his (or her) death.

If this interest of the deceased in the property, was held by the deceased by virtue of a donation to him (or her)

- by the person to whom the right of enjoyment of the property in which the deceased held the interest, accrues (on death of the deceased) or,
- where the interest consists of a right to an annuity charged upon property, by the person who is the owner of that property

then the value of the interest (included in the property of the deceased) is deducted under section 4(g).

11. IMPROVEMENTS TO PROPERTY

There are two deductions available where the value of the property, included in the estate of the deceased, was enhanced by improvements that were made to the property.

These improvements will have enhanced the value of the property. For example, the deceased owned the property and bequeathed the property to someone else (the heir). This other person improved the property (during the life-time of the deceased, or before the death of the deceased).

The first one relates to improvements made by the person to whom the property accrues on the date of death of the deceased. Section 4(i) then grants a deduction to the estate and reads as follows:

> *"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … the amount by which the value of any property included in the estate has been enhanced by any improvements made to the property concerned-*
> *(i) at the expense of the person to whom such property accrues on the death of the deceased; and*
> *(ii) during the lifetime of the deceased and with his consent."*

Note that it requires the consent of the deceased to have been granted, before death of course, and the improvements must have been at the expense of the person entitled to the property after death.

In the second instance, the property in question is deemed property in the estate, a limited interest (any fiduciary, usufructuary or other like interest), which ceased upon the death of the deceased. Section 4(j) provides for a deduction and reads as follows:

> *"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … the amount by which the value of any fiduciary, usufructuary or other like interest which ceased upon the death of the deceased has been enhanced by any improvements made to the property concerned-*
> *(i) at the expense of the person to whom the benefit arising by reason of the cessation of such interest upon the death of the deceased, accrues; and*
> *(ii) during the lifetime of the deceased and with his consent."*

Note that, in this instance, it also requires the consent of the deceased to have been granted, before death of course, and the improvements must have been at the expense of the person to whom the benefit arising by reason of the cessation of such interest upon the death of the deceased, accrues.

12. PROPERTY OWNED BY A COMPANY AND USED FOR FARMING OPERATIONS

The deduction, in this instance, relates to the value of shares held (at date of death) by the deceased or a member's interest of the deceased in a close corporation. The value of the shares or member's interest will have been included as property in the estate of the deceased.

It is section 4(p) that provides for the deduction and it reads as follows:

Section 4(p)

> *"The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say … so much of the value of any property deemed to be property of the deceased by virtue of the provisions of section 3(3) as has not been deducted under any of the other provisions of this section and as the Commissioner is satisfied has been taken into account under the provisions of section 5(1)(f)bis in the determination of the value of any company shares or a member's interest in a close corporation included as property in the estate."*

The reasons for amending the Act to introduce this deduction was to empower SARS, for estate duty purposes *"to reduce the value of any property which is deemed to be property of a deceased person by virtue of the provisions of"* section 3(3) of the Act, *"by so much of that value as" SARS "is satisfied has been taken into account … in the determination of the value of any company shares included as property in such person's estate."*

At the time there were other deemed inclusions, but for the present, this arises where the proceeds of an insurance policy, or property of which the deceased was competent to dispose of, is deemed to be property in his or her estate. It is then possible that the value of shares held by the deceased in a company, or a member's interest in a close corporation, would include the value of such property.

In its simplest form for instance, a key person policy, paid out to a family company and the amount thereof was taken into account in the valuation of the shares in the company. The proceeds of the policy is deemed property in the estate of the deceased, and it is clear that there is some element of double inclusion in the estate of the deceased. A really simple example of this would be as follows:

> *"The amount recoverable under a domestic policy, upon the life of the deceased, is amount of R1,2 million and the amount deemed to be property in terms of section 3(3)(a) is R1,0 million. In terms of the policy an amount of R1,2 million was paid to company. If the deceased held 60% of the shares in this company (which is a family company) at time of death, and if the value of the shares increased directly in proportion to the proceeds payable to the company, the deduction under section 4(p) would be available. In this instance the deduction would then be 60% of the R1,0 million."*

Note, it is of course more complex as this where the value of the shares is not in direct proportion to the value of the deemed property, but the example explains the principle and the deduction.

That concludes the discussion of the deductions available in arriving at the net value of the estate. There is one more deduction available and this deduction will reduce the net value of the estate of the deceased to the dutiable amount thereof.

12.1 The section 4A deduction

12.1.1 General principle

Section 4A provides a basic deduction to any estate. This deduction reduces the net value of the estate and basically ensures that the estate duty will only be levied where the net value of the estate exceeds the amount of the section 4A deduction. It serves the same purpose as does the rebates, for normal tax (income tax) do – it fixes a threshold below which no tax will be payable.

In terms of section 4A(1), *"the dutiable amount of the estate of any person shall be determined by deducting from the net value of that estate, as determined in accordance with section 4, an amount of R3,5 million."*

The amount of the section 4A deduction has been increased in the past, but the last increase took effect on and applies in respect of the estate of a person who dies on or after 1 January 2010.

The section 4A deduction, at its current value, results in no estate duty being payable by any person who died, if the net value of the estate of a deceased person is less than R3,5 million.

The unused portion of the section 4A deduction, where the net value of the estate is less than R3,5 million, is of course lost. In other words, it can be carried over to the heirs of the deceased. This should not be a problem where the deceased was single, but where the deceased was the spouse of another person, it created a problem.

A problem arises where the first-dying spouse bequeathed property in the estate, in the smaller estates this may well be all the property in the estate, to the surviving spouse. Because the property accrues to the surviving spouse, the section 4(q) deduction would then reduce the net value of the estate to nil. When the second-dying spouse dies, the section 4A amount is R3,5million and before 2010, was not increased. Spouses made use of trusts, for instance, to ensure that the first-dying spouse utilises the full R3,5million.

SARS and National Treasury recognised this problem and explained how planners were dealing with the problem – see the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2009 - as follows:

> *"Married couples often seek to maximise the R3.5 million deduction per spouse through one or more structures (e.g. trusts). The purpose of these structures is to ensure that R7 million of assets (i.e. R3.5 million per spouse) can be passed to the married couple's heir (e.g. children) free of Estate Duty."*

SARS and National Treasury, in 2009, introduced an amendment to section 4A in order *"to make the automatic deduction portable between spouses"*.

