



Do you qualify?

TRANSFERRING RESIDENCES FROM COMPANIES AND TRUST

Transferring residences from companies (including close corporations) and trusts in terms of the recently promulgated concession requires careful consideration, as there are fairly restrictive requirements that need to be met.

The concession is intended to simplify structures and provides a window of opportunity to allow persons occupying residences owned by companies or trusts to take personal transfer of the residence free of transfer duty and without a capital gains tax (CGT) consequence.

To qualify for the concession, the requirements are broadly as follows:

- the transferee must have ordinarily resided in the property from 11 February 2009 to date of transfer
- the shares of the company must have been owned by the transferee or his / her spouse from 11 February 2009 to date of transfer
- the transferee must have donated the property to the trust, or financed all the expenditure relating to the acquisition of the property by the trust.

The benefits are as follows:

- the property can be acquired by the transferee free of transfer duty
- the transferor will not be liable for CGT or secondary tax on companies
- the transferee will 'inherit' the base cost and date of acquisition from the transferor and become eligible for the primary residence exclusion on disposal

of the property

- assuming the company or trust serves no further purpose, deregistration is facilitated.

In order to meet the acquisition criteria, the transferee or spouse must have personally and ordinarily resided in the property from 11 February 2009 to the date of

transfer. If, for example the property was let out during this period, this requirement will not be met, irrespective of whether or not the transferee intends to re-occupy the property one day. Similarly, if the property is occupied by the child of the shareholder, transfer of the property will not qualify for the concession.

Some argue that a holiday home does qualify, as it's ordinarily occupied, albeit for short periods.

“To qualify for the concession, the transferee must have ordinarily resided in the property..”

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Others maintain that only the home that would qualify as a primary residence (for the purposes of the primary residence exclusion) qualifies.

The shares of the company must have been personally owned by the transferee/spouse – a property owned by a company, the shares of which are held by a trust, simply does not qualify.

Transfer from a trust may be very restricted due to the requirement that the property has either been donated

to the trust by the transferee, or the transferee has financed all the expenditure incurred by the trust relating to the acquisition and improvement of the property. If, say, the deposit on the property was paid by the trust out of resources other than those provided by the transferee, the property does not qualify.

While the concession, available until 31 December 2011, is attractive it is clear that not all circumstances will qualify and advice should be sought.

Dirk Kotzé

Learnership allowances

The provisions relating to learnership allowances have been simplified, enhancing their ease of use and making them more attractive for employers looking to upskill their employees.

Learnership allowances are available to employers as additional deductions over and above their remuneration costs. The allowances are available to employers who enter into registered learnership agreements with existing or new employees. The allowances are intended as an incentive for employers to encourage skills development and job creation.

The allowances are no longer calculated with reference to an employee's remuneration. A commencement allowance equal to R30 000 will be available to an employer in each year that the employee is party to the learnership agreement. Where the agreement is less than a 12-month period, or severed before its completion, the commencement allowance in respect of that year will be apportioned accordingly.

The completion allowance is available to an employer in the year in which the learner completes the learnership agreement. Where the learnership agreement is less than 24 months in length, the completion allowance is equal to R30 000. Where the learnership agreement exceeds 24 months, the completion allowance is multiplied by the

number of full consecutive 12-month periods within the duration of the agreement.

Enhanced allowances are still available to employers who enter into learnerships with disabled employees. The allowances in such cases will be increased by R20 000.

The recoupment provisions have been deleted. This means that should an employee leave his employer's employ for any reason prior to completion of the learnership, such employer will not suffer a recoupment in respect of allowances previously claimed. This was modified in order to alleviate the hardship felt by employers suffering recoupments for reasons beyond their control, for example, employees seeking alternative employment. In this case subsequent employers will be entitled to a pro-rata commencement allowance and the entire completion allowance.

Example: Employer concludes a three-year learnership with a learner at the beginning of the 2010 year of assessment. The learner completes the learnership as anticipated. Assume the learner does not have any disabilities. The employer may claim the full R30 000 commencement allowance in each year. In 2012, the employer may further claim the R90 000 completion allowance (the basic R30 000 amount multiplied by three).

The amendments will take effect from the commencement of the 2010 tax year.

Matthew de Wet

Accessing finance in an increasingly illiquid market

The recession continues to trounce forecasts and budgets and erode bottom lines, but can one source the financing to endure this economic slump?

With the incremental lowering of the prime interest rate by the recently departed governor of the Reserve Bank, one was left with a somewhat false sense of relief. To the average debt-bearing person, this meant a slight ease in periodic interest payments, an appreciated saving during the hyped-up global recession. But what does it mean for the sourcing of new debt?

