The capital gains tax implications of the disposal of limited interests in property

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I INTRODUCTION

For the purposes of capital gains tax (CGT) an 'asset' includes 'property of whatever nature, whether movable or immovable, corporeal or incorporeal ...' and 'a right or interest of whatever nature to or in such property'.

It is clear from this definition that an 'asset' includes limited interests in property that are real rights such as bare dominium, a usufruct, a fiduciary interest, a right of usus, a right of habitatio and grazing rights, as well as personal rights such as the right to income from a trust and the right to occupy trust property.

In this article an attempt is made to clarify the position regarding the impact of CGT on the disposal of these limited interests. More specifically, the article examines the CGT implications of the following:

- enjoying a limited interest at the time of death;
- the bequest of a limited interest;
- the ceasing of a limited interest during a person’s life-time;
- the donation of a limited interest;
- the sale of a limited interest;
- a loss arising on the disposal of a limited interest; and
- the disposal of limited interests by non-residents.

II ENJOYMENT OF A LIMITED INTEREST AT THE TIME OF DEATH

(1) The position of the deceased

With certain exceptions, when a person dies he/she is deemed to have disposed of his/her assets to his/her deceased estate for proceeds equal to

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1 Para 1 of the Eighth Schedule of the Income Tax Act 58 of 1962, hereafter referred to as 'the Act'.
2 Excluded are assets transferred to a surviving spouse, assets bequeathed to certain public benefit organizations, certain long-term insurance policies, and certain interests in pension, provident and retirement annuity funds. See para 40(1)(a)-(d).
the market value of those assets at the date of death, and the deceased estate must be treated as having acquired those assets at a cost equal to that market value.\(^3\) It follows that if the deceased was enjoying a limited interest in property at the date of death, he/she is deemed to have disposed of it to his/her deceased estate for proceeds equal to the market value of the limited interest at the date of death.

The question arises as to what the market value of the limited interest is at the date of death. 'Market value' is not defined in the Act itself. However, part V of the Eighth Schedule which is headed 'Base Cost' contains a provision (para 31), headed 'Market value', which purports to determine the 'market value' of a number of different assets.

Paragraph 31(1)(d) provides that the market value of 'a fiduciary, usufructuary or other similar interest in any property' is:

> 'an amount determined by capitalizing at 12 per cent the annual value of the right of enjoyment of the property subject to that fiduciary, usufructuary or other like interest . . . over the expectation of life of the person to whom that interest was granted, or if that right of enjoyment is to be held, for a lesser period than the life of that person, over that lesser period.'

Paragraph 31(2) provides that the 'annual value' referred to in para 31(1)(d) means an amount equal to 12 per cent of the fair market value\(^4\) of the full ownership of the property.\(^5\) However, the Commissioner may fix a different annual value if he is satisfied that the property which is subject to the interest cannot reasonably be expected to produce an annual yield equal to 12 per cent.\(^6\)

The term 'fair market value' in para 31(2) is not defined in the Eighth Schedule. Nor is it defined in the Act except for the purposes of donations tax.\(^7\) Its ordinary meaning, therefore, must be used which is presumably the same as the donations tax meaning, namely, the price that could be obtained on a sale of the property between a willing buyer and a willing seller dealing at arm's length in an open market.\(^8\) However, in the case of immovable property on which a bona fide farming undertaking is carried on, the option may exist, as it does for donations tax purposes\(^9\) and estate duty purposes\(^10\) to use the 'Land Bank' value if such value is lower.

This tentative suggestion is based on para 31(1)(f) which may provide for

\(^3\) Para 40(1).
\(^4\) Writers' emphasis.
\(^5\) Para 31(2).
\(^6\) Ibid.
\(^7\) See s 55(1) of the Act.
\(^8\) Ibid.
\(^9\) See s 55(1) read with s 55(2).
\(^10\) See part (b) of the definition of 'fair market value' in s 1 of the Estate Duty Act 45 of 1955 and s 1(2) thereof.
such option. The suggestion is tentative for two reasons: firstly, as
discussed below, it is uncertain whether para 31 has any application other
than in determining base cost; and secondly, para 31(1)(f)\(^\text{11}\) determines the
'market value' of farming property whereas para 31(2) is concerned with
'fair market value'.

