



APPOINTING NEW BENEFICIARIES OF A TRUST

ITC 1828 70 SATC 91 is not a new tax case. However, it is an interesting case, which highlights some of the potential tax implications that may be triggered upon the appointment of new beneficiaries to a trust, particularly, a discretionary trust.

In *ITC 1828 70 SATC 91* a discretionary trust (trust) had been established with the object of benefiting the founder, the founder's wife and the children, being the discretionary income and capital beneficiaries. The trust had acquired certain immovable property in 1995 and in 1997 the trust and a third party (the purchaser) signed an offer to purchase the property. However, the offer to purchase was subsequently cancelled. Instead, it was decided that:

- The purchaser would discharge the indebtedness of the trust to its various creditors and pay an amount of money to the founder for the loan claim against the trust. The payment to the trust's creditors and the founder equalled the purchase consideration that would otherwise have been paid by the purchaser for the property had it been acquired in terms of the offer to purchase;
- Against payment of the above amounts, the existing beneficiaries of the trust agreed that they would take the necessary steps to ensure that they were no longer trustees and beneficiaries of the trust and the purchaser, together with his nominees, were appointed trustees and the Purchaser was also appointed as the beneficiary of the trust.

The South African Revenue Service (SARS) argued, and the court agreed, that, viewed holistically, the agreements in issue constituted a transaction contemplated in the Transfer Duty Act, No 40 of 1949 (TD Act) and transfer duty on the value of the property was payable. It was held by the court that the purchaser had entered into a series of transactions whereby the outgoing beneficiaries lost all of their rights in the trust and the incoming beneficiary (the purchaser) acquired those rights lost by the outgoing beneficiaries.

IN THIS ISSUE

- **Appointing new beneficiaries of a trust**
- **Complaints to the Tax Ombud and the fear of reprisal? Canada gives its taxpayers comfort.**

The purchaser thus, *de facto*, acquired ownership of the property forming the subject of the trust, which constituted a 'transaction' for purposes of the TD Act.

The definition of a 'transaction' in the TD Act has subsequently been amended to specifically include the substitution or addition of one or more beneficiaries with a contingent right to any property of a discretionary trust. However, it is still interesting to note the following:

- The court accepted that in law, beneficiaries may consent to amend a trust deed and, in certain circumstances, may even consent to bringing an end to a trust. In effect, beneficiaries can vary the trust to set-up a new trust that differs from the old trust; and
- Based on the facts in *ITC 1828*, a new trust had in fact been created in view of the fact that the object and purpose of the old trust (as envisaged by the founder) had come to an end.

The income tax and capital gains tax (CGT) implications for trusts and trust beneficiaries are complicated and depend on, amongst others, the nature of the trust concerned (eg a vesting or discretionary trust). From a CGT perspective, it is generally accepted that the appointment of new contingent/discretionary beneficiaries by the trustee of a discretionary trust, will not give

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rise to a disposal by the trust or the beneficiaries. However, where the appointment of new contingent beneficiaries results in the object and purpose of a trust coming to an end, there may in fact be a 'disposal' by the 'old trust' to the 'new trust' for CGT purposes. If that is the case, one would have to consider whether the deemed disposal at market value rules, contained in paragraph 38 of the Eighth Schedule to the Income Tax Act, No 58 of 1962, may be applicable (see page 78 of SARS's *Comprehensive Guide to Capital Gains Tax* (Issue 4)).

One should therefore be mindful that if beneficiaries of a trust vary the object and purpose of the trust to such an extent that a different ascertainable object and purpose has been effected, a new trust may come into existence, which may trigger tax implications for the trust and/or its beneficiaries.

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COMPLAINTS TO THE TAX OMBUD AND THE FEAR OF REPRISAL? CANADA GIVES ITS TAXPAYERS COMFORT

The first formal mention of the appointment of a Tax Ombud in South Africa was in the Draft Tax Administration Bill (released for public comment on 29 October 2010). Said legislation was introduced in response to the perceived inability of the South African Revenue Service (SARS) Monitoring Office to adequately address complaints and administrative difficulties faced by taxpayers and advisers.

Finance Minister Pravin Gordhan announced the establishment of a dedicated ombud for tax matters in the 2012 Budget Speech. The intention was to provide taxpayers with a low-cost mechanism to address administrative difficulties that could not be resolved by SARS.

The Tax Administration Act, No 28 of 2011 (TAA) took effect on 1 October 2012. Part F of Chapter 2 sets out the powers and duties of the Tax Ombud. Section 259(1) of the TAA requires the Minister of Finance to appoint the Tax Ombud within one year of the commencement date of the TAA, ie by the end of September 2013. The appointment of the SA Tax Ombud is around the corner.

Going hand in hand with the appointment of the local Tax Ombud is the SARS Service Charter. It was launched in October 2005 and set certain "clearly defined deliverables" which had to be implemented by 2007. The Charter was also intended to be a "statement of intent through which SARS undertakes to uphold and respect the rights of taxpayer". Furthermore, the Charter would be the yardstick against which "compliant taxpayers can judge the quality of SARS' processes, its integrity and its conduct." (Refer SARS press release, 19 October 2005 and the SARS Guide titled "Review of SARS Service Charter & Standards, *Version 1*")

The concepts of a Tax Ombud and taxpayers rights are well-known internationally. The Canadian Revenue Authority (CRA) for example, published a "Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer." It details what taxpayers can expect from the CRA and how the CRA should conduct itself when interacting with taxpayers.

Interesting, though, is the recent addition of Article 16 to the CRA Taxpayer Bill of Rights. The Canadian Tax Ombud was appointed in 2008. During August 2013 the CRA addressed what it called a taxpayer's potential "fear of reprisal". This could manifest itself where for example a taxpayer considered complaining to the Tax Ombud or when invoking the Taxpayer Bill of Rights. The CRA felt that a "fear of reprisal... has the potential to undermine trust and confidence in the tax system."

On 26 June 2013 the Canadian Minister of National Revenue and the Canadian Tax Ombud jointly announced the introduction of Article 16 into the CRA Taxpayer Bill of Rights, namely: "You have the right to lodge a service complaint and request a formal review without fear of reprisal."

The intention is to give Canadian taxpayers comfort that invoking a Taxpayer Right or lodging a complaint with the Tax Ombud would not result in "harsh treatment from the CRA." The joint announcement stated: "This right means that if you lodge a service complaint and request a formal review of a CRA decision, you can be confident that the CRA will treat you impartially, and that you will receive the benefits, credits, and refunds to which you are entitled, and pay no more and no less than what is required by law. You should not fear reprisal." Internationally Canada has taken the lead to deal with "fear of reprisal."

It will be interesting to see whether other revenue authorities will follow suit.

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