South African Revenue Service

DRAFT INTERPRETATION NOTE

DATE:

ACT : INCOME TAX ACT 58 OF 1962
SECTION : SECTIONS 9HA, 9HB AND 25
SUBJECT : DISPOSAL OF ASSETS BY DECEASED PERSON, DECEASED ESTATE AND TRANSFER OF ASSETS BETWEEN SPOUSES

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Preamble

In this Note unless the context indicates otherwise –

- **"CGT"** means capital gains tax, being the normal tax attributable to the inclusion of a taxable capital gain in taxable income under section 26A;
- **"deceased"** means a deceased person;
- **"deceased estate"** means the estate of the deceased;
- **"livestock"** or **"produce"** means livestock or produce as contemplated in the First Schedule;
- **"resident"** means "resident" as defined in section 1(1);
- **"Schedule"** means a Schedule to the Act;
- **"section"** means a section of the Act;
- **"TA Act"** means the Tax Administration Act 28 of 2011;
- **"the Act"** means the Income Tax Act 58 of 1962; and
- any other word or expression bears the meaning ascribed to it in the Act.

All guides and interpretation notes referred to in this Note are available on the SARS website at **www.sars.gov.za**. Unless indicated otherwise, the latest issues of these documents should be consulted.

1. Purpose

This Note provides guidance on the application of the deemed disposal of assets by the deceased,[1] a deceased estate[2] and the transfer of assets between spouses.[3]

2. Background

Section 9HA provides for the tax treatment of the assets of a person upon death, including the value that such assets are disposed at to the deceased's surviving spouse, heirs and legatees. Section 9HA came into operation on 1 March 2016 and applies to a person who dies on or after this date.

1 Section 9HA inserted by section 15(1) of the Taxation Laws Amendment Act 25 of 2015.
2 Section 25.
3 Section 9HB inserted by section 20 of the Taxation Laws Amendment Act 23 of 2018.

Section 25 provides for the tax treatment of the deceased's assets in the deceased estate and also prescribes the values of assets acquired from a deceased estate that should be taken into account by spouses, heirs and legatees. Section 25 came into operation on 1 March 2016 and applies to a person who dies on or after this date. A comprehensive discussion on the taxation of deceased estates under section 25 is outside the scope of this Note. Section 25 is discussed in this Note to the extent that it applies to section 9HA.

Section 9HB provides for the tax treatment of assets transferred between spouses. Section 9HB came into operation on 17 January 2019 and ensures parity of treatment of all disposals of assets between spouses.[4]

The insertion of sections 9HA, 9HB and the substitution of section 25[5] was effected with the intention to move some of the rules in paragraphs 40, 41 and 67 of the Eighth Schedule into the main body of the Act.

The implications of donations made by a deceased estate and between spouses are not covered in this Note. The provisions under Part V of the Act should be considered in this regard.

3. The law

The relevant sections of the Act are quoted in the **Annexure**.

4. Application of the law

4.1 The deceased

4.1.1 Year of assessment of the deceased

The taxable income of a person upon death must be determined for the period from the beginning of the year of assessment to the date of death.

Section 66(13)(*a*)(i) provides that in the year of assessment in which a person dies, a return must be made for the period commencing on the first day of that year of assessment and ending on the date of death. Accordingly, for a person who dies during the year of assessment, tax is chargeable from the first day of the year of assessment until the date of death. Therefore, in such a case this period will be the "year of assessment" as defined in section 1(1).

Under section 6(4) the primary, secondary and tertiary rebates must be apportioned for a period of assessment of less than 12 months, which will usually apply to the deceased in the year of death.

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4 Inserted by section 20 of Taxation Laws Amendment Act 23 of 2018.

5 Section 25 substituted by section 48(1) of the Taxation Laws Amendment Act 25 of 2015.

4.1.2 Deemed disposal of assets by the deceased to heirs or legatees other than a resident surviving spouse [section 9HA(1)]

Under section 9HA(1) the deceased is deemed to have disposed of his or her assets at market value (see discussion below on market value) on the date of death, other than the following:

- Assets transferred to the surviving spouse[6] if the surviving spouse is a resident (for a discussion see **4.1.3**).[7]
- A long-term insurance policy (other than second-hand policies) of the deceased if any capital gain or capital loss that would have been determined in respect of a disposal of such policy that resulted in proceeds of that policy being received by or accruing to the deceased would have been disregarded under paragraph 55 of the Eighth Schedule.[8]
- An interest of the deceased in a South African pension, pension preservation, provident, provident preservation or a retirement annuity fund or similar funds situated outside South Africa. This exclusion is applicable only if any capital gain or capital loss that would have been determined in respect of a disposal of any such interest that resulted in a lump sum benefit being received by or accruing to the deceased would have been disregarded under paragraph 54 of the Eighth Schedule.