12.1.2 The roll-over of the section 4A amount

Since then, as was explained in the Explanatory Memorandum, *"the estate of the surviving spouse will benefit from a double deduction at the time of the surviving spouse's death (currently at R3.5 million), less the amount used by the estate of the predeceased spouse (which can never exceed the R3.5 million amount)."*

This was done by adding subsection (2) to section 4A – it reads as follows:

> *"Where a person was the spouse at the time of death of one or more previously deceased persons, the dutiable amount of the estate of that person shall be determined by deducting from the net value of that estate, as determined in accordance with section 4, an amount equal to the amount specified in subsection (1)-*
> *(a) multiplied by two; and*
> *(b) reduced by the amount deducted from the net value of the estate of any one of the previously deceased persons in accordance with this section."*

In order to make this deduction, of the R3,5 million plus the amount rolled over, the executor of the estate of the deceased person must submit to SARS a copy of a return submitted to SARS (the REV267) in terms of section 7 or other relevant material that SARS may regard as reasonable in respect of the estate of the previously deceased person. See section 4A(5) of the Act.

In SARS document, issued on 6 August 2020, and called "Frequently Asked Questions - Deceased Estates" the following question and answer appears:

> *"What documentation is required to qualify for the section 4A(2) abatement?*
>
> *A stamped copy by the Master of the liquidation and distribution account (L&D account) or a stamped copy by the Master of the predeceased's estate duty return (REV267) together with the other estate documentation, is required to qualify for the section 4A(2) abatement.*
>
> *The deduction will not be allowed if the L&D account or REV267 is not submitted or is not stamped by the Master's office. Alternatively, the Commissioner may request any other relevant material that the Commissioner may regard as reasonable in relation to the estate of the predeceased spouse."*

The amendment went further and recognised that the surviving spouse may have been a spouse of more than one spouse who may have died before the spouse who now died.

But it limited the amount of the reduction to R3,5 million. In other words, the surviving spouse would always be entitled to a deduction under section 4A of at least R3,5 million, and the reduction from the R7 million cannot exceed the R3,5 million. The explanatory Memorandum explained it as follows:

> *"If the deceased is a surviving spouse of one or more marriages, the deduction is merely doubled as if the surviving spouse had survived only one marriage. Amounts subtracted for previously used automatic deductions are limited to one pre-deceased spouse of the executor of the surviving spouse's estate."*

The amendments also recognised that *"a deceased spouse"* may have *"multiple concurrent spouses"*, and then provides that *"the R3.5 million amount will be divided equally among the surviving spouses."*

This is achieved through section 4A(3), which reads as follows:

> *"Where a person was one of the spouses at the time of death of a previously deceased person, the dutiable amount of the estate of that person shall be determined by deducting from the net value of that estate, as determined in accordance with section 4, an amount equal to the sum of-*
> *(a) the amount specified in subsection (1); and*
> *(b) the amount specified in subsection (1) divided by the number of spouses, reduced by an amount which is determined by dividing the amount deducted, in accordance with this section, from the net value of the estate of the previously deceased person by the number of spouses of that previously deceased person."*

This is best explained with an example. The two examples below were taken from the 2009 Explanatory Memorandum:

12.1.3 First example:

12.1.3.1 Facts (see example 3 in the Explanatory Memorandum)

Mr X is married to Mrs X. Mr X passes away. The net value of Mr X's total estate is nil (because all of Mr X's assets have been transferred to Mrs X upon death). Mrs X then marries Mr Z. Mrs X then passes away. The net value of her estate is R6 million with R5 million being transferred to her children. The estate duty impact of the transfer is nil because her estate fully utilises the section 4A deduction (attributable to her estate and the estate of the Mr X). Mr Z then dies with an estate of R4 million, leaving the full amount to his children.

12.1.3.2 Application of the law

Understanding the following fact:

> *"The estate duty impact of the transfer is nil because her estate fully utilises the section 4A deduction …"*

Description	Amount
The net value of the estate of Mrs X is	R6 million
The facts are silent about this, but because the net value of the estate is given, it must be accepted that a section 4(*q*) deduction was allowed if any property accrued to the surviving spouse, Mr Z.	
The R6 million was bequeathed to her children (R5 million) and to persons other than her surviving spouse or public benefit organisations.	
The section 4A deduction is R3,5 million multiplied by 2, less Rnil. It is limited to the net value of her estate.	(R6 million)
Dutiable amount	Nil

Mr Z's dutiable amount is calculated as follows:

Description	Amount
The net value of the estate of Mr Z is	R4 million

The section 4A deduction is R3,5 million multiplied by 2, or R7 million.	
The amount deducted from the net value of the estate of Mrs X, the previously deceased person, was R6 million, but it is limited to R3,5 million.	
The section 4A deduction available to Mr Z is	R3.5 million
The dutiable amount of his estate then	R0,5 million

12.1.4 Second example

12.1.4.1 Facts (see example 4 in the Explanatory Memorandum)

Mr X is the spouse of Ms A, Ms B and Ms C in a customary marriage. Mr. X passes away with the estate utilising an automatic section 4A deduction of R500 000. Ms. A then passes away. The net value of her estate is R4 million.

12.1.4.2 Application of the law

Unpacking the following fact:
“Mr. X passed away with the estate utilising an automatic section 4A deduction of R500 000.”
This means that the net value of the estate of Mr. X was R0,5 million and that the section 4A deduction in his estate was therefore also R0,5 million. Put differently, an amount of R3,0 million of the section 4A amount was not utilised.

Mr A’s dutiable amount is calculated as follows:

Description	Amount
The net value of the estate of Ms A is	R4 million
The section 4A deduction is R3,5 million multiplied by 2, or R7 million.	
The amount deducted from the net value of the estate of Mr X, the previously deceased person, was R0,5 million.	
The amount that could be rolled-over, R3,0 million. Section 4A(3)(b) however requires the following calculation to be done: (R3,5 million less R0,5 million) divided by 3 = R1,0 million. This is due to Ms A being one of the spouse in the customary marriage in existence at date of her death.	
The section 4A(a) deduction available to Ms A is R3,5 million	
The total amount that may be deducted under section 4A is therefore R4,5 million, but is limited to the net value of the estate	R4 million
The dutiable amount of her estate then	Nil

12.2 Amendment of section 5 of the Estate Duty Act, 1955

That concludes the discussion on arriving at the dutiable amount of an estate. As was explained in the format of the calculation of estate duty, SARS will assess the estate, based on the REV267, and the rates of estate duty are then applied to the dutiable amount to arrive at the estate duty payable.

The administrative issues related to the submission of the return, assessment, payment of the duty and interest is discussed later in this guide.

It was mentioned earlier in the guide that the dutiable amount of an estate had to be expressed in money terms. The Estate Duty Act prescribes how the valuation of property must be done.

12.3 Value

It was mentioned earlier in this guide that the property in the estate had to be expressed in money terms. This would of course be where the property is not cash and require the executor to have the property valued. The same applies also as far as the deductions are concerned – a valuation of the property deducted may be required.

The Estate Duty Act prescribes, in section 5 of the Act (under the heading the "determination of value of property"), the basis that must be used to value property. It is outside the scope of this guide to deal with these valuation rules in detail.

