The concept of ‘disposal’ for the purposes of capital gains tax in South Africa

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Abstract
Liability for capital gains tax is determined in terms of the Eighth Schedule to the Income Tax Act 58 of 1962. According to the Eighth Schedule, the disposal of an asset is the event that triggers the liability for capital gains tax. It is therefore imperative to know what constitutes a disposal, because it is fundamental to the entire capital gains tax regime.

The purpose of this paper is to analyse the definition of a disposal in order to ascertain whether a disposal, as defined, is intended to mean a transfer of ownership in an asset or whether a disposal could take place upon the occurrence of events or causae other than the transfer of ownership.

A study of relevant literature was undertaken to analyse the definition of “disposal” in order to fully comprehend the intention and meaning of the term as it is contemplated in the Eighth Schedule. The current definition of a “disposal” could lead to uncertainty and anomalies. It is therefore recommended that the legislature should amend the definition of a disposal in the Eighth Schedule. The definition should refer to the disposal of an asset (other than a personal-use asset) as being the transfer of ownership of an asset from one person to another or the loss of the ownership of an asset. Because the common law has clear principles regarding how ownership of different classes of assets is transferred, no confusion would arise regarding whether or when a disposal has occurred.

Key words
Creation
Ownership
Disposal
Transfer
Extinction
Variation
1 Introduction and research objective

Capital Gains Tax was introduced into the Income Tax Act 58 of 1962 (the Act) by means of the Taxation Laws Amendment Act No. 5 of 2001. Liability for capital gains tax is determined in terms of the Eighth Schedule to the Act and applies to the disposal of assets on or after 1 October 2001 (paragraph 2 of the Eighth Schedule).

This form of taxation is aimed at levying tax on the capital gains that taxpayers make. Previously, capital gains were not taxable, because capital gains fell beyond the ambit of the definition of “gross income” in section 1 of the Act. If, however, an asset is disposed of on or after 1 October 2001, individuals pay normal income tax on 25% of the capital gains they make, whereas companies and close corporations pay normal tax on 50% of the capital profits they make.

According to the Eighth Schedule, the event that triggers the liability for capital gains tax is the disposal of an asset. It is therefore imperative to know what constitutes a disposal, because it is fundamental to the entire capital gains tax regime (De Bruin 2001).

The dictionary definition of “disposal” is “the act or means of getting rid of something” (Hanks, Long and Urdang 1979) or the “settling” or “dealing with” something (Concise Oxford Dictionary 1983). It is submitted that “disposal” as defined in terms of its dictionary meaning, would be tantamount to relinquishing ownership in an asset. This relinquishment of ownership could be as a result of the transfer of ownership to another party or simply the abandonment of an asset, i.e. res derelictae (Van der Merwe 1989). The application of the common law principles regarding the transfer of ownership, established over many decades, could be of great assistance in achieving clarity and simplicity in respect of a complex capital gains tax system.

Paragraph 1 of the Eighth Schedule defines the concept of “disposal” for the purposes of capital gains tax as “an event, act, forbearance or operation of law envisaged in paragraph 11 or an event, act, forbearance or operation of law which is in terms of this Schedule treated as the disposal of an asset and ‘dispose’ must be construed accordingly”. Paragraph 11(1) of the Eighth Schedule repeats the wording of the definition in paragraph 1 and continues to describe the consequences of the events or operation of law, namely the creation, variation, transfer or extinction of an asset.

For the purposes of this paper, only the disposal of an asset that has consequences for capital gains tax is considered. Assets that are defined as personal-use assets in terms of paragraph 1, read with paragraph 53 of the Eighth Schedule, fall beyond the scope of this study. Legislation that was effective on 31 July 2002 was used for the purposes of this paper.

The purpose of this paper is to:
Analyse the definition of a disposal to ascertain whether a disposal, as defined, is intended to mean a transfer of ownership in an asset or whether a disposal could occur upon the occurrence of events or causae other than the transfer of ownership.

Make recommendations, based on the conclusions drawn from the research, regarding changes that should be made to the current legislation.

