VDT Attorneys

Member of the Phatshoane Henney Group

# ONLY DEATH AND TAXES ARE CERTAIN, THE SAYING GOES.

How to avoid - legally - paying your last respects to SARS.

# ONLY DEATH AND TAXES ARE CERTAIN, THE SAYING GOES. HOW TO AVOID - LEGALLY - PAYING YOUR LAST RESPECTS TO SARS

Conventional wisdom dictates that only death and taxes are certain. However, in a country where 50% of voters are now reportedly in favour of an unlawful tax boycott [link: https://bit.ly/2P38Vjr], the need for lawful tax avoidance is even more certain. Sakkie Burger of VDT Attorneys shares some tips on structuring your estate to avoid tax as far as possible.

Death is indeed certain. So is your tax obligation. But many people underestimate how far-reaching your tax obligations can be after death.

Sakkie Burger explains that there are three broad charges and taxes involved in the administration of a deceased estate:

- The executor's fees. The current maximum fee is 3.5% (excluding VAT) of the gross value of the estate payable to the person or institution performing the complex task of administering the estate. The executor will also be entitled to a portion of all the funds collected on behalf of the deceased estate.
- Estate duty. This is a tax levied by the government. It is currently 20% of the dutiable estate up to R30 million and 25% on the amount above R30 million. An estate with a nett value of less than R3.5 million will pay no estate duty.
- Capital gains tax (CGT). Often forgotten is the issue of CGT. The Income Tax Act stipulates that death triggers a "deemed disposal" of the deceased's assets. Most of the normal rules to calculate CGT applies to the deceased estate as if the person sold everything he or she owned in the last second of their life.

From the above, it is apparent that estate planning is a crucial and complex exercise which requires expert advice. Responsible financial planning will ensure that your deceased estate has enough liquidity to pay all the associated charges and taxes without forcing the sale of more illiquid assets, such as property, to cover these costs.

Burger gives the following broad guidelines on how the charges and taxes may be minimised.

**1. Nominate beneficiaries for life insurance policies and negotiate fees**

With larger estates, most executors will be willing to negotiate the fee at the time of drafting the will or even when the family of the deceased approaches a potential executor.

Certain measures will also reduce the executor's fees. An easy measure is to appoint a beneficiary for your life policy as the proceeds will be paid directly to that beneficiary and not the estate.

"Do note that the proceeds will still be subject to estate duty. There is also a danger that an estate will not have sufficient cash for all the expenses if all life policies are paid directly to beneficiaries," he says.

Many people try to avoid executor fees altogether by appointing a relative or friend as executor – often causing long delays, and emotional and financial hardship for those left behind.

"Administering an estate is very complex. Using a skilled executor will not only save your loved ones the burden of the vast administration involved, but also speed up the process and ensure expeditious payment of your heirs," Burger says.

An added benefit of using an attorney as executor is the protection afforded to members of the public through a fidelity fund of attorneys. Should an attorney mismanage your estate, your loved ones will have recourse against the fund.

**2. Rather leave it for your spouse**

Being married or in a long-term relationship entailing support and care has pronounced tax benefits while being alive, but also in death.

Donations between spouses – also in anticipation of death – is exempt from donations tax. In situations where the death of a spouse is anticipated, nothing prevents the dying spouse to donate his or her assets to a spouse to decrease the size of the estate and therefore taxes.

Parents wishing to provide for their children in the event of death may be tempted to leave sizeable assets for their children. Although this may be appropriate in certain circumstances, the testator should bear in mind that such inheritances will not benefit from spousal tax concessions.

If the surviving spouse is willing and able to care to care for the children, there are considerable tax benefits in nominating your spouse as heir.

"Firstly, deemed disposals to a spouse will not attract Capital Gains Tax," Burger advises.

Legacies for spouses will also be deducted from the estate value to arrive at the nett estate value to calculate any estate duty.

**3. Doing the admin while you are alive**

Older people who are in the fortunate position of excess assets may derive tax benefits by actively managing their estate before death.

"Any person may donate assets up to the value of R100 000 per year without attracting donations tax," Burger says.

Although any disposals of assets will still be subject to CGT, individuals and special trusts have an annual exemption of R40 000 of capital gains that will not attract any CGT. If an estate is managed over several years, this could lead to considerable tax savings.

By decreasing the value of the deceased estate, any amounts payable in executor's fees and estate duty will also be decreased.

**4. Don't let the tail wag the dog**

"In drafting your will and planning your estate, your desired outcome should be the main focus rather than avoiding tax at all costs," Burger says.

Avoiding unnecessary tax is a valid objective, but could lead to unforeseen problems if it becomes the main focus and priority.

"Someone with such a large estate that would attract considerable tax most probably has far more important objectives and considerations than paying the last respects to his or her good friend SARS."

Contact **Sakkie Burger** • **sakkieb@vdt.co.za** or call 012 452 1300 at VDT Attorneys for assistance in this regard.