It is important to remember in this respect that in terms of section 9(1A), of the Estate Duty Act, if SARS, prior to the issue of a notice of assessment in terms of section 9(1):

(a) is dissatisfied with any value at which any property is shown in any return; or

(b) is of the opinion that the amount claimed to represent the dutiable amount as disclosed in any return, does not represent the correct dutiable amount,

the Commissioner <u>shall adjust such value or amount</u> and determine the dutiable amount upon which such assessment shall be raised accordingly."

This gives a right to SARS, without following the process prescribed in the Tax Administration Act, to adjust the values or amounts and effectively increase the duty payable. In practice however SARS actually communicates with the executor when they intend to do this.

It was already said that section 5, of the Act, prescribes the valuation rules. The section provides a general rule, then an exception to the rule where property is liquidated in the course of winding up the estate, and then rules related to limited interests and shares in private companies. The valuations with respect to limited interests are quite complex and differs from the ones that apply for donation tax purposes. It is outside the scope of this guide to deal with the methods to be used in doing the valuations et cetera.

Prior to 2001, the opening words of section 5(1) referred to *"the value of any property included in the estate"*. At the time some arguments were *"raised that on a literal interpretation of section 5, that section can only be used to value property for purposes of including that property in the estate of a deceased"* – see the Explanatory Memorandum. It was mentioned in the Explanatory Memorandum that many *"circumstances, however, arise where a value also needs to be placed on property which qualifies for a deduction for estate duty purposes"* and that although *"the valuation rules provided for in section 5 have in practice been applied for purposes of both the inclusion of property in the estate and the deduction thereof in terms of section 4, there has been some uncertainty in this regard" and that this "practice has also been supported by case law."*

In order to eliminate this uncertainty, mentioned above, the wording of section 5(1) and (2) were amended *"to specifically provide that the value of the property determined in terms of this section, shall apply in respect of property to be included in an estate, as well as for purposes of the deductions contemplated in section 4."*

The guide will only deal with section 5 and the general rule will be discussed first.

12.3.1 The general rule

It is section 5(1)(g) of the Act that provides this rule and it reads as follows:

> *"The value of any property for the purposes of the inclusion thereof in the estate of any person in terms of section 3 or the deduction thereof in terms of section 4 determined as at the date of death of that person, shall be … in the case of any other property, the fair market value of such property as at the date of death of the deceased person:"*

A proviso to section 5(1)(g) reads as follows:

> *"Provided that in any case in which, as a result of conditions imposed by any person whomsoever, the value of any property could or would be reduced for any reason at or after the moment of death, the value of such property shall, unless the Commissioner otherwise directs, be determined as though those conditions had not been imposed."*

The general rule then is that the value of property is the "fair market value" at date of death of the deceased person and in determining this value any conditions imposed that could result in a reduction of this value must be ignored.

The general rule applies when the other special rules in section 5 do not apply – it follows from the "*in the case of any other property*" in paragraph (g).

The term "fair market value" is a defined one and it reads as follows (see section 1 of the Act):

*In this Act and in any regulations made thereunder, unless the context otherwise indicates "**fair market value**", means –*

- *(a) the price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market; or*
- *(b) in relation to immovable property on which a bona fide farming undertaking is being carried on in the Republic, the amount determined by reducing the price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market by 30 per cent;"*

The concept of a price which could be obtained upon a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market is one that also appears in other tax Acts, specifically the Income Tax Act and for purposes of capital gains. Put differently, the general rule to value property for purposes of the capital gains tax at date of death are the same as the rules for estate duty purposes. The one that differs relates to property disposed of by a purchase and sale in the course of the liquidation of the estate of the deceased – see the discussion thereof below.

As was said before, this guide will not deal with the valuation methods to be used, and who must do the valuations, *et cetera*.

It was already stated that one of the exceptions to the general rule, is section 5(1)(a) of the Estate Duty Act. The definition of fair market value refers to a price which *could be obtained* upon a sale of the

property. The executor, or person doing the valuation, therefore must determine what value an item of property will fetch in an open market value.

12.3.2 The price realised

Section 5(1)(a) requires the value to be the *price realized by* a sale. The sale must be one in terms of which the property is disposed of by a purchase and sale which in the opinion of the Commissioner is a *bona fide* purchase and sale *"in the course of the liquidation of the estate of the deceased"*.

> With regard to the issue whether this was disposed of by a purchase and sale which in the opinion of the Commissioner is a *bona fide* purchase and sale in the course of the liquidation of the estate of the deceasedJudge Howie, in CSARS v Estate Late Streicher ((194/03) [2004] ZASCA 126 (31 May 2004)) in respect of the question (or issue) in this instance, said that the "*primary, and in my view, decisive one is whether the sale … was 'in the course of the liquidation' or merely 'during' the liquidation*." The judge also said that "*the meaning of the expression 'within the course of the liquidation of the estate' is clearly not a matter of fact but of law*."

The important point made by the judge was that "*generally, there is in law a difference between 'during' and 'in the course of'*."

The Judge concluded "*that a sale 'in the course of the liquidation of the estate' in s 5(1)(a) of the Estate Duty Act means a sale between which and the liquidation process there is some relationship. Put another way, it means a sale effected in the exercise of the functions involved in the liquidation. In short, the sale must be one in implementation of the liquidation process. It must therefore be by the executor or on behalf of the executor, in the latter's capacity as executor, not in the latter's personal capacity as beneficiary*."

Judge Howie referred to the phrases 'in the course of employment' and 'in the course of business', found in other Acts. In Ess Kay Electronics (Pty) Ltd v First National Bank of Southern Africa Ltd 2001 (1) SA 1214 (SCA), Judge Howie stated (paras [7] and [8]):

> *"Vicarious liability is imposed on innocent employers by a rule of delictual law. The rule in its most simple form is that the liability arises when an employee commits a delict within the course of such employee's employment. The foundational formulation of the rule is to be found in Mkize v Martens 1914 AD 382 at 390. The dictum in question goes on to warn that an act done solely for the employee's own interests and purposes, and outside the employee's authority, is not done in the course of employment even if done during such employment. Uncertainty created by later judicial pronouncements as to the content and ambit of the rule was removed by the decision in Minister of Law and Order v Ngobo 1992 (4) SA 822 (A).*
>
> *The reason for the rule is often stated to be public policy (see for example, Salmond and Heuston on the Law of Torts 19ed at 507). And an underlying reason for that policy has been held in Feldman (Pty) Ltd v Mall 1945 AD 733, in a passage at 741, to be the consideration that because an employer's work is done "by the hand" of an employee, the employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee's improper or negligent conduct "in carrying on his work*"…'

> *The question is always as Howie JA put it (para [10]), 'were the acts in the case under consideration in fact authorised; were they in fact performed in the course of the employee's employment?"*

The late Meyerowitz, in paragraph 29.2 of the book already referred to, states that "*a bona fide sale in the course of liquidation' presupposes a post-mortem sale independent of any contractual obligation undertaken by the deceased in his lifetime whereby he sold or obliged his executor to sell*".

