

Tax Alert

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Recent decision may have important implications for will drafting and estate planning

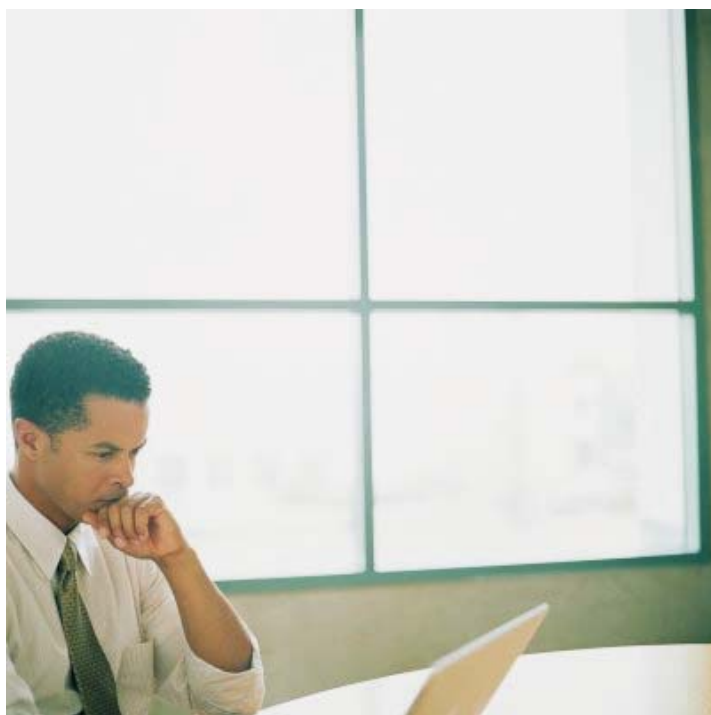
A recent decision by the Kimberley Tax Court, handed down on 1 December 2008, has added fuel to the debate around the capital gains tax trap considered in ITC 1793.

In ITC 1793 (2005), a testator had stated in her will that she bequeathed to her family trust any debt owing to her by that trust. It was held that the trust was subject to capital gains tax on the amount of the debt which had been so bequeathed to it, and which had thus been extinguished, thereby “discharging the debt for no consideration”.

Since that decision, drafters of wills have scrupulously avoided bequeathing to a trust a debt owed to the testator by that trust.

In this recent case, a trust owed R500 000 on loan account to the testator. The testator provided in her will that she bequeathed “the residue of my estate”, after payment of legacies, to the trust. The tax court held that a bequest, expressed in this language, (i.e. as a residuary legacy), was distinguishable from the specific legacy provided for in ITC 1793, and that in the present case the trust was not subject to capital gains tax on the amount of its debt that was extinguished by merger via that residuary legacy.

If the latter decision is indeed correct, then a bequest in these circumstances, expressed as a residuary bequest, could avoid the capital gains tax trap revealed by ITC 1793. However, both cases emphasised the overriding importance of the true intention of the testator so it could be dangerous to attach too much significance to the specific language of the will. Furthermore, since these cases were both Tax Court cases, no legal precedent has been created – and it is also not yet clear whether SARS is intending to appeal against the recent decision.



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