

Practice Note: No. 35 – 17 November 1994

Estate Duty: Bequest of trust income to surviving spouse: trustee's discretion: deduction under section 4(q) of the Estate Duty Act, 1955 (the act)

1. One of the deductions permitted by the Act in the determination of the net value of a deceased estate is provided for in section 4(q), the introductory wording of which is as follows:

"(q) so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section, as accrues to the surviving spouse of the deceased: provided that . . ."

2. In Income Tax Case 1520 ([54 SATC 168](#)) which served before the Income Tax Special Court, the Court had to decide whether a deduction was permissible in terms of the aforementioned section (as it read in 1986) where the testator had directed that the income of a trust created in terms of his will was to be available to the administrators of the trust: ". . . for the maintenance and welfare of my wife, to be utilized by them for these purposes as they in their entire discretion shall deem fit, any surplus income being retained as income or re-invested as capital at the discretion of my Administrators." The trust would terminate upon the death of the testator's wife when the assets would devolve upon his three sons or their issue.
3. The testator died in 1986 at which stage section 4(q) did not contain the proviso's currently in the Act. The crisp point for decision was, however, whether it could be said that the trust income had *accrued* to the surviving spouse given the administrators' discretion to utilize the trust income as they deemed fit.

The Court concluded that as it was clearly the deceased's intention that the administrators of his estate should use the entire income from the trust for the benefit of his wife and that a beneficial interest, which fell within the definition of property, had accrued to her. The Court accordingly held that the Commissioner for Inland Revenue was incorrect in not allowing a deduction under section 4(q).

4. The Commissioner lodged an appeal against the Court's decision whereupon the respondent abandoned the judgment. The deduction was, therefore, not allowed.
5. As the case and the Court's findings have been reported and commented on in various journals this practice note is being issued to draw attention to the abandonment of the judgment by the executors of the estate and to reaffirm the Commissioner for Inland Revenue's policy and practice that in the case of a discretionary trust no vesting is regarded as having taken place where the surviving spouse's right to income from the trust can be defeated or diminished by the exercise of the trustees' discretion. Under such circumstances a deduction in terms of section 4(q) of the Act will not be allowed.