The executor must only use the value determined under section 5(1)(a) of the Estate Duty Act if the disposal was *"within the course of the liquidation of the estate"*. The advantage of this value, because it is an actual arm's length transaction, is that it is a better indication of the value of the property at date of death, particularly where it takes place shortly after date of death. But where the value of property is subject to market fluctuations, such as listed shares, the value of the shares went may well increase significantly after death (and even shortly after death) and this would increase the amount on which estate duty will be imposed. It is (duty) tax neutral if the property included also qualifies to be deducted, but the deceased estate will of course benefit where the price obtained in the transaction is less than the market value at date of death.

It is important to remember that the price realized by such sale cannot be used in respect of the property referred to in paragraph (f)*bis* or the proviso to paragraph (g), of section 5. Section 5(1)(f)*bis* deals with the valuation of shares in any company not quoted on any stock exchange – it is covered in the discussion later on in this part.

12.3.3 Fair market value

In terms of the definition of "fair market value" in the Estate Duty Act, as far as it relates to estate duty, and a similar definition in the Income Tax Act as far as it relates to donations tax and capital gains tax, persons carrying on *bona fide* farming operations can elect to value their immovable property at its fair market value or fair agricultural or pastoral value. It allows for the arm's length value to be adjusted by 30%.

This was not always the case. In the past, the Land Bank Act read with the Estate Duty Act provided for the appointment of land bank valuators, the method of determining the agricultural or pastoral value and an appeal process for taxpayers dissatisfied with the valuation to the Land Bank Board. Applications for valuations were made to the magistrate of the district in which a property was situated. The Land Bank Act was replaced by the Land and Agricultural Development Bank Act, 2002, which no longer then provided for the applications to magistrates and does not provide for the appeal process to the Land Bank Board. From an administrative point of view it has, therefore, become impossible to administer these provisions.

The Estate Duty Act was therefore amended, and the land bank valuation was replaced with the valuation applicable to all other property, namely, the price that could be obtained between a willing buyer and willing seller dealing at arm's length in an open market but must be reduced by 30 per cent in recognition of the fact that land bank valuations were lower than the fair market value. It was explained at the time that the reason for this reduction is that the land bank value represented the fair agricultural or pastoral value of the property and not the open market value.

During 1988 (in regard to the words "farming operation" and "boerdery" used in the text of the definition of "fair market value" and "billike markwaarde", respectively), in order to bring into conformity the language used in the two official texts of the Estate Duty Act, an amendment was made to section 1 of the Act.

In addition to the intention to bring into conformity the language used in the two official texts, the purpose of the amendment was also "to make it clear that the valuation provisions relating to farming property apply not merely if operations described as "farming" are carried on but that a farming undertaking is carried on such property" - see the 1988 Explanatory Memorandum.

An amendment was made to section 5 of the Estate Duty Act during 1985 to allow for the Land Bank value, at the time and now the 70% of market value, to be used when company shares are valued.

It was explained in the relevant Explanatory Memorandum that section 5 of the Estate Duty Act *"lays down rules for valuing property included in the estate of any person. Where the shares in a company not quoted on a stock exchange are involved the special rules found in subsection (1)(f)bis will apply, notwithstanding the fact that the shares may have been sold in the course of the liquidation of the estate or that, if not so sold, the company owns immovable property on which bona fide farming operations are being carried on."*

The amendment introduced *"an important concession the effect of which is that, at the option of the executor, the agricultural or pastoral value, and not the commercial value, of the farm property owned by the unquoted company (which includes a close corporation) may be taken into account in determining the value of the shares for estate duty purposes."* This was legislated by adding section 5(1A) to the Act and it reads as follows:

> *"Where any company referred to in paragraph (f)*bis *of subsection (1) owns immovable property on which bona fide farming operations are being carried on in the Republic, the value of such immovable property shall, in so far as it is relevant for the purposes of determining in terms of that subsection the value of any shares in such company, be determined in the manner prescribed in the definition of 'fair market value' in section 1."*

It was already stated that section 5 of the Act, prescribes how the value of property in an estate must be determined. Historically sections 5(1)(f), 5(1)(f)*bis*, 5(1)(g) and 5(2) provided that the value of the property referred to in those paragraphs must be the fair market value as determined by sworn appraisement by some impartial person appointed by SARS. Although this was a specific requirement in the Act, this was not done in practice and would also have had considerable cost implications to SARS if they had to obtain a sworn valuation by an impartial person for every asset in an estate. Because SARS, as was mentioned earlier in this part, has the power in terms of section 8 of the Act to adjust the value of property if they are not satisfied with the valuation of an asset of an estate, these provisions were amended to remove this requirement. SARS now audits, in a sense, the values of property in the estate and this is particularly common where the property are shares in unlisted company or close corporation.

Section 5, as was already said, prescribes how shares in companies and member's interests should be valued.

12.3.4 Shares in companies or member's interests

The relevant valuation rule is covered in section 5(1)(f)*bis* and it reads as follows:

> *"The value of any property for the purposes of the inclusion thereof in the estate of any person in terms of section 3 or the deduction thereof in terms of section 4 determined as at the date of death of that person, shall be … in the case of shares in any company not quoted on any stock exchange, the value of such shares in the hands of the deceased at the date of his death, subject to the following provisions, namely –*
>
> *(i) no regard shall be had to any provision in the memorandum and articles of association, founding statement, association agreement or rules of the company, as the case may be, restricting the transferability of shares therein, but it shall be assumed that such shares were freely transferable;*
>
> *(ii) no regard shall be had to any provision in the memorandum and articles of association, founding statement, association agreement or rules of the company, as the case may be, whereby or whereunder the value of the shares of the deceased or any other member is to be determined;*
>
> *(iii) if upon a winding-up of the company the deceased would have been entitled to share in the assets of the company to a greater extent pro rata to shareholding or membership than other shareholders or members, no lesser value shall be placed on the shares held by the deceased than the amount to which he would have been so entitled if the company had been in course of winding-up and the said amount had been determined as at the date of his death;*
>
> *(iv) no regard shall be had to any provision or arrangement resulting in any variation in the rights attaching to any shares through or on account of the death of the deceased;*
>
> *(v) there shall be taken into account any power of control exercisable by the deceased and the company whereunder he was entitled or empowered to vary or cancel any rights attaching to any class of shares therein, including by way of redemption of preference shares, if, by the exercise of such power he could have conferred upon himself any benefit or advantage in respect of the assets or profits of the company;*
>
> *(vi) …"*

It is important to remember the principle stated earlier in this part, namely that the price realised where the shares were disposed of in a *bona fide* purchase and sale in the course of the liquidation of the estate of the deceased cannot be used as the date of death value. The shares (or member's interest) must be valued as prescribed above.

