AMENDMENTS TO THE TRUSTEES (PERPETUAL SUCCESSION) ACT

Analysis of changes in tax and other provisions

Changes in The Trustee (Perpetual Succession) Act

The Trustee (Perpetual Succession) (Amendment) Act, 2021 was assented on 7th December 2021, and all the provisions of the Amendment Act became effective from 23rd December 2021, providing various updates to the legal framework governing the establishment of trusts, their composition, legitimacy, among other provisions.

Notably, the amendments shed more light on the definition and legal framework surrounding the establishment of family trusts which was essential in providing clarity on some amendments brought by the Finance Act 2021.

Legitimacy of trusts

A trust may be created by a person or a body of persons, and all trusts are irrevocable unless the trust contains an express power of revocation.

A family trust will not be invalidated for reason that the settlor/joint settlors are listed as beneficiaries of the trust. However, a trust will not be valid if:

i) The settlor/joint settlors had no legal capacity to create the trust in the first place;
ii) Has no identifiable/ascertainable beneficiary(ies);
iii) The terms of the trust are so uncertain as to render performance impossible;
iv) Created for the purpose of doing illegal activities in Kenya; or
v) It is established by duress, fraud, including for purposes of evading the creditors of the settlor.

An enforcer may be appointed to monitor the administration of the trust for the benefit of the beneficiaries.

Definition of a family trust

The specific amendments brought about by the Finance Act 2021 under the Income Tax and Stamp Duty Acts were in relation to the transfer of property to registered family trusts.

The amended Trustee (Perpetual Succession) Act defines a family trust to mean:

A trust, whether living or testamentary, partly charitable or non-charitable, that is registered or incorporated by any person or persons, whether jointly or as an individual, for the purposes of planning and managing their personal estate

Any person or a group of people, who have lawfully constituted themselves to form a trust, may apply to the Principal Registrar (of Documents) for registration. The Principal Registrar will then have 60 days to grant or reject the application.

On approval, an incorporation certificate will be issued, whereas on rejection, a written notice stating the reasons for rejection will be given by the Principal Registrar.

Amendments to the Income Tax and Stamp Duty Act

A) Income Tax Act amendments

The Income Tax Act amendments provide tax exemptions for the transfer of properties to registered family trusts. Specifically, Part I of the First Schedule of the Income Tax Act exempts from tax:

1. Any property, including investment shares, which is transferred or sold for the purpose of transferring the title or the proceeds into a registered family trust (Paragraph 36(g)).
2. The income or principal sum of a registered family trust (Paragraph 57).
3. Any capital gains relating to the transfer of title of immovable property to a family trust (Paragraph 58).

B) Stamp Duty Act amendments

The exemption from stamp duty under Section 52(2)(b) of the Stamp Duty Act now includes the conveyance or transfer of property to registered family trusts, in addition to transfer or conveyance of property to charitable bodies and trustees of those charitable bodies previously exempted from stamp duty.

Definition of property

The definition of property referred to in the Income Tax Act and Stamp Duty Act is defined by the Interpretation and General Provisions Act to include:

Money, goods, choses in action, land and every description of property, whether movable or immovable; and also obligations, easements and every description of estate, interest and profit, present or future,

In ascertaining whether a property is movable or immovable, the same Act defines them follows:

- **Immovable property** includes land, whether covered by water or not, any estate, right, interest or easement in or over any land and things attached to the earth or permanently fastened to anything attached to the earth, and includes a debt secured by mortgage or charge on immovable property; vested or contingent, arising out of or incident to property as herein defined; and
- **Movable property** means property of every description except immovable property.

In light of the above definitions, a transfer of shares does not constitute transfer of immovable property, hence any capital gains realized on the transfer of shares to a registered family trust will not be exempt from tax.

Additionally, where the transferor of the immovable property and the trust are related entities, it is our view that the immovable property's transfer value will be the market value.

Suffice to say that the above amendments brought about by the Trustee (Perpetual Succession) (Amendment) Act, 2021 have provided much needed clarity on the transactions that qualify for tax and duty exemptions, enabling individuals to properly plan their affairs for succession purposes.