The valuation of a usufruct for tax purposes

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The value of a usufruct is often needed to be calculated for purposes of taxes, for example:

- for purposes of estate duty should a testator/testatrix bequeath a usufruct over property to an heir;
- for purposes of donations, tax should a usufructuary renounce his/her usufructuary rights; or
- for purposes of capital gains tax, should a property in respect of which a usufruct is registered be disposed of.

In this regard, the value of a usufruct over a property (“the Property”) is, broadly speaking, calculated with reference to the life expectancy of the usufructuary or the term of the usufruct (whichever is shorter), the market value of the Property and the annual value of the right of enjoyment of the Property (“the annual yield”).

The Income Tax Act No. 58 of 1962 and the Estate Duty Act No. 45 of 1955 (“the Estate Duty Act”) provide that the annual yield of a property means an amount equal to 12% of the value of the full ownership of the property which is subject to the usufructuary interest. However, where the Commissioner is satisfied that the property which is subject to a usufructuary interest could not reasonably be expected to produce an annual yield of 12% on the full value of the property, the
Commissioner may fix such sum as representing the annual yield as may seem to him reasonable in the circumstances.

Accordingly, in certain circumstances, the Commissioner may accept a different percentage annual yield – should this be supported by facts. It is therefore possible for a person to provide proof that the Property produces or would produce a yield of less than 12% per annum with reference to, for example, information concerning the price at which related property in the area is leased or a rental valuation prepared by an estate agent.

In terms of section 5(1)(b) of the Estate Duty Act, should the Property consist of books, pictures, statuary or other objects of art, the annual value of the right of enjoyment thereof shall be deemed to be the average net receipts (if any) derived by the person entitled to such right of enjoyment of such property during the three years immediately preceding the date of death of the deceased.

Furthermore, in *C:SARS v Klosser’s Estate* 2000 (4) SA 993 (C), 62 SATC 93, the court upheld the Commissioner’s use of an annual yield of 2.5% for listed shares. The court held that the Commissioner was required to make predictions regarding the future yield and that such predictions could only be based on the relevant background facts – including the yield of such shares at the death of the testator and prior thereto. It is accordingly a factual question whether the assets within an estate could be reasonably expected to produce a yield of 12%.

It is accordingly recommended that, in determining the value of a usufruct for tax purposes, careful regard be had to the relevant background facts to determine whether a 12% annual yield would be acceptable in the circumstances, and a 12% annual yield should not, as a matter of course, be applied in determining the value of a usufruct. It is important to adequately consider all relevant background facts in determining the applicable annual yield so as to ensure that
excessive tax is not inadvertently triggered.