Section 1(1) defines the term "spouse" as follows:

> **"spouse"**, in relation to any person, means a person who is 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 is intended to be permanent,
>
> and **"married"**, **"husband"** or **"wife"** shall be construed accordingly: 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 out of community of property;

If the deceased's spouse is a non-resident, the assets will be deemed to be disposed of to the non-resident spouse at market value under section 9HA(1). For purposes of section 9HA "market value" means as defined in paragraph 1 of the Eighth Schedule which in turn refers to paragraph 31 of the Eighth Schedule. For assets not specifically listed under paragraph 31(1)(*a*) to (*f*) of the Eighth Schedule, the market value is the price which could have been obtained upon its sale between a willing buyer and a willing seller dealing at arm's length in an open market.[9]

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6 The term "spouse" is defined under section 1(1).

7 Section 9HA(1)(*a*) refers to a spouse as contemplated in section 9HA(2) which refers to a resident spouse.

8 Section 9HA(1)(*b*).

9 Paragraph 31(1)(*g*) of the Eighth Schedule.

The term “assets” is not defined in section 1(1) or 9HA but since section 9HA contains the rules relevant to CGT that were previously contained in the Eighth Schedule, the definition of “assets” under the Eighth Schedule should be applied. The definition of “assets” in paragraph 1 of the Eighth Schedule is very wide and includes, property of whatever nature excluding foreign currency and including a right or interest of whatever nature to or in such property.

Assets for puposes of section 9HA can include assets held on capital or revenue account. In determining whether an asset was held on capital or revenue account, considering the intention of the taxpayer upon acquisition of the asset is the most important test.[10] Any change in a taxpayer’s intention with an asset after acquisition should also be considered.

The term “gross income” is defined in section 1(1) in the case of a resident to mean the total amount in cash or otherwise received by or accrued to or in favour of the resident but excludes amounts of a capital nature unless specifically included under paragraphs (*a*) to (*n*) of the definition. The market value of assets of revenue nature, for example trading stock, livestock and produce, must be included in the gross income of the deceased on the date of death under section 9HA(1), except if such assets have been bequeathed to a surviving spouse. For the CGT consequences of a deemed disposal under section 9HA, refer to **4.4**.

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

Section 9HA(2)(*a*) provides that the deceased is deemed to have disposed of an asset for the benefit of a resident surviving spouse if that asset is acquired by that surviving spouse –

- by *ab intestato*[11] or testamentary succession;[12]
- as a result of a redistribution agreement between the heirs and legatees of that person in the course of liquidation or distribution of the deceased estate;[13] or
- in settlement of a claim arising under section 3 of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).[14]

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10 ITC 1185 (1972) 35 SATC 122 (N).

11 This term refers to a person who dies without a valid will, that is, intestate.

12 This term refers to a person whose estate is wound up under a valid will.

13 Under a redistribution agreement the heirs can agree to redistribute the assets of the estate amongst themselves.

14 This Act makes the accrual system automatically applicable to a marriage out of community of property entered into after 1 November 1984 (see section 2) unless its application is specifically excluded in the antenuptial contract. Under the accrual system a claim will arise on death in the hands of one spouse against the other for the difference in growth of the estates of the spouses. If assets were used to settle such a claim, it would be subject to roll-over treatment under section 9HA(2)(*b*) read with section 25(4).

In the context of a natural person, "resident" is defined in section 1(1) as a natural person who is ordinarily resident[15] in South Africa or a person who meets the requirements of being physically present in South Africa for a certain prescribed number of days.[16]

Under section 9HA(2)(*b*) the deceased is treated as having disposed of the asset to a resident surviving spouse for an amount received or accrued that is equal to, in the case of –

- trading stock, livestock or produce, the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income, before the inclusion of any taxable capital gain,[17] for the year of assessment ending on the date of that person's death; or
- any other asset, the base cost[18] of that asset, as contemplated in the Eighth Schedule, as at the date of that person's death.

4.2 Deceased estate (section 25)

When a person dies, that person's year of assessment comes to an end and a new entity comes into existence, namely, the deceased estate. In reality a deceased estate is not a person but simply an aggregate of assets and liabilities of the deceased administered by an executor.[19] This common-law position is varied by the Act in that a deceased estate is a person as defined in section 1(1) and the executor is its representative taxpayer, also as defined in section 1(1).

Section 25(5)(*a*) provides that a deceased estate must be treated as if it were a natural person, other than for purposes of the primary, secondary and tertiary rebates under section 6, the medical scheme fees tax credit under section 6A and the additional medical expenses tax credit under section 6B.[20]

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

The first return for the deceased estate commences on the day after the date of death and ends on the last day of February or, if earlier, on the date on which the liquidation and distribution account becomes final. For subsequent years of assessment the executor of a deceased estate must continue to submit returns of income for each year of assessment until the liquidation and distribution account becomes final.

