

## DISPOSALS FROM A TRUST IN TERMS OF PARAGRAPH 51A OF THE EIGHTH SCHEDULE OF THE INCOME TAX ACT

We discuss the procedure for disposal of a property from a Trust in terms of the above paragraph 51A. This is a new paragraph to the Eighth Schedule and significantly changes the procedure as discussed in our previous article headed "TAXATION LAWS AMENDMENT ACT OF 2009 – YOUR SECOND CHANCE"

Paragraph 51A was introduced into the Eighth Schedule by the Taxation Laws Amendment Act 2010 and is effective from the 1 October 2010.

Requirements for the application of paragraph 51A –

A “disposal” is defined in the case of an agreement subject to a suspensive condition as the date upon which the condition is fulfilled, and, in the case of any agreement which is not subject to a suspensive condition the date on which the agreement is concluded.

The disposal from a trust must take place between 1 October 2010 and 31 December 2012.

1. The property must be disposed of to –
  - a) natural persons who are connected persons as defined in the Income Tax Act,
  - b) who have ordinarily resided in the residence, and
  - c) which residence has been mainly used for domestic purposes since 11 February 2009 until date of disposal.
2. the term “ordinary residence” is not defined but according to case law it has been held to be the place to which a person “would naturally and as a matter of course return from his wanderings”. Absences for vacations and business trips would be in order but would not cover say a holiday home. An interest in a share block company is not excluded from paragraph 51A.
3. the term “mainly used” for domestic purposes is not defined but according to case law is determined on a floor-area basis which exceeds 50 per cent in domestic use.
4. a connected person in relation to a trust means –
  - a) any beneficiary of such trust; and
  - b) any connected person in relation to such beneficiary.
5. the trust is deemed to have disposed of the residence to the natural person for an amount equal to the base cost of the property at the time of disposal. “As a result the trust will make neither a capital gain nor a capital loss on the disposal. The no gain/no loss treatment is confined to an interest in a residence. Other assets which need to be disposed of before the trust can be terminated will trigger capital gains and losses in the normal way.” (SARS Draft Guide).
6. The term "residence" means any structure including a boat, caravan or mobile home which is used as a place of residence by a natural person and therefore does not include vacant land. (SARS Draft Guide).
7. Under paragraph 51A there is no restriction on the size of the land on which the residence is situated (as there was under paragraph 51).

8. within 6 months of the date of disposal the founder, trustees and beneficiaries of the trust must have agreed in writing to the revocation of the trust or make an application to court for the revocation of the trust. If the founder is deceased application will have to be made to court. (SARS Draft Guide).

Before proceeding with the disposal one must take into consideration –

- that the trust must be revoked within 6 months of the disposal; and if the trust contains other assets these would have to be transferred out of the trust which could trigger other tax implications; and
- if the trust was originally set up for estate planning purposes the effects of the disposal of the property to the natural person would increase his estate duty liability as the residence will now form part of his estate.

We recommend that one should consult his or her financial adviser before embarking on a disposal in terms of paragraph 51A so as to ascertain the tax and estate duty implications.

Disposals from a company or close corporation involve other additional considerations and will be dealt with in a subsequent article.