The requirements of section 5(1)(f)*bis* are relatively clear and will not be discussed in detail.

The prescribed method to determine market value for purposes of the determination of capital gains for normal tax purposes are similar to the section 5(1)(f)*bis* requirements. SARS, in their guide to capital gains, gives the following simple explanation:

> Market value, for purposes of the Eighth Schedule, is the … price based on willing buyer, willing seller at arm's length in an open market, ignoring any
>
> - restrictions on transferability;
> - stipulated method of valuation; or

- if a holder of shares is entitled to a share of assets on winding-up disproportionate to the holder's holding of shares, the value must not be less than the amount the shareholder would have received had the company been wound up on valuation date.

Section 5(1)(f)*bis* doesn't contain the requirement (in paragraph 31(1) of the Schedule) that the value *"must be determined at a value equal to the price which could have been obtained upon a sale of the share between a willing buyer and a willing seller dealing at arm's length in an open market"*.

With respect to the second and third bullet above it is specifically stated in the footnotes that the two provisions are *"similar to that found in s 5(1)(f)bis"*, and *"based on a similar rule in s 5(1)(f)bis(iii) of the Estate Duty Act"*. With respect to the third bullet it is stated that *"it is aimed at preventing capital losses in respect of the disposal of pre-valuation date unlisted shares."* This is only relevant for purposes of determining that taxable capital and not for estate duty purposes.

There however is another, and important, difference. Whilst the 'market value less 30%' method is also available in respect of certain immovable property on which a *bona fide* farming undertaking is being carried on - see paragraph 31(1)(f) of the Eighth Schedule – it does not apply to the valuation of shares in a company carrying on farming operations on immovable property in South Africa. Unlike section 5(1A) of the Estate Duty Act, the Eighth Schedule does not contain an equivalent valuation rule. Shares in an unlisted company of this nature must, for purposes of the determination of a capital gain, be valued under paragraph 31(1)(g) read with paragraph 31(3) of the Schedule.

SARS, see https://www.sars.gov.za/types-of-tax/estate-duty/:

> Share valuations
>
> The Commissioner must approve the valuation of shares held by the deceased person in unlisted companies / close corporations or share-block companies at the time of death.
>
> For the valuations to be done, valuation packs together with the Valuation Pack Checklist, must be provided to the Share Valuations Team at the following address:
> estatesharevaluations@sars.gov.za.
>
> Please note:
>
> Emails should be kept to a size of 2MB per email. Emails should be numbered if send in batches to allow SARS to verify that all emails are received.
>
> Shares/ members' interests that are bequeathed to the surviving spouse and not sold by the estate, would no longer be required to be approved by SARS. (This will only be the case if the full portion of the shares/members' interest that the deceased person held is bequeathed to the surviving spouse in terms of an approved Will or intestate succession. Should any portion go to another heir or the spouse obtains it in terms of a re-distribution agreement, then approval by SARS will be required.)
>
> The requirements for each type of valuation pack are as follows:
>
> Ordinary shares/Member's interest

- Valuation of the shares/member's interest.

Should the shares be in a holding company of a group, then the consolidated financial statements should also be included.

- The annual financial statements as close as possible to date of death.
- The annual financial statements for the 2 years prior to date of death.
- Copy of the letter of executorship, (as well as a letter indicating authority to deal with SARS in this regard or power of attorney given by the executor/executrix.)
- Contact details of the executor/executrix.
- If there is fixed property in the company/close corporation, then a REV246 form needs to be completed and attached.
- If Patents in a company/close corporation, then a valuation thereof should be attached.

The facts in CSARS v The Executors of Estate Late Sidney Ellerine (142/2017) [2018] ZASCA 39 (28 March 2018) can be used to explain provision (v) of section 5(1)(f)bis.

The facts (as they appear in the case):

> Since 1969 the deceased had been the registered owner of the issued preference share capital of 112 000 7 per cent redeemable non-cumulative preference shares of R1 each. These shares conferred upon the holder, being the deceased, the right to vote 99.47 per cent of the votes at general meetings of the company. (Note, the register owner, or holder, was of course the late Sidney Ellerine).
>
> The company, in which the deceased enjoyed the controlling interest, held 40 per cent of the issued share capital in another company, Ellerines Brothers (Pty) Ltd, an investment holding company, which owned the bulk of the family investments. The remaining 60 per cent of EB shares were held by Eric Ellerine Trust (Pty) Ltd a company controlled by the deceased's brother Eric Ellerine.
>
> The essence of SARS's case was that the "nominal value of the 112,000 preference shares does not reflect the market value of the shares, as the voting rights attached to the shares entitled the deceased to convert his preference shares into ordinary shares at any stage after 9 May 2006, this by virtue of article 7.1.10 of the Articles adopted on 09 May 2006 by the Company, and notwithstanding the provisions of Special Condition 5.8." This was for purposes of paragraph 31(3) of the Eighth Schedule to the Income Tax Act.

Judge Davis agreed with SARS and the market value of these shares at date of death of the late Sidney Ellerine was held to be R563 376 418.

The question is whether provision (v), of section 5(1)(f)bis of the Estate Duty Act, will apply here and require that the value of the preference share is also not R112 000, but R563 376 418.

The provision requires, that when valuing the shares, any power of control exercisable by the deceased and the company, in terms of which he was entitled or empowered to vary or cancel any rights attaching to any class of shares in the company, must be taken into account, if, by the exercise of such power he could have conferred upon himself any benefit or advantage in respect of the assets or profits of the company.

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The judge, in the Ellerine's case, said that *"… the deceased through the preference shares enjoyed sufficient voting power to ensure a conversion of the preference shares to ordinary shares. While the voting rights of the respective class of shareholders would not have changed, by means of the conversion, the value of the existing issued ordinary shares would have declined in value by way of the increased number of the ordinary shares pursuant to the conversion."*

Judge Davis, qualifies the *"enjoyed sufficient voting power"* and said that it was *"clear that the deceased, by virtue of holding the overwhelming majority vote could have converted the preference shares to ordinary shares. While the voting rights of the respective class of shareholders would not have changed, by means of the conversion, the value of the existing issued ordinary shares would have declined in value by way of the increased number of the ordinary shares pursuant to the conversion."*

In terms of section 5(1)(bis)(v), the deceased must have been entitled (or empowered), due to the power of control exercisable by him to vary or cancel any rights attaching to any class of shares therein. Relevant to this, Judge Davis said that *"to fall under the scope of rights being "varied" it would then have been necessary to interpret the phrase to mean that the shares of the ordinary shareholders were now commercially less valuable."*

For purposes of section 5(1)(f)bis, it would be if the deceased *"could have conferred upon himself any benefit or advantage in respect of the assets or profits of the company"*. The holders of ordinary shares would be entitled to share in the "profits" (an old concept) of the company by way of dividends which is not limited when compared to the holder of a preference share with a fixed yield. The fact that the value of *"the shares of the ordinary shareholders were now commercially less valuable"* would of course mean that the value of the shares held by the deceased would then have been commercially more valuable.

