

DON'T TRUST THE TRUST WHEN YOU "BUY" IT

A seller advertising the fact that we wants to sell his spec-house in Klein Windhoek: The house is in a trust so there is no transfer duty and costs

Who advised this seller that this was in fact the correct position in regard to transfer duty and costs? If the property is sold by the trust, transfer duty will be payable beyond any doubt. If the seller intends to "sell" the trust ..., well read on!

Now we all know that it is quite common for an immovable property to be advertised as "being in a close corporation" or "being in a company". Instead of selling the property "out of " the close corporation or company, the seller uses this fact as a costs and duty beneficial marketing tool for the sale of the property by effectively selling the members interest or shares together with the respective loan accounts. What about the so-called "sale of a trust"? An analysis of this type of transaction is usually structured in more or less the following way: -

1. A "purchase price" for the trust is determined. This is actually a purchase price for the property.
2. The existing trustees assume new trustees (the purchasers or their nominees).
3. A resolution is passed by the old and new trustees to substitute or vary the class or identity of beneficiaries (so as to comply with the needs of the purchasers).
4. The existing trustees (the sellers) resigns as trustees.
5. The existing beneficiaries, if considered necessary, waive their rights to benefit under the trust.
6. The "purchase price" is paid by the "purchasers" to the "sellers", namely to the trustees and/or the beneficiaries.

Effectively what happens is that the new trustees step into the shoes of the old trustees and the new beneficiaries step into the shoes of the old beneficiaries. By so doing, the trustees "inherit" *ex officio* the assets and liabilities of the trust and the new beneficiaries become entitled to the benefits to be awarded to them by the trustees in accordance with the provisions of the trust deed.

Nowadays, this form of transaction is quite fashionable. The "owner" of the property owning trust achieves his goal as no transfer duty is payable by the "acquirer" (trustee? beneficiaries?). However, it is too soon to rejoice. There are many uncertainties that have to be addressed before this type of transaction is declared "safe". I submit that the structuring is contrary to the spirit of tax laws and in addition, contrary to the true nature and intention behind the establishment of trusts. Inherently, trusts are not saleable commodities. Sales of trusts have not yet been tested by our Courts. Participants in these arrangements should be aware that they are running a number of risks, not least of which is that the purported "sale " may be declared void.

Where there is equity in the trust i.e. the "purchase price" exceeds, for example, the bond registered over the property, an interesting tax question arises. Can this "profit" be a receipt of a capital nature and therefor not subject to income tax?. In my view, this consideration, being consideration for the trustees resignation, could possibly be subject to income tax in the hands of the trustees. The same argument could apply to receipts by beneficiaries. It is assumed throughout this article that the trustees have the power to vary the trust deed (discretionary trust) can beneficiaries however be void. It may be so that the beneficiary only has a *spes* in terms of the normal discretionary trust.

A seller should have been more carefully advised of the possible pitfalls involved in the "sale" of a trust. In these circumstances, the trust is not the panacea of all tax avoidance situations.