Paragraph 31(1)(e) provides that the market value of 'any property
which is subject to a fiduciary, usufructuary or other similar interest'\(^\text{12}\) is:

'the amount by which the fair market value of the full ownership of that
property exceeds the value of that fiduciary, usufructuary or other like interest
determined in accordance with item (d)'.\(^\text{13}\)

The phrase 'or other similar interest' used in para 31(1)(d) and (e)
includes a *usus, habitatio* and grazing rights and also the right to income of
a trust or to occupation of the property of a trust.\(^\text{14}\)

The question arises whether the provisions of para 31 are applicable
generally in the determination of 'market value' for CGT purposes or
only for the purpose of determining 'market value' for 'base cost'
purposes. An indication that para 31 is of general application is the fact
that both paras 31(1)(a) and 31(1)(c) refer to the value of an asset on its
disposal. That para 31 is of general application is also supported by the fact
that the Explanatory Memorandum\(^\text{15}\) on the Taxation Laws Amendment
Bill 2001 clearly points this way. On the other hand, the heading to Part V
('Base Cost') indicates that para 31 is not of general application but only
for the purposes of determining 'base cost'.\(^\text{16}\) It is also noteworthy that
para 29, which deals with market value 'on valuation date',\(^\text{17}\) determines
such market value in the case of certain specific assets in sub- paras (1)(a)
and (1)(b) and then in sub-para (1)(c) provides that in respect of any other
asset the market value shall be 'determined in terms of para 31'. In those
other instances in Part V where the term 'market value' is used, there is no
reference to para 31. This perhaps indicates that not only is para 31
limited to the determination of 'base cost' but is in fact confined to the
determination of 'base cost' on valuation date only. It may also be argued
that the Eighth Schedule has a definition paragraph of general application,
namely para 1, and therefore if the legislature intended the definition of

\(^{11}\) Para 31(1)(f)(i) refers to the definition of 'fair market value' in s 1 of the Estate Duty Act
which allows the use of 'Land Bank' value.

\(^{12}\) Hereafter referred to as 'bare dominium'.

\(^{13}\) Here again the problem just discussed arises regarding the option of using 'Land Bank'
value.

\(^{14}\) See *CIR v Lazarus' Estate* 21 SATC 379 and *Estate Bourke v SIR* 41 SATC 131.

\(^{15}\) At 64.

\(^{16}\) See, for example, Ernst & Young *Practical Guide to Capital Gains Tax* 2002 3.3.1; M Stein
*Stein on Capital Gains Tax* para 7.16.

\(^{17}\) 'Valuation date' is 1 October 2001, the date that CGT came into force.
'market value' in para 31 to apply generally, para 1 would have been the obvious place to put it. This is, of course, not conclusive. Legislative amendment is necessary to put the matter beyond doubt.

Assuming that the provisions of para 31 are applicable generally and not only for 'base cost' purposes, no difficulty arises with the determination of the market value of bare dominium. The market value of bare dominium is the fair market value of the underlying property less the value of the fiduciary, usufructuary or similar interest, determined by using the life expectancy of the person enjoying the interest or, if it is to be enjoyed for a lesser period, that lesser period.

Difficulty does, however, arise with the market value of a limited interest other than bare dominium. Paragraph 31(1)(d) requires the interest to be valued over the expectation of life of 'the person to whom that interest was granted' (or lesser period). That person is presumably the deceased. Now, clearly, a deceased person has no life expectancy, in which case the market value of the interest is nil. But is that what was intended or was the intention that death should be ignored and the life expectancy determined as if the deceased was still alive? It may well be argued that if that was the legislature's intention it would have said so, as it has done with the valuation of deemed property referred to in s 3(3)(d) of the Estate Duty Act. Section 3(3)(d) includes in deemed property for estate duty purposes:

'property (being property not otherwise changeable under this Act . . .) . . . of which the deceased was immediately prior to his death competent to dispose for his own benefit or for the benefit of his estate.'

Section 5(1)(f) of the Estate Duty Act provides that where the property in s 3(3)(d) consists only of profits the property must be valued by capitalizing at 12 per cent such amount as the Commissioner may consider reasonable as representing the annual value of such profits 'over the expectation of life of the deceased immediately prior to the date of his death'.