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15 For more information, see Interpretation Note 3 "Resident: Definition in Relation to a Natural Person – Ordinarily Resident".

16 For more information, see Interpretation Note 4 "Resident: Definition in Relation to a Natural Person – Physical Presence Test".

17 For a discussion on "taxable capital gain", see the *Comprehensive Guide to Capital Gains Tax*.

18 Base cost is determined under paragraph 20 of the Eighth Schedule. For further detail, see the *Comprehensive Guide to Capital Gains Tax.*

19 *CIR v Emary NO* 1961 (2) SA 621 (A), 24 SATC 129.

20 For a discussion on the medical scheme fees tax credit and additional medical expenses tax credit see the *Guide on the Determination of Medical Tax Credits.*

Under section 25(1)(*a*) income received by or accrued to or in favour of any person in the capacity as the executor of a deceased estate must be treated as income of the deceased estate. Under section 25(1)(*b*) income includes amounts received or accrued which would have been income in the hands of the deceased had it been received by or accrued to or in favour of the deceased during his or her lifetime.

4.2.1 Acquisition of assets by the deceased estate [section 25(2)]

Under section 25(2)(*a*) a deceased estate is deemed to acquire an asset from the deceased (other than an asset that will be disposed of to a resident surviving spouse) for an amount of expenditure incurred equal to the market value of the asset on the date of death.

Under section 25(2)(*b*) the deceased estate is deemed to acquire an asset that will be transferred to a resident surviving spouse[21] for an amount of expenditure incurred equal to the amount contemplated in section 9HA(2)(*b*) (see **4.1.3**), namely, in the case of –

- trading stock, livestock or produce, the amount that was allowed as a deduction in respect of that asset for purposes of determining that deceased's taxable income, before the inclusion of any taxable capital gain, for the year of assessment ending on the date of that person's death; or
- any other asset, the base cost of that asset, as contemplated in the Eighth Schedule, as at the date of that person's death.

The deemed acquisition rule in section 25(2) must be read with the deemed disposal rule in section 25(3)(*a*), which together provide for a tax-neutral transfer of assets from the deceased estate to heirs or legatees, including a surviving spouse.

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

Under section 25(3)(*a*) an asset awarded to an heir or legatee is treated as being disposed of by the deceased estate for an amount received or accrued equal to the amount of expenditure incurred by the deceased estate in respect of that asset. As discussed above, such expenditure could comprise the deemed expenditure under section 25(2) for the asset acquired from the deceased or actual expenditure under section 11(*a*) if the executor purchased more assets after the date of death. The amount of the deemed expenditure will depend on whether the asset is bequeathed to an heir or legatee [section 25(2)(*a*)] or to a resident surviving spouse [section 25(2)(*b*)]. The purpose of section 25(3)(*a*) is to ensure that the deceased estate is in a tax-neutral position, so that the amount included in its gross income is equal to the amount of expenditure incurred or deemed to be incurred by it.

4.2.3 Disposal of assets to third parties by the executor

Amounts derived from the disposal of assets by the executor of the deceased estate to third parties must be included in the gross income of the deceased estate under section 25(1).

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[21] Includes assets acquired by the resident surviving spouse by inheritance under a will or under the laws of intestate succession, through a redistribution agreement or as a result of the settlement of a claim under the accrual system applicable to a marriage out of community of property.

4.2.4 Cessation of deceased estate

The deceased estate must account for transactions in its returns of income up to the date on which the liquidation and distribution account becomes final. The liquidation and distribution account is required to lie open for a period not less than 21 days for inspection by any person interested in the estate.[22] This period must be stipulated by the executor in the *Government Gazette* and in one or more newspapers circulating in the district in which the deceased was ordinarily resident.[23]

The estate becomes distributable after the period stipulated in the notice assuming no objection has been lodged against the account, and it is at this point that the account becomes final.[24] Should an objection be lodged against the account, the date on which it becomes final will depend on the facts. If the Master dismisses the objection and the aggrieved party applies to court to have the Master's decision set aside, the account will become final only when the court process is completed.

On the reckoning of the 21-day period, section 4 of the Interpretation Act 33 of 1957 provides as follows:

> **4. Reckoning of number of days.—**When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

Thus, if the account was advertised in the *Gazette* on Friday 3 January 2020, the period of 21 days will end at midnight on Friday 24 January 2020.

4.3 Heirs or legatees

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

Under section 25(3)(*b*) an heir or legatee is treated as having acquired an asset from the deceased estate for an amount of expenditure incurred equal to the expenditure incurred by the deceased estate in respect of that asset.

