



TRUSTS AND ESTATES

ALERT

BUDGET ALERT: ESTATE DUTY

From an estate planning and deceased estate perspective, the 2012 Budget was, on critical analysis, far more eventful than it seemed at first glance.

Estate duty (under the Estate Duty Act 45, 1955, as amended) is the most prominent tax currently payable following the death of an individual. It is sometimes quaintly referred to as “death duty”. Currently, estate duty is payable at a flat rate of 20% on your net estate (in other words, after payment of all liabilities) over R3,5 million.

Over time, there appears to have been a general move towards relaxing estate duty. The threshold rose from R1.5 million in 2002 to R3,5 million in 2007, and the increase compensates more than is required to counter the effect of inflation on the value of money. With the introduction of the so-called portable estate duty in the 2009 Budget, which came into effect on 1 January 2010, the threshold for estate duty was raised to R7 million for a married couple. The estate duty Act refers to spouses and the definition is extensive.

The trend hinted at the possible abolishment of estate duty tax. Amid much speculation, the topic remains a sticky point, more so for ideological reasons than fiscal reasons.

With the introduction of Capital Gains Tax (CGT) on 1 October 2001, estate duty became an onerous form of double taxation, which gave fuel to the argument for its abolishment.

Estate duty has given rise to the creation of highly complex structures and the existence of a secondary industry resulting in negative spending to avoid the payment of estate duty. To some the whole exercise seems a waste of productive time and resources. In fact this was stated by the minister to be a motivation for the introduction of the portable estate duty provisions.

In his budget speech of 2010, the Minister appeared to suggest the demise of estate duty tax when he said: “*Both estate duty and capital gains tax are payable on death, which is perceived as giving rise to double taxation. The estate duty raises limited revenue and is cumbersome to administer. Moreover, its efficacy is questionable: many wealthy individuals escape estate duty liability through trusts and other means. Taxes upon death will be revised.*”

This theme was taken up and spelt out unambiguously in the 2011 budget speech with the Minister stating that estate duty was being reviewed and several options were under consideration.

Most commentators agree that if estate duty were to be abolished, it would be replaced and the obvious choice has been possible changes to CGT levied in terms of schedule 8 of the Income Tax Act. Such a dispensation could counter both ideological

continued

and fiscal arguments for the retention of estate duty. The regime would have to be extended either to the group of assets that fall within the CGT net, the increase of the inclusion rate, or the increase of the tax payable to align the actual effective rate of the tax to donations tax and estate duty, which is currently at 20%.

CGT is relevant to estate planning, because it becomes payable on all assets that are included for CGT purposes during one's life on the basis that it becomes automatically payable on death in terms of a so called deeming provision. In fact, there can be two CGT tax events. The first is the gain in respect of the value of the assets, which is the date of acquisition and the date of death. The second event is if the asset is sold during the administration of the estate, namely the gain or loss, between date of death and the date of realisation.

In spite of all this, there is no reference to estate duty in general or specifically in the Budget, and it is anybody's guess as to the progress of the reviews that are being undertaken by whatever body has been designated with this task or what the current thinking is.

Perhaps the answer lies in the substantial announcements the Minister made on CGT. He has proposed that the inclusion rate in respect of which gains are taxed be increased from 25% to 33,3% for individuals. Effectively, the actual tax payable at the highest tax rate will now be 13,3% of the actual gain, as opposed to 10%.

A possible interpretation is that although the 2011 budget speech made not a single direct reference to estate duty, the first extension of the capital gains tax regime since 2001 may have signaled just the first confirmation of the demise of estate duty and its replacement by a comprehensive and augmented CGT system.

While it may be premature to announce the demise of estate duty, prudent planners will take heed of these developments.

Johann Jacobs

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

CONTACT US

For more information about our Trusts and Estates practice and services, please contact:



Johann Jacobs
Director
National Practice Head
T + 27 (0)21 481 6380
E johann.jacobs@dcladh.com



Martin Jackson
Director
T + 27 (0)11 562 1136
E martin.jackson@dcladh.com



Karin Muller
Senior Associate
T + 27 (0)21 481 6372
E karin.muller@dcladh.com



Gretchen Barkhuizen-Barbosa
Associate
T + 27 (0)11 562 1250
E gretchen.barkhuizenbarbosa@dcladh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T + 27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dcladh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T + 27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dcladh.com

5th floor Protea Place Protea Road Claremont 7708, PO Box 23110 Claremont 7735 South Africa
Dx 5 Cape Town
T + 27 (0)21 683 2621 **F** +27 (0)21 671 9740 **E** ctn@dcladh.com

©2012