As has already been indicated, there is no basis on which the estate duty means of valuation may be used. Section 5(1)(b) of the Estate Duty Act prescribes the method for valuing a fiduciary, usufructuary or other like interest for estate duty purposes. It provides that the interest is to be valued using the life expectancy of the person who, on the death of the deceased, succeeds to the enjoyment of the interest or if it is to be enjoyed

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18 Apart from the uncertainty regarding the use of 'Land Bank' value for farming property discussed earlier.
19 It is not clear whether 'Land Bank' value can be used for farming property.
for a lesser period, then using that lesser period. It is clear that such construction cannot be placed on para 31(1)(d).

If para 31 is only relevant for the purposes of Part V of the Eighth Schedule (Base Cost), the term 'market value' for the purposes of para 40(1) will have to be given its ordinary meaning, which would presumably mean the market value that the asset would fetch on an open market for assets of the same kind on a sale of the asset between a willing buyer and a willing seller dealing at arm's length. As the interest ceases to exist on the deceased's death, the market value is clearly nil. The limited interest has run its course and accordingly will have no value.

If the interest has a market value of nil its deemed disposal to the deceased estate can give rise to no capital gain but only a loss. The CGT implications of such a loss are dealt with below.\(^{21}\)

It follows from para 40(1) that if the market value of the limited interest on death is nil, the deceased estate is treated for base cost purposes as having acquired the interest at no cost.

\(\text{(2) The position of the successor}\)

With certain exceptions,\(^{22}\) where an asset is disposed of by a deceased estate to an heir or legatee or trustee of a trust, the deceased estate is deemed by para 40(2) to have disposed of that asset to the heir or legatee or trustee of the trust for proceeds equal to the base cost of the deceased estate in respect of that asset. The heir or legatee or trustee in turn is deemed to have acquired the asset, for base cost purposes, at a cost equal to the deceased estate's base cost.

Paragraph 40(2) clearly applies where the deceased has bare dominium in property. However, where the deceased held, for example, a usufruct, which on death passes to the bare dominium holder, para 40(2) has no application because there is no disposal to 'an heir or legatee . . . or a trustee of a trust'. When the bare dominium holder succeeds to the usufruct this does not involve a disposal by the deceased estate to an heir or legatee, even if the bare dominium holder happens to be an heir or legatee of the deceased estate. Surely what is envisaged in para 40(2) is a distribution of an asset by the executor of a deceased estate to an heir or trustee in terms of the law of testacy or intestacy or to a legatee in terms of the law of testacy, which is not the case here.

If there is no para 40(2) disposal to the bare dominium holder, does this mean that one must still consider a disposal by the deceased to the bare dominium holder other than in terms of para 40(2)? Paragraph 11(1) of the Eighth Schedule provides that a disposal is '... any event, act,

\[^{21}\text{See section VII below.}\]

\[^{22}\text{Para 40(2) does not apply where the heir or legatee is the surviving spouse of the deceased or an approved public benefit organization.}\]
forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset . . . ’. Paragraph 11(1)(b) includes within the meaning of disposal the ‘termination, . . . discharge, relinquishment, . . . [or] expiry . . . of an asset’. There appears to be sufficient scope within the meaning of this wording to conclude that a disposal has been made by the deceased to the bare dominium holder. If so, the next question is, what are the proceeds on disposal? If the bare dominium holder is a connected person in relation to the deceased, then, in terms of para 38(1)(a), the proceeds are equal to the market value of the usufruct at the date of death. It is considered that this disposal is irrelevant for CGT purposes from the deceased’s point of view because a disposal to the deceased estate has already been deemed to have taken place in terms of para 40 and it is unlikely that it could have been intended that two disposals are to be construed as having taken place. But this disposal is relevant from the bare dominium holder’s point of view because in terms of para 38(1)(b) it appears that the bare dominium holder is deemed for base cost purposes to have acquired the usufruct at a cost equal to the market value at the date of the deceased’s death. This brings one back to the problem relating to the meaning of ‘market value’ discussed earlier. If the bare dominium holder is not a connected person in relation to the deceased, then para 38(1) has no application to the disposal and accordingly the usufruct has no cost to the bare dominium holder for base cost purposes.