An heir, other than a resident surviving spouse, would therefore acquire assets from the deceased estate under section 25(3)(*b*) read with section 25(2)(*a*) at an expenditure equal to –

- its market value on the date of death plus any further costs incurred after the date of death when the deceased estate acquired it from the deceased;
- its cost price to the deceased estate if it was acquired by purchase by the executor; or

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22 Section 35(4) of the Administration of Estates Act 66 of 1965.
23 Section 35(5)(*a*) of the Administration of Estates Act 66 of 1965.
24 Section 35(12) of the Administration of Estates Act 66 of 1965.

- nil when it was acquired by the deceased estate by natural increase[25] such as livestock since the deceased estate would not have incurred any expenditure to acquire the naturally increased livestock.

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

Facts:

Y's late father's estate comprised a house with a market value on date of death of R500 000. The house was bonded to the extent of R450 000. The executor was informed that Y was willing to take over the bond. With the bank's consent, the house was awarded to Y by the executor.

Result:

Under section 25(3)(*b*) the base cost (for purposes of the Eighth Schedule) of the house in Y's hands is deemed to be R500 000. The fact that there is a bond repayment of R450 000 is not taken into account.

4.3.2 Acquisition of assets by a resident surviving spouse

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

The assets acquired by a resident surviving spouse of the deceased as contemplated in section 9HA(2) are subject to "roll-over" treatment under section 25(4). This rule applies to any amount of allowance or deduction that the spouse may be entitled to, any recoupment and capital gain or capital loss upon disposal of the asset by the spouse.[26]

No roll-over from the deceased to a non-resident surviving spouse is permitted, regardless of the nature of the asset, because section 9HA(2) refers only to a surviving spouse who is a resident.

The resident surviving spouse inherits the base cost and all aspects of the history of the asset (date of acquisition and usage) from the deceased spouse under section 25(4) and will have to account for any capital gains or capital losses when the asset is ultimately disposed of. The provision is not an exclusion from CGT but merely a roll-over measure that has the effect of shifting the incidence of the tax from the deceased to the surviving spouse. The roll-over relief applies automatically and neither the deceased nor the surviving spouse can elect out of it.

The acquisition of assets from the deceased is regulated by section 25(4) which treats the resident surviving spouse, the deceased and the deceased estate as one and the same person for purposes of determining any allowance or deduction to which that spouse may be entitled or that is to be recovered or recouped by or included in the income of that spouse in respect of that asset.[27]

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

26 Section 25(4)(*a*)(i) and (ii).

27 Section 25(4)(*a*).

Section 25(4)(*b*) treats the resident surviving spouse contemplated in section 25(4)(*a*) as one and the same person as the deceased and deceased estate with respect to –

- the date of acquisition of the asset by that deceased;
- any valuation effected by that deceased as contemplated in paragraph 29(4) of the Eighth Schedule;
- the amount of any expenditure and the date on which and the currency in which that expenditure was incurred in respect of the asset –
  - by that deceased as contemplated in section 9HA(2)(*b*); and
  - by that deceased estate, other than the expenditure contemplated in section 9HA(2)(*b*);
- the manner in which that asset had been used by the deceased and the deceased estate; and
- any allowance or deduction allowable in respect of an asset to the deceased and the deceased estate.

The expenditure taken over by the resident surviving spouse for the asset is the amount referred to in section 9HA(2)(*b*). Section 9HA(2)(*b*)(i) deals only with the year of assessment in which a person dies. The expenditure to be taken over by the resident surviving spouse is equal to the amount that was allowed as a deduction in respect of the asset for purposes of determining the deceased's taxable income, before the inclusion of any taxable capital gain, for the year of assessment ending on the date of that person's death.

Example 2 – Assets disposed of by deceased

Facts:

Mr X died leaving his holiday home which he had originally acquired for R200 000, with a market value of R950 000 at the time of death to his wife, Mrs X. The remainder of his assets which were held on capital account, were acquired after valuation date of 1 October 2001 by him at a cost of R600 000 (none of which qualified for any exclusions) and were valued at R1,5 million at the time of his death.

Result:

Under section 9HA(1) Mr X is treated as having disposed of the assets not left to Mrs X at the market value of R1,5 million (proceeds) as at the date of his death resulting in a capital gain of R900 000 (R1 500 000 proceeds – R600 000 base cost). Under section 25(2)(*a*) Mr X's deceased estate is deemed to acquire these assets for an amount of expenditure incurred equal to the amount contemplated in section 9HA(1) being R1,5 million.

Under section 9HA(2)(*b*)(ii) Mr X is treated as having disposed of the holiday home bequeathed to Mrs X for an amount equal to the base cost of the asset at the time of death, namely R200 000. Since the proceeds and base cost under this deemed disposal rule are both R200 000, there is neither a capital gain nor a capital loss.