Not much. The lower prime rate is effectively a means for the banking sector to manage its risk and buffer its profit line. Where one could procure a loan at prime minus 2%, that same loan is on offer today at prime plus 2%. And that is assuming that the bank will grant you finance. But it's not all doom and gloom. Banks have recently made headlines in financial circles for their current appetite for lending. They have seized the opportunity to take on smaller loans and finance what they see as 'riskier' investments. For businesses, there is a similar trend, with banks realising that a tight-fisted approach is potentially costing market share. This has seen some financial establishments focus on specific lending strategies, a popular one currently being management buy-outs (MBOs); a method seen to lower the execution risk of the funding and thus lower the borrower's risk profile.

Alternative finance institutions such as the IDC, Business Partners and Khula are also more than content to take on clients that have been turned away from the large finance houses. The benefit for them is the lowering of their risk profiles as they become privy to additional business plans. The hidden cost to borrowers from pursuing such financing,

however, is the possibility of sharing in one's equity which, once the economy improves, will overly penalise one's stake in the black. Likewise, think twice before seeking angels. High net-worth investors can be beneficial (especially in kick-starting certain business ventures) but can be costly in a recessionary climate where most business value has its back up against the wall.

Regardless of the size of the funding required, one should always take heed of the 'S' word phenomenon financing bodies look for:

- Solvency – before and after a loan, this is banks' top priority, and they generally seek a comfortable interest cover margin
- Security – ye old faithful for a lender's portfolio
- Synergies – loans for business acquisitions generally require proof of economies of scale
- Suits – it never hurts to don a suit for your meeting with the bank.

The key issue to bear in mind is the fact that regardless of the market, all institutions have budgets to meet. Ultimately, the responsibility of procurement and proof of eligibility lies with you, the borrower.

Andrew Morris



Property developers beware – renting unsold units attracts VAT

Many developers caught short by the sudden dearth of residential property buyers due to the economic recession have been letting their unsold units to service development expenditure while still actively marketing them for sale.

Unfortunately, the South African Revenue Service (SARS) views this as a change of use, with consequent VAT implications that can be detrimental to a developer's cash flow, particularly in these difficult times.

When units are sold, developers are regarded as making a VAT-able supply and are required to levy VAT on the selling price. As a result of using the units in making a VAT-able supply, the developer would've claimed back all VAT to which he was entitled whilst developing the units. When a developer decides to rent out his units instead of selling them, the rental income is exempt from VAT, and SARS finds itself short the VAT it was expecting on the sale of the units and the VAT claimed by the developer during development.

To counter the "shortfall", SARS views this change of use as a deemed supply of the units and requires developers to pay the full amount of VAT as if the unit had been sold at the unit's open market value. Payment must be made in the developer's first VAT period after the unit is rented.

The cash strapped developer faces a cash flow crisis as no actual sale of the unit has taken place to provide the funds for the VAT payment required by SARS, and VAT paid is only reversed when the unit is sold.

SARS's view that the rental of the units creates a 'deemed supply' and the subsequent timing of the substantial VAT liability requires that the units be "wholly" used to make a

VAT exempt supply. SARS's interpretation and application of the relevant VAT legislation to the developers' actions is questionable.

Argument exists that no actual change in the use of the units has occurred (and therefore no deemed VAT liability) or at the very least that there is only a partial change in the use of the units to temporarily produce rental income which would postpone the deemed VAT liability.

Hopefully, if rumours of an upturn in the property market come to fruition, the units will be sold before the VAT becomes due.

Di Seccombe

Di Seccombe



Mazars introduces IT audit services

Mazars has taken an exciting first step towards establishing an Information Technology (IT) audit function in South Africa by appointing its first dedicated IT auditor based in our Cape Town office.

The South African IT audit function will work closely with the Mazars European offices (UK, France, Germany, Ireland and Holland) that have already established a successful IT audit and advisory division, known as Technology and Systems Assurance Services (TSAS).

Altogether, there are approximately 60 TSAS staff members in these European offices and this number is expected to grow rapidly in the short term. This shows that there are numerous opportunities for IT audit and Mazars South Africa is starting to gear up to take advantage of these opportunities.

What is IT audit?

IT audit is the assessment of risks and controls within an organisation's information technology infrastructure.

Why are IT audit services needed?

Advancements in technology have enabled organisations to gain access to information more quickly than before, enabling faster decision-making, efficient financial reporting and improved performance. These opportunities, as well as an organisation's dependency on IT, give rise to risks in the IT environment.