III THE BEQUEST OF A LIMITED INTEREST

When a deceased has in his/her will split ownership of an asset in the deceased estate into limited interests in that asset and bequeathed these limited interests, the CGT implications thereof require examination. For illustration purposes the example will be used where a deceased owned a block of flats at the date of death and bequeaths the usufruct thereof to X and the bare dominium to Y.

The application of para 40(1) in deeming a disposal of the block of flats by the deceased to the deceased estate at market value raises no difficulties. What does, however, create difficulty is the application of para 40(2). In other words, difficulty is experienced in determining, for base cost purposes, at what cost X and Y are deemed to have acquired their usufruct and bare dominium respectively.

The difficulty arises because the deceased, in bequeathing the usufruct and bare dominium, is not bequeathing the asset referred to in para 40(2), which is the asset which the deceased is deemed in terms of para 40(1) to have disposed of to the deceased estate, namely, full ownership of the

23 See the definition of ‘connected person’ in s 1 of the Act.
block of flats. The assets bequeathed are the usufruct and bare dominium in that block. Therefore, on a strict reading of para 40(2) on its own, it is submitted that para 40(2) has no application in this situation and X and Y are to be treated as having acquired their assets at no cost.

It is of note that X and Y are not connected persons in relation to the deceased estate and accordingly para 38(1) has no application.\(^\text{24}\) Accordingly, an acquisition cost cannot be deemed via para 38(1).

It is unclear whether para 33(1) of the Eighth Schedule, which is headed 'Part-disposals' applies in these circumstances. Paragraph 33(1) provides that:

'where part of an asset is disposed of, the proportion of the base cost attributable to that part disposed of is an amount which bears to the base cost of the entire asset the same proportion as the market value of the part disposed of bears to the market value of the entire asset immediately prior to the disposal'.

Paragraph 33 appears to be aimed at the disposal of ownership of part of an asset and the retention of ownership of the other part, for example, where a person purchases a piece of land and then sells part of it. It is doubtful whether the legislature envisaged para 33 applying to the splitting of ownership into limited interests. An indication that it is not applicable to such a split in a deceased's will is that para 33(1) requires the market value immediately prior to disposal to be taken into account when determining the required apportionment. Paragraph 40(2), on the other hand, clearly requires the market value at the date of death, and not the date of disposal, to be taken into account in determining the base cost of the heirs and legatees.

If para 33(1) is applicable it appears that values would have to be placed on the usufruct and the bare dominium and the market value (either at the date of death, or the date of distribution – this is not clear) of the asset would have to be apportioned between the usufruct and the bare dominium in the ratio that the values of the usufruct and the bare dominium respectively bear to the market value. The issue arises again whether the method for the determination of the values of the usufruct and the bare dominium, as set out in para 31, is applicable. This is discussed above.\(^\text{25}\)

So far the application of para 40(2) to the bequest of a usufruct and bare dominium in an asset has been discussed. It is submitted that similar difficulties present themselves when the deceased creates a \textit{fideicommissum} in his will; for example, he/she bequeaths ownership of an asset to X for

\(^{24}\) The definition of 'connected person' in s 1 of the Act does not deal with 'connected persons' in relation to a deceased estate.

\(^{25}\) See section II above.
X's life and when X dies it is to pass to Y. X is acquiring a fiduciary interest in the asset. For the purposes of para 40(2), X is not acquiring the asset referred to in para 40(1). X is acquiring a different asset, a limited interest like a usufruct. It is to be noted that para 31(1)(d) equates a fiduciary interest with a usufruct which indicates that the same difficulties pertaining to the application of para 40(2) to a bequest of a usufruct, discussed above, apply equally to a bequest of a fiduciary interest. If this is the case, it may well be that X will be treated, for base cost purposes, as having acquired the fiduciary interest at no cost. The anomaly then arises that if there had been no fideicommissum but X had simply been bequeathed the asset, X would have a base cost of the market value referred to in para 40(1), whereas if X only receives a fiduciary interest, X will have no base cost even though the fideicommissum could fall away soon afterwards if Y predeceases X.

