

**MULTIPLE TAXES LEVIED ON DECEASED ESTATES:
A COMPARISON OF THE DETERMINATION OF THE VALUE
AND THE TAXATION OF LIMITED INTERESTS FOR ESTATE
DUTY, CAPITAL GAINS TAX AND VALUE-ADDED TAX**

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of Master of Commerce in Taxation, specialising in South African Taxation.*

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CONTENTS

ABSTRACT	(5)
DEDICATION AND ACKNOWLEDGMENTS	(6)
TABLE OF CONTENTS	(7-11)
GLOSSARY AND LIST OF ABBREVIATIONS	(12)

ABSTRACT

South Africa has one of the highest wealth inequality rates in the world, and there is a dire need for practical methods of redistribution of wealth in South Africa (SA). For this reason, the need for wealth tax in SA is undeniable however the multiple taxes imposed on deceased estates has been the topic of discussions, with many being of the opinion that the taxes imposed on deceased estates are excessive.

The main objective of this research is to discuss the multiple taxes levied on certain limited interests in property, at the event of death. To achieve this objective, the imposition of estate duty (ED), capital gains tax (CGT) and value-added tax (VAT) on usufructuary and fiduciary interests in deceased estates were examined.

In line with the said main objective the taxation and valuation methods of these limited interests for the aforementioned taxes were compared to determine if they are stream-lined and if any relief is provided between taxes. The use of limited interests was found to be an efficient tax planning tool when all factors are taken into account by the testator, however it was found that taxation and valuation methods for these taxes are not stream-lined, and it appears that no interplay exists between taxes. The substantial differences in taxation and valuation methods between taxes results in the same asset being taxed at different values for each tax. This places a heavy administrative burden on the executors of deceased estates and goes against some of the main objectives of a tax system which should be fair, simple and easy to administer.

Due to the complexities involved in the different tax computations of these rights, it was not possible to provide a conclusive answer regarding whether or not taxes imposed on deceased estates are fair or excessive. In conclusion, however, recommendations have been made to align deductions and valuation methods across taxes, in order to bring about transparency which would enable the determination of whether or not the tax burden is excessive and identification of any weaknesses in the tax systems. The alignment could ultimately result in a more efficient, fair and transparent tax system for the multiple taxes which are levied on deceased estates. It could thus address and resolve the concerns regarding the simultaneous levying of these taxes on the same asset at the event of death.

DEDICATION

For Quanita, my precious angel and the joy of my life.

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My immense gratitude is owed first and foremost to my Lord God and saviour, without Whom I would never have been able to complete my studies. I wish to thank my daughter Quanita, as well as my mother and brother, Frances and Edward who has, without waiver, encouraged and supported me with patience and love.

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1. CHAPTER 1	12
1.1 An exordium to the research.....	12
1.1.1 Introduction	12
1.1.2 Wealth inequality in South Africa	12
1.1.3 The efficacy of Estate Duty as a Wealth tax.....	14
1.1.4 Multiple taxes levied upon the incidence of death.....	15
1.1.4 Estate Duty background	16
1.1.5 Capital Gains Tax background	16
1.1 The focus and objectives of the research.....	18
1.2 Limitation of scope.....	19
1.3 Limited interests	19
1.4 Research method	19
1.5 Structure of the report	19
2. CHAPTER 2: LIMITED INTERESTS	21
2.1 Introduction	21
2.2 Property	21
2.3 Rights	22
2.4 Classification of limited interests	22
2.6 Usufructs and other like interests	23
2.6.1 Usufructuary rights	23
2.6.2 Other like interest: usus right	24
2.6.3 Other like interest: habitation right	24
2.7 Fiduciary rights.....	24
2.8 Quasi rights	25
2.9 Value of limited rights for Estate Duty purposes	26
2.9.1 Valuation method	27
2.9.2 Limited interests created – value for the deceased person.....	27
2.9.3 Limited interests ceasing – value for the deceased person	27
2.9.4 Reduction of the value of the ceasing right for the deceased person	28
i. Bequest price paid by bare dominium successor to a usufruct	28
ii. Improvements made to the property by the successor to a ceasing limited interest	28
iii. Succeeding beneficiary is a Public Benefit Organisation or exempt body	28
iv. Reversion of donation	29
2.10 Exception for valuation method of ceasing usufructs:	29
2.10.1 Valuation of ceasing usufructuary right to the succeeding bare dominium holder	29
2.11 Determination of values of the bare dominium right	30
2.11.1 Valuation of bare dominium created or held by deceased	30
2.12 The Commissioner’s adjustment of the value.....	30

2.13	Conclusion and practical points	30
3.	CHAPTER 3: ESTATE DUTY	34
3.1	Introduction	34
3.2	The Estate Duty calculation	34
3.3	Property and deemed property	35
3.4	Value of property	35
3.5	Estate Duty deductions	35
3.5.1	Funeral, tombstone and death bed expenses (Section 4(a))	36
3.5.2	Administration costs (Section 4(c))	36
3.5.3	Costs for requirements of the Master of the High Court or SARS, (Section 4(d))	36
3.5.4	Debts to South African and Foreign creditors (Section 4(b))and Section 4(f)).....	36
3.5.5	Deemed property – valuation of unquoted shares (Section 4(p))	36
3.5.6	Foreign property (Section 4(e)).....	36
3.5.7	Books, pictures, statuary and other works of art (Section 4(o))	36
3.5.8	Improvements made to inherited property by the heir or legatee (Section 4(i))	36
3.5.9	Property accruing to a surviving spouse (Section 4(q)).....	36
3.5.10	Ceasing usufructuary or other like interest created by a pre-deceased spouse (Section 4(m)).....	36
3.5.11	Improvements made by the succeeding beneficiary of a Ceasing Fiduciary, usufructuary or other like interest (Section 4(j))	36
3.5.12	Reversion of limited interest back to the donor (Section 4(g))	36
3.5.13	Donations made to tax exempt or special bodies (Section 4(h)).....	36
3.6	Practical application of deductions for limited interests	36
3.6.1	Property accruing to a surviving spouse (Section 4(q)).....	36
3.6.2	Ceasing usufructuary or other like interest created by a pre-deceased spouse (Section 4(m))	37
3.6.3	Costs for requirements of the Master of the High Court or SARS, (Section 4(d))	37
3.6.4	Improvements made by the succeeding beneficiary of a Ceasing Fiduciary, usufructuary or other like interest (Section 4(j)).....	37
3.6.5	Reversion of limited interest back to the donor (Section 4(g)).....	37
3.6.6	Donations made to tax exempt or special bodies (Section 4(h))	37
3.7	Deduction and limitation for usufructuary rights that do not apply for fiduciary rights	38
3.8	The section 4A Abatement, rebates and credits	38
3.8.1	Section 4A Abatement	38
3.8.2	Successive deaths rebate	39
3.9	The liability for Estate Duty on limited interests	40
3.9.1	Ceasing fiduciary, usufructuary or other like interests	40
3.9.2	Vested right requirement for the ED liability on ceasing rights	40
3.9.3	Unascertained beneficiary	40
3.10	Conclusion	41
4.	CHAPTER 4: CAPITAL GAINS TAX	44
4.1	Introduction	44
4.2	CGT principles and concerns regarding limited interests:	45
a)	General principles	45

b)	Questioned aspects - uncertainties.....	45
i.	Paragraph 33(1).....	46
ii.	Paragraph 31(1).....	46
4.3	An asset	47
4.3.1	Rights	47
4.4	Disposals	47
4.4.1	Exceptions from paragraph 40 disposals	48
a)	Assets disposed of to the surviving spouse.....	48
b)	Bequests to specified exempt or partially exempt bodies	48
4.5	Market value of limited rights at creation	48
4.5.1	Values of usufructuary rights created	50
i.	Usufruct created (not in favour of the surviving spouse)	50
ii.	Usufruct created for surviving spouse	51
4.5.2	Market value of bare dominium right created by a deceased person	52
4.5.3	Market value of fiduciary right created by a deceased person.....	52
4.6	Acquisition cost.....	52
a)	Paragraph 33(1).....	52
4.6.1	Acquisition costs of a usufruct created	53
4.6.2	Acquisition costs of a fiduciary right created	54
4.7	Cessation of limited rights.....	54
4.7.1	Cessation of usufructuary right.....	54
4.7.2	Cessation of usufruct to the bare dominium successor.....	55
a)	Paragraph 38(1) applies for a bare dominium successor	55
a)	Paragraph 38(1) requirements not met for bare dominium successor	57
4.7.3	Cessation of fiduciary right:	57
a)	Cessation of fideicommissum – acquisition costs for the deceased person and deceased estate	57
b)	Cessation of fideicommissum -acquisition costs for the successor	58
4.8	Losses arising from the disposal of a limited interest	58
4.9	Small business exclusion	58
4.9.1	Qualifying criteria for small business exclusion	58
4.9.2	Active business asset.....	59
4.9.3	Non-qualifying business asset	59
4.9.4	Creation and cessation of usufructuary or fiduciary right	59
4.9.5	Limited rights created over a qualifying active business asset	60
4.10	Amendments to the Eighth Schedule and the Income Tax Act.....	60
4.10.1	Section 9HA(1)	60
4.10.2	Acquisition of assets by deceased estate from deceased person Section 25(2)	61
4.10.3	Disposal of assets by deceased estate to heirs or legatees- Section 25(3)(a)	61
4.10.4	Rollover treatment for surviving spouse	61
4.11	Conclusion.....	61
5.	CHAPTER 5: VALUE-ADDED TAX (VAT).....	63
5.1	Introduction	63

5.2	Enterprise	63
5.3	Connected person	63
5.4	Distribution of assets – general principles	64
5.5	VAT implications of bequests	64
5.5.1	Bequests.....	64
5.5.2	Exception – bequests to a connected person (Section 10(4)).....	64
5.5.3	Bequest price paid when Section 10(4) applies	65
5.6	Open market value of limited interests	65
5.7	Fideicommissum	66
5.7.1	Creation of fideicommissum	66
5.7.2	Open market value of fiduciary right	66
5.7.3	Cessation of fideicommissum	66
5.8	Usufruct	67
5.8.1	Creation of a usufruct	67
5.8.2	Open Market value of usufructuary right	67
5.8.3	Cessation of the usufruct	67
5.9	Bare dominium	67
5.9.1	Creation of the bare dominium.....	67
5.9.2	Open Market value of the bare dominium right.....	68
5.9.3	Cessation of usufruct for the benefit of the bare dominium holder.....	68
5.10	Conclusion	69
6.	CHAPTER 6: CONCLUSION	71
6.1	Introduction	71
6.2	The use of limited interests as an estate tax planning tool	71
6.3	Value of limited interests	71
6.3.1	Creation of limited interests	72
a)	Estate Duty.....	72
a)	VAT.....	72
a)	CGT.....	72
	Usufructuary rights created.....	73
6.3.2	Cessation of limited interests.....	73
a)	Estate Duty.....	73
b)	CGT.....	74
i.	Cessation of the usufructuary right.....	74
ii.	Cessation of the fiduciary right	74
c)	VAT.....	74
i.	Cessation of the usufructuary right.....	74
ii.	Cessation of the fiduciary right	75
6.3.3	When a usufruct ceases and succeeds to the bare dominium holder:	75
a)	Estate Duty.....	75
a)	CGT.....	75
a)	VAT.....	75
6.4	Deductions, reductions and acquisition costs	76

a)	CGT	76
i.	Creation of usufructuary rights	76
ii.	Creation of fiduciary rights.....	76
iii.	Ceasing usufructuary right	76
iv.	Ceasing fiduciary right.....	76
b)	VAT	77
c)	Estate Duty	77
6.5	Differences in taxation of limited interests across taxes	77
6.6	Concluding comments	78
7.	CHAPTER 7: COMPARISON TABLE	80
7.1	Introduction	80
7.2	Table - General principles for taxation of limited interests for ED, CGT and VAT	81
	BIBLIOGRAPHY	85
	Articles / Journals	85
	Books.....	85
	Case Law.....	85
	Dissertations.....	85
	Websites.....	85
	Legislation	86
	Reports.....	86

GLOSSARY AND LIST OF ABBREVIATIONS

SARS	South Africa Revenue Service
The Income Tax Act	the Income Tax Act, no 58 of 1962 as amended
The ED Act	the Estate Duty Act, 45 of 1955
The VAT Act	the Value-Added Tax Act, 89 of 1991
The Eighth Schedule	The Eighth Schedule to the Income Tax Act
Resident	A South African resident is a person that is a ‘resident’ as defined in Section 1 of the Income Tax Act
The republic	The republic of South Africa
The Commissioner	The Commissioner for SARS
The DTC	The Davis Tax Committee
Common Law	South African common law is derived from case law. It is found on Roman-Dutch law.
IN	Interpretation note (the interpretation of SARS on the identified topic)
Fiscus	The term used to refer to the South African National Treasury, including SARS
DT	Donations Tax

1. CHAPTER 1

1.1 An exordium to the research

1.1.1 Introduction

Estate duty (ED) is a wealth tax levied on deceased estates, and to understand its purpose as a death tax in South Africa, the reasons for wealth taxes and the state of wealth equality in South Africa will be presented in this chapter. Furthermore in this chapter I provide a brief background of ED and CGT as well as an overview of the research problem.

1.1.2 Wealth inequality in South Africa

Wealth consists of capital assets which are accumulated through preservation between generations, whereas income encompasses monthly income (e.g. salaries and wages), interest and rent accruals as well as profits received by entrepreneurs (DTC, 2015: 12).

The measurement of wealth and income distribution in a country is a challenging task, and to achieve this, reliance is placed on the Gini coefficient. The Gini coefficient is used as a tool to gauge economic inequality, measuring income distribution and wealth distribution amongst a population (Gini Index, n.d). It was explained that “the coefficient ranges from 0 (or 0%) to 1 (or 100%), with 0 representing perfect equality and 1 representing perfect inequality” (Gini Index, n.d).

In a report by the World Bank in South Africa, which was updated on 03 May 2017, it was stated that:

South Africa remains a dual economy with one of the highest inequality rates in the world, perpetuating both inequality and exclusion. According to Statistics South Africa, the Gini coefficient measuring relative wealth reached 0.65 in 2014 based on expenditure data (excluding taxes), and 0.69 based on income data (including salaries, wages, and social grants). The poorest 20% of the South African population consume less than 3% of total expenditure, while the wealthiest 20% consume 65%. (World Bank, 2017)

With regards to wealth inequalities, the Davis Tax Committee (DTC) explained that generally, the main driver of inequality is the returns on capital exceeding the rate of economic growth. The result is an undermining of democratic values as there is a widening of the wealth inequality gap (DTC, 2015:15).

The views of French economist Thomas Piketty were used in the report by the DTC to aid in providing insight on the topic of wealth inequalities. In the report by the DTC (DTC, 2015:17) an explanation of Piketty's statement that "the past will devour the future" was described to mean that the underlying cause of wealth inequality is that "society inexorably tends toward dominance by inherited wealth". In other words, wealthy individuals will easily maintain their status due to substantial capital available to them to generate returns (DTC, 2015:17).

The DTC (2015:8) report stated that:

wealthy individuals could easily reinvest enough of their income to ensure that their wealth and hence their incomes were growing faster than the economy, reinforcing their economic dominance.

It was further explained in the report by the DTC that the skewed income and wealth distribution in South Africa is a direct result of colonialism, slavery and Apartheid which plagued black South Africans. Furthermore it was stated that black people were "deliberately subordinated economically and systematically excluded from participating in the economy" (DTC, 2015:12). Essentially, it appears that the extreme inequality in South Africa came about by deliberate Apartheid policies which prevented black people from accumulating any type of wealth (DTC, 2015:12).

Taking into account the statistics of wealth inequality in South Africa, it is clear that there is a dire need for practical methods of redistribution of wealth. Taxes are one form of achieving redistribution and addressing inequality and although it is not the only available instrument, it is utilised in South Africa for this purpose (DTC, 2015:13).

The taxation of income and capital gains at progressive rates aims to address the inequalities within South Africa, however, this only deals with the income inequality and not wealth inequality (DTC, 2015:34). It is clear that, in order to right the wrongs created by Apartheid law and to heal as a country there is an undeniable need for a wealth tax in South Africa. To allow the continuance of uneven wealth distribution in South Africa, would mean that all efforts in healing the nation from the effects of the former laws will be in vain, and the impact of Apartheid will still dominate South Africa. With this in mind, I concur with the recommendation of the DTC to retain ED as a wealth tax in South Africa (DTC, 2015:34), (DTC, 2016: 20, 33).

1.1.3 The efficacy of Estate Duty as a Wealth tax

Currently, ED and donations tax (DT) are the only 'wealth taxes' levied in South Africa, and both these taxes are levied on assets at the event of death. In addition, capital gains tax (CGT) is also levied on the disposals of capital assets at the event of death (DTC, 2015:33).