Furthermore, the King III report considers IT governance a crucial aspect of corporate governance and states that it should include areas such as business continuity, information management, information security and data privacy.

Effective and efficient IT systems and processes are fundamental for many organisations to remain successful. System problems can easily result in financial losses and operational inefficiencies and in today's economic climate, with the increasing pressure of IT budgets and cost management, maximising the value from technology is even more important.

Achieving sustainable value through an appropriate balance of robust and efficient controls, while eliminating inefficient processes and mitigating risks, remains a key goal for many IT functions.

IT audit can greatly assist management, external and internal audit in reducing the risks associated with the IT environment as well as improving the operating efficiency.

We can provide the following services to clients to assist in the mitigation of IT risks:

- IT general control reviews
- Application control reviews
- Data mining / data analysis

If you require IT audit services please contact: Conrad Burger or Cindi Davids at +27 21 405 4000.

Cindi Davids



CONSUMERS SHOULD THANK LORD DENNING

The Consumer Protection Act was signed by the president on 24 April 2009. It will largely come into effect on 24 October 2010.

Much has been written about the Consumer Protection Act. Surprisingly, little or nothing has been said about the influence of Lord Denning. He was the father of contemporary consumer protection law, leading the way where parliaments feared to tread.

The contemporary law of consumer protection can be traced to two of Lord Denning's cases. One was *Karsales v Wallis*. The other became known as the High Trees case. As you might have guessed, *Karsales v Wallis* was about the car that the unfortunate Mr Wallis bought from Karsales. It was, at the time that Mr Wallis bought it, a Buick in good condition. Karsales kindly undertook to deliver it to Mr Wallis' premises. Mr Wallis found it outside his premises a week later. It had the frayed remnant of a tow rope hanging from the front bumper. The cylinder head had been removed. The pistons were burnt. Worst of all, it had been stripped of its chrome – a sorry state, for the car known as the King of Chrome.

Mr Wallis refused to accept delivery. Karsales sued him. They pointed to the contract. The contract said that the car was sold without any warranty. It went further. It said that no warranty of any kind was to be implied. It went yet further. It said that what was sold was not even warranted to be fit to be used as a motor vehicle.

Lord Denning rejected the notion that a dealer could contract out of all and any implied warranties as to fitness. A dealer, said Lord Denning, could not rely on exclusions where he was in 'fundamental breach' of his obligations to a purchaser. In affirming the rule of fundamental breach, Lord Denning laid the cornerstone of the law of consumer protection in Britain.

The High Trees case saw Lord Denning developing a doctrine that became known as "inequality of bargaining power".

High Trees was the farm that a fond father repeatedly mortgaged to his local bank in order to support his son's debts. The son was an ineffectual businessman. It was plain that mortgaging High Trees to the hilt would not rescue the son. It would only impoverish the father, whose sole asset it was. The bank manager did not caution the father. Nor did he establish whether the father understood the implications of his actions.

Lord Denning held that the agreement between the father and the bank could not be enforced against the father – there had been an inequality of bargaining power.

It may well be thanks to Lord Denning's pioneering judgments that our new Consumer Protection Act contains provisions dealing with the "implied warranty of quality", which could have been tailor-made to protect people like the unfortunate Mr Wallis.

With one exception, all goods sold are to be subject to a six-month warranty of quality. Within six months of delivery, the consumer may return defective goods. The consumer may choose whether the defective goods are to be repaired, or replaced, or whether the purchase price should be refunded. If the goods are repaired, there is to be an implied three-month warranty on the repair.

The one exception relates to defective goods. There will be no implied warranty on the sale of goods if they are expressly stated to be defective, and the nature of the defect is pointed out.

The Consumer Protection Act also contains sweeping provisions dealing with inequality of bargaining power, and unfair conditions. Terms and conditions will be unfair, unreasonable or unjust if they so favour the supplier, and so disadvantage the consumer, that they can be said to be inequitable. The Act also imposes an obligation upon a supplier in cases where the agreement imposes a risk or liability upon the consumer. In such cases, the agreement must use plain and understandable language.

Lord Denning would applaud. And we should applaud him.

Wouter Scholtz

PARTNER PROFILE: CRAIG MACGILLIVRAY

Craig MacGillivray is Managing Partner of the Cape Town office, and national sponsor of talent management. We spoke to him about what's ahead for the Cape Town office in 2010.

Cape Town is Mazars' largest office in South Africa. How did this come about?

It comes down to a philosophy that has been built over the years of providing for the future by investing in all aspects of the business. We believe if you put good people together with the right resources, clients will have a positive experience and the business will grow.