IV A LIMITED INTEREST CEASES DURING ONE'S LIFETIME

The issue under this head relates to the situation where Mr X is enjoying, for example, a usufruct for a fixed period, which period expires during his lifetime.

There is no doubt that the lapsing of the usufruct constitutes a disposal for CGT purposes, irrespective of whether the usufruct passes to another person or reverts to the bare dominium holder. Paragraph 11(1), as mentioned above, provides that a disposal is ‘... any event ... or operation of law which results in the ... transfer or extinction of an asset ...’. Also, para 11(1)(b) includes within the meaning of disposal the ‘termination, ... discharge, ... [or] expiry ... of an asset’. The scope of the meaning of ‘disposal’ as indicated by this wording appears wide enough to include the lapsing of a fixed period usufruct.

Accepting that there is a disposal, the next question is: What are the proceeds? As no actual consideration will be received by Mr X, the only circumstances in which proceeds (in excess of nil) can ensue is where para 38 applies. In terms of para 38, if the new usufructuary or the bare dominium holder, as the case may be, is a connected person in relation to Mr X, then the disposal is deemed to be for proceeds equal to the market value of the usufruct at the date of disposal. The new usufructuary or the bare dominium holder, as the case may be, will, in turn, be deemed to have acquired the asset at a cost equal to that market value.

26 A fiduciary interest is also equated with a usufruct for estate duty and donations tax purposes.
27 See the definition of ‘connected person’ in s 1 of the Act.
28 Para 38(1)(a).
29 Para 38(1)(b).
If para 38 is applicable, the question arises as to the determination of this market value. It is submitted that the position is the same as where a person dies and at the date of death was enjoying a usufruct, and the comments made in this regard\(^{30}\) are equally applicable here. The market value of a usufruct on its ceasing must surely be the same whether it ceases because of death or the lapse of time. It is submitted that the market value is nil.\(^{31}\)

V THE DONATION OF A LIMITED INTEREST

What are the CGT consequences of the donation of a limited interest? The donation of an asset is, subject to certain exceptions,\(^{32}\) a disposal for CGT purposes\(^{33}\) and the proceeds are deemed to be the market value of the asset at the date of disposal.\(^{34}\) The donee is in turn deemed, for base cost purposes, to have acquired the asset at that market value.

In the case of a donation of a limited interest in property, how is the market value to be determined? Is it to be valued in terms of para 31(1)(d) if it is a fiduciary, usufructuary or other similar interest in property or para 31(1)(e) if it is property subject to such an interest? Here again the question arises as to whether para 31 applies generally or only in the context of the determination of base cost. This is discussed in section II above.

If para 31 has no application then ‘market value’ will have to be given its ordinary meaning, which means the market value that the asset would fetch in an open market for assets of the same kind. A reasonable method of determining such value would in fact be, it is submitted, the method prescribed in paras 31(1)(d) and 31(1)(e), read with para 31(2). If that is the case, then, in the context of the donation of limited interests, the issue as to whether para 31 is to be applied becomes of academic interest only.

The difference between the market value of the limited interest and the donor’s base cost will result in either a capital gain or loss. How is the donor’s base cost to be determined?

It is possible that the donor may have acquired the limited interest by purchase, inheritance or donation. It is likely, however, that where a limited interest in an asset is donated the donor owns the asset and donates a limited interest therein, and accordingly only such scenario will be dealt with. For illustration purposes the situation will be dealt with where the donor owns an asset, for example a block of flats, and donates a usufruct over the block to Mr X.

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\(^{30}\) See section II above

\(^{31}\) Ibid.

\(^{32}\) See para 38(1) read with para 38(2) and 67.

\(^{33}\) See para 11(1)(a).

\(^{34}\) Para 38(1).
It will be recognized that the asset itself that is being donated, namely the usufruct, is not an asset that the donor acquired. The donor acquired ownership of the block of flats and has created a usufruct over the block which he/she has donated. So there is no actual acquisition cost of the usufruct itself that can be looked to in the determination of its base cost. It follows that the only way in which a base cost could be determined for the limited interest is through the application of para 33 (part-disposals) which, as has already been suggested, may not be applicable to the splitting of an asset into limited interests, as opposed to the disposal of ownership of part of an asset and the retention of ownership of the remainder.