In the first Interim Report of the DTC, the relevance of the role of ED to support an equitable and progressive tax system was reviewed as a result of the insubstantial amount of revenue being raised by ED (2015:25). The report by the DTC (2015:32) included discussions on the views expressed by the Katz Commission (1997), which summarised the principle objectives of a tax system to be efficiency, equity, simplicity and transparency. The meaning of these objectives were described as follows:

- Efficiency: The tax system must produce sufficient income for the state, with minimum distortions to the economy (i.e. neutral).
- Equity: All residents must contribute to the fiscus in proportion to their ability to do so. Both horizontal and vertical equity are important.
- Simplicity: As far as possible, taxes should be simple to understand and should be collected in a timely and convenient manner. Compliance costs are thereby minimised.
- Transparency and certainty: The manner in which taxes are collected and the calculation of tax liabilities should be certain. Tax rules and procedures should be transparent and applied consistently.

Measured against these principle objectives, the ED system was found to be :

- Manifestly inefficient
- Displays various aspects that are inequitable. In particular, the wealthy are easily able to plan and implement ED planning mechanisms with liability largely dependent on marital status and class of asset of the estate
- Significantly complex, time consuming and inconvenient
- Lacks transparency in that it encourages the wealthy to create estate planning structure and lacks certainty as it is almost impossible to determine the true tax liability (DTC, 2015:32).

In light of the abovementioned conclusion that was reached by the Katz Commission, the following options were reviewed in the First interim report of the DTC:

1. Repeal the ED Act completely, moving away from the concept of treating death as a taxation event.
Or
2. Amend the ED Act in order to achieve a simpler, more efficient and just system.
Or
3. Replace the present ED system with a new form of wealth taxation (DTC, 2015:33).

A comprehensive review was done by the DTC, of the history of ED, the importance thereof and the implications of the Katz Commission's recommendations.

The recommendations made by the Katz Commission to retain ED as a death tax were taken into account in the report of the DTC (Katz Commission, 1997: 5.8, 14.2) (DTC, 2015:34). The outcome of the First Interim report by the DTC was that the huge disparity of wealth in South Africa didn't justify the repeal of ED without its replacement. It was reported by the DTC, that the considered replacement (being Capital Transfer Tax) presented complexities and a heavy administrative burden, which went against the principles of keeping taxation simple and easy to enforce (DTC, 2015:33).

The DTC concurred with the conclusion reached by the Katz Commission (1997:5.2). which was for the retention of ED, in the absence of a suitable replacement, for the following reasons:

- SA has a marked concentration of wealth
- Although the taxation of income and capital gains is taxed at progressive rates, these address only income inequality and not wealth inequality
- The repeal of ED and DT would raise serious questions of equity in the tax system.

In the alternative to replacing ED, the DTC (DTC, 2015:34) suggested that the underperformance of ED as a contributor of National Revenue suggests leeway for the possible increase in its scope in order to address inequalities.

1.1.4 Multiple taxes levied upon the incidence of death

It is clear that there is a requirement for a wealth tax in South Africa, however, the multiple taxes imposed on deceased estates in South Africa has generated many discussions in the industry, with many experts being of the opinion that the taxes imposed on deceased estates are excessive.

An estate of a South African resident may be comprised of private and business assets at the date of death, resulting in scenarios where property which was used by the deceased person for the purpose of carrying on a trade may be subject to value-added tax (VAT). VAT implications on the selected business assets in a deceased estate will be discussed in Chapter 5 of this research.

The provisions of the ED Act no 45 of 1955 (hereafter referred to as 'the ED Act') aims to levy tax on the transfer of wealth at the event of death. Upon the death of an individual, ED is levied on the dutiable amount of assets in the deceased's estate, which is the total value of the property and deemed property, less allowable deductions and the ED abatement (DTC, 2015:26).

In addition to ED, (and VAT levied on business assets) the death of a South African individual gives rise to CGT implications as a result of the deemed disposal from the deceased person to the deceased estate in terms of para 40(1) of the Eighth schedule to the Income Tax Act no 58 of 1962 as amended (hereafter referred to as 'the Eighth Schedule'), and from the deceased estate to the heirs or legatees in terms of para 40(2) of the Eighth Schedule. Since the introduction of CGT in 2001, concerns have been raised that CGT is a similar tax to ED which is levied on the same assets in an estate, at the same time. Various independent articles and recommendations have been written on this topic, calling for the abolishment of ED, or for the amendments to the CGT framework within the Eighth Schedule in order to relieve the alleged excessive taxation on assets in an estate at the event of death.

The brief overview of the background of ED and CGT is given below in 1.1.4 and 1.1.5.

1.1.4 Estate Duty background

The ED Act, which came into operation in 1955 (1 April), imposed a progressive rate of tax until 1988, after which it became a flat rate of tax. ED was levied at a flat rate of 15% from 1988 to 1996. This rate changed to 25% from 1996 to 2001, at which time the rate was decreased to 20% and remains at 20% to date (DTC, 2015:28).

In order to determine the dutiable amount of an estate, the total assets in an estate which is comprised of property and deemed property, in terms of Section 3 of the ED Act, is reduced by the total liabilities, deductions and the abatement as per the provisions of Section 4 of the ED Act. The ED rate, which is currently 20%, is then applied to the dutiable amount determined. Further reduction of the ED liability is provided, where applicable, in the form of rebates for transfer duty, successive deaths and foreign duties paid (DTC, 2015:28).

1.1.5 Capital Gains Tax background

CGT was introduced on 1 October 2001, as a tax on the disposal of capital assets. In the National Treasury release on CGT in 2001, in a broad overview given of the importance of CGT, the National Treasury stated that the need for CGT was crucial, as its absence

encouraged taxpayers to convert ordinary taxable income into tax free capital gains (National Treasury, 2001:11).

CGT was introduced with an inclusion rate of 25% for individuals resulting in an effective rate from 0% to 10%. In order to reduce the increased tax burden imposed on estates at the event of death, when CGT was introduced, the flat rate of ED was reduced from 25% to 20%, and the abatement provided in Section 4A of the ED Act was increased from 1 March 2006 by R1000 000. In the 2012 tax year the inclusion rate for CGT increased to 33.3% for individuals, making the effective rate 0% to 13.3%, and in 2017 the rate increased to 40% resulting in an effective rate of 16.4%. However no further adjustments to the 20% tax rate for ED was made to provide relief for the increased inclusion rate (DTC, 2015:28), (DTC, 2015:64).

The exclusions and inclusion rates provided within the framework of CGT, makes it clear that CGT is aimed at taxing wealthy taxpayers. However, due to the fact that the event of death is a trigger for CGT, concerns have been raised that CGT is, in principle, a second *wealth tax* being levied on the same assets as ED.

To address these concerns regarding similarities between ED and CGT, a distinction was made between these two taxes by the DTC. In the Second and Final Interim report on ED, the DTC (DTC, 2016:20) explained that CGT is a tax on capital income only and not a type of wealth tax on the net value of assets, as is the case with ED.

The concluding statement by the DTC (2015:56) on this issue was that:

Capital gains taxes are not wealth taxes and are therefore not included in the report. They are taxes on deferred income gains. These taxes do not aim to tax the sole possession or transfer of certain assets, because tax is only due when the possession or transfer of the assets results in the realisation of income. Wealth taxes on the other hand are typified by the fact that the transfer or possession itself is taxed, regardless of whether income is realised.

The concern, however, is that the deeming provisions in the Eighth Schedule to the Income Tax Act provides that the date of death results in deemed disposals from the deceased person to the deceased estate, and from the deceased estate to the beneficiaries. Provisions in the Eighth Schedule results in a neutralisation of the deemed disposal from the deceased estate to the beneficiaries, however, it is the deemed disposal that occurs between the deceased person and the deceased estate that gives rise, in most cases, to a taxable capital gain for the creator

of the right. Effectively, the possession of assets that are not disposed of for gain, in the pure sense, but which is deemed to be disposed of to an estate, will be subject to CGT- irrespective of the fact that there is no realisation of 'income', other than values determined and used as 'proceeds'. This is similar to wealth taxes described by the DTC, as previously stated, which is the taxation of transfer or possession, regardless of whether income is realised.

It seems that the comparison between ED which is levied on the transfer of assets on the one hand, and CGT which is levied on the transfer of assets to a deceased estate on the other, (due to its classification as a deemed disposal event) seems to be too close to justify that the two taxes levied on the same asset are completely different from each other.

In any event, the determination of whether or not the levying of CGT and ED are in fact the same type of tax which is levied on the same assets triggered by the same event (and whether or not one tax should replace the other) is not be a focus area of this research. However, the tax computations for both these taxes will be taken into consideration when looking at the various taxes levied on selected assets in a deceased estate.

1.1 The focus and objectives of the research

The main focus of the research is to discuss the multiple taxes levied on certain limited interests in property at the event of death. In line with the main objective, the research will be conducted with the intention to determine whether or not the various taxing Acts are aligned. The determination will be made after doing a comparison between ED, CGT and VAT, of deductions, taxation and valuation methods relevant for the selected limited interests.

In the process of this research, the following aspects will be addressed and answered:

- the utilisation of limited interests in deceased estates,
- the levying of ED, CGT and VAT on usufructuary and fiduciary rights in deceased estates,
- are valuation methods for limited interests stream-lined for ED, CGT and VAT? and
- does the tax computations (deductions and reductions) for ED, CGT and VAT reflect interplay between the Acts? In other words: are relief measures provided in the ED Act, the Income Tax Act and the VAT Act, to cater for these taxes which are simultaneously levied on the same asset?

1.2 Limitation of scope

As previously stated, to achieve the main objective of this research, the tax implications on the selected property in deceased estates will be analysed and a comparison will be made between the methods of taxation and valuation for ED, CGT and VAT. Deductions, abatements, rebates and exclusions within the provisions of the relevant Acts, relating to the taxation of the said property will be examined.

1.3 Limited interests

The property discussed in this research will be usufructuary and fiduciary rights, which are limited interests that are created over property or deemed property in deceased estates.

The term limited interests refers to fiduciary rights, usufructuary rights and other like interests and, in Chapter 2, a detailed review of the nature of these rights will be provided.

1.4 Research method

The research method will consist of a literature review, and analysis of the relevant provisions of the various Acts where applicable (The ED Act, the Income Tax, the VAT Act), as well as reports, training material, journals, dissertations, books, websites and articles that have been used in this research. The research will be doctrinal, using a theoretical method and will be done in an explanatory and interpretive manner. The relevant information on valuations and taxation for each tax will be analysed and summarised to do a comparison between taxes.

1.5 Structure of the report

In Chapter 1, the history, background information, the limitation of the scope and an overview of the research method is provided. The problems associated with the taxation of limited interests in deceased estates are identified and the intended research is described and stipulated as a research objective.

Limited interests will be discussed in Chapter 2, providing an understanding of its attributes, and purpose. The overview will provide the basic information on the different types of

limited interests, and the method of valuation of the selected rights for ED purposes. In this chapter the utilisation of limited interests as a tax planning tool will be examined.

The ED tax computation will be the main focus of Chapter 3 which will provide a detailed explanation of how the dutiable values for usufructuary and fiduciary rights in deceased estates are determined, focusing on deductions and abatements that are applicable.

In Chapter 4, CGT implications on usufructuary and fiduciary rights in deceased estates will be discussed, focusing on valuation methods and deductions (acquisition costs). The tax implications for the creator of the right (as the deceased person), the holder of the right (as the beneficiary and as the deceased person) and for the deceased estate will be examined. In addition, the small business CGT exclusions will be discussed briefly.

In Chapter 5, an overview will be provided of the VAT implications on the distribution of fiduciary and usufructuary rights over property which formed part of the deceased person's enterprise. The overview will be focused on valuation methods and taxation for the deceased person who created the right and for a deceased person who was a holder of a right.

In Chapter 6, the main differences in valuation methods and the taxation of limited interests for ED, CGT and VAT will be discussed. A conclusion will be reached and comments will be provided in accordance with the research question and the aspects identified in chapter 1.

Chapter 7 will provide a comparison table for the ED, CGT and VAT implications on usufructs and fiduciary rights in deceased estates.

2. CHAPTER 2: LIMITED INTERESTS

2.1 Introduction

All references in this chapter to the terms “ED” and “the ED Act” are to Estate Duty and the Estate Duty Act no 45 of 1955 respectively. References in this chapter to the terms “Section” or “S” are to sections of the ED Act, unless the context indicates otherwise.

Limited rights are essentially the granting of a right of entitlement to property, subject to certain restrictions or conditions which are imposed by the creator of the limited right. The limited interests that are included as property in deceased estates are fiduciary rights, usufructuary rights and other like interests in property, however, this research will be limited to fiduciary and usufructuary rights. In this chapter the characteristics of limited interests and the valuation thereof (for ED purposes) will be examined.

2.2 Property

A limited right constitutes property of a deceased estate in terms of Section 3(2) of the ED Act. As a result, limited interests which entitle the holder to a vested right, and which exists at the date of death of the holder of the right, will form part of the assets in the estate of the deceased person (Meyerowitz, 2010:27), (Stein, 2011:33).

Section 3 (1) and Section 3(2) of the ED Act states the following:

(1) For the purposes of this Act the estate of any person shall consist of all property of that person as at the date of his death and of all property which in accordance with this Act is deemed to be property of that person at that date.

(2) 'Property' means any right in or to property, movable or immovable, corporeal or incorporeal, and includes-

(a) any fiduciary, usufructuary or other like interest in property (including a right to an annuity charged upon property) held by the deceased immediately prior to his death;

(b) any right to an annuity (other than a right to an annuity charged upon any property) enjoyed by the deceased immediately prior to his death which accrued to some other person on the death of the deceased.

It is clear that there are two categories of property in Section 3 of the ED Act, both being rights to property, one of which is ownership rights, and the other being limited rights (Van der Mescht, 2012:45). With the aim of providing an understanding of the characteristics that define the various limited interests that exists, a brief description of what is meant by the term ‘rights’ follows in 2.3 below.

2.3 Rights

A real right is a right to property (an object or a thing), in other words it is the right between a person and a thing, whether corporeal or incorporeal, either in full rights or limited rights to property. When there are restrictions placed on the right to property, the right will be a limited real right (Paul Kasekesner: 2014). Essentially, a real right exists where there is a direct legal connection between the person and the object (Badenhorst, Pienaar & Mostert, 2006:51), hence a limited right created will be a real right to property which has certain restrictions placed on it by the creator of the right.

A servitude is a type of limited interest which is created when a person is given a right to use and enjoy another person's property (Abrahams & Gross Attorneys Notaries Conveyancers). It is a real right which is limited, which cannot be transferred (Badenhorst, Pienaar & Mostert, 2006:338 -339), and which entitles the holder to either use and enjoy another person's property, or it is used to restrict the rights of the owner of the property over which the servitude exists (Badenhorst, Pienaar & Mostert, 2006:321).

2.4 Classification of limited interests

It is submitted that the limited interests under discussion are classified by virtue of the limitations imposed on them, and said classification is crucial for taxation purposes. Generally fiduciary rights have fewer limitations imposed on them than usufructuary rights however, usufructuary rights are subject to certain advantages (a deduction and a limitation of the value) that are not applicable to fiduciary rights (these will be discussed in Chapter 3) (Stein, 2011: 21). The classification of the limited interest will determine the value of the limited interest that is subject to ED and therefore has a direct impact on the ED liability in the deceased estate of the holder of the right.

In order to identify the type of limited interest that exists, a summary of the different characteristics of usufructs, other like interests, fiduciary rights and quasi rights will follow in 2.6, 2.7 and 2.8 below.

2.6 Usufructs and other like interests

2.6.1 Usufructuary rights

The word usufruct originated in the 17th century from the latin words *usus* meaning ‘a use’, and *fructus* meaning ‘an enjoyment’ (English Oxford Living Dictionaries).

A usufruct is a real right, and a personal servitude which is granted to a person for the use and the fruits of a property, of which ownership belongs to another person. The property may be movable or immovable, and may be corporeal or incorporeal (Badenhorst, Pienaar & Mostert, 2006:339). The concept to be understood about a usufructuary right, is that it only entitles a holder of the right to use the property and to enjoy the fruits of a property, but the property will never be owned by the holder of the right (Stein, 2011:21). In other words, ownership of the property is never transferred to the holder of a usufructuary right even during the time of that the right is in existence.

The usufructuary holder has no ownership rights and therefore cannot sell the property over which the right is held (Stein, 2011:21), and it is submitted that the property cannot be bequeathed as the right is a personal servitude (as previously mentioned) which ceases upon the death of the holder or the end of the specified period of the right. However, the right can be disposed of or mortgaged by the usufruct if the bare dominium holder agrees to it (Stein, 2011:21), (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2). The usufructuary right is created with a fixed term determined by the creator of the right (the testator), which is generally either the lifetime of the usufruct or a shorter specified period (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2).