Tell us about the move to new offices in 2010 and what's driving it?

We have a strategy of being an employer of choice and as part of this we need to provide a work environment that's conducive to people putting their roots down and growing with us, particularly the next generation of professionals, on whom our future rests. We also wanted to bring our teams closer together. At the moment we operate from five different floors serviced by two separate lift shafts, which makes it difficult for teams to interact. In our new offices, at Century City, we'll be on contiguous floors which will promote interaction and infuse positive energy into our workspace.

How is Cape Town gearing up for the introduction of the new Companies Act?

We're operating on the premise that our clients will continue to require our services even if the nature thereof changes for some. We have very few clients who do not make use of a wide range of our services in addition to their annual audit. But, of course, as we get clarity on the impact of the new act, we'll adapt and look for the opportunities such change presents.

How did you come to join Mazars?

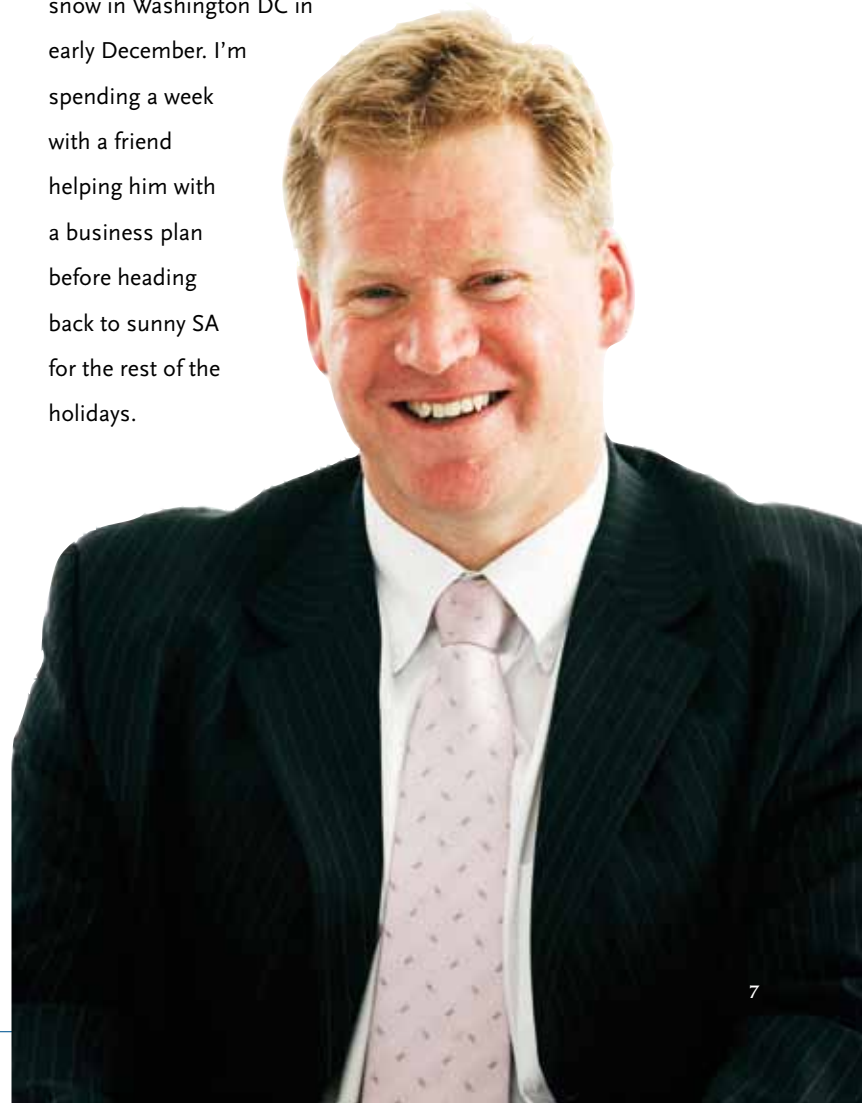
I did my articles at Mazars from 1991 to 1993, studying for my post-graduate diploma in accounting part-time. I then moved into the commercial world, holding various roles in the mining and retail industries before returning to Mazars in March 2000. I was appointed Managing Partner in May 2008.

Tell us briefly about your family

My wife Anne, is a stay-at-home Mom, and I have two daughters both at Kenridge Primary in the northern suburbs. They have all been very supportive of my passion for Mazars and the role this plays in my life.

Where will you spend your holidays this year?

I'll be battling my way through snow in Washington DC in early December. I'm spending a week with a friend helping him with a business plan before heading back to sunny SA for the rest of the holidays.





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