Trusts and Estates

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SA | ACCOUNTING ACADEMY

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Outline / Agenda

A. Introduction

B. Estates

C. Trusts

Questions?

A. Introduction

INTRO TO TRUSTS AND ESTATES

These SLIDES (supplemented by the COURSE MATERIAL) will provide guidance and reference material for your future use

Layout & sequence (order) of slides and course material

Estate and Trust planning go hand in hand….

Adding the service to your business can greatly assist you clients and create another income stream…

⇒ **Estates**
- Notes, Legislation and Examples

⇒ **Trusts**
- Notes, Legislation and Examples

INTRO TO TRUSTS AND ESTATES

GOALS

Our goals today:

- Get an overview of estate planning and trust law;
- Understand accounting for trusts and deceased estates;
- Understand how to draft an estate plan and administer an estate;
- Understand how to correctly create and administer a trust; and
- Understand curatorship and the roles and responsibilities thereof.

Estates

Intro to Estates

- Every person has an estate
- Some estates are bigger than others
- It can be very complicated
- Drafting a will is essential…
- Today we want to look at the basics

Example of a will

LEGISLATION

3 Main pieces of legislation:

- The Administration of Estates Act, which regulates the disposal of the deceased's estates in South Africa;
- The Wills Act, which affects all testators with property in South Africa;
- The Intestate Succession Act, which governs the devolution of estates for all deceased persons who have property in the Republic and who die without a will.

WHAT IS AN ESTATE

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- Upon death all assets go into the deceased estate
- The will guides the Executor on how assets should be distributed
- No will = Intestate succession
- Net Estate = Gross Assets less Deductions and Liabilities (Estate duty, Masters fees etc.)

KEY TERMS

- When a person (taxpayer) dies, that person is called a '**deceased person**'
- all his or her assets on **date of death** will be placed in an estate
- therefore this estate is called a **deceased estate**
- Assets in a deceased estate can amongst other things include immovable property (eg: house), movable property (eg: car, furniture, etc), cash in the bank, etc.

KEY TERMS (CONT.)

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- The person who administers a deceased estate is called an '**Executor**'
- Once the Executor has finalised all the administration in the deceased estate, the remaining assets (after paying all the debts) will be distributed to the **beneficiaries**.
- A beneficiary can consist of either **heirs** and/or **legatees**.

KEY TERMS (CONT.)

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- A **legatee** is a person who receives a specific asset from the deceased estate.
- An **heir** is a person who receives the balance of the estate (that is, after all disposals to a legatee is finalised).

ESTATE ADMINISTRATION

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- Executor is responsible for the administration of the estate
- has a fiduciary responsibility towards the Estate
- Upon death the death certificate and will is lodged with the master of the High Court
- an appointment letter as executor is obtained

Estate Administration(cont.)

- various administrative processes that must be followed
- It is a paper chase…you build a file
- Admin processes include adds in newspapers etc…
- Executor is in control
- L&D account is drawn up and submitted to master
- L&D account then open for comment

PRACTICAL ISSUES

- As accountant you normally have a good relationship with the family
- You are in the ideal position be the executor of an estate
- As executor your first responsibility is to ensure the family is looked after
- As assets are frozen upon death there must be contingency plans

Executors fees

- An Executor receives fees for the administration of an estate
- Statutory rate (but can be less if agreed in will)

3,5% of Gross Assets

6% of Income accrued to the Estate after Death.

Estate Assets

Assets in a deceased estate can amongst other things include immovable property (eg: house), movable property (eg: car, furniture, etc), cash in the bank, etc.

Life insurance policies are included although they might be paid out directly…

Basics of Estate Planning

- Good estate planning maximizes the nett estate value through the minimization of Estate duty.
- Estate duty is calculated at 20% of the portion of the Estate which carries duties. The calculation is similar to that of a tax calculation.

Basics (cont.)

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BASIC CALCULATION

All Property of the deceased person at date of death	RXXX
Property deemed to be property of the deceased estate at date of death	XXX
Gross value of the deceased estate	XXX
Less: allowable deductions	(XXX)
Net value of the deceased estate	XXX
Less abatement amount	(3 500 000)
Dutiable amount	xxx
Estate duty calculated at 20% of the dutiable amount	XXX
Less: applicable tax rebates	(XXX)
Less: amount of estate duty to be recovered from beneficiaries (if applicable)	(XXX)
Estate duty payable by the deceased estate	xxx

EXAMPLE

The estate of a deceased person is subject to 20% Estate Duty, after taking into account a deduction of R3.5 million against the net value of the estate.