If the power of control exercisable by the deceased is then taken into account, the inescapable conclusion must be that the value of the preference shares held by the deceased is not its nominal value, but the market value of ordinary shares in the company.

12.3.5 The valuation of limited interests

The general rule is that the valuation is done over the expected life of the person who benefits from the limited interest after the death of the person, unless the benefit is to be enjoyed for a shorter period.

With respect to the value of any fiduciary, usufructuary or other like interest in property as is referred to in section 3(2)(a) of the Act (and for the purposes of the inclusion thereof in the estate of the deceased person or the deduction thereof and as at the date of death of that person) is an amount determined by capitalizing at twelve per cent the annual value of the right of enjoyment of the property in which the deceased held any such fiduciary, usufructuary or other like interest. See the comment about the 12% below.

This is in terms of section 5(1)(b) of the Estate Duty Act and the subsection also prescribes the period over which the capitalisation is to be done. In this respect section 5(1)(b) provides that *"to the extent to which the person who upon the cessation of the said interest of the deceased in consequence of the death of the deceased becomes entitled to any right of enjoyment of such property of whatever nature", it must be capitalised "over the expectation of life of such person"*, unless *"such right of enjoyment is to*

be held for a lesser period than the life of such person", when it will be capitalised "over such lesser period".

In terms of the third proviso to section 5(1)(b), *"if upon the cessation of the interest held by the deceased it is not possible to ascertain until some future date the person or some or all of the persons who will become entitled to the right of enjoyment of the property, the value shall be determined by capitalizing at twelve per cent over a period of fifty years the annual value of the right of enjoyment of the property in which such interest was held"*, and it applies unless SARS *"and the executor agree that, having regard to the circumstances of the case, it would be reasonable to adopt a lesser period than fifty years, in which event such lesser period, as agreed, may be adopted accordingly."*

In terms of section 5(3), *"where for the purposes of sub-section (1) any calculation is required to be made over the expectation of life of any person, such calculation shall, in the case of a person who is not a natural person, be made over a period of fifty years"*. In other words, if the person benefiting from the limited interest is a company or a trust, the 50 year period must also be used.

Calculations for the purposes of the valuation of annuities or of fiduciary, usufructuary or other limited interests in property in the estate of any person who died or dies on or after 1 April 1977 must be made in accordance with the Tables subjoined to a Regulation under the Estate Duty Act.

Table A, of the Regulations provides *"the expectation of life and the present value of R1 per annum for life capitalised at 12 per cent over the expectation of life of males and females of various ages"*. And Table B provides the *"present value of R1 per annum capitalised at 12 per cent over fixed periods"*.

The Regulations, after each table, gives some simple examples of how the calculation is to be done.

It was said that *"the annual value of the right of enjoyment of a property means an amount equal to twelve per cent upon the fair market value of the full ownership of the property which is subject to any fiduciary, usufructuary or other like interest"*. In terms of the proviso , where SARS *"is satisfied that the property which is subject to any such interest could not reasonably be expected to produce an annual yield equal to 12 per cent on such value of the property"*, then SARS *"may fix such sum as representing the annual yield as may be reasonable, and the sum so fixed shall be deemed to be the annual value of the right of enjoyment of such property"*.

In terms of the second proviso to section 5(1)(b), *"where upon the cessation of the interest of the deceased in any property, there accrues to the holder of the bare dominium therein, the full ownership in that property, the value of the advantage or benefit so accruing by reason of the cessation of the interest held by the deceased, shall not exceed the difference between the fair market value of that property as at the date of such cessation and the value of the bare dominium as at the date when such bare dominium was first acquired under the disposition creating the said interest held by the deceased"*.

The Explanatory Memorandum explained section 5(1)(c) as follows:

> *"In the case of an annuity charged on property the value of the annuity is, where the right to the annuity accrues to some other person on the death of the deceased, capitalized over the expectation of life of such other person or, if the annuity is to be enjoyed for a lesser period, over such lesser period.*

Where the right to the annuity does not accrue to some other person the value of the annuity is capitalized over the expectation of life of the person who on the death of the deceased is the owner of the property upon which the annuity is charged.

In the case of an annuity which is not charged on property and the right to which passes from the deceased to some other person, the value of the annuity is capitalized over the expectation of life of such person or, if it is to be held for a lesser period, over such lesser period."

In terms of section 5(1)(d), in the case of any right to any annuity referred to in section 3(2)(b), (an annuity which is payable under an insurance policy) the value is *"an amount equal to the value of the annuity capitalized at twelve per cent, over the expectation of life of the person to whom the right to such annuity accrues on the death of the deceased, or if it is to be held for a lesser period than the life of such person, over such lesser period"*.

The Tax Administration Laws Amendment Act, 2022, Act No. 16 of 2022, affected an amendment, or textual correction, by adding a comma after *"capitalized at twelve per cent, over the"*. It is textual in nature and there is no change in the interpretation or application of the provision.

In terms of section 5(1)(d)bis, the value in the case of any annuity to which the provisions of section 3(3)(a) or (a)bis apply, is an amount equal to the value of the annuity capitalized at twelve per cent over the expectation of life of the annuitant, or if the annuity is payable for a lesser period than the life of the annuitant, over such lesser period. In terms of a proviso to section 5(1)(d)bis, if within five years after the death of the deceased the annuity ceases to be payable because of the death of the annuitant within that period or, where the annuitant is the widow of the deceased, because of her remarriage within that period, the value of the annuity shall be deemed to be an amount equal to the lesser of –

(i) the aggregate of the amounts which accrued to the annuitant in respect of the annuity and any amounts which accrued to him or his estate upon or as a result of the termination of the annuity; or
(ii) the said capitalized value of the annuity.

In terms of section 5(1)(f), where a right of ownership in property which has to be valued for estate duty purposes is subject to a usufructuary or other like interest in favour of any person, *"the amount by which the fair market value of the full ownership of such property exceeds the value of such interest"*. Put differently, the value of such interest is the value of the full ownership of such property less the value of the interest. The value of the limited interest, being a usufructuary interest; an annuity charged upon the property; or any other interest, is determined by capitalisation over the expectation of life of the person entitled to the interest or annuity or, if such person's right of enjoyment or the annuity is to be held for a lesser period than the life of such person, over such lesser period.

12.3.6 The valuation of property of which the deceased was competent to dispose of

Section 5(1)(f)*ter* of the Act deals with the value of property which is deemed to be that of the deceased under section 3(3)(d).

If this property consists only of profits, the value is an amount determined by capitalising at twelve per cent such amount that SARS may consider reasonable as representing the annual value of such profits over the expectation of life of the deceased immediately prior to the date of his death.