The statement that the usufruct has no base cost unless para 33 is applicable, must be qualified by the fact that the donations tax payable by the donor would be deductible from the market value in determining the capital gain. Where, instead of the usufruct in the block of flats being donated, the bare dominium in the block is donated, the same difficulty arises with regard to the determination of base cost. Again, in the absence of the application of para 33, the bare dominium will have no base cost other than any donations tax arising out of the donation.

Where a usufruct is donated and it constituted an 'interest' in a 'primary residence' the availability of the 'primary residence' exemption arises. This is dealt with under the next heading: 'The sale of a limited interest'.

VI THE SALE OF A LIMITED INTEREST

On the sale of a limited interest the difference between the proceeds realized and the base cost of the limited interest will result in either a capital gain or loss for CGT purposes.

Again, as in the case of a donation of a limited interest, the likely scenario is one in which the seller owns an asset and sells a limited interest therein and accordingly only that scenario will be considered.

In such circumstances it appears that the position is exactly the same as where the limited interest is donated, except that the proceeds are the actual proceeds and, of course, there is no donations tax to be taken into account. The comments regarding the base cost of the limited interest in section V above are accordingly of equal application here.

Of importance in the context of the sale of a limited interest is the availability of the ‘primary residence’ exemption where a limited interest in such property is disposed of. Paragraph 45(1) of the Eighth Schedule provides that: ‘so much of a capital gain or capital loss determined in

35 See section III above.
36 Para 20(1)(c)(vii) read with para 22.
respect of the disposal of the primary residence of [a natural] person or [. . .] special trust as does not exceed R1 million' must be disregarded for CGT purposes.

A 'primary residence' means:

'a residence —
(a) in which a natural person or a special trust holds an interest; and
(b) which that person or a beneficiary of that special trust or a spouse of that person or beneficiary —
(i) ordinarily resides or resided in as his or her main residence; and
(ii) uses or used mainly for domestic purposes.'

An 'interest' as referred to in paragraph (a) of the definition of 'primary residence' means:

'(a) any real or statutory right; or
(b) a share owned directly in a share block company as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980) or a share or interest in a similar entity which is not a resident; or
(c) a right of use or occupation.

But excluding —
(i) a right under a mortgage bond; or
(ii) a right or interest of whatever nature in a trust or an asset of a trust, other than a right of a lessee who is not a connected person in relation to that trust.'

A 'residence' means38 'any structure, including a boat, caravan or mobile home, which is used as a place of residence by a natural person, together with any appurtenance belonging thereto and enjoyed therewith'.

It is clear from the definition of 'interest' that a natural person or a special trust will hold an 'interest' in a primary residence not only through direct ownership but also, inter alia, through the holding of a usufruct or right of habitatio in the primary residence. The right to occupation of trust property is, however, expressly excluded.39

What is disconcerting is that, on a strict reading of para 45(1), the R1 million exclusion only applies if the full ownership of the primary residence itself is disposed of and not if an 'interest' in the primary residence less than full ownership (such as a usufruct or right of habitatio) is

37 Para 44.
38 Ibid.
39 Accordingly if, for example, a person dies and leaves the family home to a trust with a usufruct in favour of his wife and she disposes of the home or dies, the usufruct does not qualify as an 'interest' for the purposes of the primary residence exemption. The deemed disposal or death does not pose a problem if, as it appears (see above) the usufruct has a nil value for CGT purposes.
disposed of. Paragraph 45(1) refers to the disposal of ‘the primary residence’, and not an ‘interest’ in a primary residence, and ‘primary residence’ means ‘...a residence... in which... a... person... holds an interest...’.

This problem arises not only where a limited interest is sold but also where it is donated. It is not an issue where there is a deemed disposal on death if, as appears to be the case, the limited interest has a nil value.  

VII LOSSES ARISING ON THE DISPOSAL OF A LIMITED INTEREST

Generally, when the base cost of an asset exceeds the proceeds on its disposal the resultant loss is available for set-off against the disposer's capital gains in the year of assessment in question.  