Only the usufruct will be entitled to the use and the fruits of the property during the existence of the usufructuary right and the fruits may be obtained by leasing the right or by using the property over which the right is held to generate fruits (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2).

It is submitted that the bare dominium is only entitled to ownership rights and will not have any entitlement to the use or the fruits of the property while the usufruct is in existence. Furthermore, it is clear that when the usufructuary right finally comes to an end upon expiry of the specified term or the death of the *final* usufructuary holder, the right will succeed to the bare dominium holder of the property who will then enjoy full ownership rights.

It appears that the main characteristics of a usufructuary right is that it is created over property in two parts simultaneously, one part to the owner (bare dominium holder) and one part to the usufruct. The total value of a limited right created must thus be split, for ED purposes, between the usufruct and the bare dominium holder. Accordingly the valuation of the limited interests must be done in terms of Section 5(1)(b) of the ED Act (which is discussed later in this chapter).

2.6.2 Other like interest: usus right

Usufructuary rights and usus rights are similar, in that the rights are granted to the holder thereof who is entitled to the use and to the fruits of the property, however, the minor differences that exists between these two rights places them into their category as rights. They differ in that the usufructuary is entitled to unlimited fruits to use or to trade with, and the holder of a usus right is only entitled to use so much of the fruits that is required for the maintenance of the holder and his or her immediate family. Furthermore, the holder of a usus right cannot sell any of the fruits or lease the right to another person and can therefore never trade with the fruits from the property (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2), (Badenhorst, Pienaar & Mostert, 2016:341).

2.6.3 Other like interest: habitation right

The right of habitation is a right over fixed property, and entitles the holder of the right, with his or her immediate family (and employees), to dwell in the property. Habitation rights are limited only to the use for dwelling purposes, however the right may be leased by the holder of the right (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2). Effectively, the right is technically restricted to non-trade usage (private dwelling), however, the right may still be leased to provide fruits for the holder of the right.

2.7 Fiduciary rights

A fideicommissum is a real limited right which is created when ownership of the property is transferred to a person (the fiduciary), on the condition that ownership will pass to a second person (the fideicommissary) upon the happening of a specified event (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2), (Stein 2011:20).

The main characteristic of a fiduciary right is that ownership of the property is transferred to the holder of the right, who then becomes the sole owner of the property (with limited rights) for the duration of the right. Essentially, it is submitted that the fideicommissum will always be transferred to one person at a time, and the fiduciary will thus own the property and have rights to use the property and to enjoy the fruits of the property as he or she sees fit, for the duration of the right. However, the fiduciary is not usually entitled to bequeath, sell or encumber the property (e.g. with a mortgage) (Stein 2011:20).

There is no common law limit on the duration of a fideicommissum, but the courts have limited the duration to four generations (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2). However, in respect of immovable property, the duration of a fideicommissum is limited to two successive fideicommissaries in terms of the statutory limitations imposed by the Immovable Property Act 94 of 1965 (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2).

There will always be more than one person with rights to the fideicommissum property, however, the fiduciary rights granted over a property will not exist simultaneously. The rights of the fideicommissary are not certain but are contingent upon the happening of an event and will only become vested upon the happening of that event (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2). The right will automatically be forfeited, should the succeeding fideicommissary pass away before the specified event transpires for the right to pass to that fideicommissary. In this scenario, the fiduciary right will succeed to the next fideicommissary when the fiduciary right ceases or the existing fiduciary will become the unlimited full owner of the property (as the last determined fiduciary holder) if no further fideicommissary exists (Davis, Jooste & Beneke, 2017: Chap 2: para 2.3.2.2).

It is submitted that the reason for this (with reference to Van der Mescht's statement to this effect), is that the right to the property does not vest in a successor until the happening of the specified event, and the fiduciary holder is the already the legal owner since the property was transferred and vests in the fiduciary when the right is created (Van der Mescht, 2012:47).

2.8 *Quasi rights*

Another type of limited interest is a quasi right which is defined in the Oxford dictionary to mean 'seemingly, appears to be or apparently, but not really'. Its latin origin means 'as if,

almost', in other words when a right appears to be a servitude or is a servitude to some degree, it is referred to as a quasi servitude (Van der Mescht, 2012:97).

An example of a quasi right, is the right to mine (mineral rights), which differs from a personal servitude in that the right is transferable from one person to another by the person holding such right (Badenhorst, Pienaar & Mostert, 2006:51).

It is clear that the restrictions that are placed on the right determine the type of limited interest that exists, and thus the basis for determining the taxable value of the right created. While it is important to determine the type of right that exists the next step, which is of equal importance, is the determination of the value of the right for taxation purposes. The methods used to determine the value of limited interests are provided in Section 5(1)(b) of the ED Act, and an examination and discussion of these methods follows below in 2.9, 2.10 and 2.11.

2.9 Value of limited rights for Estate Duty purposes

Generally the price realised by way of a bona fide sale of property in a deceased estate must be taken into account for ED purposes (SARS Tax Academy Research and Production Team, 2010:162). Section 5 of the ED Act provides the valuation methods for various different properties, however, if no specific method is provided, the market value of the property at the date of death is used for ED purposes (in terms of Section 5(1)(g)) (SARS Tax Academy Research and Production Team, 2010:161-162).

The valuation methods used to determine the value of limited interests are provided in Section 5(1)(b) and applies equally to usufructs, other like interests and fiduciary rights (Stein, 2011:24). The valuations are subject to approval by the Commissioner in terms of Section 9(1) of the ED Act which states the following:

The Commissioner shall assess the duty payable under this Act and shall in respect of every estate liable for the duty issue a notice of assessment to the executor or, if there is no executor, to any person liable for the duty.

(1A) If the Commissioner, prior to the issue of a notice of assessment in terms of Sub Section (1)-

(a) is dissatisfied with any value at which any property is shown in any return; or

(b) is of the opinion that the amount claimed to represent the dutiable amount as disclosed in any return, does not represent the correct dutiable amount,

the Commissioner shall adjust such value or amount and determine the dutiable amount upon which such assessment shall be raised accordingly.

2.9.1 Valuation method

Section 5(1)(b) essentially works on the principle of capitalising the annual value of the full right of enjoyment of the property over which the interest is held, for the period of enjoyment. This annual value is determined by applying the prescribed yield factor of 12% to the fair market value of the full ownership of the property (Stein, 2011:24). It must be noted that the fair market value must be determined by means of a sworn appraisal by an impartial person and is subject to the approval by the Commissioner (Stein, 2011:25). The determined annual value is then capitalised over the life expectancy of the succeeding beneficiary, or the specified shorter period.

2.9.2 Limited interests created – value for the deceased person

It is submitted that the creation of a limited right over property owned by a deceased person, does not change the nature of the property in the estate of the deceased person who created the right. The deceased is the owner of the full property and the normal ED implications apply to the full fair market value of the property that was not sold, as provided in Section 5(1)(g) of the ED Act. However, it is submitted that, in certain circumstances it will be required to determine the value of the limited right created, in order to allocate an ED deduction. An example of this is when a limited interest created for the benefit of a surviving spouse, the fair market value of the property must be split between the bare dominium and usufruct portions bequeathed, in order to determine how much of the fair market value will be subject to the surviving spouse deduction for the creator of the right.

2.9.3 Limited interests ceasing – value for the deceased person

When the holder of a limited right dies, the limited right ceases and the value of the ceasing right is determined in terms of Section 5(1)(b), and is based on the value that the right will have for the person receiving it. The capitalisation is thus done on the life expectation factor of the succeeding beneficiary, or the shorter period of entitlement for that succeeding beneficiary (if specified) (Stein, 2011:24). The factors relevant to the gender and age (Table A), and to the period of entitlement (Table B) of the beneficiary, are presented in Tables A and B provided in the ED Act in terms of the Section 29 regulations (Stein, 2011:24).

2.9.4 Reduction of the value of the ceasing right for the deceased person

Once the value of the ceasing right is determined, the value of the rights so determined may be reduced when there was a bequest price paid (Stein, 2011:24), improvements made to the property, a donation of the right to a Public Benefit Organisation or an exempt body, and when there is a reversed donation (Stein, 2011: 27-28).

The abovementioned scenarios in which the value of the rights may be reduced are described below (at 2.9.4 (i)-(iv)).

i. Bequest price paid by bare dominium successor to a usufruct

The first proviso to Section 5(1)(b) of the ED Act provides for the reduction of a bequest price paid by the bare dominium successor of a usufructuary right, and interest calculated at 6% from the date of payment till the date cession of the right. This amount will reduce the value determined of the ceasing usufructuary right (Stein, 2011:24).

ii. Improvements made to the property by the successor to a ceasing limited interest

The amount by which the value of the property has been enhanced as a result of improvements that were made by the succeeding beneficiary of the ceasing limited interest will qualify as a deduction from the value determined of the ceasing limited right.

The requirements are that the deceased person must have given consent during his or her lifetime for improvements to be made to the property by the person who will benefit when the limited right ceases (the successor) and the improvements must have been made during the lifetime of the deceased (Stein, 2011:24, 70). The deduction is allowable in terms of Section 4(j) of the ED Act.

The factors which relates to aspects of the original bequest, that may result in the reduction of the determined value of the limited interest in terms of Section 4 of the ED Act are:

iii. Succeeding beneficiary is a Public Benefit Organisation or exempt body

When the succeeding beneficiary of the limited interest is a qualifying Public Benefit Organisation (hereafter referred to as 'PBO'), or an exempt body or institution in South Africa, then the ceasing value of the limited right will be exempt from ED, as a deduction of

the full value determined is allowable in terms of Section 4(h) of the ED Act (Stein, 2011:24, 69). It is submitted that, in this way, the creator of the limited interest can ensure that the value of the ceasing right will not be subject to ED in the estate of the holder of the right.

iv. Reversion of donation

A deduction is allowed from the value determined of the ceasing right, when a limited interest which was created and donated by a person (the donor) to a beneficiary (the donee), reverts back to the donor upon the death of the donee. Effectively, when a fiduciary or usufructuary right ceases and the successor to the right is the creator of the right, then a deduction of the full value of the ceasing right in the estate of the donee, will be allowed in the estate of the fiduciary or usufructuary holder, in terms of Section 4(g) of the ED Act (Stein, 2011:24), (Stein, 2011:76).

2.10 Exception for valuation method of ceasing usufructs:

The method used to determine the value of a ceasing usufructuary interest will differ when the full ownership of the property over which the usufruct interest is held will succeed to the bare dominium holder and not to a succeeding usufructuary beneficiary. In this scenario there is a limitation on the value of ceasing usufruct (Stein, 2011:32).

2.10.1 Valuation of ceasing usufructuary right to the succeeding bare dominium holder

The value for the deceased holder of the usufruct is determined by the capitalisation of the annual value of the right of enjoyment of the property in which the interest is held at 12%, over the life expectancy factor of the person who is entitled to receive the benefit (this will be the life expectancy of the bare dominium holder) (Stein, 2011:32). The value determined will be limited, in terms of the second proviso to Section 5(1)(b) of the ED Act, to the difference between the fair market value of the property at the date of death of the usufructuary holder, and the value of the bare dominium at the date that the limited right was created. It must be noted that the normal calculation rules must be applied to determine the value of bare dominium at acquisition (i.e.: the fair market value of the asset less the value of the usufructuary interest). Furthermore, for the purposes of this limitation, if the bare dominium interest was acquired before 1 April 1977, the previous yield percentage of 6% must be applied in calculating the value of the bare dominium right (Stein, 2011:32).

2.11 Determination of values of the bare dominium right

2.11.1 Valuation of bare dominium created or held by deceased

A bare dominium interest is the right of ownership of an asset which is subject to a limited interest. The bare dominium interest forms part of property in the estate of the holder thereof, in terms of Section 3(1) of the ED Act (Stein, 2011:30). For the determination of the value of the bare dominium interest held by a deceased, the fair market value of the full ownership of the property must be determined. This value must be reduced by the value of the limited interest (usufructuary right) determined (Stein, 2011:30). Where there are successive usufructs on the property, the life expectancy factor used to determine the value of the bare dominium right, will be the greater factor determined for the successive usufructs to the property (Stein, 2011:31).

2.12 The Commissioner's adjustment of the value

The annual value and the tables of life expectancy and present value came into operation on 1 April 1977, at which time the pre-determined yield changed from 6% to 12% (Stein, 2011:32). Should the Commissioner be dissatisfied with the value or if the Commissioner is persuaded that the property cannot reasonably be expected to produce an annual yield of 12% of its fair market value, the Commissioner may fix an annual value that is considered to be reasonable (Stein, 2011:25). An adjustment can be made by the Commissioner to reduce the prescribed 12% yield, but not to increase it (Stein, 2011:25).

2.13 Conclusion and practical points

The valuation methods discussed in this chapter determine the value of the limited right which is included in the deceased estate, before taking into account allowable ED deductions. These valuation methods present complexities in practical application which is briefly discussed below:

Valuation of limited interests

The value of a limited interest for ED purposes, (as previously indicated in this chapter) is determined over the life expectancy of the person receiving the benefit or succeeding to it (or, if the interest is to be enjoyed by the successor for a lesser period, then over the lesser

period). There are two tables provided in the ED Act for this purpose: the first table (Table A) has pre-determined factors based on age and gender of a natural person and the second table (Table B) has pre-determined factors for capitalisation over a period (Stein, 2011:24).

Valuation Tables – how they work

It appears that the factors provided in Table A presents the anticipated period of enjoyment of the benefits. In other words the older the successor is, the less the amount of years will be left for the successor to enjoy the benefits of the right. Effectively, the pre-determined factor will be lower if the successor is older and the value of a ceasing right will thus be less. The same principle applies to Table B, which effectively increases the factor for every increased year of entitlement, and reduces the factor for every reduced year of entitlement.

In essence, Table A provides that the older the succeeding beneficiary is, the smaller the value of the usufruct will be for the holder of the limited interest (in other words, there will be a smaller value for ED purposes). The said determined usufructuary value is subtracted from the full fair market value of the property to determine the bare dominium value, thus the older the usufruct is, the bigger the bare dominium value will be (Davis, Jooste & Beneke, 2017: Chap 12: para 12.2).

Life expectancy factor

Table A provides a factor based on the gender and age of the beneficiary. Effectively when a succeeding beneficiary to a ceasing right is entitled to the benefit of the right for his or her life time, the value of the ceasing right is determined using the life expectancy factor from Table A for the beneficiary. In the scenario that the beneficiary is responsible for the ED liability attributable to the ceasing limited right (which is discussed in Chapter 3), the liability is paid on the value of the limited interest which was capitalised over his or her life expectancy (Davis, Jooste & Beneke, 2017: Chap 12: para 12.2). The negative aspect to this, is when the beneficiary dies in a shorter period than the pre-determined life expectancy, in which case the beneficiary would have paid in advance for a benefit that he or she never enjoyed (Davis, Jooste & Beneke, 2017: Chap 12: para12.4).

However, it is submitted that a rebate for successive deaths may be applicable in this case if the beneficiary dies within ten years after the ceasing right devolved upon him or her (discussion on this rebate follows in Chapter 3). Furthermore, the ED liability attributable to

the ceasing right in the estate of the next succeeding beneficiary will be recoverable, in most cases, by the executor from said next succeeding beneficiary in terms of Sections 11 and 12 of the ED Act (discussion on the ED liability attributable to limited interests follows in Chapter 3)

The efficacy of the utilisation of limited rights

It is submitted that one of the main reasons for the use of limited interests is to provide for the care of loved ones of a deceased person and to safeguard assets of the deceased testator. It is thus important that the testator understands the tax implications for all beneficiaries of the right as the provisions the ED Act places the ED liability resulting from the cessation of a limited interest in the hands of the succeeding beneficiary (Section 11(a)(i) of the ED Act), (Davis, Jooste & Beneke, 2017: Chap 12: para 12.2).

The efficacy of the utilisation of a limited right depends on the testator and whether or not the tax implications for all the beneficiaries have carefully been considered and properly provided for.

Effective tax planning: successful utilisation of limited interest

In circumstances where proper consideration and planning was practiced, the use of limited interests may serve its purpose as an effective tax planning tool and reduce, postpone or avoid the ED liability for the deceased estate of the testator and for the beneficiaries of the limited right. With that said, it must be borne in mind that each person is entitled to arrange his affairs so as to obtain the best tax benefit within the parameters of the law, and that tax planning or avoidance is therefore not illegal. This concept is a well-established one, and in the case of *Duke of Westminster v IRC*, Lord Tomlin stated the following:

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be (De Koker & Williams, 2017: chap 19: para 19.1).