If the total net value of the estate is R4 million, Estate Duty will be dutiable on 20% of the amount exceeding R3.5 million which amounts to R100,000 (20% of R500,000). It is normally the responsibility of the Executor to pay the duty as levied on the property of the deceased.

EXAMPLE (CONT.)

There are instances where the estate duty is payable directly by the person who is receiving the property.

For example, where a policy is payable directly to a beneficiary, the Executor must recover the estate duty attributable to such policy directly from the beneficiary (in other words, this portion of the estate duty will not be paid by the deceased estate.)

PRACTICAL PLANNING

- Bequeaths between spouses are exempt from Estate Duty.
- It is a valuable tool to utilise in Estate planning.

PRACTICAL PLANNING EXAMPLE

John is married out of community of property and has a nett estate of R8 million. He would like to bequeath an amount to his wife but has also formed a trust for the welfare of the children.

PRACTICAL PLANNING EXAMPLE

Solution:

- Bequeath R3,5 million to the Trust for the children thus utilising the exemption of R3,5 million.
- Bequeath the balance to his wife as bequeaths between spouses are exempt.
- Thus ZERO estate duty

PRACTICAL PLANNING CHALLENGES

- Planning can be challenging where a client does not have cash available in the estate
- Assets might have to be sold to cover duties
- Plan ahead – do the scenario calculations

EXAMPLE – CASH SHORTAGE

Joe has a farm with a value of R10 million. He has movable assets of R2 million. There are no policies or cash in the bank and his wife passed away. He wishes to leave everything to his 3 children.

EXAMPLE – CASH SHORTAGE

Solution:

As you can see we have a problem. There will not be enough money to pay estate duty…The beneficiaries might have to sell the farm or movables to pay duties and costs. An option would be to advise Joe to get a life insurance policy to cover duties calculated.

We will build on these examples as we discuss the use of Trusts.

DRAFTING A WILL

- A will can be very complicated or very simple.
- In drafting a will one must always be practical
- Stipulations in the will must be legal

LEGAL REQUIREMENTS

- Any person older that sixteen years of age can draft a will.
- For all practical purposes a will must be in writing.
- It must be signed by the Testator
- and two competent witnesses (14 years or older)

witnesses are added to confirm the signature of the Testator and have nothing to do with the contents of the will.

Legal requirements (cont.)

Certain persons are excluded from benefits in terms of the specific will:

- Person who attests and signs the will as witness
- Person who signs the will in presence and by direction of the testator
- Person who writes the will or any part thereof on behalf of testator
- Spouse of such a person

Legal requirements (cont.)

- If the will is longer than one page, it must be signed on each page by testator and witnesses.
- A witness cannot be the Executor of the will.
- Any and all amendments must be signed by the testator and witnesses.

BASIC ELEMENTS OF A WILL

- Statement that the document is the Last Will and Testament of “John Goodspeed”.
- Name, ID number, Married in/out of community of Property
- Statement that this Last Will and Testament replaces and cancels all previous documents drafted.

BASIC ELEMENTS OF A WILL (CONT.)

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- Details of specific bequeaths to legatees
- Details of general bequeaths to heirs
- Special requests or instructions regarding burial/cremation
- Stipulation regarding security
- Your appointment as executor
- Signature and date of Testator
- Signature of two competent witnesses with statement that the will was signed in their presence.

GENERAL TIPS

- Discussing, planning and drafting a will can be an emotional matter
- Set the right tone
- make the client understand that it is in his and his family's best interest to do proper Estate planning
- Do the calculation to show how things will roll out.

GENERAL TIPS (CONT.)

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- Be practical in terms of utilising the exemptions
- Estate duty and bequeaths between husband and wife.

NB:

- Keep the original, give testator copy. You will need the original for appointment as Executor.

TRUSTS

INTRO TO TRUSTS

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- Trusts are a valuable tool in Estate and Tax Planning. Very flexible…
- Trusts can be formed while you are alive (Inter Vivos)
- Trusts can be form in accordance with your will after death
- There are various aspects to the process around trusts

Example Trust deed

TYPES OF TRUSTS

Two main types:

- Family Trust (holding assets)
- Business Trust (set up to be transferrable)

Others in use:

- Employee Share Trust (B-BBEE Act)
- Broad Based Share Trust (B-BBEE Act)

WHEN DO WE USE TRUSTS?