However, para 15(c) provides that in the case of any ‘fiduciary, usufructuary or other similar interest the value of which decreases over time’ which is ‘used for purposes other than the carrying on of a trade’, the loss must be disregarded. The same applies to a loss on the disposal of ‘any right or interest of whatever nature to or in’ such interest.

As mentioned earlier, the phrase ‘or other similar interest’ includes, in addition to a right of usus, a right of habitatio and grazing rights, also the right to the income of a trust and the right to occupation of property of a trust. So losses on the disposal of these rights are also subject to the exclusion in para 15(c).

The exclusion in para 15(f) relating to ‘any right or interest of whatever nature to or in’ a fiduciary, usufructuary or similar interest is a little obscure. It is not clear what types of rights or interests the legislature had in mind. Paragraph 15(f) is perhaps an anti-avoidance provision to prevent an attempt at the avoidance of the exclusion in para 15(c) by disposing of, for example, a right to a usufruct instead of the usufruct. Presumably a contractual right (for example, in terms of a redistribution agreement) entitling a person to, for example, a usufruct at some future date, would also qualify. In the case of a real right such as a usufruct, such a right is a ius in personam ad rem acquirendam. Other than contractual rights, it is difficult to discern what was envisaged. Perhaps the reference in para 15(f) to para 15(c) was inserted ex abundanti cautela. It is also not clear how a right or interest referred to in para 15(f) is to be valued.

The exclusion in para 15(c) only operates if the right or interest in question is one ‘the value of which decreases over time’. The implication

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40 See above.
41 Para 6.
42 Para 15(f).
43 See section II (1) above.
44 See CIR v Lazans' Estate 21 SATC 379; Estate Bourke v SIR 41 SATC 131.
of this wording is that it is possible to have a fiduciary, usufructuary or similar interest that does not decrease over time. It is submitted, however, that it is not possible to have such an interest. An interest is held either for life or for a fixed period and in either case its value, as the life or period, as the case may be, runs out, must eventually decrease to nil.

If, however, the words ‘the value of which decreases over time’ envisage an interest which is always decreasing over time, then it is possible to have an interest which does not meet the criterion for exclusion by para 15. This would be the case where the property underlying the interest is increasing to such an extent that the value of the interest is increasing (at least for a time). This may be illustrated by the following example (using the method of calculation set out in para 31(1)(d)):

J holds a usufruct for life at 30 September (acquired ten years earlier at the age of 40 over an asset with a market value then of R5 million). If the value of the asset has not changed (ie is still R5 million), the difference in the value of the usufruct with reference to J’s life expectancy (age next birthday 51), would be as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
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<tbody>
<tr>
<td>Original usufruct value</td>
<td>R4 806 402</td>
</tr>
<tr>
<td>New value</td>
<td>R4 522 278</td>
</tr>
<tr>
<td>Decrease in value</td>
<td>R284 124</td>
</tr>
</tbody>
</table>

If, however, the value of the asset had increased to R8 million, the following would result:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original usufruct value</td>
<td>R4 806 402</td>
</tr>
<tr>
<td>New value</td>
<td>R7 235 645</td>
</tr>
<tr>
<td>Increase in value</td>
<td>R2 429 243</td>
</tr>
</tbody>
</table>

If this is the correct construction to place on the wording, it is arguable that in those instances in which it is uncertain whether the underlying property may or may not increase in value to the necessary extent, the exclusion in para 15(c) cannot apply. The requirement of certainty of a decrease in value dictated by this construction would not be satisfied.

Where the right or interest is held by a juristic person (for example, a company) for ‘life’ (which is unlikely) the determination of whether it is a right or interest the value of which decreases over time, is complicated by the fact that, theoretically, the juristic person can continue ad infinitum.

It is to be noted that para 15(c) uses the word ‘value’ and not ‘market value’. Whether anything turns on the distinction is unclear, other than that it is arguable that the distinction indicates that the valuation does not have to be in accordance with the method prescribed in para 31(1)(d) (the general application of which is, in any event, contentious)45 which is concerned with ‘market value’.

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45 See section II above.
Where the right or interest is used for the purposes of carrying on a trade, para 15(c) has no application. The term 'trade' is defined in s 1 of the Act and has a wide scope of meaning.