Tax planning however, is not the focus of this research, hence discussions have merely scratched the surface in respect of the factors that require consideration when utilising limited interests as a tax planning tool. Of-course it must be noted that CGT and VAT which may be chargeable on a limited interests will also require consideration by the testator who creates the limited interest over property. Essentially, the testator is within his or her rights to ensure

that the tax implications are understood and to plan accordingly in order to ensure the most beneficial utilisation of limited interests in his or her deceased estate.

Concluding comments

Once the value of the limited interests in a deceased estate has been determined, the deductions provided in Section 4 of the ED Act must be taken into account to determine the dutiable value of a said interest. While some of these deductions have been mentioned in this chapter, the full ED tax computation will be examined and the deductions relevant for this research topic will be discussed in Chapter 3.

3. CHAPTER 3: ESTATE DUTY

3.1 Introduction

All references to “ED” and “the ED Act” are to Estate Duty and the Estate Duty Act no 45 of 1955. All references to the terms “Sections” or “S” in this chapter refers to sections of the ED Act unless the context indicates otherwise.

The identifying characteristics and the method used to determine the value of limited interest for ED purposes were discussed in Chapter 2. The value determined for the limited interest is reduced for ED purposes, by taking into account allowable deductions provided in the ED Act. In this chapter the ED tax computation will be examined, and the relevant deductions and rebates will be discussed.

3.2 The Estate Duty calculation

In terms of Section 2 of the ED Act, ED is levied on property owned by a South African resident which is situated in or out of South Africa, as well as property owned by non-residents which are situated in the republic (SARS Tax Academy Research and Production Team, 2010:15). ED is a tax on the transfer of wealth from one person to another at the event of death (as discussed in Chapter 1).

The process followed to determine the ED liability is that the total value of property and deemed property is first determined, after which certain deductions are allowed to determine the net value of the estate. The ED abatement will then reduce the net value of the estate resulting in the dutiable amount to which the ED rate of 20% is applied (Stein, 2011:2). Once the liability is determined, a transfer duty deduction, foreign death duties deduction (subject to any double taxation agreement in place) and a successive death rebate will be allowed, if applicable (Stein, 2011:2).

3.3 Property and deemed property

As previously stated, the first step in determining the ED liability in a deceased estate is to determine the value of property in the estate. The total value of the property and deemed property in an estate is determined in terms of Section 5 of the ED Act (as discussed in Chapter 2).

3.4 Value of property

Generally, for ED purposes, either the disposal value (the price realised upon disposal) or the fair market value of the property will be the value that is included in a deceased estate in terms of Section 5(1)(a) and Section 5(1)(g) respectively. The value of limited interests, however, is determined in terms of Section 5(1)(b) of the ED Act (SARS Tax Academy Research and Production Team, 2010:13). The valuation methods provided in Section 5(1)(b) to determine the value of limited interests have been discussed in Chapter 2 and will not be repeated in this chapter.

3.5 Estate Duty deductions

Once the value of property is determined, the next step in the ED calculation is the deduction of expenses from the total value of property in a deceased estate. All the ED deductions in Section 4 will be mentioned and certain points on practical application, which are relevant to this research topic, will be discussed. Deductions are allowable in terms of Section 4 of the ED Act for the following:

- 3.5.1 *Funeral, tombstone and death bed expenses (Section 4(a))*
- 3.5.2 *Administration costs (Section 4(c))*
- 3.5.3 *Costs for requirements of the Master of the High Court or SARS, (Section 4(d))*
- 3.5.4 *Debts to South African and Foreign creditors (Section 4(b))and Section 4(f))*
- 3.5.5 *Deemed property – valuation of unquoted shares (Section 4(p))*
- 3.5.6 *Foreign property (Section 4(e))*
- 3.5.7 *Books, pictures, statuary and other works of art (Section 4(o))*
- 3.5.8 *Improvements made to inherited property by the heir or legatee (Section 4(i))*
- 3.5.9 *Property accruing to a surviving spouse (Section 4(q))*
- 3.5.10 *Ceasing usufructuary or other like interest created by a pre-deceased spouse (Section 4(m))*
- 3.5.11 *Improvements made by the succeeding beneficiary of a Ceasing Fiduciary, usufructuary or other like interest (Section 4(j))*
- 3.5.12 *Reversion of limited interest back to the donor (Section 4(g))*
- 3.5.13 *Donations made to tax exempt or special bodies (Section 4(h))*

3.6 *Practical application of deductions for limited interests*

3.6.1 *Property accruing to a surviving spouse (Section 4(q))*

This deduction is allowable for property accruing to a surviving spouse, provided that the definition of ‘surviving spouse’ in Section 1 is complied with and that the value of the property was not already deductible in terms of Section 4 of the ED Act (Stein 2011:71). It is clear that the surviving spouse deduction will apply to the portion of a limited interest (bare dominium, usufruct or fiduciary interest) that is bequeathed to a surviving spouse when a limited right is created. Effectively, it appears that property owned by a person in a spousal relationship, will only be subject to ED in the estate of one of the spouses if all the relevant criteria are met.

3.6.2 Ceasing usufructuary or other like interest created by a pre-deceased spouse (Section 4(m))

The Section 4(m) deduction is allowable when the deceased person who is the surviving spouse of a previously deceased person, had inherited a limited interest over property from said pre-deceased spouse. The deduction applies if the pre-deceased spouse did not qualify for the Section 4(q) deduction (Stein 2011:82). If the Section 4(q) deduction was allowable in the estate of the first dying spouse, irrespective of whether or not it was claimed, the Section 4(m) deduction will not be allowable in the estate of the surviving spouse (Stein, 2011:82).

It must be noted that the Section 4(m) deduction is only applicable to usufructs and other like interests and not to fiduciary assets. Effectively, when a pre-deceased spouse fails to qualify for the surviving spouse deduction, the creation of a usufruct, as opposed to a fiduciary right, will ensure that the surviving spouse is able to claim the unclaimed deduction and avoid an ED liability on the bequest. It appears that if a fiduciary right is created by the first dying spouse in this scenario, the surviving spouse deduction will be lost to both spouses as the Section 4(m) deduction will not apply.

3.6.3 Costs for requirements of the Master of the High Court or SARS, (Section 4(d))

It must be noted that the Section 4(d) deduction of valuation fees paid upon the cessation of a fiduciary, usufructuary or other like interest are deductible even though the valuation fees are recoverable from the succeeding beneficiary (Stein, 2011: 66).

3.6.4 Improvements made by the succeeding beneficiary of a Ceasing Fiduciary, usufructuary or other like interest (Section 4(j))

Practical application of this deduction was discussed in Chapter 2 and will not be repeated.

3.6.5 Reversion of limited interest back to the donor (Section 4(g))

Practical application of this deduction was discussed in Chapter 2 and will not be repeated.

3.6.6 Donations made to tax exempt or special bodies (Section 4(h))

Practical application of this deduction was discussed in Chapter 2 and will not be repeated.

3.7 Deduction and limitation for usufructuary rights that do not apply for fiduciary rights

As previously discussed, the ED deduction that applies to usufructuary rights but not to fiduciary rights, in terms of Section 4(m) of the ED Act (as previously discussed in 3.6.2 above), is the deduction which is allowed against the value of the ceasing right for a usufruct who is the surviving spouse of a pre-deceased person. If the requirements are met, the value of the ceasing usufructuary right will be fully deductible (Stein, 2011:75).

In addition, as previously discussed, the limitation provided of the value determined of a ceasing usufructuary right that succeeds to the bare dominium holder, in terms of the second proviso to Section 5(1)(b), does not apply to fiduciary rights (Stein, 2011:32). The value of a ceasing right for the bare dominium successor will thus be less than the value of the ceasing fiduciary right for a final fideicommissary successor, unless the value of the property substantially increased between the two deaths (Davis, Jooste & Beneke, 2017: chap 12: para 12.2).

3.8 The section 4A Abatement, rebates and credits

3.8.1 Section 4A Abatement

Once all deductions are taken into account, the net value of property in the estate is reduced by the abatement provided in Section 4A of the ED Act (hereafter referred to as the Section 4A abatement). The current abatement amount is R3 500 000 for the deceased individual, and surviving spouses will be entitled to any portion of the abatement that was un-used by the pre-deceased spouse. The increased benefit for the surviving spouse is not effected by the type of marriage or by how the property and deemed property was dealt with in the estate of the first dying spouse (Surtees, 2009). It seems that the Section 4A abatement thus ensures that only the estates of wealthy individuals will be subject to ED, and that married people enjoy additional relief from ED. After allowing the Section 4A abatement, and applying the ED rate to the dutiable estate, the following rebates and credits may reduce the ED liability:

- rebate for transfer duty,
- successive Deaths rebate, and
- foreign death duties paid (Stein 2011:85-86).

3.8.2 *Successive deaths rebate*

When a deceased dies within ten years after a first-dying person, and property that was dutiable in the estate of the first-dying person is also dutiable in the estate of the second-dying person, the successive deaths rebate comes into operation. The rebate is allowed for the portion of the ED liability that was attributable to the property in the estate of the first-dying person provided that the liability was borne by the second-dying person (Stein 2011:86). The rebate is allowed at 100% of the duty attributable to the asset in the estate of the first dying if the second person dies within two years of the first dying, and the allowable rebate is less by 20% for every following two year period, up to a maximum of ten years. In other words, the rebate will be:

80% if the second person dies within three to four years after the death of the first person,
or 60% if the second person dies within five to six years after the death of the first person,
or 40% if the second person dies within seven to eight years after the death of the first person,
or 20% if the second person dies within nine to ten years after the death of the first person)
(Stein, 2011:87).

The usufructuary, bare dominium and the fiduciary beneficiaries are legatees by virtue of the bequest made by the creator of the right over property owned by the deceased, in terms of a last Will and Testament (Will). It is clear that the ED liability of property on which a limited right was created (not held) is the responsibility of the executor of the deceased estate, as legatees are not responsible for the ED liability on property in an estate (Stein, 2011:90), (Section 3(2), Section 11(a)(ii)). The ED liability attributable to the limited right is thus not recoverable from the legatees of the limited interests created and it appears that the successive death rebate would therefore not be available upon the death of the first usufructuary, bare dominium or fiduciary holders. The successive deaths rebate may, however, be considered for ceasing limited interests which devolves upon a succeeding beneficiary from the holder of a right, as the ED liability attributable to the ceasing right will be recoverable by the executor from the succeeding beneficiary in terms of Section 11(a)(i) (This is discussed in more detail in the conclusion to this chapter).

3.9 The liability for Estate Duty on limited interests

3.9.1 Ceasing fiduciary, usufructuary or other like interests

In terms of Section 12, the executor of an estate is always primarily responsible for the ED liability, but his responsibility will never exceed the total value of available assets in the estate (Stein, 2011:93). The ED liability on certain property will however be recoverable, from the beneficiaries of the property by the executor in terms of Section 11(a)(i) of the ED Act.

Section 11(a)(i) of the ED Act provides that the ED liability on ceasing limited interests will be the recoverable from the beneficiary, and states the following:

The person liable for the duty shall be-

(a) where duty is levied on property of the deceased which falls under subsection (2) of section *three-*

(i) as to any property referred to in paragraph (a) or (b) of that subsection, the person to whom any advantage accrues by the death of the deceased.

Effectively, the ED liability in respect of the ceasing limited interest, (and any associated expenses) will be the liability of the person to whom the benefit accrues (as a vested right) (Stein, 2011:93).

3.9.2 Vested right requirement for the ED liability on ceasing rights

Vesting of a right is not a requirement for the imposition of ED when the limited right ceases, however, the ED liability will not be recoverable from the succeeding beneficiary's if he or she only has a contingent right to the property (Stein, 2011:94). A succeeding beneficiary who has a vested right to the limited interest, but will only receive the benefits at a future date will still be responsible for the ED liability as the right is vested even though it is delayed (Stein, 2011:94). The successor to usufructuary and fiduciary rights are both vested at the time that the right ceases, and the ED liability on the ceasing usufructuary or fiduciary right is therefore recoverable by the executor, from succeeding beneficiary of the right.

3.9.3 Unascertained beneficiary

In the instance that the beneficiary is unascertained, the liability of ED will stay with the executor, and may only be recovered from the beneficiary once the beneficiary is determined (Stein, 2011:94).

3.10 Conclusion

Estate Duty deductions

In this chapter, the deductions provided in Section 4 of the ED Act were identified, and those deductions that impact limited interests were discussed. One of the principles that was identified from this chapter is that the ED liability on property will be subject to tax in the deceased estate of one person at a time (within the specified period limitations and reducing percentages for successive deaths). Another principle that was identified in this chapter is that the person responsible for the ED liability (in respect of limited rights) is the person to whom the vested benefit of the limited interest accrues (except when that beneficiary is a legatee of the right).

Practical application points for limited interests

The deductions available in Section 4 of the ED Act, are taken into account after the value of the limited interests are determined in terms of Section 5(1)(b) of the ED Act. Certain deductions will reduce the value determined of limited interests in deceased estates (as discussed above) in instances when:

- there is a reversion of a limited interest back to the donor (Section 4(g)),
- when the Section 4(q) deduction was not allowable in the estate of the pre-deceased spouse of the deceased holder of the usufruct or other like interest (Section 4(m)), and
- when improvements were made to the limited right property during the lifetime of the deceased by the succeeding beneficiary (Section 4(j)).

Practical application - Successive deaths rebates for ceasing limited interests

It is submitted that due to the nature of limited interests, the holder of a fiduciary or usufructuary right cannot bequeath the right, and the right will devolve upon the succeeding beneficiary by virtue of the bequest made by the creator of the right. For this reason, the succeeding beneficiary of the right is not a legatee in respect of the ceasing right, and the ED liability that is attributable to the ceasing right is therefore recoverable by the executor from the succeeding beneficiary in terms of Section 11(a)(i) and Section 12 of the ED Act.

Effectively it appears that a successive deaths rebate must be considered when a deceased person holds a usufructuary or fiduciary right which ceases, when said ceasing limited right devolved upon the deceased person within ten years prior to the date of his or her death. The

first step is to determine if the ED liability attributable to the ceasing right in the first dying's estate, was borne by the deceased person as the successor to the right, in which case a successive deaths rebate will apply. The rebate is allowed even though the ED liability for the ceasing right is recoverable from the succeeding beneficiary of the right (Stein, 2011:91).

Practical application – Section 4(h) deduction

In terms of Section 4(h) of the ED Act a deduction is allowed of the total value of the property that accrues to certain Income Tax exempt and other specified bodies, by virtue of the donation of that property by the deceased. This applies when the creator of the right bequeaths the property to a succeeding beneficiary or the succeeding bare dominium holder that is a PBO or qualifying exempt body. In other words, a donation made to a qualifying body as the bare dominium holder of a limited interest, will entitle the holder of the right (when it ceases) to deduct the total value of the ceasing interest, even though the bequest was technically not made by the limited interest holder but by the pre-deceased creator of the limited interest. This is because the right will succeed to an exempt body which is the bare dominium holder of a ceasing usufruct or the final successor to a fideicommissum. (Stein, 2011: 69)

The purpose of Estate Duty as a wealth tax, and the main objectives of a tax system

With reference to the discussions in Chapter 1, the levying of ED is one of the methods used to address wealth inequalities in South Africa. It is therefore understandable that the ED provisions allow a generous abatement and various deductions with the aim to tax wealthy individuals. However, as previously stated, wealthy individuals are generally of the means to devise effective tax planning schemes in order to avoid or reduce the ED liability on property in their deceased estates. With that said the DTC's report (2015:32) presented the conclusion by the Katz Commission, which stated that the main objectives of a tax system were not achieved by ED as it failed in efficiency, equity, simplicity and transparency.

Irrespective of the substantial deductions, abatements and the rebate provided in the ED Act, it is submitted that the question of the excessive tax remains relevant in respect of the multiple taxes levied simultaneously on the same property in a deceased estate. In other words, the tax system applied to deceased, estates across all taxes, requires evaluation against the main objectives of a tax system.

Thus far, the valuation and taxation of usufructs and fiduciary rights in deceased estates for ED purposes has been examined (in Chapter 2 and 3 respectively), and in the next chapter (Chapter 4) the CGT implications on said rights will be reviewed for comparison purposes.

4. CHAPTER 4: CAPITAL GAINS TAX

4.1 Introduction

All references to the terms ‘paragraph’, ‘para’ or ‘paras’ in this chapter, are in respect of the Eighth Schedule to the Income Tax Act unless otherwise stated. All references to the terms “Section” or “S” referred to in this chapter are in respect of the Income Tax Act no. 58 of 1962 as amended, unless otherwise stated.