2 Research methodology
Firstly, a study of relevant literature was undertaken to analyse the definition of “disposal” in order to fully comprehend the intention and meaning of the term as it is contemplated in the Eighth Schedule. Secondly, the results of the literature study were compared to the established principles in common law regarding the transfer of ownership. The discrepancies that were discovered, were highlighted.

3 The definition of disposal in terms of the Eighth Schedule
Paragraph 1 of the Eighth Schedule, read together with paragraph 11, defines “disposal” as any event, act, forbearance or operation of law that results in the creation, variation, transfer or extinction of an asset. The reference to “operation of law” means that the consequences referred to in paragraph 11(1) of the Eighth Schedule are effected as a result of common law or statutory law, and not as the result of the conduct of any person.

The aforementioned event, act, forbearance or operation of law should “result in” the creation, variation, transfer or extinction of the asset. It is submitted that the meaning of “result in” implies a causal relationship between an event or an act and the consequences thereof. A causal relationship is the link between a cause or an event and the consequences thereof (Van der Merwe and Olivier 1976). In other words, if the event or act had not taken place, the defined consequences would not have followed. Whether there is a causal relationship between the event, act, forbearance or operation of law and the consequences of creation, variation, transfer or extinction is a question of fact. (Neethling, Potgieter and Visser 1992; Van der Merwe and Olivier 1976).

Paragraph 11(1) of the Eighth Schedule includes specific results or consequences of the event, act, forbearance or operation of law, apart from the results or consequences of a creation, variation, transfer or extinction of the asset, which are mentioned in 3.2. The distribution of an asset by a company to a shareholder and the sale, donation or any other type of alienation or transfer of the ownership of an asset are examples of these specific results that will lead to a disposal for the purposes of capital gains tax. It is uncertain whether the legislature intended that these specific results should only be examples of any event, act, forbearance or operation of law that constitute a disposal or whether they are a closed group of results or consequences.
Nevertheless, in terms of the rules of interpretation of statutes, the words “creation, variation, transfer or extinction of an asset” should be given their general meaning, because the legislature has not given any other special meaning to them. (Van Tonder, Badenhorst, Volschenk, Wepener and Steyn 1991; Kellaway 1995). The general meaning of the words “creation, variation, transfer or extinction” is reviewed in a subsequent section of this article.

The legislature’s definition of disposal that is contained in paragraph 1 of the Eighth Schedule, read in conjunction with paragraph 11 thereof, does not clearly indicate whether a disposal is effected upon the conclusion of an agreement to dispose of an asset or whether the disposal is effected upon the transfer of the ownership in that asset. Although the conclusion of an agreement to dispose of an asset and the transfer of the ownership in that asset may occur almost simultaneously, there are many instances in which the time and place of the conclusion of an agreement and the transfer of ownership are clearly separate (Van der Merwe 1989).

### 3.1 Definition of an asset

Although this paper deals with the meaning of “disposal” as defined in the Eighth Schedule, “disposal” should be considered in relation to an “asset”. In this regard, paragraph 1 of the Eighth Schedule defines an “asset” as:

“(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and

(b) a right or interest of whatever nature to or in such property;”

It is consequently necessary to comprehend what is meant by the various classifications of assets, because it has an influence on the manner of the disposal of an asset. The common law classifies assets as follows:

- A movable asset is an asset that can be moved from one location to another without damage to its form and content.
- An immovable asset is an asset that cannot be moved from one location to another without damage to its form or content, for example land.
- A corporeal asset is an asset that has a physical form that can be touched. It is therefore either a movable or an immovable asset. Since a corporeal asset is either a movable or an immovable asset, the classification of corporeal assets is not considered in this article.
- An incorporeal asset is an asset that has an abstract value that cannot be observed physically, for example shares in a company and the goodwill associated with a trademark (Van der Merwe 1989).
3.2 The general consequences of an event, act, forbearance or operation of law

As paragraph 11(1) of the Eighth Schedule stipulates that a disposal is “any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset”, it is necessary to examine the meaning of each of these results.

