



**rural development
& land reform**

Department:
Rural Development & Land Reform
REPUBLIC OF SOUTH AFRICA

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**REGISTRAR'S CIRCULAR NO. 8 OF 2010
THE TAXATION LAWS AMENDMENT ACT NO. 17 OF 2009**

1. PURPOSE

The purpose of this circular is to clarify and guide examiners and conveyancers on what the causa of deed of transfers could look like that gives effect to the provisions contained in Paragraph 51 of the Eighth Schedule to the Income Tax Act 58 of 1962 as inserted by the Taxation Laws Amendment Act 5 of 2001.

2. DISCUSSION

2.1. There has been considerable debate on what the causa should be when transfers are performed in terms of the provisions of the abovementioned Act. The following should be considered prior to providing a basic guideline on the causa of such deeds.

2.2. Paragraph 51 of the Eighth Schedule to the Income Tax Act 58 of 1962 as inserted by the Taxation Laws Amendment Act 5 of 2001 provides as follows:

51 Transfer of residence from company or trust

(1) Where an interest in a residence has been transferred from a company or a trust to a natural person as contemplated in subparagraph (2)-

- (a) that company or trust must be deemed to have disposed of that interest for an amount equal to the base cost of that interest on the date of transfer thereof;*
- (b) that company or trust and that natural person must, for purposes of determining any capital gain or capital loss in respect of the transfer of that interest, be deemed to be one and the same person with respect to-*
 - (i) the date of acquisition of that interest by that company or trust and the amount and date of incurral by that company or*

- trust of any expenditure in respect of that interest allowable in terms of paragraph 20; and*
- (ii) any valuation of that interest effected by that company or trust as contemplated in paragraph 29 (4);*
 - (c) no allowance allowed to that company or trust in respect of that interest must be recovered or recouped by that company or trust or be included in the income of that company or trust in the year in which the transfer takes place; and*
 - (d) that company or trust and that natural person must be deemed to be one and the same person for purposes of determining the amount of any allowance or deduction-*
 - (i) to which that company or trust may be entitled in respect of that interest; or*
 - (ii) that is to be recovered or recouped by or included in the income of that company or trust in respect of that interest.*
- (2) Subparagraph (1) applies where-*
- (a) that natural person acquires that interest from the company or trust no later than 31 December 2011;*
 - (b) that natural person-*
 - (i) alone or together with his or her spouse directly held all the share capital or members interest in that company from 11 February 2009 to the date of registration in the deeds registry of that residence in the name of that natural person or his or her spouse or in their names jointly; or*
 - (ii) disposed of that residence to that trust by way of donation, settlement or other disposition or financed all the expenditure, as contemplated in paragraph 20, actually incurred by the trust to acquire and to improve the residence;*
 - (c) that natural person alone or together with his or her spouse personally and ordinarily resided in that residence and used it mainly for domestic purposes as his or her or their ordinary residence from 11 February 2009 to the date of the registration contemplated in item (b) (i); and*
 - (d) the registration contemplated in item (b) (i) takes place not later than 31 December 2011:*

Provided that this paragraph applies only in respect of the portion of the property contemplated in paragraph 46.

Where a person utilizes the provisions under Paragraph 51 of the Eighth Schedule to the Income Tax Act 58 of 1962, an exemption from Transfer Duty may be claimed under section 9(20) of the Transfer Duty Act.

2.3. It must be noted that **exemption in terms of section 9(20) of the Transfer Duty Act cannot be a causa** but is merely a provision in the Act providing for the exemption from transfer duty – for example, where a deceased has bequeathed his property to his wife, there is no transfer duty payable, and the causa of the estate transfer would not be in terms of the exemption in terms of section 9 of the Transfer Duty Act, but in terms of the will of the deceased or The Intestate Succession Act.

2.4. **Paragraph 51 of the Eighth Schedule to the Income Tax Act 58 of 1962 cannot, in itself be the causa** to such transactions as it merely a means to apply for the exemption from transfer duty. Section 51(1)(a) refers to disposed of, therefore, there has to be a follow on transaction, whether a resolution of the company or by the trustees of a Trust to perform a certain act to provide for the disposal, or a sale agreement, deed of donation or exchange agreement.

