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BASICS of TRUSTS

1. Who are the Parties to an inter vivos Trust?

1.1 the founder or donor or creator and

1.2 the trustees and

1.3 the beneficiary/ies

2. How is a Trust formed?

Most commonly by way of lodging a Trust Deed (constituting the agreement between the creator and the trustees who will administer the trust for the benefit of defined beneficiaries) with the Master of the High Court for registration

A Trust can also be set up in the Will of a testator, the registration of which will require the filing of the Will with the Master of the High Court, which Will shall set out the terms of the trust

3. Can I sell the trust rather than immovable property owned by the trust so as to avoid transfer duty

Schemes were historically employed whereby the "trust was sold" as a method of passing transfer of the immovable property owned by the Trust with the main objective of avoiding transfer duty.

Taxation amendments on 13 December 2002 plugged this loophole by expanding the definition of property.

Furthermore an October 2007 Special Tax Court ruled that the "sale of a trust" in 1998 resulted in transfer duty liability for the trust as well as penalty duty for the unpaid period

Prevailing legal opinions support the view that a trust is not a tradable commodity, like company shares, due to the very personal nature of a trust and therefore that any attempt to buy over a trust so as to gain ownership of immovable property goes against the grain of a trust

Consequently these mechanism have fallen in disuse

4. Can I act on behalf of a trust before it exists?

The trustees' power and authority to act on behalf of the Trust stems from the duly registered Trust Deed and Letters of Authority issued by the Master of the High Court and the Trust Property Control Act prohibits transacting by a yet to be appointed trustee before he has been issued with Letters of Authority by the Master of the High Court

Section 6 of the Trust Property Control Act ("TPCA") states that any person whose appointment as trustee in terms of a trust instrument comes into effect after commencement of the TPCA, shall act in that capacity only if authorised thereto in writing by the Master as signified by the issued Letters of Authority

Therefore unlike Companies, a trust formed in terms of the TPCA is prohibited from entering into pre-formation contracts

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5. What type of transactions can a trustee conclude on behalf of the Trust?

The powers of the trustees to conclude particular types of transactions, such as

- buying or selling immovable property,
- lending money and
- granting the security of mortgage bonds over trust property

are derived from the powers set out specifically in the Trust Deed. If the trust deed fails to list any particular power, the trust deed will require amendment before the trustee can perform that specific power omitted from the original trust deed

6. How many of the trustees needs to be in favour of a specific transaction concluded on behalf of the Trust before it will be a valid transaction?

The Trust Deed regulates the number of trustees required to pass a valid resolution which details the contemplated transaction

7. How do I describe the Trust when I am completing the sale agreement?

"Albus Dumbledore in my capacity as trustee for the time being of HogwartsTrust No IT123/2005 acting under Letters of Authority issued by the Master of the High Court of Pretoria on 10 October 2005 and duly authorised hereto by virtue of a resolution of the trustees"

8. What are the primary FICA requirements for a transacting Trust?

- 8.1 Trust Deed and any amendments thereto
- 8.2 Most recent Letters of Authority as certified by the trustees on the Letters of Authority
- 8.3 SARS tax return baring the tax number of the Trust (not necessary for trustees)
- 8.4 Proof of Identity and proof of residence to be completed for Founder, all trustees, and beneficiaries
- 8.5 Record source of income used by the Trust to conclude transaction

9. Can a creditor of any of the parties to the Trust pursue them for satisfaction of personal debts of these parties?

Unless otherwise provided in the trust deed, the Trust assets does not constitute part of the estate of the Founder (creator of the trust), the trustees (the executive of the trust) or the beneficiaries (ultimately benefiting from the trust)

Therefore creditors of any of the parties to a trust cannot pursue the trust for satisfaction of debts of these parties

10. What happens of any of the parties to the Trust dies?

If the Founder, trustees or beneficiary dies, the trust continues to exist as an entity and the Trust Deed should regulate appointment of further trustees and re-distribution to the other beneficiaries.

Therefore in properly regulated trust, no estate duty is payable on death of the beneficiary/ donor

11. At what rate is transfer duty payable when a trust acquires a property?

Transfer duty at the current graduated rate applicable to natural persons is imposed

12. Is it possible that the sale of the Trust's property attracts VAT?

No transfer duty is payable by the purchaser of a property from a Trust seller if the Trust seller is;

12.1 registered for VAT, and

12.2 the property is part of the VAT operation for which the seller is registered for VAT in which case the sale will attract VAT at 15%

If the agreement does not specify that VAT is to be paid over and above the declared purchase price recorded in the agreement, then the purchase price as declared is deemed to include VAT, and the seller will have to remit 15% of the purchase price he receives to SARS

Therefore should the seller be a VAT vendor for purposes of the transaction, as confirmed by the trustees, clarify in the agreement whether the recorded price includes or excludes VAT

13. What is the income tax rate applicable to any income generated by a Trust?

The income of a Trust may, depending on circumstances be taxed in the hands of the following:

- Donor (Creator) [at the donor's tax rate], or
- Beneficiary [at the beneficiary's tax rate] , or
- Trust [flat rate of 40%]

Where the Trust itself is taxed, it is taxed at a flat rate of 45%. Special Trusts (usually set up for someone with disability) are taxed on a sliding scale from 18% to 45% as with natural persons. In order to claim the benefits applicable to Special Trusts, the trustees should apply to SARS for classification

Income of a Trust that vests directly in beneficiaries of the trust and not in the trust itself is taxed in the hands of the beneficiaries, at the tax rate applicable to each beneficiary

Where the donor is hold too much discretion in the allocation of trust income and there is no true separation of ownership and control of the trust assets, the donor can become liable for tax at the donor's tax rate