3.2.1 Creation of an asset

The general dictionary definition of “creation” is the “act of creating” or “product of human intelligence” (Concise Oxford Dictionary 1983). It therefore means to establish or acquire something. In terms of the definition of “disposal” in the Eighth Schedule, “disposal” therefore does not only mean to get rid of something, but also to acquire something. These meanings are confusing and could lead to illogical results.

Examples of the creation of an asset, as listed by the South African Revenue Services in its Draft Comprehensive Guide to Capital Gains Tax (2002), are the granting of a lease, a servitude, mineral rights and a license as well as an agreement to a restraint of trade (if not taxable in terms of par (cA) of the definition of gross income contained in section 1 of the Act). These are, however, logical examples of disposals, but if the same criteria are applied, the creation of an asset could constitute a disposal, as defined, in circumstances that would be totally illogical.

The following is an example of such circumstances:

A natural person purchases the material and concludes contracts for the skills needed to have a yacht built for himself. The total direct cost, excluding opportunity cost and the cost of the time value of money, could be approximately R1 million. Upon the completion of the building of the yacht, its market value could be R2 million. In terms of the definition of “disposal” in paragraph 11(1) of the Eighth Schedule, a disposal of an asset had taken place. All the elements of a disposal are present, namely an event or act, which is the building activity, which resulted in the creation of an asset, namely a yacht (which is not a personal-use asset).

This example clearly indicates that, although a disposal might not have consequences for capital gains tax, because no proceeds accrued to the taxpayer in terms of paragraph 35(1) of the Eighth Schedule, the current definition of a disposal could lead to certain actions being classified as a disposal, contrary to the intention of the legislature.

3.2.2 Variation of an asset

The dictionary definition of “variation” is “the act, process, condition or result of changing or varying” (Hanks et al 1979) or “departure from a former or normal condition” (Concise Oxford Dictionary 1983). The general meaning of variation is not that of a “disposal”, which is “to get rid of something” (Hanks et
al 1979). Variation entails the retention of the asset to which certain changes have been made and it could even include an improvement of the asset. This is another contradiction in terms that is contained in the definition of “disposal”, because the retention of an asset to which certain changes have been made can hardly constitute a disposal. However, in paragraph 11(1) of the Eighth Schedule the legislature has stipulated that a variation of an asset is a disposal of that asset.

The variation of an asset, which may constitute a disposal, as defined, could be effected under the following circumstances: The owner of a yacht (i.e. not a personal-use asset) varies the appearance of the yacht substantially (with or without improving it) by replacing the sails with those of a different colour and repainting the hull with a matching colour. Certain interior improvements are effected that result in a total expenditure of R1 million. The market value of the yacht as varied (i.e. changed or improved) may or may not be higher than prior to any variation. Because a variation is effected, a disposal, as defined, has taken place.

3.2.3 Transfer of an asset

The general dictionary meaning of “transfer” is “to change or go from one thing, person or point to another” (Hanks et al 1979). It should be noted that paragraph 11(1) of the Eighth Schedule refers to the “transfer…of an asset” and not the transfer of ownership in the asset. However, paragraph 13(1) of the Eighth Schedule refers to:

“The time of disposal of an asset in consequence of-

- a change of ownership from one person to another because of an event, act, forbearance or by operation of law is,…”.

Although this paragraph intends to regulate the time of a disposal, the first impression is that the legislature intends a disposal to be effected only upon the change or transfer of an asset. However, the reference to the various causae for the transfer of ownership in subparagraphs 13(1)(a) to (g) creates confusion and it appears as if the legislature attempts to deem a transfer of ownership to be effected upon the causae occurring and not upon the fulfilment of the common law requirements for the transfer of ownership.

Consequently, according to paragraph 11(1) of the Eighth Schedule, a disposal takes place when an asset is transferred from one person to another (i.e. without the transfer of ownership, for example the lease of an asset) or even when the same owner transfers an asset from one location to another. This could surely not have been the intention of the legislature, but it is the consequence of inaccurate formulation of what a disposal is. Paragraph 11(1) of the Eighth Schedule should have referred to the transfer of ownership in an asset and not to the transfer of an asset.