The exclusion in para 15(c) applies irrespective of the nature of the person making the disposal that gives rise to the loss. Accordingly, disposals by both natural and juristic persons are included as well as disposals made by trusts and deceased and insolvent estates.46

Paragraph 53 provides that capital gains and losses arising out of the disposal of 'personal-use' assets by a natural person or a special trust47 must be disregarded. A personal-use asset is 'an asset of a natural person or a special trust that is used mainly for purposes other than the carrying on of a trade'. A 'fiduciary, usufructuary or other like interest, the value of which decreases over time' or 'a right or interest of whatever nature to or in' such an interest is expressly excluded from the definition of a 'personal-use' asset.48 Accordingly a capital gain or loss resulting on the disposal of such a right or interest is not prevented from set-off against capital gains by para 53. It also follows that if such right or interest does not decrease in value over time, it qualifies as a personal-use asset and a capital gain or loss on its disposal must be disregarded.

VIII NON-RESIDENTS

As far as the disposal of limited interests in property by non-residents49 is concerned, para 2(1)(b) of the Eighth Schedule provides that the Schedule applies to the disposal by a non-resident of 'any interest or right of whatever nature to or in immovable property' situated in the Republic of South Africa. It appears from this that limited interests in immovable property situated in South Africa such as bare dominium, a usufruct, a fiduciary interest, a usus, a habitatio, grazing rights and the right to occupy immovable property of a trust, are covered.

Paragraph 2(2) provides that:

'an interest in immovable property situated in the Republic includes a direct or indirect interest of at least 20 per cent held by a person (alone or together with any connected person in relation to that person) in the equity share capital of a company or in any other entity, where 80 per cent or more of the value of the net assets of that company or other entity, determined on the market value basis, is, at the time of disposal of shares in that company or interest in that other entity, attributable directly or indirectly to immovable

46 The definition of 'person' in s 1 of the Act includes a trust, a deceased estate and an insolvent estate.
47 A 'special trust' is defined in s 1 of the Act.
48 Para 53(o) and (g).
49 See s 1 of the Act for the definition of a 'resident'.

property situated in the Republic, other than immovable property held by that company or other entity as trading stock.’

It appears that for the purposes of para 2(2), in computing whether 80 per cent or more of the value of the net assets of the company are ‘attributable directly or indirectly to immovable property situated in the Republic’, limited interests in immovable property situated in South Africa and not only full ownership therein must be taken into account. For example, a non-resident holds 20 per cent of the equity share capital in Company X and 80 per cent of the value of Company X’s net assets is attributable to a usufruct in immovable property situated in South Africa. If the non-resident disposes of his/her shares in Company X, the disposal is subject to CGT.

In the application of para 2(2) what is also not clear is whether the provision is only applicable if the non-resident disposes of his/her entire 20 per cent shareholding or whether it is also applicable to the disposal of any part thereof. On a strict interpretation of para 2 it is arguable that the interest referred to in para 2(1)(b)(i) read with para 2(2) is the entire holding.

IX CONCLUSION

An examination of the Eighth Schedule indicates that the CGT implications on the disposal of limited interests in property are clouded in uncertainty. Inept drafting and the apparent failure to take limited interests into account in certain instances has resulted in perplexity and anomalies that are cause for alarm. In the CGT arena, as in most fiscal contexts, the stakes are high and a real need exists for immediate and careful amendments to the Eighth Schedule to eliminate the confusion. In particular, as the article has shown, legislature clarification is called for in relation to the following:

- the applicability of para 31 to the determination of the market value of a limited interest on its disposal;
- the use of ‘Land Bank’ values in the determination of the market value of a limited interest;
- the meaning of ‘fair market value’ in para 31(2);
- the determination of acquisition cost when a person succeeds to a limited interest on the death of the previous holder;
- the determination of acquisition cost when a person inherits a limited interest and the applicability of para 33(1) (Part-disposals) thereto;
- the determination of the base cost of a limited interest where a person owns property and donates or sells a limited interest therein and the applicability of para 33(1) thereto;
• the availability of the R1 million exclusion in relation to the disposal of a limited interest in a primary residence;
• the precise scope of para 15 (c) and (f); and
• the applicability of the Eighth Schedule to the disposal of limited interests by non-residents.