Under section 25(4) Mrs X is deemed to have acquired the holiday home at a cost of R200 000 and must use that amount in determining the base cost of the holiday home when she ultimately disposes of it.

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

The executor may acquire more assets after the date of death of the deceased through purchase or by natural increase. The acquisition of such assets by the resident surviving spouse is not governed by section 25(4) because section 25(4)(*a*) refers to an asset contemplated in section 9HA(2), which is one disposed of by the deceased.

Rather, the resident surviving spouse is treated in the same manner as any other heir or legatee and acquires such asset under section 25(3)(*b*) for an amount equal to the expenditure incurred by the deceased estate.

The resident surviving spouse will not be entitled to any deduction in respect of assets acquired by the deceased estate through natural increase, since the executor would not have incurred any expenditure in acquiring such assets.

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

Section 9HA(3) provides for the situation in which an asset is transferred directly from the deceased to an heir or legatee (including a non-resident surviving spouse). Such a transfer can happen, for example, with certain second-hand or foreign endowment policies.

A legatee is a person who receives a legacy under a valid will. By contrast, an heir is entitled to the residue of the estate once the legacies and debts have been paid. *LAWSA* explains a legacy as follows:[28]

> 'A legacy is a disposition by which the testator gives the legatee a specific thing or collection of things or an amount of money. The distinguishing feature between an heir and a legatee is "the specificity of benefit" given to the legatee.'

(Footnotes omitted.)

The heir or legatee must be treated as having acquired the asset for an amount of expenditure equal to the market value of the asset as at the date of death of the deceased.

4.4 Capital or revenue nature of assets and capital gains tax

As discussed in **4.1.2**, the market value of assets held on revenue account must be included in the gross income of the deceased on the date of death under section 9HA(1), except if such assets have been bequeathed to a resident surviving spouse. For CGT purposes, the proceeds [deemed to be the market value under section 9HA(1)] must be reduced by the amount included in gross income [paragraph 35(3)(*a*)] resulting in no caital gain or loss to the deceased.

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[28] MJ de Waal *et al* Volume 31 second edition volume [online] (My LexisNexis: 28 February 2011) in para 331.

Assets of a capital nature that are deemed to have been disposed of by the deceased under section 9HA(1) may result in a capital gain or capital loss and should be determined according to the normal CGT rules. For more information, refer to the *Comprehensive Guide to Capital Gains Tax*.

If an allowance asset is deemed to have been disposed of under section 9HA(1) this may trigger a recoupment in terms of section 8(4)(*a*) of capital allowances previously allowed as a deduction or at the election of the executor, a loss on disposal under section 11(*o*).

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

Under section 25(4)(*b*)(iv) a resident surviving spouse is treated as having used that asset in the same manner that it was used by the deceased and the deceased estate.

The amount received by or accrued to an heir or legatee (other than a resident surviving spouse) disposing of an asset acquired by inheritance will generally be of a capital nature provided that it was disposed of at the earliest opportunity and not made part of the carrying on of a trade.

The Eighth Schedule eliminates receipts and accruals of a revenue nature on disposal from proceeds under paragraph 35(3)(*a*). Likewise, expenditure of a revenue nature is eliminated from base cost under paragraph 20(3)(*a*).

It remains then to determine the capital gain or capital loss of the disposal of an inherited capital asset by an heir or legatee (other than a resident surviving spouse). The capital gain or capital loss on such a disposal will be determined by subtracting the base cost from the proceeds in the normal way. The base cost would comprise the expenditure deemed to be incurred by the heir or legatee under section 25(3)(*b*), namely, market value on date of death plus any further purchase costs incurred by the executor. The proceeds will comprise the amount received or accrued on the disposal under paragraph 35 of the Eighth Schedule.

4.5 Transfer of asset between spouses (section 9HB)

Section 9HB provides for a roll-over of a capital gain or capital loss when an asset is transferred between spouses during their lifetimes. The roll-over is mandatory and spouses do not have the option to elect out of it.

Section 9HB(3) and (4) provides for roll-over treatment with regards to the disposal of trading stock, livestock or produce between spouses (see **4.5.3** for further discussion).

Section 9HB will not apply when an asset is disposed of by a person to a spouse who is not a resident, unless the asset is an asset contemplated under section 9J (interests of non-residents in immovable property held as trading stock) or in paragraph 2(1)(*b*) of the Eighth Schedule,[29] namely –

- immovable property situated in South Africa held by that person or any interest or right of whatever nature of that person to or in immovable property situated in South Africa including rights to variable or fixed payments as consideration

[29] Section 9HB(5). For a detailed discussion see the *Comprehensive Guide to Capital Gains Tax*.

for the working of, or the right to work mineral deposits, sources and other natural resources; or

- any asset effectively connected with a permanent establishment of that person in South Africa.