The transfer of ownership in an asset is subject to specific common law requirements, depending on the nature of the asset. For the purposes of this discussion it is assumed that the legislature had the transfer of ownership in
mind. To interpret the words “transfer of an asset” in terms of their general meaning, without including the transfer of ownership, would lead to illogical results. The following are the common law requirements for the transfer of ownership in an asset for each of the various types of assets:

1 Movable assets

The common law requirement for the transfer of ownership in a movable asset is delivery (Van Jaarsveld, Boraine, Coetzee, Du Plessis, Franzsen, Grove, Joubert D.J., Joubert N.L., Otto, Piek, Scott, Van Rhijn and Vivier 1992; Van der Merwe 1989). Delivery of a movable asset usually occurs when an asset is physically handed over to the recipient (Van der Merwe 1989; Millin, Wille, Cooker and Schutz 1980). Delivery as such may take on various forms (Van Jaarsveld et al 1992), namely physical delivery, symbolic delivery, delivery with the long hand (longa manu), delivery with the short hand (brevi manu), constitutum possessorium and attornment (Millin et al 1980; Van Jaarsveld et al 1992). (Discussion of the various forms of delivery falls beyond the ambit of this paper.) If none of these forms of delivery occurs, ownership in the asset has not passed, notwithstanding the fact that a valid contract may have been concluded (Van der Merwe 1989). However, mere delivery of an asset without the intention to transfer ownership does not result in the transferee acquiring ownership (Van der Merwe 1989).

2 Immovable assets

The transfer of ownership in immovable property is effected by means of registration (section 16 of the Deeds Registries Act 47 of 1937; Van der Merwe 1989; Van Jaarsveld et al 1992). The procedure for the registration of the transfer of ownership is a fairly complex process that is regulated by the Deeds Registries Act 47 of 1937. It is often a time-consuming process (Jones 1985; Van der Merwe 1989) that is only completed a considerable time after the deed of sale was concluded. Consequently, the transfer of ownership in immovable property cannot occur simultaneously with the conclusion of the contract of sale. However, in the case of a movable asset, delivery could take place immediately.

3 Incorporeal assets

An incorporeal asset, for example a share, is actually the right in and to the asset (Van der Merwe 1989; Meskin, Galgut, Kunst, King and Vorster 1994). In the case of Inland Property Development Corporation (Pty) Ltd v Cilliers (1973), the court held that “in regard to shares, the word ‘transfer’, in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and finally the registration of the transfer”. Sections 133 to 140 of the Companies Act 61 of 1973 regulate the process of the transfer of shares. Various rules apply, depending on whether or not the shares are listed on the stock exchange (Meskin et al 1994, Van der Merwe, Appleton, Delport,
Furrey, Mahoney and Koen 1995). The transfer of ownership in shares is effected by means of cession, independent of the delivery of the relevant documents (Van der Merwe et al. 1995).

3.2.4. Extinction of assets

The general dictionary definition of “extinction” is “the act of making extinct; complete destruction; annihilation” (Hanks et al. 1979). In other words, the complete destruction of an asset will constitute a disposal for the purposes of capital gains tax. The complete destruction or extinction of an asset would normally result in a loss for a taxpayer and not a gain. The complete destruction of an asset would result in a gain only if the amount or a substitute asset that the taxpayer receives from the insurer, or another person that is liable for damages, exceeds the market value of the destroyed asset. This could be the case when the asset had not been insured for its market value, but for its replacement value or when the compensation for damages exceeds the book value of the asset.

The following could represent the extinction of an asset, which would constitute a disposal as defined:

The owner of a yacht insures it for its replacement value, i.e. a yacht of a similar size and make. Upon the destruction of the yacht, the insurer either pays out the insured sum or replaces the yacht. If the amount received or the value of the replacement yacht exceeds the value of the destroyed vessel, a gain accrues to or is received by the taxpayer. Because the extinction of an asset has occurred, a disposal, as defined, has been effected. In terms of paragraph 35(1) of the Eighth Schedule, proceeds may have been received by or may have accrued to the taxpayer, and their receipt or accrual could result in a liability for the owner in respect of capital gains tax. This situation could cause hardship for the taxpayer if capital gains tax should become payable in circumstances in which the taxpayer does not have sufficient funds to replace the destroyed vessel, despite having insured it for its replacement value.