From 1 March 2016, Section 9HA and the amended Section 25 applies to deceased estates of individuals who died on and after 1 March 2016. This research is conducted based on the provisions of para 40 of the Eighth Schedule to the Income Tax Act, which applies to all deceased estates with a date of death preceding 1 March 2016 and which are not yet wound up or finalised. Brief comments on Section 9HA and Section 25 is provided in this chapter (at 4.10), to the extent that it applies to usufructuary and fiduciary rights.

As previously stated when an individual dies, both ED and CGT may become payable on assets held by the deceased person. ED is a wealth tax imposed on the dutiable amount of the deceased estate, irrespective of whether or not income is realised. CGT was described in the report by the DTC (2015:56), to be a tax on capital income or, in the case of deceased estates, on deemed disposals made by the deceased person and by the deceased estate (Davis, Jooste & Beneke, 2017: chap 2A: para 2A.1).

In terms of para 40, a deceased person is deemed to have disposed of all his or her assets to the deceased estate at the date of death (McAllister, 2015:542), (McAllister, 2017:599).

The principle is that the provisions of the Eighth Schedule will apply if there is an asset and a disposal as defined in the Eighth Schedule, meaning that CGT will be applicable on assets in deceased estates by virtue of the deemed disposal rule in para 40 (Davis, Jooste & Beneke, 2017: chap 2A: para 2A.4A). The same principles apply in respect of Section 9HA and Section 25 for deceased estates with a date of death from 1 March 2016.

This research will be conducted on the CGT implications of usufructuary and fiduciary rights in deceased estates, and as a starting point the relevant principles, concerns and definitions will be discussed in 4.2, 4.3 and 4.4 that follows.

4.2 CGT principles and concerns regarding limited interests:

a) General principles

Paragraphs 40(1) and 40(2), deals with deemed disposals at the event of death by the deceased person and the deceased estate respectively. Paragraph 40(1) provides that the deceased person disposes of all his or her assets (with certain exceptions) to the deceased estate at the date of death. Said para provides that the proceeds for the limited right created, which is deemed to be disposed of by the deceased person, will be the market value of the limited right at the date of death (McAllister, 2015:542). Paragraph 40(1) provides that the market value determined, which is used as the proceeds for the deceased person, will be the acquisition costs for the deceased estate. In terms of para 40(2) the said acquisition costs of the deceased estate will be the proceeds for the disposal from of the limited right by the deceased estate to the heirs or legatees, resulting in a tax neutral effect for the deceased estate (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2) (McAllister, 2015:542).

The problem however, is that para 40 deals with disposals of the full ownership of assets and does not cater for part disposals (Jooste & Roeleveld, 2002:91). The disposal of a limited right to a surviving spouse is not a disposal of the full ownership of an asset, but the part disposal of an asset.

b) Questioned aspects - uncertainties

The creation of a usufruct by a testator is a part disposal of an asset, and it is submitted that the part disposal will be made by either the deceased person or the deceased estate when a right is created, depending on whether or not the surviving spouse is the usufruct.

Essentially, when a limited right is created for a surviving spouse, para 40(1) cannot apply to the deceased person as there is a part disposal of an asset to the surviving spouse and to the deceased estate. However, para 40(2) will apply to the deceased estate for the disposal of the limited right to the heir or legatee.

It is apparent that, in the instance that a deceased person creates a limited right for persons other than a surviving spouse, the full ownership of the asset is disposed of by the deceased person to the deceased estate, hence para 40(1) will apply to the deceased person. In this scenario the deceased estate makes a part disposal to the bare dominium and usufructuary

heirs or legatees, to which para 40(2) cannot apply for purposes of determining the acquisition costs of said heirs or legatees.

It is submitted that the result of a part disposal being made, is that para 33(1) is utilised to determine either the acquisition costs for the heirs or legatees, or to determine the split between the base cost of the deceased person between the components of the right (McAllister, 2015:701).

Furthermore, para 31(1) is utilised to determine the market value of the components to the usufructuary right created (Jooste & Roeleveld, 2002:87).

i. Paragraph 33(1)

There is uncertainty the application of para 33 to determine the acquisition costs of the usufruct and the bare dominium holders of the usufructuary right created, and the splitting of the base cost of the deceased person between the components of the usufructuary right.

Upon strict interpretation of para 33(1) it is unclear as to whether or not said para is being correctly applied to the deemed part disposal of limited interests at the event of death (Jooste & Roeleveld, 2002:92). Discussions on this issue will follow later in this chapter, however, this research is continued on the assumption that para 33(1) is correctly used to determine the acquisition costs in the above mentioned scenarios.

ii. Paragraph 31(1)

Paragraph 31(1) is found under the base cost chapter in the Eighth Schedule, but is being utilised to determine the market value of limited interests, hence the correctness of its application for limited interests is uncertain (Jooste & Roeleveld, 2002:87). This research is continued on the assumption that para 31(1) is correctly utilised to determine the market value of limited rights in deceased estates.

It must be noted that Section 9HA (1) which is effective from 1 March 2016 provides that para 31(1) must be applied to determine the market value for limited rights, and has therefore cleared up the questions relating to the use of said para in this context.

The four key definitions which are the basic building blocks of determining a capital gain or loss, are 'asset', 'disposal', 'proceeds' and 'base cost' (McAllister, 2015:28). These terms will form the basis of the discussions in this chapter (in 4.3, 4.4, 4.5 and 4.6 that follows).

4.3 An asset

The first step to evaluating the CGT consequences triggered at the event of death, is to determine if any of the property of the deceased constitutes ‘assets’, and if so then the value of the asset must be determined. An asset includes property of whatever nature and any right or interest to or in such property, as defined in para 1, which states that:

“Asset” includes—

- (a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
- (b) a right or interest of whatever nature to or in such property (McAllister, 2015:35).

4.3.1 Rights

Fiduciary and usufructuary rights are real rights over property and constitute assets for CGT purposes. The characteristics of these rights has been discussed in Chapter 2 and it will therefore not be repeated in this chapter.

4.4 Disposals

Once it is determined that the property disposed of or deemed to be disposed of is an ‘asset’ as defined, the next step is to determine if there is a disposal. Disposals are dealt with in para 11 which covers any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset. There are, however, certain disposals which are excluded and deemed to *not* be disposed of irrespective of para 40 and para 11.

Paragraph 40 of the ED Act states that:

- (1) A deceased person must be treated as having disposed of his or her assets, other than-
 - (a) assets transferred to the surviving spouse of that deceased person as contemplated in paragraph 67
 - (2) (a);
 - (b) assets bequeathed to an approved public benefit organisation as contemplated in paragraph 62;.....to his or her deceased estate for proceeds equal to the market value of those assets at the date of that person's death, and the deceased estate must be treated as having acquired those assets at a cost equal to that market value, which cost must be treated as an amount of expenditure actually incurred and paid for the purposes of paragraph 20 (1) (a).

- (2) where an asset is disposed of by a deceased estate to an heir or legatee ...or a trustee of a trust-
 - (a) the deceased estate must be treated as having disposed of that asset for proceeds equal to the base cost of the deceased estate in respect of that asset; and
 - (b) the heir, legatee or trustee must be treated as having acquired that asset at a cost equal to the base cost of the deceased estate in respect of that asset, which cost must be treated as an amount of expenditure actually incurred and paid for the purposes of paragraph 20 (1)(a).

4.4.1 Exceptions from paragraph 40 disposals

a) Assets disposed of to the surviving spouse

Assets disposed of by the deceased, to a surviving spouse (that is a resident of South Africa) are subject to roll-over treatment (in terms of para 67(2)(a)) and are not deemed to be disposed of to the deceased estate in terms of para 40(1)(a). The surviving spouse inherits the base cost and all aspects of the history of the asset (date of acquisition and usage) and there is no deemed disposal by the deceased person. Effectively, the provision defers taxation of the asset from the deceased person to the surviving spouse until he or she passes away (McAllister, 2015:543).

b) Bequests to specified exempt or partially exempt bodies

Paragraph 62 provides that assets which are bequeathed to a qualifying body are not deemed to be disposed of by the deceased person to a deceased estate. Any capital gain or loss determined in respect of an asset bequeathed (not sold in order to make a cash bequest) to a qualifying body must be disregarded (McAllister, 2015:543).

It appears that usufructuary and fiduciary rights that are not disposed of at date of death to a surviving spouse (resident) or to qualifying exempt bodies, will constitute deemed disposals for CGT purposes in terms of para 40(1).

4.5 Market value of limited rights at creation

The method of valuation to be used to determine the market value of limited interests in deceased estates is not provided in para 40, and the Eighth Schedule does not define the term 'market value' in para 1. As a result, the market value of the limited right is determined in terms of para 31(1) (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

Paragraph 31(1)(d) is found under the base cost chapter in the Eighth Schedule and states that the market value of a limited right 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 (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

It is submitted that the main difference in the valuation of limited rights between ED and CGT is that the life expectation factor (or other specified period) of the next succeeding beneficiary is used in determination of the value of the right for ED purposes. Whereas, for CGT purposes, the value is determined using the life expectation factor (or the shorter period if specified) of the person to whom the interest *was* granted (the person who is enjoying the interest as the current holder of the right).

Paragraph 31(2) indicates that the annual value referred to in para 31(1)(d) is the fair market value of the full ownership of the property (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2). Experts on the issue have indicated that the definition of market value for donations tax purposes is applicable for the provision of para 31(2). The said definition provides that the market value is the price obtainable between willing buyers and sellers at arms-length in an open market (Jooste & Roeleveld, 2002:87).

The market value of the limited right that is deemed to be disposed of by the deceased person to the deceased estate will become the acquisition costs of the deceased estate as per para 40(1).

It must be noted that the disposal by a deceased person who creates the limited right is a disposal of a property at the full market value to the deceased estate (not a disposal of a limited interest held). The determination of the market value of the limited right created is only required if the deceased person makes a part disposal in which case the full market value must be split between the components of the right (as reflected in the practical examples provided in the CGT comprehensive guide).

In other words, when a deceased person creates a usufruct for a surviving spouse, in determining the amount subject to a rollover, para 31(1)(d) is applied (using the factor for the period of enjoyment of the usufruct/the surviving spouse who is the person to whom the benefit was granted and will be the first and current holder of the right) (McAllister, 2015:702-710). In this scenario para 31(1)(e) will apply to determine the amount that is deemed to be disposed of by the deceased person to the deceased estate.

4.5.1 Values of usufructuary rights created

For clarification purposes, the determination of the proceeds and of the acquisition costs of usufructuary rights created will be discussed under this heading.

In terms of para 40(1) when a usufructuary right is created by the deceased person, there is a deemed disposal of the asset that was owned (not a limited right) to the deceased estate, and there will be a deemed disposal from the deceased estate to the heirs or legatees (McAllister, 2015:701). However, when the usufruct is created for the surviving spouse there is a part disposal of the property from the deceased person to the deceased estate, and a part disposal of the property from the deceased person to the surviving spouse (which is a rollover for CGT purposes)(McAllister, 2015:701).

The proceeds amount determined for the deceased person who creates a usufructuary right will be the acquisition costs for the deceased estate. The said proceeds will either be the full market value (if it is not a part disposal of the property by the deceased person to the deceased estate) (McAllister, 2015:701) or it will be determined in terms of para 31(1) (if it is a part disposal of the property to the deceased estate) (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

i. Usufruct created (not in favour of the surviving spouse)

When the deceased person creates a usufruct (for persons other than the surviving spouse), the asset is disposed of to the deceased estate at the full market value (full disposal), and the deceased estate makes a disposal of the asset to the two heirs or legatees of the right (part disposal) (McAllister, 2015:701).

The deceased person in this instance will be subject to para 40(1), with the result that the full market value will be the proceeds for the deemed disposal of the property to the deceased estate (McAllister, 2015:701) and it is submitted that the total base cost of the deceased estate will be deducted from this proceeds.

The deceased estate acquires the property at the full market value (which was the determined proceeds for the deceased person) in terms of para 40(1), and disposes of it for the same value to the heirs or legatees resulting in a tax neutral effect for the deceased estate.

However para 40(2) cannot apply to the part disposal from the deceased estate to the heirs or legatees, and the allocation of the acquisition costs of the deceased estate between the heirs or legatees is thus determined in terms of para 33(1) (McAllister, 2015:701).

ii. Usufruct created for surviving spouse

When the deceased person creates a usufruct for the surviving spouse, a part disposal is made by the deceased person (i.e.: a disposal to the surviving spouse and a disposal to the deceased estate) (McAllister, 2015:701). In this instance the market value of the usufruct bequest to the surviving spouse is determined, in terms of para 31(1)(d), in order to determine the amount subject to a rollover for the deceased person (McAllister, 2015:701), (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

The deceased person is deemed to dispose of the bare dominium to the deceased estate (McAllister, 2015:701), for which the proceeds is determined in terms of para 31(1)(e) (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2). The deceased person's base cost must be apportioned between the components of the right created and is done in terms of para 33(1) (McAllister, 2015:701). Effectively, the deceased person will deduct the base cost attributable to the bare dominium interest from the bare dominium proceeds (market value) determined.

The deceased estate will acquire the bare dominium right from the deceased person at the determined market value of the bare dominium right (in terms of para 31(1)(e)) (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2). The said acquisition costs of the deceased estate will also be the proceeds for the disposal from the deceased estate to the heir or legatee resulting in a tax neutral effect for the deceased estate. The heir or legatee acquires the right at the same acquisition cost determined for the deceased estate (McAllister, 2015:702-710).

4.5.2 Market value of bare dominium right created by a deceased person

Paragraph 31(1)(e) provides that the market value of the bare dominium portion of any property which is subject to a limited interest 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)
(Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

4.5.3 Market value of fiduciary right created by a deceased person

The deceased person who creates the fiduciary right is deemed to dispose of the full market value of the property, in terms of para 40(1), and deducts the total base cost to determine the CGT liability (McAllister, 2015:711-712).

4.6 Acquisition cost

a) Paragraph 33(1)

As previously stated when a limited right is created (and neither of the beneficiaries of the right is the surviving spouse), there is disposal by the deceased person to the deceased estate, and a part disposal by the deceased estate to the heirs or legatees. Effectively, if para 40(2) cannot be applied to the part disposal to the heirs or legatees and no other provision exists to determine acquisition costs for the heirs or legatees, then there will be no acquisition costs for the rights obtained by virtue of the part disposal from the deceased estate to the heirs and legatees (Jooste & Roeleveld, 2002:92).

The base cost provision dealing with acquisition costs for part disposals is para 33(1) which states 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.

Based on the definition it appears that para 33(1) is applicable when a portion of the bare dominium ownership over property is disposed of and a portion of the ownership is retained hence its application to deemed disposals involving limited interests is not clear. Furthermore, it must be noted that para 33(1) refers to the date of 'disposal' and not the 'date of death', which gives rise to further questions regarding its application to limited interest deemed to be disposed of at the event of death (Davis, Jooste & Beneke, 2017: chap12:para12.7.3).

On the issue of part disposals, J Roeleveld (2012:156) stated that:

It is submitted that paragraph 33 of the Eighth Schedule should be amended to ensure that if a usufruct and bare dominium are created on death, the bare dominium holder and the usufructuary can each claim a deduction of a proportion of the base cost on future disposal. Currently the inheritor of the usufruct has no base cost as the full market value exists on date of death and at that point there is no part disposal. The deceased had full ownership at the market value of the property at the date of death and it is this same market value that flows through to the heir in terms of paragraph 40 (disposals to and from deceased estate). The heir is the bare dominium holder who then has a base cost (paragraphs 20 and 40) of the full market value from the date of death. Although the usufructuary is also an heir there is no mechanism to allow such person to have a base cost in terms of paragraph 40 (see further below). Currently it appears that paragraph 33, which deals with part disposals, can apply in this situation but on a strict reading of the legislation it does not apply and should therefore be amended.

D McAllister (2015:701) for SARS stated that:

When a usufruct is granted there will be a part-disposal of the asset with the result that para 33(1) must be applied for the purpose of allocating the base cost of the asset to the part disposed of (the usufruct) and the part retained (the bare *dominium*)

When the testator directs that a usufruct is to be created on his or her death and neither the usufruct nor the bare *dominium* in the asset are bequeathed to a surviving spouse, there will be a disposal of the full ownership in the asset to the deceased estate ... and the executor will dispose of the usufruct to the usufructuary and the bare *dominium* to the bare *dominium* holder. The disposal by the executor will require a part-disposal calculation on behalf of the deceased estate under para 33(1). A portion of the estate's base cost will be allocated to the usufructuary, while the balance, representing the bare *dominium*, will either be allocated to an heir or legatee.