4.5.1 Application of section 9HB(1)

Section 9HB(1)(*a*) provides that the disposing spouse (transferor spouse) must disregard any capital gain or capital loss when disposing of an asset to his or her spouse (transferee spouse).

Section 9HB(1)(*b*) ensures that the spouse to whom an asset is disposed of takes over all aspects of the history of the asset from that person's spouse. The transferee spouse is deemed to have –

- acquired the asset on the same date that the asset was acquired by the transferor;[30]
- incurred an amount of expenditure equal to the expenditure contemplated in paragraph 20 of the Eighth Schedule that was incurred by that transferor in respect of that asset;[31]
- incurred that expenditure on the same date and in the same currency that it was incurred by the transferor;[32]
- used that asset in the same manner that it was used by the transferor;[33] and

received an amount equal to any amount received by or accrued to that transferor in respect of that asset that would have constituted proceeds on disposal of that asset had that transferor disposed of it to a person other than the transferee. Any transfers of assets between spouses for the purpose of tax avoidance may result in the capital gain or capital loss arising in the hands of the transferee spouse being attributed to the transferor spouse under paragraph 68 of the Eighth Schedule.

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30 The dates and amounts of expenditure need to be taken over by the transferee spouse for the purposes of determining the time-apportionment base cost of pre-valuation date assets.

31 Under section 9HB(1)(*b*)(ii) an asset is treated as having been acquired for an amount equal to the expenditure incurred by the transferor spousethus any amounts paid by the transferee spouse to the transferor spouse for an asset must be disregarded.

32 The currency of expenditure is taken over by the transferee spouse for the purposes of determining a capital gain or capital loss under paragraph 43 of the Eighth Schedule when the transferee spouse disposes of the asset. For example, if the transferor spouse acquired the asset in USD and the transferee spouse disposed of the asset in USD, the capital gain or capital loss would be determined under paragraph 43(1) of the Eighth Schedule because the expenditure and proceeds are in the same foreign currency. Had the currency of expenditure not rolled over to the transferee spouse, the transferee spouse would have been required to determine the capital gain or capital loss under paragraph 43(1A) of the Eighth Schedule because the expenditure and proceeds would have been in different currencies.

33 The usage of the asset needs to be taken over to ensure, for example, that any business usage of an otherwise exempt asset is taxed.

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

Section 9HB(2) provides for various deeming rules to apply to persons in specific cases. These are discussed further below.

(a) Deceased spouse

A person whose spouse dies must be treated as having disposed of an asset to that spouse immediately before the date of death of that spouse, if ownership of that asset is acquired by the deceased estate of that spouse in settlement of a claim arising under section 3 of the Matrimonial Property Act.[34]

The accrual system does not result in a splitting of capital gains and losses between spouses. A capital gain or capital loss on disposal of an asset by a person married out of community of property must be accounted for by the spouse who owns the asset. A claim under the accrual system arises only on death or divorce of a spouse[35] or under an order of court.[36]

When assets of the surviving spouse are given to the deceased estate in settlement of an accrual claim arising on death under section 3 of the Matrimonial Property Act, the transfer of such assets will be subject to roll-over treatment under section 9HB. An equivalent roll-over rule applies to the deceased under section 9HA(2) read with section 25(4).

(b) Divorce order or court order

A person must be treated as having disposed of an asset to his or her spouse, if that asset is transferred to that spouse in consequence of –

- a divorce order; or
- in the case of a religious marriage or permanent same sex or heterosexual union, an agreement of division of assets which has been made an order of court.

When persons marry in community of property, they each dispose of half their assets to each other except for assets excluded by antenuptial contract before the marriage. The time of this disposal occurs immediately after they become spouses with the result that the roll-over provisions of section 9HB will apply. In *Ex parte Andersson*[37] Watermeyer J stated:

> 'The legal position as I understand it is that save for certain exceptional cases, which are not presently relevant, community of property comes into being as soon as a marriage is solemnised unless prior to the marriage the spouses have concluded an agreement which excludes community of property.'

For more information on section 9HB(2), see the *Comprehensive Guide to Capital Gains Tax*.

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34 See **4.1.3**.

35 Section 3 of the Matrimonial Property Act.

36 Under section 8(1) of the Matrimonial Property Act the court can order the division of the accrual of the estate of a spouse if that spouse's conduct is seriously prejudicial to the other spouse's ultimate accrual claim on dissolution of the marriage. Under section 8(2) of the Matrimonial Property Act the court can also exclude the accrual system completely.

37 1964 (2) SA 75 (C) at 77.