It should be noted that in the event of the extinction of an asset, paragraph 65 of the Eighth Schedule, i.e. one of the roll-over relief provisions, would be available to the taxpayer in certain circumstances. If an asset (excluding financial instruments) were lost or destroyed and the owner received compensation (e.g. insurance compensation), the gain made could be deferred until the replacement asset is disposed of, provided the following requirements are met:

- The owner should satisfy the Commissioner that the full proceeds have been or will be reinvested in a replacement asset of a similar nature;
- the contract for the acquisition of the replacement asset should be concluded within 1 year from the date of the loss or destruction; and
- the replacement asset should be brought into use within 3 years of the date of the loss or destruction.
This provision will result in the full capital gain (on the original and replacement asset) being taxed on the disposal of the replacement asset.

### 3.3 Specific inclusions of disposals

Notwithstanding the general definition of “disposal” as discussed in paragraph 3.2 above, paragraph 11(1) of the Eighth Schedule provides for specific “events, acts, forbearance or operation of law” for qualification as a disposal. It is not the intention to analyse and discuss each of these specific inclusions, but only to list them as stipulated in paragraph 11(1) of the Eighth Schedule. These events are references to the *causae* and not the transfer of ownership, except for paragraph 11(1)(a) of the Eighth Schedule, which refers to the transfer of ownership. This is *inter alia* where the confusion with regard to the legislature’s intention is created. If a disposal is intended to mean a transfer of ownership, then the reference to the *causae* is not necessary. It appears, however, as if the legislature wants to deem a disposal to be more than merely the transfer of ownership, but also to encompass certain *causae*, although no transfer of ownership is effected.

Paragraph 11(2) of the Eighth Schedule specifically excludes certain events from constituting a disposal. These exclusions are not analysed and discussed in this paper.

### 3.4 Deemed disposals

Paragraph 12(2) of the Eighth Schedule stipulates that certain events will be deemed to be a disposal for the purposes of capital gains tax. Although deemed disposals are beyond the scope of this paper, a brief discussion is included.

As the capital gains tax system is not applicable to the assets of non-residents, except for immovable property that is situated in South Africa, the deemed disposal provisions attempt to regulate the change in status of non-resident to resident and vice versa. The provisions regarding deemed disposals also attempt to regulate the change in the purpose for which assets are used, namely from capital assets to stock in trade and vice versa.

According to paragraph 12(1), the effect of these events is that the party is deemed to have disposed of an asset for proceeds equal to its market value and then the party is deemed to have reacquired the asset at an amount equal to its market value.

The effect of deemed disposals is therefore that a capital gain or loss is made if a certain event should occur (e.g. a resident becomes a non-resident), although no funds are received by or accrue to the taxpayer.

### 4 Requirements for the valid transfer of ownership

The conclusion of an agreement to dispose of an asset and the subsequent transfer of the ownership in that asset are two separate and distinct legal acts. The following are the prerequisites for the valid transfer of ownership,
irrespective of whether the asset is a movable, an immovable, a corporeal or an incorporeal asset:

- The asset should be capable of being subject to ownership, i.e. it should be a res in commercio (Van der Merwe 1989). These are assets that can be privately owned or that can be objects of other real rights (Kleyn, Boraine and Du Plessis 1987).

- The transferor should be capable of transferring ownership (Van der Merwe 1989). Because a person cannot transfer more rights than he himself has (nemo plus iuris-rule), the transferor generally has to be the owner in order for the transferee to acquire ownership, unless the transferor acts with the consent of the owner (Mostert, Joubert and Viljoen 1972, Van der Merwe 1989). Furthermore, the transferor should have the capacity to contract (Newman and McQuid-Mason 1978; Van der Merwe 1989).