As previously stated, in light of the above it appears that the application of para 33(1) is an accepted practice which applies to apportion:

- the acquisition costs attributable to the heirs or legatees when a limited right is created for beneficiaries other than the surviving spouse (Jooste & Roeleveld, 2002:92), and
- the total base cost of the deceased person, between the components of the limited right created, when the surviving spouse is one of the beneficiaries of the limited right (McAllister, 2015:701).

4.6.1 *Acquisition costs of a usufruct created*

When a usufruct is created there is a part disposal of property either by the deceased person or by the deceased estate. Accordingly the acquisition costs related to the part disposal, for either the deceased person or for the heirs and legatees to the right will be subject to apportionment between the components of the limited right. The apportionment of the acquisition costs is determined in terms of para 33(1) (McAllister, 2015:701)

4.6.2 Acquisition costs of a fiduciary right created

As previously stated, the deceased person who creates the fiduciary right is deemed to dispose of the full market value for the property to the deceased estate (McAllister, 2015:711-712). However a fideicommissum over property is a part disposal to which paras 40(1) and 40(2) technically does not apply (for the disposal to the fiduciary from the deceased estate) (Davis, Jooste & Beneke, 2017: chap12: para12.7.3). It appears, however, that in practice para 40(1) and 40 (2) is applied to determine the acquisition costs for the deceased estate and the fiduciary heir or legatee. The deceased person thus disposes of the property at the full market value determined at date of death and the deceased estate will acquire and dispose of it at the same value. The heirs or legatees acquires the fiduciary right from the deceased estate at a value determined in terms of para 31(1)(d) (McAllister, 2015:711-712).

4.7 Cessation of limited rights

4.7.1 Cessation of usufructuary right

The usufructuary right which was held by a deceased person cannot be bequeathed due to its characteristics and limitations, and the succeeding beneficiary is therefore not an heir or legatee of the deceased person in respect of the limited right. Paragraph 40(2) refers to disposals to heirs and legatees and therefore cannot apply to determine the acquisition costs of the succeeding beneficiary of the ceasing right (Davis, Jooste & Beneke, 2017: chap12:para 12.7.2).

It follows that para 40(1) and para 40(2) read with para 31(1)(d) cannot be applied to determine the market value for the deceased person or the acquisition costs of the deceased estate and the succeeding beneficiaries when a usufruct ceases (Davis, Jooste & Beneke, 2017: chap12:para 12.7.2). The deceased person therefore disposes of the right for nil proceeds and the deceased estate and beneficiaries acquires the right at nil acquisition costs (Roeleveld, 2012:90).

On this issue, D McAllister (2015:702) (for SARS) referred to the case *Union Government v De Kock* , in which CJ Innes stated that:

For a life usufruct in favour of a single individual does not "pass" to anyone upon the death of the holder. It is terminated by that event. It is a personal servitude which ceases to exist at the death of the usufructuary. The benefit which accrues to the *dominus* arises not because the right of user has passed to him but because his property has been released from the burdens of the servitude.

It appears that the deemed disposal of the ceasing usufruct by the deceased person to the deceased estate will give rise to a capital loss (if the deceased person was the first usufruct to the right), as the deceased usufructuary holder will have acquisition costs (as determined in terms of para 31(1) or para 33(1) at creation of the right) but no proceeds will be determinable for the ceasing right. However, the succeeding beneficiaries to ceasing usufructs will not have a capital gain or loss when the right ceases for them. The reason for this is that no acquisition costs would have been determinable for the successor when the right of a former usufructuary holder had *ceased* for his or her benefit, and no proceeds are determinable when the right ceases in said successor's hands (as indicated above).

4.7.2 Cessation of usufruct to the bare dominium successor

To determine the acquisition costs of the bare dominium successor to a ceasing usufruct, para 38(1) may be utilised provided that the criteria of this provision are met. It is important to note that para 38(1) may only be used to determine the acquisition cost for the bare dominium successor to a ceasing usufruct, and has no application to determine the value of the ceasing usufructuary right for the deceased person or the acquisition costs for the deceased estate (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

Paragraph 38(1) of the Eighth Schedule states that:

where a person disposed of an asset by means of a donation or for a consideration not measurable in money or to a person who is a connected person in relation to that person for a consideration which does not reflect an arm's length price-

- (a) the person who disposed of that asset must be treated as having disposed of that asset for an amount received or accrued equal to the market value of that asset as at the date of that disposal; and
- (b) the person who acquired that asset must be treated as having acquired that asset at a cost equal to that market value, which cost must be treated as an amount of expenditure actually incurred and paid for the purposes of paragraph 20 (1) (a).

It is clear that application of para 38(1) is dependent on whether or not the succeeding beneficiary is a connected person.

a) Paragraph 38(1) applies for a bare dominium successor

Acquisition costs are determinable for the bare dominium successor who is a connected person to the deceased person if the requirements of para 38(1)(b) are met.

It is submitted that para 38(1)(b) is used to determine a step-up base cost for the succeeding bare dominium beneficiary of a usufruct who is a connected person to the deceased person,

and if the property was donated, or disposed of to the said beneficiary for no consideration or for a consideration that does not reflect an arms-length transaction.

It is important point to note that it appears that the opinion of D McAllister (2015:704) (for SARS) is that para 38(1) does not apply to determine a base cost for the succeeding bare dominium beneficiary when a usufructuary right ceases. It was stated that para 38(1) only applies when there is a disposal from and to a person which is not the case when a limited right ceases, and that para 38 will apply when the usufruct sells the right to the bare dominium holder. He further indicates that the acquisition costs for the succeeding bare dominium holder of a ceasing limited interest will always be nil (McAllister, 2015:704).

On this issue, in Issue 5 of the Comprehensive Guide to CGT, D McAllister (2015:704) stated the following:

Upon expiry of a usufruct para 38 will not operate to deem any proceeds to be received by the usufructuary, nor will the bare dominium holder obtain a step-up in base cost... On the death of the usufructuary the bare dominium holder cannot acquire what he or she already owns... an expired usufruct has a market value of nil in the hands of the usufructuary. Once the usufruct expires there is nothing to pass on... The expiry of the usufruct is a one-sided disposal.

The concern however, is that para 31(1) or 33(1) was applied to determine the portion of the acquisition costs for the bare dominium heir or legatee when the limited right is created (McAllister, 2015:701), (McAllister, 2015:545). Effectively, the bare dominium holder is entitled to only the acquisition cost that bears reference to the value determined for the bare dominium portion of the right. It appears that failure to apply para 38(1) when the full right becomes the property of the bare dominium holder upon cessation of the usufruct, results in the scenario where the bare dominium holder has full ownership but is only entitled to a portion of the acquisition costs. Effectively, the utilisation of a usufructuary right as a tax planning tool would be to the detriment of the bare dominium holder.

Jooste and Roeleveld stated that para 38(1) is applicable when determining the base cost of a connected bare dominium successor (Jooste & Roeleveld, 2002:92) and the same position is taken in the Silke as reflected in Chapter 12, (chapter 12 was based on the article from Jooste & Roeleveld) (Davis, Jooste & Beneke, 2017: chap12: para 12.17.2).

In light of the above, this research is continued on the assumption that para 38(1) is applicable to determine a step-up base cost for the bare dominium successor to a ceasing usufruct.

a) Paragraph 38(1) requirements not met for bare dominium successor

If para 38(1) does not apply when the bare dominium holder is the successor to a ceasing right, the acquisition costs for the bare dominium successor will be at no value. As a result, when the bare dominium holder subsequently disposes of the asset, only the original acquisition cost determined upon creation of the limited right (in terms of para 33(1)) will be allowed (Davis, Jooste & Beneke, 2017: chap12:para 12.7.2). It is submitted that the bare dominium holder will therefore have a bigger capital gain if he or she disposes of an asset, which was subject to a usufruct for a person that is not a connected person to him or her, as para 38(1)(b) will not be considered and a step-up base cost will not be determinable when said usufructuary right comes to an end.

4.7.3 Cessation of fiduciary right:

a) Cessation of fideicommissum – acquisition costs for the deceased person and deceased estate

There will be no proceeds value for the deceased fiduciary or fideicommissary upon the cessation of the right which was held by the deceased person and which succeeds to a fideicommissary, as the right merely ceases to exist upon its cession (McAllister, 2015:711-712). It is clear that the deemed disposal of the ceasing right to the deceased estate will be at no value which will be the acquisition cost for the deceased estate, and the deceased fiduciary holder will always have a CGT loss upon cession of the right. The reason for the capital loss is that acquisition costs for both the fiduciary holder and the succeeding fideicommissaries are determinable in terms of para 31(1)(d) upon creation of the right and upon cessation of the right by the previous holder thereof (as discussed below) (McAllister, 2015:711-712). It follows that these acquisition costs will be deductible from nil proceeds when the right held by the deceased person ceases, which will effectively result in a capital loss for the deceased person.

b) Cessation of fideicommissum -acquisition costs for the successor

As discussed above, the acquisition costs for the succeeding fideicommissary is determined in terms of para 31(1)(d) (if the successor is not the final fideicommissary) and if the successor is the final fideicommissary, it is determined in terms of para 31(1)(e). Paragraph 31(1)(e) provides that the value of the right for the final fideicommissary is the amount by which the market value of the full ownership of the property, at the time of the original bequest, exceeds the value of that fiduciary right determined (in terms of para 31(1)(d)) for the previous fiduciary holder(s) (Davis, Jooste & Beneke, 2017: chap12:para12.7.3), (McAllister, 2015:711-712).

4.8 Losses arising from the disposal of a limited interest

Paragraph 15(c) provides that a CGT loss must be disregarded in respect of a “fiduciary, usufructuary or other similar interest, the value of which decreases over time”, that was “used for purposes other than the carrying on of a trade” (Davis, Jooste & Beneke, 2017: chap12: para 12.7.7). Paragraph 15(c) applies, irrespective of the nature of the person making the disposal (Davis, Jooste & Beneke, 2017: chap12: para 12.7.7). Essentially, a CGT loss resulting from the cessation of a usufructuary or fiduciary right will be allowed to be set off against other capital gains in that same tax year, provided that the right was utilised by the holder for the purposes of carrying on a trade.

4.9 Small business exclusion

The deemed disposal by the deceased person when a limited right is created, or when a limited right ceases, must be considered for small business relief if the property disposed of qualifies as an active business asset.

4.9.1 Qualifying criteria for small business exclusion

A business will be considered to be a ‘small business’ when the market value of all the business assets at the date of death (deemed disposal date) does not exceed ten million (McAllister, 2017:460). In terms of para 57(2) only a natural person may disregard a capital gain under the relief provided for a small business that is disposing of an ‘active business asset’, if the asset:

had been held for a continuous period of at least five years before the disposal contemplated; and that natural person had been substantially involved in the operations of the business of that small business during that period; and natural person had attained the age of fifty five years or the disposal was in consequence of ill-health, other infirmity, superannuation or death (McAllister, 2017,461).

Effectively, a deemed disposal at the event of death qualifies as a disposal for purposes of para 57(2), and the small business relief will apply if all the criteria are met.

4.9.2 Active business asset

The first step would thus be to determine if there is an asset, which is defined in para 57(1) as follows:

- (a) an asset which constitutes immovable property, to the extent that it is used for business purposes; or
- (b) an asset (other than immovable property) used or held wholly and exclusively for business purposes (McAllister, 2017,460).

4.9.3 Non-qualifying business asset

The definition of asset excludes:

- (i) a financial instrument; and
- (ii) an asset held in the course of carrying on a business mainly to derive any income in the form of an annuity, rental income, a foreign exchange gain or royalty or any income of a similar nature; (McAllister, 2017:460).

4.9.4 Creation and cessation of usufructuary or fiduciary right

In the case of the creation of a limited right over property which was used for business purposes, the small business relief may apply and must be considered. It is submitted that the situation is different for limited rights ceasing, as para 40(2) and para 31(1)(d) technically has no application, as previously discussed, and the ceasing usufructuary and fiduciary rights which comes to an end will therefore have no proceeds value for the deceased person (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2) (Roeleveld, 2012:90).

It therefore appears that the small business relief will not be relevant for the deemed disposal of the ceasing limited right which comes to an end and has no value to the deceased person upon cessation.

4.9.5 Limited rights created over a qualifying active business asset

Provided that all the requirements are met, the total capital gain resulting for the deemed disposal of qualifying active business assets by a deceased person, must be disregarded to the maximum of R1.8 million in terms of para 57(3). The small business exclusion of R1.8 million is once-in-a lifetime exclusion and is subject to utilisation over a period of 24 months from the first qualifying disposal (McAllister, 2017:463).

Paragraph 57(2) provides that the small business exclusion applies to a capital gain of a natural person and it is therefore applied before rollovers (e.g. the surviving spouse rollover) or exclusions (as reflected in the examples provided in the Comprehensive Guide to CGT) (McAllister, 2017:463-464).

4.10 Amendments to the Eighth Schedule and the Income Tax Act

From 1st March 2016, Sections 9HA and Section 25 of the Income Tax Act applies to limited interests, and is briefly discussed hereunder (at no. 4.10.1 and 4.10.2).

4.10.1 Section 9HA(1)

Section 9HA(1) of the Income Tax Act provides that:

A deceased person is deemed to have disposed of his or her assets other than:

. assets disposed of to a surviving spouse;

. a longterm

insurance policy of the deceased, if any capital gain or capital loss that would have been determined in respect of a disposal that results in proceeds of that policy being received by or accruing to the deceased would have been disregarded in terms of para 55 of the Eighth Schedule (which provides for the disregarding in certain circumstances of a capital gain or loss in respect of a disposal that results in the receipt by or accrual to the insured of an amount in terms of a longterm insurance policy); or an interest of the deceased in a pension, pension preservation, provident, provident preservation or retirement annuity fund in the Republic or a fund, arrangement or instrument situated outside the Republic which provides similar benefits if any capital gain or capital loss in respect of a disposal of that interest that resulted in the receipt or accrual to that person of a lump sum benefit would have been disregarded in terms of para 54 of the Eighth Schedule.

At the date of that persons death for a received or accrual equal to the market value of those assets at that date as envisaged in para 31 of the Eighth Schedule

It is submitted that Section 9HA which replaces para 40(1), works in the same way except for the fact that it clears up the uncertainty regarding the utilisation of para 31 to determine the market value of limited rights.

4.10.2 Acquisition of assets by deceased estate from deceased person Section 25(2)

In terms of Section 25(2) provides that the deceased estate is deemed to have acquired an asset from the deceased person for acquisition costs equal to the market value of that asset (determined in terms of para 31) as at the date of death of the deceased person (Except for an asset bequeathed to a surviving spouse) (McAllister, 2017:611).

4.10.3 Disposal of assets by deceased estate to heirs or legatees- Section 25(3)(a)

The deceased estate is deemed to have disposed of an asset to an heir or legatee for an amount equal to the acquisition costs determined for the deceased estate in respect of that asset.

4.10.4 Rollover treatment for surviving spouse

The roll-over treatment which was found under para 67 is now provided in Section 9HA(2) as well as Section 25(4) of the Income Tax Act, and the treatment of these disposals remains the same (McAllister, 2017:519). It appears that a limited interest bequest to a surviving spouse will be treated in the same manner as prescribed in para 40.

4.11 Conclusion

The review of the CGT implications on limited interests has highlighted the differences in the methods used to determine the value of limited rights for ED and CGT purposes. For CGT purposes the valuation method determines the market value of a limited interest using the factor that represents the life expectation (or shorter period of entitlement) of the person to whom the right was previously granted (the current holder of the right). For ED purposes, however, the factor that is used represents the life expectation (or shorter period of entitlement) of the next person receiving the benefit (the beneficiary succeeding to the right).

As discussed in Chapter 1, the levying of CGT and ED have a similar underlying purposes, however it is clear that the methods of valuation and the tax computation of limited interests differ substantially for these two taxes. It is submitted that the stream-lining of valuation methods and the possible alignment of deductions for Ed and CGT could aid in providing a solution to the alleged duplication and excess taxation.

In the next chapter, the VAT implications of usufructuary and fiduciary rights created by a deceased will be discussed. Upon completion of the next chapter, a comparison between VAT, ED and CGT valuation and taxation methods, will be done in order to achieve the research objective.

5. CHAPTER 5: VALUE-ADDED TAX (VAT)

5.1 Introduction

All references to “the VAT Act” are to the Value-Added Tax Act No. 89 of 1991, and references to the terms “Section” or “S” in this chapter are to sections of the VAT Act, unless the context indicates otherwise.

VAT is levied on property in a deceased estate, which formed part of the enterprise of a deceased person. In certain circumstances ED, CGT and VAT will be levied on the same limited interest in a deceased estate and in this chapter, the VAT implications on limited interests created and held by a deceased person will be examined. As a starting point, the definitions that are relevant to this chapter will follow (in 5.2 and 5.3 below).