- Official purpose: Manage assets for beneficiaries
- Tax planning – tax the children
- Ring fence asset growth
- Estate planning – minimize estate duty
- Estate planning – move growth assets
- Asset protection – protect assets from creditors
- Asset protection – protect assets from matrimonial inclusion

IMPORTANT ON STRUCTURE

- Donor, Trustees and Beneficiaries should not be the same person
- There should be at least 3 trustees of which one should be independent
- Beneficiaries can be specified –name and ID or be designated – “children born from Joe Bloggs”

Elements and parties to a Trust

Deed of Trust

- Trust Property Control Act 57 of 1998 refers to a Trust as an instrument.
- In Practice a trust is formed by drafting a Deed of Trust
- Deed of Trust indicates how the Trust was formed.
- who the parties to the trust are
- the rights and responsibilities of trustees (key elements)

DEED OF TRUST (CONT.)

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- stipulations regarding the administration
- who the beneficiaries are

THE DONOR

- donor can be considered as the founder of the Trust
- provides an original donation (for example R100)
- to the Trustees to administer
- on behalf of the trust for the benefit of the beneficiaries

THE TRUSTEES

- Appointed by the Master (Letter of Authority)
- manage the assets, liabilities and operations of the Trust
- for the benefit of the beneficiaries
- administrative requirements
- relevant legislation

The Beneficiaries

- Assets are placed in trust for the benefit of beneficiaries
- are defined in the Deed of Trust
- can be specific natural persons
- other trusts
- designated group of individuals

PURPOSE OF THE TRUST

- should be stipulated in the Deed of Trust
- guidance to the Trustees
- For example: “The Trust has the sole purpose to provide for the future educational needs of the Beneficiaries.”

THE NAME OF THE TRUST

- stipulated in the Trust Deed
- "The Trust will be known as The Joe Soap Trust."

SPECIFIC POWERS OF TRUSTEES

- Trust Deed must stipulate what the powers of Trustees entail
- clear stipulation that all the assets, movable or immovable, shall vest under management of Trustees
- ultimate discretion although vesting in beneficiaries

GENERAL POWERS OF TRUSTEES

- To deal with assets of the Trust
- not deal in a speculative or hazardous manner
- Rights and additional powers:

Assigned to give the trust flexibility in terms of the business it conducts

RIGHTS AND ADDITIONAL POWERS

The TRUSTEE shall have the following rights and additional powers to the rights and powers as set out in paragraph xxx of the TRUST DEED, to which this forms Schedule "A", namely:

- invest any money
- purchase immovable property or any interest therein
- Lease property or to accept any donation thereof

Rights and additional powers (cont.)

- borrow money
- guarantee either for consideration (or not) the fulfilment of any contractual obligations
- apply any of the assets of the TRUST to the best advantage of the TRUST
- exchange, sell, lease, mortgage or deal with the property
- grant credit

Rights and additional powers (cont.)

- To institute and prosecute legal action
- to defend and prosecute the defence of any legal proceeding
- recover any amounts due to the TRUST FUND
- open and operate any bank account
- hold any assets or part of any asset in the name of the TRUST

RIGHTS AND ADDITIONAL POWERS (CONT.)

- To conduct any business on behalf of the TRUST
- obtain and utilise membership on credit facilities
- expend such monies as may be necessary for the protection maintenance and insurance of any of the assets
- vote by way of majority decision in respect of any shareholding in any company

RIGHTS AND ADDITIONAL POWERS (CONT.)

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- employ the services of any legal representative, accountants, auditors or other experts for the purpose of assistance
- same rights and discretions as directors of a company as set out in the Company's Act

APPROPRIATION OF TRUST INCOME

Specify:

- Expenses of the trust
- Upkeep of beneficiaries
- Loans to beneficiaries
- Accumulation of funds

Vesting of funds:

It should vest – Trustees make decision on when paid out…

LIABILITY OF TRUSTEES

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- stipulation that Trustees do not need to furnish the Master of the Court (else nobody would accept appointment)

Remuneration of Trustees

- The Trust deed can stipulated how and when Trustees can be remunerated if applicable.
- It is not a requirement that Trustees be remunerated
- Advisable due to nature of trust management

ADMINISTRATIVE FUNCTIONS

Trust deed stipulates:

- Policies and procedures
- Conduct of meetings
- Voting at meetings
- Recording of decisions
- Electronic communication and voting
- Frequency of meetings
- Maintenance of books and records
- Preparation of annual financial statements
- Submission of tax and other returns
- Maintenance of Trust bank account

Delegation of duties

The Trust Deed may stipulate as to how and when, and to whom delegations may be given.

This is important as Trustees maintain ultimate responsibility and decisions made cannot be recalled.

TERMINATION OR REMOVAL OF TRUSTEE

- Insolvency of Trustee
- Guilt in terms of a criminal offence other than a traffic offence
- Trustee giving written notice of termination
- Breach of fiduciary duty

Marriage servitude

The Trust Deed may contain a stipulation that the beneficiary's vested undistributed interest in the Trust is excluded from community of property in terms of marriage.