2.5. At this point I would like to point out the provisions of the Alienation of Land Act, Act. 68 of 1981.

Section 2(1) of the Alienation of Land Act No. 68/1981 reads as follows:

2 Formalities in respect of alienation of land

(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

In addition it must also be noted that the definition of alienate in the Alienation of Land Act No. 68/1981 is restricted to sales, exchanges or donations.

'alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolute condition, and 'alienation' has a corresponding meaning;

2.6. Therefore, there is no reason why **a trust, company or close corporation cannot take a resolution** in terms whereof a decision is then taken to make use of the provisions of the abovementioned Act and to transfer the immovable property in terms thereof. The provisions in the Alienation of Land Act No. 68/1981 that there be a deed of alienation reduced to writing is **only** restricted to sales, exchanges or donations.

The company/trust may pass a resolution to transfer the property as a dividend in specie in case of a company and close corporation, or a distribution of a capital asset in the case of a trust.

3. Therefore it stands to reason that any of the following proposed causa's may constitute a causa when there is a transfer of immovable property in terms of the Income Tax Act 58 of 1962 as inserted by the Taxation Laws Amendment Act 5 of 2001.

3.1. The resolution by close corporation or company to transfer the property as a dividend in species to the member of the close corporation constitutes a causa. (disclose the date of the resolution)

The reason why the company or close corporation applied for the exemption in terms of section 9(20) of the Transfer Duty Act, would be the guideline for the causa when transfers are performed in terms of the provisions of the abovementioned Act, and the transaction would have to be authorized by way of resolution.

(It would be the conveyancers responsibility to determine whether the causa of the deed is not contrary to the Memorandum and Articles Of Association of such company/close corporation.)

3.2. In the case of a trust, the trustees acting on behalf of the trust might decide to transfer the property by virtue of the distribution of capital assets in terms of a resolution. (disclose the date of the resolution)

The conveyancer would have to determine whether the Trustees have been authorized to transfer such property within the powers given to them in the trust document and that transfer is not contrary to provisions of the Trust Document. – e.g. the Trust document might indicate that the assets held in Trust shall only devolve on the beneficiary once he has attained the age of 25 years, however, such person is only 15 years old now.

3.3. An agreement of **sale, donation or exchange agreement** and the date thereof.

3.4. The following is a guideline on the form for the causa in the instances of a transfer in terms of the abovementioned Act. (a causa that may be used in the case of a close corporation)

WHEREAS the undermentioned property is registered in the name of –

ABC PROPERTY CC

AND WHEREAS Donald Smith and James Smith are the members of ABC Property CC.

AND WHEREAS in terms of (Section 9 of the Transfer Duty Act 1949 as amended by the Taxation Laws Amendment Act No. 17 of 2009 and paragraph 51 of the Eighth Schedule to the Income Tax Act 1962 as amended by the Taxation Laws Amendment Act No. 17 of 2009,)

a **Resolution** was passed by ABC Property CC on 26 October 2009 by its members to transfer the property as a **dividend in species to the members of the close corporation** and in pursuance whereof the undermentioned property was to be transferred to Donald Smith and James Smith.

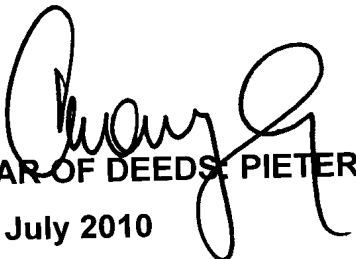
AND WHEREAS the requirements of paragraph 51 of the Eighth Schedule to the Income Tax Act, 1962 have been met.

Please note that all the references to the Acts (underlined parts) referred to in the aforementioned causa need not be made and that a causa as indicated under Clauses 3.1 to 3.3 above would be sufficient. however if reference is made it will be accepted

3.5. Examiners to take note of the discussion above that there may be a **resolution or a sale, exchange or donation agreement.**

3.6. It must be noted that to claim such an exemption in terms of The Transfer Duty Act, the transfer must be registered by the **31st December, 2011**. After this date, the causa as indicated above, cannot be utilized.

The Transfer Duty Receipt must be endorsed re exemption in terms of section 9(20) of the Transfer Duty Act.


REGISTRAR OF DEEDS: PIETERMARITZBURG
DATE: 29 July 2010