5.2 Enterprise

The SARS VAT Guide for Estates (hereafter referred to as ‘the VAT 413 guide’) describes an enterprise, based on the definition in Section 1, as follows:

An “enterprise” includes any activity carried on continuously or regularly by a person in (or partly in) South Africa whereby goods or services are supplied to another person for a consideration (SARS Legal and Policy Division, 2015:4).

The definition of enterprise excludes activities that involve the making of exempt supplies (SARS Legal and Policy Division, 2015:4).

Anything that is done as part of the commencement or termination of an enterprise is deemed to be done in the course or furtherance of that enterprise. The disposal of goods during winding down an enterprise of a deceased person, are seen as sales conducted in the course or furtherance of an enterprise (SARS Legal and Policy Division, 2015:4).

5.3 Connected person

The term connected person refers to a natural person who is:

- a relative of that natural person, or
- any trust fund in which the natural person or relative is, or may be a beneficiary of.

A “natural person” or “relative” of that person means:

- The spouse of that person;
- Anyone related to that person or his or her spouse within the third degree of consanguinity,
- Or
- Any spouse of the relative (SARS Legal and Policy Division, 2015:5).

5.4 Distribution of assets – general principles

The VAT 413 guide states that “the distribution of any asset in the form of a bequest or legacy is a supply of goods or services...” (SARS Legal and Policy Division, 2015:4).

In other words, the bequest of a fiduciary or usufructuary right over an asset which formed part of the deceased’s enterprise is a distribution of goods by the deceased person which is subject to VAT.

It must be noted however, that in terms of Section 53(1)(b) “...the deceased vendor and his estate...shall...be deemed for the purposes of this Act to be one and the same person” (SARS Legal and Policy Division, 2015:18).

5.5 VAT implications of bequests

5.5.1 Bequests

Generally, VAT output tax is levied at the standard rate on the distribution of goods and services that formed part of the deceased’s enterprise, by applying the tax fraction to the consideration charged. For bequeathed assets, in most cases there is no consideration meaning that VAT will be levied on nil consideration if there is no bequest price and will therefore result in a nil output tax liability (SARS Legal and Policy Division, 2015:25). However, if there is a bequest price (which is accepted to be an amount inclusive of VAT) the tax fraction will be applied to the bequest price (SARS Legal and Policy Division, 2015:25).

5.5.2 Exception – bequests to a connected person (Section 10(4))

The exception to this rule is when Section 10(4) applies, which will be the case when the deceased makes a supply for no consideration or for consideration less than the open market value to a connected person, and if the recipient would not have been entitled to a full input tax deduction had the open market value been charged (SARS Legal and Policy Division, 2015:6). As an example, Section 10(4) would apply when an asset is bequeathed to a connected person who is not registered for VAT, and who would thus not have be entitled to

an input deduction had the full market value been charged. Section 10(4) provides that VAT must be accounted for on the open market value of the goods even if no bequest price was payable (SARS Legal and Policy Division, 2015:25).

Effectively, once it is determined that an asset that was bequeathed by a deceased person formed part of the deceased's enterprise, it must be determined if the beneficiary is a connected person to the deceased person. If the beneficiary is a connected person, then the provisions of Section 10(4) must be considered (SARS Legal and Policy Division, 2015:25).

5.5.3 Bequest price paid when Section 10(4) applies

Once it is determined if the beneficiary is a connected person and if Section 10(4) applies, the next step would be to determine if there was a bequest price, irrespective of whether or not Section 10(4) applies. In the situation where Section 10(4) applies and there was a bequest price, the output tax must be calculated on the higher of the open market value or the bequest price (SARS Legal and Policy Division, 2015:27).

5.6 Open market value of limited interests

Section 1 of the VAT Act provides that the open market value of good determined in accordance with Section 3 of the VAT Act, however, the provisions of Section 3 provide no method for determination of the open market value of limited rights.

The VAT 413 guide provides that the open market value of a usufruct or fiduciary interest is determined by annualising the fair market value (excluding VAT) at a 12% yield, which is then capitalised over the life expectancy factor of the beneficiary of the right, or over the factor determined for a shorter period of enjoyment of the right, which is granted to the beneficiary (SARS Legal and Policy Division, 2015:30). The factor for the life expectancy or for the specified period must be determined using Tables A and B respectively, which is provided in terms of the regulations of Section 29 of the ED Act.

The method of valuation described in the step by step process in the VAT 413 guide (215:30), is in line with the method of valuation utilised for ED purposes. However, the VAT 413 guide refers to Section 10(4) read with Section 62 of the Income Tax Act to

substantiate the method of valuation provided in the guide (SARS Legal and Policy Division, 2015:29, at footnote 66).

This appears to be a contradiction, as Section 62 of the Income Tax Act provides that the determination of the open market value of limited interests is based on the life expectancy factor or the period of entitlement for the donor, not the donee.

It is submitted the method of determination of the open market value which is provided in the VAT 413 guide, and which corresponds to the method utilised for ED purposes, is assumed to be correct and this research is continued on this assumption

5.7 Fideicommissum

5.7.1 Creation of fideicommissum

The VAT consequences of the creation of a fideicommissum over property in a deceased estate, is determined in accordance with the general principles discussed in 5.5, which applies to the creator of the right (SARS Legal and Policy Division, 2015:28). As previously stated at 5.5, VAT output tax for the deceased is determined by applying the tax fraction to the consideration, which will be nil, unless there is a bequest price in which case the tax fraction will be applied to the said bequest price (SARS Legal and Policy Division, 2015:25). However, if the provisions of Section 10(4) apply then VAT must be levied on the open market value of the goods (SARS Legal and Policy Division, 2015:25). Section 11(1)(e) read with Interpretation Note 57 (IN 57), which deals with going concern disposals, must be considered when the fiduciary right is created to determine if the disposal will be zero rated (SARS Legal and Policy Division, 2015:28).

5.7.2 Open market value of fiduciary right

The determination of the open market value, which is only required if Section 10(4) applies, is determined in the manner previously described at 5.6.

5.7.3 Cessation of fideicommissum

Upon cessation of the fiduciary right, the VAT consequences for the deceased fiduciary are determined according to the same general principles discussed at 5.5 (SARS Legal and Policy Division, 2015:28). Essentially, VAT is levied on the consideration of nil or a bequest price,

unless Section 10(4) applies in which case VAT is levied on the fair market value of the limited right. Once again, Section 11(1)(e) read with IN 57 must be considered when the fiduciary right ceases (SARS Legal and Policy Division, 2015:28).

5.8 Usufruct

5.8.1 Creation of a usufruct

The creation of a usufructuary interest is a supply for VAT purposes, which may be a zero rated if the going concern requirements are met as provided in the IN 57. When the criteria for a going concern disposal are not met, the same general principles provided previously will apply as previously state at 5.5, that if the requirements of Section 10(4) are met, the deceased will have to account for output tax on the open market value of the usufructuary right (SARS Legal and Policy Division, 2015:29). However, if Section 10(4) does not apply then output tax will be calculated at the standard rate on the consideration charged of nil, or on the bequest price if there was a bequest price paid (SARS Legal and Policy Division, 2015:25).

5.8.2 Open Market value of usufructuary right

The determination of the open market value, which would only be required if Section 10 (4) applies, is determined as described in 5.6 above.

5.8.3 Cessation of the usufruct

A usufructuary right cannot be transferred as the right merely expires with the death of the usufruct as the deceased no longer possesses a right (goods or services) which can be supplied. As a result, no supply is made for VAT purposes and there will be no VAT implication for the deceased holder of the right when a usufruct ceases (SARS Legal and Policy Division, 2015:29). It is submitted that VAT implication upon the ceasing of the usufruct will be the same, irrespective of whether or not more than one usufruct exists or if the usufruct ceases for the bare dominium holder.

5.9 Bare dominium

5.9.1 Creation of the bare dominium

The transfer of a bare dominium right to property which formed part of the enterprise of the deceased will constitute a supply which is subject to VAT at the standard rate and the general principles mentioned in 5.5 will apply. Essentially, the tax fraction is applied to the

consideration charged of nil, or to the bequest price, should Section 10(4) not be applicable (SARS Legal and Policy Division, 2015:31). However, if Section 10(4) applies, the tax fraction must be applied to the open market value of the bare dominium right (SARS Legal and Policy Division, 2015:29).

5.9.2 Open Market value of the bare dominium right

The value of the bare dominium right is determined by deducting the value of the usufruct (which was determined using the method described in 5.6) from the open market value of full ownership of the asset (exclusive of VAT) (SARS Legal and Policy Division, 2015:29).

5.9.3 Cessation of usufruct for the benefit of the bare dominium holder

It is submitted that certain provisions come into play when the final usufruct ceases and succeeds to the bare dominium holder for ED and CGT purposes. In this scenario, the ED Act provides that the value of the right determined is limited for ED purposes, and the Eighth Schedule to the Income Tax Act provides a possible step-up base cost for CGT purposes. It is submitted that there are no provisions in the VAT Act which allows a reduction from or a limitation of the open market value determine when the ceasing usufruct succeeds to the bare dominium holder.

As far as input tax is concerned, the VAT guide 413 states that:

The bare dominium holder will generally not be entitled to deduct input tax in respect of the acquisition of the bare dominium as the bare dominium can usually not be used to make taxable supplies (SARS Legal and Policy Division, 2015:29)

It must be noted that even though the bare dominium holder would not have been allowed to claim an input tax deduction when the right was created, the guide is silent as to whether or not any portion of the input tax deduction will be determinable for the bare dominium holder upon cessation of the usufruct to the bare dominium holder. The research is thus continued on the assumption that no input tax deduction will be allowed for the succeeding bare dominium holder upon cessation of the final usufruct for the benefit of said bare dominium holder.

5.10 Conclusion

From the research in this chapter, the principle established is that the deceased holder of a fiduciary right and the deceased person creating a usufruct or fiduciary right over property that formed part of the deceased persons enterprise, will be subject to VAT at the standard rate. VAT output will be calculated either on the bequest price, the consideration charged (of nil) or on the open market value determined. It is submitted that the main aspect to consider for the distribution of enterprise assets in deceased estates, is whether or not the beneficiary is a connected person to the deceased person and if so, to determine if Section 10(4) is applicable.

The general rules mentioned in this chapter will only apply when Section 10(4) is not applicable, and it follows that said determination should be made first. If Section 10(4) applies, VAT is levied on the open market value of the limited interest and it is submitted that it is likely to be frequently applied in deceased estates, as bequests are generally made to connected persons to the deceased person.

When the requirements of Section 10(4) are not met, and no bequest price is charged for limited interests created in a deceased estate, then the VAT liability will be nil as there is no consideration charged for bequests. In determining the VAT liability, the tax fraction is applied to either the open market value, the bequest price or the consideration of nil (whichever is applicable).

Value of limited right

The determination of the of the open market value of the limited rights for VAT purposes (as explained at 5.6 above) is based on the value that the right will have to the succeeding beneficiary, which is the same method applied for ED valuations. However, it will only be necessary to determine the open market value of the limited interests when Section 10(4) applies.

Deductions

The provisions of the Eighth Schedule to the Income Tax Act allows the deduction of acquisition cost of limited interests from the value determined for CGT purposes, and the ED Act allows the reduction the value of the limited interests determined, neither of which is

provided in the VAT Act. Input VAT would, however, have been deductible by the deceased when the asset was acquired to be used in the enterprise. Furthermore, in certain scenarios, Section 11(e) may zero rate the transaction meaning that VAT will be levied at a zero rate.

It is submitted however, that although the creator of the right would have been entitled to an input tax deduction when the asset was purchased, the holder of the bare dominium right is not entitled to an input deduction when the limited interest accrues to him or her.

Section 11(1)(e) of the VAT Act read with IN 57, may however result in the zero rating of the distribution, and must be considered when the usufructuary and fiduciary rights are created, and also when a fiduciary right ceases.

Concluding comments

The main differences in the valuation methods and the tax treatment of limited interests for ED, CGT and VAT are summarised and compared in the next chapter (Chapter 6) to address the research objective. Recommendations are made in Chapter 6 based on the research findings.

6. CHAPTER 6: CONCLUSION

6.1 Introduction

All references to “ED” and “the ED Act” are to Estate Duty and the Estate Duty Act no 45 of 1955. All references to the terms ‘paragraph’, ‘para’ or ‘paras’ in this chapter, are in respect of the Eighth Schedule to the Income Tax Act no 58 of 1962 as amended, unless otherwise stated. All references to “the VAT Act” are to the Value-Added Tax Act No. 89 of 1991.

In this research, the ED, CGT and VAT consequences were considered for usufructuary and fiduciary rights in deceased estates. The tax implications for the deceased person, the deceased estate and the beneficiaries were considered and comparison will be made in this chapter in order to address the research topic and the sub questions discussed in Chapter 1.

6.2 The use of limited interests as an estate tax planning tool

The nature of usufructuary and fiduciary rights and the methods used to value these rights, for ED purposes, were discussed in Chapter 2, where the main reasons for utilising limited interests were determined to be the safeguarding of assets and to look after certain beneficiaries. The research suggests that the utilisation of limited interests may successfully give effect to its purpose when proper consideration is given to the tax consequences for all beneficiaries, and if the necessary provisions are made by the testator to ensure the most tax efficient outcome. (E.g. this could be achieved by considering and planning for possible tax deductions for successors upon receipt and succession of the limited rights)

6.3 Value of limited interests

Chapters 3, 4 and 5 were dedicated to ED, CGT and VAT respectively, which provided an overview of the tax implications of limited rights in deceased estates. These chapters included discussions on valuation methods and the allowable deductions or costs applicable to limited interests. The main differences that have been identified in the methods that are used to determine the value of usufructuary and fiduciary rights for ED, CGT and VAT purposes will follow (at 6.3.1, 6.3.2 and 6.3.3 below).

6.3.1 *Creation of limited interests*

a) Estate Duty

For ED purposes the market value of the usufructuary and fiduciary rights upon creation, are determined in terms of Section 5(1)(b) of the ED Act, using the factor which presents the value that the right will have to the first fiduciary and usufructuary beneficiary.

a) VAT

For VAT purposes the open market value of fiduciary and usufructuary rights are only determined when Section 10(4) of the VAT Act is applicable, as it is only then that VAT is levied at the standard rate on the market value of the right. The levying of VAT must be determined for each right (usufruct, bare dominium and fiduciary) and the open market value is determined the same way as it is determined for ED. However, if Section 10(4) does not apply VAT is levied on the consideration of bequest, which will be nil, unless there is a bequest price paid in which case VAT will be levied on the bequest price.

a) CGT

Generally, the market value of the property over which a limited right is created by the deceased person, is the full market value of the property owned (not a limited interest held) which is deemed to be disposed of to the deceased estate.

However, when a *usufructuary right* is created by the deceased person in favour of the surviving spouse, there is part disposal by the deceased person to the deceased estate and a part disposal by the deceased person to the surviving spouse directly. The different components of the limited right will thus have to be determined using the valuation method applicable to limited rights.

The method of valuation to be used to determine the market value of usufructuary and fiduciary rights is not provided in para 40 of the Eighth Schedule, and the Eighth Schedule does not define the term 'market value' in para 1. As a result, the market value of the usufructuary or fiduciary right is determined in terms of para 31(1) (The application of this section has been confirmed to be correct by the amendments made to the Act which are effective from 1 March 2016)

Usufructuary rights created

It is important to note, as mentioned above, that there are two CGT implications when the usufructuary right is created, one will be a part disposal and the other will be a full disposal. The determination of which disposal is the part disposal depends on whether or not the usufructuary right was created for a surviving spouse or for a person other than the surviving spouse. When the usufruct is created for the surviving spouse there is a part disposal of the bare dominium right from the deceased person to the deceased estate, and of the usufructuary right from the deceased person to the surviving spouse (McAllister, 2015:701). When neither of the beneficiaries to the right is the surviving spouse, then the full asset is disposed of to the deceased estate, and the part disposal is made by the deceased estate to the usufruct and bare dominium holder of the asset received (see Chapter 4 for more information on this).

The market value determined of a usufructuary right created by a deceased person will be the acquisition costs for the deceased estate. The said market value of the right created will either be the full market value (if it is not a part disposal of the property by the deceased person to the deceased estate) or it will be determined in terms of para 31(1) (if it is a part disposal of the property to the deceased estate) (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

When the part disposal of the usufructuary right is made by the deceased person, the market value of the bare dominium right is determined in terms of para 31(1)(e) (which will be the acquisition cost for the deceased estate), and the usufructuary right subject to the rollover is determined in terms of para 31(1)(d) (Davis, Jooste & Beneke, 2017: chap12: para 12.7.2).