In the case of any other property referred to in section 3(3)(d) (property other than profits), the value is the amount remaining after deducting from the fair market value of that property as at the date of death of the deceased the expenses and liabilities which the deceased would have had to bear or assume if he had at that date exercised his power of disposition.

12.3.7 Valuation of property donated prior to death and deemed to be property in the estate

The inclusion of certain donations made by the deceased prior to death was explained earlier in this guide, as well as the denial of the deduction of the claim brought by the donees. These are the donations that would have been exempt from donations tax at the time the donation was made.

In terms of section 5(1)(e), the value of property referred to in section 3(3)(b), is the amount determined in the manner prescribed in section 62 of the Income Tax Act. This means that the life expectancy of the person benefiting from the donation is not used.

12.4 Administration

12.4.1 Returns

12.4.1.1 The duty to submit a return

Section 7, of the Estate Duty Act, primarily places the obligation on the executor to submit the return to SARS. The words in section 7 are that the executor must submit a return (*"… executor … shall submit …"*). SARS can also request any person having the control of or any interest in any property included in the estate, to submit the return to SARS.

12.4.1.2 Tax period

The Estate Duty Act does not define the tax period in respect of which the return is to be submitted or does not prescribe the period within which the return must be submitted. For purposes of the Tax Administration Act, *"**tax period**" means, in relation to … any other tax, the period or date of the taxable event in respect of which the amount of tax payable must be determined under a tax Act"*. See paragraph (g) of the definition of tax period in section 1 of the Tax Administration Act.

12.4.1.3 The return

The return is called the REV267, is named the *"return of information required in terms of section 7 of the Estate Duty Act, Act 45 of 1955"* and is available on SARS's website.

Note, at the time of writing this guide that this return has not been updated with changes in the Estate Duty Act and still refers to section 28A (in terms of which penalties were imposed). Section 28A was repealed when the Tax Administration Act became effective and the imposition of penalties, in respect of estate duty, is now governed in the Tax Administration Act. Essentially, the understatement penalties imposed under the Tax Administration Act can also be imposed in respect of this return (the REV267).

It has also not been updated with respect to the addition, as deemed property, of the excess contributions deducted against a retirement lump sum.

In terms of section 7, of the Estate Duty Act, the return (the REV267) must disclose *"the amount claimed by the person submitting the return to represent the dutiable amount of the estate*. The section then requires that, together with the dutiable amount, the return must disclose *full particulars regarding-*

- *(a) the property of the deceased as at the date of his death;*
- *(b) property which, in accordance with sub-section (3) of section three, is deemed to be property of the deceased as at that date;*
- *(c) any deduction claimed in terms of section four".*

The REV267 form is not available on the SARS eFiling system and the REV267 currently is in a pdf format, but contains all of the above (apart from the deemed property in respect of retirement funds). Once the form is completed, the executor must submit it to SARS by physical delivery, or email.

12.4.1.3.1 Assessment by SARS

SARS must then, on receipt of the REV267, assess the duty payable under the Estate Duty Act and must, *"in respect of every estate liable for the duty issue a notice of assessment to the executor or, if there is no executor, to any person liable for the duty"*. See section 9(1) of the Estate Duty Act.

In terms of section 9(3) of the Act, SARS must issue a notice of assessment *"in respect of each return submitted in respect of any estate in which liability for duty"*.

Estate Duty is therefore not a self-assessment, although the five year prescription rules will apply, but this assessment would be an original assessment issued by SARS.

Section 9 recognises that additional property may be found in respect of an estate and section 9(4) provides simplified administrative rules for situations in which additional property is found after the estate is wound up. These subsequent assessments will take into account the duty chargeable on previous returns.

For estates, referred to as the section 18, the value of which is less than the amount prescribed (currently where the value of the estate does not exceed R250 000) section 9(4)(a) deems SARS to have issued an assessment for estate duty on the date on which notice is given to the Master in terms of section 7 of the Administration of Estates Act. No duty will be payable as the value in the estate will not exceed the section 4A amount.

12.4.2 Payment of the duty (and interest)

12.4.2.1 Payment

In terms of section 9C the duty payable under the Estate Duty Act *"shall be paid on such date as may be prescribed in the notice of assessment issued in terms of section 9(3)"*.

The legislation therefore requires payment of the estate duty only after assessment. There is a problem however, as the effective date for interest (see below) is the earlier of the date of assessment or 12 months after the date of death. So, where an assessment is not issued within 12 months, the duty finally assessed will be subject to interest (from the end of the 12 month period – see below).

In practice most executors are not in a position to submit the REV267, or get the duty assessed, within 12 months after date of death. Section 10(1) of the Act allows for the executor, in order to avoid the interest, or some of it, to make a provisional payment in respect of the duty that will finally be assessed.

In SARS document, issued 6 August 2020, and called "Frequently Asked Questions - Deceased Estates" the following question and answer appears:

> How to pay estate duty?
>
> Estate duty payments can only be made via e-filing. There is no electronic funds transfer (EFT) option available for estate duty.
>
> To make a payment on the e-filing system:
> 1) Select 'Additional Payments' and then 'Create Additional Payment'.
> 2) Under 'Tax Type', select 'Estate Duty (ESD)'.
> 3) Type taxpayer's (deceased's) name.
> 4) Under 'Type of Payment', select 'Estate Duty Normal Payment'.
> 5) Under 'Reference Number', type in the deceased's tax reference number.
>
> (Estate Duty Normal Payment: Please be aware that registration for income tax purposes is required in order to make a payment for the selected tax type. The reference number provided with this payment must be the income tax Reference number.) If the deceased was not registered for income tax, the executor will have to apply for an income tax registration in respect of the deceased.
> 6) Enter the amount.
> 7) Select 'Make Payment'.
>
> Please also confirm the payment with the bank. Proof of payment should be emailed to estateduty@sars.gov.za.

12.4.2.2 Interest

The Tax Administration Act, relevant to estate duty specifically, in section 187(1), provides for the levying of interest. It reads as follows:

> *"If a tax debt … is not paid in full by the effective date, interest accrues on the amount of the outstanding balance of the tax debt … —*
> *(a) at the rate provided under section 189; and*
> *(b) for the period provided under section 188".*

In terms of section 189(1) the rate of interest is the prescribed rate.

In terms of section 187(3)(c), *"the effective date for purposes of the calculation of interest in relation to estate duty for any period, is the earlier of the date of assessment or 12 months after the date of death"*. Whilst all of this has been enacted, the date of commencement is yet to be promulgated.

But section 10(1), of the Estate Duty Act, deals with the payment of interest, until the above commencement date is promulgated. It deals with it in two ways, the first when an assessment was

issued before the end of the period of twelve months from the date of death, and the second, where the assessment is issued after the end of the period of twelve months from the date of death.