- The transferee should be legally capable of acquiring ownership in the asset disposed of (Van der Merwe 1989). A transferee that does not have the necessary legal capacity should be assisted by a person that has proper legal capacity in respect of the transferee.

- The transferor should have the intention to transfer ownership in the asset and the transferee should have the intention of acquiring ownership in the asset (Van Jaarsveld et al 1992; Van der Merwe 1989). It is the intention at the time of transfer that is of importance. In the event that, at the time of disposal, the transferor has no intention of transferring ownership, the transferee does not become the owner of the asset (Weeks & Another v Amalgamated Agencies Ltd 1920).

- In the event of a cash sale of movable assets, the price should be paid or security therefore should be provided (Van der Merwe 1989), but in the event of a credit sale of movable assets, delivery is sufficient (Van Jaarsveld et al 1992).

The transfer of ownership should comply with the specific manner of transfer, i.e. delivery, registration (Van der Merwe 1989) or cession (Van Jaarsveld et al 1992) (refer part 3.2.3.).

It is clear from the above-mentioned requirements that the transfer of ownership in an asset is a definite and separate legal act, namely a real relationship or contract as opposed to a personal contract, which is the agreement itself (Van der Merwe 1989). If one of these requirements is absent, no transfer of ownership can be effected, although a perfectly legal agreement may have been concluded. The mere conclusion of an agreement does not result in the transfer of ownership (Van der Merwe 1989). In Lendalease Finance v Corpor Mercedes Agricola (1976), the court held that “according to our law, unlike certain other legal systems, ownership cannot pass by virtue of the contract of sale alone. There must, in addition, be at least a proper delivery to the purchaser of the contract goods”.

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It is therefore possible to dispose of or to transfer an asset to another party without necessarily transferring the ownership in the asset to the transferee. If it is the legislature’s intention that a disposal be effected upon the conclusion of an agreement to dispose, without the ownership being transferred, consequences in respect of capital gains tax could arise for the person that disposed of the asset on the conclusion of the agreement, even though ownership has not yet been transferred (paragraph 11 (1) Eighth Schedule).

In order to transfer ownership in an asset, a further distinct legal act should be executed. In the case of movables, delivery is required (Van der Merwe 1989). In the case of an immovable asset, registration of transfer in the deeds office is required in terms of section 16 of the Deeds Registries Act 47 of 1937. The registration could occur substantially later than the conclusion of the sale agreement. In the case of an incorporeal asset such as shares, the cession thereof is required to effect the transfer of ownership. (Van der Merwe et al 1995).

It is quite possible for a person that concludes an agreement to dispose of an asset, to receive payment upon the date of conclusion or within a specified period thereafter, without having to transfer ownership in the asset until an agreed date or event occurs. If it were the legislature’s intention that a disposal should be effected upon the conclusion of an agreement, any proceeds received or accrued without ownership having been transferred, would have consequences in respect of capital gains tax.

If it is the legislature’s intention that a disposal should only be effected upon the transfer of the ownership in the asset concerned, no consequence in respect of capital gains tax would arise if the ownership were not transferred, notwithstanding the receipt of proceeds by or their accrual to the taxpayer in respect of the conclusion of the agreement.

5 Conclusion

Without a disposal having taken place, no consequences in respect of capital gains tax can arise. It is therefore important to have clarity on what constitutes a disposal. The various aspects of a disposal, as defined in the Eighth Schedule, are examined in the preceding paragraphs in order to obtain clarity on the legislature’s intention. The problem areas identified in respect of a disposal and the application of this concept are highlighted in the following section. Thereafter several recommendations are made.

5.1 Problem areas

The following problem areas are identified in the preceding sections:

- It is not clear whether the legislature intended a disposal to be effected upon the conclusion of a valid and enforceable agreement to dispose of an asset or upon certain other causae occurring, or whether a disposal is effected upon the transfer of ownership in the asset concerned. Because the conclusion of
an agreement and the transfer of ownership are two distinct legal acts that often differ in respect of time and place, the consequences in respect of capital gains tax of either of these legal acts could vary substantially. It appears that the aforementioned definition attempts to describe various \textit{causae} for a disposal in paragraph 1 of the Eighth Schedule and that it does not require the transfer of ownership. Furthermore, paragraph 11(1) of the Eighth Schedule includes various consequences of certain events that could constitute a disposal.