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

A person that disposes of trading stock, livestock or produce to a spouse, must be treated as having disposed of that asset for an amount received or accrued that is equal to the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income, before the inclusion of any taxable capital gain.[38]

If a person acquires trading stock, livestock or produce from his or her spouse, that person and the spouse must, when determining any taxable income derived by that person, be deemed to be one and the same person for purposes of –

- the date of acquisition of that trading stock, livestock or produce by that person; and
- the amount and date of incurral by that spouse of any cost or expenditure incurred for that asset as contemplated in section 11(*a*) or section 22(1) or (2).[39]

5. Conclusion

The deceased is deemed to have disposed of his or her assets at the market value on the date of death, subject to certain exclusions and exceptions. Specific scenarios qualify for roll-over relief of a capital gain or capital loss.

The special rules under section 9HB must be considered to determine the tax implications when a person disposes of an asset to his or her spouse. While providing for a roll-over of a capital gain or capital loss when an asset is transferred between spouses during their lifetimes, it also ensures that a resident spouse to whom an asset is disposed of takes over all aspects of the history of the asset from that person's spouse.

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38 Section 9HB(3).
39 Section 9HB(4).

Annexure – The law

Section 9HA

9HA. Disposal by deceased person.—(1) A deceased person must be treated as having disposed of his or her assets, other than—

(*a*) assets disposed of for the benefit of his or her surviving spouse as contemplated in subsection (2);

(*b*) a long-term insurance policy of the deceased, if any capital gain or capital loss that would have been determined in respect of a disposal that resulted in proceeds of that policy being received by or accruing to the deceased would have been disregarded in terms of paragraph 55 of the Eighth Schedule; or

(*c*) an interest of the deceased in—

(i) a pension, pension preservation, provident, provident preservation or retirement annuity fund in the Republic; or

(ii) a fund, arrangement or instrument situated outside the Republic which provides benefits similar to a pension, pension preservation, provident, provident preservation or retirement annuity fund,

if any capital gain or capital loss that would have been determined in respect of a disposal of that interest that resulted in a lump sum benefit being received by or accruing to the deceased would have been disregarded in terms of paragraph 54 of the Eighth Schedule,

at the date of that person's death for an amount received or accrued equal to the market value as defined in paragraph 1 of the Eighth Schedule, of those assets as at that date.

(2) A deceased person must, if his or her surviving spouse is a resident, be treated—

(*a*) as having disposed of an asset for the benefit of that surviving spouse if that asset is acquired by that surviving spouse—

(i) by *ab intestato* or testamentary succession;

(ii) as a result of a redistribution agreement between the heirs and legatees of that person in the course of liquidation or distribution of the deceased estate of that person; or

(iii) in settlement of a claim arising under section 3 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984); and

(*b*) as having disposed of that asset for an amount received or accrued that is equal to, in the case of—

(i) trading stock, or livestock or produce contemplated in the First Schedule, the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income, before the inclusion of any taxable capital gain, for the year of assessment ending on the date of that person's death; or

(ii) any other asset, the base cost of that asset, as contemplated in the Eighth Schedule, as at the date of that person's death.

(3) If any asset that is treated as having been disposed of by a deceased person as contemplated in subsection (1) is transferred directly to an heir or legatee of that person, that heir or legatee must be treated as having acquired that asset for an amount of expenditure incurred equal to the market value as contemplated in paragraph 1 of the Eighth Schedule, of that asset as at the date of that deceased person's death.

Section 9HB

9HB. Transfer of asset between spouses.—(1)(*a*) A person (hereinafter referred to as "the transferor") must disregard any capital gain or capital loss determined in respect of the disposal of an asset to his or her spouse (hereinafter referred to as "the transferee").

(*b*) The transferee must be treated as having—

(i) acquired the asset on the same date that such asset was acquired by the transferor;

(ii) incurred an amount of expenditure equal to the expenditure contemplated in paragraph 20 of the Eighth Schedule that was incurred by that transferor in respect of that asset;

(iii) incurred that expenditure on the same date and in the same currency that it was incurred by the transferor;

(iv) used that asset in the same manner that it was used by the transferor; and

(v) received an amount equal to any amount received by or accrued to that transferor in respect of that asset that would have constituted proceeds on disposal of that asset had that transferor disposed of it to a person other than the transferee.

(2) For the purposes of subsection (1)—

(*a*) a person whose spouse dies must be treated as having disposed of an asset to that spouse immediately before the date of death of that spouse, if ownership of that asset is acquired by the deceased estate of that spouse in settlement of a claim arising under section 3 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984); or

(*b*) a person must be treated as having disposed of an asset to his or her spouse, if that asset is transferred to that spouse in consequence of a divorce order or, in the case of a union contemplated in paragraph (*b*) or (*c*) of the definition of "spouse" in section 1, an agreement of division of assets which has been made an order of court.