Creation of further Trusts

The Trust Deed can stipulate that the Trustees have the right to create further trust to fulfil the purpose of the Trust.

This might be utilised when legislation changes requiring specific adjustments to the role of the trust.

VESTING (NB)

- how and when in terms of distribution
- Should vest automatically (tax beneficiaries)
- a certain age of beneficiaries for right of distribution

Amendment of Trust Deed

- stipulates how and by whom it may be amended
- under what circumstances amendments may take place
- stipulation may be included that states that amendments may not affect the right of beneficiaries negatively

Duties and responsibilities of Trustees

Becoming a Trustee of a trust is a serious responsibility that needs to be approached with due diligence and the best interest of beneficiaries at heart.

General responsibilities

- Trustees are responsible for the governance of a trust
- All the assets, liabilities, rights and duties of the trust are the responsibility of the Trustees
- A Trustee has a fiduciary responsibility towards the beneficiaries
- Trustee shall, act honestly and in good faith in relation to the Trust

GENERAL RESPONSIBILITIES (CONT)

A Trustee is appointed in terms of the Trust Property Control Act 57 of 1998

Key actions required from Trustee:

- familiarize themselves with the terms and requirements stipulated in the Trust Deed
- Trustees have a fiduciary duty towards beneficiaries and must act prudently, responsibly and in their best interest at all times.

GENERAL RESPONSIBILITIES (CONT)

- The assets of the Trust must be maintained and managed separately from their own personal assets.
- Trustees have the responsibility the effectively manage the trust in terms of deed of trust and the Trust Property Control Act
- includes financial and administrative requirements, and tax compliance.

General responsibilities (cont)

- Trustees act in their personal capacity.
- Certain powers may be delegated, but the ultimate responsibility remains with the Trustees.
- must act in terms of the roles and responsibilities and any specific instruction in terms of the trust deed.
- Trustees must act impartially and consider the best interest of beneficiaries

Taxation of Trusts

Taxation of Trusts

General principal:

Taxing income is a trust at 45% is expensive.

Current legislation makes it advantageous to tax the beneficiaries, in other word have the income distributed and taxed in their hands.

TAXATION OF TRUSTS

General principal:

- Avoid donations
- All transactions must be at arms length
- Utilize the annual donation of R100 000 per person

Taxation of Trusts

Example: XYZ Trust has a net profit of R100 000.
There are two minor beneficiaries.

If no distribution: Pay R45 000 tax

If distributed to beneficiaries: Tax each on R50 000 – thus below threshold

TAXATION OF TRUSTS

Flow through principle:

Income keeps its nature – Dividends remain dividends, interest remains interest.

This is being reviewed…

TAXATION OF TRUSTS

Section 7 C

Effective 1 March 2017

Interest must be charged an loan accounts at Repo rate plus 1

If not donations tax can be levied....

Case law

- **Cases: Trusts (Independent Trustees)**

The role of the independent trustee recently came under the scrutiny of the courts in the case of *Van Zyl v Van Zyl* (supra) and the court drew an inference that, where an estate planner could not show how the independent trustee had played an active role in decisions of the trust, the trust should be regarded as the alter ego of the estate planner and the assets deemed to be his own "**for all purposes including in any redistribution order made in the divorce action between the parties." In view of the Van Zyl decision, therefore, it is not sufficient for an independent trustee simply to rubber stamp the decisions of the estate planner and he is required to play an active role in the decision making process.**

IMPORTANT

- Vesting vs Distribution
- Independent Trustee
- Annual donation
- Avoid private residence in trust (CG Exemption)
- Look out for old trusts

EXAMPLE – CASH SHORTAGE

Joe has a farm with a value of R10 million. He has movable assets of R2 million. There are no policies or cash in the bank and his wife passed away. He wishes to leave everything to his 3 children.

POSSIBLE SOLUTION

- Let’s say the farm is a growth asset…
- Sell the farm to a trust at market value
- The farm is then rented from the trust @ market related rental which is higher than the repo plus 1 (7c)
- Raise a small loan for the CGT and use exemption as far as possible
- Donate R100 000 per year against the loan

TAX EFFECT

Rental income of R1 000 000 per year

Interest to Joe (Repo plus 1) = 800 000

Net profit: R200 000.

Distributed to 3 kids = R66 000 each. No tax

The growth of the asset is fixed in the trust. The estate is frozen and diminished annually.

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THANK YOU FOR YOUR PARTICIPATION!

PARTNER WITH US!

TECHNICAL ASSIST

CONSULT

ADMINISTRATION

Disclaimer

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