12.4.2.3 Assessment issued before the end of the twelve month period

The part before the proviso to section 10(1) applies where the assessment is issued before the end of the twelve month period, and it reads as follows:

> *"If any duty remains unpaid at the expiration of a period of thirty days from the date for payment prescribed in terms of section 9C, there shall be payable, in addition to the unpaid duty, interest at the rate of six per cent per annum on the amount of unpaid duty calculated from the date of the expiration of the said period to the date of payment:"*

The date of payment, as was explained above, is the date prescribed in the notice of assessment. Section 10(1), in this instance, then prescribes that the interest is calculated at the rate of six percent per annum.

The proviso to section 10(1) deals with the instances where the assessment of the duty is delayed beyond the period of 12 months. It reads as follows:

> *"Provided that, where the assessment of duty is delayed beyond a period of twelve months from the date of death, interest at the rate of six per cent per annum shall be payable as from a date twelve months after the date of death on the difference (if any) between the duty assessed and any deposit (if any) made on account of the duty payable within the said period of twelve months."*

The rate of interest is also six per cent per annum and interest is payable in respect of the period which starts on a date twelve months after the date of death. It however is not calculated on the full amount of the estate duty assessed. The act envisages that the executor will make a payment before the date of the end of the period of twelve months. If such payment, referred to as a deposit, was made, the interest is then payable on the duty assessed and the amount of such a deposit.
The Estate Duty Act deals with the deposit as follows:

Section 10(2)

> *"Whenever the Commissioner is satisfied that the delay in the payment of duty within the period of thirty days from the date for payment prescribed in terms of section 9C, or within the period of twelve months from the date of death, as the case may be, has not been occasioned either by the executor or by any person liable for the duty, the Commissioner may allow an extension of time within which the duty may be paid without interest if, before the expiration of the said period of thirty days or the said period of twelve months, as the case may be or such further period as the Commissioner may allow—*
>
> *(a) a deposit on account of the duty payable is made of an amount which, in the opinion of the Commissioner, is reasonable, regard being had to the amount of the duty payable; and*
>
> *(b) application is made in writing to the Commissioner for such extension of time"*.

It is important to notice that SARS must be approached before the expiry of the 12 month period in order for this relief to be provided.

12.5 Who must pay the estate duty?

12.5.1 Persons liable for payment of the duty (executor, other person)

As can be expected any estate duty payable under the Estate Duty Act, *"shall be payable by and recoverable from the executor of the estate subject to the duty"*. It is section 12 of the Estate Duty Act that places this obligation on the executor.

The executor however, may not be the person liable for the duty. See section 11 of the Act and the discussion in the next paragraph relating to the other persons who may be liable for the duty and the right of the executor to recover the duty from these persons.

It is common that there may not be enough cash in the estate to use for paying the duty. This would typically be where the property in the estate at date of death consisted of property other than liquid assets and they were bequeathed. This means that the executor could not realise these assets to make money available to meet the estate duty liability.

In practice the heirs or legatees will often take this liability over, but section 14, of the Estate Duty Act, allows for the executor to obtain the funds in one of two ways in order to pay the duty to SARS.

Section 14 reads as follows:

> *"To provide for the payment of any duty, the person liable therefor may, with the consent of the Master, borrow any moneys or mortgage any property in respect of which the liability for duty arises, nothwithstanding* [sic] *any provision to the contrary contained in any deed or testamentary disposition or in any law"*.

Whilst the executor is the person responsible to pay the duty, it is not in all instances (as was mentioned in the previous paragraph), the executor who is liable for the total estate duty assessed.

Another reason why the cash available in the estate may be insufficient is that deemed property, even where they are in cash (such as a domestic policy), is not available to (or under the control of) the executor.

The following table sets out who is the person liable for the duty and the property that it relates to.

The property	**The person liable**	**Notes**
In terms of section 11, of the Act, the *person liable for the duty shall be* –		
where duty is levied on property of the deceased which falls under sub-section (2) of section three		
as to any property referred to in paragraph (a) or (b) of that sub-section,	the person to whom any advantage accrues by the death of the deceased	
as to any other property,	the executor;	
where duty is levied on property which, in accordance with sub-section (3) of section three, is deemed to be property of the deceased		

as to property referred to in paragraph (a) of that sub-section,	the executor:	
	the person entitled to recover the amount due under the policy;	Provided that where the amount due under the policy is recoverable by any person other than the executor, the person liable for the duty shall be the person entitled to recover the amount due under the policy;
as to any property referred to in paragraph (b) of that subsection,	the donee;	
as to any property referred to in paragraph (cA) or (d) of that subsection,	the executor.	

12.6 Rebate for transfer duty

There are two rebates that can reduce the RSA estate duty payable. The first one is a deduction in respect of transfer duty and the second one, in respect of foreign death duties.

12.6.1 Transfer Duty

From the SARS guide on Transfer Duty:

> *"Although a property transfer effected pursuant to the will of a deceased person is not regarded as a "transaction", any transfer of property as a result of a redistribution agreement in the course of winding up that estate is a transaction. Both types of acquisitions are, however, exempt from duty under section 9(1)(e). Any agreement to transfer property between the beneficiaries after the estate has been wound up will be a transaction which is subject to duty. Similarly, a donatio mortis causa is a transaction (despite its testamentary character) which will result in a transfer duty liability".*

Section 16(a) then allows for a deduction from any duty payable under the Estate Duty Act *"any transfer duty which is proved to the satisfaction of the Commissioner to have been paid in respect of the acquisition from the deceased or his estate of any property included in the estate for the purposes of the assessment of duty, by any person liable for the duty attributable to that property"*.

12.6.2 Rebate for foreign death duties

Section 16(c) of the Estate Duty Act provides for relief in respect of *"death duties proved to the satisfaction of SARS to have been paid to any other State in respect of any property situate outside the RSA and included in the estate of any person who at the date of his death was ordinarily resident in the RSA*". The relief is that foreign death duties must *"be deducted from any duty payable under the* Estate Duty Act. In terms of the proviso to section 16(c), the deduction under this paragraph *shall not exceed the duty imposed on such property by this Act"*.

It is specifically stated in section 16(c) that the relief is provided *"without in any way modifying or adding to the rights of any person under an agreement entered into by the Government of the Republic* (RSA) *with the Government of any other country or territory relating to the prevention of or relief from double taxation in respect of estate duty"*.

South Africa has only entered into treaties, with respect to death duties with four countries and they are actually quite old. The treaties with Canada and Sweden were terminated in 1985 and 2005.

The existing (in force treaties), with their date of entry into force, are the following:

- BLS Countries (Lesotho only) - 1 August 1944
- United Kingdom - 1 January 1978
- United States of America - 15 July 1952
- Zimbabwe - 1 October 1933.

These agreements are quite specific and would have to be consulted, with respect to taxing rights and the rebate available.