(3) A person who disposes of an asset consisting of trading stock, livestock or produce contemplated in the First Schedule to his or her spouse, must be treated as having disposed of that asset for an amount received or accrued that is equal to the amount that was allowed as a deduction in respect of that asset for purposes of determining that person's taxable income, before the inclusion of any taxable capital gain.

(4) Where a person acquires an asset consisting of trading stock, livestock or produce contemplated in the First Schedule from his or her spouse, that person and his or her spouse must, for purposes of determining any taxable income derived by that person, be deemed to be one and the same person with respect to the date of acquisition of that asset by that person and the amount and date of incurral by that spouse of any cost or expenditure incurred in respect of that asset as contemplated in section 11(*a*) or 22(1) or (2).

(5) This section must not apply in respect of the disposal of an asset by a person to his or her spouse who is not a resident, unless the asset disposed of is an asset contemplated in section 9J or in paragraph 2(1)(*b*) of the Eighth Schedule.

Section 25

25. Taxation of deceased estates.—(1) Any—

(*a*) income received by or accrued to or in favour of any person in his or her capacity as the executor of the estate of a deceased person; and

(*b*) amount received or accrued as contemplated in paragraph (*a*) which would have been income in the hands of that deceased person had that amount been received by or accrued to or in favour of that deceased person during his or her lifetime,

must be treated as income of the deceased estate of that deceased person.

(2) Where the deceased estate of a person acquires an asset from that person, that deceased estate must, if that asset is an asset—

(*a*) other than an asset contemplated in section 9HA(2), be treated as having acquired that asset for an amount of expenditure incurred equal to the amount contemplated in section 9HA(1); and

(*b*) contemplated in section 9HA(2), be treated as having acquired that asset for an amount of expenditure incurred equal to the amount contemplated in section 9HA(2)(*b*).

(3) Where the deceased estate of a person disposes of an asset to an heir or legatee of that person—

(*a*) that deceased estate must be treated as having disposed of that asset for an amount received or accrued equal to the amount of expenditure incurred by the deceased estate in respect of that asset; and

(*b*) the heir or legatee must be treated as having acquired that asset for an amount of expenditure incurred equal to the expenditure incurred by the deceased estate in respect of that asset.

(4) (*a*) This subsection must be applied in respect of an asset acquired by a surviving spouse of a deceased person as contemplated in section 9HA(2) for purposes of determining the amount of any—

(i) allowance or deduction to which that spouse may be entitled or that is to be recovered or recouped by or included in the income of that spouse in respect of that asset; or

(ii) the amount of any capital gain or capital loss in respect of a disposal of that asset by that spouse.

(*b*) The surviving spouse contemplated in paragraph (*a*) must be treated as one and the same person as the deceased person and deceased estate with respect to—

(i) the date of acquisition of that asset by that deceased person;

(ii) any valuation of that asset effected by that deceased person as contemplated in paragraph 29(4) of the Eighth Schedule;

(iii) the amount of any expenditure and the date on which and the currency in which that expenditure was incurred in respect of that asset—

(*aa*) by that deceased person as contemplated in section 9HA(2)(*b*); and

(*bb*) by that deceased estate, other than the expenditure contemplated in section 9HA(2)(*b*);

(iv) the manner in which that asset had been used by the deceased person and the deceased estate; and

(v) any allowance or deduction allowable in respect of that asset to the deceased person and the deceased estate.

(5) A deceased estate must–

(*a*) other than for the purposes of section 6, section 6A and section 6B, be treated as if that estate were a natural person;and

(*b*) if the deceased person was a resident at the time of his or her death, be treated as if that estate were a resident.

(6) Where—

(*a*) the tax determined in terms of this Act, which relates to the taxable capital gain derived by a deceased person from assets disposed of by that person as contemplated in section 9HA, exceeds 50 per cent of the net value of the estate of that person, as determined in terms of section 4 of the Estate Duty Act for purposes of that Act, before taking into account the amount of that tax so determined; and

(*b*) the executor of the estate is required to dispose of any asset of the estate for purposes of paying the amount of the tax contemplated in paragraph (*a*),

any heir or legatee of the estate who would have been entitled to that asset contemplated in paragraph (*b*) had there been no liability for tax, may elect that that asset be distributed to that heir or legatee if the amount of tax which exceeds 50 per cent of that net value be paid by that heir or legatee within a period of three years after the date that the estate has become distributable in terms of section 35(12) of the Administration of Estates Act, 1965 (Act No. 66 of 1965).

(7) Any amount of tax payable by an heir or legatee as contemplated in subsection (6), becomes a debt due to the state and must be treated as an amount of tax chargeable in terms of this Act which is due by that person.