6.3.2 Cessation of limited interests

There is no value for a ceasing right for CGT purposes (usufructuary and fiduciary rights) and only fiduciary rights have a value for VAT purposes, however, both these limited rights have determinable values for ED purposes.

a) Estate Duty

When the fiduciary or usufructuary right ceases the value of the ceasing right is determined based on the value that the right will have for the person receiving it. The capitalisation is thus done on the life expectation factor of the succeeding beneficiary, or the shorter period of entitlement for that succeeding beneficiary (if specified) (Stein, 2011:24). The factors

relevant to the gender and age (Table A), and to the period of entitlement (Table B) of the beneficiary, are presented in Tables A and B provided in the ED Act (Stein, 2011:24).

b) CGT

Paragraphs 40(1) and 40(2) read with para 31(1)(d) cannot be applied to determine the market value for the deceased person or the acquisition costs of the deceased estate and the succeeding beneficiaries when a usufruct ceases (Davis, Jooste & Beneke, 2017: chap12:para 12.7.2). The deceased person therefore disposes of the right for nil proceeds and the deceased estate and beneficiaries acquires the right at nil acquisition costs (Roeleveld, 2012:90).

i. Cessation of the usufructuary right

It is submitted that the usufructuary holders who are not the first usufruct to the right will have no acquisition costs when the right ceases (as no acquisition costs were determined when the right succeeded to the deceased person from a previous usufruct). Effectively, the ceasing usufruct will have no value for the deceased person, the deceased estate and for the successor to the usufructuary right (except when para 38 of the Eighth Schedule applies), and there will be no capital loss or gain for the deceased usufructuary.

ii. Cessation of the fiduciary right

The ceasing fiduciary right will have no values for the deceased person and the deceased estate. However, the succeeding fiduciary beneficiary will have determinable acquisition costs in terms of para 31(1)(d) or para 31(1)(e) if it is the final fideicommissary (McAllister, 2015:711-712).

c) VAT

The VAT consequences of cessation of a limited interest differs for usufructuary and fiduciary right holders. The ceasing usufruct will not have VAT implications for the deceased person, whereas the cessation of a fiduciary right will have VAT implications.

i. Cessation of the usufructuary right

Upon cessation of the usufructuary right, for VAT purposes there is no determinable value of the right which comes to an end.

ii. Cessation of the fiduciary right

Upon cession of a fiduciary right, if Section 10(4) applies, VAT is levied on the open market value which is determined the same way that it is determined for ED purposes. In other words, the open market value is determined using the period of entitlement for the person receiving the right to determine the factor to be used in the formula. However if Section 10(4) is not applicable, VAT will be levied on either the bequest price, or the consideration (of nil) if there is no bequest price. Section 11(1)(e) and IN 57 must be considered upon cessation of the fiduciary rights.

6.3.3 When a usufruct ceases and succeeds to the bare dominium holder:

a) Estate Duty

For ED purposes the second proviso to Section 5(1)(b) provides a limitation to the value determined for the ceasing limited interest. The proviso limits the value determined to the difference between the fair market value of the property when the usufruct ceases, and the value of the bare dominium of the property determined at the date that the usufructuary right was created. It must be noted that this proviso does not apply to fiduciary rights.

a) CGT

When the requirements of para 38(1)(b) of Eighth Schedule are met, the market value determined of the asset at the date of death of the usufruct will be the acquisition costs for the bare dominium successor to a ceasing usufruct. The result is that a bare dominium successor to a ceasing usufruct obtains a step-up base cost when para 38(1) applies.

a) VAT

For VAT purposes, there are no provisions in the VAT Act that allow an input claim or a reduction of the value of the ceasing right when the usufructuary right succeeds to the bare dominium holder. This is the case even though the bare dominium holder is not entitled to an input deduction when the right was created, and Section 11(1)(e) and IN 57 may not be considered upon the cessation of a usufructuary right.

6.4 Deductions, reductions and acquisition costs

a) CGT

i. Creation of usufructuary rights

For CGT purposes, upon creation of usufructuary rights, the acquisition costs for the heirs or legatees (usufruct and bare dominium holders) of the part disposal made by the deceased estate to said heirs or legatees, are determined by applying the part disposal provision in para 33(1) to the acquisition cost determined for the deceased estate.

The apportionment of the base cost of the deceased person will be required when the part disposal is made by the deceased person (which will be the case when usufruct is created for the surviving spouse) and will be done in terms of para 33(1) when required.

ii. Creation of fiduciary rights

The deceased person disposes of the property at the full market value determined at date of death and the deceased person acquires the right at the same value. The heirs or legatees however, will acquire the fiduciary right at the value determined in terms of para 31(1)(d) as the disposal of the fiduciary right by the deceased estate is in fact a part disposal to the fiduciary (which is limited to the period of entitlement of that fiduciary) (Davis, Jooste & Beneke, 2017: chap 12: para12.7.3).

iii. Ceasing usufructuary right

For CGT purposes, no acquisition costs are allowed for the succeeding beneficiaries of a ceasing usufruct, however, an exception is made when the bare dominium holder is the successor to a ceasing usufruct if all the requirements of para 38 are met. When para 38(1) applies, it is used to determine the acquisition cost for the bare dominium successor as a step up base cost.

iv. Ceasing fiduciary right

The successor fideicommissary to a ceasing fiduciary right will be entitled to acquisition costs for CGT purposes, which is determined using the same valuation rules provided in para 31(1)(d) or para 31(1)(e) (if it is a final fideicommissary).

b) VAT

The deceased person who created the limited interest would have been entitled to an input claim upon acquisition of the property which formed part of an enterprise. Upon bequest of the property, no input deductions or reductions are available to the deceased person, however, the creation of the limited right may be zero rated if the requirements of Section 11(1)(e) read with IN 57 are met, when usufructuary and fiduciary rights are created and when a fiduciary rights ceases.

The bare dominium holder of a limited right is not entitled to an input tax deduction when the right is bequeathed to him or her, as the bare dominium right cannot be used to make taxable supplies. When said bared dominium holder passes away there will be no entitlement to an input tax or any reductions to the value of the right.

c) Estate Duty

For ED purposes, the value determined for limited rights are reduced by the provisions of the ED Act which apply when:

- a bequest price was paid by the bare dominium holder,
- improvements were made by the succeeding beneficiary,
- the pre-deceased spouse did not qualify for the surviving spouse bequest deduction,
- the beneficiary is a qualifying exempt body, and
- the successor of the ceasing right is the creator of the right which was donated.

6.5 Differences in taxation of limited interests across taxes

It appears that no inter-play exists between the taxes imposed on limited interests to provide relief for the taxes levied on the same usufructuary or fiduciary rights in a deceased estate.

The differences in the taxation and valuation methods applicable to these limited rights, creates a heavy administrative burden for the executor in determining the tax liability in a deceased estate. As it currently stands, the determined value of usufructuary and fiduciary rights for ED, CGT and VAT purposes, will always differ from each other, due to the following two main reasons:

- firstly, due to the differences in the methods of valuation between these taxes, and

-secondly, due to the provisions in the relevant Acts (limitations and deductions) which reduce the value determined, but which are applicable for the one tax and not for the other(s).

Effectively, it appears that a usufructuary or fiduciary right in a deceased estate may be subject to ED, CGT and VAT at the same time, at different taxable values for each tax.

6.6 Concluding comments

This research suggests that the determination of the tax liability of limited interests for each tax individually is complex, however the combination of all three taxes being levied on the same limited right in a deceased estate simultaneously, substantially increases the complexities involved. It is submitted that the complexities of the tax system, which is applicable to deceased estates in South Africa, goes against the main objectives of a tax system, which should be fair, simple and easy to administer. It appears that the stream-lining of valuation methods across taxes would be able to simplify the process of determining the tax liability for limited interests in deceased estates.

Bearing in mind the purpose of wealth taxes and tax on capital assets, it is undeniable that there is a need for these taxes in South Africa. However, these taxes are levied in addition to VAT (on business assets when applicable) on the same asset at the event of death, for which the value of the asset is determined differently for each tax. Effectively, this makes it difficult to determine if the liability across taxes places an excessive burden on the limited interest.

The DTC (2015:32) described transparency in its report as follows:

Transparency and certainty: The manner in which taxes are collected and the calculation of tax liabilities should be certain. Tax rules and procedures should be transparent and applied consistently.

It is submitted that the stream-lining of valuation methods and deductions for limited interests may not only simplify the tax computation for deceased estates, but will also provide transparency and enable the identification of any weaknesses in the tax system, and any required relief between taxes.

My conclusion is based on the premise that the stream-lining of valuation methods across taxes is necessary, as it could very well be the answer to addressing and resolving many of

the concerns regarding taxation of usufructuary and fiduciary rights (some of which are discussed in this research). The alignment objective is to ensure that a transparent, simplified and fair system of taxation is levied on deceased estates, even if ED, CGT and VAT remain chargeable on the same limited interest at the event of death.

For ease of reference, a table is presented in Chapter 7 which provides a comparative overview of the treatment of limited interests in deceased estates for ED, CGT and VAT.

7. CHAPTER 7: COMPARISON TABLE

7.1 Introduction

The table in this chapter was constructed in order to provide a brief comparison of the tax implications and the valuation methods applicable to usufructuary and fiduciary rights in deceased estates for ED, CGT and VAT purposes.

All references to “the ED Act” are to the Estate Duty Act no 45 of 1955.

All references to the Income Tax Act are to the Income Tax Act no 58 of 1962 as amended.

All references to “the VAT Act” are to the Value-Added Tax Act No. 89 of 1991.

Estate duty column

All references to the term ‘Section’ or ‘S’ referred to under the Estate Duty columns are in respect of the Estate Duty Act, unless otherwise stated.

CGT column

All references to the terms ‘paragraphs’ or ‘para’ referred to under the CGT columns are in respect of the Eighth Schedule to the Income Tax Act, unless otherwise stated.

All references to the terms ‘Section’ or ‘S’ referred to under the CGT columns are in respect of the Income Tax Act, unless otherwise stated.

VAT column

All references to the terms “Section” or “S” under the VAT columns are to sections of the VAT Act, unless the context indicates otherwise.

7.2 Table - General principles for taxation of limited interests for ED, CGT and VAT

	ESTATE DUTY	CGT	VAT
Death of an individual	Triggers the levying of ED on assets in the deceased estate.	There is a deemed disposal of all assets from the deceased person to the deceased estate, and from the deceased estate to heirs or legatees, or to the beneficiaries. (para 40(1) and 40(2))	The distribution of any asset in the form of a bequest or legacy is a supply of goods or services, and VAT will be levied at the standard rate when an asset is bequeathed (provided that the asset formed part of the deceased's enterprise)
Usufructuary right (and bare dominium) created by deceased person	<p>Usufructuary right: The deceased is the owner of the full property and the normal ED implications apply to the full fair market value of the property that was not sold, as provided in Section 5(1)(g) of the ED Act.</p> <p>Bare dominium : The fair market value of the full ownership of the property must be reduced by the value of the limited interest (usufructuary right) determined.</p>	<p>Deceased person: CGT is levied on the deemed disposal from deceased person to deceased estate : -at the full market value of the asset (when the usufruct is not created for the surviving spouse), or -at the value determined for the part disposal of the asset in terms of para 31(1)(e) (when the usufruct is created for the surviving spouse)</p> <p>Deceased estate: Acquires the limited right from the deceased person at the full market value determined for the deceased person (when the usufruct is not created for the surviving spouse), or -at the value determined for the part disposal of the asset in terms of para 31(1) (e)(when the usufruct is created for the surviving spouse)</p> <p>The deceased estate disposes of the rights for the same acquisition costs (tax neutral effect).</p>	<p>Upon creation of a usufructuary right, the usufruct and the bare dominium rights must be considered separately when applying the general principles which are :</p> <p>When Section 10(4) applies: VAT is levied at the standard rate on the open market value determined of the right created.</p> <p>When Section 10(4) does not apply: If Section 10(4) does not apply then VAT will levied at the standard rate on the consideration (which will be nil), unless there is a bequest price.</p> <p>When Section 10(4) does not apply, the determination of the open market value is not required.</p> <p>*Section 11(1)(e) and Interpretation Note 57 (IN 57) must be considered for usufructuary rights upon creation. (Section 11(1)(e) and IN 57 is not considered for the bare dominium rights created).</p>

		<p>Heirs or legatees Acquires the right based on the acquisition costs of the deceased estate: -which is apportioned for each heir or legatee in terms of para 33(1) if it is a part disposal made by the deceased estate Or -which will be the total acquisition costs of the deceased estate if it is not a part disposal made by the deceased estate</p>	
Fiduciary right created by deceased person	The deceased is the owner of the full property and the normal ED implications apply to the full fair market value of the property that was not sold, as provided in Section 5(1)(g) of the ED Act.	<p>Deceased person: The deceased person who creates the fiduciary right is deemed to dispose of the full market value of the property, and deducts the total base cost to determine the CGT liability</p> <p>Deceased estate: The deceased estate acquires the property at the same full market value determined for the deceased person, and disposes of it to the heir or legatee for the same value. There is a tax neutral effect.</p> <p>Heirs or legatees Acquires the right at the value determined in terms of para 31(1)(d) as it is a part disposal of an asset by the deceased estate to the heir who is only entitled to the right for a limited period.</p>	<p>The open market value must be determined if Section 10(4) applies. If Section 10(4) does not apply, then no value needs to be determined for the right created as VAT will levied at the standard rate on the consideration (nil, unless there is a bequest price).</p> <p>* Section 11(1)(e) and IN 57 must be considered for fiduciary rights upon creation.</p>
Ceasing usufruct – holder of right	When the holder of a limited right dies, the limited right ceases and the value of the ceasing right is determined in terms of	<p>Deceased person (Usufruct): The value of right that ceases to exist is not determinable and</p>	There is no VAT implication the ceasing of a usufructuary right. It appears that irrespective of whether or not more than one usufruct exists,

	<p>Section 5(1)(b), and is based on the value that the right will have for the person receiving it.</p>	<p>therefore has no proceeds value for the deceased usufruct. The proceeds for the deceased person will be nil, and there will always be a CGT loss for the first usufruct.</p> <p><i>Deceased estate:</i> The deceased estate acquires the right for no acquisition costs and disposes of it at the same cost (tax neutral effect).</p> <p><i>Succeeding beneficiaries:</i> Acquires the right at no acquisition costs.</p>	<p>the VAT implication when the usufruct ceases will be the same.</p> <p>* Section 11(1)(e) and Interpretation note 57 (IN 57) must NOT be considered ceasing usufructuary rights</p>
<p>Ceasing usufruct to bare dominium holder</p>	<p>The value determined will be limited, in terms of the second proviso to Section 5(1)(b) of the ED Act, to the difference between the fair market value of the property at the date of death of the usufructuary holder, and the value of the bare dominium at the date that the limited right was created.</p>	<p><i>When para 38 does not apply</i> Para 40 and para 31(1)(d) cannot be applied to determine the acquisition costs succeeding beneficiaries and the ceasing right therefore has no value. The succeeding beneficiary therefore acquires the ceasing right at no cost</p> <p><i>When para 38 applies</i> Para 38 allows for a step up base cost for the bare dominium successor to the usufructuary right, if all requirements are met.</p> <p>Para 38 provides that the successor must be treated as having acquired that asset at a cost equal to that market value of that asset.</p>	<p>There is no VAT implication when a usufruct ceases for the bare dominium holder. *the guide is not clear as to whether or not this is the case for both a succeeding usufructuary and for the final ceasing usufruct to a succeeding bare dominium holder. This research was concluded on the assumption that it applies to both scenarios.</p> <p>*Section 11(1)(e) and IN 57 (IN 57) must NOT be considered ceasing usufructuary rights</p>

<p>Ceasing fiduciary right</p>	<p>When the holder of a limited right dies, the limited right ceases and the value of the ceasing right is determined in terms of Section 5(1)(b), and is based on the value that the right will have for the person receiving it.</p> <p>(No limitation applies for the value determined for fiduciary rights that succeed to the final fideicommissary.)</p>	<p><i>Deceased person-fiduciary:</i> The right that ceases to exist has no value, and the proceeds for the deceased person will be nil.</p> <p><i>Deceased estate:</i> The deceased estate acquires the right for no consideration and disposes of the right at the same value. (tax neutral effect).</p> <p><i>At cession of fiduciary</i> The acquisition cost for succeeding fideicommissaries, is determined i.t.o para 31(1)(d), and for the final fideicommissary it is determined i.t.o para 31(1)(e).</p>	<p><i>When Section 10(4) does not apply:</i> VAT is levied at the standard rate on the consideration, or the bequest price.</p> <p><i>When Section 10(4) applies:</i> VAT is levied at the standard rate on the open market value determined of the right</p> <p>Section 11(1)(e) and IN 57 must be considered to determine if the disposal qualifies as a going concern disposal.</p>
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