- Certain terms, such as “creation” and “variation”, that are used by the legislature in defining “disposal” result in a contradiction when the terms are understood in the context of their general meaning. Furthermore, the reference to “transfer of an asset” is inaccurate, because paragraph 11(1) of the Eighth Schedule should have referred to the transfer of “ownership in” an asset. Any other interpretation of this paragraph with reference to “transfer” would result in illogical consequences.

- The reference to “extinction of an asset” could result in an anomaly in the case in which an amount is received as compensation for the extinct asset. It would then result in the taxpayer being liable for capital gains tax thereon, and the taxpayer consequently not being in a financial position to replace the destroyed asset. However, in circumstances in which roll-over relief is available, this situation should not arise.

- Because paragraph 35(1) of the Eighth Schedule refers to the proceeds from a disposal not only being actually received by, but also accruing to, the taxpayer, the above-mentioned events could result in the taxpayer incurring a liability in respect of capital gains tax in circumstances that would be grossly unfair. An example is the variation of an asset (i.e. a disposal as defined), which could result in an increased market value (proceeds), although no cash was actually received. It is recommended that the legislature, even at this early stage, should reconsider the inequitable consequences of the definition of disposal.

- Many of the specific inclusions in the concept of a disposal, in terms of paragraph 11(1) of the Eighth Schedule, could be deleted, because they simply refer to the \textit{causae} for the transfer of ownership.

### 5.2 Recommendations

The following recommendations are made:

- Because the \textit{causae} for a transaction and the transfer of ownership in an asset often differ substantially in respect of time and place, the legislature should clearly define what the intention is when referring to a disposal. The legislature should make it clear whether only the transfer of ownership in an asset constitutes a disposal or whether it is intended that the mere conclusion of a transaction, including the occurrence of specific \textit{causae} or events, also constitutes a disposal.
The common law principles regarding the transfer of ownership, which have been entrenched in South African law over many decades, are very specific on how and when ownership in an asset is transferred (Van der Merwe 1989:303,312). In section four, the common law requirements for the valid transfer of ownership are discussed in detail. Because the method of transferring the ownership of an asset depends on the nature of the asset, i.e. whether it is a movable, an immovable or an incorporeal asset, it is suggested that cognisance should firstly be taken of the nature of the asset concerned and that the common law principles regarding the transfer of ownership then be applied.

It is recommended that the legislature should amend the definition of a disposal in the Eighth Schedule to merely refer to the disposal of an asset (other than a personal-use asset) as the transfer of ownership of an asset from one person to another or the loss of ownership of an asset. Because the common law (that has been established over decades) has clear principles regarding how ownership is transferred in various classes of assets, no confusion would arise regarding whether or when a disposal has occurred. This clarity would also obviate confusion that could result from the inclusion of the causae or consequences of an event. Such an amendment of the definition of disposal would simplify the application of the concept of a disposal, which is to be recommended in the already complicated capital gains tax legislation.

In respect of the specific exclusions from the concept of a disposal, in terms of paragraph 11(2) of the Eighth Schedule, the legislature should stipulate that the transfer of ownership in respect of certain assets does not constitute a disposal for the purposes of capital gains tax. The other exclusions in terms of paragraph 11(2) of the Eighth Schedule that do not result in the transfer of ownership would therefore be excluded automatically.

Paragraph 13 of the Eighth Schedule, which stipulates the various times for disposal, should be deleted, because the legal concept of transferring ownership (i.e. the common law principles) would automatically determine the time of the disposal. This deletion would result in a clear determination of when a disposal occurs and consequently when the liability for capital gains tax arises, namely only upon the transfer or loss of ownership. Any proceeds received or accrued prior to the transfer or loss of ownership should only be accounted for, from the point of view of capital gains tax, in the year of assessment in which ownership was transferred or lost. To do otherwise would only result in anomalies and uncertainty.
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